THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 36, NUMBER 1

LAW QUADRANGLE

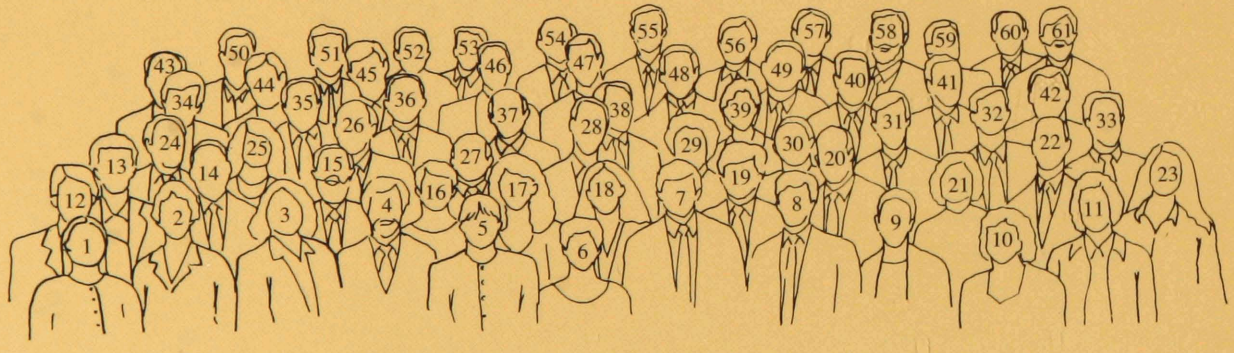
NOTES

MacKinnon Testimony on the Craig Bill

Seligman on an Alternative to Shareholder Derivative Litigation

Jackson on World Trade Rules and Environmental Policy

Update. *A large representation of the Law faculty and administrative officers, gathered to participate in the September kickoff of the Campaign for Michigan, paused on the library steps for this group portrait — the first such since the dedication of the Library Addition eleven years ago.*



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THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOL. 36, NO. 1

LAW QUADRANGLE

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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.
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Symposium on prostitution launches new law journal

With its presentation of an ambitious and successful symposium entitled "Prostitution: From Academia to Activism," held at the Law School on October 30-31 and attended by an estimated 400 people, a new Law School journal took a giant step forward in its progress from planning (begun a year before) to publication. The *Michigan Journal of Gender & Law* will present the symposium's proceedings as its inaugural issue, tentatively scheduled for distribution this coming spring.

Initial impetus for establishing a journal of feminist legal theory at Michigan grew out of a discussion among four 1991 summer starters at a Women's Law Students Association meeting at the beginning of Fall Term in 1991. Later a nucleus of eight students—Laura Berger, Julia Ernst, Jill Dahlmann, Ann Kraemer, Laura Redstone, Cynthia Smith, Susan Toepfer, and Bryan Wells—all '94L and all summer starters—coalesced to organize committees and attract broader support from fellow students and ultimately from faculty and the administration. While some concern was voiced over adding another to the number of law journals coming out of Michigan (three), all of which have treated feminist issues at some time or other, the importance of giving feminist scholarship more presence in the School by way of a publication singularly dedicated to it proved overriding.

Ann Kraemer, serving as spokesperson for the *Journal* to LQN recently, cited special faculty support from Professors Phoebe Ellsworth and Kent Syverud (the latter having taught the summer starter section of '94L), the receptivity of Dean Lee Bollinger, and also "a little extra energy" which the project received from the Clarence Thomas/Anita Hill hearings, which were taking place at the time. The event was a defining moment in gender consciousness for 1991 and a period of high public visibility for Professor Catharine MacKinnon, then on leave from Michigan.

An intense two-hour panel, "Describing the Problem," opened a two-day symposium on prostitution, which was organized and presented by the fledgling Michigan Journal of Gender and Law *this fall. Here panel member Evalina Giobbe, director of WHISPER, responds to a questionner while other participants listen carefully. They are (left to right): Vednita Nelson, advocacy director of WHISPER, Holly Fechner, Washington, D.C., attorney (moderator), John Stoltenberg, New York, writer on male sexuality, and Susan Hunter, executive director of the Council for Prostitution Alternatives, Portland, OR.*

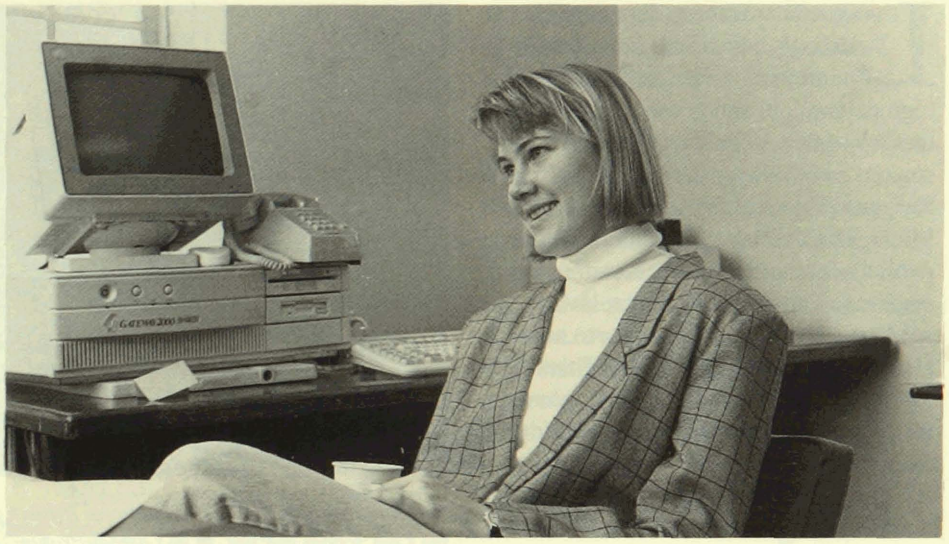
The unusual organizational structure of *Gender & Law* is described in the journal's mission statement as "egalitarian and inclusive." The 35-40 self-selected staff members have formed seven committees, each around a specific task. Each committee has a coordinator who is responsible largely for its administrative component. Each staff member holds one of three titles—Senior Editor, Associate Editor, or Member—and titles are determined by way of a point system, a certain number of points being allocated to each function on the staff.

The symposium on prostitution began Friday afternoon with a two-hour panel, "Describing the Problem," comprised of nationally known activists and speakers: Susan Hunter, Director of the Council for Prostitution Alternatives, Portland, OR; Evalina Giobbe, Director of WHISPER, St. Paul, MN; Vednita Nelson, Advocacy Director of WHISPER; and John Stoltenberg, writer on male sexuality from New York. The symposium then moved to breakaway sessions focusing on the topics Trafficking of Women under International Law, Male Prostitution, and Critique of the Liberal Feminist Philosophy on Prostitution. Keynote for the symposium was delivered Friday evening by Kathleen Berry, Professor of Sociology at Pennsylvania State University.

An address on prostitution and civil rights by Professor Catharine A. MacKinnon opened Saturday's session, followed by a panel on political solutions. Panel participants included Professors Sallyanne Payton of the Law School and

Margaret Baldwin of Florida State University College of Law, and Dorchen Leidholdt, an attorney for the Legal Aid Society of New York. Afternoon breakaway panels examined the experience of local officials in confronting prostitution and the prison-prostitution cycle. The nationally known feminist and writer Andrea Dworkin gave the closing address.

On Sunday *Journal* staff were joined for a mini-symposium by representatives of six of the nation's nine other law school publications devoted to law and gender. The scope and depth of the exploration undertaken on the weekend of the symposium give reason to believe that the new journal's goal of "combining theoretical and practical perspectives . . . [to] serve as a bridge from the classroom to the courtroom" is likely to be achieved.



A Leader But Not the Editor-in-Chief. Ann Kraemer is one of the core group of '94 that has founded the Michigan Journal of Gender & Law. *A native of rural Minnesota, Ms. Kraemer found her awareness of the importance of early, inculcated assumptions about gender coming to life during her undergraduate studies at the University of St. Thomas in St. Paul. She recently described for LQN the nontraditional, egalitarian organization of the* Journal *staff, which, among other features, operates without an Editor-in-Chief.*

During the symposium on prostitution a member of the *Journal of Gender & Law* organization removed a videotape containing sexually explicit material from an art exibit which the student sponsors of the symposium had commissioned. The tape was part of the exhibit, which had the overall title "Porn'im'age'ry: Picturing Prostitutes." The student removed the tape out of concern for speakers and participants at the conference but did so without discussing the matter with artist Carol Jacobsen, who created the tape. Ms. Jacobsen objected to the removal and this led to the closing of the exhibit two days earlier than planned.

Dean Lee Bollinger has announced that he has resolved the controversy generated by the removal of the tape by scheduling the reinstallation of the original exhibit on Law School premises and by planning an accompanying public forum. At this new conference various speakers and panelists will not only discuss such topics as pornography and violence against women but address issues raised by controversy over the removal of the tape, such as freedom of speech and principles of educational policy. Although at this writing details about format and speakers are still being worked out, Bollinger disclosed that one of the participants is to be Carol Jacobsen.

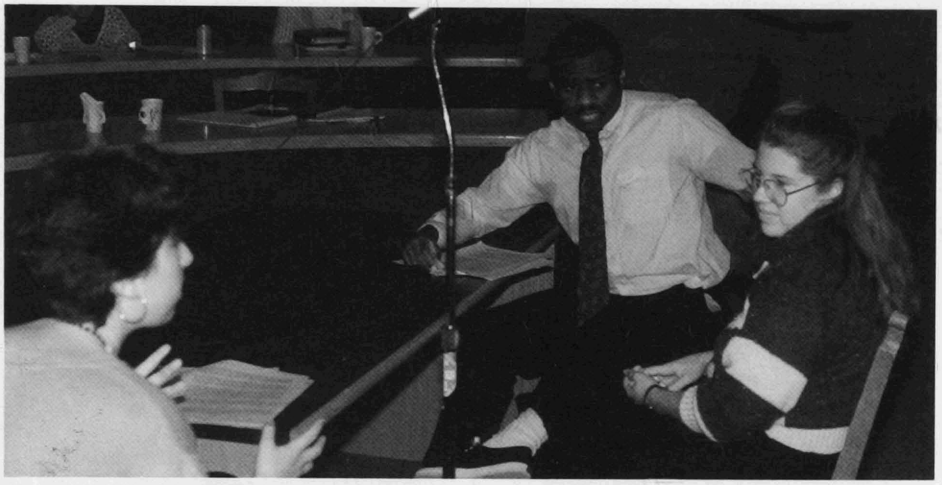
Bollinger viewed the forthcoming public forum as an opportunity to gain new understanding about a cluster of significant and emotionally charged problems: "The videotape which was part of the exhibit, and the removal of that tape by student organizers of the conference on prostitution, raise extremely important and controversial issues," he stated. "Our purpose in remounting the exhibit and holding the forum is to turn what has been a painful event for all concerned into an opportunity to discuss differences and learn."

Student project aids Haitians with asylum efforts

Law students these days are strongly identified in the public mind with the desire to secure a high paying job, and not much known for their eagerness to help others. But student involvement in the Haitian Refugee Project at the University of Michigan Law School could change the public's perception of at least some law students. Through the project, law student volunteers are working to assist Haitian refugees to apply for political asylum. Students in the project volunteered in Florida for one-week periods over the summer; currently they are traveling to Lansing, Michigan, each Saturday to assist their Haitian clients.

The Haitian Refugee Project was created in the spring of 1992 by students at Case Western Reserve University School of Law who, after volunteering at the Haitian Refugee Center in Miami during their spring vacation, saw the need to expand the project of assisting Haitians seeking political asylum into a national effort and encouraged students from law schools around the country to join the effort.

Responding to this emergency call, University of Michigan law students created the School's Haitian Refugee Summer Project. The person behind Michigan's participation in the project is second-year student Leslie Newman, who learned of the Case project through the National Lawyers Guild. Newman recruited 16 fellow students and raised the money to help participants who could not fund their own travel to Florida by tapping a wide array of sources—Law School student organizations, the School administration, and the National Lawyers Guild. Students volunteered in Florida for one-week periods over the summer, arriving on a Saturday, attending a training session on Sunday, and working with Haitian clients Monday through Friday. Each student spent the week interviewing clients and preparing addenda to asylum applications, detailing the client's life in and escape from Haiti.



New volunteers in the Haitian Refugee Project got a groundwork of training in sessions held at the Law School this fall. In this demonstration of a client interview, second-year law student Maxime Gaspard, a Haitian American, takes the role of the client; Paula Bogart, graduate student in French and project volunteer, serves as the interpreter; and Leslie Newman, a moving force in establishing the project at Michigan, is the interviewer.

Many of the summer volunteers returned to law school this fall committed to the idea of providing legal assistance for Haitians seeking asylum. According to Newman, ". . . [the] students' commitment came from our desire to use the skills and tools we had acquired by volunteering in Florida. A week is a very short time to work on political asylum cases. By the time we had figured out the process, we had to leave." Students wanted to return to Florida, where the majority of Haitian refugees have been resettled, as well as recruit and train new volunteers to work on the Project.

Before beginning any new work with clients this fall, the Project trained new volunteers, holding a two-day training session in mid-October. Over forty students attended the training, which included sessions on the human rights situation in Haiti, the basics of political asylum law, U.S. policy towards Haitian refugees, and conducting the political asylum interview.

Following the training, volunteers began working with twelve of the twenty-six Haitian refugees who have recently been resettled in Lansing, assisting them in their applications for political asylum. Initially, students must determine that each client faces a well-founded fear of persecution if he or she returns to Haiti and that he or she should therefore qualify for political asylum. To that end, project volunteers are conducting up to 12 hours of interviews with each refugee.

In January 1991, 67 percent of the people of Haiti elected President Aristide in the country's first free and democratic elections. Following Aristide's election, according to Newman, a brief period of hope and creativity began in Haiti. Aristide represented more than a new outlook or a new government to the people of Haiti, she said. He offered the chance for a new country, free from the corruption and violence that had long plagued their lives. This hopeful period quickly came to an end, however, when the military forcibly ousted Aristide from office on September 30, 1991.

In the weeks after the coup, hundreds of thousands of people left their homes and went into hiding to evade the brutal wrath of the army, Newman said. Shooting through the streets, beatings, arrests, and killings started the night of the coup and have yet to cease. Now they are more discrete, more planned, and more targeted, but Aristide supporters are still their prey.

Following the coup, thousands of Aristide supporters fled their country, taking to the sea in small boats. From October 1991 through May 1992, some 40,000 fleeing Haitians were interdicted at sea by the U.S. Coast Guard and taken to Guantanamo Naval Base in Cuba, where they were "screened" to determine if they had a valid claim for political asylum. Some 10,000 Haitians were screened in and taken to the United States to apply for political asylum, while approximately 30,000 were screened out and returned to Haiti. In May 1992, the Bush Administration instituted a new interdiction policy: Rather than being screened for valid political asylum claims, all Haitians interdicted at sea were to be automatically repatriated to Haiti.

Students' motivations for volunteering with the Haitian Refugee Project vary. "I'm learning how to deal with clients directly," said Annemarie Pace, a second-year law student volunteering with the Project and currently studying refugee law. "I think we learn a lot about the administrative process by doing this. And it just gives so much context to what we're studying in class."

"It gives me more of a sense, practically, of what you can do as a lawyer," said first-year student Audrey Richardson. "This is much different from studying Contracts."

Richardson has been to Lansing three times to interview her client, a school teacher in Haiti who was modestly involved in politics whereas his cousin was active in the Aristide campaign. In the turmoil after the coup, the cousin was killed and Richardson's client heard that "people were coming for him too," she said. He fled Haiti two days later. "We need to use the legal system to get these people the asylum they need," Richardson said.

Faculty members also see value in working on the Project. Three members of the clinical faculty, Professors Nick Rine, Yvonne Mena, and Mark Mitshkun, have volunteered to supervise student work, while Professor Alex Aleinikoff, who specializes in immigration and refugee law, has played an active role in supporting the Project and advising Newman and Supervising Attorney Jeff Dillman. Aleinikoff's students spent two weeks this semester on the Haitian refugee problem, and insights of Project members were valuable.

"It's a tremendous public service for these people in dire need of attorneys to help them navigate the difficult waters of American asylum law," Aleinikoff said. "The stakes are extraordinarily high."

President Bush was quoted by the *New York Times* in May 1992 as saying that most Haitian refugees are seeking economic opportunity in the United States and do not qualify for asylum, because they have no fear of persecution at home. At least some students working with the Haitian Refugee Project have reason to disagree.

When Melissa Worden, a second-year law student, spent a week in Miami during the summer, one of the Haitian clients she had, had been active in a literacy campaign begun after Aristide took power. After the coup, the military viewed such campaigns as subversive efforts to "empower" people, Worden said, and the client—call her Marie—was arrested. During two weeks in jail, Marie was fed twice, Worden said. She heard the screams of people being tortured. Fellow prisoners were constantly ill. When she was released from jail, she was too fearful even to return to her village and fled the country. Marie left her two young children behind. "The pain of leaving the children made it quite clear to me she did not come here for economic reasons," Worden said. "She sat with me and cried."

—— *Brian O'Donnell contributed to this story.*

Bridge over troubled waters

First-year section gets a taste of medical malpractice

Several years ago a curriculum revision instituted the practice of using a highly integrated approach to teach the staples of first-year study to one of the four first-year sections. For this section (which is selected at random) the fundamental courses are slightly shortened to make room for two additional courses: Legal Process and Public Law. When Legal Process is scheduled to meet (typically for three 1-week sessions in the Fall Term and one in the Winter) all other courses for the section (still known by time-honored tradition as "the new section") are suspended. In its first 1-week session, Legal Process resembles a course that would be so described at most law schools. Subsequent 1-week sessions, however, called "bridge weeks," are untraditional in that they serve to integrate first-year courses by studying problems that benefit from the perspective of each course.

The bridge week of November 1992 dealt with a topic that really spans a gap — one which in the public view tends to look more like a chasm: the disparate perspectives of doctors and lawyers. Medical malpractice was the rubric of the week. Class sessions drew not only on different areas of the law (torts, mediation, insurance, etc.) but also on the disciplines of and faculty from History, Economics, Public Health, and, of course, Medicine and on the good offices of several eminent malpractice lawyers. Moreover, for this week an estimated 50 fourth-year medical students joined the class.

A demonstration mediation session was held the fourth morning of the bridge week and took place in a Medical School auditorium. Mediations must by Michigan law preceed medical malpractice suits. Here (above left) the panel of three mediators—University of Michigan Medical Center Attorney Edward Goldman, Professor Theodore St. Antoine, and attorney Lore Rogers—listens to lawyers for the plaintiff and the defendant—local attorneys David Getto and Edward Stein (above right)—make their straightforward ("without puffing") presentations of each side of the hypothetical case *Lyons v. Board of Regents of the University of Michigan.*

The demonstration was the culmination of a week which, after an initial overview and a history of the medical perspective, covered "Malpractice as a Method of Assuring Quality," "The Role of Insurance in Legal and Medical Decision-Making," "Why Certain Malpractice Suits Get Filed," and "Avoiding and Settling Disputes," which included a discussion of "Varying Approaches to Informed Consent" and a presentation on "The AMA Tort Reform Proposal." A lecture by noted arbitrator Professor St. Antoine Wednesday afternoon set the stage for Thursday's demonstration mediation.

Change of venue. A recent "bridge week" offered law students a change of scene and about fifty medical students as classmates when the week's studies on medical malpractice culminated in a demonstration mediation set in an auditorium on the Medical Campus.

Professor Kent Syverud, one of the architects of the ambitious interdisciplinary effort, assessed the experience of the week as "intense in a positive way." He noted that the students and their faculty, having heard very strong views from people who differ dramatically on issues in medical malpractice, are now better able to understand just why people disagree so much. Perhaps, with this bridge week, curricular innovation has hit upon one way to start healing a rift that on occasion costs the public dear.

Frontiers, crossroads, dilemmas

Panels on major legal issues mark Campaign Kickoff

As part of the University's Celebrate Michigan (Campaign Kickoff) weekend, September 18 and 19, a group of distinguished Law School faculty and alumni participated on Friday morning and Friday afternoon in an array of panel discussions on major issues in current societal and political change. In all, over 900 students and visiting alumni took advantage of the opportunity to hear alumni experts like John Pickering, '40, Ron Olson, '66, David Belin, '54, and Roger Wilkins, '56, trade views with stellar academics on topics such as active euthanasia, the lawyer's role in an era of international interdependence, women's progress in breaking societal barriers, and freedom of speech and the press. The purpose and general flavor of the Kickoff Weekend were reported in *Law Quad Notes*, Vol.35, No.4; brief summaries of the panel discussions appear below.

John Pickering,'40, takes the rostrum to dispute some of the remarks just concluded by Prof. Yale Kamisar in the discussion of death, dying and euthanasia. Bettye Elkins,'70 (to Kamisar's right) moderated the panel, which also included Thomas Stacy,'82, Professor at the University of Kansas School of Law (at Elkins's right).

Death and Dying: Active Euthanasia Moves toward Center Stage

Bettye Elkins, '70, co-author of the official state summary of Michigan law regarding the patient's right to make decisions about their medical treatment, to refuse unwanted treatment, and to make advance directives, moderated a spirited discussion about death and dying in our present society. Panelist Yale Kamisar warned that the smudging of the societal-legal distinction between active and passive euthanasia is making euthanasia more acceptable. He maintained that legislation authorizing active euthanasia might put gravely ill patients in the position of having to justify a choice to go on living, whereas until now life itself has been its own justification.

While Kamisar has been greatly troubled by the view that removal of the feeding tube should be evaluated no differently than termination of other kinds of life support, fellow panelist, John Pickering, '40, the ABA advisor to the National Conference of Commissioners on Uniform State Laws on a Uniform State Health Care Decision Act, strongly supported this development. Pickering asserted that self-determination, effected through a durable health care power of attorney and a living will, best serves the public interest. Increased use of these two devices (which half of the audience indicated they had availed themselves of) will successfully modulate the Commission's continued opposition to active euthanasia, Pickering maintained.

Thomas Stacy, '82, newly tenured professor of law at the University of Kansas Law School, agreed that the active/passive distinction is becoming indistinguishable, but he took the position that it is morally wrong to defy the request of a competent person—as distinct from a conscious but incompetent or permanently incompetent person—to end his or her own life when the consequence is to prolong suffering of unwanted pain. Moderator Elkins contributed several important points to the group's discussion, focusing on the potential for conflict between the duty to comfort and the duty to treat, and noting that jury nullification on euthanasia cases indicates that, indeed, there are some conditions we think of as worse than death.

The Lawyer in a World of International Interdependence

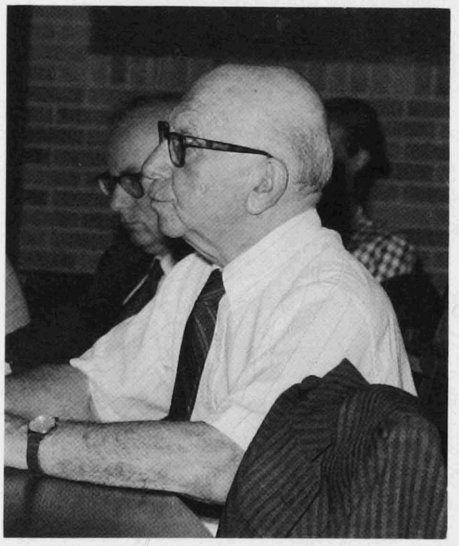
A genial moment among panel members preceded the discussion of "The Lawyer in a World of International Interdependence." They are, left to right, Paul Victor,'63, Prof. John Jackson, '59 (moderator), Prof. Ted St. Antoine, '54, and Jeffrey Smith ,'71.

John Jackson, serving as moderator, set the scene for the panel discussion of the lawyer's role in a world of increased economic and political interdependence by sketching the landscape in which lawyers with international expertise have helped to rethink and adapt the economic policies of business and government in the past four years. He described a terrain shaped by dramatic events: the confrontation in Tiananmen Square, the break-up of the USSR, the invasion of Panama, the reunification of Germany, the Gulf War, the EEC's Treaty of Maastricht, the Canada/US trade agreement, the GATT Uruguay Round, and the North American Free Trade Agreement.

Both panelists Jeffrey Smith, '71, and Paul Victor, '63, stressed that the next generation of lawyers must be familiar with global issues and cultures to be able to address the issues of an increasingly international world. Smith, a partner in Arnold & Porter, drew on his experience as former General Counsel to the Senate Armed Services Committee to discuss international interdependence as a force for both both conflict and cooperation. He cited the preeminence of American lawyers in negotiating international ventures for businesses and governments. Calling our so-called victory in the cold war the most important recent world development for lawyers, he emphasized that developing democracies around the world, including those of the former USSR, seek out American legal assistance in "creating structures of cooperation, not confrontation."

Victor, a partner at the New York office of Weil, Gotshal and Manges, pointed out that the U.S. policy of using antitrust law as a tool for protecting domestic and opening foreign markets has become a model for developing economies worldwide. He cited the Law School's late Paul Kauper as the originator of global antitrust policy.

Professor Theodore St. Antoine offered some final, "cautionary" observations about an element often forgotten in free international trade relations — the labor force. Historically a strong advocate of free trade, organized labor now takes a protectionist stance amid serious concerns about its position in a restructed labor market, which contains fewer jobs in manufacturing, former stronghold of the private sector, than in government. There are valid questions as to whether the researchers who helped fashion NAFTA paid enough attention to factors affecting the workforce. Under these conditions St. Antoine sees the best hope for protection of labor's interests in international trade relations as umbrella organizations like the International Labor Organization, in which the United States at present has too little involvement, and increased union-management collaboration in labor relations.



Listeners as well as speakers were decidedly distinguished.

Women and Justice: Where Are We Now?

Some of the most highly charged debates of the 1990s concern several women's rights issues. A Friday afternoon panel moderated by Patricia McCarty Curtner, '78, a partner at Chapman & Cutler, conducted a lively discussion of three such issues: domestic violence, reproductive rights, and sexual harrassment.

As participants in the panel on "Women and Justice," Judge Patricia Micklow,'75 (left) discussed the failure of changes in the law to change societal attitudes, particularly as they affect and impede law enforcement; Prof. Christina Whitman,'74 (right) examined implications of the Supreme Court's ruling in Planned Parenthood v. Casey.

Judge Patricia Micklow, '75, Judge Patricia Micklow, '75, District Judge of the 96th District Court in Marquette County, MI, noted that changes in the law have not changed attitudes. She backed her assertion with current statistics on domestic violence—e.g., a woman is battered every 15 seconds; 40 percent of female homicides are committed by husbands or boyfriends—which cut across factors of class, economic status, and race. She then cited impediments to legal intervention, such as police reluctance to enforce domestic violence laws for fear of invading the privacy of the home or mistaking the violence for "a minor domestic squabble," tracing some of these attitudes to roots in the English common law. Her emphasis was on the necessity for stopping the acceptance of violence and placing the onus on the offenders in these matters rather than on the victims, if this epidemic is to be halted.

Law Professor Christina Whitman, '74, discussed *Planned Parenthood v. Casey*, then the most recent abortion decision of the Supreme Court. She acknowledged that there were grounds for seeing the opinion as reaffirming the right to choose abortion but emphasized that it was also appropriate to regard *Casey* as a major disappointment to those who hoped that *Roe v. Wade* would be read to provide broad protection for women who exercised that right. *Casey's* affirmance of only "the essential holding of *Roe*" means that states may regulate in ways that clearly express hostility to abortion and increase the barriers to obtaining abortion services so long as no "substantial obstacle" to abortion is erected.

Professor Whitman suggested that the Court is likely to find a "substantial obstacle" ony when abortions are made made completely unavailable to some women. She pointed out that the Court turned pro-choice rhetoric back against women who seek abortions, using it to justify burdensome regulations that could be justified by the state's goal of ensuring that each woman's choice is thoughtful and informed. Drawing a parallel between *Casey* and the common law approach to rape, Whitman suggested that once again a woman's rights will be found to have been violated only when she resists to the best of her ability and still fails to keep her body to herself. In all other cases, whatever the pressures and difficulties that have been put in her way, she will be deemed to have chosen her situation.

Professor Catharine MacKinnon discussed the ways in which issues of sexual harrassment have transformed law in the past decade. Noting the awakening of the public consciousness by Professor Anita Hill's testimony at the Senate hearings on the nomination of Justice Clarence Thomas, MacKinnon emphasized that an equally important transformation had been achieved earlier by women who brought cases of sexual harrassment before it was recognized as illegal. She traced recognition of women's injuries in other areas of law, touching upon the developing conflict between the law of equality and of speech. (For a fuller view of Professor MacKinnon's thinking on this question see her testimony on the Craig Bill, pp. 24-27).

Freedom of Speech and the Press: First Amendment Theory and Media Practice at a Crossroads

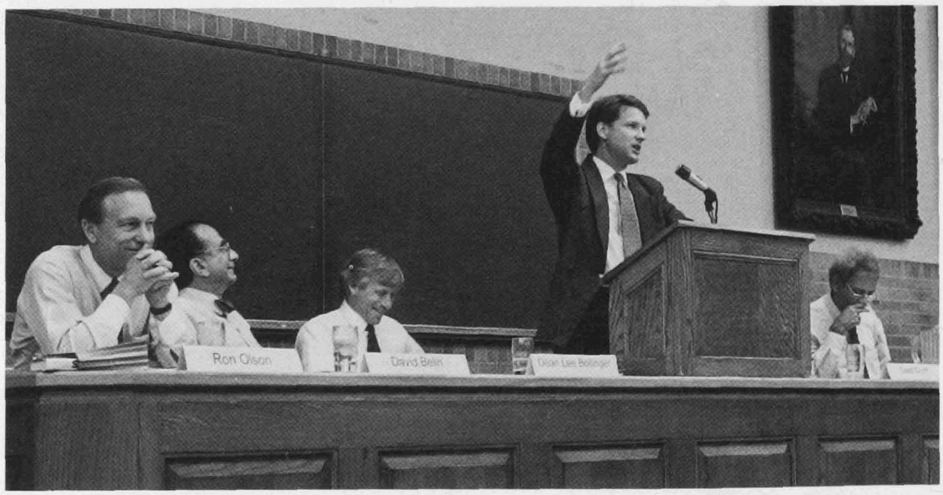
Beginning with the photo journalism of the Civil War, the role of the media in political expression has evolved in ways unimaginable to framers of the Constitution. By now the media not only inform us of events but often shape them as well, creating new ethical dilemmas which need to be explored and resolved. On Friday afternoon a lively panel discussion devoted to examining some of the elements of these dilemmas was introduced and moderated by David Westin, '77, general counsel to Capital Cities/ABC, Inc.

Dean Lee Bollinger reviewed the work of the 1947 Hutchins Commission, which found that the press then was failing to live up to its responsibilities to the public because the control of the media was too concentrated and there was too much commercialism, gossip, and invasion of privacy. Since these are factors which have continued to shape the media, Bollinger suggested that a regular means of evaluating the press and reconsidering what safeguards might be necessary, perhaps along the lines of a decennial privately funded commission, might be a sensible approach to keeping the press free but relatively honest.

Ron Olson, '66, a partner at Munger, Tolles & Olson, traced the expansion of First Amendment rights of the press from *Red Line Broadcasting* through *Writers Guild of America v. FCC, ABC, and NBC* through *Russ v. Sullivan.* Roger Wilkins, '56, Robinson Professor of History and American Culture at George Mason University, underscored the enormous power of the press and the extent to which a government figure's fate is contingent upon dealing well with the press.

The entertainment industry's treatment of politics and history reveals yet another aspect of the conflict between sensationalism and respect for veracity. David Belin, '54, a partner in the Des Moines, IA, firm of Belin, Harris, Lamson, McCormick, served as counsel to the Warren Commission in 1964 when it investigated the assassination of President Kennedy. On Friday afternoon's panel Belin analyzed the sensational bias of the Oliver Stone film *JFK* and the subsequent media promotion of the movie (including the mailing of 13,000 copies of a "*JFK* Study Guide" to high social studies and college history departments nationwide), which generated new distortions in reportage of the assassination. He warned that America's media giants have the capacity to use their "blitzkreig" of entertainment dollars to effect an "electronic eclipse" of truth.

Not all discussion was confined to the platform on Kickoff Weekend. Roger Wilkins,'56 (left—"Freedom of the Press") had a point or two to add during a chat with fellow panelists Ted St. Antoine,'54 ("Global Issues"), David Belin, '54, and Ron Olson,'66, both also "Freedom of the Press."



Moderator David Westin,'77 (standing) sets the tone for Friday afternoon's lively discussion of "Freedom of Speech and the Press" by panelists (left to right) Ron Olson,'66, David Belin,'54, Law School dean Lee Bollinger, and (far right) Roger Wilkins,'56.

Dennis Shields after a year at Michigan

New Assistant Dean for Admissions reflects on the job

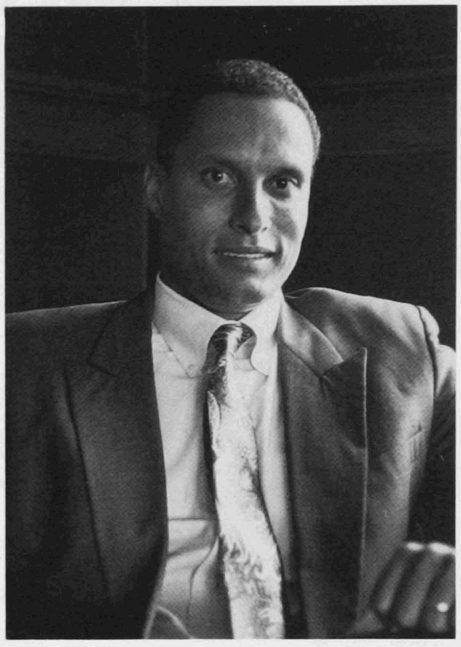
As 1991 unfolded, Iowa native Dennis Shields was settling into a new home, life with a newborn son (his second) and new responsibilities at the University of Iowa Law School, where he had studied and worked for the previous dozen years. There seemed only one thing left to do. Pick up everything and move 600 miles to Ann Arbor.

Shields, 37, was named Assistant Dean for Admissions for the University of Michigan Law School in July 1991 and took over full-time duties a short time later. Although leaving friends and colleagues in Iowa City was difficult, Shields admits, the challenges of heading the admissions program at Michigan made the decision to move an easy one.

"This came along and it was such a tremendous opportunity, I had to take it," he explains. "The hardest thing is leaving your friends, but I couldn't say no."

How does the admissions operation at Michigan differ from that at Iowa? Having worked his way up the administrative ladder at Iowa, first as a student employee, then as assistant director after receiving his J.D. in 1982, and finally taking over the reigns as director in 1984, Shields enjoyed close contact with many of Iowa's approximately 700 students. If the school was smaller, the scope of his job was larger.

"I did some academic advising, some supervising of the academic support program, that kept me clearly connected with the matriculating students," he relates. "Here, I have to work much harder to do that, but it's very important. A lot of what I like is interacting with students."



Another difference between the schools: the more than 5,000 applications that pour into Michigan each year, two to three times the number received at Iowa. In Ann Arbor, Shields enjoys the benefit of an eight-person staff that shares the load of sorting through those mounds of personal data forms, essays, and recommendation letters. "I had a much smaller staff (at Iowa)," notes Shields, who in addition to being director of admissions at Iowa was also in charge of financial aid. "It was much more of a one-man band."

During his first year at Michigan, Shields also found a difference in recruiting students. While Iowa enjoys a solid reputation that attracts interest from undergraduates in its region, selling prospective applicants from across the nation on Michigan is a different ballgame: "People automatically know about Michigan; there's just a higher level of interest across the country in finding out more about Michigan. It's much easier to get their attention. The student population, in ways you can quantify, is just a degree stronger at Michigan. And that's one of its real assets."

In fact, pointed out Shields, being in charge of admissions at a top law school brings with it its own particular problems: "You have to say 'no' to a great many people who are very strong candidates; there's nothing in their files they should be ashamed of."

Among the new practices Shields is ushering in at the admissions office is a letter he sends to all writers of recommendations for students who matriculated, to keep them abreast of what's happened. The move is part of a larger effort to personalize the admissions office for the thousands who call, visit, or write to it each year.

"We are the point of contact for a large number of people who come into contact with the Law School," he observed, "so in a large sense we are engaged in public relations. While it's safe to say this is an elite law school, we ought not to let an elitist image be the impression people take away with them. As opposed to being merely processors and decision makers, we're actually ambassadors of goodwill for the Law School."

In a typical year the admissions office at Michigan faces several tasks. September through mid-November is spent traveling on recruiting trips and getting ready to process applications. In all, staff members annually make some 60 trips to all parts of the country: to Law School Admissions Council forums in major metropolitan areas, to regional

law fairs, and to individual colleges and universities. "It's important to wave the flag," Shields says of the trips. "But the much more difficult task is to develop a network of people at undergraduate institutions with whom you have a personal relationship, those who will say, 'This person wants to apply,' and give us that extra bit of information about them. That way, you find out about the strong students before they apply, when they're juniors and sophomores."

In representing Michigan to undergraduate students of the Ivy League schools and other prestigious institutions, admissions officials say they don't find themselves facing an uphill battle. "We're one of a handful of schools the very best students at these colleges seriously consider when they think about applying to a law school," he is happy to report. "There's usually a big crowd waiting to talk to us; wanting to know about the school, what we have to offer, what chances for acceptance are."

Michigan's strong selling points include the possibilities for interdisciplinary studies, the Law School's nationally renowned faculty members, the diversity of the student body, and the college-town atmosphere of life in Ann Arbor. "We have the academic reputation," Shields explains, "but part of what we do is explain to people the other advantages of coming here."

The big gun in the recruitment arsenal is the Clarence Darrow Scholarship program, which provides a limited number of three-year, full-tuition scholarships aimed at attracting the "best and the brightest" to each year's entering class. "The idea behind the program," observed Shields, "is to attract those

"While it's safe to say we are an elite law school, we ought not to let an elitist image be the impression people take away with them."

people who could go to, and would attend, any law school in the country. They're people who, by virtue of their background and ability, will make important contributions to the intellectual life of the school." By most accounts, that's exactly the way it has turned out.

While the typical first-year class has fewer than ten Darrow scholars, recipients tend to make their presence felt immediately. "Faculty members have said they generally add significantly to class discussions from the outset. The program's been a great success."

With applications pouring in from the autumn on, December through April becomes selection time in the admissions office, the period when the majority of acceptance and rejection decisions are made. Additionally, the late winter and early spring involves hosting events such as Preview Weekends for students who have been admitted, and doing a certain amount of post-admission recruiting. Summers are spent managing the waiting list, a juggling act that has resulted in more than one student's receiving an offer only days before the start of classes, working on publications like the Law School Handbook, and gearing up for the coming year.

Following the rollercoaster pattern of the 1980s, the number of applications to Michigan's Law School entered another trough with the 1992-93 entering class: applications were off 20 percent from 1991-92. While some of that drop may be attributed to applicants' shying away from mass applications in favor of a more selective style, Shields believes the economy plays its part, as well: "There's a view out there that when a recession hits and students coming out of college are not likely to find a job, they opt for law school, but I think the opposite is true. Many young people need money, and they're more inclined to go to work. I think that's happening now."

The decline in applications was larger than those seen at comparable law schools, a fact Shields attributes to a new candor regarding what applicants should expect of Michigan. "We're a lot more forthcoming nowadays about how competitive [the admissions process] is, so people have a more realistic view. But even though we experienced a significant decline in applications, the pool is still quite strong."

For those looking for a way to make themselves stand out among the crowd of applicants, the new admissions director offers some straightforward advice: "Be yourself in the application, talk about your experience; that's what is going to separate you from others. It's not so much that you've been successful—many of our applicants have been—rather, it's how well you can articulate what you've learned from your experience."

And after a year at Michigan, away from the familiar surroundings of Iowa, Dennis Shields knows all about learning experiences.

—Michael F. Smith

Austin Anderson retires at ICLE

Austin G. Anderson, long-time director of the Institute for Continuing Legal Education (ICLE), retired December 1 to assume directorship of a newly formed organization, the Institute on Law Firm Management, which will also be headquartered in Ann Arbor. In praising Anderson's service at ICLE as a "job well done," Dean Bollinger cited the "invaluable qualities of imagination, energy, and commitment" which he brought to the directorship "through times which have challenged all continuing legal education organizations."

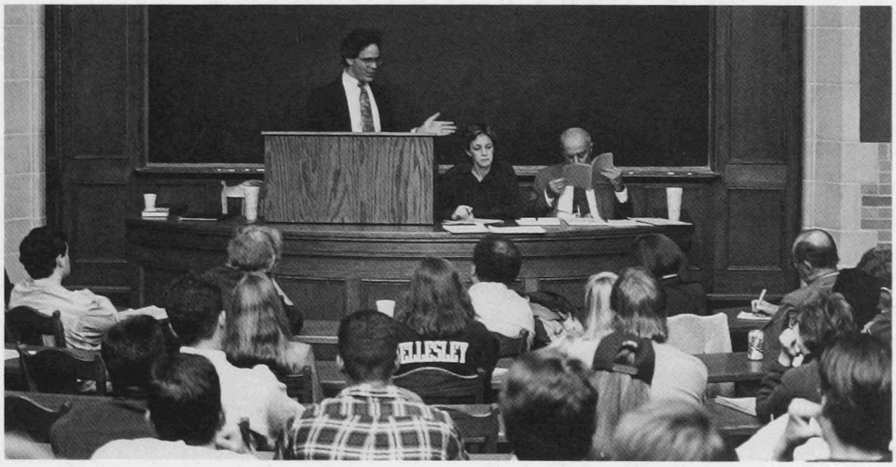
Austin Anderson

During Anderson's tenure ICLE, which is co-sponsored by the State Bar of Michigan, the University of Michigan Law School, Wayne State University Law School, the Detroit College of Law, and the Thomas M. Cooley Law School, experienced so much growth in its operations that it eventually had to relinquish its increasingly cramped quarters on the fourth floor of Hutchins Hall and build its own facility, a handsome brick structure on Greene Street not far from the football stadium.

In January 1992, Anderson became the first recipient of the Award of Excellence from the Association of American Law School's section on Continuing Legal Education in recognition of his leadership in the field. Anderson's new endeavor, which will draw on his well-demonstrated expertise in management and assisting law firms in the areas of planning, marketing, and lawyer development, is likely to transform rather than end his productive association with the Law School.

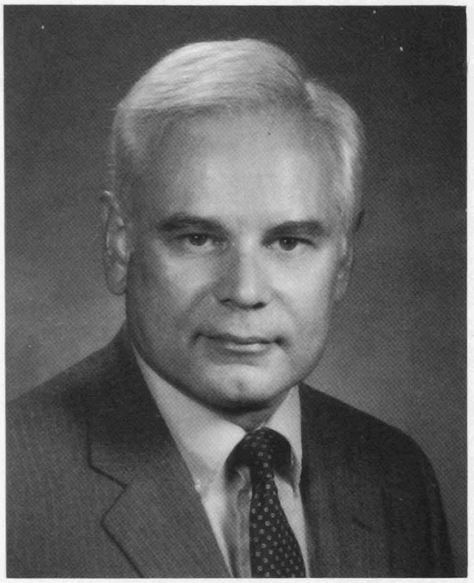
Nigerian specializes in International Human Rights Law

Professor Emmanuel Omoh Esiemokhai was in residence at the University of Michigan Law School during most of 1992 as a Research Scholar visiting from the faculty of law at the Obafemi Awolowo University in Nigeria (formerly the University of Ife, Ile-Ife). Professor Esiemokhai specializes in international law and international human rights law. During an interesting and distinguished career, he has earned degrees from Kiev and Cologne, Germany, in addition to his Nigerian degrees. A second edition of his book entitled *Human Rights in International Law* was published in 1992 (Ann Arbor: Huron Blue Company). In this study Professor Esiemokhai explores the impact of international human rights on African societies and on Nigeria in particular. He brings to the subject the perspective of a Nigerian and describes how some of the institutions of Nigeria are affected, politically and otherwise, by the international law of human rights.



Among the many lively conferences, lectures, and meetings that opened the '92-'93 academic year was a well-attended debate on the merits of capital punishment sponsored by the Federalist Society. It pitted Prof. Sam Gross against Ernest van den Haag, Distinguished Scholar with the Heritage Foundation of Washington, D.C., and a prominent proponent of the death penalty. Here Gross (left) appears to have sent his opponent scurrying back to the proverbial book. Prof. Debra Livingston moderated the event.

Waggoner plays key role in reform of law of donative transfers



Ask Lawrence Waggoner for his job description and he'll probably say he's part academic and part politician. That's because Waggoner, the Lewis M. Simes Professor of Law at Michigan and one of the nation's leading scholars on trusts and estates, is the only person ever to hold both of the two most influential positions in the country in the area of reforming the law of donative transfers: Director of Research and Chief Reporter for the Uniform Probate Code (UPC), and Reporter for the American Law Institute's Restatement (3d) of Property, Donative Transfers.

As Chief Reporter for the UPC, Waggoner played a pivotal role in the recent four-year revision of the code, culminating in its adoption by the Uniform Law Commissioners (ULC) in 1990. Waggoner was responsible for researching, drafting and presenting the uniform code, first to the Joint Editorial Board (composed of representatives of the American Bar Association, the American College of Trust and Estate Counsel, and the ULC) and a special ULC drafting committee, then to the full membership of the ULC. Following its adoption, he's served as one of the point men in the effort to convince legislatures around the country to enact the code as their own. A dozen or so states have adopted the original code in its entirety, and many more have adopted substantial parts of the code. Now, many of those states, and others as well, are at various stages of considering the new revisions. So far, Waggoner says, prospects appear bright for widespread enactment.

"One of the first things I learned in doing this, however, is that it isn't enough to produce a sound piece of legislation," Waggoner adds. "It's difficult enough to do that, but even that doesn't guarantee that your legislation will get passed or get passed completely in its promulgated form."

Since local practices and custom sometimes result in pressure on bar associations and/or legislatures to amend the uniform code before adopting it, Waggoner and other UPC advocates spend a fair amount of time discouraging such moves. "Mostly you win, but sometimes you lose," he explains. "We try to make it clear that every time a state changes [the code], it undermines uniformity. Uniformity is very desirable, not only because many decedents own property in more than one jurisdiction and many move from their state of employment to another state upon retirement, but also because another state's judicial construction of the same statutory language makes legal research, counselling, and advocacy more efficient. But then again, sometimes we have to compromise. When we do, though, we try to limit local alterations to smaller details."

Responding to societal changes since the first UPC appeared in the late 1960s, the revised code vastly increases the intestate share of surviving spouses while being sensitive to the different circumstances of multiple marriages and blended families, aims to protect surviving spouses from disinheritance by implementing a partnership theory of marriage, recognizes the dramatic growth in non-probate transfers and, in the area of wills, minimizes the influence of formalism in favor of stressing the transferor's intent. While the debate over such reforms has taken place in the rarified atmosphere populated by legal scholars and top practitioners, Waggoner believes the change will most profoundly affect the average American.

"Those who are most affected by what we do are the people with fewer

"Those who are most affected by what we do are the people with fewer assets. . . . [W]e try to provide a decent product for a person who doesn't go to a lawyer—or maybe goes to a lawyer who's not totally adequate in the area."

assets," Waggoner explains. "People with large estates generally can get the high-powered firms to look after their interests, but we try to provide a decent product for a person who doesn't go to a lawyer—or maybe goes to a lawyer who's not totally adequate in the area.

"Because surviving spouses are mostly beyond working years, they depend to a large extent on capital-generated income and social security for support. The problem is especially acute for widows, who live alone far more often and are three times more likely to be in financial distress than widowers. What they take from the decedent's estate can make a difference between a measure of economic security and sitting in an apartment with inadequate heat, because average social security payments barely exceed the poverty level. They don't have a special-interest group monitoring their rights; we represent them. We're their special-interest group, or one of them. We're particularly gratified that the American Association of Retired Persons and the National Association of Women Lawyers have endorsed our legislation."

A Michigan Law graduate who went on to a Fulbright scholarship at Oxford, followed by a two-year stint as a captain in the army, Waggoner calls his other major area of extra-academic work—Reporter for the American Law Institute's Restatement (3d) of Property, Donative Transfers—"truly a long-term project." He is now in the third year of what's expected to be a 10-year, five-volume project. Two preliminary drafts have been completed and presented to ALI advisory groups for comment.

Waggoner says that the Restatement tends to be written on a broader canvas than the UPC revisions, but will demand less post-adoption salesmanship. "The principle under which the ALI operates is that the Restatement rule is the rule an enlightened court would adopt, having all relevant arguments before it," notes Waggoner, who as Reporter is uniquely situated to advocate proposed changes. "Therefore, what ends up a black-letter rule isn't necessarily the majority rule. But if it's well reasoned, it will be influential."

A sobering by-product of working on both projects is the possibility of one's carefully crafted work being used for unintended ends.

Reflections on the responsibility that comes with creating new legal principles

A major difference between professorial activities and working on the Restatement and the revised probate code—other than having as "colleagues" a network of judges, practicing lawyers, and academics at other law schools—is the responsibility that comes with helping create new legal principles. "One thing you quickly learn is that your first draft isn't as flawless as you thought it was," Waggoner explains. And while he remains committed to life in academia (he teaches a full course load at the Law School and recently has co-authored a casebook on Family Property Law, has written several law review articles, and has given the Hess Memorial Lecture to the Association of the Bar of the City of New York and the Trachtman Lecture to the American College of Trust and Estate Counsel), Waggoner says working on the UPC revision and new Restatement tends to place things in a different light.

"You always worry that what you've written could work an injustice if it turns out to be used in a case you didn't anticipate," Waggoner notes. "Moreover, there's always going to be a lawyer on the other side trying to distort your words, and give them a meaning that wasn't intended. It's similar to the way academics feel if they become judges," he explains. "They'll all tell you that writing law as a judge is in many ways more constraining than writing proposals or analyses as an academic, where one is freer to be provocative or experimental. Writing statutes and restatements is similar to judging, because what you write can affect the lives and intra-family relationships of many people in future cases."

—Michael F. Smith

Strong U-M Law presence in December *Journal of Medicine and Philosophy*

Patricia White

Few UM law alumni, if any, subscribe to the *Journal of Medicine and Philosophy*, but many may find the December 1992 issue of special interest. Entitled "Essays in the Aftermath of Cruzan," this issue of the *Journal* with its unusual inclusion of contributions by three members of the same faculty—in this case all UM law faculty—underscores the heavy interdisciplinary work at the Law School. Contributors are **Patricia White, Carl Schneider** and **Sallyanne Payton**.

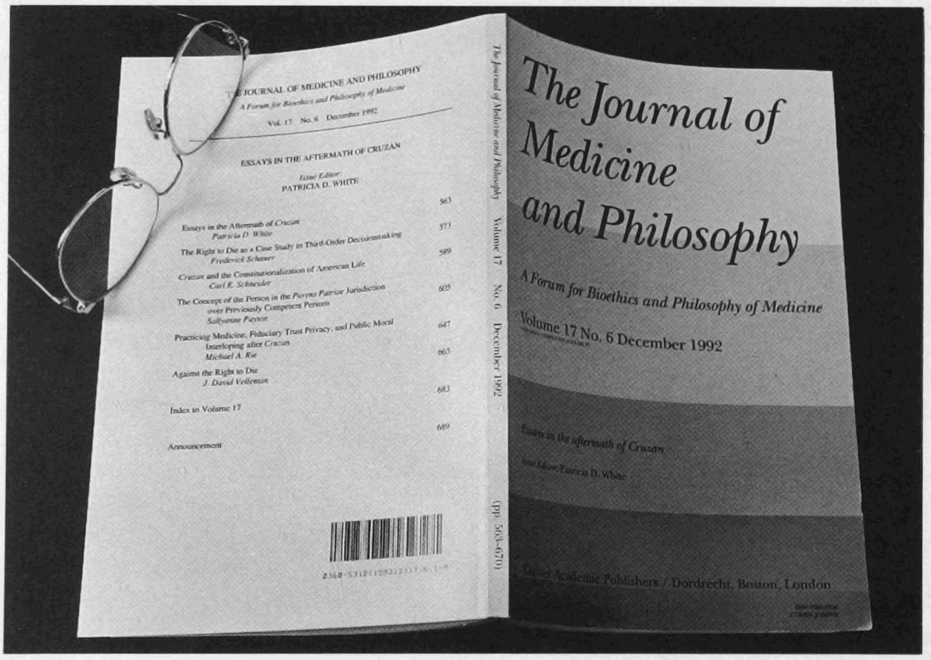
Each of the papers in the December issue of the *Journal* approaches some facet of the well-publicized Supreme Court case of *Cruzan v. Director, Missouri Department of Health* from an unusual perspective.

Nancy Cruzan was the automobile accident victim from Missouri whose parents asked the hospital, on her behalf, to stop the nutrition and hydration procedures that kept her alive after it became clear that she was in a persistent vegetative state and would not regain any mental faculties. The Supreme Court granted *certiorari* in order to consider whether the United States Constitution gives a patient the right to require medical caregivers to withdraw life sustaining treatment.

Guest editor of the issue is Patricia White, whose introduction places the "right to die" movement and the various contributions to the Symposium in perspective. Payton's paper is an analysis of the *parens patriae* jurisdiction of the state over previously competent adults. She explores the doctrine's medieval roots and finds that the relationship is a fiduciary one. She argues that because the determination of legal incompetence and the resulting transfer of custody of the person and property of the incompetent to the state would result in a drastic forfeiture of liberty and property interests were it not for the fiduciary obligation owed by the state to the incompetent, the state is under an obligation to exercise its custody in good faith. This means that it may not legitimately advance state interests or policies for their own sake. Schneider's essay emphasizes that the feature of contemporary attitudes toward law which continues to shape our reaction to cases like *Cruzan* is the tendency to think of courts as the appropriate makers of social policy. In fact, Schneider maintains, courts are poorly equipped to make social policy using rights analysis. Such policy is better created by the political process.

Adding to the heavy Maize and Blue flavor of this issue of the *Journal of Medicine and Philosophy* are papers by former Law School professor **Frederick Schauer** (now of the Kennedy School of Government at Harvard University) and by University of Michigan Professor of Philosophy **J. David Velleman**.

This issue of the *Journal* may be obtained for $19 from Kluwer Academic Publishers Group, P.O. Box 358, Accord Station, Hingham, MA 02018.



Visitors

1992-93 again finds an ecclectic ensemble of visitors gracing the School's faculty and augmenting its curriculum. Fall term brought Professors Sara Beale from Duke and Giorgio Gaja from the University of Florence; William Jentes, Esq., from Chicago, and Stanley Schwartz, Esq., from Detroit; and Adjunct Instructors Roberta Morris and James Speta, both local resources.

Professor Beale, a '74 Law alumna, who had, among other recent assignments at Duke, a place on that institution's Presidential Search Committee, taught Criminal Law and Federal Criminal Law; Professor Gaja offered a course in International Environmental Law and a seminar on International Commercial Arbitration; Visiting Professsor Jentes ('56L), prominent big-case litigator for Kirkland and Ellis, appropriately taught Complex Litigation; Visiting Professor Schwartz, well-known medical malpractice litigator and author, taught Law and Medicine Trial Advocacy. Roberta Morris, who also holds the Ph.D. in Physics, ran the Writing and Advocacy program in the Fall term and in the Winter term will teach Patent Law. James Speta ('91L) served last year as clerk to the Hon. Harry Edwards ('65L), United States Court of Appeals for the D.C. Circuit. Speta taught a seminar in Federal Appellate Courts in the Fall term and will teach Contemporary First Amendment in the Winter.

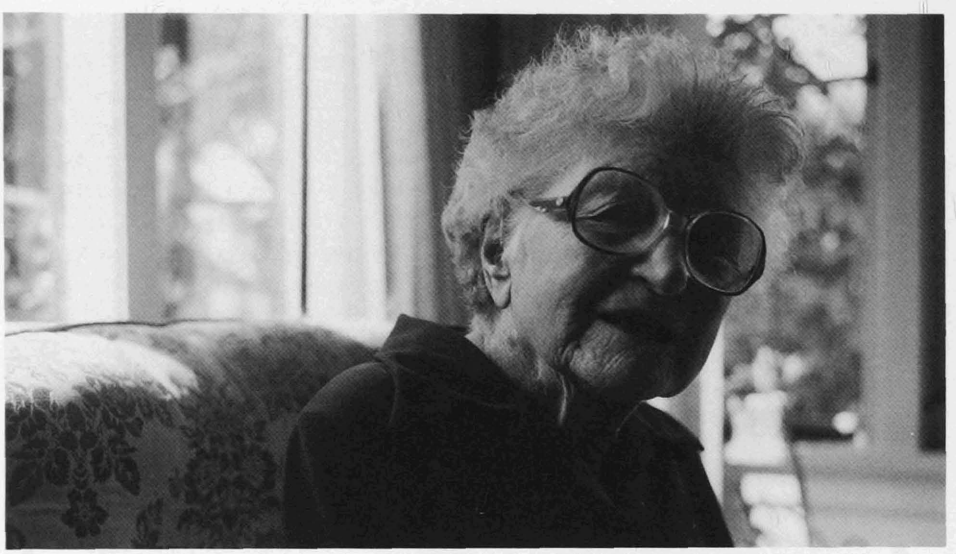
Briefer stays in the Fall term brought the following visitors from overseas, who for the most part offered specialized mini-courses: Professor Aharon Barak, Justice of the Israeli Supreme Court, from Hebrew University (Comparative Constitutional Law); Pierre Dupuy, University of Paris II (International Court of Justice); Professor Mitsuo Matsushita of the University of Tokyo (Japanese Public Law); Jochen Frowein, Max Planck Institut, Heidelberg, who, with Tokyo attorney Yochiro Yamakawa (MCL'69) offered a course in Comparative First Amendment, while Professor Yamkawa also teamed with Prof. Bollinger to teach a course on Freedom of Speech and Press: U.S. and Japan.

In the Winter term E. James Gamble of Dykema Gossett will teach Estate Planning; C. Douglas Kranwinkle, eminent practitioner from O'Melveny and Myers, Los Angeles, will give a seminar in Political Law; Robert Sedler, Professor at Wayne State University Law School, will teach Jurisdiction and Choice of Law; and Mark Rosenbaum, ACLU General Counsel in Los Angeles, will teach Civil Liberties Litigation.

In an affectionate and informal ceremony this past December the Everett R. Kinstler portrait of the late Wade H. Cree, Jr., commissioned by the School and now in place in Hutchins Hall's renovated and newly equipped moot court room, was "unveiled" before the Law School family. Dores McCree (seen above, chatting with Dean Bollinger next to some of the state-of-the-art video equipment now installed in the room) expressed her family's appreciation for the portrait and the establishment of the Wade H. McCree, Jr., professorship in law (see story, p.19). (Left) Many individual guests found a quiet moment amidst the festivities to reflect on the portrait itself.

The Lady Willie Forbus story

"[You'll] make a good stenographer for some lawyer some day," she was assured.



Lady Willie Forbus

Lady Willie Forbus turned 100 on August 24, 1992, but not surprisingly longevity is probably the least among the extraordinary attainments of Michigan's oldest living alum. It is a matter for some sober reflection that when Lady Willie, who struggled, starved, and worked her way through law school as a stenographer, went to say good-bye to the then-dean 74 years ago, he assured her she would "make a good stenographer for some lawyer some day." In some fairness, of course, it should be added that Michigan alone in a group that included Yale, Harvard, Cornell and Columbia, had accepted her as a student.

Ms. Forbus got as far as Michigan by hoeing a hard row, as recounted in an extensive profile of the lawyer and her life in the *Seattle Times* of August 30, 1992. Born in 1892 to the manager of a plantation along Mississippi's Yazoo River, she was one of six children. There were no schools in the region. Her father's job rested precariously on his turning a profit at whatever plantation he managed; consequently he changed jobs often.

To ensure her children's betterment Forbus's mother sent the six off to a town 150 miles away to form their own household and get an education. (Lady Willie was assigned the cooking and caretaking, but the household money was sent to her brothers.) The boys got scholarships to colleges all across the United States; Lady Willie took stenographic training and worked her way through the University of Mississippi.

After she acquired the law degree at Michigan and sent out letters to a wide array of lawyers asking about employment, the most promising response came from Seattle. She saved for a year to make the trip, sat up through three nights on the train, and had the last of her money, $20, stolen at her lodgings upon arrival.

Nevertheless she spent a requisite year as a law clerk in Seattle, then took and passed the bar and opened her own practice in 1919. The only woman practicing law in Seattle at the time, she retained that distinction (of which she claims not to have been made particularly conscious) for the next ten years. Her practice remained a solo one and she did not fully retire from it for seventy years.

Her career, as assessed by Judge Anne Ellington in a 1985 (Washington) *Bar Bulletin* profile, was marked throughout by her passion for social justice. As a lawyer she concentrated on representing individuals — only rarely did she take institutions or corporations as clients—and especially individuals whose personal or property rights were at stake.

A case in the early '20s set the tone for her career and apparently started her on a subsequent quest for public office. In the case she took on the Seattle Police Department and the Prosecuting Attorney on behalf of the widow of a police officer, who had been found shot to death in his car. The death had been ruled a suicide and the widow's pension therefore denied. Forbus was able to show that the man had been shot by two different guns, and the case was moved from the Prosecutor's office and brought before a grand jury, which ruled it murder.

In 1922 Lady Willie ran for Prosecuting Attorney, and lost. She also ran unsuccessfully twice for a Superior Court judgeship and was similarly unsuccessful in receiving any civil service appointment. However, in the 1940s, when she was well into middle age, she was elected to the Washington State senate, where she served for three sessions, some of that time as chair of the Judiciary Committee. According to the

Ellington profile, Ms. Forbus thought her greatest achievement as a state senator was the passage of legislation which discontinued the practice of labeling children born out of wedlock as illegitimate. She was a prominent supporter of workman's compensation, unemployment insurance, a graduated income tax, and equal pay for equal work — a position strenuously opposed at the time by the aircraft industry, dominant in the region and the major employer of its women.

By the 1950s Lady Willie had begun to focus her energies increasingly on a host of community affairs and to spend some of her freedom, as a mother whose two daughters had grown to adulthood, on world travel. She lectured widely and regularly at the University of Washington, becoming an icon of sorts to women lawyers in the region, although she consistently balked at the phrase "woman" anything. ("Why are we talking about women at all as a thing apart in a democracy?" she once asked as an aside during a speech.)

Well into her nineties, still practicing part-time, Lady Willie was an active supporter of the Equal Rights Amendment, a position she first took up in the '30s while lobbying in Washington, D.C., on women's issues and child labor laws.

Described by a local judge in the Ellington profile as "an old-fashioned liberal populist with a marvelous commitment to social justice," Lady Willie Forbus, ironically or not, has reflected honor on the institution which sent her forth in 1918 with such very modest expectations.

Chicago area alumni celebrate McCree professorship

Chicago area alumni marked the establishment of the Wade H. McCree, Jr., Professorship at the University of Michigan Law School with a luncheon this past October. The event, attended by well over fifty people, was funded by Chicago attorney John J. Lowery of Lowery & Smerz, Ltd., as a tribute to McCree, whom Lowery, not a U-M alumnus, much admired. Luncheon chairman was Donald Hubert, '73, of Donald Hubert & Associates. The organizing committee included David Adams, '76, Sharon Barner, '82, Natalie Delgado, '81, Stanley L. Hill, '73, Michelle D. Jordan, '77, Wayne A. McCoy, '72, Glenn M. Price, '73, James L. Rhodes, '74, and Arthur P. Wheatley, '73.

In a speech to the gathering, which included Mrs. Wade H. McCree, Jr. (Dores), U.S. Magistrate Judge Joe B. McDade,'63, of the Central District of Illinois stressed the imperative of "insuring that equal opportunity for Afro-Americans remains on the front burner of the national agenda" and cited McCree as a "hero and a mentor."

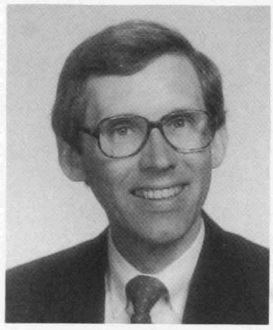
Judge McCree was, by a few months, the second African American to be named to the federal judiciary, and he became the first to reach the federal appellate court, sitting on the 6th U.S. Circuit Court of Appeals from 1966 to 1977. Similarly, he was the second African American to hold the post of Solicitor General of the United States, the first having been Thurgood Marshall. It was from this position that McCree came to the University of Michigan Law School in 1981 as Lewis M. Simes Professor of Law. The McCree Professorship is the first such honor to be bestowed upon an African American by a major law school, according to McDade.

At the luncheon Dean Lee Bollinger announced that David Chambers, noted professor of family law and longtime friend of McCree's, had been named as first recipient of the professorship and added that the endowment for the chair is halfway to its $500,000 goal.

Pictured at the Chicago luncheon (left to right): Dean Lee Bollinger, Judge Joe B. McDade,'63, Dores McCree, Donald Hubert,'73, and Earl Neal,'52.

Peter Swiecicki, Adwokat Amerykánski

To meet the many new challenges which accompany its conversion to capitalism, the Polish government has recruited the assistance of the best and the brightest, including Michigan Law School alumnus Peter Swiecicki, '82. Peter went to Poland in 1990 at the invitation of his cousin Marchin Swiecicki, Poland's Minister of Foreign Economic Relations. After serving for three months as his cousin's advisor,



Peter Swiecicki

Peter became an advisor to the Minister of Finance. In that capacity he assisted in the drafting of Poland's new foreign investment laws and banking laws. He also worked to privatize foreign trade organizations.

The United States and other democracies have a whole body of institutions which we too often take for granted, Peter says, and he notes that as to establishing a criminal law, "[T]hey really need a Yale Kamisar or Jerry Israel over here." Peter says that his work has often been frustrating. "The new democratic system . . . requires endless debate." For example, it took two years to reach a compromise between the need to receive foreign capital and the worry that Poland would sell its existing assets too cheaply.

In August 1991, Peter left the government to establish the Warsaw office of Dickinson, Wright, Moon, Van Dusen & Freeman, a firm with which he had previously been, and still is, a partner. He continues to serve as a governmental advisor on banking reform, however, and he is actively involved in the privatization of state banks.

The most difficult part in setting up a law practice, Peter claims, was obtaining a phone line. After waiting in line for days to receive an application for phone line approval, Peter perceived an opportunity to show how private initiative can work; he entered a joint venture with Ameritech and is currently establishing a cellular phone network.

Because there are no rules governing the practice of law in Poland by foreign lawyers, practicing in Poland is not a difficulty; what has proven hard, Peter says, is finding Polish attorneys to work with. There are only 5,000 admitted attorneys in Poland, and Dickinson, Wright needs ones who speak English, live in Warsaw, and are experienced in commercial law. Dickinson, Wright now employs only two Polish attorneys.

Before law school, Peter acquired a bachelor's degree from the Georgetown University School of Foreign Service and a master's degree in history from Columbia. He practiced with Dickinson, Wright in Detroit from 1982 to 1990, and became a partner in 1988.

While in the United States, he actively supported Solidarity and served as president of the North American Study Center for Polish Affairs, a non-profit educational association.

Jean Ledwith King joins Glass Ceiling Commission

Jean Ledwith King, '68, an Ann Arbor attorney and long-time activist against sex discrimination, was named in September 1992 to the so-called Federal

Jean Ledwith King

Glass Ceiling Commission. Among King's many distinctions is her election in 1989 to the Michigan Women's Hall of Fame on the basis of her work on human rights issues. King also helped form the Women's Caucus of the Michigan Democratic Party, the first women's caucus within a major U.S. political party. In 1988 the Washtenaw County Trial Lawyers Association presented her with its Outstanding Lawyer of the Year award.

Establishment of the Glass Ceiling Commission was sponsored by U.S. Representative William Ford (D-Mich., 13th Dist.) as part of the 1991 Civil Rights and Women's Equity Employment Act, and it was Ford who urged House Speaker Thomas Foley to nominate King. The 21-member commission is charged in the act with conducting a study and preparing recommendations on "eliminating artificial barriers to the

advancement of women and minorities" and "increasing the opportunities and developmental experiences of women and minorities to foster [their] advancement . . . to management and decision-making positions in business."

Dale Oesterle receives chair at Colorado

Dale Oesterle, J.D. '75, has been named the Monfort Professor of Commercial Law at the University of Colorado in Boulder. Oesterle was a professor at the Cornell Law School from 1979 to 1992. He is the author of *Mergers, Acquisitions, and Reorganizations* (West, 1992), as well as of numerous articles on subjects ranging from remedies to civil procedure to corporate finance. His latest article concerns the corporate and regulatory structure of the New York Stock Exchange. From May to October of 1992, Professor Oesterle served as the William Henry Foundation Fellow, a University-wide chair at the University of Auckland in New Zealand. Here he taught a seminar on advanced topics in corporate and securities regulation and also participated in drafting new corporation and insolvency legislation for the New Zealand government.

At Colorado, Oesterle will teach courses on corporate finance, corporations, mergers and acquisitions, bankruptcy, and securities regulation. As he prepared to move from Ithaca to Boulder, Oesterle reflected "I owe a great deal to Cornell, where I learned to teach after a rocky start. My family and I will miss it, but we look forward to the great opportunity at Colorado."

Class Notes

1950

Stuart Dunnings received two notable honors this past fall. The National Bar Association inducted him into its Hall of Fame and he was a recipient of the Champion of Justice Award from the State Bar of Michigan at its 1992 Annual Meeting. Dunnings, a Lansing MI attorney, was cited for his efforts on behalf of racial justice, community improvement, and professional excellence. He and his wife Janet are the parents of four attorneys.

1954

Stephen A. Bromberg, a Director and Shareholder in the Birmingham MI office of Butzel Long, was recently named to the Board of Directors of the Detroit Symphony.

1955

Colombia's President Cesar Gaviria recently conferred the meritorious title Defender of Justice on **James F. (Jim) Smith**. The government of Colombia established this order of merit as part of its struggle against drug trafficking and in defense of its

James F. Smith

democratic institutions. The title recognizes Smith's efforts, as Director of the U.S. Agency for International Development for Colombia, to further profound reform of that country's judicial system.

Smith served as A.I.D. chief in the U.S. embassy in Bogota for the past eight years. He retired this fall after some thirty years in the U.S. Foreign Service, which included assignments in Peru, Morocco, Venezuela, Mexico, Afghanistan and Ecuador as well as in Colombia. He and his wife, Dr. Luz Marina Gomez-Smith, who is also an attorney, are residing in Tucson, AZ.

1957

James E. Pohlman has been elected Secretary-Treasurer-Elect of the International Association of Defense Counsel. Pohlman, a trial lawyer, is chairman of the litigation department of the firm of Porter, Wright, Morris & Arthur, Columbus, Ohio.

1959

John Ziegler officially vacated his job as NHL president after 15 years and in less than a week was named an adviser to the Detroit Tigers by his long-time friend and new Tigers owner, Mike Ilitch.

1963

D. Michael Kratchman, now practicing business litigation and securities arbitration law in Southfield MI, has recently affiliated with U.S. Arbitration and Mediation of Michigan, Inc., a firm which provides alternative dispute resolution services.

Norman O. Stockmeyer, Professor of Law at the Thomas M. Cooley Law School, was designated Trustee Emeritus of the Michigan State Bar Foundation at that organization's 1992 annual meeting in mid-September. He was so honored for his 21 years of service on the Foundation's Board of Trustees, which included three years (1982-85) as its President.

1966

Terence R. Murphy, founding partner of Murphy & Malone and for two years a member of Miller, Canfield, Paddock and Stone's Washington office, formed Law Offices of Murphy & Associates on September 1, 1992. The Washington D.C. firm practices in the area of international trade and business law.

Richard E. Rassel, a Director and Shareholder in the Detroit firm of Butzel Long, has been elected to the Executive Committee of the Board of Directors of Lex Mundi.

1967

Edwin K. Hall assumed the responsibilities of Chief Counsel to the United States Senate Committee on Foreign Relations as of the end of 1991.

1970

John M. Kamins, a partner in Honigman Miller Schwartz and Cohn, Detroit, has been elected Chairperson of the Public Corporation Law Section of the State Bar of Michigan.

1971

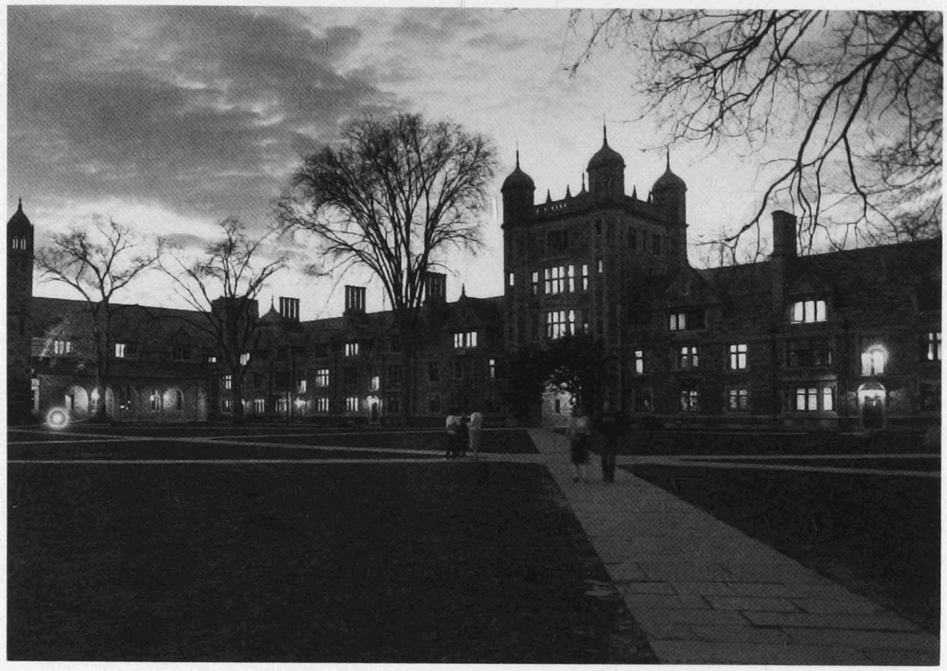
Thomas P. McMahon has become special counsel to the Denver CO firm of Williams, Youle & Koenigs, P.C., specializing in complex litigation. McMahon is Chairman of the Antitrust Subsection of the Colorado Bar Association and Vice-Chair of the State Antitrust Enforcement Committee of the ABA Antitrust Section. From 1981 to 1989 he served as Chief of the Antitrust Unit for the State of Colorado.

1973

William D. Meyer recently completed a one-year sabbatical from his firm, Hutchison, Black, Hill and Cook, Boulder CO, during which he served as liason to the Republic of Bulgaria on behalf of the Central and East European Law Initiative of the American Bar Association and pursued a variety of law reform projects.

1974

Stephen R. Drew, a private litigator in the Grand Rapids MI firm of Drew, Cooper & Anding, has been elected president of the Grand Rapids Bar Association as of July 1, 1992.



Richard G. Moon of the management employment law firm of Moon, Moss, McGill & Bachelder, headquartered in Portland ME, was elected as a management member of the Council of the Labor and Employment Law Section of the American Bar Association at the ABA's Annual Meeting in San Francisco, August 1992.

In a reorganization of the State Bar of Michigan's executive staff, **Marcia Proctor** has been promoted to General Counsel from Regulation Counsel.

1975

Detroit attorney **Connye Y. Harper** was elected vice-chairman of the Labor Law Section of the National Bar Association at its annual meeting and was re-elected recording secretary of the Women Lawyers Division of the Association.

Jeffrey K. Haynes has become a shareholder in the newly formed Bloomfield Hills, MI firm of Vanderkloot, Rentrop, Martin, Haynes & Morrison, P.C., following a merger between Siudara, Rentrop, Martin & Morrison and his former firm, Vanderkloot & Haynes, P.C. He concentrates in the area of environmental law and recently co-edited the Michigan Environmental Law Deskbook, published by ICLE, in which he authored the chapter on the Michigan Environmental Protection Act.

Douglas M. Tisdale has joined the Denver office of Popham, Haik. A nationally recognized expert in the fields of bankruptcy, commercial default/enforcement, restructurings and workouts, Tisdale worked for 16 years as a trial lawyer in these areas at the Denver firm of Brownstein Hyatt Farber & Strickland, P.C.

1976

David A. Ettinger has been appointed head of the Hospital Merger Task Force of the ABA Antitrust Law Section's Health Care Committee.

1978

Mary T. (Terry) Johnson has been appointed a member of the Departmental Appeals Board of the U.S. Department of Health and Human Services to adjudicate disputes between the Department and its grantees and appeals of medical care providers and scientists accused of fraud.

Eric L. Martin was elected to the Executive Committee of the Board of Directors of the International Festivals Association at its annual meeting, held in Rotterdam, The Netherlands, in September 1992.

The Legal Aid Committee of the Virginia State Bar awarded **Martin D. Wegbreit**, who is a staff attorney with Client Centered Legal Services in Southwest Virginia, its first annual Legal Aid Award.

1979

Susan E. Morrison has become a shareholder in the newly formed Bloomfield Hills MI firm of Vanderkloot, Rentrop, Haynes & Morrison, P.C. Her areas of concentration are environmental, municipal, and real property law.

Alumni Deaths

1911 Leroy C. Lyon

1943 Arthur Peters

1950 Ronald L. Greenberg

1980

Paula R. Latovick, formerly a shareholder with the Lansing MI firm of Fraser Trebilcock Davis and Foster, P.C., has become a full-time faculty member at the Thomas M. Cooley Law School, where she will teach courses in Property Law.

Fredric Bryan Lesser has joined the Lake Forest IL firm of Cummins & Mardoian, which has been re-named Mardoian & Lesser.

1982

David Apol, formerly staff counsel for the Senate Ethics Committee, has assumed a post as counsel for ethics at the U.S. Department of Labor.

1983

Helm Resources, Inc., of Greenwich CT has named **Michael R. Epps** Vice-President and General Counsel. Helm has diverse interests in industrial, technological, financial-service and entertainment industries.

John R. Wylie has been named a partner in the Colorado Springs office of Holme Roberts and Owen.

1984

Cindy S. Birley has been promoted to Principal in the Denver CO office of William M. Mercer, Inc., where she specializes in employee benefits and tax-related issues.

Martiné R. Dunn has become a shareholder of the Dayton OH firm of Coolidge, Wall, Womsley & Lombard Co., L.P.A. Dunn practices corporate and real estate law.

1985

Thomas N. Bulleit, Jr., was recently elected to a three-year term on the Steering Committee of the Health Law Section of the District of Columbia Bar Association. Bulleit practices with the D.C.-based firm of Hogan & Hartson.

Thomas J. Gibney has become a partner in the Toledo O firm of Eastman & Smith. He concentrates his practice in labor and employment law in Ohio and Michigan.

1986 (LL.M.)

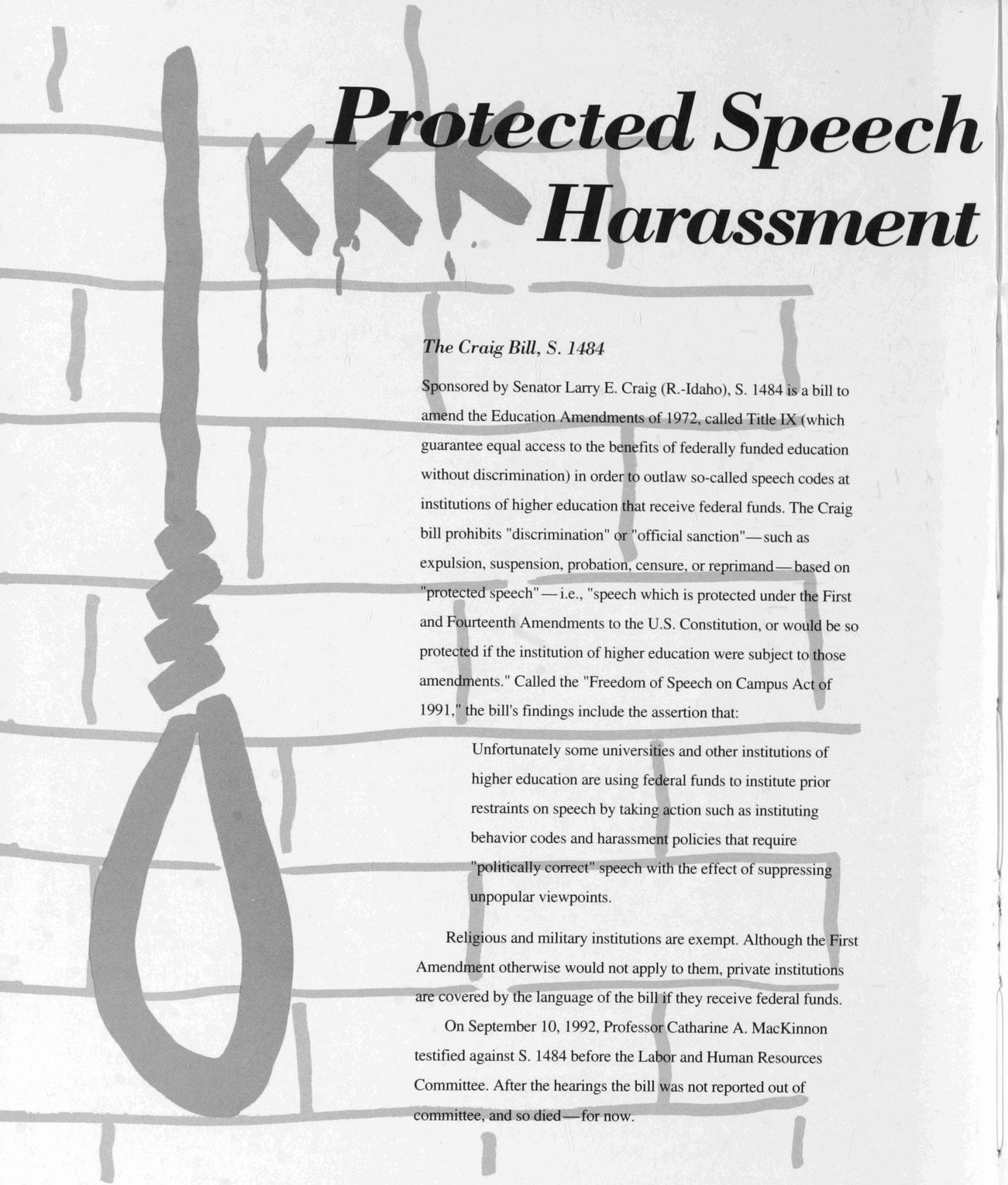
Peter L.H. van den Bossche was appointed Associate Professor of Law at the Law School of the University of Limburg, Maastricht.

1989

David L. Wynne has left private practice to devote his time to pro-bono work for the AIDS Foundation, San Diego. He also writes a column of AIDS-related legal issues for a San Diego community newspaper.

Reunion Information

If you graduated in a year ending in a 3 or an 8 then 1993 is a reunion year for you! Call your Law School friends and roommates, even your adversaries and plan to join us in celebration! Emeritus weekend, for those who graduated more than fifty years ago, will be June 4-6. All other reunions will be held in the fall. Watch your mail for further details. If you were a summer starter, and would prefer to have a reunion with a class other than your graduating class, please call 313-998-7970 and let us know.



Protected Speech and Harassment Codes on Campus

The Craig Bill, S. 1484

Sponsored by Senator Larry E. Craig (R.-Idaho), S. 1484 is a bill to amend the Education Amendments of 1972, called Title IX (which guarantee equal access to the benefits of federally funded education without discrimination) in order to outlaw so-called speech codes at institutions of higher education that receive federal funds. The Craig bill prohibits "discrimination" or "official sanction"—such as expulsion, suspension, probation, censure, or reprimand—based on "protected speech"—i.e., "speech which is protected under the First and Fourteenth Amendments to the U.S. Constitution, or would be so protected if the institution of higher education were subject to those amendments." Called the "Freedom of Speech on Campus Act of 1991," the bill's findings include the assertion that:

> Unfortunately some universities and other institutions of higher education are using federal funds to institute prior restraints on speech by taking action such as instituting behavior codes and harassment policies that require "politically correct" speech with the effect of suppressing unpopular viewpoints.

Religious and military institutions are exempt. Although the First Amendment otherwise would not apply to them, private institutions are covered by the language of the bill if they receive federal funds.

On September 10, 1992, Professor Catharine A. MacKinnon testified against S. 1484 before the Labor and Human Resources Committee. After the hearings the bill was not reported out of committee, and so died—for now.

Testimony on S. 1484
Labor and Human Resources Committee
September 10, 1992

by Catharine A. MacKinnon

An important statement in the continuing controversy over "protected speech" versus the right to equal access to the benefits of federally funded education.

To the extent S. 1484 tracks the First Amendment, it is redundant. It will do nothing not already being done. To the extent it goes further, legislating an interpretation of the First Amendment, it arguably violates and undermines equality rights — Constitutional and statutory — that now exist to eliminate barriers to educational opportunities.

Human rights *are* at stake here: equality rights, including equal access to the right to speak.

The "purposes" section of Senator Craig's bill takes aim at so-called "speech codes" on campuses. In reality, these are policies and procedures regulating discrimination that takes expressive and other forms, voluntarily adopted in response to pressure and education for the purpose of promoting equality in university settings. S. 1484 statutorily defines these anti-discrimination grievance procedures as First Amendment violations.

The operative language of S. 1484 raises serious concern that progress in addressing racial and sexual harassment and anti-gay and lesbian bigotry on campus will be undermined. It is telling that equality — the goal of the Education Amendments of 1972 that this bill would amend — is nowhere mentioned.

Sexual harassment is emphatically construable as a "right to speech" under this bill, an "unpopular viewpoint" against which reprimands or sanctions are forbidden. Nothing in the bill provides otherwise. Suppose the words that Clarence Thomas was alleged to have said to now Professor Anita Hill were spoken by a graduate teaching assistant to an undergraduate in one of his sections and the university intervened under its procedures. This bill could cut off its federal funds. If a TA said to a student, "Sleep with me and I'll give you an A," nothing in this bill keeps these words from being rendered "speech" under this bill, protected from sanction. Pornography festivals, long traditional at some schools but now being addressed by some under discrimination codes, could readily be construed as protected speech under this bill — in spite of pornography's proven connections to devaluation of women, sexual harassment, and rape. If a "White Only" sign were posted, nothing in this bill says it is not First Amendment protected speech. Even *speech* to enforce or encourage

Human rights are at stake here: equality rights, including equal access to the right to speak.

nondiscrimination, speech in the form of a "reprimand" for bigotry, would result in threat of loss of federal funds.

These examples make clear that the distinction between speech and conduct, largely incoherent in general, makes no sense at all in the discrimination context. When the students who spoke earlier today told of being called "fucking faggot," or of being told to "get out of the road, nigger" at school, they were asked if the perpetrators should be thrown off campus. Their schools' procedures do not do that, they responded. But the question seemed to miss the point: these assaults, and others like them, effectively threw *them* off campus and out of class. Legally adequate access to the benefits of an education has not been measured for some time by how much abuse and indignity you can stand.

Frankly, the problem with university responses to harassment has not been their excess of zeal to end this form of bigotry, but getting them to do anything about it at all. Initially, they had to be sued. As a result, Title IX was interpreted, in effect, to require schools to institute procedures to respond to well-founded allegations of sexual harassment or face potential civil litigation by its victims for sex discrimination.[1] The products of these hard-fought advances, extended to race under the aegis of Title VI, are the very "behavior codes" targeted by S. 1484. In other words, schools could face losing federal funds under one part of the Education Amendments for doing what another part requires them to do.[2]

This bill would leave a noose hanging over a desk and KKK scrawled on the wall as discrimination at work but make it protected speech in school. . . .

It was not until the last couple of years that it has even been imagined that sexual harassment, actionable as discrimination since the mid-'70s, might be protected speech. But it is not conjecture that this bill could result in framing as "speech" behavior that has previously been seen as discrimination. Courts that have considered "speech" attacks on discrimination regulations — some in my view inadequately defended by their universities — have rendered discriminatory harassment as protected speech, considering equality virtually not at all, and when they have, giving it no weight.[3] These courts have failed to follow the clear workplace precedents which have recognized the activity the policies cover as actionable for over fifteen years. Most discrimination regulations in university settings simply track the EEOC guidelines prohibiting sexual harassment as a form of discrimination in employment.[4] This bill would leave a noose hanging over a desk and KKK scrawled on the wall as discrimination at work but make it protected speech in school; or, more precisely, it would recognize it as discrimination if the desk is that of a university worker but make it protected speech if the desk is that of a university student.[5]

Courts need direction from Congress that unequal treatment will not be tolerated on the campuses they support with federal funds. This bill casts the balance in the opposite direction, suggesting that if bigoted behavior expresses a bigoted viewpoint — and when does it not? — it is protected speech. Although Senator Craig states he does not intend to restrict the ability of universities to address these problems, this bill would have that effect.

There *is* a real issue of free speech on campus here: the silencing of the disadvantaged and those excluded by the advantaged and powerful. At stake are serious consequences like respect, resources, personal security, and human dignity — issues raised, with all respect, by neither baldness nor height.[6] It is the university choosing to side *with* the relatively disadvantaged and *for* equality that is the real target of this bill.

Partly as a result of existing procedural remedies, we are beginning to hear some non-dominant voices in the academy for the first time. That they are being heard at all seems to be intolerable to vested interests. The resulting critique of "political correctness" is a backlash movement to re-establish the dominance of traditional groups and silence the speech of disadvantaged groups. It is a response of the powerful to losing a

fraction of their power over the terms of public discourse, a move to recover their ability to abuse others with impunity, including with their mouths, promoting exclusion from federally protected rights. If this bill passes, there will be less speech on campuses, not more.

One cannot learn in an atmosphere of bigotry and terror or gain access to speech without equality. Institutions condone and promote inequality when they fail to act against it. The Education Amendments, until now, have recognized this. This bill would undercut university efforts to create an open environment for inquiry and learning free of federally funded hostility, intimidation, and institutionalized privilege.

One cannot learn in an atmosphere of bigotry and terror or gain access to speech without equality.

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1. *Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd.*, 631 F.2d 178 (2d. Cir. 1980) (suggesting victim who can show an "improper advance" or another claimed injury of sexual harassment may have private right of action against qualified university under Title IX).

2. The Title IX guidelines are unambiguous on this point. "A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." 34 C.F.R. ch. 1 § 106.1 (7-1-91 Edition).

3. *U.W.M. Post v. Board of Regents of Univ. Wisc.*, 744 F.Supp. 1163 (E.D. Wis., 1991); *Doe v. Univ. of Michigan*, 721 F.Supp. 852 (E.D. Mich., 1989).

4. 29 C.F.R. 1604.11 (EEOC Sexual Harassment Guidelines).

5. For an enlightened recent treatment of such issues at work, see *Harris v. International Paper Co.*, 765 F.Supp. 1509, 1518 (D.Me. 1991).

6. Before Professor MacKinnon began her testimony Senator Craig had been joking with the committee chairman, Senator Paul D. Wellstone (D-Minn), about politically correct speech. Craig said that on campus he could not be described as bald but rather would be "hair disadvantaged," and Wellstone noted in response that he, then, would be termed "vertically challenged" instead of "plain old short."

Professor Catharine A. MacKinnon practices and consults nationally and internationally. An influential and widely respected legal scholar, Professor MacKinnon joined the Michigan Law faculty in 1990. Her fields of concentration include constitutional law, especially sex equality, and political theory, especially Marxism and feminism.

The Disinterested Person: An Alternative Approach to Shareholder Derivative Litigation

By Joel Seligman

Recently I had the opportunity to apply an unused procedure in a shareholder derivative litigation. In 1989 Michigan amended its Business Corporation Act to allow a court under specified circumstances to appoint a "disinterested person" to perform fact gathering functions similar to those of a German investigative judge. In 1991 I was appointed to be the disinterested person in a derivative litigation involving Rospatch Corporation. The experience persuaded me that compared to litigation and the special litigation committee, the disinterested person approach may often have significant advantages in terms of reduction of litigation costs, procedual fairness, and protection of shareholders.

I. The Dilemma of the Derivative Action

The shareholder derivative action is a device essentially to compensate shareholders for losses suffered as a result of officer or director violations of the duty of due care or of the duty of loyalty. Shareholder derivative actions have long provided a deterrent to some forms of corporate cupidity, restrained some wastes of assets, and accumulated some of the winnings from litigation or settlements to the corporation for the equitable protection of creditors as well as shareholders.

A longer, footnoted version of this article appears in 55 *Law and Contemporary Problems* (Autumn, 1992). Excerpts reprinted by permission.

Author's Note: Let me express my gratitude for comments concerning an earlier draft of this article to Professors Alfred F. Conard, John C. Coffee, Jr., James D. Cox, Merritt Fox, Richard Friedman, Harvey Goldschmid, Samuel R. Gross, John H. Langbein, Richard O. Lempert, Cyril Moscow, and Roberta Romano.

But these virtues are achieved at a price. A sizable share of the winnings from derivative litigation go not to the corporation, but to plaintiffs' lawyers, feeding the suspicion that the primary purpose of the derivative action is not to deter corporate law violations, but to enrich the plaintiffs' bar. This is not novel. The same complaint can be made of almost any aspect of plaintiffs' litigation ranging from malpractice actions to environmental litigation. Alone, the notion that plaintiffs' attorneys do well for themselves by doing good for others should not be decisive.

Three factors, however, combine with this traditional complaint to take on greater significance in the case of the derivative action. First, the shareholder derivative action is sometimes unnecessary. When material misrepresentations or omissions can be alleged, essentially what can be done in a derivative suit often can also be achieved through a direct federal securities law action. In these cases, the deterrent value of the derivative suit, an important virtue, has been reduced because of the increased use during the last three decades of the federal securities law antifraud remedies. The winnings from these claims redound to the same outside shareholders who often are the indirect victors in derivative litigation.

Second, the nature of both derivative and direct actions has grown increasingly more complex in the last few decades. Typically federal securities law claims today are joined to a pendent state fraud action, and often civil RICO and state consumer claims as well. This means that discovery in a shareholder derivative action typically begins with a very wide net capable of enveloping documents of the corporation, its board of directors, its chief officers, its outside attorney, its outside auditor, and often subsidiary or affiliated corporations. An old critique of the derivative claim that it is extraordinarily expensive or extraordinarily disruptive has taken on a greater ring of truth with the blunderbuss discovery that has recently become commonplace. When this critique is combined with the increased hourly cost for attorneys, accountants, and expert witnesses, the assertion that the derivative litigation can be "ruinous" to a small or medium-sized business can not be entirely dismissed.

Third, there is a factor that verges on the historical accident. In the mid-1970s, several hundred American corporations were found to have paid overseas "questionable payments" or "bribes." Some of these corporations' officers were also sued in derivative claims. But these were somewhat unusual shareholder derivative suits. The officers may have committed a legal or moral wrong, but they could often claim that they did so to enrich their firms, not to mulct them.

The response of the law to these events, in effect, was revolutionary. To limit the derivative claim a new technique often called "the special litigation committee" arose. The purpose, expressed or implied, of the special litigation committee is to terminate derivative claims.

This is not to say that the special litigation committee is without merits. It has the practical virtue of being far less expensive and far less disruptive than the traditional derivative claim. On occasion it has also led to some changes in corporate personnel, or some changes in corporate practice.

Moreover, the court in administering the shareholder derivative action through the special litigation committee technique typically creates incentives to make the process fairer. It requires that there be no adoption of the recommendation of a special litigation committee unless the court is satisfied that all material evidence had been discovered. It requires the special litigation committee to meet with plaintiffs'

[T]HE KEY IS THAT THE DISINTERESTED PERSON PROCEDURE BEGINS FROM A QUITE DIFFERENT EXPRESS OR IMPLIED PREMISE THAN THE SPECIAL LITIGATION COMMITTEE.

attorneys or witnesses recommended by the plaintiffs to ensure part of the adversarial process is integrated into the special litigation committee investigation. The court can take into account efforts by the corporation to voluntarily cleanse itself. The court can also be more reluctant to grant dismissal if the personnel on the special litigation committee appear to be biased, or the factual or legal analysis too crude or too simple. These techniques give the court supervising the special litigation committee some opportunities to improve the process while at the same time reducing the overall cost to the corporation and the overall disruption of the corporation.

II. The Disinterested Person Alternative

The Michigan "disinterested person" is an attractive alternative to both litigation and the special litigation committee in shareholder derivative litigation. The Michigan Business Corporation Act defines a "disinterested person" to mean "a person who is not a party to a derivative proceeding, or a person who is a party if the corporation demonstrates that the claim asserted against the person is frivolous or insubstantial." The Act also provides: "The court shall dismiss a derivative proceeding if, on motion by the corporation, the court finds that [one or more disinterested persons appointed by the court] has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation. . . . If the determination is made [by one or more disinterested persons], the plaintiff shall have the burden of proving that the determination was not made in good faith or that the investigation was not reasonable." The statute itself does not define the terms "best interests of the corporation" or "reasonable investigation." Nor are these terms defined in the few other states that have adopted similar statutes.

While the Michigan statute is not a jewel of definitional precision, the core concept implicit in the disinterested person is reasonably clear. The person should be a neutral fact finder similar to a trial court judge, a Bankruptcy Code examiner, or the Federal courts' Master, rather than a corporate employee or agent.

This aspect alone of the disinterested person procedure is significant. One much stressed criticism of the special litigation committee is the concern that directors evaluating other directors will not be able to reach a disinterested judgment. This concern has been variously expressed in terms of " 'there but for the grace of God go I' empathy," "the danger of allowing the board of directors to appoint a few 'good ol' boys' as a special litigation committee and to be accordingly whitewashed," or the "structural bias" of a special litigation committee whose members were selected by defendant-directors. However phrased, the problem posed by such directors on a special litigation committee is an obvious one. As one North Carolina court observed, "Not one committee, in all these instances, has decided to proceed with suit," even though some had recognized the legal merit of the claims asserted.

A quite different consequence of appointing a disinterested person to evaluate a plaintiff's claims in a derivative action is to ensure that the disinterested person's evaluation is the equivalent of a conventional "business judgment." It essentially involves the same type of disinterested or arm's length, cost-benefit analysis that a board of directors might undertake before deciding whether to build a new plant or introduce a new product. In contrast the courts in recent years have heard the complaint that a special litigation committee was not sufficiently independent or that its legal analysis was biased.

The disinterested person procedure can also achieve the lower-cost and less-disruption advantages of the special litigation committee, but the key is that the disinterested person procedure begins from a quite different express or implied

premise than the special litigation committee. Where the appointment of a special litigation committee will usually result in a recommendation to dismiss derivative litigation, the disinterested person procedure has a more neutral purpose. The procedure should provide a good faith, intellectually honest effort to evaluate the merits of a derivative claim. The disinterested person should not invariably conclude that derivative claims are meritless. The disinterested person should evaluate claims on the merits for the purpose of determining whether or not a claim is in the best interests of the corporation.

This change in purpose should lead to important refinements in what is meant by the pivotal statutory terms "best interests of the corporation" and "reasonable investigation."

Best Interests of the Corporation

The Michigan statute creating the disinterested person procedure does not define the phrase "best interests of the corporation." Several special litigation committee cases have defined this term.

A leading example is found in *Joy v. North* where Judge Winter wrote in part:

> [T]he function of the court's review is to determine the balance of probabilities as to likely future benefit to the corporation, not to render a decision on the merits, fashion the appropriate legal principles or resolve issues of credibility. . . . The court's function is thus not unlike a lawyer's determining what a case is "worth" for purposes of settlement.
>
> Where the court determines that the likely recoverable damages discounted by the probability of a finding of liability are less than the costs to the corporation in continuing the action, it should dismiss the case. The costs which may properly be taken into account are attorney's fees and other out-of-pocket expenses related to the litigation and time spent by corporate personnel preparing for and participating in the trial. . . .
>
> Judicial scrutiny of special litigation committee recommendations should thus be limited to a comparison of the direct costs imposed upon the corporation by the litigation with the potential benefits. . .

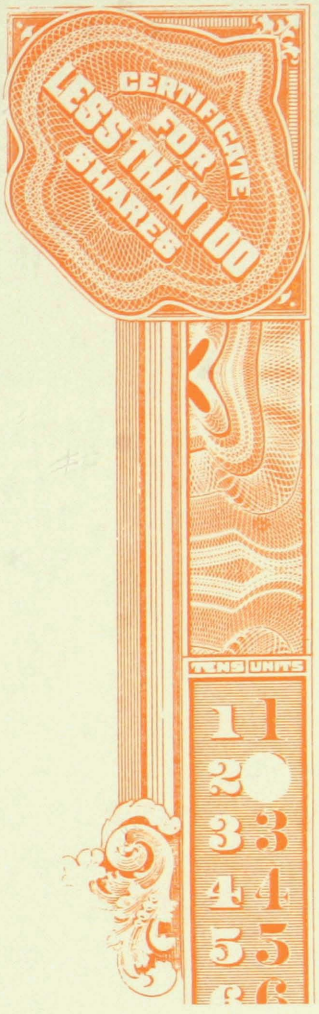
A refinement of the *Joy v. North* standard is appropriate for complex derivative claims. None of the special litigation committee cases to date have addressed the need for any form of intermediate process. The expectation is simply that the committee will file a report at the conclusion of its investigation.

In my experience as a disinterested person analyzing derivative claims in *In re Rospatch Securities Litigation*, I found that the best way I could make the *Joy v. North* standard operational was by pursuing a three-tier investigation.

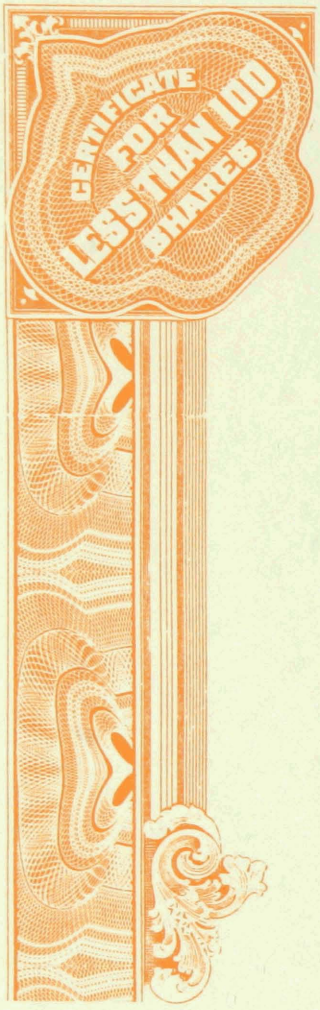
The *Rospatch* derivative complaint alleged 22 separate possible causes of action.

First, after the plaintiffs had submitted all documents that they believed supported their complaint, and I had received from the nominal defendant, Rospatch, all requested documents, I concluded that 13 possible causes of action alleged in the plaintiffs' complaint did not warrant further investigation. These conclusions were either based on the lack of sufficient documentary evidence to justify bringing the case to a jury, or my determination that the possibility of winning the case was remote.

Second, in *Rospatch* on the remaining causes of action, I conducted a fuller factual and/or legal investigation. The purpose of this investigation was to determine if there was any cause of action where I believed it was likely that the plaintiffs



THE DISINTERESTED PERSON SHOULD EVALUATE CLAIMS ON THE MERITS FOR THE PURPOSE OF DETERMINING WHETHER OR NOT A CLAIM IS IN THE BEST INTERESTS OF THE CORPORATION.



would present a case where (1) it was probable that there would be sufficient evidence to go to a jury or other fact finder, and (2) the chances of prevailing before the jury or other fact finder were greater than remote.

Third, on those causes of action where I concluded that the plaintiffs were likely to present a case sufficient to go to a jury or other fact finder and the likelihood of success was greater than remote, a cost-benefit analysis would normally be appropriate. Here one would need to analyze: Who is likely to be held liable in each cause of action? What is the likelihood that the plaintiff will succeed on each cause of action? What is a reasonable estimate of how much the corporation is likely to recover? What is a reasonable estimate of the direct litigation expenses the corporation would have to bear? Here the issue of a corporation's indemnification insurance may become particularly relevant both because of the difficulties of collecting damages from individual defendants and because specific types of claims involving intentional misconduct are not insurable.

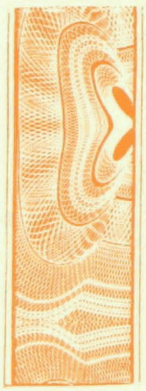
Reasonable Investigation

The Michigan statute also does not amplify the concept of a "reasonable investigation" through definition or Reporter's comments. Generally judicial authorities require a reasonable investigation recorded in "a thorough written record of the investigation and its findings and recommendations." The investigation will usually involve interviews, which may be recorded in a typewritten summary of each. The investigation will also review relevant corporate, legal, and accounting documents. An investigation, when appropriate, may also study prior work of the corporate audit committee or prior depositions or examination transcripts taken in earlier proceedings. However, to the extent that there is reliance on earlier work, the courts have required its verification. In some instances, a special litigation committee also has met with plaintiffs' counsel in the derivative or in related actions.

These special litigation committee precedents provide a good starting point for analyzing the appropriate standards in a disinterested person investigation. What is singularly missing from existing precedent, however, is an appreciation of the psychological reality of a special litigation or disinterested person investigation. Unlike a court or an adversarial deposition, the investigation is conducted typically with a single investigator meeting with a potential witness and the counsel of the witness. Many, if not most, witnesses will be defendants or allied with the defendants. The witnesses, whether coached or not, will take pains to appear reasonable. The investigator will spend typically a considerable period of time interviewing the most significant witnesses. There are none of the conventional devices found in litigation to fortify the investigator's skepticism or, better phrased, appropriate agnosticism. Unlike a trial or deposition, no opposing counsel is there to interpose a hostile cross-examination or a timely objection. The investigator, when witnesses are not under oath, has no real ability to effectively remind a witness of the penalties for perjury. While an investigator can reach conclusions about the likelihood that a witness will appear persuasive to a jury or other fact finder, this type of conclusion arguably has little place in a final report. In sum the very nature of the proceeding is biased in favor of not finding fault or minimizing fault.

It seemed preferable to me in attempting to create an evenhanded disinterested person process to integrate the most desirable aspects of an adversarial process into the disinterested person's investigation.

It seemed preferable to me in attempting to create an evenhanded disinterested person process to integrate the most desirable aspects of an adversarial process into the disinterested person's investigation. In the *Rospatch* investigation this was facilitated by the fact that virtually all relevant documents were stored in a documentary depository. This meant that I could direct that the plaintiffs, after a review of these documents, submit to me all documents that they believed tended to support the positions advocated in their complaint and a memorandum explaining the significance of the documents produced.



After I had reviewed all of the plaintiffs' document submissions and other documents that I received from Rospatch, I circulated to the parties a statement of which issues I believed justified further investigation and which issues did not. After that statement was circulated, the defendants were given the opportunity to forward for my review all documents that they believed supported their positions with memoranda explaining the significance of the documents they produced.

I took several steps to ensure that I did not merely receive relevant documents but understood them. First, as mentioned, to assist me in evaluating the documents provided by the parties, I offered both the plaintiffs and the defendants the opportunity to attach memoranda explaining the significance of the documents provided. Second, I selected a consultant on accounting standards and the analysis of accounting work papers. Third, I took other steps to ensure that I received a critical analysis of the relevant accounting and auditing issues. For example, I interviewed the plaintiffs in related direct litigation. Each of these individuals was an accountant who provided me with an adversarial analysis of relevant accounting and auditing issues. I also interviewed certain of the plaintiffs' probable fact witnesses and stated my willingness to receive affidavits from potential expert witnesses for either side. Fourth, on several occasions I requested that the parties file briefs addressing specific questions concerning the relevant legal and accounting standards to be applied in this case.

These procedures replicated some of the adversarial presentations likely to occur at trial. I was able largely to obviate the legitimate concerns of both plaintiffs and defendants that I would not discover all that I should or that I would not understand what I discovered.

At the same time a key advantage of the disinterested person procedure is that, to a greater extent than the special litigation committee, it can limit the number of interviews and document production when, and if, it becomes clear that the plaintiff's case is essentially without merit. Because the disinterested person begins as a neutral fault finder, his or her judgement should be entitled to greater weight in reaching this type of conclusion than that of a special litigation committee.

Indeed, even when the plaintiff has filed a meritorious claim, economies can be achieved because of the disinterested person's control over discovery.

. . . THE MOST SIGNIFICANT POTENTIAL USE OF A DISINTERESTED PERSON WILL BE PROBABLY IN COMPLEX FACT PATTERNS AND APPLICATION OF THE LAW TO COMPLEX FACTS.

III. CONCLUSION

The procedures employed in the *Rospatch* derivative litigation were responsive to the circumstances that the court and I faced in that case. In other contexts these procedures may not be fully appropriate.

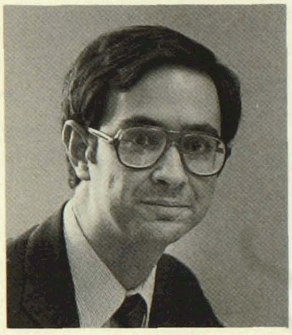
What makes the disinterested person approach, nonetheless, a desirable one is that it provides the judiciary a new alternative to the resolution of shareholder derivative litigation. Unlike the special litigation committee which, in my opinion, has been fairly criticized for its overwhelming tendency to favor defendants, the disinterested person procedure offers legislatures or the judiciary an opportunity to employ a more neutral approach while at the same time preserving the advantages of reduced cost and reduced disruption associated with the special litigation committee approach. In relatively small corporations the disinterested person may also be viewed as a bargain compared to the special litigation committee. The disinterested person, if a lawyer, does not need to hire separate counsel and can perform a role in trying to inspire settlements that would be more difficult for counsel to a special litigation committee to perform.

Nonetheless, the most significant potential use of a disinterested person will be probably in complex fact patterns and application of the law to complex facts. Here the disinterested person can perform a useful "triage" role, distinguishing meritorious from nonmeritorious claims and sharpening the understanding of the court and parties with respect to the facts concerning meritorious claims. In contrast are cases involv-

ing simpler fact patterns, where the need for a disinterested fact finder will usually be slight.

With complex cases, a significant issue suggested by the Rospatch case is whether the appointment of a disinterested person should solely be on a motion from the corporation or also might be made by the court on its own initiative. Since the corporation will normally bear the cost of the disinterested person, there is a principled basis for limiting the person's appointment to the corporation's motion. On the other hand, the court will usually have a quite realistic sense of when this type of procedure may simplify fact finding and conceivably inspire settlements.

On balance I believe the disinterested person model worked well in the Rospatch case but the area where it seemed to be most in need of improvement would be in strengthening the role of the disinterested person in helping inspire settlements. It may well be that the disinterested person will be more effective in helping inspire settlements only when he or she is joined by the judge in settlement or other periodic conferences. Like much else in a procedure only employed once to date, this is an area where a certain amount of trial and error will be appropriate.



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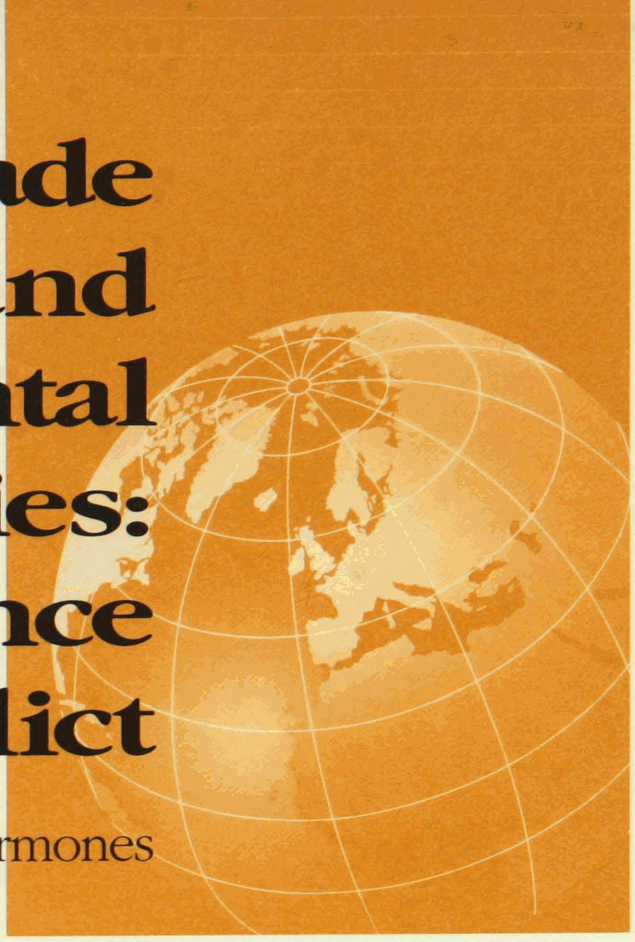
World Trade Rules and Environmental Policies: Congruence or Conflict

Of Dolphins and Hormones



By John H. Jackson

This article includes selected portions extracted from a manuscript prepared for presentation at the annual law and policy conference at Washington & Lee University in September 1992, devoted this year to international trade rules and environmental policies. The full annotated manuscript appears in 49 *Washington & Lee Law Review* 1227 (1992).

Introduction

Proposition 1: Protection of the environment has become exceedingly important and promises to be more important for the benefit of future generations. An important part of protecting the environment involves rules of international cooperation and/or sanction so that some government actions to enhance environmental protection will not be undermined by actions of other governments. Sometimes such rules involve trade restricting measures.

Proposition 2: Trade liberalization is important for enhancing world economic welfare and providing greater opportunity for satisfying lives for billions of individuals. Any measure which restricts trade often will decrease the achievement of this goal.

These two propositions state the opposing policy objectives which currently pose important and difficult dilemmas for governments. This type of "policy discord" is not unique, there are many similar policy discords, on both the national and the international scene, which governments must confront. Indeed, with respect to environmental policy and its relation to trade policy, there is at least some evidence that they are complementary, in the sense that increasing world welfare can lead to citizen demands and governmental actions to improve protection for the environment. The poorest in the world cannot afford such protection; but when welfare increases, this protection can be more affordable.

An unfortunate development in public and interest group attention to trade and environment is the appearance of hostility between proponents of the different propositions stated above. The hostility is misplaced, because each group, for its respective policy objectives, will need the assistance and cooperation of the other. Of course some of this tension is typical of political systems. Often political participants

seek to achieve opposing objectives and goals. Each side may endorse legitimate goals, but when the goals clash accommodation is necessary.

To some extent, the conflicts derive from a certain "difference in cultures" between the trade policy experts and the environmental policy experts. Oddly enough, even when operating within the framework of the same society, these different "policy cultures" have developed different attitudes and perceptions of the political and policy processes that create misunderstandings and conflict between them.

These problems are part of a broader trend of international economic relations which is posing a number of perplexing and troublesome situations for statesmen and policy leaders. Part of this is inevitable in the light of growing international economic interdependence. Such interdependence brings many benefits from increased trade in both products and services across national borders, resulting in efficiencies and economies of scale which can raise world welfare (but not necessarily everyone's welfare, since some groups will be required to adjust in the face of such increased competition). These trends require a different sort of attitude towards government regulation. Within a nation, such government regulation as consumer protection, competition policy, prudential measures (of banking and financial institutions), measures protecting health and welfare (e.g., alcohol and abortion control), and human rights (e.g. prohibiting discrimination), are all designed by governments to promote worthy policies which sometimes clash with market-oriented economic policies. When economic interdependence moves a number of these issues to the international scene, they become (at least in today's defective international system) much more difficult to manage. The circumstances and the broader context of the international system create in many contexts (not just those concerning environmental policies) a series of problems and questions, including:

Within a nation, . . . measures protecting health and welfare and human rights are all designed . . . to promote worthy policies which sometimes clash with market-oriented economic policies . When economic interdependence moves . . . these issues to the international scene, they become . . . much more difficult to manage.

- General questions of effectiveness of national "sovereignty" in the face of a need to cooperate with other countries.
- Perplexing questions of how new international rules should be made, questions that often involve voting procedures.
- General questions of the appropriateness and degree to which national sovereignty will submit to international dispute settlement procedures to resolve differences.
- Problems of a single national sovereign using extraterritorial reach of its regulation (sometimes termed "unilateralism").
- Significant legitimate differences of view between nations as to economic structure, level of economic development, different forms of government, different views of the appropriate role of government in economic activities, etc. Developing countries for example, will have different views from those of rich countries on many "trade-off" matters, arguing that environmental regulations can unfairly restrain their economic development. They note that rich countries have benefited from decades or centuries of freedom from environmental protection rules and even today are responsible for most of the world's pollution. To impose such rules on poor countries threatens starvation and stagnation for the populations there, so it is argued.

All these circumstances and arguments occur in the context of a relatively chaotic and unstructured international system.

In this paper, it is my intention to probe the more specific issues of the relationship of international trade policy rules to environmental policies and rules, primarily in the context of GATT (which is the most important set of international trade policy rules).

When speaking of "environmental" policies this paper will use that term very broadly. It would include, for example, measures relating to health or health risks. The phrases "trade policies" or "trade liberalization" also are used broadly to relate not only to trade in goods, but also trade in services.

I. Objectives of Trade Rules and Their Relation to Environmental Policy

The most significant and widespread rule system for international trade is the GATT system (which includes the GATT and over 200 ancillary treaties plus a number of other related arrangements, decisions, etc.). The GATT may soon be modified by the Uruguay Round, so this paper will refer to the GATT/MTO system to broadly embrace the system as it is now and may emerge within a year or two. Of course, a number of other treaties or arrangements, such as regional blocs like the proposed NAFTA—North American Free Trade Accord—are relevant to this discussion of "trade-environment policy discord," but most of the essential principles of that discord can be discussed in the context of GATT.

The basic policy underlying the GATT (and the broader "Bretton Woods System" established in 1944-48) is well known. The objective is to liberalize trade which crosses national boundaries and to pursue the benefits described in economic theory as "comparative advantage," which relates partly to the theories of the economies of scale. When nations specialize, they become more efficient in producing a product (and possibly also a service), and thus if they can trade for their other needs, they and the world will be better off. The international rules are designed to restrain governmental interference with that trade.

These policies recognize certain exceptions, including the problem of "externalities," which is an important part of the problem of environmental protection. If a producer pollutes a stream in his manufacturing process and there are no laws against that, he has imposed an "externality cost" on the world which is not recouped from him or the consumers of his product. This appears to be one of the most important core dilemmas or policy problems of the relationship of trade and environmental policies. Thus, much of this relationship is concerned with how environmental protection costs can be "internalized," to follow what is sometimes termed the "polluter pays principle."

When nations specialize, they become more efficient in producing a product (and possibly also a service), and thus if they can trade for their other needs, they and the world will be better off. The international rules are designed to restrain governmental interference with that trade.

To illustrate, a few "hypothetical" cases will demonstrate some of the possible policy clashes. In the cases below I use the initials "ENV" to indicate the environmentally "correct" country which imports (or exports), and the initials "EXP" to indicate the exporting country.

—ENV establishes a rule that requires a special deposit or tax on packaging which is not biodegradable, arguing that such packages are a danger for the environment. It so happens that ENV producers use a different package which is not so taxed. Only the packages from EXP are affected. (In some cases it can be established that the tax imposed is in excess of that needed for the environmental protection.)

—ENV establishes a border tax (countervailing duty) on any product of electronics which is imported from a country that does not have an environmental rule required by ENV, arguing that the lack of such rule is in effect a "subsidy" when measured by economic principles of internalization and "polluter pays," and that the subsidy should be offset by a countervailing duty. EXP argues that its own method of pollution control is different but fully adequate and more efficient and therefore cheaper, so its products should not incur the clean-up duty. Or EXP argues that its environment can better withstand pollution activity.

—ENV prohibits the importation of tropical hardwoods, on the grounds that

imports of tropical hardwood products tend to induce deforestation in important tropical forest areas, and such deforestation damages the world environment. ENV is a temperate zone nation with temperate forests, but does not apply any rule against temperate forest products, domestic or imported.

II. National Treatment and Product Standards

One of the core principles of the GATT/MTO system of trade liberalization is the rule known as "national treatment," found in GATT Article III. The national treatment clause can be traced far back into treaties of centuries ago, and is applied to a number of different governmental activities. It obligates governments to treat foreign products or persons the same as it treats its domestic products or persons, for purposes of a variety of governmental actions.

One example for trade would be a regulation which imposed a higher tax on automobiles with greater horse power and speed, when the importing country knew that its own automobile production tended to concentrate heavily in automobiles with less horse power and speed. Thus, there are some delicate decisions that have to be made in interpreting the GATT Article III.

These issues arise in a number of "environmental" type cases. The key issue then is who should decide whether the regulation is appropriate? Even if a regulation is both *facially* non-discriminatory and also *de facto* non-discriminatory, some important issues about a "minimum standard" arise. A current significant case between the U.S. and the European Community raises this issue, namely the Beef Hormone Case. The EC prohibits the sale of beef which has been grown with the assistance of artificial hormone infusions. The U.S. argues that it applies hormones by a method which is totally safe for human ingestion and that the EC has no scientific basis for its regulation, which incidentally happens to hurt U.S. exports to the EC of beef products. The EC replies that it has no obligation to provide a scientific justification.

This dispute has festered on. The U.S. pointed to a clause in the Tokyo Round Standards Code, which might have given some opportunity to require scientific justification for a product regulation. However, negotiators in the Uruguay Round have developed a draft phyto-sanitary text designed to provide some minimum standards for government regulation requiring "scientific principles" as justification. This draft text has raised some serious concerns on the part of environmental policy experts in the U.S. and elsewhere, who worry that this text would inhibit national governments (or sub-federal governmental units) from determining the appropriateness of a regulation that went beyond some minimum international standard. The language itself does not seem to call for this, but the implication that there will be an opportunity for exporting countries to challenge regulations of importing countries and to require the importing country to justify the regulation on the basis of "sound science," raises substantial fears that GATT panels will tend to rule against regulations that go beyond a lowest common denominator of national environmental regulations in the GATT/MTN system. This pushes the discourse into the question of institutions (which will be discussed below).

III. General Exceptions in Article XX: Health & Conservation

GATT contains an Article XX entitled "General Exceptions," which includes important provisions that override other obligations of GATT in certain circumstances defined in the Article. Again it is not practical or appropriate in this paper to deal with all of Article XX, but there are certain key measures which we can address. Quite often, concern for environmental matters focuses on paragraphs (b) and (g) of Article XX:

> (b) necessary to protect human, animal or plant life or health . . .
>
> (g) relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .

The opening paragraph of Article XX, however, imposes some important qualifications on the exceptions of Article XX. To a large degree, these provisions provide a softened measure of "national treatment," and "MFN" obligations. They require governments which take measures which arguably qualify for the exceptions of Article XX to do so in such a way as to minimize the impacts mentioned in the opening paragraph. This has led some panel reports to interpret Article XX so as to require nations to use the "least restrictive alternative" reasonably available to it as measures designed to support the goals of the exceptions of Article XX.

There are a number of important interpretive problems with respect to Article XX, and some of these are key to the environment-trade liberalization clash. Two interpretive questions in particular stand out, namely the interpretation of the word "necessary," and the question of *whose health*, or *which exhaustible natural resources* can be the object of an acceptable national government regulation.

Even if a regulation is both facially non-discriminatory and also de facto non-discriminatory, some important issues about a "minimum standard" arise.

With respect to "necessary," clearly this word is one which needs interpretive attention. It is partly interpreted by the "least restrictive alternative" jurisprudence mentioned above. Thus, if there are two or more alternatives which a government could use to protect human life or health, it is not "necessary" to choose the one which has more restrictions on trade, when an alternative that is equally efficient to protect human life or health exists. This will obviously impose some restraint on the latitude that nations, or sub-federal governments have to impose regulations for environmental purposes. On the other hand, it is considered important to prevent Article XX from becoming a large loophole which governments could use to justify almost any measures that were motivated by protectionist considerations. It is this slippery slope problem that worries many in connection with Article XX. The problem arises in a number of cases, including that of packaging, or hardwood imports, outlined above.

The other interpretive problem is conceptually more difficult. When GATT Article XX provides an exception for measures necessary to protect human, animal or plant life or health, should it be interpreted to mean life or health of humans, etc., only within the importing country, or anywhere in the world? This interpretive problem is intimately related to the subject taken up in the next section below, concerning the process/product characteristic difficulty. So far as this author can determine, Article XX has not been interpreted to allow a government to impose regulations necessary to protect life or health of humans, animals, or plants existing outside its own territorial borders. This was a problem addressed (somewhat ambiguously) in the Tuna Dolphin Case (again discussed below). The problem is the typical slippery slope danger,

combined with the worry that powerful (and wealthy) countries will impose their own views regarding environmental (or other social or welfare) standards on other parts of the world where such views may not be entirely appropriate. (The term "eco-imperialism" has been coined for this problem.)

If an importing nation can prohibit goods from a poor third world country in which the production occurs in a manner that is moderately dangerous to humans, why also could not a nation prohibit the importation of goods produced in an environment that differs in many social or cultural attributes from its own society? Why, it is asked, should one country be able to use its trade laws to depart from the general liberal trade rules of the GATT/MTO system, to enforce its own view of how plant or animal life in the oceans (beyond territorial sea, or other jurisdictional limits) should be protected or to protect the ozone layer (as suggested in the tropical hardwoods hypothetical case)?

The problem is the typical slippery slope danger, combined with the worry that powerful (and wealthy) countries will impose their own views regarding environmental (or other social or welfare) standards on other parts of the world where such views may not be entirely appropriate.

Other countries may have a somewhat different view of the trade-off between economic and welfare values of production and human life or health. Even in the industrial countries, there is tolerance of certain kinds of economic activity which almost inevitably will result in human deaths or injury (such as major construction projects for dams or bridges, etc.). These are tough issues, and ones that will require a lot of close and careful attention, presumably in the context not only of new rule making (or treaty drafting), but also in the processes of interpretation through the dispute settlement mechanisms. Thus once again, institutional questions become significant (as discussed in Part VII).

IV. The Process-Product Problem: The Tuna Dolphin Case & The Global Commons Questions

An important conceptual "difficulty" of GATT is the so-called process-product characteristic problem, which relates closely to the Article XX exceptions and also to the national treatment obligations and other provisions of GATT. This issue is central to the so-called Tuna Dolphin Case and needs to be explained.

Suppose an importing country wishes to prohibit the sale of domestic or imported automobiles which emit pollutants in their exhaust at a rate above the specified standard. Subject to our discussion above in Part II, there seems to be little difficulty about this regulation. It relates to the characteristics of the product itself. If the product itself is polluting, then on a non-discriminatory basis the government may prohibit its sale (or also prohibit its importation, as a measure to prohibit its sale).

Suppose on the other hand, the government feels that an automobile plant in a foreign country is operated in such a way as to pose substantial hazards to human health, either through danger of accidents from the machinery, pollutants or unduly high temperatures in the factory. On an apparently nondiscriminatory basis, the government may wish to impose a prohibition on the sale of domestic or imported automobiles which are produced in factories with certain characteristics. However, in this case it should be noted that the imported automobiles themselves are perfectly appropriate and do not have dangerous or polluting characteristics. Thus, the target of the importing country's regulation is the "process" of producing the product. The key question under the GATT/MTO system is whether the importing country is justified under either national treatment rules of nondiscrimination or exceptions of Article XX

(which do not require strict nondiscrimination in national treatment as we discussed above). The worry of trade policy experts is that to allow the process characteristic to be the basis for trade-restrictive measures would be to open an enormous loophole, permitting a swath to be cut through GATT.

Obviously, the Tuna-Dolphin Case relates to these issues. Although the GATT panel report is not entirely clear on this matter, it seems fair to say that there were two important objections to the U.S. embargo on the importation of tuna because of the U.S. objection to the way the tuna were fished (causing danger to dolphins). First, there is the question of "eco-imperialism," where one nation unilaterally imposes its fishing standards (albeit for environmental purposes) on other nations in the world without their consent or participation in the development of the standard. Secondly, there is the problem of the inconsistency of the import embargo with the GATT rules unless there is some GATT exception that would permit the embargo, and of course that exception relates to the "process-product" interpretation problem and therefore also to that problem in the national treatment rule and the general exceptions of GATT (Articles III and XX).

The approach in the GATT system so far has given great weight to this slippery slope concern, and thus tilted towards interpreting both the Article III (including some Article XI questions) and the Article XX exceptions to apply to the product standards and to life and health within the importing country, but not to extend these concepts and exceptions to "processes" outside the territorial limits of jurisdiction. The alternative which threatens to create the great loophole is a serious worry. The theories of comparative advantage which drive the policy of liberal trade suggest that an important reason for trade is differences among nations. These can be differences of natural resources, but also of cultural and population characteristics such as education, training, investment, and environment. To allow an exception to GATTwhich permits some governments to unilaterally impose standards on production processes as a condition of importation would substantially undermine the policy objectives of trade liberalization.

On the other hand, trade sanctions (which include embargoes) are a very attractive and potentially useful means of providing enforcement of cooperatively developed international standards, including environmental standards.

On the other hand, trade sanctions (which include embargoes) are a very attractive and potentially useful means of providing enforcement of cooperatively developed international standards, including environmental standards.

Thus, there is an important trade-off which the GATT must face. It is not adequate, in this writer's view, for the GATT simply to say that trade should never be used as a sanction for environmental (or human rights or anti-prison labor) purposes. There are already a number of situations in which the GATT has at least tolerated (if not explicitly accepted) trade-sanction activity for what is perceived to be valid overriding international objectives. What are the implications of this problem? To this writer, it seems clear that specific and significant attention must be addressed by the GATT/MTO system to provide for exceptions for environmental purposes, in a way that will establish boundaries to these exceptions to prevent them from being used as excuses for a variety of protectionist devices or unilateral social welfare concerns. Possibly these should be limited to the situation where governments are protecting matters that occur within their territorial jurisdiction.

It may be feasible to develop an explicit exception in the GATT/MTO system (possibly by the waiver process which is reasonably efficient) for a certain list of specified broad-based multilateral treaties. One of the concerns expressed about the Tuna Dolphin Case in GATT is the implications that it might have for the so-called "Montreal Protocol" concerning CFC's (Chlorofluorocarbons) and the danger to the earth's ozone layer. The Montreal Protocol provides a potential future authorization of

trade sanction measures against even non-signatories for processes (not product characteristics) which violate the norms of the treaty. Under the current rules of GATT, if they are interpreted to exclude exceptions for the process situation, the Montreal Protocol Measures would be contrary to GATT obligations, except as among the signatories to the Montreal Protocol.

It may take some time and study to develop the precise wording of an appropriate amendment or treaty exception for the GATT/MTO system for these environmental treaty cases, but in the short run for a limited period of years, it could be efficient to use a GATT waiver to clarify the issue as to specifically named treaties.

In all likelihood, there are sufficient signatories to the Montreal Protocol who are also GATT members to rather easily adopt a GATT waiver (two-thirds of the GATT Contracting Parties) to authorize the trade measures contemplated in the Montreal Protocol. But at the same time, it might be wise to go a few steps further and include in such a waiver several other specified treaties. Obviously, the waiver can also be amended in the future to add more specifically named treaties.

Even under such a waiver approach, there are still some important policy and treaty drafting questions that must be faced. For example, should the exception to GATT be worded to apply only to the mandatory trade measures required by the specified environmental treaties? Or should they also be extended to those measures which are deemed discretionary but "authorized" by the environmental treaties? Or, would the GATT waiver even go the further step to authorize GATT members to take trade measures unilaterally to help enforce the substantive environmental norms contained in the environmental treaties, even when such environmental treaties do not have trade measures/sanctions indicated in their texts?

V. Subsidies

The problem of subsidies in international trade policy is perhaps the single most perplexing issue of the current world trading system, and one that is very complex indeed. Some of the major controversies and negotiation impasses (such as the question of agriculture) relate to this problem. The GATT rules have become increasingly elaborate, and contain several different dimensions. Not only are there provisions in GATT itself (Articles VI and XVI), but there is the Tokyo Round "Code" on subsidies and countervailing duties which provides obligations to the signatories of that code. It is not feasible in this paper to go into great detail on the subsidies question. Indeed, the subsidies question in relation to environmental policies may be one of the most intricate and difficult of those facing the world trading system during the next decade.

The following hypothetical cases can illustrate some of the problems that could occur:

- Suppose an exporting country establishes a subsidy for certain of its manufacturing companies to allow them grants or tax privileges to assist them in establishing environmental enhancement measures (such as machinery to clean up smoke or water emissions, or other capital goods for environmental or safety/health purposes). When those producers export their goods, the goods could be vulnerable to foreign

nations imposing countervailing duties. Is this appropriate or should a special exception for environmental measures be carved out?

- Can an importing country argue that the lack of environmental rules in the exporting country is the equivalent of a subsidy and impose a countervailing duty?

- Similarly, suppose a nation lacks environmental rules with the result that its domestic producers can produce more cheaply and thus compete to keep out goods which are imported from other countries which have substantial environmental rules. Thus the lack of environmental rules becomes an effective protectionist device.

Obviously these hypotheticals are not so hypothetical. A good part of the discourse about the proposed NAFTA treaty expresses the worry that if Mexico lacks environmental rules, this will give Mexico a competitive advantage vis-à-vis American (or Canadian) producers.

These problems illustrate the need for careful examination of the subsidy rules so as to design appropriate environmental exceptions or rules without destroying the advantages of the subsidy rules.

Can an importing country argue that the lack of environmental rules in the exporting country is the equivalent of a subsidy and impose a countervailing duty?

VI. The Institutional Problems: Dispute Settlement, Transparency, and Jurisprudence

The GATT is a rather strange and troubled institution. It was born with several birth defects, since it was never intended to be an organization itself. Instead it was intended that an ITO Charter (International Trade Organization) would come into effect that would provide the institutional framework, in which GATT would be one part. Because of this troubled birth history, GATT has always been deficient in the institutional clauses normally found in a treaty establishing an international organization.

These problems have become increasingly troublesome as world economic developments have gone beyond the rules provided by the GATT system. Some of these problems are being addressed in the current Uruguay Round GATT negotiation, and, if that is ultimately successful, it may help improve the institutional situation. Other GATT problems include problems of accepting new members, particularly those with different economic structures; the problem of assisting developing countries; and the difficulty of facing up to some of the more newly appreciated issues that are affecting international trade flows—such as cultural and economic structural differences, questions of competition policy (antitrust), and, of course, environmental policies.

More broadly, the GATT suffers generally from institutional deficiencies in the two essential ingredients for an effective international organization, namely the making of new rules, and the provisions for making those rules effective through dispute settlement procedures.

What are the implications of all of this for environmental policy? First, as fairly frequently noted in the text discussion in prior sections, many of the policy clashes that environmental policy has with trade policy point towards institutional questions. This is most importantly the case for the dispute settlement processes of GATT. It is in those processes that some of the interstitial decisions involving interpretation of

current or future GATT/MTO treaties will be fought out. One example of that was the Tuna-Dolphin Case in which the panel itself noted that it would be inappropriate for the panel to make the requested interpretation of the GATT general exceptions of Article XX. It stated that such decisions should be made by the negotiators or the appropriate GATT bodies as a matter of treaty law alteration, rather than simply through an interpretation by a panel.

Nevertheless, the environmentalists, apart from the question of precedent, have several legitimate complaints about the GATT dispute settlement (and other) procedures. First of all they note appropriately that the GATT lacks a certain amount of transparency. By that, we can understand that the GATT tends too often to try to operate in secrecy, attempting to avoid public and news media accounts of the actions of GATT. In recent years, this has become almost a charade, because many of the key documents, most importantly the early results of a GATT dispute settlement panel report, leak out almost immediately to the press. For purposes of gaining a broader constituency among the various policy-interested communities in the world, gaining the trust of those constituencies and enhancing public understanding, as well as avoiding the charade of ineffective attempts to maintain secrecy, the GATT could go much further in providing transparency of its processes.

As more and more decisions which affect firms, citizens, and other groups are made at the international level, it will be necessary for the international decision-making process to accommodate goals of transparency, adequate expertise, and participation in the advocacy and rule-making procedures.

Secondly, there is criticism and worry that in the dispute settlement processes the GATT lacks the kind of expertise which would help it to make better decisions. In particular, it is felt that expertise in environmental issues is lacking. Again, there is considerable room for improvement in this regard, perhaps with procedures that would give panels certain technical assistance.

Finally, there is criticism of the GATT panel processes in that they (while operating in secret) do not make provision for the transmittal of arguments, information, and evidence from a variety of interested groups, including non-government environmental policy groups. Once again, there should be ways that the GATT can improve on this problem.

Apart from the dispute settlement procedures, the overall institutional set up of a GATT and a possible MTO could be likewise improved. In particular, transparency could be enhanced, perhaps by NGOs (Non-Governmental Organizations) as well as IGOs (Inter-Governmental Organizations) gaining some share of participation in the GATT processes, perhaps through an annual open meeting. Furthermore, as the GATT or MTO continues to evolve, procedures such as those already set up called the TPRM—Trade Policy Review Mechanism—might build in provisions for explicit attention to environmental concerns. It is clear that some of the GATT rules need to be changed through waivers or new negotiated text.

VII. Some Conclusions

In the light of those discussions, what can we say about the relationship of two policy sets and whether they are congruent or conflicting? The answer obviously is a bit of both.

In broader long-term perspective, there would seem to be a great deal of congruence. Some of that congruence derives from the economic and welfare enhancement of trade liberalization policies. Such welfare enhancement can in turn lead to enhancement of environmental policy objectives, as mentioned at the outset of this paper.

On the other hand, it is clear that the world trade policies and environmental policies do provide a certain amount of conflict. This conflict is not substantially

different from a number of other areas where governmental policies have to accommodate conflicting aims and goals of the policy makers and their constituents. Thus, to some degree it is a question of where the line will be drawn, or how the compromises will be made. In that sense, institutions obviously become very important, because the decision making process can tilt the decision results. If the world trade rules are pushed to their limit—i.e., free trade with no exceptions for problems raised by environmental policies and actions affecting environments—clearly the trade rules will cause damage to environmental objectives. Likewise, if the environmental policies are pushed to their limit at the expense of the trading rules, so that governments will find it convenient and easy to set up a variety of restrictive trade measures, in some cases under the excuse of environmental policies, world trade will suffer.

Furthermore, there is no doubt that the "cultures" of the two policy communities—that of trade and that of environment—differ in important ways. The trade policy experts have tended over decades and perhaps centuries to operate more under the practices of international diplomacy, which often means secrecy, negotiation, compromise, and to some extent behind-the-scenes catering to a variety of special economic interests. In addition, at the international level, the processes are slow, faltering, and lend themselves to lowest common denominator results, or diplomatic negotiations that agree to language without real agreement on substance.

On the other hand, the environmental policy groups, perhaps partly because they primarily operated on the national scene, have become used to using the processes of publicity and lobbying pressure on Congress or Parliament, to which they have considerable access. There is thus a much broader sense of "participation" in these processes, which the international processes have not yet accommodated. Furthermore, the environmental policy groups (like many other groups working on the domestic level) have a sense of power achieved through successes in the legislative and public discussion processes. They feel somewhat frustrated with the international processes because those are sufficiently different to pose puzzling obstacles to the achievement of environmental goals.

This difference in culture is not inevitably permanent, and indeed the international processes need to accommodate more transparency and participation. This is true not only of the environmental case, but it is increasingly an important consideration for the broader way that international economic interdependence is managed. As more and more decisions which affect firms, citizens, and other groups are made at the international level, it will be necessary for the international decision-making process to accommodate goals of transparency, adequate expertise, and participation in the advocacy and rule-making procedures.

[W]hen the United States submits . . . to international dispute settlement procedures, it will sometimes lose and find itself obliged to alter its own domestic policy preferences.

The notion that the United States, for example, can, or should, impose unilaterally its environmental views and standards on other parts of the world, without any constraint from international rules or international dispute settlement procedures, is not likely to be a viable approach in the longer run. This means that when the United States submits (as it must, partly to get other countries to submit reciprocally) to international dispute settlement procedures, it will sometimes lose and find itself obliged to alter its own domestic policy preferences. This has already been the case, and the United States has a mixed record of compliance with the GATT rulings, although for a large powerful nation that record is not too bad.

Apart from these longer run and institutional issues, there are matters which can be undertaken jointly by the trade and environmental policy communities, in the context of the GATT/MTO system.

For the near term actions should include:

1. Greater transparency both in the rule making and in the dispute settlement procedures of the trading system. This would call for more participation, opportunity for policy advocacy inputs, and more openness—e.g., publication of the relevant documents faster and in a way more accessible to interested parties.

2. Greater access to participation in the processes.

3. Some clarification about the degree to which the international process will be allowed to intrude upon the scope of decision making of national (and subnational) governments. For example, the "scope of review" of international GATT/MTO panels over national government regulatory decisions concerning environment needs to be better defined.

4. Finally, some near-term rule adjustments or changes in those rules through one or another of the techniques for changing GATT rules (probably focusing on the waiver procedure) to establish a reasonably clear set of exceptions for certain multilateral environmental treaty provisions that call for trade action that would otherwise be inconsistent with the GATT/MTO rules.

Looking at the longer term:

1. The subsidies area will need substantial study.

2. Some type of more permanent exception will be needed either as an amendment/waiver embellishment of the Article XX exceptions of the GATT system, or possibly in the context of the national treatment rules. This can build upon the short-term rule alterations (e.g., by waiver) mentioned above, with particular reference to the process-product characteristic question, so as to accommodate the broadly agreed international environmental policy provisions, such as those now contained in some treaties.

3. The GATT/MTO dispute settlement procedure will continue to evolve, in the light of experience, and there will need to be further adjustments in that procedure.

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