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THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 31, NUMBER 2, WINTER, 1987

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Law Quadrangle Notes

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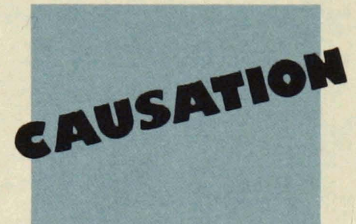
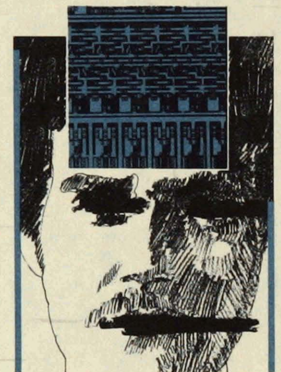
ARTICLES

24 **Thinking about Causation, with Special Reference to Pornography**
Frederick Schauer

30 **Rule Without Eyes or Voice**
Joseph Vining



24



30

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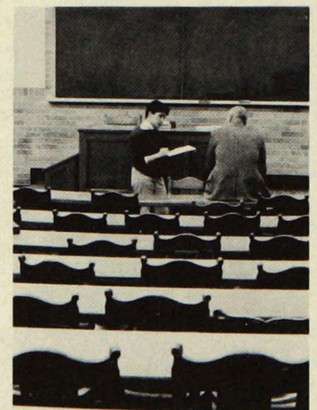
答解
律法
问询

3



DEPARTMENTS

1 **Briefs**
Whitmore Gray examines the new Chinese civil code; A.W.B. Simpson, Joel Seligman, and Marie Deveney join the faculty; LQN surveys the Class of '89; Jonathan Lowe is named assistant dean; and more.

12 **Events**
Wallace Stegner presents Cook Lectures; experts discuss implications of new tax law; U.S. Solicitor General Fried visits as DeRoy Fellow; Library Addition named in honor of Allan and Alene Smith.

17 **Alumni**
Two graduates working in professional sports; a New Jersey lawyer recovers Philippine assets; and lots of notes about our other alumni.

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On the cover: Snowflakes depicting legal symbols and Law School architectural motifs by Dr. Thomas Clark, M.D., U-M Health Service.

China's changing legal climate

A comment on the nature and significance of the new civil code

by Whitmore Gray

The entry into effect on January 1, 1987, of China's new civil code, "The General Principles of Civil Law of the People's Republic of China," marks the culmination of a six-year period of almost feverish legislative activity in the private law field in China.

When the Communists came to power in 1949, they abolished all the existing civil legislation. Although drafts of both criminal and civil codes were prepared in the 1950s, the political climate changed, and for some time it looked as though final versions might never be completed. After the turmoil of the Cultural Revolution (1965-1975), a series of major statutes in the private law field was enacted, beginning in 1980. First was a new marriage law, then an "economic" contract law to deal with contracts in what we might call the commercial area. These were followed by another contract law to deal with foreign economic contracts, and an inheritance law. Finally in April, 1986, the General Principles of Civil Law were adopted, dealing with most of the other basic private law subject matters — persons, property, contracts, torts, etc. While the provisions of the General Principles are less detailed than those of the earlier individual statutes, China can now be said to have a comprehensive framework of provisions in the field of civil law.

The decision to draft the General Principles came as a surprise. A more extensive Civil Code had gone through four drafts and had been widely discussed, but perhaps the process appeared to be moving too slowly. Those responsible for the management of the economy as well as foreign investors wanted to have rules, and apparently were willing to sacrifice detail for speed in the process. In this pragmatic vein, the General Principles say they were (and in fact appear in large part to have been) based on a summary and analysis of recent day-to-day experience in civil matters.

One academic argument almost stood in the way of speedy drafting of even general principles. Echoing the debate which has gone on among legal scholars in many of the socialist-bloc countries for at least 20 years, the Chinese argued about whether "economic" law should be included within the "civil" law field or treated as a separate body of law. For example, should the provisions of civil law have any effect on relations between two state-owned enterprises? The economic law group said No, and argued for separate statutes applicable to their contracts. The "Economic" Contract Law enacted in 1981 was a manifestation of this point of view. The civil law group said that contract law should be viewed as unitary, and that only some special provisions might be necessary to deal with peculiarities of contracts between certain parties. In fact, this pragmatic view prevailed even in the Economic Contract Law. In an addendum to the original set of provisions, they were made applicable to contracts between the new individual entrepreneurs and other economic units.

The debate came to a head in the General Principles, for the economic law group felt threatened by the inclusion of general provisions relating to legal persons. Basic provisions on legal personality were included—a victory for civil law inclusivity. Other economic law topics, however, such as intellectual property, received only summary treatment (in contrast, for example, to the more extensive provisions in the somewhat comparable Soviet Fundamental Principles of Civil Law adopted in 1961).

Perhaps the most interesting aspect of that debate is the fact

Professor Whitmore Gray keeps up with current events in China with J.D. student Zhu Ning.

that it is going on at all. A few years ago such preoccupation with the form that legislation should take and the theoretical basis for it would have been unthinkable. Today, however, the number of students studying law in full- or part-time programs is probably close to 100,000. In-service education for China's judges, very few of whom have had formal legal education, has been instituted, and an extensive legal literature is now appearing. In this climate the system seems indeed ready for raising the range of private law questions dealt with in the provisions of the new General Principles of Civil Law.

The Principles show the influence of the continental tradition. Some of those who worked on the drafting may have had some direct knowledge of French or German law. The civil law idea of a systematic code and the conceptual patterns seem natural, however, to any of the older scholars who had a Nationalist legal education in the pre-1949 period. Certainly a European lawyer will feel more at home with these provisions than will a common lawyer. The style of the Principles is quite conceptual, building on the abstract concept of "legal act," common to many European codes and all European legal theory.

In addition, it seems clear that there was a significant input in the drafting process from those scholars who either were trained in the Soviet Union or who studied under Soviet teachers in China during the 1950s. Some of this influence is reflected in what might be called "socialist" provisions. For example, state enterprises receive property from the state — land, buildings, money, and goods, and some of this is disposed of, e.g. sold, in the same way that private persons dispose of their property. The idea of "ownership," however, was not acceptable to the Soviets in connection with this property. Consequently, in the Soviet Fundamental Principles, the right of the enterprise was described somewhat awkwardly as a right to operate and manage property, while the incidents of that right to operate and manage were described in the same terms as ownership (i.e. the right to acquire, use and dispose of the property).

The Chinese adopted this same distinction, but it becomes even more awkward in the Chinese provisions as the country moves toward a mixed economy, involving extensive interaction and cooperation between socialist and private economic actors. Probably we should be surprised not that there is Soviet influence, but rather by its really limited extent. The general tone of the Principles is a rather straightforward attempt to provide workable rules for partnerships, family businesses and the like, without regard to the theoretical underpinnings of the institutions.

In fact, much of the substance is recognizable. Principles of agency, contract damage rules, and conflict of laws rules contain few surprises. One provision may even reflect some of the ideas taken home by Chinese students who had studied our UCC.

> Article 88. Parties to a contract must fully perform their duties in accordance with the contract.
>
> Where the provisions of a contract relating to quality, duration, place or price are not clear and definite, and these elements cannot be determined from the content of related provisions of the contract, or the parties cannot reach agreement through consultations, the following provisions apply:
>
> 1. Where quality requirements are not clear and definite, performance is according to the State standard; where there is no State standard, according to the usual standard. . . .
>
> 4. Where the price provision is not clear and definite, performance is according to the State price; if there is no State price, performance is made with reference to the market price or the price of similar products or to standard remunerations for similar services. . . .

The pragmatic, commercial approach of this provision is in sharp contrast to the doctrinaire provisions of the earlier Economic Contract Law, which had provided that no contract came into being until there was agreement on all the essential terms.

Obviously, this burst of legislative activity is just the beginning of the elaboration of a comprehensive set of rules for private law in China. Additional statutes and regulations will no doubt be forthcoming, but our experience would lead us to expect a major contribution from the work of the lawyers and judges who must apply these rules to concrete cases in their daily activities. This may be particularly true under the present circumstances in China, for the patterns of economic activity and daily life continue to change more rapidly than statutes can be modified. The Chinese may have been very wise to choose a framework type of civil code at the present time, allowing the details to be filled in gradually through experience. To Americans, at least, this seems like a very sensible approach. ⊠

In November, 1986, Professor Whitmore Gray published a translation of the new General Principles of Civil Law of the People's Republic of China. 34 Am. J. Comp. L. *716 (1986). The translation was done in collaboration with Henry Ruiheng Zheng, an S.J.D. candidate at the Law School from Peking University, who is presently working with Graham & James in San Francisco. Professor Gray began his study of Chinese while he was a student at the Law School, spent eight months in Hong Kong in 1964, and between 1976 and 1986 has been to China ten times.*

New trends in the Chinese legal profession?

Members of law faculties at universities in the People's Republic of China have recently been organizing "law firms" which offer legal services to domestic and foreign clients. Until this development, legal advice was available by such Beijing groupings as Global Legal Services, a unit of the China Council for the Promotion of International Trade; the C & C Law Firm, part of the China International Trust and Investment Corporation; and the Great Wall Group, sponsored by the Ministry for Trade and Economic Development. Other groups of lawyers presently serving on the staff of major industrial enterprises are reported to have applied for a separate status.

The picture below was made available by Eric Stein, Hessel E. Yntema Professor Emeritus, who recently returned from a lecture tour in China and Japan. He and Mrs. Stein were the guests of the State Education Commission of the Chinese government. Professor Stein and Professor Whitmore Gray are members of the U.S. Commission for the Legal Education Exchange with China (CLEEC), which has sponsored Chinese students and professors coming to the U.S., as well as lectures and research by Americans in China.

Professor Gray was a CLEEC lecturer on contract law in 1982, and taught in the CLEEC Summer Program in American Law in China in 1985. Jeanne Tai, a 1984 U-M graduate, was a CLEEC research scholar in China in 1985-86, working with Sullivan and Cromwell. In addition, a number of Chinese lawyers have been studying at the U-M Law School in the LL.M, S.J.D., and J.D. programs. ⊠

Good deals on legal services

This is the fee schedule posted in one of the new law offices set up by the new law faculty at a Chinese university:

ATTORNEY FEE SCHEDULE

SERVICES PROVIDED	SUBJECT MATTER	FEE (U.S. $ equivalents)
Legal Consultations	Non-property civil matters	.20 to $1.10
	Property civil matters	.75 to 1.80
	Commercial matters	1.10 to 3.70
Drafting of Legal Documents	Criminal matters, legal notices, and other usual legal documents	.35 to 1.10
	Civil complaints and answers, appeals, and petitions	.75 to 1.80
	Wills, administration of estates, gifts and other documents related to property	1.80 to 3.70
	Contracts, agreements	1.80 to 11.10

Table of legal services and corresponding fees by the law faculty at the Fudan University in Shanghai. One Yuan equals about 33 U.S. cents. Note that general price levels in China are radically lower than in the United States. Fees charged to foreign clients would presumably be substantially higher. Translation into English by Professor Whitmore Gray and Zhu Ning, a Chinese lawyer who began his J.D. studies at Michigan in August, 1986.

Comings and goings

A.W. Brian Simpson, Joel Seligman, Marie Deveney join the faculty; Reed, Sax depart

The Law School has recently announced three new faculty appointments: A.W. Brian Simpson, a renowned English legal historian; Joel Seligman, a widely-read corporate and securities specialist; and Marie Deveney, an innovator in the field of historical conservation.

The brief accounts of the work, accomplishments, and interests of Simpson and Seligman below will be supplemented by more detailed articles in subsequent issues of *LQN*. A feature on Marie Deveney, who began teaching at the Law School this winter, follows.

A. W. Brian Simpson

A highly regarded scholar with wide ranging accomplishments

A. W. Brian Simpson, a highly respected legal scholar who visited at the Law School during the fall, 1985 semester, will be joining the faculty next fall on the senior level. Simpson has taught at the University of Chicago Law School and served as professor of law and dean of the Faculty of Social Sciences at the University of Kent, Canterbury, England.

Simpson's extensive interests (including contracts, property, philosophy, and history) have established him as one of the widest ranging and most highly regarded English legal scholars of his generation. His work in legal history includes two books on the development of common law doctrine: *A History of the Land Law* (2nd ed., 1985) and *A History of the Common Law of Contract* (1975).

More recently, Simpson has written on the legal, social, and cultural background of some of the best known English cases. His widely acclaimed *Cannibalism and the Common Law* (1984), according to Law School Professor Thomas Green, is praiseworthy for the range of sources, the ingenuity, and the pure sleuthing displayed in it.

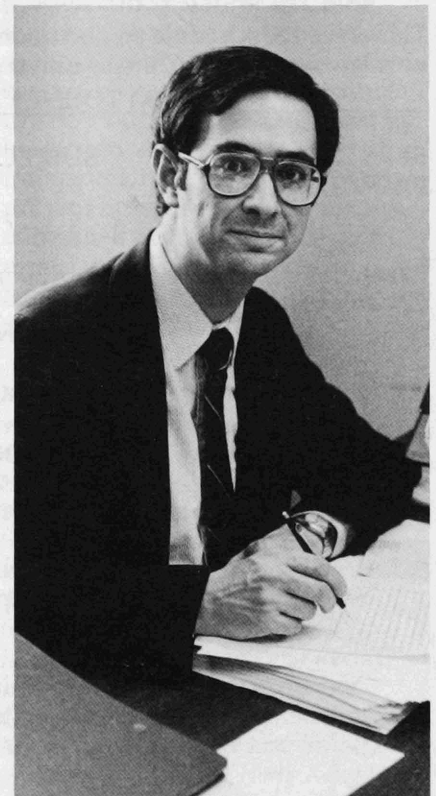
Simpson brings to teaching at Michigan a mastery of the evolution of common law doctrine. He is, in the words of Green, "deeply committed to the view that the litigation that produces new doctrinal twists and turns — and the twists and turns themselves — must be studied in a social context." During his visit here last year, he was highly regarded by the students who took his courses. "He's an engaging teacher, both in terms of how he relates human interest with deep theory, and the way he conveys attention to the process of reasoning," said Professor Frederick Schauer, who chaired the committee which recommended that Simpson be invited to join the U-M law faculty.

Joel Seligman

Prodigious writer on corporate, securities, anti-trust law

Joel Seligman, who is visiting at Michigan this year, will join the regular faculty next fall as a mid-level, tenured appointment. Seligman is well known and respected for his extensive writings in the fields of corporate, securities, and antitrust law.

Before coming to Michigan, he taught at Northeastern Law School in Boston and George Washington University's National Law Center in Washington, D.C. A graduate of UCLA and Harvard Law School, Seligman spent several years with Ralph Nader's Corporate Accountability Research Group. There, he co-authored *Taming the Giant Corporation* with Nader. The book maintained that federal incorporation of business firms should replace our current system of state incorporation. Seligman is also the author of *The Transformation of Wall Street: A History of the Security and Exchange Commission and Modern Corporate Finance*, 1982; *The Security Exchange Commission and the Future of Finance*, 1984; and *The High Citadel: The Influence of Harvard Law School*, 1978. Seligman's principal research and writing project for the next few years will be a revision and expansion of Louis Loss's monumental treatise, *Securities Regulation*. When completed, the



Joel Seligman

new third edition is expected to fill eight volumes.

Seligman has served as a consultant to the Federal Trade Commission and the Department of Transportation.

Marie Deveney

A former art historian, she's designed a new course in the legal issues of historic and cultural preservation

Six years ago Marie Deveney was listed in the U-M faculty and staff directory as the curator of the Art History Department's nationally renowned slide and photograph collection. In the latest edition of the directory, her name appears as an assistant professor in the Law School.

Explaining the motivating factors behind the career change, Deveney said, "It certainly wasn't disaffection with art history. I loved the field, and I still do, but I felt that after working with the collection for nine years, I had gotten all that I could from that job in terms of intellectual stimulation and new challenges. And, since I was the head of one of the best teaching and research collections in the country — with respect both to the depth and breadth of the collection's coverage and to the size and quality of the professional staff — there just was not another curatorial position to go to that was better than the one I had." (Deveney, who has a master's degree in art history, worked her way up from a cataloger's position in 1972 to the point where she was responsible for the department's collection of 250,000 slides and 165,000 photographs.)

"I also felt that I had given whatever special things I had to offer — that I had exhausted my creativity. The one option in the field would have been to go on for a Ph.D., but teaching positions in art history were closing up."

When Deveney began to take stock of what else she might do, she saw law as a way of spanning the gap between the active and the contemplative life. "I like having real world problems to consider and I also enjoy having the academic perspective from which to consider them," she explained.

During the interim, she attended the U-M Law School (graduating first in her class), and clerked for two years, first for Judge Harry T. Edwards of the U.S. Court of Appeals for the D.C. Circuit, and then for Supreme Court Justice William J. Brennan, Jr.

Deveney talks about her law school experience with great enthusiasm. "Like all first-year students, I found law school stressful, but I also found it one of the most intellectually exciting times in my life. A whole new world had opened up to me, and I knew immediately that I wanted to teach. I especially liked the Socratic method, because it's such an active form of learning."

Marie Deveney

People often ask Deveney whether it was difficult to move from the visual field of art history to the more abstract realm of the law. "I didn't find it a terribly jarring switch," she responds. "As an art historian, I was interested in iconography, and as a law student I found that just as paintings have different levels of meaning, so too do judicial opinions." She elaborated, using as an example her master's thesis, an iconographic study of *The Madonna with Many Animals* by Albrecht Durer, the leading figure of the German Renaissance. "At the most obvious level, it's a depiction of the Christ Child and the Virgin seated in a hilly landscape, surrounded by a plethora of animals and plants. At a deeper level, each animal and plant symbolizes an attribute of Christ, the Virgin, the Devil, or St. Joseph. Taken as a whole, the painting is an icon of salvation history.

"Judicial opinions similarly may operate at a number of levels. At the most basic level, they simply announce the resolution of an individual case and establish a narrow rule of law. But the reasoning a court employs and the analogies it selects communicate a vision of the law that transcends the individual case. And, at the broadest level, a court opinion can provide a portrait of society and its values."

As a law professor, Deveney finds that her teaching and research interests lie principally in the areas of constitutional law, property, and governmental regulation of land use. Of particular

interest to her is the role of government in preserving the architectural legacy of our past. She uses the term "cultural preservation" to refer to government's attempts to preserve structures associated with historical events and people as well as those which are deemed worthy of conservation for stylistic, aesthetic, or emotional reasons.

In order to be fully effective in this province of land use, Deveney believes that "lawyers need to be familiar with more than just preservation legislation and the agencies and organizations dedicated to preservation. They must be acquainted with the many purposes preservation may serve — stimulation of patriotic sentiments, conservation of great works of art, creation of humane and pleasant urban environments, and maintenance of community stability and identity."

Preservation is a costly activity, both in economic and human terms, she points out. The financial burdens imposed by protective legislation on the owners of historic structures raise concerns of fairness and constitutionality. At the same time, the displacement of the poor and of minorities sometimes occasioned by preservation activities raises difficult ethical and social issues.

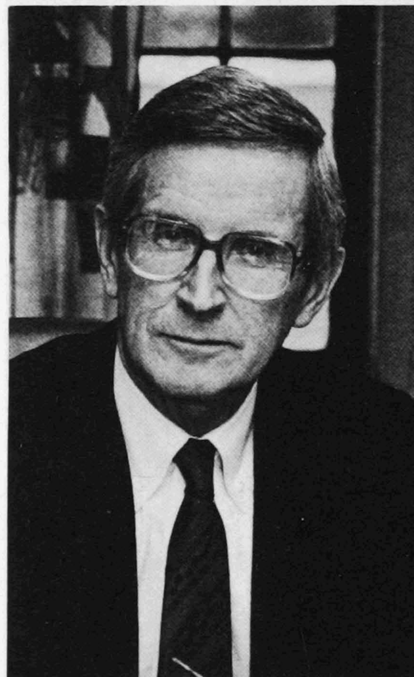
These issues form the basis of a seminar Deveney is constructing this semester and a starting point for her initial research and writing projects. It's not surprising that she feels at home as a member of a law school faculty with deep and broad interests in the interaction of law and the humanities.

Deveney is married to Martin S. Pernick, an associate professor of history at the U-M who specializes in the history of medicine and medical ethics.

Reed to head Wayne State L.S.

John Reed, the Thomas M. Cooley Professor of Law, will retire at the end of the winter term, one year earlier than originally planned. Reed emphasized that the early retirement was not a resignation, but was prompted by an invitation to serve as the dean of Wayne State University Law School, in Detroit, for a five-year term. The appointment will give Reed the opportunity for four years' service beyond the time possible at the U-M.

A graduate of William Jewell College and the Cornell Law School, with graduate degrees from Columbia, Reed first came to Michigan in 1949. Although he left Michigan for a term as dean of the University of Colorado Law School, he returned in 1968. For five years he directed the Institute for Continuing Legal Education.



John Reed

Sax departs for Berkeley

Joseph Sax, the Philip A. Hart Distinguished University Professor of Law, has moved to the University of California-Berkeley (Boalt Hall Law School) as of the winter semester. Widely known for his writing in the fields of water law and environmental protection, Sax came to Michigan in 1966 from the University of Colorado.

Joseph Sax

Sax cited personal reasons for leaving, among them his wish to be near the mountains and the fact that his children were now grown. "As for the Law School," he said in a letter to the faculty, "it is the place where I grew and prospered professionally, and it shall always be my intellectual home . . . It was one of the great schools when I first arrived in the summer of 1965, and it is a great school now."

The Class of '89

Who they are, why they're here, and where they're headed

A total of 378 students began their legal studies at Michigan last summer and fall. Who are the people who make up the Class of '89? Where have they been and where are they going?

Statistics kept by the Admissions Office tell only part of the story. To learn a little more, *LQN* conducted a brief survey of the first-year students. We kept the survey simple and administered it in the classroom, and in this way managed to reach 348 students, or 91 percent of the first-year class. The picture that emerges is drawn from these two groups of data.

Women account for 39 percent of the Class of '89, a figure that correlates closely with the proportion of female applicants, and an all-time high. Minorities comprise 15 percent of the first-year class. Thirty-eight percent are Michigan residents. The rest come from 36 other states, with the largest group of non-residents (37) from New York, followed by Illinois (26), California (19), Ohio (16), Iowa and Wisconsin (12 each), Minnesota and Pennsylvania (11 each), Indiana (9), New Jersey (7), Massachussets (7), and Washington (6).

The Class of '89 comes from 124 undergraduate schools, including 66 from the U-M-Ann Arbor; 21 from Michigan State; 10 from Northwestern, Princeton, Illinois, and Yale; 9 from Wisconsin, and 8 from California-Berkeley and Chicago.

While the median age of this year's group of incoming students, 22, is lower than that in recent years, the survey revealed that 70 of the 348 respondents, or nearly 23 percent, are 25 or older. Of this group, 31 are women and 39 are men. Thus, 22 percent of the first year females are over 25, compared to only 11 percent of their male counterparts. The survey also revealed that 20 students (almost six percent) are over the age of 30, and 3 are in their 40s.

The survey found that nearly ten percent of the students have at least one parent who was born outside the United States. Almost eleven percent have a parent who is an attorney. Ten percent of the Class of '89 are married and 7 percent have already attained a graduate or professional degree, with at least six doctorates.

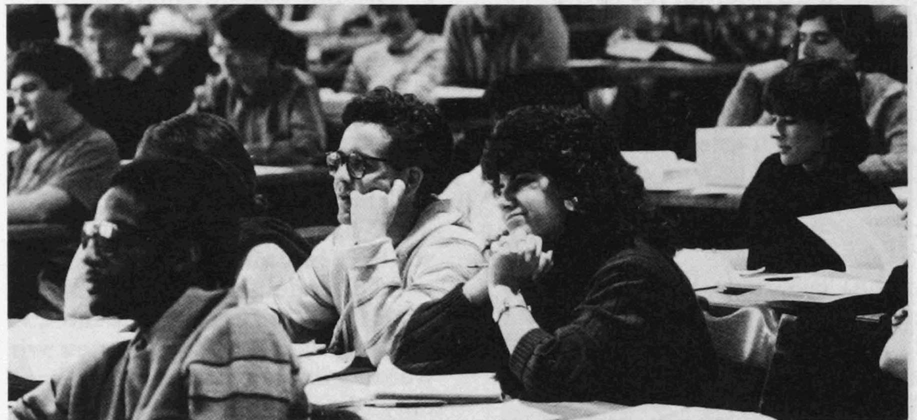
Over 37 percent of the first-year students have lived abroad, most of them under study programs. To a question concerning their most challenging, significant, or rewarding experience, however, only 19 percent of the respondents identified travel or living abroad. Other answers to this question were widely varied and included study (15 percent), work (8 percent), public service (8 percent), and a great many diverse replies such as parenting, journalism, involvement in politics, teaching, sports, and dealing with a life crisis. Almost a third of the respondents chose not to answer this question, which perhaps is somewhat indicative of the relatively young age of this year's beginning law students.

The survey also asked the students to identify the woman and man they most respect or admire. Here the answers were also extremely varied. Over a third of the respondents left the spaces blank (40 percent for the most admired woman and 34 percent for the man). Of the answers given, the most frequent by far were "my mother" or, occasionally, another female relative (almost 22 percent) and "my father" or another male relative (18 percent). Overall, the three most admired individuals were Mother Theresa (the choice

of 18 students), Corazon Aquino (11), and Martin Luther King (9). In general, the most respected or admired men tended to be historical figures and social activists, followed by politicians, and entertainers. While relatively few female historical figures were listed, the most frequently named individuals were politicians and activists, followed by entertainers.

Names mentioned several times were Sandra Day O'Conner, Jeane Kirkpatrick, Margaret Thatcher, Indira Ghandi, Madonna, Jane Fonda, Gloria Steinem, Golda Meir, Ralph Nader, Jesse Jackson, Cesar Chavez, Robert Kennedy, John Kennedy, Winston Churchill, Pope John Paul II, Abraham Lincoln, and Bruce Springsteen. Although Ronald Reagan was chosen five times, it should be mentioned that the survey was administered several weeks before news of the Iran arms sales reached the public. Jimmy Carter was mentioned only once, as was Bo Schembechler.

The survey also asked the students to name what they felt was the most serious problem facing the world today. The most common answers were the threat of nuclear war (20 percent) and poverty (just over 21 percent), followed by a block of replies that included prejudice, racism, and selfishness (6 percent), terrorism (6 percent), illiteracy (4 percent), inflexible ideologies (3 percent), and environmental problems (just



under 3 percent). While slightly over 4 percent identified the most serious problem as "U.S. power" or "Ronald Reagan," just over 2 percent saw the problem as "Communism" or "the U.S.S.R." Among myriad other answers were finding a cure for AIDS, the monetary crisis, the breakdown of the family, and unwillingness to take responsibility.

Regarding political affiliation, the survey asked the students to rank themselves on a scale from 1 to 7 as liberal or conservative. While 21 percent of male and an almost identical 20 percent of female respondents ranked themselves as "4" or middle-of-the-road, the women turned out to be much more liberal than their male counterparts. Of the total female respondents, 62 percent ranked themselves on the liberal end of the scale (between 1 and 3), compared to 47 pecent of the male correspondents. On the other hand, only 18 percent of the female students put themselves on the conservative end of the scale (between 5 and 7), compared to 32 percent of the male students.

To the question, "Why do you want to study law?" the largest group who responded (20 percent) said that they found the discipline interesting and challenging. Another 15 percent thought it was a useful tool; 11 percent wanted to achieve social change or improve the conditions of the world in some way; 8 percent viewed it as a means of personal growth; and 5 percent saw it as a way to become wealthy. Another 10 percent gave a variety of other replies

Some of the students listed a former teacher or present law school professor as one of the persons they most admire. Included here were Jessica Litman, John Jackson, John Reed, and Yale Kamisar. One person even listed Professor Kamisar's secretary.

including "It's something I've always wanted to do," and "It's the best way to use my talents." Another 24 percent did not respond.

Looking ahead, the survey asked the students two questions about their goals. Regarding their primary goal in the next 10 years, 25 percent replied that they didn't know; 12 percent wanted to be happy; another 12 percent wanted to have a family; 9 percent wanted to earn a substantial amount of money; 8 percent wanted to make a contribution to society or achieve social change; 6 percent wanted a career in politics or government; another 6 percent wanted self-fulfillment or independence; and 5 percent wanted to practice law. Other goals included writing, maintaining values, athletic achievements, and further study.

In terms of long-term career plans, 23 percent of the first year students said they had no idea; 20 percent indicated they preferred a large private law practice; 14 percent wanted to enter a small or medium practice; while only 1.5 percent preferred a solo private practice. Although 17.2 percent looked forward to a career in politics or government, only 1.5 percent were interested in working as a prosecutor. Relatively small groups of students were also interested in working as house counsel for a corporation (3 percent), in teaching (5 percent), in public interest posts (4 percent), or in business (4 percent).

The Class of '89 includes two former college lecturers, a woman who worked in the U.S. Embassy in Moscow, an army veteran of 11 years, a former professional football player, a man who worked on Mount St. Helens after the eruption, a woman who worked on drafting new domestic violence laws for Ann Arbor and Michigan, and several people who had been involved in national political campaigns. ⊠

Building stronger bonds

Jonathan Lowe promoted to assistant dean for Law School relations

Jonathan Lowe, who held the post of director of Law School relations since March, 1984, has been appointed assistant dean for Law School relations. In assuming the responsibilities of directing the Law School Fund and maintaining contact with alumni, Lowe follows Professor Emeritus Roy Proffitt, who retired last summer after a highly successful 20 years in this position.

Lowe is a graduate of Oakland University and the U-M Law School (J.D. '76). Before joining the Law School Fund office, he practiced law in the Detroit area for eight years. During five of those years he was very active with the Law School Fund, including a remarkably successful period as chairman of the Detroit region, during which contributions from the region nearly doubled.

An enthusiastic proponent of strong alumni relations, Lowe said, "We are blessed with a loyal and generous alumni body who provide, through the Law School Fund and in many other ways, the 'extras of excellence' that allow the Law School to excel. I hope to build on that by expanding our base of support and raising the percentage of alumni participating in the Fund each year above the elusive 50 percent level."

Another important goal, he added, is to expand the Law School Fund's program for planned giving both through the University's Pooled Income Fund and through testamentary and lifetime planning vehicles.

Lowe, a tireless organizer of alumni functions since he began working at the Law School, hopes to broaden the School's reunion program in order to encourage more alumni to celebrate their reunion milestones by returning to Ann Arbor with their classmates and friends. He noted the increase in the number and variety of alumni functions across the country, both in connection with annual state bar meetings and as alumni get-togethers in major urban areas, a trend that he predicted will continue in the years ahead. He also plans to encourage the expansion of Michigan Law School alumni clubs. The existing clubs, in Chicago and Washington, D.C., meet regularly, often with members of the faculty and prominent graduates. ⊠

Jonathan Lowe

New chair to fund visitors from abroad

The Law School's traditional strength as a center for the study of international and comparative law, built on the groundwork laid by such faculty as William Bishop, Eric Stein, and Hessel Yntema, is soon to be further enhanced by a generous gift from the DeRoy Testamentary Foundation. The Foundation will provide funds for an endowment to support the Helen DeRoy Visiting Professorship, which will be awarded each year to a distinguished professor from abroad.

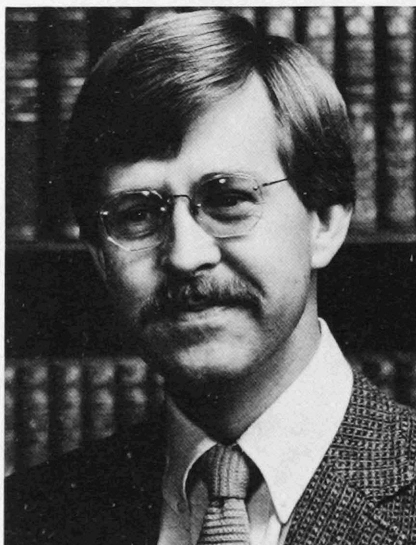
"One of the important elements of Michigan's tradition in international and comparative law," said Dean Terrance Sandalow, "is that we regularly have faculty members from abroad. They not only enrich the educational program for students, but also help broaden the experience of the faculty. The DeRoy Professorship, by enhancing our capacity to bring distinguished visitors from abroad, will significantly assist the School in continuing that tradition."

The DeRoy Foundation was established by the bequest of Detroit philanthropist Helen L. DeRoy. The trustees are Leonard H. Weiner, a Michigan Law School graduate of the class of 1935, chairman of the board; Arthur D. Rodecker; and Bernice Michel. In the past the foundation has funded a variety of innovative activities at the Law School, including the DeRoy Fellowships, which bring public officials and renowned lawyers to the School, an intensive trial practice course, and a skills training program in negotiation, counseling, and drafting. ⊠

Faculty members receive key appointments, honors, awards

Donald Duquette, a professor in the Law School's Child Advocacy Clinic, was appointed to serve on an 18-member task force to recommend how probate courts can improve their services to neglected and delinquent children and their families. The task force is known as the "Riley Commission on Juvenile Justice" after the supervising Michigan Supreme Court justice, Dorothy Comstock Riley.

The commission, according to Duquette, will probably propose some significant reforms in the delivery of services to children and youth primarily. This is likely to be accomplished by reducing the fragmentation of services delivery that exists in Michigan and by greater differentiation of roles among the executive departments and the courts. Judicial review of cases, he feels, would be strengthened, state wardship of youth abolished, and greater local control over children and youth services implemented.



Donald Duquette

Robben Fleming

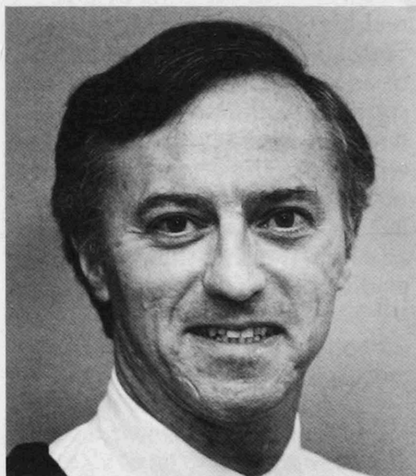
Robben Fleming, professor emeritus of the Law School, and president emeritus of The University of Michigan, recently received a distinguished service award from his alma mater, the University of Wisconsin Law School. The award honors those who have made "an outstanding contribution to the profession."

A leading authority on labor law and arbitration, Fleming has been president of the National Academy of Arbitrators and chairman of the National Institute for Dispute Resolution. He is a former president of the Corporation for Public Broadcasting.

Leon Irish received a distinguished performance award and certificate from the American Bar Association's Real Property, Probate, and Trust Law Section for representing that section on the Joint Commission on Employee

Benefits from 1980 to 1986. The Joint Committee brings together the employee benefits leadership of five sections of the ABA (RPP&T, Tax, Corporate, Labor, and Torts & Insurance Practice).

One of the founders of the Joint Committee, Irish has been on it since its inception, and served as its chairman in 1984-85, representing the RPP&T. He has taught at the Law School since 1985 following 16 years with Caplin & Drysdale in Washington, D.C.



Leon Irish

Wade H. McCree, Jr., the Lewis B. Simes Professor of Law, last fall was appointed by the bar of the U.S. Supreme Court to be chairman of a committee to draft a resolution in memory of the late Justice Potter Stewart. The resolution was read by the solicitor general at a special session of the Supreme Court and adopted by the Court for publication in the official United States Reports.

McCree served as solicitor general from 1977 to 1981, and as a judge on the U.S. Court of Appeals for the Sixth Circuit from 1966 to 1977.

Law School Dean Terrance Sandalow and Professors Jerold Israel and Thomas Kauper also served on the committee.

Wade H. McCree, Jr.

Lawrence Waggoner, the James V. Campbell Professor of Law at Michigan, was appointed director of research for the Joint Editorial Board of the Uniform Probate Code. The board is in the process of systematically reviewing and revising the Uniform Probate Code. As director of research, Waggoner will be proposing and drafting these revisions for the board's consideration.

Lawrence Waggoner

A member of the faculty since 1974, Waggoner has written extensively in the areas of wills, trusts, and future interests, and the taxation of gifts, trusts, and estates.

James Boyd White

James Boyd White, the L. Hart Wright Collegiate Professor of Law, last spring presented the John A. Sibley Lecture at the University of Georgia and the Distinguished Alumni Lecture in Jurisprudence at the University of Tennessee. This fall he addressed the Integrative Studies Association at its annual meeting.

White, who holds joint appointments in law and English, and who teaches in the Classics Department as well, also received two appointments recently. He now serves on the editorial board of *Ethics: An International Journal of Political Social and Legal Philosophy* and on the National Advisory Board of the Project on the Rhetoric of Inquiry at the University of Iowa. ☒

The West: "a semi-desert with a desert heart"

Wallace Stegner presents William W. Cook Lectures

Wallace Stegner, one of the American West's most articulate observers and commentators, presented an evocative portrait of his native region this fall through the William W. Cook Lectures on American Institutions. Under the title, "A Semi-Desert with a Desert Heart; the American West as Living Space," the lectures gave a personal, anecdotal account of the region based on the 77 years Stegner has lived there. As he noted, "it is the West that has conditioned me. It has the forms and lights and colors that I respond to in nature and in art. If there is a western speech, I speak it; if there is a western character or personality, I am some variant of it; if there is a western culture in the small-c, anthropological sense, I have not escaped it."

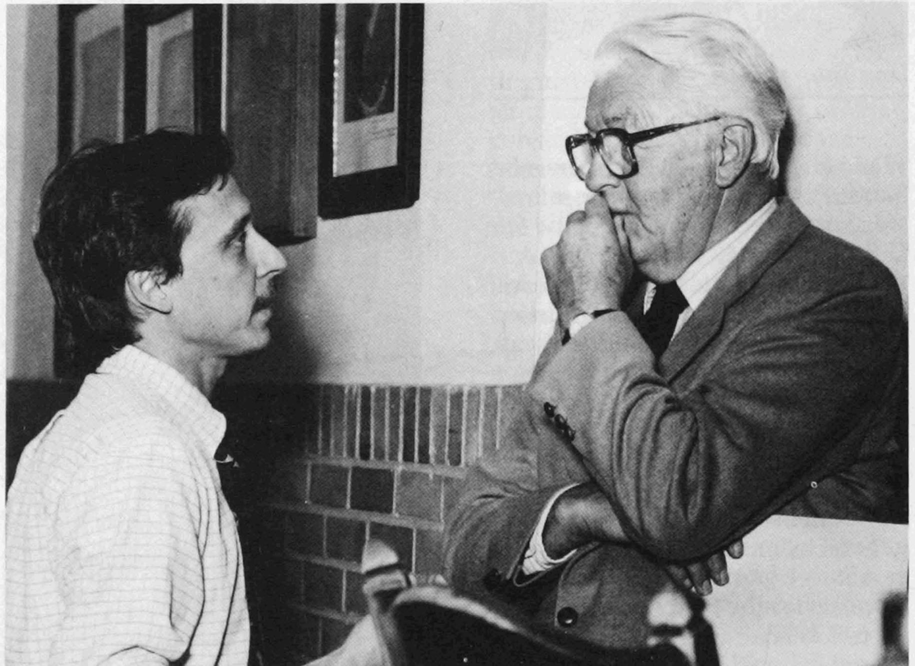
Proceeding from the area's climate and topography, Stegner wove a loose, richly textured image of the region, its history, its culture, and the role of its dominant characteristic — aridity. In the first lecture, "Living Dry, an Overview," he recounted some of the experiences of early travelers to the West: "They were at the border of strangeness. Only a few miles into the West, they felt the difference; and as Webb says, the degree of strangeness can be measured by the fact that almost all the new animals they saw they misnamed. The prairie dog is not a dog, the horned toad is not a toad, the jackrabbit is not a rabbit, the buffalo is not a buffalo . . . . But they could not mistake the aridity. They just didn't know how much their habits would have to change if they wanted to live beyond the 98th meridian."

In the second lecture, "Striking the Rock: the Manipulation of Western Water," Stegner focused on governmental attempts to deal with the water shortage in the West and to protect extensive forest areas and wildlife from private exploitation. Here Stegner, quoting a number of critics, discussed the social consequences, the costs, and the environmental losses resulting from the setting up of what one critic called "an empire on impounded and redistributed water."

These facts, Stegner said, "sad to say, . . . make me admit . . . that neither nostalgia nor boosterism can any longer make a case for the West as the geography of hope."

In the third lecture, "Consequences: Western Society, Western Character, Western Myth," Stegner called into question the existence of a distinct western culture and western character. Pointing to the ethnic and cultural diversity that has inundated the West since the beginning of the century, he noted, "the western culture and western character with which it is easiest to identify exist largely in the West of make-believe" — in the cowboy. "In real-life, as Boone, Bridger, Jed Smith, Kit Carson, he appeals to us as having lived a life of heroic courage, skill, and self-reliance." It is these characteristics, as well as the freedom from social responsibility seen more clearly in outlaws such as Butch Cassidy and Billy the Kid, that we find appealing and that we identify with the West.

Stegner noted that "there are more federal employees in the



Clinical Professor Mark VanPutten (left) spoke with Wallace Stegner after one of his lectures.

West than there are cowboys — more bookkeepers, aircraft and electronics workers, auto mechanics, printers, fry cooks. Nevertheless, when most Americans east of the Missouri hear the word 'West,' they think 'cowboy.'" Why, he asked, "hasn't the stereotype faded away as real cowboys became less and less typical of western life?" The answer, Stegner said, had to do with space, "the product of incorrigible aridity and hence more or less permanent, [it] continues to suggest unrestricted freedom, unlimited opportunity for testings and heroisms, a continuing need for self reliance and physical competence."

Stegner concluded by saying that if he were advising a documentary film maker where he might find the most quintessential West, he would steer him toward small cities like Missoula or Corvallis, "still close to the earth, intimate and inter-dependent in their shared community, shared optimism, and shared memory. These are the seedbeds of an emergent western culture. They are likely to be there when the agribusiness fields have turned to alkali flats and the dams have silted up, when the waves of overpopulation that have been destroying the West have receded, leaving the stickers to get on with the business of adaptation."

* * *

Stegner has spent much of his distinguished writing career interpreting the American West: in numerous fictional works including *The Big Rock Candy Mountain* (1943) and *Angle of Repose* (1972); in essays on western places such as those collected in *The Sound of Mountain Water* (1986); in his biography of John Wesley Powell, *Beyond the Hundreth Meridian* (1964); and in such historical and autobiographical works as *Mormon Country* (1942) and *Wolf Willow* (1962). His writing has an integrity based upon his strong preference for fact over popular mythology.

An active and influential conservationist, Wallace Stegner has lent his talents as a writer to some of the major battles for the preservation of western lands. He has served as assistant to the Secretary of the Interior and as a member of the National Parks Advisory Board. In his academic role as a teacher of writing, Stegner has held positions at the University of Utah, the University of Wisconsin, Harvard University, and Stanford University, where he directed the Stanford Writing Program for 25 years and retired as the Jackson E. Reynolds Professor of Humanities.

Stegner has won numerous fellowships and prizes, including the Pulitzer Prize (1972) and the National Book Award (1977), and is a member of the Academy of Arts and Sciences and the Academy of Arts and Letters.

The Cook lectures are sponsored by an endowment of William Wilson Cook. ■

A revolution in our tax law

Kahn, Schmalbeck, Ross discuss the impact of TRA '86

Now that the Tax Reform Act has become law, questions over its ultimate impact continue to mount. Late last fall a group of tax experts held a panel discussion at the Law School to explore some of the possible unforeseen effects of the changes in the law. The panel entitled, "A Revolution in Our Tax Law," was composed of Law School Professor Douglas Kahn, Visiting Professor Richard Schmalbeck, and Dennis Ross, a faculty member who has taken leave to serve as tax legislative counsel to the Treasury Department. They agreed that the law will have significant unintended effects and will probably engender legislative changing of its own provisions.

Schmalbeck began by noting a major unintended effect of TRA '86: "It is not revenue neutral — one of the supposed hallmarks of the act. It will provide much less indirect funding for total public goods and services."

To illustrate this point, Schmalbeck noted that the traditional high rates, coupled with high deductions, had a "channeling effect" for investable assets. And although the investors may have been the wealthy, "those of modest means were also indirect beneficiaries of the old structure."

Schmalbeck used the example of an individual with an income of $150,000 and $100,000 to invest. The individual is deciding between two investments. One investment will yield $12,000 of interest income; the other, an apartment building, offers $30,000 of paper losses from depreciation. Under the old law, the investor would have more after-tax income by acquiring the apartments. The depreciation deductions would lower his taxable income to $120,000, on which he would pay about $40,500 in tax, netting him $109,500. The other choice would increase his taxable income to $162,000, cost him about $60,000 in tax, and net $102,000.

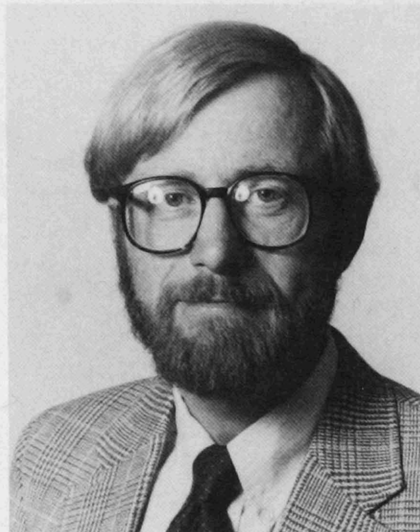
This extra $7,500 offers a strong inducement for the investor to opt for the real estate. Under the new law, however, this option is no longer attractive. For buildings, depreciation schedules have been

extended, and are on a straight line basis — no accelerated depreciation is allowed. Now, therefore, both the government and the investor *appear* to win. The investor chooses the interest income and pays tax at a lower rate. He pays about $45,000, leaving him $117,000, which amounts to $7,500 more than before. The government nets $4,500 more than before.

"This scenario, however, is incomplete," said Schmalbeck. "When the investor chose real estate under the old law, $12,000 of potential interest income from the alternative investment was *foregone*." While the old depreciation deductions benefitted the owners directly, they also worked to the indirect benefit of renters as a form of rental assistance. Making it cheaper to own makes it possible to charge lower rents. But if an investment offers neither cash flow nor tax losses, investors will become disinterested. The owner forfeited the $12,000 in interest to obtain the $30,000 deduction. The $12,000 thus becomes an implicit tax in support of renters, not owners.

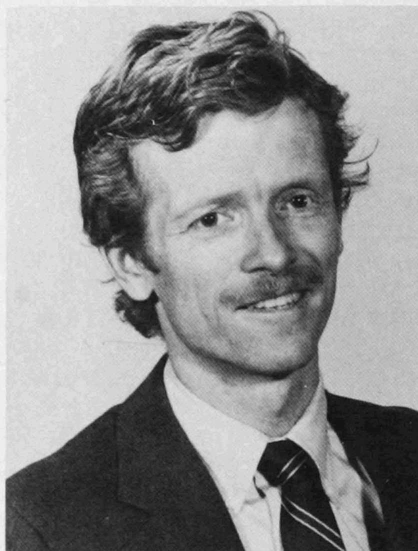
Schmalbeck noted the prediction of one economist that the new tax law will result in a substantial increase in the amount of rent paid by tenants. Ross pointed out that the reduction of the tax rates will increase the after-tax income of tenants out of which they pay the rent. Panelists agreed that while it is difficult to assess the impact of the changes in this implicit tax, it is likely to have far reaching consequences.

The channeling effect of the old law has also been reduced by eliminating favorable tax treatment for long-term capital gains and by reducing the advantages of charitable giving through lower overall tax rates. Lower rates mean less tax savings from charitable deductions. A recent study indicated that charitable giving may decrease by as much as 25 percent, thus increasing pressure on government which provides many of the same services that charities do.



Richard Schmalbeck

Dennis Ross noted another problem. The new law shifts more of the tax burden to corporations. This could result in higher prices, lower wages, both, or neither. The unknown is how changes in the tax code will be expressed in human behavior. "It is very difficult to trace payment of tax back to the individual," said Ross. "If the increase in rates is on holders of capital — pension funds, for example — how are you going to trace it to the individual? How will it influence his behavior?"



Dennis Ross

Ross also commented on Schmalbeck's observation that the elimination of the sales tax deduction may well influence state governments to move away from the sales tax as a source of revenue. "A possible shift to other forms of taxation at the state level was not overlooked by the economists working on the new law," said Ross, "but it will be some time before the full effect is known." Recently there has been news that 33 states may change their taxing systems to offset this change.

Douglas Kahn

Douglas Kahn concluded by saying, "The main goal of the 1986 tax reform was to minimize the influence that taxation has on

financial decision-making. The 1986 act was partially successful in achieving that goal, but many of the neutralizing provisions were lost to political compromise." Kahn summarized Schmalbeck's position as noting that the 1986 act eliminated tax preferences that had channeled private sector dollars into projects which the government will want to maintain. The resulting shortfall in the funding of those projects, he said, may have to be made up by the use of federal funds — for example, by making direct grants.

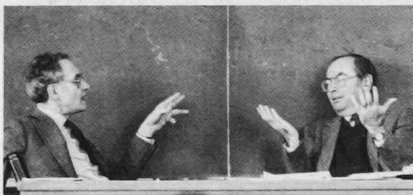
Kahn suggested that while corporations of the "smokestack" variety may fare badly under the new law, service corporations will benefit, and the act may provide some small corporations with new opportunities. For example, the new law permits corporations to deduct passive activity losses against active income — something individuals can no longer do. This could mean that while individuals may want to get out of real estate programs they bought as shelters under the old law, corporations may want to buy such real estate (at bargain prices) to take advantage of the write-offs the individuals can no longer use.

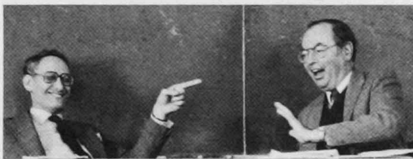
What is the ultimate prognosis? Kahn predicted, "Because the overall effects of the law are almost certainly not revenue neutral, there will be increased pressure on the government to replace lost charitable services and to provide substitutes for other beneficiaries of tax channeling that was reduced or eliminated by the 1986 act. Within a few years we will see either higher rates or a further broadening of the tax base."

Material for the above article was provided through the kind assistance of Law School Professor Douglas Kahn and Derek P. Brereton of Oberdick, Brereton and Associates, Inc., Ann Arbor.

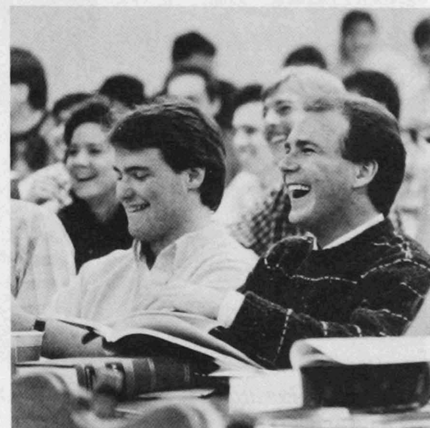
DeRoy Foundation brings Solicitor General Charles Fried to the Law School

Charles Fried, a Harvard Law School professor who is currently on leave to serve as the U.S. solicitor general, spent several days on the Law Quad last fall, visiting classes and meeting informally with students. His visit was supported by a DeRoy Foundation Fellowship.





Professor Yale Kamisar's criminal justice class witnessed a rapid cross-fire of ideas when the solicitor general and the professor sat down to talk about defendants' rights.

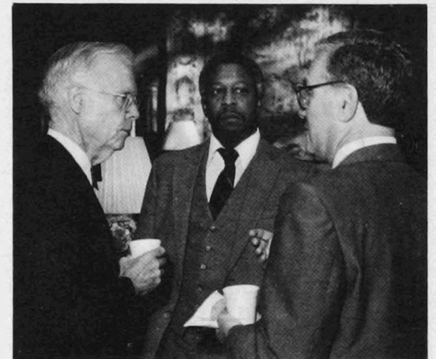


Library Addition gets a name

Visitors join celebration honoring Allan and Alene Smith

The annual Committee of Visitors meetings this year coincided with a special event in Law School history — the dedication of the Library Addition in honor of Allan and Alene Smith. Professor Emeritus Smith has served the Law School as professor and dean, and the University as vice president for academic affairs and interim president.

University of Michigan President Harold Shapiro opened the festivities with words of appreciation for the Smiths.



The Smiths unveiled a plaque representing the esteem and affection reserved for them within the Law School community.

Professional sports and the J.D.

Profiles of two U-M Law School grads working in the top ranks of the major leagues

While the growing field of sports law is a relatively new phenomenon, a number of U-M Law School alumni are already well-established in several areas of professional athletics. They include Alan Rothenberg, president of the Los Angeles Clippers; Miguel Rodriguez, assistant counsel in the Office of the Commissioner of Major League Baseball; John A. Ziegler, Jr., president of the National Hockey League; and Alan Harazin, senior vice president of the New York Mets.

Last year, *LQN* published an article on Alan Rothenberg (see vol. 30, no. 2, winter, 1986). Recently, we talked with John A. Ziegler, Jr. and Alan Harazin and learned how a combination of energy, talent, discipline, and fortuitous circumstances led each of them to their present positions.

NHL President John A. Ziegler, Jr.

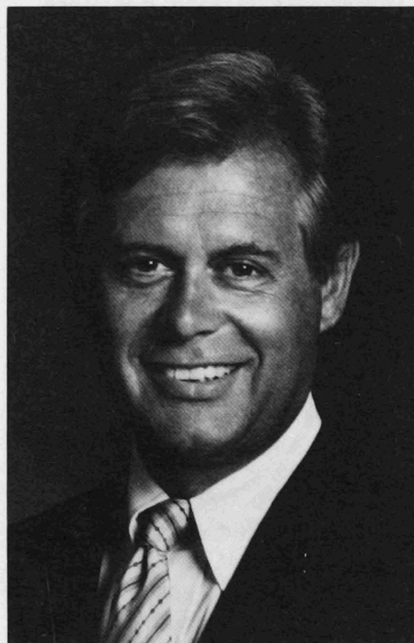
A low-keyed, skillful negotiator

In the fast-paced, sometimes volatile arena of hockey, John A. Ziegler, Jr., stands out. A low-keyed, skillful negotiator, the National Hockey League president has had a stabilizing influence on the sport in North America. Over the course of the past decade, he has guided the organization from the brink of financial and managerial crisis to a point where it has now begun to prosper. Under Ziegler's leadership, the NHL has set new attendance records each year, regrouped after a period of overexpansion, and upgraded many of its events.

"He's a polished, classy, upbeat guy, who's been very fair in understanding negotiations with the Players' Association," said U-M Hockey Coach Red Berenson, a former NHL player.

When he was elected president of the NHL in 1977, Ziegler brought with him over 20 years of experience in litigation. From 1957, when he graduated from the Law School, until 1969, he worked with the Detroit law firm of Dickinson, Wright, McKean and Cudlip. In 1970, he set up his own firm, Ziegler, Dykehouse and Wise, where he continued as senior partner until assuming the NHL post.

Ziegler's involvement with professional hockey began back in 1959, when he began to do work for Olympia Stadium, the Detroit Red Wings, and Bruce Norris, the Red Wings' owner. He continued to serve these clients in various capacities until his election as president of the NHL. As alternate governor for the Red Wings from May, 1966, he worked on many NHL committees and was involved in various aspects of the league's litigation.



John A. Ziegler, Jr.

"I'm pleased that I had the opportunity to practice law for 20 years before assuming my present position, and particularly that I was able to do a good deal of that in corporate litigation," he said.

Professional sports, Ziegler explained, "have become legally intensive ever since the period between the late 50s and the 70s, when the status of leagues — in all sports — changed from that of private clubs of wealthy men to big businesses." Because professional sports deals with contracts, collective bargaining, partnership relationships, basic operating agreements, etc., sports law, a whole new area of jurisprudence has developed.

An avid amateur hockey player for half his life, Ziegler recalls how he used to shoot pucks down the corridors of the Law Quad into a chair during study breaks. "One particularly memorable shot," he admits, "got a little high and sailed through some leaded glass windows."

Ziegler continued to play hockey when he was a practicing attorney in Detroit, giving up the sport, as he explains it, "only after some of the cuts and black eyes I was getting became difficult to explain to my clients." The turning point came when Ziegler went in to court for an important case with stitches and bruises on his face. He recalls, "We won the case, but when one of the senior partners asked me how much I was getting paid to play hockey, I took the hint and retired from the rink."

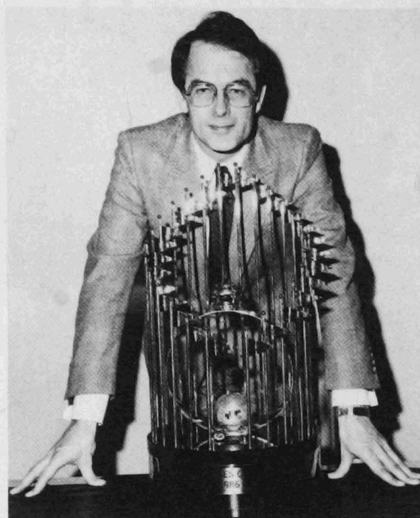
Ziegler, who was born and raised in Grosse Pointe, MI, explains how he first thought of becoming a lawyer: "When I was in the tenth grade, one of my teachers required us to talk about what we wanted to be when we grew up. I really wanted to be a professional baseball player, but I didn't have the courage to say so. I was afraid it would sound too frivolous. I knew that I couldn't be a scientist or a doctor because math and science weren't my strong areas. And I knew that I liked to read. So by the process of elimination I said I'd like to be a lawyer."

Ziegler has continued to make his home in the Detroit area (Ortonville, MI), while maintaining offices in Montreal and New York. He looks back on his law school education at Michigan as "one of the finest experiences I've had." He elaborates, "The competition, the professors who pushed my mind, challenged my thinking, and gave me the respect for doing a thorough preparation have served well in whatever I've done. There is no substitute for preparation. This was particularly true in trying lawsuits and I find it true in what I do today. The discipline of forcing yourself to reach a little further to outprepare the other person is something that became ingrained in me through that law school experience."

New York Mets' v.p. Alan Harazin

Versatile, organized, and willing to take risks

Alan Harazin, senior vice president of the New York Mets, has a way of turning a gamble into a success story. Seven years ago, Harazin, then with the front office of the consistently strong Baltimore Orioles baseball team,



Alan Harazin, J.D. '67, with the 1986 World Championship Trophy.

was offered a position with the floundering New York Mets. The latter team had struggled through four consecutive losing seasons, with an average record of only 66 wins to 96 losses. To Harazin, the opportunity to rebuild a losing club and turn it into a success was compelling.

After what Harazin describes as "three very difficult years," the Mets began to turn things around, ending up in second place in 1984 and 1985. During their phenomenal 1986 season, when they captured the world championship, they won a total of 116 games — a divisional record, took a solid hold on first place in mid-April, and led their division by 21 games by the end of the season.

This wasn't the first time that a gamble had paid off for Harazin. Several years earlier he had given up a successful law practice with the prestigious firm of Taft, Stettinus, and Hollister, in Cincinnati, to manage a minor league affiliate of the Baltimore Orioles, in Asheville, NC. "I could very easily have stayed in Cincinnati for the rest of my life," Harazin recalls. "Labor law had been my primary interest in law school, and Taft, Stettinus was a strong labor law firm. After five years with them, however, I knew that if I were ever going to change directions, this had to be the time. I was going on 30, and of course, it seemed like 80 to me."

Harazin admits that "running a minor league baseball team made absolutely no pragmatic or economic sense. It meant giving up a lot in terms of job security. But frankly, I couldn't resist the temptation. The chance to operate a team on my own, to run it the way I wanted, to make all the decisions, to learn the business from the grass roots level was something I couldn't pass up.

"For the next two years my wife, Anne, and I literally ran the whole show. We did everything from dealing with major league team players to swabbing out the umpires' locker room and running the concessions stand. We couldn't afford to hire anybody but high school and college students, so we were the only two adults involved in the operation. It was a unique, demanding, wonderful experience. I don't think we ever had more fun or worked harder in our lives."

After two years in Asheville, Harazin was offered a chance to work for the major league team in Baltimore, which he eventually accepted before moving on to the Mets.

In his present position with the Mets, Harazin is second in command to General Manager J. Frank Cashen. His responsibilities encompass both the business and baseball areas of the club's operation, and include broadcasting, marketing, public relations, and contracts. "I don't work as a lawyer," he explained, "but having a legal background is certainly helpful in everything I do."

During late fall and winter, most of his time is spent working with

the team's lawyers and the players' agents to negotiate contracts. "After we wind up the negotiations in February," he said, "I pack up my family and head for spring training in St. Petersburg, FL. Then it's a series of administrative things — the nitty gritty things to prepare for the coming season."

Once the season begins, Harazin travels with the club every third road trip, alternating with two other senior team representatives. He explains, "We do this for no specific reason but to be there if we're needed. For example, if we make a trade on the road, if a player gets involved in a fracas, we're there to take care of it."

Harazin claims that he loves the immense variety of responsibilities involved in his work. Others in the Mets' front office find his versatility and organizational skills amazing. "He does more things at the same time than anyone I've ever met," says Jay Horwitz, the club's public relations director. "Things have become more systematic since he's joined the organization. Everyone knows exactly what they have to do. And Frank Cashen regards him very highly for his observations on players. The only bad thing I have to say about Al Harazin is that I can't read his handwriting. It's worse than a doctor's." ⊠

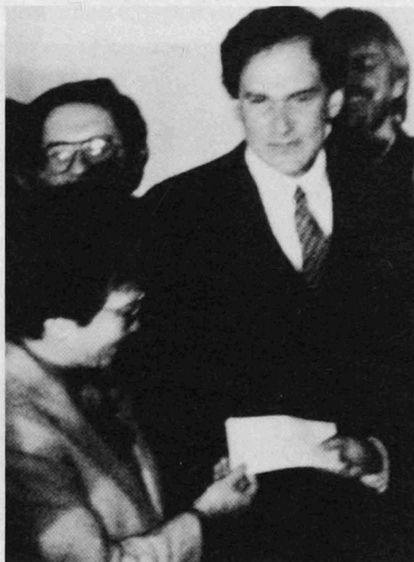
Of Marcos and millions

N.J. alumnus recovers Philippine assets illegally diverted by former leader

As details of the extravagant lifestyle of deposed Philippine President Ferdinand Marcos came to light last spring, Law School alumnus Jeffrey J. Greenbaum, J.D. '72, was feverishly gathering evidence on behalf of the Philippine government.

Last fall at a ceremony in New York City, Philippine President Corazon Aquino expressed her appreciation to Greenbaum and his associates in the Newark, NJ law firm of Sills Beck Cummis Zuckerman Radin Tischman & Epstein, for the vital role they played in recovering assets illegally diverted by Marcos.

The ceremony followed a September 12 landmark judgment by the New Jersey Superior Court which held that the assets in question had been fraudulently acquired by Marcos during his tenure in office. In seeking this ruling, the Newark lawyers became the first legal team to link Marcos directly to real estate assets in this country.



Philippine President Corazon Aquino received a check from the firm of Jeffrey Greenbaum representing Philippine government assets recovered from former President Ferdinand Marcos.

Greenbaum's connection to the case began in early March when his firm was approached by Morton Stavis, president of the Center for Constitutional Rights (CCR) in New York City, and asked to assist the Aquino government in the recovery of assets in New Jersey.

The research and legal maneuvering that the case required were packed into a tense, exhausting period of six months. From the initial request early last March by the CCR that Sills Beck represent the Aquino government in New Jersey to the September 12 court ruling, Greenbaum and his associates labored intensely on the case.

The Newark team had slim documentation available to them — a series of cancelled checks and the deeds to several New Jersey properties that had housed the Marcoses' children and their security guards while the children attended college in the U.S.

With the sale of one or more of these properties imminent, "it became imperative," said Greenbaum, "to obtain an immediate restraining order to stop the sales. Once we had that, we worked day and night to gather enough evidence to convince the court to maintain the restraining order. We could not risk having the assets slip out of reach."

Greenbaum and his associates have been retained as lead counsel in all Philippine litigation pending in the federal courts of New York involving commercial properties there allegedly owned by Marcos. These properties, worth $300 million, include a site at 40 Wall Street, the New Herald Center at 34th Street and 6th Avenue, the Crown Building at 57th Street and 5th Avenue, and an estate on Long Island. ⊠

Making a difference

Law School grad left private law practice to work in Houston's inner city

by Elizabeth Bennett

Two years ago, Joe Higgs was an up-and-coming trial lawyer at Liddell, Sapp, Zivley & Laboon, one of Houston's oldest, most prestigious law firms. He had a bright future, pulling down a salary of close to $50,000 a year. His clients were rich Houston businessmen who could afford to pay for the best legal advice anywhere in the country.

But Higgs gave it all up to pursue a dramatically different career and lifestyle. Today, as the director of religious education at St. Joseph's Catholic Church in Houston, Higgs earns $12,000 a year. His "clients" are inner-city children and their parents who have little money for the essentials of life, much less an attorney. His home, located in a rundown neighborhood, is a tiny, one-bedroom dwelling. And his goal is to expose poor people in his parish, especially young people, to the possibilities of a better life.

"With exposure, they're gonna see something to work for," says Higgs earnestly. "One thing I really want to do is be a go-between for the civic and business community and the barrio. One person can make such a difference in people's lives."

Higgs, 29, became involved at St. Joseph's as a volunteer soon after moving to Houston in 1982 and getting a job at Liddell Sapp. The 1982 U-M Law School graduate and Indianapolis native became involved in the parish when he signed up for Spanish lessons there. A parish priest agreed to give him lessons if Higgs would give English lessons for Spanish-speaking people in the community.

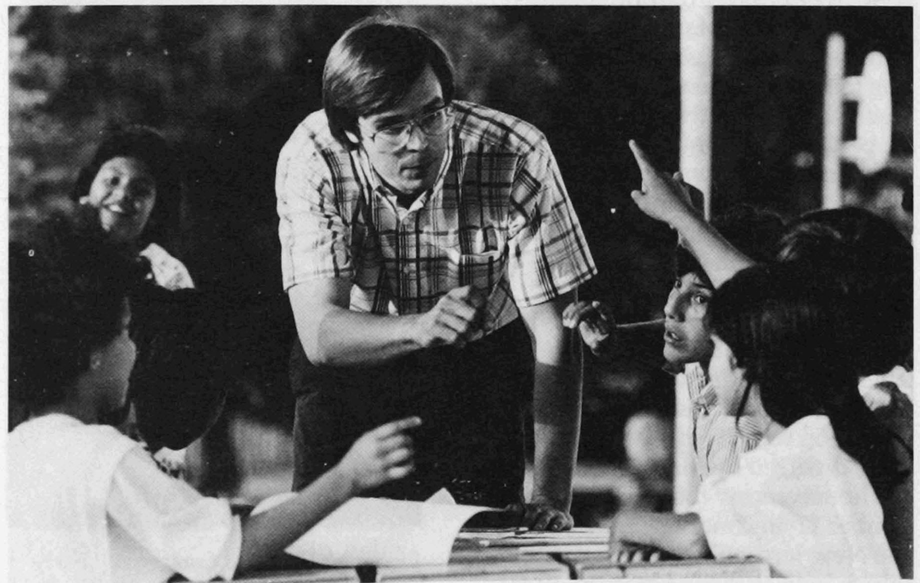
Once at the church, Higgs began to see the pressing need for volunteer help, especially among young people. He explains, "I heard some kids talking about wanting to play basketball, but they didn't have a coach. I grew up with sports and I think they're very important. Many of these kids had never been on a sports team before. They'd never been asked, or they couldn't afford the league fees."

In addition, many of the kids "had never been out of the city, says Higgs. "The high schools in the area don't provide a lot of programs.

After a few months, he found himself organizing baseball, basketball, and soccer teams, coaching the teams, looking for other people to help him, and "probably putting in 20-30 hours a week" as a volunteer. "I got to the point where this was my second job, and I began questioning why this was so important to me. Is this the place where I get the energy that makes life worth living?"

In late 1984, Higgs served on a committee to hire a new director of religious education at the church. When he saw that the job offered opportunities to develop programs and resources for all youngsters in the area, Higgs decided to apply for the job himself. "Once I got it," he recalls, "I never looked back."

The hardest part was breaking the news to his parents. He put off calling them for three weeks and "they cried at first and were kind of overwhelmed, but they were remarkably understanding. There was a big lobby not long ago to get me to go back (to the law firm) — they said, 'you're about to be 30, you know'—but I think they're proud, too."



Former trial lawyer Joe Higgs took a huge cut in salary to work with inner-city youngsters at St. Joseph's Catholic Church.

The people at his law firm, he says, knew about his volunteer work and weren't all that shocked at his decision to leave the firm. Higgs has several attorney friends who do some volunteer work at St. Joe's with him and help him pay the bills for special activities, including an annual bus trip to Texas A&M University to expose youngsters to life on a college campus.

If he ever does practice law again, says Higgs, it would probably be "in the area of juvenile law, working with juvenile offenders. Or possibly immigration law." For right now one of Higgs's primary goals is to start bringing legal services to the community. ◼

The above article first appeared in The Houston Post *on November 3, 1986, © 1986. It is reprinted in abridged and slightly edited form by permission.*

Have you moved recently?

If you are an *alumnus*, please send your new address to the Law School Fund Office, U-M Law School, Ann Arbor, MI 48109-1215.

All others, please send your new address to *Law Quadrangle Notes*, U-M Law School, Ann Arbor, MI 48109-1215.

U-M grads flood Penn bar

One of our alumni has informed LQN of a rather unique situation involving U-M Law School graduates active in the Pennsylvania Bar Association. Out of the 12 present zone governors in the association, four are graduates of Michigan: Richard A. Bell, JD '51; William C. Cassebaum, LLB '56; Robert B. Dornhaffer, LLB '54; and I. Samuel Kaminsky, JD '60.

Class notes

'28 **Henry Ford III** recently won an award for his poem, *The Human Mind*, in The Writers Circle Spring 1986 Poetry Contest. He currently is "of counsel" to his former law firm, Ford and Kriekard, P.C., of Kalamazoo, MI.

'35 **Oscar Baker, Jr.**, a Bay City trial attorney for 51 years, was one of three recipients of the third annual Damon J. Keith Award. The award is named for Judge Damon J. Keith of the U.S. Court of Appeals, 6th Circuit.

'42 **Horace Gilmore**, a U.S. district judge of the Eastern District of Michigan, also received the Damon J. Keith Award, which was presented at a ceremony in Detroit last fall.

'48 **Douglas W. Hillman**, U.S. district court judge for the Western District of Michigan, is now chief judge of that court.

'50 **Byron D. Walter** has become counsel to the Detroit law firm of Moll, Desenberg, Bayer & Behrendt.

'51 **George A. Leonard** has been elected chairman of the Greater Cincinnati Chapter of the American Red Cross.

Arthur J. Rubiner, a practicing attorney in Birmingham, MI, has been elected president of the Detroit chapter of the American-Scandinavian Foundation for 1986-87. Rubiner has been Consul of the Republic of Iceland for the last 12 years.

'52 **Frank W. Allen** has retired from the legal staff of General Motors in Detroit after 32 years in that office. He is now living in Kailua-Kona, HI.

'53 **John B. Bruff** was appointed Macomb County circuit judge.

'55 **Richard E. Kent** is now a member of Weiss, DesCamp, Botteri & Huber, P.C., in Portland, OR.

'56 **Charles Renfrew**, vice president of Chevron Corporation in San Francisco, has been elected to the board of fellows of the Claremont University Center, in Claremont, CA.

Mark Shaevsky, a Detroit attorney, has been elected a director of First Federal of Michigan.

'57 **Roy H. Christiansen**, a partner in the firm of Kerr, Russell and Weber, has become a Fellow of the American College of Trial Lawyers.

Richard F. Kohn has joined the Real Estate Practice Group, Corporate and Securities Dept., of Baker & McKenzie's Chicago office.

'58 **John T. Hammond** was elected judge of the Second Circuit, Berrien County, to succeed Judge Julian E. Hughes, J.D.'49, who is retiring. Judge Hammond had served 18 years as district judge and was prosecuting attorney from 1965-68.

M. Robert Kestenbaum was appointed general attorney and treasurer of Sandia National Laboratories, Albuquerque, NM. A former adjunct professor of law at NYU, Kestenbaum now teaches on the adjunct faculty of the University of New Mexico Law School.

'61 **Harold S. Barrow** has become a partner in Seyfarth, Shaw, Fairweather & Geraldson. He will be based in the firm's Chicago office.

Barry I. Fredericks has been appointed to the faculty of the University of Virginia's trial advocacy program, effective September, 1986.

James B. Pannebaker, senior partner, Pannebaker and Associates, P.C., Middletown, PA, recently received the Educate for Service to Humanity Award from the Elizabethtown College Alumni Association.

'62 **Warren M. Laddon** has been appointed assistant general counsel of the Cigna Corporation, Philadelphia, PA.
Shunji Shimoyama was promoted to managing director of the Japan Atomic Power Co. last June.

'63 **Joe Billy McDade** has been an associate circuit judge of the 10th Judicial Circuit of Illinois since 1982.

Lawrence K. Snider has been elected a member of the National Bankruptcy Conference.

'65 **John H. Blish** has formed a new litigation firm, Blish & Cavanagh. He previously had been a senior litigation partner of Edwards & Angell, of Providence, RI. Blish is a fellow of the American College of Trial Lawyers.

Andrew Mott is vice president of the Center for Community Change. The Center, a national nonprofit organization, provides technical assistance to minority and low income community organizations which organize people to work on self-help projects and tackle public policy issues affecting poor neighborhoods.

Paul M. Lurie recently authored a chapter of a four-volume treatise, *Construction Law*, which has just been published by Matthew Bender & Co. Lurie, a partner in the Chicago firm of Lurie Sklar & Simon, wrote Chapter 8, "Documenting and Presenting Construction Claims."

Thomas B. Ridgley, a partner with Vorys, Sater, Seymour & Pease in Columbus, OH, was one of the featured speakers at the Tort and Insurance Practice Section (TIPS) of the ABA's conference on "Insurer Insolvencies" in Boston last spring.

Louis A. Smith serves as chairman of the board of directors of the Thomas M. Cooley Law School in Lansing, MI.

'66 **Stephen A. Bodzin** is a partner in the Washington, D.C. office of Finley, Kumble, Wagner et al.

Jeffrey W. Hutson was elected a fellow in the American College of Trial Lawyers.

George W. Pilling is a biographee in *Who's Who in American Law*, 4th edition, 1985-86.

'67 **John A. Sebert, Jr.** has been designated acting dean of the University of Tennessee College of Law, effective Aug. 1, 1986.

'68 **Bruce P. Bickner** has been named president and chief executive officer of DEKALB Corporation in Dekalb, IL.

Clement Dinsmore was promoted to associate general counsel of the Federal Home Loan Bank Board.

Stephen A. Glasser, who together with his wife, Lynn S. Glasser, founded Law & Business, Inc., will continue as president and publisher, respectively, of the firm following its acquisition by Simon & Schuster from Harcourt Brace Jovanovich, Inc. Law & Business is a prominent publisher and sponsor of seminars in the legal and business fields.

Lawrence M. Glazer is serving as legal advisor to Governor Blanchard.

Ronald L. Ludwig, a member of Ludwig & Curtis in San Francisco, served as advisor to the U.S. General Accounting Office study of employee stock ownership plans. Ludwig received an award from the ESOP Association at the May, 1986 convention in recognition of service as chairman of the legal advisory committee in improving ESOP laws, 1978-86.

'69 **Lawrence E. Hard** is in private practice with Le Sourd & Patten, in Seattle. He is also involved in ski resort law as secretary and general counsel for Crystal Mountain, Inc.

Richard C. Lam joined Atlantic Richfield Company's Los Angeles office as an assistant tax officer.

'72 **Murray A. Gorchow** is a partner with the labor law firm of Miller, Cohen, Martens & Ice, P.C., with which he has been associated since 1972.

David A. Lipton was appointed ordinary (full) professor at Catholic University School of Law. He was also elected vice chairman of the steering committee of the D.C. Bar Division of Corporations, Finance and Securities.

Seth M. Lloyd has been elected to the board of trustees of the CCS — Institute of Music and Dance (formerly the Detroit Community Music School). Lloyd is a partner in Dykema, Gossett, Spencer, Goodnow and Trigg.

'73 **Neil Ganulin** was elected treasurer of Cancer Family Care, a United Appeal agency that provides counseling to cancer patients and families.

Wendy Cole Lascher, a Ventura, CA attorney, has been elected 1986-87 president of the California Academy of Appellate Lawyers. Ms. Lascher, 35, is the first woman and youngest person to head the organization of appellate-practice specialists.

Lawrence A. Margolis was elected vice president, general counsel, and secretary of Anixter Bros., Inc., of Skokie, IL.

John F. Van Bolt was appointed executive director/general counsel of the Michigan Attorney Discipline Board. He was also elected for his second term to the Ypsilanti city council.

'74 **William A. Roy** has been elected chairperson of the General Practice Section of the State Bar of Michigan for the 1986-87 year.

F. Wallace Strong, Jr., a lieutenant commander, Judge Advocate General's Corps, U.S. Navy, has been assigned as the staff judge advocate for the Naval Hospital, Charleston, SC.

'75 **Eric A. Eisen** has become a partner in the Washington, D.C. firm of Birch, Morton & Bittner.

Jeffrey F. Liss, a partner in the Washington, D.C. office of Piper & Marbury, is a member of the adjunct faculty at Georgetown University Law Center, where he teaches a course in equitable remedies.

'76 **John C. Reynolds, LL.M.**, is now working as a group legal advisor to Cargill UK Ltd., in London.

'77 **Ronald G. Rossi** has left Mayer Brown & Platt to form the firm of Rossi, Stone & Greve in Denver.

'78 **Joseph P. Curran** has been named a partner in the Providence, RI, law firm of Hinckley, Allen, Tobin & Silverstein.

Duncan M. Davidson recently joined Strategic Planning Associates in

Washington, D.C. as an information technology consultant. For the last several years he has been a director of the Computer Law Association and chairman of the Proprietary Rights in Software Committee of the ABA Section of Science and Technology. Duncan and his wife, Jean Kunkel, have just finished their 1987 update to their book, *Advanced Legal Strategies for Buying and Selling Computers and Software* (J. Wiley & Sons, N.Y., 1986).

Dennis W. Fliehman has become a founding partner of the San Diego law firm of Klinedinst, Fliehman and Rescigno. The firm specializes in civil litigation and insurance matters.

Gary P. Kaplan has opened his own practice under the name Kotite Kaplan Bodian & Eames. The New York City firm specializes in tax, business planning, and litigation.

W. Robert Kohorst now works for Public Storage, Inc., in Glendale, CA, as the president of the private placement group that is responsible for capital raising in Reg. D syndications.

'79 **Charles R. Lowery, Jr.** has recently taken a position as an attorney for the Federal Voting Assistance Program in the Office of the Secretary of Defense in Washington, D.C. Lowery was formerly a trial attorney for the Division of Enforcement of the Commodity Futures Trading Commission in Los Angeles.

'80 **Todd J. Anson** has become a partner at Brobeck, Phleger & Harrison, practicing real estate law. He also serves as a visiting lecturer in real estate at the University of California, Berkeley Graduate School of Business.

G.A. Finch, assistant counsel in the litigation/claims unit of Chicago Title Insurance Co., has been named a fellow of Leadership Greater Chicago for 1986-87. He is among 24 Chicagoans, selected from more than 90 nominees, who will serve the not-for-profit association in a year-long study of the problems and concerns of metropolitan Chicago.

Richard T. La Jeunesse has been named a partner in the Cincinnati law firm of Graydon, Head & Ritchey.

Frederic R. Klein has been elected a partner of the Chicago firm of Schiff Hardin & Waite.

Paula R. Latovick, who practices in the litigation, municipal and administrative departments of Fraser Trebilcock Davis & Foster, P.C., has become a full shareholder and member of the board of directors of the Lansing firm.

Iris K. Socolofsky, who practices in the business and administrative law departments of Fraser Trebilcock Davis & Foster, P.C., has become a full shareholder and member of the firm's board of directors.

'81 **Rudolph B. Chavez** is now president of Chavez, Montes & Associates, Albuquerque, NM. The firm is engaged in the general practice of law, with emphasis in workers' compensation, personal injury, and medical malpractice.

Alyssa J. Taubman is now with Salomon Brothers, Inc., New York. She will be moving to their Los Angeles office in the first quarter of 1987.

'82 **Robert M. Gurss**, formerly senior staff attorney at Media Access Project, has joined the Washington, D.C. law firm of Wilkes, Artis, Hedrick, & Lane as an associate.

'83 **Hugh Hewitt** has been appointed general counsel of the U.S. Office of Personnel Management.

Jonathan Hollingsworth is now associated with Porter, Wright, Morris & Arthur as a litigator in their Dayton, OH office.

'84 **Gary Rosen** is an associate with Hangley, Connolly, Epstein, Chicco, Foxman & Ewing in Philadelphia.

Joseph M. Inwald has joined Seidman & Seidman BDO as a senior consultant in its managerial services department, specializing in health care engagements.

Alumni deaths

'13 **Robert W. Clewell**, July 8, 1986, in Dubuque, IA
Joseph A. Frankowski

'19 **Charles L. Kaufman**, October 1, 1985

'24 **West H. Gallogly**, November 8, 1986, in Birmingham, MI

'25 **Leo Mellen**, October, 1986
Bernard Segall, October, 1986

'28 **Earl G. DeFur**, June 20, 1986
Charles F. White, February 20, 1986, in Evanston, IL

'30 **Walter O. Estes**, July 27, 1986
Walter C. Greene, November 5, 1985
Joseph Solomon
Eugene A. Weinberg, July 7, 1986

'31 **J. Allen Lampman**, May 11, 1986
James R. Rood, May 4, 1986

'32 **William S. Kaplan**

'35 **John T. Damm**, August 20, 1986
John E. English, July 20, 1986

'36 **Max L. Feldman**, January 24, 1986
Robert F. Krause, September 4, 1985

'37 **F. Lamar Forshee**, November 22, 1986, in Monterey, CA

'38 **Robert W. Dudley**

'40 **Richard R. Lyman**, May 27, 1986, in Norwich, NY
Lawrence A. Robie, August 22, 1986

'41 **Shepard J. Crumpacker**, October 14, 1986

'42 **Harvey W. Clarke**, January, 1986
Seymour J. Spelman

'45 **Albin J. Schinderle**, September 6, 1986

'48 **Eldridge H. Henning, Jr.**, August 1, 1986

'49 **Richard H. Sproull**, June 11, 1986

'51 **Victor H. Bergstrom**, August 6, 1986
Curtis Wright, July 31, 1986

'54 **James M. Nicholson**, June 29, 1986

'57 **Richard A. Kurland**, July, 1986

'67 **Joel B. Strauss**

Thinking About CAUSATION With Special Reference to Pornography

by Frederick Schauer

What is it to say that smoking causes cancer, that chili causes heartburn, and that drinking causes automobile accidents? The identification or attribution of causation is part of our everyday conceptual apparatus. The deployment of this conceptual apparatus, however, can be philosophically difficult and politically controversial, as can be seen from the discussion of the report of the Attorney General's Commission on Pornography. The Commission's most prominent finding was expressed as a causal claim, that "substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence."[1] Exploration of the meaning of, justification for, and implications of that causal claim may enlighten us about statements of causation in general, while also helping to clarify claims made in the context of discussing what is commonly and unfortunately referred to as "pornography."[2]

Thus, I want to inquire into what it is to make a causal claim, what justifies making a causal claim, and what actions might follow from a justified claim of causation. The first of these questions is one of meaning, the second of evidence, and the third of policy, and it will be useful to keep this distinction in mind. But that there is a distinction between questions of meaning, justification, and policy does not mean that they are unrelated. As shall be seen, for example, what counts as sufficient evidence to justify an identification of causation varies with the policy implications of such an identification. Nevertheless, the questions remain different for all their dependency on each other, and I want to structure this analysis around these three issues.

My purpose is not to provide a precis of the complete *Report of the Attorney General's Commission on Pornography*, or even of Part Two (Part One of the privately published edition), which contains the analysis, findings, and conclusions of the Commission. A few brief comments, however, may help put what I am about to say in context. First of all, the Report strongly discourages use of the term "pornography," in part because the pejorative connotations of the word obscure any descriptive content it may possess, and in part because the term, even if nonpejoratively restricted to material that is "predominantly sexually explicit and intended primarily for the purpose of sexual arousal,"[3] is simply too broad. All of the work of the Commission must thus be viewed through the lens of the Commission's subdivision of both the large world of the sexually explicit and the much smaller world of the legally obscene into three categories. These categories are the sexually violent; the subordinating or degrading but not explicitly violent; and material, no matter how explicit and no matter how unconventional the sexual practices depicted, that is neither violent nor degrading. The Commission made no findings spanning all three categories. With respect to the last category, which is comparatively small within the universe of the legally obscene and comparatively large within the universe of the sexually explicit, the Commission concluded that there is *no* causal relationship between such materials and acts of sexual violence. Even where such material is legally obscene, therefore, the Commission did not urge increased prosecution. It did, however, acknowledge that a community's decision to prosecute existing obscenity laws with respect to material that is neither violent nor degrading is consistent with existing constitutional law.

What I wish to focus on, however, is the conclusion that there was a causal relationship with respect to sexually violent materials. This conclusion was made, but with substantially less confidence, with respect to degrading materials as well. Although these findings encompassed a range of materials far broader than the legally obscene, the Commission rejected pleas urging that the scope of what is constitutionally regulable be

expanded beyond existing Supreme Court definitions. In many areas, including this one, the First Amendment properly protects a wide range of harmful utterances, such as potential marches by Nazis in localities inhabited by Holocaust survivors, or speeches by the Ku Klux Klan in areas beset by racial tension, or erroneous published condemnations of newly opened restaurants. Thus, any plausible theory of the First Amendment, and current First Amendment doctrine, drives an analytic wedge between what is harmful and what may be regulated. To say that something is harmful is not to say that it can or should be regulated. This seems the appropriate starting place for our closer look at the issue of causation as it relates to the Commission's primary finding regarding sexually violent material.

I

What do we mean when we say that something causes something else? Some people speak as if an assertion of causation were deterministic, in the sense that the assertion that X causes Y (or that A,B, and C together cause Y) means that X, or A,B, and C together, are universally sufficient conditions for the production of Y. To say that there is causation under a deterministic view of causation is to say that the cause is invariably followed by the effect.

Deterministic views of causation do occupy some corner of philosophical thinking about the question of causation. Nevertheless, the perspective of causation more commonly employed in ordinary language, and almost universally employed in the social sciences, is *probabilistic causation*.[4] Under such a perspective, C is a causal factor for E within a population P if there would be more E in a population in which everyone had C than in a population in which no one had C, assuming that the two populations are identical in every respect except for the presence or absence of C. This way of putting things focuses on the incidence of the effect within a large population, but the exact same idea can be expressed in terms of probability for a given individual (or event) rather than incidence over a population. Thus, we can say C causes E when the presence of C makes it more probable that E will occur than would have been the case in the absence of C.

All of this can be seen in a relatively common example, the assertion that there is a causal relationship between cigarette smoking and contraction of lung cancer by the smoker. To say, under a probabilistic causation approach, that cigarette smoking causes cancer is not to say that everyone who smokes will get cancer. It *is* to say that for two otherwise identical populations of statistically significant size, there will be more cases of lung cancer in a population in which everyone smokes than in a population in which no one smokes. If we shift this incidence model to an individual probability model, we would say that the claim that cigarette smoking causes cancer means that for a given individual, the likelihood that that individual will contract lung cancer if he or she smokes is greater for that individual than it would be, everything else being the same, if that individual did not smoke.

Note, therefore, that a claim of increased incidence or increased probability need not entail any particular quantity of increase, or any particular proportion of the effect among the relevant population. If in a statistically significant and otherwise randomly selected population of non-smokers there will be 16 cases of lung cancer for every thousand individuals, and if in a statistically significant and otherwise randomly selected population of smokers there will be 82 cases of lung cancer for every thousand individuals, a probabilistic view of causation would identify smoking as bearing a causal relationship to the contraction of lung cancer. This would be the case despite the fact that, at least on this evidence, it appears that only 82 of 1000 smokers contract lung cancer. Similarly, if I get heartburn one out of 20 times after eating my usual dinner, and one of three times after eating Mexican food, we would normally say that Mexican food gives me heartburn, even though I have no such symptoms two thirds of the time that I eat Mexican food.

Perhaps even more significantly, therefore, the identification of one agent as a cause is not inconsistent with identifying other agents as causes as well, or even with saying that other agents bear a *greater* causal relationship to an effect than the agent under scrutiny. To say that failure to wear seat belts bears a causal relationship to the incidence of highway fatalities is not inconsistent with saying that drinking, poor driving, or other factors also bear a causal relationship to highway fatalities, and may be causally related to an even greater degree.

Thus, as a matter of conceptual clarification, prior to confronting the evidentiary issue, we can and very often do say that causation exists to the extent that a given agent or fact increases the probability of an effect for an individual and the incidence for a population over what it would be without that agent. To make the claim, therefore, that extensive exposure to material portraying sexual violence in a favorable light bears a causal relationship to acts of sexual violence is not to say that everyone so exposed will commit an act of sexual violence. Nor is it even to say that a majority or some other significant proportion of those so exposed will commit acts of sexual violence. It *is* to say that there will be more acts of sexual violence committed by a population in which every member is so exposed than by a population in which no member is exposed. Or, to put it somewhat more realistically, it is to say that we can expect more acts of sexual violence in a population in which such exposure is prevalent than in a population in which there is no such exposure. This, then, is what the claim of a causal relationship means, and this is how it is explained in the *Report*. The question, then, is what would justify someone in making such a claim.

II

Questions about evidence have both a qualitative and a quantitative dimension. What *type* of evidence can justify a given conclusion or action, and *how much* evidence is necessary to justify that conclusion or action? And both of these questions presuppose an answer to what might be called the *contextual* question. What does an identification of causation entail in a certain context? Does it mean, following Hart and Honoré,[5] that the agent causing the effect is in some way out of the norm, such that it seems odd to say that driving is a significant cause of highway fatalities, despite the fact that such an attribution of causation is undoubtedly true given our prior definition? Or does it mean, following Calabresi,[6] that what we identify as a cause is realistically within our power to change, so that, to use the same example, we may identify drinking as a cause of highway fatalities rather than driving faster than 40 miles per hour because it is unrealistic to suppose that we would ever reduce the speed limit to 40.

Once we see the contextual problem, it is clear that the question of evidence is closely tied to the question of what we are going to do with a "positive" finding of causation. It is an everyday phenomenon that the quantity and quality of the evidence we require varies with the consequences of the actions we are considering taking. Just as we require less evidence to impose civil liability for conversion than we do to impose criminal penalties for theft, so too is it rational to require less evidence for making certain personal decisions, such as whom to exclude from the guest list for my party or whom to vote for, than is necessary for a court imposing civil liability.

I will return to these issues in the next section, but they should be kept in mind in what I want to discuss now, the questions of the quantity and quality of evidence necessary to support a determination of causation. But for the moment let us suppose that the issue is merely the ability to *assert*[7] that the causal relationship exists, rather than the justification for taking restrictive actions against the cause based on the existence of the causal relationship.

Two questions naturally provide the focus of the inquiry. First, to what extent do we, can we, or should we make empirical statements or empirical assessments of causality based on evidence that is not, strictly speaking, scientific? If people can rely on their own experiences, or their perceptions of the world, in order to assert that Mexican food causes heartburn, or that driving on ice causes skidding, or that excess permissiveness causes children to grow up spoiled, to what extent can that kind of evidence, or that kind of reasoning, be used in other arenas as well?

Second, what counts as scientific evidence, to the extent that we think it important to have some scientific evidence? Is a laboratory experiment showing that smoking causes lung cancer in rabbits, monkeys, and dogs to count as *scientific* evidence for the proposition that smoking causes lung cancer in human beings? If there is scientific evidence supporting the proposition that reports of high inflation cause young Canadian women to buy more automobiles than they otherwise would, is this to count as evidence for the proposition that reports of a lessening of inflation will cause middle-aged American men to buy fewer automobiles than they otherwise would?

To take up the first question, the use of non-scientific empirical evidence, we should start with the observation that reliance on non-scientific evidence is a staple of both public and private life. Not only do we continually make causal assessments in our daily lives, but these causal assessments pervade policymaking as well. In *New York Times Co. v. Sullivan*[8] the Supreme Court based its result in large part on the determination, unsupported by any scientific studies, that a legal standard of strict liability would *cause* political speakers and writers to be excessively cautious in attacking public officials and their policies. Similarly, many legislatures have enacted journalists' shield laws based on the assumption that the possibility of compelled disclosure of their identities will *cause* many people to refrain from providing information to reporters. The disclosure provisions of the securities laws are based in part on the premise that there is a causal relationship between disclosure of information and investor behavior, despite the fact that most investors do not base investment decisions on information contained in the prospectus. And many of the exemptions and deductions in the Internal Revenue Code are based on frequently untested assumptions about economic behavior.

I do not mean to suggest that there is anything wrong with reliance on scientific evidence. Nor do I deny that many of the non-scientific causal assessments of the past have proved to be erroneous, such as the assessment that touching a toad causes warts. In order to avoid such mistakes, perhaps it would be better if the causal assumptions of Supreme Court cases or legislation were tested scientifically before being allowed to undergird the law. But it remains the case that we are far from that ideal, that life often must go on while experiments are being conducted in the laboratory, and that scientific experimentation is itself often inconclusive and contradictory. Scientific experimentation is usually more accurate than the views of the average person on the street. My point is only that we live in a world in which basing governmental policy decisions on empirical assessments that may not be wholly or even largely based on scientific experimentation is an entrenched feature of political life.

When policy decisions are based on such non-scientific evidence, the empirical presuppositions must be tested against human experience rather than in the laboratory. And whether such an empirical presupposition will be accepted or rejected by itself will

often turn on whether a specific empirical assumption is consistent with the other and larger empirical assessments of our daily lives. The assumption, therefore, that favorable portrayals of sexual violence bear a causal relationship to acts of sexual violence is presumptively acceptable precisely because a large part of our experiences confirm and few of our experiences deny the hypothesis that widespread exposure to the view that certain activity is desirable bears a positive causal relationship to the incidence of that behavior. Parents raise their children on this general assumption, advertisers advertise products on this general assumption, and many people question the glorification of violence based on this general assumption. Thus, the assertion that, speaking probabilistically, depictions of sexual violence bear a positive causal relationship to acts of sexual violence is little more than the instantiation of a general causal assumption by which most of us lead our lives.

The same does not hold true, of course, with respect to the alleged relationship between sex alone and violence. Once we are talking not about the relation between favorable portrayals of X and the incidence of X, our ability to tap into a wealth of human experience evaporates. The relationship between favorable portrayals of X and *Y* is much more problematic, and without some more scientific evidence that things are not what they seem, the alleged connection should be rejected. Scientific evidence of that kind does not exist, and we are left with the conclusion that favorable portrayals of sex are likely to bear a causal relationship to the incidence of sex, and not of violence. Those of us for whom the incidence of sex is not seen to be a central concern of the state can thus note the existence of a causal relationship, while at the same time saying that the effect is not or should not be a concern.

Once we turn to scientific evidence either to support or to rebut what would otherwise be our non-scientific assessment of causation, we can see that there are large varieties of scientific evidence. In most areas of causal inquiry, a centrally debated point is the extent to which correlational evidence is probative on the question of causation. To say that cigarette smoking correlates highly with lung cancer, for example, is not necessarily to say that smoking causes cancer. After all, as the cigarette companies have been trying to prove for years, some third factor, genetic, behavioral, or whatever, might cause both the inclination to smoke and the susceptibility to lung cancer.

We are properly skeptical when the cigarette companies assert that correlation does not prove causation. This is the case not because they are not right in the abstract, but because the extent that correlation provides non-conclusive evidence of causation is a function of the plausibility of some hypothesized independent variable. We doubt the cigarette companies because neither common sense nor scientific experimentation leads us to believe that such a third factor exists.

By and large, this is not the case with respect to much of the correlational evidence, whether scientific or non-scientific, linking portrayals of either sex alone or even sexual violence with acts of sexual violence. It is quite possible that various forms of sexual deviancy may lead people both to be more inclined to desire images of sexual violence and to be more inclined to commit acts of sexual violence. The correlation between readership of *Sports Illustrated* and tennis elbow does not mean that reading *Sports Illustrated* causes people to get tennis elbow, but only that some third factor — interest in sports — is likely to bear a causal relationship to both.

For those of us who reject virtually all of the existing correlational evidence dealing with even sexually violent material, there is still evidence that must be examined. The properly performed control group experiment avoids the pitfalls inherent in correlational evidence by taking the test group and dividing it into two randomly separated subgroups, and then subjecting one subgroup to the stimulus and treating the other as a control. To the extent that one group then shows an effect not present in the other, the very randomization of all other factors serves to isolate the stimulus as the causal factor in producing the effect.

Most control group experiments, however, must substitute one type of potential difficulty for another. As all readers of *Arrowsmith* know, performing a controlled experiment on real people involves either subjecting real people to a potentially dangerous stimulus in the name of scientific accuracy, or depriving people of a potential cure in the name of that same scientific accuracy. In most cases we are unwilling to do this, and thus do not force experimental subjects to, for example, ingest substances we think might be cancer-producing. Instead, we use laboratory animals, relying on the non-scientific, or "transscientific," as it is called, assumption that effects measured in laboratory animals are likely also to be present in humans.

The same necessary reliance on the transscientific occurs in control group experiments on sexually violent material. Because we are properly unwilling to wait to measure actual acts of sexual violence, scientists measure either changes in attitudes or changes in levels of aggression, leaving it to transscientific assumption to determine whether changes in attitudes or increases in aggression level themselves bear a causal relationship, in probabilistic terms, to acts of sexual violence. Let us suppose that it could be shown, as it in fact has been repeatedly shown in control group experiments, that exposure to sexually violent materials bears a causal relationship to increases in aggressive tendencies towards women,[9] or bears a causal relationship to the attitude that women frequently desire to be raped.[10] The transscientific question would remain whether more acts of sexual violence are likely to take place in a population in which there is more aggression towards women than in one in which there is less aggression towards women, or whether more acts of sexual violence are likely to take place among a population of men who believe that many women desire to be raped than in a population

of men who believe that women do not desire to be raped.[11] The answers to these questions, the ultimate questions of causation, must inevitably rely on assumptions not completely provable in a laboratory.

Perhaps the most interesting scientific question, and one again related to what use can be made of a particular study, is what might be called the question of *localization*. For example, there are many studies that show that widespread proliferation of favorable images of beer drinking, cigarette smoking, and Ford driving bear a causal relationship among a population to the incidence of beer drinking, cigarette smoking, and Ford buying. To what extent can we generalize from these and other studies about the relationship between favorable images generally and the incidence of the behavior generally? If we can so generalize, then it may be the case that much of the evidence about one specific phenomenon is evidence, albeit far from conclusive, for another phenomenon. That is what I mean by localization, the utility of some studies outside of their most obvious and immediate application. Are studies about nonsexual violence in Topeka relevant to thinking about nonsexual violence in Burlington, and are studies about nonsexual violence applicable to sexual violence?

Whenever we make one of these jumps, we make an assumption, but this kind of assumption, based on our own experiences, or based on other studies, is part of what we do all the time. If there are studies that show that there is a causal relationship between portrayals of nonsexual violence and the incidence of nonsexual violence, can we draw on these studies as part of a total evidentiary picture in trying to determine if there is a causal relationship between portrayals of sexual violence and acts of sexual violence? Perhaps there is not, but it appears that such a discontinuity is inconsistent with much of our experience.

The question of localization, therefore, is but a way of focusing on the fact that most scientific studies quite properly assert no more than can be determined by the use of the scientific method. As a result, most scientific studies are narrower than the potential uses to which they may be put. Moreover, the step from the conclusion that can be stated scientifically by scientists to another conclusion that may be justified by the first conclusion is a step that is not itself completely scientific. When we take these steps, we should be self-conscious about what we are doing, and especially careful of misstepping. Never to take one of those steps, however, is to relegate most scientific research to uselessness.

III

It should be apparent that the evidence necessary to justify *saying* that something bears a causal relationship to something else need not be as great as the evidence necessary to justify legal restrictions. And it is of course familiar ground in constitutional law that the evidence necessary to justify restricting conduct covered by a constitutional right must be substantially greater than the evidence necessary to justify restricting conduct not covered by a constitutional right. Other factors also play a role in determining the extent to which the existence of a causal relationship between X and Y will justify restricting X. Obviously, one of those is the question whether Y is harmful at all, and, if so, how harmful. Social scientists quite properly do not purport to determine moral questions, and thus are likely to describe the causal relationship between sexually violent materials and increased aggression towards women as a "negative effect." Indeed, even rape is referred to as a "negative effect," although there is plainly some evaluation going on when the word "negative" is used. Nevertheless, the fact that determining whether rape or sexual harassment are harmful is not the province of the social scientist does not mean that it is not the province of the citizen or the policymaker.

Although the rape example is easy, there are people in this society who view what they think of as "deviant" sex as also harmful. Thus, if it can be shown that there is a causal relationship between favorable images of sexual relations between or among unmarried people and the incidence of sexual relations between or among unmarried people, this shifts the focus away from the question of whether the effect is itself harmful. For those of us who think that this effect is neither harmful nor the legitimate concern of the state, the existence of a causal relationship does not matter.

Thus, we can consider a proper governmental concern about the effect to be a necessary but not sufficient condition for government regulation. The extent to which government regulation will in fact be justified depends not only on the factors already mentioned in this section, but also on the nature of the regulation proposed (we ought to need better evidence to justify criminal penalties than to justify other forms of control, for example), and, as important as it is unappreciated, on the state of the law, and the state of perception about the law, at the time some action is considered.

It is this last factor that turned out to be important with respect to the *Report of the Attorney General's Commission on Pornography*. Law has a symbolic effect, even more so with the public visibility of the area of law involved. Consequently, it is often the case that the specific deregulation of that which has previously been regulated may be perceived as government imprimatur of the deregulated conduct in a way that failure to regulate that which has not previously been regulated will not be perceived as imprimatur.[12] Thus, even if we stick to the rather settled law that the kind of material that would be considered legally obscene is not covered by the First Amendment,[13] the *initiation* of criminal penalties for constitutionally unprotected sexually violent material would require a particularly

strong showing of causality between the putatively restricted conduct and some harmful effect. But with respect to the world in which we live, such material is now subject to regulation and is in fact regulated, admittedly with widely divergent degrees of governmental enthusiasm, by the United States and virtually all of the states. To take the affirmative step of deregulation would thus more likely be perceived as a governmental statement that the deregulated conduct is harmless. Because that is one likely effect of such an action, it ought to require less evidence to justify the continuation of regulation than it takes to justify the initiation of regulation against the previously unregulated. Or, to put it another way, the burden of proof ought to be on those who would have society engage in a potentially symbolic deregulation in a way that it is on those who would have society initiate a potentially symbolic regulation.

In the case of material that is both legally obscene and sexually violent, deregulation would send out the message that such material, admittedly a very thin slice of the sexually violent images at large in the world, is in fact harmless. Since the evidence inclines quite strongly in the exact opposite direction, it would be a mistake for government to send out such a message. As a result, the continuation of regulation for material that is legally obscene and sexually violent has its effect not primarily on the regulated material, but upon the way people will perceive the much larger world of properly constitutionally protected images in which sexual violence or degradation of women is glorified. When we see law as symbol rather than exclusively as controller, we can understand why, on the existing state of the evidence, affirmative deregulation of sexually violent legally obscene material would take us away from rather than towards a world in which *coercive* sexuality in all of its forms is universally condemned. ▣

[1] *Attorney General's Commission on Pornography: Final Report* 326 (1986) (hereinafter cited as *Report*).

[2] I say "unfortunately" because the word "pornography" has simultaneously taken on such a pejorative meaning in ordinary language that it has lost virtually all of its descriptive content. *Report*, at 228-229. Even if one limits the word to material that "is predominantly sexually explicit and intended primarily for the purpose of sexual arousal," without any condemnation attached, the word is still too broad, including within one term strikingly different material in terms of the tragically lost distinction between sex and sexual violence. Much of the work of the Commission, and reaction to that work, can be seen as an attempt to force a subdivision of the world of the sexually explicit into an environment that uses words that conflate these important divisions.

[3] *Report*, at 228-29.

[4] The standard references include I.J. Good, *A Causal Calculus I-II*, 11 British Journal for the Philosophy of Science 305 (1961); 12 British Journal for the Philosophy of Science 43 (1962); H. Reichenbach, The Direction of Time (1956); P. Suppes, A Probabilistic Theory of Causality (1970). For contemporary discussion of the issues surrounding probabilistic causation, *see, e.g.*, Blalock, *Multiple Causation, Indirect Measurement and Generalizability in the Social Sciences*, 68 Synthese 13 (1986); Eels, *Probabilistic Causal Interaction*, 53 Philosophy of Science 52 (1986); Humphreys, *Causation in the Social Sciences: An Overview*, 68 Synthese 1 (1986); Papineau, *Causal Assymetry*, 36 British Journal for the Philosophy of Science 273 (1985); Papineau, *Probabilities and Causes*, 82 Journal of Philosophy 57 (1985); Salmon, *Probabilistic Causality*, 31 Pacific Philosophical Quarterly 50 (1980).

[5] H.L.A. Hart & T. Honoré, Causation and the Law (2d ed. 1985).

[6] Calabresi, *Concerning Cause and the Law of Torts*, 43 U. Chi. L. Rev. 69, 106 (1975) (cause is the word used in law "to identify those pressure points that are most amenable to the social goals we wish to accomplish").

[7] And, of course, the context of even assertion has evidentiary consequences. It ought to take better evidence for a person to assert something publicly rather than privately, and it ought to take better evidence for government or *The New York Times* or Dan Rather to assert something than for a person or entity with less influence to assert it.

[8] 376 U.S. 254 (1964).

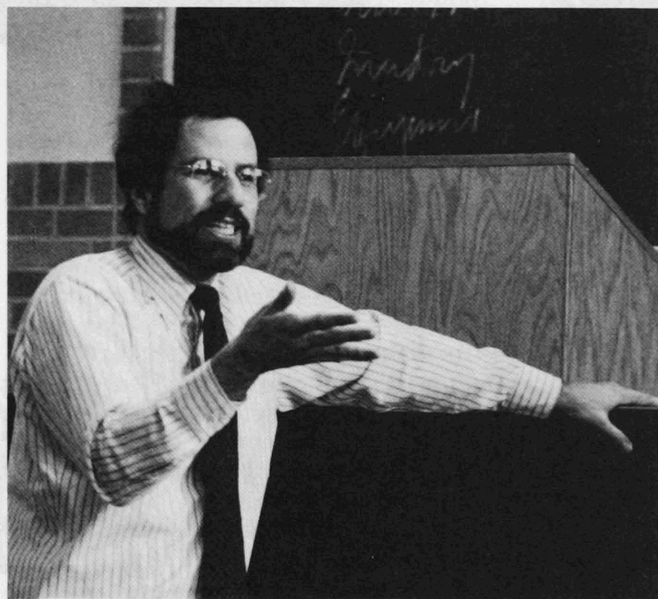
[9] *E.g.*, Donnerstein, *Aggressive Erotica and Violence Against Women*, 39 Journal of Personality and Social Psychology 269 (1980).

[10] *E.g.*, Malamuth, *Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli*, 10 Archives of Sexual Behavior 33 (1981).

[11] It is uncontroversial that a common theme in sexually violent material, whether legally obscene or not, is the woman who is raped or otherwise coerced into sex, and who then expresses great enjoyment and begs for more.

[12] Note, for example, Reitman v. Mulkey, 387 U.S. 369 (1967), in which the Supreme Court, for "state action" purposes, relied on the way in which specific permission to discriminate would be perceived as encouragement to discriminate.

[13] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Roth v. United States, 354 U.S. 476 (1957).



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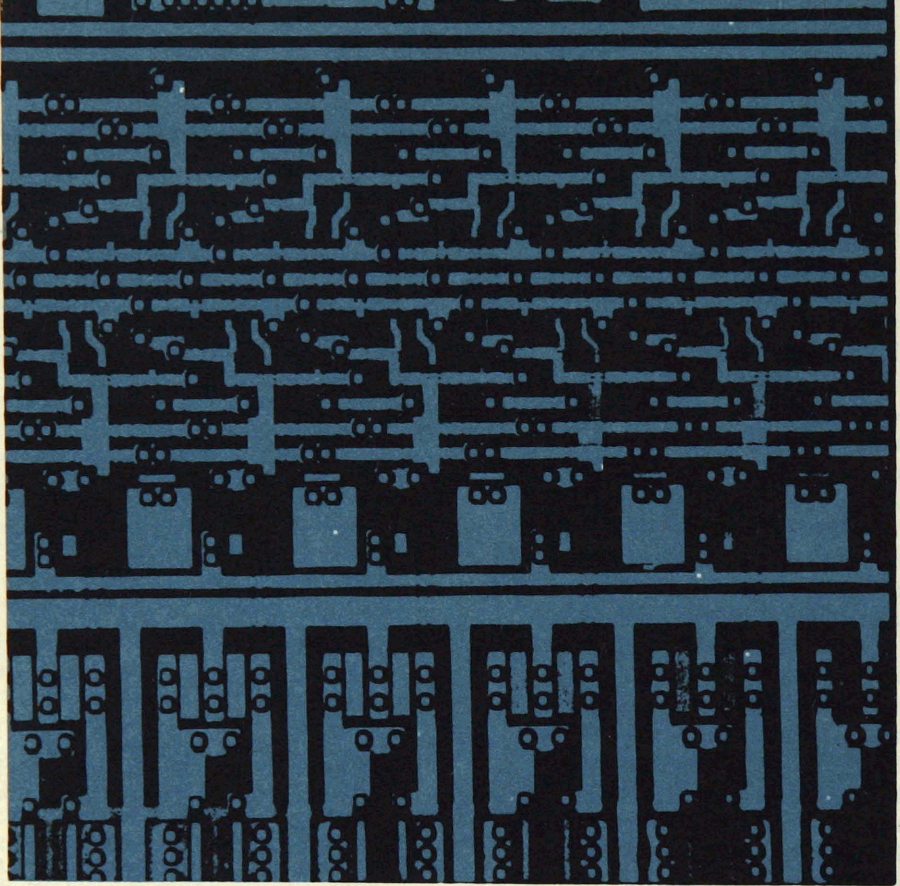

Rule without Eyes or Voice

by Joseph Vining

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The Mute Result of Description

How would we go about doing legal analysis if Supreme Court opinions came to resemble the opinions issued by a bureaucratic organization such as the Interstate Commerce Commission? To answer this question we must ask what lawyers think they are doing when they construct an authoritative statement of law. That is a question of methodology — what the method of legal analysis can be said to be — and to understand it fully we must look at the connections and distinctions between lawyers and the practitioners of other disciplines.

Legal analysts, by and large, no longer think they are engaged in a scientific enterprise in the tradition of the mathematical and physical sciences. This was once the dominant professed conception, and we still live in its shadow. The central building in the monumental law complex at The University of Michigan, begun in the 1920s, is named the Legal Research Building. The central building at Harvard Law School is Langdell Hall, named for the late nineteenth-century Dean whose legacy to American legal education was the proposition that the utterances of judges were raw data from which law might be objectively induced as laws of science might be induced from the data presented by nature. Lawyers are still taught from descendants of the casebooks introduced by those who propagated the scientific metaphor. The American Law Institute, established to carry out the scientific enterprise by restating the law in a formulaic way, with its condensed black-letter taking the place of the pregnant equations of physics, still functions.

And yet it is all only a shadow. None but the benighted believes in the method. To take one small example, an assertion that this one formulation is the "majority" rule followed by more than 50 percent of state or federal courts, but that other is the "minority" rule, does not move a modern student to say the "majority rule" is the law. In fact, from its very beginning the method was pretense. The casebooks and treatises emphasized the opinions of some judges and not others; they reflected the law of chosen jurisdictions, notably Massachusetts, New York, and England. Was one to treat as equivalent an opinion of Holmes in Massachusetts and an opinion of what's-his-name in Wyoming? Of course not. Some judges spoke truer doctrine than others, a New York opinion on a commercial matter had more weight than one from Maine. The opinions themselves were presented in heavily edited form. A person seeking to state the law did not in fact go about finding it empirically.

Claims about the method of social science, however, are still very much with us. It was an early and enthusiastic vision of a science of society that first influenced legal thinking; and legal thinking, like the ocean, retains the heat of an idea longer than the atmosphere around it. In contrast to the nineteenth-century view of the divination of law as a science, social science turns from what lawyers and judges say and therefore from analysis of doctrine, and looks instead to what judges and other officials do, to behavior

and patterns of behavior, with discovery of correlations leading to assertions of causality. Partly as a result of the scientific ethos generally, partly as a result of the realist movement in law particularly and the recognition of what is called administrative law

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(emanating from official agencies in addition to courts and legislatures), lawyers today all act as naturalists or positivists from time to time, and with some conviction.

A strain of this can be found in the old common law. Students are told at the very beginning of traditional legal training that in analyzing a case a distinction should be drawn between what the judge says and what the judge does. What he says can be put aside if it is not necessary to what he does. It is then idle talk, speculation. There are, as might be expected, enormous difficulties in establishing criteria for determining necessity and even what exactly it is that the judge does. There is also a core of psychological truth in treating as more seriously reflective of actual belief the making of decisions that have perceptible consequences. But I shall not go further into this aspect of

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common-law analysis. I want only to note it, to recall how familiar the distinction is toward which such analysis tries to point, and upon which the standard method of social science is built. It is the distinction between speaking and acting.

The distinction as we know it in ordinary life is most vividly perceived in the difference between a friend and an enemy. With friends we pay attention to what they say as well as what they do. The phrase that so often comes to mind of the agonized parent, and that is sometimes said out loud to everyone's embarrassment, "This hurts me more than it hurts you," is not always a lie. With enemies, on the other hand, we look *only* to what they do, and treat what they say as something that they are *doing*. We assume that their language is strategic, not authentic, their words counters in a game like a boxer's banter in the ring, and that the only pressure within them toward truthfulness is their fear of getting caught and losing the credibility that makes possible successful distortion and omission.

Disentangled from the experience of everyday life and raised to the level of theory or method, the distinction is that between nature and man, that between the outside and the inside, and, to a large degree, that between what is objective and what is not.

Teachers, scholars, and practitioners of law often consider themselves social scientists when they do not take at face value what a judge says and instead ask what is really going on. But an interest in the actual and the real, in what is really going on, does not make one necessarily a scientist. When in search of law one asks, "What does this speaker really mean?" one has not crossed the line between man and nature. When one speaks in causal terms and asks "What caused this speaker to say what he said?" one has crossed that line. And for the lawyer it is a most dangerous line to cross. Once over it, we know, the lawyer is in danger of being picked up and swept bumpety-bump over the horizon and into a breakfast theory of justice — the theory of the 1930s that what a judge does is determined by what breakfast he eats in the morning. When at the end of one's search for law one finds oneself deposited in a small white room staring at a fried egg, one has the choice of giving up the enterprise, for one really has nothing useful or interesting to say and no one to say it to; or one can come out of the room and creep back to one's fellows.

One might think, however, that one could go outside and cross the line without exposing oneself to the risk of that lonely little room, if one confined oneself to description. Although description is the first step in scientific analysis, it does not necessarily involve the pursuit of causes that carry us away. One can say to a friend, "Look at what you are doing to yourself," without going on and saying, "You are doing this *because* of this and that and the other;" one can say, "Let me describe this painting or this piece of music to you," without undertaking to explain it away.

But when we describe we make implicit causal statements, at least in the sense that we describe something rather than everything: we draw a line around that which we focus our attention upon. A painting has a frame around it. A piece of music has a beginning and an end in time. Within the thing we are describing and have drawn a line around, there is a hanging together of parts and pieces because they are connected in some

fashion. They are organized into the entity to which we point. They have been given structure. In any good description one can see the parts *pushing* this way and that and resulting in a perceivable form, rather as one can see the parts of a skyscraper pushing this way and that to produce the skyscraper and continuously *cause* it to be a skyscraper and a thing that can be described.

In the course of legal analysis we certainly do describe. Careful, exhaustive description is part of legal method. Just think how rich a cultural, social, historical, and economic context lawyers build up around a case if they are trying to draw law from it in a way that will excite the professional admiration of their colleagues. Felix Frankfurter's early course in administrative law, which was called Public Utilities, was nicknamed the Case-of-the-Month Club. American law students are amazed at how much time a contracts professor can spend on *Hadley v. Baxendale*, an English decision of 1854. The working over of cases in questions from the bench, the memoranda of clerks to their judges, and the arguments in good briefs may be more in the way of sketches of such full analysis, owing to limits of space and time, but their object is the same. Good lawyers today are all practitioners of sociological jurisprudence. Exhaustive investigation and description, as the product of an urge, indeed a necessity to know what is really going on if we are to engage in legal analysis, does give the study of law a kinship with science.

So, if we want to know what the law of probation is in an American jurisdiction, we go beyond conclusory judicial statements about public safety and dangerousness, and examine what factors are being taken into account in decisions to grant probation or to institutionalize juveniles or convicts. If we want to know

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what the law is in a field regulated by an administrative agency, we are instructed by the Administrative Procedure Act not to limit ourselves to the rules the agency has designated as the law, but to examine also the internal policies and guidelines that organize the agency and govern the decisions of agency officials. Those, too, are defined as agency rules. In short, we see sources of law as systems. As we explore, investigate, probe, collect, categorize, and arrange the data, we more and more have before us a process, a set of moving relationships that form a pattern; and with the process brought out and set down on paper, the legal products — the texts and statements to which our attention is initially directed — become parts of the process, outcomes of the process. The decisions and the statements of rules become, in a way, transparent, as a living cell becomes transparent upon investigation, and what we see instead is a system, a structure — as if we were scientists of a descriptive bent.

But here again we are in terrible difficulty, not quite so severe or quite so obvious as if we were to be presented with a fried egg whenever we asked for law, but severe enough. The difficulty in saying that description and perception of process is all, or even the major part, of legal analysis is that when we are done we have nothing that need be obeyed, nothing that we need respect. What we have discovered to be really going on has no authority over us, and for the same reason that nature has no authority over us. Since we have from the first been searching for what is authoritative and to be obeyed, we cannot say that we have found the law at all.

The Authority of Nature

It may not be self-evident that nature has no authority over us. *Of course* nature has authority over us, you may say. It has the most powerful authority of all. We are physically limited, mentally structured. Our passions rise in us despite ourselves. The art of happiness consists in the acceptance of these limitations and these drives, our sexual nature and our social nature particularly. How can it be said that nature has no authority over us? Why, nature has the *only* authority over us that we must accept.

In truth, however, when we accept, let us say, the sexual part of ourselves, and feel we ourselves are at the center of it rather than it outside us and we the victims or playthings of it, then we have to that extent transcended nature. You cannot be the slave of *your* passions, for if you felt that, they would not be *your* passions. We need not accept the sexual urge, and insofar as men and women do not accept it and fight and struggle against it, it is something apart from them, over and against them, a cause they can resist, manipulate, and trick, with cold baths and repression. We never accept the limitations of time and space. We have no wings, but we want to fly. We steady the body against old age. We seek to escape in art the rush of time. The nature we think of as good and an extension of ourselves is just that, an extension of ourselves. The authority of beauty is the authority of our own perceptions. We could *say* that a row of hills is not beautiful when in fact we felt it was, but we would not be disobeying any command or even disassociating ourselves from the object that had enthralled us.

Nature is sometimes said to be that which we actually do. But what we actually do is not what we must

do: our entire effort over centuries may be directed against what we actually do. What we must do is not what we ought to do or want to do. Again, our entire effort may be directed against what, *for the time being,* we must do. For, really, we do not know our limits. Nature, real nature, about which we have no say, does not, in itself, have legitimacy or justify what we do or fail to do. Nature, that which is, just goes on.

I have called the difference between nature and man the difference between an enemy and a friend, and this though I myself love nature in one sense, love its colors, its warmth, its music and its light. But I believe, when I say I love nature, that I personify and create. When it is sunny and we are happy we feel at one with

Nature will go on its own way regardless of our cry, unless, of course, we force it to do otherwise.

nature and embrace it. But when it is gray we may resist it, and often do. I would not put myself in the hands of nature, and neither would you. Nature will go on its own way regardless of our cry, unless, of course, we force it to do otherwise.

Natural *laws* are nothing to be obeyed or respected. Quite the reverse. In natural science results are not right or wrong. They are just results. What is observed, what is done, behavior — here I do not say "what is chosen," "decided," or "said," for such anthropomorphic terms cannot be used in natural science except in a fanciful way — is never unlawful or against scientific law. Results are the sovereign. If they are inconsistent with scientific law, the law is changed to eliminate the inconsistency, or elaborated to explain the inconsistency (and thus make it no inconsistency at all) by adding additional variables that had not been thought of before or included in the rule. If the very perception of a result is tied to a concept that has no existing place in scientific thought, the result may be put aside and ignored, or not perceived; but it may precipitate a change that is not in form an elaboration, rather a move toward apparent simplicity. The newly stated rule or the more elaborate rule (or collection of proliferated subrules) then becomes the scientific law, which remains until new results come in which falsify the statement. Natural laws are not even addressed to that which they are said — again fancifully — to govern, and the joy of the practicing scientist is pitting himself against them.

Consider again the search for law through description, as that technique is practiced upon nature.

In examining how the American criminal justice system really works, the student today looks at that vast bulk of its workings which take place before and after the criminal trial. Indeed, when one views the criminal justice system as a system, a trial and conviction of substantive crime is largely a jurisdictional event: it does not determine what actually happens to anyone. If there is a trial, what the trial is about — what facts and substantive law are involved in it — is determined by an administrative process through which some particular criminal charge is chosen. Whether there is a trial at all — that is, whether the mode by which jurisdiction over a defendant's life is obtained is trial rather than conviction by guilty plea — is determined by an administrative process in which prosecutor and defense attorney participate and a large number of factors, including the cost and time of a trial, are taken into account. After conviction, sentencing is entirely administrative, with prosecutors, probation officers, and judges acting as administrative officials. If sentence is not suspended, further decisions are made administratively by probation officers, prison officials, and parole boards, with judges engaged in some judicial review of all these various decisions and, if necessary, in their ultimate enforcement. Where is the *law* in all this? How does one go about finding it and stating it? By what technique, what methods?

Suppose you examine the records carefully, putting one sentencing case with another, and discover that in a particular district all judges take into account whether a young girl smokes cigarettes in deciding whether to grant or revoke probation. You might induce a rule that young girls on probation may not smoke. This rule can be restated as a practical rule that at least some young girls who smoke may or will be jailed for smoking. Is this the law?

Natural laws are not even addressed to that which they are said — again fancifully — to govern, and the joy of the practicing scientist is pitting himself against them.

The same problem arises in the perennial attempt to define what administrative law is. The question with which scholars and compilers of casebooks constantly wrestle is how far administrative law is to be treated as a study of doctrine, and how far it is to be treated as a study of the way administrative agencies go about making policy and decisions. As the description of an administrative system increases in detail and sophistication, more and more prominence is given to the daily interaction between the agency and organized parts of its regulatory field — consumer groups, industry, professional societies, and the like — and to

the frequent bargaining with congressional oversight committees, figures in Congress who influence agency budgets, higher officials within government departments who set priorities, the Office of Management and Budget, and special task forces on the president's staff. A practitioner seeking to guide a client and predict how an agency will behave will want to know these things. The legal scholar seeking to know what is really going on must likewise have a good sense of these things. But suppose it is discovered that the Environmental Protection Agency issues a rule taking into account the larger budgetary hopes of the agency after discussions with White House staff and members of Congress in which industry and other group representatives have been deeply involved. Can we say it is the law that, pursuant to the governing environmental statute, there is to be lower air quality if the next budget of the Environmental Protection Agency would be improved thereby? Do we not lose anything that we can identify as law or teach as law as we penetrate deeper and deeper into system and process? The line between law and policy fades, and then the line between policy and politics fades too.

Laughter, Seriousness, and Authority

We search for law, for the legitimate. The legitimate is authoritative. It can order us, order our minds and our actions. This word "order" has at least two connotations which, in our inherited language, are joined together for a very good reason. What cannot speak to us cannot order us. If it does not order us we will not obey. It is not that we will disobey. It is just that obedience and disobedience do not enter into the situation at all. We may adapt, go along just so long as we have to, in the same way that a walker coming to a river is led by the river along its winding bank, the way the river is going and not the way the walker wants to go. The river gives no order to the walker to change his course, and the walker does not think the river has any authority over him. The river just is, at least for the time being, until a ford is reached. The difference can perhaps be brought home to lawyers by recalling the first of the choices they face, which is met with every day in the practice of law.

There are two attitudes toward a command, and the choice between them is always open to lawyers and their clients. One possibility is to take the command into account in good faith when making decisions. The other is not to take the command into account except insofar as we are forced to or it is convenient and good strategy to do so. The one partakes of faith. The other is to pursue our various ends to gain whatever advantage we can until a superior force comes after us and makes us stop. The one is active, the other passive: we can take the initiative with respect to the purpose and sense of the command, or we can shift the burden of initiative to those seeking to affect our behavior, and use the advantages of delay and congestion that two of the givens of existence, namely, the passage of time and the limits of space, always hold out to us. We externalize the command, or we can internalize it, with large practical consequences for the everyday conduct of affairs, as everybody well knows. An organization which is alive and whose members are full of morale is infused with the one attitude and goes forward rapidly toward its goals. An organization that is dead or dying and whose members are disengaged and estranged is marked by the other attitude. I suggest that when we search for the law, what we find is the law — or it is not — depending upon which attitude it evokes in us: faith, activity, and life — or their fearful opposites.

Consider our reactions to computers and other complex machines that enter our lives. The touch-tone dialing system uses music (or at least tones in sequence) to convey information to its vast and complex control center. We are often presented such a place in television advertisements. It is a room filled with whirring wheels and blinking lights, and we are shown, as a painting by Magritte, the backs of the heads of human beings who face, as we do, the banks of machinery. At a telephone in a dimly lit college dormitory a student with a panpipe plays a little tune which gains him entry to the system and a free call to a friend three

What is the common attitude toward a fulminating computer creditor? What is yours? Do you pay attention as you would to the pleas or commands of a person?

thousand miles away. The student has the key to the system. He knows its secret. What is the common attitude toward the student and what he has managed to do? What is your attitude, really? Is there not an element of delight in it, just a *little* desire to applaud? Does it immediately seem to you that he is a thief?

When we do not pay our credit card bills exactly on time, a computer begins to speak to us. Messages are printed out on subsequent bills, beginning with gentle reminders and then becoming more ominous as time goes on, with words like "please," "appreciate," and "thank you" progressively deleted, until finally sharp threats are made in a personal letter addressed to us in a separate envelope — just before we send our check. What is the common attitude toward a fulminating computer creditor? What is yours? Do you pay attention as you would to the pleas or commands of a person? Do you warm to the politeness and concern expressed in the early messages, quiver at the sternness

and threats programmed into the last? Do you feel badly that the computer had to print out a special personal letter to you? Are you moved, or do you look to your convenience, affected only by the thought that at some point the computer may put a black mark on your credit rating for tardy payment?

Or consider the phenomenon of cheating on computer administered examinations. A large part of a recent graduating class at a prominent graduate professional school took advantage of a defect in the programming of a nutrition test. For each student, the computer was to select 40 out of 350 questions, flashing them on the screen one by one, and the student was to respond by punching in the answer. At the end of the test the computer flashed the student's grade and then stored the grade in its memory. The system had a feature that allowed the student to skip a question, as he might on a written test, and come back to it later. The computer was to flash the question again at a later time. Unfortunately the computer was programmed to forget the questions skipped and postponed by the student, and, moreover, not to count them in tallying the percentage answered correctly. Any clever student, who could draw the proper inferences from reports of the computer's behavior casually dropped by students who had taken the test, was in a position to go in, start skipping questions until he came to one he knew he could answer, answer that, skip all the rest, and then ask for his grade, which would be a perfect score.

Are you moved, or do you look to your convenience, affected only by the thought that at some point the computer may put a black mark on your credit rating for tardy payment?

When the error was discovered — there had been an astonishingly large number of high grades — the school administration did not simply reprogram the computer and give the test again. It invoked the honor code and accused the students of doing something wrong, of cheating. Many students responded that there was nothing wrong with using ingenuity to beat a computer. The school, they said, was simply punishing them for its own sloppy computer programming. And to the administrator's horror, some parents called up to defend their children, saying they had all had a good laugh about it.

Laughter. What was done was considered to be no more than beating a machine, the dean lamented. None of this is really hard to understand. You need only ask whether your own sense of honesty, when you encounter mistakes or inconsistencies in pricing, feels a bit more unmoored in a large supermarket than in a small corner store. In all these instances, there is a loss of the sense of obligation. In all of them, individuals are dealing, or sense they are dealing, with a mindless system.

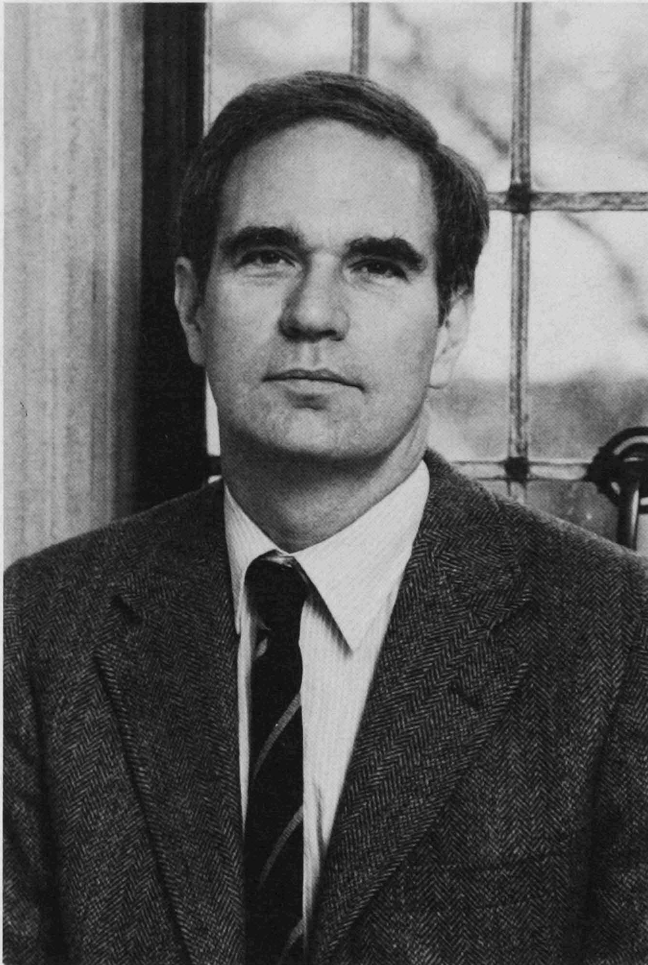
In some cases the designer of the system can be conceived as standing behind it. But it is a striking feature of machines in the modern world — particulary those to which intelligence is attributed — that they stand independent of their creators. From the time of Mary Shelley and Frankenstein the very attribution of intelligence to machines, whether or not it is correct, has resulted in this independence. Moreover, when the system is not given the attributes of intelligence and a designer can be conceived standing behind it, the designer is often not a person who cares about those the system is affecting. There is an observable difference in the attitude even of the young toward a system of training, obstacles, and tests set up for them by a coach, and their attitude toward the other systems and processes in which they are enmeshed. In the case of the long-distance telephone, the telephone company behind the system is profit-maximizing, or is thought to be. In the case of the school that creates a testing machine there is some ambiguity, and this, I should suppose, is what produces the difficulty in deciding whether beating that system is wrong. But what we truly see as a system, whose existence can be set out for us exhaustively through the technique of description alone, can make no claim at all upon our behavior.

But what we truly see as a system, whose existence can be set out for us exhaustively through the technique of description alone, can make no claim at all upon our behavior.

A system can demand no trust from you. You cannot trust a system. A system will not look out for you or be concerned about the consequences of its operations for you. So long as it is just a system, it cannot. Outcomes, results, effects, for a system, just are. You cannot let down your defenses, put yourself into its hands, go along with it, any more than you can let down your defenses and go along with a chemical reaction or invite an unknown gas to join you behind your scuba diving mask. It will come in if you let it and do what it must do, and it may possibly not come in if you do not let it. A system does not pity you, and you do not pity a system. You observe it, and wait. A system will not respond if you cry out to it. It cannot hear you. Nor can it cry out to you. It cannot speak. You do not seek to persuade a system to do anything: you punch it, punch into it, put something into it. Obeying would be as foolish as the opposite, getting angry and

kicking the machine. No feeling is in place when facing a system, a process, a machine, save the one feeling of coolness — which is absence of warmth, of life, of being inside. No emotion is appropriate in your relation with it — nothing of that from which man's motion comes.

And if a system consists of words — instead of musical tones, wires, prices, or radar signals — the situation is not different. Words themselves cannot speak. ⊠



Joseph Vining began his academic career at Michigan in 1969. He holds degrees from Yale, Cambridge, and Harvard Law School.

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