THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 36, NUMBER 2

LAW QUADRANGLE

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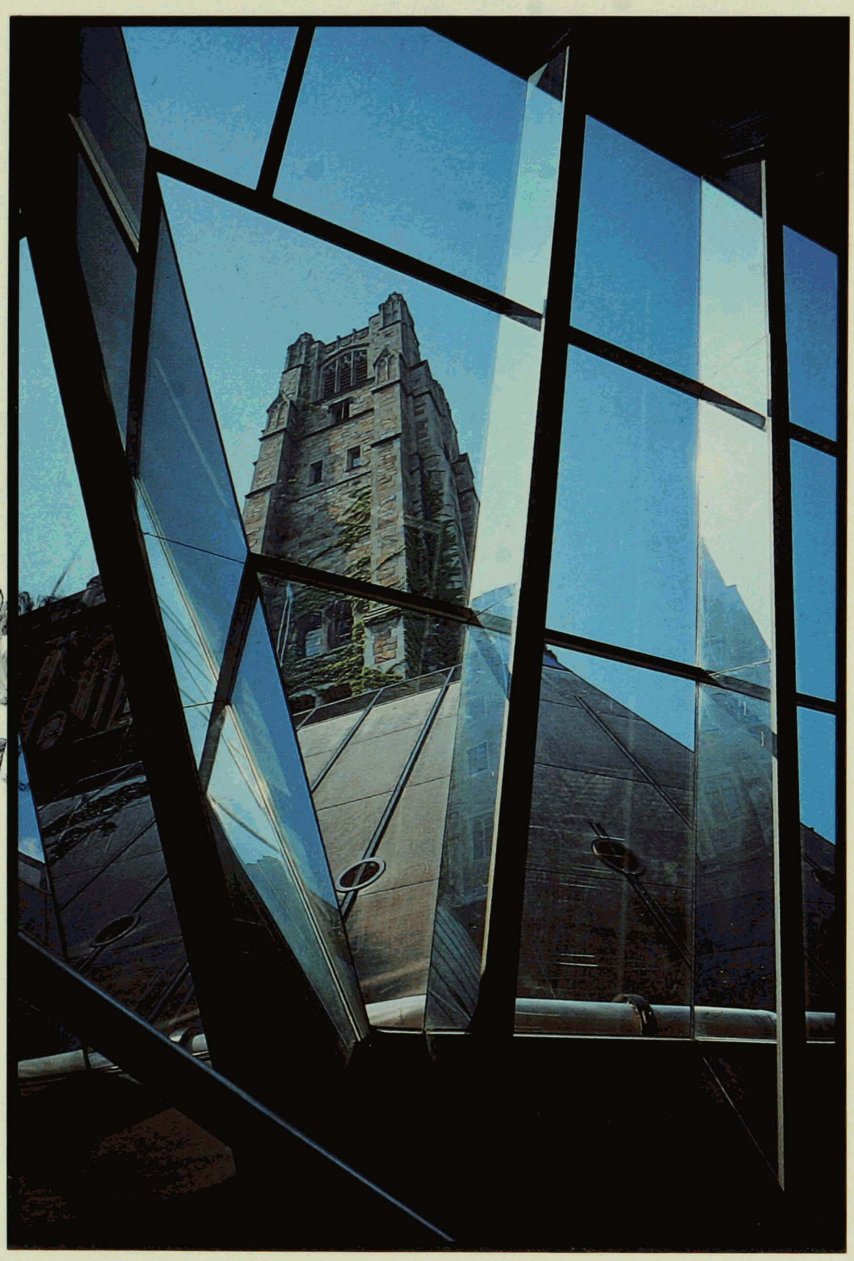

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On the cover: Looking from the Allan and Alene Smith addition of the Law Library to the "stacks" of the Legal Research Building.

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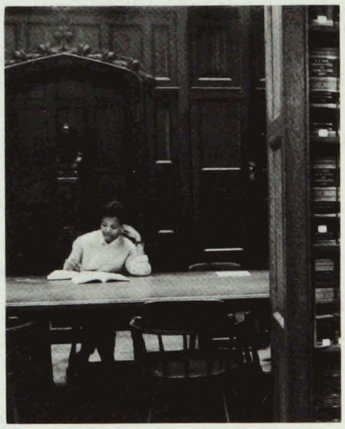

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Record number of students accept clerkships

More students will be working for judges upon their graduation in 1993 than in any other year in Michigan Law School history, according to Professor Kent Syverud, the outgoing chair of the law school clerkship committee. As of February 1993, seventy members of the Class of '93 had accepted jobs with federal and state judges, a substantial increase from previous years.

Syverud reports that he expects that "75-80" members of the Class of '93 will end up clerking, once late hiring and hiring by newly appointed judges is complete. There will be at least 20 Michigan graduates working for the federal courts of appeals, 30 on the federal district courts, 10 at state supreme courts in eight different states, and 10 at intermediate state appellate courts and specialized federal courts. As recently as 1987, only a few dozen students in each graduating class went on to clerkships.

Asked why the numbers of clerkships have grown, Syverud gave three reasons: "First, our Placement Office staff, faculty, and alumni have been incredibly helpful. We have hundreds of alumni who are judges around the country, and many more who know judges, and many of them have helped a Michigan student obtain a clerkship. Second, Michigan students have started applying earlier and in larger numbers. The early applications have understandably annoyed many judges, and I apologize, but they have also produced interviews for our students with judges who did not consider them in the past. Third, the market for firm jobs has been less stable, leading many more students to consider clerking."

Professor Deborah Malamud, who clerked for Judge Louis Pollak and Justice Harry Blackmun before joining the Michigan faculty in 1992, will be chairing the clerkship committee in 1993-1994.

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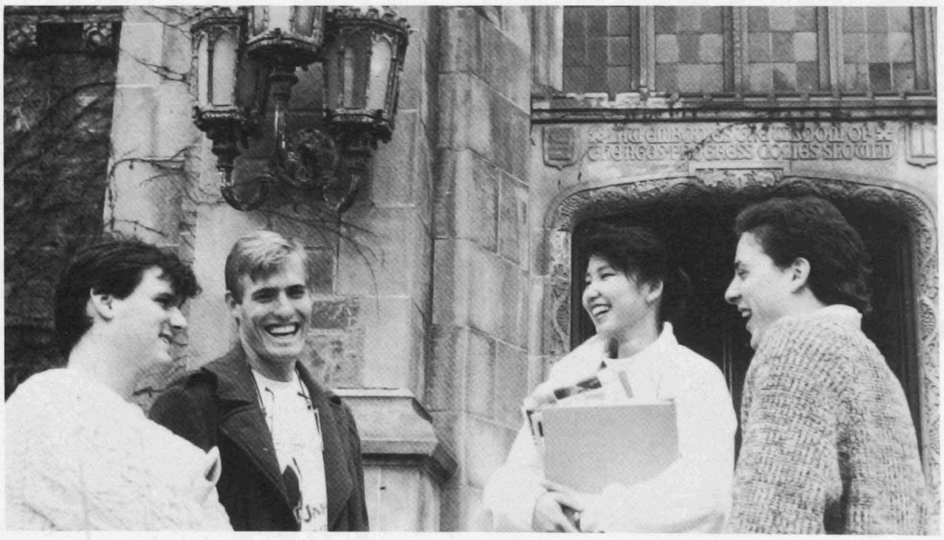

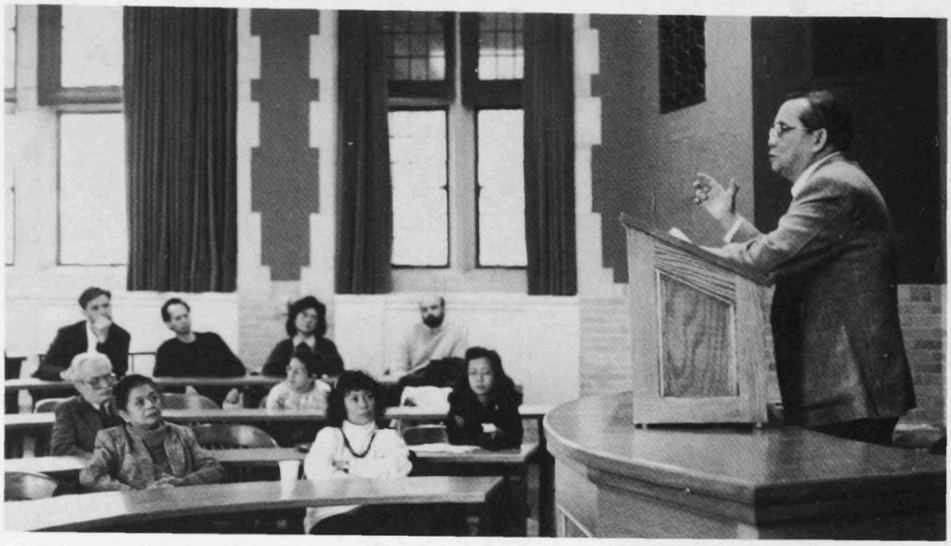

Jovito Salongo discussed human rights in the Philippines at a visit to the Law School in March. Salongo, a Filipino senator, is one of the world's leading human rights activists.

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United States District Court
for the Eastern District of Michigan
Detroit, MI

Karen Young
Michigan Court of Appeals
Detroit, MI

Correction:
Joe B. McDade, '63, is a United States District Judge of the Central District of Illinois.

Chief Justice of the Supreme Court of Latvia, G. Zemribo, visited the Law School in February. His stay included an address to faculty, staff and students on "Human Rights in the Baltic Republics."

Bridge Week 3

Capital punishment: fundamental, practical study

A prosecutor who routinely seeks the death penalty, a leading historian of capital punishment and a one-time "death row" inmate were among those brought together at the Law School in January to discuss the status of the death penalty in America.

The five-day series of lectures, discussions and presentations, held January 25-29, was the third of four "bridge weeks" for 90 members of the New Section of first-year students. Designed to expose students to the practical side of various legal issues, the death penalty forum provided a weeklong opportunity to examine the current state of this controversial area of the law.

"Whether or not it changed students' underlying view of the death penalty, most of them realize now that there are fundamental, practical problems involved in administering it," said 3L Andrew Clubok, New Section teaching assistant and co-organizer of the week's activities. "It sparked a lot of discussion. People were surprised to find out some of the things that they learned about the administration of the death penalty."

The week included lectures, video presentations and small group discussions. Among the participants were Watt Espy, a leading historian of the death penalty, and David Baldus, author of a noted study that claims a murder victim's race plays a large part in determining whether the death penalty is imposed.

Joan Barton, an assistant Texas attorney general in charge of handling habeas appeals in that state, spoke in favor of the death penalty. So did Joseph Briley, a district attorney in Ocmulgee County, Georgia, who has prosecuted more capital cases than any other district attorney in his state.

Appearing in opposition to the death penalty were Bryan Stevenson, director of the Alabama Death Penalty Resource Center; and Andrea Lyon, head of the organization's Illinois office. Billy Moore, who spent 16 years on Georgia's Death Row before being pardoned in 1991, gave students a glimpse of life on the inside for those awaiting execution. Law School faculty members taking part in the discussions included Phoebe Ellsworth, Samuel Gross, Yale Kamisar, and William Miller.

While public-opinion polls show that a large percentage of Americans not only favor the death penalty but are firmly committed to that view, New Section student Stacie Brown speculated that many would be more willing to change those views if they were presented with some of the information students were given.

"A lot of students were pro-death penalty at the beginning, but I think many, many people were starting to change their minds as the week went on, even if only a little," Brown explained. "Many students started to doubt the validity of the death penalty, and whether it could be fairly administered. It was a very enlightening experience."

Professor Peter Westen, co-organizer of the week's activities, observed that the sessions painted a dismal portrait of the legal representation afforded those accused of capital crimes. "I was startled by the data that was compiled about the low level of competence on the part of trial lawyers who defend indigent capital defendants," reported Westen, one of four New Section instructors for the spring semester. "Many states don't have a salaried public defender, and if they do, they're overworked, and have no time for research or preparation."

Attorneys assigned to defend capital cases commonly have little or no criminal experience, Westen noted, and may even have been assigned a death-penalty case as "punishment" for angering a judge in another matter. "Often the attorneys don't want to be associated with the case in the community, so some distance themselves and don't do the work," explained Westen. "The lack of preparation is truly shocking."

The bridge weeks aim to give students a chance to examine an issue with a depth not otherwise afforded by the first-year curriculum. Topics generally cross course boundaries, and present students with a face-to-face view of matters legal practitioners frequently encounter. The fall semester included sessions on judging and medical malpractice; a fourth bridge week focusing on Negotiations will round out the 1992-93 offerings.

Because of the death penalty's implications for varying aspects of the law, and because the practitioners who work with it must confront a range of vexing professional and moral issues, organizers felt it presented a perfect topic for the concentrated focus of a bridge week.

"To understand the current law of the death penalty in the United States, one has to have an understanding not just of criminal law, but of constitutional law — because the Supreme Court has largely constitutionalized the area — and of procedure," Westen explained. "When I went to law school, we spent several days covering the death penalty in criminal law. But now that the subject has been constitutionalized, it not only is not covered at all in most criminal law courses, it often is not covered *anywhere*. That's the irony: the death penalty has become so important and so complex, it normally doesn't get covered at all in law school."

–Michael F. Smith

Students fast to protest Haitian refugee policy

Black armbands with the number "264."

• Signs reading "Clinton: Broken Promises" and "Release the 264 Haitians illegally detained in Guantanamo Bay."

• A representative barbed wire enclosure.

• Chants of "HIV is not a crime. Why are Haitians doing time?"

• And a group of supporters from the law school, University community and Ann Arbor provided the backdrop for an emotionally-charged speech given by Black Law Students Alliance (BLSA) Chairperson-Elect and seven-day faster, Dan Varner.

"Yeah, I've been hungry, I've been nauseous a couple of times, and I've been light-headed," Varner said to a crowd outside the law school library on March 31. "But I can go home, to my home, and eat a meal. I can call up my family and ask them how they are doing. They will tell me that they are fine. They will ask me how I'm doing, and I can say that I am fine. But those Haitians on Guantanamo Bay can do none of those things."

Varner was one of 23 Michigan students who participated in a week-long hunger strike to protest President Bill Clinton's refusal to release 264 Haitian refugees detained at Guantanamo Bay, Cuba, many of whom are HIV-positive. Some are being detained because they are related to someone who has the disease. All of the Haitians have been there for at least six months, some for more than 15 months. Fifty of them are children.

Over 150 other students and faculty pledged to give up meals or make other symbolic efforts in support of the Haitian hunger strikers.

Those Haitians have been on a hunger strike since January 29, 1993 to draw attention to their situation.

"Don't ask me why I'm fasting. Look at what's happening and ask why you are not," said Walter Lanier, 1L, during the kick-off rally on March 24.

Daniel Varner (2L), chair-elect of the Black Law Students Alliance, speaks at a rally outside the law library following his seven-day fast in protest of the treatment of Haitian refugees.

A seven-day faster, Lanier said his purpose was to "bring attention to the plight of 264 human beings detained against their will for no other reason than for the color of their skin and for being HIV-positive."

The United States government is detaining the 264 refugees, who have already shown that they have potentially valid claims for political asylum which should be pursued in the U.S. However, they have not been allowed to move from Guantanamo Bay because of their HIV-status.

Law students at Yale, Harvard and Brown have also staged hunger strikes. Michigan symbolically received the strike from Brown University on March 24 and passed it on to students at Columbia on March 31.

Detroit Pistons player Olden Polynice, who was born in Haiti, joined the rally. He participated in his own hunger strike in February and continues to campaign actively for the release of those detained at Guantanamo Bay.

Polynice compared the treatment of HIV-positive superstar athlete Magic Johnson with that of the 264 refugees.

"Magic was made out to be a hero, and he knew how he got the virus," Polynice said. "These people are being treated as criminals, and many of them do not know how they contracted the virus."

Lawyers for the refugees have won two injunctions against the government, but the U.S. Supreme Court has twice intervened to stay the injunctions.

– Julie Beck
Res Gestae News Editor

Martin Luther King, Jr. Day observed

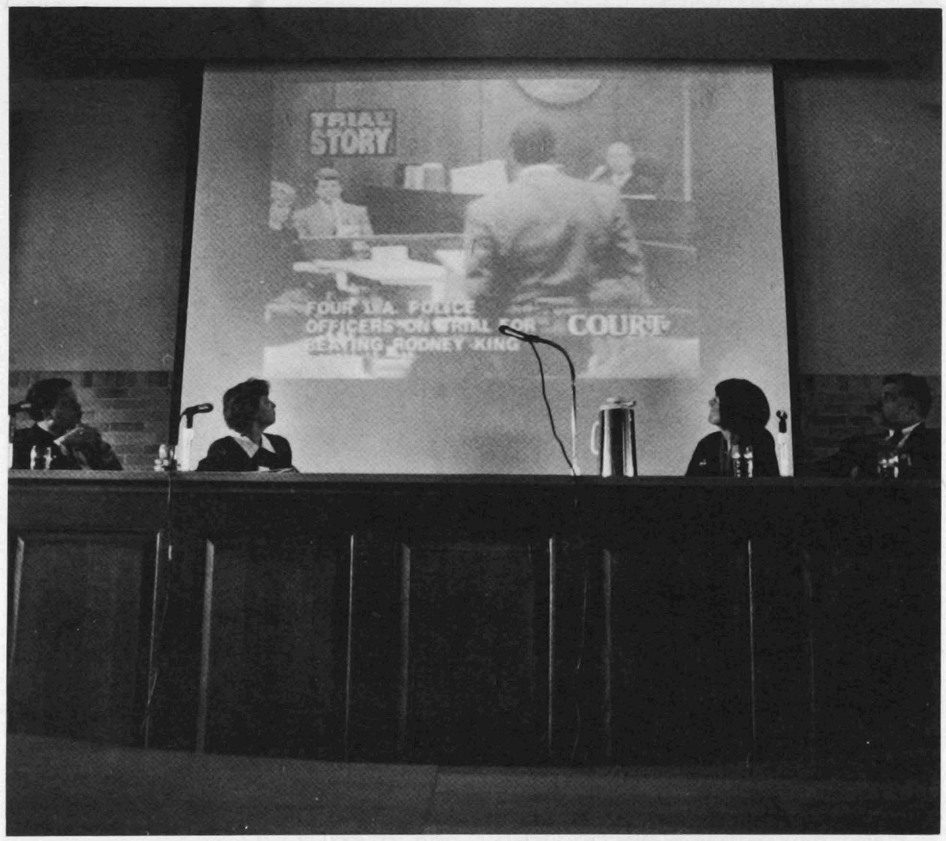
An examination of the first Rodney King beating verdict marked the Law School's observance of Martin Luther King, Jr., Day '93. A panel composed of Assistant Professor Ted Shaw, Detroit Attorney and jury expert Neal Bush, and Professor Phoebe Ellsworth, with Assistant Professor Debra Livingston moderating, considered the social terrain in which King's beating by four Los Angeles police officers took place, analyzed the trial's strategies as shown in film clips of the courtroom proceedings, and focused particularly on the question of jury composition, the dynamics of jury deliberation, and possible improvement in the jury system.

Shaw, who in 1987 established the Los Angeles office of the NAACP Legal Defense Fund, summarized the social, political, and legal climate of the city at the time the beating took place. He outlined, among other cases, an earlier police brutality case, Lyons v. City of Los Angeles, in which an African-American plaintiff unsuccessfully attempted to obtain redress for permanent injuries he had received from a police chokehold. (Routine use of the chokehold on African-American suspects was defended by then-Police Chief Daryl Gates on the grounds that African-Americans' throat muscle structure is "different from normal peoples'.") Citing the intensity and pervasiveness of racial tensions in the Los Angeles area, Shaw was not optimistic about current portents of change seen there.

Bush, who noted the brilliance of defense tactics in the first King trial, discussed jury selection in Michigan, especially as affected by the limitation to voire dire resulting from the Ross case, and the strictures on change of venue in this state.

Ellsworth's remarks concentrated on the dynamics of jury selection and deliberation and small but potentially significant steps to improve a system which, she noted, if it is intrinsically flawed, bears the flaws of a democratic society. She pointed out that a judge system is unlikely to be fairer to minorities than a jury system and emphasized the importance of instructing jurors on how to do their job and how to structure deliberation.

In her introduction of the panelists, Professor Livingston announced that Shaw will go on a two-year leave at the end of Winter Term to join the new Director/Counsel of the NAACP Legal Defense Fund, Elaine Jones, as Associate Director/Counsel.



Left to right, Professors Ted Shaw, Debra Livingston and Phoebe Ellsworth, and noted Detroit attorney Neal Bush, '70, watched a tape along with the audience before their presentations on jury composition, deliberation and possible jury system improvements.

Masterful third edition of *Securities Regulation* crafted by Seligman

When the 11th and final volume of the Third Edition of *Securities Regulation* rolled off the presses of Little, Brown & Co. this spring, the world of securities law gained possession of the first comprehensive revision of this landmark treatise in three decades.

But for Law School Professor Joel Seligman, who collaborated with Harvard Law School Professor Louis Loss on the massive, eight-year effort, the event will signal merely the end of one project and the beginning of another: updating.

"The great risk of writing a treatise is that you become a slave to it," notes Seligman. "And annual supplements are close to indentured servitude."

For Seligman, work on the treatise has been a labor of love. Having begun the project while teaching at George Washington University Law School in Washington, D.C. ("Dec. 21, 1984, at one o'clock," he recalls), Seligman carted his boxes of index cards along with him upon becoming a faculty member at Michigan during the 1987-88 academic year. Though admittedly a daunting task at first, Seligman notes that the business of writing a treatise became more manageable when broken down to its component parts.

"It's like any other type of legal writing; you focus your attention and develop a kind of instinct for it," he observes. "I don't think that it's that much different from working on a law-review article."

The first edition of *Securities Regulation*, written by Loss, appeared in 1951. It was followed 10 years later by a three-volume Second Edition, itself supplemented in 1969 by a three-volume update. Although Loss issued a "mini-treatise," entitled *Fundamentals of Securities Regulation* in 1983, it was clear the dizzying pace of development of securities law would make it necessary to create a third edition, nearly from the ground up. Loss, now professor emeritus at Harvard Law School, chose Seligman for the job.

The task involved an exhaustive process of reading and digesting thousands of securities-related cases and decisions of the Securities and Exchange Commission. Over the past few years, updated volumes of the treatise have emerged one after another in steady fashion. In all, the eleven volumes total approximately 5,700 pages.

"I've never run in a marathon, but I have to believe that writing a treatise is a little bit like doing that," Seligman notes. "It's not that each stride is different, but the cumulative exhaustion is sort of surprising. The last volume is like the 22nd, the 23rd, the 24th mile. You're tired, but you have to keep pounding away."

The pounding must have been worth it, for reviewers have been lavish in their praise. Writing in The Business Lawyer, A.A. Sommer, Jr. described the Third Edition as a "magnificent intellectual tour de force . . . the most authoritative source of interpretation of the federal securities laws extant." In the Georgetown Law Journal, Professor Jeffrey D. Bauman of the Georgetown University Law Center declared the publication of the first three volumes "a signal event in the scholarship of securities regulation." And reviewing the revised treatise for the Harvard Law Review, Professor Mark A. Sargent of the University of Maryland School of Law called the updated version ". . . monumental . . . few of today's treatises combine intellectual sophistication and felicity of expression with the

aplomb that characterizes the Third Edition of *Securities Regulation*."

While the job of penning a treatise is a massive one, Seligman notes that it carries with it the responsibility to be fair and accurate. Early drafts were circulated among experts in the securities-regulation field as they were completed, and all efforts were made to include any legitimate concerns brought to the authors' attention.

"What we're trying to do is be balanced and fair," Seligman explains. "If we criticized a case or a statute, and someone defended it, we'd be sure to note their defense. Because it is a treatise, you never want to present cases that support only your view. Rather, you want to give the reader a feeling she's getting a comprehensive view of the whole field."

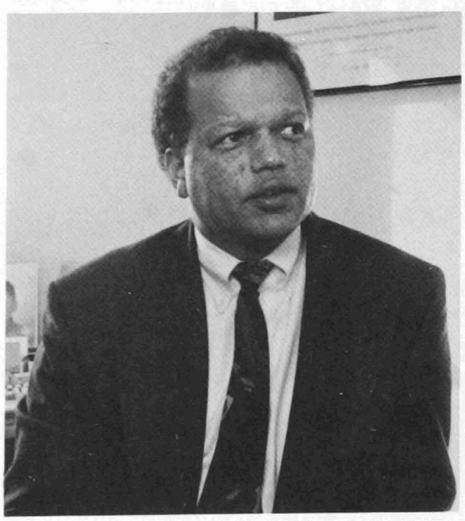
Although work on the treatise has been completed, Seligman plans to keep busy preparing annual supplements. He also intends to turn his attention to corporate law, and says any decision as to whether there will be a Fourth Edition of the treatise is still a few years off.

While *Securities Regulation* no doubt will be used in the coming years to inform countless practitioners and academics of the finer points of securities law, Seligman notes that the educational process involved is a two-way street. "Writing a treatise is a discipline," Seligman explains. "It forces you to think through everything that's out there. It makes you realize the world is a very complex place, perhaps in a way you might not have thought in the beginning."

–Michael F. Smith

Shaw to NAACP Legal Defense Fund

Assistant Professor Theodore M. Shaw, who joined the faculty in November of 1990, is taking a two-year leave of absence beginning in June of 1993. During that time, Shaw will be Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. at its headquarters in New York City. Shaw started his legal career as a trial attorney with the U.S. Department of Justice, Civil Rights Division under the Carter Administration. He joined the Legal Defense Fund in March of 1982, and served as director of its education docket until 1987, when he helped to establish a West Coast Regional Office for LDF.



Dean Lee Bollinger said of Shaw, "The most important fact to keep in mind is that Ted has *not* left the School — he is only on a temporary leave of absence. Even so, we will miss deeply the enriching voice he brings to students and faculty."

Shaw, who teaches Constitutional Law, Civil Procedure, and a Civil Rights seminar, said in a letter to his faculty colleagues that the decision to take a leave was a difficult one because he is very happy at Michigan. However, he noted that this is a very important time for the Legal Defense Fund and said that because "I am deeply committed to this great organization and its work . . . I have agreed to rejoin LDF for a time."

The Legal Defense Fund is the nation's premier civil rights public interest organization. Established by the NAACP in 1940 and initially headed by Thurgood Marshall, LDF is a completely separate organization. Julius L. Chambers, who has taught on the Michigan Law faculty, ended an eight year tenure as LDF's director-counsel in December, 1992, and has been succeeded by Elaine R. Jones. Because Jones will spend much of her time engaged in fundraising activities and working with external constituencies, government and other organizations, Shaw will direct the legal program and day to day operations. While the challenge of helping to run the Legal Defense Fund is stimulating, Shaw looks forward to returning to the Michigan Law School faculty and to the community he now calls home.

Kamisar honored on being named Distinguished University Professor

At a formal banquet at the Lawyer's Club on December 5, 1992, the Law School honored Yale Kamisar for his appointment to a University-wide chair as Clarence Darrow Distinguished University Professor. This chair is the highest academic honor the University awards. In selecting Kamisar, the Regents of the University recognized a lifetime of outstanding and distinguished scholarship on issues of criminal law, constitutional law, and the administration of criminal justice.

Kamisar's chair is named after a person who was probably the most famous lawyer in American history, but one whose only formal legal education consisted of attending the "Law Department" (as it was then called) of the University of Michigan from 1877-78. After one year Darrow decided to prepare for the bar exam by studying in a lawyer's office (a common practice then). He was acutely aware of the financial burden his law school studies were imposing on his older sister and brother. (Tuition was $50 a year, but evidently that was a lot of money in those days.)

Kamisar was toasted and roasted at the dinner in remarks by Dean Lee Bollinger and by Professors Jerold Israel, Jeffrey Lehman, and Theodore St. Antoine. Israel has co-authored three widely used casebooks with Kamisar. Lehman is a former law student of Kamisar's (as is Lehman's wife, Diane). St. Antoine joined the U-M law faculty the same year Kamisar did (1965) and they have been close friends ever since.

Employing both respect and humor in his commentary, Bollinger narrated an extended slideshow of Kamisar's life from birth through college (where he was voted the best college sportswriter in the NYC area) and the Korean war (where he saw combat as an infantry lieutenant) to academia. Kamisar's three sons, lawyers Gordon and Jon and tennis pro David, all came for the event.

Kamisar thanked the audience for its kindness and support over the years, and paid special tribute to his wife, Christine, for her constant support and good judgment. He spoke movingly about why he is driven to write, and to keep writing, on such issues as confessions; search and seizure; and death, dying and euthanasia.

Professor Yale Kamisar, center, was joined by his wife Christine and Dean Lee Bollinger in the Lawyer's Club at the December banquet where he was roasted, toasted and recognized for his appointment to the Clarence Darrow Distinguished University Professorship.

Weiler leaves after seven years at U-M

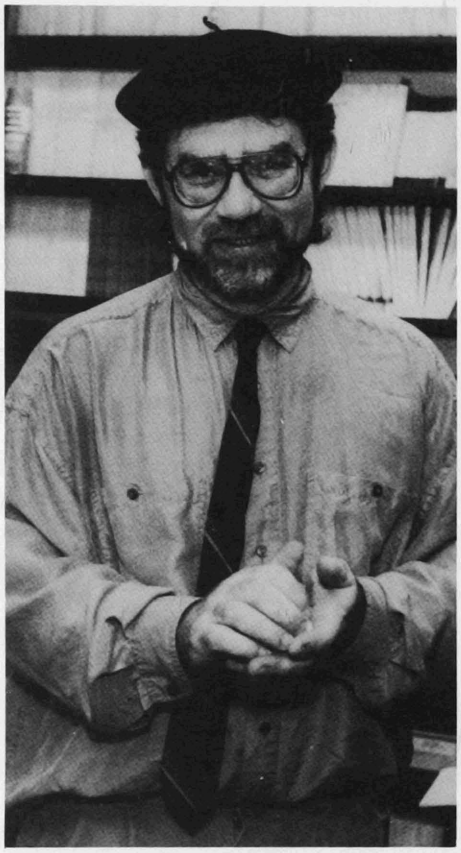
After what he called "seven wondrous years in Ann Arbor," Professor Joseph Weiler has left the U-M Law School to join the Harvard Law faculty. Weiler's teaching and research have focused on European Community law, international law, and comparative law. "Joe Weiler's departure is my deepest regret," said Lee Bollinger.

When asked to comment on leaving Michigan, Weiler submitted the following:

A faculty advisor to *Law Quad Notes* asked me to write a few words about my departure.

I am a leaver. World class, compulsive and consummate. A connoisseur of all nuances of exodus, departure, withdrawal, migration. The quintessential Wandering Jew. Sometimes I think it is genetic. Consider my parents: My father, may he live to be 120, was born in Riga, Latvia. In 1921, his family left and settled in Palestine. In 1925, after finishing high school in Tel Aviv, he and his brother left Palestine and wandered to the United States. The brother, my Uncle Si(mon) settled in Paris, Texas and still lives there. But my father left the United States and moved to South Africa where he met and married my mother.

Her grandparents were also born in Russia, but they left and moved in the late 19th century to England. (They, at least, had a good reason: pogroms). My mother's parents left England (cold and grey and no work) and went to the Belgian Congo(!). My mother was born in Elisabethville. They left and moved south to Rhodesia (now Zimbabwe). She left again and moved to South Africa. I was born there, but didn't stay long. My parents left and returned to Israel. In



Israel I lived first on a kibbutz, left, and moved to the Mediterranean town of Haifa, left again, and moved to Jerusalem. After completing my army service, I left Israel and went to live and study in England where I met my wife. We left and moved to Italy, and then, after seven years, we left again and moved to Ann Arbor where we spent another seven wondrous years. My children, all three, were born in Ann Arbor. If you suspect a note of apology in this somewhat dizzying tale, you would be right. We have done it again! We have left Ann Arbor and Michigan Law School and have moved to Boston and Harvard.

What have been the reactions?

First the institution. Every religion worth its name has a complex taxonomy of sin; grading sin must be a particularly pleasurable pastime — living it vicariously. At Michigan, leaving is always considered bad, sometimes sad. If you are 61 and leave for Florida, it is more sad than bad. If you are 51 and leave, say, for Columbia, it is quite bad and quite sad. If you are 41 and leave for Harvard it is just bad. A really serious transgression. Inexcusable. Actually the Law School has acted with grace and sympathy.

And friends? There is an exquisite symmetry in the attitude of friends and "friends," most notable in the period when it was known I was "being considered" at Harvard. My friends wanted me to get the offer because they knew it would please me. They hoped I wouldn't because they knew I would accept it. As for my "friends," well they wanted me to get the offer from Harvard, because they knew I would accept it. And they hoped I wouldn't get it, because they knew it would please me. Leaving is hard.

Still, in my future Guide to Cozy Departures, rule number one will be: Always leave when the going is good, when feelings are cordial, when memories are agreeable, when homesickness is assured to set in. The key to a successful departure is a delicate, ever present, lingering sense of regret.

And so I feel about my departure from Michigan.

Editor's note: Correspondence for Professor Weiler should be directed to Harvard University Law School, Cambridge, Massachusetts 02138.

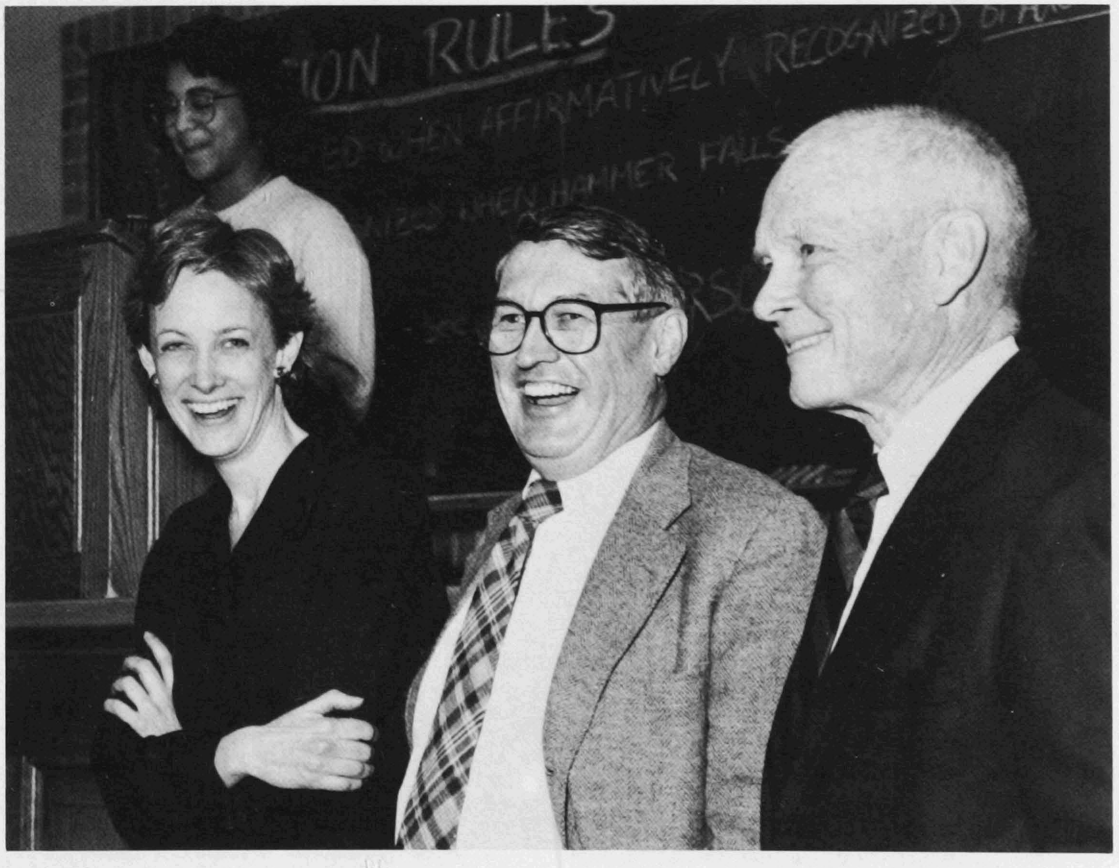
Jerold Israel completes service to Michigan Law Revision Commission

Jerold Israel, the Alene and Allan F. Smith Professor at the Law School, was recently honored upon his retirement as Executive Secretary of the Michigan Law Revision Commission. The Commission was created by statute, due in large part to the urging of the late Jason L. Honigman (J.D. '26), to be a non-political and expert advisor on law reform issues.

From 1973-1992, Israel supervised the Commission's research on hundreds of problems arising under the civil and criminal Michigan statutes and common law. More than 50 statutes were enacted into law pursuant to the Commission's recommendations during this period. Subjects of the legislation included family law, criminal and civil procedure, corporate law, taxation, criminal law, property, trusts and estates, administrative law, banking regulation, environmental law, and many others.

Israel employed dozens of Michigan law students to help with the research over the years. His rigorous training and supervision has helped many of the students in their subsequent careers.

At the Fall 1992 meeting of the Commission, its current chair, Richard McClellan (J.D. '67) honored Israel for his service and presented him with a brick from the State Capitol building. The Commission's members passed a resolution expressing thanks for work that has "enlightened lawmakers and the legal profession," as well as "immeasurably benefiting the people of the State of Michigan."



Professors Debra Livingston, left, and Theodore St. Antoine, center, were selected as this year's L. Hart Wright Award winners. Professors James J. White, right, and Joel Seligman (not present), were runners-up for this teaching honor awarded by students.

Creative gift to help future law students

A generous gift from an alumnus whose class is celebrating its 30th reunion this year will aid future law students in one of the places they need it most — the checkbook.

Stuart F. Feldstein, '63, has given a major gift, in the form of a charitable unitrust, which will be used to establish

Stuart Feldstein

loans with favorable borrowing terms for students needing financial assistance. The loans will be interest-free and will have a fixed payback that begins after students' other legal loans have been met.

"Number one, I have a love for the University and the profession," Feldstein explains. "Number two, I know that graduate school has become exceedingly expensive. And number three, there are groups which are underrepresented in our profession and ought to be primary beneficiaries."

Feldstein, who practices communications law as a partner in the Washington, D.C. firm of Fleischman and Walsh, credited the law school as his "launch pad."

Also an alum of the U-M Business School, the Law Quadrangle's neighbor, Feldstein recalls an attraction to the law school because of the "lovely buildings and a certain mystique. It turned out to be a great intellectual stimulus for me and the foundation for everything I've done since."

As an in-state student, he says he was fortunate enough not to need financial aid; he did rely on summer jobs, however. In his half-serious estimation, summer work in his time could earn enough to cover about a semester of school but he thinks the equation now might be more like "two weeks." "Students can have a tough time making it through school" when it comes to footing the bill.

A charitable remainder unitrust allows a gift to be designated while retaining income from the donated assets.

Some of Feldstein's fonder memories from law school days include the give-and-take of constitutional law classes, participating "like crazy" in intramural sports, the enthusiasm of Professor Harris who taught contracts, and doing research for Professor Israel on a law review article. He was asked to do law review his second year but chose not to in order to "protect good grades."

Feldstein also did some legal research work for a Michigan State University professor to make some money. This research, in copyright, helped him later as he entered practice. "It was helpful to meet people at the Library of Congress. When I was with the FCC, my first employer, I became liaison with the Copyright Office."

Married between the second and third year of law school to Ellen Smith (Northwestern), Feldstein and his wife have two children, a son who is a journalist in Houston covering NASA and a daughter who is a schoolteacher in Maryland working toward a master's degree at Johns Hopkins.

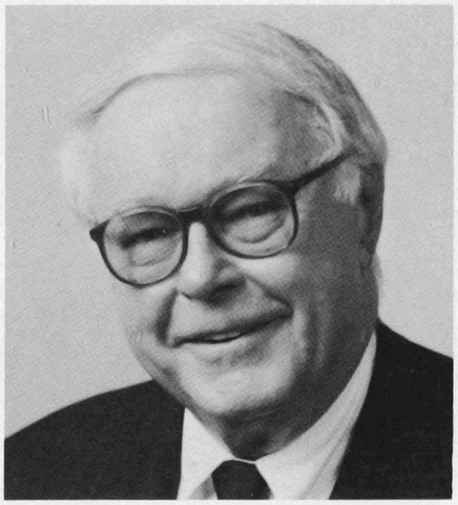
"Not everyone is as fortunate as I or my kids," he says, speaking when asked about his gift. "I think it is a responsibility of those who have been lucky to give something back."

Bushnell chosen to head ABA

George E. Bushnell, Jr., class of '51, of the Detroit law firm of Miller, Canfield, Paddock and Stone, has been nominated by the American Bar Association to be president-elect. His term as president-elect will begin in August, 1993. He will assume the presidency at the ABA's annual meeting in New Orleans in August, 1994.

Bushnell is past president of the State Bar of Michigan, Detroit Bar Association, and National Conference of Bar Presidents. He recently completed a term as chair of the ABA's House of Delegates.

George E. Bushnell, Jr.



He currently serves as a member of the American Bar Association's Commission on Women in the Profession.

In addition, Bushnell is a member of Michigan's Attorney Discipline board and has also chaired the state's Judicial Tenure Commission.

Pickering receives 50-year award

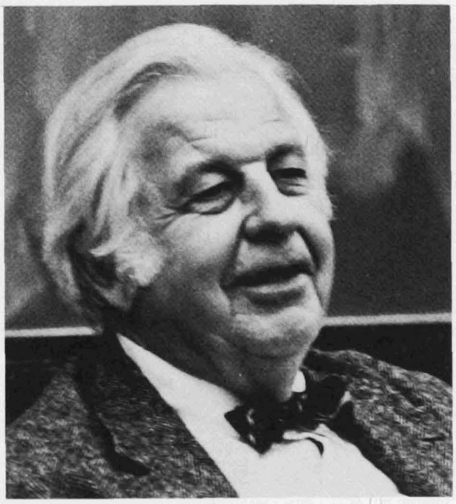
John H. Pickering, class of '40, of Wilmer, Cutler and Pickering in Washington, D.C., has been honored with the 1993 50-Year Award from the Fellows of the American Bar Foundation.

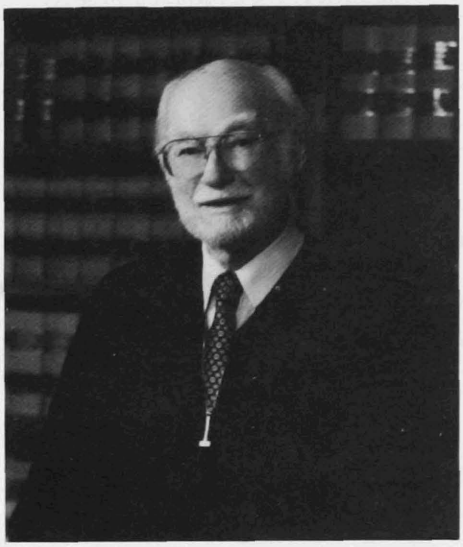
The award is presented to a Fellow who has actively practiced law for more than 50 years, and who, during that time, has adhered to the highest principles and traditions of the legal profession and of service to the public. Only one award is presented each year.

Pickering began his career as a law clerk to Supreme Court Justice Frank Murphy. He went on to serve in such diverse capacities as Chair of the Advisory Committee on Procedures, U.S. Court of Appeals, and as a member of the Special Committee on Lawyer's Public Service Responsibility. He is especially noted for eight years of leadership as Chair of the Commission on Legal Problems of the Elderly.

One of the Fellows who proposed him for the award was his partner **Sally Katzen**, class of '67

John H. Pickering





John R. Brown

Architect of a judicial legacy

John R. Brown, Law class of '32, died January 21, 1993, in Houston after an illustrious career as a Federal judge. He is known for his significant contributions to the establishment of equal rights in the South. Appointed in 1955 by President Dwight Eisenhower to the U.S. Court of Appeals for the Fifth Circuit in New Orleans, which then comprised Texas, Louisiana, Mississippi, Georgia, Alabama, Florida, and the Panama Canal Zone, Judge Brown presided over a region and a time — directly after the Supreme Court ended school segregation — of deep, often violent, conflict.

His opinions included the 1967 order that James Meredith be admitted to the then all-white University of Mississippi. In the same vein, Judge Brown, whom the *New York Times* described in a January 27 obituary as " a civil rights Republican in the Lincoln tradition," voted to strike down the Texas poll tax, to bar other discriminatory voting practices, and to overturn the conviction of two African-American men who had been on Louisiana's death row for 13 years, citing the absence of African-Americans on the jury.

Brown was Chief Judge from 1967-79. The judicial groundwork which he established with fellow judges John Minor Wisdom, Elbert P. Tuttle, and Richard T. Rives is chronicled in a 1981 book, *Unlikely Heroes* (New York: Simon & Schuster), by Jack Bass.

Among the best – A sampling

The pages of the 1993-94 compendium *Best Lawyers in America* (Aiken, SC: Woodward/White, Inc.) are in all likelihood laden with U-M Law grads. Among the contingent of Michigan practitioners, the following happen to have come to our attention:

1949 **Joe C. Foster, Jr.**, shareholder, Trebilcock Davis & Foster, Lansing; Trusts and Estates

1957 **Ronald R. Pentecost**, shareholder, Trebilcock, Davis & Foster, Lansing; Corporate Law

1962 **Chris L. McKenny**, Conlin, McKenny & Philbrick, Ann Arbor; Corporate Law

1966 **Robert E. Gilbert**, Miller, Canfield, Paddock & Stone, Ann Arbor; Real Estate
E. Edward Hood, Dykema Gossett, Ann Arbor; Business Litigation
Edward R. Stein, Stein Moran, Ann Arbor; Personal Injury

1967 **Larry J. Ferguson**, Ferguson & Widmayer, Ann Arbor; Employee Benefits Law

1968 **Michael E. Cavanaugh**, Trebilcock, Davis & Foster, Lansing; Business Litigation

1970 **Bettye S. Elkins**, Dykema Gossett, Ann Arbor; Health Care Law
Susan S. Westerman, Susan S. Westerman, P.C., Ann Arbor; Trusts and Estates

1972 **Philip Green**, Green & Green, Ann Arbor; Labor and Employment

1976 **Robert B. Stevenson**, Stevenson Keppleman Associates, Ann Arbor; Employee Benefits Law

1978 **Darrell Lindman**, Trebilcock, Davis & Foster, Lansing; Employee Benefits Law
Timothy D. Sochocki, Miller Canfield, Paddock & Stone, Ann Arbor; Health Care Law

Class Notes

1947

Clarence J. Brimmer (D-Wyoming) has been appointed as a member of the Judicial Panel on Multidistrict Litigation.

1952

Judge **Joseph E. Stevens, Jr.**, was elevated to Chief Judge, United States District Court for the Eastern District of Missouri, effective October 31, 1992.

1954

In accordance with long-standing plans, **Justin Rogers** retired from the chairmanship of the board of the Pennsylvania Power Company, effective March 1. In November 1992 he retired as chairman of the board and CEO of Ohio Edison. He retains a score of civic jobs and posts on the boards of many agencies, campaigns, and institutes centered in Ohio.

1956

Richard J. Riordan of Riordan and McKenzie and founder of the Riordan Foundation, a philanthropic organization which promotes literacy, is in the field of early candidates for mayor of Los Angeles.

1959

L.R. Gardiner, Jr., has recently been named Chief Executive Officer of the Snowbird Corporation, which owns and operates the Snowbird Ski and Summer Resort in Utah.

Hilary F. Snell has been named managing partner of Varnum, Riddering, Schmidt & Howlett, Grand Rapids.

1960

C. Robert Wartell of Maddin, Hauser, Wartell, Roth, Heller & Pesses, Southfield, MI, was recently elected as one of forty new members to the American College of Real Estate Lawyers.

Guy Vander Jagt, after serving 14 terms in Congress, has become of Counsel to the firm of Baker & Hostetler in their Washington office. During his distinguished career as a legislator Vander Jagt served for 18 years as chairman of the National Republican Congressional Committee, attained prominent positions on many powerful congressional committees, was the prime Republican legislative architect of the Carribean Basin initiative, and on several occasions was President Nixon's personal representative in international matters.

1963

John A. Scott has been elected a Fellow of the American College of Trusts and Estate Council. He is also serving as a member of the Probate and Estate Planning Council of the State Bar of Michigan and as Chairman of the Standing Committee on Code, Practice, and Rules of that council.

1964

Richard J. Aronson of Aronson Sanders Smith & Cross has been appointed Managing Attorney of Fireman's Fund Staff Counsel in Chicago.

William R. Warnock, an attorney with Donovan & Olsen in Chicago, has been re-elected to a three-year term as a representative of Cook County on the board of directors of Attorneys' Title Guaranty Fund, Inc.

Barry R. Whitman has been named to the board of directors of the NTID Foundation, a newly formed philanthropic unit at the National Technical Institute for the Deaf, a college of Rochester Institute of Technology. Whitman is a partner in Harter, Secrest & Emery, and chairman of the firm's Labor and Human Resources practice group.

1966

Ingham County Ciruit Court Judge **Michael Harrison** has ben elected president of the Michigan State Bar Foundation. He has served as president-elect, treasurer, and vice-president and has been a fellow of the foundation since 1984.

1967

Eli Segal, who served as chief of staff for the Clinton presidential campaign and as chief financial officer on the transition team, has been named Assistant to the President and Director of the Office of National Service in the new Administration.

1968

John C. Koster is the author of a chapter on "Marinas" in a 1993 Matthew Bender book, *Recreational Boating Law*. Koster is a partner in the New York maritime law firm of Healy & Baillie.

William Veen has become president-elect of the San Francisco Trial Lawyers Association. He specializes in construction negligence and product liability in his own seven-lawyer private firm, founded in 1975.

1969

Samuel W.W. Mandell has been named president and CEO of Bradlees, Inc., Braintree MA. He will assume responsibility for Bradlees stores and operations while retaining responsibility for the discount department store chain's real estate, labor relations, informations systems, loss prevention, and public and government affairs.

1970

George E. Feldmiller has been inducted as a fellow of the American College of Trial

Lawyers. Feldmiller is a partner in Stinson, Mag & Fizzel of Kansas City, MO, where he has practiced for the past 22 years.

David B. Lewis has been elected to the board of directors of the Louisville Gas and Electric Company, a subsidiary of LG&E Energy Corporation.

Lawrence A. Young has been elected partner in the Houston firm of Baker & Hostetler. He concentrates his practice in the areas of bankruptcy, consumer credit, and health care law. At present he is serving both as chairman of the ABA's Interest and Usury Subcommittee of the Commercial Finances Committee and as chairman of the Consumer Bankruptcy Committee, as well as being a member of several other ABA committees and task forces which center on consumer finance law.

1971

Robert W. Edwards, Jr., has joined the Providence, RI, office of Peabody & Brown as partner in its Business Law Department.

Steven F. Winkler, who is vice president and Connecticut counsel of Lawyers Title Insurance Corporation in Bridgeport, CT, was recently elected to the American College of Real Estate Lawyers.

1972

David G. Baker was recently elected to the American College of Real Estate Lawyers, one of 40 new members. Baker is partner and chair of the real estate department at Brickler & Eckler, Columbus, OH.

1973

Kathleen McCree Lewis has been appointed co-chair of the Appellate Practice Committee of the American Bar Association for 1992-93.

1973 LLM

Curtis L. Mack has been elected to the Board of Directors of the Uniroyal Technologies Company. At one time Regional Director of the National Labor Relations Board in Atlanta and Professor of Law at the University of Florida, Mack is currently the managing partner of Mack & Bernstein, the largest minority-owned law firm in the Southeast.

Three members of the class of 1965 found each other at a recent conference of the National Association of Women Judges. Left to right: Judge Mary Waterstone, 36th District Court, Detroit; Judge Joan Arrowsmith, Immigration Court, U.S. Department of Justice, Washington, D.C., and Justice Rosemary Pooler, New York Supreme Court, Syracuse.

1974

William J. Danhof of Lansing, MI, and **Clarence L. Pozza, Jr.**, of Ann Arbor have been elected to two-year terms as managing partners of Miller, Canfield, Paddock and Stone. They will each be involved in managing the firm's eleven offices, which are in Ann Arbor, Bloomfield Hills, Detroit, Grand Rapids, Howell, Kalamazoo, Lansing, and Monroe, MI, Boca Raton, FL, Washington, DC, and Gdansk, Poland. Danhoff will continue to manage the Lansing office.

Judge **Carolyn Stell**, Chief Judge of Ingham County, MI, Circuit Court, has had a scholarship named in her honor by the Mid-Michigan Region of the Women Lawyers Association of Michigan. The scholarship will assist Mid-Michigan women students with law school expenses.

1975

Scott Bass became a partner in the New York office of Piper and Marbury as of April 1992. Presently serving as chair of the New York State Bar Section on Food, Drug, and Cosmetic Law, Bass also wrote the chapter on "FDA's Enforcement Powers" in the *Food and Drug Law* treatise published by the Food and Drug Law Institute.

Ronald F. Graham, a shareholder in the Bloomfield Hills, MI, firm of Buesser, Buesser, Black, Lynch, Fryhoff & Graham, P.C., and a specialist in family law and malpractice defense, has been tapped to write a column for the newsletter of the Michigan Association for Marriage and Family Therapy. First subject tackled: responding to subpoenas for confidential files.

Barbara Timmer has joined ITT Corporation as general counsel and director of government affairs in Washington, DC. Ms. Timmer had, from 1989 through 1992, served as general counsel for the U.S. House of Representatives Committee on Banking, Finance, and Urban Affairs. She was lead counsel for the committee during the writing and passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and had similar responsibilities in connection with the Federal Deposit Insurance Corporation Improvement Act of 1991.

1976

The Honorable **Barbara A. Harris** has been elected Chief Judge of the City of Atlanta Municipal Court, the first woman to hold the position.

As of October 1, 1992, Magistrate Judge **Carol E. Jackson** was elevated to U.S. District Judge, U.S. District Court for the Eastern District of Missouri.

1977

Gaylen J. Byker, international financier and oil executive, has been named to a three-year term on the board of Fuller Theological Seminary, Pasedena, CA.

1978

Darrell A. Lindman has been elected to the Board of Directors and to the office of Treasurer for the Lansing law firm of Fraser Trebilcock Davis & Foster, P.C. He also serves as chairperson of the firm's Employee Benefits Law Department.

G. Mark McAleenan, Jr., has joined the Grand Rapids office of Dykema Gossett as an attorney of counsel. His practice will focus on business transactional matters. Prior to this he was a partner with Porter & Clements in Houston, TX.

John P. Murtaugh has been elected to the Executive Committee of Pearne, Gordon, McCoy & Granger, a Cleveland intellectual property firm. Murtaugh has been a partner in the firm since 1991. Prior to 1987 he was active in general litigation. Deciding to switch to patent law and patent litigation, he left his law firm, devoted himself full-time to studies at Case Western Reserve University, and obtained a requisite degree in chemistry. He then joined Pearne, Gordon as an Associate in 1989.

1979

Gwen A. Rowden has been appointed vice president and general counsel for the Rockefeller Group (RGI). She will continue to hold the titles of vice president of Rockefeller Center Development Corporation and Rockefeller Management Corporation, both subsidiaries of RGI.

1980

Iris K. Socolofsky has been elected to the Board of Directors and to the office of Secretary of the Lansing, MI, firm of Fraser Trebilcock Davis & Foster, P.C. She also serves as chairperson of the firm's Business Law Department.

Keith Wetmore has joined the board of directors of the San Francisco Bar Association. He is managing partner of Morrison & Foerster.

1981

Amy Wachs Fellner (nee Wachs) has married and moved from Cleveland, where she was a partner of Calfee, Halter & Griswold, to Midland, MI, where she has joined the corporate law department of the Dow Chemical Company.

Christopher H. Meyer has become a partner in the firm of Givens, Pursley, Webb & Huntley in Boise, ID, where he practices environmental and natural resources law. Prior to entering private practice, Meyer served as counsel to the National Wildlife Federation for ten years.

Robert M. Goldberg has joined the firm of Buchanan Ingersoll and will base his practice in the firm's new office in Lexington, KY.

1982

Christo Lassiter, a professor at the College of Law at the University of Cincinnati, has been conducting research in support of a study which examines the dramatically disproportionate rate of executions of black versus white soldiers in the U.S. Army convicted of capital crimes in England during World War II. The study, which was initiated and is directed by J. Robert Lilly, professor of sociology and criminology at Northern Kentucky University, was reported in detail in the N.Y. Times of Feb 7, 1993.

Donald Hubert, class of 1973, center, has been named the 1992 Chicago Lawyer Person of the Year, an award of Chicago Lawyer magazine. He was honored "for his effort to save an inner city Chicago school, his bar association work aiding attorneys who need to improve business skills to avoid disciplinary problems, and for his legal skills." An accompanying plaque was presented by Bernard Judge, left, the magazine's publisher and editor and by Lanning Macfarland Jr., president of Law Bulletin Publishing Co.

1984

Thomas L. Frederick, **George C. Lombardi**, and **Rex L. Sessions** have been elected partners of Winston & Strawn. Frederick and Lombardi are litigators in the firm's Chicago office; Sessions is a labor lawyer in the firm's New York office.

Michael H. Hoffheimer, Associate Professor of Law at the University of Mississippi, is the author of a new book, *Justice Holmes and the Natural Law* (Garland Publishing, Inc., 1992). In the work, which challenges prevailing views of Holmes through reassessing the sources and meaning of Holmes's break with transcendentalism, Hoffheimer employs an array of critical techniques, ranging from psychoanalysis to close textual reading.

1985

Jonathan B. Frank has become a member of the firm of Mason, Steinhardt, Jacobs & Perlman in Southfield, MI.

Three members of '85 have been named new partners in the Cleveland office of Baker & Hostetler. They are: **Ronald S. Okada**, who focuses his practice on employment litigation, especially on defense of employment discrimination and wrongful discharge actions; **Raymond Rundelli**, who concentrates his practice in commercial litigation and intellectual property law, particularly on matters of copyright, trademark and unfair competition; and **Ernest E. Vargo, Jr.**, who practices in the areas of antitrust and commercial litigation.

1986

Peter G. Fitzgerald, a partner in the law firm of Riordan, Larson, Bruckert & Moore, has begun his first term in the Illinois state senate. As a student at Michigan he was on the staff of the *Journal of Law Reform*.

Charles B. Fromm has been elected as a partner of Kirkland & Ellis in the New York office.

Arthur H. Siegal, formerly of Honigman Miller Schwartz & Cohn, has joined the firm of Jaffe, Raitt, Heuer & Weiss as partner in the Detroit office. He will be concentrating his work in all areas of environmental law, where he has extensive experience, particularly in matters concerning non-hazardous waste.

David J. Zott has been elected as a partner of Kirkland & Ellis in the Chicago office.

1987

Patrick B. Carey, **Brian Negele**, and **Lisa M. Pannepucci** have each been elected to partnership in the firm of Honigman Miller Schwartz & Cohn. All practice in the Detroit office of the seven-office firm.

David G. Roland has been elected to the Board of Directors of the Center for Children and Families, Jamaica, New York. Roland is a partner at Anderson Kill Olick & Oshinsky, P.C., specializing in commercial litigation. The Center serves at-risk children and troubled families throughout New York City.

Michigan Governor John Engler has appointed **Ena L. Weathers**, an attorney with the Service Employees International Union Local 79 in Detroit, to the State Child Abuse and Neglect Prevention Board.

1991

Todd W. Grant has opened his own law practice in Ann Arbor, as of February 1993. Grant had been practicing with Cox & Hodgman in Troy, MI. His practice concentrates on family law.

1992

Ann L. Andrews and **Mark A. Randon** have become associated with the Honigman Miller Schwartz and Cohn firm. Ms. Andrews is practicing out of the firm's Lansing office, Mr. Andrews practices at the Detroit office.

Laura Westfall Casey and **Troy L. Grigsby, Jr.**, were recently named as Associates by the Ohio firm of Vorys, Sater, Seymour and Pease. They are practicing in the firm's Cincinnati office.

Eugene Feingold, who is a professor emeritus of health services management and policy at the U-M School of Public Health and president-elect of the American Public Health Association as well as a member of the Law School class of '92, has recently been elected president of the Michigan League for Human Services.

David M. Glaser has joined the Minneapolis law firm of Fredrikson & Byron as an associate.

Alumni Deaths

1921 Harold M. Shapero, 11/15/92

1924 Max A. Wishek, 2/8/93

1932 John R. Brown, 1/21/93

1933 Charles E. Jones, 12/23/92

1938 George M. Holmes, 12/19/92
Milo M. Rouse, 12/24/92

1948 Neal H. Hundt 11/27/92

1950 Ronald L. Greenberg 5/18/92

1951 Harold L. Neal, 12/4/92

1957 Carl O. Petersen, 12/8/92

1963 David M. Serotkin, 1/11/93

1964 David J. Ohlgren, 11/92

1989 David Wynne 2/28/93

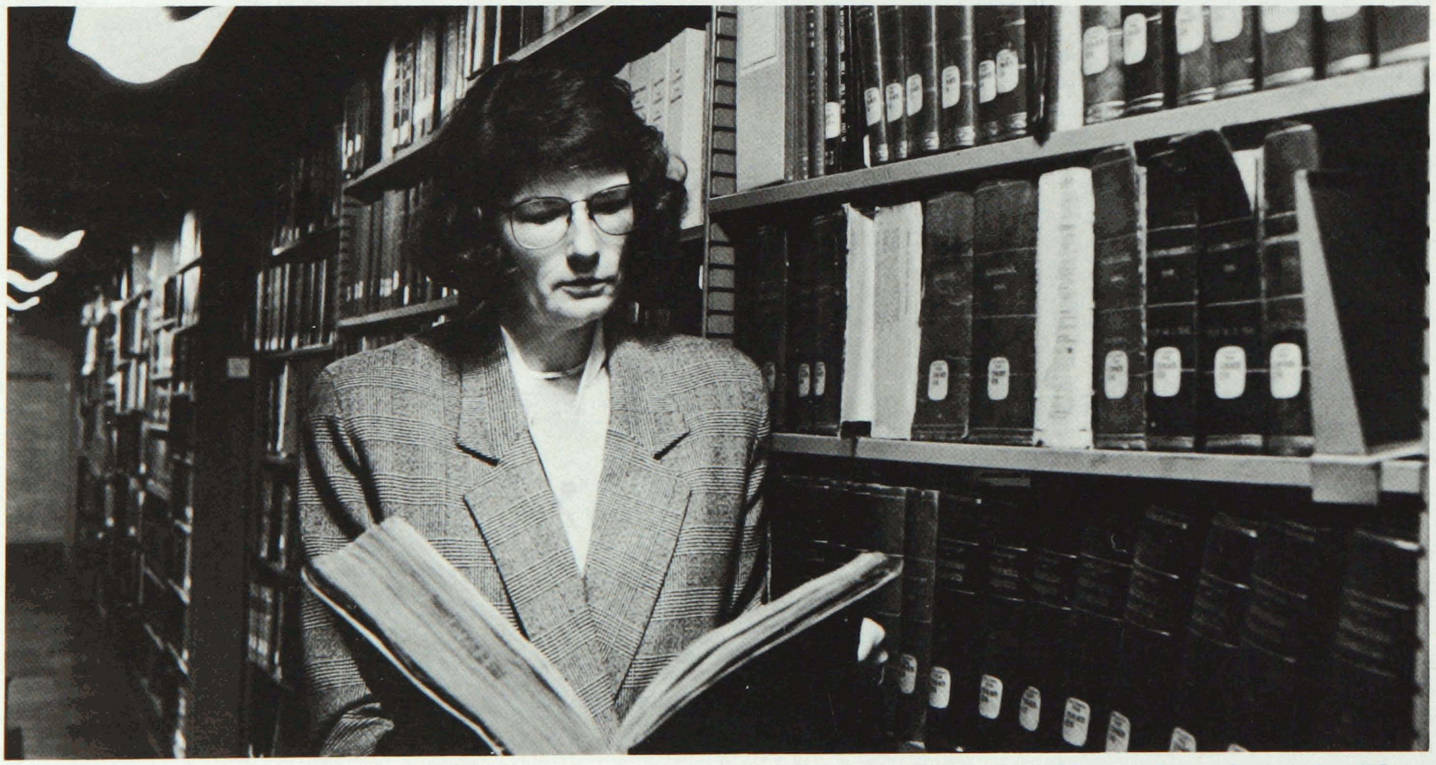
Coming in the next issue of Law Quadrangle Notes:

- Senior Day/Commencement (Eli Segal, '67, will be this year's speaker)
- Kent Syverud on taking students seriously
- Yale Kamisar on the constitutionality of laws against assisted suicide
- Suellyn Scarnecchia: two legal clinics and one high-profile case

A Source of Legal Knowledge

Deep in thought, Darrell Cochran assumes the classic law student posture: yellow highlighter in hand, casebook and spiral notebook spread out in front of him, body hunched slightly over his materials. Whether he knows it or not, the 25-year-old third-year student from Olympia, Washington is re-enacting a ritual that has been going on for 61 years, ever since the Gothic-style reading room was dedicated in 1931. Conservatively speaking, Cochran estimates that he has clocked in some 3,500 hours in the library during his law school career.

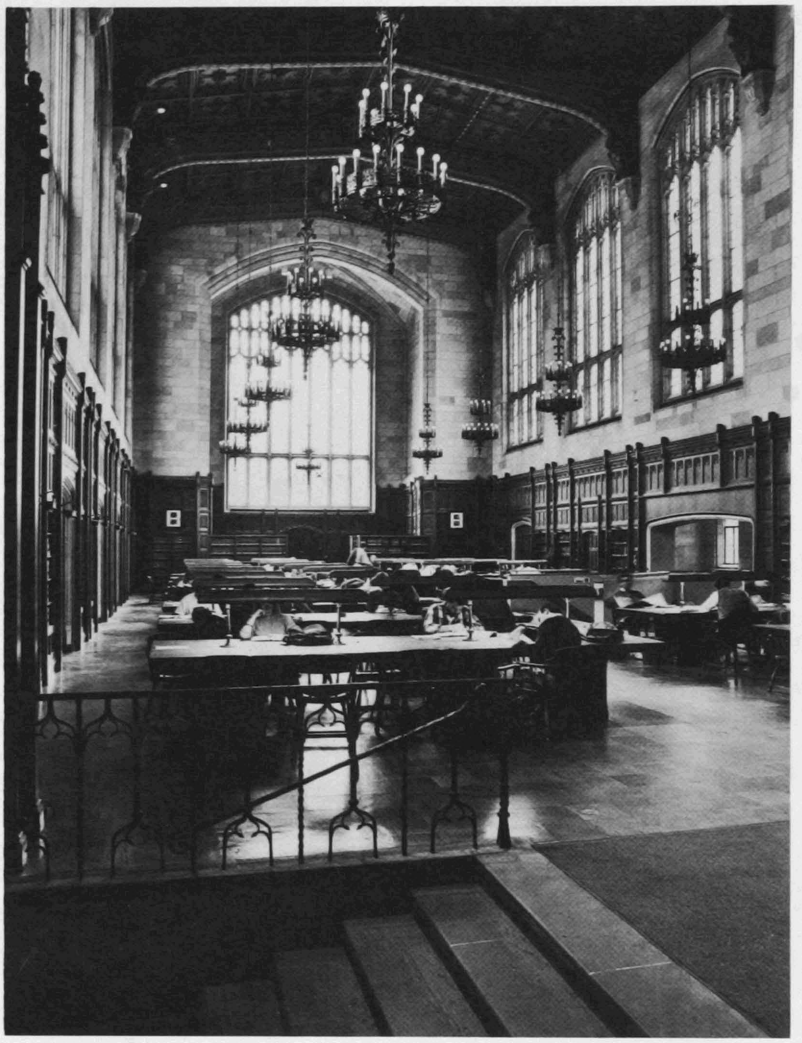
Being at the University of Michigan, whether as a student or as a faculty member, means spending long hours poring over law books. And no one knows how many hours are spent that way better than Margaret Leary, the director of the University of Michigan Law School library. Despite her best efforts to clear out the building when it closes each night, she still occasionally finds students who are asleep in the stacks in the morning when it opens. One scholar was so determined to stake out his claim in the library that he took over a conference room and turned it into his own private office. "He literally hung his socks out to dry," recalls Leary.



Margaret Leary, director, Law Library

Home away from home or study center, Michigan's law library is one of the finest academic libraries in the country, paralleled only by those at Harvard, Yale, Columbia and Berkeley. With 750,000 volumes on 23 miles of shelving, the library offers patrons everything from incunabula (books created before the printing press) to computerized law services. Scholars come to Ann Arbor from around the world to use the collection. Says Leary, "We get visitors who come here from other countries who will go through the library and touch the books, saying, 'Oh, you have this! I've heard of it but I've never seen it!'"

Despite the library's preeminence, however, budgetary problems at the law school threaten the quality of the collection and services. University funding from the state has declined precipitously as a result of the recession. Additionally, over the past five years, the cost of books has increased about 20%, while the library's appropriation has increased much more slowly. "This is one of the great libraries in the country," says Dean Lee Bollinger. "But we're facing the question of what quality of library we can afford." For the first time, the law school administration is examining the possibility of scaling back the library. Says Bollinger, "Margaret and I have talked about what the budget would look like not for a top-tier library, but the next level down."



Clearly, that is not the dean's preference. The law school administration makes no secret of the fact that it hopes that several million dollars for the library endowment will be donated to the current $75 million Law School Campaign. Margaret Leary's unofficial Wish List includes more gifts like the one for the Rare Book Room. The Theodore and Mina Bargman Foundation, the Stanley Imerman Memorial Foundation and the family of 1938 graduate Joseph Jackier donated several hundred thousand dollars in Jackier's honor and memory. The gift will foot the bill for a soon-to-be-built room to house library books published before 1850; the room will be designed with much needed humidity control and fire protection. Other such benefactors are eagerly sought.

If Leary's past record is any evidence, she is a person who is not easily thwarted in her goals. Holder of both a J.D. and a master's in library science, Leary was a trailblazer in her field, the first woman to head a library at one of the top five U.S. law schools. She was drawn to Michigan as the library's assistant director in 1973 by the prospect of designing and organizing the spacious new underground addition to the library. An attractive offer in 1990 from Yale Law School to be the head of its library couldn't lure her away from Michigan. Observes Bollinger, "Margaret is by nature a librarian. She thrives on and is very good at running an institution. She also has a sense of the preservation of knowledge. You hold an institution like this in trust. Margaret really appreciates that."

Even Leary's romantic life has been entwined with the law library. In 1978, her husband-to-be, Thomas Miller, showed up at her door in the library. "He came to tell me that I had to move out of my office soon so it could be demolished," laughs Leary. Miller was the general labor foreman of the library construction project. He and Leary became close as work on the new Allan and Alene Smith Library addition progressed. "He was an easy person to work with; he had a great sense of humor," she recalls. "He also had some respect for the legal research building as a piece of architecture and for the study and teaching of law." In 1980, the couple were married; a year later, the new addition opened.

For students and faculty at the law school, Leary is the resident Shell Answer Woman. She can answer questions about the most obscure materials, such as where Kenyan statutes are located (Level 10) and how to find the law of executive orders (in federal compilations). As part of her responsibilities, Leary manages a $3.2 million budget, hires the staff, acquires new materials, oversees the operation of the library and supervises 85 employees. The library also boasts of five reference librarians, each with a law degree and a master's degree in library science.

The requirements of students and professors are quite different. Says Leary, "What we need to do for students is relatively simple and relatively inexpensive: provide quiet study space, reference services and access to American legal materials." The library's hours — 8 a.m. to 2 a.m. — accommodate even the most hard-core grind. Today's law students enjoy the benefits of computerization, with access to both Lexis and Westlaw. They can even look for jobs in the computer room with 15 terminals. On a recent weekday, Lawrence Garcia, a first-year student, anxiously peered into a computer terminal hoping to find a summer job. At his fingertips was information about firms throughout the country. "They suggest you make 100 applications," he said wistfully, settling into his chair.

Students are most likely to study in the underground floors of the new addition, which are popularly referred to as the "subs". There are three airy, well-lit levels with cozy seating, plush carpeting, and thriving plants. The offices of the school's three law journals are all located in the new addition: the Law Review, the Journal of Law Reform and the Journal of International Law. Egdilio Morales, a 3rd year student and a note editor on the Journal of Law Reform, is typical of these "resident patrons." Says Morales, who keeps a green toothbrush on his desk, "I spend from 20 to 30 hours a week in the library, sometimes more." Leary teaches an advanced research class, and Morales was one of her students. Says he, "Professor Leary is extremely hands-on and student oriented. The most significant advantage that she brings to her classroom is her extraordinary expertise."

Not every student is as easy to please. Leary has bravely taken on the role of the library's Dear Abby. She keeps a suggestion book at the front desk, and dutifully answers students' queries, no matter how cranky or strange. As the semester progresses and exams near, the complaint book becomes a group catharsis:

"I find my creativity being stifled by legal research and feel the need for some type of activity to unlock my artistic longings. Being a rock climber, I would have serious interest in rappelling the library wall. Any chance of this?"

"It's incredibly cold in here. How's a body supposed to concentrate? Are all my tuition dollars being spent on air conditioning?"

"Help, I'm dying from the sweltering heat! Can nothing be done? Who will save us in our hour of need?"

"Is the water in the drinking fountain safe to drink? It tastes awful!"

"Could we hire an exorcist for the clocks? It sure would be nice if they could be set (even remotely) to the same time zone (Preferably this one). Thanks!"

"AAAAHHHH!!! Mommy, Mommy, I don't want to be a lawyer."

For faculty members who long ago weathered their student days, Leary and the staff prove invaluable assistance for their scholarly work. Requesting material from the library for professors is as easy as ordering a pizza — it's just a phone call away. More than 50 faculty members a month use Phone Page to order library documents. Likewise, the library provides research that may range from a bibliography to 10 volumes of material. Requests for material may even be made by computer E-mail. Says Criminal Law Professor Yale Kamisar, "The library isn't a place where you go to browse anymore. Instead, you browse in your office. The library is a service, rather than a location."

Different faculty members have different research needs. And those needs help enrich the law library. When Professor Kent Syverud came to the law school in 1987, no one had taught insurance law since the 1960s. "The insurance collection in the library had stagnated," explains Syverud. "I worked with the library staff to build an insurance library. Now I can't keep the books on the shelf because everybody in Michigan comes here to use them. It's one of the best collections in the state."

At Professor John Jackson's request seven years ago, the library bought important GATT documents that cost more than $10,000. "We became the first non-government place to have the documents," says the international law professor. "It put Michigan on the cutting edge."

Specialization poses few problems. Immigration Law Professor T. Alexander Aleinikoff refers to his office as "a branch of the library. I have an immigration library in my office that most immigration lawyers would be happy to have." Professor Catharine MacKinnon, who studies issues of sex equality, reports that the library has been able to find even the most arcane materials, sometimes through inter-library loans. "It's a glorious library," she says. "Of the eight law libraries I've used while teaching, this one has been the most supportive of my research needs."

Visiting scholars like Anthony Carty, a senior lecturer in international law at the University of Glasgow, are also drawn to Ann Arbor by the UM Law Library's extensive holdings. "For me to come here without the law library," comments Carty, the author of nine books, "would have been a waste of time." His present interest is German law, and "not every university in Germany has these materials."

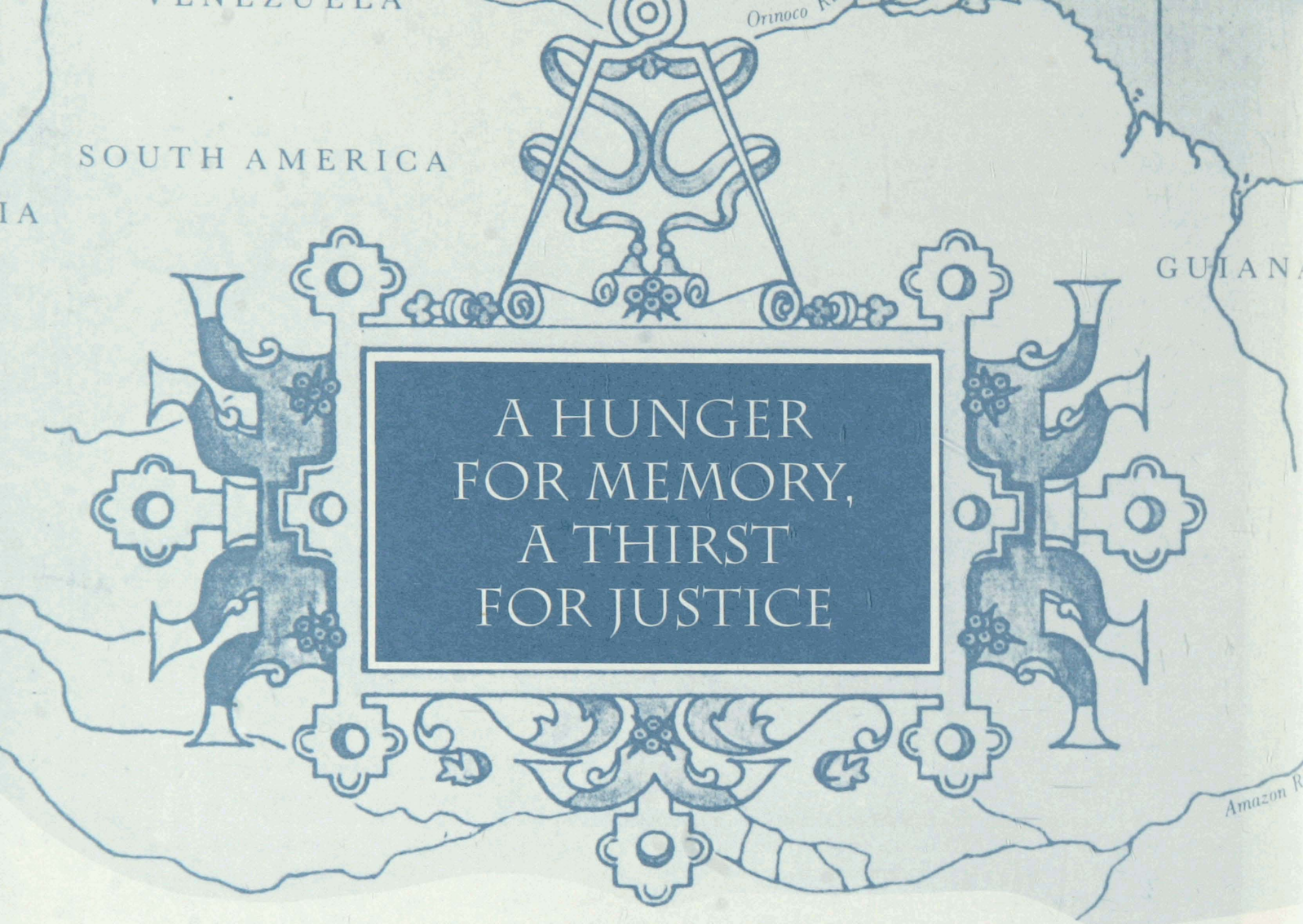
But such quality does not come cheaply. Books cost a hefty $1.3 million annually out of the $3.2 million library budget. Nor is that enough. "If Michigan wants to continue to have one of the top five faculties and student bodies," warns Leary, "then the library's book budget needs to be increased by $200,000 a year."

The reading room, with its football field expanse and Gothic majesty, still holds a special appeal for law students like Katy Kendall, a first-year student who drops by between classes and late at night. Coupled with the gleaming new addition, says Kendall, the building plays a special part in her academic life. "I like the contrast of the library," muses Kendall, "it brings the ancient and modern together, just like the law does."

Andrea Sachs, '78, is a reporter for *Time* magazine and a frequent contributor to the *ABA Journal*. While a law student, she also wrote for *Res Gestae*.

The University of Michigan Law Library is one of the finest legal research resources in the world. Although numbers don't capture the full range of holdings and services available through the library, here are some fast facts of general interest.

- Expenditure for acquisitions, staffing and provision of service was $3,225,413 in 1992-93.
- The law library is open 126 hours a week.
- There are 868 carrel and study seats in the library.
- The library has 110,765 net square feet of space and 23 miles of shelving.
- There are 67 computer terminals available for use.
- Holdings include more than 735,500 volumes and microforms – fifth largest in the nation.
- Active serial subscriptions currently total 11,144.
- Total time of online computer assisted legal research (Lexis/Nexis, Westlaw, Dialog) was 19,879 hours last year.
- Deteriorating paper in books produced after 1850 puts at least 143,000 paper volumes beyond repair and another 340,000 in need of treatment to arrest deterioration.



A HUNGER FOR MEMORY, A THIRST FOR JUSTICE

by Rubén G. Rumbaut

This piece was originally presented November 7, 1992 as the keynote address for the Eighth Annual Juan Luis Tienda Scholarship Banquet presented by the Hispanic Law Students Association (HLSA). The author is now Professor of Sociology at Michigan State University. He also holds appointments at MSU's Institute for Public Policy and Social Research and at The University of Michigan's Center for Research on Social Organization. At the time of this presentation, he was Professor of Sociology at San Diego State University and Senior Research Fellow at the Center for U.S.-Mexican Studies at The University of California, San Diego.

It was almost exactly one year ago tonight, in Chicago, that I first learned of Juan Luis Tienda, a former President of this Hispanic Law Students Association, and of the HLSA scholarship that bears his name. Who could have guessed then that I would be addressing you tonight, trying to connect his biography, the meaning of his life and of this scholarship, to a larger historical theme: that of ethnic diversity and immigration, especially of Hispanic groups, in the United States today? Or even more improbably, that I would be marrying his sister Irene Tienda in December of 1992, thus connecting two families of Cuban and Mexican immigrants. Juan Luis himself had been engaged to marry his Cuban fiancée in December of 1976, a wedding cut short by his tragic death a few months earlier that year. But biography and history are full of irony, always surprising us with the unexpected. And so it is with a deepened sense of irony that I have sketched by remarks this evening.

I

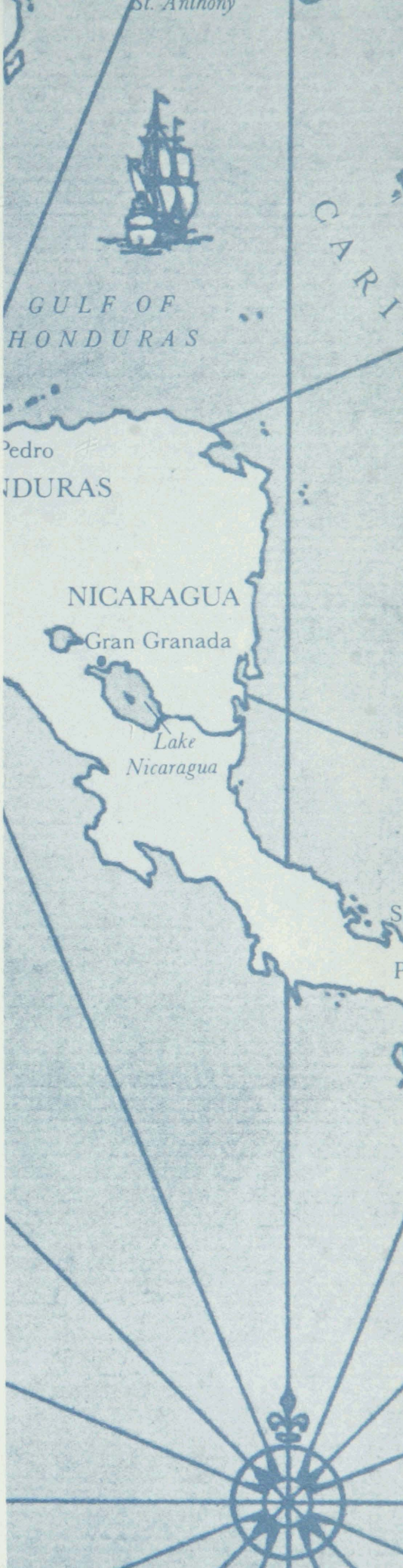
In The Book of Embraces (Libro de los Abrazos), the Uruguayan novelist Eduardo Galeano has a haunting passage — he called it a "celebration of contradictions" — that expresses vividly that dialectical sense of irony and poetic justice I want to convey to you tonight. "Memory," Galeano wrote, "is born every day, springing from the past and set against it... Human history...is born as it dies and builds as it destroys... Every loss is a discovery. Courage is born of fear, certainty of doubt. What it all comes down to is that we are the sum of our efforts to change who we are. Identity is no museum piece sitting stock-still in a display case, but rather the endlessly astonishing synthesis of the contradictions of everyday life." In this spirit I have entitled my remarks "A Hunger for Memory, A Thirst for Justice." I mean that both in a biographical and in a historical sense.

Biographical, because Juan Luis' life was animated above all by a search for justice — in a way, that was his "sum of his efforts to change who he was" — and because we meet tonight in the shadow of his memory: in awarding scholarships to talented Hispanic law students who embody the ideals and the commitments that characterized his own thirst for justice, we meet to honor his memory, and to keep it alive in our own. My words, then, are meant as a heartfelt remembrance, especially in the Spanish sense of recordar, "to remember," which comes from the Latin re-cordis, "to pass back through the heart."

Historical, because it was almost exactly 500 years ago that "Hispanic Americans" were born in that fateful encounter between Europe and the Americas that changed the world forever and that raised fundamental and still unresolved questions of memory, identity, and justice.[1] For Hispanic Americans in the United States the task of discovering ourselves in history, and of reexamining and illuminating the Hispanic origins of our American past, is made particularly difficult because in American popular culture the American past has been portrayed as the story of the expansion of English America rather than the stories of the multiethnic peoples and cultures — American Indian, European, African, mestizo, mulatto, and Asian — that comprise our national heritage. As the African proverb says, "Until lions have their own historian, histories of the hunt will glorify the hunter." And in the United States, furthermore, a historical sensibility — a "hunger for memory" — is not a notable virtue.

II

Still, racial and ethnic diversity and inequality have been central themes of the history of the United States, shaped over many generations by the European conquest of indigenous peoples and by massive waves of both coerced and uncoerced immigration from all over the world. Indeed, immigration and conquest — by hook or by crook — have been the originating processes by which American ethnic groups have been formed and through which, over time, the United States itself has been transformed into arguably the world's most ethnically diverse society, with sizable communities of people drawn from every continent on earth. The familiar Anglocentric story of the origins of the nation typically begins with the founding of the first permanent English settlement in America at Jamestown, Virginia, in 1607, and with the arrival of the Pilgrims at Plymouth, Massachusetts, in 1620. Until very recently the "Hispanic" presence in what is now the United States was little noted (the term itself was not used by the Census Bureau until 1970), although that presence antedates by a century the creation of an English colony in North America and has left an indelible if ignored



Spanish imprint, especially across the southern rim of the United States, from the Atlantic to the Pacific. Even in Virginia, Americans who know of the English colonies at Roanoke and Jamestown have probably never heard of the mission established in Virginia many years earlier, in 1570, by Spanish Jesuits.

In fact, the Spanish origins of the United States date to 1513, when Juan Ponce de León first came to La Florida, as he named it, and Spanish St. Augustine in Florida is the oldest continuously occupied European settlement in the continental United States. By the time of the American Revolution, Spain had cast a wide net of Hispanic culture and communities stretching from San Diego and Los Angeles to San Francisco on the west coast; throughout the Southwest from Tucson to Santa Fe, El Paso and San Antonio; along the Mississippi River from St. Louis to New Orleans (where, incidentally, nearly all of the oldest buildings in New Orleans' so-called "French Quarter" were constructed during the city's Spanish era); and eastward through towns that stretched to Florida's Atlantic coast by way of Mobile, Pensacola, and Tallahassee. Between the two coasts, Spain claimed much of the American South and the entire Southwest — at least half of the U.S. mainland — and Spain governed these areas for well over two centuries, a period longer than the U.S. has existed as an independent nation.

Thousands of place names, from California to Cape Cañaveral, silently testify to these Spanish antecedents, as well as others for whom the Spanish derivation is not so obvious: for instance, as the historian David Weber reminds us, Key West derives from Cayo Hueso (literally "Bone Key"), words that English speakers would mispronounce and misspell. (Perhaps here in Michigan you may have heard of the humorous story that Canada's name resulted from Spanish exploration in the early 16th century. When Jacques Cartier met Indians along the coast of Newfoundland, they reportedly greeted him with the only European words they knew — "acá nada" — meaning in Spanish "nothing is here"!)

In any case, our historical memory is further clouded by lingering, almost subconscious anti-Hispanic prejudices and stereotypes whose roots go to colonial rivalries in the 16th century between Spanish America and English America, and especially to anti-Spanish propaganda in Protestant Europe and America that built into the hispanophobic Leyenda Negra (Black Legend), now centuries old, whose original intent was to denigrate and delegitimize Catholic Hispanic culture throughout the world. Ironically, this Black Legend gained impetus from the work of a remarkable Spanish man born in Seville in 1484, Bartolomé de Las Casas. Few figures symbolize so profoundly the ambiguities and contradictions of the conquest and colonization of America.

Las Casas was a lawyer (like Juan Luis and like you) who studied law at the University of Salamanca, then an encomendero and slave owner in Cuba, and finally a Dominican friar, who witnessed firsthand the brutality of the Spanish conquistadores.[2] Vividly and tirelessly, for half a century he sought justice and brought the plight of the Indians to the attention of the Spanish monarch, especially in his Brevísima Relación de la Destrucción de las Indias (1552), which shocked Spanish society with its revelations and his argument that "Indians must voluntarily accept Spanish rule before it is legitimate," but also helped to make Spain the only empire of its time, and the first empire in history, to debate with itself on the nature and justice of its colonial policies in the Americas. From that debate was born the modern concept of international law, based on the universality of human rights, as elaborated by 16th century jurists and intellectuals like Francisco de Vitoria and Francisco Suárez.

Paradoxically, Las Casas' Relación was exploited by Spain's rivals (especially the English, Dutch and French) to portray Spaniards as a uniquely cruel and depraved race: the Leyenda Negra. That legend was kept alive whenever conflict arose between English- and Spanish-speaking societies in America in the 1800s, especially during the Texas Revolt (1836), the U.S.-Mexican War (1846-48), and the Spanish American War (1898). (During the Spanish American War, in fact, a deluxe edition of Las Casas' Relación, complete with Theodor de Bry's famous drawings, was published and circulated by a New York publisher.) This was the case above all in the American Southwest: for a full century after the 1840s, Mexican Americans were subjected to

laws, norms and practices similar to the Jim Crow system that discriminated against blacks after the Civil War — injustices, most deeply rooted in Texas, that caused Hispanics in the Southwest to see themselves as foreigners in a foreign land.

Nonetheless, today that long-muted Hispanic presence has emerged, seemingly suddenly, as a pervasive fact of American life (and of American spice: Pepsico's Pizza Hut just came out with a "fajita pizza," the enchilada is vying with the hamburger in every fastfood outlet, and Time magazine recently metaphorized that "there's jícama in the salad"). Once again, history is filled with unintended consequences, and one of the ironies of the history of a nation that expanded its influence and "manifest destiny" into Latin America and the Caribbean is that, in significant numbers, their diverse peoples have come to the United States and themselves become "Americans."

Of the 249 million people counted by the 1990 U.S. census, Hispanics accounted for 22.4 million, or 9 percent of the total population (up 53 percent from the 14.6 million counted in 1980 and nearly sextupling the estimated 4 million in 1950). The official total is not adjusted for an estimated undercount of one million Hispanics, nor does it include the 3.5 million Spanish-speakers living in Puerto Rico. This sharp increase in the Hispanic population has been largely due to recent and rapidly growing immigration from Latin America and the Caribbean. Indeed, for the first time in U.S. history, Latinos now form the largest immigrant population in the country. Only Mexico, Argentina and Colombia have larger Spanish-origin populations in all Latin America. If current trends continue, Hispanics as a whole may surpass African Americans in population size sometime in the next decade.

Between the two coasts, Spain claimed much of the American South and the entire Southwest — at least half of the U.S. mainland — and Spain governed these areas for well over two centuries, a period longer than the U.S. has existed as an independent nation.

About 60 percent of all U.S. Hispanics are of Mexican origin (13.5 million) and 12 percent are Puerto Ricans (2.7 million on the mainland, excluding the 3.5 million in Puerto Rico[3]), making them the nation's largest ethnic minorities after African Americans. Only four other groups had populations in 1990 above one million: American Indians; the Chinese (the nation's oldest and most diversified Asian-origin minority, originally recruited as laborers to California in the mid-19th century until their exclusion in 1882); Filipinos (colonized by the U.S. for the first half of this century and also recruited to work in plantations in Hawaii and California until the 1930s); and Cubans (who account for 5 percent of all Hispanics and whose immigration is also tied closely to the history of U.S.-Cuba relations). The original incorporation of all of these sizable groups, except the oldest (American Indians) and the newest (Cubans), was characterized by processes of labor importation.

What is more, while the histories of each took complex and diverse forms, the four largest ethnic minorities in the country —African Americans, Mexican Americans, Puerto Ricans and American Indians — are peoples whose incorporation originated largely involuntarily through conquest, occupation and exploitation (followed, in the case of Mexicans and Puerto Ricans, by mass immigration during the 20th century, much of it initiated by active labor recruitment by U.S. companies), setting the foundation for subsequent patterns of social and economic inequality. The next three largest groups — the Chinese, Filipinos and Cubans — are today largely composed of immigrants who have come to the U.S. since the 1960s, but building on structural linkages established much earlier.

Indeed, while today's immigrants (the largest flows since the peak years of immigration at the turn of the century) come from over 100 different countries, the majority come from two handfuls of developing countries located either in the Caribbean Basin or in Asia, all variously characterized by significant historical ties to the U.S. The former include Mexico (still by far the largest source of both legal and illegal immigration), Cuba, the Dominican Republic, Jamaica and Haiti, with El Salvador emerging

prominently as a source country for the first time during the 1980s; the latter include the Philippines, South Korea, Vietnam, China (including Taiwan) and India. In each case, their historical relationships with the U.S. have variously given rise to particular social networks of kin and kith that over time serve as bridges of passage to the United States, linking places of origin with places of destination, opening "chain migration" channels, and giving the process of immigration its cumulative and seemingly spontaneous character.

In this vein, Alejandro Portes has argued cogently with respect to Mexico and Puerto Rico that "[T]he countries that supplied the major Spanish-origin groups in the United States today were, each in its time, targets of [an] expansionist pattern [of] U.S. intervention...In a sense, the sending populations were Americanized before their members actually became immigrants to the United States... The rise of Spanish-speaking working-class communities in the Southwest and Northeast may thus be seen as a dialectical consequence of past expansion of the United States into its immediate periphery...Contemporary migration patterns tend to reflect precisely the character of past hegemonic actions by regional and global powers." The Mexican-American writer and filmmaker Luis Valdés put it plainly: "We did not, in fact, come to the United States at all. The United States came to us." Poetic justice: what goes around comes around.

Largely at the urging of American growers, the passage of restrictive national-origins immigration laws in 1921 and 1924 placed no limits on countries in the Western Hemisphere, to permit the recruitment of Mexican workers when needed — and their deportation when they were not.

To be sure, there are many possible factors — economic, political, cultural, geographic, demographic — that help explain contemporary immigration to the United States, but none can do so adequately outside of its concrete historical context. That is, large-scale immigration flows to the U.S. are not simply a function of state policies regulating exit or entry, or of individual calculations of costs and benefits, nor can they be reduced to simple push-pull or supply-demand theories, but need to be understood in the macro-context of historical patterns of U.S. expansion and intervention, and in the micro-context of the social networks that are created and consolidated in the process and that help thereafter to sustain continued immigration and ethnic group formation. Among the largest contemporary Asian immigrant groups, for example, Filipinos, Koreans, and the Vietnamese provide various illustrations of this dialectic.

The countries of the Caribbean Basin, particularly Mexico, Puerto Rico and Cuba, have felt most strongly the weight, and the lure, of the U.S. hegemonic presence. They include countries that, since the days of Benjamin Franklin and Thomas Jefferson, were viewed as belonging as if by some "laws of political gravitation" (the phrase is John Quincy Adams' in 1823) to the "manifest destiny" of the United States, and in a Caribbean long viewed as "the American Mediterranean" (the term is Alexander Hamilton's). Not surprisingly, if paradoxically, given historical patterns of economic, political, military and cultural influence established over the decades, it is precisely these countries whose people are visibly emerging as a significant component of American society. They are not, however, a homogeneous lot, but reflect different histories, patterns of settlement, types of immigrants, and modes of incorporation in the United States.

IV

While Mexicans, Puerto Ricans and Cubans trace their main historical ties to the U.S. to the 19th century, Mexicans are by far the largest and the oldest of Hispanic ethnic groups, and they have been incorporated overwhelmingly as manual laborers. When the Treaty of Guadalupe-Hidalgo ceded the lands of the Southwest to the U.S. in 1848, there were perhaps 80,000 inhabitants of Mexican and Spanish origin residing in that territory, nearly three-fourths of them in New Mexico, with smaller numbers of Tejanos and Californios. Toward the end of the century, with the rapid expansion of railroads, agriculture and mining in the Southwest and of the U.S. economy generally,

and with the exclusion of Chinese workers in 1882 and later the Japanese, Mexicans became preferred sources of cheap and mobile migrant labor — at about the same time that capitalist development in Mexico under the government of Porfirio Díaz was creating a landless peasantry.

By the early 1900s railroad lines, which expedited deliberate labor recruitment by U.S. companies, had linked the interior of Mexico with Texas and other states of the U.S., and large numbers of Mexican manual laborers were working from the copper and coal mines of Arizona and Colorado to the steel mills and slaughterhouses of Chicago, and further to Detroit and Pittsburgh. Parenthetically, Toribio Tienda, the father of Juan Luis, came as a teenager from Mexico to Texas in the 1940s, and then to Detroit in the 1950s, where he labored for 30 years as a steelworker.

Not all these braceros returned to Mexico, and settler communities began to form and grow. It has been estimated that as many as one million Mexicans, up to one tenth of the Mexican population, crossed the border to the U.S. at some point during the violent decade of the Mexican Revolution of 1910, while demand for their labor in the U.S. increased during World War I and the 1920s. The U.S. census in 1910 counted some 220,000 Mexicans in the country; that number more than doubled by 1920 and had tripled to over 600,000 by 1930.

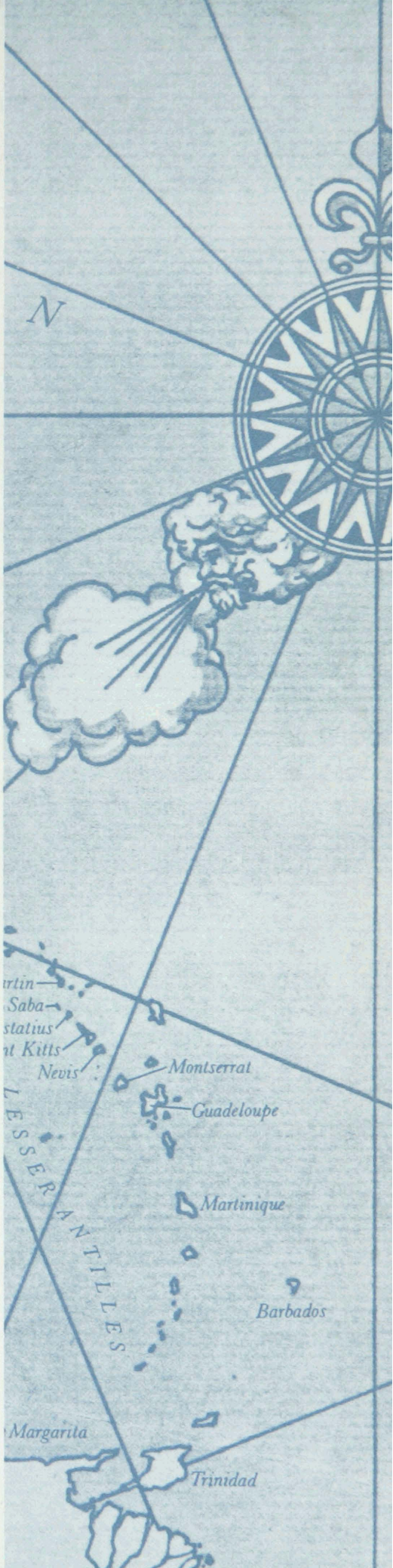
Largely at the urging of American growers, the passage of restrictive national-origins immigration laws in 1921 and 1924 placed no limits on countries in the Western Hemisphere, to permit the recruitment of Mexican workers when needed — and their deportation when they were not (as happened during the 1930s, when about 400,000 were repatriated to Mexico, including many U.S. citizens, and again during the much larger deportations of "Operation Wetback" in the mid-1950s). The large increase in the Mexican-origin population in California dates to the World War II period, with the establishment of the Bracero Program (1942-1964) of contract-labor importation negotiated by the U.S. and Mexican governments. The end of the Bracero Program prompted increasing flows of illegal immigration, peaking in 1986 (when the Immigration Reform and Control Act was passed) and then declining briefly but increasing and stabilizing again since 1989.

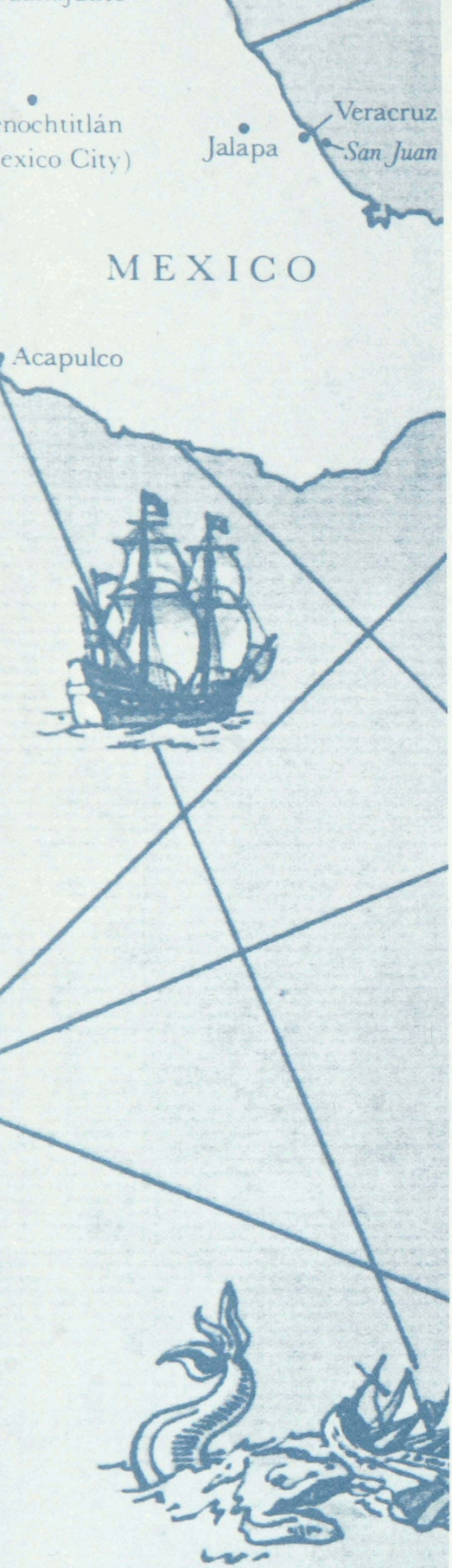
Despite the large flows of legal and illegal Mexican immigration in recent years, however, the 1980 census found that 74 percent of the Mexican-origin population was U.S.-born. The Chicano experience and consciousness has gone through distinct psychohistorical generations and has differed markedly from that of recent immigrants. Still, the formation of the nation's second largest ethnic group retains the stamp of its working-class origins and a history of exploitation and discrimination.

Puerto Rico, then a rural society based on subsistence agriculture and coffee exports, was occupied by the United States in 1898 and formally acquired as part of the Treaty of Paris which settled the Spanish-American War. The status of the islanders was left ambiguous until the passage of the Jones Act in 1917, which gave Puerto Ricans U.S. citizenship and made them eligible for the military draft. These provisions essentially remained after 1947 when a new constitution defined commonwealth status for Puerto Rico (Luis Muñoz Marín, who took office in 1949, was the first governor elected by popular vote).

This status defines the island's relationship with the U.S. and distinguishes Puerto Ricans fundamentally from other Latin American and Caribbean peoples. As U.S. citizens by birth Puerto Ricans travel freely between the island and the mainland, just as one would travel from Hawaii to California, without having to pass through the screens of the Immigration and Naturalization Service or the Border Patrol, as would foreign-born immigrants (legal or illegal) to the U.S.

Puerto Rican migration has been viewed as an exchange of people for capital. Soon after the military occupation U.S. capital began flowing into Puerto Rico, especially into a new and rapidly growing sugar industry which displaces subsistence peasants into the cities and combined with high population growth to create urban unemployment. Capital-intensive industrialization and urbanization of the island continued and rapidly accelerated after the introduction of "Operation Bootstrap" in 1948, but failed to solve





the urban unemployment and population growth problems, intensifying internal economic pressures for migration to the mainland.

Labor recruitment began in 1900, when a large group of workers went to sugar cane plantations in Hawaii, and later as farm workers to the mainland, but became widespread among industrial employers only during and after World War II — at the same time that cheap air travel was instituted between San Juan and New York (a one-way ticket cost less than $50 — when mass immigration to New York reached its peak and made Puerto Ricans the first "airborne" migration in U.S. history. The Puerto Rican population on the mainland grew from about 12,000 in 1920, to 53,000 in 1930, 301,000 in 1950, and tripled to 888,000 in 1960. Net Puerto Rican migration to the mainland during the 1950s (about 470,000) was higher than the immigration totals of any country, including Mexico, during that peak decade.

Although net migration has since decreased, travel back and forth is incessant, averaging over 3 million people annually in the 1980s. The pattern of concentration in New York City, which accounted for over 80 percent of the total Puerto Rican population in the U.S. mainland in 1950, gradually declined to 62 percent in 1970 and under 40 percent in 1990. Of the more than 6 million Puerto Ricans in 1990, including the populations of the island and the mainland, about 45 percent now reside on the U.S. mainland.

Unlike Mexico, the first nation in the Americas to achieve its independence from Spain, and Puerto Rico, the only one that has never become an independent state, Cuba was the last in Spanish America, becoming formally independent in 1902 after a 3-year period of U.S. military occupation following the end of the second Cuban War of Independence (1895-1898), during which over 10 percent of the population died, and the Spanish-American War (1898). A notable Cuban presence in the U.S. goes back to the early 19th century, beginning what became a tradition for Cuban exiles to carry out their political work from bases in New York and Florida. At the same time, Cuba was the target of repeated efforts at annexation by the U.S. throughout the 19th century, and also a main focus of U.S. trade and capital investment, though it never became a recruiting ground for agricultural workers, as did Mexico and Puerto Rico.

U.S. economic penetration of the island increased sharply after the war and the military occupation at the turn of the century, expanding its control over sugar production as well as other sectors of the Cuban economy, including transportation, mining, construction, and public utilities. By 1929 U.S. direct investment in Cuba totaled nearly one billion dollars — more than one-fourth of all U.S. investment in Latin America as a whole, and more than that invested by U.S. capital in any Latin American country both on a per-capita basis and in absolute terms.

Moreover, the U.S. remained heavily involved in Cuba after 1902 under the terms of the Platt Amendment, attached by the U.S. Congress to the Cuban constitution. Not rescinded until 1934, the Platt Amendment formalized the right of the U.S. to intervene in Cuban internal affairs, and to lease the Guantánamo Bay naval base which the U.S. has held ever since, and bred deep resentment of U.S. domination in various sectors of the Cuban population. Nonetheless, an informed observer of the historical development of close ties between Cuba and the U.S. and of the Americanization of the Cuban scene could write that, at least in the cities, "[I]t is probably fair to say that by 1959, no other country in the world, with the exception of Canada, quite so resembled the United States." Still, at that time the Cuban population in the U.S. was just over 70,000.

The waves of exiles that began in earnest in 1960, in the context of the East-West Cold War, have continued to the present in several phases, from the daily flights that were suspended after the 1962 Missile Crisis, to the orderly "freedom flights" from 1965 to 1973, the boat flotillas from Camarioca in 1965 and Mariel in 1980, to the increasingly desperate crossings since the deepening crisis in Cuba after 1989. Incredibly, in 1990 a 17-year-old crossed the shark-infested Florida Straits riding a windsurfer, and in 1991 some 2,000 persons made it on inner tubes and makeshift rafts.

Despite U.S. government efforts to resettle the exiles away from Miami, many eventually drifted back, making the city a majority-Cuban community. The Cuban

American population in the U.S. in 1990, at over 1 million, represents about 10 percent of the total on the island. One of the many ironies of the history of U.S.-Cuba relations is that Fidel Castro, that anti-Yankee par excellence, may have done more to deepen structural linkages between Cuba and the U.S. than anyone else in Cuban history.

Data from the 1990 census show that while Hispanics now constitute 9 percent of the total population, their impact is much more notable because of their concentration in particular localities. Nearly three out of four Hispanics in the United States reside in just four states: California (with over a third of the total), Texas (nearly one-fifth), New York and Florida (combining for one-sixth). By contrast, less than one-third of the total U.S. population resides in those states. Indeed, Hispanics now account for more than 25 percent of the populations of California and Texas.

Patterns of concentration are even more pronounced for specific groups: three-fourths of all Mexican-Americans are in California and Texas alone, half of the Puerto Ricans are in the New York-New Jersey area, and nearly two-thirds of the Cubans are in Florida. Significant numbers of Mexican-Americans and Puerto Ricans are also in Illinois, overwhelmingly in Chicago. The category "Other Hispanic" used by the census includes both long-established groups who trace their roots to the region prior to the annexation of the Southwest after the U.S.-Mexico War (notably in New Mexico), as well as recent immigrants from Central and South America and the Spanish Caribbean (with a quarter in California, another quarter in New York-New Jersey, and a tenth in Florida).

The Mexican-origin population is exceeded only by Mexico City, Guadalajara and Monterrey; there are twice as many Puerto Ricans in New York City as in the capital of Puerto Rico, San Juan.

These patterns of concentration are more pronounced still in metropolitan areas within states, and in particular communities within metropolitan areas. In 1990, there were 3.4 million in Los Angeles County alone, 15 percent of the national Hispanic population and 38 percent of the total population of Los Angeles. Three other adjacent areas in Southern California, Orange, San Diego and San Bernardino Counties, reflected the highest rates of Hispanic population growth over the past decade and combine with Los Angeles to account for 21.5 percent of the U.S. total.

Nearly 8 percent of the total Hispanic population resides in four boroughs of New York City: the Bronx, Brooklyn, Manhattan and Queens. Half of the populations of Dade County (Miami) and Bexar County (San Antonio) are Hispanic — principally of Cuban and Mexican origin, respectively — as are over two-thirds of the population of El Paso and nearly a quarter of Houston.

Indeed, the Mexican-origin population of Los Angeles today is exceeded only by Mexico City, Guadalajara and Monterrey; Havana is the only city in Cuba larger than Cuban Miami; San Salvador and Santo Domingo are slightly larger than Salvadoran Los Angeles and Dominican New York; and there are twice as many Puerto Ricans in New York City as in the capital of Puerto Rico, San Juan.

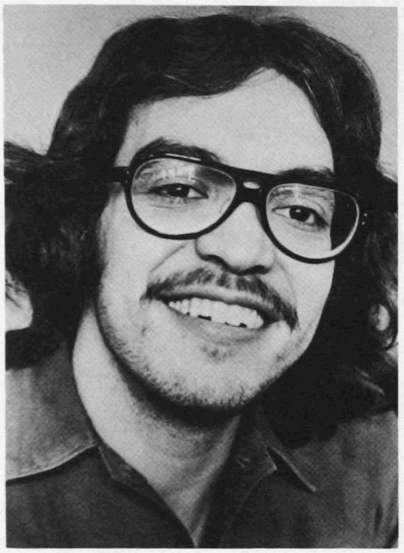
The focus on "Hispanics" as a catchall category, however, is misleading, since it conceals both the substantial generational differences among groups so labeled, and especially the enormous diversity of contemporary immigrants from Latin America and the Caribbean — in national origins, racial-ethnic and class origins, legal status, reasons for migration, modes of exit, and contexts of reception. In a recent essay I have portrayed those differences in detail, relying on the available research literature and on INS and census data, for all Latin American immigrant groups as well as for the main U.S.-born ethnic groups among Hispanic Americans.[4] Time constraints do not permit a fuller consideration of these topics in this talk. Let me turn, instead, to a much more personal plane.

"If, as I have argued, history presents us with an "endlessly astonishing synthesis of contradictions," so does biography — and in particular, the life of Juan Luis Tienda, as I

have come to know at least some aspects of it. Ontogeny, you might say, recapitulates phylogeny. Consider:

• Juan Luis' parents had no formal education and his mother died when he was 6 years old. Yet for the Tienda family education has been a central value and a central goal, producing a second and now a third generation who have made and continue to make extraordinary contributions to this society in a wide variety of fields. And when Juan Luis graduated from high school he enlisted in the U.S. Army in 1969, in the middle of the Vietnam War, to get his education paid for later on through the GI Bill — at the time Juan Luis Tienda had no "Juan Luis Tienda Scholarship" that helps now make possible for others what was not then possible for him.

• When Juan Luis was 8 to 10 years old, from June to September each year, he would work daily almost from dawn to dusk with the rest of the family, along with groups of 70 or so Mexican farmworkers, picking tomatoes, cherries, green beans and other produce, living under deplorable conditions typical of the lot of migrant workers. Yet that experience perhaps more than any other shaped his passion for social justice and his future calling in the law as an instrument of social change. And if he experienced poverty and deprivation in his formative years, it only honed his commitment to serve others and to focus on poverty law. In fact, while at this law school he led in the development of legal assistance programs for migrant workers and of the Milan Prison Project.



Juan Luis Tienda

A few weeks ago I was able to contact Elsa Lamelas, Juan Luis' fiancée at the time of his death in 1976. She too was a law student here then, and the person who did more than anyone else to establish this scholarship in his name. Although we've never met, I wrote and asked her if she could share with us some of her memories of Juan Luis. She responded with a moving and generous letter, in Spanish and English.

> *"[Juan Luis] was a person of great energy, full of joy and enthusiasm. He walked very straight, head held high, with big steps and long legs. Instead of looking a few steps ahead like most people, he always kept his eyes on the horizon... I met him by phone in 1974 when I applied to the University of Michigan. In those days I knew nothing about law schools. One night, still here in Wisconsin, one Juan Tienda called to tell me I should go to Michigan, that it was a great university, that it would suit me. He called several times, always encouraging me; at home they almost knew him by name. He was engaging, I felt the energy over the telephone wires, and I began to speculate about him — why would he try so hard, put so much effort into encouraging a stranger? He was right about Michigan — it had a prestigious law school. In time, the university accepted me and gave me a scholarship. It had Juan Tienda, and I went there.*
>
> *I was not the only person whom he helped. He had credibility among other Mexican-Americans at the school, because of the force of his personality, because he was articulate, because of his efforts with farmworkers, because of the Milan Prison Project. He used his influence to persuade others that everyone belonged, and he tried to bring Puerto Ricans and Cubans as well as Mexican-Americans to the law school. Not everyone was inclined to agree, but his view prevailed, at least while he lived.*
>
> *Juan wanted to make a difference, he wanted to help. We spent the summer of 1976 working with migrants. At one point I became discouraged, and asked him if he really wanted to do this sort of thing forever. He asked me, what sort of thing, and I said, well, poverty law. He said, 'Yes, I really do.' I said I didn't think I wanted to, that I didn't know precisely what I wanted to do, but that I wanted to practice in another area. He said that was fine by him, that I should do what I felt was right for me. His vision had room for others; we didn't all have to march to the same drummer.*

Though he was committed and enthused by his dreams, he spoke simply, and honestly. Oftentimes he simply was not politically correct. In 1975 the military had a poor image, but he nevertheless asserted that the United States Army was the best thing that happened to him, and that if he hadn't enlisted he would have spent his life in a Detroit factory. That fact seems plain after almost 20 years, but back then I was stunned that anyone of my generation could say something good about the Army... I remember his descriptions of when he left home vividly. At boot camp, he could hear others crying in their bunks at night. But he did not; he had been through so much worse during his childhood... He actually enjoyed boot camp — he could do so much when he finished, he felt fit and strong.

On the way to Vietnam, someone came out and addressed his unit, asking if anyone knew how to type. They needed a typist in Japan. His hand shot up faster than anyone else's. The others went to Vietnam, he went to Japan. I heard this story a couple of times before I thought to ask when he had learned to type. He said, I didn't know how. So, I said, what did you do? He answered, oh, I learned, fast! I would never have had the presence of mind to raise my hand. But that was Juan —quick on the uptake, ingenious and confident. He spent only one month in Saigon.

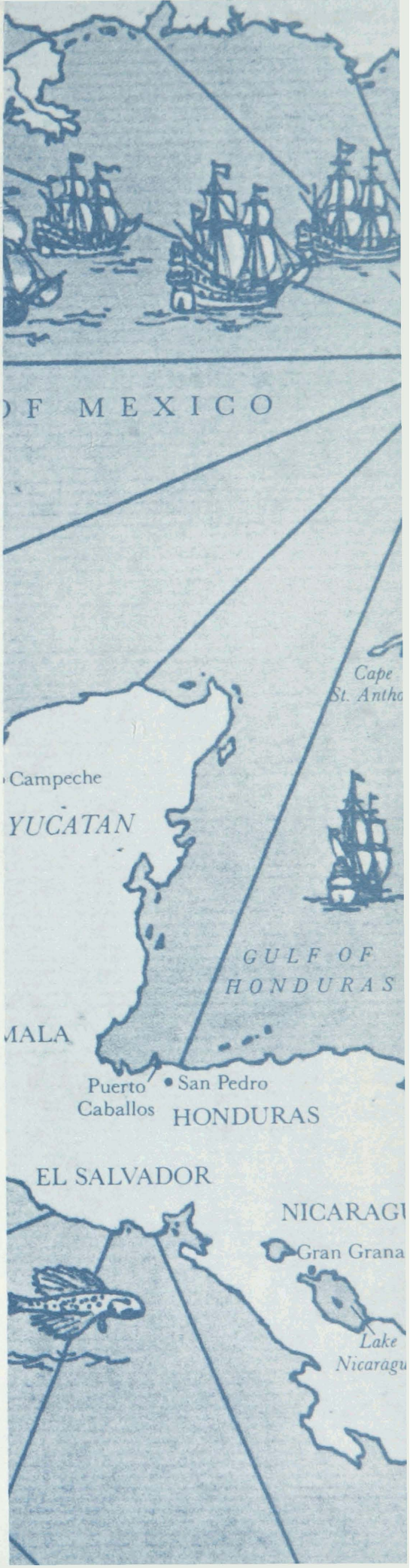
Juan did well in the Army, and he was proud of that. It gave him the taste of success, and opened doors to the world. He traveled. At the end of his tour he went to Germany, and worked in a JAG unit. That's where he decided he wanted to be a lawyer, and asked what he had to do to become one. They told him he had to go to law school. So he said he would do that. Then they said first you have to go to college. So, he said, I guess I'll have to do that. And he did, getting out of Michigan State University in three years.

There are many things I could tell you about him, the summer spent with the farmworkers, his hunting and his dog, his unexpected friendships. Of course, I remember the first time that I saw him, in a room that the La Raza Law Students had in the basement between Hutchins Hall and the library. After all these years, and though I have a happy life, three kids, a husband, good health, a challenging job and a big, lovely house, I cannot bear to think of him and of what happened to him, or to speak of him without crying... I want more than I could ever express to help in your effort to remember him."

The words of Elsa Lamelas "pass back through the heart"; they humanize and enliven our recuerdo of Juan Luis. And as we try to remember him, it may be well to recall the words of another, written over 300 years ago: Miguel de Cervantes, toward the end of his classic work, the first modern novel, had Don Quixote give Sancho Panza the following instructions, which express as well as any the universal search for identity:

"Rejoice, O Sancho, in the humility of your lineage, and don't be afraid to say that you came from laboring men, for when you are not ashamed of yourself, nobody will try to make you so; and always strive to be held thoughtful and virtuous, rather than proud and vicious. A countless number from low beginnings have risen to high positions of great dignity, and to confirm this truth I could bring you so many examples they would weary you. Note, Sancho, that if you follow virtue as a way of life and strive to do virtuous deeds, you need not envy those who are born of princes and nobles, for blood is inherited, but virtue is achieved, and thus virtue is of worth by itself alone, and so is not birth."

A young man of humble lineage, Juan Luis Tienda strived for, and achieved, a virtuous life. We know him best by his deeds. He himself, only 24 years old when he died, may not have been fully conscious (who among us is?) of the historical chain of being of which he was a part, anymore than fish are of water. Yet his short life was meaningful and purposeful, and in his own way, above all in his thirst for justice and in his search for meaning in his life's work, he was a representative of a long and rich



Hispanic tradition in the Americas of students of law — from Bartolomé de Las Casas, the Spanish son of a friend of Columbus who denounced the encomienda system while renouncing his own inherited privilege and who issued the "first cry for justice in the Americas," to Benito Juárez, a Zapotec Indian who did not learn to speak Spanish until he was twelve but became Mexico's great reformer and liberal president, and José Martí, the criollo son of Spanish immigrants and apostle of Cuban independence whose prolific prose and poetry was penned largely in exile — lawyers all who thirsted for justice, who saw wrong and tried to right it.

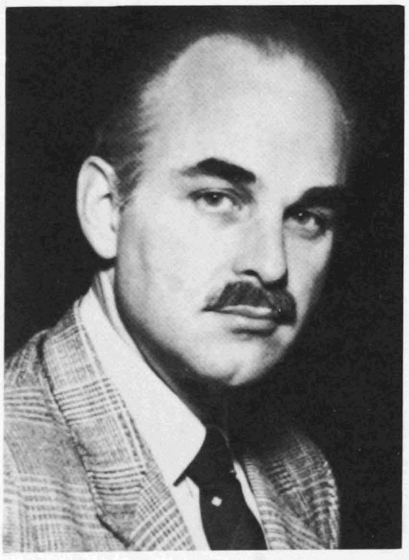
Let Juan Luis' memory now be strengthened by what you do in HLSA and in your chosen profession, and let what you do as Hispanic lawyers be inspired by and true to the pursuit of justice that so animated his life. Like a bright, fleeting star, he shone for just a moment in time — but he shone, brightly, and his light reaches us still.

Note: Space did not permit inclusion of all footnotes with this article. For complete citations, please contact Editor, Law Quadrangle Notes, University of Michigan Law School, Ann Arbor, Michigan 48109-1215.

[1] In October 1992, 500 years after Columbus' first voyage, the Nobel Peace Prize was awarded to Rigoberta Menchú, a Mayan of the Quiché group from northwestern Guatemala and an activist on behalf of Guatemalan Indian rights. Since 1981 she has lived in exile in Mexico, where she fled after her father, mother, and brother were killed by government security forces. Parenthetically, the year 1492 marked at once the beginning of the Spanish conquista of the Americas and the culmination of the reconquista of Spain after nearly eight centuries of Moorish rule with the expulsion of both the Moors and the Jews from Spain. How ironic that an empire that embraced an ideology of "limpieza de sangre" (of racial purity and "ethnic cleansing") should have produced the world's most racially and ethnically mixed populations in Spanish America, that fully a quarter of all Spanish words derive from Arabic, and that the world's greatest center of both the Spanish language and the Catholic religion today is found not in Spain but in Mexico.

[2] In Cuba, Las Casas witnessed in one instance the slaughter of hundreds of indigenous men, women and children, and the burning at the stake of the cacique Hatuey, an Indian chief who had led in the resistance to the conquistadores. When a priest offered Hatuey the choice of being executed by a sword if he would be baptized and thus go to Heaven, or be burned at the stake and go to Hell, Hatuey asked: "Are there Christians in Heaven?" When told that there were, he chose not to go to Heaven where such cruel men would be found. In contrast to Hatuey's immolation, Atahualpa, the Inca usurper and ruler at the time of Pizarro's conquest of Perú, chose to be baptized when he was given a similar choice between being burned alive as a pagan or becoming a Christian before being strangled. Atahualpa's last words reportedly were "My name is Juan. That is my name to die with."

Rubén G. Rumbaut



[3] Although Puerto Ricans are U.S. citizens by birth, the U.S. Census only includes Puerto Ricans living on the mainland in reporting U.S. population totals. A separate count is kept for Puerto Rico, as well as Guam and other territories.

[4] This essay, "The Americans," elaborates in detail the portrait of Hispanic groups in the U.S. presented in this talk. The book in which it appears accompanies the 10-part PBS TV series, "Americas," broadcast nationally during January-March 1993. Professor Rumbaut was a principal advisor for this series. Rubén G. Rumbaut, "The Americans: Latin American and Caribbean Peoples in the United States," in Alfred Stephan (ed.), Americas: New Interpretive Essays (New York: Oxford University Press, 1992), pp. 275-307.

AN ASYMMETRICAL APPROACH TO THE PROBLEM OF PEREMPTORIES?

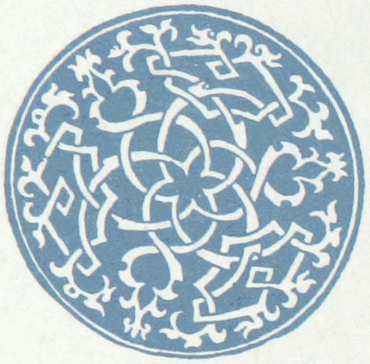
by Richard D. Friedman

The Supreme Court's decision in Batson v. Kentucky, and the extension of Batson to parties other than prosecutors, may be expected to put pressure on the institution of peremptory challenges. In this article, Professor Richard Friedman contends that peremptories for criminal defendants serve important values of our criminal justice system. He then argues that peremptories for prosecutors are not as important, and that it may no longer be worthwhile to maintain them in a system of peremptories consistent with Batson. Friedman concludes that the asymmetry of allowing peremptories in a criminal case only for the accused is not troublesome.

In 1986, in Batson v. Kentucky, the Supreme Court held that the Constitution forbids a criminal prosecutor to exercise peremptory challenges to potential jurors in a racially discriminatory manner. Batson raised a host of important issues. Most obvious, perhaps, was the question of whether the prohibition of Batson would be extended to litigating parties other than a criminal prosecutor. In its last two terms, the Court has answered that question resoundingly. In 1991, in Edmonson v. Leesville Concrete Co., the Court extended Batson to civil litigants. And in 1992, the Court completed the circle, holding in Georgia v. McCollum that neither may criminal defendants exercise peremptories in a racially discriminatory manner.

Thus, the question of who is bound by Batson seems to have been pretty much resolved in a couple of broad brush strokes. But other problems and complexities remain, and they are sure to put pressure on the continued maintenance of the institution of peremptory challenges itself. Indeed, in McCollum Justice Thomas, concurring, predicted dolefully that the death of peremptories was inevitable. To many, though, that would be a welcome development. Concurring in Batson, Justice Thomas' predecessor, Justice Marshall, advocated the abolition of peremptories. And recently, three judges of the New York Court of Appeals — one shy of a majority on the highest court in the state — endorsed the same idea.

There is, however, another, somewhat more moderate, possibility, which may at first sound slightly odd, though in fact it has deep historical roots: retention of the accused's peremptories but elimination of the prosecution's.



The historical background suggests that, although peremptories now are provided to both sides in both civil and criminal litigation, they exist principally for the benefit of criminal defendants.

HISTORICAL PERSPECTIVE

Although peremptory challenges in civil cases appear to be a relatively recent creation, in criminal cases they are very old. The common law was generous in its provision of peremptories to criminal defendants — allowing them 35, later reduced except in cases of high treason to 20. The allowance of peremptory challenges was extolled by Blackstone as "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous."

But by a statute of 1305, enacted to correct a pro-prosecution bias in the selection of jurors, peremptory challenges were denied to the king's attorneys. This prohibition was only marginally effective, because prosecutors were allowed to require a member of the venire to "stand aside," giving a reason only if a jury of twelve could not be selected.

The "standing aside" procedure did not find quick or universal acceptance in the United States, however. This resistance appears to be attributable to the same perception that led to the constitutionalization of the jury right — the perception of the jury as an essential bulwark against state oppression. Thus, it was not until 1919 that Virginia allowed prosecutors any form of peremptory challenge. In 1856, the United States Supreme Court held, pursuant to statute, that federal courts should follow the procedure with respect to prosecutors' peremptories of the state in which they sat. But through the nineteenth century, as the mistrust of government characteristic of the Revolutionary era gave way to increasing acceptance of state power, peremptories for the prosecution gradually became the rule rather than the exception.

Even today, prosecutors are not always given the same number of peremptories as the accused. Under Federal Rule of Criminal Procedure 24(b), for example, in non-capital felony cases the accused is given ten peremptories and the Government only six. And statutes in seventeen states provide more peremptories to the accused than to the prosecution in at least some criminal prosecutions. Local practices may add more asymmetries.

PEREMPTORIES FOR THE ACCUSED: "TENDERNESS AND HUMANITY," AND EFFICIENCY AND THE PERCEPTION OF FAIRNESS

The historical background suggests that, although peremptories now are provided to both sides in both civil and criminal litigation, they exist principally for the benefit of criminal defendants. The value of the accused's peremptories may be assessed by comparing the status quo with the situation that would prevail if they did not exist. Presumably more liberal granting of challenges for cause would take up some of the slack caused by elimination of the accused's peremptories. Nevertheless, for several reasons it is far preferable to retain the accused's peremptories.

Perhaps most obviously, even if the standard for a cause challenge is lowered, a biased juror will very often escape it. Largely for this reason, Justice Thomas, though concurring in McCollum, purportedly on the ground of stare decisis, expressed grave misgivings: "I am certain that black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes. . . . Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Unless jurors actually admit prejudice during voir dire, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict."

Indeed, in some cases, an accused may reasonably conclude on the basis of one or more aspects of a potential juror's background or attitudes that she is less likely than the

potential juror next in line to find in favor of the accused. Such a probabilistic judgment is an appropriate basis on which to exercise a peremptory challenge, and it will weed out some biased jurors. In most cases, though, it cannot support a challenge for cause — unless the standard for a cause challenge is eased so much as to sap it of virtually all meaning.

The point should not be overstated: It is probably relatively rare that the availability of peremptories actually prevents an inaccurate verdict. Empirical research suggests that attorneys, despite extensive efforts, and even aided by "scientific" selection methods, actually tend in most cases to have only modest success in identifying jurors inclined to find adversely. And even where the attorney is able to identify hostile jurors, in most cases it is unlikely that the use of peremptories will prevent an inaccurate verdict. After all, a peremptory does not prevent the inclusion of a biased juror unless the attorney identifies the juror as relatively hostile and a challenge for cause fails (or would fail if made). And even if in a given case the exercise of peremptories does prevent the inclusion of one or more biased jurors, it still may be unlikely that denial of peremptories would lead to an inaccurate result; at least where jury unanimity is required, the inclusion of one or a few biased jurors is probably more likely to cause a hung jury than to transform an accurate verdict into an inaccurate one.

The point should not be overstated: It is probably relatively rare that the availability of peremptories actually prevents an inaccurate verdict.

But, even if peremptories are of only occasional importance in contributing to fairness itself, they are of consistent, though not as dramatic, importance in contributing to the perception of fairness. No system of challenges for cause can serve as well as peremptories can the crucial function of giving the accused a strong sense that his jury is fair. As Blackstone noted, the accused may be suspicious of a juror "even without being able to assign a reason." Or perhaps the accused knows the reason but is not able to persuade the judge that it amounts to good cause; it may be that the accused is engaging in what Professor William Pizzi has rightly called "comparison shopping," and believes that the juror belongs to a group that, as a statistical matter, is significantly less likely than the average run of jurors to find in his favor. The value of peremptory challenges lies precisely in their peremptoriness — that the accused can remove a potential juror whom he suspects would be biased against him (or merely less likely to vote for acquittal than the next potential juror) without having to persuade anyone. Peremptories thus help remove even grounds of suspicion that are weak or that would be difficult or embarrassing for the accused to articulate or for the judicial system to assess.

Given the nature of a criminal trial, in which the state attempts to deprive an individual of liberty (or even of life), increasing not only the actuality of fairness but also the accused's perception of fairness is a particularly crucial goal. Punishment by the state is more easily justifiable when that perception is a strong one. This consideration is especially important when the accused is particularly vulnerable to oppression by the state and prejudice by portions of the populace — and, as suggested by Justice Thomas in McCollum, that may be when peremptories serve their most important purpose.

The accused's peremptories have other, subsidiary benefits as well. To develop a challenge for cause often requires extensive questioning of a juror, and as Blackstone pointed out, "the bare questioning his indifference may sometimes provoke a resentment." The problem is inevitable, but making the system more dependent on challenges for cause would aggravate it.

Finally, in some cases peremptories offer efficiency benefits. Occasionally, the exercise of a peremptory may keep off the jury an outlier, someone who would not persuade her colleagues but who might through sheer stubbornness or conviction cause a hung jury. Moreover, challenges for cause are more expensive to administer than are peremptory challenges. Not only must groundwork be laid in questioning, but an argument must be made to the judge, who must rule, and if the ruling is against the accused an appeal is possible.

Peremptories, by contrast — to the extent they are allowed to be truly peremptory — are about as simple to administer as could be. The importance of this consideration is mitigated, but not eliminated, by the fact that, so long as the accused does not have a surplus of them, he has a strong incentive to develop a challenge for cause against a juror whom he wishes to exclude, thus saving one of his peremptories.

Batson has mitigated, though hardly eliminated, one serious aspect of this problem– the tendency for prosecutors to use peremptories discriminatorily against potential jurors from minority ethnic groups.

PEREMPTORIES FOR THE PROSECUTOR: IS THE GAME WORTH THE CANDLE?

The prosecutor's peremptories stand on weaker ground than do the accused's. Indeed, as the historical background has indicated, during much of the last 700 years or so, peremptories have not been as firmly established for prosecutors as for criminal defendants. I think there is good reason for this: The crucial function of increasing the accused's perception of fairness is not served by prosecutors' peremptories. Indeed, that function will be disserved to the extent that the prosecutor uses her peremptories to exclude jurors who, though apparently fair-minded, have backgrounds and attitudes suggesting that they are more likely than the average member of the community to find in favor of the accused.

Batson has mitigated, though hardly eliminated, one serious aspect of this problem– the tendency for prosecutors to use peremptories discriminatorily against potential jurors from minority ethnic groups. At the same time, however, Batson has created a serious disadvantage of another type: It has made prosecutors' peremptories a frightfully expensive procedural nightmare. Batson has meant that very often the prosecutor's exercise of peremptories threatens to append a mini-case of discrimination onto the criminal trial. (This is particularly so where the accused is a member of a minority group, but even in some cases where he is not, in Powers v. Ohio, the Court held that the accused, a white man on trial for murder, had standing to object to the prosecutor's use of peremptories to exclude black jurors.) And the discrimination case is not so easily resolved.

In some cases, the Court must first determine whether the group assertedly excluded is cognizable under the Batson doctrine. If the prosecutor excludes blacks or Hispanics willy-nilly, that will run afoul of Batson, but presumably if she does the same to plumbers or pipefitters that will not. What if she excludes people whose names sound Italian? The cases seem to be in conflict. Conflicts such as this one may be resolved in time, but new ones are sure to arise as courts test the outer reaches of Batson. One court, for example, has applied Batson to disallow a peremptory challenge of a hearing-impaired juror. The possibilities are seemingly endless. Suppose the prosecution in a rape trial challenges young men. Is that covered? I know of no cases as yet, but no doubt there will be.

If the Court determines that the discrimination alleged is the type covered by Batson, it must then determine whether a prima facie case of discrimination is made out. According to the New York Court of Appeals, "[t]here are no fixed rules" for answering this question; the statistics of whom the prosecutor challenges and whom she accepts are helpful, but not conclusive, especially when the accused's objection is to a single peremptory challenge. Such factors as "objective facts indicating that the prosecutor has challenged members of a particular racial group who might be expected to favor the prosecution because of their backgrounds" must also be taken into account.

There is a slightly bizarre aspect to this consideration, though it may be inevitable given Batson. In exercising peremptories, the prosecutor is not only allowed to but expected to adhere to generalizations based on the background of a potential juror – but the prosecutor must disregard one crucial facet of the potential juror's background, her race, that may have affected her life and perspective more strongly than any, or nearly any, other.

If the Court does find a prima facie case of discrimination, the sideshow is not over, because the prosecutor has the opportunity to demonstrate that she really exercised the peremptories on a permissible basis. Suppose that the accused is Hispanic, and that much of the testimony will be in Spanish. Can the prosecutor defend her peremptory challenges of Spanish-speaking jurors by expressing fear that they will follow their own understanding of the testimony rather than the official translation? The Supreme Court has allowed one prosecutor to get by with that explanation, even while suggesting that it

might not fly in the future. It is difficult to know which this decision puts in the most unfavorable light — the judicial exaltation of the translation over the actual testimony, the Batson rule, or peremptories themselves.

If the Court does find a Batson violation, it must grant an appropriate remedy; sometimes it may be feasible for the Court to order the seating of jurors who had previously been excused, but sometimes it is necessary to dismiss the entire panel and start anew.

Finally, if in the end the trial court decides there is no Batson violation, the accused may appeal on that issue. Unless the appeal is interlocutory — which requires a postponement of trial —the only effective remedy, if the appellate court determines that there has been a violation, is a retrial.

Small wonder that, as Professor Pizzi has said, "[i]f one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than Batson."

Sometimes, the prosecutor's own interests might encourage restraint in exercising peremptories, so that she does not add unnecessary complexity to the case. But the prosecutor eager to secure a conviction cannot be expected reliably to take into account the full impact on the judicial system of her exercise of peremptories.

The complexities that have stemmed from Batson are, I believe, virtually inevitable in a system that gives the prosecution peremptory challenges subject to the qualification that a limited set of grounds for their exercise is impermissible. The qualification could be removed only if Batson were overruled. That prospect, however, is both unappealing and extremely unlikely. The question then becomes whether the supposed benefits of prosecutors' peremptories are great enough to make the considerable costs worthwhile; Batson has so fundamentally altered the nature of prosecutors' peremptories that inertia alone should not justify their retention.

Prosecutors' peremptories do presumably occasionally prevent inaccurate verdicts, but for reasons discussed above this is probably a relatively rare occurrence. Allowing the prosecutor to challenge a juror peremptorily might also, in some cases, prevent the perception of unfairness to the prosecution, but this is not nearly so important as preventing the perception of unfairness to the accused.

Prosecutors' peremptories might also offer some benefits comparable to the subsidiary benefits of the accused's peremptories. But these do not seem weighty enough to warrant retaining them. And neither, I shall now argue, should any concern about altering the balance of litigation.

If the Court does find a Batson violation, it must grant an appropriate remedy; sometimes it may be feasible for the Court to order the seating of jurors who had previously been excused, but sometimes it is necessary to dismiss the entire panel and start anew.

PUTTING IT TOGETHER: THE NON-PROBLEM OF ASYMMETRY

So far I have argued that it is important to preserve peremptories for the accused and suggested that it may be wise to eliminate them for the prosecutor. Putting these ideas together is sure to raise objections of asymmetry. I do not believe these objections are troublesome.

For one thing, as I have pointed out, the allocation of peremptories is already asymmetrical in federal courts and in a substantial number of states. Eliminating peremptories for the prosecution altogether would expand and accentuate an already existing asymmetry, not create a new one.

More fundamentally, it is important to bear in mind that criminal trials are not about even-handedness. In various ways, we create asymmetries to protect important rights of the accused. Most obviously, the accused is presumed innocent, and only proof beyond a reasonable doubt will suffice to convict; if, after all the evidence is in, the jury is in equipoise, or even thinks that guilt is substantially, but not overwhelmingly, probable, it must return a verdict of not guilty.

Other asymmetries can also be crucial. The prosecution is obligated to disclose potentially exculpatory evidence to the accused, but the accused has no obligation to disclose inculpatory evidence to the prosecution. The accused can decide to testify, but the prosecution cannot compel him to. The accused can put his character into issue, to show that he was not a person likely to commit the crime charged, but unless he does so the prosecution cannot attempt to show that he was such a person. Similarly, in some cases, only the accused can decide whether to raise questions about the character of the purported victim, such as by bolstering a contention of self-defense by showing that the supposed victim is a violent person. And in some circumstances the accused's right to confront witnesses against him under the sixth amendment to the Constitution gives him the right to override an evidentiary objection of the type that would bind the prosecution.

As compared to a symmetrical rule, each of these asymmetries alters the results of the fact-finding process in favor of the accused. To a large extent, though, that is desirable. Blackstone's statement that it is better to let ten guilty defendants go free than to convict one innocent one may be a cliché, but it only became one because it expresses a fundamental value. The principal expression of that value in our criminal law system is the standard of proof beyond a reasonable doubt, which, as compared to a more-likely-than-not standard, prevents some fact-finding errors against the accused at the price of creating far more fact-finding errors in favor of the accused — a trade-off that we find easily worthwhile.

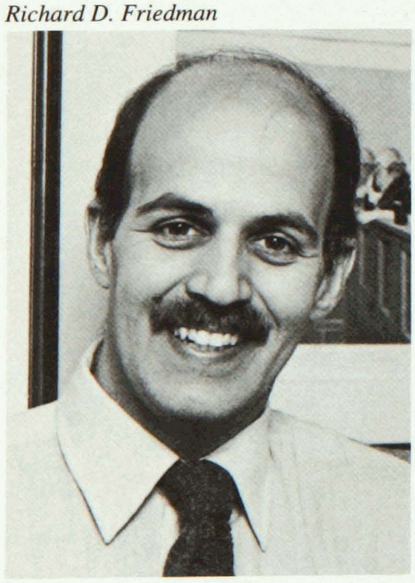
Thus, even if an asymmetrical rule on peremptories led to a substantially greater number of pro-accused errors as compared to those that would be yielded by a symmetrical rule (either both sides or neither side having peremptories), that would not be enough to condemn the asymmetrical rule. We would first have to ask whether the corresponding reduction in anti-accused errors is great enough to make the change a net improvement in the truth-determining process, given that anti-accused errors are far more important than pro-accused errors. There is no way of knowing for sure, but it seems unlikely that the increase in pro-accused errors would be so many times greater than the increase in anti-accused errors to make the trade-off a bad one.

Moreover, even if the ratio of these two effects does work to the disadvantage of the asymmetrical rule, it is unlikely that the magnitude of the increase in pro-accused errors would be so great as to be not only a significant concern, but to outweigh in importance the efficiency of denying peremptories to the prosecution or the perceptional value of maintaining them for the accused.

A RUMINATION

There is a strong case for maintaining peremptories for the accused. Perhaps the case can be made for retaining prosecutors' peremptories, but this is doubtful — and it does not seem that the case can be made on the ground of symmetry. So this presents the possibility of an asymmetrical solution, in which the accused but not the prosecutor may challenge potential jurors peremptorily. And that leads one to wonder whether McCollum would have come out the way it had if there were no prosecutors' peremptories. Would the Court have been tempted to limit the accused's exercise of his peremptories? The best guess — and it can only be that — is that the Court would have let the accused's peremptories remain truly peremptory.

Richard D. Friedman



(Editor's note: This essay is adapted — without footnotes — from Professor Friedman's article of the same title, 28 Criminal Law Bulletin 507 (Nov.-Dec. 1992). For a copy of citations for this essay, please contact the editor, Law Quadrangle Notes.)

A full house was on hand in Honigman Auditorium for the sixty-eighth annual Henry M. Campbell Competition held March 29. An entire panel of judges, all with moot court competition experience, heard final arguments in the hypothetical case of Wilkins v. State of Wyoming. They were left to right: Judges Harold M. Fong, U.S. Federal District Court of Hawaii; Jerry Smith, Fifth Circuit of the U.S. Court of Appeals; Alex Kozinski, Ninth Circuit Court of Appeals; Helene White, Michigan Court of Appeals, and Emilio M. Garza, also of the Fifth Circuit Court of Appeals.

LAW QUADRANGLE

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