Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 32, NUMBER 2, WINTER, 1988

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Comings and goings

Simpson, Ellsworth, Gross, and Pildes join the faculty

LQN recently interviewed four new faculty members who arrived in Ann Arbor during the latter part of 1987. They bring with them a range of interests and expertise (in areas as diverse as legal history and psychology) that will greatly strengthen the Law School's educational program and its capacity to contribute to the profession and the scholarly community.

A.W. Brian Simpson

A distinguished scholar with eclectic interests

by Eve Silberman

"It has a sort of macabre attraction," says Brian Simpson modestly of his highly acclaimed — and provocatively titled — book *Cannibalism and the Common Law.*

A transplanted Britisher, Simpson, who joined the faculty this fall as the Charles F. and Edith J. Clyne Professor of Law, was a bit surprised at the widespread attention the book (published by the University of Chicago Press in 1984 and reissued by Penguin last year) received. In *Cannibalism and the Common Law,* Simpson did the first in-depth study of a famous 1884 case, in which a shipwrecked English captain and mate killed and ate a ship's boy. The notoriety of the case (the sailors were convicted and sentenced to death but were pardoned and served only a short sentence) helped put an end to the surprisingly common cannibalistic practice among Victorian sailors.

The case of the sailors on the yacht Mignonette is one familiar to most criminal law students.

A.W. Brian Simpson

"It raises the question," explains Simpson, "to what extent you can kill other people in order to save your own life." But Simpson was startled at what his findings revealed about both sailing culture and Victorian morality.

"What's odd about the case is that the two sailors actually boasted about what they'd done. Then you find out that the family of the ship's boy didn't blame them at all but accepted it."

To research the episode, Simpson did everything from working as a crew member on a large sailing ship to interviewing by telephone the descendants of the notorious Mignonette captain, who now live in Australia. His thoroughness characterizes his commitment to legal history — a field, he observes, finally coming into its own.

"When I was first an academic, the history of law was a very unfashionable subject, especially in law schools," he recalls. "In the last 15 years or so, it's really enjoyed a tremendous increase in popularity both in England and more particularly in America." Simpson's interest in legal history was kindled in the early 50s when he was an undergraduate at Oxford where he was encouraged by legal scholar Derek Hall. His books, *Introduction to the History of the Land Law* (which explored the medieval development of what evolved into the modern land laws of England and the United States) and *A History of the Common Law of Contract,* are considered classic expositions of the development of two of the main pillars of the common law. He has also written *Pornography and Politics* (resulting from his experiences as a member of a blue ribbon British government committee on pornography and censorship), and has edited *Oxford Essays in Jurisprudence* and *A Biographical Dictionary of the Common Law.*

Simpson's career has been both distinguished and eclectic. He taught first at Oxford, then at the University of Kent. For several years he served as a justice of the peace, an unusual experience for an academic. He described the voluntary position as "rather depressing," recalling that he dealt with a gamut of minor offenses like shoplifting and drunk driving. Simpson also served as dean of the Faculty of Law at the University of Ghana in 1968-69. He became a visiting professor at the University of Chicago Law School in 1979, joining the faculty in 1983.

Despite his long sojourn in the United States, Simpson maintains strong links to his native country, where two grown children live.

He is a professor emeritus at the University of Kent and still owns a 16th century cottage in a village near Canterbury.

The new U-M faculty member has found the Law School's intellectual climate much to his liking. "The Law School here is bigger than that of the University of Chicago, and there is a much more varied range of interest among the academic staff," he notes. "There's also a superb library here—a marvelous collection!"

Simpson spent a term at Michigan as a visiting professor in 1985. Both students and faculty were lavish in their praise of his teaching. This winter, Simpson is teaching English legal history and a seminar on law and morality. He is intrigued to find that American law students tend to be livelier than their British counterparts, who are usually undergraduates.

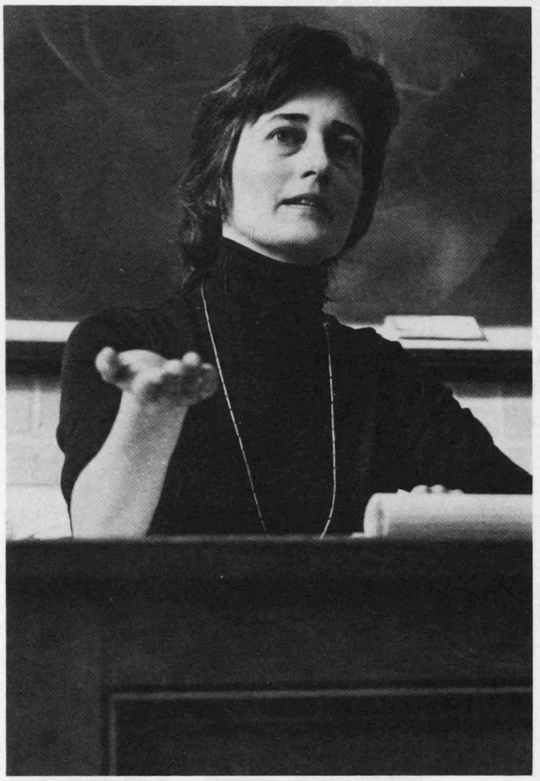
Simpson is the first faculty member to hold the Clyne Professorship. The new position is supported by an endowment created pursuant to the bequest of Edith J. Clyne, the widow of Charles F. Clyne, a member of the Law School Class of 1902. ◘

Eve Silberman is a staff writer for the Ann Arbor Observer.

Phoebe Ellsworth

A top scholar who believes in making science useful to society

The addition of Phoebe Ellsworth to the Law School and the psychology department was viewed as a major coup by both. A prodigious researcher and writer since her very first year of graduate school, she's now recognized in one sphere as a nationwide leader in the psychology of emotions and in another sphere as one of the country's top experts on psychology and law. She brings with her, too, a reputation as a gifted instructor. Her classes have always attracted large numbers of students, and three years ago at Stanford she received the Dean's Award for Distinguished Teaching.



Phoebe Ellsworth

Ellsworth says that what lured her here (and what lured her husband, Samuel Gross, as well) was not only the Law School's strength and diversity, but also the university's encouragement of interdisciplinary work. "Part of me really enjoys being a pure scientist," she says. "But I also like making science useful to society. I have a drive to do research that's going to be used and considered in court." Ann Arbor also appealed to the couple as a good place to raise their children, Alexandra, 6 and Emma, 1.

Ellsworth's interest in law arose while she was earning her Ph.D. in social psychology from Stanford in the late 60s. A visiting law professor was working with a commission on uniform state laws dealing with divorce and child custody, and Ellsworth helped him evaluate relevant psychological literature. That convinced her that "there were many areas in which the questions that the law needed answers to were really empirical social science questions."

One of those areas was death penalty litigation. In 1968, in *Witherspoon v. Illinois*, the U.S. Supreme Court considered the constitutionality of death-qualified juries. The challenge was brought on the grounds that weeding out prospective jurors who were opposed to the death penalty created juries that were biased against the defendant in capital cases. The justices declared that too little evidence existed for them to decide the matter, and they declined to set a precedent. Notes Ellsworth, "It was perhaps the most explicit invitation ever from the Court for empirical research on an issue of legal concern." Before leaving Stanford, Ellsworth took several law classes and did basic research on the death penalty under the tutelage of Anthony Amsterdam.

Ellsworth spent the 70s as a psychology professor at Yale, but she returned twice to Stanford — the second time (on sabbatical) — to work as Sam Gross's expert witness in his challenge to the constitutionality of death-qualified juries.

The challenge which Ellsworth helped Gross mount ultimately failed in the Supreme Court, but she feels it was a victory of sorts

for the social sciences. Too often, she says, the use of social scientific research findings is "haphazard." In this case, by contrast, "the justices had the research in front of them. It had been thoroughly evaluated in the lower courts, and the empirical arguments were fully and accurately described in the briefs."

Ellsworth, who is teaching a course on juries this semester, is currently focusing her legal research on what she calls "a microanalysis of jury deliberations." It's basic research, she says, aimed at "finding out in what ways jurors are doing their job well and in what ways they're doing it poorly, and how their performances might be improved." Among her early findings are that jurors are very good at getting the facts, but often poor at understanding legal definitions and the judge's instructions.

Last semester, Ellsworth taught Psychology of Litigation with Law School Professor Richard Lempert. She describes it as a practical course on the uses of psychology research findings for attorneys. "It seems clear that scientific and social scientific evidence is increasingly becoming a part of the law, and not just in the appellate courts," she explains. "We're going to see all sorts of experts coming in to testify in civil and criminal cases, too. I believe that lawyers are going to do better if they have some familiarity with how scientific experts think."

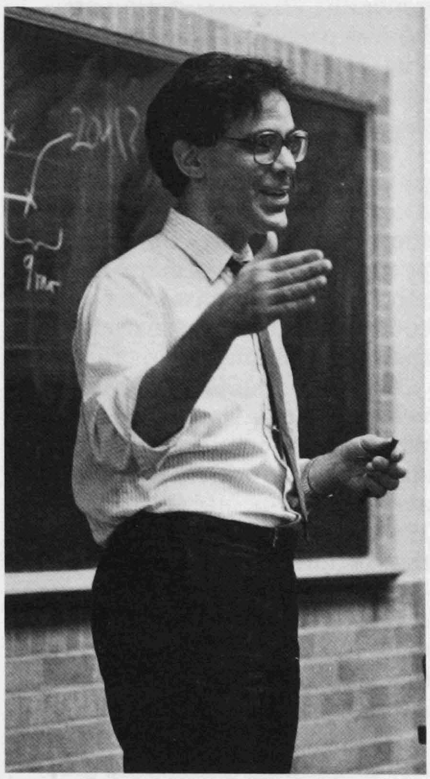
Looking ahead, Ellsworth is considering shifting her legal research back to where it began, in family law, a field where she believes the social sciences need to play an important role. "When you're talking about divorce and what's best for the children," she notes, "it's very hard to leave psychology out of it." ◘

Samuel Gross

Taking the winding road back to academia

Sam Gross did not come to the U-M Law School by any direct route. Since graduating from the University of California at Berkeley Law School in 1973, Gross has worked with the San Francisco firm of Kennedy & Rhine, with the United Farm Workers Union in California, with the Wounded Knee Legal Defense Committee in Nebraska and South Dakota, and with the NAACP Legal Defense and Educational Fund in New York City.

He has also conducted a solo practice for a half-dozen years, and for three years was director of the Death Penalty Jury Project, a part of the National Jury Project. During his energetic career he has tried felony cases and argued appeals in circuit courts, appellate courts, two state supreme courts, and the year before last, the U.S. Supreme Court. And while teaching at Yale and Stanford over the past seven years, he has also developed an innovative clinical instructional method.



Samuel Gross

Gross's journey back to academics began in 1978, when he organized the Death Penalty Jury Project. That project challenged the constitutionality of death qualification in jury selection, the process by which courts exclude anyone who is strongly opposed to the death penalty from juries that try capital cases.

Gross steered the issue from the Alameda County (California) Superior Court (which ruled against him) through an increasingly successful series of appeals, all the way to the U.S. Supreme Court. There, he briefed and argued *Lockhart v. McCree*. "It was the final act in the death-qualification drama," he says. He gives a wry smile. "We lost."

Taking on this project, Gross says, "has shaped what has happened to me since then in almost every aspect." He elaborates, first "it destroyed my own practice" — it took up all his time, and he simply became unavailable. Second, he met Phoebe Ellsworth, a Yale social psychologist, who became first his expert witness and later his wife. Third, it rekindled his interest in the social sciences and convinced him of their usefulness in law. And fourth, it brought him into contact with one of the legal profession's superstars, Anthony Amsterdam (then at Stanford Law School, now at NYU). Gross calls Amsterdam "both the leading intellectual and organizational force behind anti-death-penalty litigation in the U.S. in the past 20 years, and a major innovator in clinical legal education."

In the first year of their col-

laboration, Amsterdam and Gross prepared for the upcoming litigation on death qualification with a group of law students who used the issue as a basis for courtroom simulations. The possibilities of this type of teaching convinced Gross to rethink an earlier decision to avoid legal education.

This semester Gross is teaching both a lecture course and a clinical seminar on evidence. In the seminar he is using a method of simulation he developed at Stanford that deals with the problem of trying to reproduce in a clinical setting the emotions of the courtroom and the consequences for the participants. Gross develops simulated cases based on past experiences of his students. In this way, the students work with testimony fueled by real memories and personal interest. Gross interviews his students to discover an event they participated in or witnessed which, with a few circumstantial changes, could have been the subject of testimony in a trial. Students then perform all of the courtroom roles, including those of judge and witness, in trying these cases culled from their own experience.

Currently, Gross is finishing a book on racial discrimination in the uses of the death penalty. The book will focus in part on last year's Supreme Court decision in *McClesky v. Kemp.* That decision rejected a challenge based on studies by Gross and others which show that murderers of whites are more likely to receive the death penalty than murderers of Blacks. Next, Gross plans to pursue a long-term research project on the use in litigation of expert witnesses. ◘

Richard Pildes

A former chemist concerned with social issues

Richard Pildes

"This is an exciting time to begin a career in legal scholarship," says Richard Pildes, an undergraduate physical chemistry major who turned to law and then clerked at the Supreme Court. "The study of the nature and function of law has been deepened in recent years through exposure to the insights and techniques of a number of other disciplines."

Pildes's wide ranging theoretical interests give him special reason to be pleased to be launching his teaching career at the University of Michigan Law School.

"This school has a willingness to move beyond the internal analysis of legal doctrine to examination of broader questions concerning law as a cultural practice and the nature of the legal method more generally," he says, noting that he was particularly impressed that 20 percent of the faculty have joint appointments in other departments.

This winter, Pildes is teaching public law to first year students, a course that has been offered at the Law School only the past two years. He notes that many law schools have begun adding courses in public law to update their curriculum.

"Much of the 20th-century development of law involves the displacement of common law with statutory law, a trend that accelerated even more rapidly in the 1960s and 70s. Today, the law that people deal with in practice — as well as the law affecting individuals in their daily lives — more often originates with legislatures or administrative agencies rather than with courts."

He describes the course "as an attempt to expose students to the materials and facts of legislative processes, to develop understanding of the implications of a realistic view of this process for other institutions, such as courts, and to raise questions about the nature and role of public law generally. The course will range from statutory interpretation, examined from the perspective of modern understandings about the practice of interpretation generally, to considerations of structural reform in democratic institutions."

Pildes describes himself as interested in "public policy and the role of law in the development of ideas and political culture." He explains, "I hope to teach courses like constitutional law, perhaps federal courts, maybe administrative law." Potential research topics include: "legislative processes and law's simultaneous capacity for both legitimating existing institutional arrangements and for criticizing and transforming those arrangements."

Concern about social issues triggered Pildes's interest in public law — and, in fact, led him away from a promising career in science. "I'd always been torn between a career in science and a career in the humanities," he says. As an undergraduate at Princeton, he majored in chemistry and won a couple of major chemistry prizes. After graduation, he worked briefly as a research chemist for a firm in Illinois. "But I decided," he says, "that a career in the lab would be too isolating from the kind of ongoing social concerns I had. I came to the law seeking social commitment and change."

At Harvard Law, Pildes was an editor of the *Harvard Law Review*. He went on to clerk for Judge Abner Mikva of the Court of Appeals, and for U.S. Supreme Court Justice Thurgood Marshall. The latter experience, in particular, enhanced his excitement about the law. "Justice Marshall is one of the great figures of American political life in this century, and experiencing American history through his eyes, as well as developing the perspective on the entire court structure afforded by a year at the Supreme Court, increased my engagement with public law."

Pildes rounded off his pre-Michigan career by working for the Boston law firm of Foley, Hoag & Eliot, where he concentrated in appellate litigation, including some pro bono litigation. "I knew I wanted to go into teaching," he says, "but I believed some practical experience would provide a better perspective and improve my capacity to train students."

Pildes describes himself as "ecstatic" about the opportunity to teach. "Law school for me was an exhilarating intellectual experience, and I hope I can communicate to students some sense of the power and importance of ideas in the law as well as some excitement about law's capacities." ◘

Back by popular demand

Fleming returns as interim president

Robben W. Fleming, president emeritus of The University of Michigan and professor emeritus of the Law School, began his term as interim president of the U-M on January 4. The interim appointment was made by the regents last September. Fleming's term is expected to last approximately six to eight months, while the search for a new president proceeds. Former President Harold T. Shapiro assumed the presidency of his alma mater, Princeton University, in January.

A specialist in labor law and industrial relations, Fleming was president and professor of law at Michigan from 1968 to 1979. He left the U-M to head the Corporation for Public Broadcasting, where he served until 1981. He returned to the Law School in 1981 and was named professor emeritus in 1985.

Remarking on the appointment, Law School Professor Thomas E. Kauper, who heads the faculty search committee, said, "The university is most fortunate that Robben Fleming has agreed to serve as interim president. His wide-ranging knowledge of the university, his sound judgement and administrative skill will keep the institution moving ahead while the search for Harold Shapiro's successor goes on."

Fleming served as president during one of the most turbulent periods in the history of higher education. During his tenure, he earned a reputation as a skillful negotiator who was able to maintain calm while safeguarding the climate of intellectual freedom on campus.

Robben W. Fleming

Over the coming months, Fleming expects that the bulk of his work will involve the routine business of day-to-day decision-making. One of his primary concerns will be in the area of minority issues, where he is committed to carrying through the initiatives set forth by former President Shapiro last spring. These include the university's efforts to increase minority enrollment and retention, to recruit minority faculty and staff, and to develop programs dealing with various aspects of racism, multi-culturalism, and diversity.

Fleming graduated from Beloit College in 1938 and from the University of Wisconsin Law School in 1941. He was director of the Industrial Relations Center at the University of Wisconsin from 1947 to 1952 and served as executive

director of the National Wage Stabilization Board in 1951. He directed the Institute of Labor and Industrial Relations at the University of Illinois from 1952 to 1958, and served as professor of law there from 1958 to 1964. Prior to coming to the U-M, he held the posts of chancellor and professor of law at the University of Wisconsin at Madison for three years.

When asked to assume the interim presidency last fall, Fleming replied jokingly, "Well, to paraphrase Jimmy Carter, I do not lust for it. For several years now my wife and I have been spending the winter months in Florida. But I guess I'm the logical person for the job." He continued, "The heartwarming thing is how kind people have been about saying they're glad to have us back. We're looking forward to it." ◘

Bad Acts and Guilty Minds

New book by Leo Katz wins critical acclaim

Henri plans a trek through the desert. Alphonse, intending to kill Henri, puts poison into his canteen. Gaston also intends to kill Henri but has no idea what Alphonse has been up to. He punctures Henri's canteen, and Henri dies of thirst. Who has caused Henri's death? Was it Alphonse? How could it be, since Henri never swallowed the poison. Was it Gaston? How could it be, since he only deprived Henri of some poisoned water that would have killed him more swiftly even than thirst. Was it neither then?

Strange conundrums like this one have fascinated lawyers and nonlawyers for centuries, raising problems of causation, intention, negligence, necessity, duress, complicity, and attempt. With wit and intelligence, Leo Katz's new book, *Bad Acts and Guilty Minds*, seeks to understand these moral, linguistic, and psychological puzzles that plague the criminal law. Drawing on insights from analytical philosophy and psychology, he brings order into the seemingly endless multiplicity of these puzzles: many of them turn out to be variations of a few basic philosophical problems, making their appearance in different guises.

To test his arguments, Katz moves far beyond the traditional body of exemplary criminal law cases. He brings into view the decisions of common law judges in colonial and postcolonial Africa, famous cases such as the Nuremberg trials, Aaron Burr's treason, and ABSCAM, as well as famous incidents in fiction.

The book, published by the University of Chicago Press late last year, has already received some enthusiastic pre-publication reviews. Michael S. Moore, Robert Kingsley Professor at the University of Southern California Law School and author of Law and Psychiatry: Rethinking the Relationship, said of it: "Leo Katz's *Bad Acts and Guilty Minds* is unique in the field of criminal law jurisprudence. The book combines a theoretically sophisticated discussion of serious issues with a lively, engaging style and fresh point of view . . . Katz's book should become a classic in the field for years to come. I recommend it to beginning law students and lay persons interested in an introduction to the field, as well as to criminal law academics interested in furthering their already well-developed understanding of criminal law theory."

Sanford H. Kadish, Morrison Professor of Law, University of California, Berkeley, wrote: "*Bad Acts and Guilty Minds* is a fascinating, profound and accessible review of the moral perplexities of the substantive criminal law. Mr. Katz can tell a story and probe an argument with equal dexterity."

An excerpt from the book begins on p. 25. ◘

Mastermind of legal reform

Pierce begins 19th year as head of NCCUSL

Professor William J. Pierce is something of an enigma — an inscrutable veteran of legal reform who has spent over 20 weekends a year for the past three decades hammering out the words, the phrases, the very punctuation of state laws.

To those who have worked with him, however, Bill Pierce is the mastermind of the National Conference of Commissioners on Uniform State Laws (NCCUSL). "No one can appreciate the full scope of his abilities without having seen him participate in a committee drafting session," notes Law School Professor Lawrence Waggoner, who has served as a reporter for a uniform act. "Bill has an uncanny ability to solve problems that have stumped the so-called experts, no matter what the subject matter."

William J. Pierce

"He's a marvelous generalist with a wide-ranging intellect," says Richard V. Wellman, the Robert Cotton Alston Professor of Law at the University of Georgia, who formerly taught at Michigan. Wellman explains, "I've never met anyone who can come at whatever is under discussion from so many different perspectives and with so many different ideas."

The National Conference of Commissioners on Uniform State Laws is an organization designed to promote uniformity in state laws. The conference is composed of commissioners appointed by the governors (and drawn from the ranks of lawyers, judges, legislators, and law professors) of each state, the District of Columbia, and Puerto Rico. The commissioners meet annually to consider drafts of proposed uniform legislation. Proposals are referred to a Committee on Scope and Program which makes an investigation, sometimes hears interested parties, and reports to the conference whether the subject is one on which it is desirable and feasible to draft a uniform law. If the conference decides to accept a subject, a special committee of state commissioners with expertise in the area under consideration is appointed to prepare a draft of an act.

Pierce's job as executive director includes overseeing the research and drafting processes, raising hypothetical problems, helping to select the reporters employed by the conference, and assuring that the proposed legislation is practical. "Bill attends every meeting of the drafting committees of the NCCUSL," notes Little Rock,

Sandalow appointed to Sunderland chair

Former Law School Dean Terrance Sandalow has been named the Edson R. Sunderland Professor of Law. The position was formerly held by Francis A. Allen, who retired as of June 30, 1987.

Sandalow, who was dean of the Law School from 1978 to 1987, is one of the leading figures in American legal education. He received his A.B. and J.D. degrees from the University of Chicago. He began his teaching career at the University of Minnesota, and joined the faculty of the University of Michigan in 1966.

Professor Sandalow's career as a scholar has covered the fields of municipal government and constitutional law. Besides numerous articles, he has co-authored a pathbreaking casebook, *Government in Urban Areas*, and co-edited *Courts and Free Markets*. In addition to his work at the Law School, he has frequently testified before Congress on pending legislation.

In recommending the appointment, Dean Lee C. Bollinger noted, "[Sandalow's] work is marked by his great breadth of learning and interest in virtually all of the areas of social science and the humanities that continually grow in importance in legal scholarship. As colleague and dean, Professor Sandalow has been a vitally important source in shaping the directions that will be followed by the Law School in years to come." ◘

Arkansas attorney Phillip Carroll, immediate past president of the conference. "These committees seek statutory solutions to some of the knottiest contemporary problems facing state governments. While the solutions must be practical, obtainable, and constitutional, there are no other restraints on creativity. Thus, Bill is placed in an atmosphere where he functions best. He is the mastermind of the conference. He is our diagnostician of hidden flaws, our innovator when solutions seem out of sight, our pragmatist when fancy is about to take flight."

Pierce, who has served as NCCUSL's executive director for nearly 19 years, has been involved in the conference since early in his career, serving first as a reporter and then as a state commissioner. A 1950 graduate of the Law School, he was recruited as a faculty member because of his deep interest in and intuitive understanding of the legislative process.

A gray-haired man with a portly, Hitchcock-like bearing and build, Pierce approaches legal education and legal reform in a no-nonsense fashion. "I've always had an interest in law reform, in making the law better and more in tune with changing social and technological conditions," he says simply, a characteristic smile flickering on and off across his face. The smile fades into a slightly stern look as he continues, peering down from behind his massive oak desk in his spacious Hutchins Hall office.

"If you look at law review articles, how many say the law should be changed?" he asks. "*Very few,*" he says emphatically. "And, of those, how many contain a draft of the statute and say how it should be done? One in a blue moon! Drafting an actual law is much more difficult than simply proposing change. The tough part is knowing *how* to do it."

Since its inception, the conference has drafted over 200 uniform laws on numerous subjects in various fields of law. Though it's hard to gauge the total number Pierce has worked on, those who have worked with him attest that he has, in large measure, shaped the conference's portfolio of uniform state laws. As Phillip Carroll put it, "Indirectly, Bill Pierce has played a major role in the development of the law of this nation. The thousands of commissioners who have witnessed his skill and wit salute him." ⊠

Vining participates in Mellon Seminar

Joseph Vining, the Harry Burns Hutchins Professor of Law, was a member of the Mellon Law Seminar held for four days in late 1986 at Dunwalke, a retreat run by Princeton University. The subject of the seminar was Law and Morality and, particularly, new directions for and sources of legal thinking for the future. Vining and six others presented papers for which there were respondents and discussants. The title of Vining's paper was "Law and Enchantment: The Place of Belief." The papers will appear in book form this year.

The gathering was unusual in its mixing of anthropologists, sociologists, philosophers, and political scientists with legal scholars, its bringing together representatives of the Islamic and Judaic with the English, American, and Canadian traditions, and its emphasis on theological as well as moral reasoning as a future source for developments in law.

Participants included Joseph Raz of Oxford, Fazlur Rahman of the Oriental Institute of the University of Chicago, Dean Izhak Englard of the Hebrew University Law School (Israel), Ernest Weinrib of the University of Toronto Law School, Steven Toulmin of the Committee on Social Thought of the University of Chicago, and Joseph Boyle from the Philosophy Department of St. Michael's College in Toronto.

Respondents included Alan Donagan from the California Institute of Technology, Lawrence Rosen, chairman of the Department of Anthropology at Princeton and also on the Northwestern Law School faculty, Roger Michener of the Department of Sociology at Princeton, and Judge John Noonan of the U.S. Court of Appeals for the 9th Circuit, formerly of Boalt Hall.

Shown above are Joseph Vining, Fazlur Rahman, Roger Michener, Alan Donagan, Dean Englard, and Joseph Raz in front of Dunwalke.

In memoriam: William W. Bishop, Jr.

A favorite among students, a pioneer in his field

Professor Emeritus William W. Bishop, described by Dean Lee C. Bollinger as "a towering figure in international law as well as . . . an incredibly sweet man," died December 29, 1987 at the age of 81 of a heart attack.

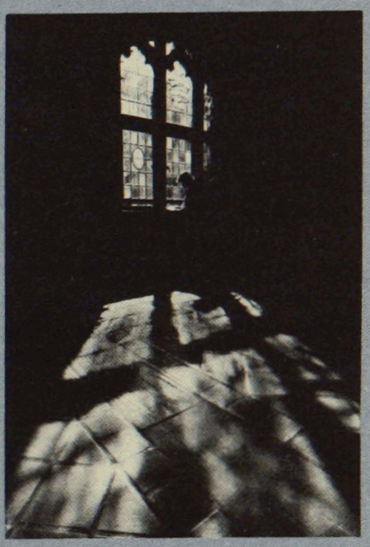
"He was just adored by students," Bollinger said. "Students would always prepare for his class and always attend class because he was so kind and apologetic if he called on them and they weren't prepared."

Bishop received his A.B. from the U-M in 1928 and his J.D. from the Law School in 1931. He devoted most of his academic career to the U-M, joining the law faculty in 1948. During his tenure, he was the co-director of the Law School's international legal studies program, and received several honors, including the Distinguished Faculty Achievement Award in 1965. He served as the Edwin DeWitt Dickinson professor of Law from 1966 to 1976.

A pioneer in his field, Bishop was the author of the casebook *International Law Cases and Materials*, a landmark volume widely used since it first appeared in 1949.

Bishop married Mary Fairfax Shreve of Dunn Loring, AV, in 1947. After her death in 1979, he lived by himself but traveled frequently with tours sponsored by the U-M Alumni Association or with his daughter, and regularly attended concerts and U-M sports events. Bishop was a lifelong supporter of the Wolverine Council of the Boy Scouts of America, and actively pursued his interests in reading, walking, and bird-watching up until the time of his death.

Bishop is survived by his daughter, Dr. Elizabeth S. Bishop (of Ann Arbor and East Lansing, MI), cousins, and friends. Memorial contributions may be sent to the Law School Fund in his name. ◘



A Tribute

by John H. Jackson

The following tribute is based on remarks presented at a memorial service held January 22 in the Lawyers Club, where Professor Jackson was one of several speakers.

We of the law faculty are sadly adjusting to the departure of our treasured colleague Bill Bishop.

The Gothic premises of the Law School will seem emptier without Bill's gothic presence, for surely he represented the values of the architecture around him — stability, solidness, uncompromising excellence, attention to detail, and a bit of "old-fashionedness" in the laudatory sense of that phrase.

It is hard to believe that Bill had been retired for 11 years. He remained incredibly active — teaching part time every year, and regularly coming to his Law School office to pursue ▶

his research interests, (often in a tie and coat even in mid summer!). For many years Bill Bishop has been a central academic figure of international law in the United States. After more than a decade of practical experience, including a 1939-1947 period of service in the Legal Advisor's Office of the U.S. State Department partly as assistant legal advisor, Bill entered academic life, teaching at Pennsylvania and Columbia, then joining the University of Michigan faculty in 1948 for the remainder of his career. During much of this career he was the editor-in-chief of the *American Journal of International Law*, a position that gave him a world wide prominence and influence rarely matched in his subject area. He delivered the prestigious general course on international law at The Hague Academy and was a member of the Permanent Court of International Arbitration (which plays a key role in the selection of judges for the world court.)

Bill was a popular teacher, always filling his courses to over-capacity. He was revered as a professor in the "anti-Kingsfield" model, being one who cared about his students and who treated them with kindness and courtesy.

Bill was also, for many years, a veritable "elder statesman" for not only the law faculty but for his professional associates around the world and particularly for the American Society of International Law and the *American Journal of International Law*.

Our sadness is tempered only by the belief that he left us in the manner he wanted to — active to the last, and very suddenly.

Fighting child abuse

Two clinical programs at work to help protective services

Disturbing accounts of incidents of child abuse have been appearing in the news recently with alarming frequency. Late last year *Newsweek* cited statistics compiled by the American Humane Association indicating that official reports of child abuse and neglect have risen 223 percent nationally since 1976.

Social workers are frequently called upon to deal with the legal aspects of investigation and intervention in such cases. Yet, many caseworkers lack sufficient knowledge of the juvenile court process to work confidently and effectively on behalf of children needing protective services. In a 1978 survey of 183 Michigan protective services caseworkers, legal training was identified as the primary training need. (See David F. Gillespie, "Protective Service Worker Study," George Warren Brown School of Social Work, Washington University, St. Louis.)

In response to this need, Clinical Law Professor Donald Duquette and other Michigan faculty associated with the U-M Interdisciplinary Project on Child Abuse and Neglect developed a training program for social workers several years ago. Through the program, nearly 400 social workers throughout the state of Michigan receive training on legal aspects of child abuse and neglect each year.

For the past two years, the training has been conducted by Lisa D'Aunno, Law School graduate (JD '84) and clinical assistant professor in the Child Advocacy Clinic. The training sessions, sponsored by the Michigan Department of Social Services, are held periodically at various cities throughout the state. D'Aunno typically co-trains with a social worker from the state Department of Social Services and Dr. Clyde Owings, a pediatrician and associate professor in the U-M Medical School.

Lisa D'Aunno

The training is organized into two courses. The first, Legal Aspects of Child Abuse and Neglect, leads protective services and foster care workers through the legal steps involved in non-voluntary intervention in an abusive or neglectful family. The second, Differential Diagnosis and Treatment of High Risk Families, focuses on three areas: 1) the legal limitations of investigation of suspected child abuse, 2) strategies for termination of parental rights under extreme circumstances, and 3) the growing field of protective services caseworker liability.

Each course consists of two days of lectures, discussions, question and answer periods, and simulated hearings. In conducting these sessions, D'Aunno tries to strike a balance between a theoretical perspective and practical tips for day-to-day practice. Regarding the theoretical aspect of the course, she notes that "imparting an understanding of a concept such as due process in a couple of hours can be really challenging." For example, caseworkers sometimes fail to understand the need for a court order before entering a home to view a child over parental objections. Child welfare workers often feel the legal system is weighted heavily against the state's interests in protecting children.

Much of the training, however, is devoted to "nuts and bolts" material, such as how to organize facts and draft petitions, how to testify in court, and how to document a case so that records can later be used as evidence.

"In most Michigan counties," D'Aunno notes, "the Department of Social Services is represented in court by the busy local prosecutor's office. Caseworkers often find themselves, however, making decisions which affect the legal outcome of the case, usually without counsel. They need a 'road map' of the juvenile court process to enable them to carry out their work effectively."

The Michigan Department of Social Services is currently considering proposals to make such training mandatory.

Training social workers is very gratifying, D'Aunno finds. "I get no greater satisfaction than helping caseworkers do their jobs better and feel better about their role and status in the community," she says. "Before entering law school, I seriously considered becoming a social worker. My interests were in social service administration, particularly the professionalization and empowerment of the caseworker. After I became a lawyer, I began to search for ways to combine that old interest with the practice and teaching of law."

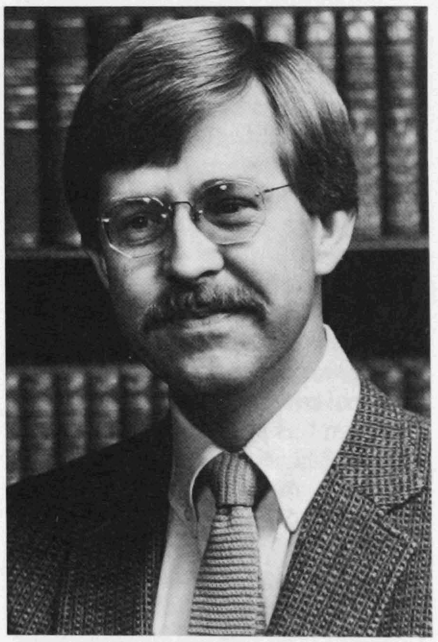
D'Aunno, who last fall along with her husband, Thomas, became a first-time parent of a daughter, Elizabeth Jane, was appointed by Governor James Blanchard in 1985 to serve on the board of Michigan Children's Trust Fund for the Prevention of Child Abuse and Neglect. ◘

Grant to support interdisciplinary training

The Law School's Child Advocacy Clinic, together with four other U-M units, was recently awarded a three-year federal grant to support interdisciplinary graduate training in child abuse and neglect. The grant, totalling $150,000 for each of three years, is sponsored by the U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect.

Clinical Law Professor Donald Duquette, who applied for the grant, explains that since its beginning in 1976, the Child Advocacy Law Clinic has worked closely with the Departments of Pediatrics, Psychiatry, Social Work, and, more recently, Psychology. Beginning this semester, the grant will provide stipends of $1000 and credit for fellows from each of the five units who have completed at least two years of graduate education. The four Law School fellows, Sondra Soderborg, Elizabeth Barrowman, Susan Pachota, and Barbara Hooberman, were selected from students who had already taken the clinical course in child advocacy. The fellows will work together on child abuse and neglect cases in seven different clinical sites, and will meet weekly with faculty in a joint interdisciplinary seminar. The joint sessions will focus on clinical skills necessary to respond effectively to such cases and will review significant questions of public policy raised by these cases.

Fellows from each of the five units will be exposed to the full range of child abuse and neglect cases including 1) prevention programs, 2) presentation of physically battered children at the University Hospital, 3) diagnosis and assessment of chronically neglectful families, 4) psychological and social work treatment of child abuse and neglect cases, and 5) legal intervention, termination of parental rights and adoption. ◘



Donald Duquette

Faculty activities, awards, honors

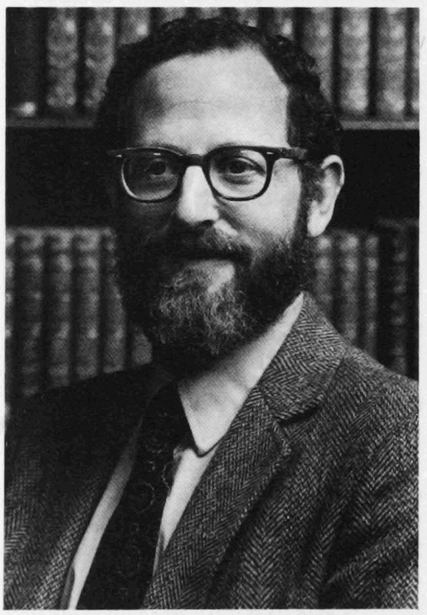
Rebecca Eisenberg delivered a paper at a symposium on academic freedom held October 16 and 17 at the University of Texas Law School. The title of her paper was "Academic Freedom and Academic Values in Sponsored Research." The symposium was jointly sponsored by the *Texas Law Review* and the American Association of University Professors. The symposium papers and comments will be published in a forthcoming issue of the *Texas Law Review*.

Rebecca Eisenberg

Thomas A. Green has become editor of *Studies in Legal History*. The series is published through the American Society for Legal History by the University of North Carolina Press. In all, the series has published about 30 books, including some of the most influential recent works in legal history.

Besides scouting for promising manuscripts and overseeing an external review process, Green reads all submissions and prepares extensive recommendations for revision. Much of his time is devoted to young scholars. Green explains, "The distance between dissertation and book is often very great and almost always daunting. The A.S.L.H. series review process provides a reading and critique even for manuscripts that are still a long way from ready for a formal external review."

Green has served as the society's publications committee chair (1978-86), member of its board of directors (1983-85), and as its vice president (1986-87). He is the author of *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, Chicago, 1985; co-editor (with James S. Cockburn) of *Twelve Good Men and True : The Criminal Trial Jury in England, 1200-1800* (forthcoming, Princeton, 1988), and co-editor (with Morris S. Arnold, Sally A. Scully, and Stephen D. White) of *On the Laws and Customs of England: Essays in Honor of J. Samuel E. Thorne* (University of North Carolina Press, 1981).



Thomas A. Green

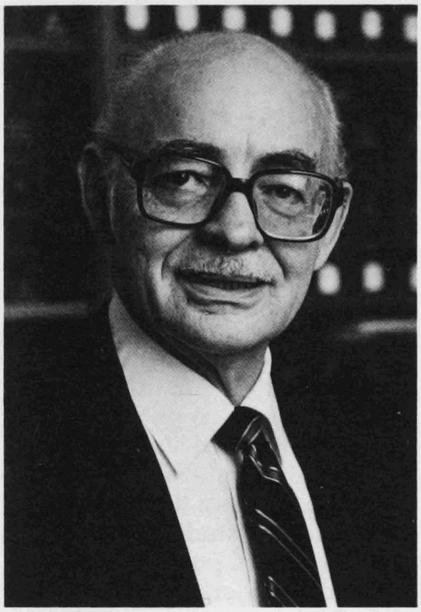
John H. Jackson

John H. Jackson was invited by the director general of GATT to participate in a panel discussion on November 30, in Geneva, to commemorate the 40th anniversary of GATT. Other panelists included trade ministers of several of the GATT contracting parties, including Ambassador Yeutter of the United States and Minister Pat Charney of Canada.

In December Jackson traveled to Moscow to accompany a committee of citizens organized by the United Nations Association to study U.S. - U.S.S.R. relations.

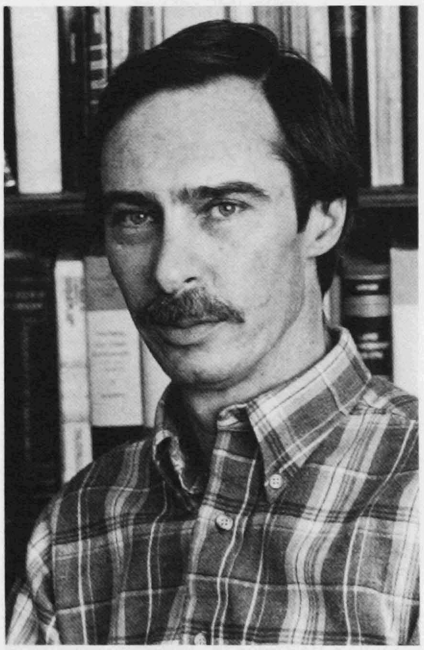
B R I E F S

The committee was organized to focus on economic relations, and was considering the question of potential GATT membership for the Soviet Union.



Frank Kennedy

Frank R. Kennedy, Thomas M. Cooley Professor Emeritus in the Law School, served as a consultant to the World Bank last November in connection with a study of the financial sector of the Philippines at the request of its government. Kennedy's assignment involved a review of the legal aspects of debt recovery and bank regulation in the Philippines. He spent a week in Manila and was able to visit with a number of Michigan alumni, including Justice Irene Cortes of the Supreme Court of the Philippines; Gabriel Singson, senior deputy governor of the Central Bank of the Philippines; Renato de la Fuente, general counsel, senior vice president, and secretary of the Ayala Corporation; Antonio Bautista, Arturo de Castro, and Rafael A. Morales. Mr. Bautista served as a research assistant to Professor Kennedy during the years 1963-66, when Kennedy was reporter for the Advisory Committee on Bankruptcy Laws of the United States Judicial Conference. Mr. de Castro wrote his J.S.D. dissertation under Professor Kennedy's supervision on the subject of security interests in bankruptcy and reorganization procedure under the laws of the United States and the Philippines, a subject of prime concern in the World Bank study. Mr. Bautista, Mr. de Castro, and Mr. Morales are members of Manila law firms.



James E. Krier

James E. Krier spoke on economic analysis in property teaching and scholarship last September 19 at the AALS Workshop on Property in Chicago. Less than two weeks later, on October 1, he presented a paper entitled "Environmental Quality as a Political Question" as part of a bicentennial program at the University of Tennessee, in Knoxville. Then, on October 10, he spoke on controlling environmental damage, as part of a Conference on Legal Control of Corporate Behavior at Princeton, New Jersey.

Krier recently became a member of the editorial advisory board of Little, Brown & Co., Law Division. Little, Brown now has the manuscript for the second edition of *Property*, which Krier co-authored with Jesse Dukeminier. The book will appear next spring. The first edition has been the most widely used property book in the United States.

Legal Thinking and Legal History Essays on the Common Law, by **A.W. Brian Simpson,** who joined the faculty this year, was published in late summer by the Hambleden Press. It reprints a selection of 16 articles which have appeared since 1957 and a previously unpublished essay on R.S. Rattray's writings on Ashanti customary law.

Professor Simpson recently presented the Childe Lecture to the Oxford Law Faculty on "Rhetoric, Reality, and Regulation 18B." The lecture dealt with litigation in England challenging wartime detention without trial of British subjects. This litigation involved issues similar to those concerning the detention of Japanese Americans in the U.S. after the attack on Pearl Harbor.

Simpson's latest book, *Invitation to Law*, was published in late 1987 by Blackwells. It is a short book designed primarily for those contemplating going to law school in England and forms part of a series dealing with other subjects — including economics, sociology,

archaeology, etc.

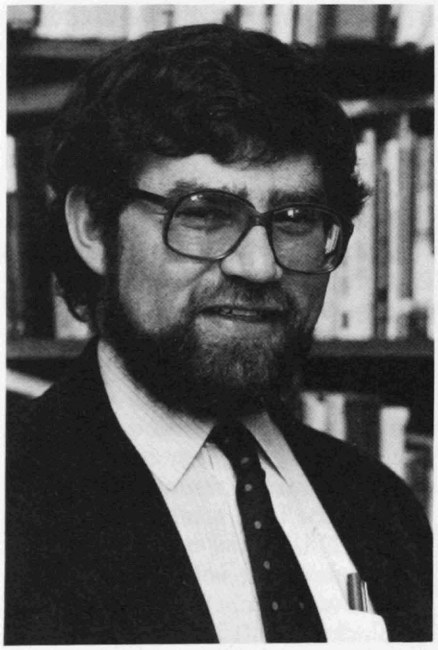
A photo of Simpson appears on p. 1, accompanying an article on him and his work.

Philip Soper has been appointed a visiting fellow at Clare Hall in Cambridge, England, where he will spend a sabbatical leave working on a book in legal theory and moral philosophy. The work is a continuation of topics explored in a series of seminars for lawyers and philosophers which he conducted at the University of Western Ontario in London, Ontario, in June of 1987. Soper also presented an introductory course in jurisprudence for California judges later that summer as part of the Continuing Judicial Studies Program of the California Center for Judicial Education and Research.

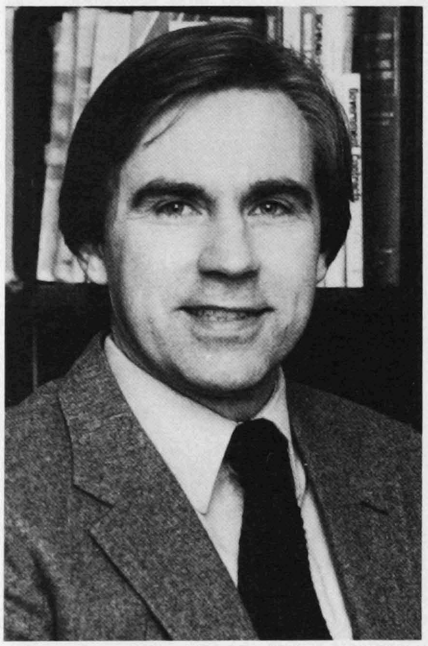
While in the U.K., Soper will give a seminar at the Centre for Criminology and the Social and Philosophical Study of Law in Edinburgh, Scotland. He will also return to the States briefly in March to deliver the Dean Louis TePoel Lecture at Creighton University School of Law.

Lawrence W. Waggoner has been appointed an advisor for the Restatement of Law, Second, Property (Donative Transfers) and a member of a study group of the U.S. State Department on private international law aspects of decedents' estates. Waggoner's work as an adviser for the Restatement, Second, of Property fits in with the law reform work he is doing as director of research for the Joint Editorial Board for the Uniform Probate Code. Substantial revisions of the substantive-law aspects of the UPC are underway, one of which (redesigning the spouse's forced share) is the subject of his article in this issue of *LQN* (see p.30).

A monograph by **Joseph H.H. Weiler,** *Europe's Middle East Dilemma: The Quest for a Unified Stance,* was recently published by Westview. The book was co-authored by Ilan Greilsammer, an associate professor of comparative politics in the Department of Political Science, Bar-Ilan University, Israel. In it the authors analyze the attempts by the member states of the European Community to coordinate their foreign policies and formulate a unified stance with regard to the Arab-Israeli conflict. Their book offers a theoretical scheme for the study of the process of European political cooperation and considers the conditions of the European community's formulating a foreign policy independent of the United States.



Joseph H.H. Weiler



Philip Soper

Visiting faculty

Two visitors are joining the faculty for the fall and winter.

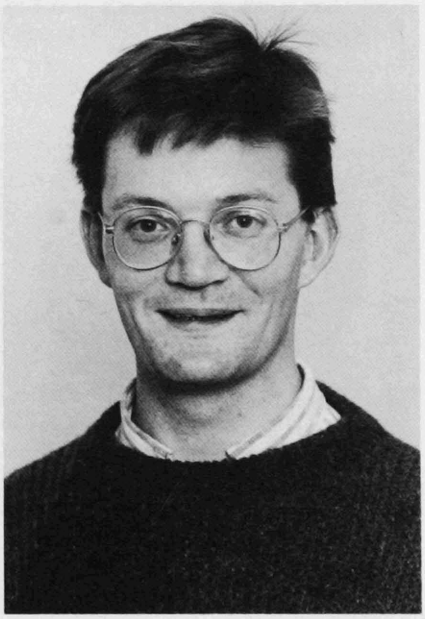
Richard D. Friedman is visiting from the Cardozo School of Law, where he has taught since 1982. Friedman previously worked as an associate with the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison. A graduate of Harvard (B.A., history, '73; J.D. '76) and Oxford University (D. Phil. '79), Friedman clerked for Judge Irving R. Kaufman, U.S. Court of Appeals, 2d Circuit. This fall, he

Richard D. Friedman

Martin H. Redish

taught two sections of a course on evidence. He is teaching the sequel to that course and a seminar on the Supreme Court this semester.

Martin H. Redish, a visitor from Northwestern, began his academic career there in 1973. He has also visited at Stanford and Cornell. Redish received his A.B. from the University of Pennsylvania in 1956 and his J.D. from Harvard in 1970. After serving a clerkship with the Hon. J. Joseph Smith (U.S. Court of Appeals, 2d Circuit) Redish worked as an associate with the firm of Proskauer Rose Goetz & Mendelsohn in New York. Last semester he taught a section of civil procedure. This winter he is teaching courses on constitutional law and civil procedure.



David Johnston

Five visiting professors were here for the fall semester only.

Donald C. Langevoort

David Johnston spent the fall at the Law School as this semester's Sunderland Fellow. Johnston visited from Christ's College, Cambridge, where he is a research fellow and a teaching supervisor in Roman law. A 1982 graduate of St. John's College, University of Cambridge, Johnston earned his doctorate in Roman legal history at the University of Cambridge in 1986.

Donald C. Langevoort visited from Vanderbilt University, where he has taught since 1981. A graduate of the University of Virginia (B.A., religion, '73) and Harvard Law School (J.D. '76), Langevoort began his career as an attorney with Wilmer Cutler & Pickering in Washington. He subsequently held a post at the U.S. Securities and Exchange Commission for three years before entering the academic world. At Michigan he taught Enterprise Organization and Financial Institutions.

B R I E F S

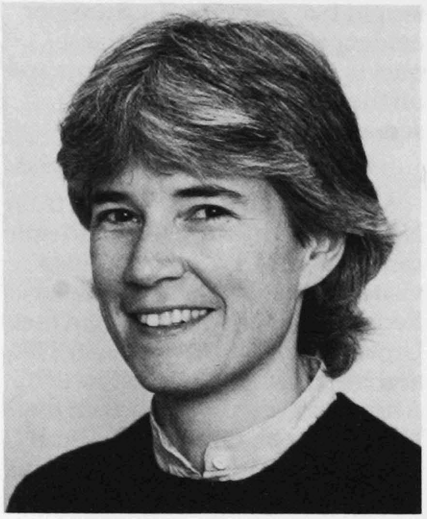
Raymond Nimmer received both his B.A. (math, '66) and his J.D. ('68) from Valparaiso University. He visited from the University of Houston Law Center, where he has taught since 1975. He previously worked as a research attorney and project director for the American Bar Foundation in Chicago.

Professor Nimmer's work has been primarily in three areas: the law of computer technology, bankruptcy, and commercial law. During his visit he taught Commerical Transactions and Creditor's Rights.

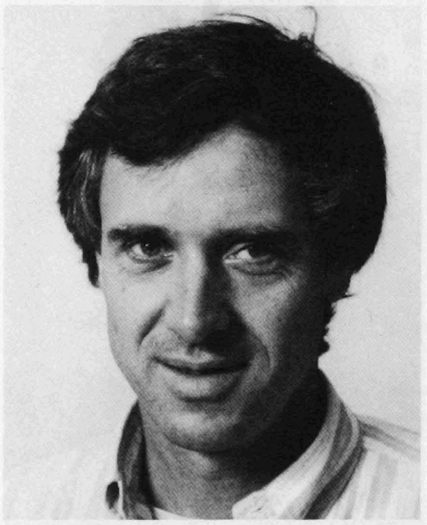
Raymond T. Nimmer

Elinor Schroeder, a U-M alumna (B.A., French, '68; J.D. '74), visited from the University of Kansas, where she has taught since 1977. Schroeder taught French at the junior high school level for three years before entering law school. After graduating, she worked with the firm of Spencer, Fane, Britt & Browne in Kansas City, Missouri for three years.

Professor Schroeder, who has written on employment discrimination and labor law, taught courses in those areas at Michigan.



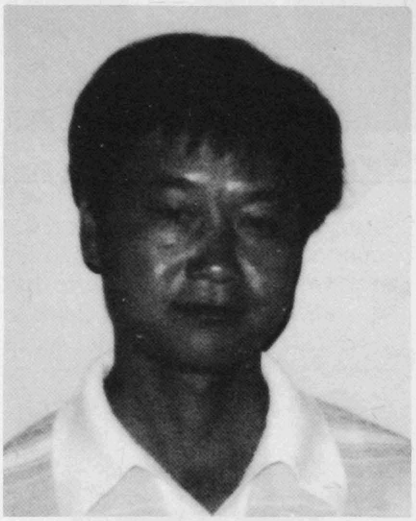
Elinor D. Schroeder



Gunthner Teubner

Gunther Teubner is the head of the Jurisprudence Department at the European University Institute, Florence. He is a graduate of the University of Tubingen (Dr. iur. '70) and the University of California-Berkeley (M.A. '74, law and society). During his visit he taught Comparative Business Organizations: Governance in Group Enterprise and Discourse & Autopoiesis: Foucalt, Habemas, and Luhmann on Law.

During the fall semester, a scholar from China, **Mr. Ting yun Sun,** came to the Law School to do research on trade law. A Law School alumnus (MCL '81), Mr. Sun was one of the first Chinese to do graduate study in a U.S. law school after the reopening of relations with the People's Republic of China. Now a member of the Chinese bar, he serves as legal counsel for China National Machinery and Equipment Import and Export Corporation (one of China's largest diversified trading corporations) and advises the corporation in its trade dealings with the U.S.

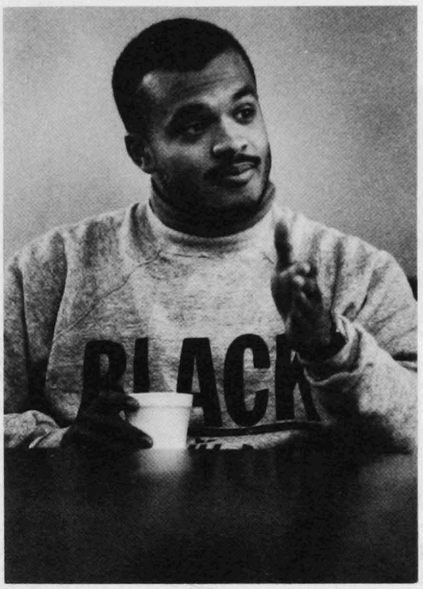


Ting yun Sun

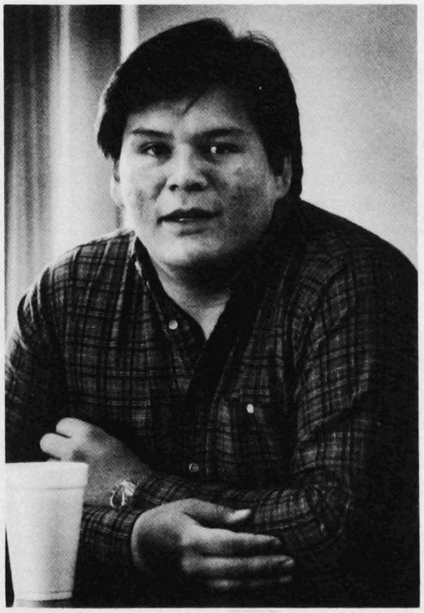
During his stay at Michigan, Mr. Sun also co-taught a course, Doing Business with China, together with Law School Professor Whitmore Gray.

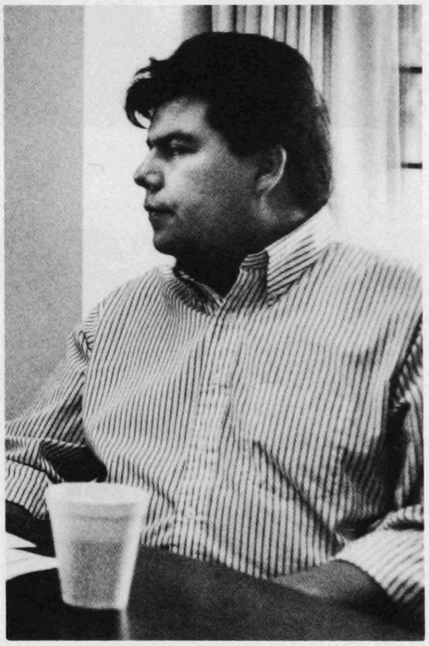
Addressing racial issues

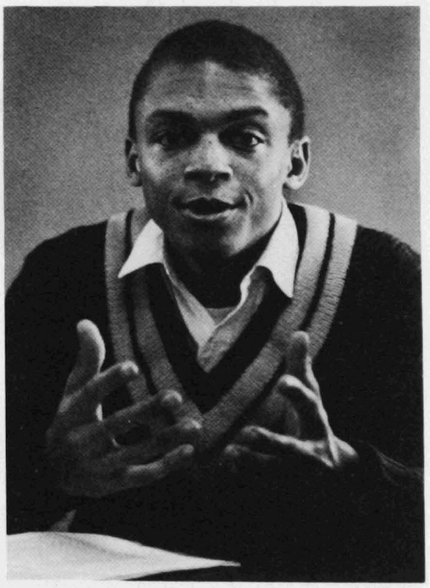
Committee of visitors hears students' concerns



A panel of students representing the various minority groups at the Law School addressed the Committee of Visitors on the subject of racial issues last October. Shown above are (clockwise from upper right) are Sandi Miller, Charles Wynder, Marty Castro, Jeff Crawford, and Barron Wallace. Other members of the panel were Carl Anderson, Charlotte Hawkins, and John Yamamoto.



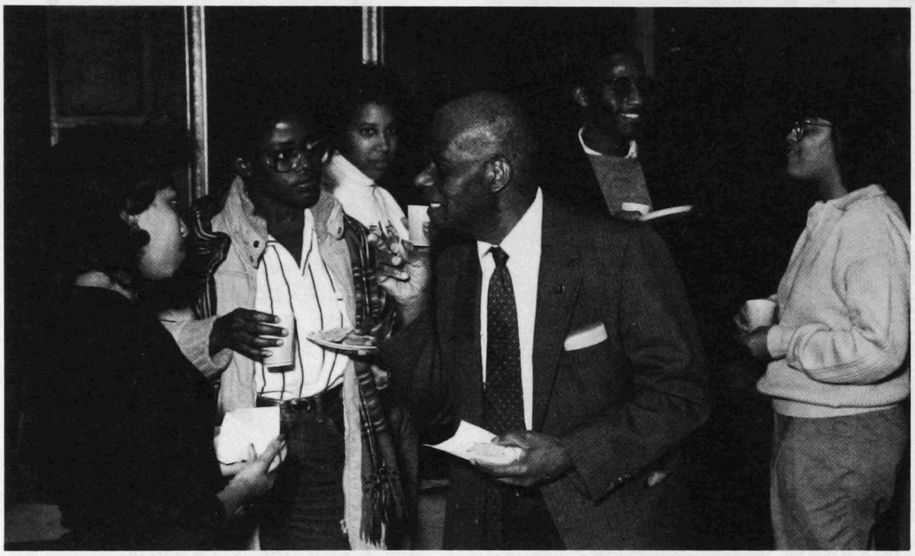




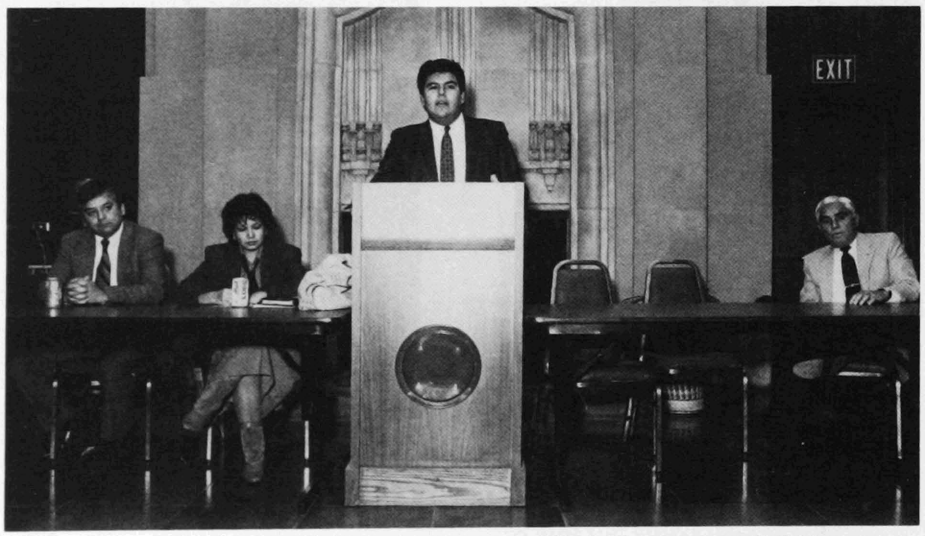
Sights (& sounds) of last fall

A pictorial survey of Law Quad happenings

After a long hiatus, the Law School will again have a yearbook. Staff members Grace Shin, Christine Drylie, and Dave Di Rita work on the layout for The Quadrangle *(not to be confused with* Law Quadrangle Notes).



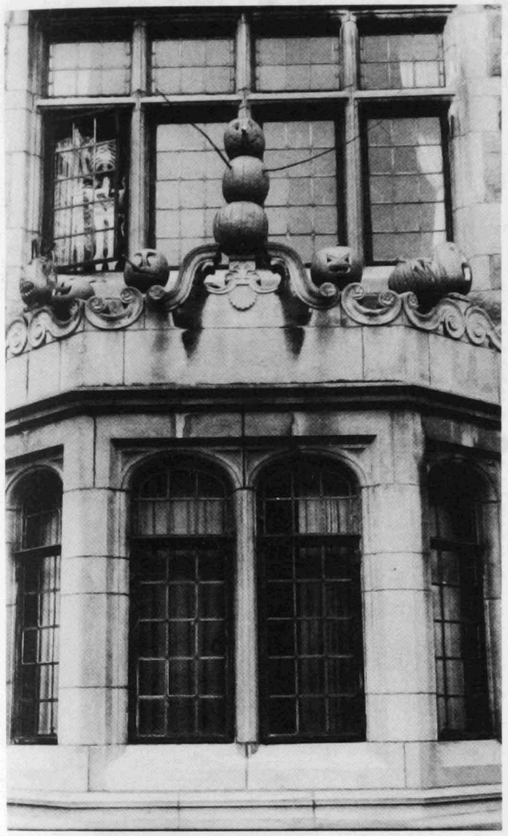
John Henrik Clarke (center), professor emeritus at Hunter College, spoke on "Black Women in Antiquity," a lecture sponsored by the Black Law Students Alliance and various other university organizations. A reception in the Lawyers Club Lounge followed his lecture. ▼

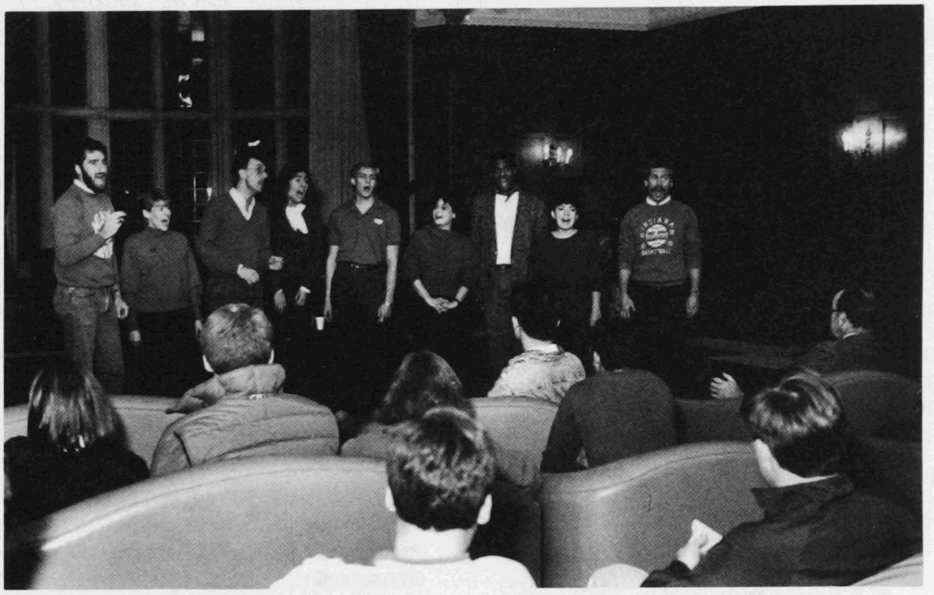


George Navarratte, deputy director of licensing and regulation for the state of Michigan, spoke on "Examining Hispanic Stereotypes" as part of a panel discussion sponsored by the Hispanic Law Students Association. The panel also included (from left) attorney Hector Cisneros, Rosa Ybarra from WXYZ-TV in Detroit, and Judge George La Plata, U.S. district judge for the 6th Circuit.

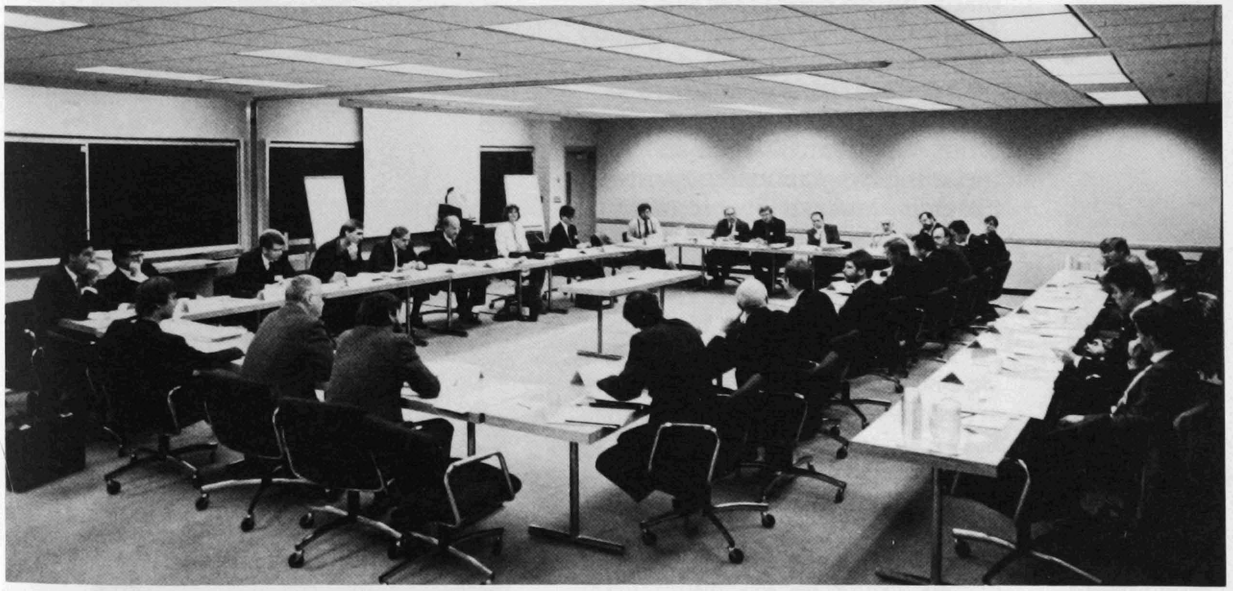
Michigan graduate Susan Gzesh (JD '77), an attorney with the Lawyers Committee for Civil Rights, was the keynote speaker at the Alternative Practice Conference held at the Law School on November 14. Other speakers included Law School graduates working as activists, in government, and in academia. ▼

E V E N T S





The Headnotes, the U-M Law School vocal ensemble, presented their fall concert in the Lawyers Club Lounge on November 9. The group, along with trumpet virtuoso Armando Ghitalla (a faculty member of the U-M music school) and a string quartet from the school, also performed at a holiday concert for Law School students, faculty, and staff held in the Reading Room of the library.



Representatives of various governments and law firms, as well as students and several Law School faculty members, participated in a two-day conference on comparative anti-dumping law on the U-M campus this fall. The conference was organized by Law School Professor John H. Jackson and sponsored in part by the German-Marshall Fund of the United States.

Housewarming for ICLE

Institute dedicates new headquarters

by Shelley Wilks Geehr

The Institute for Continuing Legal Education moved to its new headquarters last June and formally dedicated the building on October 13, 1987. Located at 1020 Greene Street, Ann Arbor, the building was designed by Hobbs and Black of Ann Arbor with extensive input from Rose Mosley, assistant director of administration at ICLE. The new site features a lobby displaying all of ICLE's publications, a seminar room for programs, and a viewing room where visiting attorneys can preview audio and video cassettes.

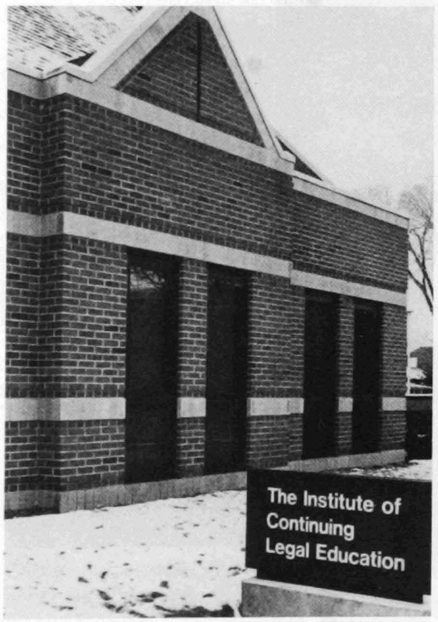
ICLE was founded in 1960 at the request of the State Bar of Michigan to keep practicing bar members abreast of changes and developments in Michigan law. Sponsored by the four law schools in the state (Cooley, Detroit, U-M, and Wayne State) and the State Bar, ICLE was originally housed on the fourth floor of Hutchins Hall at the University of Michigan Law School.

Over the past 27 years, ICLE has expanded its services. It now offers more than 80 seminars, including five nationally oriented programs and satellite programs from the American Law Institute, American Bar Association and the Practising Law Institute. These programs are offered in 21 different locations throughout Michigan, allowing lawyers in remote areas of the state to participate in ICLE courses. In addition, ICLE has created a publications department that offers practice handbooks, legal treatises, substantive systems manuals, and monographs written for and by Michigan law practitioners.

Eugene D. Mossner, (right), president of the State Bar of Michigan and Austin G. Anderson, ICLE director, opened the ceremonies.

ICLE is a non-profit organization, relying on the time and efforts of Michigan Bar members for help in planning courses, lecturing, and writing. The new building itself was furnished through the Continuing Commitment to Service Fund, a drive chaired by Patrick J. Ledwidge of Dickinson, Wright, Moon, Van Dusen & Freeman of Detroit and supported by the generous donations of Michigan attorneys, law firms, and bar organizations.

Shelley Wilks Geehr is the promotions coordinator at ICLE.



ICLE moved into its new headquarters at 1020 Greene Street last June.

Patrick J. Ludwidge presented the building to Law School Dean Lee C. Bollinger.

Mary Frances Berry, J.D. '69

Educator, author, outspoken civil rights activist

"There is no national leadership to finish the unfinished business of civil rights reform in this country," asserts Mary Frances Berry. "Consequently, Blacks and other minorities must take the initiative on civil rights issues. We have to be informed about issues, we have to have a number of different strategies, and we have to be vigilant."

The Law School graduate (J.D. '69), educator, and member of the U.S. Civil Rights Commission, spoke at the U-M last fall, inaugurating the first annual Black Student Welcome. The event was sponsored by the Black Law Students Alliance, the Black Student Union, and several other campus groups.

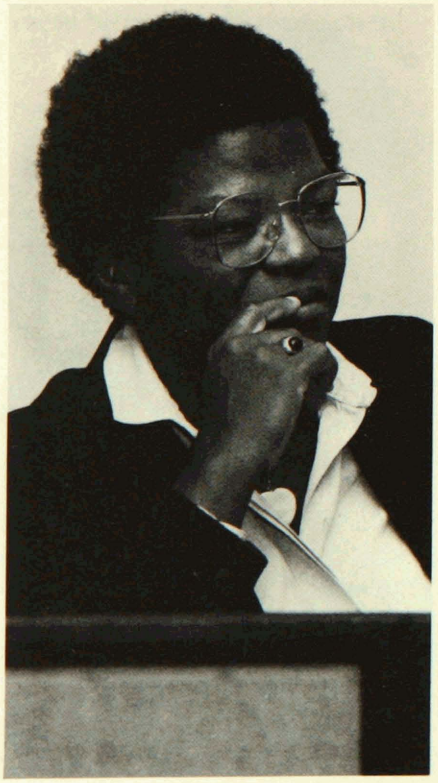
People who meet Berry for the first time are usually surprised at her size. A small, compact woman standing barely five feet two, she speaks with quiet conviction in the classroom, with charisma on the podium. In either setting, she is not reluctant to speak with candor and with sometimes biting sarcasm. Berry feels that too much emphasis is placed on test scores in recruiting both Black students and Black faculty. "Black students" she feels, "come to college fearing people will assume they were special admits. There's a presumption about it and an insecurity — which often exacerbates the problem.

"What's interesting to me is that we're finding that on the SAT, Asian Americans do better than anyone else. Now you're seeing a lot of discussion over whether the test scores should actually be used. I wonder if that's because the Asian Americans do so well!"

Berry maintains that colleges and universities have not been imaginative enough in recruiting and encouraging minority students. "The problem is not so much at the high school level," she said in a phone interview. Citing an article in the *Chronicle of Higher Education* (Dec. 9, 1987), she noted, "The number of Black students graduating from high school is increasing, but the percentage of those who go on to college is lower. Colleges and universities are not doing enough, first, to bring people into undergraduate schools, and then to prepare and nuture them and give them a goal. All students need faculty members who will pay attention to them, and this is especially true if they are a small minority."

Berry's life is a testimony to her faith in the power of education. After putting herself through Howard University by working full-time at a hospital lab, Berry earned her Ph.D. in history at the U-M, and then went on to law school while teaching as an associate professor of history at Eastern Michigan University. After receiving her JD from the Law School in 1969, she joined the history department at the University of Maryland. A short time later, she was appointed director of Maryland's Afro-American Studies

program and then provost of the school's Division of Behavioral and Social Sciences. In 1976, Berry became chancellor of the University of Colorado at Boulder, a position she held until 1978, when President Jimmy Carter named her assistant secretary for education in the Department of Health, Education and Welfare. Since 1980, she has served on the U.S. Commission on Civil Rights. With the advent of Reagan appointees into HEW in 1981, Berry set up her own law practice in Washington, D.C., advising clients on legislative matters. At the same time she began teaching history and constitutional law at Howard University. Most recently, Berry was appointed the Geraldine R. Segal Professor of American Social Thought at the University of Pennsylvania as of the fall semester.



Last year, Berry was selected as one of ten "Women of the Year" honored by *Ms. Magazine* (January, 1987). Berry was chosen "for translating the tactical wisdom and eloquence she gained in the U.S. civil rights movement into the campaign against apartheid in South Africa, and thus helping to awaken America's conscience."

The *Ms.* article described Berry's frustrations in working as a member of the Civil Rights Commission, the watchdog agency which had been rendered toothless through Reagan appointments. (Berry enjoys relating how she sued the Reagan administration to get her job back after being fired for criticizing the president's civil rights policies.) *Ms.* also recounted Berry's arrest on Thanksgiving eve, 1984 for demonstrating in front of the South African embassy to inaugurate the Free South Africa Movement. Finally, the article mentioned Berry's latest book, *Why the ERA Failed.* (The book discusses a breach of alliance between Black women and white women caused by Black women feeling that some of their concerns were overlooked in the elation over Geraldine Ferraro's nomination by the Democratic Party.)

Berry credits much of her success to her mother, who supported Mary and her two brothers through domestic jobs and encouraged all three children to finish college. "Her assessment of me was that I was intelligent and that I could read well and absorb tremendous amounts of material," Berry recalls. "She called these my God-given talents. She also knew that I was stubborn and courageous as a child. What she did was to put all these things together with her sense of justice and fairness and her own experience of being poor and discriminated against.

"She always believed that you should go as far as your talents will take you. Throughout my life, and even now, whenever I finish something involving social activism, my mother will always say, 'What are you going to do *next?*' When I got out of jail for protesting in front of the South African embassy, the first thing she said was, 'What are you going to do next?' I wonder if she'll ever say, 'Hey, that's enough.' "

Berry herself envisions a future in which she can continue to work in multiple roles as participant, scholar, and lawyer. "I do bits and pieces of a lot of things," she said, "but the pattern is always there. I'm always writing something, always teaching, and always working on some cause."

Books by Mary Frances Berry

Black Resistance/White Law: A History of Constitutional Racism in America

Military Necessity and Civil Rights Policy: Black Citizenship and the Constitution, 1961-1868

Stability, Security, and Continuity: Mr. Justice Burton and Decision-Making in the Supreme Court, 1945-1958

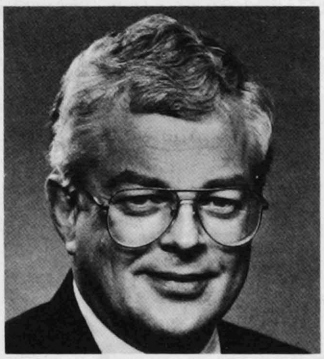
Long Memory: The Black Experience in America (co-authored by John W. Blassingame)

Why the ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution

Alumni news

Joyce Bihary, JD '75, has been appointed by the Eleventh Circuit Court of Appeals as U.S. bankruptcy judge for the Northern District of Georgia. She was sworn in on November 13, 1987 in ceremonies at the Richard B. Russell Building, U.S. Courthouse, Atlanta, Georgia.

Joyce Bihary



Stanley P. Wagner

Judge Bihary earned her undergraduate degree in economics at Wellesley College in 1972 and studied at the London School of Economics and Political Science. Prior to her appointment as bankruptcy judge, she had been a partner since 1979 with the Atlanta law firm of Rogers & Hardin. She also served as an adjunct professor at Emory Law School.

Her sister, Sheila Bihary, is a 1978 graduate of the Law School.

Tacoma, WA attorney **Stanley P. Wagner, Jr.**, JD '64, as been awarded the first Fulbright Research Fellowship to a practicing attorney for study in Korea. His project is an examination of the administrative law and procedures involved in international transactions in Korea.

Wagner has a long standing interest in Korea. He was stationed there as a Marine, later studied at Yonsei University in Seoul, and was a foreign legal consultant to the Korean law firm of Kim & Chang.

In addition to his practice, Wagner is an adjunct professor at the University of Puget Sound Law School.

Clerking at the Supreme Court

Two 1986 Law School graduates are serving clerkships with U.S. Supreme Court justices for the 1987-88 term.

Sharon Beckman is clerking for Associate Justice Sandra Day O'Connor. Beckman spent the past year as a clerk for Judge Frank M. Coffin of the U.S. Court of Appeals for the First Circuit in Portland, Maine. At Michigan she served as editor-in-chief of the *Michigan Law Review*, was selected to the Order of the Coif, and received a Henry M. Bates Memorial Scholarship.

Before entering law school, Beckman worked as a paralegal for a small criminal defense and civil rights law firm in Boston. She received her A.B. with a government concentration from Harvard, where she also served as captain of the varsity swim team. A world-class marathon swimmer for several years, Beckman swam the English Channel in 1982.

Abner Greene, who is clerking for Justice John Paul Stevens, spent the past year as a clerk for Chief Judge Patricia M. Wald, U.S. Court of Appeals for the D.C. Circuit. Greene graduated from Yale

Sharon Beckman

Abner Greene

in 1982, majoring in philosophy and theater studies.

At Michigan, he served on the *Law Review* staff, and received the Daniel H. Grady Prize, which is awarded to the student who has graduated with the highest standing in his or her Law School class in the preceding calendar year. Greene also received numerous other honors, including a Henry M. Bates Scholarship, a Class of 1908 Memorial Scholarship, and membership in the Order of the Coif.

Class notes

'48 (LLM), '55 (SJD) Joseph W. Morris, an attorney with the law firm of Gable & Gotwals in Tulsa, OK, has been elected to the board of directors of the American Judicature Society, a national organization dedicated to the improvement of the judicial system.

'54 J.B. King, a senior partner of the law firm of Baker & Daniels in Indianapolis, has been elected vice president and general counsel of Eli Lilly and Company.

William Reamon, a practicing attorney in Grand Rapids, MI, has been appointed to the Grand Valley State College Board of Control by Michigan Governor James Blanchard.

'65 John W. McCullough has been joined by **Dennis Frostic ('67), Lawrence M. Gill ('68), James D. Wangelin ('74),** and **Michael C. Cook ('77)** as founding partners in the new Chicago law firm of McCullough, Campbell & Lane. **David L. Hartsell ('82)** and **Robert E. Walsworth ('83)** are also associated with the firm.

'67 Thomas M. Boykoff, a Madison, WI attorney, co-authored *Community Property in a Nutshell, 2d Edition* (West Publishing Co.) with Robert L. Mennell of Roseville, MN.

'69 Robert Meisner has become a featured columnist on real estate and condominiums in the Observer & Eccentric, a chain of suburban newspapers in metropolitan Detroit.

'70 Michael J. Thomas was recently elected vice president of the PNC Merchant Banking Co., a subsidiary of PNC Financial Corp. in Pittsburgh, PA.

'72 John S. Baker, Jr., of the Louisiana State University Law Center, team taught a course commemorating the Bicentennial of the Constitution at Aix-Marseilles Law School, France, with U.S. Supreme Court Justice Antonin Scalia.

'74 David W. Clark, a partner in the Jackson, MS law firm of Wise, Carter, Child & Caraway, has been appointed co-chair of the Individual and Small Firms Committee of the American Bar Association's Section of Litigation.

'75 James Stoetzer, a partner in the Seattle firm of Lane, Powell, Moss and Miller, was featured in an article on the personal and professional benefits of pro bono work. The piece appeared in the *Seattle King County Bar Bulletin* last April.

'76 John Nussbaumer, an assistant professor at the Thomas M. Cooley Law School in Lansing, MI, was recently named by the Federal Court of Appeals for the Sixth Circuit to serve as the co-reporter for the Sixth Circuit Pattern Criminal Jury Instruction Committee.

'78 Stephen A. Edwards has become a partner in the business and finance section of Morgan, Lewis & Bokius, in Philadelphia, PA.

'79 Steven M. Fetter was appointed to the Michigan Public Service Commission by Governor James Blanchard last October. His term runs until July, 1993.

'82 Peter H. Trembath has been appointed secretary and director of Legal Services of BMC Industries, Inc., St. Paul, MN.

'84 Michael H. Hoffheimer, after three years as a litigation attorney in Cincinnati, OH, has become an assistant professor at the University of Mississippi Law School

'85 Kathryn L. Biberstein is working with the Geneva, Switzerland law firm of Poncet, Turrettini, Amaudruz & Neyroud, on a leave of absence from the Boston law firm of Goodwin, Procter & Hoar.

Correction: In LQN *32:1, p. 13, the seminar room being renovated through the sponsorship of the firm of Barris Sott Denn & Driker of Detroit in honor of* **Herbert Sott, JD '43,** *was spelled incorrectly.*

Alumni deaths

'11 Chris Maichele, September 8, 1987 in Middleville, MI

'19 Gordon V. Cox, October 4, 1987 in Carmel, CA

'24 Bruce G. Booth, May 27, 1987

'26 Daniel Petermann

'28 Ernest C. Schatz, July 12, 1987

'29 Joe C. Gamble, May 28, 1987

'30 Robley E. George
Frances E. Raiter, September 2, 1987

'32 Chester Gordon Rosengren, February 19, 1987
Leonard H. Young, August 3, 1987 in Ann Arbor, MI

'33 Carlton G. Champe, September 18, 1987 in Norway, ME

'39 F. Emerson Boyd, September 9, 1986

'48 Lewis Garner, Jr., December 26, 1986

'49 Herbert M. Heaney, May 14, 1987

'50 R. Bunker Rogoski, September 21, 1987 in Muskegon, MI

'52 Yoshiaki Nakamoto
Allan J. Stevenson, September, 1987

'53 Harold J. Holt, May 25, 1987

'57 James A. Leavengood

'58 Philip Macy Browning, Jr., April 9, 1987

'59 William George DeLana, November 9, 1987 in Hartford, CT

'61-'62 Wilhelm K. Geck, April 25, 1987

'63 Arthur Lloyd Foote
Patrick Henry Oliver, October 22, 1986

'68 James A. Tuck, August 16, 1987 in Detroit, MI

'85 Gregory Scott Canton

Witchcraft and the Interpretation of Statutes

LEO KATZ

The article below is an edited version of a chapter from Professor Katz's book, Bad Acts and Guilty Minds: Conundrums of the Criminal Law, *© 1987, The University of Chicago Press; reprinted by permission.*

The Definition of Witchcraft

"I have nothing to say. I deny it." But by being stubborn and taciturn, the woman only strengthened the prosecution's case against her. Puna was an African native, a member of the Shona tribe, who had been charged with violating Southern Rhodesia's Witchcraft Suppression Act, first passed in 1899 but still actively enforced in 1948, the year of her trial. Contrary to its name, the act was not intended to punish witches. It was intended to punish those who engaged in witch-hunts or those who invited witch-hunts by pretending to be witches. Puna was in the former category.

The case against Puna was formidable, Mazinyana, Puna's neighbor, had testified that Puna had publicly denounced her as a witch and caused her to leave the local kraal: "Last year the accused had eye-sickness. She consulted a diviner. . . , who visited our kraal. I was not present. Next day she said I was a witch *(Muroyi)* as the diviner had said I was the cause of her

eye-sickness. She said if I did not believe her I could go to another diviner and that I was to leave the kraal." In fact, Mazinyana and her family did consult a diviner of their own. "We threw the bones," she proudly testified, "and all of us were cleared." Still, she felt compelled to leave the kraal. Puna's own daughter-in-law, Tizirayi, confirmed Mazinyana's account: "A diviner . . . spent a night with us at tax time. Accused asked him to divine the cause of her illness. He said it was witchcraft *(Uroyi)* and caused by Mazinyana, who was not present. Next day accused told Mazinyana she was a witch *(Muroyi).* She left the kraal." The prosecutor was confident of a conviction.

When the British came to Africa, they were outraged by the natives' custom of blaming most of their misfortunes — from a back ailment to a crop failure to the death of a baby — on witchcraft and of killing or ostracizing those of their neighbors they believed had bewitched them. The Witchcraft Suppression Act was a very comprehensive statute designed to eradicate such customs. The statute punished a variety of related practices: the imputation of witchcraft, especially by a professional witch doctor or diviner; the hiring of a witch doctor or diviner to "smoke out witches"; trial by ordeal of suspected witches; and the practice of witchcraft itself, whether intended to injure an enemy or help a friend. The specific provision under which Puna had been indicted provided that "whoever names or indicates any other person as being a wizard or witch shall be guilty of an offence and liable for a fine not exceeding one hundred pounds or to imprisonment not exceeding three years, or to corporal punishment not exceeding twenty lashes or to any two or more of such punishments."

The drafters of the act thought the term witchcraft somewhat vague and prefaced the substantive portions of the statute with a definition that read: "In this Act 'witchcraft' includes the 'throwing of bones', the use of charms and any other means or devices adopted in the practice of sorcery." Unfortunately, the drafters knew very little about the customs they were seeking to eradicate. They did not know, for instance, that the "throwing of bones," a ritual the British had frequently seen witch doctors engage in, was not a means of bewitching someone, but a means of detecting witches. Nor did they know that the natives drew a sharp distinction between witchcraft and sorcery. Witchcraft, the natives believed, was the use of malevolent psychic powers. Only a woman possessed by an evil ancestral spirit could practice it. It was largely an inherited skill. Sorcery was a much less serious affair. Although used to harm others, it was much less awe-inspiring. It merely required the performance of some ritual acts; almost anyone could learn it. The Witchcraft Suppression Act thus completely misdescribed the phenomenon it sought to root out.

The drafters' misapprehension of the nature of witchcraft beliefs was understandable. But it had the potential of stultifying the purpose of the statute. Puna was accused of calling Mazinyana a witch. But the statute says a witch is someone who throws bones or practices sorcery. Puna had charged Mazinyana with neither. What was a conscientious judge to do? Throw his hands up and say: It is for me to apply, not make, the law. The legislature blundered. But I must do what they say. And what they say is — punish those who have accused others of sorcery or throwing bones. Hence I acquit Puna. Or should he just ignore the definition — which is what the judges of Southern Rhodesia did? If he did, would he be faithful to the purpose of his office which is to interpret a statute according to its plain meaning?

What is the plain meaning of a word like "witchcraft" in a statute like the Witchcraft Suppression Act? Is it really what the drafters say it is? That's how the traditional conception of meaning would have it? But is the traditional conception right?

If a biologist were asked the meaning of "tyrannosaur," he might say that it is a giant, flesh-eating, two-legged reptile that lived in the Mesozoic era. According to the traditional conception of meaning, if that's what the biologist thinks of when he says "tyrannosaur," then that's what he's referring to. Such a view has strange consequences. It's conceivable that much of our knowledge about tyrannosaurs will turn out to be wrong. Tyrannosaurs might turn out to be plant-eating and four-legged, for instance. Yet under the traditional view that's absurd: a plant-eating four-legged tyrannosaur wouldn't be a tyrannosaur, just as a married bachelor wouldn't be a bachelor. *But it doesn't seem absurd.* It's also conceivable that under the appropriate environmental pressures tyrannosaurs could have evolved into plant-eaters. Again, under the traditional view that's absurd — for the same reason. *But it doesn't seem absurd.* Finally, it's conceivable that there exists somewhere a group of animals that look just like tyrannosaurs, but evolved by an entirely different route (say from mammals). A biologist would deny that these are tyrannosaurs. Again, under the traditional view, that's absurd. *But it doesn't seem absurd.*

Another example. If someone were asked the meaning of "Shakespeare," he might say that it refers to a sixteenth-century playwright who wrote *Hamlet, Macbeth,* and *Romeo and Juliet.* According to the traditional view, "Shakespeare" to this speaker is synonymous with "a sixteenth-century playwright who wrote *Hamlet, Macbeth,* and *Romeo and Juliet.*" It's conceivable that Shakespeare didn't write any of the plays attributed to him. Yet, under the traditional view, that's absurd. (If Shakespeare didn't write those plays, he wouldn't be Shakespeare.) It's also conceivable that if Shakespeare hadn't become a playwright, he would have gone into law. Yet again, under the traditional view, that's absurd. (If Shakespeare hadn't become a playwright,

he wouldn't be Shakespeare.) Finally, it's conceivable that the celebrated William Shakespeare didn't really write those plays, but had an unknown ghostwriter by the same name who wrote them. Nevertheless, when people speak of Shakespeare, they appear to be referring to the celebrity, not the ghostwriter. Under the traditional view, that's absurd. ("Shakespeare" refers to the playwright, not a *poseur*.) *But none of this seems absurd.*

The traditional conception of meaning has another strange consequence. It makes scientific discourse incomprehensible. Early scientists believed that atoms were the basic building blocks of matter. Later it was discovered that even smaller particles existed. They described this by saying: We have discovered new things about the atom; they consist of even smaller particles. According to the traditional view, this perfectly natural statement must seem eccentric. If by atoms scientists mean the basic building blocks of nature, they could not possibly discover that something else was the basic building block of matter (just as one cannot discover that not all bachelors are unmarried, after all). They could only discover that some things they thought were atoms are not in fact atoms because they are made up of even smaller particles.

What is amiss with the traditional view? How can it be remedied? Another example will show us. Gerald attends a cocktail party with his wife. In a faraway corner he notices his boss, whom his wife has never met. Gesturing toward the corner, he whispers to her: "The man in the Brooks Brothers suit, the Yves St. Laurent tie, and the Gucci shoes is my boss." As it happens, he didn't get it quite right. The man is indeed his boss, but his suit is not from Brooks Brothers but the Marshall Fields Department Store, the tie isn't Yves St. Laurent but Pierre Cardin, the shoes aren't Gucci but Florsheim. According to the traditional view, "the man in the Brooks Brothers suit, the Yves St. Laurent tie, and the Gucci shoes" means just what it seems to mean: a man in a Brooks Brothers suit, an Yves St. Laurent tie, and Gucci shoes. Under this view we would have to say that Gerald's statement is wrong. There is no man wearing a Brooks Brothers suit, Yves St. Laurent tie, and Gucci shoes who is also his boss. Yet the statement is true. What the traditional view overlooks is that "the man in the Brooks Brothers suit," etc., is here merely used *referentially*. It is used to pick out a certain man of whom it is then asserted that he is Gerald's boss. As long as the man whom the "Brooks Brothers" phrase picks out really is Gerald's boss, it should be considered true.

At first it may seem that we only use such referential expressions very sparingly. After all, usually when we refer to someone, he isn't present for us to point him out as we misdescribe him. And if he isn't present, how would anyone know whom we meant if we misdescribe him? But suppose I want to make a statement about Lee Harvey Oswald. Unable to recall his name I speak of him as "Kennedy's murderer." Let us assume, arguendo, that Oswald is innocent. Clearly my misdescription of Oswald does not prevent your knowing who I mean even though Oswald is not in the same room with us for me to point him out and even though I have misdescribed him. The reason my misdescription works is that you understand "Kennedy's murderer" to refer to the same person that journalists mean when they speak of "Kennedy's murderer," and journalists mean Oswald.

What these examples show is that very often we use nouns not as shorthand expressions for certain properties the speaker associates with them, but referentially, as a way of picking out a particular object. The person who says "Shakespeare" is not using it as a shorthand for "sixteenth-century playwright who wrote *Hamlet, Macbeth,* and *Romeo and Juliet*." He is using it to refer to whomever the person who introduced him to the name was referring. And who was that person referring to? Whomever the person who introduced *him* to the name was referring to. And so on down the line to the persons who actually knew Shakespeare and used the name to refer to that particular person. It now becomes clear why the statement "Shakespeare did not write *Hamlet, Macbeth,*" etc., is not absurd. When we finally discover the person to whom the name Shakespeare was applied by those who knew the man, it might well turn out that he did not write the plays attributed to him. Similarly, the biologist who says "tyrannosaur" is not using it as a shorthand for "giant, flesh-eating, two-legged reptile," etc. He is using it to refer to animals like those the person who introduced him to the term was referring to. And so on down the line to the archaeologist who first unearthed the bones of a tyrannosaur. That is, by "tyrannosaur" the biologist is referring to animals of the same species as the one whose bones the archaeologists discovered at a certain spot. It might well turn out that that animal wasn't a flesh-eater or two-legged. We can now dispel the air of paradox surrounding scientific discourse. The early scientists who said that atoms are not the smallest particles of matter were simply stating that certain specific entities they had encountered and dubbed "atoms" are not in fact the smallest particles that are."

It is a startling consequence of this new view that people do not necessarily mean what they think they mean. People think that when they say Shakespeare they mean a certain playwright who lived in the sixteenth century and wrote certain plays. Any of these facts may turn out to be wrong. On closer reflection, this ceases to be startling. There is a rule in the law of wills known as the doctrine of incorporation by reference. The rule permits a testator to make reference in his will to documents not attached to the will itself. The testator might, for instance, bequeath all properties listed in a certain document to his son. The list, let us say, contains a valuable lamp. Did the testator mean to bequeath the lamp to his son? Quite clearly. Did he

know that he was bequeathing the lamp to this son? Not necessarily. Conceivably he even thought that the lamp was listed in a separate document whose contents he bequeathed to his wife. There is nothing very surprising about the fact that the testator means something different from what he thinks he means. Our new view of meaning maintains, in essence, that every speaker is like a testator who in using a certain word incorporates by reference whatever it is that that word meant to the persons who first introduced it.

What does the new theory of meaning imply about our witchcraft statute? Again, remember Gerald, who attends a cocktail party given by his boss. He might tell his wife: "Would you please talk to the man over there with the Brooks Brothers suit, the Yves St. Laurent tie, and the Gucci shoes. He is my boss." She complies with his request. Later on the man discovers that his boss is not wearing a Brooks Brothers suit, an Yves St. Laurent tie, or Gucci shoes. Would he be entitled to complain to his wife: "Darling, you did not comply with my request. I asked you to talk to a man with a Brooks Brothers suit, an Yves St. Laurent tie, and Gucci shoes and you did not!" The legislature's law can be construed in a similar fashion. The drafters (or the people they relied on to supply them with relevant information) had observed a certain set of practices among the natives. They pointed their finger toward these practices and said "Stop that!" Of course, unless they were personally present and pointing no one would know what "that" meant. So they tried to describe what "that" was, just like the man who tried to describe his boss to his wife. The fact that they slightly misdescribed "that" does not mean that their order cannot be complied with. It is complied with by punishing that which they were pointing to as opposed to that which their misdescription conjured up! Clearly, then, by witchcraft the legislature meant something other than throwing bones and sorcery, even though what it thought it meant was throwing bones and sorcery.

I may seem to have made too much of what is after all only a minor glitch in a rather exotic statute. But it is not atypical. Some kind of misdescription is virtually inevitable in a comprehensive statute seeking to regulate a complex reality. Judges are fond of taking the legislature severely to task for such glitches. Yet they rarely do much better themselves when asked to formulate rules of a quasi-legislative nature. Think of the Supreme Court's attempts to produce a reasonably clear definition of obscenity. What stands in the way of such a definition is not just that the justices differ in their value judgments but that they are unable to put into words what they agree on. In *Roth v. United States*, the court defined obscenity as something whose "dominant theme" the "average person, applying contemporary community standards" would find "taken as a whole, appeals to the prurient interest." Shortly after this pronouncement the Supreme Court was embarrassed by the case of someone who published books depicting sadomasochism, fetishism, and homosexuality. He argued quite correctly that under the court's definition such books are not obscene because they do not appeal to the prurient interest of the average person. The court replied lamely that the definition should not be so narrowly construed.

The Trouble with Definitions

Why is accurate description so difficult? Conversely, why is misdescription such a common pitfall? The main reason is that the legislature will often need to refer to things whose underlying nature (or "deep structure," as philosophers like to say) neither the drafters nor anyone else understands yet. The legislature may need to regulate the export of gold even before its molecular structure is understood. It may need to quarantine leprosy victims even before the responsible virus has been identified. But any definition of gold or leprosy without such knowledge will be inaccurate. An appearance-based definition of gold is likely to include fool's gold and exclude white gold. A symptom-based definition of leprosy is likely to include many cases of fungal infection (or ichthyosis, as happened in Sherlock Holmes's celebrated "Adventure of the Blanched Soldier") and exclude many atypical cases with initial symptoms resembling altogether different diseases, like tuberculosis of the skin. Fortunately, not everything has a "deep structure." Gold and leprosy do. Bachelors, pens, and garbage pails don't. Their meaning is conveyed by simple dictionary definitions. Philosophers call something with a "deep structure" a "natural kind."

The judge in *Regina v. Puna* proceeded as though he understood all this. To begin with, he didn't dismiss the case just because the witchcraft definition was inaccurate. He realized that a correct reading of the statute required him to ignore the misdefinition of witchcraft and focus on that concept's "deep structure." But he didn't stop there. Puna was charged with witchcraft imputation. The judge realized that the meaning of "imputation" in this context would not be conveyed by a simple dictionary definition either. "Imputation" in this context is really a "natural kind" term.

The judge knew that there was but one authoritative procedure for ferreting out witches:

"The procedure was for all adult members of a kraal to be called together suddenly to form a *gumbgwa* [divination party] to visit the *nganga* [diviner]. Those who could not join the party sent [some personal effects instead]. The gumbgwa having assembled, the nganga threw the bones to reveal the reasons for the visit, or the type of misfortune, several further throws might indicate the cause of the trouble, such as irritation of an ancestral spirit through neglect of some old tribal law. That was as far as the nganga [could] go;

at this point he could show what had caused the trouble."

Even if he diagnosed witchcraft as the source of a problem, the diviner was still not in a position to "name" the witch. That required the witch's active cooperation. "Each member of the party had to throw bones, and the nganga would identify the witch by returning to the thrower the object which he had brought to the nganga. Such manual tradition was the traditional affirmation that this particular thrower was a witch." In Puna's case, the correct procedure had never been followed. To be sure, on some literal reading of the term "imputation," she had in fact imputed witchcraft to someone. But "witchcraft imputation" in this context functioned as a "natural kind." It referred to a certain set of rituals that rendered a verdict of witchcraft authoritative. Those rituals not having been performed, there had been no witchcraft imputation. The judge acquitted her.

Literature and the Meaning of Rules

Statutory interpretation is of course important for its own sake, but not only. Sometimes what one learns in the process of interpreting statutes has implications for the interpretation of other texts as well. The insights gained from trying to understand the Witchcraft Suppression Act may shed new light, for instance, on a long-standing problem of literary criticism.

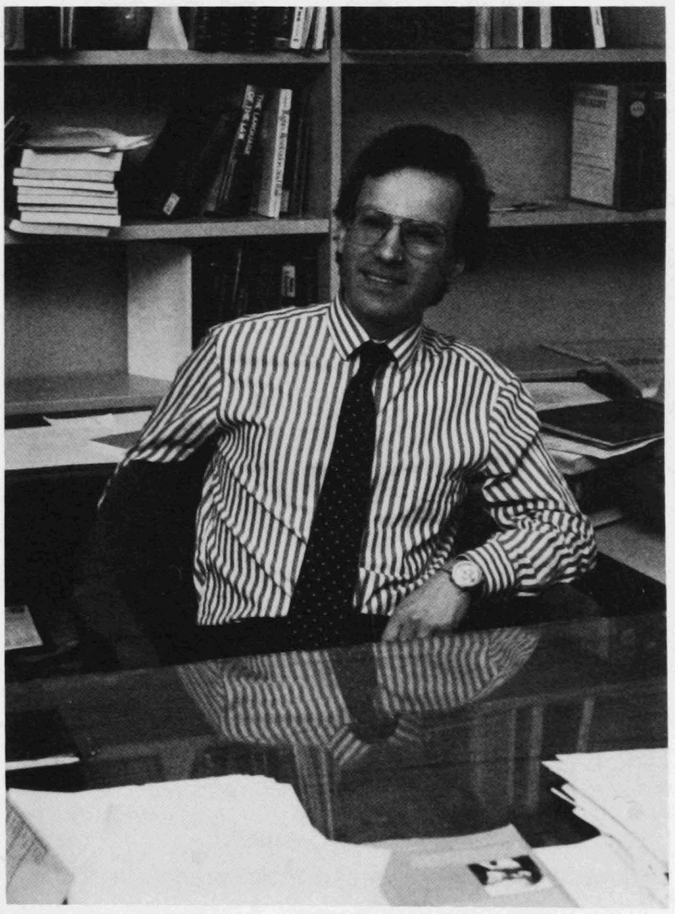
The literary critic faces a perennial quandary. He is in the business of constructing elaborate and ingenious theories to explain the meaning of arcane works of art. But the suspicion continues to gnaw at him, or at least at his readers, is this really what the author had in mind? Sometimes a malicious author will simply pull the rug from under the critic by announcing point-blank: "Silly you, that's not at all what I meant. Such a thought never crossed my mind." And if he doesn't want to bite the hand that strokes him, he may say euphemistically: "How cleverly that critic penetrated into my unconscious. I never knew these meanings existed in my work." Does that prove the critic's work is illegitimate? Is the meaning of a work of art necessarily present in the author's mind?

Perhaps not. Is this not the same quandary we faced in construing the meaning of a rule, namely whether the meaning of a rule necessarily coincides with what's in the minds of its drafters? Puna, we decided, should not be acquitted simply because the drafters of the Witchcraft Suppression Act thought witchcraft consisted of sorcery or the throwing of bones. What holds for legal rules should, for fairly similar reasons, hold for works of art as well: their meaning, too, will be only partially determined by what's in the artist's head. Not surprisingly, then, critics are able to discover meanings in a work of art that are news to their creator.

Chesterton seems to have been on to this quite some time ago, when he observed that it is possible for an "author to tell a truth without seeing it himself." "I was once talking to a highly intelligent lady about Thackeray's *Newcomes*," he recalled:

"We were speaking of the character of Mrs. Mackenzie, the Campaigner, and in the middle of the conversation the lady leaned across to me and said in a low, hoarse, but emphatic voice, 'She drank. Thackeray didn't know it; but she drank.' And it is really astonishing what a shaft of white light this sheds on the Campaigner, on her terrible temperament, on her agonised abusiveness and her almost more agonised urbanity, on her clamour which is nevertheless not open or explicable, on her temper which is not so much bad temper as insatiable, bloodthirsty, man-eating temper. How far can a writer thus indicate by accident a truth of which he is himself ignorant?"

It often happens that someone knows more than he can tell. And sometimes, it now turns out, he can tell more than he knows. Literary critics must have sensed this all along. Judges are just starting to appreciate it.



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Redesigning the Spouse's Forced Share: A PROPOSAL

American forced-share law underwent a major round of reform in the 1960s. The main objective was to prevent the decedent from engaging in "fraud on the widow's share," that is, using nominal inter vivos transfers to evade the surviving spouse's forced-share entitlement. In jurisdictions that follow the Uniform Probate Code of 1969 (UPC), that mischief has been eradicated. The UPC extends the forced-share entitlement to property that has been the subject of inter vivos transfer.

by John H. Langbein and Lawrence W. Waggoner

The following article is adapted from Langbein & Waggoner, Redesigning the Spouse's Forced Share, 22 Real Property, Probate & Trust Journal 303 (1987). The Joint Editorial Board for the Uniform Probate Code recently accepted in principle the idea for redesigning the elective share presented in that article. Legislative language incorporating the authors' proposals has been approved by the Joint Editorial Board and will soon be submitted to the National Conference of Commissioners on Uniform State Laws for official inclusion in the Uniform Probate Code.

In the present Article we develop the view that the time has come for a further round of reform of the forced-share system. With concern about evasion largely resolved, we direct attention to the underlying architecture of the forced share. Taking the UPC provisions as our model, we point to serious discrepancies between purpose and practice in the forced-share system, and we propose legislative correctives. We show that our proposal would remedy the worst shortcoming of modern American forced-share law — its astonishing insensitivity to differences in the duration of a marriage. If a marriage ends in death, the statutes currently in force allow the surviving spouse the same entitlement in the decedent's estate whether the marriage lasted five days or five decades. We recommend a means for adjusting the forced share to the duration of the marriage.

Marital-Property Regimes and the Rationale of the Forced Share

The basic principle in the common law states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns, even when the logic of the marriage is that one spouse earns less, or nothing at all, in order to enable the other to earn more. By contrast, in the eight community-property states, and in the Spanish legal system from whence our community-property states derived their model, each spouse would have an immediate half interest in the property that the other earns during the marriage. This half interest in the fruits of the marriage is known in academic parlance as the community of acquests (in contrast to the so-called universal community, in which spousal rights attach even to property earned before the marriage or acquired through inheritance or gift).

Legal-academic opinion in the United States today generally prefers the community of acquests over common law separate property. By granting each spouse an immediate half interest in the earnings of the other, the community of acquests recognizes that the couple's enterprise is in essence collaborative.

In 1983, the National Conference of Commissioners on Uniform State Laws endorsed a species of the community of acquests when it promulgated the Uniform Marital Property Act (UMPA). Although Wisconsin adopted a version of UMPA and is now reckoned as the ninth community-property state, the prospects for widespread adoption of UMPA in the separate-property states to which it is addressed appear bleak. The act has encountered resistance from the organized bar, in large measure for fear that the scheme of lifetime dual management that the act propounds is too complex.

It is essential to understand that American forced-share law *is entirely a consequence of the common law's separate-property regime for marital property*. Our community-property states do not have forced-share statutes. Having recognized in each spouse a reciprocal half interest in the earnings of the other, no further adjustment is thought necessary when death later terminates the marriage. Forced-share law, in contrast, is the law of the second best. It undertakes upon death to correct the failure of a separate-property state to create the appropriate lifetime rights for spouses in each other's earnings.

The preeminent legal and social policy that underlies the forced-share statutes is to limit the freedom of testation of the primary breadwinner, in recognition of the economic dependency that a conventional marriage characteristically entails for the spouse who specializes in what the economists call household production. Forced-share law is not Yuppie law. If both John and Mary were routinely going to be vice presidents at the Morgan Guaranty Bank, nobody would much care about giving them reciprocal claims in each other's estates. Indeed, under existing law serious Yuppies will contract out of the forced-share system by means of a premarital agreement. For the future and away from elite groups, however, traditional patterns of intrafamilial specialization are continuing.

Interestingly, the protective policy of the forced-share statutes has found expression in a pair of competing theories. One is the support or need theory; the other is the contribution or marital-property theory.

As for the support theory, the label pretty much suggests the argument. The breadwinner has a duty of support during his lifetime, which he ought not to be able to evade in death. If, however, you probe the typical forced-share statute, you will find that it is quite deficient in implementing a support policy. On the one hand, the fixed fraction, usually a third of the decedent's estate, may be woefully inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, all but a few forced-share statutes award the fixed fraction regardless of whether the survivor is in actual need — that is, even when the survivor has independent means that are quite ample. Both these objections to the support theory are of a similar sort — that the forced-share statute addresses need badly because it adopts a categoric rather than an individuated standard.

The other theory, the contribution theory, relates forced-share law back to what we have identified as its origin, in the shortcomings of the separate-property marital-property regime. Spouses are highly likely to have contributed to each other's nominal earnings through various forms of intrafamilial support. Especially in the conventional marriage, in which the burdens of home and childcare fall mainly upon the wife, she should be entitled to a share of what she helped her husband earn. Accordingly, the contribu-

tion theory is sometimes expressed as a "partnership" or "sharing" theory.

The contribution theory is intrinsically more plausible than the support theory, because the contribution theory responds directly to the defective marital-property regime of the separate-property states. Remember that in community-property states there are still plenty of needy widows, but no forced-share statutes. *Once contribution has been rewarded, nothing more is done to adjust the division of marital property to take account of the survivor's need.* Thus, we see in the forced-share system for separate-property states a contingent marital-property regime, under which the law presumes irrebuttably that the survivor contributed materially to the decedent's wealth.

One discrepancy between the contribution theory and current practice is that the forced share extends to all of the decedent's property, including property acquired before the marriage or property that came to the decedent through gift or inheritance — in other words, property that the surviving spouse did not help earn.

Even harder to square with the contribution theory is that aspect of forced-share law that we have advertised as its worst shortcoming, failure to take into account the duration of the marriage. Manifestly, the spouse of five days has not contributed remotely as much as has the spouse of five decades. Here the disparity between theory and implementation is so enormous that the customary apologetics about administrative convenience are not convincing. Either the contribution theory misdescribes the purpose of a forced-share system that tolerates such a disparity or, as we shall presently argue, that shortcoming of our forced-share system needs to be repaired in order to implement the theory properly.

Serial Polygamy

Despite its worthy aspiration to redress the inadequacy of our marital-property law, modern forced-share law does more harm than good.

The time has come to speak of serial polygamy. In modern times it has become increasingly common for people to have more than one spouse — alas, not simultaneously as in the good old days, but in a series. Divorce and remarriage is the most common variety of serial polygamy, a variety that now abounds in modern marriage behavior. From the standpoint of the troubled forced-share law, we are concerned with a remarriage pattern that is not primarily associated with divorce: the tendency among the elderly, whether divorced or widowed, to remarry later in life. The phenomenon is more noticeable among elderly men; since fewer men survive into advanced years, their chances of remarrying are correspondingly higher. Good data on remarriage late in life is hard to find, but the evidence of the troubled forced-share case law reinforces our impression that the phenomenon has become more common across the twentieth century. Growing longevity and better health in advanced years predispose the elderly to live more fully, and taboos against this sort of marriage have probably abated.

The objection to awarding the forced share in these circumstances is manifest. The forced share devolves upon a spouse whose contribution to the decedent's wealth bears no relation to what theory presupposes. It is wrong for a legal system that otherwise places such paramount value on freedom of testation to abridge that freedom when the benefit flows to a person who stands so far outside the protective purposes.

An Accrual-Type Forced Share

We wish to turn a fresh leaf and advance some proposals for legislative reform that have not thus far been considered.

The great attribute of community-property law that fits it for modern patterns of marriage behavior is that community-property rights are automatically adjusted for the duration of the marriage. The community-property right in a spouse's earnings attaches only to the property earned during the persistence of the marriage.

In the redesign of the forced-share system that we propose in this article, we shall be imitating key features of community-property (and UMPA) law; but we avoid both of the characteristic drawbacks of community law — the cumbersome lifetime dual management regime and the tracing-to-source of noncommunity property. We call for a forced-share entitlement that is sensitive to the duration of the marriage; that is mechanically determined; and that resembles the 50/50 split of community and UMPA law. We envision an accrual-type forced-share system in which the forced share grows with the length of the marriage. The particular analogy that we have in mind is the vesting schedule in a pension plan. Under a vesting schedule, there are two elements to consider: the amount of the ultimate benefit, and the rate at which one's entitlement in that benefit becomes indefeasible.

Amount: ***Increase the Forced-Share Fraction to Half.*** In forced-share law the analogue to the retirement benefit under a pension plan would be the statutory fraction of the decedent's estate, which in the UPC and most non-UPC jurisdictions is one-third of the estate. We would increase this fraction from a third to a half, primarily to align the forced-share fraction with the half interest that characterizes the functionally similar community-property and UMPA systems. (We explain shortly that we would apply the fraction to an entity

that is somewhat differently calculated than the probate estate or the "augmented estate" to which the present statutes apply.) We suspect that the one-third figure in present law is a hangover from the one-third life estate in common law dower. We think the return-of-contribution theory better supports a 50/50 split.

Accrual: ***Schedule the Forced Share to Vest Over Time.*** We recommend that the survivor's forced-share entitlement be phased in, according to a predetermined formula. We call this an accrual-type forced share.

Under current law, when John and Mary leave the altar on the day of their marriage, each has a one-third forced-share in the estate of the other. Under our proposal, the forced-share right of each spouse would vest incrementally across time. Suppose, for example, that the revised scheme allowed ten percent of the forced share to vest upon marriage, and the remaining 90-percent of the forced share to vest in five percent annual increments. On those numbers, it would take 18 years for each spouse to acquire the full 100 percent interest in the forced-share fraction.

The Survivor's Property

Our concluding group of proposals would refine the mode of calculating the forced share, by taking into account the survivor's own property. This proposal, for which there is support in a few of the existing state statutes, shares with our other recommendations the object of approximating the outcomes that would be achieved under the community of acquests (or under UMPA), but in a mechanical fashion.

Under the community of acquests, each spouse immediately acquires a half interest in the property earned during the marriage by the other spouse, which means that each spouse incurs an immediate reduction of half of the property arising from his or her earnings. Thus, when death terminates the marriage, the surviving spouse's property has already been reduced by the value of the decedent spouse's half interest.

By contrast, most American forced-share statutes disregard the property that the survivor has earned and titled in his or her name. Consider, for example, the UPC's augmented-estate scheme. The augmented estate is a tripartite computational entity that includes:

(1) The decedent's net probate estate.

(2) The value of property that the decedent transferred during the marriage by means of various will substitutes to persons other than the spouse. For convenience we shall call this class of property the "recapturables."

(3) The value of any of the survivor's property that the decedent had transferred gratuitously to the spouse. We call this the "spousal setoff" property.

The UPC's forced-share fraction (presently one-third) is applied to this computational entity. Property included in the augmented estate that belongs to the survivor (spousal setoff property) or that passes to the survivor as a result of the decedent's death is applied first to satisfy the forced share. As a result, the decedent cannot defeat the forced share by means of the common will substitutes; on the other hand, a surviving spouse for whom the decedent makes ample lifetime provision is precluded from forcing a further share.

We propose to make a pair of further adjustments in the UPC's augmented-estate system, in order to achieve the larger purpose of approximating the community property/UMPA outcome.[1] In this instance, the feature that we believe should be emulated is that under community law there is a 50/50 split in the property acquired by *both* spouses during the marriage.

The Property: ***Combine the Spouses' Augmented Estates but Charge the Survivor with His Own.*** Our proposal would make two alterations in the UPC's augmented estate. First, we would substitute for the present entity, which is constructed only on the decedent's augmented estate, a *combined augmented estate* that merges both the decedent's and the surviving spouse's augmented estates. This entity would, in fact, eliminate an administrative complexity inherent in the current UPC augmented-estate entity, which requires that the spousal setoff property be traced. Our proposal entails no tracing of the sources of funds of either spouse. The combined augmented estates would contain: (1) the decedent's augmented estate, now defined as his net probate estate plus the value of any recapturables; plus (2) the surviving spouse's augmented estate, defined to include that spouse's net worth, together with the value of any recapturables stemming from that spouse.

Including the survivor's augmented estate in the entity to which the forced share attaches requires the second adjustment to the UPC's augmented-estate system: In satisfying the forced share, *the surviving spouse must be charged with receipt of the survivor's own augmented estate.* That is, the survivor's own augmented estate (and property passing to the survivor as a result of the decedent's death) would be subtracted from the survivor's potential forced-share entitlement. Estate planners familiar with modern drafting techniques responsive to the federal transfer tax will recognize that our proposal would allow the elective share in a long-duration marriage to work in the nature of an

equalization clause, hence to duplicate the 50/50 split of the community and UMPA regimes.

It will be manifest that this proposal tends in the direction of the universal community and away from the community of acquests that we prefer in principle. Our proposal does not exclude the property that a spouse acquires by inheritance or gift (so-called separate property), although in a late marriage of short duration the incremental vesting feature does tend by approximation to eliminate the value of property that was acquired before the marriage. Our rationale is straightforward: We opt for the more inclusive system in order to preserve a mechanical forced share — in order, that is, to avoid the tracing for exclusion of separate property that the community of acquests would require. But we think that several factors help to narrow the gap between those two models in the forced-share context. In modern circumstances, it is unusual for either spouse to bring significant separate property to a long-duration first marriage. Further, when substantial separate property does enter such a marriage, it need not necessarily unbalance the spouses's holdings; an affluent person is more likely to marry someone of the same ilk than a pauper. For short-duration marriages, the accrual mechanism that we have emphasized would abate the consequences of an enriched forced share by diminishing the vested portion of the short-term spouse's forced-share entitlement. Finally, in the case in which there is material disparity in the wealth of the parties, the premarital contract would be available to oust the default regime of the forced-share law, as in current practice.

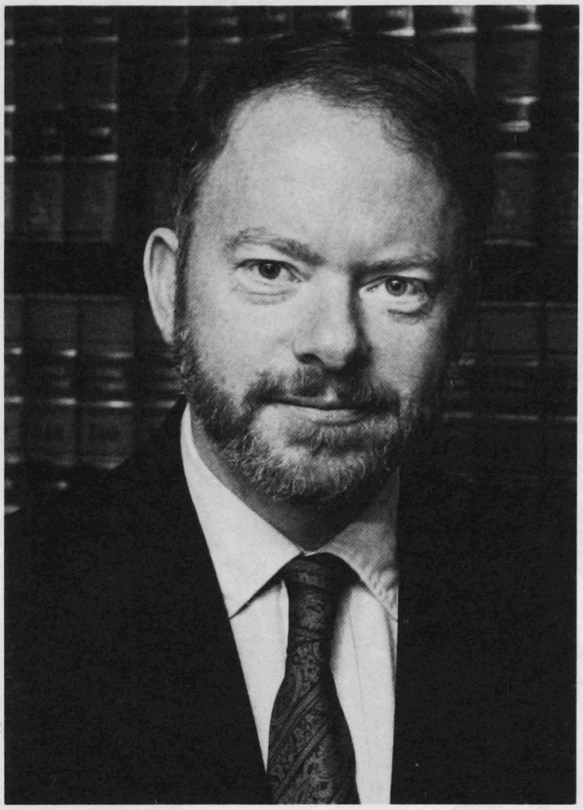
The Needy Survivor: ***Guarantee a Minimum Amount.*** Although we have shown why it is correct to see the contribution theory, rather than the support theory, as the driving force behind the forced-share system, we have also pointed out that the concepts largely overlap. Furthermore, the support theory unmistakably underlies such ancillary measures as the family and homestead allowances. Accordingly, we think it consistent with a system that is in the main based upon the contribution theory to make particular provision for extreme need.

We recommend, therefore, a minimum share for the impoverished survivor. Fifty thousand dollars is the figure we have in mind. Under our proposal the survivor is charged with receipt of his own net assets plus the amounts shifting to the survivor at the decedent's death. If those sums are less than the $50,000 minimum, then the survivor should be entitled — at the least — to whatever additional portion of the decedent's estate is necessary, up to 100 per cent, to bring the survivor's assets up to that $50,000 level. In the case of a late marriage, in which the survivor is aged in the mid-70s, the $50,000 figure would be more or less enough to provide the survivor with a straight-life annuity at a minimum subsistence level of approximately $10,000 per year.[2]

Conclusion

The merits of the accrual system that we have proposed should be fairly obvious in view of our critique of existing forced-share law. The serial-polygamy windfalls would be eliminated (and this by itself is a further ground for increasing the amount of the forced share from a third to a half). But because the accrual-type mechanism would work automatically, the reform would not entail the tracing and other administrative complexity associated with the community property and UMPA regimes.

To be sure, any system that has the advantage of mechanical application will have the corresponding drawback: Mechanistic justice is rough justice, and in most areas of the law we aspire to more than rough justice. But in the realm of forced-share law, there are important reasons for thinking that we cannot do better. Forced-share law is intrinsically arbitrary. The fixed fraction (whether a third or a half or anything else) is arbitrary. So, too, is the very premise on which the forced-share entitlement rests, that is, the irrebuttable presumption that the survivor contributed to the decedent's wealth. The law could, in theory, open such questions to examination of the merits in each case, but it has not, and for good reason. The proofs would be extraordinarily difficult. The issues in such a case would not resemble the issues in ordinary fact-finding — issues such as whether the traffic light was green or red. Examining the true merits of the case under a forced-share system that tried to establish the spouses' actual contributions to the family wealth would necessarily entail an inquiry into virtually every facet of the spouses' conduct throughout the marriage. Further, that litigation would arise just when death has sealed the lips of the most affected party. These are the concerns that have in the past led American policymakers to prefer a mechanical forced-share system. Accordingly, we would claim that the accrual-type system that we have recommended as a corrective for serial-polygamy forced shares has the considerable virtue of consistency with the rest of a mechanistic system. The reforms we propose would not achieve perfect justice. They would, however, achieve much better justice for an area of private law in which the results, at present, are too often repugnant.



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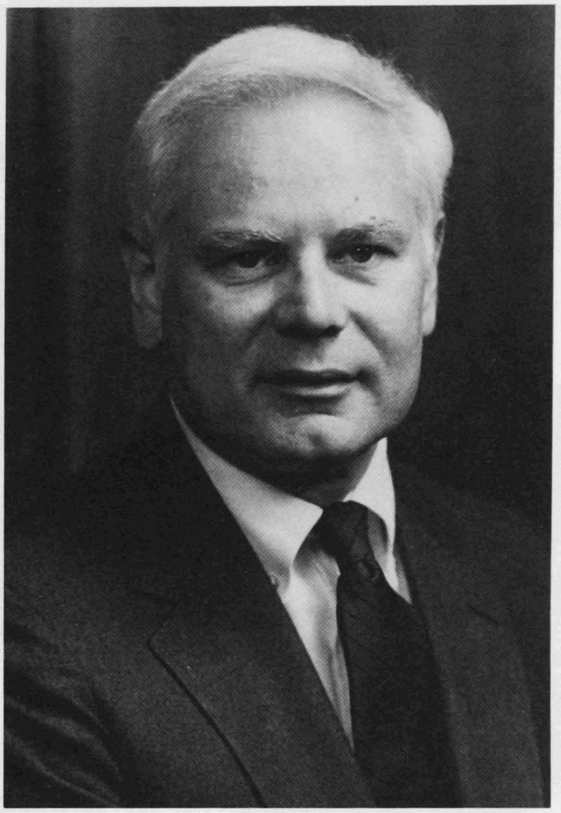

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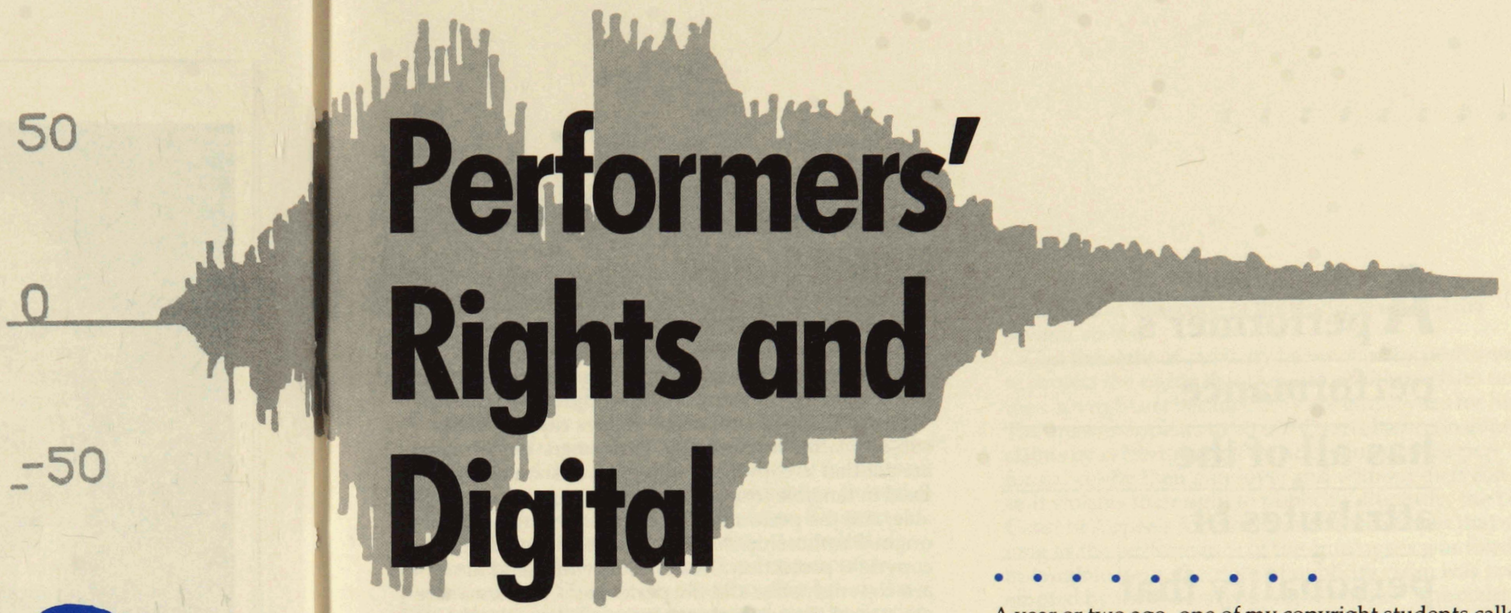
Footnotes

1. Because a forced-share system protects the property interest of the surviving spouse, it does not recognize the contribution-based interest of the decedent spouse. The community-property system does protect the decedent's interest as well, and in this respect our proporsals will fall short of the aspiration to achieve community-like outcomes. Community-like mutuality would require granting to the estate of the deceased spouse a claim against the assets of the surviving spouse. Such a right of election would have to devolve upon the decedent's personal representative, where it would resemble somewhat the situation in current law in which a fiduciary makes the election on behalf of a surviving spouse who is incompetent. In most jurisdictions the standard for making such an election is the survivor's need for support. If a decedent spouse's election were created, that spouse would not require support, but that spouse's personal representative would owe a fiduciary duty to the beneficiaries of that spouse's estate. The election would become virtually automatic when not waived by a well drafted instrument, in contrast to the present situation in which the forced share is actually exercised only rarely, in cases of deliberate disinheritance of the survivor.

2. The guaranteed minimum would also affect the short-duration marriage that ends in death early in life. In the case of a late-in-life short-duration marriage, not much wealth is acquired during the marriage, and the accrual-type forced share produces a better result by not shifting substantial wealth in such circumstances. In an early marriage, however, the partners typically enter the marriage with little in the way of separate property, and all or most of the wealth will have been acquired during the marriage. Under a community-property or UMPA regime, such property would have been community or marital property, and thus divided evenly between the spouses. If the marriage terminates on early death of one of the spouses, the survivor would be entitled to the community or marital half interest in the property despite the short duration of the marriage. By contrast, under the accrual-type forced share that we propose, the short duration of the marriage would cause the vested proportion of the forced share to fall short of the full fifty percent, and thus the surviving spouse would be credited with an inadequate return of contribution. This is not a problem of frequent occurrence; an early marriage gone sour is much more likely to end in divorce than in disinheritance upon premature death of one of the spouses. But a minimum entitlement of $50,000 would ameliorate, in a concededly rough way, the rare case in which such an event came to pass.



Performers' Rights and Digital Sampling under U.S. and Japanese Law

Jessica D. Litman

A year or two ago, one of my copyright students called to my attention a problem that seemed to him to pose unique difficulties for the copyright statute. The problem arises because of a technology called digital sampling.[1] Digital sampling is a new threat to performers' rights that has grown out of the combination of digital recording technology with music synthesizer technology. This threat is a very recent one. Indeed, the digital sampling problem is so new that copyright lawyers haven't yet figured out how to think about it.

Digital Sampling

Digital recording technology enables one to record a sound and encode it digitally in computer memory, which can then reproduce the sound absolutely faithfully. A digital sample is a very short digital recording, only a few seconds long, that is analyzed and stored in the memory of a computer. Older synthesizer technology enabled a computer to create music from computer-generated sound waves, although the result sounded a little metallic. If you plug a digital sample of a sound into a synthesizer, though, you can create music that sounds as if it's being played by the person who made the sound you recorded. Manufacturers have created products called sampling keyboards that combine the two technologies. And, over the last year or two, music created by using digital samples along with synthesizer technology has been showing up as backup music on many commercially released records. It's easy to see why. Using samples is less expensive and less trouble than hiring real performers.

Record producers are increasingly sampling the sounds of musicians they record to build up their libraries of sounds. And music created from these samples shows up on other recordings, and in the music for television programs or commercials, often without

A performer's performance has all of the attributes of personality that we instinctively expect to receive legal protection.

the sampled performer's knowledge or consent. Meanwhile, samples of commercially successful musicians' performances have become available in sample libraries and on the black market. Musicians with home recording studios are using the samples in their recordings.

This certainly seems to be the sort of situation that ought to give rise to a legal remedy. A performer's performance has all of the attributes of personality that we instinctively expect to receive legal protection. Although it may not be tangible, it smells like property. Using the performance without the performer's consent smells like a tort. Legal protection of performances is nonetheless murky, and it isn't clear how the law would approach unauthorized use of digital samples.

Recently, the Copyright Law Society of Japan asked me to give a lecture comparing the rights of performers under Japanese and U.S. law. I decided to examine how the laws of both countries would treat the problems posed by the widespread commercial use of digital sampling. The United States and Japan take different approaches to protection of performers' rights. Notwithstanding those differences, the commercial use of digital sampling poses similar challenges to U.S. and Japanese law.

Performers' Rights in the United States

Performers in the United States can seek protection under a variety of federal and state legal theories. The obvious place to start exploring the protection of performers' rights is the federal copyright statute.

The U.S. copyright statute defines copyrightable subject matter very broadly. Performers' performances are entitled to copyright protection as soon as they are fixed in tangible form. Sound recordings are copyrightable; and the performers' performances are part of the original authorship that entitles sound recordings to copyright protection. Audiovisual works and films are copyrightable; and the performers' performances are part of the original authorship that entitles those works to copyright protection. The copyright statute gives authors very strong economic rights, including exclusive rights of reproduction, adaptation, distribution and public performance.

As a theoretical matter, then, United States copyright law could offer performers very strong economic rights in their performances. As a practical matter, however, performers can almost never claim rights under the copyright statute. The reason for this is our "work made for hire" doctrine. The United States probably has the most expansive work made for hire doctrine in the world. It provides that any work created by an employee in the course of her employment is a work made for hire, and that the employer is the work's legal author. Copyright in that work, then, vests in the employer upon fixation. The reason that performers can never claim rights under the copyright statute is that virtually all copyrightable works that embody performances are works made for hire. Almost all sound recordings, films, and television programs made in the United States are made under contracts that expressly provide that the performers' contributions are works made for hire. The bottom line is that although the copyright statute gives the copyright owner the exclusive right to make reproductions of all copyrighted works, and the exclusive right to make public performances of copyrighted audiovisual works, the performer whose performance is embodied in these works is not the copyright owner and cannot exercise these exclusive rights.

Rights in Unfixed Performances: State Common Law

Federal statutory copyright does not vest in a work until the moment it is fixed in tangible form. There is no federal statutory copyright in performances that have not yet been fixed. Thus, federal law does not

protect the exclusive right to record a live performance. The only source for protection for unrecorded performances is the laws of the 50 states. Indeed, the federal copyright statute expressly preserves the power of the states to protect works that have not yet been fixed in tangible form. So far, however, few states have exercised that power. Only one state, the state of California, has a statute that gives protection to works that have not been fixed in tangible form. No cases have been decided under that statute. A handful of other states can be found that offered common law protection to unfixed works of authorship before the 1976 federal Copyright Act preempted state protection of fixed works and preserved state protection of unfixed works. In theory, such protection should remain available after the effective date of the 1976 Copyright Act. But, in the nearly 10 years since the 1976 Act took effect, no case has been reported in which plaintiff recovered for infringement of common law copyright in an unfixed work or performance. So although the possibility of state law protection of unfixed performances exists in theory, the right of first fixation has not yet received protection from state courts.

The Right of Publicity

Performers have another source of rights under state law. That source is the right of publicity. In the United States, the right of publicity protects a celebrity from misappropriation of her name or likeness for commercial purposes. The right of publicity has also been used by performers to protect their performances. In states that recognize the right of publicity, performers have a tool that will allow some of them to prevent the unauthorized commercial exploitation of their unfixed performances, either by reproduction or broadcast communication. Indeed, performers have succeeded in some courts in recovering not only for unauthorized use of their performances but also for unauthorized *imitation* of their performances. And courts have been tending to interpret the right of publicity with increasing breadth. Nonetheless, most courts require the claimed invasion of the right of publicity to involve a recognizable appropriation of a widely recognized feature of plaintiff's "identity."

Because the right of publicity is a creature of state law, it varies from state to state. Some states interpret it very broadly; others interpret it narrowly; and still others refuse to recognize it at all. The most vexing characteristic of the right of publicity is the wide variations in the scope of the doctrine among the several states.

Can the right of publicity be invoked by performers to protect the rights that they are unable to claim under the copyright act because they are employees for hire? The answer appears to be no. Courts have considered claims by celebrities that broadcasting of their performances by their employer and without their consent violates their right to publicity. Recently, the U.S. Court of Appeals for the Seventh Circuit held that so long as the performance of the employees was fixed in tangible form, the right of publicity claim was preempted by the federal copyright statute.[2] The court reasoned that the right of publicity being asserted was equivalent to a right of public performance in performances that had been created and fixed within the context of the employment relationship. The copyright statute vests the right of public performance in the employer, and preempts laws under which the employee could claim ownership of essentially equivalent rights.

Section 43(a) of the Lanham Act

United States law has another source for protection of performers' rights that I want to mention briefly: it has assumed increasing importance in United States intellectual property law. That source is section 43(a) of the Lanham Act, a statutory section tucked in at the end of our federal trademark statute that courts have interpreted to establish a federal statutory tort of unfair competition. The gravamen of a cause of action under section 43(a) is that defendant has confused or misled the purchasing public about the nature or source of defendant's goods or services. Section 43(a) sometimes offers performers a remedy for claims that are not otherwise actionable. For example, Woody Allen's right of publicity suit against a Woody Allen lookalike was unsuccessful, but he prevailed against the lookalike in a claim based on section 43(a).[3] In another case, the singer Charlie Rich successfully relied on section 43(a) to enjoin the re-release of a 10 year old sound recording of his performance with a current photograph of him on the record jacket.[4] An advantage of section 43(a) is that it is part of a federal statute rather than a creature of state law, so it is immune from federal preemption.

I have briefly described four possible sources for performers' rights under United States law: the federal copyright statute, under which performers, as em-

ployees, have no rights; state common law copyright which, in theory, gives performers a right of first fixation and, in practice, does not appear to exist; the right of publicity, which offers performers a pastiche of inconsistent rights; and section 43(a), which offers performers who can prove public confusion the possibility of parasitic recovery based on the confusion. None of these legal doctrines was designed with performers' rights in mind. Performers who seek protection under them find that the situations they complain of fit into these doctrines very poorly. For that reason, most performers have looked to the labor unions that represent them to secure through collective bargaining the rights that the law has failed to provide. The labor unions that represent performers are relatively weak, and have not been very successful in their attempts to negotiate stronger rights for their membership.

Performers' Neighboring Rights in Japan

The situation in Japan is very different. The copyright law of Japan follows the model of many European nations:[5] copyright vests, without any formal requirements, in works of authorship within designated subject matter categories. Performers' performances are not so designated and, thus, are not themselves subject matter entitled to copyright protection. Sound recordings that embody performances of music are not copyrightable. Films are entitled to copyright, but the authorship embodied in a film or audiovisual work includes only the production, direction, art direction and photography, and not the performers' performances.

Japanese law protects performers by giving them "neighboring rights" *(chosaku-rinsetsuken)* that are independent of and different from the copyright granted to authors.[6] The Japanese neighboring rights were modeled on the provisions of the Rome Convention of 1961,[7] and give performers very strong rights in their unfixed, live performances, including an unqualified right to authorize or forbid the recording of their live performances.[8]

Performers' rights in performances once those performances have been fixed in tangible form are much weaker. The statute gives performers a very limited reproduction right over performances that have already been recorded or filmed.[9] Performers also have a nominal right to equitable remuneration for commercial broadcasts of their fixed performances,[10] and a limited public lending right.[11]

Japanese law does not presume that all fruits of an employee's creative endeavor belong to her employer.

These rights are far narrower than their United States analogues. But they are essentially inalienable. Moreover, a performer's employment status does not affect them. Japanese law does not presume that all fruits of an employee's creative endeavor belong to her employer. Instead, the Japanese provisions for neighboring rights expressly preserve a limited set of rights in performers, whether employed or not. Nor do neighboring rights depend on a particular performer's fame or her audience's confusion.

I have outlined the overall shape of United States and Japanese legal doctrine for the protection of performers. How do these doctrines apply to digital sampling?

Digital Sampling Under U.S. Law

The first instinct of American music lawyers when their clients came to them and complained that their performances were showing up on other people's records was to think about a copyright infringement suit. They immediately ran into problems figuring out how to think about it.

Suppose, for example, that the digital sound sample was taken with the performer's consent, but outside of the context of an employment relationship. Perhaps a fellow musician recorded it when playing around with her equipment. Using the sample in other recordings might violate the performer's copyright rights to reproduce the work and to prepare derivative works, but only if the digital sound sample were copyrightable. And here we run into problems. First of all, a digital sound sample is itself probably too short to be copyrightable. The Copyright Office assimilates digital samples to other uncopyrightable building blocks of copyrightable expression: single words, brief phrases, discrete items of data or short dance steps. If the digital sound sample is uncopyrightable, then it is not copyright infringement to exploit it in other recordings. Even if the sample were held to be entitled to a copyright, there are further obstacles. Under the U.S. copyright statute, the copyright owner is entitled to prohibit any duplication of a sound recording, but may not prohibit imitation of it.[12] We talk about this as a "dubbing" right: it covers record piracy and off-the-air recording, but not sound-alike records. And it is simply not clear whether a United States court would hold that creating a sound recording through the use of digital sound samples is a use that involves duplication, rather than mere imitation. A defense lawyer could argue that imitation is the essence of digital sampling: a computer analyzes the attributes of a sound wave, stores its characteristics in computer memory, and then uses synthesizer technology to imitate the sound. If courts assimilate the use of digital samples to imitation rather than duplication, then the creation of new recordings from those samples would not be copyright infringement.

Consider, instead, a situation in which the sample is taken from a copyrighted sound recording. We have some of the same problems, and some additional hurdles as well. If the sample is taken from a copyrighted sound recording, the sound recording is copyrightable, but the copyright doesn't belong to the performer because the sound recording is a work made for hire. Assuming that there were a way over that hurdle, a copyright infringement action might fail on the ground that the accused recording was not substantially similar to the original sound recording, or that the amount taken was *de minimis*. After all, the sample is merely a few seconds long. The bottom line is that U.S. federal copyright law offers little protection of substance to the performer who has authorized the fixation of a digital sound sample of her performance.

What about bootlegging, or unauthorized fixation? State common law copyright might protect a performer whose live performance has been surreptitiously sampled. But there are no cases out there to look at, and it is entirely possible that states would find arguments that sound samples are mere building blocks and not protectable works of authorship to be compelling.

This brings us to the right of publicity. The right of publicity should protect performers from unauthorized commercial exploitation of their performances; so it would seem a perfect remedy. There are nonetheless significant obstacles to recovery. First, a sound recording may use music generated from a digital sample of a performer's performance, without being widely recognizable. Most courts deny recovery for unrecognizable uses of plaintiff's likeness or identity; those courts would surely deny recovery for unrecognizable uses of plaintiff's performance. Secondly, most jurisdictions privilege "incidental use" of names and likeness, that is, use for purposes other than taking advantage of the celebrity's reputation or prestige. Where the incidental use privilege is broad, the sort of appropriation involved in unauthorized use of digital sound samples would fall within it. Finally, there is the problem of preemption. If the performer has authorized the sample's fixation in tangible form, state law causes of action for use of the sample would likely be preempted by the federal copyright statute.

This brings us to section 43(a) of the Lanham Act, and a ray of hope for the performer. Although there have as yet been no cases decided under section 43(a) on analogous facts, courts have interpreted it expansively, and used it to make otherwise unactionable wrongs actionable. So long as consumers are not confused as to the provenance of sounds on recordings or programs, section 43(a) ought not to provide a remedy. Courts, however, have been generous recently in finding the requisite likelihood of confusion, and quick to respond to impressions of misappropriation with injunctions.

No 43(a) suit has yet been filed. In the face of gloomy prognoses from their attorneys, performers aggrieved by the use of digital sound samples of their performances in commercial sound recordings have tried to persuade their union to pursue the issue. Thus far, however, the union has failed to do so.

Why is U.S. law so inhospitable to claims for this sort of injury? United States protection of intellectual

A performer's voice, or trumpet tone, is not something that the law envisions as more likely to be 'created' if incentives are available.

property is based on an economic incentive model rather than a natural rights model of personality. The bare fact that someone created something does not suffice to entitle that person to legal rights in her creation. Instead, U.S. law offers property rights as incentives for creation and concentrates those rights in the hands of those entities most likely to exploit them. A performer's voice, or trumpet tone, is not something that the law envisions as more likely to be "created" if incentives are available. Nor would giving performers property rights in their performances facilitate exploitation. Indeed, the multiplicity of ownership that would result from giving property rights to each performer in any given performance would significantly raise the transaction costs involved in the transfer and exploitation of those rights. Because unrestricted digital sampling neither interferes with incentives for creation nor burdens the exploitation of protected works, it may not invade any interests that U.S. law was designed to protect.

Digital Sampling Under Japanese Law

Japanese law embodies an approach that derives from natural rights, and expressly recognizes rights in performers. One might therefore expect it to be more favorable to performers than its U.S. counterpart. Indeed, under Japanese law, performers are in a somewhat stronger position. Their statutory neighboring rights give them a right to prohibit unauthorized fixation of their performances, and a right to prevent duplication of unauthorized fixations. If taking a digital sound sample of a performance is deemed to be a recording of that performance, an unauthorized sample should violate performers' neighboring rights, and any reproduction of that sample should also be a violation. There are, nonetheless, significant hurdles that performers must overcome. Notwithstanding the fact that Japanese law approaches issues of performers' rights differently from the United States, the obstacles performers face in recovering for unauthorized uses of digital samples are similar.

First of all, as in the U.S., it isn't entirely clear that a recording as short as a digital sound sample would constitute a reproduction of a performance. Second, even if a digital sound sample were deemed a reproduction of a performance, it is not completely clear that a new recording that incorporates music created from the sound sample would also be deemed a reproduction of the performance. Finally, taking and using a digital sound sample might be exempt under the Japanse statute's provisions permitting short, attributed quotations from performances if consistent with fair dealing.[13]

If the performers have consented to the sample, then in addition to these hurdles we have a problem of ownership. Under the Japanese neighboring rights provisions, the unqualified reproduction right would belong to the producers of the phonograms, which, under the statutory definition would seem to be whoever recorded the sample.[14] Performers could prevent the sample's use in other sound recordings only in very limited situations. These would be weak rights, but they would be stronger rights than are currently available to performers in the United States.

Why is Japanese law not more favorable to performers aggrieved by the unauthorized use of digital sound samples? Although Japanese law takes a natural rights approach to performers' rights, and accords performers rights that are essentially inalienable, it defines those rights restrictively. Indeed, because the rights are inalienable and may be owned by a multiplicity of persons who may have conflicting interests, it is necessary that they be narrow in scope. Because digital sampling involves a new technology, it is difficult to predict whether it is encompassed within the restrictive language of Japan's neighboring rights provisions.

Japanese performers face, for different reasons, many of the same obstacles as performers face under U.S. law.

Conclusion

Both the United States and Japan offer performers rights, but they are weak rights. Japan is more solicitous of performers than is the United States, but the development of new technology has outstripped the legal provisions in both nations' laws. United States law in this area has set its highest priority as facilitating the transfer and exploitation of rights by concentrating their ownership in the hands of few people: hence, our adherence to the work made for hire doctrine, which vests copyright in almost all performances in the performers' employer. Japan has been more willing to tolerate plurality of ownership, and the resulting restraints on alienation and exploitation of rights. But the development of digital sampling techniques strains the provisions made for performers' rights under both systems, because the way that performances may be exploited no longer fits comfortably within the language of either of our laws.

The *Rome Convention*, upon which Japan's neighboring rights provisions are based, is only a first step in protecting the rights of performers, and is already outdated. The provisions of the *Rome Convention* are, nonetheless, more generous to performers than current U.S. law. The United States is unlikely to join the *Rome Convention* and unlikely to amend its law to conform with the convention's terms.[15] Performers' protection in the United States, then, is likely to continue to be based on a collection of diverse and sometimes inconsistent legal theories, providing a system of uneven and often unpredictable rights and remedies.

Footnotes

1. Jeffrey Newton, J.D. 1987, won first prize in the 1987 Nathan Burkan Memorial Competition with his paper on the digital sampling problem, "Digital Sampling: The Copyright Considerations of a New Technological Use of Musical Performance." I am grateful to Mr. Newton for directing my attention to this problem, and for educating me in the lore and technology of musicianship.
2. Baltimore Orioles v. Major League Baseball Players, 805 F.2d 663 (7th Cir. 1986).
3. Allen v. National Video, 610 F. Supp. 612 (S.D.N.Y. 1985).
4. Rich v. RCA Corp., 390 F.Supp. 530 (S.D.N.Y. 1975).
5. Japan is a signatory to the *Berne Convention for the Protection of Literary and Artistic Works*, an international copyright treaty ratified by the overwhelming majority of nations in the world. The United States has not yet acceded to *Berne*. In significant respects, the copyright laws of *Berne* members share similarities that United States copyright law does not share.
6. Copyright Law, Arts. 89 - 104 (Law No. 48, 1970). *See* T. Doi, The Intellectual Property Law of Japan 238 - 55 (1980); Katsumoto, The New Japanese Copyright Law, 52 Internationale Fesellschaft fur Urheberrecht Schriftenreihe 113, 148 - 50 (1975).
7. *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, October 26, 1961*. The *Rome Convention* is another international treaty that the United States has not joined. *Rome* provides for rights ancillary to copyright for the benefit of performers, phonogram producers and broadcasting organizations. *See generally* International Labor Organisation, Laws and Treaties of the World on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1969).
8. Copyright Law, art. 91. *See* T. Doi, supra note 15, at 241 - 42.
9. If the fixed performance is embodied in an audiovisual work or a film, the performer may prevent the reproduction of that performance in a sound recording, but not in another audiovisual work. Copyright Law, art. 91. Performers may, however, enforce contractual restrictions on broadcast programs in which their performances are incorporated. Copyright Law, arts. 93, 94. If the fixed performance is, instead, embodied in a sound recording, the performer may prevent a reproduction of the sound recording for a purpose completely different from the purpose for which the performer consented to the original fixation. Although the right to reproduce phonograms belongs to the phonogram producer, at least one court has apparently enforced the reproduction right at a performer's behest. *See* Hamasake v. Ishiyama Kaden K.K., Tokkyo To Kigyo, Jan. 1979, p.64 (Tokyo Dist. Ct. Nov. 8, 1978), discussed in T. Doi, supra note 15, at 242.
10. Copyright Law art. 95. In Japan, the individual performers never receive the money paid as equitable remuneration for secondary uses. Instead, broadcasters pay royalties to Geidankyo, the performers' collecting society. Geidankyo uses some of the funds for activities that benefit performers, and disburses the rest of the money to performers' organizations and unions for use in their operating budgets.
11. Copyright Law art. 95*bis*.
12. 17 U.S.C. sec. 114(b) (1982).
13. *See* Copyright Law arts. 32, 48, 102.
14. *See* Copyright Law art. 2, paragraph (1) (vi).
15. Notwithstanding the inadequacy of United States law on issues of performers' rights, it appears very unlikely that the United States will accede to the *Rome Convention*. Because broadcasting organizations and phonogram producers have strong economic rights under the copyright statute, they are unlikely to support accession to *Rome*. Performers alone are insufficiently powerful political players to command congressional attention. The most recent effort to expand performers' rights under the copyright statute, the proposal to establish a performance right in sound recordings, languished in Congress despite the support of the Copyright Office. *See* Subcomm. on Courts, Civil Liberties and the Administration of Justice, of the House Judiciary Comm., Performance Rights in Sound Recordings (Committee Print 1978).

R.S.V.P.

New alumni directory being compiled

An updated version of the U-M Law School Alumni Directory, replacing the one published in 1985, is now being prepared and is scheduled for publication in December, 1988.

The directory will be divided into several sections. The first will contain information about the Law School; the second, individual listings of graduates, including professional or home addresses. Another section will list alumni geographically, by city, state, and, where relevant, by foreign country.

The information in the directory is being compiled by the Harris Publishing Company through questionnaires sent to all alumni. The data will be verified through followup phone calls. The new directory will be available only to U-M Law School alumni, who will be given the opportunity to order a copy when their information is verified by phone.

The Law School Relations Office is requesting the kind cooperation of all graduates in responding promptly to the questionnaires to insure the success of this comprehensive directory.

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