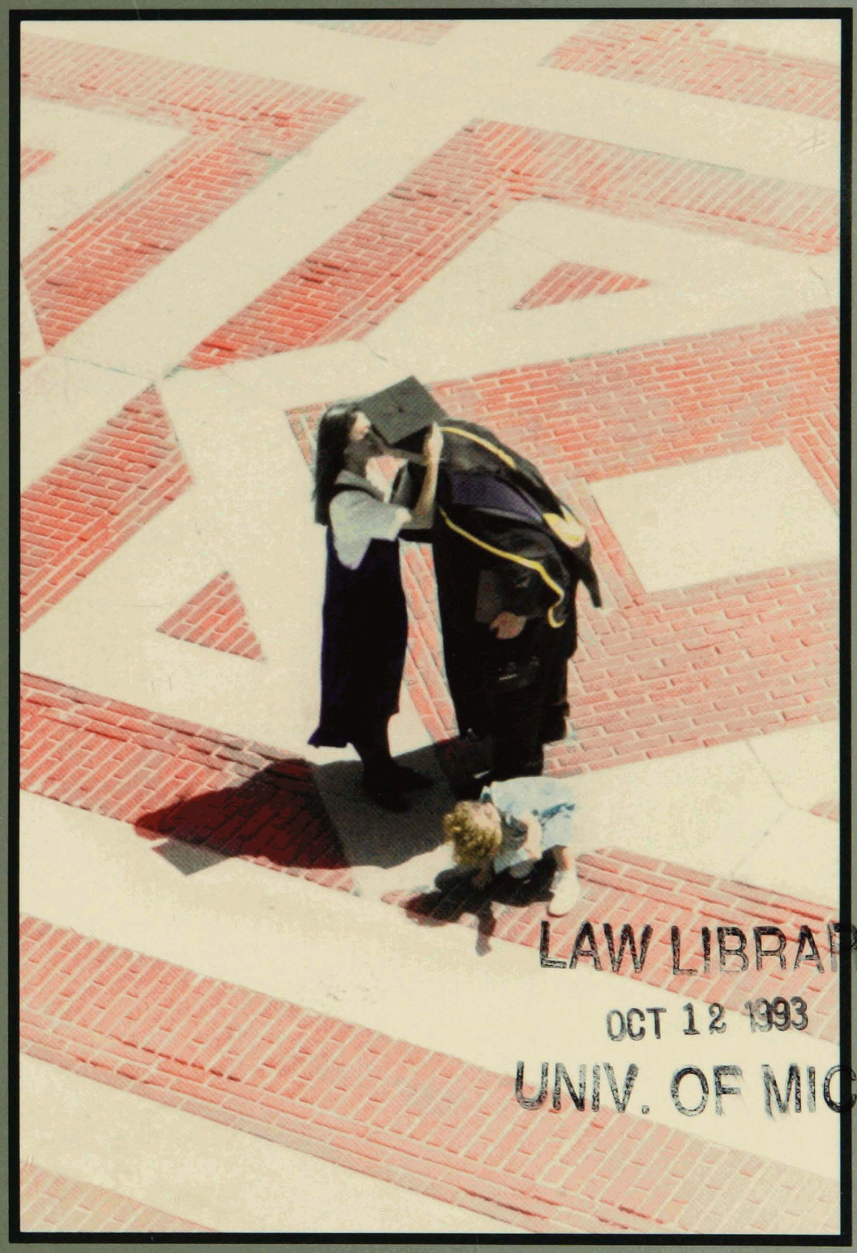
THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOL. 36, NO. 3 • FALL 1993

LAW QUADRANGLE

NOTES



Suellyn Scarnecchia — a courageous voice for children
The Sherman Act after a century
Are laws against assisted suicide unconstitutional?

THE UNIVERSITY OF MICHIGAN LAW SCHOOL ALUMNI EVENTS

OCTOBER

1 Missouri State Bar
Annual Meeting
Adam's Mark Hotel, St. Louis
12:00 noon Alumni Luncheon

1-3 Class Reunions
1953, 1963, 1973, 1983

8 Law School Fund National
Committee Meeting
Hutchins Hall
2:30 p.m.

California State Bar
Annual Meeting
San Diego Marriott, San Diego
7:30 a.m. Alumni Breakfast
Speaker: Assistant Professor
Heidi Li Feldman

13 Nebraska State Bar
Annual Meeting
Holiday Inn, Omaha
12:30 p.m. Alumni Luncheon

22-24 Class of 1968 25th Reunion

Committee of Visitors Weekend

23 Scholarship Donors Luncheon
with student recipients
Law School, Ann Arbor

NOVEMBER

5-7 Class Reunions
1948, 1958, 1978, 1988

Watch for "Taking Students Seriously" by Kent Syverud in the next LQN. Due to publishing delays at another journal, it will not appear in this issue as slated.

HAVE YOU MOVED LATELY?

If you are a Law School graduate, please send your change of address to:

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915 Legal Research Building
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Cover illustration: Gregory Fox's photo of a family moment at Law School graduation was colorized by Williams & Williams, Inc.

LAW QUADRANGLE

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BRIEFS

FACULTY

ALUMNI

FEATURE STORY

ARTICLES

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Senior Day '93

Justice 'too important to be left to the law'

The class of 1993 ended three years of study with a final lesson at commencement: that justice involves action that goes beyond the letter of the law.

Eli Segal, '67, now director of President Bill Clinton's national service initiative, urged graduates to be "a voice for justice" through service to others. Likewise, Dean Lee Bollinger told graduates not to get so absorbed in their profession that their relationships with others suffer, and Law School Student Senate president Kira Jarratt told them to work at being happy. More than 300 graduates took part in the May ceremony.

Segal's talk echoed John F. Kennedy's 1960 campaign speech from the steps of the Michigan Union that called students to worldwide volunteerism — an idea that led to the creation of the Peace Corps. Kennedy's call to service was powerful because it was a challenge, not an order, Segal said.

"It did not invoke the power of the law to require virtuous conduct; instead, it argued directly for virtue itself," he said. "Our laws, written in terms of rights and prohibitions, won't ever guarantee a society where we fully meet our responsibilities to one another," explained Segal. He cited as an example the Civil Rights Act of 1964; though it codified our commitment to rights for all, it didn't eliminate the injustice of racism. "The law allows some things that are wrong, and requires far less than what is right. The fact is, some things are too important to be left to the law. Among them is justice itself," Segal said.

To correct injustices, public-spirited attorneys have sought to coin new individual rights — a right to education, a right to housing, a right to health care. "I believe fervently in those goals and causes, yet I think that we will never achieve them through law, because rights are demands upon the unwilling," Segal said. "A challenge like Kennedy's makes people feel like volunteers in — rather than victimized by — efforts toward social justice. If we can persuade our fellow citizens that justice genuinely demands action, then we will need fewer laws. If we cannot persuade them, no number of laws will ensure justice."

These limits to the law's effectiveness do not call for cancelling commencement. In fact, they make the jobs of lawyers infinitely more interesting and important, Segal argued. "A good lawyer will tell a client precisely what the law requires and what it allows. But in time, a *computer* will be able to do that. A great lawyer — the kind this law school turns out —also offers judgment that transcends the letter of the law. I urge you to be a voice for justice."

Segal challenged graduates to reach out to serve others in ways that relied on their humanity, not their education. "Don't let your diploma obscure your humanity. Visit with the elderly. Tutor a child. Read to the blind. Find a way to make a difference in one life, not just abstract hundreds or thousands of lives.

Eli Segal, manager of Bill Clinton's presidential campaign, told graduates he has been trying to elect a Democrat to the White House since his Law School graduation in 1967. This year, like the Michigan football team at the Rose Bowl, he finally won the big one.

In serving another, you will find your best self and a way of looking at the world that you will not forget when it is time to return to your legal practice."

Returning to campus for commencement completed a circle for Segal that began 26 years ago when he crossed the Hill Auditorium stage to graduate "*summa cum fortuna* — with great luck." His first job was with Eugene McCarthy's presidential campaign, and he's been trying to elect a Democrat to the White House ever since. "Like Michigan in the Rose Bowl, though, I just couldn't win the big one," Segal joked.

Still, Clinton overlooked Segal's 0-7 record and named him chief of staff for the 1992 campaign. Segal's team finally won and he took on the challenge of shaping Clinton's ideas about service into a program that will benefit youth and communities; that brought him back to Michigan to address new lawyers. "As if to prove that I was no longer cursed, Michigan even won the Rose Bowl this year," he added.

While on campus, Segal met with the U-M Task Force on Community Service to learn about flourishing volunteer activity on campus and brief members on the status of his proposed national service program. After commencement, he also described the proposed program to an enthusiastic group of graduates.

As envisioned, the program would offer students and recent graduates low-paying, socially beneficial jobs along with a stipend of up to $7,000 to cover their college costs. While the federal government would subsidize the costs and set program standards, state and local governments and community organizations would actually establish the jobs where needed. (In July, the Senate and House of Representatives considered legislation for a program very much like what Segal described. If Congress passes the bill, the program could begin in October.)

Eli Segal, director of President Clinton's national service program, posed with students on the Michigan Union steps where Kennedy first voiced the idea for the Peace Corps. Segal urged graduates to work for justice by serving others.

Bollinger, like Segal, advised graduates to hold on to their humanity and not to get so wrapped up in their profession that they grow distant from people who matter. "Watch out for the busy, self-absorbed life. If you have a briefcase telephone, you are taking yourself far too seriously," he quipped. "Keep a sharp eye on the limits of your profession and your identity as a member of the profession. Keep your youthful attitudes, and at least occasionally, walk up to the precipice and look into the depths of ignorance," he advised. "We wish you fulfilling, productive, socially rewarding lives. We will not forget you, and when you return to Michigan, we will be here to welcome you home."

Scrutinizing the Constitution

Law School hosts first con law conference in a decade

From historical perspectives to breaking news, the Association of American Law Schools' Conference on Constitutional Law held at the Law School looked at the topic from just about every angle.

The conference, held June 12-16, was the first in a decade to take a comprehensive look at the current status of constitutional law. With about 160 attendees, the program was the largest subject-specific conference the AALS ever held.

Participants spent the five days of the conference exploring scholarly views on how to define, interpret, critique and teach constitutional law until at the end, someone raised the question, "What is constitutional law?"

While the conference took on such fundamental, philosophical questions, much of the discussion was shaped by recent events and daily headlines demonstrating the current workings of the Constitution. Lani Guinier's "spectacularly mishandled" nomination for assistant attorney general for civil rights, withdrawn just before the conference, prompted a special session on the role of academics and their writings in public life.

Conversations were rife with reaction to a *Wall Street Journal* article by Harvard Law Professor Mary Ann Glendon, which argued that Guinier's case shows elite law schools are now hotbeds of radical theories "woefully out of touch with American culture and political life." Faculty interrupted a panel discussion on "Perspectives on the Changing Court" to announce a surprising possible change—Clinton had just named Ruth Bader Ginsburg as his nominee to the court.

These events offered fertile ground for debate on the nature of the confirmation process, the impact of nominees who can shape law, and the role of law schools in training or evaluating these public servants.

Below are some brief highlights of the ideas and comments expressed at the welcoming dinner and daily panel discussions.

The Confirmation Process

• Confirmation has become a hot issue because it's become an intensely partisan process driven by revenge, said Mark V. Tushnet of Georgetown University. The Republican right is sinking recent nominees to "get back" at the liberal left for what it did to Robert Bork.

• The process is different for each of four areas where the Constitution authorizes confirmation: treaties, Supreme Court judges, Article III judges and Article I presidential nominees, said Robert Nagel, University of Colorado. In the last case, it is the President's role to evaluate an appointee's ideas and philosophy and take responsibility for how the appointee exercises those views on the job. The Senate should focus only on the nominee's integrity and ability to do the job; it's not the Senate's role to dictate the make-up of the executive branch administration.

• Nagel and Burt Neuborne of New York University agreed that for Supreme Court nominees, it's more important to consider nominees' views and values, especially in light of how those views would shape decisions that impact our lives. Neuborne said recent confirmations focused on extreme issues of character and philosophy and ignored key issues like abortion and affirmative action. This process is aimed at predicting a nominee's future decisions instead of carefully analyzing the current direction of the court, where it should be heading and how that nominee might change the direction.

The Constitution and Unenumerated Rights - The Right To Die Issue

• A moot court considered the case of a physician who allegedly violated a law that allows medical providers to withdraw life-sustaining treatment at the specific request of terminally ill patients but bans medically assisted suicide. The doctor withdrew food and nutrition at the request of a quadriplegic patient who was in great pain, but not terminally ill, and sedated the patient to ease his death. The mock Supreme Court found in favor of the physician, arguing that a patient wishing to exercise the right to withdraw from treatment shouldn't be denied a doctor's assistance, regardless of the terminal nature of the disease.

The Changing Face of Freedom of Expression

• Traditional debates over freedom of expression focus on the "extremes" like hate speech and pornography. New voices representing feminist theory, critical race theory and other underrepresented views are questioning the freedom allowed to the extremes, said Dean Lee Bollinger. "They are raising recognition that harm comes from that speech and questioning whether the slippery slope is really as steep as we think. Is the concept of freedom of speech now so internalized into our public and legal culture that we can afford to legislate some control?"

• Censorship occurs in settings when people confuse behavior problems with informational problems. Society has lost faith in the ways of changing problem behavior, and censorship is the tool we're grasping at; the difference is that this tool traditionally held by the political right is

now in the hands of the liberal left.

• One task for free-speech scholars in the future is to empirically document how free speech really is, said Cass Sunstein of the University of Chicago. Increasingly, the ideas aired in the media marketplace of idea are controlled by advertisers deeply afraid of offending mass public interests, he said, noting that a TV movie on Roe v. Wade was threatened by an advertiser boycott.

Scholarship, Public Life and Confirmation

• Lani Guinier told the truth. Burt Neuborne argued that the remedies she wrote about are actively, if quietly, used in the back rooms where civil rights law is practiced. The Senate Judiciary Committee found them politically dangerous and didn't want to acknowledge them.

• Guinier and the Clinton administration had three possible defenses of her academic work, according to Alex Aleinikoff of the U-M. They were: "I didn't say that;" "It's mainstream;" and "It doesn't matter." Since most Americans weren't ready to accept her views as mainstream, she should have taken the first approach, attacking the distortion of her views.

• Academic writings are not exempt from scrutiny when academics seek public life, said Sandy Levinson of the University of Texas. Panelists and audience members agreed that the moral of Guinier's story seems to be that if you think you will seek public office some day, you should expect to have your writings examined and potentially distorted, but that should not stifle your scholarship.

• William Marshall of Case Western Reserve noted that emphasis on style over substance in the last four presidential campaigns shows that no one is interested in debating ideas in articles. "In fact, debate of any idea at all, even if it is a caricature of the idea, is probably a step up from debate on paying taxes on nannies and 20-year-old drunk driving citations."

Perspectives on the Changing Court

• The Supreme Court isn't changing much, argued Suzanna Sherry of the University of Minnesota. Even after 10 years of conservative appointments, decisions haven't shifted much from liberal precedents.

• The court hasn't had cases available to make great judicial leaps backward, but there is potential for a court shift, said William Cohen.

• The big change is that the court has become boring, said Terrance Sandalow of the U-M. Justices write long, tedious opinions that don't illuminate issues at hand. Sherry said a court that is centrist, sensible and getting it right is bound to be boring.

Constitutional Interpretation

• Henry Monaghan of Columbia University said our use of the Constitution is shaped by a peculiar American view of what the document is. Traditionally, the English understood a constitution to be a document explaining the institutions of government; Americans instead defined it as the law of the land, to be enforced by courts. Today, however, many new rights like abortion or the right to die are seen in the Constitution when they aren't really there, and other clauses actually in the document are routinely ignored.

• Robert Post of University of California-Berkeley said the Constitution has authority not only by rule of law, but of our consent to be ruled by it and our commitment to the "good things" it represents. "Constitutional law is the continuous act of trying to identify what we're consenting to, of understanding ourselves and our culture."

Even when relaxing in the Law Quadrangle courtyard after the fourth day of the AALS Constitutional Law Conference, participants continued their lively discussion of current constitutional issues. From left are Susan Kupfer, Golden Gate University; Phoebe Haddon, Temple University; and Mark Tushnet, Georgetown University.

Panel debates the law and philosophy of assisted suicide

Is suicide always irrational and immoral? Maybe not.

Should the state of Michigan make it illegal to help someone commit suicide when that act itself is not illegal? Again, maybe not.

These were some of the questions raised by a panel discussing "Assisted Suicide: the Right to Self-Determination or the Duty to Die?" at an April symposium sponsored by the Jewish Law Students Union and the American Jewish Committee. The panel included medicide proponent Dr. Jack Kevorkian's lawyer; the attorney for the University of Michigan Medical Center; and two members of the University's philosophy faculty.

Judgments about assisted suicide depend on what we conclude about the morality of suicide itself, stated Carl Cohen, Ph.D., professor of philosophy and director of the Program for Human Values in Medicine at the U-M Medical School. "Is suicide always wrong? Suicide is often very wrong and very sad, but I believe that there are circumstances for a competent, rational adult in which taking one's own life is not morally wrong."

"If there are cases where it is entirely right for me to take my own life, there are few cases when it is wrong for me to seek help doing it," Cohen added. In that light, he said, penalties against suicide or assisted suicide interfere in private lives.

Medical Center attorney Edward Goldman, '68, agreed with Cohen. In his 15 years of practice at the U-M Hospitals, he said, "I've seen a small class of patients for whom no treatment options are available. They should have the option to end their lives of suffering if they wish. To say, 'Fine, but we can't help you' is not right," Goldman said.

Hospitals and doctors already make decisions with patients about when life will end, guided by case law and the values of all involved. "This is a serious responsibility. I believe hospitals have demonstrated that we can meet this responsibility successfully without abuse, and I don't believe state prohibition of assisted suicide is necessary," he said.

Goldman found several problems with Michigan's assisted suicide ban, passed in February in response to Kevorkian's activities. (The law has since been challenged and overturned on procedural grounds and reinstated by the Court of Appeals.) First, he pointed out that while suicide is far from desirable, it's not a crime, either. "It's interesting that we have a law that says helping someone to commit a legal act is illegal," Goldman said.

As enacted, the law makes it a felony "to have knowledge of one's intention to commit suicide and provide the physical means or participate in a physical act to end that life." That could be interpreted pretty broadly, he pointed out.

"The other day I found a $3.98 copy of Derek Humphrey's book about suicide at Borders Book Shoop. I asked the clerk, 'Can I buy this book?' He said, 'Of course.' I said, 'Do you know why I want to buy this book? I want to buy this book because I want to commit suicide.' He sold me the book. He had knowledge and he sold me the means. Did he just violate the law?"

Goldman advocated more aggressive use of pain relief and hospice services to both ease a patient's final days and relieve the desire to commit suicide. Still, he has come to believe that there are circumstances under which physicians can help their patients who wish to die. Such actions should only take place:

- in a well-established doctor-patient relationship
- after establishing that the desire to die is not a result of temporary depression
- after full exploration of all medical options
- after the physician consults with medical peers
- after sufficient time to make sure that the patient's wishes remain unchanged
- with a mechanism in place for peer review.

Geoffrey Fieger, attorney for Kevorkian, characterized efforts to ban assisted suicide as the work of "right-wing religious fanatics who think it's God's will to suffer to the end." He added, "It is the right of the individual to make decisions about continuing life in the face of disease. Who but a physician is most adept at helping you make that decision?"

Panel moderator Helene White, a justice of the Michigan Court of Appeals, asked Fieger if his viewpoint allowed for any regulation. "Yes," Fieger replied. "Jack Kevorkian has written criteria for medicide that are very similar to Mr. Goldman's, but only physicians can regulate it," Fieger answered. "You can't expect legislators untrained to regulate it, except to make sure doctors are competent."

David Velleman, a U-M professor of philosophy, said he objected to the idea of a right to commit suicide or assist in one. By calling it a universal right of individuals, "you claim the benefit for a class of people like yourself. Securing such options for others can harm them by giving them options they wouldn't want to have," Velleman said. "Obtaining rights alters circumstances; it may put others in a position to exercise an option they wouldn't want to have."

IN CAMERA

"The American Art Museum Today: Three Perspectives" was the topic of the William W. Cook Lectures on American Institutions. The series included talks by (from left): Annamaria Petrioli Tofani, director of the Galleria degli Uffizi in Florence; Stephen Weil, deputy director of the Hirshhorn Museum and Sculpture Garden in Washington, D.C.; and Marcia Tucker, founder and director of the New Museum of Contemporary Art in New York City;

Alan C. Page, (center) the first African-American associate justice on the Minnesota Supreme Court, spoke on the importance of activism in economically depressed communities at the 15th annual Butch Carpenter Scholarship Award Dinner. The dinner sponsored by the Black Law Students Alliance supports a scholarship fund established in memory of Carpenter, a student leader and athlete who died in 1977 in his first year of law school. Shown with Page are Kathryn Wordlaw, BLSA chair; Tracy L. Richards, winner of the first-year scholarship award; Lisa Lawson, Butch Carpenter chair; and Bentina Chisolm, second-year award winner.

A panel discussed "Economic Development: Strategies for Empowerment" at the Law School's Native American Law Day 1993 in April. Panelists were (from left) John Bailey, director of the Northern Michigan office of the Michigan Department of Commerce; Manley Begay, executive director of the Harvard Project on American Indian Development; Richard Tilmann, business development director for the Saginaw Chippewa Indian Tribe; and David Matheson, former federal deputy commissioner of Indian affairs.

'24-karat dean' to step down in '94

After seven years of deeply personal leadership, Dean Lee C. Bollinger has announced to the faculty that he will step down as dean next year. He has accepted the position of provost at Dartmouth College.

Dartmouth's president, James O. Freedman, announced Bollinger's selection in May. However, because Bollinger is committed to his responsibilities and a smooth leadership transition at Michigan, he will not leave to assume his new post in Hanover, N.H., until July 1, 1994.

In his announcement to faculty, Bollinger wrote, "I will not try to say in a letter what it has meant to me to be on this faculty for 21 years, seven of them as dean."

Intent on making the most of the coming year, he isn't ready to focus on his departure now. "Since I have a year to go, I'm committed to accomplishing as much as I possibly can, and at this point, I'm resistant to summing up my career here."

He'll spend the year assisting the faculty in the search for his successor and tending to the diverse needs of the "heart and soul of the school" — the students and faculty. In addition, he said, "I'll continue to focus on our capital campaign. It's vital to the well-being of the school. We're up to $32 million now. I'll work as hard as I can to bring it up to $40 million."

Dartmouth's Freedman said, "Dean Bollinger has a distinguished record of achievement as teacher, scholar and academic administrator. Most of all, he is an intellectual who cares deeply about ideas and liberal education. I am confident that he will bring outstanding qualities of leadership and character to his new position."

Dartmouth's gain is a major loss for Michigan, where Bollinger has impressed and inspired everyone with his rare combination of scholarship, integrity and personal warmth.

Shining through all his professional relationships was a caring, human touch that faculty, students and alumni appreciated and will sorely miss. "Often you can find a genuine scholar who can express creative ideas, but that person may lack a warm human touch. Lee has both in abundance," said Theodore St. Antoine, a professor and former dean. "He has a 24-karat quality; it's clear to everyone that he has no artificial aspects."

"I think of Lee as one of the more important moral anchors of the Law School, and that's the quality I'm most concerned about losing," said Richard Pildes, a recently tenured assistant professor. "His strength is an ability to champion commitment to the traditional values of tolerance, discussion and decency while still maintaining strong convictions about the values that ought to define a great law school."

Long-time faculty member James J. White noted, "The most important thing he has done as dean is to establish high standards in hiring." Bollinger recruited a talented, diverse group of scholars and used his "wonderful talent for listening" to minimize conflict and maintain harmony among faculty of all ages and viewpoints, White said.

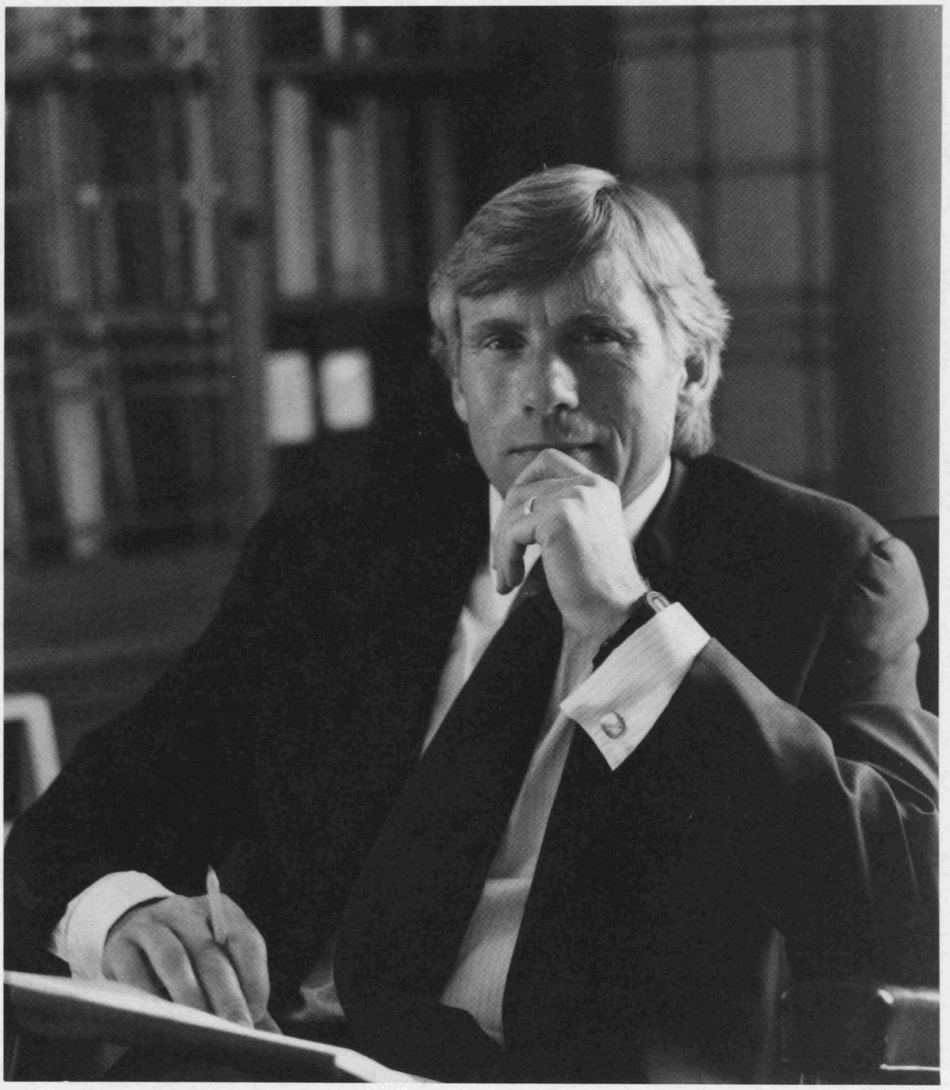
"He was very successful at bringing in a critical mass of young faculty with diverse strengths and doing everything a dean can do to help them grow," added Pildes. That was true even if Bollinger's own work and viewpoint was very

different, noted Suellyn Scarnecchia, a clinical assistant professor of law hired to teach in the Child Advocacy Law Clinic the same year Bollinger became dean. "I'm very sad he's leaving because he's been a very positive leader," Scarnecchia said. "He always made me feel like my work was extremely valuable and never passed up an opportunity to give me positive reinforcement, even though my clinical work was very different than his academic focus."

Bollinger has strengthened the Law School in many ways. "Even outsiders can see how successful he has been," says Jeffrey Lehman, a professor of law and public policy. "During his deanship, the Law School renovated its buildings, enhanced its international connections, hired exciting new faculty with diverse intellectual styles, and experimented with innovative academic programs. Remarkably, Lee was able to pursue that kind of agenda during a time when some of our traditional sources of financial support were shrinking."

Bollinger has addressed that challenge, too. "He's been tremendously successful at the terribly important task of raising money," St. Antoine said. He played a major role in launching the Law School's five-year, $75 million capital campaign that will end in 1997. The same warmth that impressed faculty made a big impression on alumni, who generously invested in the school's future by endowing chairs and contributing to scholarship funds.

The Law School is losing not only a talented leader but a preeminent scholar. "His work is characterized by the rare integrity of an academic who writes because he wants to figure out how to live and act," Pildes noted. Since Bollinger joined the U-M faculty in 1973, he has taught courses on the First Amendment and comparative freedom of speech, mass media law, contracts and law and culture. He has written three books and many articles dealing with free speech. A graduate of the University of Oregon and Columbia Law School, Bollinger was a law clerk to Justice Warren E. Burger from 1972-73.

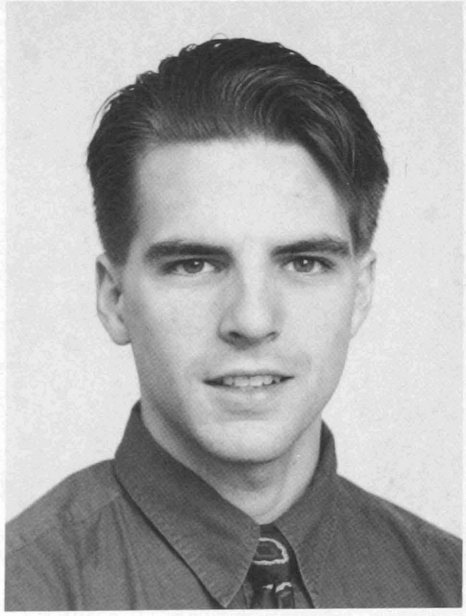


It will be difficult to replace Bollinger, all agree. "We want to carry on Lee's traditions, and we'll be looking for someone with the same qualities: scholarly excellence and strong administrative capabilities," St. Antoine said. Because Bollinger has done a great deal to build on the school's basic character and assets, he leaves the institution in a strong position to face the future.

New faculty and faculty news

Two Yale-trained attorneys joined the Law School faculty this summer. Assistant professor Steven P. Croley will be teaching torts and administrative law. Kyle D. Logue, also an assistant professor, will teach federal income tax law.

Croley, a Michigan native, graduated summa cum laude from the U-M in 1988 with a bachelor's degree in political science. At Yale Law School, he was articles editor of the *Yale Law Journal*, a teaching assistant for first-year constitutional law and director and co-founder of the Yale Student Legal Theory Workshop.



Steven P. Croley

After receiving his law degree in 1991, he clerked for the Hon. Stephen F. Williams, U.S. Court of Appeals for the D.C. Circuit. This year he was working on a doctorate in politics at Princeton University.

He has published an article offering an alternative explanation for the liability crisis and is authoring works on efficiency and regulation of consumer markets.

Kyle D. Logue

Logue, a 1990 Yale graduate, also was articles editor of the *Yale Law Journal* and a member of the Yale Student Legal Theory Workshop. He was named the John M. Olin Scholar in Law, Economics and Public Policy at Yale in 1988 and 1989.

A native of Alabama, he graduated first in his class at Auburn University in 1987, earning a bachelor's degree in political science with minors in economics and English. At Auburn, he was student president of the College of Liberal Arts and won several awards for academic achievement.

He clerked for Patrick Higginbotham of the U.S. Court of Appeals, Fifth Circuit for two years. Since 1991, Logue has practiced tax law at Sutherland, Asbill & Brennan in Atlanta.

Three join scholarly academy

Faculty members Bruce W. Frier, Richard O. Lempert and W. Brian Simpson were elected as fellows of the American Academy of Arts and Sciences in April.

Founded in 1780, the academy is a learned society with a dual function: to honor scholarly achievement and to conduct a varied program of studies that address the needs and problems of society. Today it has 3,800 fellows and foreign honorary members from all backgrounds and disciplines. Its membership includes 171 Nobel laureates and 58 Pulitzer Prize winners.

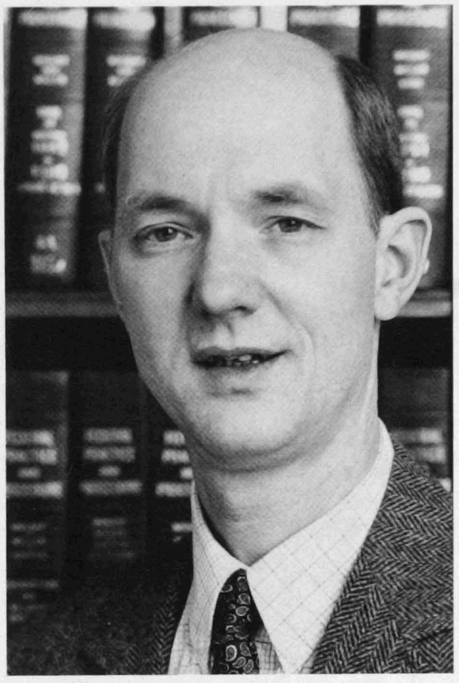
Frier, a professor of law and of the University's Classics Department, teaches seminars on Roman law. Lempert, '68, a professor of law with a joint appointment in the Sociology Department, studies and teaches the sociology of law, exploring the functions of courts, the jury system and deterrence. Simpson's expertise is in common law, legal history and legal philosophy.

Their election brings the total U-M Law School faculty membership in the academy to eight. Previously elected members are Emeritus Professor Francis Allen, Dean Lee Bollinger, Phoebe Ellsworth, Terrance Sandalow and James Boyd White.

Cooper named to Civil Procedures Rules Committee

Edward H. Cooper, the Thomas M. Cooley Professor of Law and the associate dean for academic affairs, has been named reporter to the Advisory Committee on Civil Rules.

As reporter, Cooper will help draft changes and reforms of the Federal Rules of Civil Procedure, which govern disposi-



Ed Cooper

tion of almost all civil lawsuits in federal courts. A co-author of several volumes in the leading treatise on federal civil procedure, he brings a wealth of experience to the task.

Cooper has already become deeply involved in the work of the committee. A revision of Federal Rule 23, which governs federal class action lawsuits, has been circulated for comment. The committee also is considering changes to Rule 68 involving offers of judgement. Among other things, the proposed changes would permit plaintiffs as well as defendants to make offers.

The committee's long-range projects include a comprehensive stylistic revision of the federal rules and a substantive reworking of the Special Master procedures of Rule 53.

Cooper is the third in a series of civil rules reporters with Michigan connections. The previous reporter was Paul Carrington, who served on the U-M law faculty for 13 years before becoming dean of the Duke Law School. The reporter before Carrington was Arthur Miller of the Harvard Law School; he taught at Michigan from 1965-72. Moreover, the late Edson R. Sunderland, professor at Michigan from 1910-1959, was one of the founding drafters of the first civil rules issued in 1938.

Visiting faculty

Experts from all over the country and around the world continue to enrich the experience of learning law at Michigan. Adjunct lecturers for 1993 fall term are: Susan Gzesh of Chicago, teaching immigration and nationality; Roberta Morris, currently teaching writing and advocacy at the Law School, teaching copyright; and Carl Valenstein of Arent, Fox, Kintner, Plotkin & Kahn, teaching international jurisdiction.

Visiting faculty during the 1993-94 academic year are:

Philip Alston, Australian National University—European community law and human rights

Aharon Barak, Supreme Court of Israel—comparative constitutional law

Christoph Engel, Universität Osnabrück—European economic and communications law

E. Allan Farnsworth, Columbia University —commercial transactions

J. Peter Kalbe, Commission of the European Communities —European Economic Community

Takashi Maruta, Konan University, Japan —Japanese legal system

Howard Nemerovski, San Francisco

Richard Pogue, Cleveland — tax law

Peter Schueren, University of Münster—European labor law

Takao Tanase, Kyoto University—sociology of law

Lorraine Wienrib, University of Toronto—Canadian constitutional law

Leary named to William Mitchell board

Margaret A. Leary, director of the Law Library, has been named to the Board of Trustees at William Mitchell College of Law, where she earned her juris doctor degree.

Leary will serve a three-year term on the board of the St. Paul, Minn., college.

Leary holds a bachelor's degree in government from Cornell University and a master's degree in library science from the University of Minnesota. Her career has focused on law library administration. She came to Michigan as assistant director of the Law Library in 1973. She played a major role in planning the award-winning underground addition that is now the active center of the library. She also developed a new course in advanced legal research. She was appointed director in 1984.

She brings to the William Mitchell board her experience evaluating legal education programs as a member of the Association of American Law Schools accreditation team. She has served on several other committees and groups involved with legal education and bar association activities. An advocate for law librarian education and advancement, she is past president of the American Association of Law Libraries.

Lea's gift endows chair

L. Bates Lea, '49, has endowed a professorship in international law with a gift of $750,000 to the Law School.

The income from the endowment fund will pay the costs incurred in inviting faculty members from foreign educational institutions to teach and do research at the Law School.

Lea, a long-time friend and volunteer to the Law School and a member of its Chicago Major Gifts Committee, saw a growing need to strengthen students' knowledge of international legal systems. "Much of our country's future is intertwined with the rest of the world. A great institution like the University of Michigan Law School is in a superb position to participate in this developing process of interdependence in a very positive way," Lea wrote in making the gift.

Lea is former vice president and general counsel of Amoco in Chicago.

Three faculty tenured

Three faculty members earned tenure and promotions from the U-M Board of Regents.

Richard Pildes was named professor of law; Suellyn Scarnecchia was promoted to clinical professor of law; and Avery Katz was named professor of law and adjunct associate professor of economics.

Pildes, who joined the faculty in 1988, teaches courses in constitutional law, public law and the history of American legal thought. He also has taught extensively in the Law School's innovative New Section, which offers a more interdisciplinary and practical approach to first-year legal education.

Pildes has written on a wide range of subjects, including legal philosophy, public policy, democratic theory, pornography and voting rights. In addition to his academic writing, he frequently contributes articles on legal subjects to the popular press.

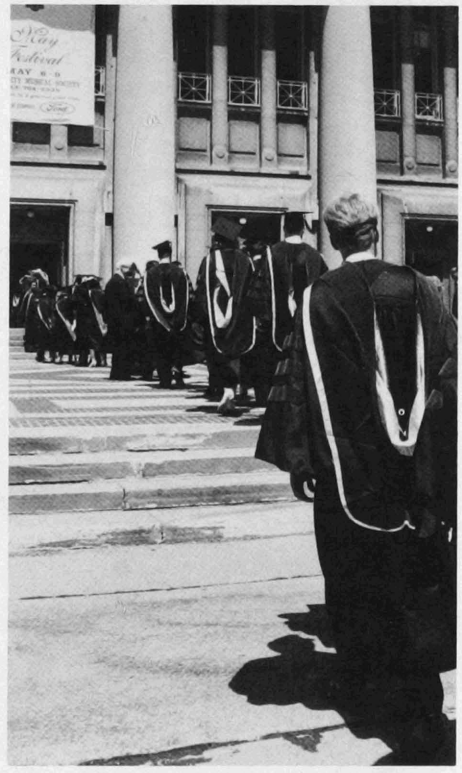
He has served as counsel in the U.S. Supreme Court on behalf of an array of state and local government organizations and as advisor to the Constitutional Drafting Commission for the government of Nepal. He has been an invited lecturer at many law schools, including Columbia, Georgetown, Yale, Houston, Texas, Chicago and Wayne State.

He graduated magna cum laude from Harvard Law School in 1983, where he was Supreme Court note editor and articles editor of the *Harvard Law Review*. He served a clerkship with Chief Judge Abner J. Mikva of the U.S. Court of Appeals for the D.C. Circuit in 1983-84 and with U.S. Supreme Court Justice Thurgood Marshall in 1984-85. Before joining the Michigan faculty, he practiced law in Boston with Foley, Hoag and Eliot.

Scarnecchia's interests are in gender bias, family law and children's issues. For the last year, she and her students in the Child Advocacy Law Clinic have been immersed in a high-profile custody battle (see p. 20). She earned her law degree at U-M in 1981 and practiced employment discrimination law with McCroskey, Feldman, Cochrane and Brock, P.C., in Battle Creek, Mich. She was named partner in 1985 and joined the Law School's clinic faculty in 1987. In 1990, she first offered the Women and the Law Clinic to students.

Katz graduated summa cum laude from the U-M with a bachelor's degree in economics. He earned master's and doctoral degrees in economics and a law degree at Harvard University. He joined the U-M faculty as an adjunct assistant professor of law in 1986.

Katz teaches contracts, commercial law and economic analysis of the law and has taught in the New Section. His courses focus on contracting parties' commercial and economic objectives and how laws regulate the pursuit of those objectives. He has written about contract remedies, the rules of offer and acceptance and the duty to read the fine print in contracts, all from an economic perspective. He has been invited to lecture at Columbia, Georgetown University, University of Chicago, Yale, Harvard, Stanford and University of California-Los Angeles. He was the Olin Faculty Research Fellow at Yale in 1990.



Michigan women on the bench

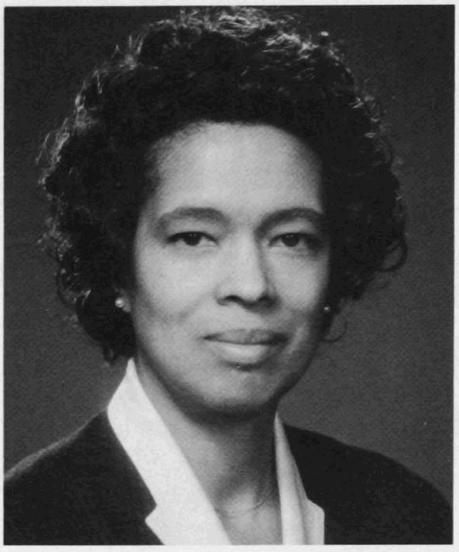
When President Bill Clinton announced in June that he was nominating Ruth Bader Ginsburg to the Supreme Court, it marked a new era for women judges. No longer could women be seen merely as token appointments on the highest court.

Ginsburg herself underscored that point as she addressed the crowd in the Rose Garden. "The announcement the President just made is significant, I believe, because it contributes to the end of the days when women, at least half the talent pool in our society, appear in high places only as one-at-a-time performers," she remarked.

Women now make up 13 percent of the federal judiciary, and the U-M Law School is well represented in that group.

The female federal judges who went to Michigan are a varied group, appointed by both Democratic and Republican presidents. Some went to law school before it was common for women to do so, while others are part of the recent wave of female graduates. Most of them have racked up a considerable number of firsts as pioneers in law and the judiciary.

For a time, it looked as if the next Supreme Court justice might be a Michigan alumna. **Amalya Kearse, '62,** a judge on the Second Circuit Court of Appeals, was frequently mentioned as a possible nominee. She had a considerable following. The *Los Angeles Daily Journal* polled 50 nationally known lawyers and law professors by phone in May, asking them who should be selected on merit to the high court. Although Ginsburg's name came up often, Kearse came in first in the poll. A former U.S. Solicitor General quoted at the time described Kearse this way: "She's very bright, has a remarkable judicial temperament and an open mind."



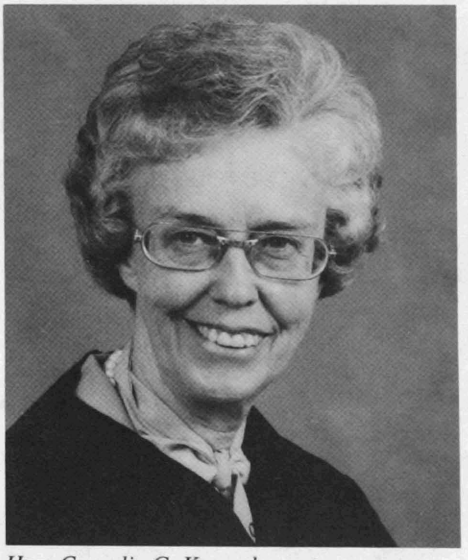
Hon. Amalya Kearse

Kearse has been blazing trails and garnering headlines throughout her career. When she went to work for Hughes, Hubbard & Reed after graduating, she was the first black associate at the firm. At that time, her father told a New York newspaper, "My daughter was once fascinated with the idea of being an FBI agent. She knew it would be helpful to be a lawyer. She decided against the FBI as a career, but never gave up her dream of being an attorney." Later, she notched other notable firsts: the first black woman to be named a partner in a Wall Street firm in 1969 and the first woman to be appointed to the Second Circuit in 1979. In the meantime, she had become one of the leading bridge players in the country, writing several books on the subject.

Women judges who, like Ginsburg, went to law school before it was common had an uphill fight at times. **Cornelia Kennedy, '47,** a judge on the Sixth Circuit Court of Appeals in Detroit since 1979, recalls that the five women in her class were told that it would be too hard to place them in the workforce. "We all found our own jobs," she says. Like most women judges, Kennedy doesn't believe that gender affects one's decisions. Still, she says, "Probably all women lawyers have had incidents where they have had some kind of discrimination, so they're more aware of how a person being discriminated against feels."

In 1970, Kennedy was named a district court judge, becoming the first woman named to the federal bench in Michigan history. As a judge who had once stood for election, Kennedy particularly appreciated achieving lifetime tenure on the Court of Appeals. Her first judicial position had been on the Wayne County Circuit Court, to which she was elected in 1966. "Running for office in a large county like Wayne is a real chore," she says. "I couldn't see myself doing that until I retired."

Some court-watchers thought Kennedy might become the first woman ever appointed to the U.S. Supreme Court.



Hon. Cornelia G. Kennedy

It was widely reported that she and Sandra Day O'Connor were finalists for the appointment that ultimately went to O'Connor in 1981.

Like Kennedy, some women judges became interested in practicing law because their fathers were lawyers. But others pursued legal careers instinctively, even though they were not encouraged in that direction. **Deanell Reece Tacha,** who was named a judge on the U.S. Court of Appeals for the 10th Circuit in 1985, grew up in a small town in Kansas where law was an unlikely profession for a woman. When she reached her senior year in college, she watched most of her female friends entering traditional fields. "But something was on my mind that nursing and teaching weren't right for me," she recalls.

Tacha went ahead and applied to law school without telling her parents. On a Sunday night, she called her father, a highway contractor, to tell him that she had been accepted at law school. "I expected an argument, but he was silent. He said, 'Oh, that's interesting,' and hung up." A few hours later, the housemother came to her sorority room to announce that her father had just made the long drive to the campus and was waiting downstairs. "He took me out for coffee and tried to talk me out of it. He said, 'Why would you choose a profession where it will be so difficult for you to succeed?' But he saw that I couldn't be dissuaded." Tacha went on to graduate from Michigan in 1971.

Hon. Marilyn L. Huff

Unlike most male judges, many women judges have domestic responsibilities as well. (Taking care of children is just part of it. Historian Beverly B. Cook found that at the same time they were sitting on the bench, 38 percent of women trial judges were doing all or most of their housework.) The earliest women on the bench juggled home, family and careers, and they find that their younger colleagues are still trying to figure out how to manage it all.

"I'm 68 and I'm considered a role model," says **Helen Wilson Nies,** chief judge of the Court of Appeals for the Federal Circuit. "I get a lot of young women who want to talk about how I managed a successful career and a husband and children." In Judge Nies' view, "You can't really do it all well at the same time. I took nine years off. If I'd been put in charge of women's progress, I would have pressed for special considerations, not equality. I'm not in vogue with the current push for being in the office with little ones. Young women now are pressured into careers who would rather be at home for a while."

Quality of life is important, says Nies, '48, because life changes dramatically when one goes on the bench. "It's a very isolated experience. Once you're on the court, the phone rarely rings. You don't socialize much with your friends in the bar, just with other judges and neighbors." It's a busy life, too. She starts reading and writing at home at 5 a.m. and works on the weekends. Her advice to would-be judges: "Remember, you're trying to create a life, not just a career."

Women lawyers have increasingly done the sort of networking necessary to be named to federal judgeships. **Marilyn Huff, '75,** of the Southern District of California was very active in county and state bar activities before she was appointed in 1991. She was also the first woman member in San Diego of the American Board of Trial Advocates. That brought her to the attention of Senator Pete Wilson, the previous mayor of San Diego. Still, Huff found that the old boy's network is alive and well. She says, "Women may have the expertise to become judges, but many still may not have the political connections to get the recommendations from the Senator."

A new generation of women judges is emerging, though. **Joyce Bihary, '75,** is typical. She found law to be "a natural progression. I went right after college." She quickly became a partner in the Atlanta firm of Rogers & Hardin and went from there to the bench in the U.S. Bankrupcty Court in 1987. With bankruptcies increasing, she now has 6,000 cases pending. "There's never an end to the cases. When you finish one, there are a hundred waiting," she says.

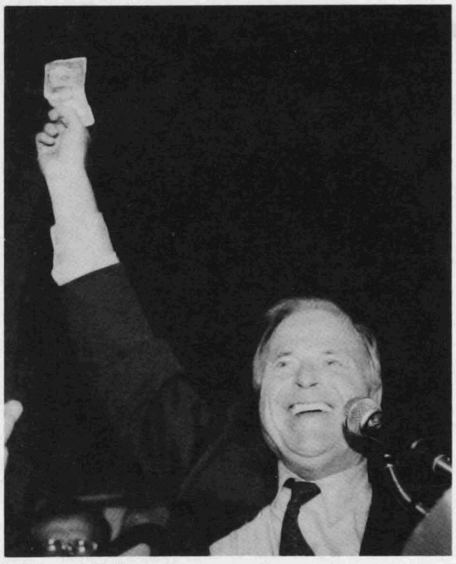
Bihary's swearing-in ceremony was a sign of the times. Not one but two women judges were joining the bankruptcy court. Shortly after swearing-in ceremony, the chief judge, David Kahn, joked with the two new jurists. "He said, 'Well, which one of you is the token and which one of you got it on merit?'" Bihary recalls with a laugh. How times have changed.

—Andrea Sachs, *'78,* is a reporter for *Time* magazine

Alumni in high places

Recently LQN heard about several alumni elected or nominated to important posts:

Richard J. Riordan, '56, was elected mayor of Los Angeles in June, becoming the first Republican to hold the office since 1961.



AP/Wide Word Photos

Richard J. Riordan

Riordan won 54 percent of the vote in the race against Michael Woo, a Democrat city council member. The 62-year-old land developer, investment banker and corporate attorney ran on a pro-business, law-and-order platform. His campaign slogan was "Tough enough to turn L.A. around."

Riordan heads a city struggling with crime, economic decline and ethnic strife. In speeches after the election, he promised to use his skills as an entrepreneur to unite the city's factions and make L.A. safe. "Fear and despair must come to an end. We must create a will in every Angeleno to turn this city around," he said at his victory rally.

Riordan has served on city commissions and helped negotiate deals for the city and county.

President Clinton has named **Sally Katzen, '66**, as administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs. The Senate confirmed her appointment May 28.

Katzen will take over an office that has not had a leader for three years. She said her first task as head of OIRA will be drafting an executive order for Clinton on federal regulatory review policies and practices. Because of conflicts between Congress and the Bush administration over the regulatory review role of the Council on Competitiveness headed by Vice President Dan Quayle, the Reagan administration rules are still in effect.

At her Senate confirmation hearing, Katzen pledged to bring "greater openness and accountability" to rule-making, information management and paperwork reduction.

Katzen was a partner in the Washington, D.C. firm of Wilmer, Cutler & Pickering and has been with the firm since 1968. From 1979-81, she worked for the Council on Wage and Price Stability. She is a former chair of the American Bar Association's Administrative Law and Regulatory Practice Section.

Daniel Tarullo, '77, has been named Assistant Secretary for Economic and Business Affairs in the Department of State. An expert on international economic affairs and public policy, Tarullo was international counsel to the firm of Shearman and Sterling. He previously taught at the Harvard Law School. No newcomer to government, he has served in the Antitrust Division of the Department of Justice, as executive assistant to the undersecretary of commerce for international trade, and as chief counsel for Senator Edward Kennedy.

Rob Portman, '84, of Cincinnati was recently elected to Congress to represent Ohio's Second District.

The Republic Congressman practiced international trade law in Washington, D.C. from 1984-86 and business law at Graydon, Head and Titchey in Cincinnati from 1986-89. That year, he joined the Bush administration as associate counsel to the president. Later he was promoted to deputy assistant to the president and director of the Office of Legislative Affairs. In 1992, Portman was elected as an alternate U.S. Representative to the United Nations Human Rights Subcommission.

During his campaign, Portman promised to focus on economic and budget issues and fight Washington's legislative gridlock. "Washington just isn't working. My goal is to take the principles, values and common sense of the people of this district to Washington," he told voters.

Ginger's book profiles a legal pioneer

Ann Fagan Ginger, '47, has combined an attorney's viewpoint and a writer's insight to author a biography of pioneering civil rights lawyer Carol Weiss King.

Ginger's book, *Carol Weiss King - Human Rights Lawyer 1895-1952* (University Press of Colorado 1993), has been described as the first in-depth biography of a woman attorney.

King made significant contributions

to constitutional, labor and immigration law between World War II and the Cold War. Described as brilliant, aggressive and stubborn, she helped win landmark victories for African Americans, labor unions, citizen dissenters and immigrants.

Using King's letters, her 1,500-page FBI file and other sources, Ginger portrays a tireless fighter for justice and a mentor who nurtured younger lawyers to carry on in the battle for individual liberties.

Marc Van Der Hout, past president of the National Lawyers Guild, describes Ginger's book as a "must read" for immigration lawyers and activists. Herma Hill Kay of the University of California-Berkeley School of Law calls the book "an exuberant celebration of the life of Carol Weiss King."

Class Notes

1951

Herbert M. Balin was named Humanitarian of the Year by the Long Island chapter of the American Cancer Society in June. He is a senior partner in the East Meadow, N.Y., firm of Certilman Balin Adler & Hyman.

1952

Ernest L. Bell III of the New Hampshire firm Bell, Falk & Norton, P.A., was named a Life Fellow of the American Bar Foundation at the Fellows' 40th annual meeting. Membership in the Fellows honors practicing attorneys, judges and law teachers whose careers demonstrate outstanding dedication to their communities and the highest principles of the legal profession.

William A. Clark has been named chief judge of the U.S Bankruptcy Court in the Southern District of Ohio. He succeeds the former Judge Burton Perlman, also of the class of '52.

1953

Howard M. Handelman of the Delaware firm of Bayard, Handelman & Murdoch, P.A., was named a Life Fellow of the American Bar Foundation at the Fellows' 40th annual meeting.

1954

Bradford Stone has been named Charles A. Dana Professor of Law at Stetson University College of Law in St. Petersburg, Fla.

1955

Alice A. Brumbaugh has been named the Robert Stanton Distinguished Service Professor at the University of Maryland School of Law in recognition of her achievements as a teacher and scholar.

Alan Z. Lefkowitz has become a director of the Pennsylvania firm of Kabala & Geeseman.

1956

Robert E. Robinson is now serving as administrator of the Legal Division in the State of Indiana Department of Revenue.

1957

Edward C. Adkins has started a new firm, Adkins & Kise, P.A., in Tampa, Fla.

1961

Francis C. Marsano was appointed a Maine Superior Court justice in April. A partner in the Belfast, Maine firm of Eaton, Glass, Marsano & Woodward, he served six years in the state House of Representatives.

1963

Alan I. Rothenberg, a partner at Latham & Watkins in Los Angeles, is chairman of the World Cup USA 1994 soccer tournament. He also recently was awarded the American Jewish Committee's Learned Hand Award for his efforts toward understanding and cooperation in ethnically diverse communities.

1964

Timothy W. Mast of Hill Lewis has been elected president and chairman of the board of directors of the Pewabic Society, Inc., which preserves and promotes the Pewabic ceramic arts learning center, museum and gallery. Mast also has been elected to the steering committee of the Modern Decorative Arts Group of the Friends of Modern Art at the Detroit Institute of Arts.

Lawrence G. Meyer of Arent Fox Kintner Plotkin & Kahn in Washington, D.C., has been elected to serve on the board of directors of the Hockey Hall of Fame and Museum in Toronto.

1965

Robert B. Foster has joined the Detroit-area firm Butzel Long as managing shareholder of the firm's new Ann Arbor office.

1967

Ronald R. Gilbert, chairman of the Foundation for Spinal Cord Injury Prevention, again has been named to Who's Who in America, Who's Who in American Law, and Who's Who in the Midwest. He is active in an injury prevention program called SAFE KIDS AMERICA and in efforts to prevent diving accidents linked to starting blocks in swimming pools with shallow water.

J. Kirkland Grant, professor of law at Touro College School of Law in Huntington, N.Y., won the annual Teacher of the Year Award from the school's Student Bar Association.

Richard D. McLellan has been named Michigan's honorary representative to the American Chamber of Commerce in Italy. The American Chamber is a private association that promotes and supports trade and investment between the U.S. and Italy.

1968

David L. Callies is the editor and chapter author of "After Lucas: Land Use Regulation and the Taking of Property Without Compensation," a book examining the impact of the

U.S. Supreme Court decision in Lucas v. South Carolina Coastal Council on property rights.

Lester L. Coleman has been appointed executive vice president and general counsel of Halliburton Co., one of the world's largest diversified energy, engineering, maintenance and construction companies.

Robert M. Vercruysse of Butzel Long has extended his practice in labor and employment law to the firm's new Ann Arbor office. He is a former adjunct professor of labor and employment law at the Law School.

William R. Weber was recently named president and chief executive officer of the Farm Credit Council, the national trade association of the Farm Credit System.

1969

Ralph S. Rumsey has become counsel to Butzel Long and is practicing in the firm's new Ann Arbor office.

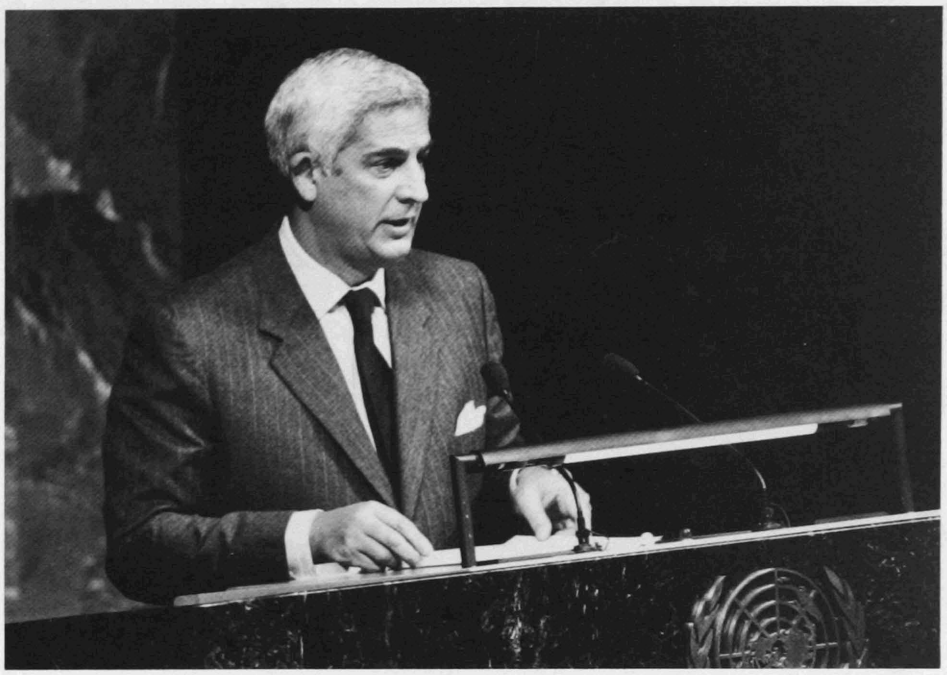
Samuel W.W. Mandell has been named president and chief operating officer of Bradlees, Inc.

1970

U.S. Air Force Col. **Richard J. Erickson,** assigned to the Office of the Assistant Secretary of Defense of Regional Security Affairs, recently lead a joint team of the departments of State and Defense in successful negotiations in Singapore and Brunei. The team reached a formal agreement on matters related to bilateral defense cooperative relationships.

Bruce R. LeMar, formerly of the A.B. Dick Co. of Chicago, now is senior vice president of human resources for the Automotive Carrier Division of Ryder System Inc. in Troy, Mich.

Kenneth J. McIntyre was recently admitted to the American Law Institute. He is a partner of Dickinson, Wright, Moon, Van Dusen & Freeman of Detroit.



After 30 years of practice in international financial law, Emilio J. Cárdenas, MCL '66, has become a diplomat. He was recently appointed representative to the United Nations for the Argentine Republic.

1971

Laurence J. Kline, formerly of Pope, Ballard, Shepard & Fowle, Ltd. of Chicago, formed a new firm in February with partners Timothy G. Carroll and Bernard T. Wall. The new firm, Carroll, Kline & Wall, specializes in estate and business planning.

1972

Robert G. Kuhbach has been named vice president, general counsel and secretary of Dover Corp. He was previously with Sudbury, Inc. of Cleveland.

1973

Samuel L. Bufford, a U.S. bankrupcty judge in the Central District of California, recently taught a seminar on bankruptcy law to a group of Hungarian bankers in Budapest.

Robert E. Hirshon has received the Maine Bar Foundation's distinguished Howard H. Dana, Jr. Award. He is a senior partner in the Portland firm of Drummond, Woodsum, Plimpton & MacMahon.

James E. Stewart of Butzel Long now is practicing media and intellectual property law at the firm's new Ann Arbor office.

Robin G. Weaver, a partner with the Cleveland, Ohio firm of Squire, Sanders & Dempsey, recently was inducted as a fellow in the American College of Trial Lawyers.

1974

Ellen Dennis of Butzel Long has extended her practice in general, commercial and criminal litigation to the firm's new Ann Arbor office.

1975

Richard C. Sanders has been elected to the executive committee of Hill Lewis, a firm with offices throughout Michigan and in Phoenix and Minneapolis. He concentrates in litigation at the Detroit office.

1976

Ronald K. Henry, formerly of Baker & Botts, has become partner at Kaye, Scholer, Fierman, Hays & Handler in Washington, D.C. Henry will continue to represent commercial concerns in contracts or litigation with government agencies.

1977

Diana MTK Autin, managing attorney at Advocates for Children of New York, was named Advocate of the Year by the Disabilities Awareness Coalition. The award honors her report investigating the state of special education in New York and other legal and policy activities on behalf of persons with disabilities.

Michael A. Marrero has joined the Cincinnati office of Benesch, Friedlander, Coplan & Aronoff, where he is of counsel.

James M. Olson, L.L.M., recently established the law firm of Olson & Noonan, P.C., with **John D. Noonan,** '89, in Traverse City, Mich. The firm focuses on environmental law and land use planning.

1978

Gregory S. Hill has been named assistant general counsel and assistant secretary of Day & Zimmerman, Inc., a firm providing engineering, construction and other professional services to government and industry. He has served as senior attorney and legal advisor to the firm's Defense Systems Group since 1988.

Danny R. Williams has been named administrator of Cuyahoga County in Ohio. Williams will oversee the county's $700 million budget and 4,400 employees.

Elizabeth A. Campbell has been named assistant general counsel at Delaware North Companies. She will focus on employee issues and litigation management for the firm.

1979

Mark A. Filippell has been named managing director at McDonald & Company Securities, Inc., an investment banking firm in Cleveland, Ohio. He is head of bankruptcy and distress business practice, mergers and acquisitions.

1980

Jonathan Rivin is a partner in the newly-formed firm of Springs Rivin Detwiler Dudnick & Stikker in the San Francisco Bay area. The firm practices business, real estate, tax and estate planning law.

1981

Ernest Robles, a deputy U.S. Trustee in San Jose, Calif., has been named to a seat on the Central District bankruptcy court serving Los Angeles, San Bernadino and Santa Barbara counties.

1982

Richard J.J. Scarola has formed a law partnership with Helen D. Reavis in New York. Their practice emphasizes counseling and litigation in commercial and financial matters, intellectual property and entertainment law and international trade.

1983

Claudia Roberts Ellmann has been promoted to partner at Miller, Canfield, Paddock and Stone. She practices labor and employment law.

James S. Laing has been named partner at Keck, Mahin & Cate. He practices in the area of special financial services at the Chicago office.

Jack Gregg Haught has left his position as deputy attorney general of Ohio to join the firm of Benesch, Friedlander, Coplan & Aronoff, where he will practice public law.

R. Clayborne Petry, Jr. has joined the Nashville, Tenn. firm of Boult Cummings Conners & Berry, where he specializes in commercial lending and real estate.

1984

Steven Goren of Goren and Goren, P.C., is among 10 Michigan attorneys appointed to the Institute of Continuing Legal Education's new Publications Advisory Board. ICLE is Michigan's largest publisher of law books and continuing legal education materials.

Stephen M. Merkel now is co-general counsel at Cantor Fitzgerald, an international broker of financial products in New York.

Leonard M. Niehoff of Butzel Long now is practicing litigation and media law at the firm's new Ann Arbor office.

Mark D. Pollack has been named partner at Jenner & Block of Chicago.

1985

Robert A. Boonin has been named a shareholder at Butzel Long. He also is the current president of the Michigan Council of School Attorneys.

Pamela Hobbs has been promoted from senior attorney to associate principal at the Detroit-based firm of Kitch, Saubier, Drutchas, Wagner & Kenney, P.C.

Priscilla A. May has been named partner at the Chicago office of Peterson & Ross.

Michael P. McGee has been promoted to partner at Miller, Canfield, Paddock and Stone. His practice in municipal finance law focuses on solid waste management and regulation, school finance and economic development.

1986

Sharon L. Beckman has joined Jenner & Block as an associate.

Jeffery M. Brinza of Butzel Long now is practicing business, commercial and intellectual property law at the firm's new Ann Arbor office.

Patrick C. Cauley has been named partner at the Detroit firm of Bodman, Longley & Dahling. He practices business, corporation, banking and bond law and estate planning; he also is a certified public accountant.

Kevin Tottis has been named partner at Keck Mahin & Cate. He practices commercial litigation at the firm's Chicago office.

1987

John T. Juzmik has returned to the Hong Kong office of Baker & McKenzie after three years of practice in the firm's Beijing office. He focuses on transnational trade and investment law in the People's Republic of China.

Jordan S. Schreier of Butzel Long now is practicing employee benefits and compensation law at the firm's new Ann Arbor office.

1989

Linda S. Howell has joined the firm of Scholten and Fant, P.C. as an associate. She is practicing environmental law at the firm's Holland, Mich., office.

John D. Noonan recently established the firm of Olson & Noonan, P.C., in Traverse City with **James M. Olson,** '87. The partners are coauthors of the Public Trust Doctrine chapter in the recently published Michigan Environmental Law Desk Book.

1990

Frank J. Garcia is left his Portland, Ore., practice to teach international trade and business law at the Florida State University College of Law. He also worked for two months at the Academy of European Law in Florence, Italy before beginning teaching duties in June.

1991

Jean T. Brennan has joined Jenner & Block as an associate.

Todd W. Grant, formerly of Cox & Hodgman of Troy, Mich., has opened his own law practice in Ann Arbor.

Terri J. Smith has joined the Chicago firm of Greene and Letts as an associate.

Barbara S. Weintraub is a judicial clerk for the Hon. William G. Schma in the Ninth Judicial Circuit in Kalamazoo, Mich.

1992

Four 1992 graduates have joined Jenner & Block in Chicago as associates. They are **Kara Novaco Brockmeyer, Hilda L. Harris, Matthew J. Renaud** and **Marc Van Allen.**

Jim Freeman won a Fellowship for Equal Justice from the National Association of Public Interest Law. With the award, he will establish the Environmental Justice Project in Brooklyn to work with Latino, African-American and Hasidic communities to identify environmental threats. Current Law School student **Michelle Bacchus** also won a fellowship to work on domestic violence issues in a low-income community in Chicago.

Robert E. Norton II has become an associate at Butzel Long.

1993

Christopher L. Bollinger has joined Jenner & Block of Chicago as an associate.

Corrections

The accomplishments of Wade H. McCree, Jr., were many, but he was not the first African American appointed to the federal appellate court, as we stated in a story announcing the McCree professorship in his name in the last issue of this magazine. The first was the late William H. Hastie, who served on the U.S. Third Circuit Court of Appeals from 1949 until 1976.

Judge Joseph E. Stevens, Jr. was elevated to chief judge of the U.S. District Court for the Western District of Missouri, not the Eastern District as we reported in our last issue. LQN apologizes for the error.

In Memoriam

The Law School notes with regret the deaths of these alumni:

1918	Lady Willie Forbus, 4/ 27/93
1920	Jesse M. Seabright, 3/21/93
1926	Raymond H. Harkrider, 3/3/93
1927	Pricilla R. Zeisse
1928	Frederick W. Seitz, 3/22/93
1929	George W. Paxson, 12/17/92
1931	Harold D. Parker
	Justin C. Weaver
1932	George E. Diethelm, 4/25/93
1934	Samuel G. Wellman, 3/6/93
1936	William F. Fratcher, 6/24/92
1938	George M. Holmes, 12/19/92
1940	Charles W. Campbell, 6/1/93
	Verne D. Johnson, Jr., 12/19/92
	Victor H. Weipert, 2/13/93
1941	E. James Adams, 4/13/93
1942	James D. Guernsey, 3/16/93
1944	Clark M. Olmstead
1947	Forrest A. Hainline, Jr., 3/3/93
1948	Jack E. Christensen, 3/15/93
	Alfred B. Fitt
	Jackson C. Kramer, 2/19/93
	Edward N. Mack, 3/30/93
	George G. Mutnick
	Dwight Alexander Olds, 1/2/93
1949	Henry M. Campbell, 3/31/92
	Richard B. Secrest, 3/6/93
	James A. Sprunk, 12/8/92
1950	Robert D. Edsall
1951	Alexander A. Trout, 1/17/93
1952	Harry T. Baumann, 8/30/92
	Myron A. McMillan, 1/16/93
1953	Michael Salata, 1/26/93
1956	George E. Ewing, 6/29/92
	John T. Abernethy, 4/12/93
1957	Robert J. Snyder, Jr., 1/26/93
1960	Frank G. Carrington, 1/2/92
1970	Ronald E. Brodowicz, 5/21/93

Suellyn Scarnecchia – A Courageous Voice for Children

by Toni Shears

Once in a while, a case comes along that can refocus your whole career in law. For Suellyn Scarnecchia, that case came in the small form of a child known as Jessica.

Scarnecchia and students in the Law School's Child Advocacy Law Clinic represented Roberta and Jan DeBoer in their struggle to adopt the child they've lived with and loved for two years. The girl's biological parents, Cara and Daniel Schmidt of Iowa, fought to block the adoption and reclaim custody.

Cara, then single, waived parental rights to her daughter at birth in February 1991, but she named the wrong man as father. Within weeks, she reconsidered; after the DeBoers brought the baby back to Michigan, she told Schmidt that he was the real father, and they launched a legal battle to reclaim the child. After three Iowa courts confirmed the Schmidts' parental rights and granted them custody, the DeBoers sought the clinic's help.

In Michigan courts and the glare of intense publicity, Scarnecchia and the DeBoers argued that the Iowa rulings weren't valid because they failed to consider the child's best interests. In July, the Michigan Supreme Court ruled that the child must go back to the Schmidts in Iowa. Scarnecchia, Professor Kent Syverud and attorneys at the Washington, D.C., firm of Wilmer, Cutler and Pickering asked the U.S. Supreme Court to block the transfer order and hear the case. The Court refused, and in a tear-drenched parting Aug. 2, Scarnecchia handed the child over to the Schmidts.

Scarnecchia, a clinical professor of law, normally teaches litigation and guides clinic students who actually argue cases in court. Suddenly she found herself litigating under the bright lights of Court TV cameras, taking late-night calls from fact checkers at *The New Yorker*, and getting harassment calls at home from Schmidt supporters.

The thoughtful, low-key professor says she's learned a lot from the high-profile, high-stress case. The experience gave her new perspectives on the legal status of children's rights, her work and herself. Most important, she says, "I've really come to see that a child's voice is nearly silent in court. I'm thinking about ways to change that.

"There's no question that this case has solidified my interest in child advocacy. I think sometimes an attorney needs a major case to bring out strengths and goals and this is mine."

The DeBoers came to Scarnecchia and the Child Advocacy Law Clinic for help in November 1992. They were waiting for the Iowa Supreme Court to rule on their appeal and anticipating the worst. They had exhausted their financial resources but not their hopes, and they wanted to fight on in Michigan if they lost a third time in Iowa. A private attorney referred them to the clinic, where students gain real-life experience by providing free legal services in cases involving child abuse, neglect or termination of parental rights.

At first, Scarnecchia thought there was little hope that Michigan courts would take the case, but the students she asked to research the jurisdiction issue found one case that offered a precedent to switch states. "My clients and I knew we had little chance of success, but we felt that the injustice inherent in the Iowa decision was something we should try to fight," she says. "A child's right to have her best interests considered, even in the face of a conflict with her father's rights, is an important legal issue. The case offered a good teaching tool."

Not least among the lessons was a crash course in advanced media relations. "As soon as we realized how much media coverage there was going to be, we saw that this was not a case where we could put students in court like we usually do. We didn't want them to be in a situation where they were reciting their very first words in court while hooked to *20/20's* cameras," Scarnecchia says with a laugh.

Instead, she argued the case up to the Michigan Supreme Court.

She found herself constantly televised, photographed and interviewed. Court TV broadcast the entire eight-day hearing on the child's interests in Washtenaw County Circuit Court. "I found out people were sitting in bars in Cedar Rapids watching every minute of this," she marvels. Of all the surreal media moments, "Court TV was the weirdest part," she says. "They are just like sports commentators, doing play-by-play during the trial. They ask you during breaks if you want to comment on the trial. One day I decided I did want to comment on some issue. The reporter was listening to the guy in the New York studio through an earpiece and all of a sudden she turned to me and started asking me questions. I felt like I was Bo Schembechler being interviewed on the sidelines. It was really strange."

Like sportscasts, Court TV relies on experts around the country to give instant analysis of a trial in progress. Ironically, one such expert asked to comment on Scarnecchia's performance in court had to decline because about that time, he was evaluating her teaching skills for her tenure review at the Law School.

She was granted tenure in May, but because her review was mentioned in the newspapers, even that came under public criticism. Schmidt proponents complained that she shouldn't be rewarded with tenure for spending the Law School's resources and taxpayers money to support the DeBoers when they have little legal standing. Scarnecchia calmly ignores the personal attacks, but she defends the clinic's role in taking the case.

"The clinic is here to take a public policy position on children's rights and teach students about important issues like this. We will always have people who disagree with a position and they will object to tax dollars spent on it, but in fact, those dollars are spent on educating law students. We can't teach students to be lawyers without taking positions on cases."

Scarnecchia stresses that the DeBoers paid all out-of-pocket expenses related to the case, including phone bills, copying fees, travel costs, expert witness fees and filing fees. "All we've provided is free attorney time, which is considerable," she says, declining to even estimate the hours involved. "However, there is no question that there are other attorneys who would have been willing to do this for free, although it might have taken a combination of offices to handle the workload, whereas we had the students to help."

She's grateful for the efforts of her students and attorneys, including alumni, who volunteered to help with parts of the case. For example, Veronique Lerner, '86, and local attorney Joan Lowenstein coauthored a Michigan Supreme Court brief on behalf of guardians ad litem. Sally Rutzky, '73, and Peter Darrow, '48, served as Jessica's court-appointed guardians ad litem. Scott Bassett, '81, represented Darrow in a second case filed in the child's name.

The six students staffing the case clearly learned a lot and loved it. "They're excited about jurisdiction and civil procedure in a way I've never seen students excited about these subjects," she says. She has shared every problem and issue with them — even the somewhat superficial but very real problem of what to wear when all the cameras are aimed at you.

After long debate, Scarnecchia broke the long-standing taboo for female attorneys and wore pants to court. Yes, even the Michigan Supreme Court. "My women students were appalled. They were so convinced that you have to wear a skirt to court. It's another example of the questions new women lawyers face that men just don't have to deal with," she says. She had serious qualms herself, but finally decided, "The Supreme Court was not going to decide the case on whether or not I wore pants. It came down to the fact that I would feel much more comfortable trying a case in pants." She did and encourages women attorneys to try it and "call me if someone complains!"

Heaven knows she's heard plenty of complaints already. Emotions ran high on both sides of the case, and she received anonymous calls at home from people supporting the Schmidts. Pro-DeBoer people stopped her on the street to tell her she was doing a good job. "That's nice, but it also scares me a little bit to have strangers coming up to me because there are such strong feelings on the other side," she notes.

Scarnecchia battles her own worries about what will happen to Jessica. "From all I've been told, sending her back to Iowa will hurt her terribly. It's my experience that courts usually consider the child's interests paramount in custody cases. This case feels worse because the courts aren't considering her interests at all. It's very frustrating," she says quietly.

The intense media attention and the potential of arguing the DeBoers' case all the way to the Supreme Court made Scarnecchia call on qualities she didn't know she had — like courage. She told Law School graduates in a speech at Honors Convocation in May that she found herself contemplating courage as she struggled to make sense of her role. After 12 years as an attorney, she was surprised to realize how hard it was to relate courage to her profession. It was still harder to think of herself as courageous. "Then I remembered what had drawn me to becoming a lawyer. It was my desire to be like those courageous lawyers who fought in court for the underdog, like Atticus Finch, the white lawyer who faced his town to represent a black defendant wrongly accused of rape in *To Kill a Mockingbird*," she told students.

As this case drew to its bitter conclusion, Scarnecchia showed commitment and courage worthy of the heroes of literature and

the civil rights movement who inspired her career choice. On the day the court-ordered transfer took place, it fell to her to carry the screaming Jessica from the DeBoers' home, escorted by guards hired after intense public opposition led to threats. She drove the child to a secure garage at Ann Arbor Police Department where the Schmidts waited, shielded from cameras, to claim the child. She had to entice Jessica to climb into the Schmidts' van, and then she turned away. Just two hours later, she bravely recounted the wrenching experience before a room full of reporters.

"We really could not anticipate how hard this was going to be. It was terribly, terribly hard," she told reporters. "We've taken a healthy, happy child and sent her away from her family. We've done a terrible thing to her today.

"I strongly believe that it was the law of the state of Iowa that created her family with the DeBoers and the law that ripped her family apart. I'm ashamed in many ways to be part of a legal system that allowed this to happen and I pray she'll be O.K. A lot of people have debated who was at fault in this case. Regardless of what the adults did and where we went wrong, the fact is that the law should have intervened to protect her from this trauma."

Although disappointed in the law now, Scarnecchia has known since age 14 that she wanted to battle injustice as a lawyer. Once in law school, she was drawn to the women's movement and served as president of the Women Law Student Association. After graduation in 1981, though, she shelved her interest in family law and practiced employment discrimination law in private practice in Battle Creek instead.

"I kept away from family law because I was aware that there was a sexist stereotype that it was a woman's field. I was worried that people wouldn't take me seriously as a litigator in that kind of practice. It's ironic that I'm getting all this publicity and attention for a child's case after all," she laughs.

Ultimately, her interest in children — her own son and others — brought her back to the Law School to join the clinic faculty in 1987. "One of the reasons I left private practice was to be able to spend more time with my son, now 7. During this case, I spent more weekend and evening time working than I ever did in practice," she notes.

More soberly, she adds that she's worried about the impact of the case on her son. "He's heard me talk to reporters on the phone about how terrible I think it would be for Jessica if she went to Iowa now. I didn't really realize how much of that he was hearing until Martin Luther King Day. Everyone in his class had to finish the sentence, 'I have a dream. . . .' His was, ' I have a dream that Jessica will get to stay with the DeBoers.'"

Jessica's case has given her new ways to think about child abuse and neglect. "I know I've learned just how difficult it is to ask adults to think in terms of a child's point of view. I realize

Suellyn Scarnecchia took Roberta and Jan DeBoer all the way to the U.S. Supreme Court in their fight to keep custody of 2-year-old Jessica.

Ann Arbor News Photo

just how ingrained our belief is as a society that biological parents' rights are absolute," she says.

"I've thought a lot more about fathers' rights. I believe fathers should have a right to make a claim for custody, but a child's rights should have at least equal consideration. In reading other cases through the light of this case, I've come to see that a child is not considered a person and often has no voice in what will happen. There's an assumption that a parent can give away a child like property."

Scarnecchia hopes to focus more on sex abuse cases in the future, and Jessica's case has handed her a key to the tough problem of proving children's claims. "I think the key is that children's voices are nearly silent in court." Her challenge is to find ways to help the courts see and hear the views of the very young.

Although she lost the DeBoer case, Scarnecchia knows she's helped raise interest in children's rights in ways that only a real case with a real child can do. She's passionately hoping for legal reform that will protect adoptive parents and respect the best interests of children. She also has the satisfaction of introducing students to the legal issues involved and watching their confidence grow.

It's clear that Scarnecchia and her students will long remember the lessons of a case with immense consequences for parents and children. With quiet passion, she says, "We took on this case to teach students how to be lawyers and be advocates for children's rights. We feel we've been very successful at both. Even in our loss, we've moved children's rights into the public eye."

The Battle for Custody

February '91 Cara Clausen gives birth to a baby girl and releases her parental rights. The man she named as father waives his rights as well. The infant goes to live in Ann Arbor with Roberta and Jan DeBoer.

March '91 Clausen challenges her release of rights in Iowa courts, claiming she signed papers without waiting the 72 hours required by Iowa law. Dan Schmidt also challenges the adoption, claiming that he is the real father. The Iowa Juvenile Court dismisses both claims.

December '91 Iowa District Court finds that Schmidt is the father and orders the DeBoers to return the child to him.

January '92 Iowa Supreme Court stays the District Court order, finding that it is in Jessica's best interest to leave her with the DeBoers pending appeal. In September, the court affirms district court findings.

December '92 The Iowa Supreme Court grants custody to Schmidt. The DeBoers file in Michigan Circuit Court under the Uniform Child Custody Jurisdiction Act.

January '93 Michigan Circuit Court holds an eight-day hearing on Jessica's best interests.

February '93 Circuit Court judge finds it in the child's interest to remain with the DeBoers. The Schmidts' attorney appeals the court's jurisdiction.

March '93 Michigan Court of Appeals rules that Michigan has no jursidiction and the DeBoers have no standing to bring a custody case.

April '93 Jessica's guardian ad litem, Peter Darrow, files a new custody case in Circuit Court on behalf of the child. The Michigan Supreme Court grants leave to appeal both the DeBoer case and the child's suit.

June '93 The Michigan Supreme Court hears oral arguments in both cases.

July '93 The Michigan Supreme Court upholds the Court of Appeals decision and orders both parties to work out a transfer plan to return Jessica to the Schmidts within 31 days. The DeBoers petition the U.S. Supreme Court to stay the transfer order and hear the case. The Court refuses to grant a stay. On Aug. 2, the DeBoers bid tearful goodbyes to Jessica and Scarnecchia turn her over to the Schmidts, who fly her back to Iowa immediately.

Learning Real-World Law

When 1981 graduate Suellyn Scarnecchia studied law at the U-M in 1978-81, clinical law courses weren't cool.

Back then, clinics were considered bad for your résumé, recalls Scarnecchia, a clinical professor of law who now teaches in the Child Advocacy Law Clinic.

Today students are scrambling to enroll in the clinics for a taste of real-world legal practice before they leave Hutchins Hall. In 1992-93, nearly 30 students applied for 10 slots in the Women and the Law Clinic, says Scarnecchia, who splits teaching duties in that clinic with Julie Kunce Field.

"The clinics offer a tremendous confidence booster for students and let them develop the kinds of relationships they will have as attorneys. We start off in the roles of faculty and students; the goal is to end as colleagues working on a case together and that is usually successful," says Scarnecchia. "Every year we see students go from very frightened to confident and skillful."

The Child Advocacy Law Clinic, launched in 1976 by Donald Duquette, handles all aspects of child abuse and neglect cases. The 1992-93 class lucked into a very different learning experience with the high-profile DeBoer adoption battle.

The Women and Law Clinic represents women in family law, domestic violence, employment discrimination and sexual harassment cases. Students practice their trial skills and participate in a mock jury trial before moving on to handle real civil cases.

Other clinics are:

- The Michigan Clinical Law Program. Director Paul Reingold, Mark Mitshkun, Nick Rine and Field supervise about two dozen students who handle civil cases for indigent clients in circuit, district and probate courts. Students try cases involving prisoner civil rights, employment discrimination, landlord-tenant disputes, consumer insurance issues and family law.

- The Environmental Law Clinic. Mark Van Putten directs the clinic that operates as a field branch of the National Wildlife Federation. Most of the clinics projects involve protecting and enhancing Great Lakes water quality.

- The Criminal Appellate Clinic. An appointee from the Michigan State Appellate Defender's office heads this clinic. Students learn about appeals by writing briefs and defending clients from the office's caseload.

- The Legal Assistance for Urban Communities Program. It channels students' energy and talent into legal and technical assistance for community development organizations in Detroit. Rochelle Lento heads the three-year-old program.

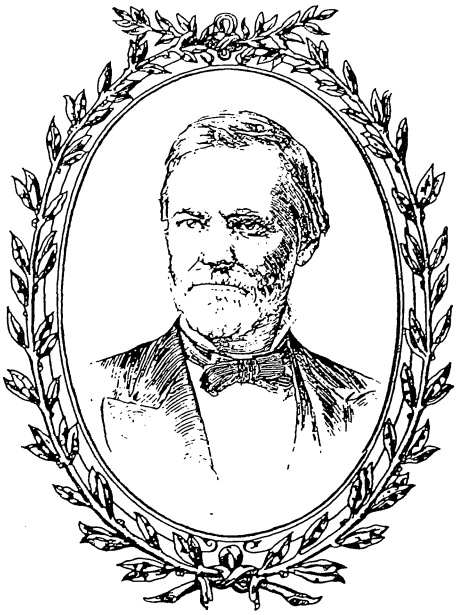
In addition to the clinics, there are several student-run projects that assist clients with real-world problems in immigration law, Haitian refugee issues, family law and other areas.

The clinics attract a broad range of students. Some have a special interest in the specific field of law and others just want litigation experience. "The clinic is a tremendous opportunity to turn them on to an area of law or just make them aware of issues in a field that they otherwise might not learn about," Scarnecchia says. "It also puts students in contact with clients who may have backgrounds and viewpoints very different from their own."

Although the clinics offer a great teaching opportunity, they face an uncertain future as funding becomes scarce. The Law School funds one or two faculty positions and support staff for each major clinic, but all other funding comes from grants or donations. Recently, a generous gift from the Milton A. Charlotte and R. Kramer Charitable Foundation helped the Child Advocacy Law Clinic meet its 1992-93 budget.

The newest program, the Women and Law Clinic, is staffed only part-time by Scarnecchia and Field and can serve only 10 students. Without further support from grants or gifts, the clinic may not continue. The other clinics are facing financial struggles as well.

"The clinic programs are expensive to run because the student-faculty ratio is so low," says Reingold. "There used to be a fair amount of funding available but it's just gone. If we could find a donor to support our work, it would be great."



U.S. Sen. John Sherman, 1823-1900

THE SHERMAN ACT AFTER A CENTURY

Thomas E. Kauper reviews the lasting legacy of the 103- year-old Sherman Antitrust Act.

Adapted from a speech presented at the U.S. Department of Justice

A few years ago, when I was asked to give a speech on the impact of Sherman Antitrust Act on its 100th anniversary, I was tempted to give this simple answer: It has spawned a bureaucracy and put the children of antitrust lawyers through college. Beyond that, who knows? For in the end, we can but speculate on how society would have differed in its absence.

But "who knows?" isn't a very satisfying answer, so in searching for significance of the act, I looked back to an earlier speech in which I provided a brief tour of the "greatest moments of the Sherman Act during the preceding 20 years." In that talk, I noted two effects felt by every American consumer – telephones that don't always work and more televised college football games than anyone can possibly tolerate. Among the highlights I picked out in that speech were the Von's and Schwinn cases, the Herfindahl-Hirschman Index, and, as the crowning highlight of all, the Antitrust Division's Vertical Restraints Guidelines. Obviously, it was a speech that poked fun, and in doing so, trivialized the impact of the Sherman Act.

In recent years, trivializing the act has become common sport, particularly in academic circles. However, it has been done not in good humor, but to suggest either that the act has served no social purpose or, in the worst case scenario, has been counterproductive, impairing the operations of American enterprises without any benefit to consumers, business enterprises, or anyone else for that matter. The act, in these eyes, can do only harm. Its enforcement is a silly, trivial and expensive exercise. Such critics' evaluations cannot simply be answered by a "who knows?" response.

Discussions of the Sherman Act often pair it with the general idea of competition, suggesting that the two somehow go hand in hand. Certainly we like to believe this is so. Yet there have been times in the history of the Sherman Act when the two have seemed to diverge; unless one gives to competition a strange meaning, the act itself has at times been used to reach what seem to be anti-competitive results. The significance of competition may be one thing; the significance of the Sherman Act may be quite another.

What has been the significance of competition to society as a whole (a question which seems easier to deal with than the Sherman Act itself)? To antitrust lawyers, competition means rivalry among economic enterprises in a market. But competition is far more pervasive in American society than that. Individuals compete for jobs, for schools, for grades. Churches compete for parishioners. Bureaucracies compete for funds. Through competition, we believe, the best come to the top. In the market sense, resources are properly allocated. Throughout society, competition preserves choice and demands accountability. It is the result of economic liberty – a system of economic choices valued in its own right – but perhaps more important, because it is an integral part of the political and social liberty we cherish.

DOES COMPETITION WORK?

Do we know that competition works as advertised? Can we actually prove the virtues of competition, or is all of this simply an act of faith? After all, there have been both economic and social systems which do not rest on competition as the regulator and stimulus to achievement. Indeed, even in the United States the value of competition has been questioned. Competition results in both success and failure, and failure is often unaccept-

able. It presupposes an equality of opportunity which is often lacking. Competition, particularly at the individual level, suggests a kind of social Darwinism which many consider destructive and counter to a democratic notion of egalitarianism.

The tension between individual liberty on the one hand and equality of individuals on the other has been a central feature of democracy from the beginning. This same tension has spilled over in antitrust decisions, particularly in the 1960s when, in words reminiscent of the civil rights cases of that same period, the Sherman Act seemed to reflect a restraint on the consequences of unbridled competition in the name of equality. We have, in other words, occasionally decided that too much competition is a bad thing, and have made the decision to temper it. We cannot simply assume that competition always produces the outcomes society seeks.

The tension between individual liberty on the one hand and equality of individuals on the other has been a central feature of democracy from the beginning.

During the Depression, competition itself was seen as a destructive process, a causative element in the nation's economic difficulties. In more recent years, a growing body of critics suggests that greater cooperation among enterprises and the government would improve the position of American firms in the market place. The government, and not competition, would choose winners and losers. While suggestions that competition is inherently destructive or destabilizing have passed from the scene, the contention that competition alone will not lead to optimal technological development and efficiency has been more difficult to counter, particularly when other players in world markets don't abide by the same rules. As markets become truly international, competition as a market regulator becomes suspect. Some of the players may win by stacking the deck. But there are dangers to responding in kind, not the least of which is the erosion of the economic liberty upon which our political liberty in part depends.

Clearly our belief in the value of competition rests in part in theory, in part on the success of American economy and the material gains it has produced, and in part on faith. The empirical measure may best be seen in the events of the late 1980s and early 1990s. Communism, and to a significant extent socialism, have failed. The Soviet Union and nations of Eastern Europe have turned in the direction of market economies, driven by the engine of competition. They are not all likely to be wrong. Competition is valued in part because it has provided greater prosperity and economic progress. But let us not forget that it also tolerated, and I use that word advisedly, as the price of political freedom. The Chinese learned, to their regret, that political freedom and economic liberty go hand in hand. The results of competition may be harsh. They often need tempering. But no one has yet devised a system which works better.

The Intent of the Act

But let us take the virtues of competition and a capitalistic and free market as given. What has been the significance of the Sherman Act? Has it done what it was meant to do, or does it represent a promise unfulfilled? Has it done more good than harm? In the academic world, at least, there is strong disagreement on these questions. Views on the act are mixed, to say the least.

To some, the act may be seen as a futile gesture indeed – an intentionally futile gesture meant only to deflect the late 19th century's growing interest in Marxism, Socialism and other methods of curbing the use of corporate power. In these terms, the act was a success at the moment of its enactment and has caused some degree of harm with every subsequent action to enforce it. Historically, there is little to support this cynical view; clearly the act was meant to have some continuing impact. But what was it to be?

Much of the considerable disagreement over the impact of the act arises out of uncertainty over what its purpose actually is (or was). While Ohio Sen. John Sherman and the Congress of 1890 did not like the trusts, they didn't say why. "Restraint of trade'' is a remarkably loose term. Analyses of legislative history and the common law have not been terribly helpful. Debate has been more over what the Sherman Act's goals should be as a policy matter than on what Congress originally meant. At various times, and to various observers, the Sherman Act's purpose has been described as including consumer welfare, protection of small business, the control of corporate and social political power, redistribution of wealth and simple fairness. Each of these goals has appeared in antitrust decisions under the act at different periods of time.

Our inability to state the purpose of the Sherman Act led to inconsistent enforcement over a 100-year span, which further complicates efforts to evaluate it. Shifts in enforcement and judicial philosophy (and, indeed, abandonment of the act altogether in crisis), have meant that the act has not over time fulfilled what some at any given moment expected of it. For example, the Sherman Act of the 1960s may in fact have aided small business (although this seems unlikely). As small business ceased to be a direct concern, that protection, if any, was lost. From a perspective of the 1990s, the Sherman Act seems to have done little to forestall the demise of small entrepreneurs.

Those who would impart to the Sherman Act lofty social and political ambitions, who perceive it as a bulwark against the oppression of economic and political liberty through the centralization of private economic power, may from the perspective of today characterize it as a failure – a failure resulting from the inability or unwillingness of agencies and courts to carry out its mandate. Economic concentration has increased steadily. Corporate America seems larger today and sometimes beyond control. The individual seems lost in the marketplace. Conversely, to those who believe the act's purpose is to protect consumer welfare, it is at best a mixed blessing, all too often leading to enforcement actions that have been both inappropriate and costly. Such actions have impaired efficiency and caused the loss of sales and jobs to foreign competitors.

Without the act, there can be little doubt that cartels would be commonplace, and single-firm monopoly would be more persistent.

Views of antitrust are shaped by values and beliefs about broad issues of political and economic power. These values are born out of tradition and our individual economic and political philosophies. Fear of economic concentration, faith in the ability of government to act responsibly and intelligently, and skepticism about the equation of private and public good will lead some to seek a highly interventionist antitrust program. Such a program is, in turn, an anathema to those whose major fear is the government and whose faith in free markets is unshaken.

These underlying values are as much a matter of faith as demonstrable truth, however hard we may try to wrap antitrust in the trappings of science. They are central to the evaluation of the Sherman Act, the body of antitrust doctrine which it has spawned, and the performance of the institutions involved in its interpretation and enforcement. Disagreements on these broad issues will not and cannot be resolved simply through the exercise of reason.

It would be a mistake, however, to conclude that the Sherman Act has been an exercise in futility, for it has in fact accomplished a great deal. It has deterred cartels, preserved freedom of entry and set the stage for the control of market-dominating mergers. It is easy to lose these truly major accomplishments by arguing over the peripheries. Without the act, there can be little doubt that cartels would be commonplace, and single-firm monopoly would be more persistent. Perhaps cartels and monopoly would erode over time, even without the Sherman Act (although those of us burnt by the economists' notion of contestable markets during the airline deregulation battle remain very nervous over assertions of ease of entry).

Perhaps the amount saved has not been worth the cost. The Sherman Act has imposed direct enforcement costs in terms of attorneys' fees, court time, litigation expenses and so

on. It also added indirect costs in competitive conduct foregone for fear of liability and inefficiencies imposed by rules perceived to be misguided (although those who believe the act is to protect consumers may view resulting costs and inefficiencies as the price of social benefits). How much in costs cartels have (or would have) imposed is unclear. Efforts at cost-benefit analysis are necessarily doomed to failure; there is little agreement over what the costs of monopoly are even in purely economic terms (i.e., monopoly profits or only dead-weight loss). In any event, those costs cannot be measured (particularly with respect to cartels which never occurred because of the deterrent effects of the act). Much of what some describe as indirect costs of enforcement were the result of society conforming to its perceived purpose of the act – costs which we were prepared to incur to achieve "benefits'' not included in this equation.

The act has deterred cartels and the development of monopoly power through enforcement actions, public and private. Perhaps it needs no further justification. But in my own view, the act has had a significance far beyond the cartels and monopolies it has directly deterred. The act, and the institutions it has spawned and supported, have been a steady force moving the economy in the direction of competitive outcomes.

Symbol of Capitalism

The Sherman Act is a symbol of commitment to a capitalistic market economy and to the government's proper role in checking abuses of the market. It has been the counterpoint to direct economic regulation and the tendency of government to create and nurture monopoly power. Without the Sherman Act and those involved in its enforcement, there may have been no significant check on this tendency. Deregulation and the introduction of competitive considerations into a variety of government policies may have saved the American consumer as much as all of the Sherman Act's direct enforcement combined. It is, after all, government which creates the most enduring market power. In totalling the benefits of the Sherman Act, this indirect effect must be given its due. Finally, the symbolism of the Sherman Act has had a dramatic impact outside theUnited States. The Sherman Act was not the first national antitrust legislation, but it has been the most influential. The world has moved in our direction. The examples are obvious: Germany, the EEC, and so on. No country has fully imitated the act and perhaps their antitrust systems are the better for it. The act, after all, is hardly perfect. But if our nation is best served when free market economies predominate throughout the world, in part because economic and political liberty go hand in hand, then we have also been well served by the Sherman Act, which perhaps more than anything else has been the symbol of our commitment to such an economy.

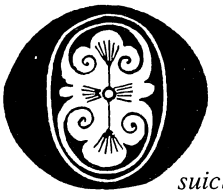
Thomas E. Kauper, J.D. '60, the Henry M. Butzel Professor of Law, is an expert in property and anti-trust law.

In June, 1989, I attended a small conference of American and Chinese scholars who were experts in something broadly called "economic law.'' It was in many ways an astonishing event. Among other things under discussion were drafts of Chinese antitrust legislation. I observed during the euphoria of that conference that I never thought I'd live to see the day when China had an antitrust law. That thought turned out, I am afraid, to be prophetic. Several hours after our Chinese colleagues boarded aircraft to begin their long journey home, government troops entered Tianemen Square. The ideas we discussed died that night along with the gallant young Chinese who sought only a degree of freedom. But the point of our discussions was clear. Antitrust was necessary to preserve competition, according to our Chinese friends; otherwise plant managers, unwilling to bear the risks a free market imposes, would simply collaborate among themselves. But antitrust was seen as something more. It was a powerful symbol of commitment to a market economy and to the principle that society must keep some check on accretions of private power.

I do not know how the benefit of such symbolism can be measured. But it is real and an important part of the benefits of the Sherman Act. Has the act been worth the costs of enforcement and errors along the way? Surely it has, although its benefits cannot be quantified. What of the future? The impulse to cartels won't go away. Nor will the urge of government toward monopoly. Entry will not always be free, and cartels will not inevitably fail. The act is still needed and can accommodate new learning in the next century just as it has in the past, if we are smart enough just to leave it alone.

ARE LAWS AGAINST ASSISTED SUICIDE UNCONSTITUTIONAL?

by Yale Kamisar



n Feb. 25, 1993, shortly after Dr. Jack Kevorkian helped a 15th person die by suicide, Michigan enacted a law making assisted suicide a felony punishable by up to four years in prison. The law, effective that very day, prohibits anyone with knowledge that another person intends to commit suicide from either "intentionally providing the physical means" or "intentionally participating in a physical act" by which that other person commits suicide.

With its new anti-assisted suicide law, Michigan joined approximately 35 other states which criminalize assisted suicide (most by specific legislation, but a few by viewing it as a form of murder or manslaughter). As soon as the Michigan law went into effect, the American Civil Liberties Union of Michigan brought a law suit on behalf of two cancer patients and several health care professionals challenging the anti-assisted suicide law's constitutionality. Are all these laws constitutionally vulnerable?

In this article, adapted from one that appeared in the May-June 1993 issue of the Hastings Center Report, *Professor Yale Kamisar considers and rejects various arguments that have been made for a due process right to assisted suicide. He concludes that the U.S. Supreme Court will not, and should not, strike down laws such as Michigan's on constitutional grounds.*

*On May 20, less than a week after Professor Kamisar's article was published, Judge Cynthia Stephens of the Wayne County Circuit Court struck down Michigan's three-month-old law (*Hobbins v. Attorney General of Michigan*).*

Judge Stephens invalidated the law on the basis of a rather technical Michigan constitutional provision relating to the objects and changes of purpose of state laws. But in what some would call an advisory opinion and others an alternative holding, she made it clear that if she had not been able to invalidate the law on procedural grounds, she would have issued a preliminary injunction against its enforcement on the basis of a due process right to assisted suicide. Kamisar strongly criticizes this aspect of her opinion in "'Right to Die' Can't Be the Last Word," Legal Times, *June 14, 1993, pp. 29-30. On June 22, the Michigan Court of Appeals stayed Judge Stephens' ruling and reinstated the assisted suicide ban while it reviewed the merits of her decision.*

A "Right" to Suicide?

Is there a "right" to commit suicide? If so, does it include the right to enlist the assistance of others?

So far as I know, nowadays no state makes either suicide or attempted suicide a crime. Nor does the American Law Institute's *Model Penal Code* (although the code does criminalize aiding or soliciting another to commit suicide). *Why* is neither suicide itself nor attempted suicide still a crime in this country? And what follows from this?

The fact that suicide and attempted suicide are no longer crimes in this country does not mean that society *approves* these acts or that it recognizes that personal autonomy or "self-determination" extends this far. As the University of Chicago's Leon Kass has recently observed, the *capacity* to take one's life — "I have inclination, means, reasons, opportunity, and you cannot stop me, and it's not against the law"— does not establish the right to do so.

The comments to the *Model Penal Code* are helpful on this issue:

> There is a certain moral extravagance in imposing criminal punishment on a person who has sought his own self-destruction . . . and who more properly requires medical or psychiatric attention. There is no form of criminal punishment that is acceptable for a completed suicide, and criminal punishment is singularly inefficacious to deter attempts to commit suicide.

The comments to the *Model Penal Code* go on to say, however, that the fact that criminal sanctions will not deter the suicide itself does

> not mean that the criminal law is equally powerless to influence the behavior of those who would aid or induce another to take his own life. Moreover, in principle it would seem that the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim.

Does the "Right to Die" Include the Right to Assisted Suicide?

As a rallying cry, the "right to die" is hard to beat. But it is much easier to chant a slogan than to apply it to specific situations. There is no absolute or general right to die. The only right or liberty that the *Karen Ann Quinlan* case and subsequent so-called right to die rulings have established is the right under certain circumstances to be disconnected from artificial life support systems or, as many have called it, the right to die a *natural death.*

The Michigan anti-assisted suicide law recognizes this right by explicitly excluding from its coverage "withholding or withdrawing medical treatment." It also exempts "prescribing, dispensing or administering" medication or treatment designed "to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death."

In the 1970s, the *Quinlan* case brought the right to die issue to national prominence and set the tone for the developments in law and bioethics that followed. But the *Quinlan* court specifically distinguished between committing or assisting in a suicide and what it called "the ending of artificial life support systems" — the only issue presented.

As one of the leading commentators in this field, Rutgers University Law School's Norman Cantor, recently observed: "The assertion that rejection of life-saving medical treatment by competent patients constitutes suicide has been uniformly rejected — usually based on a distinction between letting nature take its course and initiating external death-causing agents."

The one right to die case that rivals *Quinlan* for prominence is the 1990 *Nancy Beth*

Cruzan decision — the only case on death, dying and the right of privacy ever decided by the U.S. Supreme Court. As did *Quinlan*, the *Cruzan* case involved the right to end artificial life support and it, too, provides no comfort to proponents of a constitutional right to assisted suicide.

The *Cruzan* Court sustained a state's power to keep alive, over her family's objections, an incompetent patient who had not left clear instructions for ending life-sustaining treatment. In the course of rejecting the efforts of Nancy's parents to terminate her artificial feeding, Chief Justice William Rehnquist, who spoke for five members of the court, pointed out that a state has an undeniable interest in the protection and preservation of human life — even the life of a person in a persistent vegetative state. The chief justice supported this assertion by noting that "the majority of states in this country have laws imposing criminal penalties on one who assists another to commit suicide."

If a majority of the Supreme Court meant to suggest that laws against assisted suicide are constitutionally suspect, it chose a strange way of doing so.

The chief justice assumed for purposes of the case that a competent person does have "a constitutionally protected right to refuse life-saving hydration and nutrition." But he declined to characterize it as a "fundamental right" — a designation that requires a state to offer a compelling justification for restricting that right (a test the state can rarely satisfy). Instead, he called the right a Fourteenth Amendment liberty interest. The Court, it seems, will allow states to restrict the liberty interest upon a lesser showing of need than it would require if that interest were characterized as a fundamental right.

Although the Chief Justice tentatively assumed that there is some degree of constitutionally protected liberty interest in avoiding unwanted medical treatment, concurring Justice Sandra Day O'Connor was more explicit and more emphatic on this point. "[T]he liberty guaranteed by the Due Process Clause," she wrote, "must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." But she, too, avoided fundamental right language.

The *Cruzan* case is hardly the court's last word on death, dying, termination of life support, assisted suicide and euthanasia. The principles lurking in this area will be brought into sharper focus only by new prodding of the facts of new cases and by taking a fresh look, each time, at the overall problem.

If *Cruzan* demonstrates anything, however, I think it signals the reluctance of the high court to "constitutionalize" an area marked by divisive social and legal debate and its inclination to defer instead to the states' judgments in this difficult field. A Supreme Court that refused to constitutionalize a right to die broad enough to uphold the claims of the Cruzan family is hardly likely to constitutionalize a right to assisted suicide.

If a majority of the Supreme Court meant to suggest that laws against assisted suicide are constitutionally suspect, it chose a strange way of doing so.

Justice Scalia's Concurring Opinion

We should not forget that there was one justice in the *Cruzan* case who did equate the termination of life support with ordinary suicide — Antonin Scalia. Although his lone concurring opinion was more or less ignored by the other justices, it should not go unnoticed.

Justice Scalia maintained that for constitutional purposes "there is nothing distinctive about accepting death through the refusal of 'medical treatment,' as opposed to accepting it through the refusal of [natural] food, or through the failure to shut off the engine and get out of the car after parking in one's garage after work." As he viewed the case, the request of Nancy Cruzan's parents to terminate their daughter's artificial feeding and hydration was, in effect, the assertion of a right to suicide.

But Justice Scalia is well aware that the answer you get depends on the question you ask. Surely, a principal reason why he framed the question the way he did was his confidence that there was *no way* a majority of the Court would recognize a constitutional right to commit suicide. And nothing any of the other eight justices said suggests

court assessing the constitutionality of a criminal prohibition against assisted suicide must do a good deal more than simply reason by analogy from the relevant precedents on the books.

that Scalia's confidence was unfounded.

In fact, the other justices did not say anything about a right to suicide. None of them disputed Scalia's point "that American law has always accorded the state the power to prevent, by force if necessary, suicide." Nor did any of them disagree that, as Scalia wrote, "there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"

Although none of Justice Scalia's colleagues responded in so many words to his argument that the termination of lifesaving medical treatment constitutes suicide, they responded nevertheless. They all framed the question in terms of a right to refuse or to be free from "unwanted medical treatment" or, more specifically, "unwanted artificial nutrition and hydration."

As a matter of logic, I think there is a good deal to be said for analogizing a patient's termination of life-sustaining medical treatment to ordinary suicide. But law is not entirely a syllogism.

It may be helpful to view the Cruzan case as involving two competing traditions. One is the common law right to refuse medical treatment, even life-saving surgery. As the Cruzan majority observed, "the logical corollary of the doctrine of informed consent is the right not to consent, that is, to reject treatment." The other tradition, which has continued to exist alongside the first one, is the anti-suicide tradition, as evidenced by society's discouragement of suicide and attempted suicide and by the many criminal laws against assisted suicide.

In Cruzan, a majority, perhaps as many as eight justices, evidently decided that the termination of artificial nutrition and hydration was more consistent with the rationale of the cases upholding the right to refuse treatment. So far as we can tell, only Justice Scalia believed it implicated the concerns underlying the anti-suicide tradition.

Assisted Suicide vs. Active Voluntary Euthanasia

Debating the constitutional "right" to assisted suicide requires us to consider the fine, often blurred line between doctor-assisted suicide and physician-administered voluntary euthanasia. Voluntary euthanasia has been variously described as assisted suicide or on the knife's edge between suicide and murder, and suicide has sometimes been called self-administered euthanasia.

Doctor-assisted suicide is not quite active voluntary euthanasia for, unlike euthanasia, the final act that brings on death is performed by the patient herself, not her doctor. But suppose that a person is unable to swallow the barbiturates that will bring about death or lacks the physical capacity to trigger a suicide machine? If the right to control the time and manner of one's death — the right to shape one's death in the most humane and dignified manner one chooses — is well-founded, how can it be denied to someone simply because she is unable to perform the final act by herself? Although there is a "mechanical" distinction between assisted suicide and euthanasia, is it a distinction without a difference?

Yes, answered the late Joseph Fletcher, the medical ethicist who advocated active euthanasia for some fifty years. As he viewed the matter, "it is impossible to separate [active voluntary euthanasia] from suicide; it is indeed, a form of suicide," and the case for active voluntary euthanasia "depends upon the case for the righteousness of suicide."

That may be, but others have strongly resisted linking the two. Thus, in his new book *Death and Dignity,* Dr. Timothy Quill, the Rochester, N.Y. physician who assisted a long-standing patient to commit suicide, comes out in favor of physician-assisted suicide, but balks at active voluntary euthanasia. Quill does not support the latter practice, at least at this time, because of the "potential for abuse" and because "it puts the physician in a very powerful position," whereas in the case of doctor-assisted suicide "the balance of power between doctor and patient is more nearly equal."

I find this reasoning more conclusory than explanatory. Dr. Quill would require many

safeguards for physician-assisted suicide (e.g., the patient must freely, clearly and repeatedly ask to die; her judgment must not be distorted; the physician must make sure that the patients suffering and request are not the product of inadequate comfort care). If, as he believes, these safeguards would greatly reduce the risk of abuse and render the balance of power between doctor and patient relatively equal, why would they not achieve the same results for voluntary euthanasia? Conversely, if even when all the safeguards Quill proposes are in place it would still be imprudent to legalize active voluntary euthanasia, why is it safe to sanction assisted suicide?

Although I am opposed to both assisted suicide and active voluntary euthanasia, I find the position taken by Brown University philosopher Dan Brock (who supports both practices) more coherent and principled than Dr. Quill's. Observes Professor Brock:

> In both [assisted suicide and voluntary euthanasia], the choice rests fully with the patient. In both [cases] the patient acts last in the sense of the right to change his or her mind until the point at which the lethal process becomes irreversible. If there is no significant, intrinsic moral difference between the two, it is difficult to see why public or legal policy should permit one but not the other; worries about abuse or about giving anyone dominion over the lives of others apply equally well to either.

I find it difficult to avoid the conclusion that Dr. Quill's position is colored by the fact, as he notes, that "unlike assisted suicide, where the legal implications have yet to be fully clarified, euthanasia is illegal in all states in the United States and likely to be vigorously prosecuted." Dr. Quill and I disagree about a number of things. But I venture to say we are in agreement on one — the uniform ban against active euthanasia is not going to be struck down on the ground that it violates the right to die. Therefore, a proponent of the right to assisted suicide, understandably, is likely to put as much distance as possible between that concept and euthanasia.

Only for the Terminally Ill?

If you are trying to establish a right to assisted suicide, it is good advocacy to frame the issue narrowly — to speak only of a right to assisted suicide *for the terminally ill.* But is there any principled way to so limit the right? If the merciful termination of suffering (or termination of an unendurable existence) is the basis for this right, why limit it to those who are terminally ill?

Alan Sullivan, who has presented a persuasive argument for a constitutional right to suicide, makes plain that he would not limit such a right to the terminally ill. "Surely," he observes, "under a variety of circumstances life may be unendurable to a reasonable person, even though he does not face the prospect of immediate and painful death."

It is interesting to note that, although Dr. Quill carefully circumscribes the right to assisted suicide in many respects, he would not limit it to the terminally ill. "The patient must have a condition," Quill tells us, "that is incurable, and *associated* with severe, unrelenting suffering." (Emphasis added.) Though he anticipates that most people who desire physician-assisted suicide "will be imminently terminal," Quill does "not want to *arbitrarily* exclude persons with incurable, but not imminently terminal, progressive illnesses such as ALS or multiple sclerosis." (Emphasis added.) But is it any less arbitrary to exclude the quadriplegic? the victim of a paralytic stroke? the mangled survivor of a road accident? a person afflicted with severe arthritis?

Why stop there? If a competent person comes to the unhappy conclusion that his existence is unbearable and freely, clearly and repeatedly requests assisted suicide, why should he be rebuffed because he does not qualify under somebody else's standards? Isn't this an arbitrary limitation of self-determination and personal autonomy? In his new book, *The Troubled Dream of Life,* Daniel Callahan asks, "How can self-determination have any limits? Why are not the person's desires or motives, whatever they be, sufficient?"

As I understand the position of those advocating a constitutional right to suicide and to assisted suicide, a person who qualifies should have the same right to enlist the aid of

Although suicide occurs at an alarming rate among young people, the highest suicide rates and the greatest number of suicides are found among people over the age of fifty.

others to die by suicide as one now has to withhold or withdraw life-sustaining medical treatment. If so, it is fairly clear that once established the right to assisted suicide will not be restricted to the terminally ill. For as demonstrated by such decisions as *Elizabeth Bouvia*, a case involving a young woman with a case of severe cerebral palsy who was not terminally ill, and *Larry McAfee*, a case involving a quadriplegic who apparently had a long life expectancy, the right to terminate life support has not been so limited.

Although the U.S. Supreme Court did not rule on these cases, they were warmly received by most bioethicists and medico-legal commentators. Moreover, in the *Cruzan* case the high court failed to attach any significance to the fact that Nancy Cruzan was not dying or terminally ill, as those terms are usually defined. No doubt many thought that she "might as well be dead" or that she was "better off dead" but if her feeding tube had not been removed Nancy might have been kept alive another 20 or 30 years.

The Dangers of Establishing a "Right" to Assisted Suicide

I believe that any state that prohibits assisted suicide can advance justifications for its legislation that go well beyond the law's conformity to religious doctrine or "morality." And I think these justifications are sufficiently strong to withstand constitutional attack.

Philosophers have spent much time and effort addressing such questions as: When, if ever, is it "rational" for a person to want to commit suicide? Is there a moral right to commit rational suicide? But I think the more relevant questions for a legislator considering the desirability of a law prohibiting assisted suicide and a judge determining the constitutionality of such a law are these:

So far as we can tell, how common or rare is the so-called rational suicide? How often does suicide occur in the absence of a psychiatric disorder? How often do primary care physicians fail to recognize treatable depression in their patients, especially elderly patients? How often is the failure of a primary care physician to take an aggressive approach to pain management or a failure to recognize or adequately to treat depressive illness influenced by ageism — prejudice against and stereotypes about elderly people? How likely is it that the social sanctioning of rational suicide and assisted suicide will lead to an increase in "irrational" suicide and assisted suicide? In a suicide-permissive society, how often will the right to commit suicide and the right to enlist the assistance of others in this enterprise be interpreted, especially by the most vulnerable, as the duty to do so? In a suicide-permissive society, how often will a burdensome, elderly relative not otherwise desirous of death be "helped along," or pressured or manipulated into suicide?

A court assessing the constitutionality of a criminal prohibition against assisted suicide must do a good deal more than simply reason by analogy from the relevant precedents on the books. And such a court must keep in mind that it is doing something quite different than simply judging a debate among philosophers. As Philip Devine observed in *The Ethics of Homicide:*

> "If philosophers have something to say to the law, so also has the law something to say to philosophers. Attention to the working, or the possible working, of any institution or principle may well give us insight into weaknesses which remain concealed so long as it is posed in sufficiently abstract terms."

Suicide is a problem of considerable magnitude. Although it once ranked 22nd on the list of causes of death in the United States, it now ranks (depending on the particular year) eighth or ninth. Every year there are between 25,000 and 30,000 reported cases of suicide. The number of cases is probably grossly underreported both because of the social stigma involved and because of the possible loss of life insurance benefits. Moreover, it is estimated that every year in this country several hundred thousand people attempt suicide and that about 10 percent of that group go on to kill themselves within a 10-year period.

Although suicide occurs at an alarming rate among young people, the highest suicide rates and the greatest number of suicides are found among people over the age of fifty. Indeed, for American white males, from childhood on, the risk of suicide rises with age until the eighth decade of life. Suicides by people over the age of sixty account for about 25 percent of all suicides.

No doubt the higher rate of suicide among the elderly has led advocates of the right to rational suicide and to assisted suicide to focus on this age group, especially on elderly people who are terminally ill. But the problem of suicide is a good deal more complicated.

Consider the views of Herbert Hendin, a professor of psychiatry and a leading suicidologist, who is opposed to the legalization of doctor-assisted suicide. He concedes that it is sometimes rational for a person with a painful terminal illness to wish to end his life. Indeed, he observes in his illuminating book, *Suicide in America,* "that is precisely why supporters of the 'right to suicide' or 'death control' position" base their arguments on the cases of patients suffering from incurable, painful cancer. But Dr. Hendin is quick to add:

> In reality... such understandable cases form only a small percentage of all suicides or potential suicides. The majority of suicides confront us with the problem of understanding people whose situation does not seem, from an outsider's viewpoint, hopeless or often even critical. The knowledge that there are more suicides by people who wrongly believe themselves to be suffering from cancer than there are suicides by those who actually have cancer puts the problem in some perspective.

According to suicidologist David Clark, the major studies all agree in showing that the fraction of suicide victims struggling with terminal illness at the time of their death is in the range of 2 percent to 4 percent. Two-thirds of those who died by suicide when they were in their late 60s, 70s, and 80s were in relatively good physical health.

To ask another relevant question: How often does suicide occur in the absence of a major psychiatric illness? It would not be surprising if the answer to this question were affected by what one thought about the right to commit suicide. Some believe that virtually every person who wishes to die by suicide is mentally ill. Others maintain that such a person is simply called mentally ill so that his behavior may be controlled.

Nevertheless, one cannot ignore the studies that do seem to bear on this question. And when one dips into the relevant literature one discovers considerable authority for the view that a suicide rarely occurs in the absence of a major psychiatric disorder.

Yeates Conwell and Eric Caine, geriatric psychiatrists at the University of Rochester Medical School, warn that notably lacking from the debate about rational suicide and physician-assisted suicide is "attention to the effects of psychiatric illness on rational decision making." They point to suicide study findings that 90 percent to 100 percent of persons who die by suicide do so while they have a diagnosable psychiatric illness, an observation that is equally true in suicides among the elderly. According to many experts, even in terminally ill patients who express a wish to die, often the wish is a symptom of treatable depression.

More significant for our purposes, I think, than the prevalence of depressive illness among people who die by suicide is the inability of depressed persons to recognize the severity of their own symptoms and the failure of primary physician to detect major depression, especially in elderly patients. As Conwell and Caine emphasize:

> [M]any doctors on the front lines, who would be responsible for implementing any policy that allowed assisted suicide, are ill equipped to assess the presence and effect of depressive illness in older patients. In the absence of that sophisticated understanding, the determination of a suicidal patient's "rationality" can be no more than speculation, subject to the influence of personal biases about aging, old age, and the psychological effects of chronic disease.

Ageism — the prejudices and stereotypes applied to the elderly solely on the basis of their age — may manifest itself in a failure to recognize treatable depression, a refusal to take an aggressive approach to pain management, the view that an elderly person's desire to commit suicide is more rational than a younger patient's would be, or, more generally, the

attitude that the elder has every reason to be depressed or that "if I were in his place I would want to die too." Unfortunately, and unnecessarily, such views can prove to be a self-fulfilling prophecy.

Manipulated Suicide

The legalization of assisted suicide or the recognition of a liberty interest in or a right to assisted suicide poses other dangers. Hendin says evidence relating to the contagious or suggestive effects of suicide on the emotionally vulnerable is accumulating; these effects are "likely to be magnified if suicide is given social sanction."

The impact on the elderly and the infirm poses special problems. In *The Enigma of Suicide,* George Colt writes, "Although we shrink from the idea of elderly suicide and euthanasia, we encourage it by our neglect and indifference." He cites sociologist Menno Boldt's observation:

> Suicidal persons are succumbing to what they experience as an overpowering and unrelenting coercion in their environment to cease living. This sense of coercion takes many familiar forms: fear, isolation, abuse, uselessness, and so on.

Will these pressures intensify in a society that sanctions assisted suicide (and thereby suicide as well)? In a suicide-permissive society, will family members so inclined be more likely to alter or manipulate a sick, elderly person's circumstances (for example, by providing shoddy or even hostile care) so that suicide becomes a reasonable, even attractive choice?

In a climate in which suicide is the rational thing to do, or at least a reasonable option, will it become the unreasonable thing *not* to do? The noble thing *to* do? In a suicide-permissive society plagued by shortages of various kinds and a growing population of "nonproductive" people, how likely is it that an old or ill person will be encouraged to spare both herself and her family the agony of a slow decline, even though she would not have considered suicide on her own?

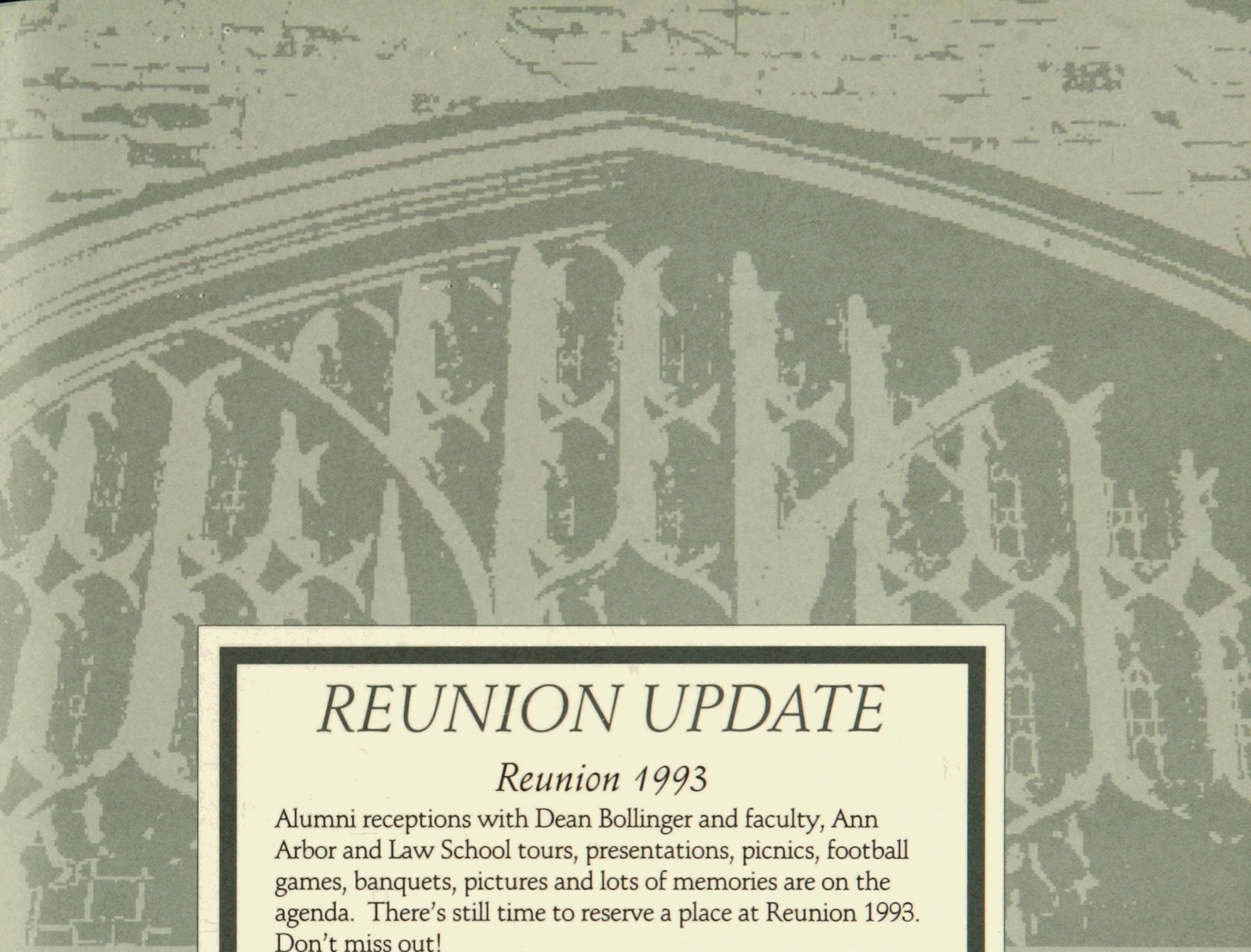
The best discussion of "manipulated suicide" appears in a well-known essay by philosopher Margaret Battin who, ironically, is a proponent of rational suicide. With open-minded, balanced scholarship, Battin presents a strong case against her own position. She conscientiously spells out how acceptance of her views would open the way for both individual and societal manipulation of vulnerable people into choosing death by suicide when they would not otherwise have done so. She concludes, nevertheless, that "on moral grounds we must accept, not reject, the notion of rational suicide."

A state legislature is free to agree with Professor Battin, but *must* it? Is it constitutionally required to do so? I hardly think so.

Albert Alschuler, my counterpart at the University of Chicago Law School, recently referred to "the historic divide" between direct killing (and, I would add, assisting in another's suicide) and the termination of life support or "letting die." Since I have been focusing on the constitutional dimensions of the right to shape the timing and manner of one's death I do not have to argue that a state would be unwise to cross this historic divide (although I would if I had to do so). I need only argue that a state is not constitutionally compelled to cross this line. It is free, rather, to give Professor Battin's observations and insights about the dangers of manipulated suicide more weight than she herself is willing to do.

Although Battin is painfully aware of "the moral quicksand" into which the notion of rational suicide threatens to lead us, she voices the hope that if we accept that concept, "perhaps then we may discover a path around" the quicksand. Perhaps. Perhaps not. In any event, I submit, the Constitution does not prevent a legislature from reaching the conclusion that there is no safe path around.

Yale Kamisar, the Clarence Darrow Profesor of Law, has written extensively on euthanasia, assisted suicide and the so-called right to die.



REUNION UPDATE

Reunion 1993

Alumni receptions with Dean Bollinger and faculty, Ann Arbor and Law School tours, presentations, picnics, football games, banquets, pictures and lots of memories are on the agenda. There's still time to reserve a place at Reunion 1993. Don't miss out!

October 1 - 3	1953, 1963, 1973, 1983
October 22 - 24	1968
November 5 - 7	1948, 1958, 1978, 1988

If you have not received your invitation or would like another, please contact the Development and Alumni Relations office at (313) 998-7970.

Reunion 1994

Attention, graduates of classes ending in 4 or 9: watch the mail for dates and schedules for Reunion 1994 events. Call classmates now and plan to meet in Ann Arbor next fall.

Reunion 1995

Classes ending in 0 or 5 will meet in Ann Arbor in 1995. Although Reunion 1995 is two years away, it's not too early to start planning now.

LAW QUADRANGLE

NOTES

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