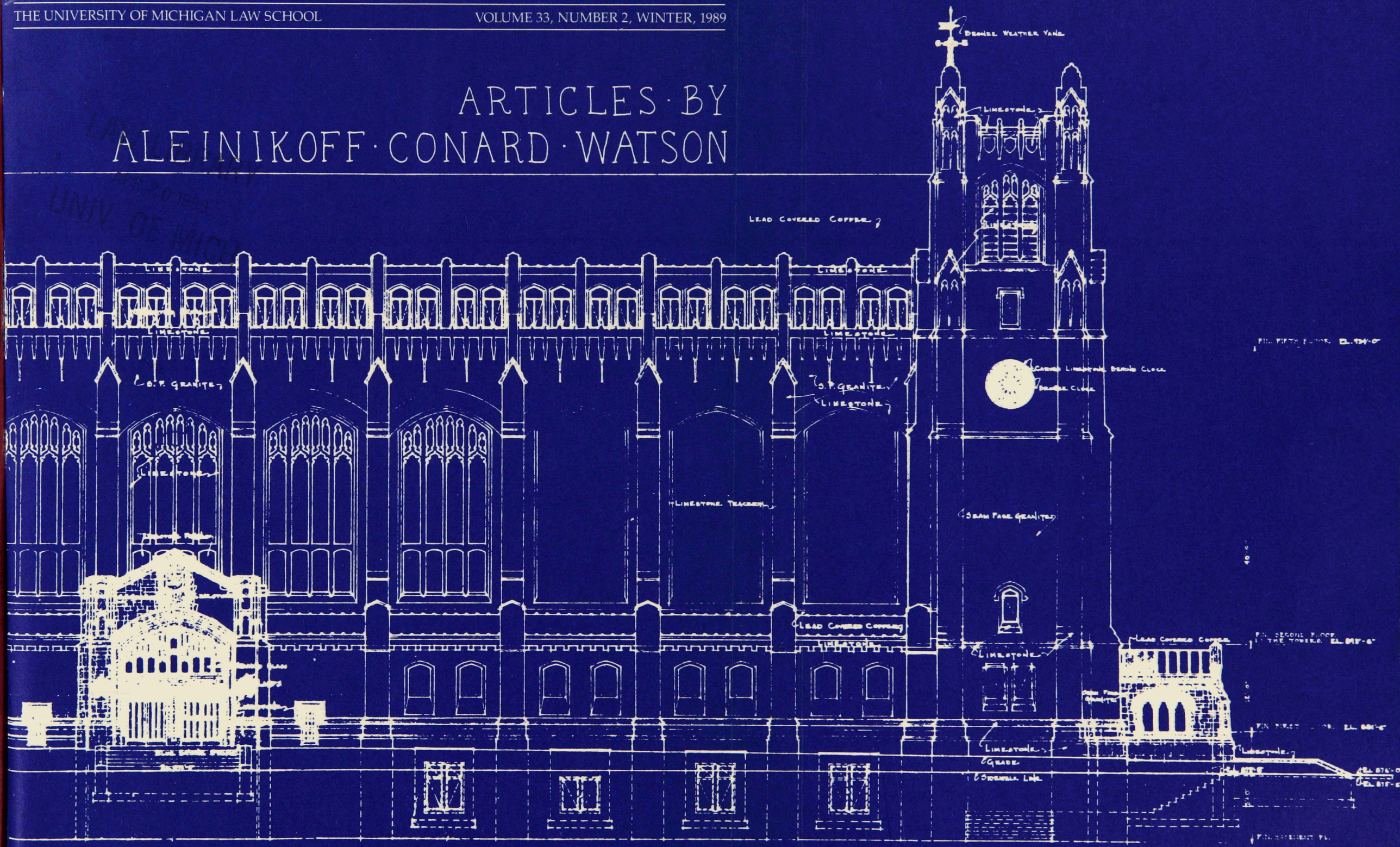
Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 33, NUMBER 2, WINTER, 1989

ARTICLES · BY ALEINIKOFF · CONARD · WATSON



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DEPARTMENTS

Illustration by Michael McGowan

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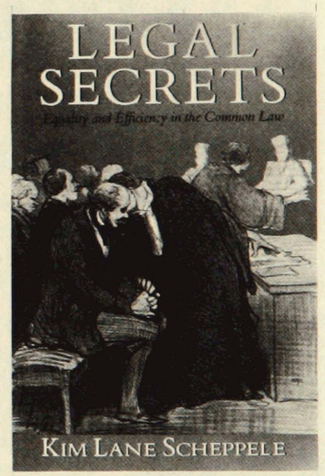

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Comings and goings

Profiles of Bradley, Fox, Simma, McCree

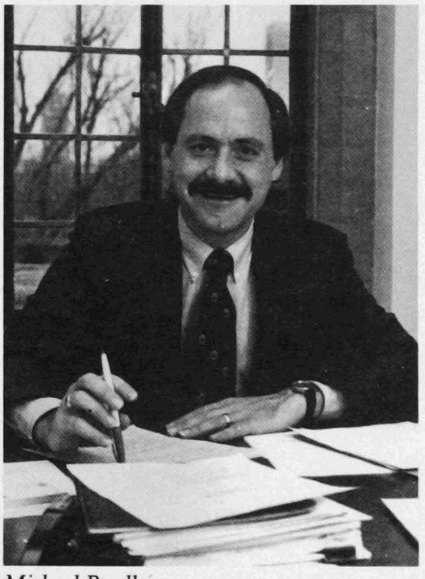
The Law School faculty and administrative staff continue to be strengthened by the addition of new members. In the present issue, *LQN* presents profiles of Michael Bradley, an expert on corporate finance; Merritt B. Fox, a specialist in securities; Bruno Simma, an internationally renowned scholar on human rights law; and Dores McCree, a new student services administrator who has had extensive contact with the legal profession. We are also including news of Head Reference Librarian Linda Maslow's departure for a parallel post at the U.S. Supreme Court Library.

Michael Bradley

Champion of hostile takeovers

A highly controversal issue in corporate governance recently has been the desirability of hostile takeovers. Michael Bradley, a nationally renowned professor of finance at the U-M Business School who now holds a joint appointment at the Law School, believes that hostile takeovers are beneficial to the nation's economy. "While there is an inherent suspicion of these transactions," asserts Bradley, "research indicates that they result in a higher value allocation of corporate resources and that the claims of detrimental effects are unfounded."

The Everett E. Berg Professor of Business Administration and one of the country's leading specialists in the area of corporate control, Bradley describes problems blamed on hostile takeovers as "smokescreens," explaining that occurrences such as plant closings or reduction in wages are really the result of economic conditions and would have happened in any case. Asked about the traditional idea that competition is good for the economy, Bradley explains, "We should realize that we are in a world economy and that to compete with multi-national conglomerates, companies have to be a minimum size." Another benefit of hostile takeovers, he argues, is that they "force corporate managers to be vigilant of what is going on in the marketplace and to comply with the discipline of the takeover market."



Gregory Fox

Michael Bradley

A native of Pittsburgh, Pennsylvania, Bradley moved with his family to Potlatch, Idaho, where his father bought a general store in 1965. "It was quite a change, going from an urban setting to a small town," Bradley recalls. "But I liked Idaho enough to go to college there."

After graduating from the University of Idaho with a major in applied economics, Bradley moved back to Pennsylvania to work for GTE-Sylvania, first as a systems engineer and then as manager of market research. He earned his M.B.A. while working at GTE by attending night school at Syracuse University. In 1973, Bradley continued his studies at the University of Chicago's economics department and started working on his Ph.D. in the business school the following year. In 1978 he joined the faculty of the University of Rochester.

A member of the U-M Business School faculty since 1981, Bradley began teaching courses at the Law School in 1983. Known as an outstanding teacher, he is also recognized an an incisive scholar whose research is widely cited in academic journals and Supreme Court decisions. His joint appointment was viewed as an important intellectual bridge between the schools of business and law. Commenting on the importance of teaching law students, Bradley says, "Corporate control issues have spilled into the law school. Lawyers, especially those going into business law, need to be aware of these issues and economic issues in general." Bradley believes that, with courts more likely to accept economic arguments, this knowledge is becoming increasingly important to law students.

Grace Shackman

Merritt Fox

Corporate and securities law specialist

"Too much investment decision making is occuring within corporations at the top," states Merritt B. Fox, a specialist in corporate and securities law who joined the faculty this fall. Current practices, he feels, "not only result in investments that enhance the interests of management more than those of shareholders, but they stifle innovation as well."

Fox developed this thesis in his recent book, *Industrial Performance in a Dynamic Economy: Theory, Practice*

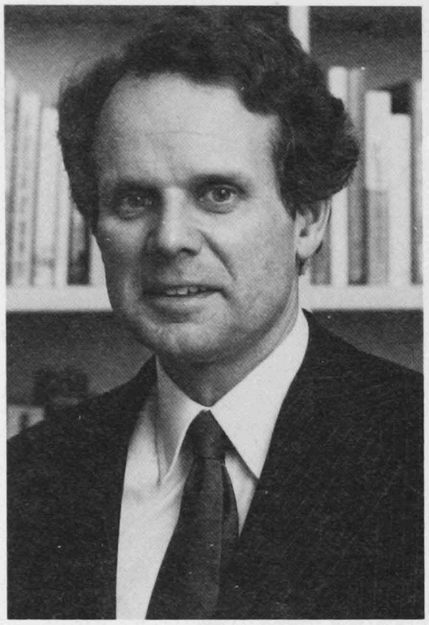
and Policy. "I wanted to ask why we have taken for granted the notion that corporations can retain as much earnings as their management wants," he explains. "It's worth reexamining our very strong presumption that the amount of earnings to be retained is management's decision alone."

Fox's appointment to the faculty demonstrates the Law School's strengthening commitment to the field of law and economics. His credentials include both a Ph.D. in economics and a J.D. from Yale; more than six years of experience with the Wall Street firm of Cleary, Gottlieb, Steen & Hamilton; and eight years as a law professor at Indiana University in Bloomington. In both private practice and in teaching, Fox's interest in law and economics has been focused upon international finance, corporate law, and securities law.

Fox has had wide ranging experience in areas unrelated to economics. At Yale, he worked for six years with political scientist and law professor Harold Lasswell on a project that explored the relationship between politics and architecture. Fox started out as a research assistant, taking photographs of over 1000 political buildings around the world, and later became a collaborator with Lasswell in writing *The Signature of Power,* the book that grew out of the project.

While in New York, Fox married Ann Gellis, an associate with Cleary, Gottlieb, who subsequently went into city government. In 1980, they both accepted appointments at the Indiana University Law School in Bloomington. At present Gellis remains with the couple's two sons in Bloomington, where she teaches property and local government law, while Fox commutes to Ann Arbor.

The contractual or agency theory of corporations is one area in which Fox is developing an economics based critique. "The thrust of this theory," he explains, "is that the corporation's articles of incorporation are, in essence, a contract among shareholders and management." The analogy to contract theory suggests that the terms of the articles are presumptively in the best interests of shareholders, and, thus, should be strictly construed when in conflict with the state corporation code. Fox disagrees. The assumption that corporate articles are in the best interests of shareholders is "not as dependable as these theorists claim. As a result, contractual theorists unduly limit the appropriate role of the legislature and the courts in structuring corporate decision making." Fox plans to become involved in the debate over "what disclosure regulations should look like in an increasingly global securities market."



Gregory Fox

Merritt B. Fox

Fox has found teaching at Michigan very exciting. "There appears to be a large student interest in the areas in which I teach," he observes. "Many of the students are willing both to master the technical details inherent in the subjects and to grapple in a sophisticated way with the policy issues that stand behind them. I enjoy the challenge."

Bruno Simma

A leading figure in international law

"It's a busy schedule," said Bruno Simma modestly, "but it does provide a regular dose of change." Recognized throughout Europe as one of the two or three leading figures in international law, Simma will be teaching at the Law School each fall. He also retains his posts as professor of international law and European Community law, and as director of the Institute of International Law at the University of Munich. He looks forward to his months in Ann Arbor: "In fact, when I come to Ann Arbor, 12 of 15 things that bother me I leave behind."

Simma is the co-author (with the late Alfred Verdross) of the most prominent textbook on international law in the German language, *Universelles Volkerrecht* (3rd edition, 1984). He is currently working on an English edition, which he plans to use in teaching his American students. Simma is also the editor of a 55-article commentary on the Charter of the United Nations, due to be published in time for the United Nation's 45th anniversary. "There will be two volumes, one in English and one in German," he explains. "There has been nothing comparable in English since 1969." Simma is also co-editor of a 31-volume documentation of international environmental law, entitled *International Protection of the Environment: Treaties and Related Documents (1975-1983).*

Simma is fluent in German, English, French, and Italian. He grew up in Bludenz, Austria, and spent a year in high school at Alleman High School in Rock Island, Illinois. He received his doctorate of law from the University of Innsbruck in 1966. His year at the U-M Law School in 1986 was only one of several visiting appointments he has held in Europe and in the United States.

Gregory Fox

Bruno Simma

Simma has been a government-appointed representative to the United Nations' Committee on Economic, Social and Cultural Rights since 1986, a position for which he expresses tremendous enthusiasm. "I am one of 18 independent experts who review reports submitted by the member countries of the International Covenant of Economic, Social and Cultural Rights. We, in turn, report to the Economic and Social Council of the United Nations. I find that the reports, and the meetings, provide excellent insights into the possibilities and limits of human rights, and the difficulties of working with sovereign nations." Governments, said Simma, are schizophrenic — "a pack of wolves talking about the protection of sheep" — and he finds the opportunity to work face to face with government officials instructive.

Since 1985, Simma has also been a member of the International Olympic Committee's Court of Arbitration in Sports. The Court's objective is to move the resolution of controversial issues concerning Olympic competitors away from national courts, in order to assure a fair hearing for participants. "The system is relatively undeveloped — with few precedents and little doctrine," noted Simma, "and as members of the Court we are faced with the task of working with a legal grey cloud." The question of the legal status of South African runner Zola Budd and the issue of the appropriate penalty imposed on Canadian track star Ben Johnson are examples of issues which may come before the Court in the future.

In addition to these professional activities, Simma has found time to enjoy some of Ann Arbor's fall pleasures, including attendance at the Miami-Michigan football game. "I found interesting," remarked Simma, "the lack of aggression in the audience, despite the intensity with which preparations were made. There were jokes flying back and forth between the Michigan and the Miami fans — compared to a soccer game in Munich, this was relaxed."

Marija Willen, Law, '89

Dores McCree

An invaluable resource

Dores McCree joined the Law School last fall as a student services associate and special projects administrator. She is the first person to hold this position, which was created to fill a void in the area of minority affairs. She spends much of her time working with minority students — in recruitment, placement, and alumni activities, as well as coordinating special projects.

"She has a vast understanding of the structure of the legal world and thinks creatively about ways our students might tap into it," observes Associate Dean Sue Eklund.

About her interaction with students, Mrs. McCree emphasizes, "My door is open to all students,

Gregory Fox

Dores McCree

not just minority students." For instance, she expressed concern over the special problems facing women law students who have young children. "The demands and pressures on them are infinitely greater than those confronting the single, childless student," she explains. "I feel that this group needs a good bit of support."

Mrs. McCree has been working with Placement Director Nancy Krieger to develop meaningful minority placement programs. "She's an invaluable resource to our office and is a joy to work with," states Krieger. Another area of involvement has been with the Financial Aid Office. Through Mrs. McCree's efforts, the General Motors Corporation recently awarded the Law School a $100,000 grant for minority student scholarships over a five-year period.

A graduate of Wayne State University, Mrs. McCree earned a library degree from Simmons College in Boston and pursued a long

and varied career as a librarian. She previously served at the Wayne County General Hospital Library, the Detroit Public Library, the University of Michigan Extension Library, and the Federal Trade Commission Library in Washington.

Apart from her professional background, Mrs. McCree has had extensive contact with the legal field and legal education as the spouse of the late Wade H. McCree, Jr. who served as judge, U.S. Solicitor General, and Law School professor. Mrs. McCree is also the mother of two successful attorneys — Kathleen McCree Lewis (U-M Law '73), a partner at Dykema Gosset in Detroit; and Wade Harper McCree, an associate at Lewis, White & Clay in Detroit. Her other daughter, Karen McCree, is an assistant in the Cultural Affairs Department in the Manhattan Borough President's office in New York City.

Mrs. McCree has this advice to offer law students: "Don't take yourselves too seriously. Law school is *only* three years of your life and then it's over; it's an interim, not an eternity."

Dianne Miller, Law, '89

Linda Maslow

Head reference librarian moves on to Supreme Court

After four years as the head reference librarian at the U-M Law Library, Linda Maslow assumed a parallel post at the U.S. Supreme Court Library in the nation's capital last October. "I could not imagine a better job. After four years you start to think about moving on, but usually you have to think about moving into a position that is purely administrative with less contact with people. The reason that I liked research and reference is because of the contact with the students and faculty," she said.

Gregory Fox

Linda Maslow

A 1980 graduate of the Harvard Law School, Maslow worked for two years as an associate with Webster and Sheffield, a New York law firm, but found the work unrewarding.

In 1982, she began working on a Master's in Library Science (MLS) at the U-M School of Library Science, supported by a fellowship from the Council of Library Resources. This course of study included an internship that took her to Northwestern University, where she worked in both the general university library and the law library. While working there, a person on Michigan's law library staff went on maternity leave and Maslow was appointed to a one-year, temporary position as a reference librarian. During that year, the reference department head position at Michigan became available and she landed the job in September 1984.

"This is certainly a very research-oriented library," said Maslow. "In addition, we are not only involved with the collection of strictly legal materials. We collect on the basis of faculty research and teaching interests so that we have current collections in many diverse fields, such as anthropology, sociology, economics, and the humanities.

In explaining how she came across the notice about her new job at the Supreme Court Library, Maslow attributed her good fortune to attending a recent meeting of the American Association of Law Librarians (AALL) in Atlanta. "The availability of the position was made known at that meeting," she said, noting that Margaret Leary, director of the Michigan Law Library, is the current president of the AALL. "As you might imagine, working as a law librarian for the U.S. Supreme Court is an enormously desirable position. I applied and was called for an interview. I ultimately got the job," she said.

"I have always been a big-city person and wanted to return to the east," added Maslow, a native New Yorker. "But I really have been impressed with Ann Arbor — its students and intellectual environment. I really enjoyed working here and will miss many of the people."

Clinton Elliott, Law, '91

Eclectic economist

Noll visits as Sunderland Fellow

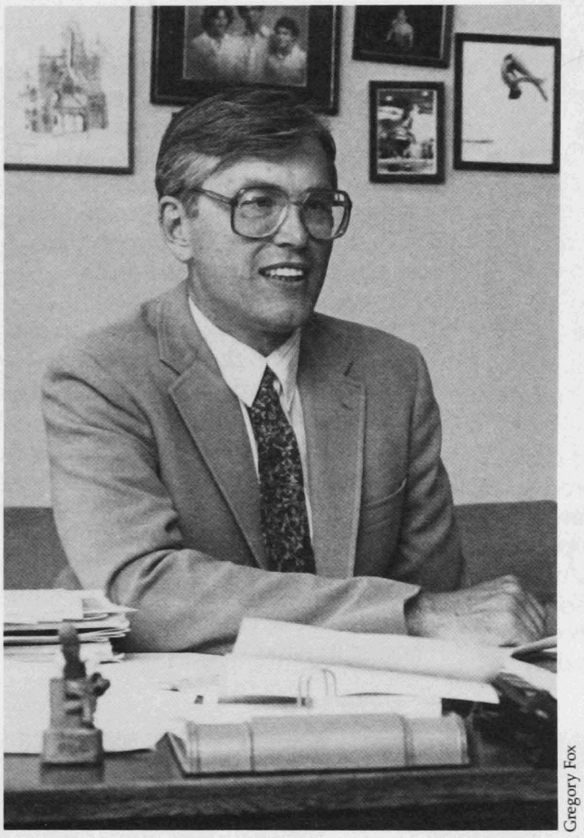
There is nothing that doesn't interest Roger G. Noll, last fall's Sunderland Fellow at the Law School. His official title at Stanford University is professor of economics, yet he has applied his expertise to extensive research in areas as diverse as broadcast and cable regulation, the environment, and professional sports.

Regardless of the specific area, Noll's work centers around government regulation and, in his words, "how the institutional arrangements matter — how structure affects performance." He is most interested in the consequences of regulation, focusing on observing the failure of programs. "I want to know why this phenomenon happens," he says. "Could one predict failure from the way a government program is structured?"

Noll first visited the Law School a year and a half ago as a guest lecturer for a session of Professor James Krier's law and economics seminar. Noll and Krier were colleagues on the faculty at the California Institute of Technology in the '70s.

Noll used the fellowship to clear up a backlog in his work before starting on his next project. The work that he finished includes a book on the economics and politics of government research and development policy. He also wrote a paper with Krier on the limitations of humans' cognitive functions on the ability to perceive risk, and the implications for regulatory policy. Noll describes this project as "thinking about disasters."

Finally, he finished a paper comparing Japanese structural policies to those in the U.S. Noll presented this piece at an international conference in Japan in November.



Gregory Fox

Roger Noll

After returning from Japan, Noll devoted the remainder of his time at Michigan to research on the policy effects of the Granger movement in the Midwest in the 1850s on formulation of economic regulatory policies.

Noll received a B.S. in mathematics from the California Institute of Technology and both an A.M. and a Ph.D. in economics from Harvard University. Before joining Stanford University as a professor of economics in 1984, Noll was professor and chairman of the Division of Humanities and Social Sciences at CIT. He served as a senior economist on the President's Council of Economic Advisors and also as a senior fellow at the Brookings Institute.

Noll has worked extensively with and in government advising on policy design and implementation. In addition to his position with the CEA, he has consulted for a number of government entities including NASA, the Internal Revenue Service, the Environmental Protection Agency, and the Federal Communications Commission. He currently sits on the Advisory Council of the National Science Foundation and the Energy Research Advisory Board of the Department of Energy.

Noll's consulting activities extend beyond the public and into the private sector. His projects include consultantships with professional sports teams and leagues; he has advised the players associations of major league baseball, the NBA, and the NFL on their collective bargaining agreements. Noll was also hired as a consultant by the United States Football League in their unsuccessful antitrust suit against the National Football League.

The Thomas E. Sunderland Fellowship is awarded annually to support scholars for a semester or an academic year of residence at the Law School. The fellowship is open to persons in fields other than law whose interests in some way relate to the study of law. Fellows are not required to teach while at the Law School. To encourage their scholarship, fellows are provided with office space and support staff, and may draw upon the resources of the entire University.

Dianne Miller, Law, '89

New chairs

Cooper, Krier receive named professorships

In recognition of their significant contributions to legal scholarship and their distinction in the classroom, Professors Edward H. Cooper and James E. Krier have been appointed to named professorships. Cooper has been named the Thomas M. Cooley Professor of Law and Krier, the Earl Warren DeLano Professor of Law.

Edward H. Cooper, who serves as associate dean for academic affairs, is highly regarded for a leading treatise on federal jurisdiction and civil procedure, which he coauthored, and for his work in antitrust law.

"As a teacher, Professor Cooper is widely respected by students," said Dean Lee C. Bollinger. "As associate dean, he has managed to be both supremely efficient and beloved by his colleagues."

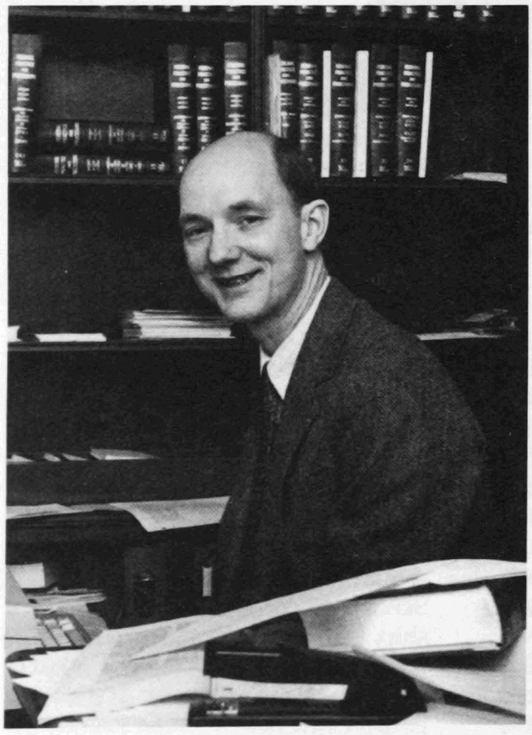
Cooper joined the Law School faculty in 1972, following private practice in Detroit and teaching at the Wayne State University Law School and at the University of Minnesota Law School. He received his A.B. degree from Dartmouth College in 1961 and his LL.B. from Harvard Law School in 1964.

Professor Cooper presently serves as a reporter on the Committee on Federal-State Jurisdiction for the Judicial Conference of the United States. He is also an advisor to the American Law Institute on its Restatement [Second] of Judgments as well as its Complex Litigation Project. He was recently elected to the Council of the American Law Institute, one of the most prestigious bodies in American law.

James E. Krier has authored and coauthored a large number of articles and books, primarily in the fields of property law and environmental law. As Dean Bollinger noted, "Professor Krier has enjoyed outstanding success in teaching, not only his primary subjects of environmental law and property law, but also such innovative subjects as legal writing for a lay audience." Much of his writing employs the tools of economic analysis and the perspectives of other social sciences to illuminate and guide legal doctrine. Krier's book, *Property,* coauthored with Professor Jesse Dukeminier of the UCLA Law School and now in its second edition, is the most widely used property course book in the United States.

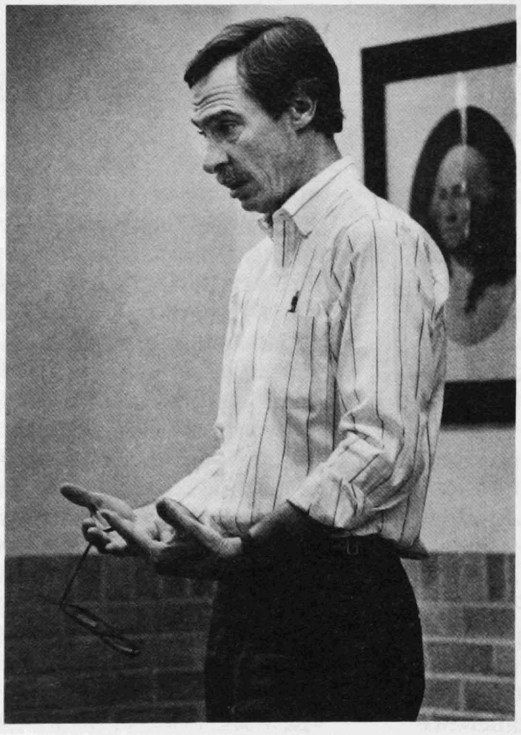
After graduating from the University of Wisconsin Law School, Krier served as a law clerk to the late Roger J. Traynor, chief justice of the Supreme Court of California. He practiced law with Arnold & Porter in Washington, D.C. and served as professor of law at UCLA and Stanford before joining the Michigan Law School faculty in 1983.

Krier, who regularly consults with governmental agencies on environmental problems, is directing his current research toward problems of risk management.



Gregory Fox

Edward H. Cooper



Philip Dattilo

James E. Krier

The sporting life

Kahn serving as Big Ten representative

Douglas Kahn, the Paul G. Kauper Professor of Law, has been appointed a faculty representative to the Big Ten Conference, which regulates the operation of athletic programs at the universities that comprise the Big Ten. Professor Kahn is one of the two faculty representatives for the University of Michigan. Attendant to that appointment, Kahn will also serve as a member of the Board in Control of Intercollegiate Athletics at the University of Michigan, and he will serve as one of the University's representatives to the annual meeting of the National Collegiate Athletic Association.

Among its numerous tasks, the Big Ten Conference establishes the academic standards that a student must satisfy for eligibility to compete in intercollegiate sports; establishes the standard of conduct for recruitment of student athletes and for their treatment while they are enrolled in school; monitors the conduct of the Big Ten universities to determine whether the academic and non-academic standards of the conference have been violated; determines the sanctions that are applied to a school that has been found to have violated the conference's rules; and negotiates television contracts for the member schools.

Professor Kahn is following in the footsteps of several former members of the law faculty who served for some years as faculty representatives. Professors Marcus Plant and Ralph Aigler each served in this post with distinction.

Gregory Fox

Douglas Kahn

Meeting global challenges

Jackson appointed U-M associate v.p. for international affairs

John H. Jackson, the Hessel E. Yntema Professor of Law and a specialist in legal issues related to world trade, was recently appointed associate vice president for academic affairs with responsibility for the U-M's international activities. The appointment is intended to highlight the importance of international and area studies at the University.

U-M President James J. Duderstadt, who helped establish the new position while he was provost, explained, "The depth and richness of our intellectual resources make the U-M one of the premier institutions in the nation for meeting the global challenges of the twenty first century. The University encompasses distinguished area studies centers, excellent international curricula in many disciplines, and a faculty that is highly regarded in international fields of scholarship. Professor Jackson's appointment will provide coordination and visibility to these extensive international capabilities which exist on our campus."

Part of Jackson's task will be to assist in designing an administrative structure that can efficiently handle communication and coordination of international studies and research. A key challenge, said Jackson, "will be to prevent the daily operational activities from crowding out the more important task of developing some plans and insights for the future of the University."

Gregory Fox

John H. Jackson

Jackson will continue to teach at the Law School on a half time basis while he holds the administrative post. While admitting that he

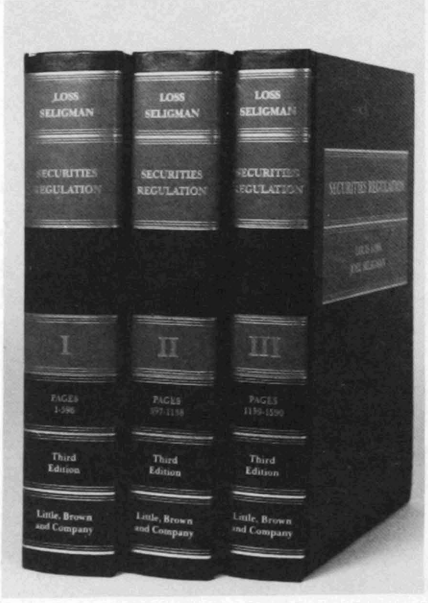
regrets having to postpone some of his planned research and teaching, he said that he considered the task he was asked to undertake sufficiently important to take precedence over his other plans. The administrative appointment, he says, "offers the opportunity to coordinate some of the planning which is already going on within the Law School about international legal studies with the broader plans of the University as a whole."

A member of the Law School faculty since 1966, Jackson has also served as general counsel of the U.S. Office of Trade Representative, as a Rockefeller Foundation Fellow studying the European Common Market, as a consultant to the U.S. Congress on matters of international trade negotiations, and as a visiting fellow at the Institute for International Economics in Washington, D.C. He is the author of several books and numerous articles on contract law and international economic relations.

Time out for humor

Seligman expounds on the poetry of corporate law

Professor Joel Seligman, widely known for his work in the area of securities regulation, is currently working on the third edition of Louis Loss's treatise on the subject. As of early December, Seligman and Loss had already completed a sizeable portion of this monumental task: three volumes out of a total of twelve had already been published and another was soon forthcoming. Published by Little, Brown, the new treatise is intended to fill a gap in work on the subject created by the dramatically broadened scope of securities regulation law as well as by administrative and judicial changes.



Gregory Fox

Equally as impressive as the size and significance of this work is the fact that throughout the project, Professor Seligman has lost neither his endearing personality nor his engaging sense of humor. When asked how he has managed to hold up under the heavy pressures of publication deadlines and teaching, Seligman admitted he occasionally turns to various extracurricular outlets, i.e. collecting works of poetry and cartoons on the subject of corporate law. The following examples speak for themselves.

The poetry of corporate law

by Joel Seligman

The etymology of corporate and securities law has received a fair amount of informal study. Any field that includes terminology as colorful as "red herring" prospectuses, "tombstone" ads, and junk bonds, no doubt, deserves such study. But I have become convinced that corporate law etymology promises more than it delivers. Rarely have terms such as "tramp corporations" or "piercing the corporate veil" been less related to their substance. While such phraseology may suggest the slightly salacious fantasy life of bond indenture attorneys, it has little else to recommend it. I have also been disappointed by the variability of terminology. Thus, one person's "poison pill" is another's "rights plan;" one person's "death sentence" provision is another's "new lease on life;" one person's "greenmail" is another's "selective stock repurchase."

To be sure, insisting on literalness in definition can make one guilty of what Jerome Frank called the "pigs is pigs fallacy" by which one insists that each word has only one meaning. Employing this fallacy, one could not drink a toast, and a hot dog would be a species of the canine variety. On the other hand, when words cease to have any relation to underlying meaning they cease to be "the skein of a living idea." Thus, while one may admire the ingenuity of the originator of a phrase such as "lollipop defense," it is mystifying why it should mean a tender offer by an incumbent management for all shares but a rival bidder's. Similarly, a phrase such as the "Lady MacBeth defense" has a certain classical air to it. But, as is the case in many of the classics, few, if any, scholars fully recall what it means.

Corporate law has also led a rather disappointing life in most areas of

literature. During a few of the early editions of their celebrated casebook on securities regulation, Richard Jennings and Harold Marsh recommended a novel, *The Comfort Letter*, a fictionalized account of a securities fraud. Reading this work went far to persuade me that truth is often more interesting than fiction. Theodore White, the noted journalist, wrote a fictionalized account of his unsuccessful effort to rescue *Collier's* magazine, entitled *A View from the Fortieth Floor*. The book was sufficiently disappointing to him that he next proceeded to write the "Making of the President" series. In that instance, all was well that ended well. More recently, H.F. Saint wrote *Memoirs of an Invisible Man*, a work that included brief, rather dreary moments of insider trading.

In only one area of literature has the rather limited promise of corporate and securities law been fully achieved. That is poetry. While there are no Miltons or Shakespeares among the authors who find their muse here, the poetry produced in this field, I suspect, compares at least moderately well with counterpart works in labor or environmental law.

Let me offer a few illustrations.

The first poem dates back to a 1926 controversy concerning nonvoting common stock, a controversy recently reprised without poetry. This controversy prompted the *New York World* to publish a satirical verse, "On Waiting in Vain for the *New Masses* to Denounce Nonvoting Stocks."

Then you who drive the fractious nail,
And you who lay the heavy rail,
And all who bear the dinner pail
And daily punch the clock —
Shall it be said your hearts are stone?
They are your brethren and they groan!
Oh, drop a tear for those who own non-
voting corporate stock.

Federal securities law requires the registration of publicly issued securities, but not privately placed ones. For decades the difference between public and private sale turned on whether a sale was made with "a view to distribution," a highly subjective concept that found its most bewildering applications in the "change of circumstances" doctrine. C. Leonard Gordon, a New York attorney, memorably explained:

If you buy stock privately,
Enlightened counsel will implore;
Heed the Act of Thirty-Three,
Subsection One of Section Four.
Make your purchase for investment.
Have a clear and pure intent.
Do not think about divestment
Till some unforeseen event.
Avoid the Crowell-Collier snare
Be one of few and not of many.
You need not be a millionaire
But don't go in with your last
penny . . .

Thereafter, changing factors which
Might make a sale by you exempt
Must be a bad and sudden switch
Which justifies a changed intent.

- continued -

Drawing by Charles Addams; © 1979 The New Yorker Magazine, Inc.

"There's no cause for panic, Mrs. Munson, but, frankly, there are certain indicators that cannot be ignored."

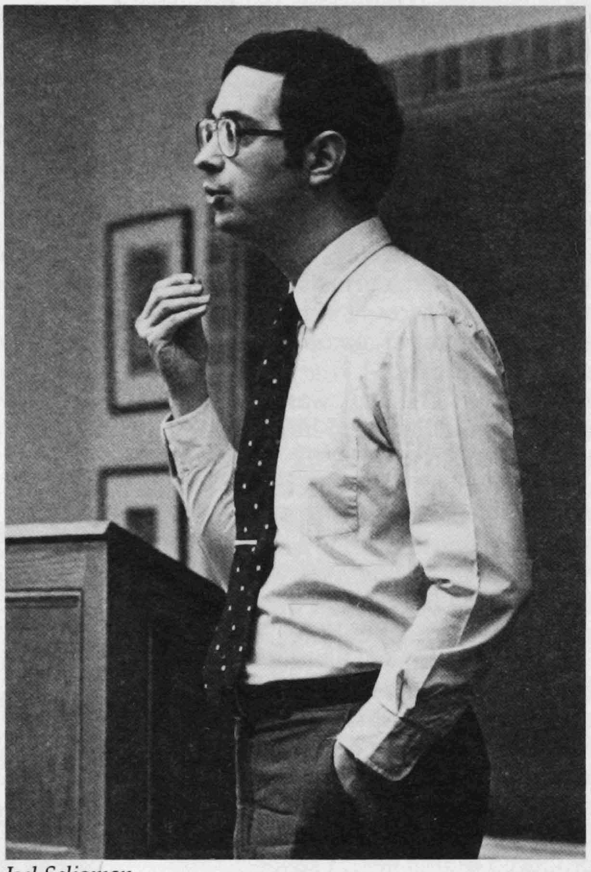
When you have held two years or more
That sad and unforeseen event
Need not be tragic as before
To justify a new intent!
So put your stock upon the shelf;
Don't question when it will be free.
The very thought defeats itself
With legal logic's subtlety.
With time and troubles, you may get
Advice of counsel or, much better,
Advice to sell that's safer yet —
An SEC "no action" letter.

David Ratner, while a professor of Cornell Law School, I believe, was one of the few professors to suspect the implicit poetry of the field. At one point, he went so far as to suggest that much insider trading law could best be understood as an opera.

The heroine of the opera is Dieci Becinque (10b-5), a beautiful 30-year-old rule, much beloved by securities lawyers everywhere. In the first act, we find her in a marble temple surrounded by nine high priests who sing her praises. First Willio, the eldest priest, sings his famous patter song, "Il Sovrintendente d'Assicurazione" ("The Superintendent of Insurance"), in which he eulogizes 10b-5 as the solution to all the wrongs of mankind. The act closes with Blackmunio's aria, "I Uti Affiliati", in which he lauds her as the savior of the oppressed Indian tribes of the American West.

After a three-year intermission, the curtain rises on the second act. We find our heroine in the same marble temple, but the mood has changed dramatically. Two new priests, Paolo and Rehnquistio, are sworn to destroy her. In the opening aria, "La Scheggia Azzurra" ("The Blue Chip"), Rehnquistio tells her that only one who has paid the price may enjoy her affections. This is followed by the rousing "Ride of the Hochfelder," in which Paolo tells her that she was born in manipulation and deception and may only deal with wicked people. Next, in the haunting aria "O Santa Fe" ("Oh, Holy Faith"), Bianco declares that she must have nothing to do with corporate managers, no matter how wicked they are. Finally, in "La Chiarella" ("The Little Printer"), sung again by Paolo, she is told that nobody must have anything to do with her unless he has first breached a specific duty to his fellow man.

What I particularly like about Ratner's Opera is its ability to inspire derivative works. One night while teaching at George Washington Law School, I reread his work and immediately conceived the first verse of "Insider's Blues." Lisa Eggert and Liz Arky, two of my students, then wrote the rest (sung to the tune of "16 Tons").



Gregory Fox

Joel Seligman

16(b) Whose ox gets gored:
Officers, 10 percent owners and members of the board.
If within six months you buy and sell
Then all your profits are shot to hell.

But the SEC said, "That's not enough."
So they rolled up their sleeves and they got tough.
Fraudulent trading will no longer thrive
Once we create Rule 10b-5.

Now if you misstate or omit a fact
The Commission will be on your back.
So if you have info that no one else knows
Your basic choice is abstain or disclose.
Though 16(b) applies to only a few
Rule 10b-5 reaches nearly all of you.
So if you have a duty, this advice you must choose
Or else you'll be singing the "insiders' blues."

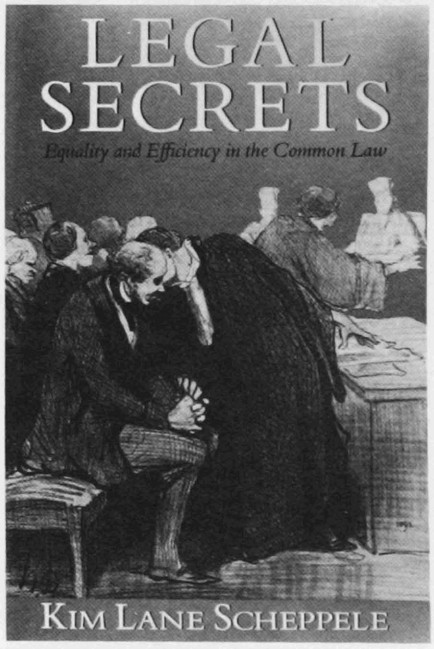
There is finally the most quixotic effort in the field. About ten years ago, two securities attorneys announced that they found "poetry" in the provisions of the Trust Indenture Act. I carefully read their article but found no proof of this assertion, but on second thought decided that its title alone suggested a certain poetic bent. It was, "Put a Bullet in the Poor Beast. His Leg is Broken and His Use Is Past. Indenture Trustee: A Proposal to End It in the Public Interest," 32 Bus. Law. 1705 (1977). Anyone who could write a title like that is fully entitled to find poetry in any statute.

Legal Secrets

New book by Scheppele explores efficacy in the Common Law

Gregory Fox

Kim Scheppele



Gregory Fox

Must a seller of a house tell the buyer that the water is turned off for twelve hours everyday? The courts say yes. But why, then, is a buyer of a great quantity of tobacco not impelled to inform the seller that the military blockade of a local port, which had depressed tobacco sales and forced down prices, is about to end? On what basis is the difference in judgment drawn? How can we understand this difference?

These seeming inconsistencies emerge somewhere amidst the process of interpreting the law. Kim Lane Scheppele, adjunct faculty member at the Law School and assistant professor in the Department of Political Science, confronts the confusion by answering the question, "Which secrets are legal secrets and what makes them so?" Her recently published book, *Legal Secrets: Equality and Efficiency in the Common Law* (University of Chicago Press, 1988), offers a reconciliation for legal discrepencies, and sheds light on the ethical questions of our society, such as whether the psychiatrist should disclose to his patient's girlfriend that his patient wants to kill her. Scheppele shows how other disciplines in the social sciences and the humanities border on and develop with the culture of law, and how these connections have become more apparent in the recent concern over legal interpretation.

In exploring legal secrets and what defines them as such, Scheppele poses a challenge to the economic theory of law which argues that judges decide cases in ways that maximize efficiency, and she asks whether these secrets are also efficient secrets. Scheppele argues that the economic view of law is not complete. In addition, Scheppele explains questions about general judicial reasoning, such as how a judge reaches a resolution in a dispute built from facts and rules, and how he or she filters the values of the legal culture into every fact summary.

Ultimately, Scheppele shows how these specific insights into legal secrecy are consistent with the moral theory of law. She suggests that a general moral theory indicates that the content of law in a democracy is a justification which rests upon the consent of the governed.

More than a book about legal secrets, *Legal Secrets* demonstrates the limits of the economic view of law. This is a work of constructive legal theory that draws on moral philosophy, sociology, economics, history, and political theory, in order to develop a new angle from which to view legal interpretation and legal morality.

In a pre-publication review, James S. Coleman of the University of Chicago, one of the nation's top ranked sociologists, calls the book "a strikingly powerful and original analysis." He writes, "I expect *Legal Secrets* to become a landmark study, both because of the quality of the legal research on which it is based and because of the thesis Scheppele sets forth. If Scheppele can successfully contend against the efficiency position, the consequences for legal theory are very great indeed."

Legal Secrets, predicts Jules L. Coleman, Yale University Law School, "will be influential among law and economics scholars, jurisprudes, and contract theorists. It is a highly original work, one that is sure to be controversial."

Deborah Gray, LSA, '89

Faculty honors, activities

Courtesy of the Ann Arbor News

Yale Kamisar

Yale Kamisar, the Henry King Ransom Professor of Law, had a busy fall 1988 semester. For the tenth consecutive year he was one of the three principal speakers (along with Dean Jesse Choper and Professor Laurence Tribe) at U.S. Law Week's annual two-day constitutional law conference (Sept. 8-9, Wash., D.C.). On October 7, in Minneapolis, Minn., he spoke about recent developments in constitutional-criminal procedure, at a conference celebrating the 100th anniversary of the University of Minnesota Law School. On October 22, in New York City, he delivered the keynote address at the Legal Aid Society's conference marking the 25th anniversary of the *Gideon* case. Four days later he was back in New York, participating in a panel discussion on drug testing and the Fourth Amendment, held at Columbia Law School.

Frank R. Kennedy, the Thomas M. Cooley Professor Emeritus at the Law School, presented a lecture on the Supreme Court's interpretation of the Bankruptcy Reform Act of 1978 during the decade since its enactment at the Williamsburg Conference on Bankruptcy. The conference was presented by the American Law Institute-American Bar Association Committee on Continuing Professional Education last October 17. Kennedy also participated in two panels at the conference: on Priorities and the Avoiding Powers and on the Agenda for Reform.

Gregory Fox

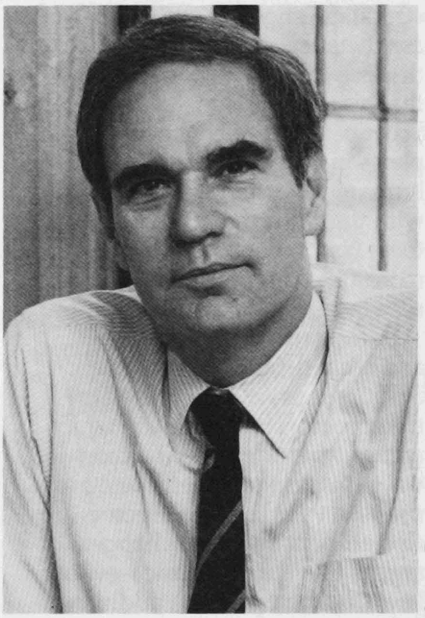
Frank R. Kennedy

Sallyanne Payton received the Stanford University Law School's 1988 Award of Merit at its annual Alumni/ae Weekend last fall. Stanford Dean Paul Brest toasted Professor Payton as "a true path-breaker with a history of service to government [and] legal education."

Gregory Fox

Sallyanne Payton

Joseph Vining, Hutchins Professor of Law, participated in two panels in a Symposium on Law, Religion, and Ethics at Hamline University, St. Paul, MN last October 13 and 14. The symposium was designed to consider how theology and ethics may shed light on law, the vocation of law, and the relation of law to justice.



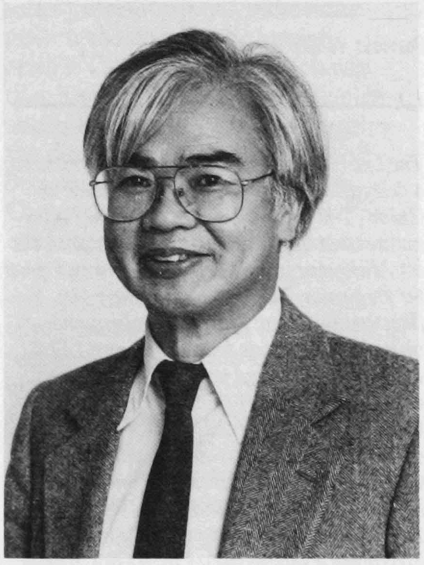
Gregory Fox

Joseph Vining

Visiting faculty

Three visiting faculty taught at the Law School during the fall semester: Koichiro Fujikura, Frances Olsen, and Stewart Schwab.

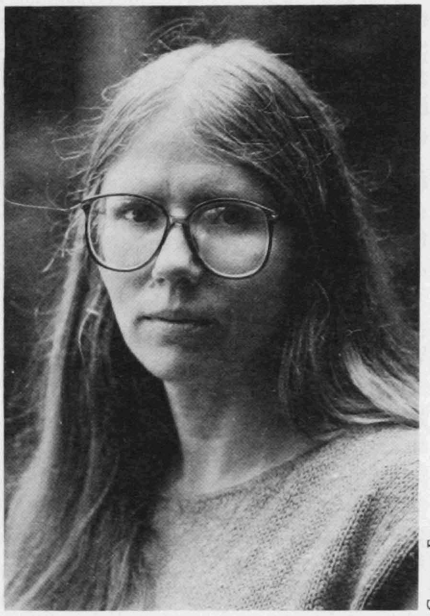
Koichiro Fujikura, a professor at the Faculty of Law, University of Tokyo, taught a course on Japanese law. He previously served as a visiting professor at Duke Law School and the University of California-Berkeley. Professor Fujikura earned his LL.B. from Doshisha University in Kyoto in 1957; and then studied political science at Amherst College, where he earned a B.A. in 1961. He also holds two LL.M. degrees, one from Northwestern University Law School and another from Harvard.



Gregory Fox

Koichiro Fujikura

Frances Olsen visited from UCLA, where she has taught since 1984. Olsen has written numerous articles on legal theory, particularly focused on feminism. At Michigan she taught a seminar entitled "Toward Feminist Jurisprudence" together with Prof. Christina Whitman, as well as a section of torts. Olsen received a B.A. from Goddard College in Plainfield, Vermont; and, in 1971,



Gregory Fox

Frances Olsen

a J.D. from the University of Colorado. She clerked for a federal judge before representing the American Indians at Wounded Knee, South Dakota, throughout the 1973 seige by the U.S. Government. Olsen then opened a public interest law firm in Denver. She entered academia in 1975, teaching at the University of Puget Sound, Western New England Law School, and St. John's University in New York. She received an S.J.D. from Harvard Law School in 1984. She was voted a fellow of New College, Oxford University in Hilary Term 1987; and a member of the Senior Common Room, Brasenose College, Oxford, in Trinity Term 1987.

Stewart Schwab, on the law faculty of Cornell University, taught a course on labor law and a seminar on economics and the law at Michigan this fall. Schwab earned his B.A. in economics at Swarthmore College and did research at the Federal Reserve Bank of Philadelphia before coming to the U-M, where he earned both a J.D. ('80) and a Ph.D. in economics ('81). After graduating, Schwab clerked for Judge J. Dickson Phillips, U.S. Court of Appeals for the 4th Circuit, in Durham, North Carolina; and then for U.S. Supreme Court Justice Sandra Day O'Connor.

Professor Schwab has written extensively in the areas of tort litigation and labor law.

Gregory Fox

Stewart Schwab

Two visitors are teaching at the U-M for the entire school year.

Menachem Mautner is a senior lecturer at the Tel Aviv University Faculty of Law, where he received his LL.B. and his LL.M. After completing his legal degrees, he was appointed legal advisor to the Ministry of Defense. In the years 1977-1979 he participated in the peace negotiations between Israel and Egypt as a member of a high-level governmental team. From 1979 to 1982 Mautner studied at Yale Law School, where he earned both an LL.M. and a J.S.D. Mautner has been teaching and writing in the areas of contracts, international trade law, and bankruptcy. He is a

B R I E F S

Gregory Fox

Menachem Mautner

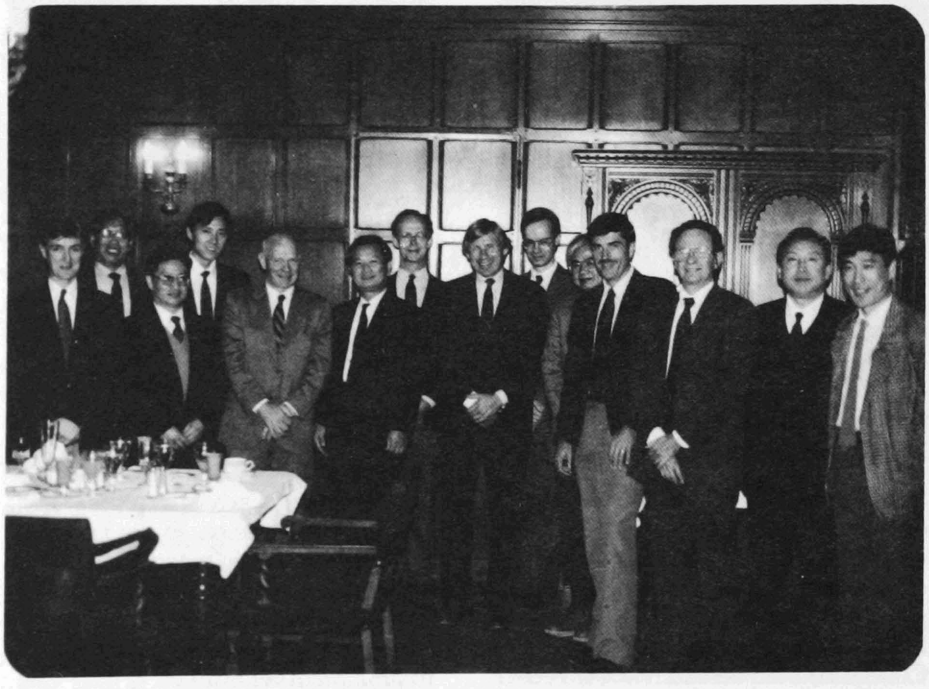
member of the committee for the preparation of the new civil code of the state of Israel. At Michigan, he is teaching commercial transactions during both terms.

Patricia D. White, a specialist in taxation and legal philosophy, visited from Georgetown University. She holds three degrees from the U-M: a B.A. in philosophy ('71), a J.D. ('74), and an M.A. in philosophy ('74). White practiced law with the Washington, D.C. firms of Steptoe & Johnson and Caplin & Drysdale from 1975 to 1979. She joined the faculty of the Georgetown University Law Center in 1979. She visited previously at the Law School in 1984-1985.

Last fall she taught federal income tax and trusts and estates; this winter she is teaching two tax courses.

Gregory Fox

Patricia White



The Law School hosted in October a visit by a delegation from the People's Republic of China. The delegation was gathering information and opinions in connection with the establishment of the Chinese Training Center for Senior Judges. During their stay they met with law faculty members and visited the Institute for Continuing Legal Education. Pictured above at the dinner given for them by the Law School are (left to right) Kevin Kennedy, editor-in-chief of the Michigan Law Review, who speaks Chinese and is concurrently working on a master's degree in Chinese politics; Wang Zenong, a high-ranking official in the State Education Commission; Dean Gu Chunde of People's University Faculty of Law in Beijing; Lin Yi, a young teacher from Wuchan University currently a visiting scholar at the Law School; Professor James J. White; Shou Daolnan (delegation leader), Justice of the Supreme People's Court and member of its important Judicial Committee; Professor Whitmore Gray; Dean Lee Bollinger; Professor Kent Syverud; Professor Koichiro Fujikura of the University of Tokyo Law Faculty, currently visiting professor at the Law School; Professor Martin Whyte (Sociology); Professor Donald Munro (Philosophy); Dean Zhao Shenjiang and Vice-Dean Wang Chenguan of the Peking University Law Faculty.

Henkin delivers Cooley Lectures

Scrutinizing constitutionalism, democracy, foreign affairs

The Thomas M. Cooley Lectures last fall were delivered by Louis Henkin, University Professor Emeritus and Special Service Professor at Columbia University. The topic was "Constitutionalism, Democracy and Foreign Affairs," and the three lectures were entitled "Tension in the Twilight Zone: Congress and The President," "The Treaty Makers," and "Courts in Foreign Affairs."

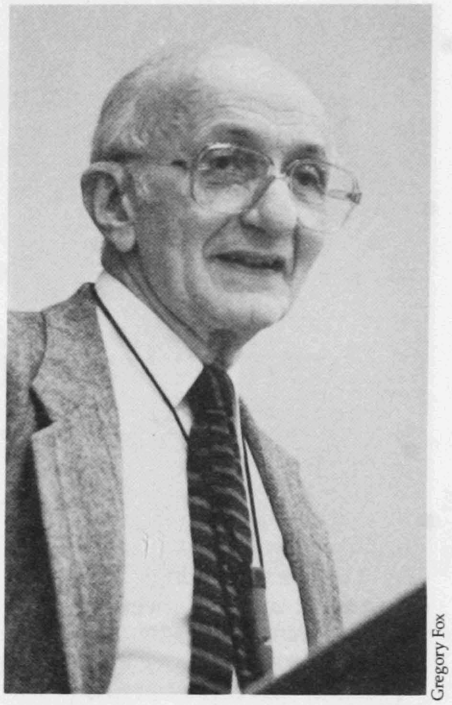
The lectures centered on the question of whether the Constitution is satisfactory for the third century of United States history, particularly where constitutional provisions govern the conduct of foreign affairs. Despite sweeping changes that have taken place since the constitution was adopted — including the development of the executive bureaucracy, the complexity of Congress, the expansion of the judiciary, and the growth of the country in general — the original provisions still remain. Consequently, uncertainty exists about the nature of the responsibilities of the different branches of government. Henkin suggested that the executive branch may have taken on more than is warranted in a system where the branches of government are supposed to balance one another out. "If the Constitution does not require new organs," he contended, "it is time for a check up and some rehabilitation."

In the first lecture, Henkin examined the respective constitutional authority of Congress and the president. He began by distinguishing the powers of Congress from the powers of the president, and continued by exploring the evolution of those powers. He explained that even if Congress had intended to have comparatively greater powers with respect to foreign affairs, as the system has evolved, it is the president who takes the reins.

Henkin concluded with a discussion of the evolution of the United States from republican to democratic, using that as a basis for the argument that the need for congressional participation is even greater. "If I'm correct," said Henkin, "Congressional activism is not usurpation, it's mandatory . . . Constitutionalism, individual rights, good government as well as democracy demand fewer decisions by one representative alone for war or in peace."

In his second lecture, Henkin addressed the adequacy of our constitutional jurisprudence on treaties for the next century. First, he explored the "advice and consent" role of the Senate, from Article II, Section 2. The Senate, Henkin said, has developed a role less of "advice and consent," and more of "consent on conditions." Henkin examined in particular the ABM treaty and the reactions of the Senate to the president's interpretation of it. Second, Henkin briefly explored the role of treaties in domestic law, positing that the Framers "were really quite committed to the law of nations." Henkin concluded with an appeal to a return to the "advice" function of the Senate. "As long as we live with this one," Henkin said, "what we need is presidential candor and honesty with the Senate and senatorial self-restraint."

Henkin's third lecture concerned the courts and foreign affairs, and focused on judicial review — the responsibility of the courts to scrutinize governmental action to assure its conformity to the Constitution. Henkin discussed the issues concerning the level of responsibility the courts have taken, and should



Gregory Fox

Louis Henkin

take, specifically dealing with the political question doctrine. Henkin took the position "that the courts ought to decide the constitutional issues even if they can't give a particular remedy and maybe even if they can't give any remedy at all," a position which Henkin admitted to be "highly controversial." He continued: "I think if you told the president and the courts and the Congress in a particular case what their respective authority is they would come up with a remedy and I'd be willing to let them try."

Educated at Yeshiva College and the Harvard Law School, Professor Henkin served as an officer in the Bureau of International Organization of the U.S. Department of State for ten years. He has earned a national and international reputation as a leading scholar in constitutional and international law. Henkin was responsible for tough, two-year, continuous negotiations that led to the end of the Korean War — a major achievement of American diplomacy.

- continued -

The Thomas M. Cooley Lectureship was established by the faculty of the University of Michigan Law School in order to stimulate research and to communicate its results in the form of public lectures. The Lectureship is supported by the William W. Cook Endowment for Legal Research and is named in honor of Thomas M. Cooley, one of the leading figures in 19th century American law and scholarship who served as dean of the U-M Law Department and as a member of the Supreme Court of Michigan. This year's lectures will be published in full by the *Michigan Journal of International Law* in a future issue.

Marija Willen, Law, '89

Return of the Visitors

Annual meeting explores state of the School

The annual three-day Committee of Visitors meeting, held last October 20-22, included the usual combination of business meetings, panel discussions, informal meetings with students, class visits, and conviviality.

Featured this year as faculty luncheon speaker was Jeffrey S. Lehman, who presented his views on the recently enacted Michigan Educational Trust Fund in a speech entitled "Thinking About Societal Responses to the High Cost of College." Lehman, who together with his colleague Kent Syverud has examined the ramifications of the new proposal, questioned the state's ability to meet its obligations to families who invest in the program in the light of the projected costs of a college education in the coming decade. He also examined the effects the proposal might have on the quality of education in state supported institutions.

The agenda for the visitors and faculty also included a panel discussion on teaching professional responsibility.

The Friday evening dinner in the Lawyers Club Lounge was followed by entertainment in the library Reading Room. Heading the bill was a performance of *Antigone's Reply,* an original choral work written by nationally renowned composer William Albright. The work, commissioned by the Law School, is based on a translation from the Greek by Joseph Vining and James Boyd White. This performance was followed by a trumpet solo by Armando Ghitalla, another U-M music school virtuoso, and capped by Albright's return to the piano to play a lively group of rag numbers.

Following a Saturday morning business meeting in the Michigan Stadium Press Box, the visitors and hosts were treated to a decisive Michigan victory over Indiana on the gridiron.

Gregory Fox

An appreciative audience greeted the performance with warm applause.

Gregory Fox

Soprano Laura Lamport from the School of Music was featured in a performance of Antigone's Reply.

Indicting pornography

Dworkin presents feminist prespective

Andrea Dworkin, controversial feminist author and theorist, spoke to an enthusiastic audience at Rackham Auditorium on Friday, November 18, 1988. In her powerful and bitingly sarcastic manner, Ms. Dworkin detailed the central role that pornography plays in women's subordination in society. Citing examples of some of the most shocking forms of pornography, including rape and torture scenes, murder films, and pornography in which "race hatred is sexualized," Dworkin scoffed at the notion of such acts being protected by the First Amendment.

Dworkin argued that the Constitution's free speech provisions do nothing to protect the women whose acts of submission are photographed or filmed, many times by force, and sold on the market.

Many lawyers and law students are familiar with the anti-pornography ordinances that Dworkin co-authored with legal scholar Catharine A. MacKinnon. In her address, Dworkin spoke of her frustrations in trying to have these ordinances passed. The Minneapolis City Council passed such an ordinance in December 1983, but the city's mayor vetoed the law the following January. The mayor of Indianapolis, however, signed into law an anti-pornography bill that made pornography a form of discrimination against women, and violators were subject to civil suits. That law, too, was struck down.

Dworkin is author of several classic feminist works — *Pornography: Men Possessing Women*, *Right-Wing Women*, and most recently *Intercourse*.

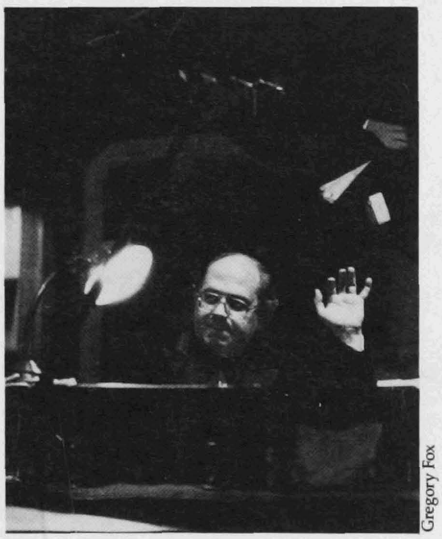
Following her talk, the audience gave Dworkin a standing ovation. Afterwards, Dworkin answered questions from the audience and signed books. She later met with the Law School's "Feminist Jurisprudence" seminar to further discuss her work. Dworkin's appearance was sponsored by the Law School, Women Law Students Association, Lesbian and Gay Law Students, National Lawyers Guild, Michigan Student Assembly, Rackham Student Government, and Law School Student Senate Speakers Committee. It was organized by Laura Anderson '89 and Holly Fechner '89.

Gregory Fox

Andrea Dworkin

Gregory Fox

Trumpet virtuoso Armando Ghitalla performed several solo numbers as part of the post-dinner entertainment.



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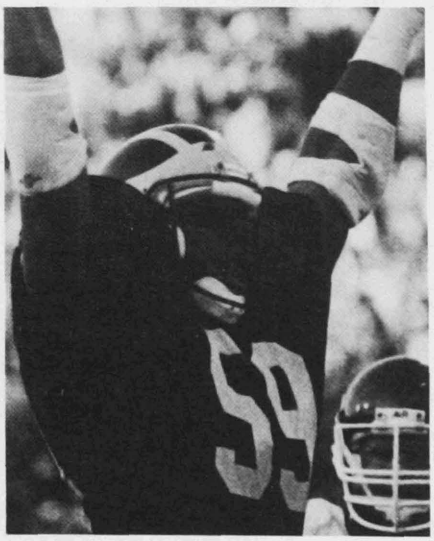
William Albright returned to the piano to play a lively group of piano rags.



Courtesy of the Ann Arbor News

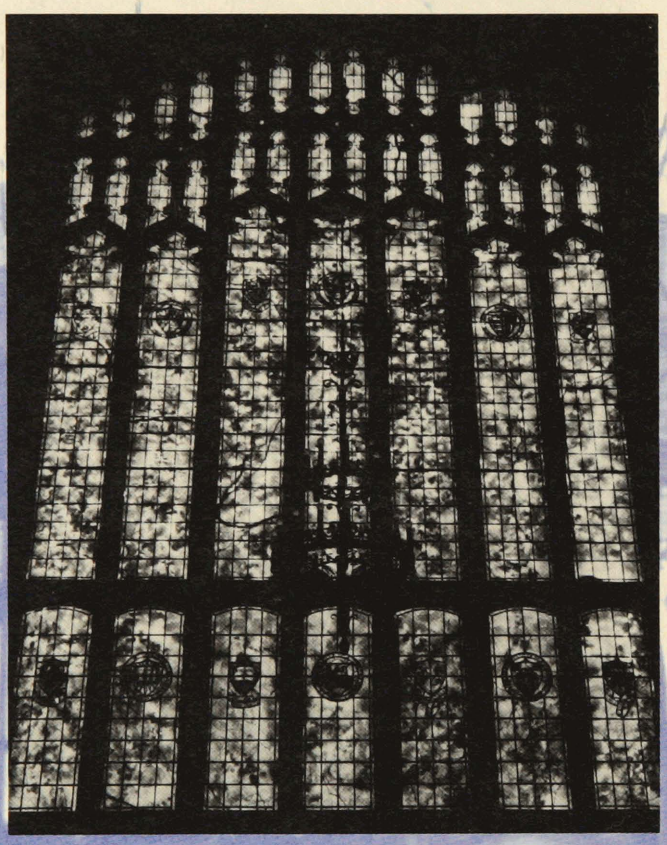
The visitors were treated to a decisive 31-6 victory over Indiana Saturday afternoon.

Cheers!

Law School celebrates end of classes with music, reception

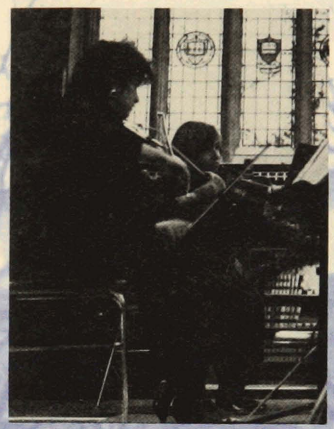
Following a new tradition established by Dean Lee C. Bollinger, the Law School hosted its second annual school-wide end of class celebration last December 7. Students, staff and faculty converged in the stately library Reading Room to hear a concert that included traditional winter music performed by members of the music school and the Law School's own Headnotes.

Following the performance, the group proceded to the lower level of the library to graze, visit, and commiserate together before facing the impending final exam schedule.

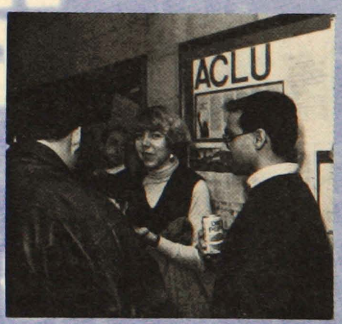


The 13-member Law School Headnotes sang a selection of seasonal pieces as part of the end of class celebration.

EVENTS



All photos by Gregory Fox



Faculty, staff, and students mingled together at a reception on the lower level of the Law Library following the performances.

New support for research

Cohn Fund to serve critical need at Law School

The Law School recently received a major gift from Judge Avern Cohn, U.S. District Court, Eastern District of Michigan (J.D. '49) for the establishment of a fund to support faculty research. The gift, totalling $100,000, will support the Irwin I. Cohn Research Fund. Income from the fund will be used for an annual award to a faculty member to engage in research. Receipt of the gift, stated Dean Lee C. Bollinger, "is especially gratifying to me because this is the first major gift for research during my brief tenure as dean, and it is new support for research that I regard as the critical need of the school for now and the near future."

Judge Cohn has a deep and abiding interest in improving the quality of jurisprudence at the working level of the legal system in Michigan. "It is my hope," he explained, "that some of the research undertaken with the support of the Irwin I. Cohn Research Fund would advance the jurisprudence of our state." Cohn himself has published numerous articles on practical aspects of jurisprudence, including "Effective Trial Practice: One Judge's View," *Michigan State Bar Journal,* Dec., 1982; "Effective Brief Writing: One Judge's View," *Michigan State Bar Journal,* Nov., 1983; "Sentencing Federal Offenders: Some Thoughts on the Present and the Future," *Detroit College of Law Review,* Issue 4, 1983.

Judge Cohn has served in his present position since 1979. Prior to his appointment, he practiced law, first with the firm of Irwin I. Cohn (1949-61), and later as a partner in the firm of Honigman Miller Schwartz and Cohn (1961-79). His distinguished career has also included service on the Michigan Social Welfare Commission; the Michigan Civil Rights Commission, which he chaired from 1974-75; and the Detroit Board of Police Commissioners, which he chaired in 1979.

Judge Avern Cohn

Proffitting research

Class of '63 raising $1,000,000 to fund new professorship

The Class of 1963 is currently engaged in the most ambitious fund raising project ever conducted for a single class reunion gift. The project is aimed at raising $1 million to establish the Roy F. and Jean Humphrey Proffitt Research Professorship at the Law School.

Over 40 leadership gifts were received by the time of the reunion, accounting for more than half of the total goal. Active fund raising is now underway, primarily geared toward members of the 25th Reunion Class, although gifts from other alumni and friends of Professor Emeritus Roy Proffitt would be welcome.

The project is headed by John Galanis, president of the Class of 1963, and several of his classmates, most notably Murray J. Feiwell of Indianapolis, Indiana; Alan Rothenberg of Los Angeles, California; and Robert Wagenfeld and Alvin J. Shoemaker of New York City.

The Roy F. and Jean Humphrey Proffitt Research Professorship would allow one active faculty member to spend an entire semester each year on writing and research toward the completion of an important piece of research. The award would be administered on a rotating basis. Because the Law School's teaching load is among the highest in the nation, the ability to be relieved from teaching duties while devoting an entire semester toward research would be immeasureably helpful to a faculty member at a critical point in his or her research activities.

Gregory Fox

Professor Emeritus Roy Proffitt and Jean Proffitt

Alumni now serving clerkships

Two recent Law School graduates are serving clerkships with U.S. Supreme Court justices for the 1988-89 term.

Abner Greene

Abner Greene, J.D. '86, is serving his second year as a clerk with Justice John Paul Stevens. Greene did his undergraduate work at Yale, majoring in philosophy and theater studies. At Michigan he served on the *Law Review* staff and received numerous honors, including membership in the Order of the Coif, a Henry M. Bates Scholarship, a Class of 1908 Memorial Scholarship, and the Daniel H. Grady Prize (awarded each year to the graduate with the highest standing in his or her Law School class in the preceding calendar year).

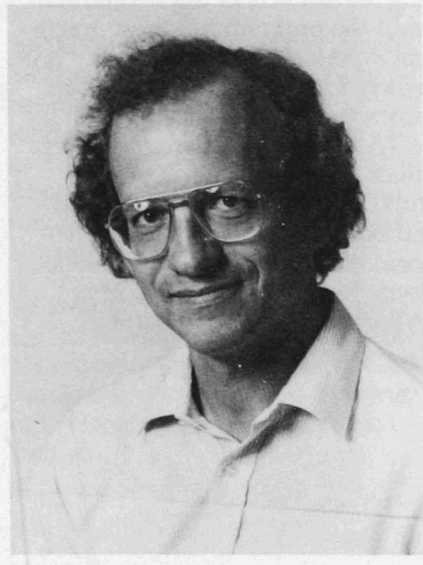
Greene clerked for Chief Judge Patricia M. Wald, U.S. Court of Appeals for the D.C. Circuit the year following his graduation.

John M. West, J.D. '87, is clerking with Justice William J. Brennan, Jr. West served as Law Review editor in chief and worked in the National Lawyers Guild Unemployment Benefits Clinic. His honors at Michigan included the Daniel H. Grady Prize, membership in the Order of the Coif, West Publishing Company Awards for three years, and a Henry M. Bates Scholarship.

Last year West clerked for Judge Harry T. Edwards, U.S. Court of Appeals, D.C. Circuit.

Before entering law school, West earned a Ph.D. in international studies at the University of Denver. He also studied at Marburg University, Germany; the Free University of Berlin; and the University of Caen, France.

He was recently married to Linda Elloitt, J.D. '86, who served as editor of the Yearbook of International Studies, and who is currently working as a criminal defense lawyer through a clinical program at Georgetown Law School.



John West

In addition to Greene and West, 39 alumni who graduated in 1988 hold state- and federal-court clerkships this year:

John R. Abdenour (Appellate Court of Conneticut, Hartford); **Eric M. Acker** (Hon. D. Lowell Jensen, U.S. District Court for the Northern District of California, San Francisco); **Karen L. Barr** (Hon. Walter E. Black Jr., U.S. District Court — Maryland, Baltimore); **Monica C. Barrett** (Hon. Sylvia Pressler, New Jersey Superior Court, Hackensack); **Elizabeth M. Barry** (Hon. A. David Mazzone, U.S. District Court — Massachusetts, Boston); **Gary B. Beren** (Hon. Robert J. Corcoran, Arizona Court of Appeals, Phoenix); **Molly Carrier** (Hon. Richard Suhrheinrich, U.S. District Court for the Eastern District of Michigan, Detroit); **Margaret A. Cegelis** (Hon. John Feikens, U.S. District Court for the Eastern District of Michigan, Detroit); **Gabriel J. Chin** (Hon. Richard Matsch, U.S. District Court — Colorado, Denver); **Joseph G. Cosby** (Hon. Jerry Smith, U.S. Court of Appeals for the Fifth Circuit, Houston); **Debbie J. Gezon** (Hon. Jack Schmetterer, U.S. Bankruptcy Court, Chicago); **J. Oscar Gonzalez** (Hon. Leif Clark, U.S. Bankruptcy Court, San Antonio); **Howard A. Greenberg** (Hon. J. Edward Lumbard, U.S. Court of Appeals for the Second Circuit, New York); **Jeffrey A. Hall** (Hon. James L. Ryan, U.S. Court of Appeals for the Sixth Circuit, Farmington, MI); **Troy L. Harris** (Hon. Earl E. O'Connor, Chief Judge, District Court of Kansas, Kansas City, KS); **Judith L. Hudson** (Hon. George Woods, U.S. District Court for the Eastern District of Michigan, Detroit); **Eric A. Johnson** (Hon. Allen Compton, Alaska Supreme Court, Anchorage); **Nanette Joslyn** (Hon. Howard McKibbon, U.S. District Court — Nevada, Reno); **Alison R. Kean** (Hon. Samuel Conti, U.S. District Court for the Northern District of California, San Francisco); **N. Peter Knoll** (Alaska Supreme Court, Fairbanks); **M. Sean Laane** (Hon. Cornelia Kennedy, U.S. Court of Appeals for the Sixth Circuit, Detroit); **Robert D. Labes** (U.S. Court of Appeals for the Second Circuit — Motions, New York); **Gary A. MacDonald** (Hon. Cornelia Kennedy, U.S. Court of Appeals for the Sixth Court, Detroit); **Melissa H. Maxman** (Hon. Harry Edwards, U.S. Court of Appeals for the District of Columbia, Washington, D.C.); **Todd J. Maybrown** (Hon. Barbara Rothstein, U.S. District Court for the Western District of Washington, Seattle); **Andrew J. McGuinness** (Hon. Frank Coffin, U.S. Court of Appeals for the First Circuit, Portland, ME); **Edward A. Morse** (Hon. Deanell R. Tacha, U.S. Court of Appeals for the Tenth Circuit, Lawrence, KS); **Sharon L. Moylan** (Hon. Anna Diggs Taylor, U.S. District Court for the Eastern

District of Michigan, Detroit); **William D. Odle** (Hon. Joseph Stevens, U.S. District Court for the Western District of Missouri, Kansas City; **Maryelena Pardo** (Hon. Conrad K. Cyr, U.S. District Court — Maine, Bangor); **Janice K. Procter** (Hon. Spencer Letts, U.S. District Court for the Central District of California, Los Angeles); **Richard M. Rosenthal** (Hon. John Eldridge, Maryland Court of Appeals, Annapolis); **David S. Sherman** (Hon. Alan Sternberg, Colorado Court of Appeals, Denver); **Scott A. Sinder** (Hon. Zita Weinsheink, U.S. District Court — Colorado, Denver); **Mark R. Soble** (Hon. Donald Porter, U.S. District Court — South Dakota, Pierre); **Sheila Sundvall** (Hon. Richard P. Cudahy, U.S. Court of Appeals for the Seventh Circuit, Chicago, IL); **James L. Thompson** (Hon. Ralph Guy, U.S. Court of Appeals for the Sixth Circuit, Ann Arbor, MI); **Jerianne Timmerman** (Hon. Boyce Martin, Jr., U.S. Court of Appeals for the Sixth Circuit, Louisville, KY); **Janet K. Welch** (Hon. Robert Griffin, Michigan Supreme Court, Traverse City).

In memoriam

Judge John X. Theiler

Judge John X. Theiler, J.D. '48, who served on the Bay County (Michigan) Circuit Court bench for 23 years died May 28, 1988, of injuries sustained in an automobile accident. He was 66.

Theiler graduated with highest honors from the Law School, in the top 5% of his class. He was an assistant prosecuting attorney in Bay City from 1950 to 1956 and in 1957 he became the city attorney for Bay City and was named to the Bay County Board of Supervisors. In 1965, he was elected circuit court judge to fill an unexpired term and was elected four more times to serve consecutive six year terms, most recently in 1986.

Judge Theiler was president of the Michigan Judge's Association in 1985. He continued to serve in that association as a member of the Executive Committee and on the Supreme Court Rules and Instructions Committees. He was a past delegate to the National College of State Trial Judges and a member of numerous other professional and civic associations.

Alumni at Chicago firm establish scholarship

Michigan Law School graduates at the firm of Wildman, Harrold, Allen & Dixon have pledged $100,000 to establish a scholarship fund at the Law School. The Wildman, Harrold, Allen & Dixon Scholarship Fund will provide financial aid to needy law students serving as senior judges or junior clerks in the Law School's Case Club program. This program provides training in legal research, writing, and analysis as well as an introduction to oral advocacy.

The alumni felt that this was a particularly appropriate purpose since partner Max Wildman was active in the Case Club program and served as a senior judge during his law school days. Wildman calls the program his "best practical experience" in law school. "It is where I really got my start as an advocate," he said.

The firm's Michigan graduates, all of whom contributed to the fund, are Tom Allen, John Arado, Ed Butt, Stew Dixon, Doug Mielock, Ann Petersen, Dave Radelet, Jayne Rizzo, Tom Snyder, Max Wildman, and John Ybarra.

Class notes

'36 Michael W. Evanoff, who retired in 1978 following a castatrophic accident, has recently published his second book, *Tender, Loving Care: A Long Night in a Nursing Home.* The book concerns the legal rights of nursing home residents and was inspired by Evanoff's experience as a quadriplegic following his accident. His first book, *Through the Melting Pot and Beyond: An Ethnic Feature of the St. John St. Community of Flint,* depicted the life of a multi-national neighborhood where Evanoff and his family lived.

'40 John H. Pickering was reappointed to chair the American Bar Association Commission on Legal Problems of the Elderly. Pickering is a partner in the Washington, D.C. law firm of Wilmer Cutler & Pickering. He also is a member of the ABA House of Delegates, and heads the District of Columbia's 28-member delegation to the House.

'49 Herman Gordon was elected senior vice president and is general counsel of the Leslie Fay Companies, Inc. He has been a partner in Parker Chapin Flattau & Klimpl, a New York City law firm, and will remain of counsel to that firm, as well as to the Leslie Fay Companies, Inc.

'51 Rex E. Brown, formerly a member of Knight Wegenstein and then of Knight Wendling, has become managing partner of Wegenstein, Schreyer, Brown & Partner AG, of Buchs, Switzerland.

'54 David W. Belin's book, *Final Disclosure,* was published in November on the 25th anniversary of the assassination of President Kennedy. Belin is a partner in the Des Moines, IA, law firm of Belin Harris Helmick Tesdell Lamson & McCormick.

'55 **Bernard A. Kannen** has been appointed Judge of the Superior Court of New Jersey by Governor Thomas Kean. He is currently sitting in the county seat in Toms River, New Jersey. Judge Kannen was previously engaged in private practice and was municipal judge in several communities.

'57 **John N. Washburn,** of Washington, D.C., was the grand prize winner in the Marriott Corporation's shareholder suggestion program at Marriott's 1988 annual meeting. Washburn suggested that the family restaurants be named to honor Alice S. Marriott, co-founder.

Robert B. Webster has been elected president-elect of the State Bar of Michigan by the bar's board of commissioners. Webster is a partner in the law firm of Hill, Lewis, Adams, Goodrich & Tait in Birmingham, MI.

'58 **Donald L. Reisig** took office as the 54th president of the State Bar of Michigan at the close of the bar's Annual Meeting in Detroit, September 28-30. Reisig is a principal in the law firm of Sinas, Dramis, Brake, Boughton, McIntyre & Reisig, PC in Lansing, MI.

'59 **Thomas H. Singer,** of counsel with the South Bend, IN law firm of Nickle & Piasecki, recently was elected to the 1988-89 American Judicature Society Board of Directors.

'60 **Robert L. Bombaugh** was among those top federal workers honored as a recipient of the 1988 Distinguished Presidential Rank Awards. Bombaugh is director of the Office of Immigration Litigation, U.S. Department of Justice, which provides counsel to the Immigration and Naturalization Service, the Department of State, and other client agencies involved in formulating and implementing immigration policy.

'61 **Lewis Vastine Stabler, Jr.** was recently elected a fellow of the American Bar Foundation. Stabler is a member of the law firm Cabaniss, Johnston, Gardner, Dumas & O'Neal in Birmingham, AL, and is a member of the National Association of Railroad Trial Counsel.

'62 **Stuart D. Shanor** was the recipient of a State Bar of New Mexico Outstanding Contribution Award for his work as chair of the bar's Commisssion on Professionalism. Shanor is a senior partner in the Roswell, NM, law firm of Hinkle, Cox, Eaton, Coffield & Hensley.

'63 **Allan Nachman** has joined Butzel Long Gust Klein & Van Zile of Detroit and Birmingham, MI as a shareholder. Nachman practices real property law.

'64 **Martin B. Dickson, Jr.** former dean of the University of Kansas School of Law, has been awarded the Chancellor's Award for Excellence in Teaching and the Moreau Student Counseling Award.

Franklin L. Hartman has been named vice president and corporate counsel at Cleveland-Cliffs Inc., of Cleveland, OH.

'64 **William R. Radford** has joined Morgan, Lewis & Bockius as a partner in its 45-lawyer Miami office. Radford had served as the partner in charge of the Labor and Employment Relations Law Department of Miami's Mershon, Sawyer, Johnston, Dunwody & Cole.

'65 **Fred L. Woodworth** has been elected treasurer of the State Bar of Michigan by the Bar's Board of Commissioners. Woodworth is a partner in the Detroit law firm of Dykema Gossett.

'67 **Ronald R. Gilbert** is a member of the board of directors and executive committee of the National Spinal Cord Injury Association, and is currently serving as acting chairman. He is also chairman of the Detroit-based Aquatic Injury Safety Group, a non-profit educational group that aims to reduce the number of diving injuries and drownings or near-drownings.

James P. Kleinberg, a partner in the law firm of McCutchen, Doyle, Brown & Enersen of San Francisco, CA, has been elected a fellow of the American Bar Foundation.

'68 **David L. Callies** was elected chair-elect of the American Bar Association's 6000-member Section on Urban, State and Local Government Law at the annual meeting of the American Bar Association in Toronto. Callies is professor of law at the William S. Richardson School of Law at the University of Hawaii where he teaches land use, state and local government, and real property.

'69 **LL.M. Harry B. Endsley, III** has become chairman of the International Law Section of the State Bar of California. Endlsey also serves as the executive director of the California Council for International Trade. He practices law in San Francisco at Harry B. Endsley & Associates.

'71 **Michael B. Evanoff** (son of Michael W. Evanoff, '36) is general counsel and vice president of the Hyatt International Hotel Corporation, Chicago, IL. He has both legal and managerial responsibilities, and his duties have taken him to Thailand, China, Singapore, England, and Indonesia.

Richard N. Feferman's new book, *Building Your Firm With Associates,* has just been published by the American Bar Association. Feferman has a solo law practice in Albuquerque, NM.

Donald F. Tucker has announced the formation of the new law firm of Tucker & Rolf, based in Southfield, MI. The firm will offer clients a broad range of legal services, including specialties in commercial litigation, government relations, environmental law, and sports and entertainment contracts.

'73 Michael T. Chaney has been elected to the board of governors of the West Virginia State Bar. His biography appears in Marquis's *Who's Who in American Law,* Fifth Edition.

Donald S. Skupsky is president of Information Requirements Clearinghouse and publisher of *Legal Requirements for Business Records,* a looseleaf analyzing federal and state recordkeeping requirements.

Lawrence R. Smith, a partner in the Chicago law firm of Querrey & Harrow, Ltd., was recently installed as the president of the Illinois Association of Defense Trial Counsel. The organization represents the interests of 600 defense attorneys in Illinois, sponsors seminars, publishes a quarterly newspaper, and actively reviews cases for amicus participation.

'74 Joseph G. Scoville has been appointed as United States Magistrate for the United States District Court for the Western District of Michigan. Before his appointment, Scoville was a partner in the Grand Rapids, MI firm of Warner, Norcross & Judd.

'76 Andrew H. Marks, a partner in the Washington, D.C. firm of Crowell & Moring, has been appointed general counsel of the District of Columbia Bar.

Ann C. Petersen is a partner in the Chicago, IL firm of Wildman, Harrold, Allen & Dixon, and is president of the Woman's National Republican Club of Chicago. Petersen is on the board of directors of the Business Executives for National Security.

'77 Peter L. Edwards has been named a partner in the Denver-based firm of Rothgerber, Appel, Powers & Johnson. Edwards practices primarily in the areas of commercial and corporate litigation, with an emphasis on telecommunications, intellectual property, and software rights protection.

Edward Fowler Preston has joined the law firm of Tillman, McTier, Coleman, Talley, Newburn, & Kurrie in Valdosta, GA.

'80 Peter B. Kupelian is a member of the Southfield, MI firm of Tucker & Rolf.

Gordon Earle Nichols is now a partner in the Nashville, TN law firm of Boult, Cummings, Conners & Berry, where his practice is centered in the employee benefits and related tax and fiduciary areas. He was formerly a partner in the Houston, TX law firm of Lidell, Sapp, Zivley, Hill & LaBoon.

Kenneth B. Roberts is a partner at Hawkins, Delafield & Wood in New York.

'81 Jeffrey McCombs, now teaching tax at the University of Nebraska College of Law, published his first article, "A New Federal Tax Treatment of State and Local Taxes," 19 *Pacific Law Journal* 747 (1988).

David P. Radelet has been named a partner in the Chicago-based law firm of Wildman, Harrold, Allen & Dixon, where he practices labor and employment law representing management.

Alisa A. Sparkia has been in solo practice (primarily plaintiff's tort litigation) in Albuquerque, NM since 1984. She in now included in *Who's Who of American Law, Who's Who of American Women,* and *Who's Who in Society.*

'82 Laura A. Wing has been named a partner in the Denver-based law firm of Rothgerber, Appel, Powers & Johnson. Wing is a civil litigator who practices primarily in the labor and employment area.

'85 Andrew R. Feldstein is currently a member of the California bar and resides in West Hollywood. After being associated with the firm of Ball, Hunt, Hart, Brown and Baerwitz for two years, he has recently joined the Century City firm of Proskauer Rose Goetz & Mendelsohn and practices corporate, securities, and business law.

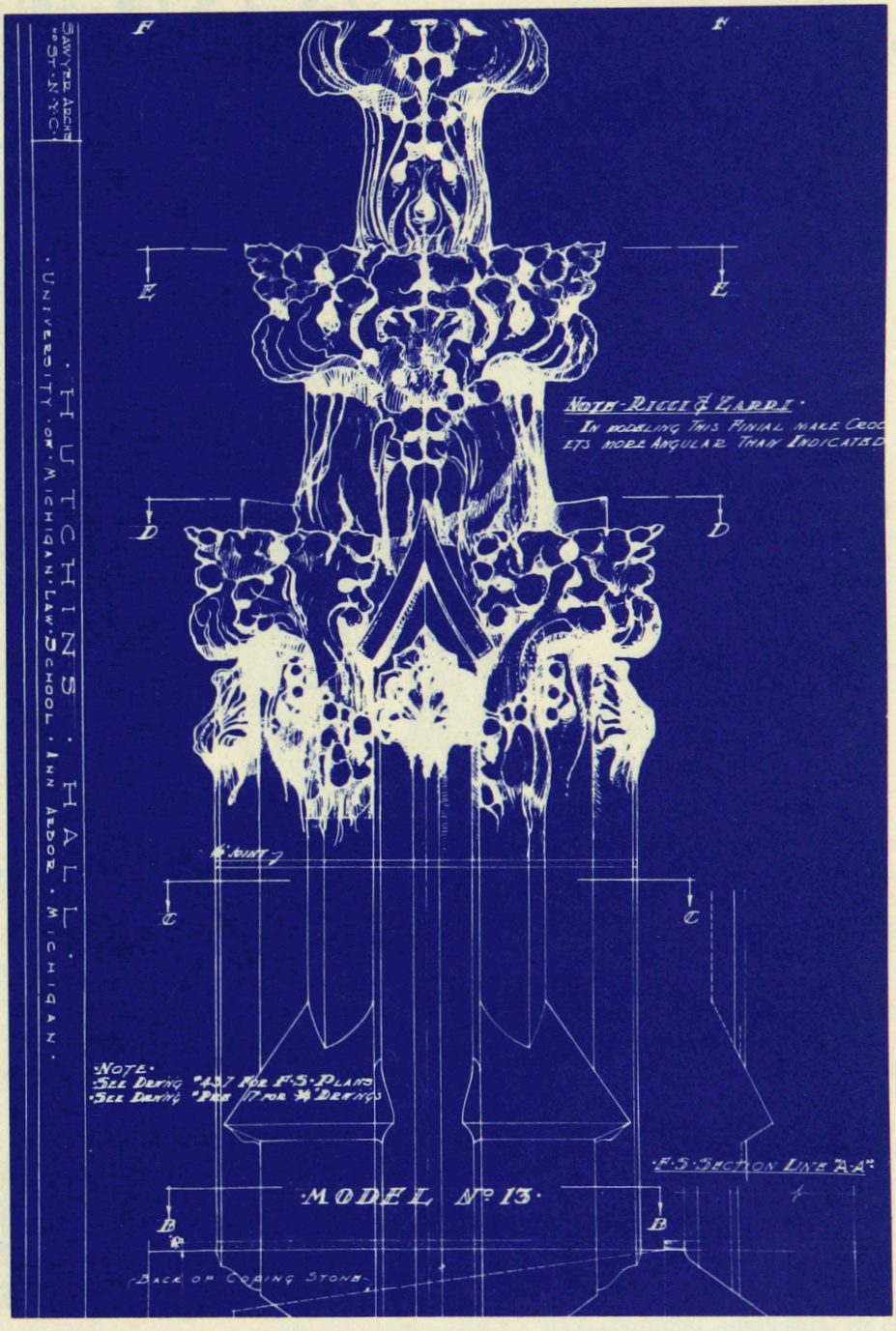
'87 Il Young Byun has received a Fulbright Scholarship to conduct research in Seoul, Korea for the 1988-89 academic year. He is a research intern at the Ministry of Finance, National Savings Coordination Department, of Korea, and at the Law Department of Seoul National University where he is studying various aspects of legal culture.

Alumni deaths

'16 **Benjamin H. Schaphorst,** July 1, 1988
'23 **Earl F. Boxell,** June 7, 1987
Howell E. Hays
'24 **John A. Carrigan,** August 22, 1988 in Auburndale, FL
Ronald M. Ryan, August 3, 1988
'25 **Russell R. Hays**
'26 **Robert L. Weisenburger,** July 10, 1988
'28 **Lee W. Ensel,** July 10, 1988
John F. Wagner, August 29, 1988 in Minneapolis, MN
'29 **Howard Neitzert,** June 21, 1987
'30 **John K. Colwell,** February 16, 1988 in Orange, CA
Elvin R. Latty, July 3, 1987
John D. Todd, October 24, 1987
'33 **Robert L. Sloss,** August 17, 1988
'34 **A. Lee Henson, Jr.,** October 28, 1984
'36 **Robert H. Howard,** February, 1988

A L U M N I

'37 **Anthony F. Bielawski,** January 10, 1988
'38 **Mitchell Feldman,** August 22, 1988 in West Bloomfield, MI
'39 **Benjamin G. Cox,** June 10, 1988
Charles H. Haines, Jr., March 18, 1988
'40 **Berton Sevensma,** July 19, 1988
John F. Somerville, Jr., August 24, 1987
'41 **J. Gordon Gibbs,** September 2, 1987
'42 **Donald R. Flintermann,** October 2, 1988 in Grosse Pointe Shores, MI
Robert C. Lovejoy, July 27, 1988 in Janesville, WI
John G. Lovrien, April 11, 1988
'43 **R. Russell Eagan,** April 21, 1987
Phillip Nusholtz, July 31, 1988 in Detroit, MI
'47 **Willard I. Bowerman, Jr.,** September, 1987
Jack H. Mizuha, September 7, 1986
'48 **George R. Cook,** October 16, 1988 in Grand Rapids, MI
John S. Olds, March 28, 1988
'49 **David H. Armstrong,** December 23, 1988 in Aurora, IL
'50 **Gilbert M. Westa,** January 28, 1988
'52 **Ronald C. VanBuren,** July 25, 1988
'54 **Ralph T. Entwistle,** April 26, 1988
Joseph F. Sablich
'55 **Philip M. Ambrose,** May 2, 1988
John P. Hanrahan, July 13, 1988
'56 **Joy A. Xenis,** August 3, 1988
'57 **Kenneth C. Kellar, Jr.,** September 19, 1981
'63 **Jerry L. Coslow,** August 9, 1986
'72 **Mark T. Starr,** August, 1987
'73 **John N. Thompson, Jr.,** July 16, 1988 in Ypsilanti, MI
'75 **Abigail S. Kelly,** December 11, 1988 in San Francisco, CA
'77 **Louise Ann Ponte,** August 10, 1988 in Ypsilanti, MI
'83 **Felicity Brown,** November 17, 1988 in Ann Arbor, MI
'87 **Kevin C. Holton,** May 21, 1987



From an architectural blueprint by York & Sawyer, New York.

THE CENSUS AND UNDOCUMENTED ALIENS:

A CONSTITUTIONAL ACCOUNT

by T. Alexander Aleinikoff

Testimony Before the House Committee on Post Office & Civil Service, presented at Eastern Michigan University, Ypsilanti, MI, June 24, 1988

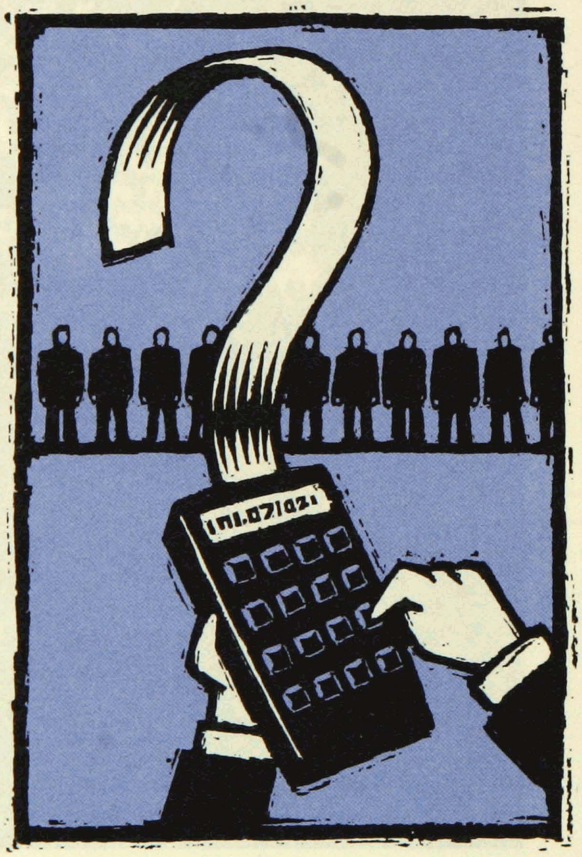


Illustration by Michael McGowan

You have asked me to address the question of whether the Constitution requires that undocumented aliens be counted in the 1990 census. My conclusion is that the Constitution probably requires that undocumented aliens who have established a residence in the United States be counted for purposes of apportioning representatives among the states.

I should make clear at the outset that I do not think that counting undocumented aliens will necessarily redound to their benefit. Many people seem to assume that counting undocumented aliens is a "pro-alien" position and not counting them is an "anti-alien" position. As a little reflection will reveal, counting undocumented aliens does not mean that they or their interests will thereby be represented in Congress. It simply means that states with high numbers of undocumented aliens may gain additional representatives in Congress. Depending on the political makeup of the state, such an outcome may actually harm alien interests — if the voting population of the state is strongly "anti-alien." Indeed, counting a group that is disenfranchised may be the worst situation for that group. Recall that the idea that slaves should count for apportionment purposes was pressed by the slave states, not the free states.

I. Does the Constitution mandate that undocumented aliens be counted in the 1990 census?

Article I, section 2, paragraph 3 of the original Constitution provided:

> *Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.*

This provision was superseded by section 2 of the Fourteenth Amendment, which provides:

> *Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.*

One can state with the utmost confidence that these provisions call for the counting of (at least some) aliens residing in the states. Other interpretations of the phrase "whole number of persons" seem inconsistent with other parts of the constitutional text. For example,

one can imagine plausible theoretical grounds for apportioning representation based on the number of voters or citizens in each state. But Article I and the Fourteenth Amendment use the word "citizen" elsewhere (and Article I also uses the term "elector"), which strongly suggests that the Constitution's reference to "whole number of persons" means a category broader than voters or citizens. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (resident Chinese aliens are "persons" under the Fourteenth Amendment's Equal Protection Clause). Furthermore, as pointed out by the district court in *Fair v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (three judge court), during consideration of the Fourteenth Amendment "other options [for determining the apportionment base] were considered and expressly rejected, after considerable debate, including the options of 'voters' or 'citizens.' " It is clear that the Reconstruction Congress recognized that the formulation in Article I encompassed aliens, *see, e.g.*, Cong. Globe, 39th Cong. 1st Sess. 356 (statement of Senator Conkling), and that it intended to keep the original apportionment base (except for the elimination of the infamous three-fifths ratio). Throughout all the historical materials that I have investigated, the central idea is that *population* should constitute the basis of apportionment; and nowhere do the materials suggest that resident aliens ought not to count as part of the population of the states.

Does the Constitution mandate that undocumented aliens be counted in the 1990 census?

Further support for counting aliens derives from the consistent and longstanding practice of both the Congress and the executive branch. Since the first census of 1790, federal statutes have required the counting of "inhabitants" — not "citizens" or "voters" — and the executive branch has always interpreted such statutes as mandating the counting of resident aliens.

The conclusion that the enumeration clause requires the counting of aliens may seem counterintuitive. If we count aliens, some might ask, are we not saying that they have a "right to be represented" and would not such a result be inconsistent with the idea that only members of a political community have a right to be represented in the national legislature? The answer to this question requires investigation of why the framers favored apportionment by population.

Apportionment based on population was a new idea in the late 18th century. It was an important part of republican ideology because such a formula of representation would prevent the creation of a "rotten borough" system that allowed a small aristocracy to dominate Parliament in England. Proportioning representation based on the actual number of persons would thus support democracy through majority rule.

The apportionment scheme was also based on the view that representation should be linked to taxation. If states were to be asked to contribute to the new national government, such contribution would have to bear some relation to size (no one expected Rhode Island to contribute as much as Massachusetts). But if large states would be taxed more, it was sensible that they have representation commensurate with their contribution. (This idea echoes the Revolutionary slogan that "taxation without representation is tyranny.") The linkage of representation and taxation is explicit in the enumeration clause, which provides that "Representatives and direct taxes shall be apportioned among the several States." The clause also excludes from the apportionment base "Indians not taxed."[1]

Both the "taxation without representation" and the "majority rule" justifications were reflected in the Pennsylvania Constitution of 1776 — the first constitution to expressly provide for representation based on population and a document no doubt known to the framers. It proclaimed that "representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land."

Apportionment by population was also linked with the view that representation ought to be based on wealth. An early draft of the enumeration clause provided that the initial apportionment would be altered based on "wealth and inhabitants." While this formulation did not survive, it was subsequently remarked at the Constitutional Convention that population would serve as a reasonable approximation of wealth. The counting of slaves as three-fifths is hard to reconcile on any ground other than that the framers thought that wealth formed an appropriate basis for representation. Madison makes this explicit in his defense of the Convention's apportionment scheme in Federalist No. 54. In that essay, Madison constructed an argument that "one of our Southern brethren" might make for counting slaves. The Southerner's analysis, which Madison generally accepts, relied in part on the claim that "votes allowed in the federal legislature to the people of each State ought to bear some proportion to the comparative wealth of the States." To be sure, the enumeration clause does not apportion based on wealth. But as Madison explained in Federalist No. 54, "[I]t is agreed on all sides that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation."

Thus apportionment by population served several goals: it supported majority rule, linked taxation and

[1] I have stated the relationship between representation and taxation in theoretical terms here. Perhaps more importantly, the linkage helped resolve the troubling controversy over how to count slaves. Southern states would be able to count slaves for representation purposes but would also have to count them when direct taxes were apportioned.

representation, and based representation on the respective wealth of the states. It is difficult to know the relative importance of these purposes in the minds of the framers or the degree to which the theoretical arguments were used to mask political interests. I am not an historian and am not prepared to answer these questions. But I think it can be said with a fair degree of certainty that, contrary to modern intuitions, the apportionment scheme was not seen as linked with the right to vote.[2] It is thus not surprising that the enumeration clause speaks of "persons" and not "voters" or "citizens."

I do not believe that the intent of the framers necessarily controls constitutional interpretation today. And modern developments may make the original understanding of the enumeration clause look antiquated. Thus, one might make the following argument: We now have near universal suffrage in this country and the Supreme Court has established the principle of "one person, one vote" for establishing congressional districts within states. This means that, in our current political system, there is a close link between voting and representation (that is, equal numbers of voters should choose equal numbers of representatives), and since only citizens can vote, aliens ought not to be counted for apportionment purposes. While I see a logic to this argument, it is simply inconsistent with the text of the Constitution and a 200 year practice of counting aliens. Furthermore, it fails to appreciate that the enumeration clause does not establish a right to be represented on behalf of individuals. Rather, it is a clause that regulates the distribution of power among states.[3] In abstract political theory, Michigan might be able to complain that it has lost a representative because of the huge (legal) alien population in California. But California may properly respond: These people are as much a part of the state as U.S. citizens. They contribute to the economy, pay taxes, and use public services. To count them is not to give *them* rights; it is rather to recognize the benefits they provide to the nation and acknowledge the burdens the state bears because of their presence.

I do not believe that the intent of the framers necessarily controls constitutional interpretation today.

I thus conclude that the term "whole number of persons" in the enumeration clause includes aliens. This does not mean that the Constitution requires the counting of all persons physically within the borders of a state. At any moment in time, the population of a state may include tourists, people in transit, visiting businesspeople, and others who have not established domicile in the state and do not consider the state their permanent place of abode. Traditionally, such persons have not been counted as part of the state's population for apportionment purposes. The first census statute provided that "every person occasionally absent at the time of enumeration [shall be recorded] as belonging to that place in which he usually resides in the United States." This practice continues to this day. Current census forms ask respondents to identify all persons who "usually live" at the address, a phrase deemed not to include persons who have their principal residence elsewhere. Perhaps the best word to describe those to be counted is "inhabitants" — a term used both by the first Congress and James Madison in his *Federalist Papers*. This construction is consistent with the purposes identified above. By describing the actual resident population of a state, the term provides a reasonable measure of the state's wealth, its tax base, and its contribution to the nation. The "inhabitant" line is neutral as to citizenship, but it does require that aliens (and citizens) be residing in (not simply visiting or travelling through) the state.

Now, what does all this say about undocumented aliens? It is certainly arguable that if "residence" is the key to counting for apportionment purposes, then the legality of the residence should not matter any more than whether the resident is a citizen or an alien. Under this view, resident undocumented aliens would be counted like all other "inhabitants" of the state. Note that this is not the same thing as saying that all undocumented aliens must be counted wherever they are found. The test is whether a person has established residence in a state. Thus, transient undocumented aliens or migrant workers who come to the U.S. for a short period of time would not be counted, just as tourists are not counted.

Opponents of this view assert that residence is at least in part a legal status, and someone who has not been granted permission to be in the country cannot be deemed to have established residence. Furthermore, this argument runs, since undocumented aliens can be deported at any time, their continued "residence" in a state is beyond their control.

The idea that someone ought to be "legal" in order to be counted seems to accord with theories on the nature

[2] It could be argued that the framers thought that nonvoters would be evenly distributed among the states; thus, a system of apportionment by population would, in effect, be based on the number of eligible voters. But this theory cannot explain the counting of slaves, which greatly benefitted the slave states and bore no relationship to the number of eligible voters in the South.

[3] Thus, the interests served by the enumeration clause are quite distinct from those served by the equal protection clause of the Fourteenth Amendment and Article I, section 2, paragraph 1 of the Constitution, which provides that "[t]he House of Representatives shall be composed of Members chosen . . . by the People of the several states." These clauses guarantee equality among voters *within* a state for federal and state elections. *See Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

of rights and entitlements. However, while I share those intuitions, I think they are fundamentally misplaced and should be resisted in this context.

Many of those who are opposed to counting undocumented aliens seem to believe that including them in the apportionment base would, in effect, be giving them rights. To state it more pithily, counting undocumented aliens would make them count. Senator Shelby, D-Ala., put it this way when he introduced S. 2013: "Does it make sense that illegal aliens who are here without the consent of the governed be given representation in Congress?" Cong. Rec. S 281 (Jan. 28, 1988).

But the argument for counting undocumented aliens is not about providing them representation in Congress. Few would assert that such aliens (or even lawful aliens) have a "right" to be represented in Congress. The apportionment formula is intended to solve a problem among the states, not to establish individual rights. Viewing the apportionment problem from the state's perspective, it is not the legal status of the inhabitant that matters, but rather the total number of persons living and working in the state.

This view is fortified by a crucial fact often overlooked in the apportionment debate. The regulation of immigration is exclusively a federal power. Congress decides what classes of aliens may enter and the terms of their stay, and also provides for the enforcement of our national borders. Border and coastal states may not police international boundaries, nor may any state declare itself closed to immigrants or seek to deport undocumented aliens within its borders. Thus, the distribution of aliens (both lawful and unlawful) within the United States is beyond the control of the states. This means that states become the homes of large numbers of undocumented aliens primarily because of the actions (or inactions) of the federal government in failing to enforce the border or to deport undocumented aliens who have crossed the border. To the extent that undocumented aliens are a burden to a state,[4] it seems reasonable that they "count" toward that state's representation in the body charged with regulating their presence in the state and the nation.

Furthermore, it is not clear which theory of the enumeration clause supports counting legal resident aliens but not undocumented resident aliens. If one views the clause as establishing equality among members of a political community, what justification is there for counting *legal* aliens? As will be discussed later, the inclusion of lawful resident aliens in the enumeration works the same kind of "dilution" or "distortion" that counting undocumented aliens could. Yet, to my knowledge, none of the opponents of counting undocumented aliens argues that lawful resident aliens should not be counted.

In sum, the constitutional standard for the apportionment of representatives is a function of the number of the inhabitants of each state, and there is no reason to distinguish citizen from alien inhabitants or legal from illegal inhabitants. It is my view that the Constitution does require that *resident* undocumented aliens be counted for apportionment purposes.

I thus conclude that the term "whole number of persons" in the enumeration clause includes aliens.

II. Comments on objections to counting undocumented aliens.

It is important to address a fundamental misconception that pervades the apportionment debate. Some have asserted that counting undocumented aliens for apportionment purposes constitutes a dilution of one's right to vote in violation of the constitutional norm of "one person, one vote." *See, e.g.*, H.R. 3639 ("[T]he Congress finds that . . . by including the millions of illegal aliens in the reapportionment base for the House of Representatives[,] many States will lose congressional representation . . . thereby violating the constitutional principle of "one man [*sic*], one vote."). To be sure, counting undocumented aliens may have an effect on the apportionment of representatives. But it is far from clear that any such effect is a cognizable constitutional harm. Quite simply, "one person, one vote" cannot be the appropriate standard for apportionment purposes, if the standard is understood to mean that each voter's vote should have an equal chance in influencing a congressional election.

This is clear from Article I's guarantee that each state have at least one representative and that representatives be apportioned among the states. Because congressional districts cannot be drawn across state lines, there will naturally be a wide *interstate* variation in the size of congressional districts. For example, congressional districts apportioned after the 1980 census varied in size from 376,619 (Montana, Second District) to 652,695 (North Dakota, At large). The "one person, one vote" standard applies to congressional districts *within* a state, not among states.

Even *within* states, the "one person, one vote" principle does not guarantee that each voter's vote counts equally. Under current practice, the drawing of congressional districts is based on total population,

[4] It should be noted that there is much scholarly debate about whether undocumented aliens benefit or harm the economy. It seems fairly well established that such aliens generally contribute more in taxes than they receive in government transfer payments. However, the biggest burden undocumented aliens impose may be at the local level, in terms of education and medical costs.

rather than on eligible voters or citizens. This means that in districts with high numbers of aliens, a voter's vote is given extra weight. To see this consider two districts, *X* and *Y*. Assume that each has 500,000 residents, 150,000 of whom are children. Assume further that district *X* has 100,000 [adult] aliens; district *Y* has 10,000. Under this scenario, there are 250,000 eligible voters in district *X* and 340,000 eligible voters in district *Y*. Thus, a vote in district *X* is worth substantially more than a vote in district *Y*. This example does not appear to be a flight of fancy. Unfortunately, the Census Bureau does not publish data on the number of citizens in each congressional district, but some rough estimate can be made from the data on the percentage of foreign born in each district. Here there is wide variation among congressional districts. On the high end, one district in Florida reports a population 52% of which is foreign born; districts in California have 29.5% and 40% foreign born. On the low end, many congressional districts report foreign born populations of less than 2%. Assuming that not all foreign born persons have naturalized and that the number of those who do naturalize are evenly distributed across districts, these data show a substantial impact on the weight accorded a voter's vote *even if congressional districts are exactly the same size.*

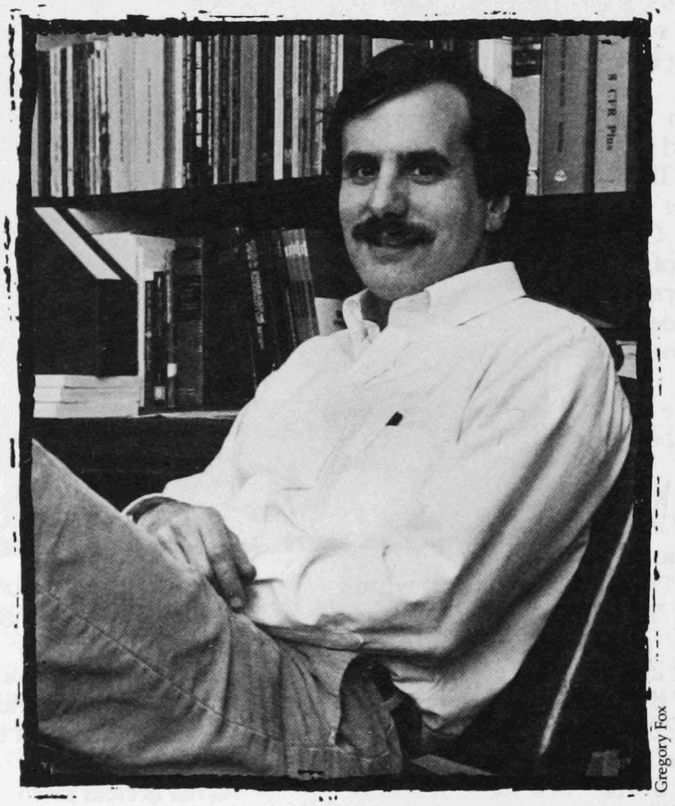
The Supreme Court has never specifically addressed these disparities caused by uneven distribution of (non-voting) aliens. But a declaration that "one person, one vote" requires equality in the number of eligible voters (or registered or actual voters?) would require radical redrawing of congressional districts. In essence, what the Court seems to have required, consistent with the apportionment scheme that requires the counting of "persons," is not "one person, one vote" but "one representative for equally sized districts."

Given this reasoning, it is difficult to see what the "dilution" claim is all about. The weight of a vote is already "diluted" if the voter lives in a district or state with a small number of *lawful* aliens. Yet all seem to agree that lawful aliens should be counted for apportionment purposes. On what reasoning can counting undocumented aliens produce an unconstitutional dilution when counting lawful aliens does not?

III. Even assuming Congress has the power to exclude undocumented aliens from the apportionment base, it would not be wise policy to do so.

Even if the Supreme Court were to read the Constitution to permit Congress to exclude undocumented aliens from the census, there are strong reasons why Congress should not do so. This is not to say that the central argument of the opponents of counting undocumented aliens — that each voter's vote should have equal weight — is frivolous or unimportant. However, I believe that the Congress sets an unfortunate precedent when it states, as a matter of national policy, that undocumented aliens are not "persons" under a clause in the Constitution. Such a declaration, of course, cannot overturn other decisions of the Court holding constitutional provisions applicable to undocumented aliens.[5] But such statements have important symbolic value; they become part of the common understanding, playing into anti-alien emotions in the nation at large. And they become precedents for further congressional action.

My claim here is an attitudinal one. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court resisted the argument that undocumented aliens were not "persons" protected by the Fourteenth Amendment. In so doing, the Court did not amend the immigration laws or legalize undocumented aliens. Rather, it recognized the reality that this country has, and will continue to have, a large undocumented population, and that it is in the long term interests of the U.S. to guarantee all residents basic human rights. While not counting undocumented aliens in the census does not, I believe, deny them a fundamental right, it is a symbolic step down the wrong road.


Gregory Fox

T. Alexander Aleinikoff is a graduate of Swarthmore College, and the Yale Law School. He joined the Michigan law faculty in 1981, teaching courses in constitutional law, immigration and nationality, and race and gender discrimination.

[5] *See, e.g. Wong Wing v. United States*, 163 U.S. 228 (1896) (Fifth Amendment); *Almeida-Sanchez v. United States* 413 U.S. 266 (1973) (Fourth Amendment).

The Voice of the Funds

by Alfred F. Conard

The following article is a condensation of an address delivered by the author on May 12, 1988 to a symposium of the Pension Research Council at the Wharton School of the University of Pennsylvania.

There are thousands of words in ERISA (the Employee Retirement Income Security Act), but "voting" is not one of them. In 1974, when the Act was adopted, Congress gave no thought to the voting of the enormous number of shares that would be accumulated by the funds that the Act protected.

Twelve years later, when the Federal Employees Retirement System Act was adopted, the authors mentioned voting, but only to say that the votes should *not* be cast by the executives, the boards, or the employees of the fund.

In 1988, voting came out of the closet. Today, everybody in the pension world is talking about who should cast the votes that go with fund shares, and on whose side they should vote.

I. The reasons for concern

There are two main reasons for the eruption of concern about the voting of shares held by pension funds.

The conflicts of interest. One of the reasons is the emergence into view of a pervasive conflict between the interests of corporation executives and the interests of investors; Jack Coffee called it "Shareholders versus Managers: The Strain in the Corporate Web." The spectacular evidence of this conflict is the series of takeover battles, in which bidders offer shareholders premiums that average around 30 percent over market price, while target executives exhaust corporation assets in preventing shareholders from receiving these premiums.

Figure 1 is a graphic presentation, copied from the Journal of Financial Economics, of the financial effects of tender offers on share values.

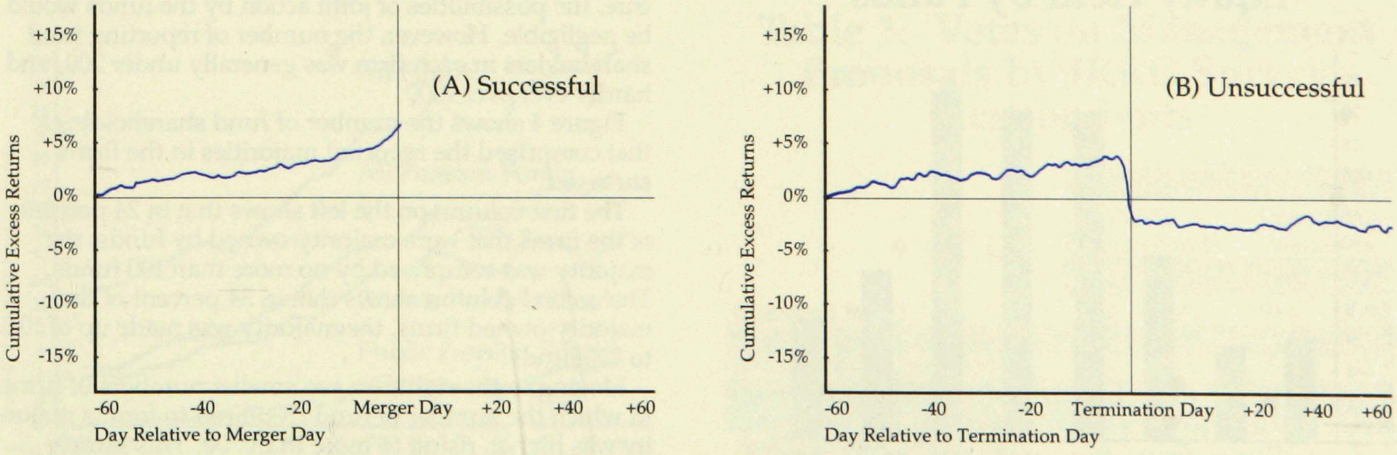
The diagram on the left shows the positive returns to target shareholders in 211 bids that succeeded, while the diagram on the right shows the negative returns in 91 bids that failed, from 1962 to 1976. More recent figures would only accentuate these observations.

While takeover bids generally benefit target shareholders when they are successful, they are less beneficial to the shareholders of bidding companies, as shown in Figure 2.

Here we see that shareholders of takeover bidders lost market value even when bids succeeded, and even more when bids failed.

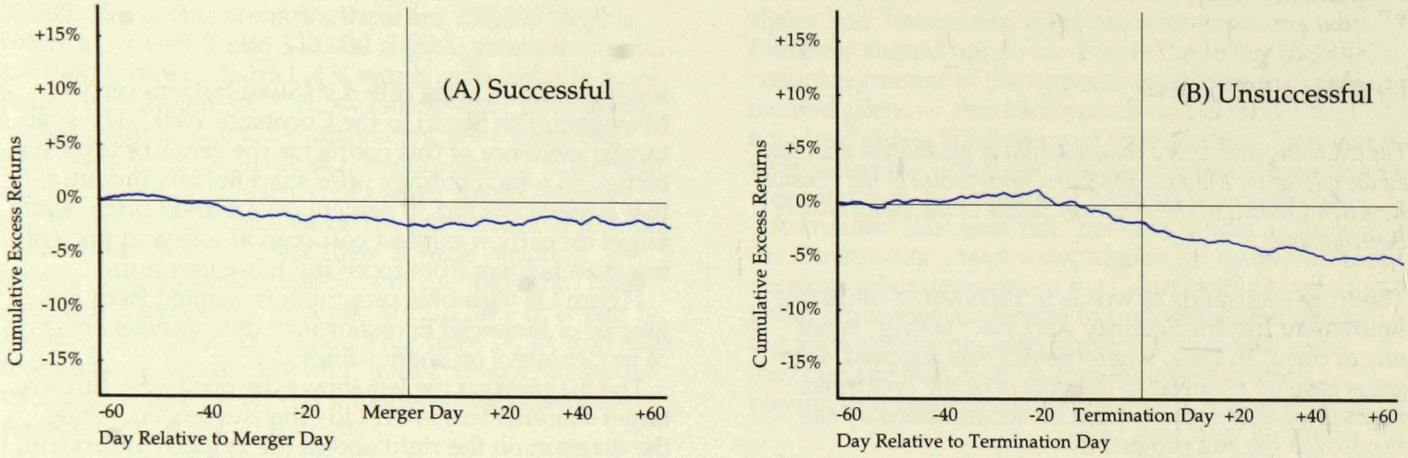
All these figures are aggregates; they blend cases in which target shareholders gained with cases in which they lost, and cases in which bidder shareholders lost with cases in which they gained. But the aggregates offer convincing evidence that the executives of many target companies are acting against the interests of their shareholders when they resist bids, while executives of many bidding companies are acting against their shareholders' interest when they launch bids. The executives

Figure 1: Returns to Target Shareholders



Source: Asquith, *Merger Bids, Uncertainty, and Stockholder Returns* 11 J. Fin. Econ. 51, 62 (1983).

Figure 2: Returns to Bidders' Shareholders



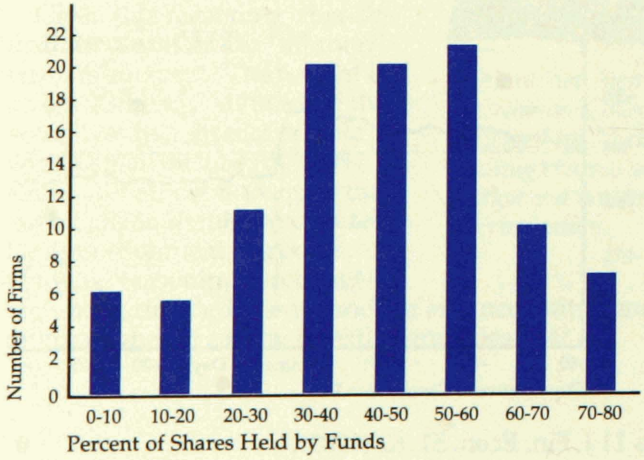
From Asquith, *Merger Bids, Uncertainty, and Stockholder Returns*, 11 J. Fin. Econ. 51, 63 (1963).

in these cases are like medieval kings, waging wars to gain territory or to save their thrones without regard to the welfare of their populations.

Takeovers are not the only area in which this conflict emerges; they are just the area in which the conflict is currently most obvious. The conflict exists in many other areas, such as executive compensation and dividend distributions.

The conflict should not surprise us. It is exactly what we should expect in an era in which shareholders have lost control of corporations because of the dispersion of individual holders, and the passivity of institutional holders. A few years ago, financial economists propounded the theory that managerial fidelity was enforced by the "market for control." But a series of successful defenses against takeover bids, with judicial approval, have destroyed any illusion about the efficiency of that market.

Figure 3: Percentages of Firm Equity Held by Funds



The power of funds. The second reason why the fiduciary duty in voting has become critical is the explosion of fund ownership of shares. In nearly half of major corporations, more than half the shares are held by pension funds, mutual funds, and other institutional investors, whom I designate collectively as "the funds." Figure 3 is a graphic presentation of the distribution of fund holdings in a sample of actively traded securities on the New York Stock Exchange in 1987.

Starting at the right hand side of the figure, we see a column representing the firms of which 70 to 80 percent of the shares were held by funds. The next column shows the firms of which 60 to 70 percent were held by funds. The third column represents the firms that were 50 to 60 percent fund-owned. Putting these groups together, the funds were majority owners in 38 of 100 firms. If we add in the next column, we find that 58 out of 100 firms were more than 40 percent fund-owned.

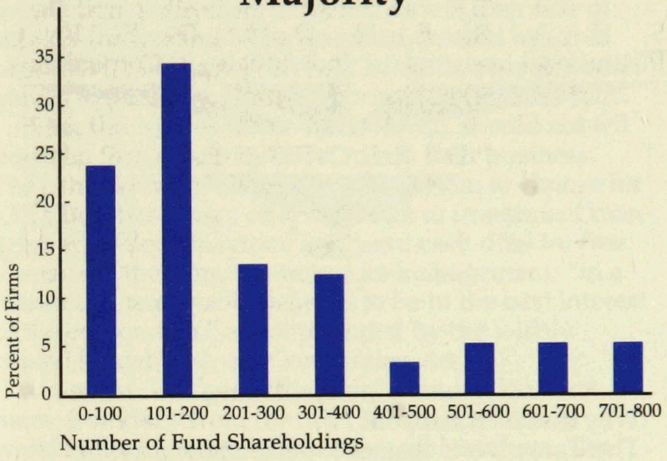
These percentages would not be very important if the funds that held these percentages numbered in the tens of thousands, like individual shareholders. If that were true, the possibilities of joint action by the funds would be negligible. However, the number of reporting fund shareholders in each firm was generally under 200, and hardly ever over 1000.

Figure 4 shows the number of fund shareholdings that comprised the reported majorities in the firms surveyed.

The first column on the left shows that in 24 percent of the firms that were majority-owned by funds, the majority was comprised by no more than 100 funds. The second column shows that in 34 percent of the majority-owned firms, the majority was made up of 101 to 200 funds.

Moving to the right, we see smaller numbers of firms in which the number of funds required to form a majority was higher, rising to more than 700. This sample turned up no firm in which more than 800 funds were

Figure 4: Number of Fund Shareholdings Comprising a Majority



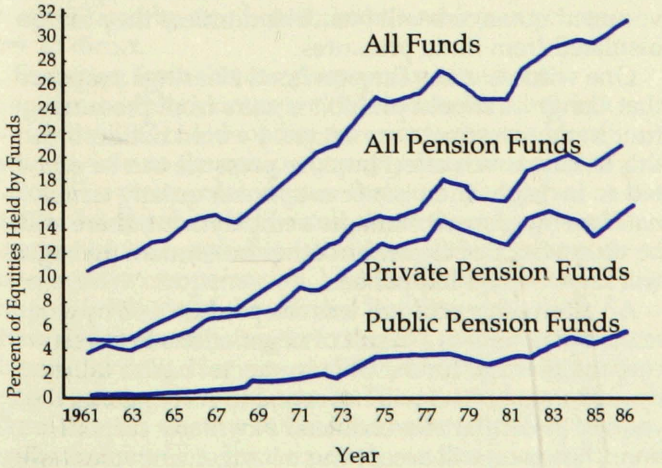
required to make up a majority of shares. Even AT&T, which has over two million shares, had only 789 reported fund shareholders.

These data indicate that the mobilization of voting majorities among funds is no longer beyond the bounds of possibitity. If funds would vote together, they could block the adoption of shark repellents in many corporations, and even elect directors of their choice. These possibilities have led some of the public pension funds to unite in the Council of Institutional Investors to develop common policies on corporate governance.

The importance of these numbers is enhanced by the rate at which fund shareholdings have been growing over the past quarter-century, as indicated by Figure 5.

This diagram shows the continued growth of all fund shareholdings from 1961 to 1986, as measured by the Federal Reserve Board. The top line shows that fund holdings, as a percent of all publicly traded equities, grew threefold, from about 11 to about 31 percent. The middle line shows that pension funds grew fivefold, from about 4 to about 20 percent of equities. The lowest line is that of public pension funds, which grew thirty-fold, from about a sixth of one percent to 5 percent. They are likely to grow even further as a consequence of the Federal Employees' Retirement System, which is just getting under way.

Figure 5: Growth of Funds' Equity Holdings, 1961-1986



The growth of fund holdings means not only that funds have the power to defend the interests of shareholders against the conflicting interests of executives, but that if they do not, nobody will. In more and more corporations, the *non*institutional shareholders are dwindling to impotent minorities.

II. How Funds Vote

Although the funds would have enormous power if they voted together, they will not do so. Voters in company elections have different opinions, just as voters in political elections. But they also split along lines that seem unlikely to reflect random differences of opinion.

The most conspicuous split is between "public" funds, such as the state employee pension funds of California, New York, and New Jersey, and the private "investment managers." The latter are the professional financial advisers and agents whose principal clients are corporate pension funds, such as those of General Motors or General Electric. The officers of the public funds generally owe their jobs to elected government officials. The private investment managers usually owe their service contracts principally to officials of the sponsoring corporations, although union officials may have had some input.

A survey conducted by the Investor Responsibility Research Center shows a striking divergence between the votes of public pension funds and the votes of private investment managers on five antitakeover measures proposed by company managers, as shown in Table 1.

Table 1: Votes on Management Proposals by IRRC Survey Respondents

	Survey Votes			
	Public Pension Funds		Investment Managers	
	Pro	Con	Pro	Con
Classified Board	10%	90%	50%	50%
Authorize Blank Preferred	12	88	35	65
Increase Blank Preferred	53	47	55	45
Increase Authorized Common	47	53	77	23
Antigreenmail Provisions	74	26	87	13
Averages	39	61	61	39

This table shows that public pension funds voted *against* takeover defenses in the ratio of 61 to 39, on the average, while investment managers voted *in favor* of takeover defenses in the same ratio. The divergence is particularly marked in the first two items, which are most directly related to takeovers. Public pension funds voted against classified boards, 90 percent to 10, while investment managers split 50-50. Proposals to authorize blank preferred stock, which were opposed by majorities of both groups, were opposed by public funds in the ratio of 88 to 12, and by investment managers in the ratio of 65 to 35.

Since plausible arguments can be made for a vote on either side of these proposals, the sources of the divergence are speculative. One can imagine that private investment managers, being themselves in the private sector, are less suspicious of the motives of company managements than are the state employees that manage the public funds. However, a substantial number of investment managers have reported feeling pressure from corporate sponsors of funds; a significant part of the difference is probably attributable to these pressures, rather than to differences in analysts' opinions on the economic benefits of takeover defenses.

The pressure of sponsors puts investment managers in a bind. In many instances, they would serve the interest of beneficiaries by voting against management proposals; but if they did, they might impair their access to information, and even lose their jobs to other investment managers who are more compliant.

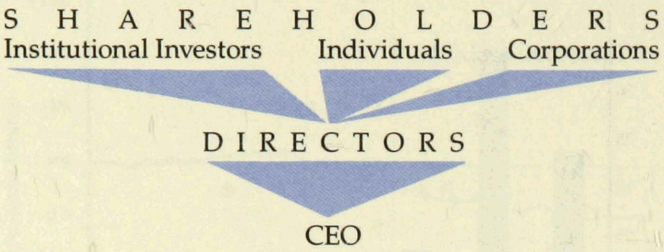
The result is even more unfortunate for the national economy. It means that there is sometimes no cure, short of bankruptcy, for inefficient or self-serving managements. This might be called the acquired immune deficiency syndrome of American business. Fortunately, the disease does not infect all companies; but it may spread if more and more fund shareholders become paralyzed by the pressures that fund sponsors exert upon investment managers.

III. Therapeutics

Funds cannot accomplish much for their beneficiaries by voting for or against the charter amendments that company managers propose, or by voting on the peripheral proposals that shareholders are permitted to insert in the company proxy statement. The only means by which funds can assure that corporate managements will operate in the interest of fund beneficiaries is to choose the directors. This is the statutory model of corporate governance, as diagrammed in Figure 6.

If funds would elect directors who represent the interests of shareholders rather than those of incumbent executives, investors would not have to worry about takeover bids and takeover defenses that conflict with shareholder interests. Investor-oriented directors would make sure that these and other activities are conducted in the interest of shareholders, rather than of incumbent executives. Even better, inefficient executives would be removed without the destruction of takeover wars.

Figure 6: The Statutory Model of Corporate Governance



Why doesn't it happen?

There are several obstacles. Some of them are in the institutions' own attitudes; others are in the legal system.

The free rider problem. To organize a voting bloc, someone has to take the lead. The fund that initiates action will pay the bill, and the others will get a free ride. For a private investment manager who is in price competition with others, this consideration may preclude initiating action. But this obstacle is being overcome by the initiatives of public and nonprofit funds, which private investment managers can support without spending their own time and money.

Until recently, the public funds' initiatives were limited to voting on management and shareholder proposals. But Edward Regan, Comptroller of the State of New York, broke the ice in 1987 with a proclamation in favor of funds' activism in electing directors. The best hope for pension fund beneficiaries is that public funds will initiate nominations, and that private fund investment managers will vote with the public funds.

Exposure to pressures. When investment managers start thinking about the possible advantages of joining in the initiatives of the public funds, they think also of the flak that they will get from fund sponsors and from the issuers of the securities that they must analyze. Investment managers will be hobbled unless they can be insulated from these pressures.

One witness at the Pension Fund Hearings proposed that Congress should prohibit issuers from pressuring funds and investment managers. I would not expect this to have much effect because pressure can be exerted so invisibly. If an issuer or sponsor quietly terminates an investment manager's employment, there will be no evidence of crime, but other investment managers will know why it happened.

An alternative solution was adopted in 1988 by a few corporations as a result of negotiations between corporations and funds. This is a secret ballot, tallied by accountants who will not reveal to corporations the votes of particular shareholders. Not many corporations, however, will accept this arrangement voluntarily.

To be widely adopted, it would have to be imposed by statute, or by an addition to the SEC proxy rules.

Control liabilities. A major apprehension that deters investment managers from even contemplating the installation of directors of their choice is their fear of liability for "control." The fear is stimulated by cases in which banks have been held liable for coercing companies to pursue policies that proved to be disastrous.

What these cases tell us is that funds should not tell portfolio firm executives how to run their business. They should not even tell directors whom to choose for CEO. But these cases offer no threat to investment managers who elect directors, and leave each director free to manage the firm, or oversee its management, "in a manner he reasonably believes to be in the best interest of the corporation," as commanded by the widely copied Model Business Corporation Act.

A more serious peril to activist shareholders emanates, ironically, from the SEC, which ought to be working for investors, rather than against them. The threat inheres in the SEC's definition of "control," which embraces "the possession, direct or indirect, of the power to direct or cause the direction of management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." A literal reading of this definition embraces any aggregation of shareholders, institutional or otherwise, that commands a majority of votes.

Under other provisions of the Securities Act and the Securities Exchange Act, "controlling persons" are liable for all the securities law transgressions of the corporation that they "control" unless they can bear the burden of proof that they lacked knowledge of, or influence upon, the relevant events. Even more serious from the viewpoint of an investment manager, "controlling persons" are forbidden to sell their shares without filing a registration statement, or conforming to the narrow exemption of Rule 144.

In the face of these perils, investment managers are justifiably reluctant to join in voting blocs to elect directors. If the SEC wants corporations to be governed by their shareholders, as Congress apparently intended when it authorized proxy regulation, the SEC should amend its definition of control to exclude direction that is effectuated by electing directors and leaving them free to direct.

Exclusion from the company proxy statement. Another roadblock in the way of shareholder activism, which the SEC could readily remove, is shareholders' lack of access to the company proxy statement and ballot. The proxy rules require that company proxy statements tell shareholders all about the *management's* nominees for directorships, the *management's* proposals for executive compensation, and the *management's* proposals to amend the charter. But they exclude shareholders from using the company proxy statement to present competing nominations, and arguments *against* management proposals. The practical result is like a Russian election, where the ballot provides an opportunity to vote for the party's candidates and the party's proposals, and citizens are not told about other nominees or contrary arguments.

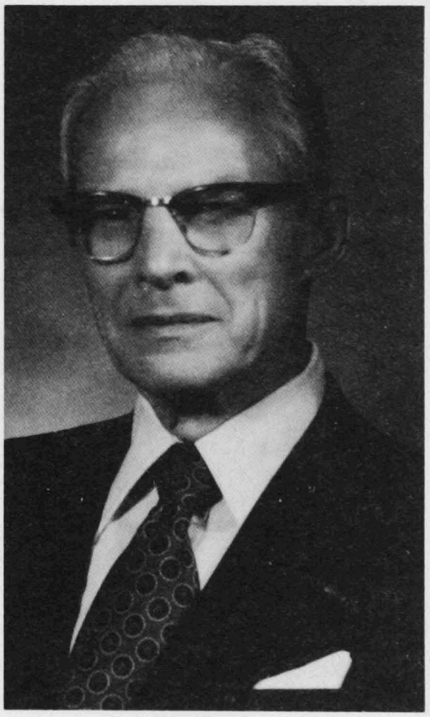
In a ceremonial genuflection to democratic ideas, the SEC lets shareholders insert resolutions of their own in the company proxy statement. But the Commission assures the emptinesss of the right by excluding messages about the things that count — the election of directors, and arguments against the proposals of the management.

Fund managers and investment managers will never be able to do much for their beneficiaries until Congress or the SEC provides that shareholders have the right to present *their* candidates and *their* arguments in the company proxy statement and the company ballot, and to elect directors of their choice without incurring liability for "control."

On the other hand, Congress and the SEC are unlikely to change the rules in favor of fund activism until private investment managers indicate an interest in using their voting power in a constructive way.

Conclusion

The wasteful ways of the takeover game could be greatly relieved if funds would join hands to protect the interests of their beneficiaries. However, a kind of gridlock exists among the competitive interests of investment managers, the pressures exerted by the corporate sponsors of funds, and the rules of the SEC. The current activities of public pension funds offer some hope of breaking the logjam, but they cannot prevail until the public funds are joined by some of the other actors on the investment scene.



Talbot Photography

Professor Emeritus Alfred Conard taught at the University of Michigan Law School from 1954 to 1982. He is the author of a casebook and a textbook on corporation law, and served on the Corporate Laws Committee of the American Bar Association's Section of Business Law.

Some psychological aspects of the trial judge's decision-making

Illustration by Michael McGowan

The following article is an edited, abridged version of a piece that originally appeared in Mercer Law Review: *39.3 Spring, 1988, pp. 937-960. Reprinted by permission.*

In 1930 Judge Jerome Frank published his remarkable book *Law and the Modern Mind*. Frank stated that there is a central myth in law that focuses on our eternal quest for certainty. He linked this with a universal fantasy of childhood wherein infants attribute omniscience and omnipotence to their parents and expect them to know and to do everything. Much of law-making, Frank believed, is a derivative of this childhood need: all humans have great reluctance to accept the fact that life is filled with uncertainty.

This paper will extend Frank's exploration into some of the psychological means that judges use in their efforts to achieve this myth of certainty and to make themselves comfortable while doing so.

Clearly, trial judges occupy one of the more stressful jobs in contemporary society. Placed in their positions

Andrew S. Watson, M.D.

by election or appointment, they have a multitude of role-defined tasks that they are expected to carry out with impeccable honesty, resolute evenhandedness, compassion, and a high degree of judicial wisdom. An analysis of the psychological dynamics of judicial roles reveals many elements which contribute greatly to the emotional stress we so often see and hear about in judges. In this paper I will explore some of these forces and then present some suggestions about how they might be mitigated by personal insight and perhaps through judicial training. Also, if these psychological dynamics can be understood better by counsel appearing as advocates, it may help them present their cases in ways that will help ease the judge's tensions. Such a process is an important aspect of the art of persuasion, the *sine qua non* of good advocacy.

Let us begin by looking at the psychological characteristics of those who occupy the role of judge. Since I first began observing law students and lawyers more than 30 years ago, I noted that a large proportion of those who enter the legal profession are characterized by greater than average concerns about aggressiveness, orderliness, and social altruism. I have also noticed how these psychological motivations fare when law students encounter the Socratic case method of legal education. It is my impression that the law school educational encounter generally makes lawyers considerably less at ease with their emotions than many non-lawyers. Consequently, lawyers are inclined to intellectualize excessively in order to ward off uncomfortable feelings by driving them out of consciousness. Lawyers may then function in ways that make them quite oblivious to some or many of the emotional aspects of their clients' cases and their analysis may entirely miss vital psychological concerns of the client.

Lawyers carry these same attributes onto the bench as judges. Many of the psychological dynamics described below are the products of these conditioned inclinations when they impact upon some of the conflict situations judges encounter in their daily work.

On the Nature and Recognition of Stress

All animal existence is characterized by the constant existence of stress stimulated by a multitude of sources ('stressors'). No species is more prone to this phenomenon than *Homo sapiens*. We not only are bombarded by a multitude of threats and pressures from without, but because of our complex mental life, we also have to deal with an unending stream of potentially stressful images from within. It is a fundamental biological law that all animal organisms undergoing stress will respond with a reaction of either fight or flight. This principle, called Cannon's law, may occur in a number of ways.

The flow of adrenalin, triggered by the perception of threat that causes fear or anxiety, stimulates a whole train of physiological events, all of which facilitate the fight/flight reaction. Additionally, a person can psychologically fight or take flight through the use of 'defense mechanisms.' For example, when judges have a troubling opinion to write, they may "forget" about it and leave it undone. The long-range cost of this temporary relief is high: as more and more time passes, the opinion usually becomes increasingly difficult to write.

The function of these defense maneuvers, then, is to alleviate the awareness of stress and to restore a feeling of balance, or homeostasis. Many of the seemingly incomprehensible behaviors we observe in others, including judges, have this purpose. As we ponder some of the specific conflicts that judges encounter, their judicial behavior will become more understandable when we analyze it against this model.

Some Stressors of Judging

Inevitably, given their backgrounds, those appointed to the bench will have many deeply held values, some of which must be set aside in deference to the obligation and the desire to be and to appear fair. This can generate great internal conflict and stress. Most law-trained people will probably agree that their legal education provided little or no exploration of how to cope with these elusive value conflicts.

As noted above, one of the powerful psychological motivating forces for those who go into law is the desire to be altruistic; judges are no exception. They must grapple constantly, however, to resolve inordinately complex issues in which it is difficult or impossible to achieve a positive result. For example, juvenile court judges must face families who suffer from enormous social and economic deprivation. Because the chance of successfully resolving these problems is miniscule, it is easy for judges to develop a sense of virtual impotence in their efforts to bring forth effective change for those families.

The New York City Magistrate Court provides a vivid example of massive overload and its consequent stresses. Hundreds of cases pour onto the dockets of these judges weekly and they must make a decision about the disposition of each one. To observe them at work is to see the progressive and insidious unfolding of a great sense of cynicism and bitterness. It is easy to understand their frustration and pain, as evidenced by their frequent outbursts of angry sarcasm. For the most

part, these judges work in an atmosphere of isolation, so they do not have adequate opportunities to deal with the emotional conflicts generated.

Personal "Biases" As Conflicts In Judicial Function

During childhood, all humans acquire heavily biased attitudes regarding fundamental values of "good and bad" which they are taught by those who rear them. As children grow up and become socialized, they reach out progressively into settings beyond the home, and many of their early prejudices are elaborately woven, in varying degrees, into attitudes about racism, sexism, religion, and politics.

Judicial appointments at the federal level, at least, are slanted to a considerable degree by political and socio-economic considerations. Consequently, there will be many archaic biases derived from the particular childhood backgrounds of those appointed that will be highly operative in their decisional behavior.

Elected judges on the other hand, must at least pay lip service to being aware of public attitudes about how they carry out their judicial role. While there may be some reality to their notions about "what the public thinks," more often than not, I believe, judges project their own personal biases upon the community and then act on them accordingly. At any rate, judges will always be torn between images of how they think a judge *should* behave versus how they are *inclined* to decide based on old values retained.

The Need To Decide

One of the most frequently harrowing psychological tasks for a trial judge comes from the necessity to make decisions. The opening of the trial presents the judge with a deluge of problems involving law, evidence, and procedure. With each of these problems, the judge must deal with his or her own internal critic, who is constantly evaluating the appropriateness and wisdom of the decision. At the same time, this critic will be receiving pressure from the lawyers on both sides of the case who are eager to help the judge make the "right" decision. How the judge perceives their arguments and measures them against his own value presumptions will influence not only what he decides, but how he feels about his decision.

As Judge Frank noted, the central unstated goal of the law is related to mankind's unceasing search for certainty. In our society, the judge, who has the duty to see that "the law" is found and followed, exemplifies and personifies that goal. Society looks to the judge with that expectation and need. Judges may well seek to convince themselves that they have those oracular powers which would enable them to find certainty, in order to alleviate their own doubts.

When the trial is over and the judge has to state or write the opinion, he or she may worry about several matters: whether it was handed down too quickly or too slowly; whether it is adequately reasoned; whether it is wise or foolish. All of these concerns can raise anxiety. Some judges appear most reticent to hand down opinions. They purportedly "work" on opinions for months as though the passage of time makes it easier to deal with the conflicted issues. This strategy only increases the likelihood that matters will become more vague and necessitate unconscious "reconstructions" of information before a judgment is reached.

In the great majority of cases the facts and the law are more or less congruent and they may be decided without undue tension. However, when the facts or the law in a case drive the judge toward a conclusion which he feels will not be equitable, he may experience acute psychological stress. He will need to realign the facts somehow, or do some creative reshaping of the law to resolve his desire to reach a just decision. He may do so consciously or unconsciously, depending on how comfortable he is with the notion of judge as lawmaker. If he is uncomfortable with that role, he will indulge in complicated rationalizations to make it appear that he is only applying an old rule. The way in which such judicial anxieties are resolved is a significant factor in the development of the law. Sir Roger Ormrod of the English Court of Appeals aptly states this proposition when he says:

> Most judges use [the law] as a sculptor uses an armature, to promote a supporting structure for their judgments. Some proceed by logical deductions; some, as I find I have to do to understand it, look at it in an historical perspective, as a process of evolutionary development which occasionally appears to have gone off the track; others with greater intellectual power, succeed in extracting principles from it; a few others find it an irksome yoke. If my thesis is right, all use it as a means of resolving their judical anxieties.

During the process of writing the decision, the judge must choose what he or she will include. Usually judges are aware that the more they set forth, the more fully revealed thier judicial reasoning will be. Value judgments and biases will be more readily ascertainable and thus will provide more grist for the appellate mill. The desire not to be reversed will influence greatly the

judge's writing process. While appeals offer the possibility of personal psychological ratification, they also carry the risk of revealing "reversible error." In order to be comfortable with themselves, judges should understand this process and instead of seeing it purely as jeopardy, should also use it to learn more about themselves. Frank believes the law would benefit if judges were to express their values and preferences more openly instead of couching them in the usual rationalizations which obfuscate comprehension and interpretation.

There is yet another high principled aspiration for a judge to strive. There may also be a resurgence of omnipotence fantasies which psychiatrists and psychologists believe all individuals have during infancy. The ongoing press of daily events make him aware of his human fallibility and allow him to take a more humble approach toward his tasks. Decisions may then be tailored out of his best understanding of the case, coupled with all of his and counsels' research and consideration. His opinion will then represent the best job possible under the circumstances, and around that, his own self-evaluation can be shaped realistically.

Stress From Problems With Power

Trial judges sit in a position of enormous power over those who appear before them. Although there are procedural rules to define and limit their actions and codes of judicial ethics to modulate their behavior, ultimately judges have discretion to deploy their power in a wide variety of ways. In addition to the external influences upon them (rules, etc.), they will need to accommodate certain internal attitudes they hold about issues of power. Many people, including judges, have been acculturated to feel that any assertive action toward others is to be questioned. As a result, any *impulse* to be aggressive may cause the opposite response of submissiveness (i.e. the defense of reaction-formation).

Other judges, angered by any one of a variety of lawyer activities before them, may respond with inappropriate outbursts which seem to be out of control. These outbursts may reflect a repression or a denial of the restraint a judge is supposed to use in the performance of his or her tasks.

The fact finding process presents the greatest likelihood that a judge's conflicting feelings about his power will work to the detriment of the judicial process. Judges may actively communicate their opinions to the jury through vocal inflections or body language. This interferes with the jury's role as fact finder. Other examples include questioning or calling witnesses. This interferes with counsel's tactical plan for the examination, and may cause the counsel authority problems before the jury.

A judge's comments upon and evaluation of the evidence to the jury can have a powerful influence on the jury. The option to make such evaluative observations would certainly be tempting to a judge with power inclinations, and his concurrent need to balance this temptation or action with images of even-handedness would stir conflicts in him.

Of course the judge has another great potential source of power deployment in his relationships to counsel during the trial. Since most judges come from the trial bar, they are (or can imagine themselves to be) good litigators. To whatever degree their narcissism permits, they may tilt with counsel merely to show their own litigation prowess.

Finally, in writing his decision, the judge can take a fairly wide range of positions in order to give himself a sense of powerfulness. Although he must avoid statements of law that would bring reversal on appeal, he still has great latitude in asserting *his* opinion in the service of power images. However, there is always an inner part of his psyche that *knows* the appropriate uses of his authority and that will prod him to conform more or less with "the law." In the end, if a judge is to gain gratification from his role, it needs to come from his own knowledge of a job well-performed, and not from his desire to be powerful.

Stress From Sentencing Tensions

Criminal court judges widely acknowledge that sentencing is one of their most difficult and stressful tasks. They must face (or avoid facing) and determine the disposition of the individual who has just been found "criminal." The sentencing judge's psychological and emotional tendency toward retribution often will oppose his own wishes to understand, to forgive, and to move toward rehabilitation. To solve this conflict he can easily move toward complicated rationalizations about deterrence. A judge may blur the distinction between his own values about sentencing and those he attributes (i.e. projects) to the public. Such "reasoning" can be further rationalized with concerns about reelection or appointment to a higher court. These conflicts may create sufficient stress to require the judge to resort to his own specific psychological defense maneuvers.

Even after deciding how he would *like* to dispose of a case, the judge swiftly encounters the disturbing facts of reality which grossly limit his alternatives. The inability to put into effect the treatment plan he believes

appropriate may create an enormous sense of frustration that elicits feelings of inadequacy or even guilt, making the whole task seem unconscionably impossible. Such thinking is very painful for conscientious humans: it always entails deliberately "writing off" certain individuals in cases where treatment payoff is so low that it is not cost effective and would seriously jeopardize the whole treatment system.

Conflicts Over Personal Needs Versus Professional Demands

Another source of stress for a judge is the excessive amount of work to do. If a judge is conscientious, he is aware of the fact that he is tempted to give less attention to issues than they deserve. Sometimes this will cause him to press for compromise settlements in cases where considerations of justice suggest that there should be no compromise. Such work pressure can produce dissatisfaction, defensive cynicism, and/or a great sense of inadequacy.

All of the above conflict situations function as psychological stressors that can stimulate great internal discomfort for judges and disturb the sense of certainty which, as noted earlier, is so important. Because so much of such a problem is felt to be inside the judge's mind, he has little direct means for dealing with the resultant anxiety. The fight/flight reaction of Cannon's Law will take effect and from that point, behavior and decision making is very likely to be nonrational.

Judicial Self Help and Aids for Advocates

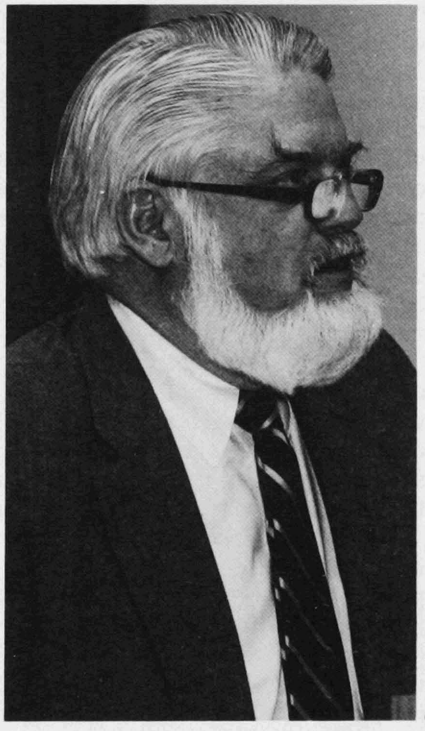
The principal remedy for the judge's problems of psychological tension is for him to be able to resolve the conflicts which produced the tension. Naturally, a large and comparatively well known part of his judicial efficiency depends upon his possessing a thorough substantive knowledge of law and procedure. He may also have a good grasp of relevant jurisprudential knowledge enabling him to explore a broader rationale for the decisions he makes. The judge, through that knowledge, will realize that others have struggled with similar questions and agonized over incomplete and unsatisfying answers, just as he has done. The distress arising from a sense of isolation in the struggle will be alleviated to some degree. The judge can then feel that he properly applied the law and any negative impact his opinion had on any given litigant will not be his "fault."

There is no group of professionals for whom the ancient Greek admonition of "know thyself" has more applicability and importance than for the judiciary. At the very least judges should work conscientiously to become intuitively and cognitively sensitive to the kinds of issues that cause them emotional conflict. Only then can they face the multitude of contradictory values encountered in judicial deliberations and be able to keep them within reach of cognition and rational resolution.

Conclusion

Judges must nurture self-awareness as a matter of professional responsibility and as a duty they owe to their role. I *know* that there is little or nothing we can do to eliminate the all too human proclivities which influence judges' decision making. If a judge is conscientious, however, and wishes to do so, he may learn about his psychological self and optimize his chances for dealing responsibly with all of his personal quirks, biases, and inclinations. Such self-awareness will also help the judge to be more comfortable and better gratified as judicial tasks and efforts are carried out amidst the constant *strum und drang* of judging. He and we would all profit from such efforts.

Andrew S. Watson, Professor of Law and Professor of Psychiatry (ret.), University of Michigan, has practiced psychiatry and has had substantial experience as a psychiatric witness in major litigation. His principal scholarship is in the area of psychotherapy of family units, but he has also written on a wide range of topics related to law and legal education. One of his works is the basic text, Psychiatry for Lawyers, *published in 1968 and revised in 1978.*



Gregory Fox

Letters

On The Role of Legal Education

Congratulations to Judge Harry T. Edwards on his article entitled "The Role of Legal Education in Shaping the Profession." His conclusion that law schools should be at the cutting edge of structural changes in the legal profession is not only sound, it is mandatory. From where else will the leadership come? Senior partners of major firms, corporate lawyers and even public service lawyers are either too busy or non-motivated to undertake a leader's role. Were that not the case, the private bar still would be hamstrung without the cooperation of law school faculty.

David R. Frazer
Phoenix, Arizona
LLM 1954

Clinical Experience

As a 1974 graduate of the Law School, I enjoyed your article regarding Michigan's legal aid clinics. During the Spring of 1974, I had my first taste of actual practice under the gentle guidance of Jim Martin. Your recent article failed to mention Ed Goldman who was a practicing attorney and another instructor at the Clinic that year. He was probably the most important member of the faculty in my development as a litigation attorney...

Halfway through the semester, Ed decided that we should represent patients at the local mental hospital. Unfortunately, our first experience was not a good one. We met with a very big and obviously violent client who thought his good behavior justified his release, contrary to the recommendation of the hospital staff. Ed and I spent an hour in a locked room with this young man, both scared to death. We did succeed in convincing him that his request was premature!

That experience and the trial practice course I took during my last year were invaluable to me when I began practicing law almost 15 years ago. I still have a general practice. For the past 10 years I have been teaching legal ethics at Lewis & Clark Law School in Portland, and have always used a practical approach in my course. Thanks to Ed Goldman, I learned long ago the value of a practical education for young lawyers in all fields.

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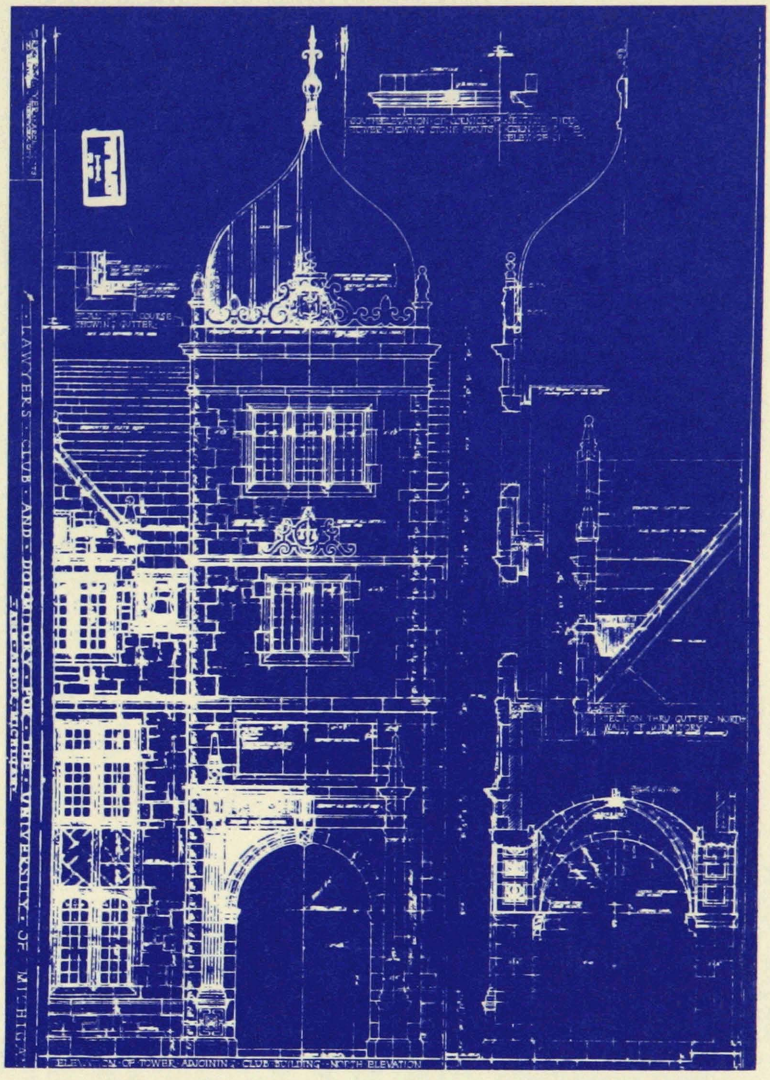

From an architectural blueprint by York & Sawyer, New York.

Coming events

Breakfast on the beach?

The Law School will be holding its yearly breakfast on August 7 at the ABA annual meeting in Hawaii. Watch for more information in the next issue of *LQN* or call the Alumni Relations Office at (313) 763-7965.

In the next issue

Articles by Frank Kennedy, Theodore J. St. Antoine, James Boyd White.

A new course on the federal courts, taught by alumnus Judge Harry T. Edwards, takes a look at the judicial process.

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