THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 34, NUMBER 3

LAW QUADRANGLE

NOTES

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THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOL. 34, NO. 3, FALL, 1990

LAW QUADRANGLE

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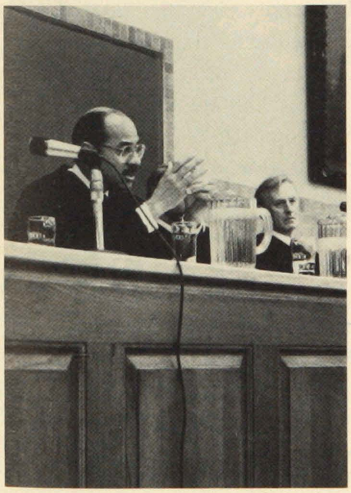

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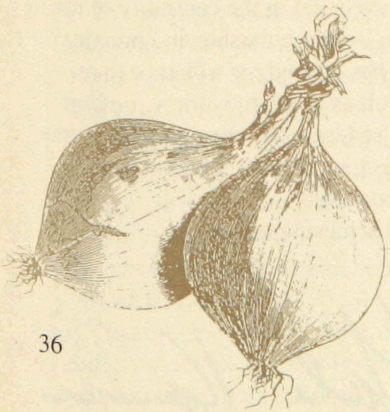

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Introducing a new editor

A letter from the faculty advisor

Susan Isaacs Nisbett

Although I have been faculty advisor of *Law Quadrangle Notes* for 25 years, I have little to do with the actual publication of the magazine. I have been able to leave almost all the work for the various talented editors we have been blessed with over the years. But this is one of those occasions when I do think I should say a word or two.

Last fall, Bonnie Brereton, editor of *Law Quadrangle Notes* since 1985, left her position at the Law School to accept a Fulbright Fellowship for study in Thailand. During her tenure as editor, Bonnie constantly strove to improve the publication and made important contributions to it. I enjoyed working with her and wish her well in her new adventures.

As the School contemplated making a new appointment, a decision was reached to expand the job's responsibilities to encompass those of public information officer. A search was conducted, and Susan Isaacs Nisbett joined the Law School staff as both editor of the magazine and director of media relations.

Educated at Brooklyn College (B.A. '68) and Yale University (M.Phil., French, '71), Susan has worked as a newspaper and magazine journalist for the last 15 years — including two, from 1983 to 1985, as editor of *Law Quadrangle Notes.* She comes back to the Law School having spent the previous five years as assistant editor and then editor of the feature section of the *Ann Arbor News.* During her tenure, the section won two prestigious Penney-Missouri awards and other editing and writing awards from the Associated Press and the Michigan Press Association.

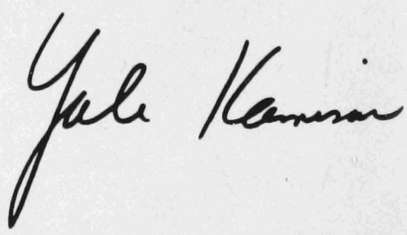
In addition to writing extensively for the feature section of the *Ann Arbor News* before joining its desk staff, Susan worked in the late '70s and early '80s as a staff writer for the *Ann Arbor Observer,* a monthly city magazine. As a freelancer, her feature pieces have appeared in the *New York Times,* the *San Francisco Chronicle,* the *Milwaukee Journal* and the *Miami Herald.*

Susan is a great addition to our administrative staff. I am sure that Dean Lee Bollinger spoke for the entire faculty when he recently observed: "Both the magazine and the job of media liaison are vital to the school. We are extremely pleased to have Susan back with us again."

Susan is equally delighted to be back at the School.

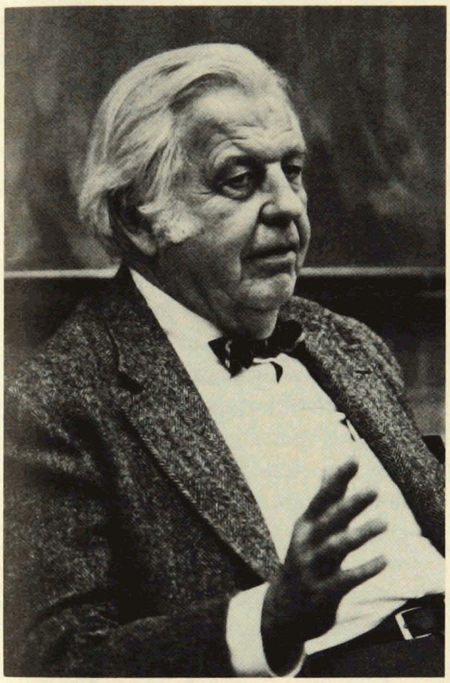
"Although I'm not a lawyer," she says, "I have a deep belief in the centrality of law to our lives, and in the centrality of this Law School to legal scholarship and practice. Dean Bollinger's invitation to rejoin the School's staff has offered me a chance to return to the pleasures of non-deadline journalism, as well as to put to work — both in *LQN* and as the School's media liaison — the things I've learned in my years inside the newspaper industry. I look forward to working with the Law School community to make the magazine as interesting and informative as possible."

I am confident that Susan will go a long way toward achieving her goal.



Point, counterpoint

Professor, alumnus debate "right to die"



John Pickering

John Pickering, one of the Law School's most illustrious graduates, and Professor Yale Kamisar share a number of things in common. Among them: allegiance to the U-M Law School and distinguished professional reputations, the one as a practitioner, the other as a legal scholar. But when it comes to the right-to-die issue, the two — both leading commentators on the topic — part ways.

With the Nancy Cruzan case in the public eye, Kamisar and Pickering were busy late last year making joint appearances, in print and on television. Shortly before the case was heard by the Supreme Court in December 1989, the *Legal Times* devoted a four-page spread to their opposing analyses of the case. A few days later, they appeared together on "The Health Show," on ABC. Both spoke on the topic at the ABA meetings in August.

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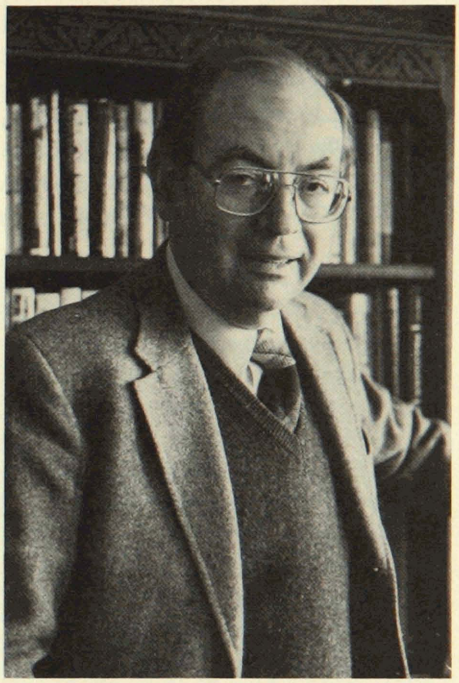

Yale Kamisar

*THE "RIGHT TO DIE": GREEN LIGHTS AND YELLOW LIGHTS**

By Yale Kamisar

**Based on an article written in the September 1990 issue of* The World and I.

In the long-awaited and much-discussed *Nancy Cruzan* case, a 5-4 majority ruled that absent "clear and convincing evidence" of a once but no longer competent patient's wishes to discontinue her life support (in this instance artificial nutrition and hydration) a state is not constitutionally compelled to terminate that support.

Nancy's situation is tragic. Since suffering severe injuries in 1983, she has been in a persistent vegetative state. Yet medical experts testified that if her feeding tube were not removed she could linger on in her present condition for many years.

But the first thing to keep in mind about the *Cruzan* decision is that the question presented was not whether pulling the feeding tube under the circumstances is desirable or sensible but whether it is *constitutionally mandated*. The *Cruzan* case went all the way to the U.S. Supreme Court because Missouri, the state where the litigation arose, applies a heightened standard of proof of a patient's wishes before life support may be terminated. The Court did not "approve" or "endorse" the Missouri standard; it simply found nothing in the U.S. Constitution that prevents a state from utilizing such a standard.

On the facts of the *Cruzan* case, many states would reach (or already have reached) a different result. Nothing in the *Cruzan* decision affects the law in these other states. Nothing "takes away" a broader "right to die" in these other jurisdictions. A state remains free to apply a lower or looser standard of proof of the patient's wishes or even

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"I believe in the sanctity and value of life, but I reject completely the notion that life is too precious to put a value on . . ."
— John Pickering

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(The topic was also the subject of the Campbell Competition. See Page 18.)

Pickering, a name partner in the prestigious Washington, D.C., firm of Wilmer, Cutler, Pickering and chairman of the ABA's Commission on Legal Problems of the Elderly, had filed an amicus curiae brief with the Court on behalf of the American Academy of Neurology. In the *Legal Times* article, excerpted from the Leon and Josephine Winckler Lecture he gave at the Law School in April 1989, Pickering expressed strong support for the right to die when life-sustaining technology only results in the "futile prolonging of the natural process of dying."

"I . . . believe in the sanctity and value of life," he wrote, "but I reject completely the notion that life is too precious to put a value on and must be preserved at all costs. That notion is pious balderdash. We put programmatic values on life in the abstract every day by how we allocate social and economic resources, and it is mindless nonsense to pretend otherwise."

Examining the case law on the subject, he concluded that "with a few unfortunate exceptions, such as the Cruzan decision, the case law seems to be accepting the concept of natural death with dignity rather than the preservation of life at all costs."

The framework, he said, "minimizes the law's intrusion into what are intensely private and personal matters." It remains to be seen, he added, how the framework will meet the challenges of the future.

Kamisar, the Henry King Ransom Professor of Law, has written extensively on euthanasia, taking the view, generally, that the distinctions between passive and

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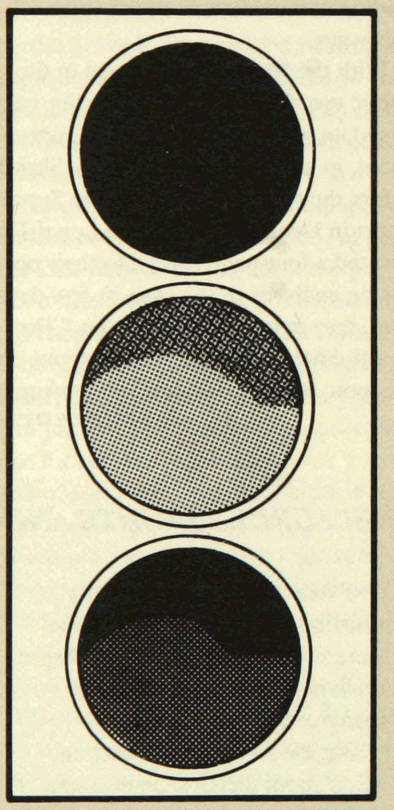
— absent any specific evidence of what the patient would want — simply to defer to the decision of close family members.

Although the opinion of Chief Justice William Rehnquist was officially designated as the "opinion of the Court," Justice Sandra Day O'Connor cast the decisive vote and wrote a separate opinion that merits the closest attention. This brings us to the second point to remember about the *Cruzan* case: Because the four dissenting Justices take an even more expansive view of the constitutionally protected "right to die" than she does, Justice O'Connor's separate opinion is *really* the opinion of the Court.

The Chief Justice "assumed for purposes of this case" that a *competent* person does have a constitutionally protected right to refuse lifesaving hydration and nutrition. Justice O'Connor was more explicit and more emphatic on this point. Forcing a competent adult to "endure [artificial feeding] against her will," she wrote, "burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it



protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."

Proponents of the "right to die" achieved a significant victory when the Court rejected a distinction between the feeding tube and other forms of life support. In the 1970s such a distinction was widely regarded as an important one. But our way of thinking about this matter changed dramatically in the 1980s. The American Medical Association, various other medical/legal groups and a number of state courts rejected any such distinction.

On the eve of the *Cruzan* case, however, the issue was still a matter of considerable dispute. A number of commentators maintained that the distinction should be preserved for various reasons: Nutrition and hydration are basic care, not medical treatment; denial of such care poses a serious threat to the doctor-patient relationship, and permitting withdrawal of artificial nutrition and hydration undermines the psychological distinction between "killing" and "letting die." Moreover, nearly half of the 40 states that have adopted living will statutes (including Missouri) explicitly exclude artificial nutrition and hydrationy from the category of life-sustaining treatment that may be refused.

Nonetheless, five Justices (O'Connor and the four dissenters) seem to have put an end to this controversy, obliterating the distinction as a matter of constitutional law.

"The U.S. Supreme Court could not establish a right to die in the Cruzan case without generating other difficult questions."
— Yale Kamisar

active euthanasia are artificial — and that "right-to-die" decisions are not medical questions but rather moral, legal and philosophical ones. The Cruzan case, he argued in his *Legal Times* piece, and also in an op-ed piece for *The New York Times*, is not the case on which the Supreme Court should establish the constitutionality of such a right.

"The U.S. Supreme Court could not establish a right to die in the Cruzan case without generating other difficult questions: What quantum of proof is needed to support the right to die? What presumptions and burdens of production and persuasion should the Court assign? What should the right mean for the never-competent and the no-longer competent? What if there is clear and convincing evidence that the patient would prefer to die quickly by lethal injection, rather than slowly by starvation and dehydration? If a person has a constitutional right to die, why doesn't she have the right to choose what she regards as the most 'humane' or 'dignified' way to die?"

That, of course, is what Janet Adkins, diagnosed with Alzheimer's disease, chose to do in Detroit in June, when Dr. Jack Kevorkian assisted her in committing suicide by hooking her up to a home-made device that allowed her to push a button and end her life by lethal injection.

Her case, and the intense reactions it produced, make a point on which both Kamisar and Pickering can agree: The controversy, legal and medical, over euthanasia is not likely to go away. Indeed, it may, as Pickering notes, "intensify as medical science continues to prolong life even after it has become essentially meaningless or unendurable. . . ."

This feature of the *Cruzan* case strikes me as more remarkable than the Court's conclusion, on the particular facts of the case, that a state is not constitutionally compelled to discontinue life support.

Does an *incompetent* patient have a constitutionally protected "right to die" under certain circumstances? Before lapsing into her present condition, Nancy had neither made a "living will" nor designated anyone else to make health-care decisions for her. What if she had?

The Chief Justice left open the question whether a state might be required to defer to the decisions of a surrogate selected by the patient herself while still of sound mind. Once again, Justice O'Connor put it more strongly. In her view, the duty of a state to implement the decisions of such a surrogate "may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment."

That Justice O'Connor focused on the proxy decision-maker procedure rather than on the living will is interesting. A number of commentators have maintained that because the former procedure is more flexible than the latter and not restricted to cases of "terminal illness" it is superior to the living will.

In general, living will statutes require that the patient be "dying" or "terminally ill" before the directive can become operative. As these terms are commonly defined, a patient must be suffering from an irreversible condition that will produce death in a short time *regardless* of medical intervention. If these definitions apply, Nancy was neither "dying" nor "terminally ill." (Nor, for that matter, was Karen Ann Quinlan.)

But none of the Justices suggested that even if there were "clear and convincing" evidence of Nancy's wishes to remove the feeding tube, her wishes could be frustrated because her condition had stabilized — if artificial nutrition and hydration were not stopped she could live for another 20 or 30 years. Indeed, at one point Justice O'Connor observed that "a seriously ill *or* dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures." (Emphasis added.)

I venture to say that in some future case the Court will make plain what I think is implicit in *Cruzan:* A patient's "right to die" cannot be denied solely on the ground that she is neither "dying" nor "terminally ill" — no more than it can be denied solely for the reason that the life support involved is a feeding tube rather than a respirator.

As I have already indicated, I think the *Cruzan* decision is a narrow one. The particular result the Court reached will turn out to be less important than some of the general observations Justice O'Connor made about a constitutionally protected "right to die" and some of the conclusions the Court reached implicitly.

Under our system of constitutional law, when the states regulate in a field, especially in a still evolving area of law, morality and social judgment about which reasonable people differ, they do not have to wait for a "green light" from five Supreme Court Justices. They are free to act unless and until the Court flashes a "red light." On the particular facts of the *Cruzan* case, the Court declined to flash such a light — but it did not display a green one either. Instead, it flashed a yellow light. It issued a warning that in this area the states must proceed with caution — they must look constantly at their rear view and side view mirrors at the U.S. Constitution.

Coming full circle

Eric Stein advises his homeland on new constitution

In 1939, Eric Stein, then a young lawyer from Prague, fled his native Czechoslovakia to escape the Nazis. Through the help of an American law professor, he obtained a scholarship to take a law degree at the University of Michigan. Through the help of a U.S. vice-consul in Naples, Italy, he obtained a visa to take advantage of that offer — despite the fact that the consul knew it was Stein's intention to remain permanently i the United States.

Stein did remain permanently, adding his talents first to the student body and then to the faculty of the Law School, where he is currently a professor emeritus. He has made his mark as an expert in international law, and his long career has included not only teaching at the U-M but work with the U.S. Department of State in the mid-1940s getting the United Nations off the ground.

Today he is helping to get a different venture off the ground: He is part of a 27-member international committee advising the Czechoslovak government on a new constitution for that country.

One of four Czech natives on the committee, which also includes former U.S. Solicitor General Charles Fried and former Canadian Prime Minister Pierre Trudeau, Stein was in Salzburg and Prague April 20-24 for discussions with committee members and members of the Czechoslovak government.

Stein explains that the Czechs' primary concern last spring was to develop rules for new elections, which took place in June. A constitutional revision commission was established after the elections, to examine issues that will shape the national government.

A number of the key questions facing the constitutional commission are linked to federalism and division of powers — both economic and political — between the Czech and Slovak republics and the national government. "This will be important in the area of foreign economic relations," Stein notes.

Stein's particular mission as an advisor is to consider the foreign affairs issues that are likely to arise for the Czechoslovaks. The allocation of powers is one question. Others include participation in international organizations, such as the U.N. or the European Community, and the role of international law in the internal legal order.

The April trip to his homeland held special meaning for Stein. He returned briefly to Czechoslovakia in 1948 to bring the only surviving members of his family — his sister and her son, who had spent the war in a Nazi concentration camp — to the United States. His next trip was 35 years later, in 1983, when he attended the 50th reunion of his gymnasium, or high school, class.

Then in 1985 he returned again. "It was an anticlimax," he says. "I decided I would never go back unless the regime changed."

Eric Stein

Now the regime *has* changed, and Stein is part of an effort to ensure that the next regime will be shored up by a workable constitution.

"I don't quite take it in," he says, "because it's too radical a change."

Of free speech and arts funding

Bollinger testifies before Congress on NEA reauthorization

Both in Washington, D.C., and in Cincinnati, the Robert Mapplethorpe retrospective has brought attention to the use of public funds for controversial art.

The questions raised have to do not only with public policy, but with constitutional issues of free speech.

"It is a fair interpretation of the First Amendment tradition to conclude that a government subsidy program is not entirely free of First Amendment law," says Law School Dean Lee C. Bollinger.

A nationally recognized expert on free speech and the First Amendment, Bollinger was called upon in April to testify before the Senate Subcommittee on Education, Arts and Humanities. The committee was conducting hearings on the reauthorization of the National Endowment for the Arts, the government agency whose duties include arts-subsidy decisions.

Bollinger told the committee that "the best approach for the Congress is to work from the premise that the First Amendment insists that a subsidy program like the NEA hew very closely to the standard of promoting artistic quality or excellence."

Such a "quality" standard, he noted, is not free — for better or worse, depending on your views — from content evaluation. It might result, in actual operation, in the de facto exclusion of some fine artistic expression because it is offensive.

"Content evaluation seems inevitable," Bollinger said. The reality, he added, is that "a 'quality' standard is bound to be difficult if not impossible to penetrate to get at the real reasons for decisions."

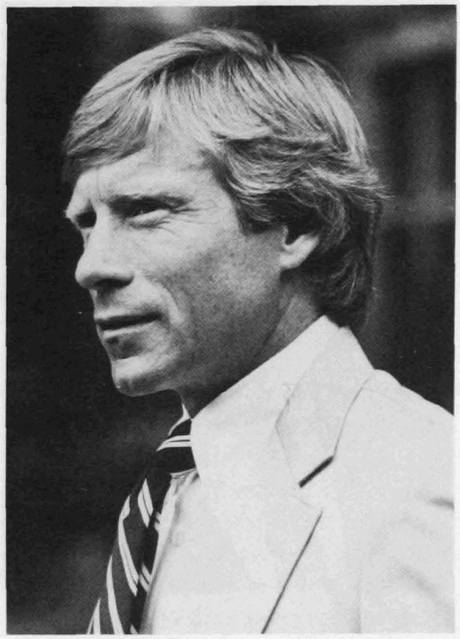
Nonetheless, from both a First Amendment and a policy standpoint, the "quality" standard, Bollinger said, should be the exclusive guide to administering a public grant program for the arts. "The virtue of tolerance is not easy to come by, and the government has a critical role to play in setting an example of strong commitment," he noted.

The area of arts subsidies is not one in which, from a constitutional standpoint, the government can impose the limits it might in other First Amendment areas. For example, it might, in commissioning a painting, legitimately demand that such a work of art not embarrass or undermine the existing government. It could not, on the other hand, award NEA grants only to those artists who pledged to vote Republican, or who vowed not to create art that would embarrass the government, Bollinger said.

First Amendment limits on standards employed to distribute subsidies under a program like the NEA, however, do not approximate the limits imposed on the use of some government property — such as public streets or parks and other so-called public forums. In this area, a long line of Supreme Court cases upholds a largely content-less standard of allocation among speakers.

"Few would say that the same is true of a public program of grants to the arts," Bollinger said, "just as few would say that the walls of our public museums must be open to all who wish to hang their art, regardless of how good the museum administrators think their art is."

There is no question that speech unprotected by the First Amendment — because, for example, it is obscene or libelous under constitutional definitions — could be freely excluded from the system of arts subsidies, provided that statutory language "tracked" the constitutional definitions. Beyond that, artistic quality should be the guide, as well as a policy of tolerance.



Bollinger's testimony concerned the application of First Amendment doctrine to arts subsidies.

"When we seek illumination through art, we must be prepared to live with what we do not fully understand, with what we sometimes dislike, and with what we sometimes even find offensive," Bollinger noted. "Our commitment should be to the idea that more great art will flower in a tolerant environment."

Was Hamlet guilty of murder?

At a local high school, the verdict is in

By Douglas Kahn
Paul G. Kauper Professor of Law

For the past three years, I have taught a course in Legal Process to high school seniors at Greenhills School, a secondary school in Ann Arbor. The course is essentially the same as one that I used to teach some years ago to college students at the University of Michigan. Most of the course materials are taken from a book that has been out of print for some years. The principal focus of the course is to introduce the students to the operation of the common law and to the roles played by the judge, the advocates and the jury in the adversary system.

The course materials include jurisprudential writings on: the doctrine of *stare decisis,* the determination of the holding of a court decision, the source of the laws that a court applies or creates, the sources from which the court determines the operative facts, the difference between adjudicative and legislative facts, the difference in the function of a court when applying common law rules and when applying statutory rules, the ethical constraints on attorneys engaged in litigation, and the role of the jury in a jury trial (including the question of the propriety of jury nullification).

In conjunction with the jurisprudential material, the students study and discuss cases that illustrate the operation of the common law. Most of the cases deal with the now defunct "fellow servant" rule. The students begin by reading the 19th century cases in which the "fellow servant" rule was adopted in England and then was transplanted to the United States. They follow the progress of the rule through cases that illustrate how courts began to confine the rule by creating limited exceptions to it. They then study statutes that were adopted to create broader exceptions to the rule, and they study cases that interpret and apply those statutory provisions. By this means, the students can see the birth of a legal doctrine, its subsequent modification first by common law decisions and then by legislative action, and they can examine the interaction between the legislature and the courts that interpret and apply legislative acts.

In addition to their study of the common law, the students take up one current topic. For example, last year we discussed some of the legal issues arising out of the abortion cases. This year, the class will examine the question of the extent to which a secondary school can impose restrictions on a student's speech.

The final assignment of the students is to prepare and present an oral argument in a defamation case. This is a moot court assignment.

Last year, I had the class do something that I had not tried before. I heard of an English class in an independent school in Georgia in which the instructor had the students make an oral argument as to whether Hamlet was guilty of murder. The students were required to base their argument on the facts and statements set forth in the text of Shakespeare's play. Since about two-thirds of my students

Was Hamlet guilty or not guilty? And on what counts? Those were the questions before a class of high school students taught by Law School Professor Douglas Kahn.

were also taking a course in Shakespeare in which they studied the play, *Hamlet,* I conferred with the instructor of the class in Shakespeare, and we agreed to have our two classes jointly put Hamlet on trial for murder. I determined that a trial would be much more interesting to the students than would a moot court argument; since my students already had a moot court argument assignment, a trial would be a different, and a rewarding, experience for them.

To try Hamlet, I adopted the fiction that the trial was to take place in Heaven so that the characters of the play (most of whom died before it ended) could testify. Although Hamlet caused a number of deaths, we tried him on only four of those homicides — the deaths of Polonius, Rosencrantz and Guildenstern, and Claudius. If convicted of a criminal homicide, Hamlet could be sentenced either to Purgatory or to Hell.

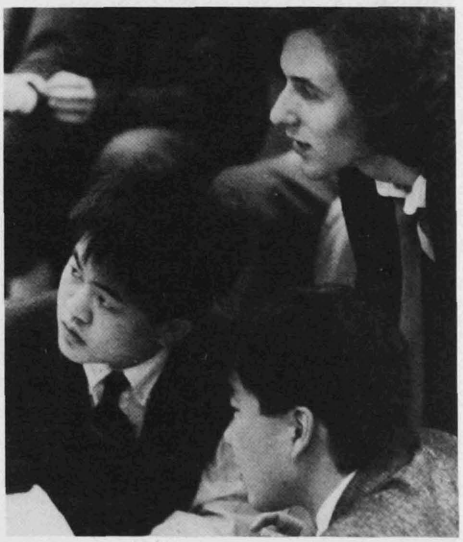
The lawyers and the judge for the trial were all students from the law class. The witnesses and the jury were drawn from students in the English and the law class. There were three lawyers for the defendant and three lawyers for the prosecution. There were eight witnesses who testified (one of whom was Hamlet himself). Two of the lawyers for each party examined three of the witnesses each, and the third lawyer for each party examined two of the witnesses and made the opening and closing statements. The witnesses were called by the court rather than being a witness for either party. Prior to the trial, the judge determined the order in which the eight witnesses would testify, and for each witness the judge determined whether that witness would be examined first by the prosecution or by the defendant. In addition, before the trial, the lawyers for each party had to inform the judge in writing as to the names of the lawyers who would examine each witness and the name of the lawyer who would make the opening and closing statements.

I did not provide for a redirect examination, but, the trial judge permitted additional questioning and also allowed the defendants to recall several witnesses after they had testified. The witnesses dressed in costume. The lawyers were permitted to object to questions or to the testimony of a witness, and the judge had to pass on each objection.

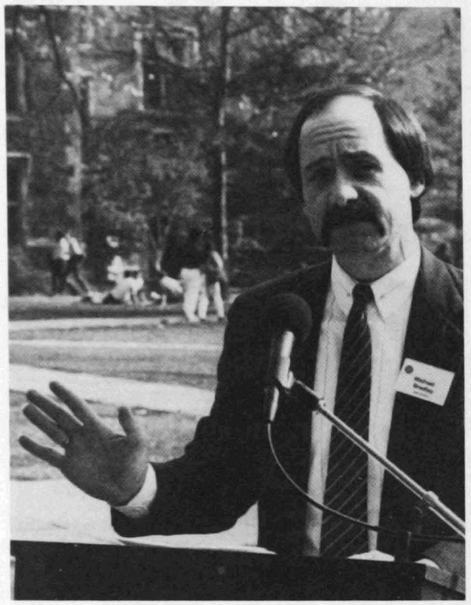
Everyone became quite caught up in the trial, and a number of objections were raised. At the conclusion of the evidence, each party submitted requested instructions to the judge, and the judge then charged the jury. I had discussed possible theories for the defense to raise with the lawyers and the judge prior to the trial. Next time, I would have them submit to me their suggested charges to the jury, and I would discuss it with them. In the absence of that discussion, the charges were general explanations of the elements of the crimes of murder in the first degree, murder in the second degree, and voluntary manslaughter. The judge also explained the requirements of self-defense to the jury. The defendant also raised the question whether Hamlet was justified in killing the king because the king had usurped the throne and had killed Hamlet's parents and because there was no legitimate authority in Denmark from whom Hamlet could seek redress.

I sat with the jury and heard their deliberations. They made a conscientious effort to adhere to the judge's charges. They acquitted Hamlet of the death of the king, Claudius; they convicted Hamlet of voluntary manslaughter for the death of Polonius; and they convicted him of murder in the second degree for the deaths of Rosencrantz and Guildenstern. The judge sentenced Hamlet to Purgatory for an indefinite term, subject to parole.

The students enjoyed the exercise and acquired some sense of the operation of a court trial. They also gained a thorough knowledge of *Hamlet,* which they are likely to retain for the rest of their lives.

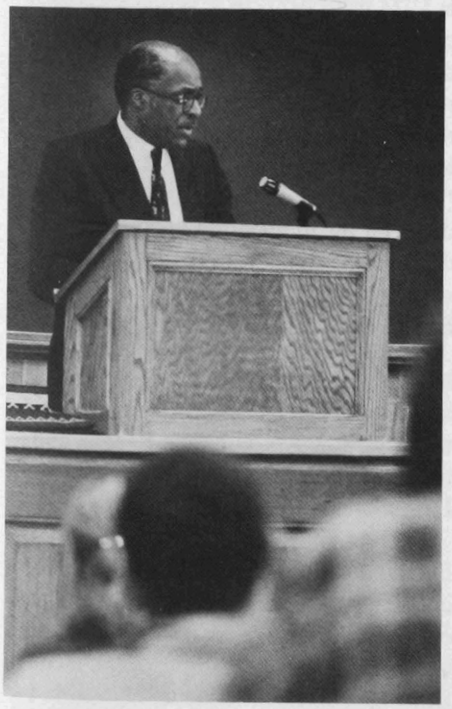


IN CAMERA: *'89-90 Events*



The weather cooperated during October '89 to permit the Committee of Visitors to enjoy lunch "under the big top" in the quadrangle. Michael Bradley, who holds a joint appointment in law and business, was the featured speaker.

Judge Nathaniel R. Jones of the U.S. Court of Appeals for the Sixth Circuit (above and left) spoke on the civil rights movement at the School's Martin Luther King, Jr. Day event.



Dores McCree, the School's Special Projects Coordinator, near right, was instrumental in bringing Jones, a former general counsel for the N.A.A.C.P., to campus.

Professorships established

School has four new collegiate professorships, two research professorships

Generous gifts from alumni and friends of the School and continuing fundraising efforts of reunion classes have enabled the Law School to set up a number of new named professorships in the last year.

The Francis A. Allen Collegiate Professorship of Law, the William W. Bishop, Jr. Professorship of Law and the John Philip Dawson Collegiate Professorship of Law were approved by the Regents in May. The three professorships will be supported by the gift of alumnus Joseph Parsons, J.D. '27. In addition, as a 25th reunion gift, the class of '65 has undertaken the establishment of a Research Professorship to bear Professor Bishop's name.

The Wade H. McCree, Jr. Collegiate Professorship of Law, approved by the Regents in June, is the 50th Reunion Project of the Class of '40. It is also supported through gifts from friends and colleagues of McCree, who died in 1987.

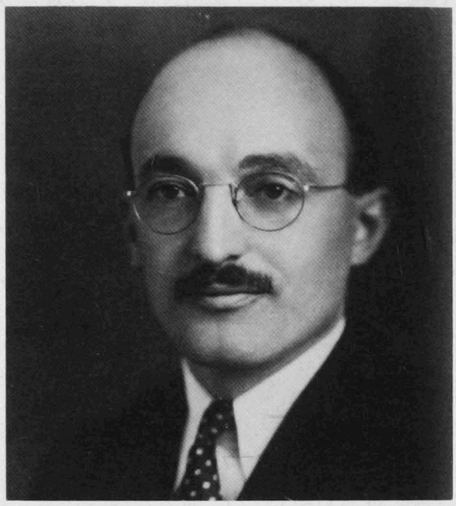
These four professorships honor outstanding former Law School faculty. They are named for:

Francis A. Allen

■ **Francis A. Allen,** the Edson R. Sunderland Professor Emeritus of Law, who served as dean from 1966-71 and retired in 1986. "As dean he guided the Law School with confidence, dignity and eloquence through years that were troubling for all institutions of higher learning," Dean Lee C. Bollinger said. "As scholar he is an outstanding leader in criminal law and procedure. As teacher he continues to win the respect and affection of all who study with him."

William W. Bishop, Jr.

■ **William W. Bishop, Jr.,** who was the Edwin DeWitt Dickinson University Professor of Law from 1966 to 1976. "The offices, appointments and honors he won are too numerous to count, bearing mute witness to his central role in advancing the Law School to center stage in the world of international law," Bollinger said. "Professor Bishop was a universally treasured colleague. His most important legacy, however, is in the hearts and minds of generations of students who knew and loved him not only as a towering figure and intellect but as the sweetest of souls."



John Philip Dawson

■ **John Philip Dawson,** who taught law at U-M from 1927-56. "While a member of the Law School faculty and throughout the remainder of his career he became recognized as an outstanding figure in the fields of restitution, contract law, and legal history," according to Bollinger. "He was revered by generations of students for the unrelenting intellectual demands he made with the utmost gentleness of spirit. He was one of the great figures in the history of the Law School."

■ **Wade H. McCree, Jr.,** who served as Solicitor General of the United States under presidents Carter and Reagan and became the Lewis M. Simes Professor of Law at U-M in 1981.

"Professor McCree's experiences in the most important legal positions in our country provided a wealth of material that enriched his roles as inspiring classroom teacher, treasured colleague of the faculty, and wise counselor to students," said Bollinger.

"He was part of the generation that brought Black lawyers into successful participation in all branches of the legal

profession; his career and successes as a Black lawyer were a vitally important part of the transformation, and added to his unique contributions to the Law School."

Wade H. McCree, Jr.

In addition to these chairs, two research professorships have been established, the Roy F. and Jean Humphrey Proffitt Research Professorship and the Louis and Myrtle Moskowitz Research Professorship. The Proffitt Professorship honors **Roy F. Proffitt,** U-M professor emeritus of law, and his wife, Jean Humphrey Proffitt. "They gave unstintingly of themselves to the Law School and its students," said Bollinger.

Roy Proffitt

"The professorship will be the first research professorship in the Law School. It will be supported by an endowment created by the Law School class of 1963 as its 25th reunion gift and by other funds gifted by the Proffitts' friends."

Proffitt retired in 1986 after 30 years on the School's faculty. He received his J.D. degree in 1948 and an LL.M. degree in 1956 from the U-M. Following a brief period in practice, he returned to academic life as a research assistant in international law at the University of Nebraska and later as a member of the law faculty at the University of Missouri.

He returned to the U-M in 1956 as associate professor of law and assistant dean of the Law School. He was later promoted to professor and associate dean.

The Moskowitz Professorship is a joint professorship in business and law. It is the result of a generous pledge of $750,000 from the Republic National Bank of New York to honor former Chairman Louis Moskowitz and the memory of his wife, Myrtle Moskowitz.

The Moskowitz Professorship will provide the cornerstone of a joint endeavor between the business and law schools to attract and retain outstanding faculty in the areas of law, economics and finance.

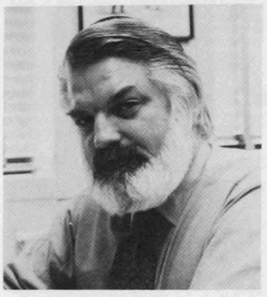
The professorship will assist a faculty member from the Law School and the School of Business Administration, on a rotating basis, by providing, as funds are available, a periodic one-semester leave from all teaching and administrative responsibilities at a crucial point in those individuals' research to allow them to bring their work to fruition. Holders of the professorship will be jointly chosen by the deans of the two schools.

■ ■ ■

As *Law Quadrangle Notes* went to press, four Law School faculty members were appointed to the School's new collegiate professorships. Richard O. Lempert will hold the Allen chair; Donald H. Regan will hold the Bishop chair; Thomas A. Green will hold the Dawson chair; and David L. Chambers will hold the McCree chair. They will be profiled in greater detail in the next issue of the magazine.

Faculty News

Andrew S. Watson, professor of law and of psychiatry, became a professor emeritus in May.



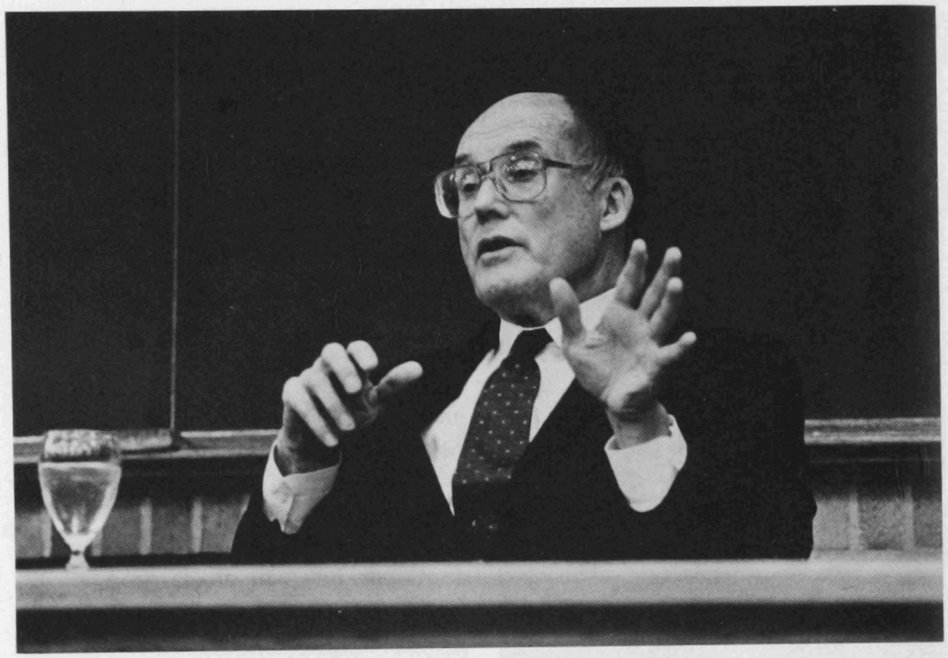
Following graduation from Temple University School of Medicine and prior to joining the U-M, Watson taught at the University of Pennsylvania from 1955-59. He then joined the U-M as assistant professor of psychiatry and of law. He was promoted to associate professor in 1962 and professor in 1966.

Watson's research in the Department of Psychiatry focused on such areas as techniques for simultaneous treatment of marital partners and the psychodynamics and community management of the battered child syndrome. He taught medical students and psychiatry residents, served as a supervisor of conjoint therapy and as a leader for residents in forensic psychiatry.

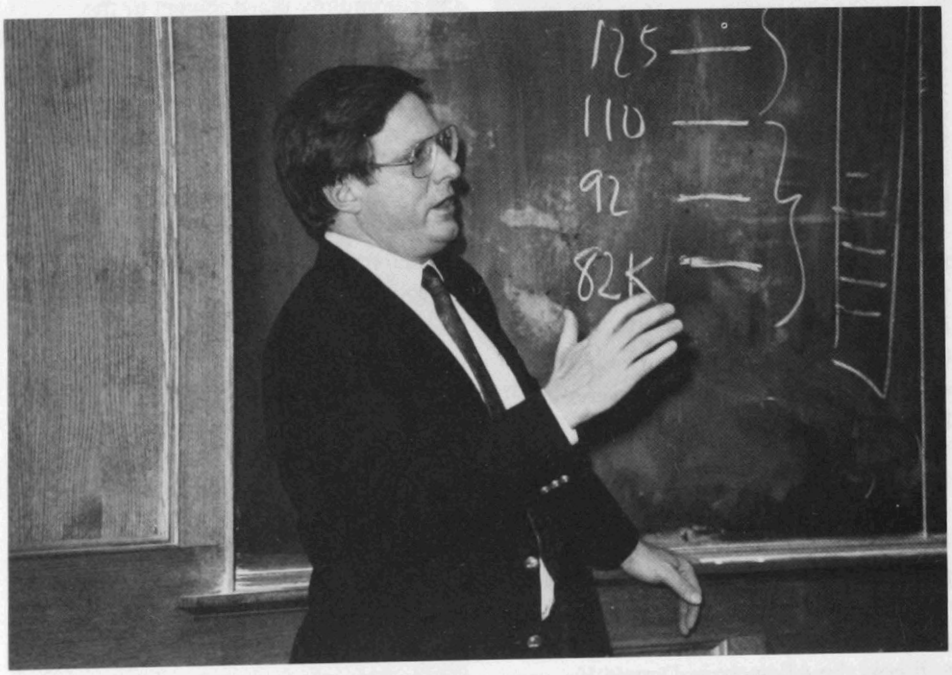
Watson did "important work on the Law School teaching process, with particular emphasis on exploring the psychological dimension of lawyer-client relations in the Law School Clinics," the Regents noted in announcing his emeritus status. "In his scholarship, Dr. Watson has been a true pioneer in bringing together the fields of law and psychiatry. Both as a teacher and a colleague, Dr. Watson enjoyed enormous success, not only in bringing psychiatry into the Law School, but also in paving the way for the widespread introduction of many other disciplines into the study of law. More than most," they added, "he taught not only his students, but also other members of his faculty."

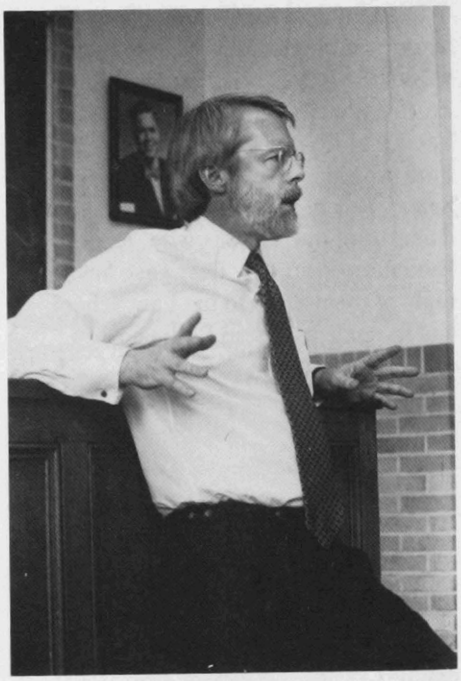
IN CAMERA: *'89-90 Speakers*

"A return to basics" was the clarion call sounded by distinguished British historian Sir Geoffrey Elton, below, in his three Cook lectures.



Supreme Court Chief Justice William Rehnquist, above, spoke to the Law School community as a DeRoy Fellow.





Alumni David Everson, above, and Fred Lambert, left, spoke to students about the realities of practice.

A pundit's predictions

Cokie Roberts examines abortion, politics

Commentator Cokie Roberts addressed the politics and the language of the reproductive-rights debate.

Social security, food stamps, education, health programs — these were the kinds of economic and social issues, says broadcast journalist Cokie Roberts, that determined the women's vote prior to 1989.

Then along came *Webster* and a pair of gubernatorial elections, in New Jersey and Virginia, in which the candidates' stances on abortion played as a key issue.

"If you had told me that the commonwealth of Virginia would be the first state to elect a black governor since Reconstruction," notes Roberts, "I would have said, 'Yeah, and the Soviet Union will go to a multi-party system. . . .' "

Abortion, politics and the media were the topics that Roberts, congressional correspondent for NPR and special correspondent for ABC, addressed at the Law School in a March talk. Her lecture was the third in a series on reproductive rights sponsored by the U-M chapter of the National Lawyers Guild and the Women Law Students Association.

Despite the New Jersey and Virginia elections, Roberts said that it is difficult to predict how abortion will affect future voter behavior. "Exit polling gives some proof of the pudding," she observed, "but basically, our data are no good since *Webster.*"

Still, she noted that the lineup in some of November's congressional campaigns — with all runners in a particular race either pro-abortion rights or anti-abortion rights — meant abortion would not be a huge issue in those elections.

She pointed out, however, that when the *Congressional Quarterly* conducted a survey to assess where candidates stood on abortion, there was often a reluctance to commit to a position.

For Republicans who adopt — or shift to — a pro-abortion rights position, admitting their stance on this issue can be problematic, she commented.

"Right now in the Republican party, the base has been the religious right vote. The party is in a lot of trouble if it alienates that base. At the same time, the group of voters that has come into the Republican party — economic conservatives, but social liberals — has ignored (the abortion) part of the platform. But now that the Supreme Court has brought it back into so many states, the Republicans could lose a lot of these people, as we saw in New Jersey and Virginia."

How do Americans feel about the abortion issue? Roberts cited a New York Times-CBS poll on abortion that showed 40 percent of respondents favoring abortion on demand, 40 percent favoring abortion with some restrictions and 18 percent favoring the abolition of all abortion rights. Some quick addition of the second and third groups indicates that a majority favors placing some restrictions on current abortion laws, she said.

Roberts pointed out that general media coverage of the abortion issue has come under fire from the anti-abortion rights community. She noted that there is some justification for a perception of bias in coverage. Observed Roberts: "Some reporters march in pro-choice events, which I find shocking."

Using the words "pro-choice" — which, like the words "pro-life," are handy in informal speech about abortion — would be unacceptable on the air at NPR, she told her audience. "You shape the debate by the words you use," she noted. " 'Pro-choice' and 'pro-life' are loaded words." NPR reporters instead use "pro-abortion rights" and "anti-abortion rights," she said.

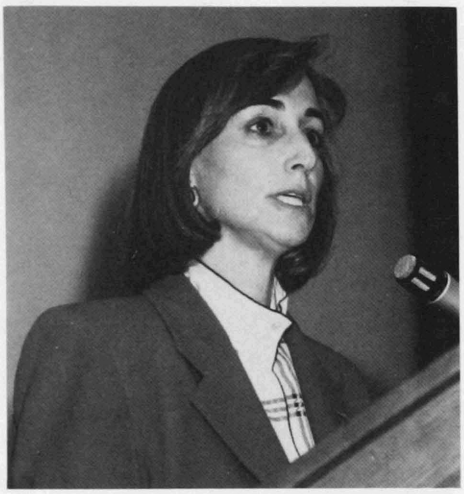
Even then, they receive complaints. "The anti-abortion people call and say they want something more specific, and the choice people go completely nuts at the term pro-abortion."

The intense reactions to terminology are symptomatic of people's intense reactions to abortion as a political issue. "It's not subject to compromise in the way that most issues are," said Roberts. "It's a subject that doesn't work in the political arena."

Science may make the arguments moot, Roberts said. "The combination of viability getting lower and the availability of some kind of abortion technique that doesn't require a third party will make the question less pressing," she predicted.

Bonnets in the courtroom?

It was a hot topic among members of the Equity Club



Virginia Drachman

The Equity Club, founded at The University of Michigan Law School in 1886 by seven women students and alumnae, was the first organization in the United States to forge professional links between women lawyers.

In the fall of '89, the Law School commemorated the 100th anniversary of the club's active years (1886-1890) with a special presentation by Virginia G. Drachman, associate professor of history at Tufts University.

Drachman's talk, "Women Lawyers and the Quest for Professional Community in Late 19th Century America," looked at the lives and views of women of the Equity Club and more broadly at the experience of women lawyers in the late 19th century.

The experience of women lawyers in the late 20th century was the focus of a dinner and discussion, attended by faculty, students, alumnae and members of the university community, that followed Drachman's talk.

Equity Club correspondence reflects the struggle of about 30 pioneering women to reconcile the conflicting demands of their professional roles as lawyers with their social roles as women in a traditional society.

According to Drachman, some women lawyers married to other lawyers mitigated this tension by dividing professional duties in a way that corresponded to traditional sex roles. But all of the women, whether married or single, carried on lengthy debates about whether a woman should confine her practice to the office or venture into the courtroom, where professional conventions would require them to act in an aggressive manner at odds with more traditional roles as women.

"One question that was hotly debated for years had to do with how, as a woman, you dressed as a lawyer. A basic question was whether you wore a bonnet in the courtroom. This was a real problem for women then — because a proper lady covered her head whenever she left her home. But a proper lawyer removed her hat upon entering a courtroom," Drachman says.

"There was no consensus on this. Some argued that as a woman it was appropriate for them to wear the bonnet, that it facilitated public acceptance of them as lawyers. Others argued that as lawyers, women should hang their bonnets on the hat rack just like men," Drachman adds.

Drachman, author of "Hospital With a Heart," about women doctors in Boston's New England Hospital from 1862 to 1969, is working on a history of women lawyers in America.

She has drawn extensively on the correspondence of the Equity Club, much of which is housed in the Schlesinger Library on the History of Women in America at Radcliffe College, Harvard University.

The corresponding secretary of the Equity Club was Martha Pearce, a U-M Law School alumna who lived in Ann Arbor. Members were required to pay annual dues of $2 to cover the costs of postage and printing, and to write one letter a year on a topic related to women in the law.

The letters were sent to Pearce, who passed them on to one club member, who passed them on to another and so on until they had reached all of the members. The next year, each member wrote a new letter, with the result that it was usually a year before members received a response, according to Drachman.

The handwritten letters were exchanged at a time when women lawyers were few and far between. Members of the club comprised approximately one-sixth of all women lawyers in the United States. By 1886 there were seven women enrolled in the U-M Law School, the highest number since the first woman, Sarah Killgore, was admitted in 1870.

"The Equity Club was the first attempt to provide a way for women lawyers around the country to communicate with each other, to overcome geographic barriers to discuss professional and personal issues," she says.

"Many were concerned about how they could justify their presence in the legal profession in an era when a woman's place was in the home. So they wrote to each other. Some argued that they should be lawyers on the same terms as men, others that they could bring something special to the profession — like morality, purity, ethics and humanity, in contrast to the purely business and commercial qualities of law as practiced by men."

Peter Seidman
U-M News and Information Services

A legal de Tocqueville

Margolick of Times *discusses "At the Bar"*

David Margolick

Social observers from de Tocqueville to Studs Terkel have drawn on personal observations and interviews to describe political cultures or historical events.

In much the same way, David Margolick's weekly *New York Times* column "At the Bar" illuminates issues facing the legal profession with essays on seemingly isolated topics.

Though his position as the *Times'* National Legal Affairs correspondent allows him to reach a much broader audience than the legal press, Margolick's subjects are often considered obscure even by *The National Law Journal*. But these smaller stories, Margolick said, can often give a better sense of what's really going on in the law than front-page trials.

In late March, Margolick spoke at the law school on writing about the law for the *Times*. Before his talk, he described how he looks for stories. "Often they'll come unexpectedly," he said. He gave as an example a story that he developed from a small notice in a legal journal about a judge in Arkansas who resigned because he felt his colleagues were too reactionary.

Though the increasing conservatism of the bench was a trend that had been well-covered, Margolick attempted to add a human dimension by interviewing the judge and his colleagues. Likewise, when the huge, aggressive New York law firm Finley, Kumble went bankrupt, the Chapter 8 proceedings were a media circus. But Margolick went instead to the sparsely attended office-furniture auction.

As he told the law school audience, the selling off of the firm's worldly goods exposed the hollowness of its pretensions. "They tried to create tradition. Though it (the firm) was only 20 years old, they were auctioning solid oak mantles and oil paintings of fox hunts."

The failure of a firm employing more than 500 lawyers has a human dimension as well. Margolick did a column on a former Finley partner, unable to find another legal job, who was driving a limousine that picked up passengers in Finley's old building. The man's greatest fear, Margolick wrote, was being spotted by a former colleague.

The idea of a column on the legal profession, as opposed to the law itself, is relatively new. While coverage of prominent trials is often intense, the attorneys themselves are often ignored in the process. Even to court reporters, the internal world of the law is often an alien one.

Margolick, who holds a law degree from Stanford as well as a bachelor's degree from Michigan, believes that formal legal training is as essential in his job as are journalism skills.

"It's more a matter of comfort and credibility than substantive knowledge," said Margolick. Asked about his career choice by a student in the audience, Margolick urged students who want to follow in his footsteps to take every opportunity to write during school. Among the benefits of his career, Margolick said, was that his writing reaches a vast audience.

Those who follow the more usual path into law firms, Margolick suggested, may have a hard time choosing a firm, given their recruiting methods. Many firms, he noted, put out slick, full-color brochures about themselves that, incidentally, make them virtually indistinguishable. "They're all full service, cutting edge, and put their attorneys immediately into the fray. All are both old-fashioned and forward-looking. All have top clients, but they're not dependent on any of them. All are unique — but in exactly the same way."

Moreover, added Margolick, while the recruiting literature suggests idyllic job satisfaction combined with personal growth, the results don't always measure up.

Symptoms of lawyer dissatisfaction are widespread, and duly noted in his column. He has reported on the growth of a cottage industry dedicated to serving the needs of unhappy lawyers. Some huge firms employ in-house therapists. An increasing number of attorneys work for temporary services to avoid the long hours that are de rigueur elsewhere. There is even a group called "Lawyers in Transition," modeled after "Smoke-Enders."

Margolick's columns are an eclectic mix. They range from descriptions of the efforts of high-powered patent attorneys to litigate a cookie-mix case to personal injury lawyers' efforts to get business using catchy phone numbers.

His self-described role is that of low-key critic. "The instant way to lose credibility, observed Margolick, is to shout." Instead, the way to make the lawyers and lay-people concerned about the legal profession's shortcomings is to let the facts speak for themselves.

— Peter Mooney
Law '92

Whose life is it, anyway?

At Campbell Competition, right to die is issue

"All rise," ordered second-year law student Johan Brigham. The several hundred students and faculty packing Room 100 obeyed as the judges entered the room.

The legal question before the five prominent jurists was no less dramatic than their entrance. Participants in finals of the 66th annual Henry M. Campbell Moot Court Competition on April 2 argued an issue right out of the headlines: "the right to die."

The hypothetical fact situation presented to the finalists — similar to that of the Cruzan case — involved a suit brought by the family members of a married couple, Byron and Shelley Austen. Members of their families were asking that the couple be taken off life support based on irreversible injuries they suffered in a car accident.

The Campbell Court was made up of Sol Wachtler, Chief Judge of New York, the Hon. Dennis Archer of the Michigan Supreme Court, the Hon. Stewart G. Pollock of the Supreme Court of New Jersey, and Professors Yale Kamisar and Sallyanne Payton.

In the Campbell Competition case, the Austens are residents of the state of Xanadu. The Xanadu state courts have held that the state-owned hospital has the right to keep both patients alive despite their parents' wishes. Shelley is maintained by a respirator and gastrostomy tube, and Byron by a nasogastric tube.

Shelley's family cannot end her life despite a "living will," the lower court has held, because such a document violates Xanadu's Preservation of Life Act; they have found also that statements Byron made in conversation about not wanting the fate of Karen Ann Quinlan were not adequate indications of intent.

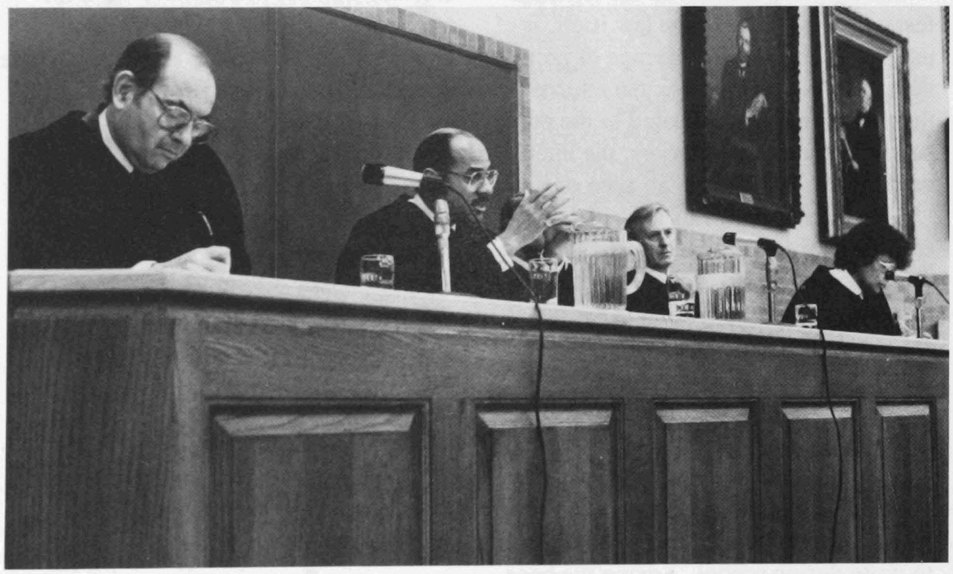
Law students Carol J. Sulcoski and Rene L. Todd spoke first as attorneys for the petitioners, Shelley and Byron's families.

Sulcoski and Todd based their presentation on the right to refuse medical treatment, which they found both in the Constitution and the common law. "The court must examine whether the state's interest in continuing treatment is a compelling interest," Todd said. If the interest was not compelling, then the Xanadu Preservation of Life Act could be held constitutionally invalid, she said.

Throughout the four students' presentations, they were peppered with questions from the judges. Though each finalist had detailed oral arguments ready, most of their time was spent trying to persuade the judges of their basic premises while the court tried to expose logical or factual holes in those premises.

Chief Judge Wachtler asked Todd why she maintained the state interest in preserving life was not compelling enough to outweigh the privacy and common law-based right to refuse treatment.

This case is not like seat belt requirements designed to preserve life, which impose less of a burden, Todd said, because "if we assert the net gain in lives is superior to individual autonomy (involving the choice of medical treatment), we would justify requiring that people submit



Judge Archer, second from left, had many questions for the Campbell finalists.

Peter Jaffe

to medical experiments as well."

Following Todd, Sulcoski argued that the court should regard Shelley's living will and Byron's earlier statements as valid expressions of intent.

The judges' questions, including a probing series by Judge Archer, revealed a concern about the implications of following a comatose patient's imputed intent.

Suggesting a tension between the asserted right to refuse life-sustaining treatment and medical ethics, Professor Payton asked Sulcoski what should happen if a person has expressed an intent not to receive treatment, but no doctor will shut off the life-support systems. Sulcoski replied that the state would have to insure that these wishes were carried out.

While the petitioners argued that the feeding tubes were a form of medical treatment, the respondents, Peter Jaffe and Ron Wernette, contended that they were merely a way of providing sustenance.

"The method of administration does not create a difference between spoon-feeding and this form of feeding," Jaffe said.

Even assuming nasogastric tubes and respirators could be accurately described as treatment, the respondents argued this would not create a right to refuse life-sustaining treatment. Jaffe argued that states should be allowed to set up their own regimes to govern this issue. "Voluntary euthanasia is not a right which is traditional under our Constitution," Jaffe said.

Does the Constitution prevent states from insisting that life support be continued against the wishes of the patients' parents? That question continued to be central to the dispute during Wernette's presentation.

"The Bill of Rights is not an exclusive list," Judge Wachtler observed, pointing out that a line of privacy decisions has expanded the scope of protected rights beyond the express language of the Constitution.

In his argument, Wernette drew an analogy to constitutionally permitted prohibitions against suicide. "The state doesn't distinguish between methods of killing oneself. One cannot put a Colt 45 to one's head," Wernette said.

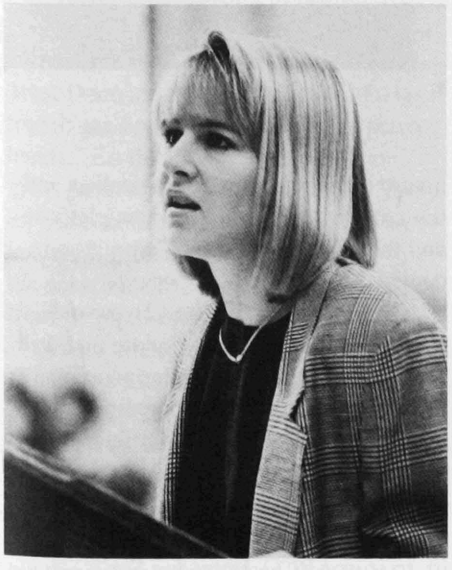
Given the "persistent vegetative states" in which Byron and Shelley exist, Judge Pollock suggested that rather than preserving life, respondents "would condemn them to an unbearable burden."

"We cannot, however, assume they would want to die," Wernette replied.

Throughout the hour-and-a-half long final arguments, the judges asked probing, difficult questions. For the students arguing the case, it was much like the feared law school Socratic Method, only with five questioners instead of one.

Later that same evening, awards were given out at a banquet. Jaffe and Wernette won the competition. Having made it to the finals of a 103-student competition, however, neither side could truly be said to have lost.

— Peter Mooney
Law '92



Rene Todd

Campbell judges and finalists. Front row, from left: Professor Sallyanne Payton, Judge Dennis Archer, Professor Yale Kamisar. Back row, from left: Carol Sulcoski, Rene Todd, Judge Stewart Pollock, Judge Sol Wachtler, Peter Jaffe, Ron Wernette.

Thinking green

Earth Day brings Sax back to Michigan

When he first had the idea to teach law students about "conservation," Joseph Sax began by saving articles on the environment from *The New York Times*. That was 26 years ago, and it took two years to fill a notebook with clippings.

"Today, it would take about two weeks to fill the same notebook," Sax says. What he doesn't say is that the boom in what we now know as "environmental law" is due, in large part, to his own efforts.

It has been four years since Sax, who just wrote his hundredth legal article, taught environmental law and land use planning courses at the University of Michigan, but he still was able to bring out an overflow crowd to Room 250 Hutchins Hall when he spoke there on April 5. Sax appeared on behalf of the Environmental Law Society's Earth Day celebration, and the large crowd of students and faculty who came to hear him was noteworthy — he was competing with Ralph Nader, who spoke at the same time at Rackham Auditorium.

Looking trim and energetic and wearing a "Think Green" lapel button, Sax began his lecture with a story of his involvement in a lawsuit where he represented his current employer, the University of California. He was in his Boalt Hall office at the University of California–Berkeley around six months ago, he said, when he received a phone call from a lawyer with the University of California system. It was a desperate plea for help with what the lawyer considered a hopeless case.

The defendants in the suit were the State lands commission, Santa Barbara County and a Santa Barbara citizens association, the University of California and the Sierra Club. The plaintiff was the giant oil company, Atlantic Richfield Corporation or ARCO. ARCO had held a lease to offshore state land on the Santa Barbara coast since 1947. The company set up offshore oil platforms and pumped millions of dollars' worth of oil until a 1969 oil spill disaster resulted in a moratorium on drilling.

Joseph Sax talked about the Public Trust Doctrine.

But recently, ARCO found oil at a different level, with an estimated value of $784 million, and wanted to set up more platforms — directly in front of the UC Santa Barbara campus and some fragile nature preserves. Environmentalists and the university opposed the new platforms, and the California Lands Commission denied ARCO a drilling permit.

ARCO sued, saying its 42-year-old lease gave it the right to explore and drill for oil. The old statute under which the lease had been drawn up contained no environmental provisions. Ordinary property law was not useful to the state because the terms of the lease were clear and valid. California had no legal authority to stop ARCO. Enter Joe Sax.

"People must maintain the authority and legal power to continually re-examine private uses of land," says Sax, enunciating the "Public Trust Doctrine" he first wrote about more than 20 years ago. At the heart of this Public Trust Doctrine is the concept that citizens hold an inalienable right to nature. Sax advised the state and the university about the doctrine and convinced them that California officials in 1947 could not legally "disable themselves" and turn land over to the oil company forever.

The Public Trust Doctrine, according to Sax, is easier to understand today than it would have been in 1947. "Under our contemporary consciousness, we now realize that we live off collective resources and depend on a 'habitat' as part of those resources," he notes. He describes the problems enforcing the public's right to natural resources as problems of an ancient legal system which does not recognize public interests. "These rights just don't exist in the books," says Sax. "Our law only knows private rights."

But now, with a resurgence of interest in the environment, Sax says the Public Trust Doctrine "permits us to find a legal tool to get scarce resources out of private hands." So the Public Trust Doctrine gives government a duty to protect land for the benefit of the people. More important for California's case against ARCO, the doctrine also forbids government from giving it away.

Armed with a belief in the Public Trust Doctrine and a zeal for fending off oil companies, Sax joined the defense team against ARCO. He found support for the doctrine in a 60-year-old California case involving early oil exploration. It's all right to grant a lease, the court had said, but the state could not put itself in a position to give up continuing supervision of that lease. When conflict with public needs arose, private needs would have to give way.

ARCO argued that the state couldn't change its mind after 47 years — one decision to lease the land should be final. But Sax was able to deliver a lethal blow to the oil company. He found a recent amicus petition before the United States Supreme Court, signed by ARCO, which demanded that environmental impact of oil drilling in national forests be determined not once but continuously, at different stages of exploration and drilling. ARCO was being hypocritical by telling California it could only decide once and telling the Supreme Court that environmental decisions should be made continuously.

The Los Angeles judge who heard the case was convinced by the adamant law professor who pounded on the podium and shouted, "You can't give the California coastline to ARCO!" California could protect its resources by invoking the Public Trust Doctrine and would not have to pay ARCO $784 million for its potential losses. Joe Sax had turned a hopeless case into a victory for environmentalists.

Sax says the ARCO decision is part of a recent trend. Courts have placed constraints on existing private water rights in Mono Lake, a lake once in danger of dying because it was drained for water by the city of Los Angeles, and in San Francisco Bay.

"It's a hopeful sign," says an optimistic Sax. "The traditional legal system encouraged people to destroy natural systems, but now private rights are being reoriented to recognize the public right to restore and reclaim these systems." Responding to a question from the audience, Sax said the Public Trust Doctrine would provide a desirable way to deal with Exxon's liability for destruction of resources around Valdez, Alaska. The state could have continuing jurisdiction over the long-term impact of the March 1989 oil spill.

Lately, Sax has concerned himself not only with environmental affairs of state government but with those in the federal realm as well. He recently completed a study of municipal waste disposal for the Office of Technological Assessment. But he says weakness in federal protection of the environment has thrust much of the responsibility for conservation on the states.

Global environmental protection is also on his mind as he prepares for a new course on Environmental Law in the European Community. Sax is working with a French professor on that course, which he will squeeze in with the other courses he teaches at Boalt Hall — Environment & Culture, Urban Land Use, Federal Lands, Water Law and an Advanced Environmental Seminar.

Dodging snow flurries on the way from Hutchins Hall to a reception at the Lawyers Club (he had forgotten about April in Ann Arbor and neglected to bring an overcoat), Sax mentioned that he and his wife, Elli, are enjoying California's warmer weather. They also enjoy the proximity to their three daughters, two in San Diego and one in Berkeley. Even so, the 54-year-old professor says, "There's no place like Michigan."

— *Joan Lowenstein*

Advice and consent

Biden discusses Senate's role in judicial selection process

Senator Joseph Biden enjoyed an excellent rapport with the large crowd that turned out to hear him speak.

Speaking before some 200 students at the Law School on Jan. 25, 1990, Senator Joseph R. Biden Jr. (D-Del.) defended his role as the chair of the Senate Judiciary Committee during the controversial 1987 defeat of President Reagan's nomination of Robert Bork to the Supreme Court. "The framers of the Constitution clearly intended the Senate to serve as a check on the President to preserve the independence of the judiciary," he said. He said the Senate has a right to evaluate Supreme Court nominees based on their political views.

Biden's speech was part of the second annual lecture series presented by the Law School Student Senate and sponsored by Clark, Klein and Beaumont, a Detroit law firm. Biden has served in the Senate for 17 years. He assumed the chairmanship of the powerful Judiciary Committee in January 1987, in the wake of the 1986 elections which gave the Democrats control of the Senate. He also serves on the Foreign Relations committee and was a candidate for the Democratic presidential nomination in 1988.

Biden said his topic, "Advice and Consent: The Senate's Role in the Judicial Selection Process," has been "hotly debated throughout our existence as a republic."

"We must make a distinction between the lower courts and the Supreme Court in terms of what senators should take into account in the selection process. In the lower courts it matters little what the nominee's political predilection is because he or she can't make new law. As long as it's an honorable man or woman, bright, committed to the law, the Senate is obliged to confirm him or her."

But the Supreme Court is "a very different story," Biden continued. "The Supreme Court is the ultimate interpreter of the Constitution. The Senate must broaden its perspective. I think the guidelines are clearly laid out by a reading of history. It is appropriate to examine constitutional views and political inclinations of Supreme Court nominees."

Biden disputed the notion that Supreme Court nominees are rarely rejected. "During the Bork fight, you heard how it was such an exception to reject a nominee. Not true. More Supreme Court nominees have been rejected than any other type — 28 since 1789."

Biden emphasized that if the President takes the nominee's political inclinations into account, the Senate has a right to do so as well. "We all like to believe that presidents will choose nominees based on their competence and not attempt to reshape the court in their own political image, but that's not always so. When the balance of the court is at stake, and the President attempts to move it, there's nothing wrong with that legally. Okay, says the Senate, me too. You want to bend it that way, we'll try this way."

To buttress his views, Biden cited both scholarly support for his reading of the Constitution and "the rich and fractious record of the Senate debates." He asserted that the delegates to the Constitutional Convention originally intended to give Congress the exclusive right to appoint judges and only included the President in the process as a last-minute compromise.

"In fact, the first Supreme Court nominee to be rejected had excellent credentials," he added. "He was John Rutledge, one of the framers of the Constitution, suggested by George Washington in 1795. Rutledge was rejected on political grounds. The Federalists opposed his opposition to the Jay treaty with England."

In the 20th century, Biden continued, the five nominees who have been rejected were all turned down because of their constitutional views. Further, said Biden, public opinion favors the Senate scrutinizing nominees' political inclinations. "At the height of the Bork debate, a *New York Times*/CBS poll found that 63 percent of citizens attached "a lot of importance" to nominees' positions on constitutional issues," he said.

The Senate's right to consider a nominee's political stance has not been questioned until quite recently, he added. Nevertheless, he cautioned, "It's not always prudent to exercise that right. There are costs that all of us would prefer not to incur. If every Supreme Court nomination became a battle, it would not be a good idea. Again, it goes back to the

standards used by the President when nominating. In recent years, nominees have been selected with less attention to their detachment and statesmanship and more for their judicial philosophy or political views."

That's what happened with the Bork nomination, Biden claimed. "The reason President Reagan felt so strongly about that appointment was his failure to have his social agenda passed through the U.S. Congress. Bork found himself at odds with fundamental views of Americans. The liberty clause of the Constitution was the main issue. Fundamental rights were expanded by the Warren court, and Americans have taken that to heart."

In evaluating nominees, Senators should examine the candidates' writings, court rulings and assertions under oath before the Judiciary Committee, Biden said. "That's entirely different than asking them to pass a litmus test. If you believe the nominees will take the country in a direction that is not good for the country, you need to vote that way."

He also issued a plea for more cooperation between the executive and judicial branches of government. "No one mentions the word advice in the advice and consent clause. It was not put there by accident. It was put there by framers of the Constitution who realized that the three-branch system of government needed lubrication to function. Almost without exception, when the President has sought the advice of the Senate, in earnest, prior to nominating, there's been no problem."

Senator Biden concluded by predicting that because of emerging issues like biogenetics and medical ethics, the "Supreme Court will have more impact on us in the next 10 years than in the last 40."

— Jean Jackman

Ask the Senator

Here are a few of the questions audience members posed after Biden's talk.

Q. How do you determine that a President's nomination is politically motivated?

A. "Because of what he says. It was part of Reagan's campaign strategy in 1980 and 1984. He said vote for me, because I'll put the right people on the Supreme Court. He said there are at least 28 landmark decisions he would like to see reversed. You just have to look at what the President says and does."

Q. Could you comment on the U.S. invasion of Panama, whether the President had the authority to act as he did and whether he violated international law?

A. "In my capacity on the Foreign Relations Committee, I have introduced a rewrite of the War Powers Act because it just does not function. The President had the constitutional authority to do what he did. Did he violate international law? It's a close call, but I think not because American lives were in danger. If the President were not to move quickly and remove those American troops, then it becomes not an emergency situation but an occupying force. The story's still not over on that. Pragmatically I think it has worked for him."

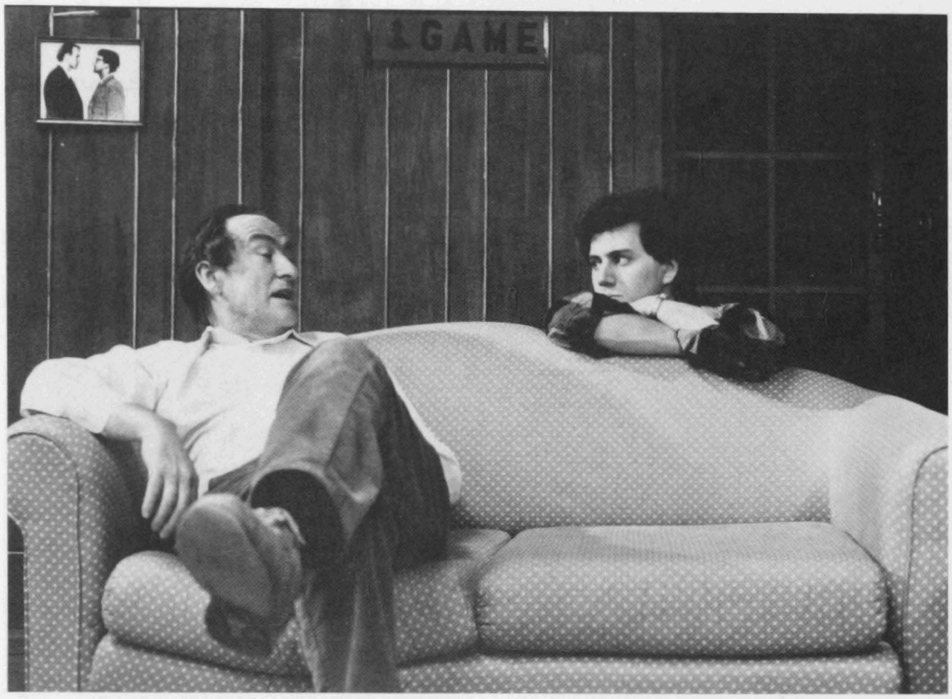
Q. Do you think the nomination process deters some qualified people from applying for federal judgeships?

A. "Money is the real deterrent — the salaries for judges are too low compared with what lawyers can make in private practice. We don't get the most competent applicants, or many practitioners at all between 35 and 50. Many times we get the older academics who see the judgeship as a cap to a long career. I think it's healthy to have some practitioners on the bench, not just professors."

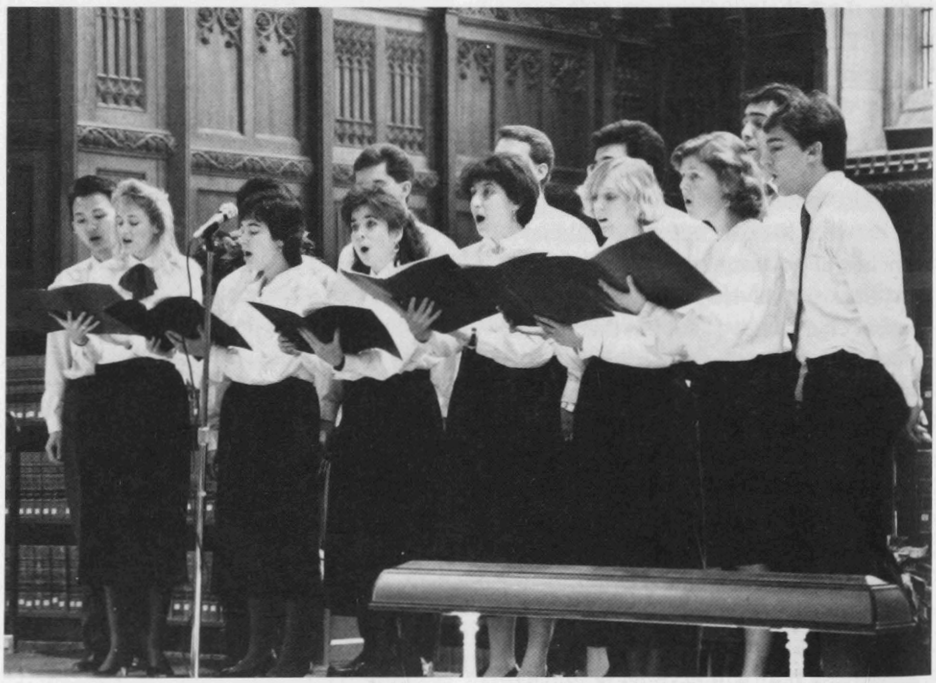
Q. If Thurgood Marshall steps down, should the President be obligated to nominate a minority to replace him?

A. "He is not obligated to, no. But it would be good policy. It's important in a democracy that the Supreme Court represent fairness, openness and reflectiveness."

IN CAMERA: *'89-90 Arts*



Things artistic had their day at the Law School last year. Professor Beverley Pooley, far left, joined a student cast in the Law School Arts Committee's production of "Deathtrap."



A concert in the reading room before winter break featured the Headnotes, right, as well as School of Music faculty Armando Ghitalla, above, and Leslie Guinn, top right.

Stepping down

George Crockett leaves U.S. House

For the past decade, Rep. George W. Crockett, Jr. has been doing in Congress what he did first as an attorney and then as a judge of Detroit's Recorder's Court for 13 years: voting his conscience and speaking out on issues even when his views were not the popular ones.

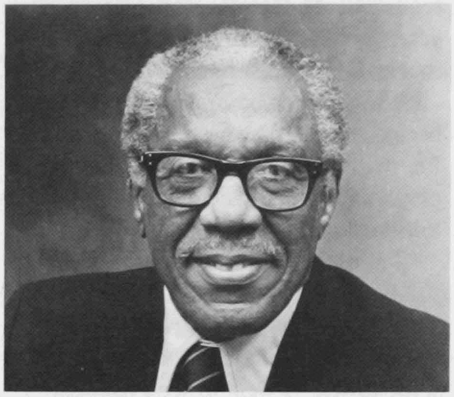
"It's the thing I'm proudest of," said Crockett, a 1934 graduate of the Law School. "I sometimes bit off more than I could chew, but I've been willing to do it my way."

Crockett, 80, announced in late March that he would retire from the U.S. House, effective January 1991, the end of his fifth term representing Detroit's 13th District.

Slowing down before then, though, was clearly not part of his plans. A few days after his announcement, he spent two days at the Law School as a Helen L. DeRoy Fellow, meeting with students and faculty both in and out of the classroom. The DeRoy fellowships bring to the Law School well-known lawyers and public figures whose presence will enrich the School's educational program.

Crockett qualifies in both categories. The first Black lawyer in the U.S. Department of Labor, he went on to become founder and director of the UAW's department of fair employment practices. Then, as an attorney in private practice in the 1950s, he defended Coleman Young and others called before the House Un-American Activities Committee. In 1952, he spent four months in federal prison for contempt-of-court after defending accused communists in the celebrated 1949 free speech trial known as the Foley Square case, in New York City.

Crockett said he was surprised by the genuine respect accorded him in prison, not only by the prisoners but by the guards. "We admire you for the stand you took," he recalls being told.



George Crockett

The prisoners, he added, used to call him "their lawyer."

"They'd form a line to tell you what a lousy lawyer they'd had. . . . They weren't really interested in your advice. But it was a source of consolation to them that you were there and willing to talk to them."

Although those four months weren't "all that bad," Crockett said, they did take their toll.

"What bothered you most were your own fears about what would happen when you got out. Would you be able to go back to your practice? Disbarment proceedings had already been started. . . . It delayed my career by 10 years. It took that long to 'come back.'"

Crockett said he knew he was home free when he was admitted to the White House during John F. Kennedy's tenure in office.

"You couldn't get into the White House unless you were cleared by the FBI, and the FBI wouldn't clear anyone who'd been a member of the Communist Party," he said. "I became 'kosher' again — friends stopped crossing the street when they saw me.

"Maybe if it hadn't happened I'd be retiring at 70, instead of at 80."

Crockett's One-minute Statement to the U.S. House March 28, 1990

MR. SPEAKER, Just last week, the press carried the story of the death of the Honorable Harold Medina, who was the judge who presided over the famous Communist trial in New York in 1949 and 1950.

In the course of that trial, Judge Medina sentenced the five defense lawyers to prison.

I'm the only living survivor of those five defense lawyers.

During the four months I served in a Federal prison, it never occurred to me that I would one day serve in the U.S. Congress, and as a Member of the Committee having oversight jurisdiction over all Federal judges and Federal prisons.

Today, I rise to inform my colleagues that I have decided to retire from the House at the conclusion of the 101st Congress.

After sixty-eight years of working, championing unpopular causes, I'm hoping to enjoy a little time off.

I won't miss running back and forth for the bells, or the endless meetings this job entails; but I will miss the company of so many deeply committed men and women with whom I have had the pleasure to serve.

For the past decade, I have been privileged to serve the people of Michigan's Thirteenth District in this body. It has been a challenge and an honor I will always cherish.

I will also cherish the tireless support I have received from members of the religious, labor, and political communities in Detroit; the senior citizens; my friend and our great mayor, Coleman Young; our dedicated Council President, Maryann Mahaffey; and my staffs in Detroit and Washington.

There is a time, however, when each man or woman must decide to leave the day-to-day struggle to others. When this Congress ends in January, I will go on to other less demanding challenges.

A century's wisdom

At 100, an alumnus looks back

When LeRoy Lyon arrived at the University of Michigan Law Department in the fall of 1908, he had in his pocket approximately $90: barely enough to cover the $60 in-state tuition and the law books he knew he would have to buy.

Much to his surprise and chagrin, Lyon, a Michigan native who had been residing with his family in London, Ontario, for the last few years, discovered he would have to pay the $90 out-of-state rate.

With a dishwashing job and a little help from then-University President James B. Angell, Lyon covered his fees, enrolled, and three years later received the J.D. degree.

The youngest graduate of his class, according to a *Michigan Daily* report, today Lyon is the oldest living member of the Law School class of 1911. He turned 100 in January 1990, receiving commendations and congratulations from, among others, the governor of Michigan and the dean of the Law School, Lee Bollinger.

Lyon, who practiced in Detroit with the firm of Alfred Lucking and later worked for Ford Motor Co. and Chrysler, lives in a Redford, Michigan, retirement community. His wife, Norma, died at age 98 in October.

Lyon's memories of yesterday are as vivid as his memories of yesteryear. It was the latter he focused on during a late-winter chat with visitors from the Law School eager to hear about the "old days."

Lyon's initial application to the Law Department met with temporary rejection, he recalled: not on academic grounds, but on the grounds that he was not yet 18. If he would like to wait a year, the school would be happy to have him. There was only one other stipulation: He would have to enroll in College English.

Lyon was happy to comply with those requirements. Besides, the intervening year would give him a chance to save the money he would need for school.

"I was a poor boy," he said, remembering the year he spent working at International Harvester, his father's employer in London, accumulating the tuition.

Ah, yes, the tuition . . . when Lyon discovered he had an inadequate sum because he was not considered an in-state student, he wasn't quite ready to throw in the towel. "I went to see President Angell," he said, to find out if the information was correct.

It was, but Angell was willing to be of assistance. "Lyon, I can help you out," Lyon recalls the president telling him. "When you go to the bookstore, tell them I sent you, and they'll give you your books on credit."

That's how Lyon acquired the "3-foot-high stack of books" he needed to begin his studies. The next day, he reported at 8 a.m. for his first Law Department class, Sales, taught by Henry Bates, who would later become dean. He was the first student called on that day — because President Angell telephoned Bates about him, he believes.

Angell's interest in Lyon did not end with that encounter. In the spring of his junior year, Lyon received an unexpected visitor at his Division Street apartment: It was Angell, come to inquire whether the law student would like to accompany him on a walk. "Did you think we had forgotten you?" Lyon remembers the president inquiring.

"Angell came four or five times more during my time at the Law School," he added. "We would walk down by the river."

When he had completed his studies, Lyon returned briefly to Canada. Finances were still an issue: "When I finished, I only had train fare back to London," he said. A summer's work at International Harvester netted him funds to journey to Detroit — the place he would establish as his professional base for the rest of his career.

LeRoy Lyon

Lyon's memories of his time at the law department include the things he learned, the things he had trouble learning and the things not taught at all.

The most difficult concept for him, he says, was equity. "It's simple when you get it into your head," he said, but nobody gave me a definition and I couldn't find one." Eventually, the meaning came clear to him: "It takes up what law left out."

What law school left out, practice afforded him, as it does most young lawyers. He recalls one of his early employers telling him, " 'It's not in the book, but this is how we do it' . . . Boy, did I absorb a lot of unknown law!"

While Lyon may attribute his long career to his schooling at the U-M, he credits his long life to another source. Asked the secret of living to be 100, he pauses for a moment, then quips: "I really think it's Upjohn Unicaps."

Alumni News

Martha Bergmark

Martha Bergmark, J.D. '73, has received the 1990 Kutak-Dodds Prize for outstanding public service through law. The $10,000 prize is sponsored by the Robert J. Kutak Foundation and the National Legal Aid and Defender Association to recognize the accomplishments of a legal services lawyer, public defender or public interest lawyer who, through the practice of law, has contributed in a significant way to the enhancement of the human dignity and quality of life of those persons unable to afford legal representation.

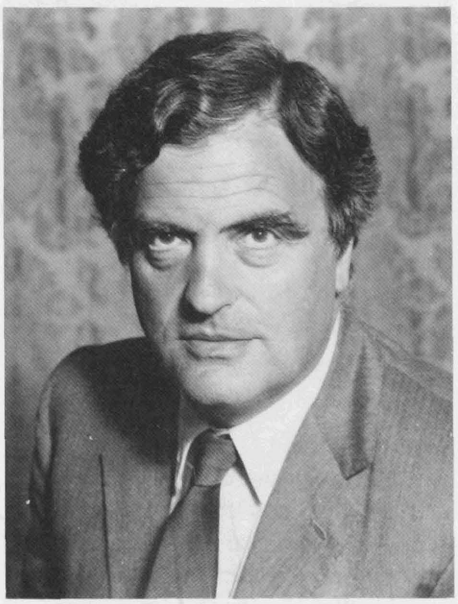
Bergmark is currently project coordinator at the Project Advisory Group, a Washington, D.C.-based group committed to preserving and improving legal services for the poor.

In 1974 Bergmark and her husband, Elliott Andalman, J.D. '73, returned to her native Mississippi and opened a public interest/civil rights law firm in Hattiesburg — the first such venture in southeastern Mississippi. In 1978 she left the firm to found the Southeast Mississippi Legal Services Corporation, the first federally funded legal services program south of Jackson. She joined the Project Advisory Group in 1987.

Brian Fall, LL.M. '61, was appointed British High Commissioner to Canada in October 1989.

Fall, who received his B.A. and M.A. from Oxford before enrolling for the LL.M. at the Law School, entered the British diplomatic service in 1962. He comes to his current post after serving in Washington, D.C., as minister and deputy chief of mission in the British Embassy. His previous appointments have included deputy director of the British Trade Development Office in New York; political counsellor and head of chancery in Moscow; head of the British Foreign Office's energy, science and space department and its East European and Soviet department; and assistant under-secretary of state dealing with arms control, disarmament and defense matters.

His office as British High Commissioner is in Ottawa, Canada.

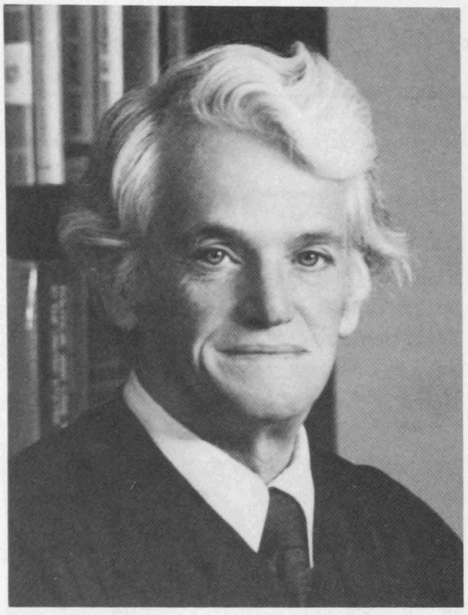


Brian Fall

Gay Secor Hardy

Gay Secor Hardy, J.D. '55, A.B. '52, has been appointed solicitor general of Michigan, the first woman to hold the job in the state.

Hardy, who assumed her position in May, served as assistant attorney general for the highway division and the consumer protection division, as well as for the liquor control commission. In 1970, Michigan Attorney General Frank Kelley named her assistant attorney general in charge of the health professionals division, where her job was to provide legal counsel to the boards in the department of licensing and regulation. She also has served on a review board that discusses and helps write formal opinions for the attorney general.



Wendell A. Miles

United States District Judge **Wendell A. Miles,** J.D. '42, has been appointed to the United States Foreign Intelligence Surveillance Court by Supreme Court Chief Justice William H. Rehnquist.

The court was created by Congress in 1978 to provide neutral and detached review of applications for electronic surveillance of foreign powers and agents of foreign powers in the United States. Miles' appointment is for a seven-year period.

Miles' distinguished public service career includes eight years on Michigan's Higher Education Facilities Commission (four as vice chairman) and a similar period of service on the Independent Colleges and Universities Commission. Since taking senior status in 1986, after serving as district judge (1974-1980) and then chief judge (1980-86) of the U.S. District Court for the Western District of Michigan, Miles has been accepting service as trial judge in the Middle District of Florida and the Southern District of Texas.

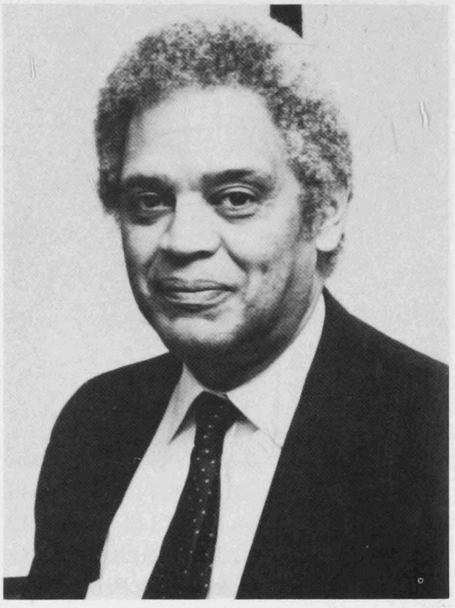
Ann C. Petersen, J.D. '76, has been appointed by President Bush as general counsel of the Department of the Air Force. In her position, which she assumed last December, Petersen is the final legal authority on all matters arising within or referred to the Department of the Air Force, except those relating to the administration of military justice. As general counsel, she also serves as a member of the Intelligence Oversight Panel, advises the Debarment and Suspension Review Board, and performs liaison duties with the Department of Justice.

After receiving her law degree, Petersen joined the Chicago law firm of Wildman, Harrold, Allen and Dixon, where she practiced principally in civil litigation, becoming a partner in 1983. She has also taught employment discrimination law as an adjunct professor at DePaul University College of Law.

Ann C. Petersen

Roger Wilkins, LL.B. '56, served as national coordinator of Nelson Mandela's United States tour, which took the recently freed 71-year-old African National Congress leader across the nation to eight cities. As coordinator, Wilkins was responsible for organizing the tour, overseeing schedules and hiring staff. The U.S. visit was part of Mandela's 13-country itinerary.

Wilkins, a Pulitzer-prize-winning writer and researcher, is the Clarence J. Robinson Professor of history and American culture at George Mason University and a fellow at the Institute for Policy Studies in Washington, D.C.



Roger Wilkins

We read it in the paper

A number of our law alumni have been the subject of news stories and features in papers and magazines around the country.

Dickinson, Wright partner **Barbara Erard,** J.D. '80, was one of the women in the prestigious Detroit law firm profiled in an April *Detroit Free Press Magazine* cover story. The article took a look at the ascendency of women in the firm and at how they juggle their personal and professional lives as they rise to power.

Saul A. Green, J.D. '72, was profiled in a *Michigan Chronicle* story about movers and shakers in Wayne County government. Green is corporation counsel for Wayne County — the nation's fifth

largest county. In his position, he serves as chief lawyer for all the county's elected officials and their departments.

In a May article on five assistant U.S. attorneys who launched the largest all-women firm in Massachusetts, *The American Lawyer* gave coverage to **Martha Sosman,** J.D. '79. In June '89, Sosman, then head of the civil section of the Boston U.S. Attorney's office, and four other civil assistants left to start their own Boston litigation boutique, Kern, Sosman, Hagerty, Roach & Carpenter, P.C.

A June feature in the *Atlanta Journal and Constitution* focused on **Karol Mason,** J.D. '82, who recently became a partner at Alston & Bird in Atlanta — the first Black woman to attain partnership in any of the city's score of silk-stocking firms. She is a member of the business and finance department and practices in the areas of public finance and commercial lending.

Lesbian, gay law graduates form alumni group

Over the last several years, the Law School has facilitated the formation of various alumni groups. As of January, there is also an organization for lesbian and gay male graduates of the school.

Gay and Lesbian Alumni (GALA) was formed at the prompting of the Lesbian and Gay Law Students Association (LGLSA), which has been active in fighting discrimination in hiring based on sexual orientation, among other issues.

Organizers of GALA say that it, too, could be a voice in battling discrimination. It will also bring participants news of campus events significant to gays and lesbians. Other potential activities for GALA include career and social networking, political activities and general fundraising.

The organization is being coordinated by a steering committee. It is open to all U-M Law School alumni committed to ending political and social discrimination against lesbians and gay men. For information, contact UMLS-GALA, 2443 Fillmore St., P.O. Box 212, San Francisco, CA 94115, or call 415-775-7031.

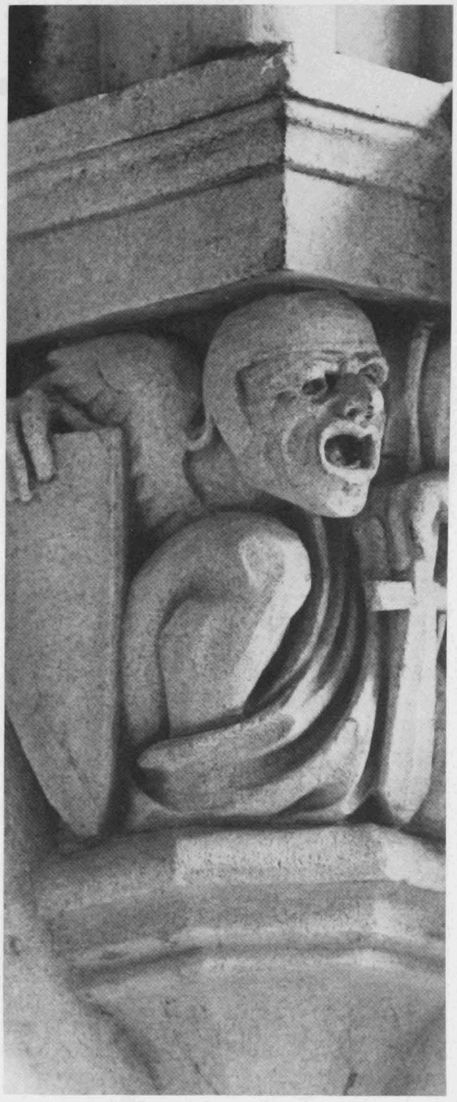
Calling all international alumni

On Sept. 19-22, 1991, the Law School will hold its first International Reunion in Ann Arbor. This reunion, for foreign alumni and alumni living overseas, follows two highly successful 1989 reunions in Florence, Italy, and Tokyo, Japan.

We hope this advance notice will be useful to alumni abroad who would like to attend the weekend, which will include intellectual excitement — panel discussions on trade law, EEC law and Japanese-U.S. relations, among other events — as well as opportunities for relaxation at receptions, banquets and an American-style barbecue.

By now, international alumni should have received a letter and a questionnaire that will help in planning the reunion. Later this year, registration materials and a detailed program of the weekend's activities will be sent. We invite any international alumni who did not receive the initial mailing to contact the University of Michigan Law School Fund, 721 S. State St., Ann Arbor, MI 48104-3071, U.S.A. (The Fund's fax number is 313-998-7340.)

We hope your 1991 calendar will include this reunion weekend in Ann Arbor.



Class Notes

1929

Charles E. Daugherty was inducted into the Steel City Hall of Fame in Gary, Indiana, on June 21, 1989, for his many years of civic leadership and community service.

1930

The Hon. James Montante, former Wayne County Circuit Judge, was honored for his service to the community by the Detroit Bar Association Foundation at its Past Presidents Reception. The Foundation benefits the Volunteer Lawyers Program, which provides legal services to the needy.

1934

Congressman George W. Crockett, Jr. (D-Mich.), Chair of the Subcommittee on Western Hemisphere Affairs of the House Foreign Affairs Committee, led a Congressional delegation to Jamaica in November, 1989, to consult with regional representatives on future economic development strategies for the Caribbean.

1936

William F. Fratcher has completed ten of the twelve volumes of the Fourth Edition of *Scott on Trusts.*

1947

Ann Fagan Ginger has accepted a teaching position at the University of San Francisco Law School.

Hugh A. Ross has been named an emeritus professor at the Case Western Reserve University School of Law.

1948

Vincent C. Immel, professor of law and former dean of the Saint Louis University Law School, had the winter 1990 issue of the school's law journal dedicated to him on the occasion of his retirement.

1950

Charles Hansen has joined Bryan, Cave McPheeters & McRoberts in St. Louis as a partner, practicing in the area of corporate law.

1953

Joseph M. Kortenhof received the 1990 Award of Honor from the Lawyers Association of St. Louis. The award is given each year to a St. Louis attorney to recognize attainments as a lawyer and honorable service to the profession.

John C. Thomas is the senior partner of Thomas and Thomas, a general practice firm in Boca Raton, Florida. He specializes in probate, real estate, divorce and corporate law.

1954

Charles F. Clippert, a partner in the Bloomfield Hills, Michigan, office of Dickinson, Wright, Moon, VanDusen & Freeman, has been elected president of the Oakland County Bar Association.

Marvin O. Young has been appointed City Attorney for the City of Warson Woods, Missouri.

1955

Harvey M. Silets has been named chair of the Illinois chapter of the American College of Trial Lawyers and is the president-elect of the Bar Association of the Seventh Circuit.

1956

Stephen C. Bransdorfer has become deputy assistant attorney general with the Civil Division of the Department of Justice in Washington, D.C.

William L. Randall, executive vice president of First Bank Milwaukee, received the Milwaukee School of Engineering's Honorary Doctor of Business and Economics degree at the school's spring commencement exercises.

Richard Riordan received the Hollzer Memorial Award for his philanthropic and civic activism from the Jewish Community Relations Committee of the Jewish Federation Council of Greater Los Angeles.

1957

Francis M. Small, Jr. has joined the San Jose office of Thelen Marrin Johnson & Bridges as senior corporate attorney and head of the corporate department.

1958

Robert E. Aitken is the author of a new book entitled *California Evidentiary Objections.*

Donald L. Reisig was appointed by former Governor James Blanchard to the newly created position of director of the Office of Drug Agencies for the State of Michigan.

1959

Charles F. Clippert was recently elected a fellow of the American Bar Foundation.

Lawrence A. Jegen III, professor of law at Indiana University School of Law, has received the Excellence in Taxation Award from the Quality for Indiana Taxpayers, Inc. The award is presented for outstanding dedication to the improvement of tax administration in the state of Indiana.

1961

Bruce Barnhart has been elected a fellow in the American Academy of Matrimonial Lawyers.

Jerome B. Greenbaum has been elected president of the Greater Detroit Chapter of the City of Hope, a non-sectarian facility for research and treatment of catastrophic diseases in Duarte, California. He practices law with his wife, Judith, in Southfield, Michigan.

Richard McLaughlin Leslie was recently elected a Fellow of the American Bar Foundation, recognizing a professional, public and private career demonstrating outstanding dedication to the welfare of his community and to the highest principles of the legal profession.

Laurence M. Scoville, Jr., has been named chairman of the executive committee of Clark, Klein & Beaumont, one of Detroit's oldest law firms.

1962

Walter Dartland was recently elected to the National Board of Common Cause.

1963

Ralph E. Mahowald recently entered solo practice in Phoenix, Arizona, specializing in plaintiff's injury litigation.

James A. McDermott has been elected a fellow of the American Bar Foundation.

Webb (Tony) Smith has been elected president of Foster, Swift, Collins and Smith, P.C. in Lansing, Michigan.

Lawrence K. Snider, a member of the law firm of Jaffe, Snider, Raitt & Heuer of Detroit was appointed by former Governor James Blanchard to the Michigan Council for the Arts.

Norman O. Stockmeyer, Jr. has edited and co-authored *Michigan Law of Damages, Second Edition,* published by the Institute of Continuing Legal Education.

C. Peter Theut was recently appointed Chairman of the Recreational Boating Committee of the Maritime Law Association of the United States. Theut is a partner in the Detroit law firm of Butzel Long Gust Klein & VanZile.

1964

William "Gary" Bailey received the San Diego County Bar Association's award for Service to Legal Education. He is a partner with the law firm of McInnis, Fitzgerald, Rees, Sharkey & McIntyre.

William Hutton, formerly of Howard, Rice, Nemerovski, Canady, Robertson and Falk, has joined the Trust for Public Land as general counsel. The Trust for Public Land is a national nonprofit land conservation organization headquartered in San Francisco. He will continue as professor of law at Hastings College of the Law, University of California.

Rocque E. Lipford of Monroe, Michigan, has been reelected managing partner in the statewide firm of Miller, Canfield, Paddock and Stone.

Jack R. Snyder has been elected a managing partner of the Indianapolis law firm of Ice Miller Donadio & Ryan. He joined the firm in 1965 and concentrates his practice in the areas of business, intellectual property and estate planning.

1965

Amos Coffman has founded the law firm of Lindenbaum Coffman Kurlander Brisky & Hayes, Ltd., in Chicago, Illinois, where he will specialize in business law.

David A. Ebershoff has joined the Los Angeles office of Fulbright & Jaworski as senior partner in the corporate law department.

1966

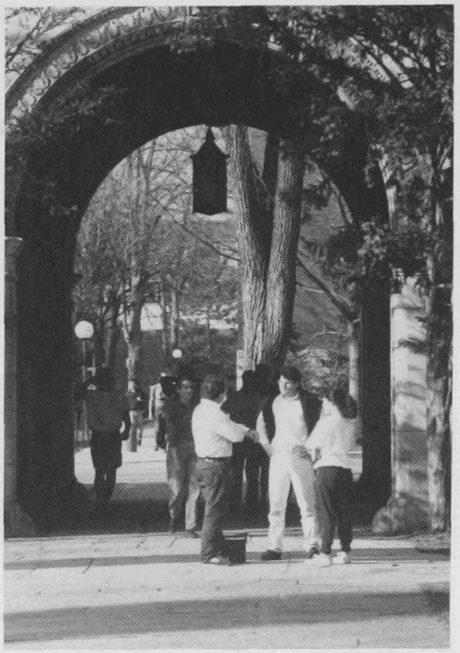
Robert E. Gilbert of Ann Arbor, Michigan, has been reelected a managing partner of the statewide law firm of Miller, Canfield, Paddock and Stone.

Barbara Ellen Handschu of Buffalo is the new section chair of the New York State Bar Association's Family Law Section.

Robert P. McBain is president-elect of the American Association of Attorney–Certified Public Accountants. McBain practices in Grand Rapids, Michigan.

1967

Cushman D. Anthony is serving a second term as member of the Maine House of Representatives.



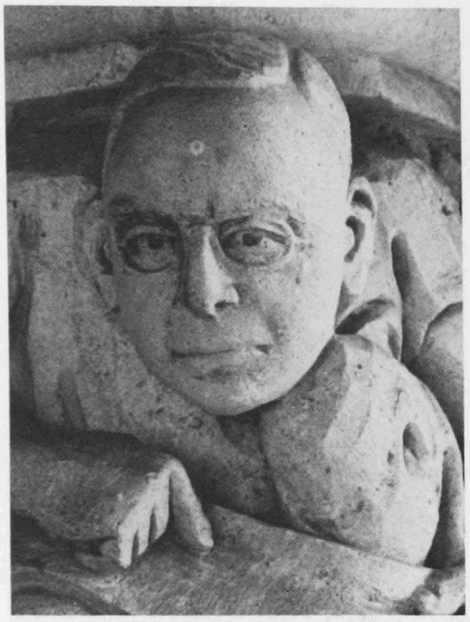
Ronald Delisle is spending his sabbatical at Arizona State University preparing a comparison of American criminal procedure with Canada's new Charter of Rights. He teaches criminal law, evidence and criminal procedure at Queens University in Kingston, Ontario.

Samuel Goodman has completed his term as president of the Lake County, Indiana, Bar Association and has just commenced a term as treasurer of the Indiana State Bar Association. Recently he became a fellow of the American Academy of Matrimonial Lawyers.

Hurst Kohler Groves has been elected a fellow of the American Bar Foundation.

John A. Sebert, professor of law at the University of Tennessee College of Law, is taking two years' leave to assume the position of deputy director of the Association of American Law Schools. He commenced his new duties in August. Professor Sebert also recently published an article on Rejection, Revocation, and Cure under Article 2 of the Uniform Commercial Code in the *Northwestern University Law Review.*

C. Gordon Simmons is taking a three-year leave of absence from teaching to be a neutral arbitrator. For the past twenty years, he has served as a member of the law faculty at Queens University in Kingston, Ontario, where he teaches labor-management relations.



John H. Stout, an officer and shareholder in the Minneapolis law firm of Fredrikson & Byron, P.A., has been named 1990 Minority Business Advocate of the Year by the Minnesota District Advisory Council of the Small Business Administration.

1968

John A. Artz has joined the firm of Brooks & Kushman in Southfield, Michigan, as a partner specializing in intellectual property law.

Alfred S. Joseph III was recently selected as a member of the American College of Real Estate Lawyers. He is a partner in the firm of Stites & Harbison in Louisville, Kentucky.

John S. Osborne, Jr. has become a partner of Watson, Farley & Williams in New York. He continues his practice in the area of general corporate work, specializing in the purchase, sale and financing of ships and other asset-based transactions.

Lawrence D. Robinson has joined Bracewell & Patterson as managing partner of the firm's new Dallas, Texas, office.

1969

Harry B. Endsley has been appointed by the U.S. Trade Representative as a member of the Chapter Nineteen roster of dispute panelists under the U.S.–Canada Free Trade Agreement.

Darrel J. Grinstead has been appointed chief counsel of the Health Care Financing Administration in the U.S. Department of Health and Human Services.

1970

Mary Frances Berry received an honorary doctor of laws degree from Smith College at its 112th commencement exercise in May. Berry is the Geraldine R. Segal Professor of American Social Thought and professor of history at the University of Pennsylvania.

George Feldmiller, a partner at Stinson, Mag & Fizzell, has been appointed a member of the Advisory Committee for the U.S. Court of Appeals for the Eighth Circuit.

Steven G. Schember has been promoted to partner in charge of litigation for the Tampa office of Dykema Gossett.

1971

David J. Peat is the Director of Legal Services for Bankers Systems, Inc., St. Cloud, Minnesota, providing compliance and regulatory solutions, services and expert systems to financial institutions.

1972

Robert G. Kuhbach has joined Sudbury, Inc., in Cleveland, Ohio, as senior vice president, general counsel and secretary.

Robert M. Lamb has joined Dinsmore & Shohl in Cincinnati, Ohio, as an associate specializing in labor and employment law.

Wayne A. McCoy was elected a member of the board of directors of the American Judicature Society at the ABA annual meeting in August 1989. McCoy is a partner at Schiff Hardin & Waite in Chicago.

Kent W. Mudie, a partner with Twohey, Maggini, has been reelected secretary of the Grand Rapids Bar Association.

Norman H. Roos recently authored the *CMBA Handbook on Connecticut Mortgage Statutes: An Analysis and Compilation of Connecticut Legislation Affecting Residential First Mortgage Lending*. Roos is a founding director of and counsel to the Connecticut Mortgage Bankers Association, Inc., and is a principal in the firm of Leventhal, Krasow & Roos, P.C. in Hartford, Connecticut.

James M. Tervo recently opened a Chicago office of the Detroit-based firm Dickinson, Wright, Moon, VanDusen & Freeman.

1973

Ronald J. Allen has been named Stanford Clinton Sr. Research Professor at the Northwestern University School of Law.

Scott Barnes has been promoted to vice president and senior counsel at Occupant Restraint Systems, TRW, Inc., in Cleveland, Ohio.

Roger Connor, a recent guest scholar at the Brookings Institution, has started a public interest group, the American Alliance for Rights and Responsibilities, in Washington, D.C.

Steven E. Fox is currently serving as Chairman of the Corporate and Banking Law Section of the State Bar of Georgia.

Robert Hirshon has been elected president of the Maine Bar Foundation.

1974

Stephen R. Drew, a partner with Williams, Klukowski, Drew & Fotieo, is the newly elected vice president of the Grand Rapids Bar Association. He is also president of the Floyd Skinner Bar Association, an organization of minority lawyers.

Priscilla Gray recently taught securities law at the University of Maine Law School.

Richard G. Moon has started his own firm specializing in labor and employment law for management in both the public and private sectors throughout New England.

1975

Frank G. Dunten, a partner with Varnum, Riddering, Schmidt & Howlett, has been reelected treasurer of the Grand Rapids Bar Association.

Terrence G. Linderman is Director of International Taxes for International Mineralist Chemical Corporation in Northbrook, Illinois.

1976

Susan Bandes has been promoted to full professor at DePaul College of Law in Chicago.

James McFarlane Davis was recently elected Circuit Court Judge from Waukesha County, Wisconsin.

The San Diego County Bar Association has honored **Marilyn Huff** as the Lawyer of the Year. She is a partner in the firm of Gray, Cary, Ames & Frye.

Thomas W. Linn of Detroit has been elected managing partner in the statewide law firm of Miller, Canfield, Paddock and Stone.

James R. Peterson has joined National Fuel Gas Supply Corp. of Buffalo, N.Y., as senior attorney.

John E. Shannon has formed a new partnership known as Shannon and Ross. The Houston firm specializes in tax, trusts, probate and related areas.

Joel Winston has been appointed an assistant director of the Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, in Washington, D.C.

1977

Martha Mahan Haines has been elected to partnership at Altheimer & Gray in Chicago.

1978

Lisa Novic Mason, executive editor of tax software publications for Matthew Bender & Company, has published a novel entitled *Arachne* about future legal practice and artificial intelligence.

Barry N. Seidel has joined the firm of Willkie Farr & Gallagher, in New York, N.Y., as a partner specializing in bankruptcy.

Mark Yura is practicing real estate law at Rudnick & Wolfe in Chicago. He also works as a volunteer mediator at the Neighborhood Justice Center.

1979

Robert B. Bettendorf is federal tax counsel for Amway Corporation, in Ada, Michigan.

David Glanz has joined the firm of Stroock & Stroock & Lavan where he will specialize in real estate law.

Ruth Brammer Johnson recently became General Counsel of Waste-Tech Services, Inc., a subsidiary of Amoco Oil Company, in Golden, Colorado.

Thomas Malone has been named associate general counsel for ANR Pipeline Company in Detroit, Michigan, where he is responsible for litigation.

Geoffrey L. Silverman is a co-founder of the firm of Shefferly & Silverman in Southfield, Michigan, specializing in corporate reorganization, insolvency matters and commercial litigation.

Richard Stevens has become a shareholder at the firm of Clary, Nantz, Wood, Hoffius, Rankin & Cooper in Grand Rapids, Michigan.

1980

Todd J. Anson has relocated from the San Francisco office of Brobeck, Phleger & Harrison to its San Diego office where he joins Ellen B. Spellman (J.D. '78) as the real estate partners in that office.

George Brandon has become a partner at the firm Milbank, Tweed, Hadley & McCloy, New York.

Gail M. Ernstein was elected president of the Southfield Bar Association. She is a principal in the Southfield, Michigan, law firm of Manason & Ernstein, P.C.

G.A. Finch, an attorney at Querrey & Harrow, Ltd., in Chicago, Illinois, has been appointed to the editorial boards of both the *Illinois Bar Journal* and the *Chicago Bar Record*.

Richard P. Layman, a partner at Jones, Day, Reavis & Pogue, has transferred to the firm's London office, where he will continue his specialization in tax and estate planning.

1981

Steven G. Adams has become a partner at Siff, Rosen & Parker, P.C., in New York, N.Y., where he is a litigator specializing in insurance coverage disputes.

Kenneth G. Dau-Schmidt, currently teaching at the University of Cincinnati College of Law, has been selected as the winner of the Association of American Law Schools' 1990 Scholarly Paper Competition. Professor Dau-Schmidt presented his paper, entitled "An Economic Analysis of the Criminal Law as a Preference Shaping Policy," at the recent AALS annual meeting.

Warren Goldenberg has become a partner in the law firm of Hahn Loeser & Parks in Cleveland, Ohio.

John C. Grabow, a partner at Ginsburg, Feldman and Bress, has published a book entitled *Congressional Investigations: Law and Practice*. He is also serving as the vice chair of the ABA Committee on Lobbying and Legislative Process.

Michael J. Grace has joined the Washington, D.C., office of Dechert Price & Rhoads as counsel.

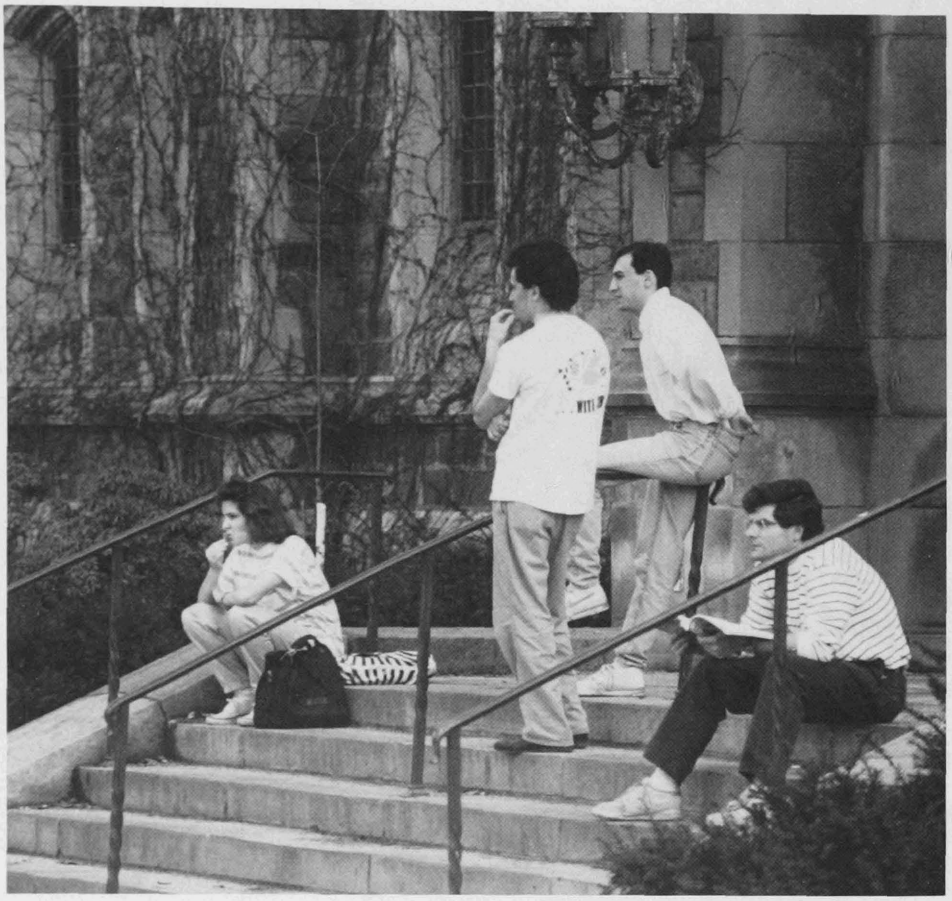
Jim Hilboldt has joined the legal staff of Pfizer Inc., where he works in the pharmaceuticals division and the licensing and development group.

David D. Kleinkopf has been appointed managing partner of the Denver Technological Center branch of Holme, Roberts & Owen.

Diana M. Lopo has become a partner at the firm of Skadden, Arps, Slate, Meagher & Flom. She is a tax attorney in the New York City office.

Michael E. Lowenstein has been named a partner at Reed Smith Shaw & McClay in Pittsburgh, Pennsylvania, where he is a member of the firm's litigation group.

J.B. McCombs has taken a leave of absence from teaching tax at the University of Nebraska (Lincoln) College of Law to accept a visiting professorship at Santa Clara University Law School for the 1990-91 school year.



Linda Rothnagel is working as the managing attorney of the legal services office in Waukegan, Illinois.

Jeffrey S. Stein is a partner at Hahn & Hessen in New York, N.Y., specializing in bankruptcy law.

1982

Nancy Welber Barr is associated with the law offices of Robert Stevenson in Ann Arbor, Michigan, where she practices estate planning and employee benefits law.

Richard A. Barr has been named a principal of Schlussel, Lifton, Simon, Rands, Galvin & Jackier, in Southfield, Michigan, where he practices real estate, corporate and commercial finance law.

James Ellis Brandt of Scarsdale has been named a partner in the New York office of Latham & Watkins. He is a litigation attorney, specializing in commercial and securities litigation and creditors' rights.

John E. Fagan has become a partner in the Tahoe City, California, office of Hancock, Rothert & Bunshoft.

Peggy J. Kopmeyer has been named a partner in Holme, Roberts & Owen in Denver, Colorado.

Kevin M. LaCroix has become a partner at the Washington, D.C., firm of Ross, Dixon & Masback.

David J. Lauth has become a partner with the firm of Dorsey & Whitney in Minneapolis, practicing in the areas of commercial and employment litigation.

Michael L. Lencione, a municipal bond and government law attorney, has become a partner at Miller, Canfield, Paddock and Stone in Detroit.

Ronald L. Mock is Director of the Center for Peace Learning and Assistant Professor of Peace Studies and Political Science at George Fox College in Newberg, Oregon.

1983

John V. Byl, an environmental law attorney, and **Kathleen M. Hanenburg,** a commerical and business law attorney, have become partners at Warner, Norcross & Judd in Grand Rapids.

Thomas Fox is associated with the firm of Meredith, Donnel & Abernethy in Houston, Texas.

John B. Frank has been elected a partner of Munger, Tolles & Olson in Los Angeles, where he represents clients involved in mergers and acquisitions, securities offerings and other general corporate matters.

Peter A. Jackson has become a partner in the Detroit office of Hill Lewis.

Diann H. Kim has become a partner of Tuttle & Taylor in Los Angeles, where she practices in the areas of antitrust, environmental and general commercial litigation.

Barbara Zahs Rothstein has become senior counsel to the Leveraged Funding Group (Midwest Division) of Heller Financial, Inc., in Chicago, Illinois.

Frank J. Saibert recently became partner in the Chicago law firm of Katten Muchin & Zavis where he specializes in management-side labor and employment law.

1984

Helen R. Haynes has transferred to the Philadelphia office of Pepper, Hamilton & Scheetz, were she continues to practice antitrust and complex commercial litigation.

James N. Humphries has been named assistant city attorney for the city of Dearborn, Michigan. He formerly served as a staff analyst for Detroit City Council's Division of Research and Analysis.

Mary Ann Lesniak has been promoted to assistant general counsel at PHH Corporation in Hunt Valley, Maryland.

Daniel P. Schaack has left private practice to become a staff attorney with the Arizona Court of Appeals in Phoenix, Arizona.

1985

Kathryn L. Biberstein has left her corporate securities law practice in Boston to join the World Economic Forum in Geneva, Switzerland, where she is legal adviser to the executive board and general manager of the WELCOM Network.

Gregory H. Gach has opened his law office in Charlotte, North Carolina.

Carol R. Shepherd has opened a practice in Ann Arbor, Michigan, specializing in computer law, copyrights, trademarks, licensing and general business law.

1986

Carolyn Ruis Hoffmann recently joined the firm of McDonough, Holland & Allen as an associate in their redevelopment and land use section.

William J. Kohler has joined the international department of Chrysler Corporation's office of the general counsel.

Ramona C. Lackore has left Western Minnesota Legal Services to establish a private practice, Holbrook and Lackore, in Willmar, Minnesota.

Eve Lerman has joined Forrester Norall & Sutton in Brussels, Belgium, specializing in European Community law.

Michael Lisi has a new position in the Commercial Law Department of Kmart Corporation in Troy, Michigan.

Thomas R. Morris has become an associate with the firm of Shefferly & Silverman in Southfield, Michigan, specializing in corporate reorganization, insolvency matters and commercial litigation.

Steven M. Taber has joined the Chicago office of Ross & Hardies as an associate. He will continue to specialize in environmental litigation and regulatory matters.

1987

Susan H. Bragdon has been awarded a Robert S. McNamara Fellowship by the World Bank to work on environmental law in Kenya. Bragdon is one of eleven winners selected in an international competition open to all World Bank member countries.

Frances Hamermesh has been appointed chair of the Ingham County Board of Health by the Ingham County Board of Commissioners in Lansing.

Thomas C. Willcox is currently a Deputy Attorney General in the Antitrust Section of the Pennsylvania Attorney General's Office.

1988

Gabriel J. Chin has completed a one year clerkship with U.S. District Judge Richard Matsch, J.D. '53. His successor is Joseph Berman, J.D. '89.

Bob Eustice has become an associate at Hazel, Thomas, Fiske, Beckhorn & Hanes in Alexandria, Virginia.

Lauren Gilbert observed Chile's first elections in more than sixteen years as part of a mission sponsored by the International Human Rights Law Group.

Oscar Gonzales has joined the firm of Leond, Marsh, Hurt, Terry & Blinn as an associate. He recently completed a judicial clerkship with U.S. Bankruptcy Judge for the Western District of Texas, Leif M. Clark.

Elisa J. Silverman is an associate at Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A., in Baltimore, Maryland, where she practices real estate and general commercial law.

Michael J. Way has become an associate at Chapman and Cutler in Chicago, Illinois.

1989

Cindy A. Cohn has joined the San Francisco law firm of Farella, Braun & Martell as a litigation associate.

Susan Lichterman, Daniella Saltz, and **Sheryl Singer** have joined the Detroit-based law firm of Jaffe, Snider, Raitt & Heuer, P.C.

ONIONS OR THE JOYS OF WRITING A TREATISE

Joel Seligman

From time to time during the five years I have worked with Louis Loss on what will be a 12-volume work on Securities Regulation, I have been asked what treatise writing is like. Normally the question is posed with the unspoken assumption that it must be a little like a serious case of leprosy or perhaps a violation of the 13th Amendment. For example: "Is it horribly depressing?" Or: "How many years do you think it will take?" Then there is a somewhat more cynical unspoken assumption that occasionally can be perceived: "Don't you miss theoretical writing?" Or most splendid of all: "Don't you look forward to writing law review articles again?"

There is, of course, some truth in each of these assumptions. It is hard to imagine working on any long project without an occasionally depressing day. This one will take close to 10 years to write and be approximately 6,000 pages in length. There is no doubt that proportionately there is less pure theoretical writing in a treatise than in a law review article.

But that said, the simple truth is that I am happier working on the treatise than I have ever been working on anything else. There is a joy in knowing that I never have to struggle to figure out what I will write tomorrow, or for that matter, three years from tomorrow. The very structure of a treatise gives one a comfort that no one facing blank pages at the beginning of a purely theoretical work consistently can enjoy. To be sure, there is a breathtaking pleasure in writing a piece as original as the music of Mozart. But very few of us, in fact, are Mozart. In music, for example, there was only one. Writing theoretical pieces like Salieri, I suspect, could also be tedious after a time.

More importantly, I like treatise writing because I believe in the form. During the New Deal period, it was common for legal authors like Jerome Frank to characterize themselves as "fact skeptics." They believed, to invoke a favorite quotation from Holmes, that "the life of the law was not logic, but experience." The thrust of the fashionable intellectual movement of that day was both empirical and antitheoretical. Times obviously have changed. We live at the "high noon" of a new generation of theoretical legal scholarship. It would not be correct to state that it is anti-empirical, but I view the volumes I am co-writing with Louis Loss as contributing to the context of this generation's work.

The theoretical work in corporate or securities law today typically focuses on a discrete problem and applies some variant of economic analysis to it. The strength of this type of work often is in its economic analysis rather than in discussion of the context of the problem. Our work, in contrast, focuses on the context.

By context, I mean several things. First, I mean textual context, that is, a full development of the structure of the statutes, rules, and agency interpretations in the field. The nature of a securities law problem seems quite different when you can contrast it with the legal treatment of several analogous problems. It is difficult for me to imagine criticizing, say, the disclosure obligations under the 1968 tender offer amendments to the Securities Exchange Act, without understanding analogous securities law disclosure regimens. Much of the best writing concerning a mandatory disclosure system has focused on other disclosure obligations. Several of the provisions in the 1968 Act were directly inspired by these earlier laws. In attempting to interpret the 1968 Act, the SEC invariably will draw on its experience interpreting the earlier laws.

Context also refers to the historical context of a problem. In 1982, for a simple example, the SEC adopted its integrated disclosure system, partially consolidating the

new issue disclosure techniques of the 1933 Securities Act and the periodic disclosure obligations of the 1934 Securities Exchange Act. To understand the 1982 administrative action requires an understanding of the events that led to the adoption of the securities laws in the 1930s, the laws themselves, the agency's subsequent rulemaking and interpretations, and the commentators' acceptance or criticism of these rules.

Indeed, to fully understand the integrated disclosure system requires a third type of contextual analysis, one that I term empirical context. The ultimate test of the wisdom of a law is in its application in the real world. To understand this application, one must understand the real world itself. With the disclosure provisions of the securities laws, this requires some understanding of securities underwriting and accounting. Increasingly, it also requires some understanding of alternative securities law systems such as those in London and in the European Community. Soon, I suspect, the real requisite of a securities law scholar will not be a rudimentary knowledge of the economics of information, but conversational Japanese. And, in securities law, there is also a need to have some sense of the potentialities of computer and communications technologies. The true "formative" events that led to the 1982 integrated disclosure system were probably the increased celerity with which debt securities could be distributed in the Eurodebt market because of computer technology and the fax machine. This is not the kind of point, say, that Samuelson or Posner typically emphasize in their work. In a more complicated problem, for example, the mechanisms of the 1987 stock market crash, computer technology revolutionized the very types of securities traded, making possible such derivative instruments as index futures and index options whose prices change in response to the price movements of hundreds of underlying stocks. Computer technology was also responsible for creating trading strategies such as portfolio insurance, and ultimately for breeding an exaggerated confidence in the liquidity of the markets and the capacity of intermarket trading systems to handle significantly increased volume.

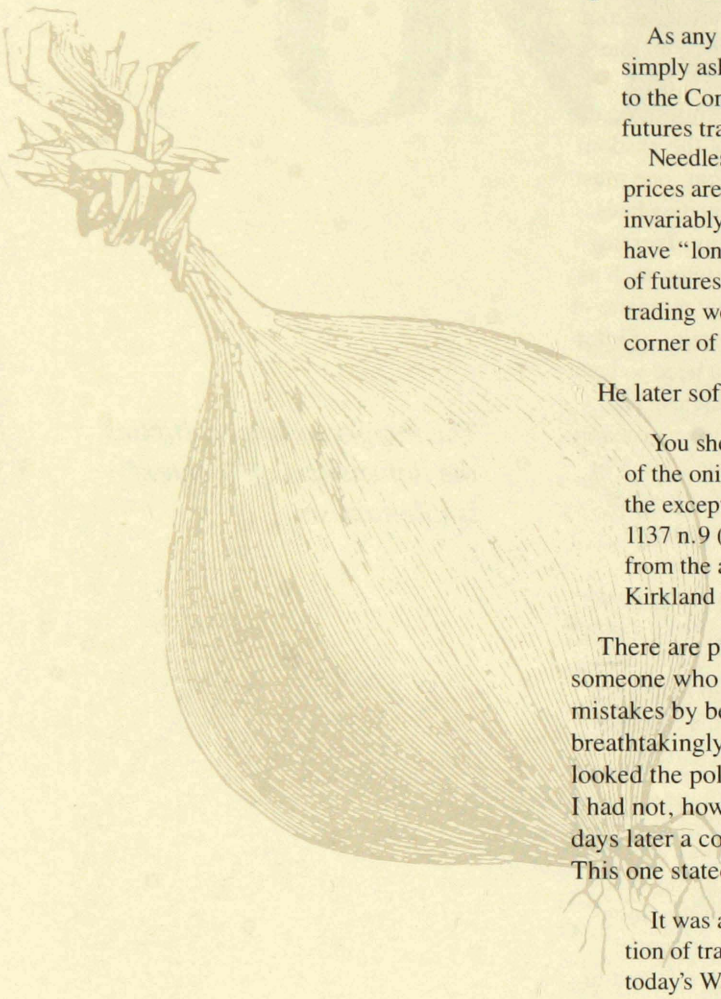
The danger as one multiplies the dimensions of "context" is dilettantism.

The danger as one multiplies the dimensions of "context" is dilettantism. No scholar who writes generally about a field will ever know about a specific problem as well as a specialist who focuses just on that problem. This has been brought home to me in several ways. I often feel subject to a peculiar linguistic handicap, when I visit the floor of an exchange, by my almost total inability to understand what the floor personnel are saying to each other. I must concede this may be my own fault. I find it difficult to understand sentences without verbs. This, however, is just one corner of the empirical context of securities regulation. There are several others, such as those that focus on limited partnerships, exempt Federal Government or municipal securities, nonexempt debt securities; broker-dealer regulation, securities litigation, or corporate compliance with reporting, tender offer, and insider trading requirements. No generalist can hope to fully understand all or even a significant part of these empirical contexts. Thus the tension in this type of work is using one's best judgment to determine how much one must know to effectively write a contextual work about securities law while operating under the constraints of "world enough and time."

Let me offer an example. At page 1073 of the treatise, Louis Loss and I began quotation of a detailed definition of the term "commodity" in the Commodity Futures Trading Commission Act of 1974 by observing that it included "a couple of dozen edible items . . . (except onions for some reason) . . ." Little did we know that our parenthetical reference to onions would generate more correspondence than any other part of the treatise, ultimately involving a distinguished economist from the University of Chicago, an SEC Commissioner, and a former president of the United States.

From my point-of-view, this was at most a marginally relevant clause, justified, in part, by a footnote from a Seventh Circuit decision, suggesting "a physiological basis for the onion producers' crying."

Our readers saw it differently. In draft form, part of this volume was circulated to University of Chicago Business School professor Merton Miller who graciously acknowledged that "it was certainly written by someone who knows his onions (though not, apparently, why futures contracts for onions were banned)." He "hinted" that the charge was led by an influential congressman who later ended up in the White House.



Soon a detailed letter arrived from SEC Commissioner Joseph Grundfest (now teaching at Stanford Law School). Grundfest, tongue barely in cheek, in part wrote:

> As any sous chef at Burger King would have been able to tell you, had you simply asked, futures trading on onions was prohibited by the 1974 amendments to the Commodities Exchange Act because of the perceived adverse effect of futures trading on cash market onions prices. . . .
>
> Needless to say, anyone with the slightest market savvy understands that onion prices are not determined like potato, silver, or stock index prices, which are invariably stable and well behaved. Onions are a product unto themselves, and have "long been the subject of extreme price fluctuations even before the advent of futures trading." . . . Indeed, even with a strict prohibition on onion futures trading we have not been able to stamp out fraud in that frenzied and cut-throat corner of America's economy.

He later softened his tone somewhat, concluding:

> You should not, however, feel slighted by your inability to discover the roots of the onion exemption. The compilers of the Lexis database apparently found the exception so incredible that in their report of *Board of Trade v. SEC*, 677 F.2d 1137 n.9 (7th Cir. 1982) the database explains that "unions [sic] were excepted from the amended definition. . . ." That is, I am sure, a great comfort to Lane Kirkland and others.

There are practical limits to a treatise writer's pride, particularly when wounded by someone who had earlier made known his intention to repeat the treatise writer's own mistakes by becoming an academic. I penned Joe a brief note thanking him for his breathtakingly incomplete analysis, snidely informing him that he had completely overlooked the political dimension of the exemption. There I assumed matters would rest. I had not, however, accurately gauged Joe's erudition or political connections. A few days later a copy of a considerably longer letter to former President Ford arrived. This one stated in part:

> It was also quite a thrill to learn that you are a leading authority on the regulation of trading in onion futures, an area of expertise that is sorely lacking in today's Washington. Despite your familiarity with the politics of onion futures, you might not be fully aware of the wonderful legal draftsmanship that gives rise to the famous "onion exemption" and the scholarship that the exemption has spawned. Rather than simply prohibit the trading of futures on onions, a solution far too obvious for Congress to comprehend, Congress determined to draft a very broad definition of the term "commodity," but then to exclude onions from that definition. . . .
>
> Translated into English, this definition effectively states that everything is a commodity, except onions. Needless to say, this inscrutable definition has given rise to serious head scratching in certain corners of academe. For example, Professors Louis Loss of Harvard and Joel Seligman of Michigan, two otherwise competent scholars, were stumped by the onion exemption. They expressed their curiosity in a recently published volume of their authoritative treatise on securities law . . .
>
> In response to this uncharacteristic lapse, I undertook the task of documenting some of the legal and economic history of the onion exemption. The enclosed letter to Professors Loss and Seligman describes the results of that research.
>
> Missing from that analysis is any consideration of the political factors that caused onions to be treated differently from, say, Solanum tuberosum (Irish potatoes). Professors Loss and Seligman would greatly appreciate any insight you might be able to provide regarding the political history of the onion exemption. . . . I would, of course, be glad to forward any information you might be able to provide.

There are practical limits to a treatise writer's pride, particularly when wounded by someone who had earlier made known his intention to repeat the treatise writer's own mistakes by becoming an academic.

President Ford takes his mail very seriously. He soon wrote Commissioner Grundfest:

> The "onion exemption" brings back interesting recollections of my service as the Congressman from the 5th District of Michigan. The 5th District included

Hudsonville, Michigan, which is a very productive onion producing area of predominately farmers of Dutch heritage. As their Congressman, I responded to their plea to exclude onions from future trading and worked hard in the Congress to achieve successfully their viewpoint.

Unfortunately, I do not recall after these many years the details of that legislative struggle. The best and most authoritative source of information would be my Congressional papers which are available at the Gerald R. Ford Library on the campus of the University of Michigan.

So prompted by President Ford, the librarians of The University of Michigan Law School quickly swung into action. Within days, they had identified 83 pages in the Gerald R. Ford Library that might be relevant. After a brief delay — the Ford Library refused to release the letters until it was prepaid 35 cents per page — the "Onion Papers" arrived. Most of the letters were the complaints of onion farmers, the contents of which were effectively suggested by the observation of one in particular: "It is the manipulators that set the price, and for the last two yrs., they ran the price down so that the grower had to sell far below cost. . . ." The National Onion Association weighed in: "For years the Nation's onion growers have been victimized by uncontrolled fluctuations and manipulations of onion futures. The industry wants futures eliminated." Support for this cause proved bipartisan. Not only then Congressman Ford but also Minnesota's Democratic Governor Freeman strongly favored ending onion futures. All the cause lacked was an effective opponent. So far as I could tell by studying the correspondence, the Chicago Mercantile Exchange, on which onion futures then were traded, barely stirred from its slumber. Inevitably victory was secured. There is a particularly poignant concluding letter in which then Congressman Ford's administrative assistant writes, "The huge carton of delicious looking onions arrived today and I certainly want to thank you . . . for your thoughtfulness in forwarding them to me." Even in an age of vicuna coats, I suspect no one would have begrudged Ford, or his administrative assistant, this unsolicited reward.[1]

Joel Seligman, a graduate of U.C.L.A. and Harvard Law School, joined the Michigan faculty in 1987 after teaching at Northeastern Law School and the George Washington University School of Law. His principal area of legal research and writing is securities regulation. He has written ***The SEC and the Future of Finance*** *and* ***The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance.*** *He is currently writing a multi-volume treatise on securities with Harvard Law School's Louis Loss.*

NOTES

1. Since I am uncomfortable writing anything without a footnote, let me add the following. Between the time this was written and the time my secretary could type it, President Bush issued a ringing declamation to the effect, "I am president of the United States and I am not going to eat anymore broccoli!" This statement was at first extremely troubling to me. Why broccoli? Surely a politician as schooled in the art of survival as George Bush would not needlessly pick a fight without some political motivation. My colleague Rick Lempert suggested the motivation was obvious. Bush is pandering to the 6- and 7-year-old voters who he counts on for support if he succeeds in repealing the 22nd Amendment that limits presidents to two terms. That may be the answer, in part, but it cannot be the complete answer. My strong suspicion is that a far higher percentage of 6- and 7-year-olds detest lima beams than detest broccoli. Indeed, broccoli can be smothered with melted cheese so that it has virtually no independent taste, while no right-thinking parent would so attempt to adulterate the taste of lima beans. Clearly another part of the answer must lie in the realities of Washington politics. There is no doubt a powerful lima bean lobby, similar to the National Onion Association I described in the text, ready to protect their vegetable from any and all political or market threats. I am doubtful that the broccoli producers have a similar lobby. Hence Bush probably cleverly choose both an unpopular vegetable and one with no visible political support.

To some, this line of argument may seem like pure speculation. But surely not to Washington insiders. They well remember the sad experience of Alfred Kahn who, when on the White House staff, was told he could not use the term "recession" in an address. Kahn, foolishly, thought he could poke a little political fun at others in the White House by delivering an address substituting the word "banana" for each reference that he had earlier written to "recession." The reaction of the banana lobby almost drive him out of Washington. In his next address, he wisely used "kumquats" as his surrogate term, after confirming that there was no kumquat lobby.

Bloodtaking and Peacemaking

Feud, Law, and Society in Saga Iceland

William Ian Miller

In his newest book, published by University of Chicago Press in August, Professor Miller continues to throw open the world of Old Norse studies to interested readers, delving beneath the Vikings' world of brutality and chaos to expose a deeper struggle for social equilibrium. His examination of ancient Iceland's sagas and legal code sheds light on the society that produced them and reveals how the culture of the feud, central to this stateless society, was driven by the related norms of honor, reciprocity and balance.

The selections that follow are from the prologue and conclusion of Bloodtaking and Peacemaking.

"The Saga of Skæring Hroaldsson" (Part I)

Skæring Hroaldsson is an exceedingly minor character in the saga world. He figures briefly in two incidents, each recounted in a different saga. Part I of his story is found in *Gudmundar saga dýra (The Saga of Gudmund the Worthy),* a saga recounting local disputes in the Eyjafjord district in the north of Iceland during the last decade of the twelfth century. It is in the last chapter of this saga that Skæring is introduced, his tale providing the epilogue to Gudmund's saga. Skæring, we are told, had been consecrated a deacon; he was also a kinsman of Gudmund. I quote the source:

> Some Norwegian merchants chopped off Skæring's hand. Gudmund dyri was given self-judgment in the injury case. Haf Brandsson [Gudmund's second cousin] and Gudmund together adjudged compensation in the amount of thirty hundreds, which was to be paid over immediately. Gudmund then rode away from the ship.
>
> But the Norwegians confronted Haf, who had remained behind; they thought the judgment had been too steep and they asked him to do one of two things: either reduce the award or swear an oath.
>
> Haf refused to do either.
>
> Some people rode after Gudmund and told him what had happened. He turned back immediately and asked Haf what was going on.

Haf told him where matters stood.

Gudmund said, "Swear the oath, Haf, or else I will do it, but then they will have to pay sixty hundreds. The oath of either one of us will have the same price as Skæring's hand."

The Norwegians refused the offer.

"Then I shall make you another proposal," said Gudmund. "I will pay Skæring the thirty hundreds that you were judged to pay, but I shall choose one man from amongst you who seems to me of equivalent standing with Skæring and chop off his hand. You may then compensate that man's hand as cheaply as you wish."

This did not appeal to the Norwegians and they decided to pay the original award immediately. Gudmund took Skæring with him when they left the ship. (*G.dýri* 26:212)

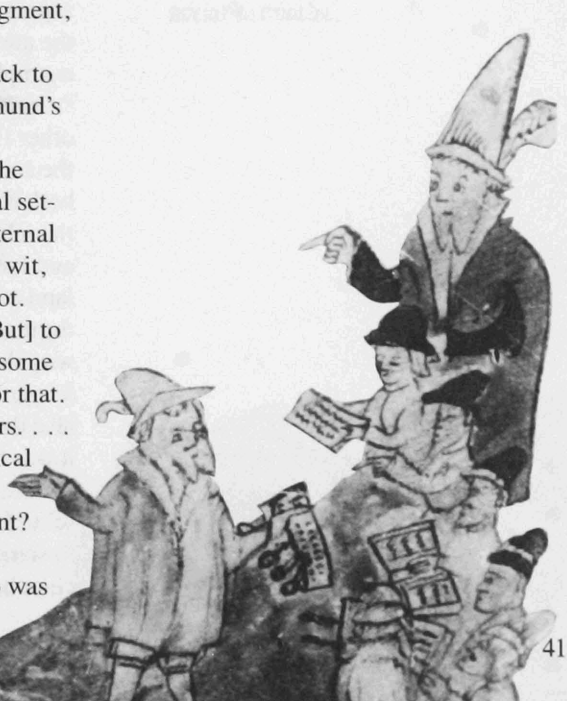
The scene takes place at shipside where Norwegian merchants would live during the summer months and Icelanders would come to trade. The setting allows us to speculate that the reason Skæring lost his hand had its origins in suspected cheating or thieving. But the origins of Skæring's misfortune are of no special interest to either the narrator or his characters. The account has something of the style of an exemplum and what is important is the existence of a claim to resolve, not how that claim came into being.

By the time the saga writer focuses attention on this incident it is not the hand that is the subject of the dispute but the legitimacy and justice of Gudmund's judgment. The Norwegians think the award excessive, and not without reason. More than a few men's lives at this time were compensated for with thirty hundreds or less. . . . Gudmund, however, is able to justify astutely his over-reaching by giving these men of the market a lesson on the contingency of value and values. To the Norwegians the award should reflect the price of a middling Icelandic hand. Gudmund forces them to conceive of the award in a different way: it is not the price of buying Skæring's hand, but the price of preserving a Norwegian hand. By introducing the prospect of one of their hands to balance against Skæring's, he is able to remind the Norwegians that the thirty hundreds they must pay purchases more than Skæring's hand; it also buys off vengeance in kind. He is also able to force them to take into account the costs of personalizing the injury. Most people, he bets, are willing to pay more to save their own hands than they would be willing to pay to take someone else's. The justice of Gudmund's award thus depends on a redefinition of its significance. Rather than buying Skæring's hand, the Norwegians are preserving their own, and the price, they now feel, is well worth paying. Fellow feeling thus comes not in the form of imagining Skæring's anguish and pain as Skæring's, but in imagining the pain as their own. Gudmund is also able to humiliate them in the process. He reveals them not only as cowards but as small-minded hagglers unwilling to pay an award they bound themselves to pay when they gave Gudmund and Haf the power to judge the case. Gudmund, after all, offers to fulfill his own judgment, thereby making, in grand style, a disclaimer of his eagerness for money at the expense of justice. By such indirection the saga writer and Gudmund bring us back to Skæring's misery, even if his misery must take a backseat to the display of Gudmund's virtuosity in the rhetoric of self-legitimation.

The account has something of the style of an exemplum and what is important is the existence of a claim to resolve, not how that claim came into being.

This little vignette serves as a reminder of the negotiability of significations, the multiplicity of possible meanings extractable by people from any particular social setting. It also demonstrates that the forcefulness of rhetoric is more than just an internal affair of language and signs; it is about power and violence. Much of Gudmund's wit, clearly, depends on his ability to take a Norwegian hand whether they like it or not. The account is dense with social, psychological, and dramatic possibility. . . . [But] to those unfamiliar with early Iceland the story must be puzzling in many ways. In some respects the case is not typical. The Norwegian presence is mostly responsible for that. The dispute would not have unfolded exactly as it did if it only involved Icelanders. . . .

In many ways, however, the case is typical or raises questions that involve typical social and legal matters. Why, for instance, does the case fall to Gudmund? Was Gudmund obliged to assist Skæring because they were kin? What is self-judgment? Were all wrongs deemed compensable and, if so, how precisely was the balance struck? Was it always a hand for a hand or were other factors more crucial? Who was



obliged to compensate for harm? Did the source of the payment matter? . . . To what extent was liability individualized and to what extent was it vicarious? There is, for instance, no concern in this account to identify and punish the person who actually did the amputation. Are all disputes subject to so much bargaining? What of rules, customs, and other norms? Were there none that governed this kind of encounter? If there were ruled constraints, to what extent were they negotiable? Just what were the expectations of the parties when they met? How will Skæring requite Gudmund? And what kind of life can Skæring, maimed, be expected to lead?

These are but a few of the questions suggested by the case. If they tend to be more strictly legal than social, that is more a function of the content of an account rehearsing the terms of an arbitrated settlement than of the special focus of [my inquiry], which is distinctly social historical. A significant portion . . . is about the disputing process in medieval Iceland, about how contention was mediated socially, and about how that process impinged on the social solidarities of households, kin, and Thing attachment. This necessarily involves a focus on obligation, on the types of claims people made on each other, both on those they considered of their party and on those they felt hostile toward, and on how they admitted or avoided those claims made upon them. In short, the focus is on the micropolitics of social interaction. "Disputes studies" has been in vogue for nearly two decades among a wide spectrum of legal anthropologists, sociologists of law, and even, lately, historians. I am deeply indebted to this literature, but a focus on the process of dispute would have been thrust upon me even in the absence of the vogue simply by virtue of the sources. The relevant written artifacts of medieval Iceland — sagas and laws — are about . . . the processing of disputes, bloodfeuds, and the subtleties of maneuver in social interactions.

Political theorists, legal historians and sociologists find many issues of interest raised more saliently in early Iceland than in medieval England.

Nonspecialist readers will be surprised, I think, to find that many issues of more general interest to sociologists, historians, legal scholars, and social and political theorists are raised in a more salient way in early Iceland than they are in medieval England and the continent, or, for that matter, in many modern settings. Part of this is due to the remarkable nature of the surviving sources, which allow us to reconstruct the forms and style of face-to-face interaction and to observe the dynamics within and between small groups (the saga writers of the thirteenth century anticipated the sensibility and perspicacity of Erving Goffman). Part is due to the simpler state of Icelandic social development when compared with most nonmountainous areas of Europe at the same time. Medieval Iceland, until the end of the commonwealth, ca. 1262, was a society without any coercive state apparatus; it had only a weak sense of lordship, yet at the same time it had a highly developed legal system with courts and elaborate rules of procedure and equally elaborate rules of substantive law. But there was no provision for public enforcement of the law; it was up to the aggrieved party to see that his wrongs were righted and execute the judgments he obtained on his own behalf. This "private" aspect of Icelandic social control and conflict resolution has already gotten the sagas the attention of an occasional Chicago School economist, ever vigilant for real-life examples of theoretical libertarian splendor (see, e.g., Friedman 1979).

Iceland's isolation gives us a society freer from outside impingements than most other European cultures. Its disorders were systemic, not imposed. Isolation relieved the society of the expense of defending against external threat: the North Atlantic was both more effective and cheaper than a system of royal burgs. The objects of fear — the inhospitable environment and the violence of one's own countrymen — were local and familiar. There was also no native population that needed to be subjugated. The land came to its new possessors unembarrassed with prior claims and too far removed for many to entertain seriously making future claims. Partly for these reasons, Iceland was blessed by an absence of a systematic exploitive lordship in the continental style longer than would have been possible had foreign invasion been a real threat. Isolation also delayed and stunted the growth of an exploitive church, although, as we shall see, it was the system of funding the church that ultimately provided the apparatus for some men to skim the production of their neighbors. In short, isolation gave the Icelanders relief from some of the more oppressive social institutions of the continent. And to some extent their relief is also mine, for underdeveloped lordship and a modest church, coupled with the fact that this frontier culture was in no way molded by Roman

occupation and administration, made for a neater and cleaner subject than the usual medieval fare. My themes will be uncomplicated by kings, counts, and monks. In Iceland, we actually had a sedentary animal husbandry society, operating in a relative vacuum, which took care to articulate laws and to develop a technique of narration of its feuds and disorders that is the envy of most world literatures. It is as if the universe designed an experiment to test the theories of Hobbes and Rousseau and was kind enough to provide for the presence of intelligent and sophisticated observers, the saga writers, to record the results.

I am primarily interested in social structures and social processes; but I am also in search of the sensibilities of the people who populate the sources. The sagas allow us to observe people living their lives at various levels of competence as they attempt to negotiate and manipulate the possibilities that inhere in the tangle of social networks. The historian is able to discern certain patterns in practical experience of which the natives too, at some level, were not unaware. We can see, for instance, that the Icelanders understood that arbitration was a likely outcome for certain categories of disputes. But the fact that we can, or they could, see pattern or structure at the conclusion of a dispute does not mean that an outcome conforming to the structure was foreordained. There were choices to be made along the route that could delay or rush events to their anticipated conclusion, the very change in the pacing of the events altering both their significance and who ultimately benefited or suffered from the statistically favored pattern. There were also choices that could shift the process into other patterns, choices that could disrupt and thwart expectation. In other words, what looks routinized to the scholar was not necessarily experienced as such. There was always cause for vigilance and anxiety no matter how predictably things were going. In my search for regularity I do not wish to lose sight of tactic, strategy, intelligence, stupidity, fear, anxiety, and grand action.

"The Saga of Skæring Hroaldsson" (Part II)

We left Skæring riding in the company of Gudmund dyri, his kinsman, with thirty hundreds in place of a hand. We next hear of Skæring in another saga where he again provides the occasion for bigger men to confront each other. It is some eight years later and Skæring is introduced as follows: "There was a cleric named Skæring, consecrated as an acolyte. He was not very skilled at bearing weapons or in dressing himself — he was one-handed. Some Norwegians had chopped it off at Gasar where Gudmund dyri took up the case on his behalf." Clumsy though he may have been at getting clothes on, he was not so bad at taking them off. Thus we learn that Skæring

> had fathered a child on a woman whose brothers then sought out Kolbein to take up their cause. [Skæring], in turn, sought out Bishop Gudmund to take his part. Kolbein protested and said he would not accept the bishop's judgment in the case.
>
> The bishop offered to pay six hundreds for the offense, claiming that that was more than twice what they were entitled to. Kolbein refused the offer saying there was no point in settling with the bishop because he broke every settlement anyway.
>
> Kolbein had Skæring outlawed, but the bishop put Kolbein along with all those who had been involved in the judgment under interdict.
>
> Nevertheless, two weeks later Kolbein and Sigurd [another chieftain opposed to the bishop] held the court of confiscation for the outlawed cleric and took his property.
>
> When the bishop learned of this he excommunicated them both, because Skæring's property had been assigned to him. (*Íslend.* 20:246)

That was not the end of it. Kolbein and Sigurd prosecuted six of the bishop's household members for aiding the outlawed Skæring. To make a long story short, matters continued to escalate until, in a pitched battle between Kolbein and the bishop's forces, Kolbein was killed, struck in the head by a rock thrown by one of the bishop's men. Kolbein's death was followed by aggressive action, culminating in an attack on the bishop by a league of seven chieftains. I quote from the source at the point Arnor,

The sagas allow us to observe people living their lives at various levels of competence as they attempt to negotiate and manipulate the possibilities that inhere in the tangle of social networks.

Kolbein's brother, had succeeded in surrounding some of the bishop's men in a church:

> Arnor and his men went up to the church with their weapons drawn, urging those who were inside and against whom they had the most cause to come out. If they didn't, they said, they would attack them or starve them in the church.
>
> Then Svein Jonsson spoke up. "I will come out on one condition."
>
> They asked what it was.
>
> "That you lop off my hands and feet before you chop off my head."
>
> They accepted his terms.
>
> He and the others then went out, because they did not want the church defiled by them or their own blood. They came out unarmed. Svein was "limbed" as he sang *Ave Maria*. He then stretched out his neck under the blow. His courage was greatly praised.
>
> Skæring the cleric also had his head chopped off there. (*Íslend.* 24:253)

Thus ends the "saga" of Skæring, a man who, at the very least, had an uncanny talent for being in the wrong place at the wrong time. He is sagaworthy only because his haplessness provides the occasion for great action on the part of others. The loss of his hand was a mere preliminary to an example of Gudmund dyri's greatness; the bit of pleasure he had with a woman, to his great misfortune, provided a point of articulation for key events in the power struggle between the chieftain Kolbein and Bishop Gudmund; and the loss of his head was nothing more than an afterthought and anticlimax to the incredible death of Svein Jonsson, a person about whom we know even less than Skæring. Svein was a fearless warrior in a modified heroic style, newly affected, it seems, by having heard or having read too much martyrology while serving the bishop's cause. He would die without any expression of fear, but passively, concerned not to defile the church, rather than actively, concerned to take down as many of his enemy as God was willing to grant him. The sagas tend to be much more interested in people like Svein than in people like Skæring. But I thought it appropriate to open this work with Skæring as an example of the little people the sources do not make much of, except to drag them on stage to suffer outrageous fortune. Skæring is a reminder that the heroism of people like Svein Jonsson depended for its effect not only on the fact that it imitated a model of heroic action from the past, but that it was distinguished in the present from the behavior of people like Skæring, neither cowards nor heroes. Without a Skæring, the actions of a Svein are deprived of their special meaning. . . .

From the Concluding Observations

Honor, in Iceland, was largely congruent with man-evening, the comparing of men. It just might be that the very comparing of men, that is, honor, with its inherent ambiguities, was much of what drove the feud, bearing some kind of causal relation to it.

While not all societies who value honor will feud, few which feud won't have honor as a central cultural value. And in Iceland, at least, honor was largely congruent with man-evening, the comparing of men. It just might be that the very comparing of men, that is, honor, with its inherent ambiguities, was much of what drove the feud, bearing some kind of causal relation to it. In any event, the nervous contradictions of demanding balance only to deny balance structured the meaning of a significant portion of experience in the saga world.

Honor, however, was much subtler than we are inclined to think. Available to the honorable person was an expansive range of practical activities, with more than enough room available for sharp practice, tactic, and strategy. Honor was more than just the pure heroic warrior ethic, although at root it still meant "don't tread on me." We are talking about honor among farmers, who worried about their livestock, land, and lawsuits. The particular content of honor was not the same in this setting as it was on longships. Reputations inhered in one's skill in law, in the quality of one's land and herds. Honor translated into practical advantage. It could even be practicality itself. It meant good marriages for oneself and kin; it meant active involvement in a number of exchange cycles with other people of honor, whether the exchanges were of gifts or of insult and injury. Honor, above all, meant relations of reciprocity with other honorable people. The life of honor could thus accommodate peace and peaceful resolution. This is captured lexically by the extension in the plural of Old Icelandic *sæmd,* "honor," to mean "compensation payment." The word thus embodies an argument on behalf of

the honorableness of honorable monetary settlements, an argument that we know was made. But we also know that the bloody counterargument was still available and more than respectable in a wide range of settings. A person, after all, should not like to "carry his kin in his purse," and any waiver of blood revenge could only be honorably made if one was able to indicate one's future inviolability at the same time. It could be said that honor is the ability to make others believe that you will indeed be tough the next time, in spite of present discomfitures.

Rather than resume the substance of this book as its author, let me step back from the work and react as a reader to the society depicted here. How do we respond to it and how do we end up describing its essence? Was it violent? If so, was it more violent than other cultures? Than ours, for instance? How can we possibly know; how can we possibly measure violence anyway? Homicide rates, only the crudest of indicators at best, are not recoverable in medieval Iceland, since we know neither the number of homicides nor the number of people. Homicide rates don't begin to capture the systematic violence directed toward children, women, slaves; they don't take into account the fear of violence. And none of these things are any more measurable now than they were then. Should the measure of societal violence also take into account the acclimatization that might inure people to violence? That pain might be something universal to the human condition does not tell us if the same act causes the same amount of pain in different times and in different places. How do we factor in saga Iceland, where, apparently, verbal insult could cause somatic responses as painful as those caused by physical assault, where words could hurt more than sticks or stones? Is such a culture more violent because to the pain of blows we must add the pain of words? Or is it less violent because some pain has its origin in mental rather than physical causes? If we judge early Iceland violent, is it because the sagas appear so unembarrassed, so matter of fact about acts that appall us? Or does it seem violent because the typical reader of this book, like myself, couldn't endure the fear and anxiety we imagine we would feel at the prospect of having no state to enforce our rights for us or to protect us from those bent on enforcing their own? In other words, does their culture seem more violent because the responsibility for actually doing acts of violence was more evenly distributed than it is now, there being no state agents to delegate the dirty work to or to claim a monopoly on the dirty work? One reader of this book in draft offered the view that if he had had doubts about the idea of progress in history before, they had just been dispelled. He was troubled by what he felt was the amorality of my account, the sympathy he believed I felt for the people and their culture, a violent and anarchic society. In his view, if this is what the minimalist state would tend toward, then that constituted a refutation of the justifiability of the minimalist state.

But could we not also describe the culture as fairly stable with violence rather constrained or at least almost always constrainable to reasonable levels? There are still scholars willing to accept a soft-on-feud view, which sees it as a "cohesive force" in Black-Michaud's terms, or sees it as promoting nonviolent stability by being so replete with conflict that conflict itself ends up in gridlock; this is the paradox of Gluckman's "peace in the feud." There is also the discounting some readers will supply for the fact that the legal and narrative sources used to construct this history would tend to be biased in favor of good stories, hence violent stories. We don't even have to discount that much. The sagas do it for us, letting us know that the violence of feud was not a daily occurrence (although we know next to nothing of violence within the household). If we add up time and killings in these stories we find that the impression of excessive violence is often a function of the compression of narrative time. The frequent saga refrains of "nothing happened that year" or "everything was quiet for a time" condenses long periods of time into very few words, the time in which animals were tended, hay was mowed, cloth was woven, etc. The sagas do not show people *continually* living with the anticipation of violence, rape, or expropriation that many American urban dwellers must live with daily.

How would a feminist react to early Iceland — a libertarian, a communitarian? I can't suppose to speak on their behalf, but I would suspect that there is no reason why the Iceland I have painted couldn't equally disappoint and appeal to them without any

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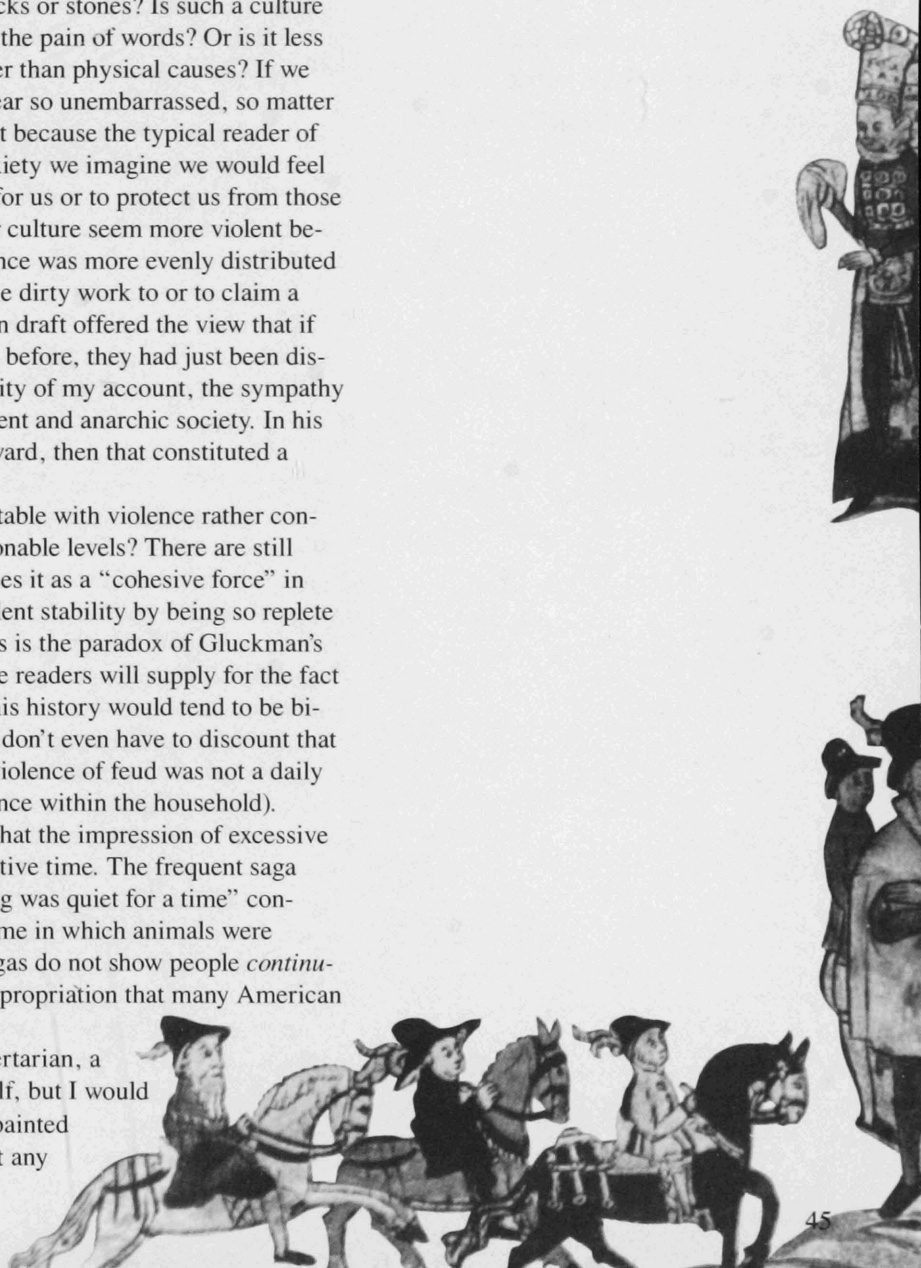

onsexist pronouns would seriously misrepresent the reality I was trying to reconstruct. The world of the sagas was enough of a man's world that I could not have adopted them.

necessary correlation between the politics of the reader and the favor or disfavor they might choose to bestow upon the culture. The saga world is mainly a world of men, but women figure larger in it than they figure in many societies before or since. Jurally and actually, they were less disabled than their continental counterparts of equivalent social ranges. Above all, the sagas did not like weak women any more than they liked weak men. Intelligence, health, beauty, and toughness were attributed in a surprisingly gender-neutral fashion in this literature. Virginity was a nonissue. The sagas did not put women on pedestals. It was women who put men there and then goaded them into maintaining their precarious stance aloft if they showed an inclination to descend. What a refreshing relief to meet the women of the sagas after a lifetime of reading of romantic heroines, or of Marys and Eves. But if Icelandic women may have had it better than did their more degraded sisters on the continent, this, for some, is still no reason to credit Icelandic society for such small favors. The world of the sagas was enough of a man's world that I could not have adopted nonsexist pronouns without seriously misrepresenting the reality I was trying to reconstruct. When I use the male pronoun it means a man, not mankind. And one might suspect that among the class of people the sagas are not especially interested in, the servants and the poor, the lot of women was somewhat worse than the lot of the men, if only because the women had more to fear from their male counterparts in the way of violence than the men did from women.

Libertarians might have reason to be suspicious of a society that draws them like a siren. Here they have a society with no coercive state seeking to redistribute wealth or entitlements. Here rights are for the most part privately created and all are privately enforced. But "private" enforcement does not mean much when there is no "public" alternative for it to be compared to. Can the "private" as an analytic category exist unless it is paired with and distinguished from "public?" The very pairing itself is a part of the history and theory of the state; it only makes sense in the context of the coercive state. There was thus no "private" enforcement of rights in Iceland. There was simply enforcement by people seeking aid from the various overlapping social solidarities they could claim connection with. And none of these solidarities, except perhaps the chieftain-thingmen association, had as its central motive the enforcement of rights. Kin groupings and household groupings were more complexly motivated. At the same time there is a suggestion that the reason there is no state is because there is not enough wealth to support it, not because, as some libertarians might suppose, of objections to certain necessarily redistributive aspects of the state (cf. e.g., Nozick 1974). It is not the have-nots, after all, who invented the state. The first steps toward state formation in Iceland were made by churchmen, who had the model of the Roman church and Rome itself available to them and by the big men intent on imitating Norwegian royal style. Early state formation, I would guess, surely tended to involve redistributions, not from rich to poor, however, but from poor to rich, from weak to strong.

People of communitarian tendencies also have reason to be attracted and repelled. The attraction is the limited role of lordship, the active participation of large numbers of free people (mostly men, but women too in a nontrivial way) in decision making within and outside the household. The economy barely knew the existence of markets. Social relations preceded economic relations. The nexus of household, kin, Thing, even enmity, more than the nexus of cash, bound people to each other. The lack of extensive economic differentiation supported a weakly differentiated class system. And if low societywide productivity meant some material deprivations, these deprivations were more evenly distributed than they would be once state institutions also had to be maintained. On the grimmer side, there were still startling disparities in access to resources. Men were net beneficiaries of women's productive and reproductive capabilities. In the Settlement Age the free could appropriate the labor and lives of slaves. And if the juridical slave disappeared sometime in the twelfth century it can hardly be said that the lot of later day laborers and vagabonds could have been much better. If we were troubled some by measuring violence across time and space, how do we measure things like quanta of misery? Was an impoverished Icelandic tenant any better off than an Angevin serf of the eleventh and twelfth century? The Icelandic tenant seemed to endure a more ecologically and less socially imposed precariousness

than the Angevin serf. But do the same presumably pathetic average caloric intakes mean something different when one is juridically free or when one is bound? The serf, we may presume, suffered greater chagrin, akin to the torment of Tantalus, seeing most of the fruits of his labors consumed by others within his sight and just beyond his reach. We still think, intuitively, that there is something more immoral about starving in a wealthy society than starving in a poor one. The serf also suffered more for the feuding style of the counts and castellans. The Icelandic feuding style, at least until the last decades of the commonwealth, and unlike its French analogue . . . tended to spare the productive units of the poor. But such small virtues have their costs too. Was the benefit of a *relatively* (I must emphasize relatively) nonexploitive society bought at the price of production levels so low that there was little to expropriate? To the extent that answers depend on hard numerical data we will never know.

Those people committed to the rule of law will have to find in medieval Iceland an interesting limiting case. The often unquestioned assumptions that law depends on the state either for its existence or for its efficacy might have to be justified more fully. In any event, theoretical musings on the origins of law and the state of nature might benefit from knowledge of this remarkable instance of social and legal form in the absence of a coercive state. Law in Iceland was pervasive, complex, purported to be regular and uniform in application over the ranges it claimed for itself. Although some of the claims sounded rather hollow, as when it purported to prohibit out-of-court settlements in serious cases unless leave to settle had previously been granted by the Logrétta (*Grágás* Ia 174, II 371), it still recognized its limits in the face of blood revenge, which it countenanced within fairly generous limits. The limits of law might well have been clearer to these people than they are to us, because they would not have been tempted to confuse the category of law with the category of the state and not because there is any necessary reason why law as law should be more limited without the state than with it. And could it be that the prospects for law's legitimacy were better in this minimal setting because law might have been perceived as less a vehicle for enforcing the interests of those whose particular interests the state primarily advanced? Did the powerful in Iceland control law in the same way that they control it in state settings? Or are the mechanisms of dominance as regards law substantially different? Whatever the limits of Icelandic law, and despite the lack of state enforcement, we have seen that people learned law, cared to have it on their side, used the legal forums, and bargained in the law's shadow. The Icelandic example reveals the force of law as a legitimating entity in a society in which legitimacy was something that was not firmly fixed or complacently assumed.

Incurable romantics might find saga Iceland to have a kind of gruff quaintness that is not without considerable charm. I must admit I fear the undermining of my critical sensibility by the attractiveness of the saga style, with its ability to imbue homely action with a sense of the heroic, with its ability to praise imperceptibly and hence subtly the honorable life well lived. Many of the men and women I admire — Skarphedin, Egil, Bergthora, Hallgerd, Hvamm-Sturla, his son Sighvat — I must remind myself probably would make worse company in life than they do in books where their dullnesses are suppressed and their excesses mediated by the considerable skills of the saga writer. A significant portion of their charm is their absence, their distance in time. The people I have named were all intelligent and witty, but Skarphedin, even when properly behaved as indeed he usually was, inspired uneasiness in his closest friends, and Egil, great poet that he was, was also something of a psychopath. While a modern might find some cause for nervous laughter in his purposefully vomiting on the face of a niggardly host, if not in his gouging out the unfortunate man's eye a few hours later, the fact is that this was the kind of a man whom anyone ending up in academia was unlikely to seek the opportunity to socialize with. My own romantic propensities are well checked by a firm belief that it would have been my luck to have lived as poor Skæring Hroaldsson did: . . . a minor cleric, for a while without hand, and finally without head.

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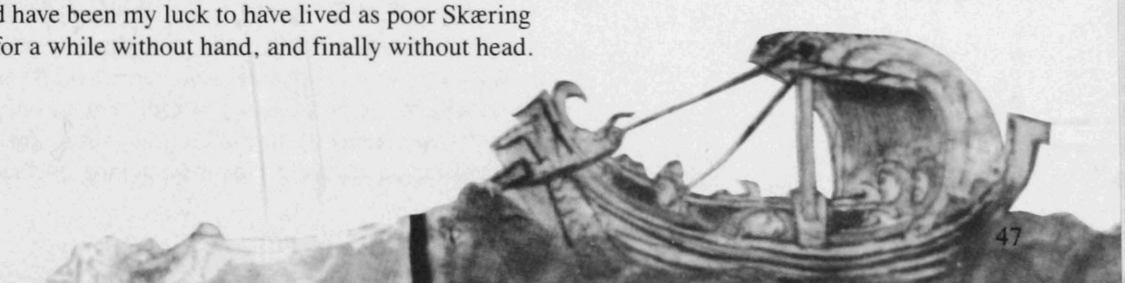

DETENTION WITHOUT TRIAL IN THE SECOND WORLD WAR: COMPARING THE BRITISH AND AMERICAN EXPERIENCES

A. W. Brian Simpson

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Both in Britain, the original home of the common law, and in the United States of America, its present day principal place of residence, individuals were detained without trial in the name of military necessity or national security.

My interest in the detention of citizens, without trial, in Britain during the war of 1939-1945 arose as a byproduct of a more general interest. The study of cases has long been central to the common law tradition. But the legal dramas we examine so minutely are too often both contextless and dehumanized. Real people assume the masks of the law, becoming plaintiffs and defendants, offerors and offerees, grantors and contingent remainderpersons, concealed from us by the forms into which their problems have been packaged for legal analysis. Two English leading cases, decided by the House of Lords on November 3, 1941, strikingly illustrate this point. Their names are *Liversidge v. Anderson* and *Greene v. Secretary of State for Home Affairs.* In both cases individuals, Robert William Liversidge, alias Jack Perlsweig, and Ben Greene respectively, attempted to challenge the legality of their detention without trial under Regulation 18B of the wartime Defense Regulations. The defendants in the cases were Sir John Anderson, Home Secretary in 1939-1940, and his successor, Herbert Morrison, who took office in October 1940.

These cases are regarded as major decisions in English and Commonwealth constitutional law. Their counterparts in the United States are the Supreme Court decisions concerning the treatment, including detention, of Japanese American citizens after the attack on Pearl Harbor on December 7, 1941, particularly the decisions in *Korematsu v. United States* and *Ex Parte Endo,* both decided on December 18, 1944. These American cases at least reveal the official reason why the individuals were detained; their English counterparts give virtually no indication as to who Liversidge and Greene were, why the authorities had locked them up, and why the government lawyers had been prepared to resist their attempts to secure liberty. There is a real sense in which the reported decisions give no indication as to what the litigation was really about.

I have attempted to recreate the historical context of these cases and to locate them in the general history of civil liberty during the Second World War. This is in part a comparative study. Both in Britain, the original home of the common law, and in the United States of America, its present day principal place of residence, individuals were detained without trial in the name of military necessity or national security. Some few turned to the courts to vindicate that most basic of all civil rights, the right to personal freedom. They had little success. In Britain, one individual, a Captain Budd, secured his liberty through habeas corpus proceedings in May 1941. Curiously enough, the score in the United States seems to have been the same, Mitsuye Endo having secured her complete liberty through legal action in 1944.

The story of detention without trial in America differs from the story in Britain socially, politically and legally. These are nevertheless comparisons and contrasts which are not without interest, and perhaps value. I shall take the British story as my point of departure, and I must explain that I have not myself engaged in any original research into the treatment of the Japanese Americans. The subject has been very fully explored by numerous writers, and I have relied principally upon Peter Irons' *Justice at War,* published in 1983. As yet, no comprehensive investigation of the British experience has been produced.

Investigation is not easy. Under the policy of freedom of information, a massive body of official American records can be consulted. In Britain, the general rule is that official records are open to public inspection in the Public Records Office after thirty years, but files can be closed for longer periods than this, even up to a century. Due to an obsession with secrecy which characterizes the British government, many papers are still unavailable. No files of the British internal intelligence service, called MI5, have ever been released. Indeed, until quite recently the very existence of this institution was always denied by government ministers. Nor have the records of the Home Defence (Security) Executive, set up under Winston Churchill in 1940 to supervise all matters of internal security, ever been generally released, though some minutes are accessible. The Home Office currently holds many files and subfiles dealing with individual detainees, including fifty or so concerned with Ben Greene, to which I have not yet obtained access. Some papers have been destroyed, for reasons at which one can only guess, while others have been "weeded," to use the jargon of this evil trade. Writing the history of the 1940s is rather like writing medieval history — one is engaged in peering through keyholes.

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Both Great Britain and the United States detained or exercised lesser forms of control over noncitizen enemy aliens; the numbers involved in both countries were roughly comparable, approaching 30,000 in Britain and from 35,000 to over 40,000 in the United States. In Britain, the power to detain such people rested on the Royal prerogative, and its exercise could not be challenged in the courts. In the early part of the war a system of classification was adopted, and only very few individuals were actually detained. On May 10, 1940, Winston Churchill assumed office while the war was going very badly indeed. Denmark, Norway, Belgium, Holland, and, almost incredibly, France fell to German military might and the sense of impotence it generated. The British army in Europe was perforce evacuated from the beaches of Dunkirk in late May and early June. Located within artillery range and separated from England by only some twenty miles of sea, enemy forces were preparing to invade. There was widespread, if erroneous, belief that German success had been assisted by a Fifth Column of collaborators, spies, and saboteurs. I can recall the general belief in the ubiquity of spies and agents, and this even in the rather remote Yorkshire village of my childhood. It was in this context that, in June 1940, the government adopted a wholesale policy of interning enemy aliens. Many of these aliens were refugees, often Jews, fleeing from Europe, and the policy met opposition, particularly after the German U-boat commander, Gunther Prien, on July 2, 1940, sank the liner *Arandora Star,* killing some 661 aliens in transit to camps in Canada. By the end of 1940 the policy had in effect been reversed, and in the course of the next year large numbers of aliens were released while a serious attempt was made to separate out the minority who could, rationally, be viewed as a threat. So far as Japanese aliens are concerned, around 100 out of the 500 or so living in Britain were detained in 1942 and, in the main, repatriated that same

year. Although there is nothing to be proud of in this "bespattered page" of British history, at least it can be said that political and official pressure quite rapidly moved against its most objectionable features. Law and the courts played no part whatever.

The legal position of British subjects was quite different, though the political context was much the same. During the 1914-1918 war, when there was violent hostility to persons of German name or nationality, and even to German dogs, legislation in the form of the Defence of the Realm Acts had delegated to the government the power to legislate by Regulation. One such, Regulation 14B, had authorized the detention of British subjects on the ground of their "hostile origin or associations," on the initiative either of the military or an Advisory Committee. Thus, while they could not be held under the Royal Prerogative, they could be held nonetheless. Very modest use had been made of this power. The average number of citizens under detention at any given time was about seventy, though many enemy aliens were detained. Regulation 14B was, at least initially, only used against people who, though technically British subjects, were in substance enemy aliens.

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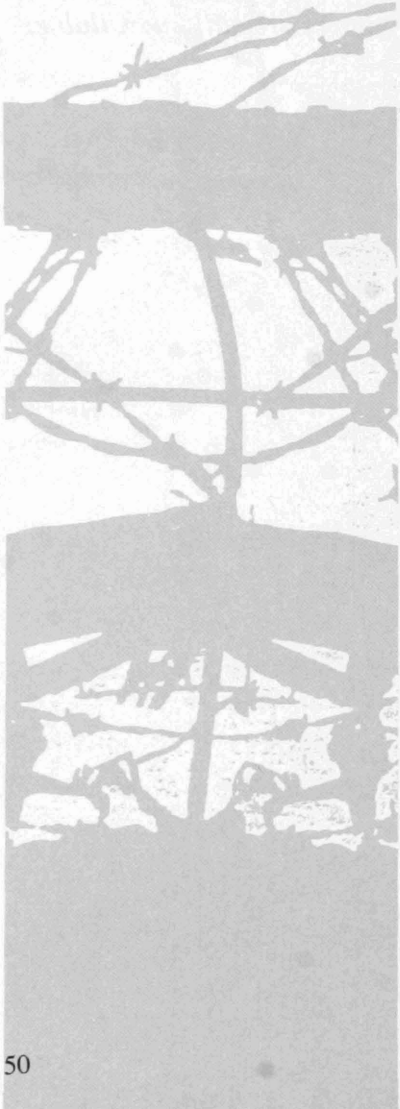
In 1937, a civil service interdepartmental committee, reporting to the Committee of Imperial Defence, considered what laws and regulations would be needed for the next war and decided that wider powers might be needed to deal with pacifists and communists. The interdepartmental committee produced a draft bill, authorizing the making of Defence Regulations by the executive through a mechanism known as an Order in Council. The bill authorized such delegated legislation for, among other things, "the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm." The draft regulation allowed the Secretary of State (in effect the Home Secretary) to make a detention or restriction order against anyone if the Secretary was "satisfied . . . that with a view to preventing him acting in any manner prejudicial to the public safety, or the defence of the realm, it is necessary to do so." Any Order in Council introducing regulations would come before Parliament and could be rejected by an affirmative vote under a procedure known as a "prayer." Otherwise the regulations would become law.

There being no power of constitutional review in Britain, the limits controlling the secret scheme for national security dreamt up by the interdepartmental committee in 1937 and accepted by the Committee of Imperial Defence on April 21, 1937, were not legal, much less constitutional in the American sense. The constraints were primarily political. The planners feared that the scheme might be defeated if Parliament was able to consider its implications, and for this reason it was thought best to keep the scheme on ice until a crisis arose. There were further limitations, difficult to separate from political considerations, which arose from vague but significant principles of political and constitutional morality. These limitations arose in particular from respect for individual freedom and for the rule of law. The force of these principles depended upon their acceptance by the governing elite — ministers, important politicians, and senior civil servants. In a country which wholly lacks the restraints of a formal constitution, such conventions assume a particular importance. In the 1937 scheme these principles found expression in a plan to establish an advisory committee to review cases of detention and make recommendations to the Home Secretary. It was to be chaired by a high court judge, or former judge, and there was to be a right of legal representation before the committee. It was envisaged that two members of Parliament would sit with the judge. So, although there was to be executive detention without any proof of wrongdoing, a spirit of legality was to be infused into the whole business through the advisory committee, a sort of watchdog protecting freedom.

As hostilities approached, the head of the internal security service, MI5, Vernon Kell, had Brigadier A. W. A. Harker produce a modest list of fifty potential detainees who would need to be locked up promptly when war came. The Home Office, with respect for the rule of law, refused his request for detention orders signed in advance "under a power which," as the Head of the Home Office civil service, Sir Alexander Maxwell, acidly minuted, "does not at present exist." Then in 1939 war came, and the Emergency Powers (Defence) Bill was rushed through a docile Parliament on August 24, 1939. The government faced little trouble, save for an attempt to restore the provision of the draft bill, deleted from the bill actually submitted to Parliament, that a High



Court Judge would serve as the Chairman of the Advisory Committee. This attempt failed. The right to legal representation had also been deleted.

The prepared code of defense regulations was passed into law in two stages. The less draconian, and thus less controversial regulations were passed into law by Order in Council on August 25, 1939. The more draconian, including Regulation 18B, passed into law on September 1 by a second Order in Council, which technically amended the earlier regulations. The House of Commons rose in revolt at the width and vagueness of the power of executive detention. The government bowed to the political storm and promised to substitute a less objectionable regulation. On November 23, by which time only twenty-six detention orders had been made, an amended Regulation 18B was promulgated and found acceptable by the House of Commons.

The revised regulation differed from the first version in two important respects. First, it listed categories of people who could be detained. Detainees had "to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts." Administrative practice treated all this as producing two basic categories — those of hostile association and/or origins on the one hand, and those who had recently been getting up to prejudicial acts on the other. Second, the Home Secretary had to have "reasonable cause to believe" both that the detainee fell into one or more categories, and that "by reason thereof" it was necessary to detain him or her. Furthermore, under the scheme, detained individuals were to have the right to make representations to the Home Secretary and to object to detention and place their case before the Advisory Committee. The committee chairman had a duty "to inform the objector of the grounds on which the order was made against him and to furnish him with such particulars as are in the opinion of the chairman sufficient to enable him to present his case." Thus, on detention the detainee had to be informed of his rights, such as they were. In addition, the Home Office had to make monthly statistical returns to Parliament, indicating how many orders had been made and people detained and released (though not giving names), and setting out the degree to which the recommendations of the Advisory Committee had been acted upon. A very well-known barrister, Norman Birkett, was made chairman of the Advisory Committee. To emphasize its independence from the Home Office the Committee operated from distinct premises, and its Secretary was not a Home Office civil servant, but a retired diplomat, G.P. Churchill, who did the job for free.

Let us now compare what happened in America. On December 7, 1941, Japan attacked Pearl Harbor. The formal steps which led to the detention of American citizens were introduced, not in the relatively placid conditions of Britain in 1939 — when, as I recall, we were cheerfully singing the popular song:

> We'll hang out the washing on the Siegfried Line;
> if the Siegfried Line's still there

— but in conditions of alarm at times bordering on panic, and worse. The states along the Pacific coastline, where the next attack was feared, contained many people of Japanese ancestry who had long been the target of feelings of racial hostility, and this hostility combined readily with invasion fears to drive reason from the field.

Introduced in this very different context the formal legal steps employed to legitimize military control, mass displacement, and eventual internment of Japanese Americans were, in comparison to their British equivalents, perfunctory. No attempt was made to set clear limits to the powers conferred. One can only speculate, but if the British Defence Regulations had been brought to Parliament in desperate conditions rather than in the placid, if tense, early days of the war, perhaps they too would have been more perfunctory. As we shall see, once conditions in Britain became alarming in May and June of 1940, a definite air of muddle likewise became apparent. Be that as it may, on February 19, 1942, President Roosevelt issued Executive Order Number 9066, which provided that military commanders might prescribe military areas from which "any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military commander may impose in his discretion." The stated

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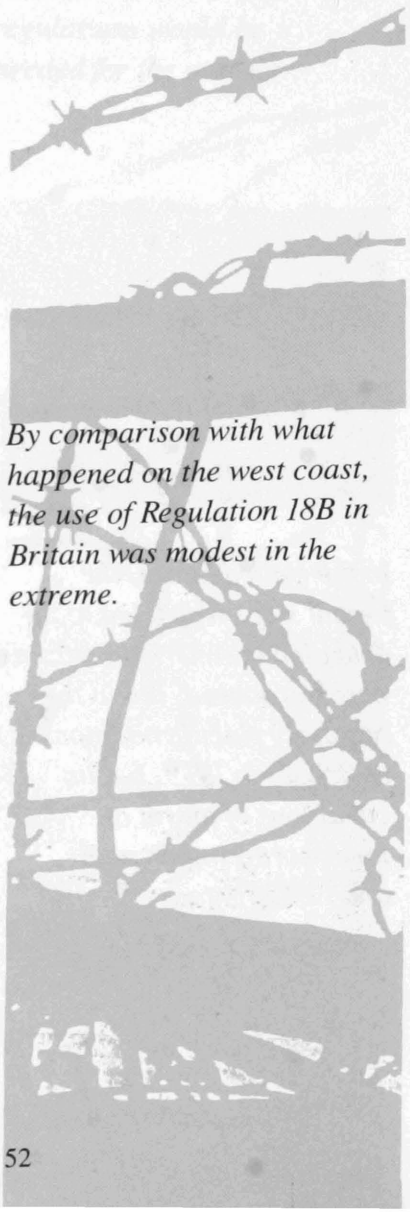
reason for the order was "the protection against espionage and against sabotage of national-defense material, national-defense premises, and national-defense utilities." On March 21, 1942, Congress gave teeth to orders made under the executive order by General DeWitt, the west coast military commander, by enacting Public Law 503. The Act made it a misdemeanor for anyone knowingly to "enter, remain in, leave, or commit any act in any military area or military zone prescribed by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander."

Between March and May of 1942, General DeWitt issued a number of proclamations making the western states into military zones. Persons of Japanese ancestry, whether aliens or citizens, were subjected to a curfew and other restrictions. They were also progressively excluded from defined zones and told to report to collecting points for evacuation. By the end of October 1942, around 112,000 Americans of Japanese ancestry, over 65,000 of them United States citizens, were detained in camps outside the supposedly threatened zones. Many Americans of Japanese ancestry were simply American citizens; others enjoyed dual nationality under then Japanese law. The justification advanced for their exclusion and detention was that the Japanese American population contained, to a greater extent than any other defined group, individuals who were potentially disloyal and who might engage in espionage and sabotage, and further that it was not possible to identify who they were, or at least not possible to do so quickly. Therefore, it was all too successfully claimed, that the only solution was to control, evacuate, and, eventually, detain them all. Plainly, this justification reflected the racial stereotype of the inscrutable oriental. In conformity with this prejudice no attempt was made after hostilities began to establish individual potential for disloyalty, much less any sort of disloyal action. The results of earlier efforts to determine individual culpability or potential for such disloyalty on the part of Japanese Americans were ignored. The detainees were to spend between two and three years in camps under very disagreeable conditions.

What now seems bizarre is the absence, both in the Executive Order and in the legislation, of any explicit reference whatsoever to the establishment of a system of detention of citizens — without trial, without set term, and without any kind of safeguards. It seems to me quite inconceivable that anyone voting to enact Public Law 503 in 1942 could have supposed from its text that they were approving a system of mass detention. Nor was this indicated as the policy at the time.

By comparison with what happened on the west coast, the use of Regulation 18B in Britain was modest in the extreme. By the end of April 1940 only 136 orders had been made, and only fifty-eight persons remained in detention. In the whole course of the war only 1,847 detention orders were made, along with an uncertain number of restriction orders imposing limits on residence, requirements to report changes of address, and other requirements, such as curfew. A longer list of detainees, the "invasion list," existed, but was never implemented. Early use of detention was largely confined to persons thought to be involved in espionage.



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The administrative arrangements in the early years of the war were characterized by a sort of bureaucratic elegance. The initiative for detention normally came from MI5, though it could originate with the police, who made a recommendation to the Home Office. This converted the human being involved into the essential subject matter of bureaucratic action — a file. The civil servants in the relevant department of the Home Office then passed the file up the bureaucracy with recommendations noted on the docket. If they favored an order, it would end up on the Home Secretary's desk, passing first over the desk of the Permanent Under Secretary, Sir Alexander Maxwell. A draft order would be attached for signature. Sir John Anderson would then sign an order, after having looked at the file and no doubt discussing any points which arose with his officials. The order would be sent in triplicate to the local Chief Constable of Police, and the individual would be arrested by a police officer. Elaborate arrangements were set up to ensure that the detainee knew of his or her rights, and the individual received one copy of the order. A second copy would be given to the Prison Governor to justify his receipt of the detainee, and the third copy returned to the Home Office endorsed with a note of the arrest and information as to the results of a personal search. The

case would then, if the detainee wished, go to the Advisory Committee. So far as I can judge, the Committee made the first extensive inquiry into the strength of the case made by MI5, since MI5 recommendations were normally accepted by the officials in the Home Office unless they were on their face peculiar. The policy was to detain first and review later.

At this point, a document called the "Reasons for Order," setting out the "grounds" for the order and the "particulars," was prepared. This was done by lawyers, recruited to work in MI5 during the war, rather than by regular MI5 officers. This "Reasons for Order" was given to the detainee. The "grounds" were legalistic and consisted of a recital of the relevant terms of Regulation 18B, indicating that the detention was based on "hostile associations" or "acts prejudicial" or whatever. The "particulars" consisted of a laconic statement amplifying the grounds, but never giving any indication of the evidentiary basis relied upon by MI5.

MI5 also prepared, for the use of the Committee, a much fuller document which the detainee did not see, called the "Statement of the Case." The "particulars" were an expurgated version of this longer document, normally produced by MI5's lawyers, but occasionally written by the Chairman himself or the Secretary. Using the "Statement of the Case," the Committee, usually in the person of Norman Birkett, conducted an inquisitorial examination of the detainee. The detainees had the right to make whatever points they wished, so long as they could get a word in edgewise, for Birkett, like many English barristers and some law professors, was a powerful talker. The proceedings have been described as combining elements of a court martial with an ecclesiastical tea party. The detainee was never allowed to confront or question witnesses, and apparently only very rarely were any witnesses seen even in the absence of the detainee. Virtually never did the Committee, so far as I can tell, see MI5 agents, upon whose investigations many cases depended, or even the agents' case officers. A transcript was made, and the Committee then made its recommendation, principally on its feeling for the case after the examination, in a written report. It also might make suggestions, carefully distinguished from its formal advice, since the rate of compliance with suggestions was not required to be reported to Parliament.

Birkett explained in a memorandum at the time that all doubts were resolved "in favour of the country and against the individual." He also explained that "the absence of legal assistance placed the appellant in no real disability, for they [the Committee members] regarded it as a duty to assist the appellant to formulate and express the answers he desired to make." No doubt this explained the happy relationship between the Committee and the Home Office. While Sir John Anderson was the Minister, that is until early October of 1940, all recommendations from the Committee, whether for release, release subject to restrictions, or continued detention, were accepted. In effect, Anderson was delegating the decisions to the Committee, which indeed did recommend release in a considerable number of cases. Given the fairly short interval between detention and appearance before the Advisory Committee, a matter of weeks only, the system did not operate too badly, and its operation was, at this period, scrupulously correct within the legal framework provided by the Defence Regulations. The principal difficulty faced by detainees was that under this procedure the case against them was never really revealed. The Committee did not in any real sense investigate the case for or against the detainees, nor could it direct any investigation by MI5, which it did not control. All it did was interrogate the detainees and listen to their answers, and on this basis, and on the "Statement of the Case," express opinions.

In early summer of 1940 the "phoney war" ended and the real war began, producing conditions in Britain which appeared as, or more, desperate than conditions were to appear in America after the shock of Pearl Harbor. Winston Churchill took office on May 10, and on May 15 the policy of mass internment of aliens was authorized by the Cabinet; Churchill favored this at the time but later came round to a more liberal view. The scale of detention under Regulation 18B also rose sharply in June and July of 1940 under these policies, again initially supported by Churchill. At the end of May there were 131 detainees, at the end of July, 1378. The number remained above a thousand until the end of 1940, and then fell steadily as detainees were released. In late 1940 and 1941 considerable conflict arose between MI5 and the Advisory Committee, which MI5

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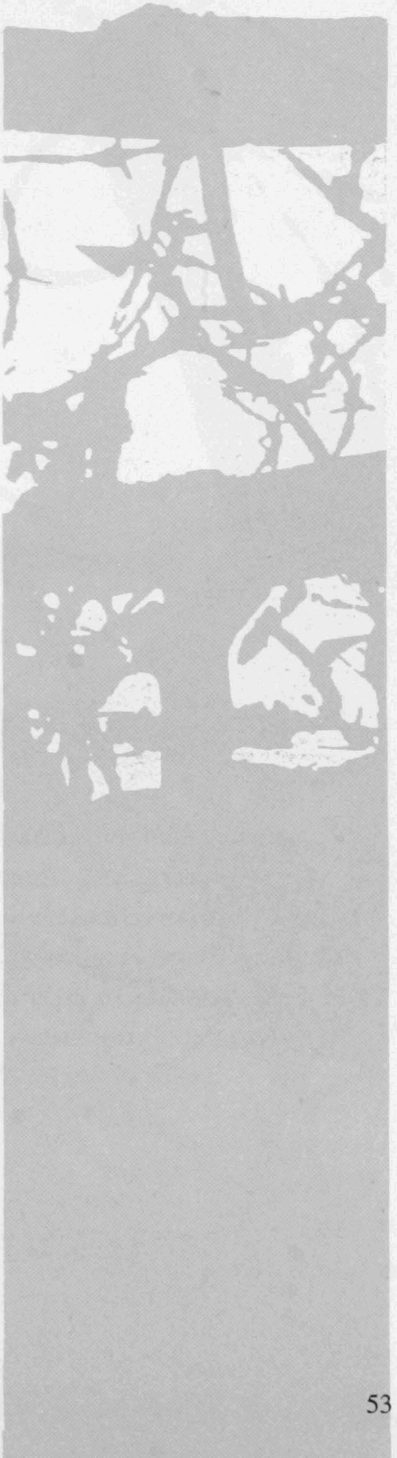

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thought was far too liberal, but the Cabinet backed the Committee and release continued. By the end of 1942, there were 486 detainees, by the end of 1943, 266, by the end of 1944, 65, and at the end of the War in Europe, 11, of whom 10 were at once released and 1, in fact an alien, deported. These are dramatically below the American figures, and on average they involved shorter periods of detention. Most detainees were kept in camps, but a small number of prominent detainees and individuals regarded as difficult to control were housed in prisons, notably Brixton Prison in London. Officially, those interned under Regulation 18B were held in reasonable conditions, but in reality their situation was one of some considerable squalor. The detained aliens were also kept in bad and sometimes appalling conditions.

The paucity of available records makes it extraordinarily difficult to discover just which of its citizens the British government saw fit to detain without benefit of trial. Nor is it possible to make a detailed breakdown into categories. No nominal roll exists, and an internal history written by a Home Office civil servant after the war, originally intended to form part of a general departmental history, has, so I am assured, been destroyed. However, the largest single group of detainees consisted of former members of the British Union of Fascists, the leading fascist party, led by Sir Oswald Mosley. In 1939, it had around 10,000 members, many of whom were not very active. On May 22, 1940, the Cabinet decided to intern twenty-five to thirty leading lights of the party, including Sir Oswald and his wife. The probable reason for this, it has been suggested, was not the belief that Mosley and his followers were disloyal — they were indeed in the main ostentatiously patriotic. Nor was the reason their anti-Semitism. It was the belief, given the risk of invasion and the grim state of the war, that Mosley, in collaboration with a group of other fellow travellers of the right, hoped to arrange a negotiated peace with Hitler, one that would put Mosley in office as Prime Minister.

What is, however, a little implausible about this explanation is that, had the war gone even worse, the people who would have likely negotiated a peace would surely not have been Oswald Mosley and his curious and politically insignificant bedfellows, such as Admiral Domvile and the Marquess of Tavistock, but Conservative Party ministers, particularly Lord Halifax and Mr. R.A.B. Butler at the Foreign Office. Even after Winston Churchill came to power, the Foreign Office continued to explore possibilities of a peace settlement. I incline to the view that since virtually nothing could be done to harm Hitler until the United States could be brought into the war, Churchill's enthusiasm for internment in 1940 was driven by his desire to appear to be taking ruthless and vigorous action.

For whatever reason, the government decided to cripple the party more effectively by detaining a further 350 or so local officials of the British Union of Fascists. Somewhere around 750 individuals connected with the party, with other right-wing groups, or with resistance to the war were eventually detained (all numbers are of necessity only approximate).

The detention of members of the British Union could not lawfully be carried out under the existing Regulation 18B, since the Fascists were neither guilty of acts prejudicial nor were they of hostile origin or associations. The Regulation, therefore, was amended on May 22 to permit the detention of members, or past members, or supporters of certain organizations upon the ground of membership or support alone. Such organizations had to be, in the view of the Home Secretary, subject to foreign influence or control, or have leaders who had, or had had, associations with leaders of enemy governments, or who had sympathized with the system of government of enemy powers. But the British Union was, in May of 1940, perfectly legal, though in July the party was banned.

The second largest identifiable group of detainees, numbering between 550 and 600, comprised persons of British citizenship but Italian descent, many being members of the Italian Fascist Party. Some may have only recently obtained British citizenship. They were detained after Italy entered the war on June 10, 1940, under an order signed earlier with the date left blank. Many of these individuals had joined the party through pressure exerted on relatives in Italy. Consequently membership in the party did not necessarily entail any actual commitment to fascism. As these persons could be lawfully detained as being of Italian origin or associations within the terms of the 1939 Regulation 18B, no new regulation was needed.

More than forty years later, around 550 other detainees remain largely unknown. The forces which led to the selective abridgement of the forms of ordered liberty were not entirely impartial or lacking in apparent caprice. Although at least one Communist, John Mason, is known to have been interned, members of the Communist Party were not detained simply because of membership. This lack of suppression warrants some suspicion since, until Germany attacked Russia, the Communist Party actively opposed the war and would have been a likely subject of government attention.

The other detainees included some members of the Irish Republican Army, some persons suspected of espionage or sabotage, a miscellaneous group of admirers of Hitler, including some holding weird racialist and conspiratorial views, as well as people who simply seemed to the police better locked up. One is reminded of the *Casablanca* Police Chief's "usual suspects."

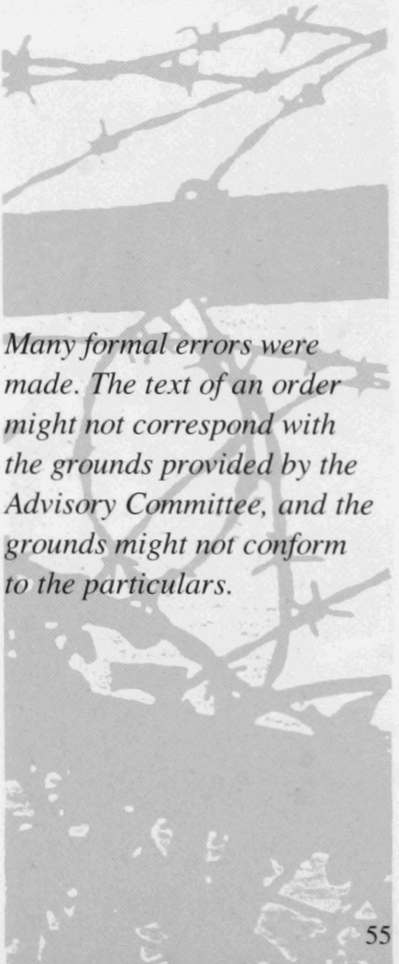
One such usual suspect was Harry Sabini, a small-time crook engaged in protection rackets with other members of the "Sabini gang" on greyhound racing tracks. Sabini has escaped the anonymity which cloaks most detainees because he sued. Further, while much weeded, his Home Office file has been released, perhaps because MI5 had nothing to do with the case. Though his name was Italian, neither he nor any of his five brothers spoke Italian or had ever visited Italy. He was detained at the instigation of the London police as being of hostile, that is Italian, associations, which was quite untrue, and the "particulars" provided to him in the "reasons for order" said that "Harry Sabini (1) is of Italian origin and associations, (2) is a violent and dangerous criminal of the gangster type liable to lead internal insurrections against the country." On this ludicrous basis, Harry, who the police conceded had no interest in politics at all, was detained for some nine months. There were probably numerous other cases involving error or malpractice of one kind or another, though it is impossible to be sure.

The increased use of detention in the summer of 1940 created many problems. The officials involved could no longer scrutinize each case, and the requirement that the Home Secretary should personally "have reasonable cause to believe" that the detainee fell into a detainable category became inoperable. In June of 1940, Sir John made 826 orders, and if he spent ten minutes on each file, 137 hours of work would have been involved. A Home Secretary at this period could not possibly have spent nearly so much time on one minor segment of administration. Indeed, merely signing the orders became a problem, and Miss Jenifer M. Fischer Williams (now married to Professor H.L.A. Hart) and Mr. R.H. Rumbelow, officials in the Home Office, devised a new monster, the omnibus order, which required only one signature, but which could have schedules of names attached to it. The Italians were detained on such an order with three schedules, the first containing 275 names. Later, during litigation, attempts were made to discover whether Sir John ever actually saw these schedules, but nobody could remember very clearly; it had been a very busy time.

Many formal errors were made. The text of an order might not correspond with the grounds provided by the Advisory Committee, and the grounds might not conform to the particulars. There were errors as to dates and failures to inform the detainees of their rights. Structurally, the gravest defect in the administration of Regulation 18B was that the Advisory Committee relied on MI5 to provide the grounds of the order and the particulars, but MI5 in fact never knew why Sir John had signed the Order; the Home Office never informed MI5 or the Advisory Committee as to what had motivated the Home Secretary, so MI5's lawyers just had to guess. Next in gravity was the meager statement of the case revealed to the detainee which was the subject of criticism and hence embarrassment. Furthermore, the delay between detention and appearance before the Advisory Committee grew longer as everyone was overwhelmed with work.

The whole scheme established by Parliament as a compromise between national security and civil liberty ceased to operate at all smoothly while the balance shifted even more markedly toward security.

Although detention of potential spies and saboteurs was generally acceptable, when detention became more widespread, with the internment of individuals who claimed with plausibility to be entirely patriotic even though they held strange or even offensive political beliefs, the practice of detention lost much of its semblance of legitimacy. More particularly, the availability of the catalogue of new offenses created by the Defence Regulations cast doubt on the need for detention without trial since troublesome



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people could perfectly well be prosecuted in the regular courts. These new offenses went very far — it became a crime, for example, to spread alarm and despondency. The authorities had no shortage of weapons for suppressing the disloyal and the discontented.

One criticism of the use of 18B which could not have been made at the time, but which can be made now, is more sinister. The breaking of the German codes employed through the Enigma encoding machines, in combination with other intelligence sources, meant that the Prime Minister knew that the threat of invasion was gone by the end of 1940 and that he would know of any serious revival of this threat. Consequently, the justification for many of the internments of May and June 1940 no longer existed in 1941.

In the United States the situation was far worse than anything in Britain, both in the scale and duration of detention, and in the absence of any immediate threat of invasion or attack to the mainland, which might have justified draconian measures. It is astonishing to find that only seven individuals out of some 120,000 appear to have commenced legal proceedings of one kind or another to challenge the legality of their treatment. I say this because litigation, today at least, plays so much larger a role in America than in Britain. Perhaps matters were different in the 1940s. From the suits of these seven litigants four cases eventually reached the Supreme Court, two being decided on June 21, 1943 (the *Hirabayashi* and *Yasui* cases) and two more on December 18, 1944 (the *Korematsu* and *Endo* cases). Only Mitsuye Endo succeeded, and that only in a somewhat technical sense as she was already at liberty. The dates of these cases are worth noticing. The *Hirabayashi* case challenged the legality of a punishment imposed for a breach of curfew and for failure to report to a center (called a Civil Control Station, a euphemism for a lock-up), in May 1942. Presence at the center was a first step towards evacuation and detention. The *Yasui* case arose out of punishment for breach of curfew, the breach having occurred somewhat earlier, in late March. Neither case addressed the legality of detention, nor the interference with personal liberty involved in the first step towards detention, turning up at what might be called the collecting point. So, over a year after this massive policy of detention had been implemented, the legal system had not gotten around to finally deciding whether it was lawful or not.

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The *Endo* case, though successful, decided nothing of general importance; the majority opinion turned on the fact that the litigant was conceded to be a wholly loyal and law abiding citizen. In *Korematsu,* the majority opinion explicitly did not pass on the legality of restraint of liberty whether in an "assembly center" (that is a collecting point) or in a camp (euphemistically called a relocation center). That is to say, it did not decide whether the massive detentions were lawful or not. The Court's decision was not delivered until well over two years after Korematsu's confinement began at the Tanforan Assembly Center, while he was still on probation and prohibited from returning to his home after over twenty months of internment. Seemingly oblivious to the preceding two years of actual relocation and expressing the spirit of Dickens's parody of interminable litigation in *Bleak House, Jarndyce v. Jarndyce,* the Court in *Korematsu* said, "It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us."

So the war came to an end without the Supreme Court having determined the real issue. Of course there are technical reasons which can be used to explain this, and the doctrine of judicial restraint urges courts not to decide tricky issues until they have to do so. But it seems to me important, especially for lawyers, not to be overly impressed with legal technicalities and dogma that produce a situation in which over 60,000 citizens are held in detention for up to three years, and indeed released at the end of it, before the legal system has gotten around to saying whether their detention violated the Constitution or not.

In Britain there were more attempts by detainees to secure relief by action in the regular courts than there were in the United States. In addition to the two leading cases which alone reached the highest court, the House of Lords, at least thirteen other actions were commenced before these two cases were decided. These cases were prin-

cipally habeas corpus proceedings but also included actions for false imprisonment and one for an order of mandamus; there may have been six more actions commenced but never pursued. Later in the war other suits were brought. However, these suits were not so much aimed at securing liberty as to obtaining compensation for the prison conditions in which detainees were held. This very un-British rash of litigation, nonetheless, delivered only one release, and the British legal system, like the American, delivered virtually nothing to the detainees.

In Britain no question of the constitutionality of the Defence Regulations could arise since no power of constitutional review exists. It was not possible to argue that the regulations dealing with detention were outside the powers conferred by the parent Act of Parliament, since they plainly were not. However, the courts could pass on the legality of the detention of particular individuals; detention would only be lawful if authorized correctly in accordance with the scheme of the regulations. Before the two leading cases involving Liversidge and Greene, there were three important decisions on the legality of the detentions. The first involved Harry Sabini, alias Harry Handley, alias Henry Handley, alias Henry S. and Harry Roy, the "small time crook."

The second case was that of Captain Charles Henry Bentinck Budd, a distinguished and severely wounded army officer in the first war who was, at the time of his detention on June 15, 1940, once more serving his country as an adjutant in the Royal Engineers. In the 1930s, Budd had been an official in Mosley's fascist party, but he had left the party in 1939. Budd had been included in a long schedule of names on an omnibus order based on membership, or recent membership, of the British Union. When arrested he had been served with a supposed copy of this single order, but this did not correspond with the original, as it named an entirely different ground for detention. So his counsel argued and the court agreed, that Budd had been arrested and detained under an order which had never in fact been made, though there did, of course, exist another order under which he could have been arrested. This way of looking at the matter treated the ostensible basis of arrest as critical to the legality of arrest and was wholly formalistic. The court's order to release Budd indicated that the courts would insist upon precise formal conformity, so that what were essentially clerical or administrative errors could lead to release. Of course this did not prevent detainees from being re-arrested under new orders, as were Budd and eleven other individuals in whose cases the same mistake had been made.

The third case involved one Aubrey Lees, detained on June 20, 1940 under an order based on his membership in the British Union of Fascists. Lees was a colonial civil servant who had served in Palestine under the Mandate. He was violently anti-Semitic, extremely right wing, and altogether a pretty nasty piece of work. But he was not, and never had been, a member of the British Union. He sought habeas corpus and swore an affidavit to this effect. The government lawyers did not challenge this. But they replied by putting in affidavits from Sir John Anderson saying that he, on the basis of reports carefully considered by him personally, had clear grounds for believing, and did in fact believe, that Lees was a member, and that he believed that on this ground it was necessary to detain Lees. Regulation 18B required that the Home Secretary should have "reasonable cause to believe" that the detainee fell into a detainable category, and that by reason thereof it was necessary to detain him. So the government lawyers were contending, in effect, that the legality of Lees's detention turned not on whether he was in reality a party member, but on whether the Home Secretary, when he signed the order, genuinely and reasonably thought he was.

The court was not a little unsettled by this. Latent common sense must have prompted the feeling that, if Lees was telling the truth, his detention was unjustified, though the position of the government lawyers would seem to have conformed to a sort of Alice in Wonderland logic. This common sense theory assumed that the court had the power to examine the legality of detention and in doing so to examine the basis for the Home Secretary's belief. But this power, if exercised, would have involved the court in a general investigation of the MI5 reports, in effect establishing the courts, and not the Home Secretary, advised by his committee, as the arbiters of detention. From this unrestricted power of judicial review the court uneasily backed off; the investigation was fictionalized by being confined merely to reading the Home Secretary's affidavit.

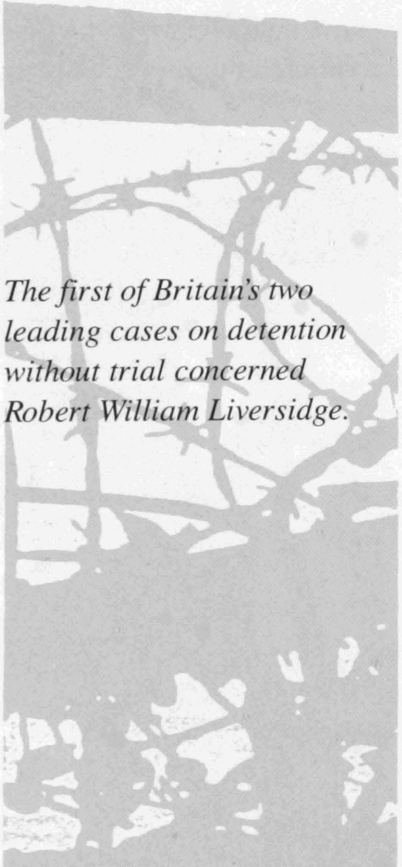
In Britain no question of the constitutionality of the Defence Regulations could arise since no power of constitutional review exists.

Sir John Anderson, so the court reasoned, said he believed Lees was a party member, and said he had reasonable grounds for this belief. That was enough to satisy the court, at least on this particular occasion, for it ruled that no general rule could be laid down as to how the basis of the Minister's belief would be investigated in other cases. The practical effect of the *Lees* decision was that so long as the formalities were observed, the Home Office could win almost any case by producing formal affidavits from the Home Secretary, affidavits involving an economical use of the truth, for it is not likely that more than a moment, if that, would in reality have been devoted to Lees's case by Sir John.

The language employed in *Lees* — to the effect that the basis of detention could be investigated — left open a slim chance that the courts would order the release of detainees who could, without securing access to confidential material in the Home Office and MI5 files, affirmatively show that there was no reasonable basis for their detention. One such situation would be a case of mistaken identity; another would be a case of detention for specific "acts prejudicial" where the detainee could show, without delving into Home Office files, a cast-iron alibi. *Lees* was not such a case, for by 1940 the membership records of the British Union, if indeed any existed, would have been hidden or in the custody of the intelligence service. Although the failure of the government lawyers to claim that Lees was a member of the party suggested that Lees was telling the truth, it could not be said that he had certainly demonstrated this by affirmative evidence.

The first of the two leading cases on detention without trial addressed just such a situation. Although Robert William Liversidge, alias Jack Perlsweig, appears in the law report as little more than a name, he was a real person. He was born in London on June 11, 1904, the son of Asher and Sara Perlsweig, who had emigrated from Russia to England sometime between 1895 and then, no doubt in reaction to the violent anti-Semitism which developed in Russia at this period. Starting in somewhat humble circumstances, he rose in life to become, by the 1930s, a wealthy businessman. Other members of his family too had prospered; one of his brothers, Maurice Perlsweig, became a very distinguished rabbi prominent in the Zionist movement, working during the war in New York to help Jews who were victims of European fascism.

Liversidge got into some trouble in his youth, at one point fled from England to escape arrest on a fraud charge, and ended up running a recording studio in Hollywood. While the charge was dropped, and he had never been convicted of any offense, the London police had a file on him and viewed him with a jaundiced eye. Early in the 1930s he began to use the name Liversidge, which was the married name of his sister. He formally changed his name in 1938. In 1939 he volunteered to join the Royal Air Force, undoubtedly for purely patriotic reasons; being a Jew he had every reason to detest Hitlerism. Nervous lest his foreign parentage might tell against him, and perhaps because he feared anti-Semitism in the recruiting system, he falsified date, place of birth, and parentage, claiming to have been born a Liversidge in Canada on May 28, 1901.



The first of Britain's two leading cases on detention without trial concerned Robert William Liversidge.

He became an intelligence officer and, so his Commanding Officer, the Earl of Selkirk, assures me, a very good one. He worked from February 27, 1940 at the headquarters of Fighter Command. Among other duties he was involved in maintaining records of aircraft strengths and in attempts to forecast enemy raids. However, the false statements regarding his background came to light, and he was arrested by the Air Force on April 26, 1940. Further enquiries revealed material in the police file. He could have been charged with the offense involved in his enlistment but, given the patriotic motive, this would not have led to any serious penalty. It is clear from papers which have been released that MI5 was not at all keen to take the initiative in having him detained. One can only guess why, but Liversidge's associates and business interests suggest that he may have been, to put it no higher, of interest to the intelligence community. He had been involved in industrial diamonds, the brokerage of oil royalties, and an attempt to secure the patent rights in the first practical helicopter, the German Focke-Achgelis FW-6I, which first flew in 1936. These were areas of considerable official interest at the time, in particular, oil. His codirectors in one company included Colonel Cudbert J.M. Thornhill (1883-1952), a former intelligence officer in

Russia who had worked in the Political Intelligence Department of the Foreign Office in 1940-1946, and Colonel Norman Thwaites (1872-1956), Britain's chief of intelligence in New York in the 1914-1918 war. Liversidge also knew Sir William Stephenson, head of British intelligence in the United States during the Second World War. Liversidge's brother had contacts with MI6. The intelligence community may have preferred to have Liversidge at large, and his connections may have meant that there existed an MI5 file on him before 1940. In the event, the Air Force authorities persuaded Sir John Anderson to order Liversidge's detention, which he did by an order of May 28, 1940, based upon his "hostile associations."

This ground was tenuous indeed. As a businessman Liversidge had European contacts and knew some persons of German nationality, but the Home Office knew that this was not the real reason the Air Force wanted Liversidge detained. The real reason was that in his work with Fighter Command he had had access to Fighter Command secrets, "very secret information" it was called, and that he was thought to be an untrustworthy person because of his false statements and police file. The Air Force wanted him isolated to obviate any risk that this information might be passed on. Even this reason was rather flimsy, since there was little or no reason to doubt his patriotism. Therefore, the order for his detention was an abuse of power, perhaps understandable in May of 1940, but an abuse nevertheless. The Advisory Committee realized this when they reviewed his case, but the Committee, adopting its settled policy, was not prepared to resolve their doubts in favor of Liversidge and against the Air Force. This decision was, of course, taken in October, 1940 at the height of the Battle of Britain. It was not a moment at which patriotic individuals were anxious to do anything whatsoever to weaken the air defenses of Britain. So Liversidge, an entirely loyal and patriotic person, remained in detention, and the Royal Air Force lost the services of an excellent intelligence officer.

The order for Liversidge's detention was an abuse of power, perhaps understandable in May of 1940, but an abuse nevertheless.

The subject of the second leading case on detention without trial of British citizens, Ben Greene, had a very different background. A member of the same family as were the novelist Graham Greene and the Director General of the BBC, Sir Hugh Carleton Greene, he was a Quaker pacifist who had been much engaged in philanthropic work in Europe. He had also been involved in Labour Party politics, having once been the private secretary to Ramsay MacDonald, the party leader. He was a prominent local citizen in Berkhamstead, where he was a lay Justice of the Peace and ran a business concern. He regarded the Treaty of Versailles after the 1914-1918 war as a disaster, and to that extent sympathized with Germany. There is no reason, however, to think that he was either anti-Semitic or fascist, indeed he had been active in refugee relief efforts. Greene regarded the war of 1939 as yet another disaster and, after leaving the Labour Party, campaigned against the war. He was a founding member and Treasurer of the British People's Party, but resigned in October 1939. This Party was chaired by the Marquess of Tavistock, later the twelfth Duke of Bedford, an ardent admirer of Hitler. Early in the war Greene had obscure connections with various individuals — some pacifists, some cryptofascists — who believed in a negotiated peace with Hitler.

Ben Greene was detained on May 28, 1940 on the basis of an order signed on May 18, 1940 which cited his "hostile association." On July 15, in Brixton Prison, he was supplied with the "grounds" and "particulars" in the "Reasons for Order." These said the order was based on "acts prejudicial," a very grave accusation. The particulars alleged action which indeed amounted to treason, including communication with the enemy. At this time treason was a capital offense for which one could still, in theory, be hanged, drawn, and quartered.

The case against Greene was based upon reports by two undercover MI5 agents, run by Charles Maxwell-Knight, a somewhat sinister and eccentric model (though not the only one) for "M" in the James Bond stories. He was noted for his strange pet animals, including Bessie the Bear, and after the war he became known as a popular naturalist.

Greene brought habeas corpus proceedings, while Liversidge instituted an action for false imprisonment. Liversidge's action was, for technical reasons, the more important legally. Liversidge's lawyer, Oswald Hickson, attempted to obtain an order for discovery of the grounds upon which the Home Secretary thought him to be of hostile associations and a person who needed to be detained. In an action for false imprison-

ment the onus of proof is on the defendant. The attorneys sought to prise out of the Home Office a fuller statement of the reasons for detention than that given in the "Reasons for Order." This statement could then be attacked in the eventual trial of the action, thus providing a basis upon which to challenge Liversidge's detention. However, the House of Lords, by a majority, ruled that no such order should be made, since it would bring before the court material which it was not the business of the court to consider.

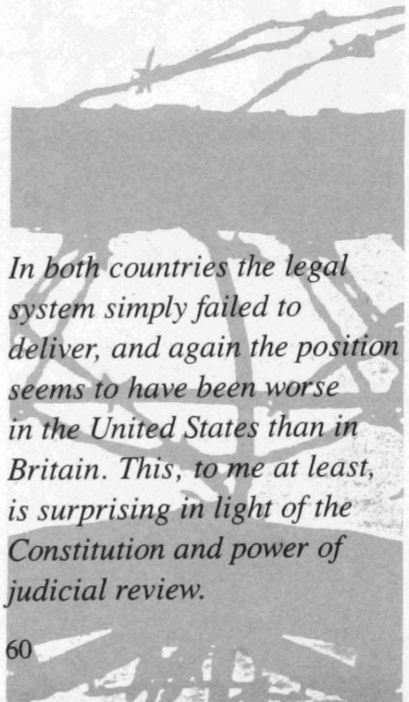
The scheme of the Defence Regulations had given the job of deciding whether individuals fell into a detainable category to the executive, in the person of the Home Secretary, and not to the courts. Thus in the absence of formal irregularity or bad faith (which in practice could never be proved), the decision of the executive could not be reviewed by the courts. So the case was treated as having been decided by ascertaining that the executive rather than the judiciary had jurisdiction. This refusal to review largely disposed of the *Greene* case as well, the production of the Home Secretary's order being a sufficient answer to the action. So far as the *Liversidge* case is concerned, the legal basis for the detention was very shaky indeed, and I find it difficult to acquit the government of something near sharp practice.

As it happened, after argument in the House of Lords, but before the opinions were delivered, Ben Greene's brother managed to lure one of the two MI5 agents, Harald Kurtz into Greene's lawyers' office. In front of Oswald Hickson, Kurtz withdrew his allegations against Greene, but it was too late to be used to put a different complexion on the case. The names of the two agents, but not their whereabouts, had been provided to Hickson on the advice of the Attorney General of the day, since he feared losing the action if their identities were not released. I do not know why he took this view, but suspect that the very gravity of the wrongdoing alleged against Greene was such that it seemed quite improper to refuse him any chance to challenge the evidence on which the charges were based, and that in this small regard, a respect for civil liberties prevailed in the face of the claims of security.

Greene was released on January 9, 1942, and the Home Office, under political pressure, publicly withdrew the allegations of treason. Greene brought a further action for false imprisonment and libel, alleging bad faith against the Home Secretary, Sir John Anderson. This collapsed, partly because the sinister Kurtz, called as a witness, now testified that he had only withdrawn his allegations in Hickson's office under standing instructions from Maxwell-Knight to deny any involvement with MI5. Liversidge had been released a littler earlier, on December 31, 1941. The government fought the cases, not because it was really necessary to keep Greene or Liversidge in detention, but in the hope of securing a favorable decision which could be used to resist other challenges. To the officials, the value of the decisions lay principally in their protection of executive secrecy. A contemporary memorandum by one of the government lawyers puts it neatly. "[T]he value of a judgement in our favor in the House of Lords would be that we could avoid in the future this probing into reasons in cases in which it is embarrassing to give them."

What general conclusions can be drawn from the experience of executive detention of citizens in the two countries? The first point I should emphasize is the difference in the scale and duration of detention. It was much greater in America, despite much weaker justification in terms of military necessity. Here I am afraid that the explanation lies in that evil force, racial antagonism towards a large, identifiable ethnic group, "a discrete and insular minority." In saying this I do not wish to appear chauvinistic. I am afraid that racism both today, and at earlier periods, has been influential in Britain too, but it was not a force on this particular occasion in the use of Regulation 18B. I must add, however, that regarding the treatment of alien refugees detained under the prerogative, a case can be made for saying that anti-Semitism played some part in influencing policy and treatment, but that is another story.

My second point is the complete failure of the regular courts to provide any substantial protection against misconduct by the executive, even granted the need for some measure of detention. In both countries the legal system simply failed to deliver, and again the position seems to have been worse in the United States than in Britain. This, to me at least, is surprising in light of the Constitution and power of judicial review.



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The British courts must get some modest number of Brownie points for at least emphasizing the need for procedural regularity. In both countries there was impassioned dissent — in Britain in *Liversidge* by Lord Atkin, in America in *Korematsu* by Justices Roberts, Murphy and Jackson. Here I feel that America comes out rather better in this regard. I do not think that Lord Atkin's dissent in *Liversidge* was principally motivated by enthusiasm for civil liberty; he was concerned rather over the relative status of the judiciary and the mandarins of the civil service. This can not be said of the dissenters in *Korematsu*. Furthermore, the legal community in America, both in criticizing the decision and in seeking over the years since then to offer some redress for the wrongs then done, has surely something of which to be proud. The idea that any sort of compensation should be offered to the 18B detainees has never even been mooted in Britain. No doubt the belief, which is not correct, that they were all fascists who had it coming to them, is part of the explanation for this.

The third point is the fragility of law and constitutional rights in the face of strong political pressure, and the importance, which one can easily underestimate, of having deeply rooted conventions of political morality and acceptable behavior, held by those involved in the process of government. Indeed, the sordid story of wartime detention illustrates that the autonomy of law as an independent force, capable of controlling the exercise of coercive power, is merely an ideal state of affairs, and that in the real world ideals are never fully realized — particularly in times of stress. Insofar as Americans from Germany and Italy were not harrassed during the Second World War, this was the result not so much of law or the legal system, but of other more subtle, often political, restraints; insofar as members of one group, the Americans of Japanese descent, were oppressed, it was because the evil force of racism overcame these cultural restraints. In Britain, the very modest use of the powers conferred by the Defence Regulations and the progressive release of detainees after the panic year of 1940 can only partly be explained by tighter legal arrangements. Along with the absence of a racial dimension in Britain, a more widespread commitment to civil liberty among those involved in government had more to do with Britain's relative adherence to liberal ideals than the formal legal niceties. But, I do not believe that such a commitment flourishes in an atmosphere of governmental secrecy in which, even in peacetime, there is extensive covert activity by government agents and acceptance of the overweening claims of national security. Thus I am not confident that in either Britain or America all is as it ought to be, or even as well as it was then. I hope I am wrong. But of one thing we can be quite sure, the successor to regulation 18B is, as I speak, alive and well, and living in the Home Office, just off Hyde Park in London, ready for use if there is a next time.

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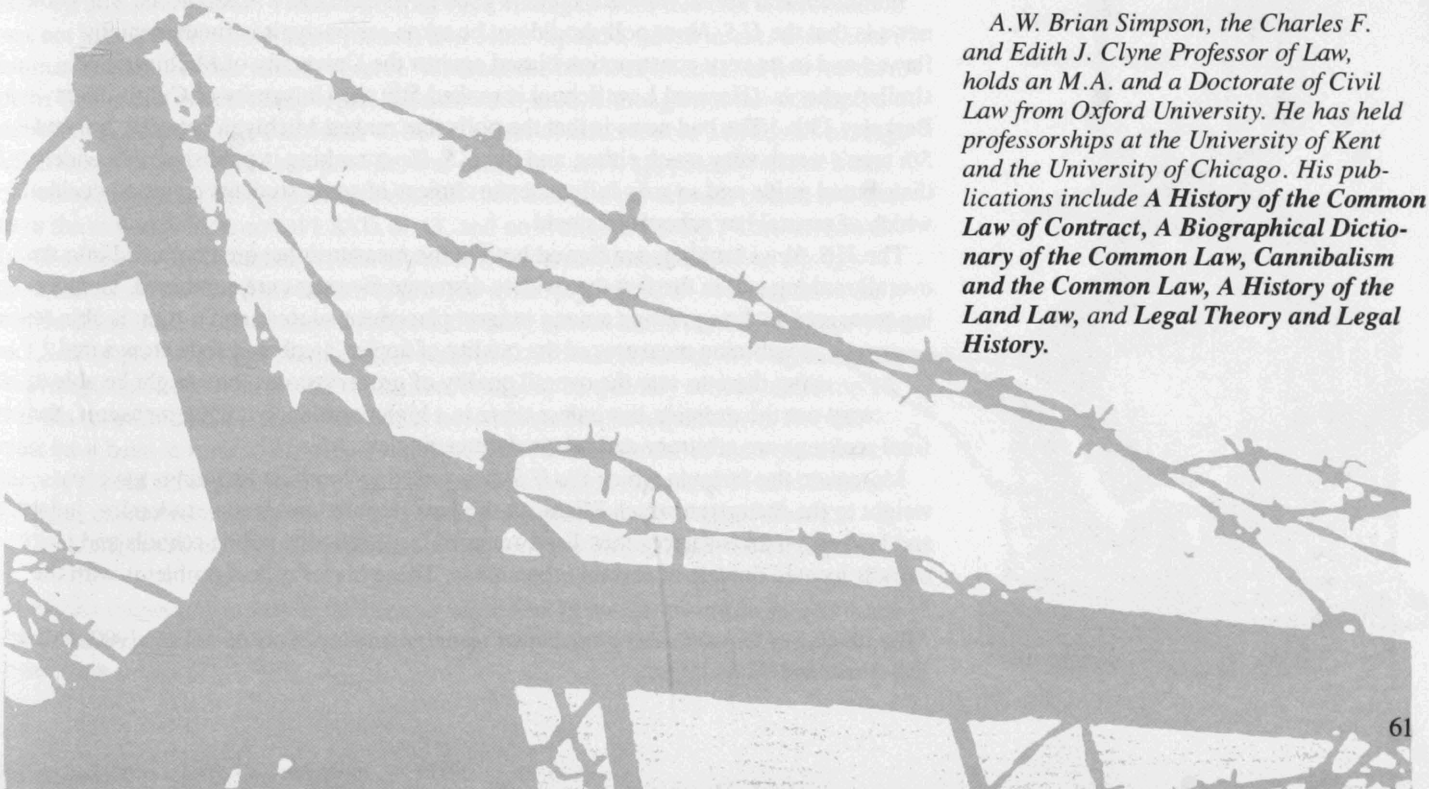
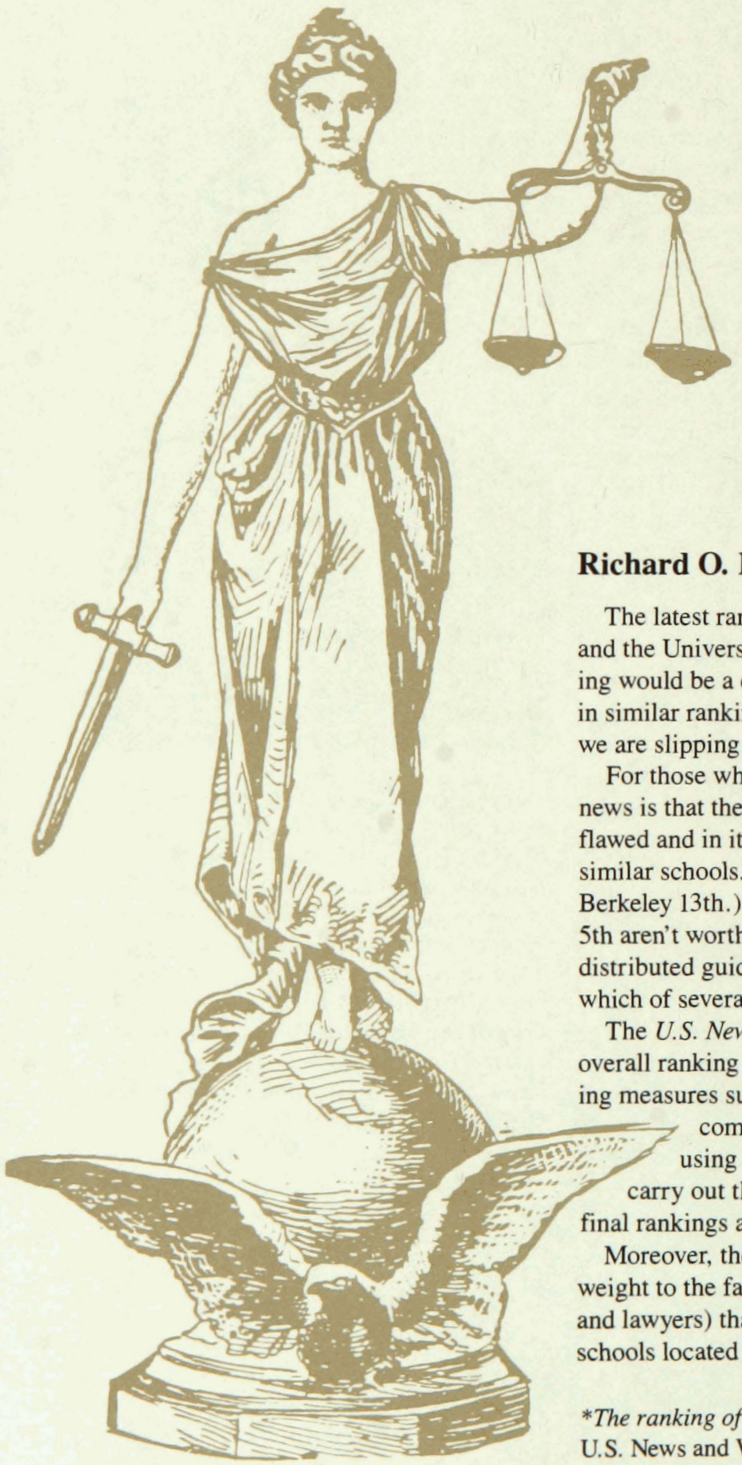


Of Polls and Prestige:

One Faculty Member's Candid Views



Richard O. Lempert

The latest ranking of law schools, this one by *U.S. News & World Report*, is out,* and the University of Michigan Law School is ranked 7th. At most schools such a ranking would be a cause for joy, but since Michigan has been ranked between 2nd and 5th in similar rankings over the past 15 years, seventh place might give the impression that we are slipping.

For those who are so worried, there is good news, and there is bad news. The good news is that the *U.S. News* poll should not be taken seriously; it is fundamentally flawed and in its very construction biased against the University of Michigan and similar schools. (Harvard Law School is ranked 5th; the University of California at Berkeley 13th.) The bad news is that the polls that ranked Michigan between 2nd and 5th aren't worth very much either, and the *U.S. News* ranking is published in a widely distributed guide and so may influence the choices of some students trying to decide which of several law schools to attend.

The *U.S. News* rankings are flawed both in the measures that are combined into an overall ranking and in the fact that widely disparate measures are combined. Combining measures such as prestige among judges, placement success and tuition is akin to combining measures of the quality of apples, lamb and soda straws and using them to rate the overall quality of grocery stores; one might be able to carry out the exercise, but unless there is a high correlation among measures, the final rankings are arbitrary and relatively meaningless.

Moreover, the formula which the *U.S. News* used to combine its ratings gave less weight to the factors on which Michigan did best (reputation among academics, judges and lawyers) than to factors that disadvantaged large schools, public schools and schools located outside of certain urban areas. These biases reflect problems with the

**The ranking of law and other professional schools appeared in the March 19, 1990, issue of* U.S. News and World Report.

study design rather than an animus against Michigan, but it is the case that among the nation's leading law schools Michigan (along with Berkeley and to some extent Harvard) seems peculiarly disadvantaged by the various biases built into the study.

The first two measures that *U.S. News* provides are measures of each school's reputation among law school deans and associate deans on the one hand (Michigan is 5th) and lawyers and judges on the other (Michigan is ranked 4th). Since Michigan did better on these measures than on any others, it would be nice to believe that these rankings are sound measures; but they are not. *U.S. News* reports 47 percent of the questionnaires it sent out were returned,[1] a return rate that is according to *U.S. News*, "far in excess of what is considered statistically significant." The claim is nonsense; there is nothing statistically significant about a response rate of 47 percent or even one of 97 percent, for that matter. It is true that if enough questionnaires are sent out, a 47 percent rate of return will yield enough responses so that even weak relationships in the data are likely to be statistically significant, but so will a response rate of 4.7 percent or even .47 percent if enough questionnaires are sent out. The problem with a low response rate is not that relationships are unlikely to be statistically significant, but rather that the sample of responses is biased so that what is revealed does not characterize the population sampled.

From this perspective, a 47 percent response rate does not meet good social science standards. It is too low to give one confidence that the responses received are unbiased or that any biases are unimportant. Indeed, one possible bias in the academic data is clear; many leading law schools spread the word that their deans and associate deans did not intend to respond to the *U.S. News* survey; so, unless they changed their minds, the group that is arguably in the best position to rate leading institutions is not well represented in the *U.S. News* data. With respect to practitioners and judges, where Michigan does best, the ratings may be tilted somewhat in Michigan's favor, for alumni tend to puff their own schools and Michigan has more alumni than smaller schools of comparable quality. This tilt toward Michigan might be offset, however, by a geographic tilt in the data; if more lawyers and judges who were polled (or responded) were from coastal cities rather from the Midwest, one would expect schools in these regions to do better because there is also a tendency to know more about schools in one's own region and, ordinarily, to rate more highly schools one is familiar with. Thus the combination of small size and Midwestern location may explain why Chicago, a small-enrollment Midwestern school, does worse when rated by practitioners and judges (7th) than in any other category.

Michigan, like a number of its peer schools, refused to give the *U.S. News* rating team certain information. Those who spoke for Michigan were told that if information was not provided, it would be estimated, and some sensed a veiled threat, a hint that if estimates were used we would regret it. Whether the hint was intentional or even there in the first place, we certainly regret the estimates used, although not our principled refusal to provide what we consider to be confidential information. Michigan's average LSAT score, which we did not provide, was estimated at 41, supposedly on the basis of the average LSAT of our peer schools. Yet the LSATs of the schools before and after us in the rankings have actual LSATs of 43, and no school in the top 14 has an actual LSAT as low as 41. (Number 11, Northwestern, has an estimated LSAT of 40; they must feel as we do that their failure to provide what they regard as confidential information came back to haunt them.) Indeed, the only school in the top 25 rankings with an LSAT of precisely 41 is Number 17 Southern California (Number 10 Virginia gives its average as 41.3). Why Southern California should be the only school in the top 25 that our estimated LSAT score matches is beyond me, but then the folks at Harvard must have been at least as mystified when the *U.S. News* estimate of their placement success placed them 18th in the placement-success ratings, one place behind Boston College's estimated placement-success rate and one place ahead of Notre Dame's.

The LSAT score estimated for Michigan was too low. Indeed, had the average

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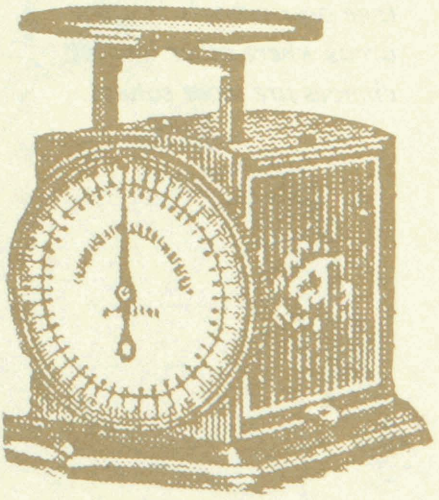
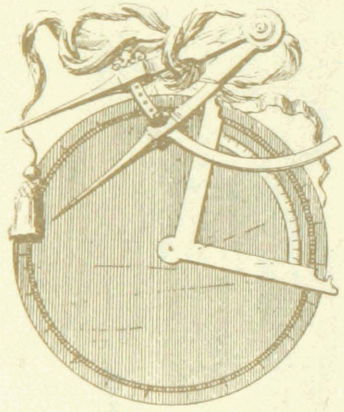


[1] *In the law school survey 44% of the questionnaires sent to the law school deans and associate deans were returned while the questionnaires sent to lawyers and judges had a 51% return rate.*

rounded LSAT score of Michigan's regular out-of-state admittees been used, no school in the country would have reported a higher score. One, of course, might object that that would have been misleading as well, for the school's average LSAT score is a blend of resident and non-resident averages. Yet *U.S. News* did not apply such reasoning when they reported estimated tuition. Here they reported not the average tuition paid by all students in a school, but, for state schools, the non-resident tuition. Moreover, they did not attempt to correct this rate for typical living expenses or the availability and terms of financial aid. Thus Michigan, which runs an extensive financial aid program, and which has a blended resident-non-resident tuition rate that is thousands of dollars less than any school in the *U.S. News* top 10 except Virginia, does not appear to be anything like the bargain that for more than one-third of its students it is. Alternatively, if the focus is on the school's position in the national rather than the resident market, the school does not appear to be nearly as selective as it in fact is.

Selectivity, in fact, is another measure that *U.S. News* uses. It is based on acceptance rates, average LSAT scores and average undergraduate gradepoint average. The University of Michigan is ranked 14th. This is another estimated measure. The undergraduate gradepoint estimate is not separately reported, but one presumes that as with the LSAT score it is an underestimate. Moreover, the LSAT appears in this ranking, which means that the *U.S. News* misestimate is presented twice, once by itself and once in a selectivity index. While only the selectivity index is used in the overall rankings, the way *U.S. News* presents its data makes it appear that Michigan ranks low on two separate dimensions, selectivity and LSAT score. In fact there is only one dimension — selectivity, which is infected by the misestimated LSAT score. The bottom line for those with children seeking to enter law school who may have rejoiced at the fact that the University of Michigan is less selective than they thought, is stop rejoicing. Michigan, particularly for non-resident applicants, is much more selective than the *U.S. News* rankings indicate.



Starting salary differences may reflect the locations in which a school's graduates choose to work, giving schools in urban areas with large firms that pay high starting salaries a significant advantage over schools in other areas where other law job choices are more salient.

Average starting salary reported for University of Michigan graduates is $57,808, substantially below the average starting salary of $69,095 reported for NYU graduates or the average of $71,354 reported for Columbia, and at least several thousand dollars below the average salaries reported for all but two other top 10 schools. These salary differences, however, reflect the locations in which a school's graduates choose to work, giving schools in urban areas with large firms that pay high starting salaries a significant advantage over schools in other areas where other law job choices are more salient. Not only do the starting salaries reported not reflect the quality of the jobs that graduates take, but they do not do a very good job reflecting how students fare with their take home income. NYU's and Columbia's graduates do well financially on the average because a large portion of their graduates go to work for New York City law firms. Yet, after taking into account the cost of living in New York City and the city income tax, it is unlikely that they are financially very much better off than their counterparts at Michigan who choose to work in the large law firms of Detroit or Cleveland. The fact is that many Michigan graduates could earn New York or Los Angeles salaries if they wished; they choose not to because they feel they are better off in many ways by going to other locations. Other of our graduates do go to cities like New York and Los Angeles, which is one reason why in comparison with most of the country's law schools our graduates appear to be financially very well off.

Average salaries are also presented twice in the rankings, for in addition to being listed as a separate criterion, they are an aspect of the "placement success rank" and included in the overall rankings as part of the latter index. Here Harvard, not Michigan, has the most to complain about. The *U.S. News* estimate of Harvard's starting salary is $5,000 less than it is for Michigan graduates and $1,500 less than it is for the overall No. 22, University of California at Davis. While Robert Morris, the *U.S. News* researcher who is responsible for this estimate, believes it is a reasonable extrapolation from figures Harvard provided, even he doesn't trust the figures he was given.[2] Nevertheless, the data not only make it appear that Harvard graduates do comparatively poorly salary wise, they are the key reason why Harvard is rated an unrealistic 18th in

[2] *Personal communication.*

overall placement success and in turn depress Harvard's overall ranking, just as Michigan's 13th place rating on this dimension depresses its overall standing.

The placement success scale is also misleading because it is based in part on figures for the proportion of graduates holding jobs three months after graduation. Michigan could not provide these figures, for we only know the proportion of graduates holding positions in surveys conducted at the end of the school year and about six months later. We provided figures based on the graduation survey, not counting those who did not respond to our inquiry. Our figures would have been higher had they been determined three months later, but they would have been lower had we counted non-respondents in the class base. More important is the fact that our placement director's conversations with other placement directors indicates that the other top schools report almost identical job placement records for their graduates, in excess of 95 percent except for Chicago, which reports an unlikely 100 percent. (For some schools, not the most elite, the three month cutoff for placement success is arbitrary in another way since their graduates often find jobs only after they have passed a bar examination, which may be six to nine months after graduation.)

Also figuring in the *U.S. News* placement success rate is the number of job recruiters who visited each school compared with the number of each school's 1989 graduates. While the incidence of on-campus recruiting is important to job opportunities and has some validity, small differences on this measure have little relationship to job opportunities and may even be misleading. Nor is the measure unbiased. Because it is a ratio, it is skewed in favor of smaller schools. Consider the situation at Michigan. In 1988-89 we had about two on-campus job interviewers for every student who graduated, and we would have had many more except that firms that seek to schedule interviews drop out each year and some have ceased coming because no student wants to interview with them. At the point where opportunities go begging, it hardly makes sense to treat additional opportunities as especially important. Moreover, a smaller school, like Chicago, Pennsylvania or Duke, will do better on this measure than Michigan even if its graduates have several hundred fewer law firms seeking their students' services. Similarly, the use of a ratio means that Michigan may do better on this measure than schools larger than us, like Harvard or Georgetown, even if we are offering our graduates fewer choices than they are.

Graduation rate rank is another interesting statistic. Our rate, which is in excess of 98 percent, left us tied with Yale for 11th on this dimension. Yet the difference between a 98-point-something graduation rate within three years of admission and a 95 percent or even a 100 percent graduation rate is so small that it should count for nothing. Clearly differences this small on graduation rate provide no valid way of ranking schools. The order of schools so close together will change yearly by the fortuities of which school has several students who transfer because of spouses' jobs, or drop out for a year to work in an election campaign, or have adjustment problems that lead them to flunk, quit or transfer.

Finally, there is the instructional resource rank, a measure tilted strongly in favor of smaller schools and schools with large teacher-intensive clinical programs or large numbers of part-time faculty. Michigan is 27th on this dimension, its worst showing by far on any ranking. Some of the measures that make up this index, like money spent per student or student-faculty ratio, appear to have some plausibility, but even these have problems. For example, since faculty salaries are the largest single law school expense, including both money spent per student and student-faculty ratio in some measure double counts the student-faculty ratio. Also, the use of student-faculty ratio as a key component of instructional resources does not recognize the benefits of a broad curriculum. Students at a large school with, for example, 60 different course offerings may be better off academically, even if their average class is larger, than that of their counterparts at a smaller school that has a better student-faculty ratio but offers only 40 courses to choose from. Moreover, *U.S. News* did not estimate full-time equivalents but calculated separate student faculty ratios for full- and part-time instructors and combined them. Not only might this lead a school that uses many part-time instructors to appear better off than one, like Michigan, that eschews part-time adjuncts in favor of full-time faculty, but it also ignores the fact that many apparently full-

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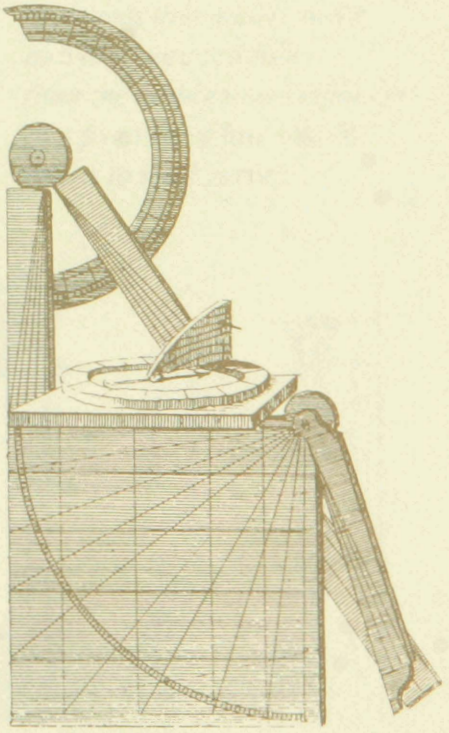

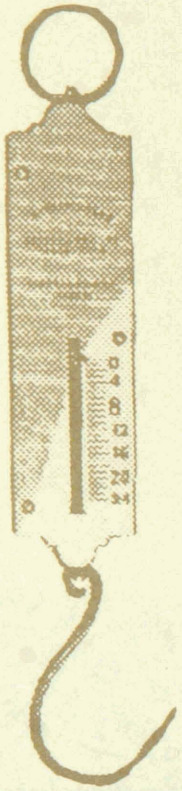

What about the other surveys? The ones that rank Michigan from second to fifth. Are they any better? It would be nice to be able to say that they are, but the truth is that they, too, have their flaws.

time faculty have leaves or joint appointments that mean their availability to students is less than full time.

For me the quality of the *U.S. News* survey is symbolized by another component of instructional resources; this is the report's measure of the availability of books and periodicals to students. It is not a measure of library size or acquisition rates; rather it standardizes library holdings on a per capita (I assume this means per student) basis. This might make sense if at the end of the year all of a library's volumes were distributed equally among the students. But it makes no sense as a measure of the utility of a library to students or faculty. Rather, a library is useful if it has the volumes one needs available when one wants them. Other things being equal, the larger a library and the more extensive its collection, the more likely it will be to hold a book that is needed. While some volumes may be needed so frequently that per capita availability might be a measure of the library's utility, law libraries purchase such volumes in multiple copies to meet student needs. Since such volumes are only a tiny fraction of any law library's holdings, they cannot even be loosely estimated from an overall per capita book rate.

This use of a per capita book rate as a measure for assessing instructional resources nicely symbolizes the ways in which the *U.S. News* survey misunderstands both legal education and the requisites of good social science. Yet *U.S. News* will be distributing its guide to professional schools to people who may have similarly limited understandings of what legal education and social science are about. Thus, it may do positive harm.

What about the other surveys? The ones that rank Michigan from second to fifth. Are they any better? It would be nice to be able to say that they are, but the truth is that they, too, have their flaws. While I have not reviewed them recently, as I recall, most are prestige surveys; they ask knowledgeable respondents — usually law school deans — to rank different schools. One problem is that they almost invariably suffer from the kinds of low response rate that may bias the reputational surveys in the *U.S. News* rankings. Also, there is an ambiguity to some surveys in that they ask respondents to list the top 5 or 10 schools and base overall rankings on the proportion of times a school is mentioned in the top 5 or 10. A school consistently mentioned as one of the top schools but never thought of as best may come out on top of the rankings while one that is often thought of as first but omitted by some respondents for largely idiosyncratic reasons will do less well. Moreover, the surveys only reflect prestige; they do not reflect quality. Despite its failure of execution, the *U.S. News* effort may be commended for its attempt to identify features that relate to the quality of education students receive. But the *U.S. News* failure should be a reminder of how difficult it is to make qualitative rankings.

If the polls are no guide, is there nothing that can be said about the relative quality of different law schools? There is, in fact, a lot that can be said, and almost any law professor can say it. However, what is said will differ from person to person. I can only give my views as one observer of the law school scene. These views do not even pretend to be scientific, for my knowledge of all law schools but Michigan is based in large measure on gossip and hearsay. Moreover, I may exhibit a "home school bias," just as people at other schools may be likely to overrate them vis-à-vis what a truly neutral observer might report. This is not because I wish to give Michigan an undeserved boost, but because I know Michigan much better than any other school. For example, I can judge colleagues' scholarship on work in progress, but I can judge scholarship at other schools only by what appears in print.

There are seven schools that for some time have been regarded as being relatively close in quality and the nation's best. They are, in alphabetical order with the *U.S. News* rankings in parentheses: Berkeley (13), Chicago (2), Columbia (4), Harvard (5), Michigan (7), Stanford (3) and Yale (1). In addition, there are perhaps 10 other schools that might plausibly argue that they should be added to this list or, indeed, displace some school from it. These include Georgetown (12), Northwestern (11), NYU (6), Pennsylvania (9), UCLA (16) and Virginia (10) among others, but for expository purposes I shall only refer to the first seven schools I have listed.

One may rank these schools in a variety of ways, but in almost every ranking marginal differences between some or all of them will be small, and for most schools there

will often be little consensus about what the precise relative positions are. Indeed, in most instances the situation is like that which *Consumer Reports* warns readers about when it ranks audio equipment. Small differences between products that its instruments can record and rank are inaudible, it tells its readers, so the buyer should shop based on price and personal tastes. It is the same for law schools. In terms of the education students receive and their career chances, students will ordinarily be better off choosing among closely ranked law schools on the basis of how comfortable they expect to feel at the school rather than on the basis of perceived differences in faculty quality or prestige. If value for money is the only consideration, no Michigan resident should ever go any place but Michigan and no California resident should go any place but Berkeley (except possibly UCLA). If the educational experience is the prime consideration, there are happy and unhappy students at all law schools. The only school that seems in recent years to have a consistent edge is Yale. For certain types of students at least, the Yale educational experience appears exceptional. Yale students are reportedly less hung up on grades and more willing to engage in lively intellectual interchanges than students at other law schools. The difference is most pronounced in the classroom, but may exist outside of class as well. It may be one reason why Yale sends a disproportionate number of its graduates into law school teaching.

In terms of prestige, there are measures that matter more and are more reliable than the ambiguous responses of a fraction of law school deans to mail surveys. Law schools compete for young faculty, for senior faculty and for students. A good measure of the way those most involved view the relative prestige of institutions is by the choices that they make. But these choices are themselves ambiguous. Junior and senior faculty may locate at schools because of the desire to be in a particular locale or to enjoy a particular life style, or because of a spouse's preferences rather than because of their judgment of relative prestige. Moreover, what is unobserved are the numbers of faculty at particular law schools who could move but stay put. I have, for example, a number of colleagues who might have been at other top schools had they wished to move, but chose to remain in Ann Arbor. Student judgments of prestige, on the other hand, are often ill-informed and quite localized. Student choices are also influenced, as perhaps they should be, by the prospect of living in a warm climate or attending a school with a big-time football team.

With these caveats and the clear warning that prestige should not be confused with quality, Harvard has the best claim to being the nation's most prestigious law school. It is the only law school that seems able to recruit senior faculty from the other leading law schools while almost never losing its senior faculty to these institutions. It similarly tends to enroll students who have competing offers from other schools, and it generally attracts those junior faculty to whom it offers positions. Yale would probably be second on these behavioral measures of prestige, with Stanford, no doubt aided by its sunny climate, third. Michigan, Chicago, Columbia and Berkeley seem to be ranked more or less together on these behavioral measures of prestige. Both students and faculty choose among these schools in an unsystematic way. Some years, for example, a majority of students jointly admitted at Columbia or Chicago will come to Michigan and some years Columbia or Chicago may be slightly ahead. Competition for faculty seems to yield similarly inconsistent results.

With respect to faculty quality, the primary way in which the law school community judges quality is by publications. Every school I have listed has some outstanding faculty regarded as leading scholars in their field whom most if not all the other schools would be happy to "steal" if they could, and every school has some people with only slight scholarly reputations at best. Every school also has some faculty members whose internal status far exceeds their extra-mural reputations. These are people who are specially valued because they are excellent teachers, adept administrators, fonts of wisdom, invaluable critics of their colleagues' work or even, on occasion, genuinely brilliant despite a paucity of published work. Because faculty members value colleagues for these low-visibility reasons and because faculty members are both aware of their colleagues unpublished work in process and specially attuned to their colleagues' published work, every faculty is likely to see itself as intellectually stronger than peer faculties see it. Nevertheless, scholarly production is visible and one can rank the

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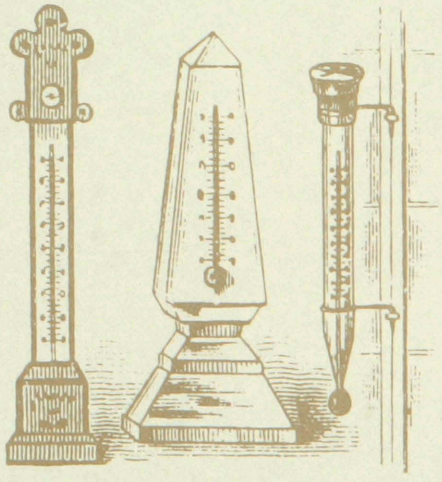

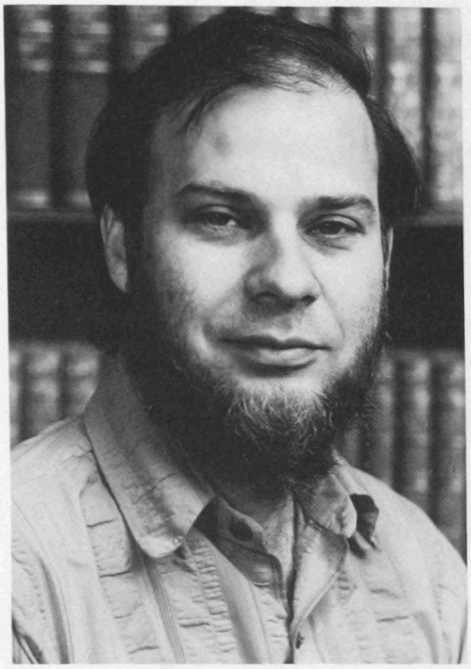

Richard O. Lempert, the Francis A. Allen Professor of Law, is a graduate of Oberlin and the University of Michigan Law School; he also holds a Ph.D. in sociology from The University of Michigan. He is particularly concerned with the problem of applying social science research to legal issues. This is reflected in much of his work, particularly his analyses of the research that has been done on the size of juries and capital punishment and his book (with Joseph Sanders), ***An Invitation to Law and Social Science.*** *From 1982 through 1985, he edited the* ***Law & Society Review.*** *He also teaches evidence and is co-author (with Stephen Saltzburg) of* ***A Modern Approach to Evidence.*** *He began his academic career at Michigan in 1968.*

various institutions.

From top to bottom, I believe that today the nation's strongest law faculty is Stanford. It wasn't always this way; in the 1970s Yale was probably at the top and 10 years before that Chicago had the best claim. Stanford's claim to be No. 1 in scholarly productivity exists not because its best people are clearly better than those at other schools, but because it has a large number of people performing at a very high level (with a particular concentration of strength among those who identify themselves with the critical legal studies perspective) and relatively few who fall short.

Harvard is an interesting contrast. Harvard has a large number of leading scholars, people that Michigan and other schools would be happy to hire if they could. But it also has many people who have stopped publishing significant work or who never produced much significant work to begin with. While there is no doubt that Harvard is a very strong school, its overall intellectual strength does not match the prestige accorded it. Scholarship may be Michigan's strongest point; indeed, if one ranks law schools by the books the schools' faculties have produced rather than by the schools' contributions to the article literature, a good case can be made that Michigan has no peer, including Stanford. But as with so many of the other comparative judgments that one might reach about the nation's leading law schools, most differences are marginal and only look large because one is focusing on differences.

In sum, it is difficult to come up with a meaningful, reliable ranking of the nation's law schools. Any composite ranking will be adding apples, lamb and soda straws which, while it may yield a number, will tell no one very much about which school is best for what tastes or purposes. While certain meaningful groupings might be made and even closely ranked top schools may to some degree be distinguished on relevant dimensions, in most cases distinctions among schools within the same group or at group borders are likely to be small, and any formal ranking system that seeks to capture such distinctions is likely to be idiosyncratic or of questionable validity at best. Thus, while the *U.S. News* report may be a bad example of how to go about the ranking enterprise, there may be no especially good model to follow.

From one perspective it hardly matters. A student can get an excellent legal education at any of the leading law schools (and at many others as well). Graduates from any of the leading law schools have a variety of career paths open to them, and most will get jobs commensurate with their tastes and law school performance. Faculty members will similarly find supportive environments for creative scholarship at the institutions I have grouped at the top and at many other schools as well. Lawyers, even the most demanding, will find that most graduates of any of the highly ranked schools perform well in practice as do many graduates of lower-ranked institutions.

From another perspective, rankings do matter if people take them seriously. Students may be guided and even misled in their choice of schools, and school reputations may be perversely affected by the very rankings that purport to measure reputation. I would, I must admit, not have attempted to document the many flaws in the *U.S. News* rankings had they purported to show that Michigan was No. 1 among American law schools rather than No. 7. So if the next poll lists Michigan as No. 1, forget what you read here, even though it will remain true. And there will be a next poll. However much and however justly they are criticized, rankings are here to stay.

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