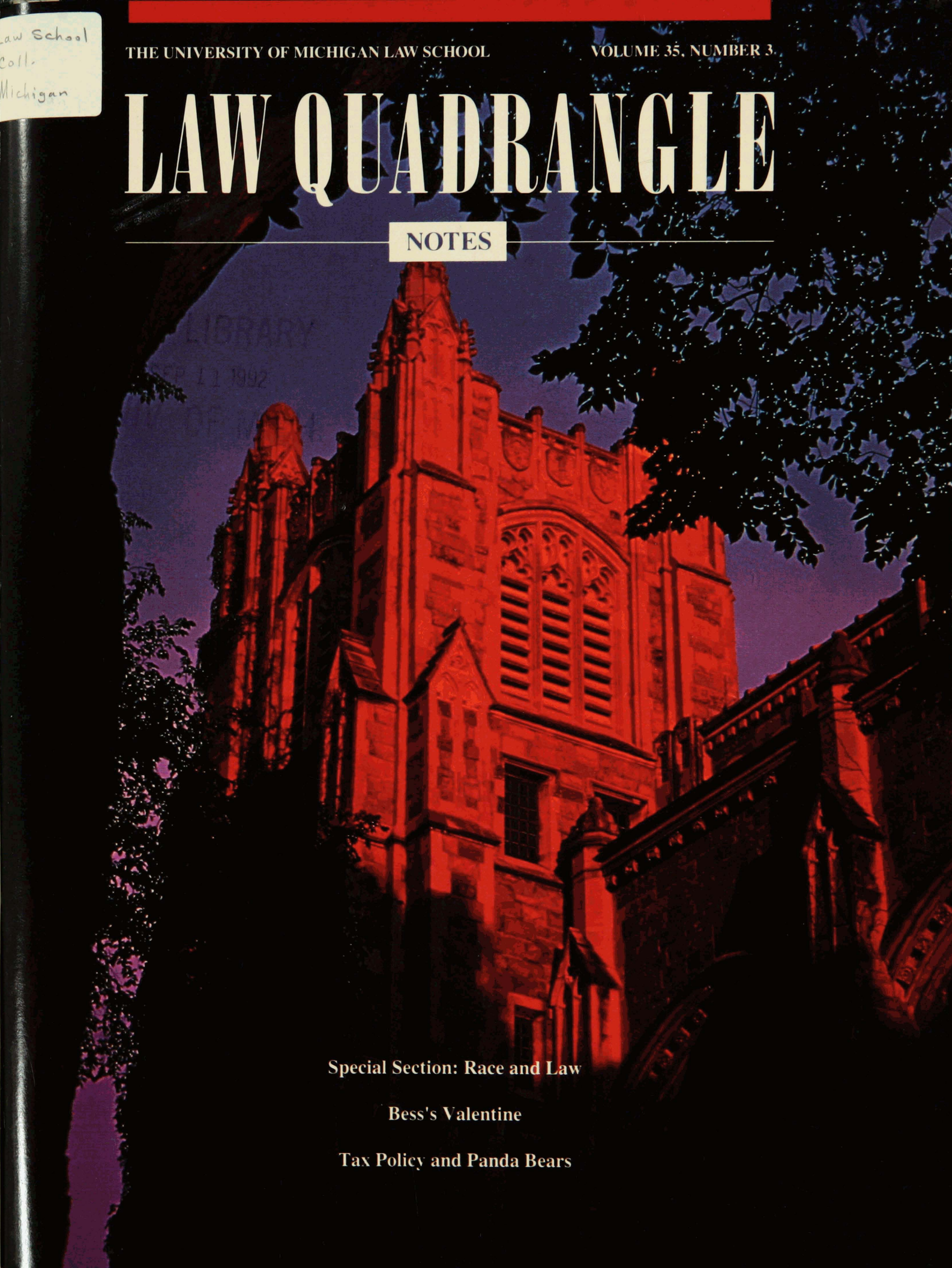
THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 35, NUMBER 3

LAW QUADRANGLE

NOTES



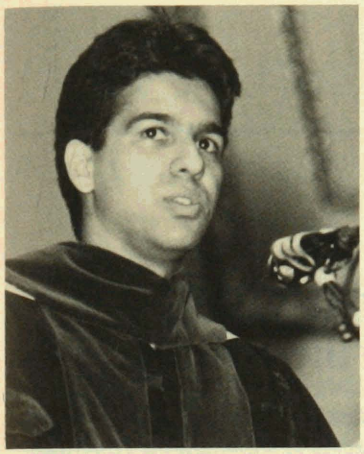
Special Section: Race and Law

Bess's Valentine

Tax Policy and Panda Bears

CONTENTS

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 35, NUMBER 3



2

9

15

23

LAW QUADRANGLE NOTES

BRIEFS

SPECIAL SECTION

ALUMNI

ARTICLES

Law Quadrangle Notes (USPS 893-460) is issued by the University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publication: Law Quadrangle Notes, Law School, The University of Michigan, Ann Arbor, Michigan 48109-1215.
Published quarterly, three substantive issues are available for general distribution; the fourth issue, the annual report, is sent only to alumni.
POSTMASTER, SEND FORM 3579 TO: Editor, Law Quadrangle Notes, Law School, The University of Michigan, Ann Arbor, Michigan 48109-1215.
Faculty Advisors: Yale Kamisar and Kent Syverud, U-M Law School; **Editor:** David Postman.
Graphic Designer: Kathy Horn, Marketing Communications.
Photo credits: All Briefs and Events photos by Gregory Fox.
Cover photo: Philip Dattilo.

Grads get unvarnished truth

Alum says profession has been damaged

Some 400 Law School graduates (360 J. D. recipients and 40 LL.M. and M.C.L. recipients) and their many relatives and friends who crowded Hill Auditorium on Sunday May 10, 1992 were given an insightful view of the profession from John H. Pickering, who shared lessons learned since graduating from U-M Law School 52 years ago.

Graduation speaker and alumnus John Pickering, left, and Law School Dean Lee Bollinger

Pickering gave an honest assessment of where lawyers stand in 1992, saying, "Damage has been done to the profession. Many major firms are retrenching, jobs are scarcer, and lawyer bashing is again a favorite sport, from the White House to the comics. Anti-lawyer jokes are legion." One example offered up by Pickering: "According to the usual reliable sources, government projections show that by the year 2020 — if present trends continue — there will be more lawyers than people in the United States."

With the jokes and the unvarnished truth about lawyers' reputations, Pickering also spoke of the problems simmering in the embers of the Los Angeles riots. "As the dust settles over Los Angeles, the public is calling for solutions, not scapegoats," he said. "These solutions will not be easy, nor will they come from efforts to achieve partisan advantage. They will come from non-partisan efforts to use the best thinking of all parts of the political spectrum — conservative, liberal and independent — and of the diverse elements of our society."

Pickering said lawyers will have a role to play in finding those solutions. "In fact," he said, "this can be the best of times for lawyers."

"There is much work to do, if we are to remedy injustice, rebuild communities, restore trust, improve race relations and do the many other things that are needed to repair and renew our social compact — to bridge the huge gap between what we say and what we do as a nation. Lawyers are needed for these tasks, for history teaches that there can be no free and just society without lawyers."

Parting advice from the Dean

Dean Lee C. Bollinger used his graduation speech to warn the Class of 1992 of "The Perils of Expertise." He told the graduates: "Do not let your egoistic imagination seduce you into thinking you're better than you are." In this excerpt, Bollinger offers two suggestions for protecting against that danger.

The first is to be a little wild — a recommendation I'm happy to make now that you are about to leave the Law School. I share the view of the French, at least the French in the small village in the Caucluse, as described in the famous sociological study of that name (by Laurence Wylie), that youth is a time for misbehavior, that wildness is a necessary step in learning the value of moderation, that "sins against social conventions do not appeal to people who have tasted the sins," and, accordingly, that the adult who has been too good as a youth is not really to be trusted, because he or she is not "predictable." (I beg of you, do not repeat this to my children.) But for this kind of wildness it is already, I'm afraid, too late for you. You are too old.

There are still other kinds of wildness you can experience, however, like that described by the naturalist Aldo Leopold in his essay "Thinking Like a Mountain." From the mountain's perspective, wolves are necessary to kill and eat the deer, which otherwise would overgraze the mountain. "We all strive for safety, prosperity, comfort, long life, and dullness," writes Leopold. But, at least in this world, some wildness is essential to maintaining the proper balance for the

mountain as well as for the person.

So, every now and then, make sure you think an unconventional thought, or sit atop a mountain and feel insignificant.

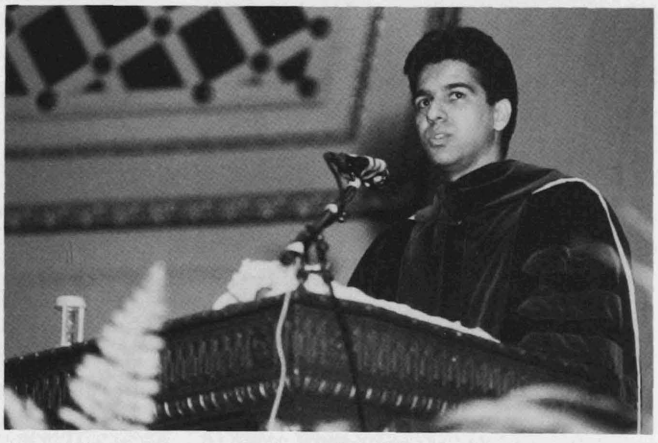
My principal suggestion, however, is that you do something you're not very good at. If the problem, as I think it is, of being an expert is that you are forever afraid of being a novice, reluctant to try anything new, then it is very important that you be a novice at something. But there are two critical qualifications here. First, to have the proper corrective effect on your personality, you must choose something you really have no chance of being very good at. And, second, you mustn't tell anyone, because it will be all too attractive for you to use this activity — whether it be learning a new language, playing the cello, or golf — as an appendage to your desire for a better public image, which will ultimately corrupt the experience.

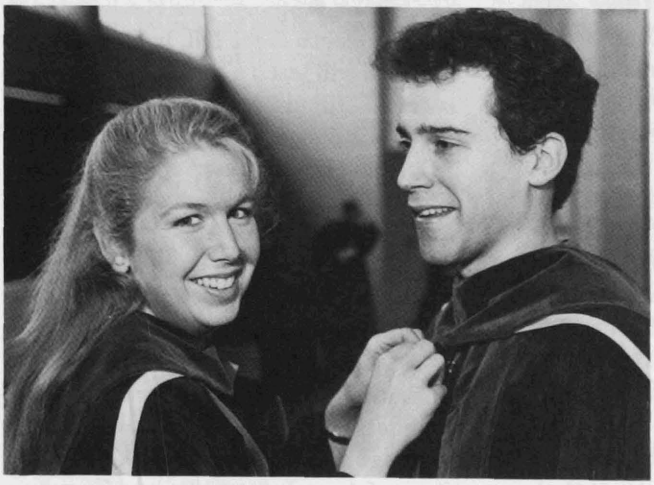
One possibility of doing what is virtually impossible to do well, as all the parents here can attest, is to have children. As children grow older, they become merciless in showing their contempt for your ways and in pricking your excessive self-confidence. My teenage daughter says she wants to be a lawyer when she grows up, which pleases me. But recently she said — rather pointedly, I thought — that she hopes to be a lawyer who sues academics.

In any event, if you do these things, or things like them, my hope is that you will overcome the perils of being an expert. You will be a happier person and a better lawyer.

◀ *Dean's assistant Lillian Fritzler and Dennis Shields, Assistant Dean and Director of Admissions*

▶ *Class President Jose Vela addresses the graduates*

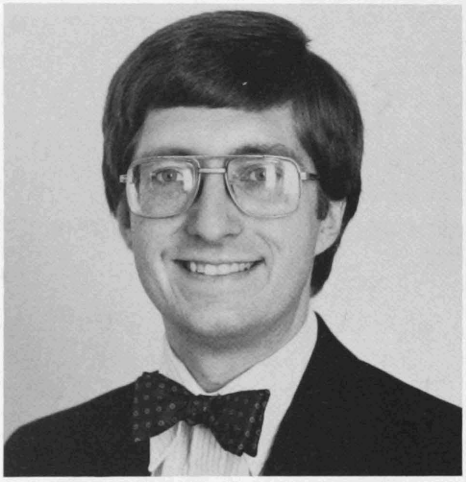




◀ *Alice Owings and Michael Wilder, a former U.S. Open Chess champion*

Faculty News

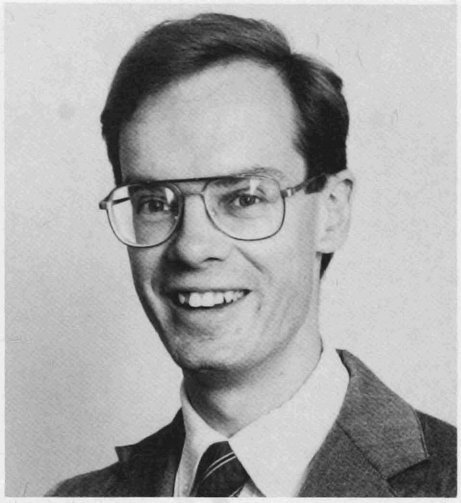
At their May 1992 meeting, the Regents of the University of Michigan promoted assistant professors **Jeffrey S. Lehman** and **Kent Syverud**, both former editors-in-chief of the *Michigan Law Review*, to the rank of full professors with tenure.



Professor Jeffrey S. Lehman

Lehman earned both a J.D. and Master of Public Policy degree at Michigan after receiving a bachelor's degree in mathematics from Cornell University. He clerked for Chief Judge Frank Coffin of the U.S. Court of Appeals for the First Circuit and for Supreme Court Justice John Paul Stevens. Lehman, who joined the Michigan faculty in 1987, teaches and publishes in the areas of taxation and social welfare policy. He was also the force behind establishment of the Program in Legal Assistance for Urban Communities, a program that involves law students with Detroit community-based economic development groups.

Syverud also joined the faculty in 1987. He clerked for Judge Louis Oberdorfer (U.S. Dist. Ct., District of



Professor Kent Syverud

Columbia) and Supreme Court Justice Sandra Day O'Connor. Syverud has twice been awarded the L. Hart Wright Outstanding Teacher Award by the law school student body. His scholarship includes studies of liability insurance and of settlement negotiations, as well as research on legal problems of advanced automotive technologies.

Debra A. Livingston, an associate with Paul, Weiss, Rifkind, Wharton & Garrison in New York, has been hired as an assistant professor. She is scheduled to teach evidence in the fall. In the winter term she will teach a seminar on ethical issues in criminal law and a criminal procedure course. Livingston received her J.D. from Harvard Law School in 1984, where she was articles editor of the *Law Review*. She received her undergraduate degree from Princeton University's Woodrow Wilson School of Politics and International Affairs.

After law school, Livingston was a legal consultant to the United Nations High Commissioner for Refugees and clerked for Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit.

For four years she worked in U.S. Attorney's office for the Southern District of New York, as assistant to the

Professor Debra A. Livingston

U.S. attorney in the public corruption unit and then as deputy chief appellate attorney.

Deborah C. Malamud has been also hired as an assistant professor. An associate at Bredhoff & Kaiser, Malamud has specialized in representing labor unions in labor and employment law. In the fall she will teach a course in labor law. She will teach classes on employment discrimination and race, class and cultural diversity in the winter term. Malamud graduated from the University of Chicago Law School in 1986 where she served as articles editor of the *Law Review*. She graduated with a degree in religion from Wesleyan University. In 1988-89 Malamud was a clerk to Supreme Court Justice Harry A. Blackmun. The previous year she clerked for Judge Louis H. Pollak (U.S. Dist. Ct., E.D. Pa.).

Profs, alumni, on L.A. riots

King verdict an outrage or logical?

When three police officers were acquitted of the beating of Rodney King, Los Angeles exploded in four days of rioting. Outside L.A. the reaction was less violent, but generally reflected anger and dismay. Among U-M Law School faculty and alumni a variety of opinion can be found about the case and its treatment by the media.

As did many, U-M Law Professor Yale Kamisar found the verdict baffling: "I don't see how anybody can conclude that the police were acting in self-defense. I think it's fairly clear from the videotape that King was not trying to attack the officers. He's virtually helpless. He's rolling around on the ground. The police are not raining blows on him because they're defending themselves. They're hitting him, rather, out of hatred and contempt."

These possible motivations — and the racial animosities they reflect — should have been dealt with by the prosecution directly, Kamisar said. In an op-ed article for the New York newspaper *Newsday*, Kamisar — recently named Clarence Darrow Distinguished University Professor of Law — illustrated this point by describing a 1920s case argued by Darrow where the great criminal defense lawyer asked jurors to confront their prejudices. By contrast, the prosecution in the King case pointedly ignored racial issues.

In 1925, a black gynecologist, Dr. Ossian Sweet, moved his family into a middle class, white neighborhood in Detroit. Hundreds of angry whites gathered, throwing stones and shouting racial epithets.

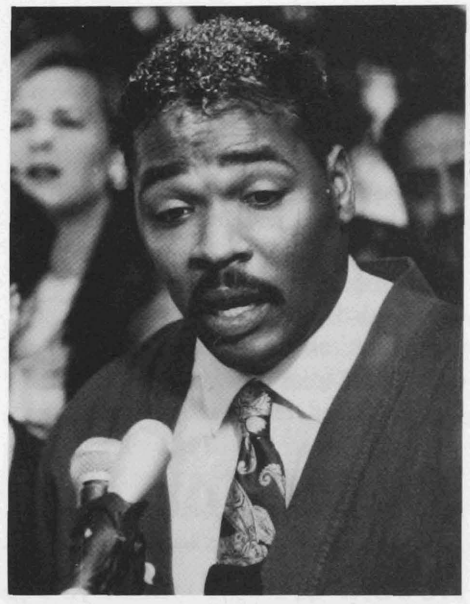
When a rock smashed one of Sweet's windows, shots were fired from the house and by the police and a white man was killed. All the occupants of the house were tried for murder. The trial ended in a hung jury. At the NAACP's request Darrow agreed to serve as defense attorney for Dr. Sweet's younger brother, Henry Sweet, in the second trial.

Rather than ignore the racial issues in the trial, Darrow faced them head-on. "I haven't any doubt but that every one of you is prejudiced against colored people," Darrow told the jury. He then asked the jury to transcend their prejudices, to imagine themselves black and surrounded by a mob of angry whites. "Supposing you had your choice, right here this minute, would you rather lose your eyesight or become colored? Would you rather lose your hearing or be a Negro? Would you rather go out there on the street and have your leg cut off by a streetcar, or have black skin?"

Darrow's appeal to empathy succeeded. Jurors voted to acquit Sweet.

By confronting the King jury's stereotypes, Kamisar concluded, prosecutors might have been better able to get their case across to the jury. The Los Angeles District Attorney's office took the opposite approach. It ignored the racial issues raised by incident and did not put King on the stand. Much of the post-verdict commentary has criticized the prosecution for letting the defense take control of the trial.

Northwestern University law professor Ronald Allen, a 1973 graduate of the Law School (see alumni profile at p.13), maintains that the prosecutors did what they could with a difficult case. He rejects media criticism of the prosecution for not putting King on the stand: "Of course it was reasonable to keep King off the stand. The media criticism has been



AP/WIDE WORLD PHOTOS

Rodney King

baloney. They're criticizing the prosecution for having lost. The prosecution was dealing with a guy who had a record, who did not have a job and who was physically large and strong. The jury may well have believed he was drunk and resisting arrest," Allen said. While not endorsing the verdict, Allen said that it's impossible to judge from television and newspaper reports how valid it was. Allen also thinks shocked reaction to the verdict reflects the media's liberal bias: "The coverage was woefully inadequate. You saw 10 seconds of an 80-second tape. That's irresponsible even if the jury verdict was wrong."

"Another example of media irresponsibility was the coverage of the verdict generally. The tenor seems to be that the court should have given the police a fair trial and then hung 'em," Allen said.

Like Allen, U-M Law Professor Richard Friedman said most expected the

officers to be convicted. He suggested that the assumption may partially explain the controversial decision to transfer venue from Los Angeles to exurban Simi Valley: "People anticipated that whatever jury sat in judgment was going to convict so, they thought, let's remove any other issues."

But the decision to move the trial may have been decisive. Simi Valley is a popular retirement area for police officers. Moreover, noted Friedman, the jury contained three National Rifle Association members.

Venue will likely be a hotly contested issue as new actions are brought against the officers. One of the four officers — Laurence Powell — was not acquitted and will be tried again. Federal civil rights actions will likely be brought against the other officers as well.

"My guess is they will be charged, will be convicted, and should be convicted," Friedman said.

Should federal charges be brought, minimizing the influence of the first trial will be difficult. "There aren't any intelligent adults alive who don't know what happened in Los Angeles after the first trial," Friedman said. "Any juror will be going in with an awareness of what might happen after another acquittal."

No one knows how the courts will safeguard the defendants' rights in future proceedings. But it's a safe bet that these decisions will garner much more attention from the earliest stages than in the first King trial.

–By Peter Mooney

Education as a human right

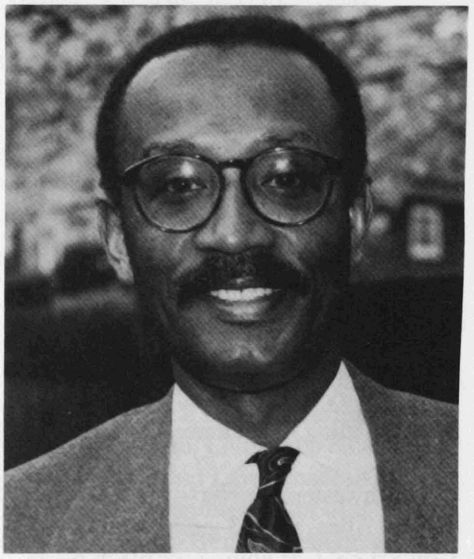
Howard U. Professor says equality benefits all America

Students at the Law School should know as well as anyone the value of education. But Howard University law professor J. Clay Smith used a speech this spring to remind law students that the kind of education they've benefited from is not available to all.

"Many African American students today live in environments in which the quest for education remains stifled due to past societal discrimination,'' Smith said. He spoke at the Fourteenth Annual Alden J. "Butch'' Carpenter memorial scholarship dinner sponsored by the Black Law Students Alliance.

Smith said that contemporary education retains much of the dual and unequal character left over from the days of formal segregation. This inequality will only be remedied, Smith said, when education is viewed as a right.

"Today schools furnished by the state, while physically opened to children, may remain segregated or woefully ill-equipped and underfunded,'' Smith said.



Howard University Law Professor J. Clay Smith

"We must emphasize and refocus our sights on the general principle that education is a human right.''

In part, Smith's strongly-held views are the result of his own background. Growing up disadvantaged and black, Smith experienced the type of discrimination that ill-prepares students to enter "the hot war of human survival.''

Without equal educational opportunities, Smith said, students won't win this war. Embracing this principle of equality benefits not only disadvantaged students, but the overall "safety and welfare of America,'' Smith said. Economic growth depends on productive citizens. Educating and motivating disadvantaged students is the only way to prepare them for growing, high-tech jobs, he said.

In its "Universal Declaration of Human Rights,'' the United Nations recognized that elementary, technical and professional education should be free and accessible to all on the basis of merit.

"The nations of the world, the great cities of the sundry states of America and the world cannot survive if they do not commit themselves to educate everyone, and in so doing defend themselves against ignorance.''

Race, poverty and the environment

Symposium looks at the connections and causes

It didn't take long for news reports to confirm the timeliness of "Race, Poverty and the Environment," a symposium sponsored by the Law School's Environmental Law Society and a committee of several other organizations.

The day after the five hours of speeches and panel discussions in Honigman Auditorium, two stories were published in *The Detroit News* about an outbreak of anencephaly, babies born without brains, in Brownsville, Texas. A few weeks later, the British magazine *The Economist* reported that the chief economist of the World Bank had written a memo advocating the export of toxic waste and "dirty industries" to less-developed countries.

However dismaying the stories, symposium participants could not have asked for better examples of what they term "environmental racism," a concept whose recognition and documentation they have pioneered.

Brownsville is a city with a large Latino population, just across the Rio Grande from Matamoros, Mexico, a heavily polluted industrial town dominated by U.S.-owned companies.

Residents believe toxic wastes from Matamoros are responsible for these deformities. Government health officials say it will be difficult to document.

But one thing is sure. As Magdalena M. Avila put it in her keynote address: "There is an increasing body of evidence that people of color are subject to a disproportionate number of environmental risks in their homes and their workplaces."

Once again, in Brownsville, it appeared that the health costs associated with economic development were being borne by poor people with dark skins.

Magdalena Avila

Several people responsible for developing and disseminating the evidence Avila cited took part in the symposium, including Charles Lee, director of research at the United Church of Christ Commission for Racial Justice and author of the landmark 1987 study, "Toxic Waste and Race in the United States"; Paul Mohai of the U-M School of Natural Resources, who delivered "Environmental Racism: Reviewing the Evidence," a study of the relationship between race and the siting of hazardous waste facilities that he co-authored with his colleague Bunyan Bryant; and Carl Anthony of The University of California-Berkeley, president of the Earth Island Institute and co-founder and co-editor (with Luke Cole, another symposium participant) of "Race, Poverty and the Environment Newsletter."

Lee said his study showed that "race is the single most important factor in predicting whether or not a community has a hazardous waste site."

Mohai and Bryant's research in the Detroit metropolitan area led them to the same conclusion. "There seems to be a lot of skepticism about the disproportionate burden of pollution in this country," said Mohai, citing articles in *The Washington Post* and *The New York Times* in which the evidence was described as "anecdotal."

But, as he and Bryant wrote in the abstract of their paper, the literature "demonstrates unequivocal evidence of the prevalence of environmental inequities based on socioeconomic and racial factors.... Race appears to have both an independent and more important relationship with the distribution of environmental hazards than income."

Mohai said he and Bryant were struck by how much data had already been developed. "Knowledge about environmental inequities has been around for a long time," he said. "Most of the previous work was done in the '70s, in fact."

But, as Russell Barsh pointed out, "Racism is actualized by differences in wealth and power. You can't deal with race and class separately. They are interrelated."

An attorney, academician and prolific writer on Native American issues, Barsh is currently the United Nations representative of the Mikmaq Grand Council (Nova Scotia). In his analysis, the siting of waste dumps, landfills and incinerators is just another way in which the costs of economic development are borne by the poor.

During the Industrial Revolution, "the confiscation of resources was an enormous subsidy of Europeans by non-

Charles Lee

Europeans," he said. "We are the result of an historical process of creating power through the depowering of other people. This power is maintained by shifting the cost of production from the affluent and predominantly white to the poor and nonwhite (and, more insidiously, to the unborn). We make them live with the shit and the mines and the toxins."

The only way to begin changing the situation, in Barsh's view, is to "talk about what drives the process of overconsumption.... The environmental movement has held out false hopes of the extent to which sustainability could be achieved without reducing our 'standard of living.'"

Lee, Mohai, Anthony and Barsh made up the day's first panel, charged with presenting "An Outline of the Problem." The members of the day's second panel — Cole, an attorney for the California Rural Legal Assistance Foundation, Gerald Torres of the University of Minnesota Law School, Hazel Johnson, a Chicago neighborhood activist, and Robert M. Wolcott of the U.S. Environmental Protection Agency — faced the arguably more daunting challenge of describing "Solutions Through Law, Activism and Government."

The presence of two attorneys and a government official notwithstanding, the panelists found activism the most promising of the three avenues.

"There are three great myths you will face if you pursue environmental law," said Cole. "The first is 'the truth will set you free,' that if you're right, you're going to win."

"The second is 'the government is on your side.' This is a much greater myth in the white community than in the black or Latino communities."

"And the third is 'we need a lawyer.' This is a mistake strategically, because the courts are the polluters' turf. They want us in court. It ties us up. It forces us to frame our anger in narrow, legal terms. And the polluters wrote the laws."

"Lawyers have been a large part of the problem," Cole added. "They and the scientists have created this dense morass of environmental law that's totally incomprehensible."

While admitting "a need for new legal strategies," he maintained that "legal solutions are secondary to community solutions and political solutions. It's people like Hazel Johnson who are going to win this fight. It's not people like me."

Johnson, the only panelist without an academic degree, drew a standing ovation for her matter-of-fact but passionate presentation. After her husband and several neighbors had died of cancer and respiratory diseases, she began knocking on doors in her Southeast Chicago neighborhood, which is ringed by what she calls a "toxic donut" of steel mills, incinerators, chemical companies, paint factories, landfills and a sewage treatment facility.

"I found skin problems, breathing problems, kidney problems, birth defects," she said. She started going to hearings, making phone calls, talking to legislators. She founded People for Community Recovery, which has, among other things, stalled a chemical incinerator project and convinced the Chicago Housing Authority to remove asbestos from nearly 2,000 neighborhood apartments.

"I feel that everyone has a purpose in life," Johnson said. "This is mine. It's hard to be out there every day fighting, but if you're not out there every day, it doesn't mean anything."

Earlier in the day, Cal-Berkeley's Anthony spoke of finding "the devastation that America's love affair with the automobile had visited" when he returned to his boyhood neighborhood in Philadelphia. Evidently, it had not been able to survive until it could bring forth a Hazel Johnson.

"The environmentalists have taught us that we're wasting cans, bottles and newspapers," Anthony said. "But we're wasting much more than that. We're throwing away streets. We're throwing away houses. We're throwing away schools."

"We're also throwing away people and communities. It's not an accident that these locations where we're throwing people away are also where we have these waste sites."

Look out fungus face

U-M alum makes mark in Philippine politics

Before reunions, people speculate about how classmates have changed. But this won't be true of Miriam Santiago's next international alumni reunion. Her fellow students know more about her now from *Newsweek* than they did during their years together.

Based on interviews with alumni and faculty it appears that since graduation Santiago has transformed herself from a quiet, unassuming student to a flamboyant politician covered in newspapers and magazines throughout the world.

Santiago's acerbic campaign for the Philippine presidency makes American politics appear tame. She was quoted in *Newsweek* referring to an opponent as "fungus face." And when not boasting of her "sexy legs," she proclaims "my opponents are certifiable idiots." Santiago earned two Michigan law degrees — a L.L.M. in 1975 and a S.J.D. in 1976. After leaving the Law School, Santiago served as a judge and later led the Philippine Immigration Commission. As Immigration Commissioner she was charged with fighting corruption in the department. That turned out to be hazardous duty. "I eat death threats for breakfast," Santiago has said.

It's not clear how much success Santiago had in fighting corruption in the immigration department. "She was able to stop the practice of extorting bribes from Chinese nationals in exchange for naturalization," Ohio University political scientist Gary Hawes observed.

She then briefly headed the Agrarian Reform Commission before being ousted by outgoing Philippine President Corazon Aquino when it was discovered that army mutineers put her name on a list of potential junta leaders.

Even if Aquino hadn't withdrawn her name it's likely the senate would have rejected Santiago. Hawes said that Santiago foreshadowed her campaign by spending much of the confirmation hearing trading insults with senators. Santiago once said she would "rather stick needles in my eyes" than enter politics. But she eventually formed a political party and began a quixotic candidacy for president.

AP/WIDE WORLD PHOTOS

Miriam Santiago in the May 11 national elections.

Not part of the Philippine political establishment, Santiago turned her outsider status into an advantage. She ran a campaign as colorful as her rhetoric, featuring the music from "Rocky" and a symbol of a fist clutching a lightning bolt.

The Santiago campaign was based on a simple theme — throw the rascals out. She promised to build more prisons to house corrupt politicians.

"I articulate the deepest need of the Filipino people, which is reform of a corrupt culture," Santiago said.
Early returns suggested that Santiago's message of change may have caught hold. Two days after the May 11 election Reuters reported that early "quick count" tallies showed Santiago in first place among the five candidates.

That lead failed to last. When results came in from rural areas, where political machines dominate, Santiago's margin evaporated and former Secretary of Defense Fidel Ramos was declared the victor.

Santiago questioned the legitimacy of the results. But Hawes characterized the election as "clean, by Filipino standards." He said most neutral observers believe Ramos did enjoy the broadest base of support among the candidates, although there may still have been graft in the election.

Despite her defeat, Santiago's surprisingly strong showing sent a clear message. "Corruption is pervasive in the Philippines. Santiago's strengths largely are owed to her reputation as a graft buster," Hawes said.

What's next? Santiago is considering an offer to spend a year at Harvard. That's news likely to elicit a sigh of relief from Philippine politicians.

–By Peter Mooney

Life on the tenure track

Five who made it

Mary Coombs' first brush with law school teaching came during her second year at Michigan. Peter Westen, who was then teaching Civil Procedure, asked if she would be willing to fill in for him one day. "I got all of the hornbooks and treatises and stayed up all night, cramming to be a substitute," she recalls. But Coombs found to her distress that her neighbors in the Law Quad were partying that night. She went next door and asked them to keep down the noise level. "Look, it's my birthday," said her unconvinced neighbor. "Leave me alone." The next day, when Coombs strode to the blackboard, there was her hung-over neighbor in the second row, obviously unprepared. "Not yet fully into the professorial style, I decided not to call on him," says Coombs wistfully.

Professor Mary Coombs, University of Miami School of Law

Coombs taught the class, a few students asked questions, and she was hooked. "I was absolutely exhilarated. I thought, 'My God, people are paid to do this!'"

Like Coombs (Michigan, '78), who is now a tenured professor at the University of Miami Law School, a significant number of Michigan Law School graduates chose to teach. For those who seek tenured positions, the road is long and difficult, filled with academic politics, scholarly burdens and heavy teaching loads. But job satisfaction is often high, because of the opportunity to do intellectual work and to influence the next generation of lawyers.

Many Michigan alumni who go on to teach found their callings in Ann Arbor. **Donald Dripps**, who graduated from Michigan in 1983, thought seriously about becoming a professor during his student days. Says Dripps, "The imminent prospect of billing 2500 hours and working for someone else on problems that come to you was very unattractive. You don't get to pick what you work on." When he was selected as the editor-in-chief of the *Law Review*, the prospect of teaching became more realistic. Still, says Dripps, "I thought I would practice for a few years and make some money."

Events conspired to move him into academia earlier than he had planned, however. While Dripps was clerking for Judge Amalya Kearse on the Second Circuit, he was contacted by the University of Illinois at Urbana-Champaign and invited to visit the campus. He did. Dripps presented a paper, was given a tour of the town, and met with the faculty. Two weeks later, he was called with a tenure-track offer, which he accepted.

How had Illinois gotten his name? "My mentors at Michigan," speculates

Donald Dripps, University of Illinois, College of Law

Dripps. "I'm not sure who said what to whom, but I'm quite sure that the appointments committee at Illinois didn't get my name from the masthead of the *Law Review* or the telephone directory for the Second Circuit."

U-M Law Professor Yale Kamisar confirms that University of Michigan professors get involved in promoting Michigan students for teaching positions on both formal and informal levels. "I think it's an important part of my role. It's crucial for a national law school to place as many of its good students into teaching as possible. I think that the image one has of a law school is inevitably affected by contact with its graduates."

According to Kamisar, there are many ways that Michigan students come to their professors' attention in addition to the classroom: moot court, law review and student organizations ranging from

the National Lawyers Guild to the Federalist Society. Says Kamisar, "Sometimes, I will go to a meeting and bump into someone and say, 'Are you hiring next year? I've got a great prospect.'"

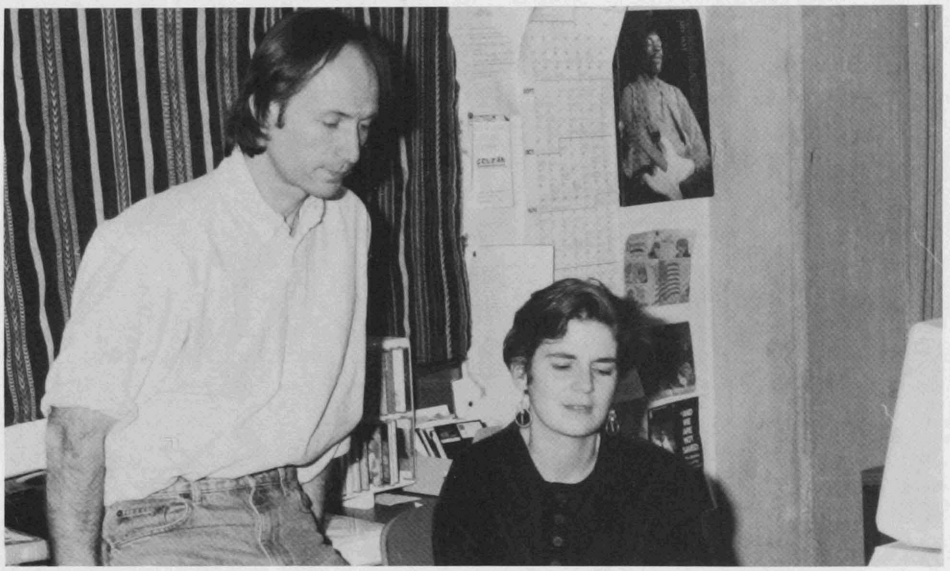
The U-M Law School also prepares a detailed listing of more than two dozen law students who have been out of school for a few years and sends it to other law schools. "There's so much competition that you have to be quite forceful, because the faculty at other schools are pushing their graduates,'' Kamisar said. "They seem to have remarkably few restraints about how hard they push their students. Some professors always tell us about prospects who they say are going to be another Frank Allen or Larry Tribe. Everyone they recommend is going to be a world-beater.''

While some teaching candidates like Dripps are hired outside of the formal process, most would-be professors attend the annual faculty recruitment conference held by the Association of American Law Schools each fall. Memories of the conference, popularly known as the "meat market," linger years after the event.

Coombs was an associate at Wald, Harkrader & Ross in Washington, D.C., when she finally decided to go into teaching in the fall of 1982. "Most of the interviews are arranged beforehand," says Coombs. "You try and fill up your dance card before you arrive. Sometimes things happen there, though."

The candidates go from room to room for interviews. "It's like musical offices. The level of nervous tension is enough to lift the hotel. In a sense, everyone is unhappy. If they really liked their job, they wouldn't be there. But unhappiness doesn't sell. The interviewers ask questions of the candidates: "What do you want to teach? What is your teaching style? What would you like to write? What are your scholarly interests?" Says Coombs, who has now been on the other side of the fence as an interviewer, "You have to show yourself off in a half hour."

The first time that the couple applied for teaching jobs, they were both practicing law in Washington, D.C. "By the time we went to the AALS conference almost all of the schools knew about our relationship. There were only a few schools that were interested in both of us and none of them had two tenure-track positions." The couple accepted jobs from the University of Kansas Law School, with Dayton receiving a tenure-track position and Stacy taking a visiting post as the co-director of a prison-rights clinic. "We decided to take the opportunity," says Stacy. "But it was a difficult situation, because as is inevitable, it was unequal." The two published an article together in the *Columbia Law Review*, and other law schools expressed interest. In the end, after a second trip to the AALS conference, Kansas made Stacy a tenure-track offer that he accepted.



Tom Stacy and Kim Dayton at the University of Kansas School of Law

Tom Stacy (Michigan, '82) and **Kim Dayton** (Michigan, '83), a husband-and-wife teaching team, knew that since they were applying to schools as a "package," that they would need the AALS meeting — and more. Says Dayton, "It was really a lot more difficult than we ever imagined it would be. There were a lot of schools that didn't want couples on their faculties. They imagine problems: one spouse will get tenure and the other will not, or the couple will get a divorce. The most serious problem is that it's not that common for a school to have two openings, especially in the right subjects."

Getting hired is only the first hurdle in

the process. For the next four, five or six years, tenure candidates have to prove themselves at their new schools. At the beginning, just learning the academic ropes is most important. "It takes a few years to get up to speed," says David Chambers, the Wade H. McCree, Jr. Collegiate Professor of Law at Michigan. "The first year, there's barely any scholarship." According to Chambers, tenure has become much more difficult to obtain in the past fifteen years at most law schools. "The scholarship portion of the job is increasingly important. At many schools, it used to be possible to get tenure almost solely based on teaching. Now, virtually everywhere, you have to write a fair amount to get tenure. How much and how good it has to be depends upon the school, but that is what counts."

Non-traditional candidates historically have faced special challenges. "The chances of getting tenure for a woman or a minority are better than they used to be," says Coombs. "But it's still probably easier if you can write and teach and present yourself in a way that the decision-makers can forget that you're not just another white male."

With each passing year, the tenure decision looms larger. Says Illinois' Dripps: "When you come in, you're pretty confident you're going to make tenure. As the years go on, though, you become concerned. There's a certain tension. If you get turned down for tenure, getting another job in teaching is harder than getting a roughly comparable job at another law firm if you get passed over for partnership. You don't want to join a faculty that has low standards."

Dripps wrote his first article in the *New York University Law Review* while he was clerking. Still, he says, "It's harder than it sounds to accomplish much writing in your first years. You end up working hard during the summers." Several articles later, Dripps was tenured in 1988. His wife, Marjorie Harris (Michigan '89) also teaches legal writing and research at Illinois.

For Kansas' Dayton and Stacy, the tenure process came and went – twice. She received tenure in 1991 and teaches criminal and civil procedure. He received tenure this year and teaches constitutional law and conflicts of law. Now that they teach together, they've discovered a different set of concerns. Says Dayton: "When you're married and you work together, people tend to treat you like a single entity. His students will come up to me and ask, 'Where's Tom?' as though I have ESP."

Still, says Dayton, "I think a lot of people think it's crazy to work together with your spouse, but it's great for me." The couple has learned to collaborate in other ways than academic. "Tenure standards are devised with a childless faculty member in mind," says Stacy. "Our son, Colin, was born prematurely and had serious health problems for a year and a half. He was on oxygen until he was two years old. For two years, we were spending almost all of our time away from teaching with our son. Our colleagues were very understanding."

For those Michigan grads who do not make tenure, that decision can be a shattering experience. "For most people," notes Dripps, "it's the first official failure they've ever had in their lives. It's a blow to the ego of people who've decided that intellectual prestige is more important than money. It is particularly difficult if you think that by all rights you should have made it." Some people will go on to other schools, but others drop out of academia.

For the fortunate ones, getting tenure means reaching the top of a steep mountain. Still, there are some personal and professional adjustments to be made. **Lea Vaughn** (Michigan, '78) was tenured last year at the University of Washington School of Law. Says she, "It's taken a year for the decision to sink in. You become incredibly self-centered in the final year, and you need to catch up with yourself and your family. I felt exhausted afterwards; I had to reset all of my goals. I spent six years getting all of my writing done and becoming a good teacher. And

Lea B. Vaughn, University of Washington School of Law

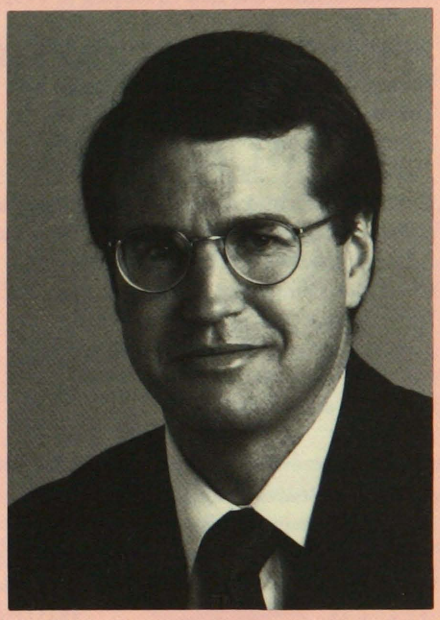
suddenly they told me, 'you've done those things.' I had to decide what I wanted to do next."

Vaughn was pleased to discover that she had additional energy to devote to new projects. "I've always spent a lot of time on my teaching, but once I got tenure, I felt more free to devote time to it. This spring, I taught a labor law class with no exam but four papers. There were 50 students. I wouldn't have done that before tenure, because I would have needed every spare moment for writing." She is now teaching six rotating courses, including labor law and civil procedure. "My teaching workload is heavier, and that's by choice. I also have some public service interests that I can finally indulge. I would like to get involved with services for children in schools. I want to develop some mediation skills, with an eye towards becoming a mediator and an arbitrator."

Getting tenure means no more moving vans for many. But for others, different horizons beckon. Coombs, who teaches family law and feminist theory, has returned north for a one-year visit at Boston University School of Law. Dripps, who teaches criminal procedure, has visited Duke and Cornell, and would consider changing schools. "There are a finite number of places I would consider going to," he says. "Lateral moves are more difficult than entry level jobs, as you develop attachments. Still, I think visiting is interesting for other than its obvious and awkward purposes. Life is short, you should see different places."

–By Andrea Sachs

Alum named Wigmore Professor



Ronald J. Allen, (J.D. '73), a nationally recognized authority on evidence and criminal law and procedure, and a member of the Northwestern University law faculty since 1984, has been named John Henry Wigmore Professor of Law. He is the fourth person at Northwestern to receive this honor. The chair was established in 1966 to honor the renowned John Henry Wigmore, whose monumental work on evidence has often been called the greatest legal treatise in the English language.

Allen is the author or co-author of five books including *Constitutional Criminal Procedure: An Examination of the Fourth, Fifth, and Sixth Amendments and Related Areas* (with Richard Kuhns, S.J.D.'78) and *An Analytical Approach to Evidence: Text, Problems and Cases* (also with Kuhns). In recent years, his research has focused on jury decision-making and the role trial judges play in the process, the relationship between jury and judges and problems in the concept of juridical evidence. Allen also conducted extensive research on the attorney-client privilege and the work produce doctrine.

A commissioner of the Supreme Court of Illinois, Allen was a member of its Attorney Registration and Disciplinary Commission Inquiry Board. In 1990, he was named citizen of the year by the Constitutional Rights Foundation, and in the 1990-91 academic year he was Stanford Clinton, Sr. Research Professor at the School of Law. Before joining the Northwestern law faculty, Allen taught at the State University of New York at Buffalo, the University of Iowa and at Duke University.

Class Notes

1943

Robert L. Ceisler was recently appointed an arbitrator by the Chief Judge of the U.S. District Court for the western district of Pennsylvania.

1944

B. Hayden Crawford has been selected as the Oklahoma attorney member on the advisory committee of the U.S. Court of Appeals for the Tenth Circuit.

1956

William C. Cassebaum became president of the Pennsylvania Bar Association at their annual meeting in May, 1992.

1962

David E. Dohnal has been elected vice president, secretary and counsel of The Kelly-Springfield Tire Company in Cumberland, Maryland.

1966

George E. Ward, chief assistant Wayne County (Michigan) prosecutor, has been elected to the position of chair, Board of Control, Saginaw Valley State University.

1968

Thomas R. Brous has been selected managing partner of Watson, Ess, Marshall & Enggas of Kansas City, Missouri where he has chaired the firm's human resource law department for the past two years.

1969

Richard G. King, a Navy commander, recently assumed command of the Navy Legal Service Office, Naval Air Station, Corpus Christi, Texas.

1970

George J. Siedel III has been named the Arthur F. Thurnau Professor at the Michigan Business School, Ann Arbor. He served as a Parsons Fellow at the University of Sydney Law School in 1991 and lectured on comparative contract law at the China University of Political Science and Law in Beijing in 1992.

1971

Hobart McK. Birmingham has joined the Tokyo, Japan office of Graham & James.

1972

Calvin B. Kirchick was recently elected as a Fellow of The American College of Trust and Estate Counsel. He is a partner in the Cleveland, Ohio office of Baker & Hostetler where he practices in the area of estate planning and related tax law, with special emphasis on estate planning involving charitable dispositions.

1973

Wilfred J. Benoit, Jr., has joined the law firm of Goodwin, Procter & Hoar, Boston, Massachusetts, as a partner and member of the Labor and Employment Law Department.

1975

Bruce E. Stanton has been appointed Chief Litigation Counsel and Secretary of LAQ, a subsidiary of ASARCO Incorporated. He was also recently elected to the Board of Directors of LAQ.

1979

Mary K. Austin was named one of two vice chairmen of the Litigation Department at Eckert Seamans Cherin & Mellott, Pittsburgh, Pennsylvania.

1980

Peter O. Shinevar has joined The Segal Company of New York City as Associate Director of Research. His research will focus on areas of public policy, legislative and regulatory issues. The Segal Company serves as consultants and actuaries for employee benefit and compensation programs in the U.S., Canada, and abroad.

1984

Robert A. Heath has been named a partner in the Louisville, Kentucky law firm of Wyatt, Tarrant & Combs.

Kirk A. Hoopingarner has become a member of the firm Holleb & Coff of Chicago, Illinois. He will concentrate in estate planning and administration.

1986

Lee Carol Johnson has been appointed Associate Director of Admissions at Georgetown University Law Center, Washington, D.C.

Andrew C. Richner was elected to serve a four-year term on the Grosse Pointe Park (Michigan) City Council.

1987

Callie Georgeann Pappas has become associated with the Washington, D.C. office of Squire, Sanders & Dempsey.

1991

Jeffery M. Brown has joined the Atlanta, Georgia law firm of Alston & Bird as an associate in the litigation department.

We regained an alum...

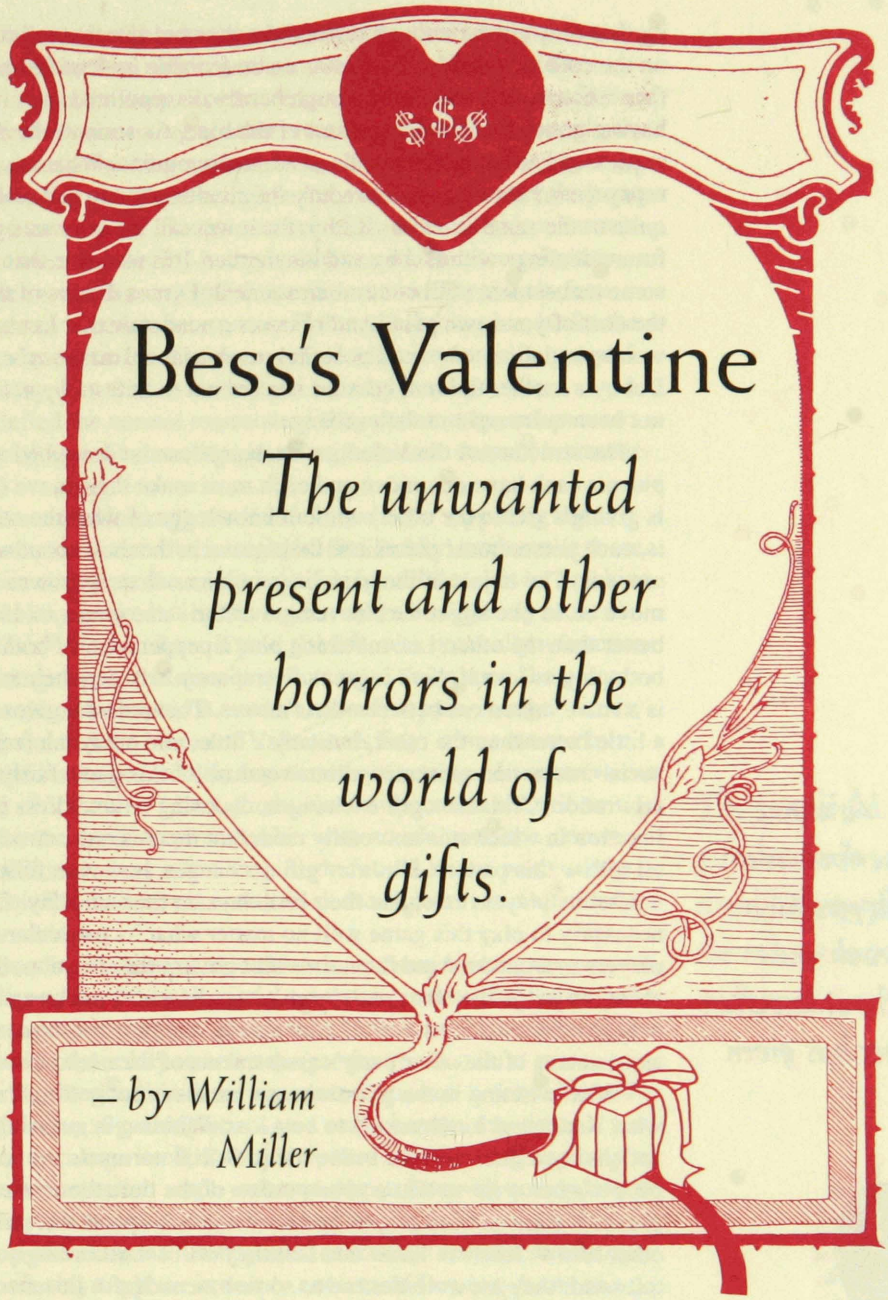
We apologize profusely for the error in Volume 35, Number 1 in reporting the death of William A. Cockell, Jr., Class of 1959. The following correspondence was received from Mr. Cockell on July 9, 1992:

Dear Sir or Madam,

I want to let you know that the report of my death in the most recent issue of Law Quadrangle Notes *is greatly exaggerated.*

I am alive and well in San Diego, California, where I am working as a corporate vice-president of Science Applications International, Corp.

Sincerely,
William A. Cockell



Bess's Valentine

The unwanted present and other horrors in the world of gifts.

– by William Miller

On Valentine's Day two years ago the door bell rang around six in the evening. At the door were the four-year old boy who lived around the corner and his mother. They had a valentine that they wanted to give to Bess, my then three-year old daughter. My wife answered the door and seeing what the occasion for the visit was went to Bess's play table and got the valentine she had had Bess make for the boy that afternoon. I marveled at my wife's skill in handling this. How in the world did she know to be ready for this exchange? The boy, a year older than our daughter, was not a very frequent playmate of Bess's and we were only on cordial but stand-offishly neighborly terms with his parents. What luck, I thought, that she had thought to have something ready for the boy. But then the glitch occurred. What Bobby handed over to Bess was an expensive doll, some twenty dollars worth. It was not a recycled toy, but had clearly been bought for this occasion. What Bess handed Bobby was some scribbling, representing an attempt to draw a heart, and a cookie that my wife, with Bess's indispensable assistance, had baked that afternoon. Things broke up quickly after the exchange. We had been fixing dinner when they appeared and Bobby and his

mother only got far enough beyond the threshold so that we could close the storm door on the cold air outside. There was an undeniable look of disappointment on the boy's face when he left and Bess, though hardly disappointed, was mildly bewildered at having gotten such a nice gift out of the blue. As soon as the door closed my wife expressed her embarrassment and acute discomfort. What could we do? How could we repay them? How could we rectify the situation? I too felt embarrassed although not quite to the same extent as Kathy, for it was not me who was going to have to have future dealings with Bobby and his mother. It is also true that both Kathy and I felt some amusement with our embarrassment. Discomfitures of this sort are funny even at the cost of your own pain. And of course, academic that I am, I started immediately wondering about why we felt acutely embarrassed and maybe even shamed and Bobby's mother did not, because she did not manifest any sense that something had not been quite right in the exchange.

The structure of the Valentine exchange can be described as a simple game. The players each have one move and each must make their move (in this instance the move is giving a gift to the other) without knowledge of what the other has given them. That is, each person must commit to their move in the dark about what the other player's move is. The object of the game is to come as close as you can to matching the other's move or, in one slight variant version of the same game, to doing ever so slightly better than the other, i.e., matching plus a peppercorn. In both versions of the game both players lose if there is great discrepancy between their moves. Both win if there is a small increment between their moves. The one who gives x plus peppercorn does a little better than the other, but only a little, and everyone feels pretty good. Normal social interaction presents various versions of this game fairly frequently. Interest arbitration, Christmas gift exchanges, choosing how to dress for a party or other social function in which it is not totally clear that there is one correct way of attiring oneself, all follow this pattern. Birthday gift exchanges, however, follow a different structure unless the players celebrate their birthdays on the same day. Certain broad skills are necessary to play this game well no matter what its particular setting may be. Adept players must understand the norms that govern the situation; they must also have the ability to judge the other party's understanding of those norms and his or her willingness to adhere to them even if understood, and they must make reasonably accurate assessments of the other party's assessments of themselves in these matters.

The structure of the Valentine exchange can be described as a simple game. The players each have one move and each must make their move without knowledge of what the other has given them.

What winning in the gift exchange means is not getting the best present. That is what Kathy and I understood to be a loss. Winning is guessing what the other will give and giving a gift adequate to requite it. Social norms do the work of coordinating people's behavior so that a good portion of the time these interactions pass without glitch. We know what to give and how much to spend and we reasonably expect that others know what we know and that they will act accordingly. Small variations can be tolerated; they are even desired to some extent. If, for instance, you want to dress at a level of formality that will accord with everyone else you might still want to wear something more tasteful or nicer looking within that level of formality than other people are wearing. If I give you a gift costing $12 and you give me one costing $10 no one is embarrassed. But when what I gave you cost a dime and what you gave me cost $20 we should, if we are properly socialized, feel awkward and embarrassed. The embarrassment, however, will not be equally distributed. The person who spent the most will feel the least embarrassed, generally speaking. Why? We can even make the question a little harder by referring back to Bess's valentine. Why was it that we, my wife and I, felt greater unpleasant feelings, when we followed the norms governing the situation, than I am supposing Bobby's mother did, who clearly broke the rules by vastly exceeding the norms of exchange for little kids on Valentine's Day?

Just what are the sources of embarrassment, shame, humiliation, and even guilt (perhaps) that were provoked by this situation? The low rollers cannot feel embarrassed that they broke the rules of the Valentine game, because they didn't. By one account the high rollers, if embarrassed, are embarrassed more because they caused the low rollers' embarrassment than because they exceeded the norms of propriety governing the game. No doubt there is a causal connection between the high rollers'

embarrassment and their failure to adhere to the norms of the valentine game inasmuch as that was what caused the low rollers' embarrassment, but that would be getting the psychology of it wrong. Their experience is one of second-order embarrassment, the embarrassment of witnessing another's embarrassment, not the primary embarrassment of having done something embarrassing. It seems that what is going on here is that there is more than one game being played and there are more than one set of norms governing the transaction. The true source of the low rollers' embarrassment is that they have also been shamed by being bested in a much more primitive game of gift exchange, one in which every gift demands a return. The simple fact remains that a gift demands an adequate return even if that gift, by its size, broke the rules governing the particular exchange. The norms of adequate reciprocity trumped the norms of Valentine's Day. Yet there is a cost here born by the high rollers. Because the high rollers defied the normal expectation they do not acquire honor to the extent that they caused shame. Their action, in effect, has made the whole transaction less than zero-sum.

A somewhat different account also suggests itself. I have been supposing the giver's lack of primary embarrassment. But it might be that Bobby' mother was more than embarrassed by embarrassing us, she might have felt humiliated, not by breaking the rules of the Valentine's Day game, but by having to realize how greatly more she valued us than we valued her. Her pain then, if pain she felt, was not really a function of misplaying the Valentine game, in the same way ours was. To be sure, the game provided the setting for her humiliation but it needn't have. Her pain, in other words, was not caused by having violated the norms of Valentine's Day; it was caused by overvaluing us and this could have occurred in any number of settings. In contrast, our pain was solely a function of Valentine's Day glitch. Yet I suspect that she felt no humiliation whatsoever, for the situation provided her with an adequate non-demeaning explanation for the smallness of our gift. Our gift, she would know, was exactly what the situation called for. The normal expectations of the situation thus shielded her from more painful knowledge.

The peculiar facts of Bess's gift show us also that who ends up bearing the costs of norm transgression will depend on the makeup of the opposing sides. Our discussion above assumed high-roller and low-roller to be individual actors in a one-on-one game (the plural and theys were adapted solely to solve the gender crisis in third person singular narration), but in Bess's situation there was mother and son on one side and mother and daughter on the other. Speaking now again only as to the emotions engendered by the game of exchange itself, Bobby's mother felt no shame and only a little embarrassment. Bess's mother felt much embarrassment. Bess felt quite pleased. But Bobby, alas poor Bobby. Here was the true bearer of the cost of his mother's indiscretion. Let us take ourselves back to Bobby and his mom as they set out for our house. Bobby, we can reasonably suppose, is deeply envious of Bess's gift and has been sick with desire for a similar gift since he has known that his mother purchased the gift for Bess. Recall the sick and painful experience of attending other kids' birthday parties when you were little. But Bobby can console himself with the knowledge that this is not a birthday gift but a Valentine gift. The return will be immediate, not miserably deferred as it is with birthday gifts. And just what has Bobby's mother lead him to believe he will be receiving? I can't predict just what, but I would guess it was a little more exciting than Bess's scribblings and one chocolate chip cookie (made according to a health food recipe no less).

Why was our discomfort so utterly unassuaged by the knowledge that our gifts involved our own efforts; they at least bore some part of our person (or at least Bess's and Kathy's)? For some reason our personalized efforts did not match the larger money expenditure of the other party. Was it just the money? It can't be that, because if Bobby had handed Bess a $20 bill we would have refused the gift without that much

The simple fact remains that a gift demands an adequate return even if that gift, by its size, broke the rules governing the particular exchange.

anxiety. Here a breach of norms governing the form of the gift (e.g., no money unless under very certain conditions) is not as capable of embarrassing the receiver, if at all, as breaches of norms governing the value of the gift. But we need to be more specific. The failure to abide by the norms governing the value of the gift only embarrasses the receiver if it exceeds the value of the normal gift; embarrassment is the lot of the giver if the gift's value is less than the norm. It seems in the end that our judgments are also quite particularized, taking into account not only the money spent, but time and energy expended, the uniqueness of the gift, the seriousness of it, how individualized it is, how much such things mean to the giver, how much they mean to the receiver, the state of relations between the parties, and so on. Our cookie and Bess's scribbling were not going to balance the money and the time Bobby's mother took in picking out a gift for Bess. Our cookies were promiscuous. They were meant to be eaten by us and by anyone who stumbled by when we were eating them. When it is not clear that the personalized effort of one party was significant, when the labors engaged in could also be interpreted as an attempt to avoid spending money, then monetary value will probably trump mere expenditures of effort. Obviously these rankings can undergo readjustment. If Bess were a recognized art prodigy, if Kathy were a professional cook, then our gifts would carry other meanings, as they would, too, if Bobby were the Cookie Monster.

One of the immediate moves that the embarrassed recipient makes is desperately to try to reconstruct a plausible account for the breach, to attempt to interpret it away by supposing legitimizing or justifying states of mind for the giver. Perhaps she was playing a different game. Could the value of the gift be partially excused because Bobby was a year older than Bess, or because Bobby was a boy, or because she had a warm spot for Bess, or a warm spot for Kathy? Was this really a gift initiating courtship in which gifts do not demand returns in the same specie? Was it simply that Bobby's mother never stinted in buying Bobby any and everything and that the toy they bought Bess had a much lower value to them than it did to us? Was she known to be inept in these kinds of things and hence each subsequent ineptitude bore a diminishing power to humiliate and embarrass? Or was the embarrassment that we feared she might be making a pitiable attempt to buy our friendship, in which case, our very palpable embarrassment at our own failings would be compounded with feeling embarrassed for her as well? Whatever, no amount of such explanation for her action made us feel any less embarrassed. And we had played by the rules! But, as it turns out, only by the rules of the Valentine's game. This game, as we discovered, was nested within a larger game of honor, and that game we had lost.

Unable to bear their relatives' scorn and worried about future wedding gifts for their other nephews and nieces, husband Yang Baosheng hanged himself after his wife, Qu Junmei, drowned herself in a vat.

The cost of our losing was our minor humiliation and shame and our great embarrassment. In our culture in that particular setting it was a cost we could bear. In other settings we may have had to suffer the sanction of being reputed cheap and even ostracized on account of it. In other cultures the humiliation and shame exact a greater toll. Reuters recently published the following story picked up by papers as column filler:

> Monday June 10, 1991, Bejing:
> **Scorn Over Gift Leads to Double Suicide.**
>
> A couple from northern China committed suicide on their nephew's wedding day after relatives scoffed at the value of their gift to him, a Shanghai newspaper said.
>
> Following custom, the couple from the province of Shanxi wrote in a gift book that they were giving a total of $3.70 as a wedding gift, less than half the $8.50 other relatives gave, said the Xinmin Evening News.
>
> Unable to bear their relatives' scorn and worried about future wedding gifts for their other nephews and nieces, husband Yang Baosheng hanged himself after his wife, Qu Junmei, drowned herself in a vat, the newspaper said.

For Reuters and the newspapers that printed it, the story was clearly intended to be comical in a black way, an example of the strange behavior of people with strange names. The story is told as one of silly people who kill themselves for trifles. Any possibility of tragedy is skillfully prevented by several devices. There are the strange

names. There is the detail of drowning in a vat which carries with it all the indignities of pure farce. And above all there are details of the money amounts involved. These people committed suicide because of $4.80. And of course therein lies the real comedy of the presentation. Such levels of poverty and economic underdevelopment are so unthinkable for us as to be a source of amusement and wonder. I don't want to be too melodramatic or even assume for more than a few sentences a tone of moral superiority. But it should be easy to discern the unfathomable shame and the desperate reassertion of dignity that these people tried to accomplish with their suicides. Suicide proved them anything but shameless and hence showed them to be people of honor. Reuters got their genre wrong. This is not comedy, but the stuff of epic and tragedy. This man and his wife were people who still understood the style and spirit of the heroic. And as for me: I hardly succeed in avoiding the self-satisfied tone of moral superiority at Reuters expense by adopting a self-congratulatory tone of literary critical superiority. But these peoples' honor survives my stylistic troubles.

MONEY AS GIFT

Money has peculiar traits as economists have known for a few centuries and theologians have suspected for even longer. It works well in the world of commerce because none of its possessors' selves attaches to it once it is transferred. To the extent that any of our person attaches to money, the less useful the particular money substance is as money. We want money to move, to be current, to mean as much to one person as to another. It is a virtue for money to be promiscuous and it may be that that was why moralists of the middle ages had such a hard time with the idea of it, if not with the thing itself. What makes money particularly suitable as money, however, is what makes it generally unsuitable as a gift. It comes without any aspect of the giver's person attached to it. No time was taken to think of an appropriate gift. No lines were waited in, no traffic jams endured, no particularizing of gift to receiver was undertaken. Nor are we willing to credit givers with the time it took them to make the money they are giving. The clock starts running only once the donor consciously begins the process of giving.

Money is that which leaves us try as we might to restrain it. We exude it, after a fashion.

Personalization cannot be supplied by giving money in the form of a check. The donor's signature can be seen to be as much an emblem of how little time the giver wants to put into giving as a sign of personalization. It is, after all, much easier to write a check than to go to the bank or teller machine to get cash. Moreover, by virtue of the check the donor has also "gifted" that labor to the recipient who must now go to the bank and stand in line to deposit the check. This labor can be a labor of love if the check is big enough. If gifts of money are going to be made there is an understanding that above a certain amount a check is the proper way to effect the transfer. But there can be no doubt that recipients are more likely to find a gift of $10 less risible if made in cash rather than by check.

Yet although we feel that little if any of our inner being, our real selves, attaches to gifts of money we also feel that money has an extraordinary capacity to bear the physical excrescences of those that have touched it before it gets to our hands and by those that will touch it after it has been in our hands. Money is magical, black-magical, in this respect. It carries the slough of others which is always rubbing off it and dirtying those that touch it without ever becoming clean for all the filth that leaps from it. But this is not inconsistent with our sense that money is current and promiscuous, that it is meant to stay with no one for very long. The main virtue of money is its ability to go out from us at a moment's notice, not unlike excrement in the broad sense of sweat, feces, fingernail parings, hair, skinflakes, dandruff, saliva. Money is that which leaves us try as we might to restrain it. We exude it, after a fashion. So money is doubly cursed from the point of view of a gift. It is not just that it conveys none of our person, none of our spirit, but that it also conveys too much of our person in the sense of dull matter and filth. This is part of the explanation of the custom of making gifts of money in the form of crisp new bills sometimes in a special envelope designed solely to carry bills. Such pristine money is not quite money because it is not yet filthy. This is why we are often reluctant to spend a new bill, especially one that has

been given as a gift and this is why when we give money we usually do so in the form of new bills. (A gift of new bills also indicates that special time was devoted to the gift since to obtain the bills a trip to the bank would have to have been undertaken.)

Money is seldom an appropriate gift unless it moves down generational levels or down status gradients. The employer can give the employee a Christmas bonus, parents can gift their kids money as can aunts and uncles their nieces and nephews. If money moves up the status grades it is seldom by way of gift. It then takes on the trappings of tribute, taxes, or protection money. Medieval people understood this only too well. A real risk was incurred anytime a gift went from low to high. It raised the expectation that it would be made again on every anniversary of the first giving, since not to give under the same circumstances that had provoked the gift in the first place would not be of neutral significance. It is one thing not to give at all, it is another to give and then to cease giving. It would suggest displeasure or disapproval of a superior, a desire to distance oneself, and as such would be a hostile gesture, a show of rebelliousness, that not giving would not have had if a gift had never been made earlier. Gifts thus had ways of rather quickly becoming mandatory exactions, of becoming customs, which we note still can bear the sense of exaction as with "clearing customs." Gifts of the faithful to God, his saints, and his ministers here on earth are more complex although in some respects they can be subsumed into any of the three categories we listed above: tribute, taxes, and protection. Some churchmen were able to complicate this picture, and not quite unconsciously, when they posed as humble and poor servants of the faithful, as lower-status beneficiaries of higher-status contributors. We should say they did both; they played the lord when they extracted tithes from the poor, often rather indelicately, and they played the humble servant when they cajoled benefactions from people they were willing to call benefactors.

If gifts moving up the status grades mimicked the behavior of taxation, gifts moving down the status grades mimicked the sociology and style of charity and alms.

If gifts moving up the status grades mimicked the behavior of taxation, gifts moving down the status grades mimicked the sociology and style of charity and alms. We can thus observe that our nervousness about gifts of money is more than just a function of such gifts being insufficiently individualized or inadequately time consuming in the making. Because gifts of money almost always go from those who have to those who don't, from high status to low, from older established to younger unestablished, they can have the look and feel of charity. A gift of money suggests that the person to whom it is given needs everything, not just a particular thing, and as such it has the capacity to insult in a different way from the latent insult implicit in gifts in general. This is why the gift of money must be so carefully limited to the precise circumstances that normalize it and euphemize it. It is thus proper to give money at key life-cycle events that show passage from tutelage to emancipation, at times, that is, when all recognize that the recipient is young and unestablished, the very purpose of the gift helping him or her make the transition to establishment. Although this varies enormously depending on social class and ethnic identification, gifts of money thus tend to be made at confirmations, graduations, and weddings. The structural resemblance of gifts of money to charity helps legitimate for some the practice of actually giving money to a charity instead of to the person who is the subject of the occasion. For example, a common bar-mitzvah gift was to give to a charity in the name and to the honor of the kid getting bar-mitzvahed. How was a thirteen-year old supposed to understand or reply? Most mothers insisted on thank-you notes from their reluctant sons and of one it is reported that he took vengeance by writing the exact same thank-you note that he sent to everyone else: Dear Mr and Mrs G—: Thank you very much for the $20 contribution to the Torah fund in my name. I will put it to very good use. Sincerely yours, Bill M. Such gifts are clearly public gestures of the giver to an audience that includes the kid's parents but not the kid at all. The kid incurred no obligation to the donor, only the parents did, who conspired to make the kid act as if a gift had been made to him. If the kid had any obligation in the matter it was prior to the gift; it was the obligation to obey his parents or at least not to embarrass them before their friends. Gifts of money can also be made at other times to

people whose status legitimates the gift, but we cannot give gifts of money to our equals or our superiors; only downward. The receiver of services in which the service involves bringing material things or taking them away can reward the server with cash; such are tips to waitpersons or Christmas gifts to letter carriers and garbage men. Here the status determinants are purely local. The custom changes when the server is a member of certain prestige professions in which the services provided are more abstract and magical as with doctors, professors, lawyers. When gifts are made to these persons they are never money.

Gifts of money, then, confirm relations of dominance and inferiority, whether the gift moves up as taxes and tribute or down as charity. They also prompt different kinds of expectations regarding recompense. If gifts of money had to be repaid in the same kind as in the case of gifts of durables with durables and gifts of consumables with consumables, it would be virtually impossible to maintain a fiction that the gift was a gift instead of a loan. Exchanges of consumables and durables are almost never identical exchanges. There are so many different types of goods and foods; if I give you a book and you buy me a book some time later you will not buy me the same book. But money is money, a set of one member. It is thus that the requital of gifts of money explicitly takes on the form of admissions and confirmations of the status differences that legitimated the gift of money in the first place. Money gifts are not to be repaid in the same specie. Receivers are to give thanks and display gratitude; they are to feel constrained to use the money "wisely," which is a euphemistic way of saying that they should use it in a way that accords with the values or expectations of the giver. Receivers often feel that such gifts oblige them to make similar gifts to others situated as they were when and if they manage to get themselves situated as their benefactor had been. Children repay their parents by being generous to their own children, the one-time student abroad repays the generosity showed him or her by doing likewise to the nationals of that country when they are here and so on. In such a way, even if the recipient understands vaguely that money is indeed moving to requite the initial obligation, it still does so in a way that reaffirms the original gift as a gift and not a loan and reconfirms the social differentiation that it helped constitute.

Gifts of money, then, confirm relations of dominance and inferiority.

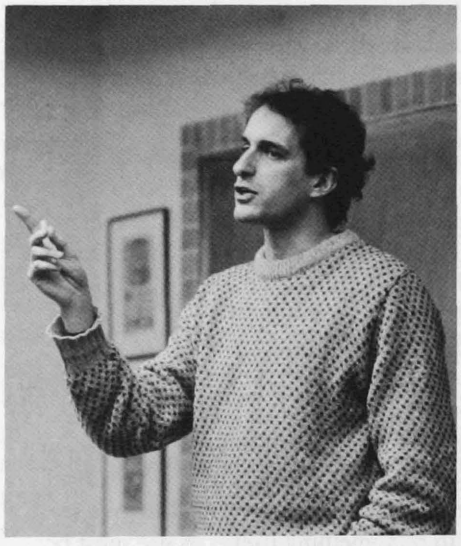
THE GIFT SHOP

Even where gifts of money might be desired by the recipient and rendered acceptable by the setting, donors are often unwilling to give it, preferring instead to buy a durable. Some recipients even self-deceive into thinking they prefer the durable rather than the money. I am hinting here at one small facet of the collection of practices that surround wedding gifts. This is a rich area of practice with much local variation and so I wish to restrict myself to one small point: the function of the gift shop. The taboo against gifts of money drives the custom of the self-signatured GIFT, those objects that proclaim their status as gift. These are what a gift shop sells. They are the myriad of items of minimal utility, usually slightly overdone even when bearing other signs of TASTEFULNESS, and generally priced higher than the same thing can be found in a non-gift shop. (The gift shop need not be an autonomous shop. General department stores have a "gifts" section). Items often are silvery or transparent as if to give them a certain liminal quality. If the object purports to be something useful its use must be severely limited. Thus eating utensils and table settings bought for gifts are not earmarked for daily use. They are to be SPECIAL and as such are intended to stand in some kind of constantly messaged and obvious symbolic relation to the occasion that elicited them. They must bear the markings of a gift, that is, of something one would never buy for oneself.

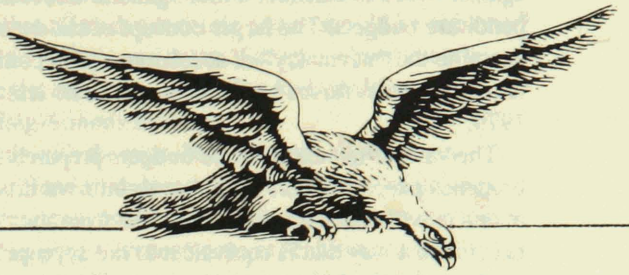
It may be that some people like to receive such things, but it is a fact that many people prefer to give these things rather than things that are marked by evident utility. We can suggest several reasons for the practice. The giver of a gift-shop gift is seldom a close relative. Close kin can give money or things more personal, like clothing. Gift-shop patrons are people who feel money gifts inappropriate and who are not intimate

enough with the recipient to select gifts that are truly personalized. They are often people who are obliged to make a gift not because of any connection to the recipient but by virtue of a relation to other family members or friends of the recipients. These are not people, in other words, who are seeking intimacy with the recipients. They do not want to enter into a cycle of exchange with them at all, but rather are continuing an exchange cycle with, for instance, the recipient's parents. What they seek is a gift that signals that they have fulfilled the social demands the occasion arguably obliged them with, a gift that proclaims "We have fulfilled our obligation to buy a gift and we want no return beyond a thank-you note that shows that you acknowledge we have discharged our obligation." Gift-shop gifts proclaim that they come with as few strings attached as any gift possibly can. They are ritual artifacts, hence the preference for objects of marginal utility, silvery or transparent. They are not to benefit the recipient so much as to indicate the proper ritual behavior of the giver. The joke (a joke at least to those familiar with the elaborate practices of cyclical gift exchanges of Melanesia and New Guinea) is that these ritual objects end up being objects of one of the few cyclical exchanges we modern Americans engage in: the regiving as gifts the gifts we receive from gift shops, in an eternally recurring cycle, to others on their weddings, graduations, or for the births of their kids. No shell necklaces for us, but an occasional shell ashtray might pass from hand to closet to hand to closet to hand to closet and never come to its final resting place.

This is excerpted from a longer chapter in Professor Miller's forthcoming book: *Humiliation & Other Essays on Social Discomfort, Violence & the Emotions.* Cornell University Press, Fall 1993.



A member of the U-M law faculty since 1985, William I. Miller taught medieval English literature at Weslyan University, Connecticut, and was an associate professor of law at the University of Houston before coming to Ann Arbor. His particular research interest is in dispute processing in pre-industrial cultures with a special interest in the bloodfeud.



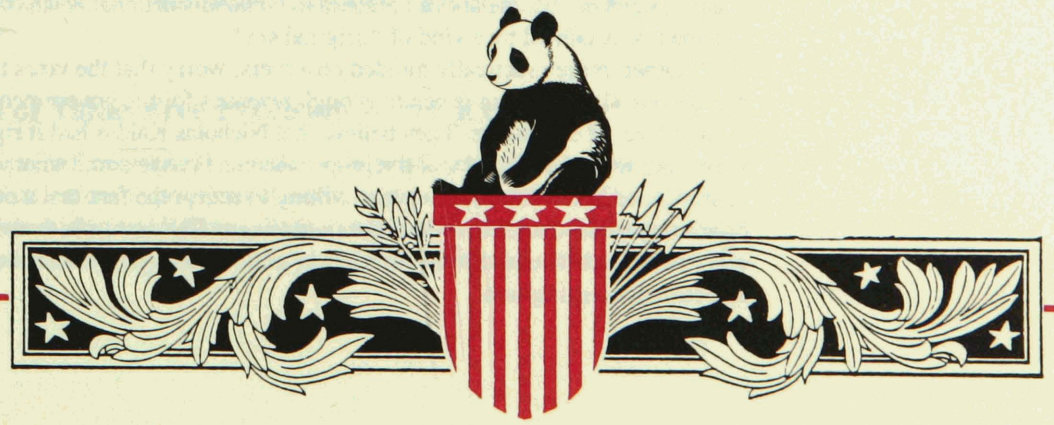
TAX POLICY AND PANDA BEARS

by Douglas A. Kahn and Jeffrey S. Lehman

In this article, Professors Kahn and Lehman argue that the concept of tax expenditures is flawed as a tool for measuring the propriety of tax provisions. It assumes the existence of one true and correct standard of federal income taxation that applies to all circumstances. To make that assumption, the proponents of the concept implicitly make a particular moral claim about the relative importance of a wide range of values, including efficiency, consumption/savings neutrality, privacy, distributional equity, administrability, charity, and pragmatism. They then measure a tax provision's "normalcy" exclusively by how it conforms to their Platonic concept of income.

Professors Kahn and Lehman maintain that there is no single ideal concept of income. Instead, there are a number of plausible candidates, the choice among which constitutes a contestable, political decision. The tax expenditure budgets create an illusion of value-free scientific precision in a world where it is neither possible nor desirable to ignore the range of societal values that speak to how an income tax code is structured. The authors believe that the tax expenditure concept distorts public debate over tax provisions.

During the past few months, *Tax Notes* has featured an extended discussion about the "normalcy" (or lack thereof) of accelerated depreciation. Two contributions to that discussion came from Professor Calvin Johnson of the University of Texas Law School, who disagreed with certain aspects of an article that Professor Kahn wrote in 1979. And the debate shows no sign of slowing down.



The interchange over the details of accelerated depreciation offers a useful backdrop against which to consider a more general issue: the intellectual coherence of the tax expenditure budgets. The larger concept of tax expenditures was what motivated Kahn to examine the "normalcy" of accelerated depreciation 13 years ago. And, to our eyes at least, the issues raised by the concept are no less interesting today than they were in 1979.

The various tax expenditure budgets prepared in the legislative and executive branches purport to carry out a straightforward task. They claim to identify those situations in which Congress has departed from the "normative," "normal," or "correct" tax rule in a way that is equivalent to the appropriation of public funds. Or, as it is sometimes put, they expose circumstances in which Congress has chosen to subsidize certain activities indirectly, through the Internal Revenue Code.

Yet, the very statement of the task exposes its Achilles heel. It assumes the existence of one true, "correct," "normative" rule of federal income taxation that should be applied to any given transaction. The collection of all such rules stands as a kind of Platonic Internal Revenue Code, an implicit reprimand to the flawed efforts of our mortal Congress.

We believe that questions of tax policy are more complicated than that. An ideal Internal Revenue Code makes no more sense than an ideal Environmental Protection Act or an ideal Penal Code. An income tax stands inside, not outside, the society that enacts it.

An ideal Internal Revenue Code makes no more sense than an ideal Environmental Protection Act or an ideal Penal Code. An income tax stands inside, not outside, the society that enacts it.

The particular contours of our federal income tax serve to reaffirm public values that are "normative" in every sense of the word except the one used by advocates of tax expenditure budgets. The disallowance of a deduction for illegal bribes confirms that we think they are naughty. Similarly, the limitation on losses from wagering transactions shows that we do not consider them to be an appropriate foundation for a career. Conversely, the exclusion from income of tort recoveries is an expression of public compassion. And our refusal to tax people when their neighbors help them move furniture, or (as some have suggested) when they enjoy a few moments of leisure, suggests a shared sense of a private domain in which even the tax collector will respect people's right to be left alone.

Experts can help to clarify the implications of one tax policy choice over another. They can show how one choice favors one particular set of moral, political, or economic commitments over another. They can argue for greater consistency in the way tensions among such commitments are resolved. They can estimate the differences in the amount and distribution of revenues that would be collected under different regimes. But, the ultimate choice must rest with the citizen and not the oracle.

The Choice Among Utopias

Let us describe a series of perspectives that are frequently presented concerning the ideal nature of an income tax:

(1) For some observers of the tax scene, any tax that alters citizen behavior is terribly unfortunate. Such observers decry any tax that alters individuals' economic incentives from what they would have been in a world with no taxes and a perfect marketplace. They would prefer that the government raise its revenues exclusively by taxing (a) activities that generate negative externalities, and (b) goods for which the demand is entirely inelastic. Since no income tax can pretend to be nondistortional, such observers view all income tax as tainted by a kind of "original sin."

(2) Other, more practically minded observers, worry that the taxes that would satisfy perspective (1) would not generate enough revenues for the government to finance its current level of operations. They believe that Nicholas Kaldor had it right almost 40 years ago, when he argued that the proper income tax system is what we now call a consumption tax. Such observers are willing to accept the fact that a consumption tax biases taxpayers' choice between labor and leisure. They console themselves with the observation that at least a consumption tax avoids biasing the choice between savings and current consumption.

(3) Another set of commentators objects that a consumption tax that would satisfy perspective (2) ignores the new economic power reflected in congealed, unconsumed, newly acquired wealth. They contend that all such economic power should be reckoned in the tax base, perhaps as a proxy for an (ideal) wealth tax. For such observers, the touchstone of income taxation must be the sum of consumption and wealth accumulation — what is commonly known as Haig-Simons income.

(4) Still other commentators find fault with the pure Haig-Simons approach endorsed under perspective (3). It would offend such commentators' notions of privacy to tax citizens on unrealized asset appreciation and on imputed income from services or durable goods. Or, at least, it would require a preposterous expenditure of administrative resources in an ultimately futile quest. These observers would prefer that we tax Haig-Simons income to the extent it is realized through market interactions.

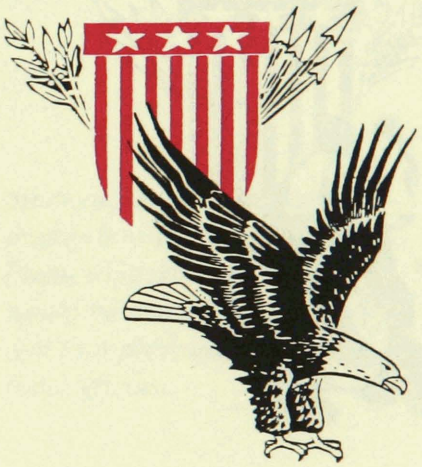
(5) Yet another set of commentators finds fault with even the market-delimited, realization-qualified version of the Haig-Simons approach suggested by perspective (4). They believe that such an approach unacceptably distorts investor incentives, leading them to overconsume and undersave, to indulge in too much leisure and not enough work. While they are in sympathy with the political vision that would allocate the tax burden according to accumulating economic power, they favor qualifications to that vision whenever the cost to productive incentives appears to jeopardize economic growth.

(6) Finally, one finds the United States Congress. It apparently believes that even the approach dictated by perspective (5) would leave the American economy in the wrong place. Not enough research and development, not enough low-income housing, not enough money in the hands of working families with children, not enough money in the hands of churches and museums, too many renters and not enough homeowners, etc., etc., etc.

If one is prone to depression, one can view the foregoing list of perspectives from (1) to (6) as identifying a kind of linear decline. Each is one step further from the Garden of Eden of distortion-free taxation. We view them differently. We prefer to see each perspective as emphasizing different elements in a basket of normative values — efficiency (in the neoclassical economic sense), consumption/savings neutrality, privacy, equity, administrability, charity, pragmatism, etc.

What is disturbing about the language of tax expenditures is its tone of moral absolutism. The tax expenditure budget is said to distinguish "normal" tax practice from that which is deviant. Sometimes it is said to distinguish provisions that are "normative" (?) from those that are (presumably) nonnormative (?!). This language is doubly confusing. First, it suggests that provisions that fit *within* the implicit baseline of the tax expenditure budget are somehow pure, safe, and good. They should not be changed because "neutral" principles have blessed them. Conversely, the language suggests that provisions that fall *outside* the implicit baseline of the tax expenditure budget (tax expenditures) are somehow corrupt, dangerous, and evil. They should be changed as soon as possible to conform with the "neutral" position. To flirt with them is to call one's probity into question.

This is, of course, a bit of an overstatement. But, it captures the rhetorical direction of the tax expenditure budget. And that rhetorical direction is grossly misleading. The tax expenditure budget's conception of an appropriate tax base has no legitimate claim to establishing the terms of political debate. It should not immunize provisions of the code from political discussion, nor should it change the burden of justification for others.



What is disturbing about the language of tax expenditures is its tone of moral absolutism.

The Illusion of Value-Free Precision — An Example

The reference point for construction of the tax expenditure budget is a measure of taxable income that is close to position (4) above, with some variations. That may be some people's Platonic Internal Revenue Code, but it is obviously not everyone's. The choice among perspectives is a contestable, contingent, political decision. Thus, while

the several existing tax expenditure budgets give an appearance of being the products of a highly sophisticated, expert, neutral examination of the tax system, they could just as accurately be characterized as exercises in mystification. They create only an illusion of value-free scientific precision in a heavily politicized domain.

Consider two features of our tax system. First, it grants a form of accelerated depreciation. Second, it does not tax unrealized gains. The first feature appears in tax expenditure budgets. Moreover, as the *Tax Notes* discussion over the past few months has made clear, many proponents of tax expenditure budgets view that as a good thing because they believe that accelerated depreciation is not "normative." Yet the second feature — the refusal to tax unrealized gains — does not appear in any tax expenditure budget.

The tax expenditure budget baseline, which distinguishes between these two features, is "normative" in the sense that it advances a particular moral or political claim. It reflects a particular balance among the ideals of efficiency, equity, neutrality, administrability, privacy, charity, and pragmatism. But, each of the six perspectives enumerated in the prior section is "normative" in precisely the same way. And at most two of the six perspectives (perspective (4) and perhaps some versions of perspective (5)) would distinguish between these two features. The others would treat both as good or both as objectionable.

One can advance plausible arguments in favor of taxing unrealized gains. One can advance plausible arguments against granting accelerated depreciation deductions. One could also argue for the status quo with regard to each of these features. But, there is no *a priori* reason to classify one feature differently from the other, or to allocate a heavier burden of persuasion to those who attack realization or defend accelerated depreciation than one allcocates to those who defend realization or attack accelerated depreciation.

Obfuscating the Debate — Another Example

In addition to this central conceptual flaw, tax expenditure budgets have the unfortunate tendency to confuse by inviting an easy equation of "tax expenditures" with direct expenditures of federal dollars. Tax expenditures automatically become "subsidies." And central questions about the appropriate goals for our American income tax get lost in the transition.

Consider the additional standard deductions available to the blind and to the elderly, listed as tax expenditures by the Congressional Budget Office. How might it be meaningful to speak of these deductions as "subsidies"? Surely they do not subsidize *behavior* that Congress desires. We may be able to make ourselves look older or younger, but dates of birth seem immutable. And sadistic though our elected representatives might be, no one believes they want taxpayers to blind themselves.

No, in this context, the only conceivable way to think of the deductions as subsidies is to emphasize that they show solicitude for a particular category of *people* — a form of welfare expenditure through the Internal Revenue Code. To be sure, the solicitude takes the form of a deduction against taxable income rather than that of, for example, a refundable credit against taxes along the lines of the Earned Income Tax Credit. Thus, it is more symbolic than financial solicitude in the case of blind and elderly people who would have no taxable income even without the extra deductions. But, some would say, that is precisely the point. The deductions are not only subsidies, but also nasty, upside-down subsidies that benefit the elderly and blind rich but not the elderly and blind poor.

The problem with this line of argument is that it tempts us to sneak around through the back door to reach a conclusion without confronting the contestable premises underlying that conclusion. In this context, the conclusion that the deductions are tax expenditures might presume that under a "normative" income tax, all taxpayers should receive the same "standard deduction." It might be understood as an initial "zero

bracket" in the progressive rate structure. But if that is so, why are not differences in standard deduction (or in the rate structure itself) based on marital status just as objectionable? Such differences exist in current law, but are not listed in the tax expenditure budget.

More directly, why isn't *any* standard deduction for nonitemized expenditures a tax expenditure? Why isn't the existence of marginal rates below the highest marginal rate a tax expenditure? What is the logic that protects a progressive rate structure from being branded nonnormative?

The debate over progressive taxation continues to follow its uneasy course. Among the defenses that seem to retain substantial support, however, are variants of the "equal-sacrifice" position — the idea that the burdens of government should exact a roughly equal sacrifice from each taxpayer. Such defenses turn out to be theoretically difficult. It is easy to assume that any individual will experience a declining marginal utility of income, as he or she moves from "necessities" to "luxuries." But, there is no reason to think that different individuals will see marginal utility decline at the same rate, or in the same pattern. And at some level, the interpersonal utility comparisons implicit in the purest conception of "equal sacrifice" become meaningless.

But this defense of progressive taxation is willing to live with a somewhat less pure concept of "equal sacrifice." It makes the social judgment that rich people can afford to spare more of their next dollar of income than poor people can. Rather than measuring citizens' personal utility curves, the rate structure can be said to describe a social judgment about what standardized hypothetical utility curve we are willing to attribute to citizens for the purpose of allocating the tax burden.

Note something about this logic: it could equally well support arguments in favor of certain forms of public direct expenditures on behalf of all poor people. Yet that fact alone is *not* enough to lead tax expenditure budgets to include the low marginal rates found in a progressive rate structure. We presume that is because one might plausibly think it *especially* relevant in the tax context — a reason to lower an individual's tax burden that might not be powerful enough to warrant the creation of a program of direct public expenditures.

Since any income tax, no matter how defined, will influence citizen behavior, it would be a strange tax system that pretended to ignore those effects.

This same logic, however, can also support the special deductions for the blind and the elderly. Such deductions can be seen as rough adjustments to the standardized hypothetical utility curve — a crude recognition that those who are blind or aged must spend more to meet their basic needs than young, sighted taxpayers must spend. Moreover, one might plausibly think such a recognition to be *especially* relevant in the tax context. A supporter of equal-sacrifice progressivity could plausibly support an adjustment to the rate schedules of the blind and the elderly without necessarily feeling compelled to support a direct expenditure program on their behalf.

Conclusion

Tax expenditure budgets divide all tax provisions into categories. One category comprises "pure tax" provisions that appear to serve no "nontax" goals. The deduction allowed a business for paying a commission to a salesman may be a representative example. The other category comprises "pure subsidy" provisions that seem to serve *only* nontax goals. The Earned Income Tax Credit, which subsidizes the wages of low-income workers with children, may be a representative example. To the extent tax provisions might arguably serve both tax and nontax goals, the function of the tax expenditure budget is to decide which set of goals predominates.

Our point is that very few items fit neatly into one category or the other. Virtually all provisions of the tax laws have elements that some individuals might consider independent of the "core" task of measuring a particular concept of "income." On the other hand, since any income tax, no matter how defined, will influence citizen behavior, it would be a strange tax system that pretended to ignore those effects. Those effects are properly important considerations in determining which conception of income we would like to use.

We think democratic debate would be promoted if we knew how much additional revenue could be gained by repealing each of the code provisions shown in the various tax expenditure budgets, as well as who would bear the incidence of that additional revenue. We think democratic debate would also be promoted in precisely the same way, however, if we knew how much additional revenue could be gained through a host of changes to provisions that are *not* shown on the tax expenditure budgets. Most tax provisions, like most policy judgments, are good only as long as their price tags are not exorbitant. Here again, the tax expenditure budget hides that fact by suggesting that certain features of the tax system are different *in kind* from others.

More generally, our critical view of tax expenditure budgets is pragmatic, not nihilistic. We do not believe that all arguments are equally good, or equally persuasive. Indeed, the two of us often disagree between ourselves about whether a particular argument is persuasive or not. But we both believe strongly that the need to evaluate such arguments on their ("normative") merits cannot be obviated by talismanic reference to an "expert" understanding of one particularized vision of the "normal" or "ideal" tax base.

We find it valuable to point out those provisions of the code that depart from what one would expect to find if one's sole concern were measuring accumulations of wealth during a taxable year. We also find it valuable to point out the different conceptions of "consumption" that might underlie arguments for or against the allowance of a particular deduction. But in precisely the same way, we find it valuable to point out the different conceptions of "privacy" or "family" or "charity" that might underlie arguments for or against other provisions of the code. Our tax laws respond to fundamental questions about what values matter to us as a society. The tax expenditure budget presumes that some of us should be deemed to know the answers better than others.

Consider the question, "Should the National Zoo house panda bears?" If one were to hold a public hearing on the matter, one could expect to hear a range of interesting arguments presented by citizens interested in issues ranging from urban planning to animal rights, from budgetary policy to biological diversity. Yet, consider how you would react to a person who offered the following testimony:

> I am from the American Society of Zookeeping Experts. In my expert opinion, and in the opinion of my fellow experts, 'normative zoos' are, by definition, zoos that house no animals other than bears(!). Following the traditions of my discipline, I have accordingly engaged in substantial research into the question whether panda bears are truly bears or merely raccoons. I report to you today that they are raccoons. Accordingly, I have placed panda bears on the Roster of Prohibited Animals.

Tax experts, like zookeeping experts, are important members of American society. Their ideas should figure prominently in debates over national tax policy. The question for us is whether tax expenditure budgets grounded in a contestable vision of tax policy are ultimately any more valuable to such debate than a Roster of Prohibited Animals grounded in an idiosyncratic vision of zookeeping.

Douglas A. Kahn is the Paul G. Kauper Professor of Law. He has written widely on the subject of federal taxation. He is the author of two casebooks and several text books on taxation. He began his academic career at Michigan in 1964.

Jeffery S. Lehman, who started teaching at the U-M in 1987, was promoted to full professor this year. His research and teaching concern poverty, taxation and the American welfare state.

Have you moved recently?

If you are a **Law School graduate,** please send your change of address to
Law School Relations
Ann Arbor, MI 48109-1215

Only non-alumni subscribers should write directly to
Law Quadrangle Notes,
915 Legal Research Building
Ann Arbor, MI 48109-1215

LAW QUADRANGLE

NOTES

THE UNIVERSITY OF MICHIGAN LAW SCHOOL / ANN ARBOR, MICHIGAN 48109-1215