Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 32, NUMBER 1, FALL, 1987

Excerpt from *Heracles' Bow*
by James Boyd White

Articles by Regan, Kronman, Kamisar

Law School pays tribute to the late Wade H. McCree, Jr.

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Entering a new era

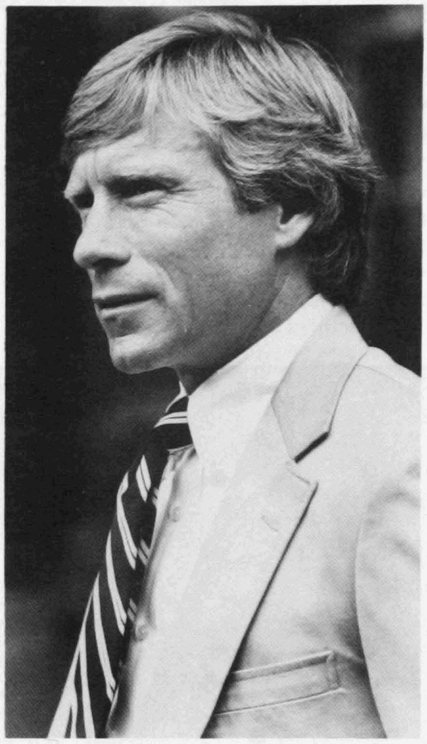
Lee C. Bollinger assumes Law School deanship

Lee C. Bollinger, a member of the Michigan Law School faculty since 1973 and well-known First Amendment scholar, began a five-year term as the school's thirteenth dean on August 1. At 41, Bollinger is the youngest person to hold that post in this century.

Bollinger succeeds Terrance Sandalow, who stepped down to return to teaching and research after nine years as dean. Commenting on the appointment, Sandalow said, "The selection of Lee Bollinger as dean symbolizes the Law School's commitment to intellectual excellence. Lee brings to the deanship a profound understanding of the intellectual life and a deep commitment to it. He also brings qualities of mind and character that are not often found in one person. Lee is that rare individual who combines a genuinely creative mind and unusually sound judgment."

A 1968 graduate of the University of Oregon, Bollinger received his law degree from Columbia University Law School in 1971. After earning a J.D. he served as a law clerk to Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit and to Chief Justice Warren Burger of the U.S. Supreme Court. He began his academic career as an assistant professor of law at the U-M in 1973 and was promoted to associate professor in 1976 and to professor in 1979. He received a Rockefeller Foundation Fellowship in the Humanities in 1980.

At Michigan, Bollinger has taught courses in contracts, constitutional law, mass media, and corporations, as well as seminars on freedom of the press.



Lee C. Bollinger

Among other professional activities, Bollinger served as an associate at Clare Hall, Cambridge University, and has lectured around the world on issues relating to regulation of the media.

Benno Schmidt, president of Yale University and one of Bollinger's professors at Columbia, remembers Bollinger as one of his "favorite students [who] has become a favorite teacher with his brilliant and original writing about First Amendment theory." Schmidt continues, "Of course, as his teacher, I take full credit for his intellectual development. But when I measure Lee's writings against my teaching I can't help recalling what Justice Holmes said to his diminutive colleague William R. Day (the 'good Day' Holmes used to call him) when Day's bulky son was admitted to the bar before the Court: 'A block off the old chip.' Bravo to Michigan for a superb choice. Dean Bollinger will enhance a great school and a great line of deans."

Bollinger is the author of *The Tolerant Society: Freedom of Speech and Extremist Speech in America*, (Oxford University Press, 1987). Vincent Blasi, professor of law at Columbia University who recently reviewed the book for the *Columbia Law Review*, observed, "Lee Bollinger is one of the foremost First Amendment scholars working today. *The Tolerant Society* is surely one of the three most important books written during the last 25 years on the subject of freedom of speech. The qualities he displays in his written work — thoughtfulness, boldness, attention to detail, a genuine desire to understand opposing viewpoints — will serve him well in his venture as dean."

Bollinger traces the inception of his interest in the First Amendment to growing up in a household in which his father was the publisher of a small town daily newspaper. "I've long been fascinated by the personality traits of the average American journalist," he said, "— the great desire to be independent, to be totally

unregulated, the desire to serve the public interest rather than the market interest." Bollinger sees a close parallel between the ethic of the journalist and that of the legal profession. "It may be that I found law intellectually comfortable precisely because of that parallel," he said.

Expressing his deep and long-abiding commitment to the Law School, Bollinger speaks of the school as a "very special institution." He said, "It is unique in this country. Deeply committed to serious intellectual work, both in the classroom and in writing, enjoying each others' company academically and socially, the faculty as a group is unmatched. The traditions of the school and university, and the magic of Ann Arbor as a community, all contribute to making this special life possible."

Looking ahead to his term as dean, Bollinger describes an ambitious agenda: "maintaining the intellectual momentum of the last several years, improving the interest for students of our educational program — especially in the third year, and making it possible for everyone within the institution to perform at their best."

Bollinger, a dedicated runner of well over a decade, may be the fastest dean in the country. He has competed at distances ranging from the quarter mile to the marathon. He and his wife, Jean Magnano Bollinger, an artist, have two children, Lee, 15, and Carey, 11. ◘

"Finding" a new dean

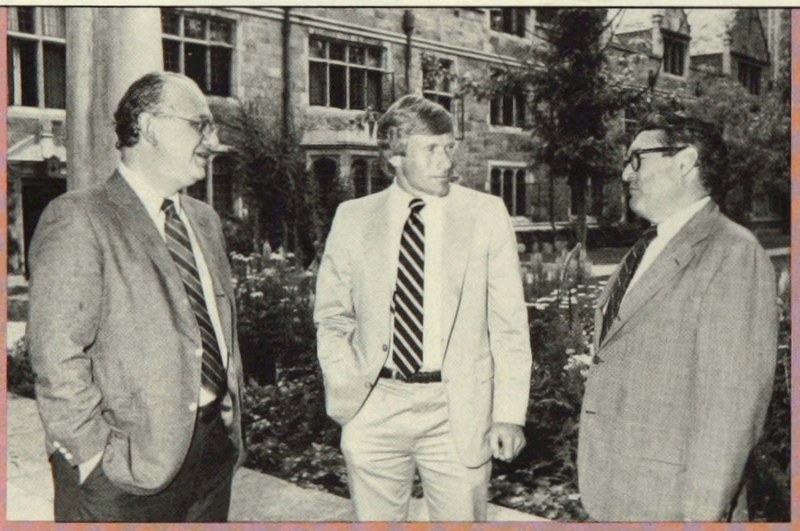
How the search committee did its job

U-M provost James J. Duderstadt appointed a dean search committee in late October, 1986. The committee consisted of six law faculty members, Jerold Israel, John Reed, Donald Regan, Joseph Weiler, Christina Whitman, with Theodore J. St. Antoine as chair, and one student, Reginald Turner, president of the Law School Student Senate.

The tradition at the Michigan Law School is that a dean search committee does not operate independently, but serves mainly to ascertain the collective will of the faculty and to communicate to the central administration. The committee began by soliciting the views of faculty, students, alumni, and administrative staff concerning the qualities needed in a new dean. (As it turned out, the characteristic most frequently mentioned as essential in a dean was "respect for diversity"; it was listed by 75 percent of the faculty.)

The search committee also requested nominations of particular individuals, and announcements of the dean search appeared in a half dozen national professional journals.

In response to these efforts, the names of 80 persons were submitted to the whole faculty for its comments. After a series of votes, the final faculty preference poll was narrowed to five candidates. These finalists were then interviewed by executive officers and regents. On May 21 Provost Duderstadt announced that he would recommend the appointment of Lee Bollinger to the regents at their June meeting.



New Law School Dean Lee C. Bollinger is flanked by previous Dean Terrance Sandalow (left) and Search Committee Chairman Theodore J. St. Antoine, who served as dean from 1971 to 1978.

In memoriam: Wade H. McCree, Jr.

Law School honors esteemed judge, mentor, friend

Professor Wade H. McCree, Jr., the Lewis M. Simes Professor of Law, former solicitor general of the United States, and distinguished federal judge, died on August 30 after a brief illness. A graduate of Fisk University and Harvard Law School, Professor McCree began his judicial career in 1954 when he was appointed to the Wayne County, Michigan, Circuit Court. The first Black judge to be appointed in the state of Michigan, he won re-election to the court and, in 1961, was appointed by President John F. Kennedy to the U.S. District Court for the Eastern District of Michigan. In 1966 President Lyndon B. Johnson appointed him to the U.S. Court of Appeals for the Sixth Circuit, where he served until 1977, when he resigned to accept appointment as solicitor general. During his lifetime Professor McCree was awarded honorary degrees from more than 30 colleges and universities.

The Law School held a memorial service in the Reading Room of the Law Library on September 4, at which several of Professor McCree's colleagues, former law clerks, and friends spoke. Excerpts from their tributes follow, in order of presentation.

Dean Lee C. Bollinger:

Wade Hampton McCree, the Lewis M. Simes Professor of Law, was our esteemed colleague and treasured teacher. For six years he graced this institution with his vast knowledge and intelligence and also with his wit, his charm, and his extraordinary kindness. He joined us toward the end of his career, after serving with high distinction in several professional roles. In countless ways, we were the beneficiaries of this remarkable life experience, which cannot begin to be captured by mere recitation of the positions he held. And for those benefits we are deeply grateful.

Wade McCree was a natural teacher. I have heard students from his classes say they had never encountered a teacher who so wanted to teach, so wanted them to learn. His door was always open, students say, which I now understand as a metaphor.

What shines most through Wade's life, what seems most worth understanding, is not to be found so much in the cases argued and won, but in the character he retained throughout his life. His successes and distinguished appointments never seduced him into vanity, and never deterred him from acting on the principles of a true democrat, one who sees the equal worth of all people. And the burdens he carried of living in an imperfect world he was committed to change he never permitted to lead him to an unkindness and, most notably, he never allowed to still his extraordinary sense of humor, which Wade used wonderfully as a way of life and a weapon of change.

Wade McCree was the perfect citizen. Only a few people from any generation are asked to take the lead for achieving fundamental reform as well as to perform public responsibilities. Wade McCree was such a person. And what is so notable about his life is that he performed these responsibilities with such intelligence and wisdom while retaining a character that gave so much greater value to whatever he did.

The late Wade H. McCree, Jr.

Professor of Law Emeritus Allan F. Smith

Former dean of the Law School and interim president of the university:

My friendship with Wade McCree was all too brief. For me, and I suspect for many others, friendship with Wade was an ever-growing experience. Each year, almost each visit with him brought me some new insights as to the depth of his learning and wisdom, the breadth of his understanding of the human condition, the astuteness of his observations on the political and social scene in this country. Yet we learned these things about him, not because he played the pundit or held forth in patriarchal style at the coffee table, but rather because those characteristics were simply a part of the warm human being with whom we have been privileged to associate.

As a colleague on the faculty, Wade was simply superb. We old deans have visions of what we might think of as an ideal faculty. In our vision, of course, every member of the faculty would be a star in his or her own right; scholar, teacher, role model for the students. But every member would also be a person whose influence would radiate from his or her own office and envelope the entire school and its faculty with a cohesive sense of the greatness of the mission of the institution. And in our vision, that reciprocal radiation from 50 offices would produce a brilliant glow at the Law School.

Regrettably, no dean has ever put together an entire faculty of such persons. But Wade was one of those. He carried an aura of greatness and it was pervasive. He came to law teaching late in his distinguished career, but he brought to teaching the same vigor which had propelled him to such success in his varied roles of lawyer, judge, and solicitor general. He brought the freshness of the new professor, but the newness was beautifully tempered by his wide experience. He brought the will to contribute all that he could to the life of the Law School, and the students who came before him.

The Honorable William T. Coleman, Jr.

Washington, D.C., Secretary of Transportation, 1975-77:

When Wade became solicitor general in 1977, he found his road map for the job in the 1890 Committee Report which accompanied the Act which created the office: "We propose to have a man of sufficient learning, ability, and experience that he can be sent...into any court wherever the Government has an interest in litigation, and there present the case of the United States as it should be presented."

History will place Wade with the greats of the solicitor general's office — Archibald Cox, John W. Davis, Robert Jackson, Thurgood Marshall, and Dean Erwin Griswold.

Wade took seriously his duty to see that the government did not press unfairly or wrongly, for he knew the United States wins its point whenever justice reigns in the Court. Or, in the words of the Supreme Court itself, the interest of the national soverign "is not that it shall win a case, but that justice shall be done."

Wade was a private man, a family man. His help to the less fortunate was constant, consistent and always, yet done so quietly. He opened doors and channels for all of us but we never learned it from him.

His mind, retentive, deep, and profound, made him of genius caliber. But mere genius is not enough to be an excellent lawyer, an excellent judge, or even an excellent solicitor general. My groping for that indispensable talent which made him a great public man, is that he had critical intelligence. He thus did for himself in thought, writing, and oral argument what Maxwell Perkins had to do for Thomas Wolfe.

As in *King Lear Act V*, we have come full circle. Wade's circle, like that of Leonardo da Vinci, was steady, required no mechanical help, and was perfect. But unlike Leonardo, he still left so much over for others: his humor, his courage, a wonderful wife and three wonderful children, many superb legal opinions, and a group of young lawyers who as his law clerks or students were touched with his fire.

Ronald M. Gould, J.D. 1973

Seattle, Washington; law clerk to Judge McCree, 1973-74:

To serve as Judge McCree's clerk was a warm and personal experience. But it was more. No one who served in that capacity would trade it for anything.

Judge McCree was a model of the common law appellate judge. He was a principled decision maker who sought to understand the facts determined by the trial court or jury, to apply the law honestly, and to consider whether justice had been done. As a former trial court judge, he was sensitive to the appellate court's proper role in a larger system. He was searching in his inquiries to counsel at argument. He did not gratuitously write philosophies, but he did not hesitate to state broad, even universal, principles of law when necessary to decide

the case. Always he was ready to learn from argument.

There were those who said that Judge McCree never had forgotten anything that he once had learned. He was able to draw upon history, literature, it often seemed the wisdom of the ages, in aid of his analysis. The breadth of his mind and recall was special. Who here truly knew his limits? Words such as "scholar," "jurist," "genius," even "friend," — these cannot wholly capture the man.

One could ask Judge McCree a question about our Constitution, for example, and his response might include comment on such rich and diverse sources as his knowledge of life in the various colonies, European political and constitutional theory of prior centuries, the predecessor views of Greek thinkers in Pericles' Athens, or the beginnings of codified law in the codes of Hammurabi.

Each part of his wisdom was like a precious gem. But he did not hoard wisdom for personal profit. Nor did he use his wisdom for display. Rather, he gave away these gems freely to others who would understand them. And his store of wisdom seemed inexhaustable.

Howard L. Boigon, J.D. 1971

Denver, Colorado; law clerk to Judge McCree, 1971-73:

I never expected to deliver, or even attend, a memorial reflection on Judge McCree. To me, Judge McCree was always larger than life — not quite mortal. I expected him to go on forever.

In courtroom encounters, as in all his personal relationships, he was unfailingly courteous, civil, and dignified. He controlled a courtroom by the force of his logic and personality, not by raising his voice.

He was a wonderful teacher and mentor. He taught me to appreciate the power and beauty of language, the wisdom of brevity, the necessity of precision.

But, he taught us much more than simply how to put words on paper. He taught us about justice and the judicial system. Despite — or perhaps because of — personal indignities that he had experienced, he had a passionate commitment to doing justice, to according each person his just due under the law. While recognizing the imperfections in our system, and working to correct these imperfections, he was committed to making the system work, and he had faith that we could all make it work. He taught us about public service, about our responsibility to give of ourselves to better the human condition. His life was a testament to the value of these precepts.

I have heard him described by others as a lawyer's lawyer. To me, he was that, but he was also a judge's judge, a poet and a scholar, a philosopher and a teacher, a great and good man whose works and spirit will live on in all of us.

Speakers at the memorial service for Professor McCree held at the Law School included his former associates in public service, as well as law clerks, colleagues, and friends. Seated, left to right: William T. Coleman, Jr., Ronald M. Gould, Howard L. Boigon. Standing, left to right: Lee C. Bollinger, Otis M. Smith, David L. Chambers, Allan F. Smith.

Law School Professor David L. Chambers:

Like many others, over the last six years, I too became a student of Wade's.

I went into Wade's office this morning as I had done so many times. Sunshine was warming the chair where he always sat. I saw again the familiar pictures of Wade with Aaron, his grandson, and Wade with President Carter.

Our offices are almost next to each other. "David, do you have just a minute?" he would ask as I

passed his always open door. And I would come in and continue my education. "I've just come back from Virginia," he would say — or "Washington" or "Kalamazoo." "I bring you greetings from your old student so-and-so. I also saw Judge x. He's looking a little tired"— and then I'd hear about the judge and the judge's father and the judge's sister who was also a lawyer and about the judge's notable achievements. For me, the most powerful stories were of Black judges and Black lawyers, many of whom I had heard about for years and nearly all of whom Wade knew well, the revolutionaries who opened opportunities for so many others, opportunities we are beginning to take for granted. I have thought about Wade's stories over the last few days and tried to think of stories that Wade told about himself but in fact very few were about himself. Wade was a modest man about his own achievements.

I learned a great deal from listening to Wade and what I learned were not ideas alone but an attitude and a tone to try to carry through life. He managed to see something praiseworthy in almost everyone he spoke about. He was never sarcastic, never cynical, never bitter, even though he had seen much in life to justify all those reactions. He had dignity without pretension, and wielded authority without arrogance. We who are here — all of us who are lawyers — have much to learn from his example.

In his last year, Wade went through much physical suffering and discomfort that, quite characteristically, he kept to himself. But there were limits to the discomfort he could suffer. One day after he entered the hospital, he had not spoken for at least a day. A nurse came in and needed to move Wade into a position that caused great pain. As she worked, she chatted to him amiably. "Does this hurt, Judge McCree?" she asked rhetorically. Wade slowly opened his eyes and looked at her. "You're damned right it hurts," he said and lapsed back into silence.

Does it hurt to have you gone, Wade? Does it hurt to know you will not come back again?

You're damned right it hurts.

The Honorable Otis M. Smith

Detroit, former justice of the Supreme Court of Michigan and regent of the University of Michigan; general counsel to General Motors Corporation, 1977- 83:

My friendship with Professor McCree goes back more than 30 years and was based upon the sharing of a profession, an undergraduate school, a culture, and a racial identity. For these reasons, and perhaps others, it has been suggested that I might add a degree of relevance to my reflections about Wade McCree by relating them to a subject which is topically sensitive to this campus at this time. The topic is racism.

First, let me try to sketch in Wade's view of the world as I interpreted it. He was born into a strong Afro-American family of which he was justly proud, not just because they were Black but because they were intelligent and strong in an environment that had not always encouraged it.

As the world enfolded to him, the young Wade McCree, who was taught by his parents to have a sense of self-worth, came to find out that the world was one and that it was peopled by a large mass of humanity who had interesting but not decisive differences of race, culture, nationality, religion, class, and so on, and if there were any elite of this world, it was based upon character and intellect and little else.

So I doubt if he ever looked in the mirror and thought he was inferior because his skin was dark, nor did he ever look at a companion whose skin was white and assume that the companion was superior. He learned at an early age that he could compete with anyone, given the opportunity.

Now what about the evidence of racism that cropped up on campus this spring? I know it caused him considerable stress because he said so. But he was never one to climb the soapbox and decry the occurrence. He felt just as deeply about it as anybody who did. It was just not his meter.

As a liberal in the classic sense, he would relentlessly search out the facts and follow them to the conclusion in which they were pointed.

But he would caution against the self-defeating, self-fulfilling rhetoric, that because of the occasional outcropping of ignorance about race that we should take to the platform and to the streets and yell that we have made no progress in our fight against racism. It simply is not true. Progress is always uneven but we are winning the war. This is what I think Professor McCree would say.

More importantly, he would be up and doing. And if you loved and respected him as I expect you did, then be up and doing in the causes he supported and extend his efforts beyond his life. ◘

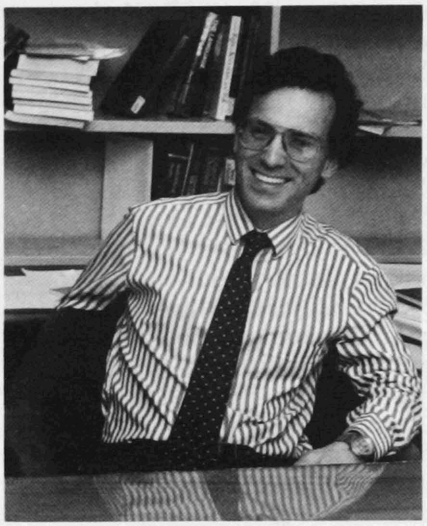
A chair in honor of Professor McCree is being established at the Law School. Memorial contributions earmarked for the chair may be sent to the Law School Fund, Hutchins Hall, Ann Arbor, MI 48109-1215.

Comings and goings

Introducing four of our eight new faculty members

Eight new faculty members are joining the Law School this year. The new group represents a wide range of experience, from three assistant professors who are just embarking on their academic careers, to several associate and full professors who have achieved recognition through their writing and teaching, to an internationally known legal scholar and philosopher.

This summer, *LQN* interviewed the four new faculty who were in Ann Arbor. Their profiles follow. The Winter issue will feature profiles of Pheobe Ellsworth, Samuel Gross, O.W. Brian Simpson, and Richard Pildes.



Leo Katz

Leo Katz

Using the arcane to illuminate the mundane

Leo Katz is beginning his academic career with a substantial list of publications to his credit in areas as seemingly divergent as criminal law and corporate law. "The interest in both may seem odd," he admits, "but in my mind the two fit comfortably together and I frequently draw on ideas from one area in solving problems in another. For example, thinking about the business judgment rule turns out to be illuminating for the doctrine of necessity. Similarly, thinking about criminal complicity suggests insights about certain quirks in the securities laws."

Katz's eclectic interests and his ability to weave together diverse strands of thought into a coherent tapestry of principles are evident in his recently published book, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (University of Chicago Press, 1987). Highlighting his arguments with the decisions of common law judges in colonial and postcolonial Africa, famous cases such as the Nuremberg Trials, and well-known incidents in fiction, Katz uses the arcane to shed new light on the mundane.

Examples: "A [Sudanese] villager kills his neighbor believing her a witch. Has he intentionally killed a human being? What about Bratton, who fires a bullet at a man, misses, and shoots the man's wife instead? And what of Clyde Griffiths, the protagonist of Theodore Dreiser's novel *An American Tragedy*, who takes his lover, Roberta, out on a lake to drown? Somehow, not quite according to plan, the boat capsizes and she does drown. Has he intentionally killed her?"

Through these and other conundrums, which raise problems not only of intention, but also of causation, negligence, necessity, duress, complicity, and attempt, Katz seeks to understand the basic rules and concepts underlying the moral, linguistic, and psychological puzzles that plague the criminal law.

A 1982 graduate of the University of Chicago Law School, Katz explains that he began thinking about the book while clerking for Judge Anthony M. Kennedy of the U.S. Circuit Court of Appeals, Ninth Circuit. He was able to complete a draft of the book by taking a year off to work on it before becoming an associate with the Chicago law firm of Mayer, Brown & Platt.

Katz's other publications concern issues of corporate law, such as insider trading cases, corporate takeovers, and the poison pill. Most of these he coauthored with Leo Herzel, one of the senior partners of Mayer, Brown & Platt. Katz and Herzel are now expanding their ideas into a book. *The Law of the Boardroom*, as it will be called, is intended to serve as an advice book for newly installed corporate directors. "It's meant to convey a sense of the legal environment in which they will be moving and the significant problems they are going to have to think about," explains Katz.

Katz, who was born in Vienna and grew up in Berlin, learned English as a teenager when his family immigrated to the U.S. after his father, a professor of Latin American history joined the University of Chicago faculty. Katz returned to Vienna for his first year of undergraduate studies and then completed both an A.B. and an A.M. in economics at the University of Chicago. As an undergraduate, Katz never expected to enter the field of law. He explained, "People I knew who

studied law in Europe found it exceedingly dreary." During his junior year, however, Katz recalls, he "stumbled into" a course in constitutional history, where he discovered that "all the things I had been looking for in economics were more fortuitously combined in law: the analytical rigor, the literary elegance, and the real world proximity."

Katz, who is looking forward to teaching criminal law this fall and enterprise organization this winter, says, "I loved practice, but I think I'll love this more. Being able to think about interesting problems and knowing that a client cares enough about them to pay you to do so was certainly an exhilirating feeling. On the other hand, I'll now have the thrill of teaching and the freedom to pursue interests even if they don't happen to match a client's immediate needs. And to get to do that at a place like Michigan seems like the kind of offer Don Corleone is famous for making, one that I just couldn't refuse."

Joel Seligman

Securities specialist, SEC enthusiast, valued teacher

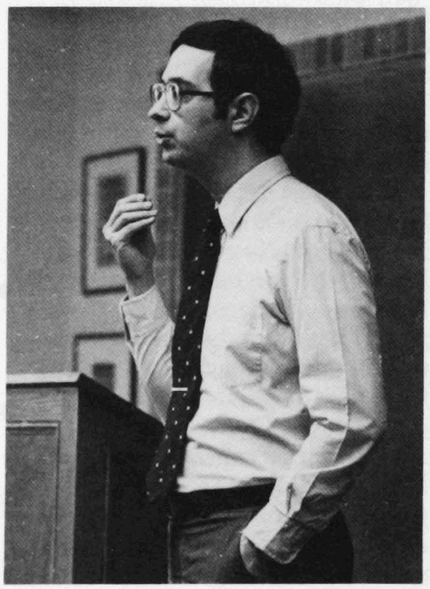
Joel Seligman — whose specialty is corporate and securities law— is the first to admit that he doesn't fit everyone's image of a corporate lawyer.

"The popular impression is of a fairly materialistic, very specialized — and very narrow — practitioner," he says. "And that's very far from my world."

In fact, Seligman joined forces with Ralph Nader upon graduating from Harvard Law School in 1974. His three-year association with the Corporate Accountability Research Group resulted in two books: *Taming the Giant Corporation,* which argued for federal, not state, chartering of large corporations; and *The High Citadel: The Influence of Harvard Law School.* The latter "had the distinction of being the only recent book about Harvard Law School not to be a bestseller," notes Seligman.

Seligman is fascinated by corporate law — a field which he says is often stigmatized as "dry." In the past 15 years, he says, it has enjoyed a kind of renaissance.

Securities regulation is Seligman's specialty, and he is currently working with Louis Loss to revise Loss's classic *Securities Regulation.* The completed work is currently expected to be ten volumes long. Despite the formidable nature of the project, Seligman is buoyed by his extensive knowledge of SEC history (he wrote *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance*) and by his unchecked enthusiasm for the SEC. "You have to appreciate that the SEC was FDR's favorite agency," he says.



Joel Seligman

Early in his career, Seligman co-authored *Taming the Giant Corporation* with Ralph Nader and Mark Green. While the book received considerable attention, Seligman says that "in terms of leading to the adoption of a federal corporate law, it didn't succeed."

In his closeup of Harvard Law School, *The High Citadel,* Seligman says, "I found myself in the odd position of having been hired by Ralph Nader who wanted a critical book, and yet finding the issues of legal education I was studying much more complicated than I thought when I started out." Nader held the view that elite schools like Harvard steered graduates into corporate law careers by the very makeup of their curriculum. Seligman concluded, among other things, that the schools had less influence than the job market.

Seligman taught at Northeastern University Law School and at George Washington University's National Law Center before coming to Michigan as a visiting professor last year. He joins the faculty as a tenured full professor this fall. Of the U-M, Seligman says, "This is not a law school where corporate and securities law has been particularly emphasized. It's a law school which has a rich, humanistic, interdisciplinary tradition, which makes working here particularly stimulating."

Seligman was one of two faculty members (the other was Professor Douglas Kahn) who received the L. Hart Wright Teaching Award voted by the 1987 graduating class for excellence in teaching. "I really can't explain how I teach," he said. "But I've been teaching for ten years and

I feel I have just as much excitement going into a classroom as I did when I began."

He adds, "What's changed is that I've grown from being obsessed with teaching students every last detail about a subject to being much more concerned with the underlying theories of the field."

Seligman and his wife, Frederike Seligman, a Russian literature specialist with a Ph.D. in Slavic Languages and Literatures from the U-M, have two pre-school aged children, Andrea and Peter.

Jeffrey Lehman

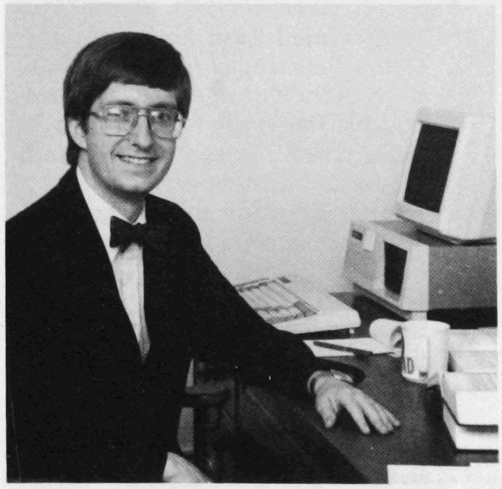
A "Monopoly" whiz who studies wealth redistribution

"I feel that anyone who sees law as an instrument of justice in society should study the American system of redistributing wealth: tax laws and welfare laws," remarks Jeffrey Lehman.

Lehman's interest in matters of wealth and poverty dates back at least to his days as an undergraduate at Cornell University, where he coauthored the book *1000 Ways to Win Monopoly Games,* published by Dell Paperbacks in 1975. "At the beginning of the game, all players have an equal amount of money," Lehman explains. "By the end, luck and skill have combined to make one player rich and the rest poor. Whenever I ended up rich, I was sure it had been mostly skill; when I ended up poor, I blamed the fates. But I was always able to forget about the game pretty quickly. In real life, people's perceptions of the role of luck and merit also seem to depend on how they are faring, but the conflict is much harder to forget about."

Lehman continued his education at Michigan, where he obtained a masters degree from the Institute for Public Policy Studies, together with his J.D., in 1981. Along the way, he served as editor-in-chief of the *Michigan Law Review* and also enjoyed the distinction of appearing in *LQN.* In 1981, he and his wife, Diane, were included in an article about seven married couples in which both members were pursuing law degrees at Michigan (vol. 25, no. 3).

From Ann Arbor, Lehman went on to clerk for Frank M. Coffin, chief judge of the U.S. Court of Appeals for the First Circuit, and for Supreme Court Justice John Paul Stevens. He then went to work at the Washington, D.C., law firm of Caplin & Drysdale, Chartered, noted for its expertise in tax law. He especially enjoyed the negotiating side of tax practice. He explains, "I was impressed by the importance of the human, emotional side of negotiation. Negotiation is a highly stylized ritual. Good lawyer/negotiators are sensitive to the nuances of that ritual and are able to promote their clients' substantive goals without shattering the other parties' expectations that the ultimate agreement will seem fair."



Jeffrey Lehman

During Lehman's four years with the firm, "he was recognized by partners and clients alike as one of the firm's superstars," observes Professor Leon Irish, a former member of Caplin & Drysdale who is also on the Michigan faculty now. Irish recalls once assigning Lehman the job of analyzing the pros and cons of complex estate planning alternatives. Within a short time, Irish notes, "Jeff presented a dazzling computer analysis which projected the after-tax consequences of each of the alternatives over a 20-year time span."

Private practice offered Lehman ample opportunities for pro bono work, an activity he hopes to continue in Ann Arbor. The major portion of his pro bono work involved working with individual poor clients seeking Social Security disability benefits. He also had primary responsibility for preparing an amicus curiae brief to the Supreme Court on behalf of 72 Nobel–Prize–winning scientists in the recent Establishment Clause case involving the teaching of "creation–science" in public schools.

Private practice also proved accommodating to the needs of the Lehman family, which currently includes two children. During their last two years in Washington, Jeff cut back to a part-time schedule with his firm, while Diane began practicing with a smaller firm 20 hours per week. "Despite the fact that we were the first part-time associates at our firms, we were extremely gratified to discover how flexible and supportive both firms were," said Lehman. "And the arrangement left us feeling pretty relaxed and confident about our relation-

ship with our children — enough so that we were able to take on a foster child for six months until she was adopted."

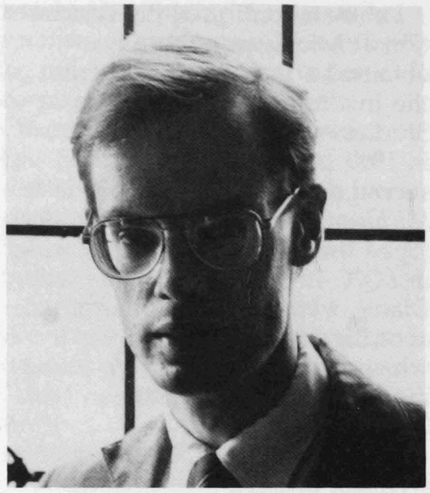
Although Lehman found his work in Washington both "challenging and fun," he always expected to return to academia. "What has always drawn me back," he explains, "is the autonomy professors enjoy to determine which problems they will study." For Lehman those problems include the tax laws and the welfare laws. He is presently teaching a section of the traditional course in basic personal income taxation. This winter he will teach a survey course on welfare law, and a seminar on wealth redistribution. The seminar will explore the philosophical question of whether wealth ought to be redistributed, as well as more concrete questions about how to manage the economic and social side effects of a redistributive program.

Kent Syverud

Finding exciting issues in insurance law

It's not difficult for Kent Syverud to identify the moment he first became interested in teaching law. "It was halfway through my first year property class at Michigan," he says. "I was being grilled on the fine points of constructive eviction, and during a rare pause when I wasn't racing to think ahead to the next question, I was suddenly exhilarated by the thought that I might someday be the one asking questions."

Syverud will be asking the questions this fall in his first-year civil procedure course. Next spring he will teach advanced civil procedure and a seminar on



Kent Syverud

settlement of civil disputes. And a year from now, Syverud will become the first regular faculty member in over a decade to teach a course on insurance.

One of two recent Michigan graduates to join the faculty this year, Syverud graduated near the top of his 1981 class, and served as editor-in-chief of the *Michigan Law Review*. He also pursued graduate studies in the U-M's economics department, earning a masters degree in 1983. Commenting on Syverud's work as a student, Professor Emeritus Allan Smith said, "In 1983, when I recommended Kent for a Supreme Court clerkship, I indicated that he was the strongest candidate I had recommended in the past 20 years. I feel the same way about his teaching prospects."

After finishing his graduate studies, Syverud clerked, first for Federal District Judge Louis F. Oberdorfer of the D.C. Circuit, then for U.S. Supreme Court Justice Sandra Day O'Conner, and then practiced law at Wilmer, Cutler & Pickering.

His four years in Washington, Syverud says, strengthened his desire to teach. "In law school," Syverud says, "I often assumed that the facts are given and the relevant legal principles are easy to identify. I was interested mostly in how judges and scholars tinkered with legal principles in applying them to given facts.

"As a litigator, I learned that there is often an infinity of facts and doctrines that can be molded and refined, discarded or highlighted almost at will by the advocate. The judgment of what facts and arguments to present — and when — was the measure of a good lawyer."

Syverud initially plans to do research and write on issues of settlement and insurance law. His interest in insurance, he says, arose out of three observations. "First, insurance has had a profound impact on how a variety of cases are tried and settled. Second, insurance is an unusual product sold by an unusual industry. The product can be defined as any device that spreads risk. In practice, the product is often defined as much by judges as by buyers and sellers.

"Finally, I'm fascinated that Americans consume so much of a product that we understand so poorly. Many Americans pay directly or indirectly for insurance against risks to their home, car, life, title, health, retirement income, bank deposits, and almost everything else they value in life. Yet the vast majority of people's eyes glaze over at any explanation of what they are paying for. I'm excited by the challenge of getting students interested in a subject people used to think boring."

Syverud is also excited about returning to Michigan with his family. He and his wife, Ruth Chen, who earned her doctorate in toxicology from the U-M's School of Public Health, have two children, Steven, 2, and Brian, who was born this past May. ◘

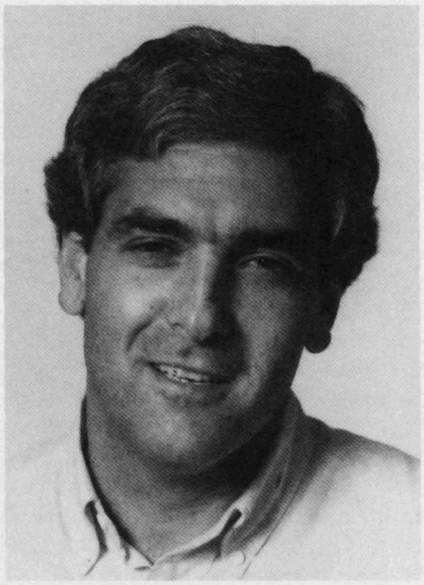
Rosenzweig returns to private practice

Michael Rosenzweig, an extraordinarily popular teacher during his eight years as a member of the U-M faculty, has returned to private practice. Rosenzweig's primary teaching and research interests were in corporate and securities law. He earned the Law School Senate's Outstanding Teaching Award in 1982, when he had completed only his third year of teaching.

While at Michigan, Rosenzweig developed a special interest in hostile takeovers, with a particular emphasis on target defensive measures. He has written three articles on the subject: *Target Litigation*, 85 Mich. L. Rev. 110 (1986); *Defensive Stock Repurchases*, 99 Harv. L. Rev. 1377 (1986) (with Michael Bradley); and *Defensive Stock Repurchases and the Appraisal Remedy*, 96 Yale L.J. 322 (1986) (with Bradley).

"Few among us," commented Dean Lee Bollinger, "have the pleasure of knowing that hundreds of former students think our classes among the best they had in the Law School. Michael leaves behind eight years of teaching with that knowledge. To this he has the added enjoyment of knowing that he is a respected scholar and a colleague for whom there will always be genuine fondness within the school."

Rosenzweig was associated with the Atlanta law firm of Rogers & Hardin before coming to Michigan in 1979. He rejoined that firm as a partner this fall. ◘

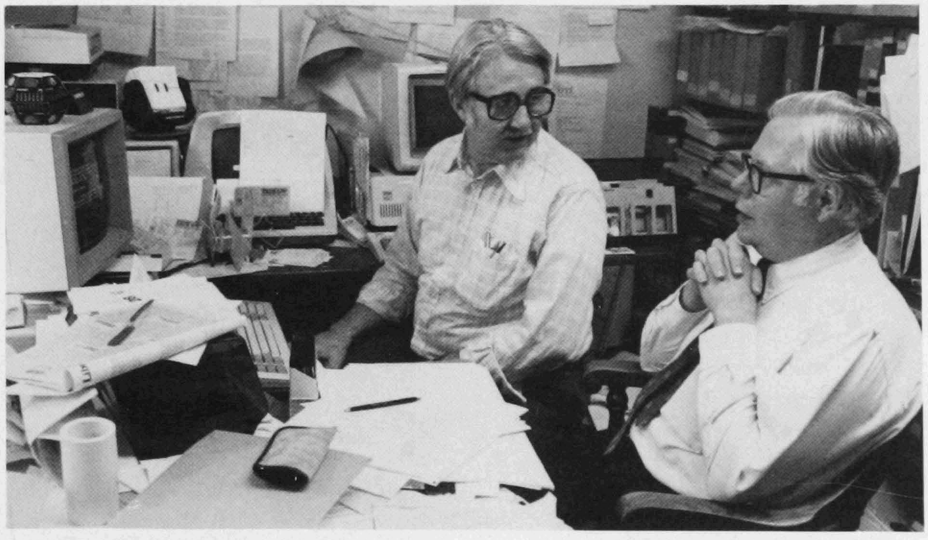


Michael Rosenzweig

Boot up your PCs

Three new legal software programs available

Research at the Law School in the emerging field of legal expert systems is paving the way for rapid and precise construction for the first wave of such systems. Professor Layman E. Allen and alumnus Charles S. Saxon J.D. '63, professor of computer information systems at Eastern Michigan University, have developed systems for implementation on IBM PC compatible microcomputers to assist lawyers in building expert systems for their own use. Allen and Saxon presented a paper entitled "Some Problems in Designing Expert Systems to Aid Legal Reasoning" at the first International Conference on Artificial Intelligence and Law, sponsored by the Center for Law and Computer Science at Northeastern University and the Association for Computing Machinery, Boston, May 27-29, 1987. The software developed



Law School Professor Layman Allen (left) and alumnus Charles S. Saxon (JD '63), a professor of computer information systems at Eastern Michigan University, have developed software to assist lawyers in building expert systems for their own use.

by Allen and Saxon helps drafters express legal rules in a logically precise form (called "normalized form") and then automatically generate expert systems based upon those precise rules. There are three computer programs that are now available for testing by users: (1) Normalizer, (2) Legal Interpretation Puzzler, and (3) Autoprolog.

The Normalizer program facilitates the process of generating legal rules in normalized form in the following ways:

a. provides the analyst valuable housekeeping assistance in specifying the constituent sentences and logical structure of the normalized rule,
b. automatically generates the normalized rule from the specified sentences and logical structure,
c. automatically generates diagrams of the logical structure of the normalized rule,
d. automatically generates more-detailed normalized versions of the rule.

The Legal Interpretation Puzzler program is a software laboratory that presents a series of problems involving the interpretation of various legal statutes in the form of puzzles that can be solved by scientific experimentation. The solving of these puzzles is challenging; it is also instructive for learning about normalized rules and becoming familiar with the legal content of the rules.

Any alumnus of the Law School who has an IBM PC compatible microcomputer available and is interested in tinkering with these three programs can obtain copies of them free of charge by contacting Professor Allen at the Law School. ◘

Expertise in demand

Jackson travels to India, China to address trade issues

At the request of the Ford Foundation, Professor John H. Jackson visited India for 10 days last February, meeting with academics and government officials for discussions concerning international trade and particularly the recently launched new GATT trade negotiation round (Uruguay Round launched in September, 1986). His schedule included a colloquium at the Indian Institute for International Trade in New Delhi, meeting with the Indian government commerce secretary and his advisors, addressing the Indian Chamber of Commerce in Bombay, and presenting several lectures at Delhi University and Jawahar Lal Nehru University. During his visit, Jackson was presented with an honorary membership in the Indian Society of International Law.

In May, Professor Jackson went to China at the invitations of the University of International Business and Economics in Beijing and several other academic groups there, including the Academy of Social Sciences and the College of Foreign Affairs. During his stay, Jackson delivered lectures at those institutions, the Faculty of Law of the University of Beijing, and other audiences.

Jackson's schedule included two days of detailed discussions with officials in the Chinese Ministry of Foreign Economic Relations and Trade. These conversations focused on the negotiations for the resumption by China of its membership in the GATT.

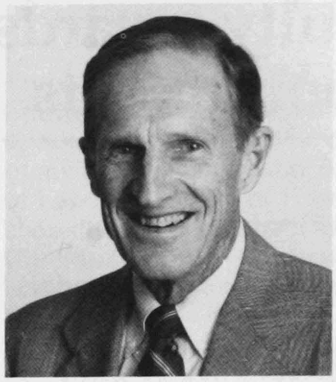
In China, as in India, Jackson was honored with an award, receiving the position of "Honorary Professor" from the University of International Business and Economics. The honor was only the ninth such award made by this university.

Professor John Jackson (left) received an honorary membership in the Indian Society of International Law. The award cited "his distinguished services to the cause of International Law and Peace."

Jackson, who spent the 1986-87 academic year as the Distinguished Visiting Professor of Law at the Georgetown Law Center, this November is again presenting a comprehensive three-day course on international trade, sponsored by the Section on International Law and Practice of the American Bar Association. The seminar, to be held at the Aspen Institute's Wye Plantation, in Queensland, MD, is a new version of the exceedingly well-received course Jackson taught several years ago under the same auspices, following a similar course taught to U.S. government officials in 1984. ◘

Phoenix lives on

Estep applauds extension of project on peaceful uses of the atom



Samuel Estep

Law School Professor Samuel Estep had occasion this last summer to express warm approval of the decision by U-M Vice President for Research Linda S. Wilson to continue the activities of the Michigan-Memorial Phoenix Project. Created shortly after the end of World War II with gifts from alumni, corporations, and students and named after the mythical bird which arose from burning ashes, the Phoenix Project was to make available to the world peaceful uses of nuclear energy.

Over the ensuing decades, the Phoenix Project Executive Committee, on which Professor Estep served for many years, made hundreds of so-called seed grants to faculty members in many different colleges and departments for research into the peaceful uses of nuclear energy. Many important research efforts resulted from these grants and one Nobel Prize ultimately could be traced back to one of these grants, the development of the bubble chamber by Professor Donald Glaser.

"It is vital not just to the United States but also to the rest of the world, and particularly the Third World, that nuclear energy be developed before we use up the world's reserves of fossil fuels," Estep said.

Estep also feels that the Phoenix Project concept has at least made a beginning in fostering multi-disciplinary research. Estep himself did most of his early research and writing with the financial and research assistance of the project. It resulted in the book *Atom and the Law*, the first definitive treatise on the legal problems of nuclear energy, of which he was the principal author and to which then Dean Stason and Professors William J. Pierce and Eric Stein also contributed significantly. ◘

New look for old rooms

Classroom renovations usher Hutchins into 21st Century

The venerable but time-worn classrooms and seminar rooms of Hutchins Hall will undergo a much needed facelift during 1987 and 1988.

Throughout the planning, care has been taken to maintain the feeling of the original architectural style of the rooms. The renovations will include changes in ventilation, lighting, and audio-visual systems; adding acoustical treatment to walls and ceilings; and the restoration, and in some cases, replacement of seating, tables, and work spaces.

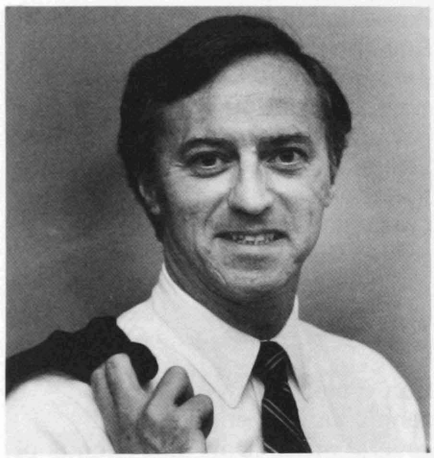
Thus far, funding for the renovations of four classrooms has been accomplished through the generosity of the following law firms: Squire Sanders & Dempsey, Jones Day Reavis & Pogue, and Baker & Hostettler, all of Cleveland; and Varnum, Riddering, Schmidt & Howlett of Grand Rapids. In addition, the renovation costs for three seminar rooms have been donated by several other firms and friends of the Law School: Linde Thomson Fairchild Langworthy Kohn & Van Dyke PC, of Kansas City; Barris Sott Denn & Driker of Detroit in honor of Herbert Scoll, JD '43; and Robert B. Aikens JD '54, of Troy, MI. Another classroom scheduled to be completed in 1989 has been sponsored by the Class of 1960 as their 25th reunion project.

Funds are still needed to renovate Rooms 150 and 250, which are two of the largest classrooms in Hutchins Hall, at a projected cost of $350,000 each, and Room 100, which will serve as both a classroom and the Law School auditorium after its renovation, at a cost of $600,000. ◘

Faculty awards, honors, appointments

Robben Fleming, president emeritus of the University of Michigan and professor emeritus of the Law School, has been selected to head the search committee to find a new athletic director for the university. Don Canham, who has held the post for the past ten years, will retire at the end of this year.

Robben Fleming



Leon Irish

Leon Irish has been appointed to serve on the Internal Revenue Service Commissioner's Advisory Group. The group consists of distinguished tax practitioners from across the nation who meet quarterly to advise the commissioner and the top leadership of the IRS on problems facing tax administration in the United States and on ways to improve the full and fair enforcement of the Internal Revenue law.

Irish has also been elected a regent of the American College of Tax Counsel. ACTC was organized in 1980 to encourage and recognize excellence in the practice of tax law. A principal activity of the college is publishing the *American Journal of Tax Policy,* which seeks to advance the discussion of policy issues in the tax law.

Thomas Kauper

Thomas E. Kauper, the Henry M. Butzel Professor of Law, has been serving as chairman of a 15-member faculty committee to advise the regents on the selection of a new president. The university's present president, Harold T. Shapiro, will leave the U-M January 1, 1988 to become president of Princeton University.

Kauper also chaired the search committee which was appointed to recommend a new general counsel for the university to replace Roderick K. Daane, who recently returned to private practice.

Margaret Leary

Margaret Leary, director of the Law Library, has been elected president of the Association of Law Librarians, beginning in July, 1988. She is currently serving as vice president of the association, a national group of over 4,000 professional law librarians. The AALL sponsors a convention and several workshops and institutes each year, besides publishing the *Law Library Journal.*

Richard Lempert has been awarded a National Science Foundation Grant to resume his

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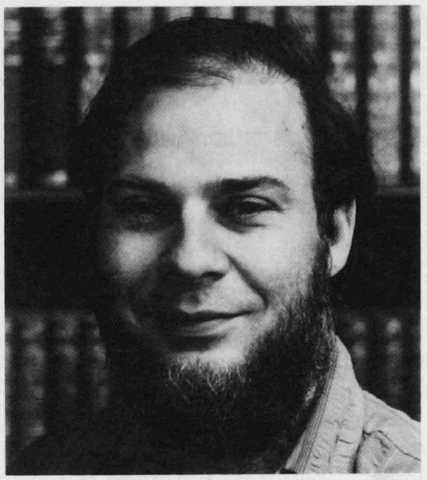


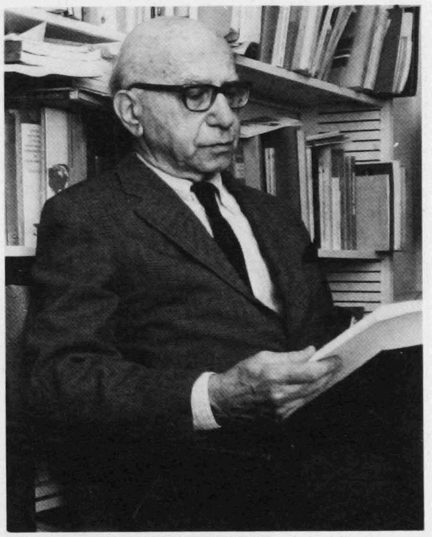
Richard Lempert

Terrance Sandalow

research on evictions from public housing by the Hawaiian Housing Authority. The research is a continuation of work begun by Lempert for his doctoral dissertation in sociology. The grant spans two years and will lead to a complete study (eventually to be published as a book) of the HHA's use of an eviction board.

Former Law School Dean **Terrance Sandalow** was recently honored by election into the American Academy of Arts and Sciences.

Allan F. Smith



Eric Stein

Founded in 1780 by John Adams and other leaders of the American Revolution, the Academy is an international honorary society based in Cambridge, Massachusetts with active regional centers in the Midwest and on the Pacific Coast. Its membership of approximately 2300 conducts programs of study and publication on issues of national and international importance.

Professor Emeritus **Allan F. Smith** was commencement speaker at the May, 1987 ceremony of the Richardson School of Law, University of Hawaii. He shared the podium with Hawaii Chief Justice Lum, former Chief Justice Richardson, and Governor Waihee.

Eric Stein, Hessel E. Yntema Professor of Law Emeritus, delivered an address before a symposium of international lawyers in Heidelberg, West Germany. The symposium, held in September 1986, was a part of the 600th anniversary celebration of the Ruprecht-Karls-University of Heidelberg.

On that occasion, substituting for University of Michigan President Harold T. Shapiro, Stein presented a document expressing to the sister institution warm congratulations and wishes on behalf of the Michigan academic community.

In April 1987, Professor Stein held a seminar on foreign relations of the European Community at the annual meeting of the American Society of International Law in Boston.

James Boyd White, the L. Hart Wright Collegiate Professor of Law, delivered the Sobeloff Lecture at the University of Maryland Law School in April. Last December he spent a week at Hamline Law School as the Bush Distinguished Fellow. At the present time he serves on the executive committees of the Michigan Society of Fellows and of the Michigan Humanities Institute.

A photo of Professor White appears on page 31, following an excerpt from his most recent book, *Heracles' Bow.* ◘

The Odyssey of Herb Brown

Campaign memoirs of an Ohio supreme court justice

by Herbert R. Brown

Excerpts from an article published by Columbus Monthly *© 1987; reprinted by permission.*

Less than two years ago, Columbus lawyer, novelist, and Law School graduate Herbert R. Brown (J.D. '56) embarked on his maiden voyage into politics, running unendorsed by his party for the Ohio Supreme Court nomination. He has chronicled Fourth of July parades, rallies, speeches, handshaking — and, finally, the victory party.

"Remember me?" the man asks, forcing himself through the crowd in the lobby of the Columbus Sheraton.

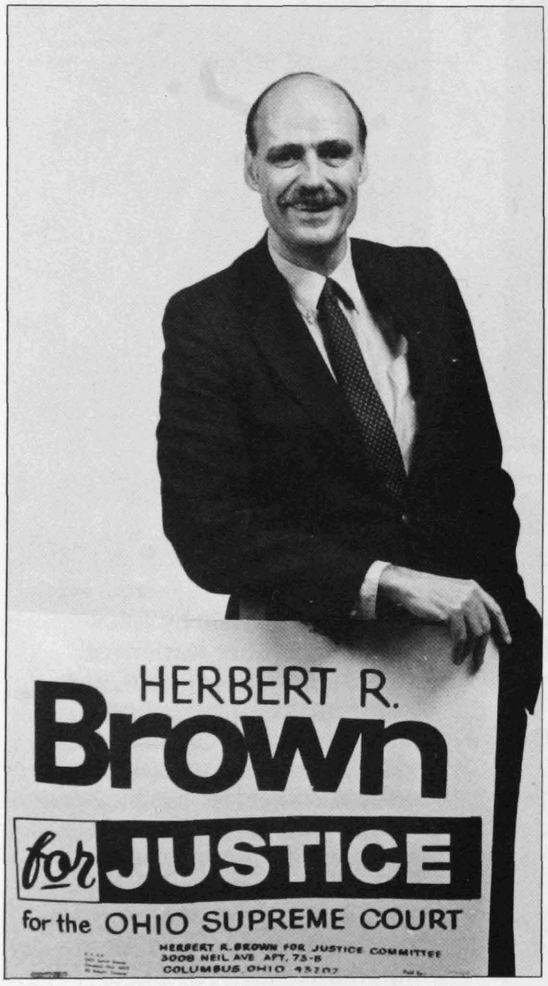
I smile and nod. I'm at Vern Riffe's $250-a-plate shindig honoring the Ohio Democratic Caucus. I'm running for office, a neophyte to politics. In a couple of seconds this man will be upon me, and failure to come up with his name will require an awkward effort to fudge. In those few seconds, my stomach tells me that my chances of winning a seat on the Ohio Supreme Court depend on my ability to recall this name.

"Tim Barnhart!" I say. "Chairman of Ross County."

"Yes." His smile seems genuine. "We met at the last meeting of the county chairs."

Then Barnhart is moving on. The next voice comes from over my left shoulder: "Hi, Herb."

This time I draw an absolute blank. I watch the lines of that smile change from genuine to forced as he reminds me of his name and where we met. Now I remember! I also remember telling him how important his advice had been, how pleased I was that we'd gotten together. I remember the "personal touch" thank-you note I wrote. So much for my "inroad" in Hamilton County.



My self-doubt peaks on January 24, 1986, when Ohio Democratic Chairman Jim Ruvolo calls. "We have endorsed Judge Don Ford," Ruvolo tells me, and his words have a final sound. Can I possibly win when the party has decided to back another candidate?

A former state party chairman warns me to prepare for the worst. "You'll be whipped 60-40," he predicts. "The party has muscle and money, and they'll spend to make the endorsement stick. It'll be a grade school team going against the Chicago Bears."

I listen to arguments and advice: I should run for common pleas judge in Franklin County. I should go back to my law firm for seasoning and try again in two years. I should ignore the warnings and run anyway. The party endorsement doesn't mean much. Democrats like an underdog.

I waffle, drawn to the prospect of closing the door and working on my novels. But the specter of the Chicago Bears haunts me. Impossible? Probably. But . . . how sweet it would be to wake up on May 7 and tell myself, "You've trounced the Chicago bloody Bears!"

I drive to Toledo to ride [Governor] Dick Celeste's coattails at a rally. I am shaking hands, getting into "working the crowd," when a short, scruffy-haired fellow

with a soft, belligerent face accosts me. "You aren't the endorsed candidate," he says.

"I know that," I say.

"You won't be introduced here."

"That's all right. I just want to meet a few people."

"The vote of the screening committee was unanimous against you."

"So?" By now, others are listening.

"So you aren't welcome."

"Are you asking me to leave?"

"I think you should."

I suggest we continue the discussion outside. The last thing I want is an incident. Only jerks get thrown out of meetings. That I have a right to be at the rally will get lost in any news story about a confrontation.

In the corridor, I try to reason, but every argument draws the same response "You should leave." I yield to prudent campaign strategy. "I'm the designated enforcer here tonight," the man says, smiling and savoring his moment as I walk away.

Finally it's primary day. A 40,000 vote computer error in Dayton allows me to experience losing. The experience isn't pleasant. Then the error is corrected, and at one a.m., too beaten down to celebrate, I learn that I am the winner — in 74 of Ohio's 88 counties, by a total of 17,000 votes.

Everyone becomes my friend. What a relief to be hailed in the speeches of the statewide candidates, to be welcomed wherever I go. Winning in politics is heady stuff. Too much of this, I keep telling myself, and you'll become addicted, begin to believe you're something special.

The only fly in my post-primary euphoria is the taint of my name. Almost no one can resist telling me I won because the name Brown is magic in Ohio. Moreover, some point out, two men named Herbert have served on the Supreme Court. I have not one, but *two* magic names.

It does little good to remind people that I didn't choose my name, that a name has nothing to do with a candidate's qualifications, or that since 1972 five Browns have won and five have lost in Supreme Court races.

If the point of politics is to win, I decide, and if the name helps, why not exploit it? John Kulewicz, my campaign manager, creates a radio commercial in which the first 30 seconds are in Polish, German, Spanish and Italian. The only recognizable words are "Ohio Supreme Court" and "Herbert R. Brown."

The beauty of the commercial, in a year when the air is polluted with all manner of political puffery, is that you have to pay attention to know what you're hearing. And if you pay attention, you hear the name Herbert R. Brown *nine* times.

I begin to relax. Campaigning can be fun. Even parades. Riding in a Fourth of July parade, I work on technique. Spot someone on the curb, wave as if he or she is an old friend and mouth a name with your lips. Then go for the guy having a beer on his back porch with his shirt off, paying no heed to the parade. Wave at him. Then, quick, go to the other side. More people will wave at you and notice you. You create the illusion that the parade route is lined with people you know.

By September, I'm getting used to it. I actually enjoy hearing the same stump speeches and jokes, over and over. For all the pleasant moments, however, campaigning is exhausting. The impossible task of raising enough money for a statewide television campaign gnaws at me daily, and sometimes when I wake up at night.

Leaving a joint interview at the Cleveland *Plain Dealer*, I pause on the sidewalk to chat with my Republican opponent, Judge Joyce George. "I feel an identity with you, however this comes out," I say, "for all we have to go through." She nods: "It can be cruel." Antagonists in a process mostly beyond our control, we feel a bond.

I make a calendar, numbering the days until November 4. On October 8, I arrive home at one a.m. after a day that began at Ohio Northern University and ended at the Allen County Fairgrounds. There I shook hands with the 700 who came, and made a short speech to the 500 who stayed after hearing Senator John Glenn.

I cross off 27. Tomorrow we tape our TV commercial. Then I can relax. The newspaper visits are finished. The "not-completely-scientific" *(Dispatch)* poll looks good. Unscientifically, I'm ahead, 59-41.

We want a commercial that mentions my name a lot and is easy to remember. So we find a Herbert M. Brown in Canton and a Herbert H. Brown in Cincinnati. Volunteer drivers bring the two Herbs to Columbus to tape the "three Herbs" spot. Each Herb proves to be a solid citizen, capable of saying three lines, including, "I'm voting for Herbert R. Brown from Columbus."

Nine days later, "Three Herbs" airs for the first time during the Ohio State-Purdue football game. Four days after that, in the middle of a week's campaigning in Northeastern Ohio, I receive an urgent message in Alliance: "Call Kulewicz."

"We want to do a new commercial," John says.

Some people, it seems, thought "Three Herbs" was frivolous.

I make my speech, and head for Columbus.

Cameras, makeup technician,

producer, and supporters are waiting when I arrive at 11:30 at the Vorys Sater Seymour & Pease law office, where the spot is to be taped. "A little darker," someone says. "Yes, that's the effect we want." We finish shooting at 1:30 a.m.

This time the theme is Scholarly Herb, burning the midnight oil — and demonstrating judicial independence. Buoyed by the general verdict — "looks great on the screen" — I forget my exhaustion, and head back up I-71 for Cleveland. Lying in the motel bed at 4:30, hoping to fall asleep quickly, I realize just how hard it is to be original and impressive in 30 seconds.

I return from Youngstown Sunday evening to see the red light on my answering machine flashing eight times—a full load of messages. There are mixed reactions to Scholarly Herb: "It sets the right tone." "Too dark, almost sinister." "You look tired."

Monday morning. Our spots have been on the air for four days in three cities. Too dark, almost sinister...and tired. We're shooting a brighter version of Scholarly Herb. My tolerance is stretched; I'm ready to settle for anything. We get the spot done, but I can't indulge in feeling relieved. I'm bushed.

Finally, blessedly, it's election day. The last-minute polls say I might actually win. John Kulewicz and our small group have confronted adversity, become emotionally close, and waged a statewide campaign that's taken me from (as the *Columbus Dispatch* put it in February) much tougher odds than those against a walk-on making the OSU football team to the brink of a seat on Ohio's highest court.

The campaign is over, and I'm nervous. The polls close at 7:30. By 10, I have no idea how I'm doing, except that it's closer than anticipated.

My election-night party is beginning but I want to get a handle on the trend before making an appearance. Shortly after 11 the phone rings. "People are getting antsy," I'm told. "You better come on down." I take along my wife, Bev, and my two boys, David and Andy.

My margin builds to 52,000 votes, but I learn that most of the uncounted votes are from Hamilton County, where I'm losing, 59-41.

It looks as if I'll survive, but by 12:30 I'm still not prepared to make myself available to reporters who want victory statements that may look foolish by morning. The result won't be certain until 2:30, when the count ends and my margin holds at 23,000 votes.

Just before one a.m., Mary Kane of the *Cincinnati Post* ferrets me out. "What," she asks, "was the toughest part of the campaign?"

Even to my numbed, anxious mind the answer comes easily. "The two election nights," I say, "this one and the primary. There wasn't a minute of exhilaration either time."

But then, the mornings after: Those were glorious. ⊠

Alumnae Council Honors Judge Helen Wilson Nies

Judge Helen Wilson Nies of the U.S. Court of Appeals, Federal Circuit, received the University of Michigan Alumnae Council's 1987 Athena Award.

The award was presented by James J. Duderstadt, U-M provost and vice president for academic affairs, at the Annual Alumnae Luncheon in June.

Nies, a specialist in trademark and intellectual property law, graduated from the U-M with a B.A. in 1946 and a J.D. in 1948. She began her legal career as an attorney with the Justice Department and Office of Price Stabilization from 1948 to 1952. From 1961 to 1980, she practiced with three law firms in Washington, D.C.

In 1980, she was named judge with the U.S. Court of Customs and Patent Appeals, and, in 1982, was appointed to her current post. An author and lecturer, she was selected as Woman Lawyer of the Year by the Women's Bar Association of the District of Columbia in 1980.

Judge Helen Wilson Nies

The Athena Award, established in 1973, is presented each year to a U-M alumna for professional excellence and public service. ⊠

Friendly adversaries

Supreme Court case reunites three Michigan graduates

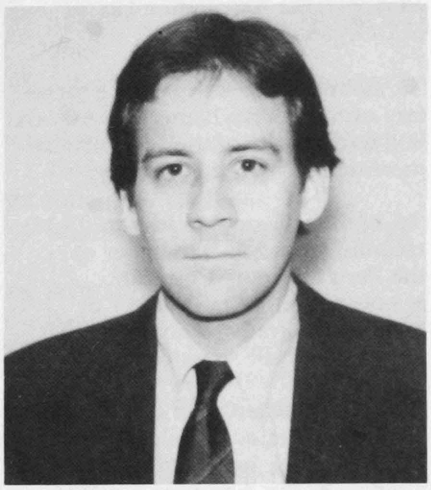
Three Law School classmates and contemporaries on the *Michigan Law Review* were recently reacquainted through briefs filed in a pending U.S. Supreme Court case. Catherine James LaCroix, Jeffrey P. Minear, and Mark Van Putten (all 1982 graduates) co-authored briefs representing different interests filed in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation et al.* In *Gwaltney* the Court will decide whether citizens suing to enforce the Clean Water Act against violators of wastewater discharge permits must allege and prove a continuing violation of the act in order to recover civil penalties for past violations.

Chesapeake Bay Foundation, a non-profit environmental organization, sued Gwaltney for violating its Clean Water Act discharge permit. The district court found in Chesapeake Bay Foundation's favor and assessed $1.3 million in civil penalties against Gwaltney for past violations of its permit, payable to the federal treasury. The U.S. Court of Appeals for the Fourth Circuit upheld the district court decision and the U.S. Supreme Court granted certiorari on the question of whether Congress intended the Clean Water Act to allow citizen enforcement suits to assess civil penalties for past violations.

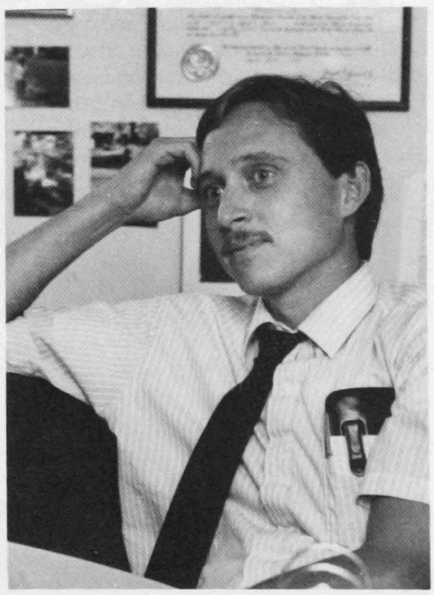
LaCroix, an associate with Hogan & Hartson in Washington, D.C., co-authored Gwaltney's brief arguing for reversal of the Fourth Circuit ruling. Minear, an assistant to the solicitor general at the U.S. Justice Department, co-authored an *amicus curiae* brief for the United States in support of affirming the Fourth Circuit. Van Putten, staff counsel for the National Wildlife Federation and director of the federation's Great Lakes regional office, authored an *amicus curiae* brief on behalf of NWF arguing for affirming the Fourth Circuit.

Gwaltney is being carefully watched by environmental lawyers since it is the first Clean Water Act citizen enforcement suit ever to be reviewed by the Supreme Court. Hundreds of such cases have been successfully prosecuted by private environmental groups over the past few years. The case is scheduled for argument and decision in the Court's 1987-88 term. ◘

Catherine LaCroix



Jeffrey Minear



Mark Van Putten

Class notes

'40 John H. Pickering, a partner in the Washington, D.C., law firm of Wilmer, Cutler & Pickering, has been re-elected to a three-year term as District of Columbia delegate to the American Bar Association House of Delegates.

'43 Robert L. Ceisler became secretary of the Pennsylvania Bar Association at the close of the PBA Annual meeting in Pittsburgh in May.

'44 Manuel Garcia-Calderon (LLM) recently retired as a member of the Peru Supreme Court and is now serving as a member of the Administrative Tribune of the Organization of American States.

'49 Joe C. Foster Jr. of the Lansing, MI firm of Fraser Trebilcock Davis & Foster, P.C. has been elected a fellow of the American College of Tax Counsel.

'52 John Jay Douglass, dean of the National College of District Attorneys at the University of Houston Law Center, was appointed chairman of the American Bar Association's Standing Committee on Law and Electoral Process.

'55 Thomas W. Watkins, of counsel to the Detroit law firm of Dykema, Gossett, Spencer, Goodnow & Trigg, has been appointed chairman of the American Bar Association Standing Committee on Legal Assistants.

William L. Wilks has stepped down as dean of The Dickinson School of Law, Carlisle, PA, as of June 30. He will continue on the Dickinson faculty following a visiting lectureship in Great Britain and Canada this fall and winter.

'59 Edward Bransilver, senior partner in Shearman & Sterling, will open the firm's new Washington, D.C. office this fall. Bransilver currently serves as head of the firm's London office.

Themistocles L. Majoros is still engaged in the practice of personal injury law as a principal in the Saginaw, MI firm of Mossner, Majoros and Alexander, P.C.

'61 Raymond H. Drymalski has become a partner of Bell, Boyd & Lloyd in Chicago. He is also a member of the board of directors of Northwestern Memorial Hospital and the Lincoln Park Zoological Society.

'63 C. Reynolds Keller, Jr. has been named managing partner of the Cleveland law firm of Weston, Hurd, Fallon, Paisley & Howley.

'66 Frank S. Dickerson, III has become senior vice president and chief financial officer of MAPCO, a diverse energy company based in Tulsa, OK. Dickerson was formerly vice president of finance and treasurer of Bethlehem Steel.

'68 Robert G. Buydens, a partner in the Detroit law firm of Clark, Klein & Beaumont, has been elected 1987 chairperson of the Michigan chapter of the Midwest Pension Conference.

Lee Hornberger organized and participated in a workshop on representing terminated employees, sponsored by the Plaintiff Employment Lawyers Association in Columbus, OH in June. Hornberger practices employment law in Cincinnati and is an adjunct professor at the University of Cincinnati.

Carl H. von Ende has been elected president of the Detroit Bar Association for the 1987-88 year. Von Ende, a partner in the law firm of Miller, Canfield, Paddock, and Stone, practices in its Bloomfield Hills, MI office.

'70 Lt. Col. Richard J. Erickson, USAF, completed a study to be published on the international law aspects of the use of military force and state-sponsored international terrorism. Erickson worked on the study while serving as a research fellow at the Air Force University Center for Aerospace Doctrine, Research, and Education.

'72 Peter N. Thompson has been appointed acting dean of the Hamline University School of Law, in St. Paul, MN.

'73 Ronald M. Gould has been named Outstanding Lawyer by the Seattle King County Bar Association for distinguished and meritorious service to the legal profession and the public. He recently chaired the executive committee of the "Today's Constitution and You" project celebrating the bicentennial of the Constitution in Washington State.

John C. Meade has joined the Indianapolis-based law firm of Ice Miller Donadio & Ryan. He is a trustee and past president of the Indiana chapter of the Leukemia Society of America.

Timothy L. Stalnaker has joined the St. Louis law firm of Gallop, Johnson & Neuman as a partner. He practices in the field of labor and employment law.

'75 Edwina E. Dowell was recently appointed assistant general counsel of Univisa, Inc., a holding company for various Spanish language media and entertainment companies, in New York City. Ms. Dowell was also appointed a vice president of UNIVISION, Inc., Univisa's largest subsidiary.

'76 Jack C. Barthwell, III has been named vice president of corporate communications and government affairs of the Stroh Brewery Company in Detroit. Barthwell, who joined Stroh in 1984, formerly served as the administrative assistant and chief of staff for Representative George W. Crockett, Jr. of Michigan's 13th Congressional District.

Nancy R. Schauer has become a partner in the law firm of Gansinger & Hinshaw in Los Angeles. The firm recently changed its name to Gansinger, Hinshaw, Buckley & Schauer.

'77 Diana M.T.K. Autin, currently deputy general counsel and assistant director for construction for the New York City Bureau of Labor Services, has been awarded a Charles H. Revson Fellowship on the Future of the City of New York honoring outstanding contributions to the city. The fellowship will allow her to pursue a year of self-designed study and research at Columbia University. She also teaches labor law at the Cornell School of Industrial and Labor Relations.

A. Kay Stanfield Brown has been appointed a magistrate of the 46th Judicial District Court in Southfield, MI.

Penny Friedman is vice president of property development for Taft Broadcasting Company in Cincinnati.

'78 Stephen E. Crofton has been made a partner in the Phoenix, AZ law firm of Jennings, Strouss & Salmon.

Frederick R. Nance has been named a partner in the Cleveland-based law firm of Squire, Sanders & Dempsey.

Gregory K. Need has been appointed general legal counsel of the United States Junior Chamber of Commerce. Need is a partner in the Waterford Township, MI law firm of Booth, Patterson, Lee, Karlstrom and Steckling.

'80 G.A. Finch recently published "A Primer on Illinois Public Mechanics' Liens" in the *Illinois Bar Journal*. Finch is a deputy planning commissioner with the city of Chicago on leave of absence from Chicago Title Insurance Co.

'82 Gershon Ekman is a vice president and associate counsel at The Chase Manhattan Bank, N.A. in New York City.

Correction: in LQN *30:3, Burton Marks '31 was incorrectly listed under the Class of '33.*

Alumni Deaths

'15-'18 Alejandro J. Panlilio, d. March 18, 1987

'17 James B. Catlett, d. October, 1986

'22 Herman J. Saulson, d. March 8, 1987

'23 William H. Messinger, d. March 15, 1987

'25 Millard H. Krasne, d. March 23, 1987

'26 Frank E. Lewellen, d. June 5, 1987 in Sun City, Arizona

'30 Robert C. Barker, d. March 18, 1987

Edwin G. Miller, d. March 3, 1987

'31 Elden W. Butzbaugh, Sr., d. March 6, 1987

'33 Arthur L. Goulson, d. February 25, 1987

Joseph Zwerdling, d. July 25, 1987 in Bethesda, Maryland

'34-'35 Albert J. G. Wilson, d. February 14, 1987 in Tucson, Arizona

'35 Theodore E. Lapp, d. February 14, 1987

Frank Rosenbaum, d. June 15, 1987 in Royal Oak, Michigan

'36 Leonard Gronfine, d. May 22, 1987

Joseph H. Jackier, d. June 29, 1987 in Southfield, Michigan

'38 Arthur J. Buswell, d. July 5, 1987

'40 Leo W. Corkin, d. December 16, 1986

'42 Ben J. Weaver, d. December 30, 1986

'45 Allan B. Schmier, d. January 21, 1987

'47 Peter L. La Duke, d. March 29, 1987

'48 Roland F. Godbout

'51 Warren H. Pritchard, d. June 13, 1987

'55 William P. Hodgkins, Jr., d. March 9, 1987

'62 Marilynn J. Balardo, d. March 8, 1987 in Williamston, Michigan

'63 Leonard F. Bryan, d. December 3, 1986

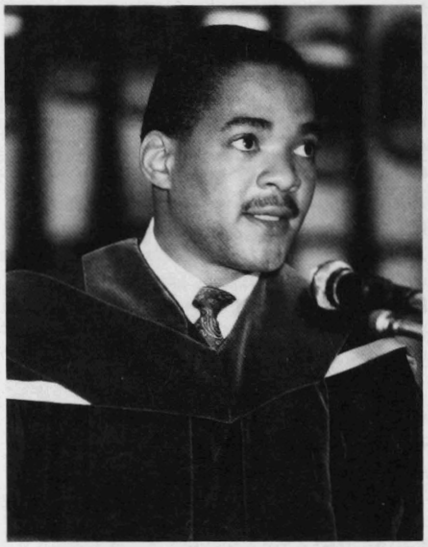
'64 Robert W. Vickrey, d. April 26, 1987

'66 Peter B. Tisne, d. 1982

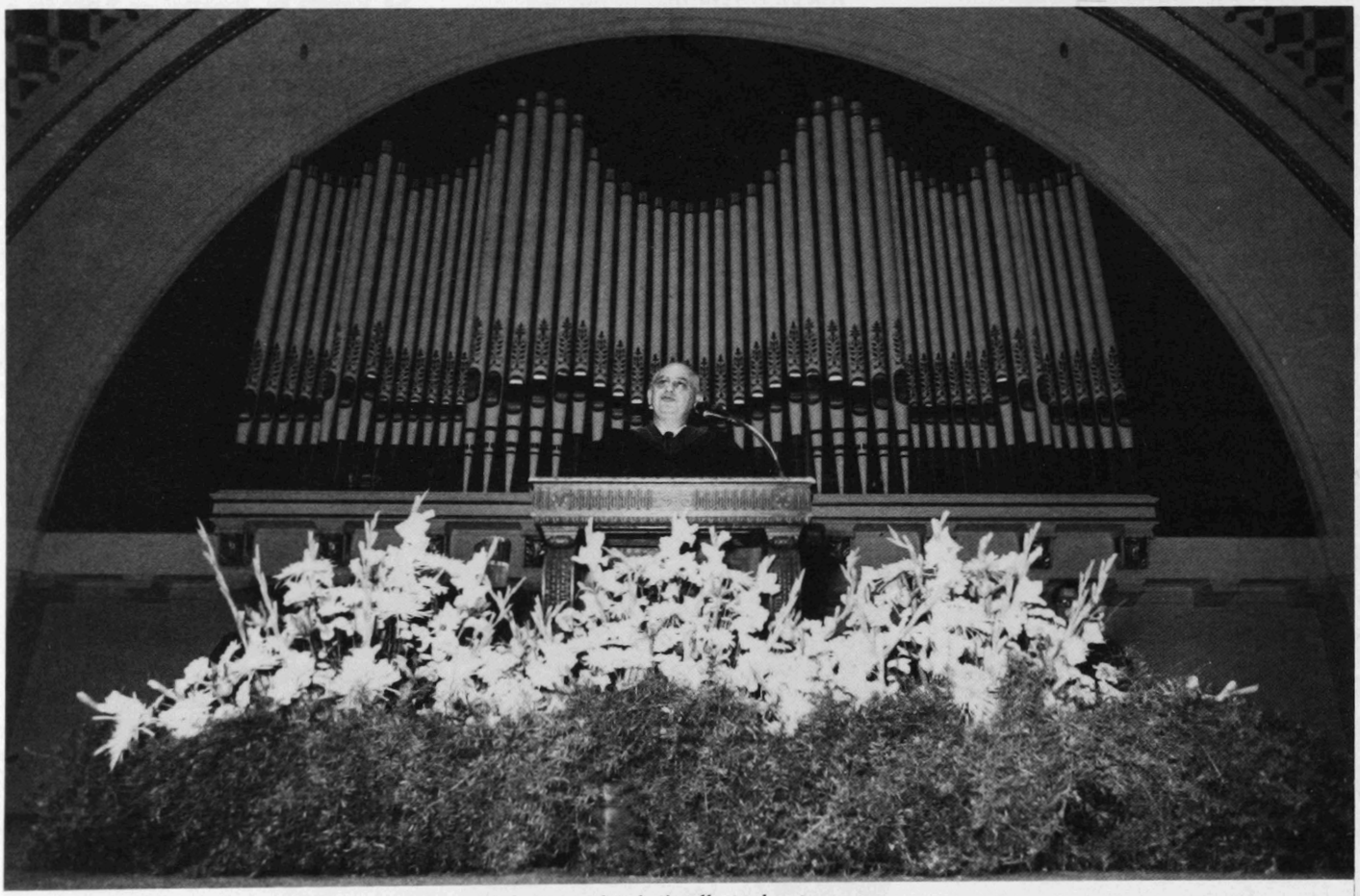
'73 Robert N. Rosenberg, d. May, 1987

Senior day

Bidding farewell to the class of '87

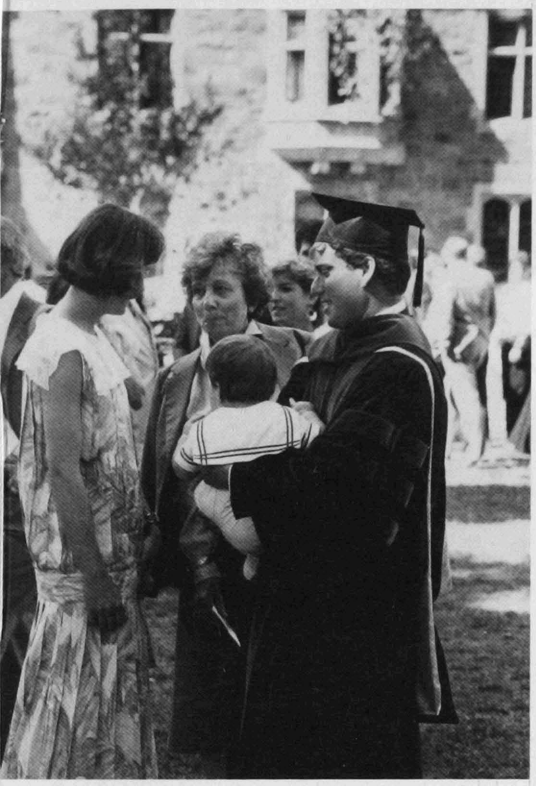


Student Senate President Reginald Turner spoke on behalf of the seniors.



Dean Terrance Sandalow urged the graduates to strive to maintain intellectual autonomy.

E V E N T S



Professor Douglas Kahn (right) was awarded the L. Hart Wright Teaching Award by the Student Senate for excellence in teaching.

Professor John W. Reed told the Honors Convocation audience: "You now belong to an aristocracy, but it is an aristocracy not of privilege but of responsibility." Reed was awarded the Francis A. Allen Award by the Senior Class. ▼

HERACLES' BOW:

Persuasion and Community in Sophocles' Philoctetes

by James Boyd White

This is a highly abridged version of the title essay of Professor White's recent book, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law. © 1985, The University of Wisconsin Press; reprinted by permission.

Here he presents a reading of Sophocles' play Philoctetes, *which is about the ethical significance of different forms of persuasion, a matter of some significance for lawyers. The play in fact establishes with great clarity a contrast that has been fundamental in Western ethical thought ever since, between treating another person as an object of manipulation — as a "means" to an end — and treating (him or her) as one who has claims to autonomy and respect equal to one's own, that is, as an "end" in himself. This contrast has a special and disturbing significance for someone who, like the lawyer, makes an art of persuading others.*

In the course of life it happens again and again — in the family, the workplace, the street, the international arena — that a crisis arises in which we are faced with the possibility of establishing or losing community. Rhetoric, as I use the term — the art of "persuasion" in its broadest sense — is the art by which we address these possibilities. As our desires, our senses of ourselves, are seen to work together, we come together, for the moment or for a longer time, making a common world defined by a common set of mutually intelligible roles and activities; or, as we feel ourselves to be opposed, we divide into separate, perhaps hostile, groups or units. A community may be momentary, based upon a sense of common ground that is quickly lost, or it may be stable and enduring. How do we — how can we — address these possibilities? What can we say to one another, or to ourselves, about our own desires and those of others, about who we are and who we want to be, and with what possible meanings, what possible successes? When is a persuasive success an ethical failure, or an ethical success a persuasive failure? What is the role of truth and sincerity in what we do?

For the lawyer these are especially critical questions. A lawyer's professional day is largely made up of conversations, oral and written, in which the object is to persuade another to a particular view. In this sense he or she is a professional rhetorician, and must be concerned with the possibilities of rhetoric as a way of life. In this essay I want to work out a way of thinking about the ethics of persuasion by looking at Sophocles' *Philoctetes*, a play that has much to teach us about how persuasion works, and can work, and what it means to give yourself to a life of persuasion of one kind or another.

The narrative form in which these questions are presented in the play is this. Philoctetes lives alone on an uninhabited island in the Aegean where, because of a foul-smelling and festering wound on his foot, he was cast out ten years earlier by the Achaeans on their way to Troy. His wound was inflicted by a serpent that bit him when he stepped on sacred ground; his cries of pain, we are told, prevented the others from making proper sacrifices and libations. During his years on the island he has been able to live only because he has with him the wonderful bow and arrows of Heracles, given him for a kindness done — Philoctetes lit his funeral pyre — and these are weapons that never miss. Now the Achaeans have been told by a soothsayer that they cannot capture Troy without that bow, and have sent Odysseus and Neoptolemus, Achilles' son, to bring it back.

These two actors are presented with an archetypal question of what I will call "constitutive rhetoric": how to bring into a community an isolated individual who is now outside it. The first question the play addresses is how they are to proceed, and that question is presented both as a practical one — what will work? — and as an ethical one — what is right for them to do?

The most obvious possibility, though the least talked about in this scene, is honest persuasion. For that to succeed, a speaker would have to find a way of talking about what has happened, and what will happen, that Philoctetes and the Achaeans could both accept, and which could thus serve as the ground of a newly constituted community between them. By "way of talking" I mean a whole language: a shared set of terms for telling the story of what has happened and what will happen, for the expression of motive and value, and for the enactment of those movements of the mind leading to a common end that we call reason. Whoever speaks to Philoctetes in this way must find a way to tell the story — the whole story — that leads naturally to his return. Such a common language, such a common story, is in fact what we mean by a community. The art of sincere statement by which this kind of genuine community is established can for our purposes be called, and in a restriction of the range of meaning of the Greek term is called by Sophocles, "persuasion" (*peitho*).

In the play Odysseus says that this kind of persuasion will simply not work against Philoctetes' intransigence — we can see, indeed, that an attempt might only put him on his guard — and that they must therefore practice persuasion of a different kind, a sort of trick or deceitful stratagem (*dolos*). He tells Neoptolemus to win the confidence of Philoctetes by pretending to be sailing back to Greece after a humiliation at the hands of the Achaeans. (He is to say that they awarded his dead father's armor to Odysseus.) Neoptolemus should offer Philoctetes passage home, and this will enable them to get close enough to get his bow.

Neoptolemus objects that this kind of trickery is inconsistent with his most fundamental conceptions of honor, and urges the use of force (*bia*) or persuasion (*peitho*). But Odysseus explains that they have no alternative: force can never prevail against the weapons of Heracles, and persuasion too is bound to fail. Philoctetes would kill them if he knew who they were, and he could certainly not be talked into coming with them.

Neoptolemus is himself "persuaded" by Odysseus — in which sense of the word we shall soon discover — and goes along with the plan. The rest of the play is about his (and our) discovery of what that decision really means, both in practical and in ethical terms. As things work out Neoptolemus in fact obtains the bow, but he becomes so disgusted with himself that he returns it (over Odysseus' violent objection) and does what he wished to do in the first place: he seeks to persuade Philoctetes to come with them voluntarily, on the grounds that this will be best for him as well as for them. (His wound will be cured by the sons of Asclepius at Troy, and he will fulfill his fate and achieve great renown.) But Philoctetes remains obdurate and insists that Neoptolemus keep his promise to take him home. Neoptolemus is about to comply when Heracles miraculously appears and tells Philoctetes that he should indeed go to Troy, where he will be cured and win great glory. Philoctetes complies, and the play ends with his farewell to his island.

Even from this outline it can be seen that the play presents its audience with a real puzzle. We are led to despise Odysseus and to admire Neoptolemus' change of heart; yet Odysseus' way is shown to have "worked" — it got the bow — and Neoptolemus' way to have failed. The play itself seems to require the intrusion of a *deus ex machina* to save it from a chaotic and impossible ending. All this suggests two sets of questions. First, how are we to make sense of the play itself, as a work of art? What, that is, is Sophocles asking us to think and feel about the two modes of persuasion — the two kinds of character and community — opposed here, and how does he seek to evoke this response? Second, what ought we to think about the substance of the questions that this play defines, both in general — as a matter of philosophical ethics — and in the context of modern law? To focus on one example of particular significance to us: what kind of persuasion (*peitho* or *dolos*) does the lawyer practice, and what does it mean — what can the lawyer make it mean — that he or she does so?

It is worth examining the initial conversation between Odysseus and Neoptolemus in some detail, for their argument about the proper way to approach Philoctetes is itself a performance of one kind of persuasion, one kind of community, and it sets forth the major polarity from which the play will proceed.

For Odysseus it is all very simple: they are sent to obtain the bow, and the only issue is how they may most certainly obtain it. His is a classic form of ends-means rationality, which naturally focuses on the possible and the impossible, on the probable and the improbable, and regards everything in the world, including itself, as an instrument to obtain the ends it is given. The only question is success. Odysseus does not in fact even argue that the end justifies the means, for justification is not an issue for him. (In the language of modern sports, winning is not the most important thing, it is the only thing.) This is his view not only of the way they should approach Philoctetes, but, as we shall see, of the way he should treat Neoptolemus as well.

Neoptolemus' position, by contrast, is based upon his sense of his own character or identity. His reason for balking at the use of stratagem is self-centered, almost aesthetic: deceit is beneath his dignity. He rests on his nature and paternity: he *is* a certain kind of person, in part by reason of his birth, and it is his sense of who he is that will be his ethical guide. His initial response to Odysseus' suggestion is a kind of instinctive reaction, learned but not wholly understood: for him force and persuasion are both acceptable, but deceit is not. His objection to deceit has nothing to do with recognizing Philoctetes' autonomy or value as a person (for force is by nature coercive) but rests rather upon his sense of what is appropriate for him, Neoptolemus, to do.

The method by which Odysseus persuades Neoptolemus to abandon the sense of character upon which he relies, to "give himself" to Odysseus for "a single day" (lines 83-84), is a performance in practice of the doctrine Odysseus espouses. It is a skillful seduction of a standard kind: not *peitho* but *dolos*. Odysseus waits to present Neoptolemus with the issue until the very moment of action, thus depriving him of the possibility of thought and reflection; and he springs upon him now, for the first time, the news that he will not be able to achieve his own great destiny as the destroyer of Troy unless they obtain the bow. This is an end that Neoptolemus cannot deny, and he acquiesces in the means necessary to attain it, shameful to him though they are. Odysseus thus disintegrates Neoptolemus' sense of self, his only ethical guide, by establishing an unforeseen conflict within it. The way this kind of persuasion works here, as elsewhere in the world, is that the successful persuader gets what he wants now and leaves the other to try to put his life and character together again afterwards on his own. This is one performance of what it may mean to regard another as an instrument.

What will it mean for Neoptolemus to do what he has agreed to do? Odysseus has given a simple version — it will mean "success" — but in terms that are impossible for us to accept, even for a moment. The play now shows us what this deception will mean in other terms, and Neoptolemus' betrayal of Philoctetes — who is the soul of frankness, warmth and generosity — is terrible to witness. When Neoptolemus finally comes to see that this course of deceit is impossible for him, and restores the bow, he gives himself the opportunity to do what he thought should have been done in the first place, that is, to achieve his mission of bringing Philoctetes back to the Achaean community not by deceit (*dolos*) nor, as he now sees, by force (*bia*), but by persuasion (*peitho*). And what he means by persuasion is not the art of manipulating others to adopt one's position, but the art of stating fully and sincerely the grounds upon which one thinks common action can and should rest.

In his speech of appeal to Philoctetes Neoptolemus claims that he has been improperly harboring his sense of injury, and he justifies this view, to Philoctetes and to us, by locating his present request in a transformed narrative of Philoctetes' life. This story defines Philoctetes not as one who simply "suffers terribly" nor as one who "suffers at the hands of the hated Achaeans," as Philoctetes wants to do, but as one who suffers for a reason that can be understood and stated. He suffers because he stepped on the sacred ground. It is not an issue whether he was at fault in doing so, for the point of Neoptolemus' statement is neither to blame nor to excuse Philoctetes for taking that step. Similarly, it is not an issue whether the Achaeans were right or wrong to abandon him: there is no discussion of the necessity of the abandonment — for example, whether their sacrifices really were disturbed, as Odysseus claimed — or of available alternatives to it. The question is seen as one of causation, not blame, and this implicitly

suggests that cure, rather than revenge, can be the aim. To stop the obsessive (if understandable) process of blaming and excusing frees the mind to think about how the wound can be healed: by the "arts of Asclepius" as Neoptolemus puts it, or, more significantly for us, by Philoctetes' reintegration into the community of which he was once a part. On Philoctetes' side, he must give up his love for his own illness. What is required of him, before he can be cured, is forgiveness — forgiveness of others and forgiveness of himself, for it was his own misstep that brought about the injury and the subsequent abandonment.

Neoptolemus' speech thus operates at once as a recognition of Philoctetes' experience, as a reinterpretation of it in light of what else is known, and as a conversion, by narrative, of the intolerable into the tolerable. It has obvious parallels with psychoanalysis, and in both cases the ruling values are truthfulness, recognition, and integration.

But this persuasive statement in fact fails, and fails for reasons that Neoptolemus should be able to understand, for they are rooted in a sense of appropriateness and self-respect. Philoctetes now in essence asks, "How can I come before the others, how can I possibly join with them, after what has happened?" (lines 1352-57). He insists that Neoptolemus keep his promise to take him home. Neoptolemus is about to comply when Heracles appears and restates to Philoctetes the story of his life and the necessity and propriety of his return. This time Philoctetes accepts and is persuaded.

How are we to read and understand this sequence of events, especially the ultimate failure of Neoptolemus' persuasion and the need for Heracles' intervention at the end? And what of the fact that Odysseus' method of persuasion succeeded? What do these events mean as part of what Sophocles is saying in the play, and what do we, independently of the play, think of the issues it presents? We can start by returning to the initial polarity between Odysseus and Neoptolemus, out of which the play moves.

In reading the opening scene one quickly sees that Odysseus habitually regards everything and everybody as an instrument, as a means to an end, but the consequences of this habit of thought emerge only gradually in the course of the play. Consider, for example, his mistake as to the meaning of the soothsayer's prophecy, which provides an assumption essential to his argument in the opening scene. Odysseus reads the prophecy as requiring the two men simply to "get the bow" as though the weapon had a kind of magic that would automatically win the war for them. This kind of reading is natural for a mind given to his instrumental way of thinking. But as the play proceeds we learn that the soothsayer's command is to obtain not just the bow but Philoctetes and that Philoctetes' return to the community must be voluntary. And we learn this fact in an interesting way: partly by a kind of accident, as one speaker or another states the authoritative command differently and with varying degrees of reliability, but much more importantly in another way, which has great relevance to the interpretation of all authoritative texts, legal among the rest. For the true meaning of the command is most reliably discovered by Neoptolemus gradually, as he matures, not by learning more about the actual words the soothsayer uttered but by learning more about the situation to which he spoke.

To one who learns to see things and to think about them as Neoptolemus does, and as we do too, it is not only immoral but unrealistic to think that all that is required here is the physical acquisition of an instrument, an inert bow and its arrows. What is required, as anyone with eyes can see — and this is after all what the soothsayer saw — is that the breach in the community created by Philoctetes' abandonment must be healed, and it can only be healed by his free and voluntary return. He must become a member of the community once more. This means that deceit cannot get the Achaeans what they want (nor indeed can Neoptolemus' original alternative, force): only persuasion, and persuasion of the sincere and authentic kind by which community is established (*peitho*), can work.

To conceive of what goes wrong as a matter of reading: Odysseus shows that he is incapable of reading a perfectly sensible directive in an intelligent way. In the law, we call such readers literalists: they are given to reading authoritative texts as "literal" commands without regard to their evident purpose and nature and without regard to the universe of understandings and commitments that render them comprehensible. Such a reader, then as now, is in fact likely to miss not only the true meaning of a text but its very words, as Odysseus does — to fail even at the task of literalism itself. The modern lawyer can perhaps thus take some heart from what Sophocles shows him: Odysseus is not a model of the crafty lawyer after all, unscrupulous but effective, rational but base, but an example of a lawyer who is bad in both senses of the term. At just the level where his

claims for himself are most seriously made, that he is a pragmatic success, he is in fact a total failure.

What Odysseus misses is the reality of the social world, and its power. His cast of mind, which itemizes the world into a chain of *desiderata* and mechanisms, is incapable of understanding the reality and force of shared understandings and confidences. This error appears today in the common idea that our "wealth" is material — the bringing of resources under individual control for purposes of exchange or consumption — while in fact our most important wealth is social and cultural: confidence in the reliability and good sense and generosity of our neighbors; trust in the reciprocal practices by which community is established; pleasure in finding, and making, shared meanings, and in elaborating them cooperatively; or, in terms of this play, confidence and pleasure in those social activities by which Neoptolemus and Philoctetes create a world of action and significance, a world so full of meaning for Neoptolemus that he cannot betray it. Think of our own desire for physical safety: whether one speaks of international relations, city streets, the workplace, or the family, the healthy and just community achieves a kind of security that mere force can never attain.

The ultimate fact about Odysseus is his disappearance into nothingness at the end. Once Neoptolemus faces him down he evaporates off the stage, to reappear only as a possible target for Philoctetes. The man whose great claim is to be a source of competent energy ends up literally nothing at all. The power of evil is only apparent, for in the realm of character and community it has no force, no actuality, against an integrated mind.

This beautifully dramatized evaporation is implicit in Odysseus' mode of thinking, for one thing ends-means rationality cannot do is choose its ends. They must be taken as givens. Compare the most systematic modern version of this kind of thought, market economics, in which ends are explicitly taken as external to the system: preferences are whatever any person happens to prefer, and all preferences are equal until given different values through the prices paid or obtained for them. Because Odysseus cannot think about the proper choice of ends, his whole being is spent in the service of ends that he cannot examine. As for the choice of means, Odysseus' attention to probability and improbability, cost and benefit, locates the authority for that choice outside the self, in the world, for the only question is what will work best. Such a mind cannot constitute a self.

Odysseus in fact makes this consequence of his thought explicit when he tells Neoptolemus to give himself "for just one shameful day, then to be the most honorable of men," and when he says that he himself "is capable of virtue when that is the game, but not when it is not": he says that he *is* whatever the situation calls for (line 1049). From one point of view this is familiar cynical advice not to be a goody-goody. From another, however, it is a horrifying statement of a person without a self, without a soul, for Odysseus seems wholly unaware that who he is today has, or can have, any relation to who he will be tomorrow, or was yesterday. For him the self has no continuity but is a series of discrete and unconnected actions and moments of consciousness, a set of fragments. This means that rational thought about, and action in, the social and cultural realm is impossible. Think of the social practices that Neoptolemus and Philoctetes share: could Odysseus pledge, or promise, or give or receive a trust?

If Odysseus is the pure "consequentialist" who fails to understand consequences of the most important kind, Neoptolemus is an exemplar of what can be called "character ethics" who at first fails to maintain his character. But as Odysseus becomes an increasingly destructive and empty version of himself, Neoptolemus is shown to develop, largely through the friendship of Philoctetes, into a mature and autonomous person who knows and can defend his own values. When Philoctetes' intractability presents him with a conflict between two different futures for himself, as one who is successful in destroying Troy and as one who is true to his pledge to and friendship with Philoctetes, Neoptolemus knows which to choose. This time he does not disintegrate.

What are we then to make of the fact that Neoptolemus' noble form of persuasion fails and Odysseus' ignoble form succeeds? Does this not upset the whole structure of value I have just outlined and undermine what seems to be the most important meaning of the play?

This is the central difficulty to which the play is written, and understanding it requires two initial clarifications. Despite what I have just suggested, the play makes clear that Neoptolemus' ultimate attempt to persuade Philoctetes in fact fails not because it is weaker than some alternative, but either because nothing would ever have succeeded against such intransigence or because the prior deception has alienated Philoctetes irreparably. We simply do not know what the result would have been had Neoptolemus

come to Philoctetes at the beginning, explaining that the soothsayer had prophesied his cure, and so forth, and urging his return. As it is, Philoctetes has just suffered a terrible abuse of trust at the hands of Odysseus and Neoptolemus, and it may be this that makes him so intractable. The proper kind of persuasion might have led to successful reconciliation and a proper reading of the play will keep that possibility in mind, at least as part of the background.

And in any event, as I suggested above, Odysseus' methods proved not to be successful. The play in fact shows that they will fail every time that true cooperation is required, for all that can possibly be obtained this way is an instrument or object, a "bow," and not the creation of a functioning community. The failure of Neoptolemus' persuasion, if failure there be, is thus not to be taken as an argument for the methods of Odysseus, which will fail even more certainly, at least on occasions like this one.

Where this leaves us is with the enforced recognition of certain central ethical and practical truths: that there is no sure-fire method of attaining your ends when those ends require the cooperation of others and that to recognize the freedom and autonomy of another, which is the only real possibility if one is to succeed at all, is necessarily to leave room for the exercise of that freedom and autonomy in ways you do not wish.

But there is more to it than that, for the play is at its heart about the conditions under which ethical and practical thought take place, about their ontology and epistemology if you will. Here its major point is that the only circumstances under which ends-means rationality might be rational never exist, for our thought must always take place on conditions of uncertainty that render that kind of "rationality" worse than useless. These conditions require us to think in other, more difficult, ways and to attend first and last to questions of character and community. The only rational "ends" — the only ends we can confidently use as guides to conduct — are conceptions of ourselves and of our relations with others, not materially describable states of affairs.

How does Sophocles establish these conditions of uncertainty and make them vivid? In this connection consider our initial mistake about the meaning of the prophecy, and the dominance of Odysseus' interpretation of it over us and Neoptolemus alike in the opening scene. As readers (or as an audience), we at first share Odysseus' mistake, and think that only the bow is required, for how could we do otherwise? We accept his statement of the premises of the expedition and only gradually come to perceive the conditions of life that render those premises impossible. We are led to misread so that our reading can be corrected.

When we learn that the meaning of the prophecy is uncertain, we at first want to know "what it says," that is, what its words are. This, we think, will enable us to judge what the characters should do. But in the real world we live always in uncertainty, without such clear prophecies or other directives; our hunger for clarity will not be satisfied; and we must accept the fact that our ethical and moral imperatives must in part be constructed by us — as the meaning of the prophecy in this play ultimately is — out of the materials of the world with which we are presented, out of the evident meanings and demands of the situation. In not giving us a reliable version of the prophecy until the very end — and even then giving it to us in a different form — and in showing us that we can nonetheless judge what is right, the play teaches us to accept the responsibilities of maturity and the conditions of uncertainty on which human life is led.

This suggests an answer to one who responds to the play by saying: "But don't we sometimes need only the bow and not the man? And *then* what Odysseus does would be justified, wouldn't it?" The answer is this: we do not know — we can never know — that we need the bow and not the man. To think that we do, or might, need only the bow, and to contrive on that basis is to commit ourselves to a course that is irrational as well as unethical.

Our thought about ethics and justice, about our practical social and political lives, must acknowledge that the facts, the imperatives, and the motives of ourselves and others are not fixed but uncertain, in a sense always made by us in conversation with each other. The conditions for pure ends-means rationality never exist. The habit of mind that yearns for these methods and their certainties is bound to be delusive, and ultimately — despite its claims to superior rationality — to be irrational, because it will not be in accordance with the nature of our world and our experience. The only way to function rationally in these domains is to recognize the radical uncertainty in which we live; to proceed by trial and error; to operate with a constant pressure towards openness; to acknowledge the necessity of community and cooperation both to the definition and to the attainment of any of our

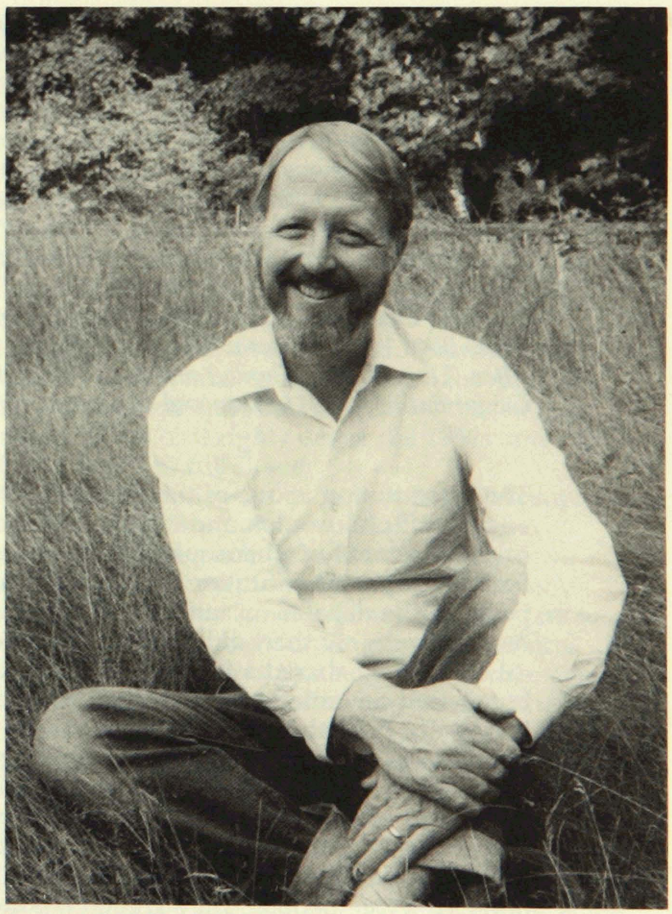
"ends"; to realize that one aim of life is the transformation of our own perceptions, wishes, and selves; and to regard the central intellectual imperative as the integration of all we can perceive, of all that we are, into meaningful wholes.

A second reality made vivid by the play is its insistence that all social action requires community and that community can never be compelled. Slaves will revolt, spouses will divorce, workmen will unite, partners will resign, allies will default, and often they will do so in the face of death itself. Our practical and moral lives are radically communal — unless perhaps we live alone on an island — and this means that our thought about what we want and who we are must reflect the freedom and power of others, without whose free cooperation we can have nothing of value, be nothing of value. This in turn means that hardheaded practical thought and sound ethical thought alike require us to recognize the existence of others and our dependence upon them. Our most practical end is never definable in terms of material results but always and only in terms of a certain kind of community: a way of facing the uncertainties of life together. These are the conditions of our existence; rhetoric is the art by which they are addressed.

But the play does more even than this, for in its demonstration of what it means to treat another as an "end" or as a "means" it establishes standards by which we can judge particular conduct and speech, particular relations and communities. This literary demonstration in the text, as read or performed, has a clarity and force — a persuasiveness — that theoretical argument could never have, for it works by constituting the audience in a new way. The play addresses the whole reader, not just one capacity or faculty, and evokes an integrated response, in which pleasure, excitement, enjoyment, commitment, as well as learning, are engaged. It integrates the experience and the self, locating them in the conditions of uncertainty in which we must actually live. The audience is newly constituted by the play in a new position, from which the only imaginable attitude to take towards persuasion and community is that of recognition and integration, the only imaginable rhetoric is sincere and authentic.

The community the play creates with us in fact has an actuality the others lack: it exists in space and time, in our minds and responses, as on a hot morning in the theater we become something, collectively and individually, for which we earlier had only the potentiality. The true meaning of the play is our response to it, who we become in response to it. This is what is most real about it, and the experience teaches us how to live in the uncertain world it represents: what to value and cling to, what to disregard, where to direct our attention and our energy.

For the rest of us, lawyers especially, this means that we must ask what worlds, what communities, our expressions and writings and conversations create. In our hands, what kind of theater can the law be, or become? When we practice law we represent others, whose needs to some degree determine our "ends," and our task is to "succeed": does that mean that, despite this play, we must act like Odysseus or be false to our profession? Must we see the "bow of Heracles" simply as an object, or can we see it as having a meaning that is essentially social and rhetorical: as standing for the autonomy and maturity of persons whose voluntary cooperation, upon equal terms, is always to be sought; a symbol of the attainment of full personality, for which community is always necessary? ◘



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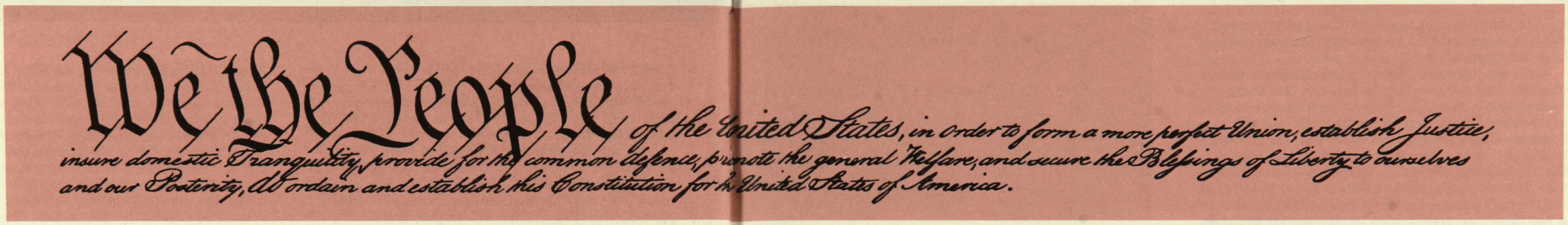

Philosophy and the Constitution

by Donald H. Regan

The article below originally appeared in Encyclopedia of the American Constitution *(1986), a four-volume work edited by Leonard W. Levy (editor-in-chief), Kenneth L. Karst (associate ed.) and Dennis J. Mahoney (assistant ed.). © 1986 by the Macmillan Publishing Company, reprinted by permission.*

In addition to Professor Regan, nine other members of the U-M law faculty are listed as contributors to the Encyclopedia: *Francis A. Allen, Lee C. Bollinger, Yale Kamisar, James E. Krier, Joseph L. Sax, Frederick F. Schauer, Theodore J. St. Antoine, Peter Westen and James Boyd White. Since writing their articles, Professors Allen (University of Florida) and Sax (University of California, Berkeley) have moved to warmer climates.*

The Constitution is one of the great achievements of political philosophy; and it may be the only political achievement of philosophy in our society. The Framers of the Constitution and the leading participants in the debates on ratification shared a culture more thoroughly than did any later American political elite. They shared a knowledge (often distorted, but shared nevertheless) of ancient philosophy and history, of English common law, of recent English political theory, and of the European Enlightenment. They were the American branch of the Enlightenment, and salient among their membership credentials was their belief that reasoned thought about politics could guide them to ideal political institutions for a free people. They argued passionately about the nature of sovereignty, of political representation, of republicanism, of constitutionalism; and major decisions in the ferment of institution-building that culminated in 1787 were influenced, if never

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wholly determined, by such arguments. The final form of the new federal Constitution embodied radically new views about the location of sovereignty — now located "in the people" in a stronger sense than any philosopher except Jean-Jacques Rousseau would have recognized — and about the function of the separation of powers and bicameralism.

Philosophy has never again played the role it played at the founding of the Republic, except perhaps in inspiring some abolitionist constitutional theory. To be sure, "philosophy" in a loose sense has always influenced politicians and judges, who are part of society. The Supreme Court in the late nineteenth and early twentieth centuries expressed in its decisions a laissez-faire "philosophy" compounded of Darwinism, a version of natural rights theory, and conservative economic beliefs. When the Court abandoned that "philosophy," they adopted another, more progressivist and pragmatic, and more attuned to, though at most only loosely connected with, the renascent empiricism among academic philosophers. Occasionally, the Court has adverted to specific philosophical doctrines, from John Marshall in *Fletcher v. Peck* (1810) to George H. Sutherland in *United States v. Curtiss-Wright Export Corp.* (1936) (on the necessary existence of sovereign power). Individual justices like Oliver Wendell Holmes may have been influenced by philosophical reading and by contact with professional philosophers. But, on the whole, while "philosophy" has had an influence, philosophy has had little — except to the extent that the "philosophy" of the present is always shaped in part by the philosophy of the past. (The decreased influence of philosophy has not lessened the relevance of philosophical issues.)

There are a number of reasons for the decreased influence of philosophy. In the open society the Framers helped to create, their style of argument, dependent on a relatively homogeneous and classically educated elite, could not maintain its political importance. Also, political philosophy itself became less unified. Widely divergent views were united under the umbrella of the Enlightenment by common opposition to hereditary privilege and hieratic religion. Once common enemies were vanquished, philosophical comrades parted company.

Another reason for the decreased influence of philosophy is that philosophy admits of no binding authorities, while law does, and does essentially. The Framers were creating a new political system. No one since then, except to some extent the Reconstruction Congresses, has had that luxury. Later contributors to our constitutional development have always had to interpret, and to attempt to maintain at least the appearance of continuity with, what has gone before.

Curiously, while recent philosophical thinking has had little discernible influence on constitutional law, the reverse is not true. The decisions of the Warren Court and the public discussion they generated certainly contributed, probably significantly, to the revival of interest among American philosophers in social and political questions, a revival that became apparent in the civil rights era of the 1950s and 1960s and that is still in full flower.

Whatever the influence or lack of it of philosophy on constitutional law, philosophical discussion among academic constitutional lawyers may have reached greater intensity in the 1980s than at any time since the 1780s. Constitutional law, like law in general, raises deep and perplexing philosophical questions. The questions that arise most immediately are questions of political philosophy, and of these the one that has generated most discussion is what is known as the "antimajoritarian difficulty": how can it be appropriate for the enormously consequential power of judicial review to be vested ultimately in nine individuals who are not chosen by the people and who are not politically accountable to anyone at all? The problem is especially vexing when the Court, in the space of three decades, has outlawed segregation, forbidden religious activity in the public schools, required reapportionment of the state legislatures and local government, created a con-

stitutional code of criminal procedure, established a right to abortion, and found in the equal protection clause a command that government shall not engage in sex discrimination.

There are three principal types of answer to the question how a democratic society can countenance such judicial power. The first answer, and the natural answer for any lawyer, is the claim that the Supreme Court has this power because the Constitution says it does. But the Constitution does not say that, at least not explicitly. The power of judicial review is nowhere explicitly granted. Now, in a sense, the lawyer's answer is still right. The Constitution as it has been interpreted from 1803 to the present does create the power of judicial review. The propriety of some form of judicial review is disputed by no one. Even so, it is noteworthy that at the very foundation of American constitutional law we encounter the problem of constitutional interpretation.

Given a document, and given agreement that its commands are to be put into practice by legal institutions, how do we decide what it commands? How do we decide what it means? Neither the words alone nor anything we know about the writers' intentions is likely to answer straightforwardly all the questions time will bring forth. For that matter, is it the document we are primarily concerned to interpret, or the political and doctrinal tradition proceeding from the document that we are concerned to interpret and to continue? And how are interpretation and continuation related?

It is important to distinguish between the document and the tradition and to ask how our commitments to each are interrelated. For example, we are firmly committed, by our allegiance to the tradition, to certain doctrines, such as the effective application of the Bill of Rights to the states and of the equal protection clause to the federal government, which can be deduced from the document only by extremely generous canons of interpretation. Some argue that if we are committed to these doctrines, then we must accept and continue to apply those generous canons. But that conclusion does not follow at all. Law, like any tradition, can sanctify mistakes.

The problem of interpretation does not arise only at the stage of justifying judicial review. It arises also at every application of judicial review. What is the Court to do with this power? The lawyerly answer, and again clearly the right answer in some sense, is that the Court should enforce the Constitution. But once more, how do we decide what the Constitution means?

The lawyerly exponent of judicial review also invites, by appealing to the Constitution, the most fundamental question: why do we care about the document or the tradition at all? It may be that to ask this question is to go beyond the domain of the lawyer as lawyer; but lawyers and judges are people, and every person who bears allegiance to the document or the tradition must face this question. Note, however: even though all lawyers and judges must face this question of political philosophy in deciding whether to carry out their roles, it does not follow that they must also appeal to substantive political philosophy in the course of carrying out their roles. Whether they must do that, and whether they could avoid doing that if they tried, are further issues.

We The People

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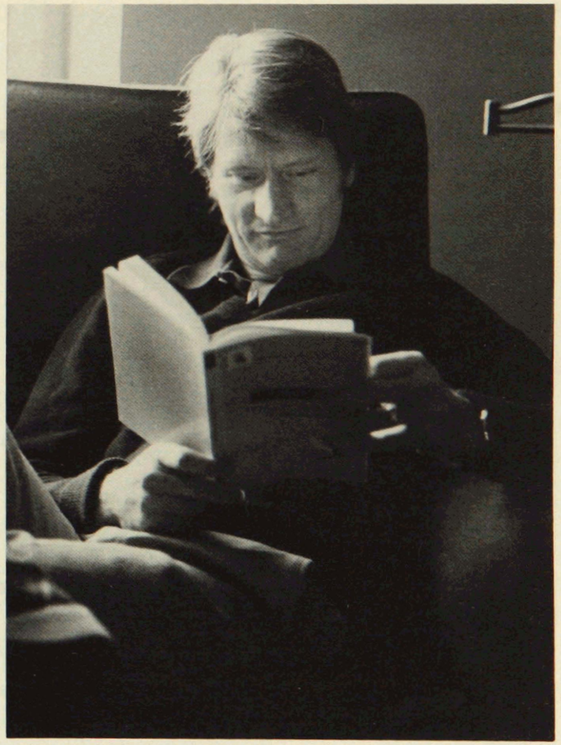
The difficulties with the lawyerly justification and exposition of judicial review have prompted two other main theories of judicial review. In one theory, judicial review is justified by the need to protect individual rights against infringement by majoritarian government. Exponents of this theory have drawn heavily on a neo-Kantian strain of contemporary American political philosophy in attempting to elucidate individual rights and the limits of the majority's legitimate power. In the other theory, judicial review does not purport to limit but merely to purify the democratic process. Judicial intervention is necessary to protect political speech and participation and to prevent distortion of the process by majority prejudice, but all in the name of more perfect majoritarianism.

Opposed as they are on the significance of individual rights, these two theories share an ambivalent relationship to the Constitution and the interpretive tradition. Whence comes the notion that individual autonomy should be protected, or that majoritarian democracy should be purified but not otherwise limited? Is it just that the Constitution says so? The Constitution says neither of these things explicitly; and it says both too much and too little to make either of these views a completely satisfactory reading of the document as a whole.

On the other hand, if someone claims to read the Constitution as protecting individuality (or purified majoritarianism) because of the independent moral weight of those values, why does the historical document come into it at all? Is not every appeal to the Constitution by a proponent of independently grounded values of autonomy or purified majoritarianism in some sense mere manipulation of other people's allegiance to the Constitution for itself?

We see that the questions raised by the lawyerly approach to judicial review are not so easily avoided. Still, the competing approaches we have noted alert us to dimensions of the problem not previously apparent. First, if the justification for judicial review is to promote general values such as autonomy or purified majoritariansim, that may help us decide how specific bits of the Constitution should be interpreted. Second, the tradition may refer to certain goals — justice, autonomy, democracy — which the tradition itself views as having a value and grounding outside and independent of the tradition. If the tradition commands allegiance both to its own specific content and to external values, it contains within itself the seeds of possible contradiction. What does faithfulness to the tradition then require?

As of the 1980s, the newest philosophical interest of academic constitutional lawyers is in hermeneutics. Whether there are answers here, and whether any such answers will influence the course of constitutional law, remains to be seen. Hermeneutics may bring new insight into the various meanings of the idea of operating in a tradition. Barring some remarkable feat of philosophical bootstrapping, hermeneutics will not answer the most fundamental philosophical question about constitutional law: why care about the tradition at all? And there is a final irony. Because the political community is made up of individuals who must confront this fundamental question, the community must confront it also, even though from another perspective it is by shared allegiance to the tradition that the community is defined. ◘



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GOOD LAWYERS

An education in the law may properly be described as a form of moral or sentimental education.

by Anthony T. Kronman

The following article is an excerpt from the third of a series of lectures entitled, "Politics, Character, and the Profession of Law," given at the Law School last semester. The series was sponsored by the Thomas M. Cooley Lectureship.

In my lecture yesterday I defined statesmanship as excellence in deliberation about public ends and described the statesman himself as someone with a special sort of character as well as an intellectual skill or expertise. The main point I shall make today is that lawyers too have a special character, a set of distinctive traits in many ways congruent with the statesman's. Because this congruence is one of disposition and desire, and not merely knowledge or belief, its existence helps to explain why so many lawyers are drawn to public life and why they are in general so successful in it. The congruence is not, of course, a perfect one — many lawyers lack either the appetite or capacity for public life and there are, in any case, other paths to statesmanship — but it is close enough to justify my claim that a temperamental link exists between them, that the statesman and lawyer resemble one another in their habits and desires.

When I say that lawyers have a special professional character, what I mean is that they share certain affective traits acquired through their common education and experience.

Law students do of course bring different dispositions with them: by the time someone begins the study of law, usually around the age of 25, his or her character is already largely fixed, and to the extent this is so the dispositional diversity that exists among people generally will be reflected in a similar diversity among lawyers. Nevertheless, the professional training that lawyers receive works on these dispositions in a regular and predictable way, strengthening some and weakening others, altering what might be called the affective economy of their souls. The changes that result may be marginal but they are real and enduring, and though the process is not a mechanical one that yields identical results in every case, it exerts a steady pressure in a particular direction, enough so that the traits of character to which it leads may be regarded as a professional norm. Because it works at the level of affect and disposition as well as the level of thought, an education in the law may properly be described as a form of moral or sentimental education. Those who reject this idea, maintaining that legal education involves nothing more than the transmission of doctrinal knowledge, will of course also deny that it makes sense to speak, as I insist we must, of the professional character of lawyers. The view that lawyers have such a character cannot in fact be separated from the claim that their professional education is in important respects a sentimental one, and it is mainly by elaborating this latter claim that I shall attempt to defend the former one.

A lawyer's sentimental education begins in law school and continues afterwards in practice. Of the various traits or dispositions that it encourages there are four that seem to me especially important. The first is an enlarged capacity for sympathetic detachment, about which I said a great deal yesterday in my account of the art of statesmanship. The second I shall call "legal conscience," by which I mean a concern for the well-being of the legal order as a whole, the kind of concern that a judge is expected to show in deciding the controversies that are brought before him. The third trait is an aversion to conflict coupled with an unusually high tolerance for it and the fourth trait is a form of conservatism: a strong attachment to existing arrangements together with a preference for change by small degrees.

These four traits, which overlap and reinforce one another, represent the main elements in a lawyer's professional character. Together they define a certain type of human being, recognizably different from other types and marked by a special integrity of its own. If we had to choose a single word to describe this type, perhaps the best we could do would be to borrow the word the Romans used to describe the combination of qualities they thought essential for success in public life: the word *gravitas*, which perfectly expresses the cool compassion and public-spirited conservatism I have in mind.

Of the four traits that I have named, the meaning of the first — an enlarged capacity for sympathetic detachment — will be clearest to you from what I have already said about it in my second lecture. It remains for me to explain, however, how this trait is strengthened by a professional training in the law. I want to begin my explanation with that part of legal education that I know best, the part that takes place in law school and that consists in a formal program of instruction under the supervision of nonpracticing professors.

The single most important fact about our system of legal education is that students are taught the law through the study of cases. In studying these cases, they are regularly asked to examine the controversies embodied in them from the points of view of the participants — judges as well as litigants — and to assume their roles or speak on their behalf. Law teachers differ in the ferocity with which they interrogate their students, but almost all behave in the way I have just described, teaching the law through cases and examining each case from a variety of conflicting points of view.

The capacity for sympathetic detachment, which the formal part of a lawyer's education helps to strengthen, must also be regularly exercised in practice...

What is the aim or function of this method of instruction? Some defend the case method on the grounds that it is the most economical way of teaching legal doctrine: because the cases that are taught have generally been selected for their difficulty, they force students immediately to confront the most obscure and unsettled issues in an area of law, thereby giving them a quick understanding of that area's

outer limits from which an understanding of its more settled interior can easily be inferred. Others defend the case method by pointing out that it trains students in those forensic skills that they will later need in practice to represent their clients effectively. Both of these explanations are plausible and I do not challenge their soundness. But they leave out of account another function of the case method which seems to me more important still: the nurturing, in those subjected to it, of a capacity for sympathetic detachment.

Most students who come to law school have strong moral and intellectual commitments but little experience with points of view other than their own. They know that such points of view exist, and are generally tolerant toward them, but they have rarely been required to entertain them in a sympathetic way. The case method of instruction forces them to do precisely this. When a student is asked to speak as the advocate for a particular point of view in a real or imaginary case, unless he declines to do so he must make the effort to see the position he is representing in its best possible light, to see everything favorable that can be said about it. This requires that he see the position, so far as he is able, from within, from the perspective of the person whose position it is, and to do this he must feel something more than mere tolerance toward it, he must feel, he must make himself feel, sympathy or compassion.

At the same time, the variety of positions he must assume and the constant movement among them force the student repeatedly to detach himself from the sympathetic associations he has formed. In this way, the case method strengthens the student's capacity for detachment as it develops his powers of sympathy, and habituates him to the simultaneous exercise of both. Often this leads to a softening of the moral and political convictions with which the student began the study of law — not to their abandonment, but to a blurring of sharp edges, a muting of the terms in which these convictions are expressed, to an acknowledgment of reservations. This is the natural consequence of an enlarged capacity for sympathetic detachment, which puts one closer to the views of others and farther from one's own, and the attitude to which it leads is well described by the ancient Roman motto, *"humani nihil a me alienum puto":* nothing human is foreign to me. This motto describes a certain condition of the soul, one marked by a wide and sympathetic acquaintance with human matters together with a cool detachment from them. To the extent it cultivates these qualities in a deliberate and disciplined way, the case method of law teaching may therefore aptly be described as a method for training souls, or to express the same idea differently, as a method for developing the repertoire of affective habits in which a particular form of character consists.

The capacity for sympathetic detachment, which the formal part of a lawyer's education helps to strengthen, must also be regularly exercised in practice and this tends further to entrench it as a trait of character. The role this capacity plays in the practice of law is obscured, however, by what I shall call the *vulgar* view of what lawyers do: vulgar because it reduces the whole of law practice to its least estimable part. On the vulgar view, it is the job of lawyers merely to implement the ends their clients give them. Clients are assumed, on this view, to come to their lawyers, for advice or representation or whatever, with their ends already fixed, and it is the lawyer's task to find the most effective and least costly way of doing what the client wants. This may require ingenuity and gamesmanship but never anything more and can therefore yield to the lawyer only the limited satisfaction that cleverness affords.

But the vulgar view, which conceives the lawyer to be a tool and his only skill a skill in deliberating about means, badly misrepresents the nature of law practice. Often clients come to their lawyers with conflicting ends, or confused ones, or with clear but misguided or evil ends, and when this happens it is part of the lawyer's job to help his client discover what he wants, or ought to want. To be sure, a client may reject the advice his lawyer gives him about his ends, but giving such advice is a regular and important feature of what lawyers do — of what they are asked and expected to do, and what they sometimes do even when it is not asked or expected of them. The fact that a lawyer is regularly called upon to give advice about ends as well as means, gives his work a dignity it would otherwise lack and his professional judgments an independence they could not possibly possess if they always took as their fixed predicate the client's own clear statement of his ends.

What does it mean for a lawyer to advise his client about the client's ends? Again, the vulgar view answers in a way that turns the lawyer into a tool or instrument: giving advice about ends, the proponents of this view say, is simply a matter of supplying the client with information about the legal consequences of the various courses of action he might undertake. Lawyers are legal experts who know certain things their clients don't, and according to the vulgar view, once a lawyer has told his client what he knows about the law, the client is

perfectly capable of making up his mind for himself.

What this overlooks, however, is the fact that the client's problem — the problem for which he sought the advice of a lawyer in the first place — may be due not to ignorance or factual error, but to a deficiency in his deliberative powers, to an incapacity on the client's part to think as clearly and calmly as he might about the problem that confronts him. When this is the source of the client's trouble, it will not be enough for his lawyer simply to tell him what the law says and what it will do to him if he chooses one course rather than another. In cases of this sort, if he is to give his client the kind of advice he wants and needs, a lawyer must himself deliberate on the client's behalf about the choice in question.

When a lawyer deliberates on his client's behalf and offers him advice about his ends, his deliberations might be called "third personal" to distinguish them from the first personal deliberations of one who is debating what ends to adopt for himself. Third personal deliberation is more complex than its first personal counterpart, but in its main features resembles it quite closely. A lawyer who is deliberating on behalf of a client must survey the client's options with the same sympathetic detachment he would employ if he were deliberating on his own account. In his imaginative elaboration of these options, the lawyer will, of course, make use of what he knows about the law and legal considerations will figure prominently in his conception of them. If he is to give the kind of advice his client needs, however, he must also make an effort to see what is of value in each alternative, and for this no amount of doctrinal sophistication can ever by itself be enough. To see the alternatives in their best light, and therefore to give his client good advice, a lawyer also needs sympathy and detachment, the same combination of traits that a person must possess in order to deliberate well about his own ends.

The difference, of course, is that a lawyer deliberating on his client's behalf rather than his own must first place himself imaginatively in the client's position, for it is from this perspective, and not the lawyer's personal point of view, that the deliberative survey of alternatives is to be conducted. Third personal deliberation is necessarily a two-step process, and it is this that gives it its special complexity. The first step, which has no analogue in first personal deliberation, consists in the imaginative adoption of another person's interests and values as one's own, and the second in a survey of various possible courses of action from the vantage point these interests and values afford. Like the second step, the first one too requires the exercise of sympathetic detachment, for unless he can combine these opposite-seeming dispositions, a lawyer will find it difficult to adopt his client's concerns while remaining sufficiently distant from them to offer calm advice.

There is another, even more obvious, way in which the qualities of sympathy and detachment figure in the practice of law. The client who comes to a lawyer often wants not just information or help in navigating the complexities of the legal system, but a champion, someone who will take his side and be, as Charles Fried has said, a kind of friend. The lawyer is not, of course, a full-fledged friend, for friends usually make one another's ends their own with less reservation than a lawyer may be said to embrace the ends of his client, and in any case true friends rarely ask to be paid for their acts of friendship. A lawyer must, in fact, work to maintain the distinction between his own ends and those of his client, to preserve a studious detachment from his client's concerns, for it is only this unfriendly attitude of distance that makes it morally and emotionally possible for him to represent people whose values are different from, and often in conflict with, his own.

At the same time, however, if he is to be a champion — something his client wants and usually deserves, and which the ethics of his profession urge him to be — he must work to sustain a spirit of sympathy in his relations with those whom he represents, whether he happens to like them or not. It is of course difficult to do this, to be a qualified kind of friend, while holding the most intimate concerns of one's client at arms' length, but this is just what lawyers are routinely required to do in their professional lives. The tension to which they are subject in their efforts to accommodate these conflicting requirements can be intense, and only a fixed habit of sympathetic detachment gives the lawyer who possesses it the ability to survive this tension over the course of a whole career, and perhaps even to make of it the occasion for a moral achievement of his own. ◘

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"Administrative search" is swarming around the Fourth Amendment like bees. And the drone may soon become deafening.

The FOURTH AMENDMENT in an Age of Drug and AIDS TESTING

by Yale Kamisar

The following article is adapted from an article that appeared in the* New York Times Magazine, *September 13, 1987.

Three quarters of a century ago the Supreme Court expressed some thoughts on constitutional interpretation that bear repeating today (Weems v. United States, 217 U.S. 349, 373):

"Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. . . [In interpreting] a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power."

The Fourth Amendment protects "the right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures" and bans the issuance of warrants except upon "probable cause" and certain other conditions. The wording of the amendment is succinct and majestic. But it is also vague and general. Thus, whether, and how, to apply it to new conditions has generated great controversy — and none greater than the current agitation over mass drug testing and mandatory or "routine" AIDS testing.

Until recently, the best illustration of the struggle to adapt the search and seizure provision to new developments was the Court's confrontation with the troublesome problem of wiretapping and electronic eavesdropping. In *Olmstead v. United States* (1928), the first wiretapping case to reach the Supreme Court, a 5-4 majority, per Chief Justice Taft, concluded, over the famous dissents of Holmes and Brandeis, that so long as electronic surveillance did not involve a physical entry into one's home or office, it fell outside the coverage of the Fourth Amendment. Conversations, reasoned Taft, were not "things" to be "seized" within the meaning of the amendment.

In the following years, as parabolic microphones and other forms of sophisticated electronic snooping made their presence felt, it became increasingly clear that the property-trespass theory of the Fourth Amendment could not survive. The Warren Court finally rejected it in the 1967 *Katz* case. The Fourth Amendment, the *Katz* Court told us, "protects people, not places"; the amendment applies whenever the government violates a person's "justifiable" expectation of privacy or one that society is prepared to recognize as "reasonable."

But that was not the end of the matter. Once tapping and bugging were deemed "searches" or "seizures," were they so inherently intrusive and indiscriminate that they were necessarily *unreasonable* ones? The Court answered in the negative. If, as Professor Albert Beisel once said, the Taft Court had read the Fourth Amendment "with the literalness of a country parson interpreting the first chapter of Genesis," to maintain that conversations are not only constitutionally protected, but beyond the reach of any warrant or court order would be to display little more sophistication.

Today it is hard to believe that the Supreme Court struggled so long and so hard to bring electronic surveillance within the ambit and the terms of the Fourth Amendment. For the constitutional problems posed by such surveillance, although not inconsiderable, pale in comparison with those raised by mass or random drug testing and mandatory or "routine" AIDS testing. Indeed, some day, I venture to say, we shall look back on such testing as either the most dramatic illustrations of the application of the Fourth Amendment to new conditions and purposes or the most striking examples of the failure to do so.

Why do I believe that electronic surveillance presented a much easier set of Fourth Amendment problems than those facing us today? It takes no leap of the imagination to say, as search and seizure historian Telford Taylor has, that the colonists would have been appalled by the suggestion that The King could conceal a messenger in their homes to overhear and report any seditious or libellous murmurings. In essence uncontrolled electronic surveillance amounts to the same thing. But some (including Attorney General Edwin Meese III) consider drug screening simply another medical testing procedure to determine fitness for duty. Moreover, law enforcement officials install taps and bugs for the same reason they conduct conventional searches — to secure evidence for use in criminal prosecutions. But testing for drugs and the AIDS virus is not undertaken for criminal investigatory purposes; it is administered as part of a general regulatory scheme.

Last year the president signed an executive order calling for widespread mandatory drug testing of federal employees. A growing number of state and local agencies have also instituted urinalysis screening. (So have many private employers, but they need not satisfy Fourth Amendment requirements because the Amendment only restricts government officals. However, government involvement in private conduct may make that conduct "state action.")

This spring the president announced — and this may only be the opening round — that the federal government would begin mandatory AIDS testing of selected groups who do not enjoy the usual Fourth Amendment protections: would-be immigrants,

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illegal aliens seeking amnesty and federal prisoners. The president also called upon the states to provide "routine" testing for state and local prisoners, patients at V.D. clinics and drug abuse centers, and for marriage license applicants. (Depending upon which official you believe, "routine" testing (a) is a nice, soft term for mandatory testing or (b) means that testing will generally be done, but individuals who object *strongly* may refuse to take the tests, a most difficult standard to administer).

These recent developments are putting enormous pressure on the Fourth Amendment. Very few people will worry about invasions of privacy when the question is whether airline pilots, air controllers, and others who hold the public safety in their hands must submit to drug tests. And not many will take seriously claims of privacy when government officials insist (even though they do so over the objection of most health experts) that mandatory AIDS testing is needed to prevent the spread of that lethal disease.

Government lawyers have urged the courts not to let the Fourth Amendment block efforts to combat a "national epidemic" in illicit drug use. We do have a serious drug problem, but "national epidemic" (or better yet, global epidemic) seems a more suitable term for AIDS, a health threat of staggering dimensions.

Experts estimate that 1.5 million Americans carry the AIDS virus in their bodies and that 20 to 30 percent of them will develop the fatal disease within five years of their infection. By the time they die, many more will be infected by them or those they have infected. By 1991, experts project, the AIDS death toll will exceed 50,000 per year, a figure comparable to the U.S. death toll of the entire Vietnam War. No cure for AIDS or a vaccine to prevent it has been found — or is in sight.

Whether or not they eventually develop AIDS, all carriers of the virus are presumed to be infected for life and able to spread the virus to others through sexual intercourse, the sharing of needles by drug users, or from mother to newborn. Because of the virus's long incubation period (typically three to five years), carriers can unknowingly infect many others. But an AIDS test can detect the presence in the blood of antibodies stimulated by the AIDS virus (usually within six to twelve weeks of the infection).

Legal objections to AIDS testing are still being shaped, but the legal battle over drug testing is currently being waged in the state and federal appellate courts and is expected to reach the U.S. Supreme Court in the near future. The outcome of that battle is bound to have an important bearing on AIDS testing.

In defending drug testing, government lawyers have displayed considerable ingenuity. Some of their arguments may be disposed of rather easily; others raise difficult questions.

The contention that state-mandated urinalysis is not a "search" or "seizure" because, unlike a blood test, it does not entail a physical invasion, or even a touching, of the body might have prevailed in the Taft Court era, but it has met a deservedly cold reception in the 1980s. Almost every court that has addressed that issue has ruled, and properly so, that urinalysis is covered by the Fourth Amendment because one has a reasonable and legitimate expectation of privacy in the personal information contained in one's body fluids. Moreover, a urine test will often be conducted under the close surveillance of a government representative, an embarrassing, if not a humiliating, experience.

Is the Fourth Amendment irrelevant because drug testing (or AIDS testing) is not directed at gathering evidence for use in criminal prosecutions? No, the Amendment applies to all governmental searches regardless of whether they are part of a criminal investigation. As the Court observed twenty years ago in the *Camara* case, it is surely anomalous to maintain that one is protected by the Amendment *only when* suspected of criminal behavior.

Questions have been raised about the effectiveness of mass drug testing. Even more have been raised about mandatory AIDS testing. (Early this summer, the American Medical Association adopted a report maintaining that, given the shortage of testing and counseling services and the low prevalence of AIDS infection among such people, AIDS testing of everyone getting married or going into a hospital would be an inefficient way to spend money. And many health officials insist that mandatory testing of everyone in the high-risk groups, homosexuals and drug users, would be counterproductive, driving away the

very people who need testing — and counseling — the most.)

But even if the courts agree that mandatory testing is an effective means of achieving an important public objective, effectiveness alone is not sufficient justification for a search. As one federal court recently noted: "There is no doubt about it — searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make [a governmental search] a constitutionally reasonable one."*

This June the point was driven home by Sol Wachtler, Chief Judge of New York's highest court. In the *Patchogue-Medford* school district case, in the course of striking down a school district program requiring all probationary teachers to submit to urinalysis regardless of any basis for believing that any particular teacher was using illegal drugs, Judge Wachtler reminded us: "By restricting the government to reasonable searches, the State and Federal Constitutions recognize that there comes a point at which searches intended to serve the public interest, however effective, may themselves undermine the public's interest in maintaining the privacy, dignity and security of its members."

"Some day . . . we shall look back on [drug and AIDS] testing as either the most dramatic illustrations of the application of the Fourth Amendment to new conditions and purposes or the most striking examples of the failure to do so."

May the government require submission to a drug test as a condition of public employment? No, answer civil liberties lawyers, quickly invoking the doctrine of "unconstitutional conditions" — the government may not condition employment (or the receipt of other state benefits) on the surrender of constitutional rights.

This is often the right answer, but not always. For the government as employer does have significantly different interests than the government as sovereign. Under certain circumstances, therefore, the government may indeed deprive public employees of some of the rights they would have as citizens at large — not on the simplistic theory that one must accept employment on the government's terms, even when these terms include the loss of constitutional rights, but on the ground that sometimes the full enjoyment of constitutional rights may be demonstrably incompatible with the mission of a particular public agency.

Thus, the Court has upheld the Hatch Act, which forbids partisan political activity by governmental employees, although such activity is obviously protected by the First Amendment in the abstract. Why? Because the concern that government employees might be coerced into working for the reelection of their superiors and the need to insure that the large government work force is not transformed into a powerful and perhaps corrupt political machine have been deemed sufficiently weighty to override the substantial First Amendment claims of civil servants.

The "government as employer" argument is likely to prevail in certain drug test settings. Not surprisingly, the Eighth Circuit recently upheld "systematic random selection" urinalyses of correctional institutional employees who have daily contact with prisoners, noting that drug use would significantly affect the employees' ability to perform their work within the prison, "a unique place fraught with serious security dangers." (*McDonell v. Hunter* (1987)).

Still more recently another federal court of appeals sustained a program requiring all customs service employees seeking transfers to certain sensitive jobs to submit to urine testing for drug use. (*National Treasury Employees Union v. Von Raab*, (5th Cir. 1987)). The court underscored "the strong governmental interest in employing individuals for key positions in drug enforcement who themselves are not drug users." Noting that "the drug user's questionable integrity, as well as the high financial cost of obtaining illegal drugs may increase his susceptibility to bribery by criminal drug enterprises," the court found *this particular* drug testing program to be a reasonable — and hence a constitutional — condition of government employment.

In a similar case, however, *Fraternal Order of Police v. Newark*, an intermediate New Jersey court, basing its decision exclusively on its state constitution, reached the opposite conclusion. This case involved a Newark police directive mandating that all memb-

ers of the narcotics bureau submit to periodic drug tests. As the court saw it, the directive authorized searches without individualized suspicion on the basis of a record that did not indicate that drug use in the targeted group was extensive. Moreover, maintained the court, objective indications of drug use (such as absenteeism, chronic lateness, and deterioration of work habits) and confidential information as to illegal use would adequately identify transgressing officers.

Some day the U.S. Supreme Court may rule that concerns about physical safety are sufficiently compelling to justify suspicionless drug testing of certain categories of law enforcement officers (and perhaps other public employees who perform dangerous tasks). But the argument that drug testing is a reasonable condition of government employment can only go so far. Thus, the U.S. Supreme Court is likely to agree with the highest court of New York, which, as previously noted, recently concluded that requiring all public school teachers eligible for tenure to undergo drug screening violated both the state and federal constitutions.

To say that the impairment of a school teacher's facilities by drug use poses a serious danger to physical safety is quite strained. To uphold suspicionless drug testing of school teachers would come close to saying that *all* public employees, no matter what the nature of their jobs, must submit to random or blanket drug testing. Ordinarily, on-the-job random drug testing should not be imposed absent a clear showing that a process of close supervision of employees plus testing upon some particularized suspicion (a less demanding standard than traditional "probable cause") produces unacceptable results.

If drug testing is a "search" and if individuals do not lose their Fourth Amendment rights merely because they work for the government, how can any public employee be tested without any suspicion particular to him simply because he is a member of a group that includes *some* who use drugs? Moreover, while the main targets of governmental drug testing have been public employees, AIDS testing is taking a different route. How can the government require all hospital patients or all health care workers to submit to AIDS tests in the absence of any individualized suspicion? After all, no court has, or ever would, approve a "dragnet" or "blanket" search of all people in a particular neighborhood, even one in a high crime area, on the rationale that such a police operation would turn up evidence of criminal conduct on the part of some people — as undoubtedly it would.

But the matter is more complicated than that. Although the Supreme Court has not specifically addressed these questions, the lower federal courts have consistently upheld what might be called "dragnet searches" of boarding passengers and their carry-on luggage at airport departure gates and what might be characterized as "blanket" metal detector searches and inspections of briefcases and parcels at the doors of courthouses and other governmental buildings. How can these "mass suspicionless investigations" be squared with the Fourth Amendment?

The answer is that the Court has viewed the Fourth Amendment as a flexible standard that permits fairly wide-open balancing of public and individual interests when government programs are directed at special problems unlike those confronted by the police in their day-to-day pursuit of criminals. In these instances (originally inspection of residential and commercial buildings for possible violations of health, safety and sanitation standards) the Court has carved out an exception to traditional Fourth Amendment constraints for what have been variously called "inspections," "regulatory searches" or "administrative searches." The essence of this exception is that searches not conducted as part of a typical police investigation to secure evidence of crime but as part of a general regulatory scheme, one applying standardized procedures negating the potential for arbitrariness, need not be based on individualized suspicion (nor, sometimes, be authorized by warrants.)

Airport and courthouse searches can best be justified as "administrative searches." But we should be slow to apply these precedents to mandatory drug and AIDs testing.

Courthouse searches were a response to the bombings of government buildings and airport searches were a response to a dramatic escalation of skyjacking and air piracy — crimes which exceed all others in terms of the potential for enormous and immediate harm. Moreover, as the University of Illinois' Wayne LaFave has pointed out, airport searches "present the government with a now-or-never opportunity" — the individual passing the checkpoint is in but momentary contact with the government and thus even a reasonable suspicion requirement would be unworkable. This, of course, is not so as to the ongoing supervision of government employees. Finally, a metal detector search constitutes a minimal intrusion, certainly a much more limited one than the forced discharge of bodily fluids.

Whether, when the Court finally comes to grips with the constitutionality of blanket or random drug testing it will rely on or sharply distinguish the airport search cases remains to be seen. It would be regrettable, but not too surprising, if the Court were to view drug and AIDS testing as simply other

kinds of "administrative searches."

The serviceability of the administrative search concept has gladdened government lawyers, but has alarmed others, including me. "Administrative search" is swarming around the Fourth Amendment like bees. And the drone may soon become deafening.

I agree with Professor LaFave, author of the leading treatise on search and seizure, who told me: "Unless the administrative search is limited to truly extraordinary situations where rigorous application of typical Fourth Amendment standards would be *intolerable*, would lead to unacceptably poor results, the Amendment — as we thought we knew it — will largely disappear. The need to detect drug users is important, but hardly more so than the need to search for narcotics dealers, kidnappers and murderers. Yet we have never demanded 100 percent enforcement of the criminal law, or anything approaching it. Instead, we are committed to a philosophy of tolerating a certain level of undetected crime as preferable to an oppressive state."

I also share the concern of the University of Chicago's Albert Alschuler that the administrative search doctrine looms as a potent privacy sneak thief. In a recent conversation I had with him, Alschuler commented: "We have witnessed and accepted airport searches, then courthouse searches. What next? Magnetometers at the doors of all office buildings and shopping centers? Will the day come when we won't be able to leave our homes and enter the public streets without undergoing a magnetometer test and a search of our belongings? Will these intrusions, too, be upheld as administrative searches? Are we moving toward a regime of total surveillance whenever we share space with someone else so long as we call the surveillance an administrative search?"

"The great tides and currents which engulf the rest of men," Judge Benjamin Cardozo once observed, "do not turn aside in their course and pass judges by." (*The Nature of the Judicial Process*, p. 168.) The cases upholding airport and courthouse searches in the absence of any individualized suspicion illustrate Cardozo's point. But I fear, and I believe there is good reason to fear, that the tides and currents now at work may engulf the Fourth Amendment itself. ◘

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Footnote

McDonell v. Hunter, 612 F.Supp.1122, 1130 (S.D.Iowa 1985)(Vietor, C.J.). On appeal, the district court's order was modified significantly, but Chief Judge Vietor's observation is still a felicitous one.

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