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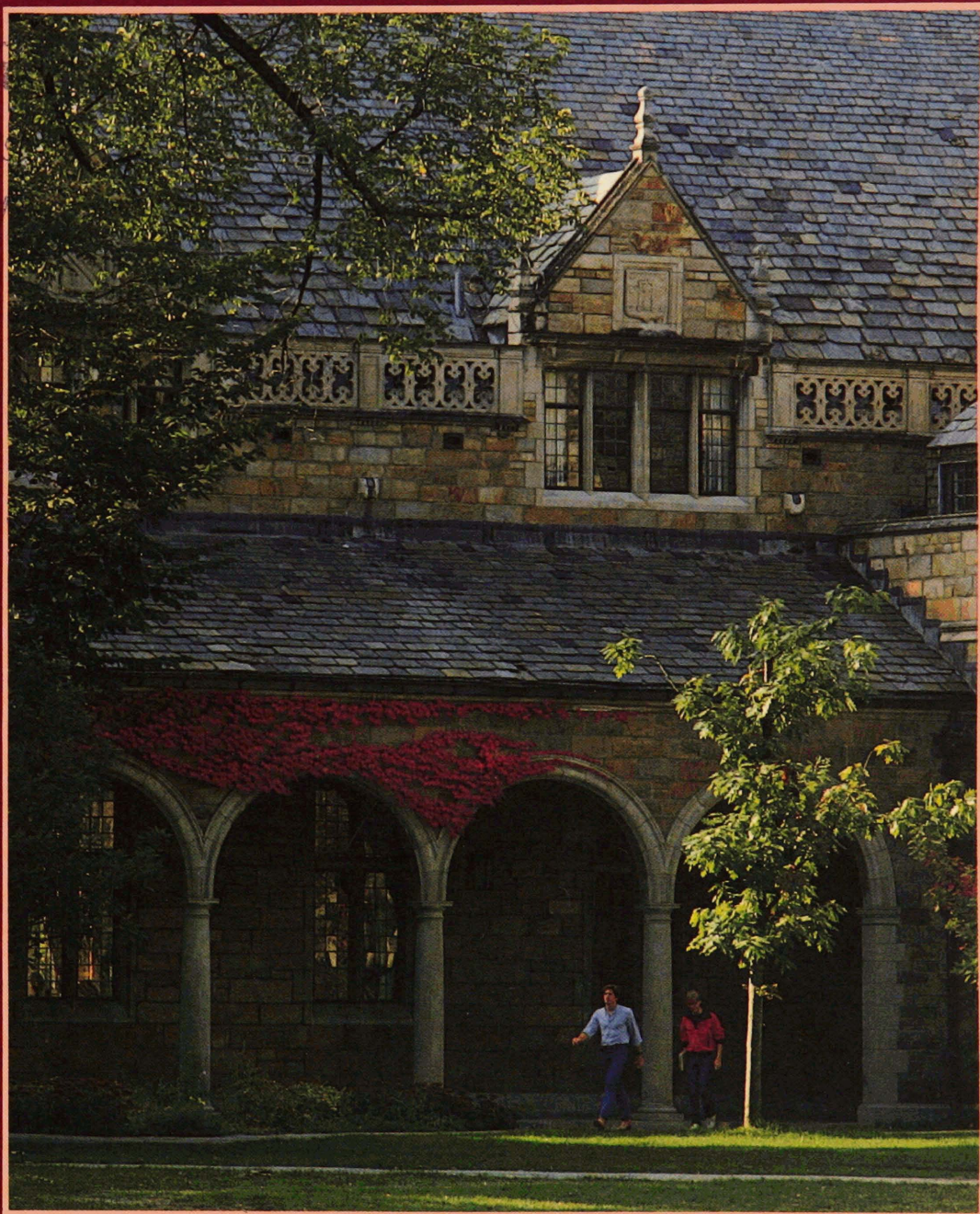
THE UNIVERSITY OF MICHIGAN LAW SCHOOL

VOLUME 33, NUMBER 1, FALL, 1988

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**Edwards:
The Role of
Legal Education
in Shaping
the Profession**

**St. Antoine:
At-Will
Employment
and the
Handsome
American**



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Looking back

The Gideon case 25 years later

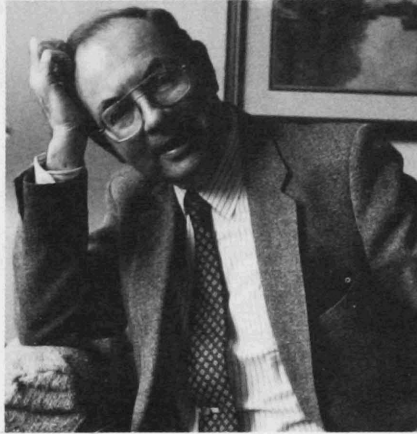
by Yale Kamisar

Last March 18 marked the 25th anniversary of *Gideon v. Wainwright*, one of the most popular decisions ever handed down by the United States Supreme Court.

Prior to *Gideon*, a person too poor to hire a lawyer had an unqualified constitutional right to appointed counsel only when charged with a crime punishable by death. In non-capital cases, he had no such absolute right. If forced to defend himself without a lawyer and convicted of a serious crime, he could obtain relief only if he could show specifically that he had been "prejudiced" by the absence of a lawyer, or that "special circumstances" (his lack of intelligence or education, or the gravity and complexity of the offense charged) rendered criminal proceedings without the assistance of counsel "fundamentally unfair."

The trouble was that application of this test was inherently speculative and problematic. When a layman defends himself, the resulting record usually makes him look overwhelmingly guilty and the case look exceedingly simple. Such a record does not reflect what defenses or mitigating circumstances a trained advocate would have seen or what lines of inquiry might have been pursued.

The *Gideon* Court deemed it an "obvious truth" that a person "too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." Thus, the Court established an absolute right to appointed counsel in all serious criminal cases. (A decade later, the Court applied *Gideon* to misdemeanor defendants sentenced to prison.)



Yale Kamisar

Courtesy of the Ann Arbor News

Most of the Warren Court's leading criminal procedure cases evoked sharp dissents on the Court and produced much unhappiness, even anger, in law enforcement circles and in the public. *Gideon* is a striking exception.

It was a unanimous decision. It was supported by a broad ethical consensus. It was widely applauded by the legal profession, press and public. It was the subject of an award-winning book by Anthony Lewis and a stirring television movie that was based on the book.

But this is no time for congratulations. On death row are some 2,000 prisoners, 99 percent of whom cannot afford a lawyer. *Gideon* is small comfort to them. Why? For one thing, in the years since *Gideon*, the Court has made it clear that the constitutional right to assigned counsel does not apply to litigation beyond the first appeal. And too many lawyers consider their job done when the highest court of any state has affirmed the conviction.

In such an event, so far as the Constitution is concerned, a prisoner who seeks Supreme Court review or other post-conviction relief is left to his own devices. And

many death row inmates cannot read or write.

Some states have tried to fill the gap. For example, Florida, where the *Gideon* case arose, has established a state agency to represent death row inmates in post-conviction proceedings. Since it started up in October 1985, this agency has won 60 stays of execution. In other states, such as Texas, where more than 250 people are on death row, there is no state support for counsel beyond the first round of appeals.

True, every person on every death row was represented by a lawyer at his trial and at the penalty phase — the part of the trial at which the jury determines whether to sentence the person convicted of a capital offense to life imprisonment or death.

But because the emotional and physical strain is so great and the compensation so low, most private lawyers shy away from capital punishment cases. Unfortunately, not infrequently the lawyers who do represent capital defendants in the first instance make mistakes that not even the most skillful appellate lawyers can overcome.

As Prof. Welsh White of the University of Pittsburgh School of Law points out in a recent book, the best way to be successful at the penalty stage "is to present a dramatic psychohistory of the defendant to the jury" (to show, for example that the defendant was abused as a child or abandoned by his parents), so that the jury can see and understand him as a human being.

But a significant number of trial lawyers in capital cases either do not adequately understand the importance of the penalty stage or lack the time, resources or commitment to gather the necessary information about the defendant's background.

In theory, an appellate lawyer can overturn a death sentence by

demonstrating that the defendant was the victim of “ineffective” trial counsel. But this is a herculean task. An appellate lawyer must not only show that trial counsel was deficient but that his unprofessional performance “prejudiced” the defendant — that but for trial counsel’s subpar performance, the outcome would have been different.

It is tempting to conclude — and many a busy court reviewing a death sentence has yielded to this temptation — that even if trial counsel had gathered a massive amount of material pertaining to the defendant, and even if he had presented the mitigating factors discovered as a result, the defendant would still have received the death penalty. This state of affairs led Justice Thurgood Marshall last year to voice concern that lower courts may be getting the impression that the right to counsel “guarantees no more than that a person who happens to be a lawyer is present at trial alongside the accused.”

Justice Hugo L. Black, who wrote the opinion for the Court in *Gideon*, observed in another case involving the rights of indigent defendants that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” This is a nice saying. And the *Gideon* Court thought it had gone a long way toward achieving “equal justice” in the administration of justice. But death row lawyers — almost all of whom can tell horror stories about capital cases bungled by trial counsel — have another saying: “People with money don’t get the death penalty.”

The above article originally appeared in the New York Times, March 16, 1988. Copyright © 1988, New York Times Co. Reprinted by permission. Yale Kamisar is the Henry K. Ransom Professor of Law at Michigan.

Comings and goings

Interviews with Friedman and Katz; farewell to Irish

Five new faculty members have been added to the Law School over the past year: Richard Friedman, a specialist in the areas of evidence and constitutional law; Avery Katz, an economist who holds joint appointments in the Department of Economics and the Law School; Merritt B. Fox, a specialist in securities; Michael Bradley, the Everett E. Berg Professor in the U-M School of Business Administration, who will regularly teach courses in the area of corporate finance in the Law School; and Bruno Simma, a specialist in international and human rights law. Profiles of Professors Friedman and Katz follow. Professors Fox, Bradley and Simma will be interviewed in the winter issue.

Richard Friedman

Working in disparate fields

“People ask me which is my favorite course. It’s like asking a parent who his favorite child is — you love them in different ways,” says Richard Friedman, who joined the faculty this fall.

A visiting professor at the Law School last year, Friedman arrived via the Benjamin N. Cardozo School of Law at Yeshiva University where he had been on the faculty for five years. Previously, he was an associate of Paul, Weiss, Rifkind, Wharton, and Garrison in New York. At the U-M, Friedman taught evidence and a seminar on the Supreme Court in the 1930s, and is teaching civil procedure this fall.

“I enjoy working in disparate fields,” says Friedman, who taught courses ranging from constitutional law to commodities law at Cardozo. But he acknowledges

special joy in teaching evidence, for that course “sweeps across the whole substance of law.” Adds Friedman with a smile, “Teaching evidence is like game-playing in a way. Once you accept a few premises, much of evidentiary law becomes a logical game, seeing whether certain things should be admissible or not. At the same time,” he emphasizes, “in certain respects, evidence law is very much in need of revision.”

Friedman will be making a major contribution to the field through his role as general editor of the classic multi-volume treatise, *Wigmore on Evidence*. Not only was the last edition of the treatise, prepared by Wigmore himself, published in 1940, but some of the partial subsequent revisions are nearly 30 years old, Friedman notes.

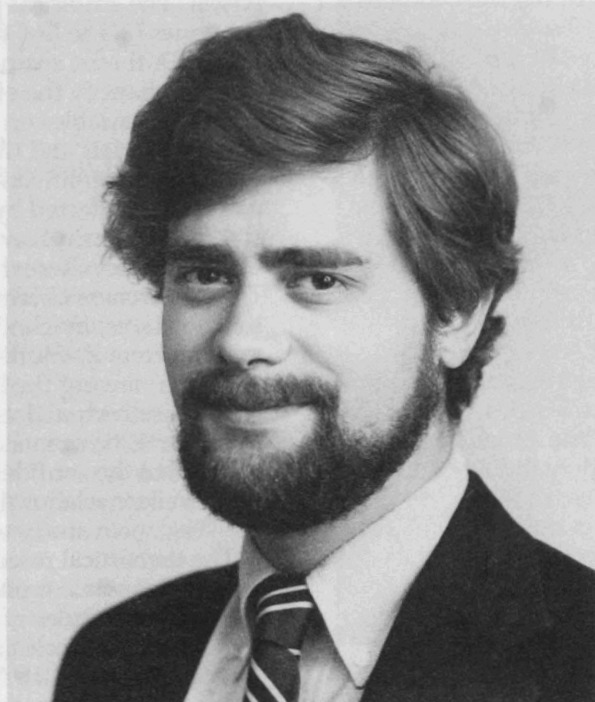
“The treatise should again be, as in prior times it always was, the first source that anyone — judge, practitioner, academic, or non-lawyer — naturally consults when seeking a reflective discussion of an evidentiary question,” he states in his prospectus to the revision.

While working on the treatise, Friedman is also preparing a short coursebook on evidence. On the back burner for now is a project of a very different nature — a biography of Charles Evans Hughes. As a Marshall scholar at Christ Church, Oxford, Friedman wrote a Ph.D. thesis on Hughes as chief justice. Because he will not be able to complete the full biography for some time, Friedman may first publish a book on Hughes’s judicial career.

“He had a fantastic career,” Friedman says of Hughes. “He was a very prominent lawyer, governor,



Richard Friedman



Avery Katz

secretary of state, twice Supreme Court justice." Friedman stresses that there is a real need for a new biography on Hughes, describing the standard work as "charmingly told but one-sided in Hughes's favor."

"My view of him is much more complex," Friedman says. "He was sometimes self-righteous and kind of haughty."

Friedman's outside interests range from baseball to politics. He's a former member of the Nassau Democratic County Committee (the lowest position, he notes, for which it is possible to run in a primary). He has written articles for the general, as well as the academic, market. A Washington Post Op Ed piece titled "Sorry, Judge, Maybe in 20 Years or So," looked at historical precedents to the confirmation controversy over Supreme Court nominee Judge Douglas Ginsburg.

A graduate of Harvard College and Harvard Law School, Fried-

man was a member of Law Review and served as one of Harvard's voluntary defenders. Having lived most of his life on the East Coast, he's been pleasantly surprised at how readily he's adjusted to life in Ann Arbor.

"It's a terrific town," he says, "and the cultural life is remarkable for a place so small. But even if I didn't enjoy Ann Arbor so much I'd still be very happy at the Law School. I'm delighted with everything — the students, my colleagues, the library and staff support, and the Law Quad itself."

Avery Katz

Using economic methods to study legal issues

by Grace Shackman

Avery Katz, assistant professor in both the Law School and Department of Economics, is in the

vanguard of scholars using economic methods to research legal issues. Observes Katz, "I combine the research habits of an economist, with the research interests of a lawyer."

According to Katz, "Economic analysis of law has risen to the level of a school of thought in the last 10 or 15 years." While law schools have often had economists on their staff (Peter Steiner, before his appointment as dean of LS&A, was the economist on the Law School faculty), having scholars trained in both fields is relatively new.

Katz graduated from the U-M with an undergraduate degree in economics (his honors thesis was on the economics of scalping football tickets) and went on to Harvard where he earned both a Ph.D. in economics and a law degree in only six years. Katz went about completing the requirements for his dual degree program in a rather unorthodox way, alternating three years of law study with two

of economics. In the fifth and sixth years he wrote his dissertation, which consisted of three essays using economic models to analyze different aspects of the litigation process.

In the first essay, Katz analyzed some of the factors that determine how much is spent on a law case. In the second, he compared the American rule requiring both parties to a lawsuit to pay their own attorney's fees with the English method of making the loser pay the expenses of both sides. He argued that although the American method is widely thought to be more expensive, in reality the English system may be costlier because it effectively makes the stakes higher and the privately perceived price of legal service lower. Katz based his argument on a premise arrived at in his first essay, that a more expensive case is more likely to be pursued. The third essay was an economic analysis of frivolous lawsuits.

Katz finished his dissertation in the spring of 1986 and joined the University of Michigan faculty that fall with a joint appointment in the Law School and economics department. Each semester he teaches one course in each department, while continuing his research.

One of his courses, law and economics, which he already taught as an undergraduate seminar at Harvard, he teaches in both departments. The course focuses on private lawsuits, contracts, private property, torts, and criminal law, all using the concepts and techniques of economics.

In the Law School Katz teaches contracts and the economics of public policy analysis. In the economics department he teaches economic regulation of business and will add next year a course on public expenditure.

Apart from his teaching, Katz is working on two research projects: one theoretical, the other em-

pirical. The empirical project continues on the line of thought in his Ph.D. thesis, seeing if it is possible to quantify the effects of economic variables on the frequency of trials and the amount of expenditure on litigation. He is using data collected by the University of Wisconsin Law School's Civil Litigation Research Project. The researchers obtained the data, Katz explains, by choosing cases at random from five judicial dockets, and interviewing the lawyers and clients. Individual data on litigation is rare, he points out, in part because of the confidentiality of the lawyer/client relationship, making the Wisconsin study very valuable.

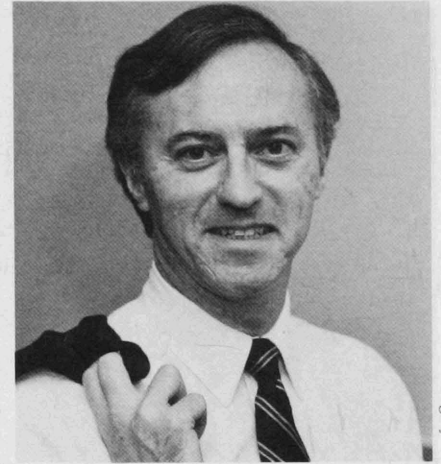
The theoretical research project applies economic models of bargaining to the rules of contract formation, and includes an economic analysis of the "battle of the forms." Katz hopes the analysis will reveal which of various rules best promotes economic welfare and efficiency.

Katz manages to continue working in two fields by remaining flexible. He says, "My interests are diffuse. I have twice as many colleagues and hear of twice as many problems."

Katz is married to U-M Law School graduate Sharon Feldman. While Katz was in graduate school, Feldman worked as an assistant attorney general in the Massachusetts Attorney General's Public Protection Bureau, specializing in insurance regulation. She is now a Michigan assistant attorney general working in the same field.

Katz's extracurricular interests include politics and music. He has served as a precinct delegate and enjoys playing classical guitar.

Grace Shackman is a freelance writer in Ann Arbor.



Leon E. Irish

Irish returns to private practice

Professor Leon E. Irish, who joined the Law School in 1985 following a highly successful career as a practicing attorney, has returned to private practice with the firm of Jones Day in Washington, D.C.

Irish cited family concerns as reasons for his leaving. Before coming to Michigan he had been associated with Caplin & Drysdale, Chartered, in Washington, D.C., for 17 years.

"It has been a great personal and professional pleasure to be at the Law School," said Irish. "It has been a very satisfying and enriching experience for me, and I am sad to leave."

Irish's leaving, commented Dean Lee C. Bollinger, "deprives us of a hope that we could provide our students and the world of scholarship with intelligent and imaginative treatment of such neglected yet critically important fields as the law of pensions, the sea and disarmament. Surely no one will ever arrive here again with this package of diverse interests, and so Lee returns to private practice with the satisfaction that it will take more than one person to replace him here. We wish Lee all the very best."

Broadening perspectives on international law

New seminar features visiting scholars from abroad

A new seminar taught last winter by Professor Joseph Weiler provided first-hand insight into the perspectives of socialist and Third World countries on current issues of international law. An integral part of this new seminar was the participation of three visiting international scholars: Professor Monica Pinto from the Argentine Republic, Professor Galina Shinkaretskaya from the U.S.S.R., and Professor Liu Gaolong of the People's Republic of China.

The seminar was designed to encourage discussion of the theories and policies underlying complex issues of international law. Among the broader topics discussed in the seminar were the common heritage of humanity, international terrorism, and the role of the International Court of Justice.

Professor Monica Pinto teaches international law and human rights at the Faculty of Law and Social Sciences, University of Buenos Aires. She is also a research fellow at the National Council on Scientific and Technical Research in Buenos Aires. Her research interests include the peaceful uses of nuclear energy, nuclear non-proliferation, and international humanitarian law.

Professor Galina Shinkaretskaya graduated from the Moscow State Institute for Foreign Relations. She did post-graduate legal studies at the Institute for State and Law where she currently serves as a research scholar concentrating on dispute settlement mechanisms in the Third United Nations Conference on the Law of the Sea.

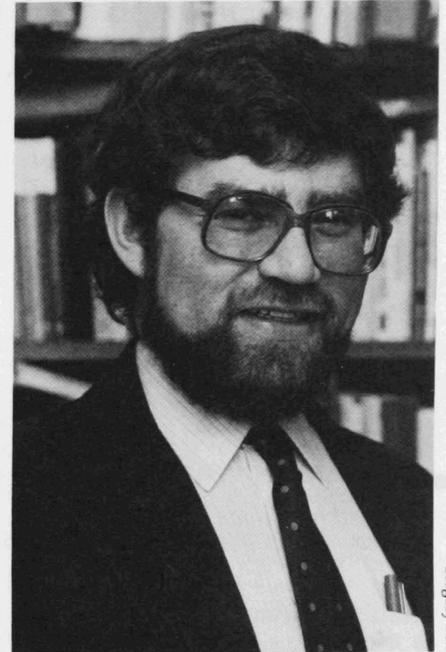
Professor Liu Gaolong is a lecturer and vice director of the international law section of the law faculty at Peking University. After receiving his LL.B. and LL.M. at Peking University, he was awarded an LL.M.

at Dalhousie University in Halifax, Canada, where he served as a visiting lecturer in 1987. He has also taught at the University of Washington Law School at Seattle.

Last semester, two students in the class, Thomas Benedict ('89) and Karen Brady ('89) interviewed the visitors for LQN. Excerpts from those interviews follow.

Q. How do you think that your country's perspective on international law differs from that of the United States or the countries of the other professors?

Professor Pinto: Our position is perhaps different in certain areas from China, the Soviet Union or the United States. Unlike these countries, we are not a member of the "Big Five" of the United Nations. Argentina is a rather special country within the international sphere because in certain areas we share our view with Western countries. After all, we are a former Spanish colony. Consequently, we inherited a number of Western legal instruments and ideologies. However, we are not a "Western" country in the strict political science definition. We are undeveloped, so in some areas we do share the views of the Third World. The difference between Argentina and most other Third World countries is that most of these countries are newly independent states. Since we have been a state since the early 19th century, we didn't participate in this last decolonization movement. This makes for a difference in our thinking in certain areas.



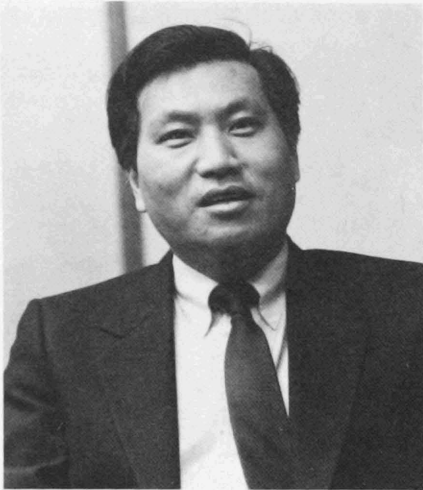
Joseph Weiler

Gregory Fox

Professor Shinkaretskaya: We see international law as democratic, and obligatory for every nation. We do not distinguish between "traditional" norms and those norms influenced by the emergence of socialist and Third World nations.

In my country, there is a very strong movement toward uniting the whole world. We must understand that the planet is small. We have a dilemma before us — either live together or perish. To survive, we have to do more than just put forward our own ideas. We have to listen to other nations, however crazy their ideas may seem to us.

I can see that people in the United States understand the danger of nuclear weapons. But they do not fully appreciate the danger of a spoiled environment. The danger to the environment is even greater than that of nuclear weapons because threats to the environment do not arouse the same sense of urgency. It is quite natural for a human being to be afraid of a bomb, but people are not as



Wendy Wilkes

Professor Liu Gaolong explained the views of his country, the People's Republic of China.

readily frightened of dirty water or dirty air.

Professor Liu: International law is relatively new to China. As a result of our recent emergence from political chaos, Chinese scholars and government officials strongly emphasize the rule of law and reliance on the legal system. This emphasis carries over into the international field. Scholars and officials in international law wish to comply with international law in order to improve the Chinese image. We want to let the world know that we are very concerned with international law and world order.

Frankly, my impression of attitudes in the United States regarding international law is quite negative. When I attended the seminar, I found your approach toward international law does not have the same emphasis on strict adherence with international norms. I got the impression from some students that if compliance with international law would harm American interests, the government may disregard international law. Many Chinese scholars have the illusion that the United States is, or should be, more willing to accept interna-

tional law because you have so many eminent authorities on international law who have shaped its development.

Professor Shinkaretskaya (laughing): We don't have any such illusions.

Q. *What do you see as the future of international law? What role do you think socialist and Third World countries will play in that future?*

Professor Pinto: International law has a great role to play for the Third World. Third World countries have been aching to use international law to implement their goals. Although these underdeveloped nations were initially wary of international law, they have shifted to a pragmatic manipulation of it. Once they reached this point of manipulation, they realized that through law they might effect certain changes in the world. I think that the Third World is very powerful because of their numbers. But even the power of



Wendy Wilkes

In a discussion of the Malvinas-Falkland Islands dispute, Professor Monica Pinto of Argentina presented her country's position.



Wendy Wilkes

Professor Galina Shinkaretskaya of the U.S.S.R. offered a first-hand perspective on the Chernobyl nuclear accident while discussing the legal ramifications of international pollution.

numerical majority is not necessarily very effective. We need consensus — we must include countries of the First and Second World. Majority alone is absolutely useless.

Present international law is the law of transaction. This explains why there are imperfect rules of international law, because those rules are the outcome of disjointed transactions. International legal rules are the reflection of social and political standards. Those rules have no chance of being effective unless they reflect a minimum consensus of Western, Socialist and Third World countries.

Professor Liu: In my opinion, international law has experienced great changes during the last two decades. One of these major changes was the emergence into the world arena of a great number of independent states. These newly independent countries have brought their own values and approach to international law, to the world. Many of these new

approaches have a great impact on the development of international law. For example, this has resulted in the emergence of many new principles, such as sovereignty over natural resources and the new international economic order. In my opinion, this is just the beginning of the active role Third World countries will play in the development of new international principles.

International law will become increasingly important in guiding international relations. Why? Previously, the major obstacle to the implementation of international law was the fact that many, even most, countries in the world had not obtained independence. Their major task was to struggle for independence — politically, militarily, and economically.

I think this phenomenon still exists in today's world. But international relations are changing because these previously colonial countries have changed their task. Their previous task was to fight for independence. Now their major task is to pursue economic development, as well as to maintain political independence. Relations among the countries will be weighted more toward economics, more toward technical issues. In these areas, countries need more international law to guide them. It will become easier for some countries to reach agreement, to consent to some norms of international law, by avoiding political issues. This is illustrated by the Law of the Sea Conference, the largest world-wide conference in the history of the world. It is basically not a politically oriented conference. It is not a discussion of independence, racism, or colonialism. The conference deals with specific technical and economic issues. I think economic and technical considerations will play an ever-increasing role in the future of international relations.

Finally, future international principles will be quite different from those to which the superpowers and industrial powers are accustomed. The superpowers and traditional industrial powers might be unhappy with these changes. This has happened in the United Nations. The United States has become more unhappy with the United Nations, threatening to withdraw from this agency or that organization. Now is the time for the United States and other traditional industrial powers to adjust to new norms and new relations. It won't work for the United States to just ignore these changes.

The traditional industrial powers can also play a very important part in the formation of new international law. In the economic and technical areas, these powers have a lot of experience. They can use this expertise to influence the de-

velopment of international law. For example, many of the technical provisions in the Law of the Sea Conference were initiated by experts from the United States, Japan, and the Soviet Union. Furthermore, as international economic transactions continue to expand, all countries will benefit.

Professor Shinkaretskaya:

Professor Liu is quite right. The only future for mankind lies in international law. Of course, sometimes every country, from whatever "World," must be patient and suffer. But in the long run, every nation and every human being will profit from these changes. Because we have so many relations deeply penetrating each others' interest, and we have so many common interests as well, the only way we can survive is through the rule of international law.

The right to die?

Kamisar: "On the brink of active euthanasia"

"We are much closer to practicing active euthanasia than is generally realized," stated U-M Law School Professor Yale Kamisar, delivering the eighth annual Philip A. Hart Memorial Lecture at the Georgetown University Law Center on April 14, 1988. Kamisar did not think it could be denied that in recent years the courts have sanctioned the "intentional killing" of patients by doctors.

When physicians withdraw artificial food and water, as various courts have permitted them to do recently, commented Kamisar, "the patient does not die from the underlying illness. Rather, the physicians establish a new and lethal cause for death. They intend to bring about death. They are *aiming*

at death — often the death of a "biologically tenacious" person who has already been removed from a respirator. If this isn't 'intentionally killing' someone, what is it?"

Continued Kamisar: "When nutrition and fluids are furnished a patient, what clinical condition is the doctor 'treating'? When nutrition and fluids are withdrawn, what 'burdensome' *treatment* is being removed? In most of these cases the patient feels no pain. And if he or she does, withdrawing nutrition and fluids may cause more pain."

At the time of the *Quinlan* case, few would have predicted that only a decade later the practice of terminating fluids and nutriment from a patient would receive widespread

support from physicians, bioethicists and the general public. The issue never arose in the *Quinlan* case, evidently because Karen Ann's father balked at discontinuing fluids and nutritional support. Indeed, recalled Kamisar, "Joseph Quinlan expressed amazement when asked whether he wanted the feeding tube removed. 'Oh, no,' he replied, 'that is her nourishment.'"

But the law and public opinion have moved very quickly in the dozen years since *Quinlan* was decided. "However formidable the psychological and symbolic distinction between respirators and feeding tubes once was, it has now collapsed." In recent years, California, Massachusetts, and New Jersey courts have rejected any distinction between the termination of artificial feeding and other forms of life-sustaining treatment.

According to Kamisar, the *Quinlan* case has contributed greatly to the current attitude. By domesticating the removal of the respirator — what he would call one form of passive euthanasia — "the next step down the slope became more thinkable and more plausible. Because of the enormous publicity generated by the *Quinlan* case, we quickly grew accustomed to the idea of turning off a respirator — and psychologically ready for the next phase. Cutting off food and water from a patient would have met enormous resistance if done in one step. But we did it in two steps. That is how the law and public opinion grow — for better or for worse."

Kamisar recognized that all legal and moral questions involve the drawing of lines. "The trouble is," he maintained, "that in this area we have *already missed* several opportunities to 'draw the line.' We might have (1) stopped short of discontinuing nourishment and hydration; (2) restricted the so-called right to die to *competent*

patients who express a desire to die or to those who (unlike Karen Ann Quinlan) executed a living will or its equivalent before becoming incompetent; or (3) limited the right to *dying* patients (an incurably ill person or one whose condition is 'irreversible,' is not necessarily a dying one). But we have done none of these things."

Recent developments, especially the "feeding tube" cases, maintained Kamisar, "have rendered virtually meaningless the distinction between 'extraordinary' and 'ordinary' treatment, 'advanced' and 'basic' treatment, 'life-prolonging' and 'death-prolonging' treatment (and the even more elusive distinction between 'life-

sustaining' and 'life-prolonging.')

Kamisar joined others in saying good riddance to these terms. But he added:

"Over the years these terms have done their work. They have confused, deceived and seduced us. The very vagueness of these terms has proved quite helpful to proponents of passive euthanasia. This spongy language has made it easy to bring about a considerable amount of passive euthanasia under another name. And the 'feeding tube' cases have seriously undermined whatever distinction once existed between 'killing' and 'letting die.'" Indeed, contended Kamisar, "these cases have brought us to the brink of 'active euthanasia.'"

Faculty awards, honors, activities

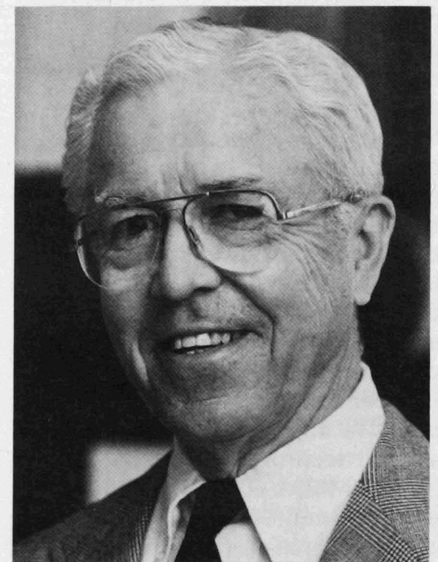
John H. Jackson, the Hessel T. Yntema Professor of Law, taught in Florence, Italy this summer, in Georgetown's 1988 Summer Law Program in international and comparative law. The program was organized in cooperation with the European University Institute, the

graduate research and teaching institution of the European Communities. Jackson taught a course in international trade and economic relations law.

Roy Proffitt, professor emeritus at the Law School, received the Distinguished Alumni Service Award from the U-M last spring. The award, the highest honor bestowed



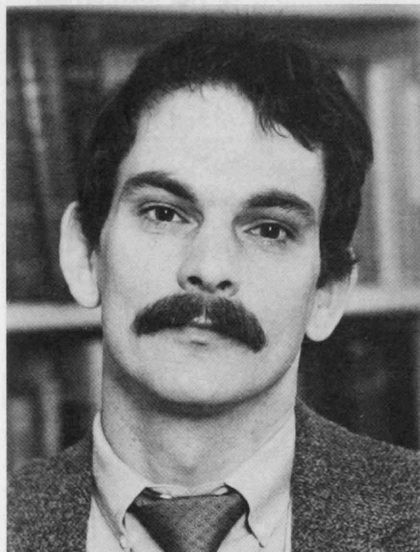
John H. Jackson



Roy Proffitt

Gregory Fox

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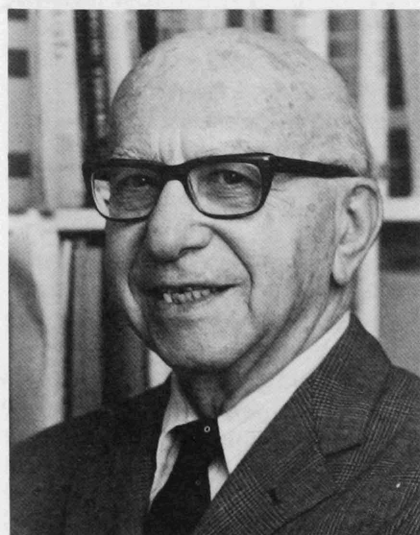


Gregory Fox

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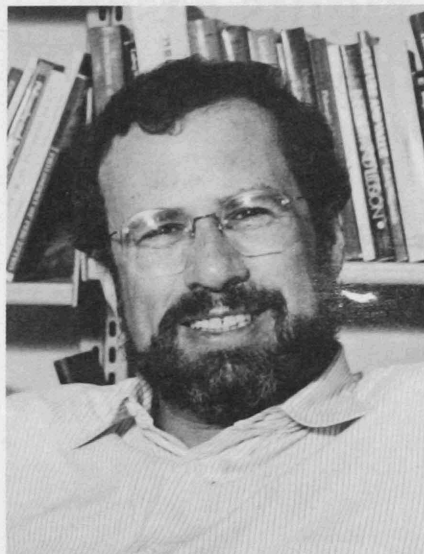
by the Alumni Association, cited Proffitt's three decades of service as professor, associate dean, and director of the Law School Fund.

Mathias Reimann has been awarded a Jean Monnet Fellowship by the European University Institute/Florence for 1988-89. Reimann is on leave this year in order to complete a major research project exploring the influence of German ideas on American jurisprudence in the 19th and 20th centuries.



Gregory Fox

Eric Stein



Gregory Fox

Frederick Schauer

Frederick Schauer had a busy 1988 Winter Term. He spoke on various aspects of freedom of expression at the Vermont and Washington Judicial Conferences. He also delivered faculty symposium papers on various aspects of rules and legal theory at the Harvard Law School, Case Western University Law School, the University of Windsor Faculty of Law, and the Academia Sinica, Taipei, Taiwan.

Eric Stein, Hessel E. Yntema Professor Emeritus, gave a course on European integration in the light of American federal experience at the College of Europe in Bruges, Belgium last March. Several Law School alumni, including Jacques Bourgeois, Ivo van Bael, and Hjalte Rasmussen, were on the faculty of the College at the same time.

A leading German law publishing house has reprinted the issue of the *Michigan Law Review* honoring Professor Stein on the occasion of his retirement. This is probably the first time that an issue of the *Review* was republished abroad in book form. (Michigan Law Review Assn. (Ed.), *The Art of Governance, Festschrift zu Ehren von Eric Stein*, Nomos Verlagsgesellschaft,



Gregory Fox

James Boyd White

Baden-Baden, Federal Republic of Germany.)

James Boyd White, the L. Hart Wright Professor of Law, is serving on the executive committee of the U-M Institute for the Humanities and will serve as chair of the Michigan Society of Fellows for the next three years. He has given lectures at St. John's University in Minnesota, at Seattle University, the University of Washington, and Concordia College, as well to the Classics Department at The University of North Carolina, and the inauguration of the Humanities Institute at the University of Georgia.

Two of White's articles have appeared recently: "Constructing a Constitution: 'Original Intent' in the Slave Cases," in *Maryland Law Review*, and "Intellectual Integration," in *Northwestern Law Review*. Last year White began teaching a series — which continues this year — of interdisciplinary courses: on Greek law and rhetoric; the sentence as a cultural artifact; and religious law. The series is supported by the Presidential Initiatives Fund.

Close-up on civil rights cases

Julius Chambers visits Law School as DeRoy Fellow

Julius Chambers, director of the NAACP Legal Defense and Education Fund, spent two days at the Law School last spring as the 1988 Helen L. DeRoy Fellow. Chosen for his achievements as a lawyer and person, Chambers, litigator in numerous civil rights cases of national significance, joins a list of distinguished fellows, including former Supreme Court Justice Potter Stewart and Judge Amalya L. Kearse, U.S. Court of Appeals, 2nd Circuit (J.D. '62).

During his visit, Chambers delivered three lectures (to classes on constitutional law, welfare law, and 14th Amendment) and met informally with various faculty and student groups. In talking to the constitutional law class, he began emphatically, "The Supreme Court's decision in *McClesky v. Kemp* was worse or as bad as its decision in *Dred Scott*." He then explored the current difficulties of proving a violation under the Equal Protection Clause of the 14th Amendment.

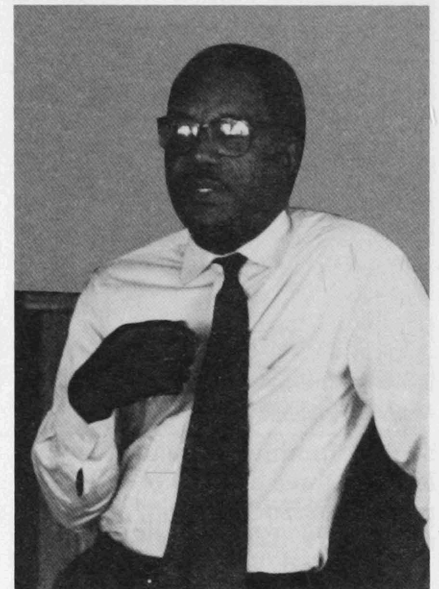
Chambers, who graduated first in his class and edited the *Law Review* at North Carolina Law School, began his education in a small racially segregated school in rural North Carolina that lacked both indoor plumbing and a library. He then attended an all-Black high school, to which he was bused 12 miles past a better equipped all-white high school less than a mile from his home. Twenty-five years later he would be plaintiff's counsel in the landmark Supreme Court decision in *Swan v. Charlotte-Mecklenburg Board of Education*, where the Court upheld busing as a means of remedying segregation.

In addition to *Swan*, Chambers has also litigated other civil rights cases before the U.S. Supreme Court. In *Griggs v. Duke Power Co.*, the Court held that an employer cannot administer a test that operates to disqualify Blacks at a significantly higher rate than whites, when the test cannot be shown to be significantly related to job performance. In *Ablemarie Paper Co. v. Moody*, the Court held that back pay may be awarded even though it could not be proven that the employer had acted in bad faith in violation of Title VII of the 1964 Civil Rights Act.

Chambers's law firm in Charlotte, North Carolina, established with the aid of the Legal Defense Fund, handles widely varying types of civil rights litigation, which comprises 60 percent of its total cases.

Beginning with the 1989-90 academic year, Chambers will teach at the Law School on a regular basis.

Graeme Sharpe, '90 and Tony Ettore, '90



Wendy Wilkes

DeRoy Fellow Julius Chambers spoke at an informal gathering of faculty during his visit.

Tackling difficult issues

Panel discusses religion and the public schools

Rapid fire interchanges and witty repartee marked a panel discussion on "Religion and the Public Schools" at the Law School last spring. The event, held in Room 100 of Hutchins Hall, drew an audience of over 200 law students and members of the local community. The discussion was jointly sponsored by the Jewish Community Council of Detroit, the Christian Legal Society, the U-M Jewish Law Students Union, and the U-M Christian Law Students. Moderated by Law School Dean Lee C. Bollinger, the panel covered a range of topics including

curriculum choices, religious programming, teacher certification, and prayer in the public schools.

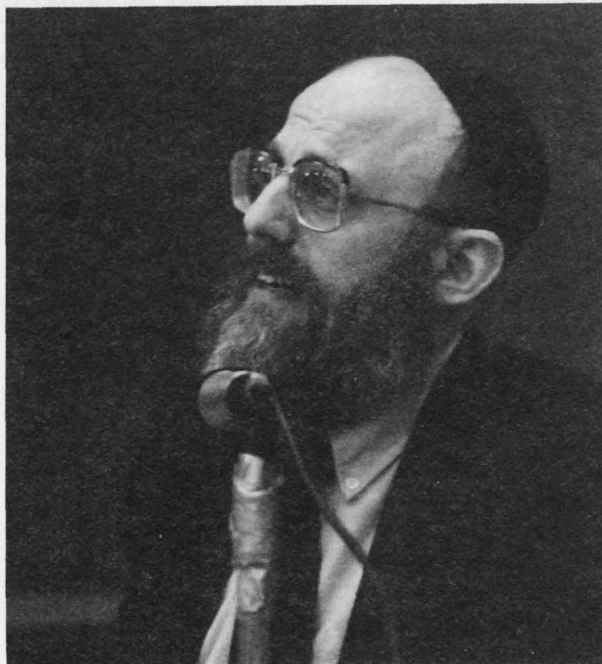
The panelists included Rabbi Yitschak M. Kagan, associate director of the Lubavitch Foundation of Michigan; Howard I. Wallach of the Jewish Community Council of Metropolitan Detroit; Lee Boothy, general counsel for Americans United for Separation of Church and State; Timothy W. Denney of the Christian Legal Society; and David A. French, general counsel and chief litigator of the Rutherford Institute in Manassas, Virginia.

Despite their diverse backgrounds, the panelists exhibited a surprising similarity of positions on a number of issues.

To begin the evening, each of the panelists pointed to the fundamental importance of religion in American life. Some disagreement came in response to Dean Bollinger's query about the efficacy of having a Christmas creche on public property. Mr. Wallach felt the creche was better off left out of a Christmas display because of his concern that such symbols might ostracize a large number of individuals, particularly in a school setting. On the other hand, Mr. Denney saw the creche as an opportunity for education rather than indoctrination and expressed the sentiment that schools should be encouraged to welcome creches as well as many other religious symbols to increase both pluralism and sensitivity to other viewpoints.

Mr. French closed the first half of the program by analyzing the difference between religious activity and non-religious activity for the purpose of applying constitutional standards. French's view was that as long as there was a valid secular purpose, religious activity should be permitted.

During the intermission Dean Bollinger received a number of questions from the audience and these formed the basis for the second half of the program. These questions forced the panelists to come to terms with what one audience member termed "a moral vacuum in America's public school classrooms." Bollinger asked the panel to consider whether the "ethic has gone too far" in divorcing religion completely from the classroom setting. Mr. Boothby seemed to see the problem as insoluble in the sense that it would be inappropriate to allow diverse beliefs such as those expounded by the Unification Church in the pub-



Wendy Wilkes

Rabbi Yitschak M. Kagan, associate director of the Lubavitch Foundation of Michigan, showed he was ready to tackle difficult issues head-on.

lic schools. Thus, he felt, strict separationist guidelines are needed.

Mr. Denney then commented, "teachers are averse to risk.... They need more leeway, not less.... We should err on the side of presenting a pluralistic view." After some comments about whether school districts' legal counsel could provide guidelines, Rabbi Kagan showed he was ready to tackle these difficult issues head-on. "Everybody," he said, "has been pussyfooting tonight about the word religion.... There are two kinds of belief — belief in a divine being, or not." We can "restructure our system to expunge the notion of a divine authority" with a resultant "deterioration of moral standards" or we can address the "moral bankruptcy of our children These choices are not gray."

Dean Bollinger next sought to elicit the panelists' views on how to "address the moral bankruptcy of our children without offending

notions of freedom of belief." To illustrate the problem he made use of the law professor's ever present tool — the hypothetical — and requested the panelists to express how a teacher should respond to issues such as drugs, sex, abortion, and racism.

Mr. Wallach noted that he had a problem with a teacher saying these things were "immoral" rather than "inappropriate." When Rabbi Kagan characterized this response as "an inability to take a moral stand," Wallach observed that some students in the class "might believe it is not wrong to be racist." The rabbi responded, "It is your duty to educate them."

The discussion continued over refreshments in the Lawyers Club Lounge after which everyone departed possibly disagreeing on some points but generally better educated about these difficult issues.

Bill Bock '89

Who gets the baby?

Campbell Competition addresses issues of surrogate mothering

The 64th annual Henry M. Campbell Moot Court Competition featured a hypothetical case involving legal issues of surrogate mothering. The arguments took place just two months after the New Jersey Supreme Court issued its landmark ruling in the widely publicized Baby M case which had engendered much public debate on the issue of surrogate parenting contracts.

The issues of this year's Campbell Competition centered around a hypothetical statute that (1) declared surrogate parenting contracts for compensation to be void and unenforceable; (2) provided for criminal penalties for parties who entered into such contracts and for those who assisted in the formation of such contracts; and (3) declared that the surrogate and the spouse of the surrogate, if any, are the legal parents of any child born under such contracts. This hypothetical statute is modeled after proposed statutes currently pending before various state legislatures. (Michigan recently became the first state to enact an outright prohibition against such contracts which is very similar to the statute at issue in the competition.)

The problem centered on a dispute over the custody of Baby Q. In the hypothetical case, Cliff and Carla Malone had been trying to begin a family since their marriage six years earlier. As a result of recent surgery, Carla would never be able to carry her own child. The

couple entered a contract with Diane Peterson which provided that in exchange for a \$10,000 fee and payment of all medical bills, Diane was to receive an implantation of a fertilized egg (Carla's egg, Cliff's sperm), carry the child to term, and upon birth give the child to Cliff and Carla. Diane also agreed to terminate any parental rights in the child. Diane's husband, Sam, supported Diane's decision to enter into the contract.

Six months after the implantation, Diane informed the Malones that she had become too emotionally attached to the child and would not be able to give it up at birth. The Malones brought suit in



Virginia Davis

Kevin E. Kennedy (above) and teammate William C. Odle, represent the Petersons in the second set of arguments, also received first place honors.



Virginia Davis

Finalists and judges in the 1988 Henry M. Campbell Moot Court Competition.

The Court (front row seated, left to right): Law School Professor David Chambers; Hon. Betty Fletcher, Circuit Judge, U.S. Court of Appeals (Ninth Circuit); Hon. Cornelia Kennedy, Circuit Judge, U.S. Court of Appeals (Sixth Circuit); Hon. Martin Frankel, District Judge, U.S. District Court for the Southern District of New York (ret.); Law School Dean Lee C. Bollinger.

The finalists (standing, left to right): Aldebaran B. Enloe; Cathy Bencivengo; Aidan Synnott; Nicolas Stasevich; Michael Wendorf; Ken Seavoy; Bill Odle; Kevin Kennedy.

E V E N T S



Virginia Davis

Cathy A. Bencivengo presented the oral argument on behalf of the Malones in the first set of oral arguments. She and Aldebaran B. Enloe comprised one of two first-prize winning teams.

the Hutchins Trial Court. Diane claimed that the statute declared that she and Sam were Baby Q's legal parents. The Malones argued that the statute was unconstitutional. The Hutchins Supreme Court upheld the statute, rejecting the Malones' right of privacy arguments. An appeal was taken to the U.S. Supreme Court.

Serving as Supreme Court justices were Hon. Cornelia G. Kennedy, Circuit Judge, U.S. Court of Appeals for the Sixth Circuit (J.D. '47); Hon. Betty B. Fletcher, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit; Hon. Marvin E. Frankel, District Judge, U.S. District Court for the Southern District of New York (ret.); Law School Dean Lee C. Bollinger; and Law School Professor David L. Chambers.

In the first set of arguments, Cathy A. Bencivengo and Aldebaran B. Enloe represented the Malones. The Petersons were represented by

Kenneth J. Seavoy and Michael Wendorf. Bencivengo and Wendorf presented the oral arguments. In the second set of arguments, the Malones were represented by Nicholas J. Stasevich and Aidan Synnott. Kevin E. Kennedy and William C. Odle represented the Petersons. Oral arguments were presented by Synnott and Kennedy.

The distinctions between the present fact situation and the Baby M case should be noted. There, the contract provided for full payment only upon delivery of a healthy baby. Here, the contract awarded pro-rated payment for the services rendered. More significantly, in the Baby M situation, Mary Beth Whitehead contributed both her egg and her womb. In contrast, Diane Peterson provided only gestational services.

The panel's questioning seemed to concentrate on the impact of this later distinction. Ms. Bencivengo and Mr. Synnott, arguing for the Malones, tried to analogize Diane Peterson's contribution to that of a wet-nurse or foster parent.

That evening, at the Campbell Competition Banquet, the judges announced their decisions: First place was awarded to the teams of Cathy Bencivengo and Aldebaran Enloe, and Kevin Kennedy and William Odle. Second place honors went to the teams of Nicholas Stasevich and Aidan Synnott, and Kenneth Seavoy and Michael Wendorf. The team of Kevin Kennedy and William Odle earned honors for the best brief for the semi-final round. Best brief for the quarter-final round was awarded to the team of Bruce L. Campbell and Alison R. Kean.

Virginia Davis

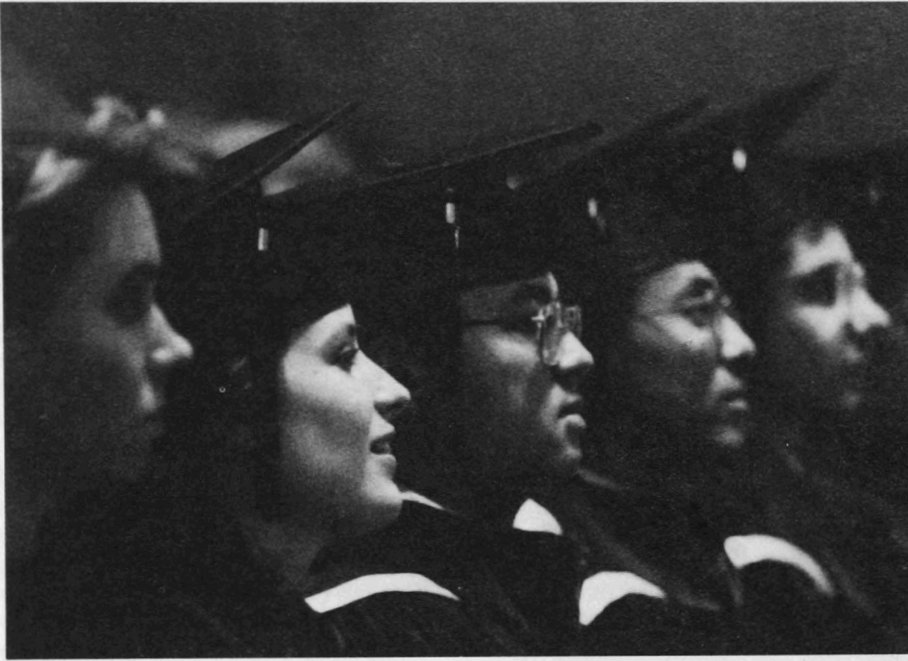


Michigan State Senator Connie Binsfeld, R-Maple City (right), sponsor of the state's recently enacted statute outlawing surrogate contracts, confers with Lucille Taylor (far left), Michigan Senate majority counsel, following the mock trial. Also pictured are (center left) Peggy Schacht, administrative assistant to the senator, and Virginia DeMumbrum (center right), staff assistant to Mrs. Binsfeld.

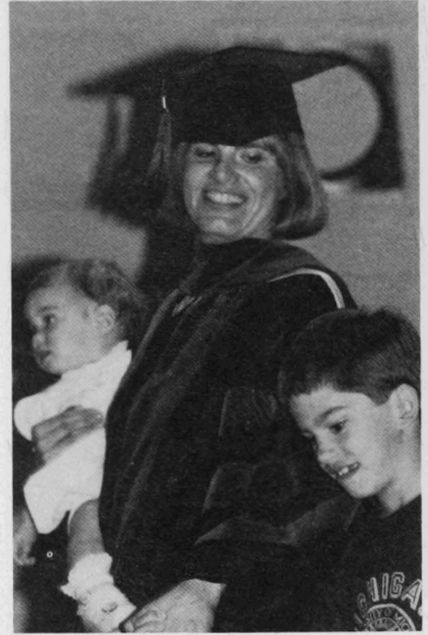
Rick Silverman, '88

Senior Day, 1988

A joyous rite of passage



Wendy Wilkes



Wendy Wilkes



Wendy Wilkes

Law School Dean Lee C. Bollinger presented his inaugural Senior Day speech.



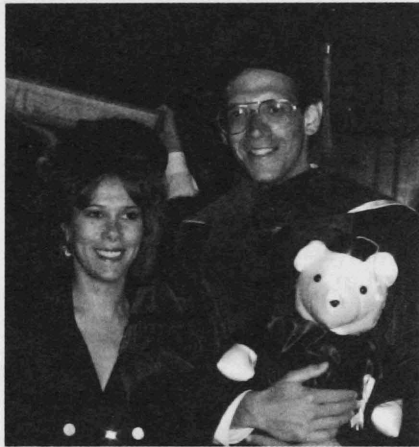
Wendy Wilkes

Julius Chambers, NAACP Legal Defense Fund, returned as Senior Day guest speaker after having visited as a DeRoy Fellow earlier in the semester.

E V E N T S



Wendy Wilkes



Wendy Wilkes

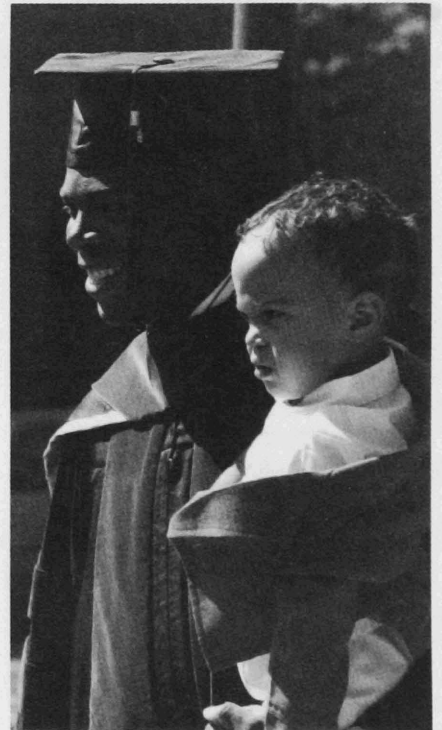


Wendy Wilkes

Student Senate President Bruce Courtade represented the seniors in his farewell address.



Wendy Wilkes



Wendy Wilkes

The lure of law librarianship

A satisfying career alternative for the J.D.

by Margaret Leary

Not all law school graduates practice law, or are happy if they do practice. The great surge in law school attendance in the late 70s and early 80s has resulted in higher than ever numbers of law graduates, many of whom might be less satisfied with practice than an alternative career. For hundreds of such lawyers a viable and intellectually stimulating career alternative has been law librarianship, a field that is broader in scope than many forms of practice and closely allied to either teaching or practice, depending on the library's setting.

At the same time, opportunities in law librarianship have begun to expand in response to both growth and changes in the legal field. As the number of lawyers has increased, so has the number of law librarians. In 1983 there were about 3,000 law librarians; now there are about 5,500, one for every 130 lawyers. Firms are larger, individuals

specialize, and cases require scientific, statistical, psychological, and almost every other type of information — information most lawyers are not trained to find and which is often not in any law library.

The U-M Law Library and the School of Information and Library Studies have recently implemented a new program to meet the increasing need for professionals trained in both law and librarianship. The program is designed for two types of students: those who have already earned a law degree and want to go into law librarianship; and those with no law degree who want to acquire expertise in legal bibliography and law library management and work in a law firm or a government library. The specialization in law librarianship includes several required courses: sources of legal information, law library management, government documents, and others in the management of information, including computer applications. The program also includes an internship in a law library.

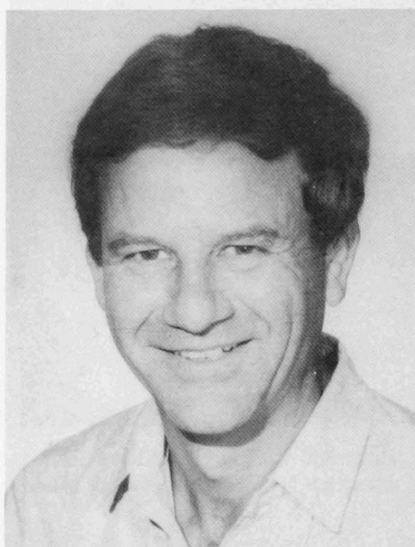
The experiences of several Michigan Law School graduates who have chosen this career alternative follow, demonstrating the wide range of work and the tremendous variety of skills that law librarians have.

A. Jerome Dupont, '67 Law, '71 M.L.S. was assistant director of the Michigan Law Library until 1973, when he left to establish the University of Hawaii Law School Library. There, he not only built a collection and a new building, but also founded the Law Library Microform Consortium (LLMC). This non-profit cooperative venture microfilms legal material to help law libraries build and preserve their collections. Dupont represents the newest generation of law librarians: an M.B.A. (1979, University of Hawaii) supplements his library and legal training. He works not only with printed material but also with microforms and computers. His present position as executive director of LLMC requires the skills of all three professions, and he is in a unique position to help libraries sort out the philosophical and practical questions that arise because of the availability of information in three formats — print, microform, and machine-readable. LLMC now lists over 1,500 titles in law and government, some 36,000 volumes.

Barbara Vaccaro, J.D. '80, M.L.S. '82 is the present assistant director of the Michigan Law Library. Of her work, Barbara says, "I help people get rid of confusion by finding information that empowers them to help themselves." From library school she learned where to get information to solve problems; from law school, she learned how to think about problems with many variables and how to arrange the elements of a problem logically to reach a solution.



Margaret A. Leary



A. Jerome Dupont

Ellen Brondfield, J.D. '85, already had a library degree when she came to law school, but had not worked as a librarian. She too has helped create and interpret law — at the United States Supreme Court. She works with the clerk of the Court, analyzing all new cases to be sure they are in compliance with procedural rules. Her first job in Washington was a temporary position with the Supreme Court Library. "It was the best job in the world," says Brondfield. "We were not solely reference librarians; we did true research. We researched both sides of questions of law, and we did research to supply information for speeches. The depth of the legal research, and the breadth of the interdisciplinary work, was unlike anything I did in a law school library."

Brondfield joins many law librarians in citing a major advantage of the work: the ability to keep up with the substance of the law in many different sub-fields, not just one speciality. The Court's librarians are, she says, nothing short of the best, but the work is demanding. Librarians who attend a morning exercise

class with Justice Sandra Day O'Connor bring along note pads to keep track of the questions she asks throughout the workout.

Melanie Dunshee, J.D. '79, M.L.S. '86, like many others, entered library school after finding that practice was not as personally satisfying as she wanted her work to be. She did her library field experience at Dickinson, Wright in Detroit. There, she filled in for the librarian, who had a new assignment to computerize records of briefs and memos. The firm found that a second professional was a real boon, and hired Dunshee for a newly created position. Firm librarians, she points out, deal with fewer books than do academic or court librarians, but they must get information quickly and accurately from many different sources: telefax, computers, personal connections, and paging are at least as important as books. A firm of 40 or 50 lawyers probably would be well-served by a professional librarian to keep on top of the firm's information needs. Librarians help select the most appropriate books,

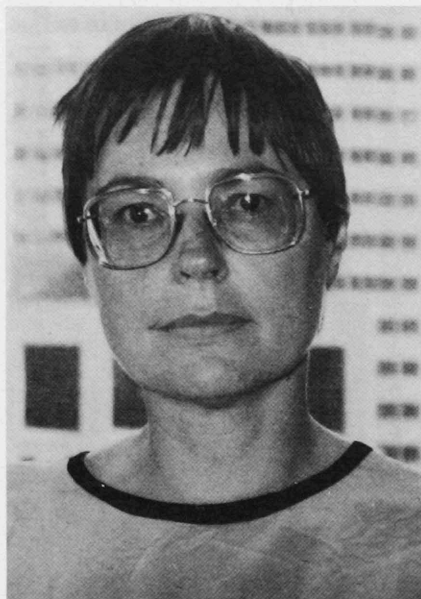
perform cost-effective computer searches, maintain budgets, train new clerks and associates, run cite-checking services, and find whatever information is needed as quickly as it is needed.

Ann Borkin, Ph.D. '74, J.D. '83, M.L.S. '83, started her career as an assistant professor in linguistics at Michigan, and decided to go to law school when she realized she disliked teaching. She chose law because of its intellectual proximity to her speciality as a linguist: the use of language in argument. During her first year or two at the Law School, she attended virtually every speech given by practitioners and judges, seeking to discover the branch of law that seemed right for her. "I never found it," she states. "I didn't think I would like doing any of it." She did, however, enjoy her work — first as a desk assistant in the Law Library and later as the faculty phone page — and decided to enroll in Library School. She now has a job she likes immensely with the San Francisco firm of Sedgwick, Detert, Moran & Arnold. Borkin's library is a typical one-person operation; she does the cataloging as well as the reference work.

Borkin enjoys helping lawyers find the arguments they need to make their writing effective; she also enjoys being able to let go of a problem just at the point where the document must be written. "Any firm large enough to need non-legal information — corporate information, newspaper searches, information from other disciplines," she feels "should consider hiring a professional librarian, because librarians can find that information much more easily than lawyers can. Librarians know the structure of information dissemination generally, and can think imaginatively about the best way to find it."



Barbara Vaccaro



Ann Borkin

Dwight King, J.D. '80, M.L.S. '81, has worked in the University of Baltimore Law School Library and is now at Notre Dame's Kresge Law Library. "I work for one of the best law librarians in the country (former U.S. Supreme Court Librarian Roger F. Jacobs)," says King, "and in a library that is building up to a research level." He's found Notre Dame stimulating, and especially enjoys the close relationship he can have with students there — first as an instructor of legal bibliography, and later as one who helps students apply the skills he taught them.

Charles Ten Brink, J.D. '79, M.L.S. '85, is reference librarian at the University of Chicago. For Ten Brink, as for Dunshee, practice was less satisfying than he had expected. He returned to Michigan for a library degree hoping that a library position would combine the best of the academic world — helping to teach and do research in the law — with the best of the practitioner's world — helping people



Dwight King

solve problems. He's found what he was looking for in his work at Chicago. In practice, Ten Brink specialized in municipal bonds, work that he found time-consuming, tedious, and intellectually narrow. He wanted to be more directly involved with people, and finds reference work a way to reach a conclusion fairly quickly as users search for a document or information.

Ten Brink says that although some of his acquaintances "couldn't understand why I gave up the prestige associated with the practice of law, my close friends applauded my change of career." Ten Brink himself has no regrets, and has found his new profession gratifying.

Most law librarians don't make the glamorous salaries associated with successful practice in a large firm. Ten Brink says the public obviously understands this: he has twice had to refuse tips from patrons who were grateful for his help and believed librarians to be so underpaid that a tip was called for. Entry level salaries for dual-degreed librarians are about



Charles Ten Brink

\$25,000; directors of the most prestigious libraries can earn up to \$100,000. Benefits in the academic sector are usually generous.

Margaret Leary is the director of the U-M Law Library. More information about law librarianship can be obtained by contacting her at the Legal Research Building, U-M Law School, Ann Arbor, MI 48109-1215.



Law School graduate David M. Ebel (left) was sworn in as judge of the U.S. Court of Appeals, 10th Circuit by U.S. Supreme Court Justice Byron White, for whom he served as a law clerk. Judge Ebel's wife, Gayle Ebel, is in the center.

Alumnus named to federal court

David M. Ebel, J.D. '65 was recently appointed to the U.S. Court of Appeals for the 10th Circuit. A former partner in the law firm of Davis, Graham & Stubbs in Denver, Ebel was sworn in on July 11. The Denver-based court encompasses Wyoming, Utah, Colorado, New Mexico, Kansas, and Oklahoma.

While a student at the U-M, Ebel served as *Law Review* editor-in-chief, graduated first in his class,

and was awarded membership in the Order of the Coif. After graduating, he clerked for U.S. Supreme Court Justice Byron R. White.

Ebel is a Fellow of the American College of Trial Lawyers and has taught corporations law as an adjunct professor at the Denver University Law School. He has also served in numerous capacities on the Colorado Bar Association.

Michigan grads elected ABF Fellows

Several U-M Law School graduates were recently elected members of The Fellows of the American Bar Foundation. They include William H. Bates, J.D. '52; Julia Kay Felt, J.D. '67; Vincent C. Immel, J.D. '48; and Robert E. Nederlander, J.D. '58.

Bates is a member of the law firm of Lathrop, Koontz, Righter, Clagett & Norquist in Kansas City, MO. Felt is a partner in Dykema, Gossett in Detroit. Immel is professor of law at St. Louis University, St. Louis, MO. Nederlander, who served as a Regent of the U-M for nearly 20 years, is a partner in Nederlander, Dodge & Rollins in Detroit.

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.

Class notes

'49 **Lewis Carroll** received the Resolution of Appreciation from the board of editors of the American Gas Association-sponsored treatise "Regulation of the Gas Industry." Carroll is former vice president and general counsel for Washington Gas Light Co. and played a key role in getting the outline of the treatise developed, obtaining authors

for the initial 32 chapters and reviewing material for the four-volume treatise.

David A. Nichols retired on May 31 after more than 11 years of service on the Maine Supreme Judicial Court. Upon his retirement, the Knox County Bar Association commissioned the painting of his portrait for the courthouse at Rockland, ME, where Justice Nichols had his chambers.

'55 **Robert C. Strodel**, a private practitioner in Peoria, IL for over 31 years, has recently authored a book on medical malpractice litigation. The volume, entitled *Securing and Using Medical Evidence in Personal Injury and Health Care Cases*, is published by Prentice-Hall, Inc.

'63 **C. Peter Theut** has become counsel to the Detroit law firm of Butzel Long Gust Klein & Van Zile. Theut practices in the areas of marine insurance, marine financing, commercial marine transactions, riparian rights, waterfront development and recreational boating.

Robert J. Wade, director of graduate programs at the Capital University Law and Graduate Center in Columbus, OH, has been appointed chair of the American Bar Association's Committee on Teaching Taxation. The appointment became effective July 1, 1988.

'65 **Walter S. Kirimitsu**, a partner in the law firm of Shim, Tam, Kirimitsu, Kitamura & Chang, was recently inducted into the American College of Trial Lawyers. Membership, which is a position of honor, is by invitation of the board of regents and is limited to the top one percent of the trial lawyers in the U.S. and Canada.

Vernon J. Vander Weide has been named a shareholder in the Minneapolis, MN law firm of Head, Hempel, Seifert & Vander Weide.

'70 (LL.M.) **Doug Rendleman**, Godwin Professor of Law at Marshall-Wythe Law School, College of William and Mary, has accepted a position at Washington and Lee University as Huntley Professor and director of the Francis Lewis Law Center.

'71 **Edward A. Porter**, vice president, National Gypsum Company, in Dallas, TX, has been elected vice president-general counsel and assistant secretary of National Gypsum and its parent company, Aancor Holdings, Inc.

'75 (LL.M.), '76 (S.J.D.) **Miriam Defensor Santiago**, Commissioner of Immigration of the Philippines, was featured in an article in the International Section of *The New York Times* last May. The article, written by Seth Mydans, highlights Ms. Santiago's efforts to fight graft, corruption, and organized crime in her agency.

'78 **Elizabeth Ann Campbell** was appointed corporate counsel of Delaware North Companies, Inc., of Buffalo, NY.

'79 **Steven M. Fetter** was appointed to the Michigan Public Service Commission by Governor James Blanchard. The three-member MPSC is responsible for the regulation of public utilities, telephone services, and intrastate trucking, as well as the establishing of an effective state energy policy for the future.

Jane E. Garfinkel has been named a partner in the law firm of Smith & Schnacke, in Dayton, OH.

Mark A. Sterling has become a member of the Washington, D.C. law firm of Hogan & Hartson. His practice is principally in the administrative and regulatory areas, with an emphasis on health law.

Ford H. Wheatley has been elected mayor of Glendale, CO. His term expires April, 1992.

'80 **Jeffrey M. Eisen**, administrative assistant, University of Evansville Dept. of Athletics, Evansville, IN, wrote an article for *Entertainment and Sports Law Journal*, vol. 4, no. 1, Spring, 1987. The piece is entitled, "Franchise Relocation in Major League Baseball."

'81 **William H. Fallon** has become a partner in the law firm of Miller, Johnson, Snell & Commiskey, in Grand Rapids, MI.

'86 **Lisa M. Parlato** has joined the Washington, D.C. office of Morgan, Lewis & Bockius. She is a member of the firm's labor section.

The theme of the 1988 Annual Conference of the Association of American Law Schools — “The Law School’s Opportunity to Shape the Legal Profession: Money, Morals & Social Obligation” — raises enormous issues. I suspect that many law professors might find it easy to dismiss this theme as a trite and overworked cliché, but I think that would be an unfortunate mistake. From my present vantage point in the profession, I fear that legal education is falling short in terms of

The Role of LEGAL EDUCATION In Shaping the PROFESSION

by Harry T. Edwards

any meaningful effort to “shape the legal profession.” This may explain the choice of the theme for this year.

To put the matter in a better perspective — at least from my vantage point — let me briefly share with you an experience that I had recently when I participated in a symposium on federal courts at the NYU Law School. The symposium brought together a number of prominent law professors, leading law practitioners, judicial administrators and members of the federal bench to discuss the “crisis in volume” in the federal courts. During our discussion of the causes and effects of this problem, there appeared a clear disjunction between the academic participants and all other conferees: for example, virtually all of the judges present at the symposium attempted — in vain — to convince the academics of the seriousness of the problem of judicial overload in our case dockets. At the end of the two days, I and many of my colleagues came away with the feeling that our friends in the law schools did not really understand the problems facing the judiciary — or, for that matter, those facing other components of the legal profession.

This experience has strengthened my impression that too many members of the law school community are either indifferent to or hopelessly naive about the problems of legal practice. I have never really understood the gulf between legal academics and practitioners, for we all profess to be equally concerned about the systems of justice in this country. Today we are facing major structural problems that threaten to alter the basic fabric of our legal system. As a consequence, we can no longer afford a circumstance where the law schools are isolated in a world of their own.

A recent ABA report, entitled “. . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*,” says that any recommendations on professionalism should begin with the law schools, “not because they represent the profession’s greatest problems but because they constitute our greatest opportunities.” I agree. The teaching and research arm of our profession has a critical role to play in determining how justice will be done and what our legal system will look like in the coming decades. Legal educators cannot afford to remain only “observers” of the changes that invariably will affect substantive judgments and results for those who seek the protection of our legal system. If the legal profession is to be reshaped, one would hope that legal educators will be among the principal architects.

Some may be skeptical about my claim that there are major structural problems facing the profession today that will affect substantive judgments in the law. I will briefly address these matters, and then suggest why I believe that legal education has such a critical role to play in helping to shape the profession.

Let me begin by cataloging what I see as some of the chief structural problems, issues, or concerns facing the profession today. Some of these are serious problems, others merely concerns on which we need to reflect. Collectively, they represent a greater potential for fundamental change in the legal system than any I can recall during my lifetime.

The first, and perhaps most discussed, is the crushing case overload at all levels of our court systems. I call this situation “crushing,” because the caseload burden has taken on such dimensions that it seriously threatens the ability of courts to produce quality work in a reasonable time — in short, to do justice. It also causes judges to establish their own personal priorities in case handling, which in turn may result in some judges giving back-of-the-hand treatment to disfavored categories of cases.

During my years in a law school environment — first as a student and then as a full-time teacher — my natural perspective on appellate cases was to look at how they had been *decided* and *explained*. Now what we face increasingly in the world of judging is pressure to succumb to the perspective inherent in the advice given

to one of my colleagues at his investiture several years ago, that in the end “there will be only one question: does he keep up with the workload? Are the opinions out on time?”

The caseload crisis, some of you will respond, is not new. In one sense, this is true. Even in what now seems to have been the pre-modern era of the 1950s, Chief Justice Warren was writing about “Delay and Congestion in the Federal Courts,” and Attorneys General Brownell and Rogers convened a series of Department of Justice Conferences on Court Congestion and Delay in Litigation. This makes it easy for academic critics to argue that the judges pointing to the caseload explosion are, once again, “crying wolf.” So what is new?

What is new is that we do not know what is causing the crisis, and we do not know what to do about it. As Judge Posner has pointed out, earlier caseload expansions tended to have readily identifiable causes. The

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doubling of the federal district courts’ caseload in the 1920s and early 30s was, for example, a consequence of Prohibition. The caseload dropped dramatically when Prohibition was repealed. Today, Posner argues, the causes of caseload growth are “not only complex, but unclear.”

More important, we appear to have run out of viable solutions to deal with the caseload problem. The obvious answers — such as more judges, specialized courts, another level of intermediate courts, expansion of so-called “prudential” doctrines to keep potential litigants out of court, or even the curtailment of substantive legal remedies — are now widely resisted as either unacceptable or insufficient.

The academic response to the caseload crisis, as seemed evident at the NYU symposium, is largely a denial that such a problem exists. For example, an article appearing in a recent edition of the *Michigan Law Review* suggests that the absence of congestion in appellate dockets can be *inferred* from the fact that certain circuit judges (myself included) seem to find time for speeches, legal scholarship and part-time teaching. Reacting to a similar comment at the NYU symposium, my colleague Judge Ruth Ginsburg whispered to me that the academics seem to want judges to do no more than issue decisions so that the academics will have a monopoly on explaining what they mean! More fundamentally, it is naive to assume that courts could keep up with the press of mounting caseloads even if judges did

nothing but work on purely judicial matters night and day for seven days a week.

Some academic critics have gone to impressive lengths to document the nonexistence of a "litigation explosion." However, their debunking of the notion that we are becoming a more litigious society is not necessarily inconsistent with the existence of a caseload crisis. In any case, the result is, as Thomas Marvell has recently written in *Judicature*, "a clearly drawn dispute between social scientists and the judiciary." Marvell's research exposes some of the weaknesses in the social scientists' studies, and confirms the judges' "persistent claims that caseload growth is a problem."

Related to the judiciary's caseload problem, yet distinct from it, is the rising expense and length of litigation. I say that this is a distinct problem, because I have in mind here not so much the delay caused by judicial backlogs as the length and expense of litigation inherent in the procedures we use to resolve many of our disputes. There are some indications, to be sure, that delays in federal court have not *increased* significantly over the last several decades. Even if correct, however, this data is beside the point. One would have hoped, first of all, that the years would have produced answers, rather than more of the same problem.

More fundamentally, the *consequences* of delay are now very different and much greater than they once were. The rising caseloads mean that *more* cases are delayed; as a consequence, apart from the rising number of disaffected litigants, the practical difficulties involved in handling the caseload become immense. For example, the more cases that are heard, the greater the likelihood of error or confusion in legal doctrines; this, in turn, inevitably results in more intra- and inter-circuit conflicts in the law. Moreover, delays now are attributable to new factors, not present in the past, such as abuse of the discovery process. Instead of resolving the problem of delay, we have adopted litigation techniques which become problems themselves and thus exacerbate the already-existing problem of delay.

Another factor effecting change within the profession is the extraordinary growth of law firms. It is hardly necessary for me to remind you of the dimensions of these changes. Just 20 years ago, the largest law firm in this country had only 169 lawyers, and the twentieth in size had 106. Today the largest firm has topped the 1,000 mark, and a firm of 106 lawyers would no longer even make the top 250. Similarly, salaries paid to graduating law students in the major firms have skyrocketed. While ten years ago the going rate in New York was \$27,500, several firms there have recently raised their first-year compensation to \$71,000.

What are the consequences of such developments? It is clear that the high salaries paid in the larger firms create more and more pressure to generate billable hours. This in turn must place pressure on these firms to do business in ways not done before. Some big firms

now offer huge "signing bonuses" to top recruits. Firms are less hesitant now to "raid" for legal talent and lucrative clients. Reports of management shake-ups and firm break-ups seem almost commonplace. The rest of the "industry," in order to compete, comes under pressure to follow suit. It is my impression, for example, based on talks with former students and law clerks, as well as partners of major law firms, and routine reports in journals like the *American Lawyer*, that the firms expect far too much of students coming out of law school — which is ironic since graduating law students today are in my view *less* well prepared for practice than those of my generation. What they face in practice often has little to do with what they learned in law school.

There is another problem associated with the coming of age of the big law firm. The money offered by these firms, we now know, is not without consequence for the career choices of graduating law students. While I do not subscribe generally to Derek Bok's criticism of

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the field of law for draining off the best and brightest minds, his comment is a telling one when we recognize that a *disproportionate* percentage of the ablest members of a generation are choosing to devote their entire careers to serving the legal needs of corporate America.

In this same vein, it is also noteworthy that we are still struggling with the problem of legal services for the poor and the middle class. Derek Bok notes that while the large institutions complain about too much law, "[i]ndigent defendants are herded through the criminal courts to receive hastily negotiated prison sentences, while people of modest means find it hard to afford a lawyer even for simple legal problems." Many observers have noted the shrinkage in recent years of the public-interest bar. We have also seen the dismantling of the Legal Services Corporation, with the resulting decrease in legal services available to the poor. How is it possible to have a fair system of justice without a strong public-interest bar and without significant governmental involvement in funding legal services for those who cannot otherwise afford them? And, should not this be a matter of the greatest concern for legal education?

Another matter for concern is the role of minorities in the profession. In certain areas of practice — notably the large, elite law firms — the representation of minority lawyers is meager at best (rivalling even the level of underrepresentation of minorities on most law school faculties).

Other troubling issues relate to our public institutions of justice. For example, over the past few years,

the Department of Justice has attracted considerable public attention and widespread criticism. The Civil Rights Division's "enforcement" of civil rights laws has caused some observers to liken it to the "double speak" ministries of Orwell's *1984*. The once universally respected Solicitor General's office has been the subject of a detailed critique in a recent book and series in *The New Yorker* — a criticism captured succinctly by one Supreme Court Justice who said of the Solicitor General's staff: "They write political speeches and put the word 'brief' on them." On yet a broader scale, over 110 senior government officials have been accused of unethical or illegal conduct in recent years; some have been indicted, and even convicted.

Finally, among the problems that we face are the subtle, but discernible, effects of increased competition in the business of law. As a judge, I am forced to deal with too many frivolous case filings; I observe too much sloppy advocacy; I witness inexcusable gouging of clients; and I even receive pleadings that are flatly dishonest in their assertions. Not too long ago, for example, an attorney arguing before my court cited a case (including a "holding" that was favorable to his client's position) that did not exist. The attorney had simply made up the case name to serve his ends! When he was asked for an explanation, he claimed that the fabricated case was an oversight due to "the press of business." A few months before this incident, I had graded a law student's seminar paper and had discovered that over 80% of the paper had been copied, almost verbatim, directly from three law review articles. The student's explanation for cheating was "the press of work" and his need to get a good job. I offer these anecdotes not as a general indictment of the profession, but only to prompt us to reflect on the connection between what goes on in law school and in practice.

There is no doubt that the pressure to compete is causing some lawyers and law students to forget some of the most sacred responsibilities of our profession. I sometimes think that we have entered a fantasy world where "L.A. Law" is the model of success. I find no solace in the realization that a large percentage of the practicing bar is composed of honest lawyers who produce high quality work, for even the best intentioned lawyers can be overwhelmed by a flawed system.

One question that we face is: to whom do we look to assume responsibility for deterioration in our systems of justice? Should not the law schools have some major role to play in dealing with the mess created by too many cases, too many frivolous filings, client gouging, intolerable time delays in case processing, low quality advocacy, underrepresentation of the poor, and dishonest practices? If the law schools do not really know (or even care) what is going on in practice, is it fair to assume that law students are really prepared to *serve justice* (as opposed to simply "making a buck") upon graduation? Indeed, shouldn't we assume that if the law schools do not deal with these growing issues,

law graduates will not even know the right questions to ask upon entering practice — they simply will be captives of the existing system, for better or worse.

If you agree with me that law schools have a vital role to play in "shaping the legal profession," what grade do we get on current performance? Professor Kenneth Pye says that:

[m]ost, but not all, legal educators dream of a law school faculty that teaches at least some of the basic principles of the legal order, explains the manner in which the legal process operates, including those factors that preclude the certainty that the uninitiated might expect from statutes or case law, provides an understanding of historical antecedents that underlie the strengths and weaknesses of contemporary institutions, and suggests the areas ripe for reform. Ideally, these goals would be accomplished by introducing students not only to the methodology of traditional legal research, but to social-science methodology, the decision-theory methodology taught in the best public policy programs, and the

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intensive case-study methodology used by the best business schools. Simultaneously, the ideal curriculum would develop skills in research and writing and teach techniques of interviewing, negotiating, counseling, and planning. It would provide opportunities for perfecting oral and written expression, and introduce students to trial and appellate advocacy and the use of computers for legal research and case preparation.

Not surprisingly, Professor Pye concludes that "legal educators are acutely aware that contemporary curricula fall far short of realizing these goals."

The ABA Report on professionalism acknowledges that "the public views lawyers, at best, as being of uneven character and quality." The ABA Report is implicitly critical of legal education in the areas of ethics and professionalism, noting that "a law school's impact on the professional development of its students should extend beyond simply teaching legal rules. Law schools should also confront students with hard ethical issues and give them a perspective on the legal profession — where it has been, where it is now and where it is going." The Report asserts that "law professors can . . . positively influence the values and ethics of students by example and through creative teaching." Notably, however, the ABA Report does *not* suggest high marks for current performance.

What are the law schools doing about all this? It is risky to generalize, except to say that there is still much to be done. In my view, the gap between the academy and the profession seems to be growing. Law professors seem more and more often content to talk only to each other — or perhaps to a few colleagues in other

academic disciplines — rather than deal with the problems facing the profession. Basic research with no immediate practical application is crucial to the existence of any great academic institution, but not at the expense of professional concerns. *There are certain things that only the law schools can do adequately, which are not being done because the law schools are not doing them.*

I am not talking about what we call “clinical education” or how-to-do-it courses. Anyone who understands me to be saying this will have missed the whole point of this paper. Rather, I am talking about structural reforms in the legal profession, i.e., the things that crucially affect our systems of justice. I am talking about the interests that will be allowed to survive in our legal system. I am referring to who gets represented, the nature of the representation they receive, the time it takes to resolve legal questions, the cost of judgment, the quality of decision-making, and the ethics of advocacy.

It is essential that law students learn not only how to *argue* an appeal, for example, but also how to consider whether to *bring* one in the first place. They must know that there are serious decisions — non-technical, but professional in the deepest sense of the word — to be made in every such situation. They must know that in making such decisions they not only serve a client but that they also affect the system of justice. If students do not know this on leaving law school, there is nothing to prevent them from succumbing to the pressure of generating billable hours — and making “professional” decisions accordingly. My impression is that most law graduates enter practice without ever having faced such questions in any meaningful way in law school. If this perception is correct, then it is certain that they will *never* reflect on such questions: they will simply not find the time — or the incentive — to do so once they have begun practice. Only the law school experience can offer the student the luxury of time for reflection on ethical problems.

The movement toward what is generally called Alternative Dispute Resolution (or “ADR”) is another matter that cries out for serious attention in legal education. ADR will greatly affect the legal system and the practice of law as we enter the 21st Century. The reason why the dispute resolution field has become so critically important is that we are realizing that we must have options for resolving some disputes without resort to the traditional forms of adjudication.

The dispute resolution movement offers the law schools a dual challenge. On one hand, it is indisputable that it portends significant changes in the way justice is done. The law schools must prepare their students for a legal system that includes a variety of ways of resolving disputes. This is the *teaching* challenge to the law schools. As Professor Frank Sander wrote several years ago, it is inconceivable that “one could properly teach . . . a course [like civil procedure]

without, at a minimum, including a major introductory segment that seeks to put court adjudication into a broader dispute resolution framework.” While there does exist a small group of law teachers who, with support from groups like the National Institute for Dispute Resolution, are attempting to include dispute resolution as a significant part of the law school curriculum, these efforts are at best uneven.

It is true that there are many more so-called “clinical” courses being offered now than when I was a law student, but too many of these courses remain mostly cosmetic. My impression is that a number of clinical offerings seem to be directed toward insulating the traditional “scholar/teachers” from dealing with the issues of law practice by pushing those concerns off on the clinical faculty. These courses consume but a small portion of the budget; very few teachers are actually involved, and particularly few tenure-track professors; the number of students affected by clinical experiences at many schools is relatively small; and there is no

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uniformity in course offerings. Most important, such programs are rarely integrated into the mainstream of the curriculum.

In addition to improving upon the teaching mission, the law schools face a second challenge: that of shaping the directions dispute resolution takes and thus the ways in which justice will be done and the law will develop in the next century. Legal scholars have an important role to play in helping to determine who, in the future, goes to court and who goes to some other forum; what kinds of cases will be decided by a judge, by someone else, or without any involvement of a “neutral”; which cases will be appealed, and on what time track; and what kinds of issues will be resolved by society at all. This is dispute resolution’s *research* and *advocacy* challenge to the law schools.

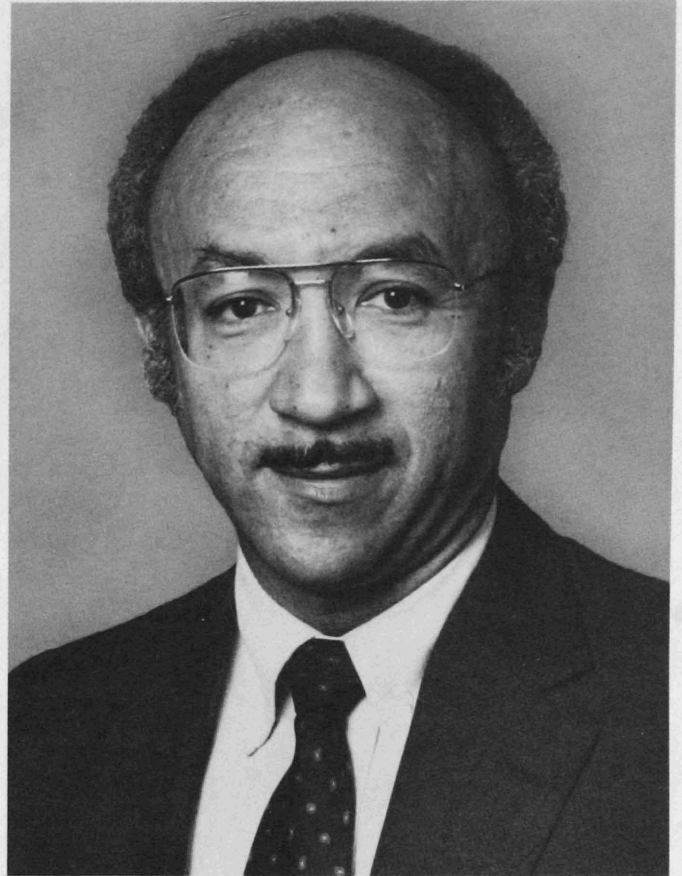
My point is simply that the academic community is being naive if it sees ADR and related developments as essentially technical questions not worthy of scholarly investigation. If the academy leaves dispute resolution to the “enthusiasts,” it will mean that the law schools will have given up any role in the making of significant decisions about the direction in which the law will develop. I submit that this is a question that the law schools *must* be involved in — not only through teaching but also through research, and not merely in a reactive mode but through active participation. Thus far, except for a small group of law teachers who are pioneering efforts to integrate legal education and legal practice, the practicing bar and non-lawyers

have had much more to say about dispute resolution than have legal scholars.

We could do worse, I believe, than look to our colleagues in the medical profession for an example. I recognize that the medical profession has some unique — some would say serious — problems of its own. Nonetheless, medical educators at least *understand* (and often seek to address) the problems of their profession, by dint of their constant exposure to them through the actual practice of medicine. It is not at all clear that many law professors, who lack their medical-school colleagues' advantage of being close to practice, even realize that there is major research and teaching to be done in regard to both the *profession* and the *substance* of law.

Worse still is the attitude of active disdain for law practice that one continues to find too frequently among law faculties. While there always has been some of this, I am now hearing from young friends in academe who are being positively steered away from any attention to the real world of the profession — even to the extent that they feel their tenure may be on the line. It seems the height of absurdity to do without the services of young scholars who are inclined to devote a meaningful portion of their careers to bridging the gap between these two worlds. In view of the mounting problems facing the profession, we cannot afford the luxury of allowing law teachers to adopt either the posture of pure reflection, which ignores the profession, or that of active disdain for it.

Nor can we afford the situation described by Ken Pye, where "legal educators appear to be [stuck] at a point midway between introspection and self-flagellation." Legal education has much to offer the profession in the way of possible solutions to existing problems. The problems that we now face are so manifold that we can no longer tolerate any further growth in the disjunction between the study and practice of law. We need the law schools to help shape the legal profession as we engage this profound era of change.



Judge Harry T. Edwards (J.D. '65) a member of the U.S. Court of Appeals for the D.C. Circuit, presented this paper at the annual meeting of the Association of American Law Schools, in Miami, Florida, on January 9, 1988. Judge Edwards taught at the U-M Law School from 1970 to 1975 and at Harvard from 1975 to 1977. He rejoined the U-M in 1977 where he taught until 1980, when he was appointed to the bench by President Jimmy Carter. He presently teaches a seminar at the Law School on federal courts and the appellate process.

AT-WILL EMPLOYMENT

Theodore J. St. Antoine

AND THE HANDSOME AMERICAN

This article was originally presented as a lecture given on Nov. 19, 1987, and subsequently published by the Institute of Industrial Relations, University of California, Los Angeles, as The Second Annual Benjamin Aaron Lecture on the Role of Public Policy in the Employment Relationship. Reprinted by permission. Copyright 1988 by the Regents of the University of California. The series commemorates the career of Professor Emeritus Benjamin Aaron, long-time director of the Institute and eminent scholar on the faculty of the UCLA School of Law.

The past decade has seen a genuine revolution in employment law, as some 40 American jurisdictions, in square holdings or strong dictum and on one or more diverse theories, have modified the conventional doctrine whereby employers "may dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong." In this paper I shall briefly review the theories most frequently invoked by the courts in dealing with wrongful dismissal and indicate their deficiencies as a permanent solution for the problem. Next, I shall summarize the major arguments for and against the doctrine of employment at will. Finally, I shall consider some of the particular issues that will have to be resolved in any proposed legislation. But first, to view the whole question from a somewhat different perspective, I should like to look at a few sociopsychological factors that may help explain why the United States remains today the last major industrial democracy in the world without generalized "just cause" protections for its workers.



SOCIAL PSYCHOLOGY AND THE HANDSOME AMERICAN

Americans are known as a generous and caring people. If a natural disaster occurs in India or Latin America, Americans can be counted on to rally around with medical supplies and open pocketbooks. We take such compassionate impulses almost for granted; they go along with our image of ourselves as the perennial good guys, as nature's noblemen. But there may be some darker shadows in the picture. On occasion, condescending or patronizing attitudes may accompany our proffered aid. In the late 1950s William Lederer and Eugene Burdick wrote a novel about this country's involvement in Southeast Asia that introduced a new phrase into popular usage — "The Ugly American." Significantly, for most persons, the term became shorthand for any oafish, uncouth, irresponsible citizen abroad. Our predisposition to regard the normal clean-cut American as the very embodiment of virtue blinded us to other possibilities. In fact, the original ugly American was one of the heroes of the Lederer-Burdick book. He spent his time out in the rice paddies helping the natives to help themselves. The handsome, well-manicured Americans stayed back in their isolated urban compounds, drawing up grandiose but unrealistic plans for reshaping the countryside with giant dams and sprawling factories.

Over the last few years I have struggled to reconcile the notion of a caring, giving, open-hearted America with the resistance I have frequently encountered, even in many traditionally progressive circles, to the concept of universal "just cause" safeguards for this country's working persons. The image of Lederer and Burdick's "handsome" Americans, who operated apart from the people they were purporting to assist, and in ignorance of their real wants and needs, led me to indulge in some amateur psychologizing about the more appealing and enduring mythic figures of our history, and the lessons they might impart about our national character. I discovered that two of my own candidates as prototypical icons — the self-sufficient frontiersman and the hard-boiled private eye, two quintessential "loners" — have been taken quite seriously as national symbols in one of the most influential of recent sociological works, *Habits of the Heart*. The authors draw on such figures from an earlier era as James Fenimore Cooper's Deerslayer, the Lone Ranger, and the beleaguered sheriff in *High Noon*, and such solitary modern heroes as the detectives Sam Spade, Philip Marlowe, and Lew Archer to illustrate a central thesis of their book: "Individualism lies at the very core of American culture." It is, however, an ambivalent individualism, for it involves, as these scholars describe it, "a commitment to the equal right to dignity of every individual combined with an effort to justify inequality of reward, which, when extreme, may deprive people of dignity."

At its best, individualism produces Lederer and Burdick's ugly but achieving and sharing American; at its worst, as a host of sociologists and psychologists have demonstrated, excessive emphasis on personal responsibility can result in self-loathing by the moderately successful and a "blaming of the victim" for his or her economic or social woes. Having failures around to identify and derogate may even be a way for the relatively unsuccessful to justify and console themselves. An overly individualistic society is harsh and unforgiving. Failure is invariably attributed to personal fault and almost never to socioeconomic forces that may often be beyond one's control. In such a dog-eat-dog milieu, it will not be easy for the fired worker to generate much sympathy for his claims of unjust treatment.

The centrality if not primacy of individualism in American life is hardly a new discovery. As early as the 1830s Tocqueville analyzed the phenomenon, but he gave it only the worst of possible connotations: "Individualism . . . disposes each citizen to isolate himself from the mass of his fellows. . . . All a man's interests are limited to those near himself." In his classic 1893 essay, "The Significance of the Frontier in American History," Frederick Jackson Turner declared that it is "to the frontier that American intellect owes its striking characteristics," including "that dominant individualism, working for good and for evil." In that prophetic work, *An American Dilemma*, Gunnar Myrdal commented on the "low degree of law observance" in the United States, noting that the "authorities . . . will most often meet the citizen's individualistic inclinations by trying to educate him to obey the law less in terms of collective interest than in terms of self-interest."

The national psyches of Western Europe and especially of the Orient plainly differ from ours, stressing interdependence over rugged individualism. Thus, psychiatrist Irvin Yalom contrasts Europe's "geographic and ethnic confinement, the greater familiarity with limits, war, death, and uncertain existence," with America's "expansiveness, optimism, limitless horizons, and pragmatism." Social psychologists point out that training for independence begins earlier in the West, particularly in the United States, than in non-Western societies. In Japan, specifically, "mature interdependence is defined in terms of reciprocal responsibilities," so that an employee's "loyalty to the firm is quite compatible with self-actualization."

The American brand of individualism is obviously not all bad. It accounts in part for those peculiar national traits of self-reliance, inventiveness, and sheer exuberance that have frequently been the envy of the world. And at widely separated but perhaps equally critical stages in our history, as Tocqueville and Myrdal have observed, the higher values of democracy — such as political freedom and a concern for the public welfare — have prevailed over the grosser excesses of individualism. Perhaps it is not too quixotic to hope that, given sufficient time for education and reflection, Americans will appropriately reorder their values concerning the issue of employment at will.

JUDICIAL THEORIES OF UNJUST DISCHARGE

Let me now turn to a brief overview of the three principal theories employed by the courts to modify the at-will employment doctrine, along with my reasons for believing these theories are ultimately inadequate for the task. The three theories include tort — violation of public policy, or “abusive” discharge; breach of an express or implied contract; and breach of the covenant of good faith and fair dealing.

Tort Theories

The courts have acted along a spectrum of public policy violations. At one extreme end employers have actually fired employees for refusing to commit a crime, such as perjury or price-fixing. I should like to think that we are past the point when any court would countenance such an outrage. Next along the spectrum are cases where employees are discharged for performing a public duty, like serving on a jury or “blowing the whistle” on wrongdoing within a company. Lastly, there are dismissals for exercising a public right, such as filing a workers’ compensation claim.

The first type of case, where criminal conduct is importuned, is going to be easy, and also extremely rare. After that, the issues will get tougher for the courts. “Public policy” is a slippery concept. For example, it may be one thing if a “whistleblower” has been subpoenaed to appear at an official inquiry. It may be quite another if he has taken it upon himself to share his good-faith but mistaken suspicions with the media, seriously damaging his employer’s reputation. Some courts have simply thrown up their hands over public policy claims, insisting such matters should be left to the legislature. Except in the most egregious situations, therefore, judicial theories of public policy are no sure answer to the problem of unfair dismissal.

Even more nebulous is the notion of “abusive” discharge. One celebrated decision sustained a suit by a female worker who was fired for refusing to date her foreman. Other courts, however, have declined to remedy such personal abuse. Moreover, there is a growing tendency to require that the public policy relied upon be “clearly articulated” and “well accepted,” or even that it be “evidenced by a constitutional or statutory provision.” That will give small comfort to most employees who are discharged spitefully or arbitrarily.

Contract Theories

At one time an employer’s oral assurance of “permanent” employment, or a policy statement in a personnel manual that employees would be discharged only for just cause, was not considered legally binding. In the early 1980s, however, a number of courts began taking employers at their word, and started treating such declarations as express or implied contracts. But many courts continued to regard these employer statements as merely nonbinding expressions of present intent. Furthermore, individual promises of job security will probably be given only to higher-ranking personnel, and only the more enlightened employers are likely to issue protective policies applicable to employees generally. Thus, the person who undoubtedly needs these safeguards the most — the rank-and-file worker in the marginal establishment — is the very one who will get the least.

Even where courts recognize the new contractual qualification on employment at will, an employer can of course avoid liability by refraining from any assurances. Clear and prominent disclaimers of any legal intent in an employee handbook will also accomplish the purpose. Although it is more problematical, I also believe an employer can ordinarily purge a manual of any guarantees against future terminations, even as to incumbent employees. After all, one would not consider an employer stuck forever with an existing, unilaterally established pay scale, even if economic conditions worsened dramatically. In short, the contract exceptions to the at-will principle seem no panacea, either.

Good Faith and Fair Dealing

Massachusetts and California have led the way in developing the most expansive judicial qualification of the employment-at-will doctrine. This modification is based on the covenant of good faith and fair dealing, which is said to inhere in every contract. “Bad faith” has been found when a jury concluded an employer had dismissed an employee to avoid paying him the full commission due on a multimillion-dollar sale, and when an employer discharged a long-term employee without good cause. This novel use of the good faith concept appears contrary to its traditional function. It has not been regarded as applicable to contract termination as such, but rather to the mutual obligation of the parties not to interfere with each other’s performance or their receipt of the benefits of the agreement. My judgment is that most courts will follow the New York Court of Appeals in rejecting the good-faith covenant in this context as fundamentally incompatible with the whole theory of at-will employment.

THE CASE FOR JUST CAUSE LEGISLATION

About 60 million persons work in private sector, non-union firms in the United States, and thus are not protected against unjust dismissal by either collective bargaining agreements or constitutional or civil service provisions. A careful scholar has estimated that of this group, some two million nonprobationary employees are discharged annually. He further calculates that about 150,000 of these would be restored to their jobs if they had the same just cause protections as unionized workers. The problem is a substantial one, then, in terms of the numbers alone.

The courts of the more progressive states, like California, Massachusetts, and Michigan, have probably neared the limits of their willingness to modify at-will employment. They will entertain suits alleging serious violations of accepted public policy. They will hold employers to their unretracted word not to fire except for good reason. But ordinarily they will not impose an affirmative obligation on employers to prove just cause to support a discharge. The next move therefore seems up to the legislatures.

Conceptually, there appears little or nothing to be said in favor of an employer's right to treat its employees arbitrarily or unfairly. For most commentators, it is a matter of simple justice. Perhaps the most outspoken academic dissenter is Professor Richard Epstein of Chicago. He views at-will contracts as fair because they are the product of freedom of contract between parties with equal bargaining power seeking a mutually beneficial relationship. He even suggests that workers will profit from "risk diversification" since the contract at will offsets "the concentration of individual investment in a single job." The Epstein thesis exudes the rarefied ozone of the ivory tower, not the rank air of the plant floor. His analysis admits of no living, breathing human beings, who develop irrational antagonisms or exercise poor judgment, on the one hand, or who suffer the psychological as well as the economic devastation of losing a job, on the other. Numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, diabetes, spouse and child abuse, impaired social relationships, and various other diseases and abnormalities that develop even in the wake of impersonal permanent layoffs resulting from plant closings. Presumably such effects are at least as severe when a worker is singled out to be discharged for some alleged incompetence or rule infraction. Even if Epstein were correct in all his statements about employees collectively, this searing harm to individuals would still justify eradicating the at-will principle.

This reform will probably come at some cost. Many persons will naturally think of the employer's loss of flexibility in its operations, and the need for extra staff in the personnel office. That will almost surely be a piece of the story but it may not be the whole by any

means. One scholar has suggested a lower wage level could result because the more stable and attractive employment situation would cause both a decrease in the demand for labor and an increase in the supply. In effect, the employees themselves would pay at least partially for their greater job security. That is a time-honored tradeoff among unionized workers, however, and should not be considered inappropriate here. There is also evidence that the net increase in employers' costs in maintaining a for-cause discharge system would not be exorbitant. For example, in all the demands by unionized firms for "givebacks" or bargaining concessions during the early 1980s, scarcely ever did employers seek to remove "just cause" contract clauses, or the grievance and arbitration procedures to enforce them.

The "competitiveness" of American business in international markets should not be markedly affected by the elimination of at-will employment. Statutory protection against unfair discharge now exists in about 60 countries around the world, including all of the Common Market, Sweden and Norway, Japan, and Canada. We are the last major holdout against the recommendations of the International Labor Organization in 1963 and again in 1982 that workers not be terminated except for a valid reason. Furthermore, experience both here and abroad suggests that the prevention of arbitrary treatment of employees may be not only humane but good business as well. Significant correlations have been shown between a secure work force and high productivity and quality output.

A more rational, systematic method of dealing with wrongful terminations would save many employers the crushing financial liability imposed by emotionally aroused juries under our existing, capricious common-law regime. For example, separate studies at different times by a plaintiff's attorney and a management attorney in California indicated that plaintiffs won between 78 and 90 percent of the cases that went to juries, with the awards averaging between \$425,000 and \$450,000. Jury awards for single individuals have gone as high as \$20 million, \$4.7 million, \$3.25 million, and \$2.57 million. Eventually, an informed employer lobby might well conclude that comprehensive just cause legislation, which would exclude jury verdicts and punitive damages, was the more favorable alternative.

There are signs, indeed, of some movement, glacial though it is. Bills forbidding wrongful discharge have been introduced in a dozen or more legislatures. In addition to the positive recommendations of the special committee of the California Bar's Labor and Employment Law Section, the individual rights committee of the ABA Section on Labor and Employment Law has drafted a questionnaire regarding the critical issues to be considered in any proposed law. The AFL-CIO's Executive Council has ended organized labor's long-standing ambivalence on the subject by endorsing the concept of wrongful discharge legislation. The Commissioners on Uniform State Laws have decided to draft a model statute. And just a year ago Montana became the first state to adopt a comprehensive law protecting employees against unjust discharge.

STATUTORY PROPOSALS

Coverage

In the higher ranges of management, one official's evaluation of another's business judgment may become so intertwined with questions of fair treatment that the two cannot be separated. These top executives should be excluded from coverage. On the other hand, shop foremen and supervisors who are not protected by the National Labor Relations Act because they are management's representatives with rank-and-file employees do not present such potential conflicts of interest under just cause safeguards, and should be covered. Several proposed bills draw the line by excepting persons entitled to a pension above a certain amount, or persons with a fixed-term contract of two years or more. Probationary employees may also be excluded. Six months is a common probation period but a California bill specifies two years. That is the sort of quantitative issue which lends itself to compromise.

Small employers may be more prone to arbitrariness and individual spite than large, structured corporations. But we hesitate to intrude into the sometimes intensely personal relationships of tiny establishments. A suitable dividing line, at least at the outset, would seem to be employers having between ten and 15 or more employees.

Public employees generally have constitutional guarantees against the deprivation of their "vested" job interests without due process. About half also have more specific civil service or tenure protections against unjust dismissal. It would seem sensible to adopt the approach of several bills in limiting new protections to private industry.

I see no principled grounds for treating organized employees differently from the unorganized with respect to basic statutory safeguards. If workers in general are entitled to invoke a just cause standard, the same public policy should arguably apply to all, regardless of the existence of parallel protections in collective bargaining agreements. Federal precedent for such an approach exists in both the NLRA and civil rights legislation. Nonetheless, there would be federal preemption problems with state laws, and procedural problems in accommodating contractual and statutory rights. There may be much practical wisdom in the solution of several bills to finesse all these complications by excluding unionized employees.

Standard Applicable and Discipline Affected

My proposal would be to articulate a standard for discharge or discipline in terms of "just cause" or

equivalent language, without further definition but perhaps with a few illustrative reasons. Even in Western Europe, which had nothing like the body of American arbitral precedent to draw upon, there has apparently been little difficulty in applying broadly phrased statutory criteria. Any effort at specificity is bound to risk underinclusiveness. Decisionmakers should be able to flesh out "just cause" much as have our arbitrators.

Outright discharge, the so-called "capital punishment" of industrial relations, is the usual target of all these proposals. But an extended suspension, a demotion, or an onerous job assignment can be almost as bad. Yet we shrink from subjecting every shop discipline to governmental review. The solution of several bills is to cover "constructive" discharge as well. An employee who feels sufficiently aggrieved may quit, and then test the legitimacy of the employer conduct that triggered her departure.

Enforcement Procedures

Administration and enforcement of new just cause legislation will have to be lodged in the courts, or in existing or newly created executive departments or administrative agencies. I would join most persons in ruling out the courts as too formal, too costly, and too slow. Beyond that, I think the locus of administration is less significant than whether we follow the hearing officer-agency model or the arbitration model. With a unanimity rare among their contentious tribe, those arbitrators confronting the issue have invariably opted for arbitration. I go along with my colleagues. I like to think our dockets are already so bulging that we could not possibly be impelled by crass commercial considerations; I do believe there are valid, objective reasons for our choice.

The arbitration format would immediately make available the vast body of arbitral precedent concerning substance and procedure that has been developed in countless decisions over the years. It would permit the use of an established nucleus of experienced arbitrators, and of the growing number of young, able aspirants who Robben Fleming demonstrated some years ago are objectively qualified to render acceptable decisions, especially in the more straightforward disciplinary cases. Arbitration would facilitate maximum flexibility, at least until more is learned about future caseloads, because there would be no need to engage a large permanent staff at the beginning. The relative informality and speed of arbitration — though both those qualities are too often much eroded — should also appeal to rank-and-file employees. One drawback of arbitration for employees, however, might be that, in keeping with the pattern in the unionized sector, and in recognition of the strained financial resources of most states, the parties themselves would have to bear the cost of the arbitrator.

It would seem highly desirable to have some screening mechanism in the statutory procedure to avoid

a flood of hearings. The most obvious would be a preliminary mediation stage of minimum duration, as provided by California and Michigan bills. One knowledgeable observer would have an official in the administering agency make a "reasonable cause" determination before a case could go to arbitration. Such a requirement would be especially appropriate if the state was to bear a major share of the cost of the proceedings. The arbitrator's award itself should be final and binding, without the need for agency adoption or review as in the case of a hearing officer's report or decision. Ordinarily, of course, the courts will not set aside a private arbitration award unless the arbitrator exceeded his jurisdiction or the award was obtained by fraud, bribery, or similar means. Those criteria ought to apply here.

Remedies

Remedies for unjust discharge in the United States have traditionally included reinstatement, with or without back pay. In Europe reinstatement is the exception. Apparently it is felt that future relations between the employer and the unwanted employee will be too strained, and that the employee is better off to leave with a flat severance payment. A number of American experts also seem to believe that reinstatement is unfeasible without the presence of a labor union to support the restored employee. I believe an award of severance pay in lieu of reinstatement should be an option available to the arbitrator. But I would not preclude reinstatement out of excessive solicitude for the employee. A reinstatement order may also furnish extra bargaining leverage to the employee in negotiating any future settlement with the employer.

The tradeoff for employers would be the elimination of jury verdicts, compensatory and punitive damages, awards for pain and mental suffering, and the like. Something rather analogous occurred in the second decade of this century, when employers swapped their powerful common law defenses to tortious injury of employees in the workplace in return for the no-fault workers' compensation system and its denial of compensatory and punitive damages. Despite some occasional creaks in the joints, workers' compensation has generally served us well. It may stand as a salutary precedent for mutual accommodations in our present deliberations over wrongful dismissal.

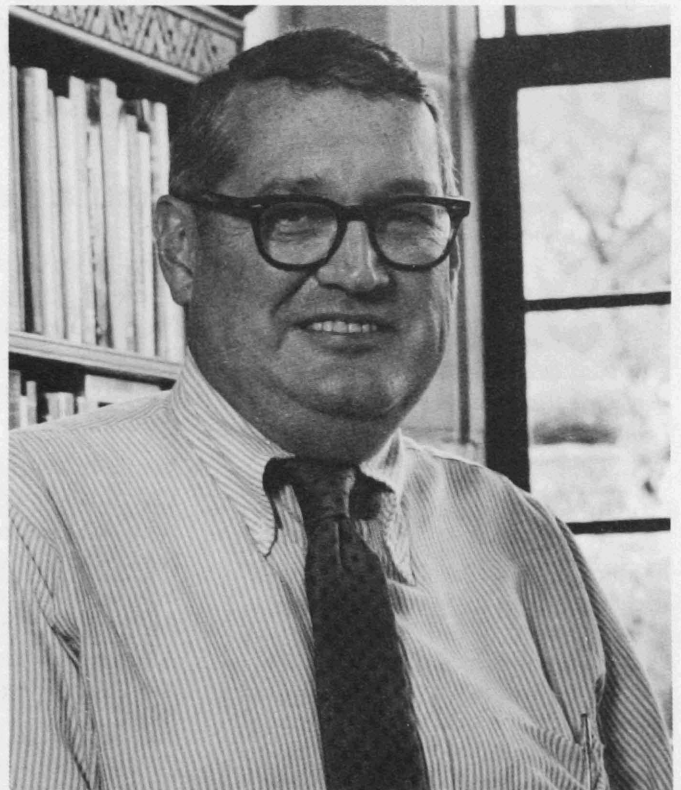
CONCLUSION

The social psychologists — and the medical diagnosticians — are only beginning to assess the full meaning of the loss of a job. At least we can now perceive that profound values are at stake, not just economic hardship. Beyond the clinically observable symptoms of

impaired, even shattered, minds and bodies, there is a genuine question of identity involved. Studies have found that "most, if not all, working people tend to describe themselves in terms of the work groups or organizations to which they belong. The question 'Who are you?' often elicits an organizationally related response. . . . Occupational role is usually a part of this response for all classes: 'I'm a steelworker,' or 'I'm a lawyer.'" To lose one's job is, in a true sense, to risk one's very being.

Rugged individualists though we may be, Americans eventually — if sometimes belatedly — recognize moral and social imperatives. In my view, reform of wrongful termination has now assumed that status, and I am confident we shall respond. But I do not expect a widespread response any time soon. It took us some 50 years longer than that hardly liberal statesman, Chancellor Bismarck of Germany, to see the need for social security.

On that timetable, counting from the ILO's initial call for just cause legislation in 1963, we shall have accomplished the task by the year 2013.



Susanne Coles-Ketchum

Theodore J. St. Antoine, the James E. and Sarah A. Degan Professor of Law, is a graduate of Fordham College and the University of Michigan Law School. He practiced in Cleveland, in the United States Army, and for a number of years in Washington, D.C. He is known for his writing in the field of labor relations and his extensive and important labor arbitration. He began his academic career at Michigan in 1965, and served as dean from 1971 to 1978.

Letters

A case of mistaken identity

In Volume 32, number 3 of your Spring Edition on page 22, you have my picture with Professor Derrick Bell and I am listed as Professor Littlejohn.

This is to inform you that I am not now nor have I ever been known as Professor Littlejohn. Some of my friends have accused me of moonlighting under another name.

— *Shelton C. Penn, J.D. '51*
District Judge
Tenth Judicial District
of Michigan



Judge Penn (left) met with Harvard Law Professor Derrick Bell.

On the late Prof. Bishop

To all of his students, colleagues and those who have the privilege of knowing him, Bill Bishop was a brilliant scholar, an inspiring teacher, an exemplary role model, a beloved mentor, and a good friend.

Bill Bishop to me was a *saya* in the fullest sense of the word. This is a Burmese word which means a teacher who is at the same time a scholar, role-model, guide, comforter and friend. As a scholar and

teacher he has imparted not only legal knowledge, but also intellectual honesty: a capacity to see, and a sympathy to understand other points of view. What better role-model can one give than to be a noted international legal scholar, a caring, conscientious and affectionate person that he was? But it is in his role as a guide, comforter, and friend that he means so much to me: his attributes in this regard surpassed the merely intellectual and moral level and reached spiritual heights. No doubt I have been greatly enriched by the intellectual and moral dimensions of his personality but it is the spiritual ones that make him stand out among all the *sayas* I know.

May my *saya* rest in peace.

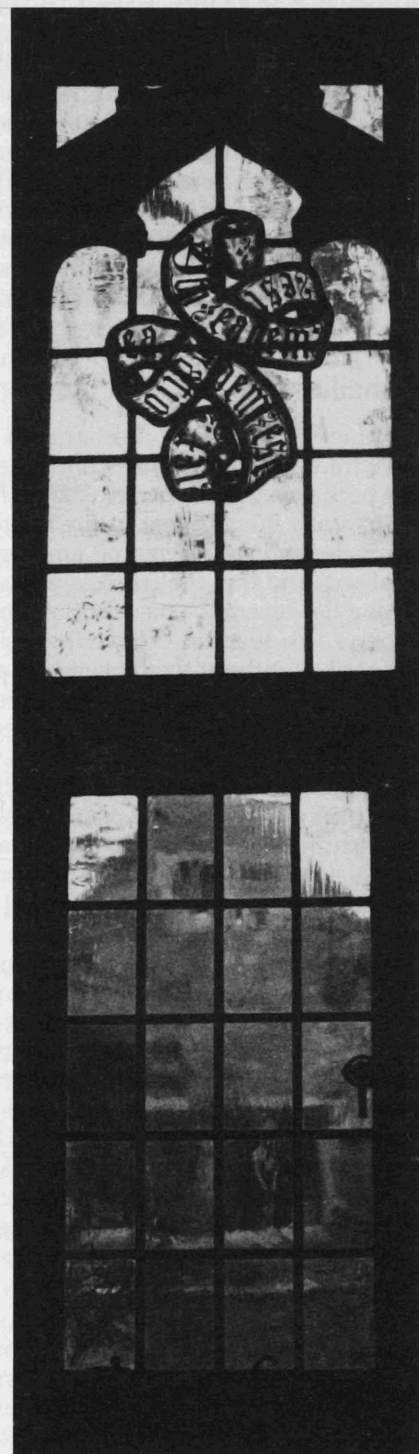
— *Myint Zan, LL.M. '82*
Mandalay, Burma

Coming events

Nov. 14-16, 4 p.m., Hutchins Hall: Cooley Lecture Series, featuring Prof. Louis Henkin, Columbia Law School, speaking on "Constitutionalism, Democracy, and Foreign Affairs."

Jan. 5-8, New Orleans: Annual Law School event in conjunction with AALS meeting. AALS members who graduated from the Law School will receive information in the mail, or they may call the Alumni Relations Office at (313) 936-2682 for more information.

Jan. 31-Feb. 2, 4 p.m., Hutchins Hall: Cook Lecture Series, featuring A. Bartlett Giamatti, president, National League of Baseball Clubs and former president, Yale University; topic to be announced.



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