Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 32, NUMBER 3, SPRING, 1988

Clinical Law at Michigan

Payton on Civil Rights and Republican Principles

Krier on the Environment and the Constitution

C. Cunningham on a Linguistic Approach to the Fourth Amendment

Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 32, NUMBER 3, SPRING, 1988

ARTICLES

DEPARTMENTS

Law Quadrangle Notes (USPS 893-460) is issued by the University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publication: *Law Quadrangle Notes*, Law School, The University of Michigan, Ann Arbor, Michigan 48109-1215.

Published quarterly, three substantive issues are available for general distribution; the fourth issue, the annual report, is sent only to alumni.

POSTMASTER, SEND FORM 3579 TO: Editor, *Law Quadrangle Notes*, Law School, The University of Michigan, Ann Arbor, Michigan 48109-1215.

Editor: Bonnie Brereton, U-M Law School; **Student Editorial Assistant, Writer:** Marija Willen, U-M Law School, '89; **Graphic Designer:** Margot Campos, U-M Office of Development and Marketing Communication; **Production Editor:** Carol Hellman, U-M Office of Development and Marketing Communication.

About the cover:
Clinical Professor Paul Reingold confers with Detroit Recorders Court Judge Robert L. Evans (J.D. '56) during a recent mock trial at the Law School. Photo by Virginia Davis.

Clinical law at Michigan

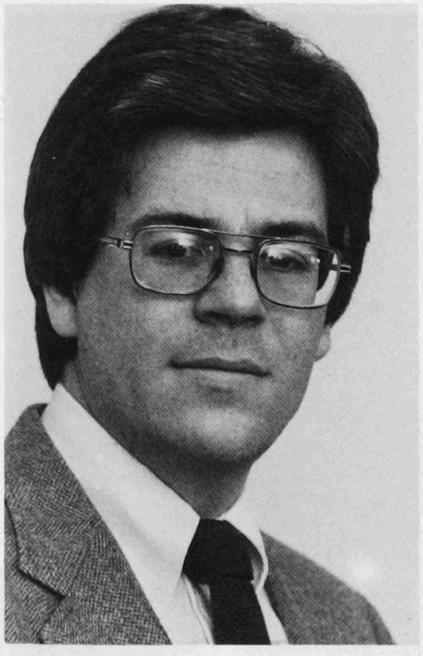
Learning to think while being a lawyer

Nearly two decades ago, shortly after Professor James J. White began his academic career at Michigan, he recognized the need for practical legal training in the classroom. "I guess I was young and idealistic then," he recalls modestly, "and I thought it would be useful for students to work in clinics and appear in court."

White soon got busy drafting a rule, which he and then Acting Dean Charles Joiner submitted to the Michigan Supreme Court, allowing students to practice in state courts.

Shortly after the rule was passed, a handful of students began practicing with the Legal Aid Clinic. Guiding them on a rotating basis were professors from the regular faculty: White, Alfred F. Conard, Jerold Israel, David Chambers, Whitmore Gray, Peter Westen, and the late James Martin. From 1974 through 1984 the general clinic was directed by Steven Pepe, who currently serves as U.S. Magistrate and adjunct professor at the Law School.

Students desiring practical experience now have a choice of five programs: the General Practice Clinic, the Child Advocacy Clinic, Criminal Appellate Practice, the Environmental Law Clinic, and the Immigration Clinic.



Gregory Fox

Clark D. Cunningham

MCLP

Representing poor people

The Michigan Clinical Law Program is the Law School's general practice civil/criminal clinic, serving more than 50 students a year. Under state and local court rules, students practice in the district, circuit, and probate courts of Washtenaw County (in which the U-M is located), as well as in the federal courts in Michigan.

Students represent indigent clients in many substantive areas, including landlord/tenant matters, consumer cases, and tort claims, primarily on referral from Legal Services of Southeastern Michigan.

Clinic students find that such cases, which may seem at the outset to involve only narrow issues and limited relief, can develop into challenging and important litigation. For example, a lawsuit that began in 1985 as a seemingly simple hospital bill collection case has now turned into an action on behalf of more than 35 plaintiffs raising claims of state-wide significance over the duty of counties to provide hospitalization for the poor.

The clinic also takes family law cases referred by the Washtenaw County Bar Association, and it accepts criminal misdemeanor cases on appointment from the 14th and 15th District Courts. One morning a week the Probate Court appoints the clinic to represent respondents in involuntary civil commitment hearings at the Regional Psychiatric Hospital in nearby Ypsilanti.

The MCLP also receives appointments from federal courts in prisoner civil rights cases. For example, this year the clinic handled a case involving two federal prisoners who had complained about being forced to work in a prison sewage pumping facility without adequate protective clothing and safety devices. The county health inspector, who responded to their complaint, later testified that "the conditions there [at the sewage facility] were certainly among the top five worst cases I've seen in my time in public health." The health hazards have now been corrected; the lawsuit also involved compensation claims for having to work under such conditions and for alleged retaliation by prison officials.

For all these cases, the clinic averages close to 100 separate court appearances every term.

The MCLP has a faculty of three: Clark D. Cunningham, Martin A. Geer, and Paul D. Reingold.

Clark D. Cunningham, who joined the clinical faculty this year, is a graduate of Dartmouth College and Wayne State Law School. Cunningham's background reflects a long commitment to the inner city of Detroit, including VISTA service (he worked with a small grassroots organization which provided assistance to low-income tenants) and several years with Michigan Legal Services. He taught for two years as an adjunct faculty member

at Wayne State. (A faculty article by Cunningham on the Fourth Amendment appears on page 48 in the present issue of *LQN*.)

Martin A. Geer, who has been with the program since 1984, is a partner in the Ann Arbor law firm of Kessler & Geer, which has an emphasis on criminal law and civil rights litigation. Geer formerly taught in the clinical program at Wayne State University Law School and served as a Reginald Heber Smith Community Law Fellow at Legal Services of Southeastern Michigan. As an ex-clinic student and a litigator, Geer believes that clinical teaching with real cases and simulation is vital to preparing students for the practice of law.

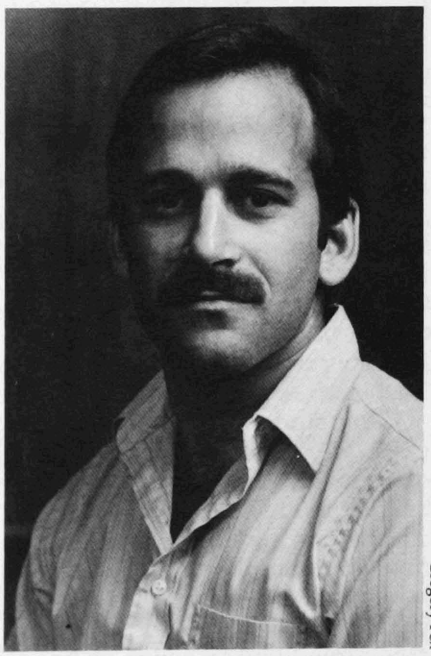
Paul D. Reingold, who has directed the program since September, 1983, is a graduate of Amherst College and Boston University Law School. A highly regarded teacher, he was awarded the L. Hart Wright Award for excellence in teaching by the Law School Student Senate in 1986. His previous experience includes five years with Legal Services of Southeastern Michigan in various positions (beginning with service as a VISTA volunteer) and working as an assistant attorney for the City of Ann Arbor. Reingold recently filed and appealed the case of Green v. Mansur, which reached the U.S. Supreme Court.

Regarding the MCLP, Reingold observes, "Our program is a small one, but when I compare it to what other schools are doing, I think it exemplifies what is best in clinical legal education."

In addition to the clinical component, the MCLP also includes four hours a week of seminars and simulations. In seminar, students get an overview of the procedural rules and the substantive law they will need to work on their cases. Whenever possible, open clinic files are used as the problems for discussion. Although the caseload may dictate the seminar agenda some of the time, every semester the syllabus includes sessions devoted to interviewing, negotiations, and legal ethics.

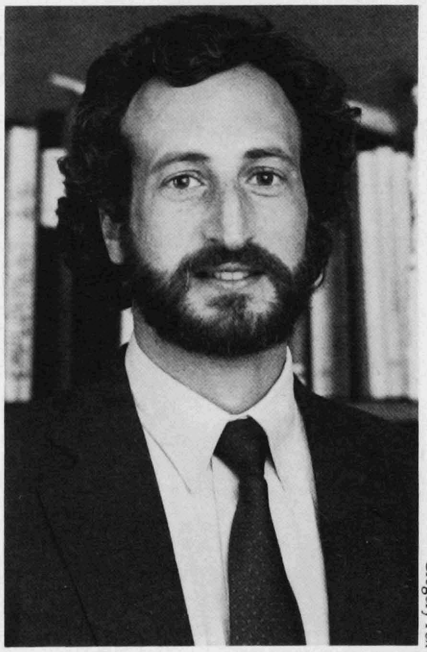
In the trial advocacy workshops, students in small groups learn the rudiments of trial practice using the role-play techniques pioneered by the National Institute for Trial Advocacy. The trial practice similations teach basic litigation skills, such as opening statements, direct and cross-examination, introduction of evidence, impeachment of witnesses, and closing arguments. The trial advocacy workshops end with full mock jury trials for all students. The trials are judged and critiqued by experienced trial lawyers and are videotaped for faculty review.

The small group sessions encourage interaction among students and an atmosphere of openness and cooperation. For example, the wrap-up discussion at the close of last semester focused on the ways in which various experiences in the clinic were affected by racial attitudes of clients, judges, court administrators, and the students themselves. The discussion was organized and led by two of the Black students in the class, Kevin McClanahan and Kelly Lambert. Explains Lambert, "I thought that the discussion that took place that night in our seminar was one of the most sensitive things that happened during my three years at Michigan. As Black students, it's important for us to have the opportunity to expose people to another point of view. The discussion was productive in the sense that a dialogue was started."



Gregory Fox

Martin A. Geer



Gregory Fox

Paul D. Reingold

Child Advocacy Law Clinic

Practicing three separate roles

The Child Advocacy Law Clinic provides 16 law students each semester the experience in handling actual cases of alleged child abuse or neglect or termination of parental rights cases. In the context of specific child abuse and neglect cases, and with close support and supervision of an interdisciplinary faculty, students address the complex ethical, legal, social, and emotional questions of when and how the state ought to intervene in family life on behalf of children.

The clinic operates in a nine-county area, contracting with local departments of social services and prosecutors' offices. Student attorneys appear in three distinct legal roles in separate counties — for the state child protective services, for the child, and for the parent. Teaching and case consultation is provided by social work and psychiatric faculty as well as law faculty.

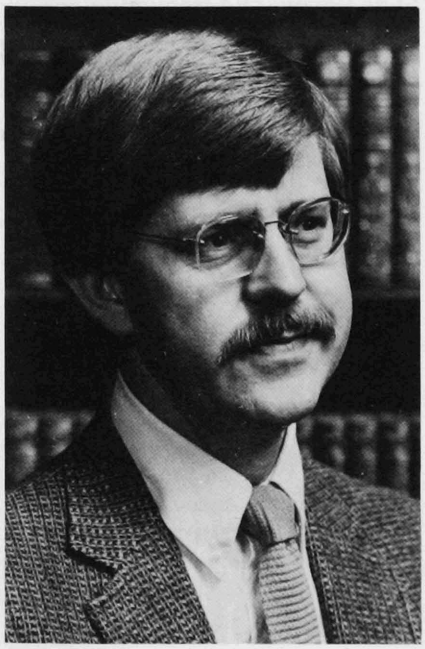
Students who enroll in the Child Advocacy Clinic, like those in the other clinics, are invariably enthusiastic about the experience. The following comments were taken from class evaluations of the CALC. "Courses such as this should be mandatory. . . . It served as a vehicle to bring together many other subjects taught in law school. Where else can you pull together evidence, civil procedure, ethics, and family law?" wrote one student. "The techniques I learned here I will remember for the rest of my life," wrote another. "In such a warm atmosphere I was not afraid to make mistakes or take risks. The work itself has been trying but satisfying . . . . I believe I will be a better attorney for having first learned in such a setting."

Apart from the immediate benefits realized by student participants and their clients, the work of the CALC often has had a long term impact on policy. The *Werner* case is one example. In the process of appealing the case, the clinic discovered a discrepancy between the rights of appeal of parents and those of the Department of Social Services. The clinic brought this discrepancy to the attention of the legislature, which recognized an apparent oversight in previous legislation. It appears that this oversight will soon be corrected.

Each semester the CALC also offers one student team the opportunity to work closely with director Donald Duquette on a special legislative project concerned with legal reform affecting children in the state. Two years ago student teams in succeeding semesters worked on a bill to protect child victim/witness in child sexual abuse cases. The first team participated in the legislative drafting committee; another followed the bills in the Michigan House and made an extensive presentation, including legal analysis and videotaped examples of children's statements, to a subcommittee of the House Judiciary Committee.

The CALC faculty consists of Donald Duquette, Lisa D'Aunno, David Herring, and Suellyn Scarnecchia.

Since its founding in 1976, the CALC has been directed by **Donald Duquette**. A 1974 alumnus of the Law School, Duquette earlier spent three years as a child protective services and foster care social worker in Muskegon, Michigan. An enthusiastic teacher, Duquette notes, "Every semester we start the clinic program with a new group of green, somewhat nervous, apprehensive, but eager law students. Through a series of readings, classroom meetings, and simulations, we bring them to the point where



Gregory Fox

Donald N. Duquette

Gregory Fox

Lisa D'Aunno

they are litigating reasonably complicated issues of fact and law with a level of expertise comparable to other attorneys with whom we appear."

Lisa D'Aunno graduated from Notre Dame in 1978 and received her J.D. from Michigan in 1984. Before attending law school, she spent three years working with non-profit agencies in Baltimore, MD, where she assisted and advised low-income neighborhood residents on strategies to enable them to receive their share of city services. She also has worked at the U-M Institute of Gerontology, organizing nursing home patients and their families.

David Herring, a 1985 graduate of the Law School, joined the CALC this winter. Herring spent a year as an assistant state's attorney at the Cook County, Illinois, Prosecutor's Office. Notes Herring, "There are a lot of changes taking place in this area of the law and the clinic is out front making and implementing these changes."

Michigan alumna **Suellyn Scarnecchia** (J.D. '81) joined the CALC in May, 1987, following six years with the western Michigan law firm of McCroskey, Feldman, Cochrane and Brock, PC, in Battle Creek. There, in addition to her legal work, she led a grassroots movement to open a domestic violence shelter. Scarnecchia finds that teaching in the clinical program combines her trial practice experience with her personal interest in working with victims of family violence.

Criminal Appellate Practice

Getting into the real nitty gritty

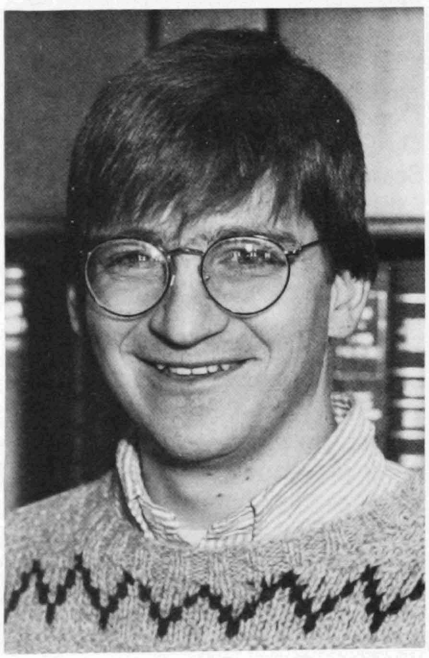
The Criminal Appellate Practice course gives students the opportunity to represent a convicted felon in the appeal of his or her conviction. Over the years students have worked with individuals convicted of armed robbery, murder, criminal sexual conduct, arson, and other felonies.

This semester several of the cases the students have handled have the potential to establish precedent with an impact beyond their individual case. Among these are issues on the scope of the confrontation clause and the post arraignment counselless interrogation of a suspect.

Class size is usually limited to 12 students who work with the state Appellate Defender's Office briefing criminal appeals. Classroom sessions are devoted to the major aspects of doing a criminal appeal: 1) reviewing the record, 2) spotting the issues in the case, 3) interviewing the client, 4) preparing the statement of facts, 5) writing the appellate issues, and 6) arguing the case before the reviewing court.

There are also classroom sessions devoted to discussions of the criminal justice system as a whole and the cases that are being used in the course for that semester. The students take a tour of Jackson State Prison, and frequently an ex-inmate comes into class as a guest speaker.

Directing the Criminal Appellate Practice course this year is **Herb Jordan**, a 1979 graduate of the Law School. An attorney with the State Appellate Defender's Office in Detroit, Jordan still maintains a full caseload of 60 cases. Heralded by his students as a skillful litigator and insightful coach, Jordan has an eclectic legal background. An appellate defender for the past eight years, his experience includes representing several nationally known musicians in litigation. (He is himself a musician and composer.) Jordan views the opportunity to teach the appellate course as a way of improving his skills as an appellate attorney.



Gregory Fox

David Herring

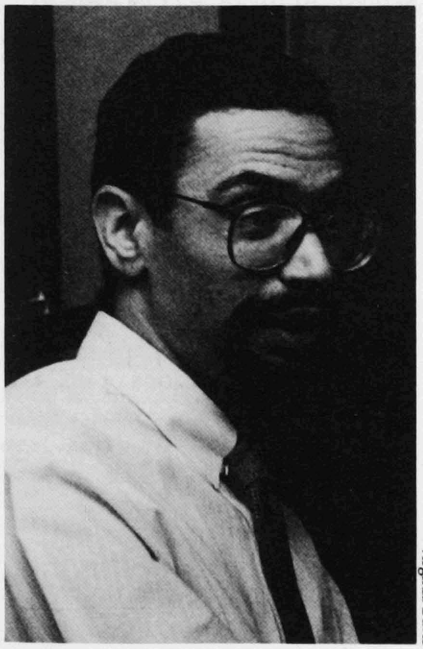
Gregory Fox

Suellyn Scarnecchia

In the course, each student is assigned his or her case about a quarter of the way through the semester. After reviewing the file, the student meets with Jordan to go over the potential issues for the appeal. Jordan and the students then visit the client (at one of the state prisons) for an interview.

Students find their prison interview one of the interesting and enlightening aspects of the class. Ann Derhammer, a third-year student in the class this winter, described her visit vividly: "We sat in an open area — they set up a table and chairs for us — it wasn't a separate, quiet room, it was a noisy, active area. It was the equivalent of conducting an interview in a mall, with people walking by with shackles on." Derhammer thinks that despite the difficult circumstances, she was able to establish a rapport with her client: "I thought we had a good case before, and the interview was helpful in that it confirmed the impressions I had from reading the trial materials."

After the interview, Jordan meets with the student to further discuss the case before the student does a mock oral argument. Following further consultation, the student submits a revised draft which becomes the basis for the brief that is ultimately submitted to the Court of Appeals.



Virginia Davis

Herb Jordan

Environmental Law Clinic

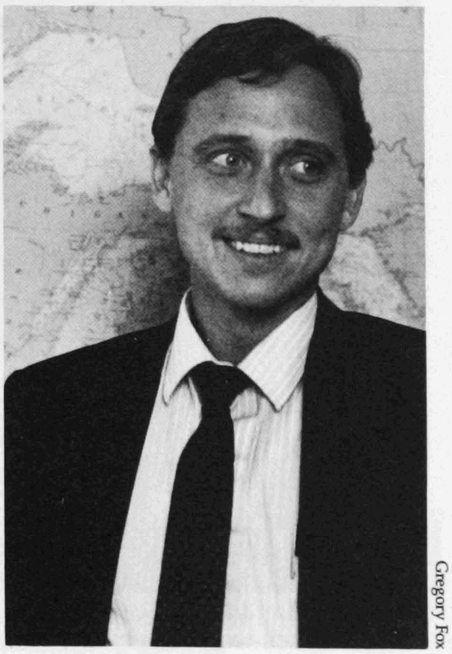
Protecting the Great Lakes

The Environmental Law Clinic is an interdisciplinary clinic operated by the National Wildlife Federation, the nation's largest not-for-profit environmental protection organization. Students from the Law School and the graduate schools of Public Health and Natural Resources work as part-time interns in the clinic under the supervision of NWF legal and scientific staff. Most of the clinic's projects relate to the protection and enhancement of Great Lakes water quality.

The clinic's director is Law School graduate **Mark Van Putten** (J.D.'82), an attorney on the staff of NWF since 1982 and director of NWF's Great Lakes office. Each semester Van Putten supervises four to six law students, who assist in prosecuting the clinic's cases and who represent NWF in administrative proceedings. For example, students frequently handle administrative appeals from denials by federal agencies of information requests filed by NWF under the Freedom of Information Act.

Students also have represented NWF on advisory committees set up by state environmental protection agencies to develop new water quality protection regulations. In addition, students frequently research and draft legal memoranda, discovery motions, briefs, etc. Currently, the clinic's docket includes six pending federal court lawsuits, many of which challenge U.S. EPA or state agency action as inadequate to protect the Great Lakes.

Similarly, graduate students from the Schools of Public Health and Natural Resources work in the clinic on scientific and policy issues relating to Great Lakes water quality. These students work under the supervision of Dr. Jeffery Foran, an NWF staff scientist, who has a clinical appointment to the faculty of these two schools. Recently, NWF added to the staff of its Great Lakes office Barbara K. Glenn, M.S., a human health toxicologist. Glenn is working with several School of Public Health graduate students on an assessment of the human health risks of consuming Lake Michigan sport fish, which are contaminated with toxic chemicals.



Gregory Fox

Mark Van Putten

The environmental clinic offers law students a unique opportunity to work in an interdisciplinary setting. Students are inevitably forced to master scientific concepts, along with the pertinent law, in preparing for litigation and administrative proceedings. Alumni of the clinic have gone on to environmental law careers with corporate law firms, national and state environmental groups, state attorneys general, U.S. EPA's general counsel and regional counsels, and with the U.S. Justice Department's Land & Natural Resources Division. NWF also funds and operates environmental law clinics in conjunction with the University of Colorado and the University of Montana.

Immigration Clinic

Helping political refugees gain asylum

The newest of the clinics at the Law School, the Immigration Clinic has successfully taken on several political asylum and legalization cases. The course is headed by **Professor T. Alexander Aleinikoff,** who has taught a course on immigration law for several years and who has co-authored (with David A. Martin of the University of Virginia Law School) *Immigration: Process and Policy*, the first widely used casebook on the subject. Last semester the clinic included seven students.

Aleinikoff's decision last year to offer the course as a clinic was largely in response to needs generated by the Immigration Reform and Control Act of 1986 (IRCA). The amnesty provisions of this law enable undocumented aliens to attain legal status if they can prove they have lived in the U.S. for a certain period of time.

The clinic's work began with the political asylum case of Ramon and Vickie Flores. Mr. and Mrs. Flores and their three small children had been forced to flee El Salvador in 1984, after the couple was picked up, detained, and tortured by the military for alleged subversive activities. In fact, the couple's only "crime" had been to work in non-governmental refugee camps, caring for displaced persons. The military, however, interpreted this conduct as sympathy for the guerillas. Shortly after Mr. Flores was released from prison where he had been held as a political prisoner for eight months, the family left El Salvador, coming to the U.S.

The students worked closely with the Flores, preparing their affidavits and supporting documentation, and doing the research and writing of legal memoranda. They also helped the couple prepare for the hearing by developing and asking questions on direct and cross-examination.

Gregory Fox

T. Alexander Aleinikoff

Their hard work paid off. On February 10, Immigration Judge Grace Dickler granted Mr. and Mrs. Flores political asylum, stating at the outset of the hearing that it was one of the strongest political asylum applications she had ever seen.

During the semester the clinic took on two additional asylum cases. Four of the students who were proficient in Spanish worked on the case of Mario Vasquez, a Honduran who fled his country in 1987. The three other students took the case of Jindrich and Irena Dokonal, a Czechoslovakian couple who entered the U.S. on visitors' visas. Professor Aleinikoff continued to play a supervisory role in each of these cases, but the students were largely responsible for developing their clients' stories and preparing the applications, supporting documents, and briefs.

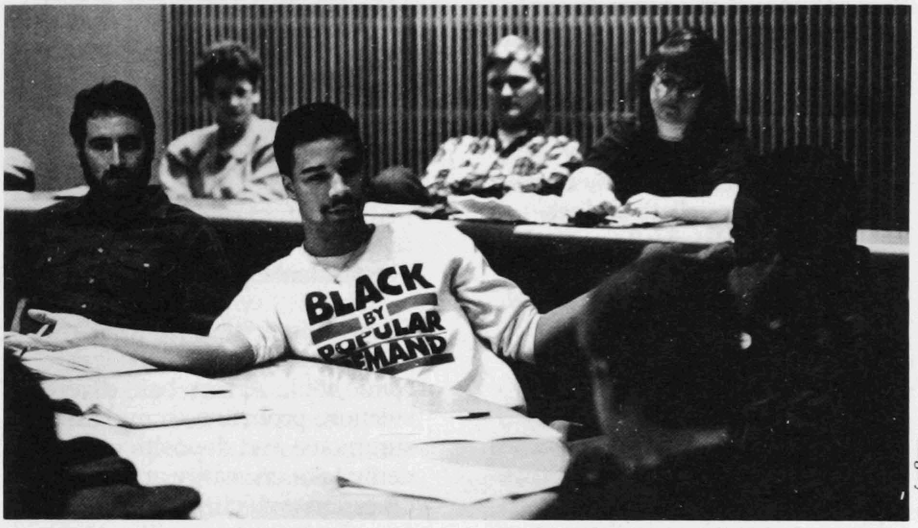
Mr. Vasquez's application for asylum was granted on February 2 by Immigration Judge Dickler in Chicago. Three of the students and Aleinikoff traveled with Vasquez to Chicago where the case was presented. At the time *LQN* went to press, the INS had just granted asylum to the Dokonals.

In addition to the asylum cases, the students have worked on legalization cases under the new immigration law. Traveling to Detroit once a week, they have helped the Archdiocese of Detroit (which is considered a Qualified Designated Entity of the INS) prepare and review applications of individuals who seek to qualify under the new amnesty provisions of IRCA.

Lauren Gilbert,'88

Clinical perspectives

Offering practical experience and the opportunity to effect change



Gregory Fox

Kelly Lambert (center) was one of the organizers of a discussion on racial attitudes in the MCLP last winter.

Virginia Davis

Criminal Appellate Advocacy student Maureen Taylor presents her oral argument.

Colleen Fitzgerald, Ann Arbor News

Mario Vasquez, a Honduran refugee, was reunited with his family after winning political asylum with the help of the Immigration Clinic.

Gregory Fox

At a trial last winter, CALC Director Donald Duquette, student attorney Lee Somerville, attorney Kathlees Goetsch, and student attorney Monica Barrett met with Probate Judge Donald Rink.

Letter from the law clinic

by Alfred F. Conard

In the early 70s, Alfred F. Conard, now professor emeritus at the Law School, was one of several faculty members who took a turn at teaching in the fledgling Clinical Law Program. His experiences inspired him to write a most memorable and quotable article, "Letter from the Law Clinic." First published in LQN: 18.1 (fall, 1973), the article was reprinted in full in The Journal of Legal Education: 26.2 (1974) and in part in The Student Lawyer: 2.7 (1974). An excerpt appears below, in slightly edited form.

The professorial payoff

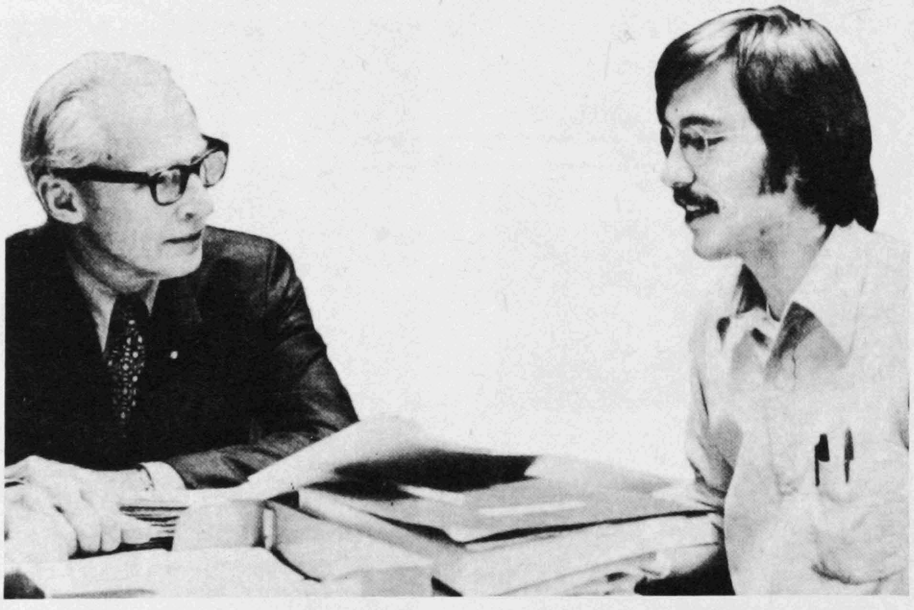
Participation in the clinical program offered me many personal rewards. One was participatory observation of the administration of civil and criminal justice in Washtenaw County in 1973. Since I supervised seven student teams, I was in court much more than any single practitioner could be; in the course of four months, I saw in action every one of the 11 circuit, probate, and district judges of Washtenaw County, and learned something of their professional characteristics and ways of doing business. I experienced a spectrum of controversy which could be met nowhere else in private or public practice.

I saw and talked with scores of accused persons, and learned from their mouths what they experience, or think they experience, at the hands of complainants, police, and prosecutors. I refreshed and updated my observation of the usual behavior and reactions of judges, bailiffs, clerks, jurors, prosecutors, private attorneys, clients, and witnesses. None of these experiences, I confess, will raise my stature as a professor of corporation law. What they enhance is my competence to evaluate the adequacy of justice in American society, and the possible ways of ameliorating its quality. The clinic provides a worm's eye view of justice which is very different from that of a law firm associate, an appellate judge's clerk, a model act draftsman, a presidential commission researcher, or a government counsel staffer — the usual "real world" exposures of law professors.

A second area of personal reward was the chance to teach students in the way a coach teaches players. Tell them in general terms what to do; then watch them do it; whisper suggestions to them as they operate; immediately afterward, review what they did and what they could have done better. Most students respond with fantastic enthusiasm to this kind of regime. They invest immense and even excessive amounts of time, and turn their minds to problems with unfeigned intensity. It is as different from classroom teaching as coaching football is from lecturing on intercollegiate athletics. It gives a teacher a chance to know young people not merely as students, but as co-workers and companions.

The students' payoff

Clinical experience puts color in the empty outlines of the legal comic book. Arrest, bail, divorce, eviction, probation, complaint, summons, and deposition suddenly take on reality and meaning. Questions which were dull and meaningless become important



This photo of Professor Alfred Conard, who taught in the clinical program in the early 70s, and student Thomas T. Casey appeared in LQN:18.1, accompanying Conard's article, "Letter from the Law Clinic." More recent photos of Conard and Casey appear on pages 16 and 9, respectively, in the present issue.

and exciting. Answers which seemed black and white become gray, red and green. Dull legal rules become memorable elements of unforgettable events.

Another product of clinical experience is training in those lawyer skills which receive so little cultivation in the law school version of Socratic discourse. One of these is interviewing. Another is counseling, which includes helping the bewildered client to understand and accommodate to the bruising events which he encounters, as well as guiding him to dodge the slings and arrows. A third is negotiation — the art of settling for something when you can't get everything. A fourth is digging out the facts — from policemen and police records, from housing inspection reports, from records of prior litigation in related cases, from friends and landlords and neighbors. A fifth is drawing motions, pleadings, stipulations, and judgment orders. A sixth is to conduct oneself in court with the correct mixture of deference and assertion toward the court, courtesy and defiance toward opposing counsel, candor and intensity toward the jury, politeness and persistence toward witnesses.

What's the hurry?

"Experience, practice, exposure: these come quickly enough, and continue as long as you practice. Why sacrifice for these the once-in-a-lifetime opportunity to learn from professors?" This is the question asked me by my fellow-teachers, and perhaps by those students — about 75 percent — who never take the clinical program.

Experience and doctrine, I would answer, are enhanced by interaction. One wouldn't teach science for three years without conducting a laboratory experiment. Medical students dissect cadavers, dental students fill cavities, social work students interview and counsel, engineering students build models and test materials — while they are being indoctrinated. Anti-clinicians will respond that the freshman moot court program and the senior practice court supply many of the benefits of experience in a simpler and more economical way. This is true, but living experience can add something that simulation never supplies. At best, simulated litigation offers verisimilitude rather than verity in matters of pleading, proving, and arguing. It offers nothing at all in the areas of interviewing, investigating, counseling, and negotiating.

The idea that experience can wait until students are working for a living is fallacious for other reasons. Most law offices do not furnish a neophyte with beginners' instructions; they don't send him to court with a supervisor, then postmortem his performance, then send him again if he did badly. They generally pick those who seem forensically gifted and make them into apprentices to the courtroom masters; the others are immured in tax, securities, and probate departments. In smaller firms, neophytes are often sent forth on short notice to hearings for which they have no preparation, no supervision, and no postmortem. Lawyers who hang up their own shingle are condemned to stagger their own way through whatever business comes their way — and suffer the disasters of their untutored mistakes.

It is true that some offices guide their neophytes wisely and well, and that many self-taught lawyers quickly master their arts. But the function of education is to shortcut the long, hard road of experience, and there is as much reason to shorten it in the arts of practice as in the realm of theory.

Then and now

***Thomas L. Casey**, J.D. '74 one of the first students to study clinical law at Michigan, in a recent photo. After graduation, he spent a year as a VISTA volunteer lawyer at the Washtenaw County Legal Aid Society, supervising all cases involving governmental benefits such as AFDC, food stamps, Medicaid, etc. In 1975 he left the Legal Aid Society and joined the staff of Michigan Attorney General Frank J. Kelley, where he is currently the assistant solicitor general. The following remarks are from a letter to the editor recalling his clinical experiences.*

"For me, at least, the long-term value [of the program] came from my exposure to the world of poverty and crime in which the Clinical Law Program's clients lived. I eventually chose a career in public service as a government lawyer rather than as a legal aid lawyer, but I know that my experiences in the program, as well as my other legal aid experiences, gave me a more vivid and sympathetic understanding of certain problems than I got from the remainder of my law school education."

Student clinicians

Close encounters with the real world of law

Clinical law courses at the U-M are known to be rigorous, time-consuming, and demanding. Who takes these courses and why? What do students have to say about the clinical experience and how it has affected their career choices? *LQN* interviewed seven students to find out.

Ed Rice

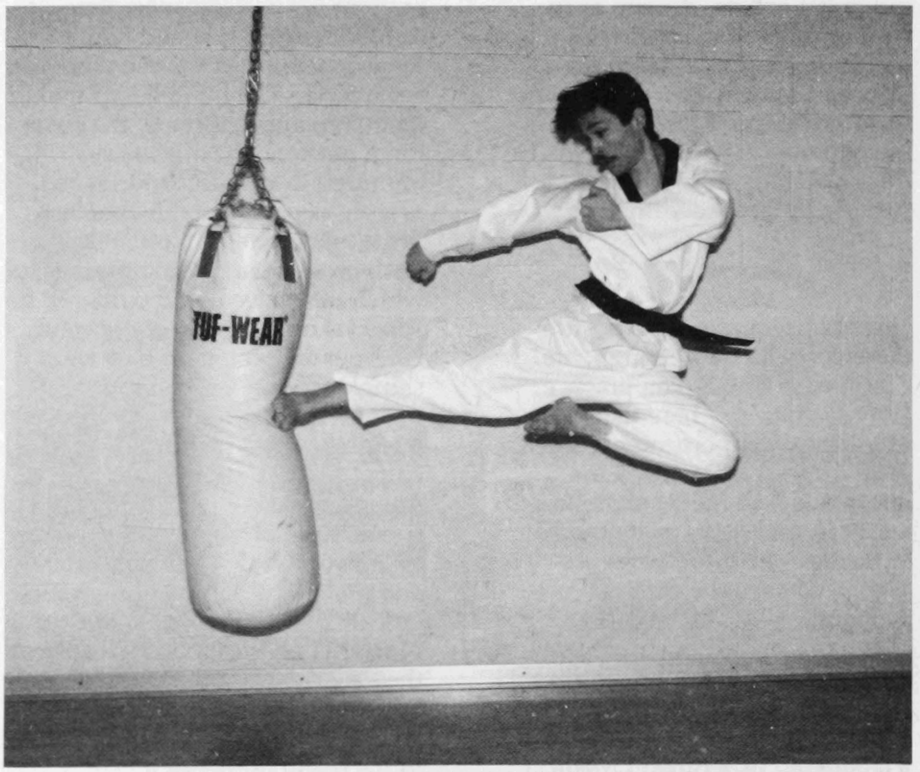
Tae kwon do and the art of litigation

Ed Rice is one of six junior partners who are spending a second semester doing advanced work in the MCLP this year. "The six of us," says Rice, "found we'd gotten so much out of the clinic we decided we wanted to continue our work." Rice is enthusiastic about the clinical experience and setting. He likens the feeling of the clinic to that in a small law firm, emphasizing the fact that "you can work closely with supervisors and other students." The supervisors, he says, are excellent, "not only as lawyers, but also as teachers. I go to see a supervisor any time I have a question, without any hesitation."

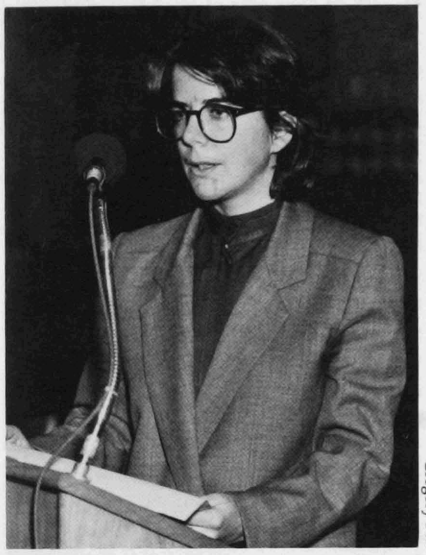
As a second semester student, Rice is involved with more sophisticated cases than those in the general MCLP. His team recently handled a case in the federal district court at Detroit, involving violations of prisoners' rights to due process and freedom from cruel and unusual punishment. The team also worked on a consumer protection case against a used car dealership. Like the other junior partners, he is also available to advise new students taking the clinic for the first time.

Rice graduated in 1983 from the University of Michigan with a degree in English. He worked for a few years in a camera shop and started a small photography business. "When I first entered law school," he recalls, "I wasn't sure what I wanted to do after graduation. My summer clerkship experiences helped me see what litigators do and I seem to gravitate towards it more than towards other areas. I think that one part of it, from a personal perspective, may be that I like jumping into the thick of the action." Rice, who has a black belt in tae kwon do, sees "a parallel between litigation and sparring in martial arts — applying your skills in a situation where you have to rely on your reflexes and reactions to some degree."

Rice will be following through on his interest in litigation by working, after graduation, for Keck, Mahin & Cate, a large Chicago firm with a reputation for its litigation work. "There is a leap," says Rice, "between learning what the rules are and being able to jump to your feet when you hear an objectionable comment. More than anything, the clinic has given me confidence through seeing and doing the job of a litigator."



Ed Rice



Gregory Fox

Monica Barrett

Monica Barrett

Already an experienced litigator

Monica Barrett is a third year student with an unusual amount of practical experience. During law school, Barrett has participated in two programs which have allowed her to use her legal skills outside the bounds of the classroom. In the fall of 1986, she was in the Criminal Appellate Practice class; in the fall of 1987, she participated in the Child Advocacy Clinic.

Barrett has a particular interest in women's issues. "In Criminal Appellate Practice, I didn't want to work on a rape case, but I did want to work with a woman. As it turned out, my client was a woman convicted of aiding and abetting child sexual abuse. The issues were interesting because they raised feminist concerns." Barrett met her client in person while preparing the appeal, which, she said, "was good because it made me realize I was doing something real." Barrett also noted that the clinic provided excellent brief-writing experience — she wrote a 35-page appellate brief — as well as an opportunity to argue the case in front of practitioners.

Barrett expresses tremendous enthusiasm for the Child Advocacy Clinic as well. This clinic provided numerous opportunities for court appearances, which increased in length and importance as the semester went on. The culmination of the process was a three day trial in which Barrett and another law student were the prosecutors for the county in a child neglect case. "The mother had been stopped driving while intoxicated with the kids in the car and the children were placed in foster care," Barrett explains. "There had never been an adjudication of neglect — and it had been two years since the DWI incident. I was really nervous on the first day of the trial but it was a great experience." She adds, almost as an afterthought, "And we won."

Barrett would like to do litigation, and through the clinic found that legal services would give her an opportunity to be in court with great frequency. Next year, Barrett will be clerking with Judge Sylvia Pressler, of the New Jersey Superior Court, Appellate Division. This, she feels, will give her an opportunity to see what is available in the way of public interest jobs in the New York area.

Elizabeth Barrowman

An intelligent career choice

Elizabeth Barrowman says that when she entered law school, with a B.A. in political science and Russian and East European studies from the University of Illinois – Champaign, litigation was far from her mind — and international law was her focus. "I had decided to stay away from litigation, but when I read the description of the Child Advocacy Law Clinic, I thought that taking a clinic would be a more intelligent way to make a choice." Now, Barrowman says, "I couldn't *not* have litigation in my professional life."

Barrowman and her partner Jennifer Zinn represented a mother who was accused of neglect of her children. "We did all the investigating — we talked to neighbors as potential witnesses, we talked to social service workers, to doctors and nurses who had had contact with our client. Our client was a strong woman for whom we felt great sympathy: the system was against her, and we were her advocates."

The two law students appeared in court as her counsel. "Appearing in court wasn't like anything I'd ever done before," recalls Barrowman. "We prepared and rehearsed for a week before going into court, and still found surprises in the tactics of the prosecutor." The prosecution called a witness who Barrowman and Zinn believed

Wendy Wilkes

Elizabeth Barrowman

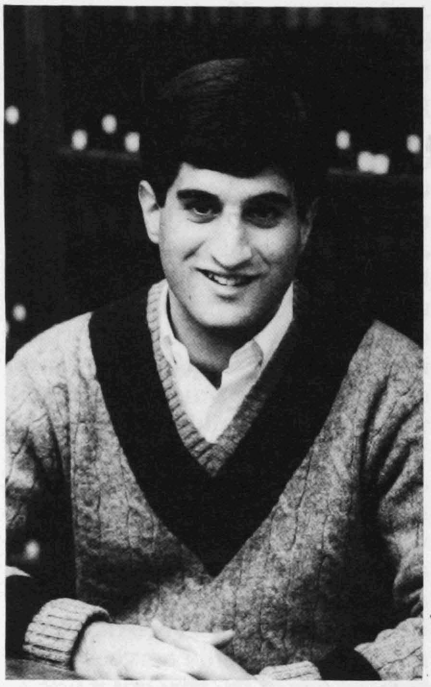
ought to have been disqualified because of her confidential relationship with their client, as a mental health worker. Their motion was denied but, says Barrowman, "we didn't get discouraged, and the witness actually helped our case." The atmosphere in the courtroom, says Barrowman, "was so adversarial that it was like being in the middle of a football game."

On the second day of trial, Barrowman presented a 20-minute motion for dismissal of the case during which their client broke down and cried. "I spent the whole weekend preparing, going over and over the words I was to use," she recalls. "I hadn't realized the effect it would have on our client."

The case, says Barrowman, was also dramatic because of the number of turns it took. Among other things, their client eventually was given a mental health evaluation, which had a strong impact on the nature of the settlement reached. "But we did reach a settlement, allowing our client to gradually get back her children. That was a happy day." In the end, however, the client failed to fulfill some of her obligations and lost her children to foster care once again.

Barrowman feels fortunate to have had such an exhilarating court experience. "We were lucky," she explains. "We had a good case. We also had an excellent role model in our supervising attorney, Lisa D'Aunno." Barrowman continued her clinical work for a second semester, serving as a fellow in the Interdisciplinary Graduate Training Program in Child Abuse and Neglect, a program run by Clinical Professor Don Duquette as well.

Next fall, Barrowman will be working in Los Angeles for the firm of Jeffer, Mangels and Butler, splitting her time between the family law and the litigation departments.



Wendy Wilkes

Grant Gilezan

Grant Gilezan

Gaining a broad perspective on environmental law

"When I'm doing my clinic work," says second-year student Grant Gilezan, "I feel like I'm a lawyer. I'm working on a case, one-on-one with an attorney. It's been a great confidence booster." Gilezan, a two-term intern in the Environmental Law Clinic, has nothing but enthusiasm for the clinic, "especially in terms of feedback."

Since early last fall, Gilezan has worked closely with Mark Van Putten, clinical profesor for the Environmental Law Clinic. Gilezan is the only intern in the litigation of a hallmark Clean Water Act citizen suit compelling the Environmental Protection Agency administrator to withdraw Wisconsin's pollutant permitting authority. He has found the writing experience invaluable, Van Putten patient and helpful.

Gilezan is sure of his interest in environmental law and has been cultivating this area of specialty for some time. He spent last summer as an intern for the Environmental Section of the Legal Staff of General Motors. As a member of the staff of the *Journal of Law Reform* at the Law School, he is preparing a note evaluating the risk assessment of vinyl chloride under Sec. 112 of the Clean Air Act. As a member of of the Environmental Law Society's editorial staff, he wrote case summaries which appeared in the *Michigan Bar Journal*.

But of all these experiences, Gilezan is most enthusiastic about his clinic work. "I have worked on every legal document in the case, from a memo exploring the possibility of suit, to the complaint itself, from writing a letter to the administrator arguing that Wisconsin's actions resulted in relaxed water quality standards to a formal answer objecting to a motion to intervene. While all of this formally goes under Mark's name, I've done the drafts — and re-drafts — on every one."

Gilezan emphasizes how much the work he's done has broadened his knowledge and understanding of the field. "What better way, not only to learn what the plaintiffs in such cases are concerned with, but also to learn about how the government works." As he had had more experience in defense work — during the summer at General Motors — Gilezan feels that the clinic work has helped him avoid the trap of seeing only one side of the issue, something he thinks can happen all too easily.

In the coming months, Gilezan will see yet another aspect of the practice of environmental law, this time as a summer associate at the Detroit firm of Dykema Gossett, which has a well established environmental section.

Wendy Wilkes

Betsy Grimm

Betsy Grimm

American history through the back door

As a senior at Washington University in St. Louis, Betsy Grimm wrote her thesis on the German-American press in St. Louis in World War I. There is, as a result, a certain symmetry to her study of and participation in the Law School's Immigration Clinic. "I've studied American history through the back door," says Grimm, "through the eyes of immigrants."

Grimm didn't enter law school planning this particular course of study. The class on immigration law appealed to her for a variety of reasons. One stemmed from her undergraduate studies in European history and German. She also had an interest in international law, particularly in the relationship of international and domestic law. Finally, she was attracted to the specificity of immigration law: the concentration on one statute requiring rigorous analysis and specialized knowledge of one body of legislation.

She wasn't disappointed. In fact, Grimm says she found in immigration law what she had been looking for in international law. The extensive discussion in class of the policies behind the law, for example, were particularly fascinating, with an aim to understanding "why the United States as a country defines itself in a certain way, and what it means to be American." Over the years, says Grimm, "there is constant redefinition of what it means to be American, and I have always been interested in the trends that develop."

The ethical issues are of interest to Grimm as well, issues that have been brought into relief in the clinic in which she has participated this year. At the heart of the problem is whether or not one should abide by what the majority has decided — specifically, in reference to the sanctuary movement. Says Grimm, "My humanitarian instincts are there in the same way the sanctuary movement's are but I'm not attracted to the activist part. I do think it's necessary, but I've always been attracted to the government part, as a trial attorney."

Next fall, Grimm will be neither activist nor trial attorney. Instead, she'll be judicial clerk to the Office of Immigration Judges in Chicago. The office is part of the Immigration and Naturalization Service of the Department of Justice. Clerking, says Grimm, is perfect for her at this point. She explains, "I won't have to be partisan, I can look objectively at the cases and at the issues."

Sherri Evans

A zest for litigation

"I always envisioned myself as a litigator," muses Sherri Evans, one of six students doing advanced clinical work on an experimental basis in the MCLP. As a "junior partner" in the clinic law firm, Evans is able to continue what she enjoys most — doing things. "I like doing things more than talking about them," she explains. "I think there are some people who like law school and the Socratic method, and some who don't like it but who do it because it's necessary in order to become a lawyer. I'm one of that latter group."

Yet Evans found that even working in the clinical program could be disappointing at times. "One of the cases we worked on for six weeks was settled the day before it was supposed to go to court. But that's how litigation is. You have to be fully prepared even though that sort of thing might happen. And the settlement worked out better for our client than it would have if the case had gone to litigation."

Virginia Davis

Sherri Evans

Evans's zest for litigation stems in part from her lifelong exposure to the legal world. As the daughter of Detroit Recorders Court Judge Robert L. Evans (J.D.'56), she recalls often going into courtrooms to watch and listen to what was going on. "I enjoyed listening to people argue," she says with a laugh.

Evans grew up in Detroit and did her undergraduate work at Michigan State, where she worked as a student defender with MSU Student Legal Services. At Michigan, she has been active in the Black Law Students Alliance. An untiring recruiter, she has been instrumental in working with the Law School Admissions Office to establish a program enabling offerees to visit the Law School in the spring, meet with BLSA members, and attend class.

The Michigan native is looking forward to a change of scene this summer as she moves to Washington, D.C. to take a job with the FCC. "I'd rather work with the government than with a large firm because it's easier to get right in the thick of things," she said. "With a large firm, you can spend your first two years locked up in the library."

Wendy Wilkes

Susan Rodriguez

Susan Rodriguez

Appellate defense — doing someone some good

"I wanted to do someone some good," says Susan Rodriguez of her decision to take the Criminal Appellate Practice class. "I thought it would be a good opportunity both to feel good on a personal level about what I was doing, and to sharpen my research and writing skills."

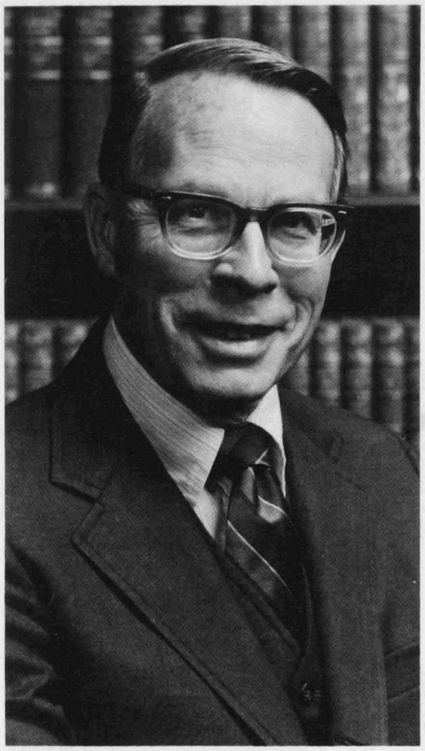
For Rodriguez, one of the most significant aspects of the experience has been the meeting with her client. "Professor Jordan and I went to the prison, in Flint, together — we both had clients to interview. I sat in on his interview, and he sat in on mine. His presence was helpful in that he could better explain the procedural aspects of the case — it's not easy to tell someone they may have to wait a year for the result of an appeal."

Rodriguez was responsible, however, for the rest of the interview. She explained to her client the legal issues involved, and had the opportunity to ask him questions about the trial, the transcript of which she had read carefully. "I had visited a prison before, but not in a legal capacity. I found the client responsive, and that being a student wasn't a problem because Professor Jordan made it clear where the responsibility lay. We really got a dialogue going and created a sense of trust."

The trial transcript, Rodriguez found, provided a number of interesting issues on which to rest an appeal. "Both Evidence, which I took last semester, and Trial Practice, which I took over winter break, helped me get a sense of trial procedure and the trial court setting. But Professor Jordan has provided the most help by getting me to channel my instinctive reactions to what I read, to get me to recognize and accept my lay response — my gut level reactions — and to translate those into legal issues."

In this case, a few issues stand out, explains Rodriguez. For example, it is possible that the denial of a continuance to the defense denied the defense attorney the opportunity to impeach the victim, where there was evidence that some of the testimony was inconsistent. Also, explains Rodriguez, "there is evidence that because the client refused to plead guilty to felonious assault, the judge threw the book at the client when sentencing him, which is prohibited by case law."

By the end of the semester, Rodriguez was required to write the appellate brief in support of her client. "It's on my mind all the time," she said shortly after the interview. "I find it so interesting — I find myself, constantly, trying to get the facts straight in my mind." A native of Los Angeles, and a graduate of Yale, Rodriguez will be going back to Los Angeles this summer to work with the California Office of the Appellate Defender.



Gregory Fox

Roger A. Cunninghan

Roger Cunningham named to Campbell Chair

Roger A. Cunningham has been appointed the James V. Campbell Professor of Law. Cunningham came to Michigan in 1959 after serving with distinction on the law faculties at George Washington University and Rutgers University. He came to law teaching after studies at Harvard College and Harvard Law School, service in the United States Navy, private practice of law with a distinguished firm in Boston, and a period as a teaching fellow at Harvard Law School.

During his nearly 30 years as a member of the Law School faculty, Professor Cunningham has made his mark on every aspect of the School's life. In the classroom, his consummate mastery of all aspects of property law has been demonstrated time and time again.

Cunningham has reached out to the wider world of law students, practicing lawyers, and scholars in many ways. In addition to numerous articles, he has contributed both to teaching materials and to treatises for lawyers and scholars dealing with all aspects of property law. His books include works on the general law of property, mortgages, land financing, and the planning and control of land development.

"Professor Cunningham," Dean Lee C. Bollinger observed, "long has been a highly valued member of the Law School faculty. He has embodied a long-standing tradition of mastery in one of the major fields of substantive law that first-year students approach with confidence and advanced students approach with trepidation. The appointment of Professor Cunningham to the Campbell Professorship is a well-deserved recognition of the important contributions that he has made to the University through his teaching and scholarship."

State Bar media awards renamed for McCree

The State Bar of Michigan has announced that its Advancement of Justice Awards competition, which recognizes outstanding print and broadcast reporting, has been renamed the Wade H. McCree, Jr. Awards for the Advancement of Justice.

"We are proud that these prestigious awards will now carry the name of Judge McCree, who was an early and enthusiastic supporter of their establishment," said Samuel E. McCargo, chair of the State Bar's Communications Committee. "Given Judge McCree's understanding of and devotion to the role of a free press in a free society, we believe that the name change honors not only him, but the reporters and editors who will receive the awards."

Wade H. McCree, Jr., who died in August 1987, served successively as a judge of the Wayne County Circuit Court, District Court for the Eastern District of Michigan, and Court of Appeals for the Sixth Circuit. In 1977, he was appointed Solicitor General of the United States serving until 1981, when he was named Lewis M. Simes Professor of Law at the University of Michigan, a position he held at his death.

The Advancement of Justice Awards mark their 15th year in 1988. The awards honor Michigan's print and broadcast professionals whose works have made outstanding contributions to the advancement of justice, whether through fostering greater public understanding of our legal system, exposing abuses, or serving as a catalyst for change. The State Bar awarded 25 bronze medallions to winners in 1987.

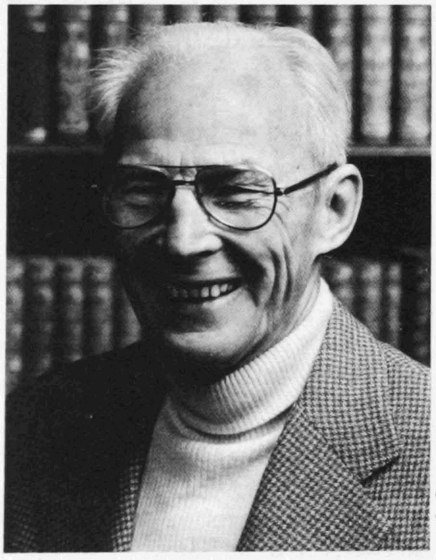
Each of the first prize winners in the broadcast and print categories also designates a Michigan college or university to receive a $1,000 scholarship in its name.

"Judge McCree was the recipient of numerous well-deserved honors during his lifetime, including more than 30 honorary degrees," Mr. McCargo said. "We believe the Wade H. McCree, Jr. Awards for the Advancement of Justice are an appropriate way to pay tribute to a man who gave so much to his community and his profession."

Faculty activities

Alfred F. Conard, Henry M. Butzel Professor Emeritus, was one of three United States law professors consulted by a visiting delegation from the Japan Securities Industry on the advisability of amending Japanese law to authorize Japanese corporations to issue non-voting cumulative preferred stock. Present Japanese law, unlike U.S. corporation laws, requires that all shares have equal voting rights.

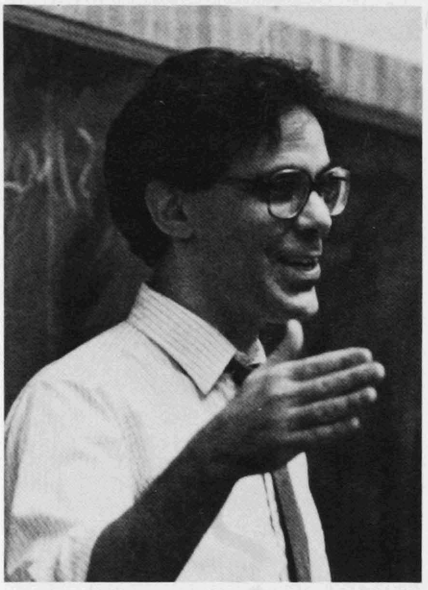
In November, Conard was employed by the Ontario Council on Graduate Studies to evaluate the graduate program in law of the University of Ottawa.



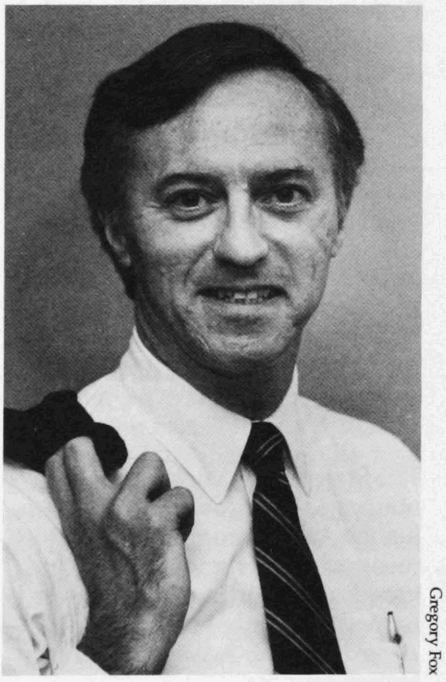
Gregory Fox

Alfred F. Conard

Samuel R. Gross presented a talk in January to the criminal justice section of the A.A.L.S. on McCleskey v. Kemp and its implications for racial discrimination in the American system of criminal justice.



Samuel R. Gross



Gregory Fox

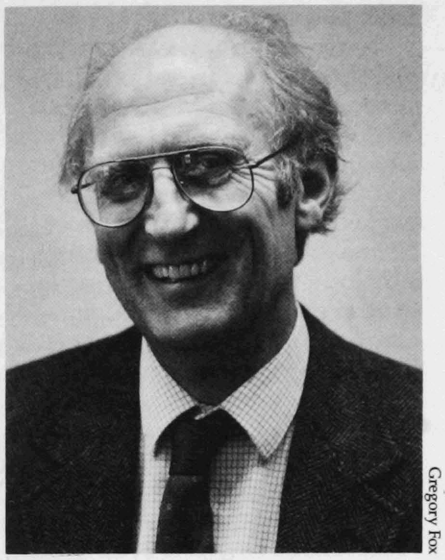
Leon E. Irish

Leon E. Irish chaired a panel at the mid-winter meeting of the ABA Tax Section. The topics covered included COBRA medical continuation benefits, code section 89 anti-discrimination rules for employer-provided welfare benefits, and pending health legislation proposals — new subjects which have wide impact but which are still little known or understood.

James E. Krier is currently serving as one of the outside reviewers of the Tennessee Valley Authority's Reservoir System Operation and Planning Review. The TVA's review is being undertaken in order to provide recommended policy guidelines to be used by the agency in future operations of the Tennessee River system. The outside reviewers consist of a panel of experts who will periodically review the TVA study to ensure that it is conceptually and methodologically sound.

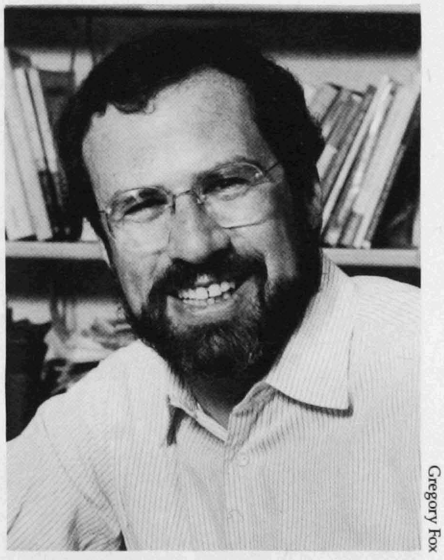
The second edition of *Property*, which Krier co-authored with Professor Jesse Dukeminier of UCLA Law School, is being published by Little, Brown & Co. this spring. A photo of Professor Krier appears on page 41, following his article.

Frederick Schauer spoke on freedom of speech and related issues at numerous conferences in recent months. His speaking engagements have included keynote speaker at a symposium on commercial speech at the University of Cincinnati Law School and Bush Foundation Lecturer at the Hamline University School of Law. He also spoke on "The First Amendment and Commercial Advertising" to the Second Circuit Judicial Conference in Hershey, PA; on



Gregory Fox

Brian Simpson

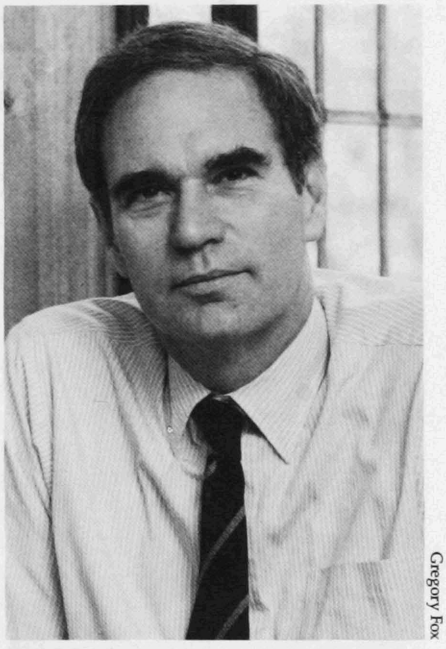


Gregory Fox

Frederick Schauer

"The Future of the First Amendment" to the Conference of Chief Justices, in Williamsburg, VA; on "The Epistemology of Free Speech," at the University of Miami Department of Philosophy; and on "The Constitution as Law," at the Annual Meeting of the A.A.L.S.

Brian Simpson, Charles F. and Edith J. Cline Professor of Law, gave the Mason Ladd Memorial Lecture at The Florida State University College of Law. The topic of his lecture was "Detention without Trial: A Comparison of the British and American Wartime Experiences." The lectureship honors the memory of Mason Ladd (1898-1980), founding dean of the College of Law, known for his work in the field of evidence.



Gregory Fox

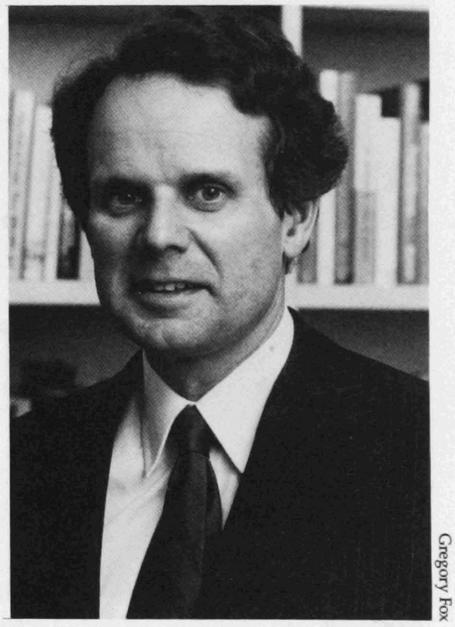
Joseph Vining

Joseph Vining, the Henry Burns Hutchins Collegiate Professor of Law, presented a paper, "The Application of Interpretative Theory to Legal Practice," to the Legal Theory Workshop at the University of Toronto last November. Other Michigan faculty who have also given papers there recently are James Boyd White and Frederick Schauer.

Visiting faculty

Four visiting professors taught at the Law School during the winter term.

Merritt B. Fox visited from Indiana University-Bloomington. Fox studied both economics and law at Yale (B.A.'68; J.D.'71; Ph.D.,'80). He was an associate with Cleary, Gottlieb, Steen & Hamilton in New York from 1974 to 1980, when he began teaching at Indiana. Fox taught a course and a seminar in securities this winter. Fox is married to Ann Gellis, who also visited at Michigan during the past semester.



Gregory Fox

Merritt B. Fox

B R I E F S

Ann Gellis, a graduate of New York University Law School and Case Western Reserve University, has taught at Indiana since 1980. Prior to that time she worked with the Economic Development Division of the Law Department of the City of New York for two years. Her experience also includes seven years as an associate with Cleary, Gottlieb, Steen & Hamilton in New York.

Gellis has taught courses in state and local government, property, real estate finance, and municipal finance and land use. This winter she taught a seminar on problems in local government.

Gregory Fox

Ann Gellis

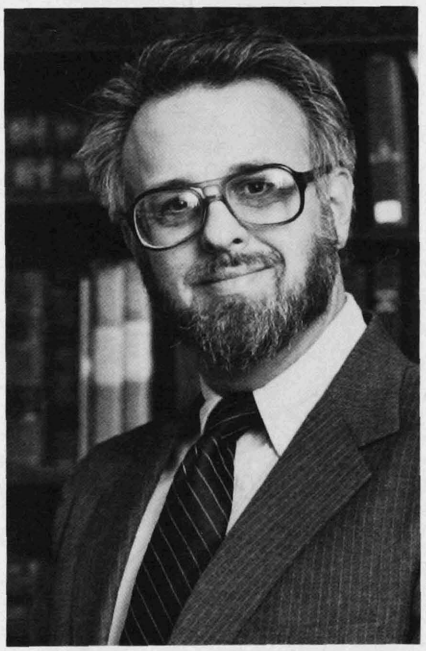
Barry Hawk, a visitor from Fordham Law School, taught two courses in the area of antitrust this winter. He earned his A.B. ('62, history) from Fordham and his J.D. from Virginia ('65). From 1965 to 1968 he worked as an associate with Pepper, Hamilton & Scheetz, in Philadelphia. He has taught at Fordham since 1968 and has written extensively on both federal and international antitrust.

Gregory Fox

Barry Hawk

Steven Wechsler, a visitor from Syracuse University, earned a B.S. in labor relations from Cornell University in 1967, an M.B.A. from Michigan in 1973, and J.D. from the Law School in 1975.

A former navy lieutenant, he worked with the Denver firm of Holme Roberts and Owen from 1975 to 1979. He was a visiting lecturer at the University of Colorado Law School in 1978. He has been at Syracuse University College of Law since 1979, serving as associate dean from 1985 to 1987. At Michigan he taught two sections of a course on lawyers and clients as well as a course entitled "The Legal Profession & Legal Ethics."



Gregory Fox

Steven Wechsler

Talk of the Law Quad

Bits and pieces of nonprofessional news

☐ **Dean Lee C. Bollinger** was part of a masters mile relay track team that won a bronze medal at the Millrose Games on February 5. Competing at Madison Square Garden, the Ann Arbor Track Club team finished in close contention with two teams from large metropolitan areas, the first-place Pioneers from New York City and the second-place Potomac Valley team from the Washington, D.C. area.

The Ann Arbor Track Club's time was 3:45, only four seconds behind the winners.

☐ **Beverley Pooley**, associate dean for the Law Library and one of Ann Arbor's most highly acclaimed Gilbert and Sullivan actors, nearly set the house on fire when he broadened his repertoire to include a performance as Captain Hook in a local production of Peter Pan last winter. A retelling of the episode by Pooley himself follows, reprinted in slightly edited form from the one originally published in GASBAG (acronym for Gilbert and Sullivan Boys and Girls), a publication of the Friends of the U-M Gilbert and Sullivan Society.

Before the conflagration: Pooley as Hook.

"Towards the end of the play I am supposed to get a bomb, with which I am supposed to blow up the ship. This bomb is handed up from the orchestra pit. It had a lighted sparkler. I got hold of it and went to the back of the stage and held the bomb where I had always held it in rehearsals, and I gradually became aware that people on stage were reacting abnormally. Either they were looking weird or they were not saying the lines they were supposed to be saying — in fact people were yelling in the audience, but I couldn't hear them.

"What happened is that one of the feathers of my hat — it had a lot of ostrich feathers on it — caught fire from the sparkler. Eventually, the whole hat caught fire, but I didn't feel anything unusual because I was so wet with sweat, and the hat was so big, it was like a shield from the heat. I was going on with my lines and people were not coming on stage. Then the splendid David Johnson, who was under a net as a captured pirate, broke rank, came out and started patting me on the head. I thought he'd gone completely crazy.

"Then I looked around and saw the smoldering end of a feather and realized what had happened. The people on stage were rather shaken, as were people in the audience. I was the only person in the hall who was completely unmoved by the whole thing — not because of valor, but because of ignorance, as is, of course, so often the case."

During the Fall: Reimann descending

☐ **Professor Brian Simpson**, the distinguished and widely-traveled British scholar who joined the Law School this year, is about to become the fourth member of the faculty to earn a pilot's license. (The others are James J. White, William Miller, and Philip Soper.) "Flying lessons here cost only about a quarter of what they do in England," Simpson explained, pragmatically.

Part of the enjoyment of his new venture, states Simpson, stems from the pithy comments of his flying instructor, an experienced pilot in her 40s and the wife of a professional pilot. " 'This is not a space shuttle!' she exclaimed during a recent takeoff," recalls Simpson, adding somewhat sheepishly, "I do tend to lift off a bit steep."

Mathias Reimann, on the other hand, prefers to jump out of planes. Reimann, who commutes to the airport by motorcycle, has more than 300 jumps behind him and now looks to night jumps and free falls for continued excitement.

Revival of environmentalism

First national ELS conference spawns new organization

Environmentalism is alive and well among law students, as demonstrated by a recent gathering of over 150 students from 42 law school across the country. The three day event, "Facing the Future: the Environmental Law Student," was hosted by the U-M Law School's Environmental Law Society. As an outgrowth of the conference, the National Association of Environmental Law Societies (NAELS) was formed. NAELS will network the law schools through a quarterly newsletter and computer bulletin board.

The conference was the first of its kind, focusing on the various ways that individuals committed to the environment can direct their commitment before and after graduation from law school. A series of panel discussions explored the profession of environmental law as it exists in very discrete sectors of society: government, public interest, corporate practice, and plaintiff's practice. A lively dialogue took place between professionals representing the corporate viewpoint, on the one hand, and those representing the public interest, on the other. William Weber, the attorney in charge of environmental affairs for General Motors, staunchly defended the environmental ethics of his corporation. Similarly, Ron Janke, director of environmental law for Jones, Day, Reavis and Pogue, one of the world's largest law firms, tried to dispel the notion that students must compromise their principles in order to represent a corporate client.

The response to the corporate viewpoint was equally intense. John Bonine, a professor at the University of Oregon Law School, related an incident about industry donors pressuring the Oregon Law School to stop its litigation clinic from filing actions against corporate interests. Lori Potter, director of the Sierra Club Legal Defense Fund, Rocky Mountain Region, insisted "when you work for a corporate firm you'll do hundreds of things you'll never remember, but when you work for a public interest firm you'll do hundreds of things you'll never forget."

The corporate-public interest dialogue was balanced by some thoughtful views put forth by environmental lawyers from state and federal government. Mark Greenwood, assistant general counsel at the Environmental Protection Agency, gave the impression that government employees work very hard to integrate environmentalism into the democratic process.

An animated exchange of ideas between the members of the various student groups took place on issues pertaining to basic organizational techniques, fund raising methods and the myriad projects which the societies conduct. Notable from students was an apparent broad revival of interest in environmental law. At a large number of the schools represented, individual societies had never existed or had become dormant in the early 80s and have been restored to an active status within the past two years.

As a followup, the University of Colorado was chosen to host a similar event in 1989 and the ELS at the University of South Carolina made a commitment to edit the NAELS newsletter for 1988-89. A thank-you note received by the Michigan ESL after the conference from students at Stanford sums up the experience: "We're still high from the conference and inspired to spread the good energy back here . . . "

ELS members at Michigan are considering organizing a reunion for all past members, tentatively to be held next fall.

Pat Gallagher,'90 and John Noonan,'89

Virginia Davis

One of the panels included Dean Spencer, Massachussetts Dept. of Environmental Quality; William Howard, senior vice president, National Wildlife Federation; and Lori Potter, Sierra Club Legal Defense Fund.

Melting pot revisited

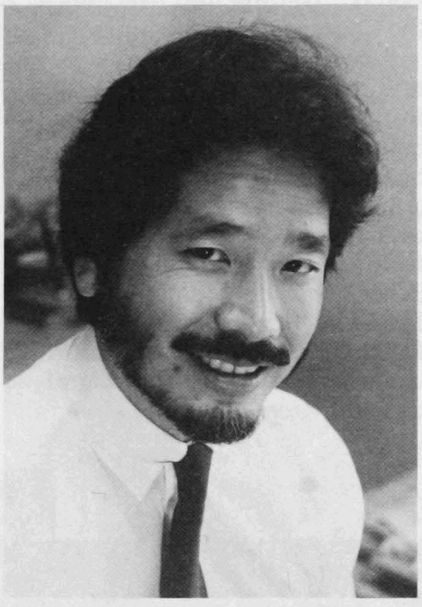
Symposium aims at facilitating coalition building

"The Melting Pot Revisited" was the title of a symposium organized by representatives from the Hispanic, Asian-American, Black, American Indian, lesbian and gay, and women law student groups. The conference, held at the Law School the weekend of March 19, was aimed at uncovering the differences and commonalities between the groups to facilitate coalition building.

The unified effort to heighten minority awareness on the U-M campus was the brainchild of two law students, Roy Esnard and Kevin McClanahan, after the occurrance of several nationally publicized racist incidents at the university last year. Esnard and McClanahan were able to coalesce a 12-member committee comprised of two representatives from each of the minority groups at the Law School. After months of planning, the committee chose six speakers to represent the concerns of individual member groups.

The weekend symposium included a speech by each guest speaker, followed by a reception on Saturday evening and a panel discussion to tie the previous day's discussion together on Sunday. The speakers in order of appearance were Rudy Acuna, Donald Tamaki, Phyllis Alexander, Velma Mason, David Scondrass, and Cynthia Robbins.

Rudy Acuna, professor of Chicano studies at the University of California-Northridge, addressed what he called "the oppressive classification" of Spanish-speaking people as "Hispanic." The term "Hispanic," he said, is a word of European origin that fails to include the indigenous and African constituency of the Spanish-speaking community. Acuna opts for the word "Latino."



Donald K. Tamaki, attorney of record in Korematsu v. United States, was one of the MASC speakers.

Donald Tamaki, the attorney of record in the reopening of Korematsu v. United States, discussed the historical background of the case and the withholding of information by the U.S. government that led to its reopening. Tamaki's speech concentrated on the internment of Japanese-Americans during World War II.

Phyllis Alexander, civil rights coordinator of Iowa City, spoke on her experience working with the coalition of Women Against Racism. The key to coalition building, she stated, is to remember that each group's oppression parallels that of other groups and is not hierarchical. This mindset, she noted, promotes cooperation and prevents placing one group's objectives above those of other groups.

Velma Mason, the director of Indian education in the U.S. Department of Education, spoke on the problems facing Indian youth with respect to their adaptation to the mainstream. She emphasized the need for white America to recognize the bicultural experience of Native Americans. She also stressed the importance of Indian identity as the key to a well-adjusted educated American Indian.

David Scondrass, an openly gay Boston city councilman, discussed the gay and lesbian movement and its constituency. Scondrass discussed the negative views of the majority towards the gay and lesbian community. He countered these views by stressing that gays and lesbians were a part of the American community, were significant individuals, and were not anti-family.

Cynthia Robbins, a public defender from Washington, D.C., spoke about her past experience with coalitions and stressed the importance of building coalitions in order to learn about other groups and increase participation. The six speakers encouraged coalition building through a recognition of the objectives and differences of each group. The weekend shed an optimistic light on the future of HLSA, AALSA, AILSA, LGLS, and WLSA working together to create a more harmonious academic community.

Anita Santos, '89

Racism in the ivory tower?

Symposium, banquet highlight tenth annual BLSA reunion

Issues of minority hiring in academia were the focus of a symposium sponsored by the Black Law Students Alliance on March 25 and 26. The event, which featured some of the most prominent Blacks in legal education, coincided with the Tenth Annual Butch Carpenter Banquet and Black Alumni Reunion. This year's reunion was dedicated to the memory of the late Professor Wade H. McCree, Jr.

The symposium, entitled "Issues of Racism in the Ivory Tower," began with an opening address Friday evening by David Neely, assistant dean of the John Marshall School of Law. The following day consisted of a series of lectures, question and answer periods, and panel discussions addressing issues of minority participation in legal academia. The first speaker was Anita Allen, Georgetown University Law Center, who lectured and led a discussion on the question of "Why Academics?" She was followed by James Jones, University of Wisconsin Law School, who spoke and led a question and answer session on "Getting into Academics: the Concerns and Dilemmas."

A panel discussion on "Nontraditional Paths into Academia" featured Michigan professors Sallyanne Payton and Frederick Schauer, together with Norman Amaker, Loyola University – Chicago School of Law. The final panel featured Derrick Bell, Harvard Law School; Edward Littlejohn, Wayne State Law School; and Richard Delgado, University of California at Davis, discussing "The Significance of Race."

The weekend culminated in the Butch Carpenter Scholarship Banquet featuring a keynote speech by Derrick Bell. The address drew from his highly acclaimed new work, *And We Are Not Saved: The Elusive Quest for Racial Justice*.

The Butch Carpenter Memorial Fund was established in memory of Alden J. "Butch" Carpenter, a Michigan football star who died of cardiac arrest after entering the Law School. Each year scholarships are awarded to disadvantaged law students who have demonstrated an inclination to practice business law and who plan to use their legal training to assist a community in need of development. This year's scholarship recipients are Jocelyn Rouse and Robin French.

Philip Dattilo

Professor Joseph Vining chatted with law student Kecia Boney and alumnus Tony Powell (J.D. '87) before the banquet.

Philip Dattilo

Keynote speaker Derrick Bell, Harvard University Law School (right) met with Wayne State Law School Professor Edward Littlejohn before the banquet.

Perspectives on American Indian education

AILSA conference brings educators, pow wow to the U-M

The American Indian Law Students Association (AILSA) sponsored the annual American Indian Law Day on March 11 and 12 at the Ann Arbor Holiday Inn West. This year's theme was Indian education. On Friday the 11th, Dr. William Demmert, a Tinglet Indian and commissioner of education for Alaska, presented the state perspective on Indian education. Dr. Earl Barlow, a Blackfoot Indian and regional director of the Bureau of Indian Affairs, Minneapolis, MN, then presented the federal government's position.

The Indian Law Day program concluded on Saturday the 12th with a traditional, tribal, and historical perspective on Indian education given by John Mohawk, a member of the Seneca Nation and lecturer in American Studies at the State University of New York at Buffalo. All three speakers advocated Indian-run education programs as one response to the underrepresentation of American Indians in higher education. Indian Law Day is one of the programs AILSA presents in an attempt to educate the public on the American Indian.

Jeff Crawford, '88

Philip Dattilo

Scenes from the 16th Annual Ann Arbor Pow Wow.

Philip Dattilo

Philip Dattilo

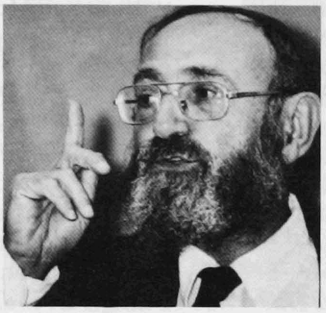
John Mohawk, lecturer in American studies at SUNY, was the keynote speaker at a brunch held at the Holiday Inn West in conjunction with Indian Law Day.

Debates, speakers, panels, sports

An overview of winter and spring events

Wendy Wilkes

Richard Gephardt, U.S. Congressman from Missouri (J.D. '65), presented a policy speech at the Law School last March while campaigning for the Democratic presidential nomination.

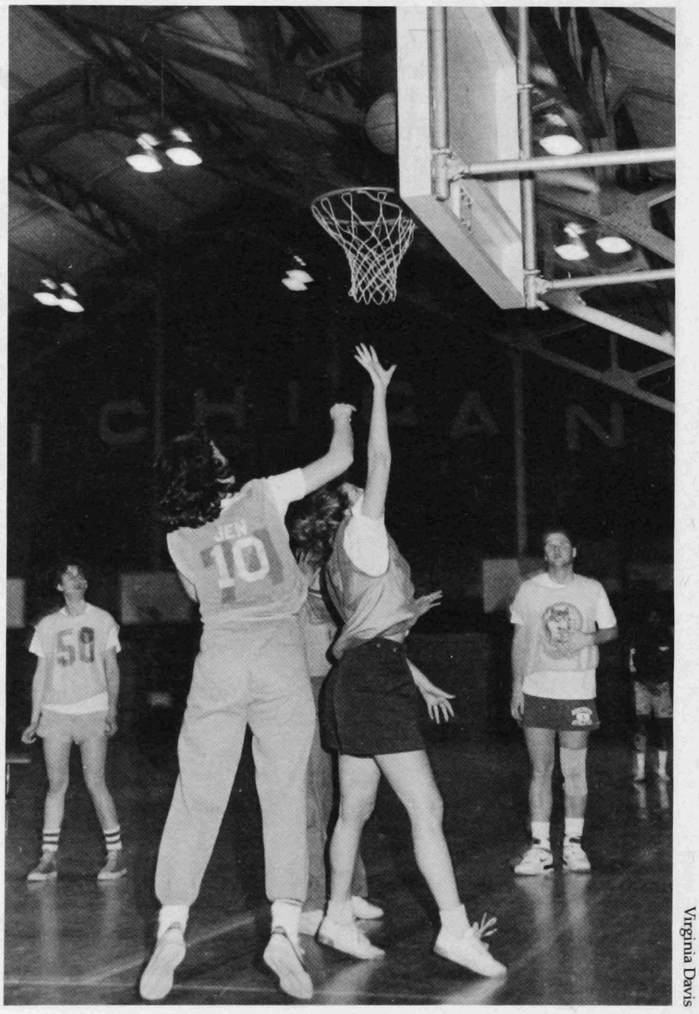


David Lublin, Michigan Daily

Aaron Kirschenbaum, a professor and chair of the Department of Jewish Law at Tel Aviv University, spoke on Israel's newly proposed constitution last February.

Virginia Davis

Ann Mayer, associate professor of legal studies at The Wharton School, University of Pennsylvania, spoke on "Interpretation in a Transitional Stage of Legal Culture — the Changing Meanings of Islamic Law" at the Law School in March. Her lecture was the second of a series of lectures on Islamic Law sponsored by the Law School and the Center for Near Eastern and North African Studies.

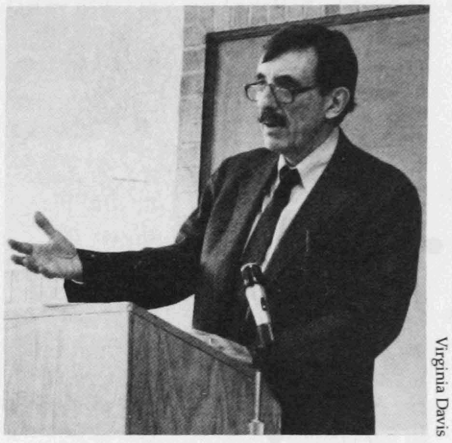


Virginia Davis

E V E N T S

Virginia Davis

Yong-Won Kim, public prosecutor, South Korean Ministry of Justice (left); Shiyan Zeng, attorney, People's Republic of China; and Yukio Kai, prosecutor, Japanese Ministry of Justice, participated in a panel on "Asian Perspectives on the Criminal Law," in the Lawyers Club Lounge. The panel was sponsored by the International Law Society.



Virginia Davis

The thirty-first series of Cook Lectures on American Institutions last March featured David Brion Davis, Sterling Professor of History at Yale University, who spoke in Hutchins Hall on "Exodus and African Colonization."

Gregory Fox

Suellyn Scarnecchia (left), a professor in the U-M's Child Advocacy Clinic, and alumna Jean King, J.D.'68, local attorney and chair of the Washtenaw County A.C.L.U., led a discussion on women's issues in the second in a series of alternative practices conferences at the Law School last January.

Gregory Fox

Lady justice in the Philippines

An interview with Irene R. Cortès, LL.M. '56, S.J.D. '66

One of the Law School's most distinguished alumnae is Irene R. Cortès, associate justice of the Supreme Court of the Philippines, where she serves along with another U-M graduate, Justice Hugo E. Gutierrez, Jr. (LL.M. '65). A former law professor at the University of the Philippines, Cortès served as dean of the U.P. College of Law and vice president for academic affairs of the university before being named to the Supreme Court. LQN recently interviewed the justice about her background, her role in Philippine higher education, and her hopes for the future of democracy and stability in her country.

Irene R. Cortès

LQN: Could you tell us something about your family background?

IC: I come from a family of ten children, six boys and four girls. My father was in government service. He was clerk of the Court of First Instance of Albay province for many years. My mother was a school teacher before marriage. As the family grew, she assumed direct management of our rice lands. Both my parents came from the small town of Libon, in the province of Albay, where our family spent long vacations. Of the ten children in the family, two became lawyers, one a pharmacist, one an engineer, another an agriculturist, and one girl earned a Ph.D. from Stanford University and is a professor in the University of the Philippines.

LQN: What was your childhood in the Philippines like?

IC: I had a carefree childhood. My parents sent my two sisters to an exclusive girls' school run by Benedictine nuns. But I chose to go to the coeducational public schools where the competition was keener. I remember exhausting the library of books to read and going through our neighbors' collection of detective and other stories.

Our home in what is now Legazpi City was in a compound in the center of the provincial capital, within walking distance from the Catholic church, the government center and the schools. Life was quiet and uneventful. Until the outbreak of World War II the only exciting things that occurred were the periodic eruptions of Mayon Volcano, the world's most perfect cone which dominates the landscape of my province. The neighborhood where I grew up was like one big family. As a child I felt welcome wherever I went.

LQN: You were a student at the University of the Philippines when World War II broke out and spread to the Pacific area. How did this affect your family life and your studies?

IC: Before the outbreak of World War II the family moved to Manila. At the start of the air raids after Pearl Harbor, classes were suspended. When Manila was declared an open city, my father decided to send us back to our hometown. We took the last train out. He followed months later taking a longer and more arduous trip.

We went to the hills to distance ourselves from the invaders and did not return to our home in Libon until things settled down. While the Japanese occupied the town, the resistance movement flourished in the hills. Later I was to be part of that movement as head of the women's auxiliary corps.

LQN: What factors influenced your decision to study law?

IC: When I went to college I was inclined to law, journalism, and medicine, but my father believed that law was the course for me. He had been working in the legal field himself. I was persuaded to

take up the course and once in law school discovered that I was on the right track. My college work was interrupted for the duration of the Japanese occupation.

LQN: Were you one of the first women in the Philippines to study and teach law?

IC: When I was a law student in the 1940s there was one lady law professor in the university. She had a doctorate in civil law from a Spanish university. I joined the full time law faculty with another alumna of my school in June of 1954. The following semester another woman was appointed to the faculty. The number of women law teachers has grown since.

LQN: What can you tell us about the status of women's rights in the Philippines?

IC: Women in the Philippines have gone about the quest for equality with men without being too aggressive or abrasive. From the start they obtained the support of men in deleting discriminatory provisions from the statute books, although much remains to be done. The 1987 Philippine Constitution declares as a principle the fundamental equality of women and men before the law. The women's proposal aimed at erasing all forms of discrimination in law and in fact failed to win approval in the Constitutional Commission. While women in the Philippines seem to have gained substantial headway, the president being a woman; with women in Congress, in the Supreme Court, in the Constitutional Commissions, etc., still equality in law and in fact has yet to be achieved fully. The status of Philippine women vis-a-vis the men is not to be measured by the advance gained by women achievers among the elite, but by equality accorded to all women in the remote areas, on the farms, in the factories, in squatter colonies, and in domestic service locally and abroad.

LQN: In 1970 you were appointed dean of the U.P. College of Law, and in 1982 you were appointed vice president for academic affairs. Can you please say a little about the important issues facing you in each position?

IC: I was dean of the U.P. College of Law from 1970 to 1978. These were the most turbulent years in the university and in the country. Classes were interrupted, barricades were set up, and buildings occupied. Students demanded participation in decision-making. Law students were leaders in these activities. As dean I had to handle the problems they raised.

Then martial law was proclaimed in 1972. Ferdinand E. Marcos, as president of the Republic was the number one alumnus of the college. My task as I saw it was to maintain the academic freedom of the College of Law and to keep from falling in with the authoritarian regime. Although there were intimations that all that was needed was for me as law dean to make known to the then president what the college needed, I thought that the autonomy of the college was too high a price to pay for concessions that could be obtained. So the college had to make do with meager resources.

LQN: You also served on a United Nations committee. Can you please say a little about this?

IC: I was one of 23 experts elected by the States Parties to the U.N. Convention on the Elimination of All Forms of Discrimination Against Women to the Committee charged with the monitoring of States Parties compliance with the provisions of the Convention. The Committee of the Elimination of Discrimination Against Women (CEDAW) meets annually either in the U.N. headquarters in New York or in Vienna to pass upon and evaluate reports of States Parties. The CEDAW reports and makes recommendations to the U.N. Secretary General who transmits the reports to the ECOSOC.

Members of the CEDAW serve a staggered term of four years. I was on the CEDAW from 1982 to 1986.

LQN: When were you appointed to the Supreme Court, how many other justices sit on it, and how do you view its role in maintaining stability and democracy in the Philippines?

IC: My appointment to the Supreme Court is dated 27 January 1987, but I assumed office on February 3rd. The Court is composed of 15 members.

Especially during this period of transition, after 20 years of the past authoritarian regime and the adoption of a new constitution, the Court has a vital role in maintaining stability and democracy in the Philippines.

The development of constitutionalism and restoration of the system of checks and balances in our system of government depends to a large extent on the way the Supreme Court resolves human rights issues and controversies before it of cases involving the executive and legislative departments of government.

Our new constitution goes into quite a bit of detail. Problems of interpretation and application are developing rapidly. Public issues eventually come before the Court.

LQN: We understand that you were one of three persons appointed to the National Cease Fire Committee when President Aquino was elected. Can you say a little more about this?

IC: Please don't give me too much credit for whatever contribution I made towards the effort at reconciliation and peaceful solution of our dissident problems. As it turned out the negotiations did not go far.

My membership in the National Ceasefire Committee came about because three neutral people were needed. I happen to be known to those who formed the committee. They believed that as a member of the academe I would be objective. I welcomed the appointment as an opportunity for service.

LQN: How has your Michigan education contributed to your professional success?

IC: Advanced legal studies in Michigan gave me the opportunity to meet and learn from experts in various fields, to interact with students of law from other countries, to broaden my horizons, enrich and sharpen my legal skills, and to form lasting friendships. More importantly, it afforded me the luxury of devoting time for in-depth inquiry into my fields of interest and for some writing.

LQN: What are the prospects for the future of democracy in the Philippines?

IC: We are on the way to regaining lost ground. There is greater awareness among our people of the stake each one has in building a Philippines of which we can be fully proud. We are working hard to make this government, established by popular will, succeed.

Remembering "Soapy"

Michigan mourns death of the Hon. G. Mennen Williams

G. Mennen (Soapy) Williams, '36, a six-term governor of Michigan, retired state Supreme Court chief justice and one of the most popular political figures in Michigan history, died February 1 after suffering a cerebral hemorrhage. He was 76.

Born into a prominent Detroit family, Williams attended a Connecticut boarding school and Princeton University before earning a law degree at the U-M. After four years in the navy, in 1947, he was appointed to the Michigan Liquor Control Board.

By 1949, he was the Democratic candidate for governor of Michigan: he mortgaged his home for $16,000 and he and his wife, Nancy, traveled the state in a beat up old DeSoto, in the first of five successful campaigns he was to wage for the position as governor of Michigan. The 1948 campaign also heralded the return of the Democratic party to strength in Michigan.

Williams ran as a Democrat but had been raised a Republican: he cited law school as a turning point in his political affiliation. "I had friends who were Democrats and I had tremendous admiration for Franklin Roosevelt," he told *LQN* in a phone interview in 1986. "I decided on a career in public service in prep school, and at Princeton I decided that the best way to do it was to be governor of Michigan. I tried to be a liberal Republican, but I just couldn't make that work."

Public service for "Soapy" — he was the grandson of soap and toiletries baron Gerhard Mennen, founder of the Mennen Company

The late G. Mennen Williams

— Williams did not end with his last term as governor. Under John F. Kennedy, he was assistant secretary of state for African affairs. In 1966, he ran for the U.S. Senate — his only unsuccessful campaign. This was followed by a year as ambassador to the Philippines. In 1970, he was elected to the Michigan Supreme Court, and re-elected in 1978. He became its chief justice in 1983 and retired in 1987.

In Michigan, he was revered: the headline of one column in the Detroit Free Press on his death

read "For some, he'll always be the governor." Some referred to the Williams era as the Michigan version of Camelot. He was known for revitalizing the Democratic party, serving an unprecedented five terms as governor, building the Mackinac Bridge, challenging Teamsters' President Jimmy Hoffa. His trademark was a polka-dotted bow tie: noting ridicule at the tie on inauguration day in 1949 from newspapers around the state, he decided to keep it. It gave him, he said, instant recognition in public.

For despite the prominence of his family background and his eastern prep school grooming, Williams developed a folksy manner in his years of campaigning. His ability to call square dances, for example, was legendary in rural parts of Michigan.

Williams's fame extended beyond the borders of Michigan. He attracted national attention because of his continued popularity with voters and his liberal programs. He angered white Africans when, in Kenya in 1961, he boldly declared "Africa for the Africans" in support of Black rule. In the Philippines, he is known as the ambassador who visited remote villages, adopted indigenous dress, participated in native dances, and once rode a water buffalo.

When he was asked once what he wanted to be remembered for, Williams said, "For being concerned with trying to help my fellow man." All those who came in contact with him, no matter how direct or indirect the contact, seem to have agreed that he is remembered in just the way he would have wanted to be.

Looking back

Law School graduates recall their clinical experiences

LQN recently contacted several alumni, asking them about their clinical experiences. Their replies follow.

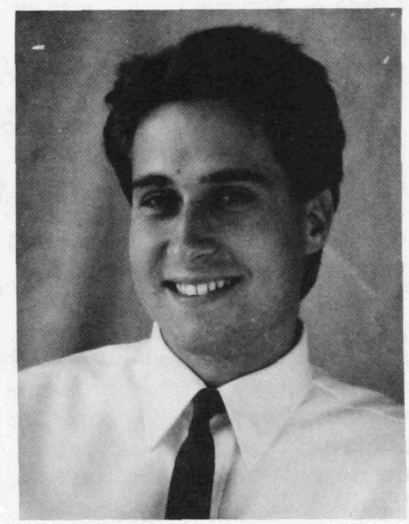
Lawrence I. Kiern *J.D. '85, Lt Commander, U.S. Coast Guard, Assistant Legal Officer, Seattle, WA, entered law school in his 30s, having been a Coast Guard officer since 1974.*

"I knew that as a Coast Guard officer I would be expected to practice immediately upon completion of the bar exam and thought the clinic would give me the practical experience necessary to hit the deck running when I returned to my duties in the service. I was right.

"In perhaps the most important case we handled, our teacher, Paul Reingold, and my two classmates and I represented a Michigan state convict in his federal lawsuit against guards at the state prison at Jackson who he alleged had assaulted him. Without our representation he would have had to proceed *pro se*. The case presented us with an experience unusual for most clinic students. We had to prepare and conduct a complete federal jury trial with just a few days of advance notice.

"Paul guided us by providing advice, direction, and familiarity with the law. However, he turned over as much of the case to us as possible. It was certainly a very effective way to involve the students in the work. We knew that our client's interests were in our hands and it was up to us to make the case. Not only did we gain the experience of conducting a jury trial, but we gained from working together as a team under challenging circumstances."

Lawrence I. Kiern



Douglas R. Ghidina

Douglas R. Ghidina *J.D.'87, now an associate with the law firm of Moore & Van Allen, in Charlotte, NC, recalls his experience in the MCLP:*

"Perhaps the most important result of my clinic experience was my personal realization of the need to make quality legal services avail-

able to those who need them but do not have the resources to secure them. Many of our clients were individuals whose legal rights were being abused simply because they were perceived as unable to protect them as a result of their economic inability to secure legal representation. It was inspiring to observe what clinic representation could do for these people.

"The ultimate strength of the Clinical Law Program is the reality it injects into the law school experience. To make a first attempt at real lawyering in a carefully supervised environment designed to minimize mistakes and maximize the development of good practical legal skills is a unique opportunity that a young attorney fresh out of law school may not encounter beginning his or her practice."

Linda K. Stevens *J.D.'87, now an associate with the law firm of Schiff Hardin & Waite, in Chicago worked in the general practice clinic:*

"My semester of clinic was probably the most challenging and rewarding part of my law school experience. The clinic clients are not faceless corporations, but real people with real problems. Their troubles may seem simple compared to a complicated anti-trust suit or a leveraged buy-out, but the rent disputes and credit problems you can solve for these people are of life and death importance for them. And corporations don't say, 'Thank you, you really saved my life.'

"My partner and I had one of our cases go to trial. Before the trial, I couldn't eat or sleep. Once things got going, however, I calmed down and had one of the best times of my life. After it was over, I knew I wanted to be a litigator — and I knew I could do it.

"Actually, the case could have won itself. Our client had sued her landlord to get her security deposit back after condemnation of her house forced her to leave. She had lived in that house for months with mice, gaping holes in the roof, and two feet of raw sewage in the basement. The landlord kept promising to fix things, but never did. We won $10,000 for our client.

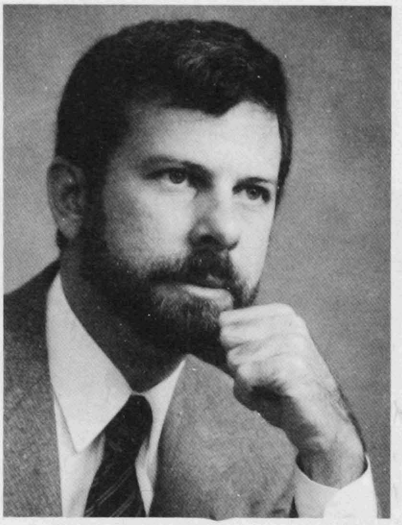
"Having joined a large corporate law firm, I will probably wait for years before I get the chance to try another case. My clinic semester provided me with a rare and wonderful opportunity. I'm glad I did it. I think everybody should do it."

Craig Starr *J.D.'74, now a partner in the San Francisco firm of Bledsoe, Cathcart, Leahy, Starr & Hardiman, was one of the first students to enroll in a clinical law class. He was also a legal aid volunteer during his second and third years of law school.*

"Even more important than the practical knowledge was just the experience and exposure that helped me realize I had made the right career choice. I really found that I enjoyed working with clients far more than I enjoyed going to classes.

"After passing the bar, I started

Linda K. Stevens



Craig Starr

out with the Justice Department for one of the strike forces. I was on my own right from the second case I had, so it was sink or swim right from the very start. If I got anything out of the clinical program that helped me there, it was a certain comfort level. The experience removed some of the strangeness. Negotiating with another attorney was not quite the intimidating experience that it might have been had I not had some contact with it before.

"I remember that while working in the clinic I had a trial involving a shoplifting charge that I'll never forget — it was so Perry-Mason-like in its outcome. You could be a litigator for 40 years and never have this kind of experience. A juvenile was charged with shoplifting a pair of shoes from Montgomery Ward. The evidence was pretty damning. The security guard supposedly followed the boy out the door and found him sitting on the curb with the shoes. And furthermore, he was taken into custody without being Mirandized, and he'd given a confession. But to me, he always denied he'd done it. He said he had a friend with him who had actually

taken the shoes and given them to him outside the door.

"He gave me the name of his friend and I took steps to have the friend in court to testify on the day of the hearing. The judge gave me permission to have them both sit in the gallery. They were wearing their high school jackets — they went to different high schools — that day. One wore orange and the other wore green. I had them switch jackets before they sat down.

"When it came time for the security guard to make his eyewitness identification, he picked out the other boy. I guess he just went by the color of the jacket. The judge said there was a reasonable doubt and dismissed the petition.

"Aside from this case, we pretty much handled small civil claims, some bankruptcy, family law. As a result, I was determined never to do family law. I ran into too many irate husbands who threatened to beat me up for representing their wives."

***Bradley D. Jackson**, J.D.'85, worked in the Environmental Law Clinic. He is now trial attorney, General Litigation Section, Land and Natural Resources Division, U.S. Department of Justice.*

"It sounds cliche, but my clinical experiences at school brought the law to life for me. I never pulled an all-nighter in law school, but I did two on cases I worked on in the Environmental Law Clinic. That work seemed to matter. We sued the Environmental Protection Agency to force it to do something about dioxins. I also took part in the National Wildlife Federation's suit against the Consumers Power Company under the Clean Water Act, challenging the operation of the Ludington Pumped Storage Plant without a permit to discharge fish entrails. The Ludington Pumped Storage Plant is the biggest fish killer on Lake Michigan, grinding millions of them up in its huge turbines.

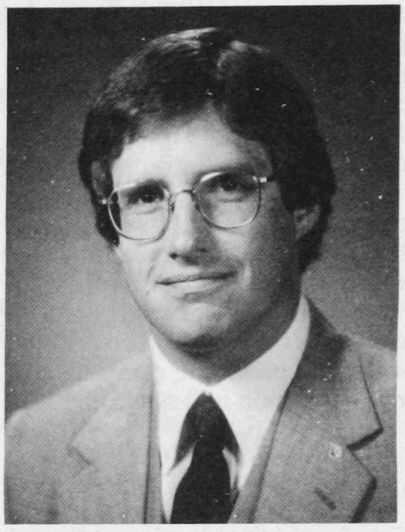
"The real world training I received in the clinics was instrumental in getting a job in the Department of Justice as a Trial Attorney in the Land and Natural Resources Division. Here they look beyond the grades and law review notes, because new attorneys often find themselves in court in the first months. (My first trial was two months after I passed the bar.)

"There is something to the adage that in law school one learns to think like a lawyer. But thinking isn't all there is to writing, arguing, dealing with clients, and whatever else lawyers do. The clinics will give you some of that, and you might even discover you like the law once it's let loose from the library."

***Patric Parker** J.D. '79, now with Parker McAra George Williams Haldy & McCabe, in Flint, was in the Child Advocacy Clinic in the fall term of 1977:*

"My first court appearance was memorable for a couple of reasons. The juvenile I represented (the clinic was involved because of some mental and emotional problems) gave me a taste of conflict of interest. Right before we went into court he confessed to me that he was responsible for a series of break-ins *in my apartment complex*. I had mixed feelings arguing for his release. Then, while we were in court he whispered to me that he was "runnin'." I ignored him, only to find that he in fact escaped immediately after the hearing — presumably because of his lack of competent counsel.

"More seriously, the clinic gave me a feel for children and child development issues that has been

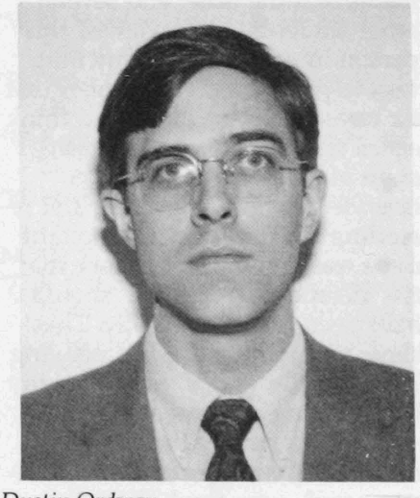


Patric Parker

valuable both in probate court and in my own family. For some years I kept a fairly active practice in the child neglect area, and was much farther ahead because of the clinic."

***Dustin P. Ordway** J.D. '81, currently works primarily in the area of environmental law, at Beveridge & Diamond, P.C., in New York, after three years of representing children in the New York City courts:*

"Looking back at my experience in the Child Advocacy Clinic, I will



Dustin Ordway

never forget being called to court one afternoon to interview and represent parents charged with burning their infant. It was a powerful experience to interview the parents, see photographs of the injuries, and appear in court with our clients within the space of an hour. It was also a powerful experience, although in a different way, to deal with the contradictions and challenges of fulfilling our responsibility of providing competent representation to the 'wrong' side."

***Eric Fogel** J.D. '86 now with the Chicago law firm of McDermott, Will & Emery, took Child Advocacy and Criminal Appellate Practice:*

"In Child Advocacy, I fought to keep an infant with her family. A social service agency wanted foster parents to adopt the baby. After doing some leg work, I informed the judge that the agency had overlooked a perfectly suitable family member who was willing to adopt the baby.

"In Criminal Appellate Practice, I did the research on and wrote the first draft of a brief for an individual who was convicted of criminal sexual conduct. Along with Richard Ginsburg [the clinical faculty member at the time] and several other students, I interviewed this person in prison. It was my first visit to prison and I remember that for days afterward all I could think about was freedom and punishment in our society. After the interview and after reading and rereading the transcripts, I thought there was an excellent chance that the defendant/appellant should have been found not guilty. This clinic was tremendously satisfying intellectually, and it sharpened my legal writing and research skills.

"The best part of the clinics, however, was exposure to the first-rate people who teach them."

In memoriam: R. Chesterfield Oppenheim

Retired Law School Professor and alumnus R. Chesterfield Oppenheim, 91, who specialized in antitrust, patent, trademark and copyright law, died of cardiac arrest January 29 at the Carriage Hill Nursing Home in Silver Spring, MD.

Oppenheim also had been chairman of the American Bar Association's antitrust law section. From 1953 to 1955, he was co-chairman of the Attorney General's National Committee to Study the Anti-Trust Laws. He was an adviser on research for the Patent, Trademark and Copyright Research Institute at George Washington University from 1957 to 1972.

Oppenheim, who lived in Washington, was born in New York City. He served in the army during World War I. He graduated from Columbia University, where he also received a master's degree in economics. He received two law degrees from the University of Michigan.

In 1927, he joined the faculty of the George Washington University Law School. He taught there until joining the law school faculty at the University of Michigan, from which he retired in 1965. He was counsel to the Washington law firm of Howrey & Simon from 1970 to 1983.

He was a past editor of the Little Brown and Co.'s "Trade Regulation Series." Oppenheim was a founding member of the Bureau of National Affairs' advisory board of "The Anti-Trust and Trade Regulation Report."

He received the Jefferson Medal from the New Jersey Patent Law Association in 1951 and received the first Charles F. Kettering Award from George Washington University's Patent, Trademark and Copyright Foundation in 1957.

His books include *Cases on Trade Regulation*, first published in 1936, *Cases on Federal Anti-Trust Laws*, first published in 1948, and *Newspapers and the Anti-Trust Laws*, which he co-wrote with his wife, Carrington Shields Oppenheim.

Law School grads elected ABF Fellows

Several University of Michigan Law School graduates were recently elected as members of The Fellows of the American Bar Foundation.

They include Allen David Evans, class of 1963; John A. Grayson, class of 1955; and Richard D. Simons, class of 1952. Evans is a partner in the firm of Crowe & Dunlevy in Okahoma City. Grayson is a partner in the firm of Ice Miller Donadio & Ryan in Indianapolis, IN. Simons is a New York Court of Appeals judge in Rome, NY.

The Fellows is an honorary organization of practicing attorneys, judges, and law teachers whose professional, public, and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession. Established in 1955, members of The Fellows encourage and support the research program of the American Bar Foundation.

The objective of the foundation is the improvement of the legal system through research concerning the law, the administration of justice, and the legal profession.

Membership in The Fellows is limited to one-third of one percent of lawyers licensed to practice in each jurisdiction.

Class notes

'67 John H. Norris was recently elected to the Board of Trustees of The Salk Institute in LaJolla, CA and to the Board of Trustees of the African Wildlife Foundation. The Salk Institute is one of the largest biological research facilities in the world, and the African Wildlife Foundation is the most prestigious of all organizations dedicated to the preservation of Africa's wildlife resources. The Foundation has its offices in Washington, D.C. and Nairobi, Kenya.

John W. Puffer III is practicing real estate and health care law in the recently opened Tampa office of the Detroit, MI based law firm of Dykema Gossett.

'68 Lester L. Coleman, senior vice president-corporate development of Halliburton Company, has been promoted to executive vice president-finance and corporate development. Halliburton Company, of Dallas, TX, is a diversified service and sales organization that provides oil field services and products, engineering and construction services, and life and casualty insurance services.

Jeffrey R. Kravitz has been made a partner in the Detroit firm of Honigman Miller Schwartz and Cohn.

'72 David H. Rockwell, a partner with the Seattle, WA firm of Stoel Rives Boley Jones & Grey, has been elected to membership in the American College of Real Estate Lawyers, a national professional association of attorneys whose practices concentrate on real estate matters.

'74 Craig A. Wolson is now included in Who's Who in American Law. Wolson is senior vice president of J.D. Mattus, Inc., a financial investment firm of Greenwich, CT.

'77 Donald W. McVay, a business attorney with the San Diego law firm of Miller, Boyko and Bell, was recently recognized as the "1987 Volunteer of the Year" by the San Diego Chapter of the National Society of Fundraising Executives. He was cited for his volunteer efforts in raising over $500,000 for San Diego children's charities and arts organizations.

'79 John W. Amberg has been elected a partner in the Los Angeles office of Bryan, Cave, McPheeters and McRoberts.

Vincent I. Polley has been named general counsel of Schlumberger Technologies, the computer and instruments group of Schlumberger Limited, and has his principal office in Ann Arbor, MI.

'80 James A. Burns, Jr. has been named a partner in the Chicago-based law firm of Ross & Hardies, where he practices labor and employment law.

G. A. Finch recently published an opinion article on "Leadership" in Crain's Chicago Business, and a column on the demise of downtown all-male clubs in the February issue of Today's Chicago Woman. Finch is a deputy planning commissioner for development with the city of Chicago.

Margaret E. Greene (formerly Margaret E. Czajka) has been admitted to partnership in the Detroit firm of Honigman Miller Schwartz and Cohn.

Ronald I. Heller has become a partner in the Honolulu law firm of Torkildson Katz Jossem Fonseca & Moore. He was previously a partner in the Honolulu firm of Reinwald O'Connor Marrack & Hoskins.

Steve Lockhart has become associated with the Port Huron, MI law firm of Flanigan, Monaghan & Traver, to concentrate in estates, corporations, and real estate. His former position was that of supervising attorney of legal assistance of St. Clair County.

W. Stevens Vanderploeg has been named a partner in the firm of Mika, Meyers, Beckett and Jones, of Grand Rapids, MI.

'81 Mary L. Mason has been named a partner in the firm of Mika, Meyers, Beckett and Jones, of Grand Rapids, MI.

Alumni Deaths

'19 Robert C. Brower, November 25, 1987

'21 Norman H. Sallwasser

'26 S. Chesterfield Oppenheim, January 29, 1988 in Silver Spring, MD

'27 Fred L. Harlocker, December 19, 1987

'28 Harry F. Moll, September 29, 1987 in Placerville, CA

'29 George W. Gale

'31 William W. Bishop, Jr., December 29, 1987 in Ann Arbor, MI
W. Thornley Hunt, December 30, 1986
Laura Osgood McCoy, November 26, 1987 in Alexandria, VA

'33 Henry Y. Morrison, January 14, 1988

'35 H. Leslie Williams, October 9, 1987

'36 John B. Baker, September 10, 1987
David Dow, November 23, 1987
George A. Richards, December 31, 1985
G. Mennen Williams, February 2, 1988

'40 Joseph W. Kindig, January 5, 1988 in Tucson, AZ

'41 Robert A. Stuart, January 7, 1988

'47 Finn G. Olsen, November 29, 1987 in Ann Arbor, MI

'48 Robert C. Acton, May 24, 1987

'49 Glenn W. Porter, 1987

'50 Charles Myneder, August 27, 1987

'52 G. Stanley Joslin, December 29, 1987 in Atlanta, GA

'55 Robert B. Olsen, November 26, 1987 in Lenexa, KS

'57 Kenneth G. Mackness, November 15, 1987

'71 Michael J. McGuigan, January 3, 1988 in Ann Arbor, MI

NOTICE:

'77 F. Dennis Nelson was inadvertently omitted from an announcement (LQN 33.2) listing the founding partners in the new Chicago law firm of McCullough, Campbell & Lane. Our apologies to Mr. Nelson.

Why should something so fundamental as the environment go unrecognized in something so fundamental as the Constitution?

The Environment, the Constitution, and the Coupling Fallacy

James E. Krier

This article is based on a paper entitled "Environmental Quality as a Political Question" that was delivered at the University of Tennessee's October 1987 Bicentennial Conference on The Constitution and the Environment.

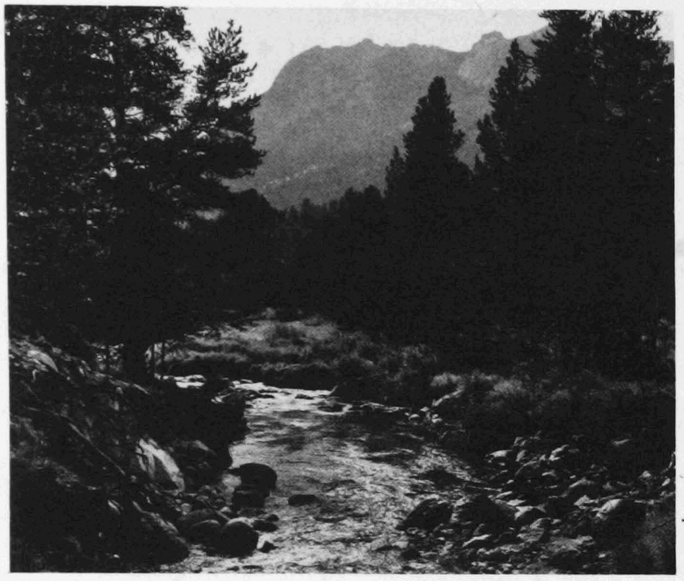
Shortly after the environmental movement first got underway, almost 20 years ago now, there appeared a little parade of articles urging a constitutional right to a clean environment. While a few of the articles campaigned for an amendment to this effect, most of them reasoned that an amendment was unnecessary. They argued that the right in question is already in the Constitution, however inconspicuously — in the Ninth Amendment, say, or in the concept of ordered liberty protected by the Due Process Clause, or in the so-called penumbra of the Bills of Rights. They asked the courts simply to acknowledge this reading, but the courts did not. The United States Supreme Court has not subscribed to any of the theories advanced by the articles, and neither have the lower federal courts nor the state courts, with a couple of inconsequential exceptions.

Why should something so fundamental as the environment go unrecognized in something so fundamental as the Constitution? True, there is no explicit statement of an environmental right in the constitutional text, but it hardly follows that such a right could not be read in, and in a principled way. The reading would be principled because it would reason from precedents themselves principled, and because it would follow one or another broadly accepted method of constitutional interpretation. Neither of these points needs to be belabored. There are precedents, involving precisely the theories mentioned above, with which to build plausible arguments for a constitutional right to environmental quality. And conventional canons of constitutional interpretation permit one to read between the lines. There is no explicit right to privacy in the Constitution, for example, but there is a constitutional right of privacy. And the Constitution does not explicitly provide a right to defense counsel, at government expense, in criminal prosecutions, but there is a constitutional right to this effect. So too for the exclusionary rule and the right to travel and so on. The Constitution is longer, and larger, than its text. So why no constitutional right to environmental quality?

Two reasons are usually given, but I think they boil down to one. The literature mentioned above, arguing for the constitutional right, was regarded by critics as high-minded but also high-flown. Close examination of the literature's claims suggested that their connection to accepted constitutional understanding was too attenuated. My colleague Philip Soper reached just this conclusion after a very patient and, I think, sympathetic review of the entire subject published in 1974. Richard Stewart, writing three years later, was more dismissive. "Advocacy of a constitutional right to environmental quality," he said, "has been rejected by the courts. There is little doubt that the judges are correct in resisting these siren calls. The asserted right lacks any foundations in the constitutional text or in history." Call this the *doctrinal* reason against the right.

Critics of a constitutional environmental right insist that such a right would reach well beyond the range of judicial competence . . .

Constitutional doctrine is not, of course, formed in a vacuum; to some degree, the Constitution and decisions interpreting it are read to say what they should say, to mean what it makes sense to have them mean, from the perspective of a given reader. To some degree, then, the readings of Soper and Stewart and others like them clearly are influenced by the belief that it would not be sensible to read the environment into constitu-



Philip Dattilo

tional law. There might be any number of reasons for this belief, but one has been obviously dominant. Critics of a constitutional environmental right insist that such a right would reach well beyond the range of judicial competence, in both the immediate sense of technical capacity and the more remote sense of political legitimacy. This is the *functional* reason against the right, and, I think, the rationale that drives the doctrinal reading of people like Stewart and Soper.

Professor Stewart is the most transparent in this regard. After writing the language I quoted above, he went on to discuss at much greater length all of the functional reasons why he considered the doctrinal case for the constitutional right to be weak. He had to do this, because he conceded that the argument from doctrine was "not necessarily a decisive objection . . . ." So he went on to say, in several passages too lengthy to quote, that (doctrine aside) "there are other basic difficulties." If the constitutional right were recognized, courts would be ultimately responsible for large resource allocation decisions, and this could mean that they would have to use economic and other methods of technical analysis when there is no reason to suppose that they know how; and they would have to determine the distributional impacts of various environmental policy alternatives, a determination that is itself a difficult technical matter, and then trade these impacts off against allocational efficiency without the assistance of any accepted guide for making such tradeoffs; and they would have to confront the polycentric and dynamic characteristics of environmental policy and figure the impact of alternatives on research and development in the field of pollution control technology, not to mention (Stewart didn't) the impacts of one environmental policy — dealing with air quality, say — on other environmental media, such as water and land; and they would have to puzzle over questions having to do with values and preferences and intergenerational justice; and there is little if any principled basis for any of this so how would the courts manage? And even if they managed, they would still be left with the embarrassing problem of figuring out how to implement the constitutionally required programs. Courts lack the competence, technical and political, for all of these tasks.

Soper is less transparent than Stewart, but his brief discussion of "judicial competence" did mention more or less the same points that Stewart repeated later. And Soper was very explicit in stating the bottom line. The functional considerations, he said, pointed to the conclusion that environmental matters are "more appropriately left to the judgment of the legislature" and to "majoritarian determination."

In other words, to politics.

Exactly! Ignore for now the possibility that the likes of Soper would insist that doctrine really is the central concern, because there will be occasion later to suggest that even on doctrinal grounds the case against the constitutional status of environmental quality has been far less than fully considered. Assume for the sake of argument that functional considerations actually do underlie the views of everyone who is troubled by the notion of a constitutional right to a clean environment. Acknowledge that in the reading of all but the most explicit of constitutional provisions, and perhaps even then, doctrine is influenced by function. And concede, as I readily do, that functional considerations emphatically suggest that environmental quality is most prudentially regarded as a political not a judicial question. Even my former colleague Joseph Sax, perhaps the foremost advocate of an active judicial role in matters of environmental law, concluded in his book *Defending the Environment* that there should not be a constitutional right, because a court "should not be authorized to function as an environmental czar against the clear wishes of the public and its elected representatives."

But look at what Sax (and everybody else, apparently) has done: The idea of a *constitutional* right has been coupled with the idea of *judicial* management of the right. So far as I can tell, the entire debate on this issue — which seems to have ended with the appearance of Professor Stewart's article a decade ago — has gone forth on the singular notion that the Constitution and the courts are necessarily coupled together. But that notion, however typical, is hardly necessary, even as a matter of doctrine.

The argument . . . commits what can neatly be called the coupling fallacy.

Political question doctrine, for instance. Whatever disputes there might be about its marginal meanings, the central core of political question doctrine is conventional enough that I can simply quote an encyclopedia on the subject. An entry labeled "Political Question" in the *Encyclopedia of the American Constitution* says that the Supreme Court recognized as early as the turn of the last century "that decisions on some governmental

questions [and here the author, Philippa Strum, could have added the words *arising from constitutional provisions*] lie entirely within the discretion of the 'political' branches of the national government — the President and Congress — and thus outside the proper scope of judicial review." In other words, decisions on political questions are not justiciable.

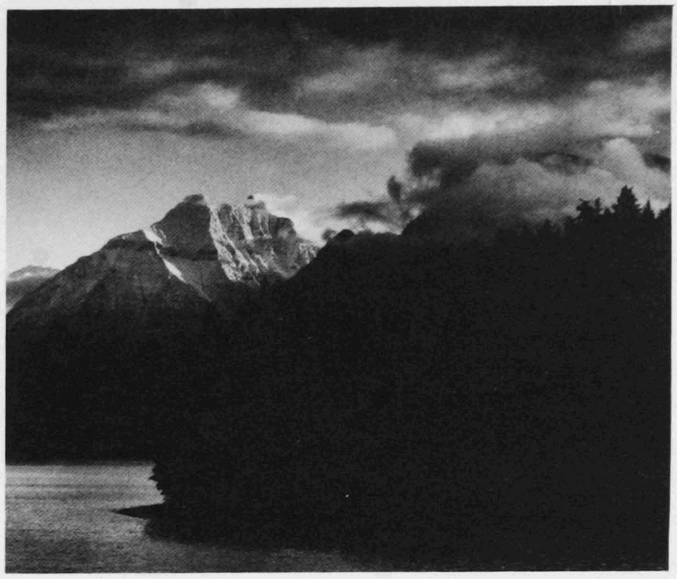
That is what Ms. Strum says at the beginning of her essay. This is what she says at the end:

> The [political question] device . . . enables the judiciary to maintain its independence by withdrawing from no-win situations . . . . The Supreme Court, declaring the presence of a political question, tacitly admits that it cannot find and therefore cannot ratify a social consensus. . . . The political question doctrine, which permits the Court to restrain itself from precipitating impossible situations that might tear the social fabric, gives the electorate and its representatives time to work out their own rules . . . .

This isn't perfect, but it's close enough, and anyone wishing to read Ms. Strum's essay in its entirety will find that the political question doctrine fits our case quite nicely. Thus the Court has used the doctrine when it would otherwise have to define obscure terms (such as "republican form of government") the content of which can be resolved only by picking one political philosophy over another, or when it would have to develop principles beyond its capabilities, or when it would have to announce unenforceable judgments. All of this sounds strangely familiar. To my mind, political question doctrine provides a ready answer to the *functional* case against constitutional status for environmental quality, because it lets us uncouple the Constitution and the courts. That the judiciary is incompetent to define and manage certain kinds of constitutional conceptions is simply not a conclusive, and maybe not even a very interesting, objection to the conceptions themselves. The argument to the contrary is faulty. It commits what can neatly be called the coupling fallacy.

Is mine just a debater's point? What good is it to find an item in the Constitution if the item is regarded by the courts as raising nonjusticiable political questions? And how would one get the item read into the Constitution in any event, aside from the difficult process of constitutional amendment? Certainly the Court isn't going to wend its tired way through the constitutional text in search of something it already knows it will declare to be of a political, and hence nonjusticiable, nature. And what about the *doctrinal* case against interpreting the Constitution in favor of environmental quality? Commentators like Soper and Stewart claim that function is not the sole concern; they claim that on their reading of the constitutional text (and on their reading of the Supreme Court's reading of the constitutional text) the environment just isn't there. So even if the functional objections are cancelled by the political question doctrine, the doctrinal objections remain.

Two of these questions — the one about achieving the desired reading, absent constitutional amendment; and the one about the doctrinal arguments against the reading — are related and call for separate treatment. The question about the value of nonjusticiable constitutional language can be considered here. Taken all together, my answers do not suggest that those who debated the general issue in the years 1970 to 1977 were wrong, on either side. The suggestion, rather, is that much of what they had to say was irrelevant.



Philip Dattilo

What good would constitutional status be, without the courts?

So what good is a constitutional provision without the courts directly behind it? There are a number of answers that come immediately to mind: Recognition of the environment as an item with nonjusticiable constitutional status might, without contradicting the purposes of political question doctrine, allow courts to insist that the legislative and executive branches consider environmental values in an open and reasoned way in the policy process, no matter what those branches ultimately conclude. Similarly, recognition might give courts room to construe ambiguous legislation in favor of environmental values when the competing values at stake in the legislation's meaning are not of constitutional dimension; or room to manipulate the burden of proof in cases involving the environment; and so on.

As interesting as these points might be, I do not wish to pursue them here. All of them arise from the premise that courts could still be *indirectly* behind our hypothetical constitutional provision. I want to consider the value of the provision utterly independent of the judiciary.

Assume, accordingly, that the courts are going to be out of the picture entirely. What good would constitutional status be then? Obviously, I have to speculate. My speculations would be greatly enriched if the origi-

nal debaters had made my debater's point and thereby been forced to take the question up, but none of that happened. If it had, I imagine that someone would have considered that a constitution is surely more than a set of propositions about the structure and limits of government and about concrete rights in the people. A constitution — I'm convinced this is true of our Constitution — must serve some more abstract purposes as well, whether you call them symbolic or educational or legitimating.

The Constitution itself, as a whole, is a symbol held in immeasurable esteem by millions of people who have never even read it. It follows that to be an item in the Constitution, explicitly or not, is to take on a meaning larger than meanings that can be captured in, or reduced to, mere operations. A republican form of government stands for something quite without the courts and even if Congress itself cannot articulate, other than by decisions in the name of the form, just what that something is.

If I were a conscientious legislator or executive who had taken my oath to heart, the fact that environmental quality had constitutional status would make the environment mean something more to me than otherwise, even if I could not articulate the meaning in the absence of reaching decisions on particular issues. It would make the environment mean more to me even if, but more likely especially because, questions of environmental quality were regarded as nonjusticiable, so that I and my colleagues had the last word on the questions. My sense of the significance of having the environment in the Constitution might be remote, but the consequences of the environment being there in the document could be immediate, as when some formerly loyal group of my constituents asked me to make a close call against environmental interests and I could point out to them that, under the circumstances, I felt *constitutionally* bound to do otherwise.

Would my explanation to my constituents assure their loyalty to me at the time of my re-election campaign? Hardly. But might the results of hundreds of re-election campaigns held over tens of years and involving hundreds of incumbents who acted as I be at least marginally different, and in a direction favoring environmental quality, if environmental quality had (nonjusticiable) constitutional status? I'm not sure, but a bet on yes is a better bet than the bet that any one particular legislator would be re-elected.

The argument from symbolism takes on more power once one recognizes that all executives and all legislators and all constituents were once children, and that most children actually study the Constitution, one way or another, in school. Would students gather a different set of notions about the environment if they studied it as an item in the Constitution rather than as merely an item in a science course or an elementary economics course or a course in current events? Again, a bet that over time the popular mind-set would change in a statistically (and politically) significant way, and in a direction more sympathetic to environmental values, seems safe. For these sorts of reasons, I am unmoved by the fact that in the few states that have amended their constitutions to include the environment, policy probably looks pretty much like it did before. It is far too soon to tell. (And if policy does look pretty much the way it did before, the amendments have probably done no harm.)

It may be, however, that the best response to skeptics is the response that accentuates the negative rather than the positive. My colleague Frederick Schauer has drawn from the literature and suggested to me the legitimating role of the Constitution. I don't mean, and Schauer didn't mean, that constitutional recognition of the environment would give a special endorsement to environmental concerns. Probably it would, but merely as a consequence of the symbolic and educational considerations discussed above. The legitimating role (perhaps it would be better called the *de*legitimating role) is importantly different and has to do with a sort of negative endorsement that might arise from the *absence* of an item in the Constitution. The concern here is the appearance of implicit moral approval of something actually wrong. Take state action doctrine, which says, for instance, that the *government* shall not discriminate on the basis of race. The unintended implication is that private citizens may discriminate, that private discrimination is legitimate. The absence of the environment in the Constitution could encourage similar, unintended reasoning. You pollute. I object. You tell me not to make a federal case out of it.

I am painfully aware that all of the foregoing sounds soft and preachy, which is perhaps why it isn't often, or ever, heard coming from legal scholars. I am equally aware that a determined program of reading might, to the contrary, actually uncover innumerable sources where much the same was said or all the same rebutted with the sort of rigor, and accompanied by the sort of citations, one associates with solid professional work. I would be willing to discipline my arguments and do the reading if my agenda right now were more ambitious and less hopeless than simply getting those debaters of ten years ago to concede that a lot of what they argued about missed, if not *the* point, still quite clearly *a* point, and that they would be well advised to start anew.

Congress is the answer . . .

Two related questions remain: Granting, purely for the sake of argument, everything said thus far, and putting a constitutional amendment to the side, and recognizing that it would be strange for the Court to search for something in the Constitution knowing all along that any discovery would be regarded as a nonjusticiable matter, how could the environment ever find constitutional status? How could it do so, in particular, in the face of inhospitable constitutional doctrine?

The questions are related because Congress is the answer to each of them. As Paul Brest and others have pointed out at some length, it may usually be the case, since *Marbury v. Madison*, that the Supreme Court is the *ultimate* interpreter of the Constitution, but it is not ever the case that it is the *exclusive* interpreter. It is in fact

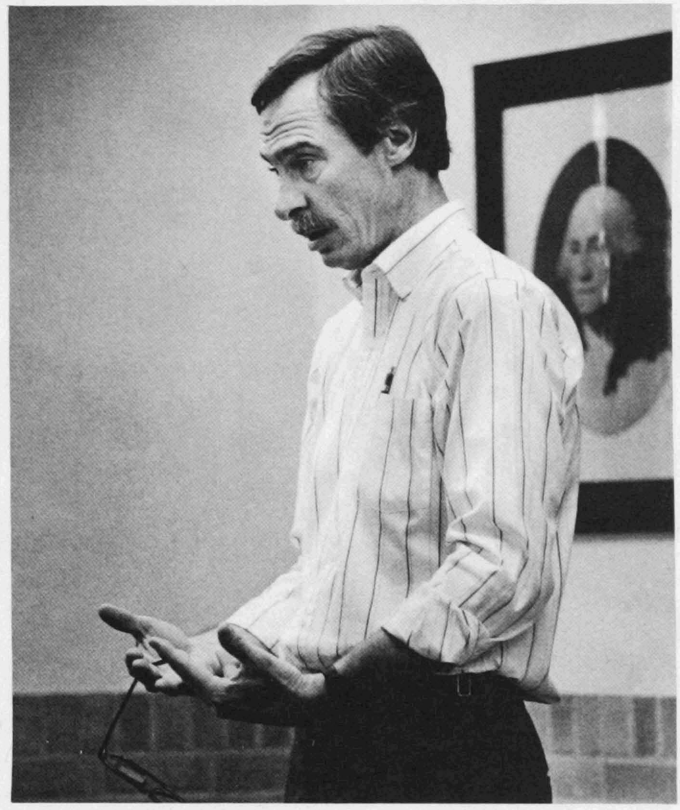
perfectly plain that Congress is necessarily an interpreter as well, and that its interpretive authority can be the equal of the Court's in that Congress may, on occasion, step beyond the boundaries of the Court's reading. Whether it is equal in the sense that Congress is entitled to contradict the Court is a much more difficult matter, but one that can be ignored here because the Court has never said, itself, explicitly, that the Constitution forecloses a reading that endorses environmental values. So I do not see why Congress could not enact a joint resolution or a statutory finding expressing exactly such a reading — a reading whose meaning, contours, and implications Congress would be perfectly happy to have the Court regard as involving political questions, nonjusticiable issues.

Could a conscientious Congress declare such an interpretation in the face of the doctrinal arguments against it? Here I draw on an article by Judge Richard Posner that appeared last year in *The New Republic*. The article suggests, to me at least, that a conscientious Congress could do precisely what I have in mind. In the course of making a case against strict constructionism, which is a brand of constitutional interpretation, Posner observed that the choice of method of constitutional interpretation is a decision that itself entails, if you will, constitutional interpretation, this simply because the Constitution doesn't explicitly state how it, the Constitution, is to be interpreted. One can't say "The Constitution says nothing on the matter of interpretation so it should be interpreted narrowly" and expect a round of applause, because one could just as well say "The Constitution says nothing on the matter of interpretation so it should be interpreted broadly." A choice independent of explicit constitutional text has to be made. This doesn't mean, though, that the choice is independent of the Constitution *as* a text. Although Judge Posner didn't say so exactly, I am sure he believes that principled interpretation will have reference to the fabric of the document. Of particular bearing here, it will have reference to, among other things, the constitutional role of the reader. So, regarding the choice of interpretative approach, Posner wrote: "That decision must be made as a matter of political theory, and will depend on such things as one's view of the springs of judicial legitimacy and of the relative competence of courts and legislatures in dealing with particular types of issues."

If, as seems to be the case, the legislature (along with the executive) is the relatively competent branch in the case of environmental matters, then it is difficult for me to understand why it could not conscientiously interpret the Constitution — purely and explicitly for its own purposes, and purely in light of its own instrumental competence — in such a way as to recognize the enduring importance of environmental quality. The doctrinal arguments that might seem to stand in the way may in fact be to the side, because they are arguments based on a reading of the Constitution for purely judicial purposes. But our purposes are not judicial at all.

Congress would not be expanding its legislative authority by interpreting the Constitution in a manner that recognizes environmental quality, because the Commerce Clause already gives Congress broad power to legislate in the area. Moreover, the interpretation I have in mind need not be considered to create congressional obligations or limitations — not, at least, justiciable ones. The interpretation would be simply hortatory. (The environmental amendments to state constitutions have been regarded by state courts in this way.) For these reasons, I have shied away from couching my own argument in terms of a constitutional *right* to environmental quality; I have spoken, rather, of constitutional status.

I don't know whether it would be easy to convince Congress to exercise its interpretive prerogative, and in favor of environmental values. I am confident that the chances that Congress could be so moved are better than the chances of obtaining an amendment or of convincing the Court to take sympathetic action. I can't be sure that granting constitutional status to environmental quality would matter in any event, but I addressed above some reasons why it might. And, most of all, I have little idea how to answer the long list of lawyers' questions that would surely arise if Congress did exercise its prerogative. But those questions, whatever they may be, I leave for now to people whose professional concern is not the environment, but the Constitution.



Philip Dattilo

Professor James E. Krier taught at UCLA and Stanford before he joined the University of Michigan Law School faculty in 1983. His teaching and research interests lie chiefly in the fields of property and environmental law.

Civil Rights and Republican Principles: a Reply to the Graham "Incoherence" Thesis

Professor Sallyanne Payton began her academic career at Michigan in 1976. She formerly served on the White House Domestic Council staff and was chief counsel to the Urban Mass Transportation Administration in the U.S. Department of Transportation.

SALLYANNE PAYTON

Philip Dattilo

I am grateful for an opportunity to respond to Professor Graham's very stimulating and informative paper. Professor Graham's central insight, as I understand it, is that the Nixon administration's civil rights policy was characterized by theoretical inconsistency and some political opportunism. The "policy" included a federal commitment to enforcing affirmative action, at the same time that it included the encouragement of a constitutional amendment against busing. It included

both a vigorous effort to help Southern school districts dismantle their dual schools systems and opposition to legislation that would have vested cease-and-desist enforcement powers in the EEOC. The Nixon administration created the Office of Minority Business Enterprise while attempting to weaken the Voting Rights Act. There was the Philadelphia Plan, but at the same time President Nixon made two attempts to place a Southern conservative on the Supreme Court of the United States. On balance, the record cannot be characterized as "liberal," but neither can it be thought of as "conservative," certainly not in the sense in which the nation has experienced a purer conservatism under the Reagan administration. Professor Graham argues that the Nixon record is, taken as a whole, "incoherent," and that what Nixon administration officials lacked was "an enunciation of Republican principles to guide their policies."

By way of introduction, I should say that I am a lawyer, and now a law professor. I came from private practice to John Ehrlichman's domestic council staff in April 1971, and served as staff assistant to the president for two years, after which I moved to the Department of Transportation. I was not at the time and have never been a civil rights professional, and civil rights policy was never in my portfolio. However, as one of the two Blacks on the White House staff at the time (Bob Brown being the other) I did have both the opportunity and, I thought, the obligation to understand what was going on in civil rights, and I participated in the women's movement as one of the Republican women so involved. It is as an interested inside bystander rather than as a participant, therefore, that I respond to Mr. Graham's paper.

Mr. Graham has discovered the eternal truth that events that seem from afar to be planned systematically frequently appear from a closer distance to be random. The latter impression may be as misleading as the former, however, because the pattern of action that one actually observes, and the principles that have guided the actors' selection of alternatives, may be based in unspoken assumptions and implicit world views. A coherent pattern can emerge from discrete actions even though the actors appear to be unaware of the pattern they are creating. I do not propose to argue with Professor Graham's data, only to suggest another way of describing the pattern.

Professor Graham's thesis seems to have been stimulated by his surprise that the Nixon civil rights policy was not as wholly unsatisfactory as he expected to find it. He suggests that what surprised him about the information that he reviewed was the "incoherence" of the Nixon administration's civil rights policy. He thereby suggests both that coherence is possible and that incoherence is a deficiency, the implication being that coherent policy, had it existed, would have yielded better results. There is a backhanded compliment here: the implicit premise is that the Nixon administration's Republican principles were so successful in other domestic areas that if they had been applied to civil rights, or if the administration had tried to develop Republican principles for civil rights, the results would have been more satisfactory, from Professor Graham's point of view, than the actual course of incoherent events. I am doubtful on that very point. I suspect that civil rights was in the early 1970s, and still is in the late 1980s, the great unmanageable item on the American political agenda, the great policy failure that poisons the nation.

Indeed, to call the problem one of "civil rights" is to confuse the issue. The problem, indeed, is how to name the problem. By the time the Nixon administration domestic policy team began to turn its attention to civil rights policy it had already become clear that "civil rights" in the classic legal sense of the term was only a fragment of the issues over which the "civil rights" struggle was being waged.

The deprivation of "civil rights" has been accompanied by and has been emblematic of a broad spectrum of deprivations visited historically upon Black America: slavery, segregation, discrimination, and now nearly complete social isolation, which have left an aggregate legacy of depression that is proving extremely difficult to counteract.

By the time the Nixon administration took office, there was a political consensus that racial distinctions ought to be eliminated from American law, a process that was occurring partly through judicial order in the wake of *Brown v. Board of Education* and partly through voluntary action on the part of legislatures and executive branches throughout the federal system. In addition, the Congress had in the Civil Rights Act of 1964 decided that discrimination against Blacks and other minorities in private employment ought be eliminated as well.

It was apparent, however, that something more needed to be done, something that Professor Graham thinks ought to have been done pursuant to Republican principles. Just in order to get a sense of the difficulty of that undertaking, let us return to the intellectual scenes of what Mr. Graham identifies as the great policy triumphs of the Nixon administration. If we look closely, we will see that they were all based on an appreciation of structure and principle. In foreign affairs, Mr. Nixon had a clear understanding of the structure of the conflict between the United States and the Soviet Union, a conflict aptly dubbed by observers a "chess game." The

This paper was originally presented at the Hofstra University "Conference on the Nixon Presidency," Nov. 23, 1987.

game is structured by geography and the determinants of domination such as access to resources, ability to deny the enemy access to resources, control of the governments of other countries, and so forth. The game can be taught. Likewise in domestic policy the achievement of the Nixon-style New Federalism, with block grants, revenue sharing, regional planning, and the like, was based on the principles of efficiency in the collection and expenditure of resources: centralized collection and decentralized administration, with the appropriate scale of the decentralized unit depending on the task to be performed. There are a small number of mutually consistent principles that were at the base of most of the Nixon administration's initiatives in restructuring domestic government. For Republican reformers, in general, good governmental structure and process are good government, and there are things that government ought to do.

What is the structure of the larger problem of overcoming the legacy of slavery and segregation? To dismantle de jure segregation and restore political participation rights in the South would be part of any agenda, because the legal subordination of an entire race was indisputably contrary to every articulate principle of American government. Once white supremacy had been rejected as a principle, formal legal equality must follow, again in principle. This principle yields frequently to the contemplation of the electoral calculus, but the principle is clear, in principle. President Johnson had gone a long way toward making the laws of the nation reflect these principles. The Civil Rights Act and the Voting Rights Act had the effect of taking down the "white only" signs all over America, the markers of the official racial caste boundary.

By the time Mr. Nixon took office those signs were down, though the memories of them were still fresh, and the nation had discovered that it had larger problems that had been obscured by the obvious one. The "white only" sign might come down from the door, but it was still in the mind. And race was class, the latter being a much more powerful marker of persons than is simple pigmentation. The problem of class became obvious in the 1970s and revealed that the integration strategy that had fueled so much of the civil rights movement was unrealistic. Races can be integrated more easily than classes, and it is extremely difficult to force integration across both race and class lines. The recent suburban flight of middle-class Blacks is simply one more demonstration of the point. Something must be done, however, about the plight of the poor, which even in 1970 was clearly worsening.

In the midst of this, it would not have required much perspicacity to have known that one did not know what to do. The behavior of the Nixon administration is largely consistent with this simple insight. Some of the actions that had been designed under the old schema were helpful and needed only to be intensified, such as increasing the enforcement of antidiscrimination policy and helping the moderates in the South to retain control of school desegregation. Accordingly, discrimination that had moved underground was attacked with the new weapon of "affirmative action," which is essentially a management tool designed to flush out unconscious and surreptitious discrimination, and school desegregation was supported. But at the same time the pathologies of the ghetto could be seen to worsen, and that was where the heart of the problem was. No one knew what to do about the ghetto.

Meanwhile, the environment in which any thinking had to occur was not conducive to sustained contemplation. America was undergoing general cultural upheaval, of which the change in the pattern of relations between the races was a central, even emblematic, part. From the vantage point of 1987 it may be difficult to remember the general din of the early 1970s. Recall Black power, busing, the arguments over the proper role of whites in the civil rights movement, the welfare rights movement, and other manifestations of the times. Meanwhile, white America was in the throes of the counterculture and the anti-war movements. The children of the white upper middle class were in the streets protesting the war in Vietnam, when they were not listening to rock music, experimenting with alternative living arrangements, and definitely not just saying no. Kent State happened in the spring of 1971.

Now if the Nixon administration had attempted to formulate "coherent" civil rights policy in accordance with Republican principles in this environment, to whom might it have turned for advice? The Southern whites who thought they knew the problem best and to whom the nation had traditionally turned for insight were the problem itself; for the first time the Blacks who were experiencing and thinking about the problem were being heard, but they had had no recent reason to admire or adopt Republican principles. Mr. Nixon, however, was a Republican, and there was a limit to his ability to continue to do things that made him look like a Democrat, or a secret Democrat. In fact, it is worth observing that the rightward shift of the Republican party in the late 1970s was stimulated greatly by conservatives' observation of the centrist tendencies of the Nixon administration.

In any event, the late 1960s and early 1970s were not the times in which cool masters of government structure such as Fred Malek and Larry Lynn could have put together a Republican design for civil rights policy. Race being an issue *sui generis* in American life, civil rights enforcement was not regarded as an aspect of ordinary administration. Civil rights enforcement is a moral imperative in the form of government. The civil rights laws are intended to eradicate discrimination, not to regulate it. Mr. Graham is astute in pointing out

that the Nixon administration never developed a coherent theory of the use of regulatory power in civil rights enforcement.[1] Where I differ with Professor Graham is in thinking that this was just as well, in light of the fact that the moral underpinnings of the civil rights laws are so different from the moral underpinnings of, say, the Interstate Commerce Act.

Professor Graham seems to be saying, however, that the Nixon administration was also incoherent *within* civil rights policy, and he makes a convincing case. The reasons for this incoherence are not so difficult to discern. Mr. Nixon was elected on a tide of reaction. There was a good deal of space to the political right of him that he might have occupied, but did not, although he did make noises soothing to conservatives who needed to believe that people who agreed with them were back in control. Mr. Nixon himself was not, however, a man of the Right; nor was he a Southern agrarian segregationist; nor was he a man whose sense of his own merit rested on his skin privilege or his control of private property. He was, if it does not seem old-fashioned to say it, a real conservative, the kind of conservative who sees inevitable change and tries to create structures to contain new energies and to accommodate them in ways that augment rather than undermine the civil order. Mr. Nixon and his principal men were centrists. They had come not to dismantle government but to rationalize it, to restore a balance between national and state power after the unbalancing actions of the Kennedy and Johnson years. Insofar as they could deal at all with civil rights policy, their inclination was to consolidate the gains of the civil rights movement and to legitimize them by institutionalizing them.

I suggest, therefore, that we start from the premise that the people in the upper ranges of the Nixon administration were at heart centrists who were interested principally in the design of government, and that they had a sense that something had to be done for civil rights but were confused as to what was best under all the circumstances, which included their interest in the re-election of their leader. I suggest that we look at Mr. Graham's data not to denounce what it reveals as "incoherent" but to think about what it may actually reveal. My assumption here is that an intelligent person tries to optimize subject to constraints; my further observation is that the Nixon administration officials operating in the domestic arena were intelligent and thoughtful, were conventionally competent professionals, and shared a core set of values and assumptions about what kind of government was likely in the long run to conduce to the happiness of the nation. Those values and assumptions were the ones that had worked, by and large, to bring white America to a state of material success unequalled in the history of the world. The problem of race, as it looked from this perspective in the late 60s and early 70s, was how to get Black America into the system, and to make the system work for Black America. The Nixon administration was conservative in this important respect: administration officials did not see the failure of the system to accommodate Blacks as a fundamental flaw in the system but as a problem for this particular moment in history, which it was important not to stretch out unnecessarily. Hence their endorsement of affirmative action, which can be understood as an effort to speed up the integration process, to reduce the Black community's frustration and to skip a generation in terms of making opportunities available and making certain that minorities took advantage of them. The solution lay, Nixon officials thought, in getting more Black people to behave like whites — to get into business, go to school, become homeowners, and so on. What worked for whites ought to work for Blacks, if the Blacks were willing to do what the whites had done and if the whites could be persuaded to treat the Blacks the same way they treated whites. This was the world in 1971.

However, civil rights enforcement was not the priority of the Nixon administration. What was most important was to deal with government structure, as Mr. Graham points out, and the structure was to be dealt with by the application to late twentieth-century government classic Republican principles, on the understanding that the existence of a substantial federal government was a fact to be accommodated. That is to say, the Nixon administration's ideas about government acknowledged the existence, utility and vast potential power of the federal government and sought to direct that power into activities that a powerful national government was uniquely suited to carry out, such as civil rights enforcement and environmental protection; conversely, the effort was to prevent the federal government from competing with state and local governments to provide services that could better be provided at the state and local level. All this was in accordance with classic Republican principles of government, which the Nixon administration was trying to update to accommodate the historical fact of the increasing influence of the federal government.

The principles themselves are familiar, but it may be helpful to review them as a prelude to the rest of this discussion. First is the principle of limited government, the idea that private ordering through the private and voluntary sectors is in general preferable to the use of government power. The second is federalism, the idea that politically responsible local governments are the primary organs of government and the indispensable locus of genuine popular self-government. If government must be used, state and local governments are systematically to be preferred to federal action. The third principle is the separation of powers, which is a technique of distributing the powers of government

among the branches in order to reduce the threat posed by the concentration of all government powers in the same individuals. Programs that are consistent with these principles may be good; programs that are inconsistent with them are surely bad in the absence of extraordinary justification. We might add here a fourth principle, which is that the laws and government structure ought to reflect in general the preferences of the majority.

The civil rights problem posed a dilemma for believers in these principles: it was fairly clear that the only civil rights policies that promised to be effective were in tension with the principles, and the policies that might be indisputably consistent with the principles were likely to be ineffective. The reason is that the principles assume as a matter of fact that individuals are better served when decision-making is lodged in the private sector or in small government "close to the people." While those assumptions may be dubious for most Americans, they are flatly contrary to fact for most Black Americans. The private sector is the setting for private racial discrimination; and state and local governments were the enforcers of official segregation. Moreover, the whites held the majorities in the legislatures so it was to the courts, not the legislatures, that Black Americans had to turn for justice. In order to build effective civil rights enforcement programs it was necessary to discard the assumptions on which much American government rested. In fact, civil rights enforcement threatened to provide a setting in which the strength of the principles might be broken forever: since discrimination was pervasive, so was the potential reach of federal judicial and regulatory authority, and it was reasonable for traditionalists to fear that regulatory programs and judicial doctrines designed to bring about effective civil rights enforcement might become models for other types of regulation and judicial intervention that did not start from such moral imperatives. This was not an idle fear: the vocabulary of "rights" expanded drastically during the 1960s and 1970s, and any of a number of movements claimed to be as important as civil rights or claimed that their beneficiaries were as oppressed as were Black people.

If vigorous, conspicuous civil rights enforcement can always be expected to raise the anxieties if not the hackles of persons of Republican temperament and principles, it is wholly unrealistic to expect a Republican president to be a crusader for civil rights even where the moral issues are clear. By the time Mr. Nixon took office, ambiguities had already set in. The pure "civil rights" issue, conceptually the easiest for Republicans, had in the main already been dealt with legislatively during the Johnson administration. Ironically, Mr. Nixon inherited not only the hard issues, but the issues that were hardest specifically for Republicans. What were those issues? By the late 60s and early 70s it was becoming clear that the demoralization of the Black family had a great deal to do with the fact that simply removing the racial caste barriers in American society would not bring about a great surge toward material success on the part of many Blacks. This fact was understandably embarassing to the Black community, and there was a good deal of heated discussion about who was to blame, but the fact could not be avoided. Indeed, over time the situation has grown more pronounced.

Republican principles assume that the basic social unit is the family, the individual members of which strive for personal advancement. The theory of racial uplift through the personal mobility of individuals, however, is based squarely in the assumption that the unit to be uplifted is an intact nuclear family with an employed or employable male head of household and an obedient and supportive female at home who runs the household and takes care of the children. All of the Republican assumptions about the appropriate division of function between the public and private sectors, about the amount of time the adults in a family can devote to making money, about labor mobility, about political participation, and a host of other matters, assume (implicitly, for the most part) a male head of household. The entire liberal democratic idea of promoting equality by promoting opportunity was designed to allow men to achieve equality with one another; the core of civil rights policy has been to allow Black men to achieve the same economic and political status as white men. On this there has been bipartisan consensus. Democrats have differed from Republicans chiefly in being more comfortable with maintaining a large population of women and children on welfare. The subtext of much policy toward the Black community, however, has been to place Black males in a position to direct their families and contribute their resources to them in the same way that white males are presumed to contribute.

The flaw in this approach has been that the nuclear family structure within the white community itself has been coming under pressure. In the 60s and 70s it was obvious to anyone willing to look that the problems of the Black community were not to be solved by cultivating patriarchy. But what else was there? The answer to that problem was not clear in the early 70s and is not clear now. What is clear is that a family unit cannot subsist on the income realistically available to an unskilled woman worker with children whose opportunities are limited by the gender segregation of the workplace. One can attack the problem directly, or one can tell the woman to find (or keep) a man and get his money. The thinking of much of the civil rights community has run along the latter lines, which are, ironically, consistent with Republican principles that contemplate the dependence of females and children on adult males. Even in the late 80s conferences on "civil rights" rarely devote much time to discussing the status of women, though the female-headed household is now a prevalent form of family organization in the Black community.

If one wants to deal with the structural problem that confronts Black America, one must deal with the status of Black women and through that window with the problem of Black children, which is where the future lies. I cannot fault Mr. Nixon for not having taken the lead on this issue, because the women's movement had just gotten underway and thinking about the status of women was embryonic. What Mr. Nixon did in fact, being unable to deal with one basic structural problem, was by no means deplorable, as Mr. Graham points out. The picture that emerges from Mr. Graham's paper is of an administration actually trying to achieve some progress, subject to political constraints and in light of its determination not to miss its opportunities to make the GOP the majority party at the presidential level. There was, predictably, a great deal of symbolic political activity directed at wooing the most discontented whites. But Mr. Nixon was no counterrevolutionary. Nor was Mr. Ehrlichman, nor Mr. Schultz. There is no villain in this piece.

What Graham actually accuses Mr. Nixon of is "incoherence" rather than villainy. The evidence for this is that Mr. Nixon said very little, never developed an articulate program, allowed the various members of his administration to go off on projects of their own (e.g., Schultz and the Philadelphia Plan), and mainly demanded that they not get him in trouble, that is, that they should design action so that if there was to be a reaction it would be directed at another branch of government, preferably the courts. Meanwhile, in low visibility areas such as budgets Mr. Nixon beefed up civil rights agency enforcement resources and helped the moderate South maintain control during desegregation. And he tried to give some encouragement to the fledgling class of Black entrepeneurs.

This is not a bad record for a Republican elected on a wave of reaction. Indeed, some conservatives have never forgiven Mr. Nixon for having been so sensible. It is possible to argue that the energy for the expansion of rights was coming from Democrats, not Republicans, and that Mr. Nixon did everything he could to keep the volume down and to retard the pace of change. But he could have kept the volume a good deal lower, and he could have been much less supportive of the ultimate direction of change. What the Nixon administration actually tried to do was to moderate change, to create sound government structures to contain the energy that was flowing, uncontrollably, into government. The administration did not, and this is important, try to stamp out the energy itself. Working for the administration was frequently frustrating for those of us who were part of the energy, but it is hard to fault the Nixon administration for being what it was elected to be, which was a moderate Republican administration. Indeed, Mr. Nixon did some things that placed him ahead of his time, such as the Indian policy put together by Ehrlichman and Bobbie Kilberg. And in the area where policy was most out of view of the right wing, that being District of Columbia affairs, the president, Mr. Ehrlichman and Mr. Krogh were consistently supportive of the Black officials of the District of Columbia government, poured very impressive amounts of resources into the jurisdiction, and worked to place the District on a sound fiscal basis and to achieve home rule. I can say on the basis of my own experience in managing District of Columbia affairs that these centrist Republican reformers were a pleasure to work for and with.

In reviewing the entire record of an administration, it is important to keep in mind that measures that are not taken as part of an advertised "civil rights" policy may have a tremendous effect, for good or ill, on Black Americans. Early in his administration Mr. Nixon proposed the Family Assistance Plan, which would have placed basic cash incomes in the hands of poor and working poor families with children, many of them female heads of families. The plan would have had a radical effect on the economic and political structure of the South. It would have provided a real subsistence floor for millions of Black children in rural areas. It would have been a first step toward treating the female-headed family as a structure, not an aberration or pathology, and therefore would have dealt with it straightforwardly as a problem of wage structure and work incentives. The FAP died as the result of a coalition of conservatives who understood its implications and of liberals who did not perceive its beneficiaries, who would mainly have been poor women and their children, as their constituency. It is only now that comprehensive welfare reform is back on the political agenda, and I fear that it is not yet widely understood that the status of Black women will ultimately determine the future of Black people in America. I cannot fault Richard Nixon and his conventional Republican reformers for having failed in 1971 to appreciate truths that are only beginning to be perceived.

Lest it sound as though I am arguing that the Nixon administration did fine on civil rights, all things considered, let me make it clear that my empathy for the intellectual problems of engineering a civil rights policy for a Republican administration does not obscure my dismay at the moral damage done to the civil rights effort during the Nixon years. At the same time that his executives were doing their sensible best to create a sound approach to civil rights, the political message that was going forth from the White House was one of Southern strategy and conservative Southern appointments to the Supreme Court, of nods and winks. The Johnson administration had put the moral weight of the presidency behind the law, and behind the civil rights movement. The Nixon administration continued and extended much of the good concrete work. But there was the moral counterweight, and I am not prepared to argue that the loss of the moral presence of the presidency on the side of those seeking to break down the racial caste system was not in the end the most long-lasting legacy of the Nixon administration. Perhaps the most balanced statement that can be made is that the time for informed judgment has not yet come.

In Search of Common Sense:

A Linguistic Approach to Fourth Amendment Law

Clark D. Cunningham

Professor Cunningham was the winner of the 1988 Scholarly Paper Competition sponsored by the Association of American Law Schools. The following article is an abridged version of that winning paper, adapted from a transcript of his presentation to the 1988 AALS Annual Meeting. His thesis is that semantic analysis of "common sense" meanings of the word "search" can provide an approach to interpreting the scope of the Fourth Amendment which is both faithful to the text and flexible enough to meet the demands of changing times. In a much longer article appearing in 73 Iowa Law Review No. 3 (March 1988) he supports his "common sense approach" with a detailed analysis of the amendment's legislative history and its relation to pre-Revolutionary events and, picking up where this paper ends, applies the semantic analysis to the Supreme Court's major cases of the last 20 years which have interpreted the scope of the Fourth Amendment.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches* and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

What is the meaning of the word "searches" in the first clause of the Fourth Amendment to the Constitution? Answering this question has proven to be one of the most difficult tasks of modern constitutional interpretation. For example, in the past four years the Supreme Court has been asked to decide whether the following government actions were "searches" for purposes of the Fourth Amendment: (1) tracking the movements of a drum of chemicals by monitoring radio signals from a transmitter hidden within the drum, *United States v. Karo* (1984); (2) entering private fenced farmland to find a hidden marijuana garden, *Oliver v. United States* (1984); (3) viewing the backyard of a home from 1000 feet in the air, *California v. Ciraolo* (1986); (4) taking high resolution aerial photographs of an open air chemical plant, *Dow Chemical Co. v. United States* (1986); (5) picking up a stereo turntable and looking at the serial number on the bottom, *Arizona v. Hicks* (1987); and (6) peering into a barn interior with a flashlight to see an illicit drug laboratory, *United States v. Dunn* (1987).

The decisions in these six cases provoked startling dissension among the members of the Court. No one justice joined the majority opinion in all six cases and all but three joined harsh dissents in at least one case. The inability of the current Court to agree consistently what "search" means in the Fourth Amendment is mirrored by a universal complaint from the scholarly community that this area of Fourth Amendment law does not make sense.

The problems we have today can be traced back 60 years ago to the famous Supreme Court case of *United States v. Olmstead* (1928). Federal agents had listened to Olmstead's telephone conversations by placing a wiretapping device on the telephone wire at a point outside Olmstead's property. The question presented to the Supreme Court was whether that activity was a search and therefore fell within the warrant requirements of the Fourth Amendment. In a 5-4 decision the Court held that no search warrant was required because no search took place.

The Court was split between two dramatically opposed positions expressed in the majority opinion by Chief Justice Taft and a famous dissent by Justice Brandeis. Taft said:

> The amendment itself shows that the search is to be of material things — the person, the house, his papers or his effects. . . . The language of the amendment does not forbid what was done here. There was no searching. . . . The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

Taft's opinion is the exemplar of what I call the "search of" interpretation of "search" in the Fourth Amendment, an approach which purports to be based simply on the "plain language" of the text. Justice Brandeis's dissent exemplifies an interpretation at the other extreme:

> The makers of our Constitution . . . conferred as against the government the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Justice Brandeis not only expanded the textual "right to be secure" into a more general right of privacy; he also effectively removed the limiting phrase "against unreasonable searches and seizures" by insisting that the means employed were irrelevant. His "interpretation" could therefore be fairly characterized as an amendment, illustrated by superimposing the language of his dissent on the constitutional text using the style of statutory drafting:

> The right of the people [to be secure in their persons, houses, papers and effects] TO BE LET ALONE [against unreasonable searches and seizures] shall not be UNJUSTIFIABLY violated . . .

Brandeis argued that this interpretation of the Fourth Amendment was necessary to keep its essential policies vital through changing times. Because of this willingness to change or abandon textual language to implement underlying policy, I have called the interpretation exemplified by Brandeis's dissent the policy interpretation.

From 1928 to the present day debates over constitutional interpretation continue to be polarized between the positions typified by the Taft and Brandeis opinions. Thus the explicit overruling of *Olmstead* by the Supreme Court's seminal 1967 decision in *Katz v. United States* has taken on doctrinal significance beyond the confines of Fourth Amendment law. Many commentators assume that *Katz* represents the ultimate victory of the policy interpretation of the scope of the Fourth Amendment.

The purpose of my paper is to demonstrate that there is a viable interpretive approach between these extremes, which I call the "common sense approach." This interpretation retains the textual language much more than the policy interpretation yet expands the meaning of search beyond the limitations of Taft's opinion. The Common Sense Approach is grounded in semantic analysis of the word "search" as used in everyday language. This analysis draws on the linguistic competence shared by all English speakers to reveal that "search" has three distinct senses with differing semantic structures: (1) to make a search *of* something, (2) to search *for* something, and (3) to search *out* something. First I will describe the semantic features which constitute and distinguish these three senses. I will then use this semantic analysis to describe the transition from *Olmstead* to *Katz*, and I will claim that the *Katz* decision most accurately is described as an application of the common sense approach. (In my Iowa Law Review article I have explained the textual and historical reasons for concluding that "searches" in the Amendment can mean *both* "search of" and "search out," but not "search for," and have applied the common sense approach to the Court's post-*Katz* cases, including the six recent cases which provoked such dissension on the Court.)

Some readers may suspect at this point that my ultimate goal is to make a normative claim: that semantic analysis will produce the authoritative interpretation of "search" in the Fourth Amendment. I am not making the claim that semantic analysis will lead to the Grail of constitutional scholars: the "right answer" to what given constitutional provisions mean. The common sense approach is at best a plausible interpretation of "search," not necessarily the "correct" interpretation.

I will confess, however, that there is a normative component to my project but it is not addressed to the question of authority. I believe that the common sense approach deserves serious consideration because it gives coherent shape to the developing case law and provides a basis for reasoned debate. The Supreme Court's current interpretation of "search" is that "a 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." This formulation, usually referred to as the "legitimate expectation of privacy" test, has produced an incoherent body of decisions and has deprived the country of a meaningful vocabulary to use in discussing the scope of the Fourth Amendment. One can say with some certainty that the Court's interpretation is so vague as to be literally meaningless, without regard to whether or not the interpretation is "correct." Indeed, we can not even discuss its correctness unless we are able to understand what it means.

The demand that a key legal term like "search" be meaningful is such an obvious normative claim that we tend to ignore its importance. The fundamental value of a common sense interpretation of a legal text is that its meaning draws on the enormous existing semantic resources of everyday language. We lose these resources whenever we disregard the common sense meaning of a legal text. I am not saying that a court should never move away from the common sense interpretation of a text, but only that there are substantial costs incurred when a court does so. The current state of Fourth Amendment law is powerful evidence of these costs. Semantic analysis suggests that these costs need not be incurred by revealing within the "common sense" meaning of even a seemingly simple word like "search" much of the flexibility that advocates of the policy interpretation seek and despair of finding in the too-narrow literalism represented by Taft's opinion.

I have been deliberately using the phrase "common sense" with a double meaning. At one level I am using "sense" the way a linguist would, to refer to a discreet meaning of a word that can be described in terms of what linguists call semantic features. "Common sense" at this level means that the senses of the words used by the speaker are the same as the senses understood by the hearer. If the hearer and speaker interpret the words as having different senses then communication will fail. The current confusion of Fourth Amendment law can be explained as caused by the lack of this kind of common sense. Different members of the Court at the same time or at subsequent points in time have used the word "search" with different meanings. But of course, "common sense" has a different meaning than this technical linguistic definition. More commonly, the phrase implies a kind of practical wisdom shared by people generally which enables them to manage and solve life's problems. This kind of common sense is often opposed to intellectual learning, usually with the observation that common sense is sufficient or even superior for navigating through the world in a sound and stable way.

My approach combines both meanings of common sense because semantic analysis is in a very real way a matter of everyday common sense. Scholars might disagree vigorously over definitions of search, yet all of us as speakers of English could immediately recognize that certain uses of search sound wrong. For example, I would predict that if I were to say, "the detective searched the smell of garlic," most hearers would say that sentence somehow does not make sense. Yet I could rephrase that sentence using both the words "search" and "smell of garlic" so it would make sense. I could say, "the detective searched *for* the smell of garlic," or "the detective searched *out* the smell of garlic." From experiments like these which simply test the reaction of native speakers of English, a partial semantic analysis of search can be constructed.

My semantic analysis begins with the first sense of "search," which can be identified in the verb form by the absence of a preposition: "search X." Common dictionary examples include: search the countryside, search the apartment, search the suspect, and search the records. I have called this first sense "search of" because it can be paraphrased "to conduct a *search of* X." Although very different physical activities are described by the four examples, semantic analysis indicates that all four share the feature: [movement through X]. A second feature describes "X": < X affected object >. (Brackets ([ ]) are used to identify semantic features of the word itself while angles (< >) mark features which must be found in specified accompanying words, such as direct objects.) A third related semantic feature is: < X has a surface or interior >. A fourth feature indicates that the movement must be taken with a certain purpose: [purpose to find Y]. This semantic analysis correctly predicts that one cannot insert "smell of garlic" for "X" because "smell" has neither a surface nor an interior; therefore, "search the smell of garlic" does not "make sense."

The second sense for "search" is marked in the verb form by the preposition "for," as in the example "search for the smell of garlic." Unlike "search of" this second sense does not contain an affected object feature because the verb describes merely the activity of the subject and not the impact of that activity on some object. Accordingly the three semantic features relating to "X" disappear. One semantic feature remains which is shared by both senses: [purpose to find Y]. Unlike the features pertaining to "X", no restrictive feature blocks the insertion of "smell of garlic" for "Y"; hence the analysis correctly predicts that a meaningful expression can be constructed using "search for" with "smell of garlic."

The third sense is identified by the preposition "out": to *search out* the smell of garlic. This third sense shares with "search of" both [purpose to find Y] and < X affected object >. In place of the [movement] feature, however, is a different description of effect on X: [find X]. "X" no longer need have a surface or interior; instead, the semantic analysis indicates: < X is hard to find >. "Search out" affects "X" not by contact or intrusion but, more subtly, by destroying its hidden or elusive character. The presence of the [find X] feature in "search out" but not "search for" explains why only the first of the following sentences makes sense:

James Bond searched for the Russian code without finding it.

James Bond searched out the Russian code without finding it.

The following partial semantic description of the three senses of "search" summarizes the preceding analysis:

(1)	SEARCH X ("search of")	
	[movement through X]	[purpose to find Y]
	< X affected object >	< X has surface or interior >
(2)	SEARCH FOR Y	
	[activity]	[purpose to find Y]
(3)	SEARCH OUT X	
	[find X]	[purpose to find Y]
	< X affected object >	< X is hard to find>

Through the kinds of common sense experiments used above semantic analysis develops a description of the sense of a word by setting forth necessary conditions for acceptable usage expressed with maximum generality and accuracy. Such a description obviously does not fully convey the meaning of a word, but it does distinguish among different meanings and enables us to predict how a word can combine with other words to form a meaningful expression.

If we employ this semantic analysis to Taft's *Olmstead* opinion, it is clear that he assumed that "search of" was the only possible meaning of "search" in the first clause of the Fourth Amendment. He cited exclusively the semantic features of "search of":

"the search is to be of material things"	< X has surface or interior >
"There was no entry of the houses or offices"	[movement through X]

Given Taft's semantic assumption, he was correct to conclude that "search of" cannot be used to described "the use of the sense of hearing and that only." Just listening does not involve movement through an area, and the objects of listening — sounds — are not areas with interiors or surfaces. Just as one can not search the smell of garlic, one can not search Olmstead's conversation.

The semantic analysis, however, reveals that Taft's "search of" interpretation is actually narrower than the literal meaning of the text, because common sense interpretation of the text would allow us to use "search out" as well as "search of." The government searched out Olmstead's secrets by listening to his telephone conversations. Therefore, it was not necessary for Brandeis to conduct radical surgery on the text, and make the move to the policy interpretation, to apply the Fourth Amendment to this particular case. It would have been enough to take the "common sense" approach of allowing "search" to mean *both* "search of" *and* "search out," thereby broadening the meaning of the text while remaining faithful to its language.

Before leaving the *Olmstead* case I want to look at a much less famous dissent, by Justice Butler. His dissent exemplified an interpretation which also sought to preserve the textual language while broadening the Amendment's scope, but did so in defiance of common sense. Butler said,

> . . . the communications belong to the parties between whom they pass during their transmission. Exclusive use of the wire belongs to the person served by it. Wiretapping involved interference with the wire while being used.

Justice Butler was trying to make "search of" fit by imagining the telephone wire as a tube and the conversation as if it were a tangible message being sent through the tube, then describing the wiretapping as if the government "searched" the wire for the conversation by entering the tube and "grabbing" the messages as they went through. This approach I call the intrusion interpretation, because it focuses on the semantic feature [movement through X] with the result that "search X" becomes paraphrased as "intrude into X." For Justice Butler, the mere intrusion of the tapping device into the telephone wire somehow made the activity a search. The intrusion interpretation dominated the Supreme Court's jurisprudence all the way up to the *Katz* decision 40 years later.

The problem with the intrusion interpretation was that it led to decisions which defied common sense, as best illustrated by comparing the Supreme Court's *Goldman* decision in 1942 and its 1961 *Silverman* decision. In *Goldman v. United States*, the government used a surface microphone from an adjoining office; by placing it against the partition wall and picking up the vibrations on the surface of the partition wall, the agents were able to hear the conversation going on next door in Goldman's office. The Supreme Court said no search took place because there was no entry into the office, no movement into that area.

By 1961 the Supreme Court was eager to extend the Fourth Amendment to cover some forms of electronic eavesdropping and thus found that a search occurred in *Silverman v. United States*. The only difference between the two cases was the location of the microphone. In *Silverman* the government used a spike mike, which was inserted through the partition wall and happened fortuitously to go into a heating duct, enabling the government to pick up conversations throughout the house. Explicitly adopting the intrusion interpretation, Justice Stewart said for the Court that there was an actual intrusion into a constitutionally protected area. *Goldman* was not overruled, rather the Court said it was (literally) distinguishing *Goldman* "by an inch."

This "one inch" distinction, based entirely on the placement of the microphone, surely made very little sense. The physical intrusion of the microphone into the partition wall had nothing to do with any plausible meaning of "search." If the government had pounded a nail into the wall, there likewise would have been an

actual intrusion into a constitutionally protected area, yet no one would think that the Fourth Amendment applied it to that activity. What made the action in *Silverman* different from pounding a nail into the wall? Not the fact of movement into an area, the distinctive semantic feature of "search of." If there was a search at all, it was because the FBI searched *out* the conversations that were taking place in Silverman's home by the use of this microphone. The fact that there was an actual physical intrusion really was irrelevant. This unsatisfactory state of Fourth Amendment law after *Silverman* led to the Court's famous 1967 decision in *United States v. Katz*.

Katz was a bookie. He went into a telephone booth to place his bets and, unfortunately for him, made his call over state lines in violation of federal law. Even more unfortunate for him was the fact that he did so while there was a hidden radio transmitter microphone attached to the top of the booth, which picked up what he said into the mouthpiece of the telephone. In light of the *Silverman* case, it is not surprising that the parties in *Katz* framed the question on *certiorari* in terms of the intrusion interpretation: 1) whether a public telephone booth is a constitutionally protected area and 2) whether physical penetration into a constitutionally protected area is necessary for the Fourth Amendment to apply. As in *Silverman* Justice Stewart wrote the majority opinion, yet he criticized this formulation of the issues as "misleading" and specifically rejected the intrusion interpretation that he had used only six years before. He said, "the reach of the amendment can not turn upon the presence or absence of a physical intrusion into any given enclosure." He also rejected the policy interpretation exemplified by Justice Brandeis's opinion: "the Fourth Amendment can not be translated into a general constitutional right to privacy."

What interpretation *did* Justice Stewart use? The best known part of his opinion is the ringing and sweeping phrase, "the Fourth Amendment protects people not places." Our leading Fourth Amendment commentator, Wayne LaFave, has said that this statement offers little to fill the void it created. Telford Taylor was more blunt: "the only merit in this comment is its brevity." But if we look at that quote in context, it then begins to make more sense. Justice Stewart went on to say:

> What a person knowingly exposes to the public even in his own home or house is not a subject of fourth amendment protection. But what he seeks to preserve as private even in an area accessible to the public may be constitutionally protected.

The Fourth Amendment does not simply protect people, but it protects *what* they seek to preserve as private. What did Katz seek to preserve as private? Not the phone booth. He would not have cared if the government had searched the phone booth before he went into or after he left it. What he sought to preserve as private were the bets he was placing, and that of course is what the FBI searched *out*. The affected object of the searching was not an area; it was an "X" which was secret. Thus semantic analysis reveals that the foundation of the *Katz* decision is an interpretation of "search" as "search out."

Unfortunately Justice Stewart failed to communicate his semantic insight unambiguously by actually using "search out." Indeed, he did not actually use "search" as a verb at all. Throughout the opinion he simply used the combination phrase "search and seizure." He thus failed to employ the semantic resources which, I believe, actually informed his opinion. As a result, his fellow justices seemed not to understand what he was doing. Justice Black, for example, assumed that he was adopting the policy interpretation and accused the majority

> . . . of giving a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. . . . thereby changing the Fourth Amendment from a law against unreasonable searches into a general protection of privacy.

That attack misses the mark if we read Stewart's opinion as using a common sense meaning of search: search out. Perhaps even more interesting, Justice Harlan, who concurred, interpreted the decision as an example of the intrusion interpretation. This is particularly significant because Justice Harlan's concurrence has been more influential than Justice Stewart's opinion for the majority and is now consistently quoted as the holding of *Katz*. This following part of Harlan's concurrence which is not so frequently quoted, however, is very telling:

> I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authority is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

Harlan was really still engaged in the same enterprise as Justice Butler: he was trying to imagine this electronic eavesdropping metaphorically as a "search of," an intrusion into, an area, the phone booth.

Justice Harlan's confusing reliance on the intrusion interpretation and Justice Black's harsh criticism of what he viewed as the substitution of policy for constitutional text might have been prevented had Justice Stewart expressly resolved the ambiguity of "search" in *Katz* by *using* the word itself in a demonstratively meaningful way. His failure to do so perhaps explains the seeming paradox that the result in *Katz* is universally praised while the majority opinion is either ignored or deprecated.

The ultimate judgment on the force and clarity of Justice Stewart's opinion, though, has been rendered by the Court itself. Although the Court almost always begins any discussion of whether a given action is a search with citation to *Katz*, often acknowledged as the "lodestar" of Fourth Amendment law, the Court consistently cites Harlan's *concurrence* as the holding of the case. The Court has used that concurrence to obscure the semantic implications of *Katz* by interpreting it in terms of the vague "legitimate expectation of privacy" test. As a result the lodestar decision is often found shining over a case in which almost all the interpretations are tangled into the same opinion. Thus the ambiguity and vagueness of Justice Stewart's opinion in *Katz* has spawned the incoherence of today's Fourth Amendment law.

One can praise the *Katz* decision as good constitutional doctrine and public policy and still regret the semantic confusion that has surfaced in its wake. Semantic analysis, of course, does not eliminate the need for interpretation in light of doctrine and policy but it can protect against interpretations which do not "make sense." This is not an unimportant service. If we cannot understand the law, its underlying doctrine and policies will be frustrated. Indeed law which cannot be understood well enough to apply prospectively to order social experience ceases to be law at all and becomes merely the ad hoc dictates of the persons who occupy positions of authority at a particular point in time.

Clark D. Cunningham is a clinical assistant professor of law at Michigan. He has also written in the area of comparative constitutional law, based on research accomplished in 1986 while a visiting scholar at the Indian Law Institute, New Delhi, and on the subject of legal ethics. A photo of Professor Cunningham appears on page 1.

ABA Alumni Breakfast

Law School to hold breakfast at ABA Annual Meeting

The Law School will host a breakfast for alumni, guests and friends in conjunction with the 1988 Annual Meeting of the American Bar Association in Toronto, Ontario. The event will be held on Friday, August 5, 1988, from 7:30 – 9:00 a.m. at the elegant Harbor Castle Westin, located downtown on the city's riverfront.

Assistant Dean Jonathan Lowe and several other faculty members are expected to attend.

Alumni who would like to attend the breakfast must pre-register by sending a check in the amount of $10.00 US (per person) made out to the "University of Michigan Law School" to:

ABA Alumni Breakfast
Alumni Relations Office
Hutchins Hall
Ann Arbor, Michigan 48109-1215.

Please send a brief note including your name, address, telephone number, and the name of your spouse or guest with your check. Registrants will receive a confirmation form and exact details of the event in July. Any questions? Call the Alumni Relations staff at (313) 764-0518.

Please note that this will be the only announcement most alumni will receive regarding this event.

Law Quadrangle Notes

The University of Michigan Law School/Ann Arbor Michigan 48109-1215

Second class postage paid
at Ann Arbor, Michigan

Have you moved recently?

If you are a Law School graduate, please DO NOT send your change of address to Law Quadrangle Notes. Send it to Law School Relations, 162 Legal Research Building, Ann Arbor, MI 48109-1215.

Only non-alumni subscribers should write directly to Law Quadrangle Notes, 441 Hutchins Hall, Ann Arbor, MI 48109-1215.