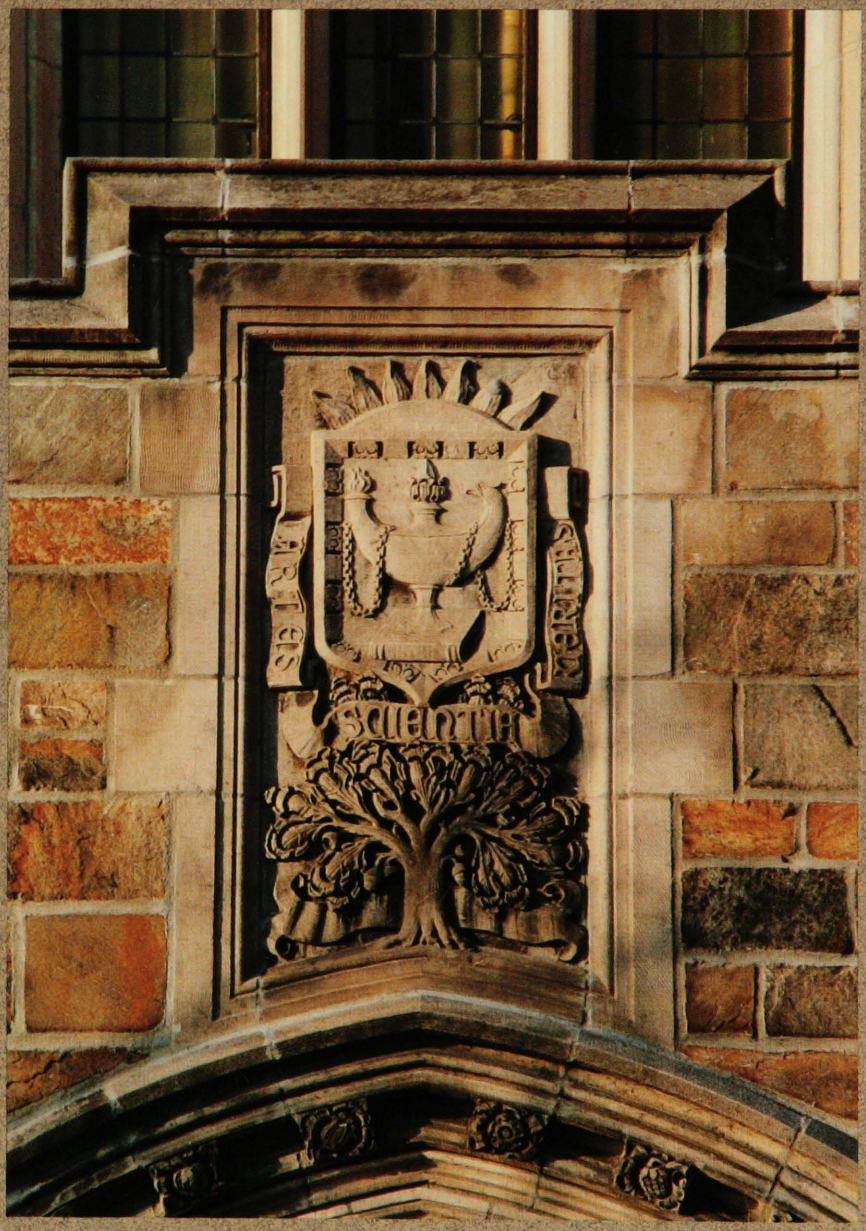
UNIVERSITY OF MICHIGAN
SCHOOL

UME 37 • NUMBER 1
SPRING 1994

# LAW QUADRANGLE NOTES




'The Growing Disjunction' Revisited
Frank Kennedy's Reflections on Bankruptcy
Limiting the Role of Patents in Technology Transfer
Prosecutors' Peremptory Challenges —
A Response and Reply

UNIVERSITY OF MICHIGAN
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# ALUMNI EVENTS

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|---|---|
| April 15 | An Evening with Bill Cosby<br>A benefit performance for the<br>U-M Law School<br>*Give Something Back*<br>Leadership Program<br>Crisler Arena, Ann Arbor<br>For ticket information, call<br>(313) 998-7973 |
| May 11 | Alumni reception<br>Pennsylvania State Bar<br>Philadelphia<br>Ritz Carlton |
| May 19 | Alumni breakfast<br>Ohio State Bar<br>Cleveland<br>Stouffer Tower City Plaza |
| June 3-4 | Firenze 1994<br>European Alumni Reunion<br>Florence, Italy |
| June 10 | Emeritus tea<br>Lawyer's Club Lounge<br>Ann Arbor |
| August 5 | Alumni meeting<br>American Bar Association<br>New Orleans |
| Sept. 22 | Alumni breakfast<br>Michigan State Bar<br>Detroit |

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**Cover —**
*The tree and the lamp of knowledge carved above the south entrance to Hutchins Hall symbolize legal education's contributions to society.*

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LAW SCHOOL

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# LAW QUADRANGLE NOTES



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# The return of Porn'im'age'ry

## A public university's response to students' removal of an art exhibit

*In October 1992, a controversy arose at the Law School when law students removed a sexually explicit video from an art exhibit they'd commissioned for a conference on prostitution. The artists promptly accused the students of violating their First Amendment rights.*

*When he heard about the incident, Dean Lee Bollinger decided to reinstall the exhibit called "Porn' im' age' ry: Picturing Prostitutes." Shortly afterward, the American Civil Liberties Union threatened to sue the school on the artists' behalf. In a settlement negotiated with the ACLU, Bollinger agreed to fund the reinstallation at the Law School. Independent of the settlement, he also planned to hold an educational forum to discuss issues surrounding the incident. The ACLU, the participating artists, art critics and the public were invited to the forum to discuss First Amendment freedoms, censorship, the campus climate for free expression, the uses of sexually explicit art and other issues.*

*The Law School hosted the reinstallation and forum Oct. 15-16, 1993. A large and diverse crowd viewed the video and photo-text exhibit and listened to statements from the Porn' im' age' ry artists during the Friday evening opening reception. Smaller crowds attended the Saturday forums on legal and artistic issues. At the forums, it was clear that more than a year after the incident, there are still disagreements over the removal and the response.*

*Originally, students on the* Journal of Gender and Law *hired Ann Arbor artist Carol Jacobsen to curate the exhibit, which depicted the lives of sex workers in their own words and advocated the decriminalization of prostitution. Students installed the exhibit without reviewing the videos. When they learned that a conference participant found one of the videos to be pornographic, they pulled the whole tape compilation without consulting Jacobsen. She then removed the entire exhibit.*

*Jacobsen and the ACLU Art Censorship Project have tried to portray this as an act of Law School-sponsored censorship. They argued that Professor Catharine MacKinnon, a participant in the prostitution conference, pressured the students into removing the tape. Both MacKinnon and the journal students have insisted that she was not involved in the decision.*

*Since the incident, Bollinger has maintained that the First Amendment issue involved is not censorship, but the students' right to control the views expressed at their own event. He explained the Law School's response to the incident in these remarks.*

I

I want to begin by talking about how we arrived at this point, with the reinstallation of the exhibit and with this public forum. I do this out of a felt need to correct some mischaracterizations about this dispute fostered by both Ms. Carol Jacobsen, curator of the Porn' im' age' ry exhibit, and the American Civil Liberties Union.

When I first heard about the removal of the videotape, which was actually several days after the conference (and hence after the removal), I asked to talk with the students about what had happened. I decided then, and I continue to believe today, that the students were seriously mistaken in handling the situation in the way they did — in particular, by simply removing the video rather than by raising their objections to the video with Ms. Jacobsen — and that they should consider issuing an apology. (The students, I should note, did subsequently issue an apology in a column in *The Michigan Daily*.)

Furthermore, I will say now, as I said to the students at the time, that in my opinion the symposium was, by the standards I believe ought to exist in a university community, too narrow in its focus, with an air of intolerance and at times some outrageous statements I didn't like. There were also many interesting and powerful things said. On the other hand, I did not think then, and I do not think now, that what the students did constituted in any way a violation of the First Amendment, and I will explain in a moment why that is so.

I also decided then — and this was before any threat of a lawsuit was in the air — that this controversy required a full airing and discussion. I thought, in turn, that this would require a reinstallation of the exhibit and a public forum, such as the one we are having today. I contacted Ms. Jacobsen to propose this, but she immediately indicated that she was unable to speak with me because she was already being represented by the ACLU. Ms. Marjorie Heins, director of the ACLU Art Censorship Project, will no doubt remember that when I first met her in New York shortly after that, I proposed reinstallation and a public forum.

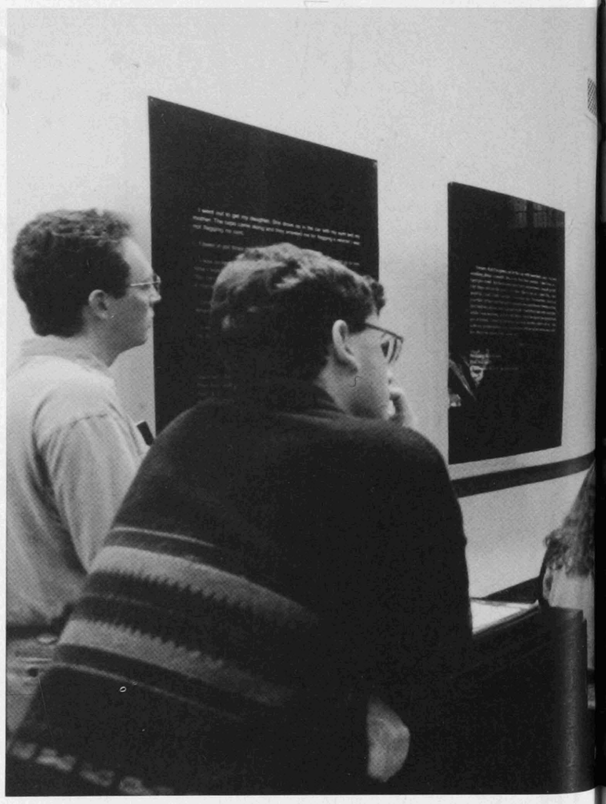
I give this brief history because it is important for everyone to understand that the initiative for what is occurring today came from the Law School and would have happened even without the intervention of the ACLU and its threatened lawsuit. From the ACLU's statements to the press, which seem often to have been uncritically accepted as true by reporters, they would like everyone to believe that this event is happening only by virtue of their vigilant efforts to protect the free speech rights of Ms. Jacobsen and the other artists. That, as I have said, is not the case. The truth is that I proposed reinstallation and a forum; the ACLU, on the other hand, threatened to sue unless the Law School, among other things, provided funding for the artists to hold their own conference on prostitution, which I refused to agree to. The settlement agreement we ultimately signed only commits the Law School to reinstallation.

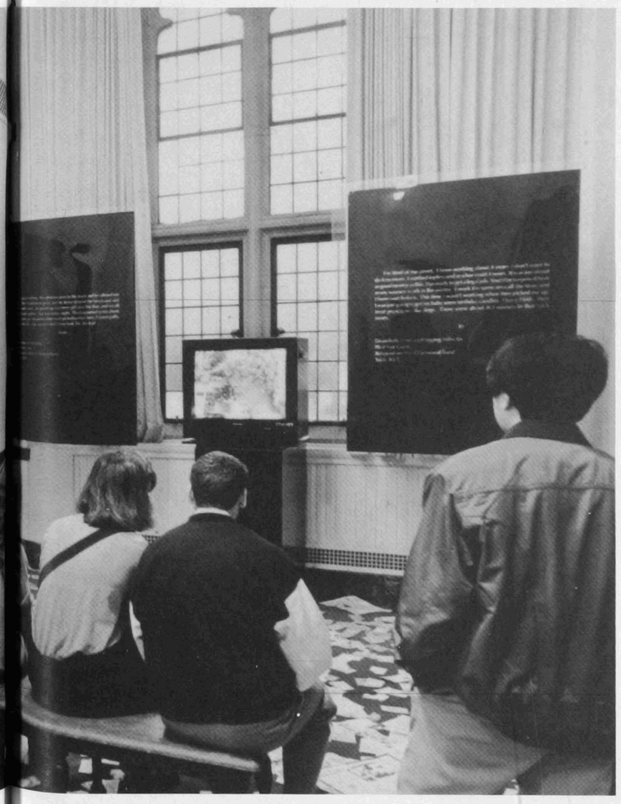
Throughout the entire negotiations, I should also say, I insisted that this public forum not be part of any legal settlement, believing as I do to this day that this is an educational program that ought to be within the full control of the Law School. This forum, therefore, is not the result of any legal requirement imposed on the Law School, whether by settlement agreement or otherwise; it is wholly sponsored and arranged at our own free initiative.

Now I want to correct, briefly, two other misimpressions created by the ACLU and Ms. Jacobsen and reported in the media. The first inaccuracy is that the Law School has refused to pay for the reinstallation of the exhibit. It is important that everyone knows that the Law School is indeed paying for the costs of reinstallation, up to the same amount that the artists charged for installing the exhibit at the conference last October. What we have refused to pay for are new and unreasonable expenses beyond those initially incurred when the exhibit was first installed.

The other mischaracterization, again one frequently reported in the media, is that the Law School is not paying Ms. Jacobsen an honorarium for speaking at the forum, while we are paying one to all other invited speakers. I'm sorry to have to say that this is completely disingenuous.

Throughout the negotiations leading to the settlement, I proposed to pay Ms. Jacobsen honoraria both for reinstalling the exhibit and for speaking at the forum, if she chose to accept my invitation to speak. At the very end of the negotiations, just before agreement was reached, the ACLU objected that, since the public forum was entirely within my discretion, Ms. Jacobsen was at risk of not





*Through pictures, text and video, visitors viewing the reinstalled "Porn' im' age' ry: Picturing Prostitutes" exhibit learned about the lives of sex workers. To set the scene, the floor of the exhibit was scattered with condoms and calling cards.*

receiving that honoraria. I then agreed to combine the two honoraria, which totaled $3,000, and in the settlement agreement to pay that amount in one lump sum. The obvious understanding was that this $3,000 figure was the two honoraria and that Ms. Jacobsen would be entitled to receive no additional personal payments either for reinstallation or for speaking at this forum.

II

Now let me turn to the First Amendment issue, which can be disposed of rather quickly, because, as we shall see, it is not really at the heart of what is underlying this controversy.

My position on the free speech or First Amendment issue here is straightforward and simple. There are many ways to try to make it complicated, but in reality it is quite uncomplicated. I will say later what motives the ACLU and the others have for trying to make a silk purse out of a sow's ear of a free speech claim.

Any private individual, group, or organization — and here it might be helpful to imagine an artists' collective composed of Ms. Jacobsen and the other artists who created the exhibit we are talking about today — has free speech rights. This right of freedom of speech includes the freedom to organize events or conferences, to define the subjects and ideas to be discussed at those events or conferences, and to invite or disinvite whomever they want to be their speakers. If the Jacobsen group decided to organize a conference on how prostitution is an exercise of female worker freedom, just like any other job in the society, they could invite Professor MacKinnon or members of the *Journal on Gender and Law* to speak, or not, as they saw fit. And if, let's say, they invited Professor MacKinnon — which, in all candor, I doubt they would — but if they did and then decided they did not like what Professor MacKinnon had to say, then they could freely — *under the First Amendment*, that is — decide to revoke their invitation to have her speak at their conference. This is basic, firmly established First Amendment law, witnessed daily in operation, in the actions, for example, of newspapers, political parties and organizations like the ACLU. There is no obligation under the First Amendment for speakers to be fair, reasonable or tolerant.

Now, our First Amendment is this way for three basic reasons. First, it is regarded as too difficult (time-consuming, expensive, etc.) as well as dangerous to free and open debate to have the government decide what is a "full" and "fair" presentation of views on any subject (*i.e.*, the government is presumed to be a "biased" arbiter of "fairness"). Second, there is also considerable advantage in the never-ending search for truth in allowing people to explore, advocate, and give their undivided attention to their own beliefs and perspectives, and to do so with fierce single-mindedness. And, third, there is a strong sense in our culture that it is wrong to force people to have to sponsor, as it were, viewpoints with which they strongly disagree, or believe to be deeply immoral or harmful.

This is the First Amendment world we live in, and it is a world, I feel compelled to add, that the ACLU has made it its institutional life mission to preserve.

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The main point to remember about the First Amendment is that your constitutional right to freedom of speech includes the right *not* to have certain speakers at your meetings and conferences.

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Now, to say that our hypothetical group of artists is *constitutionally* protected in inviting or disinviting whomever they want to their own conference on prostitution is not to say they are otherwise *legally free* to do whatever they want, nor that whatever they do is right in any moral or other sense. If this group disapproves of the ideas of one of their invited speakers and seeks physically to remove the speaker from the stage, they will not have violated the First Amendment but they may have committed a breach of contract or, worse, an assault. At the very least they may be criticized for acting discourteously or intolerantly. The First Amendment protects our right to organize our speech as we see fit, but it does not shelter us from either having to abide by the general laws of the society (*e.g.*, contract, criminal law, etc.) nor from criticism by others about our ideas or attitudes.

But the main point to remember about the First Amendment is that your constitutional right to freedom of speech includes the right not to have certain speakers at your meetings and conferences.

The next step in the First Amendment analysis is to realize that *students* have rights of free speech under the First Amendment. A long line of Supreme Court cases establishes that students, even junior high school students, possess the right of free speech, and that right must be respected by school authorities and administrations. This principle begins with the seminal case of *Tinker v. Des Moines* (1967), in which the Court protected the right of several students (including 13-year-old Mary Beth Tinker) to wear black armbands to school in protest against the Vietnam War. Absent proof that the student's speech would "materially and substantially" interfere with discipline within the school, the Court said, schools must live with the free speech rights of students.

Now, the ACLU must accept, and, I take it, does accept, all that I have said. They, however, try to construct a plausible First Amendment claim by transforming the students' actions

into the actions of the Law School. The Law School, as a public institution, does have certain obligations under the First Amendment. But we need not here explore what those obligations are, a subject which in truth is still quite obscure as well as complex. We need not because the factors that would convert the actions of the students here into those of the Law School are simply not present. Only two possible grounds exist, and they are not enough. One is that the Law School provided funding for the students' conference. The other is that a particular professor, namely Professor Catharine MacKinnon, both "influenced" the students in their attitudes about prostitution and pornography, as well as about establishing a journal, and notified the students that one of the conference speakers had seen Ms. Jacobsen's video and thought it pornography. But neither of these, alone or together, is sufficient for the ACLU's purposes.

And the reason is straightforward. If merely providing money, physical space, etc., to students, or if the mere involvement of a faculty member in student activities is enough to make the student speech the University's actions, for purposes of the First Amendment, then virtually all organized student expression within the University will become state action. For the simple fact is the Law School, just like the general University, provides funds to a host of student groups and organizations to assist them in organizing panels and conferences, to invite speakers, and to engage in a host of expressive activities. Groups we have funded over the last several years include the Federalist Society, the Environmental Law Society and the Lawyer's Guild. The only sensible approach under the First Amendment is that, so long as we provide funding on a "neutral" basis, without regard to the viewpoints of the groups (which, I must say, is certainly how we do it), then there will be no conversion of student speech into University actions. There are a number of important Supreme Court decisions holding that state financial aid to private speakers does not convert that speech into state speech; at most, it may permit the state to order the speakers *not* to say certain things.

The real First Amendment interest is the right of students and student organizations to structure their speech as they choose, just like a newspaper controls its columns and editorials.

And the same must be true for individual faculty involvement. If a faculty member acts personally, in an unofficial capacity, to respond to requests for advice, say, from the Jewish or Christian Law Students Association, that should not constitute a state "establishment of religion." Similarly, any personal involvement of Professor MacKinnon or other faculty here should not make this conference the Law School's. Otherwise, there will be an enormous loss to a vigorous open debate among students within the University.

Let me put the conclusion this sharply: What is at stake here in this controversy *is* a First Amendment issue. But it is a completely different issue than that asserted by the ACLU and the artists it represents. The real First Amendment interest is the right of students and student organizations to structure their speech as they choose, just like a newspaper controls its columns and editorials. There is, in fact, a great irony here, for the ACLU would like us to believe there is an analogy between this incident and the Sen. Jesse Helms-inspired NEA funding controversy. But they are exact opposites. Sen. Helms wanted to control the speech of recipients of government funds, while we do not.

So that, in my view, is the answer to the First Amendment issue supposedly raised by this incident. Perhaps, I should add, there might be a contract claim here, with Ms. Jacobsen having been denied the opportunity to present her exhibit. That is a different question, though I believe the answer to that is also no. I base this on many conversations I have had with the students who dealt with Ms. Jacobsen in arranging her participation in the conference. But the ACLU is not here for just a simple contract claim, and if there is very little plausibility to a genuine First Amendment claim, then why have they pursued this controversy so vehemently?

III

What is really motivating this dispute is an effort to discredit both the movement to regulate pornography and Professor Catharine MacKinnon, the leading theorist of and advocate for regulation. If the Black Law Students Association had decided to hold a conference to discuss the various justifications for affirmative action, and had then disinvited a speaker for saying racist and anti-Semitic remarks, the ACLU would not be here today. Similarly, if a university-funded student-run newspaper decided not to use a letter to the editor after first deciding to run it, the ACLU would not be here today — indeed, given the ACLU's past positions, it would be actively defending the right of the newspaper to exercise that power. (The ACLU would call it "the right to engage in editing", whereas here they call it "censorship.") The reason the ACLU is here today, taking a position absolutely inconsistent with its general approach to freedom of speech, is because it is an organization that believes the regulation of pornography is wrong; unfortunately, the ACLU is prepared to use the cheapest political tactics to support their side of what is an important, difficult national debate.

It is important to understand that one month before this controversy arose, the ACLU Arts Censorship Project issued a public statement announcing an "award" to Professor MacKinnon as an "Arts Censor of the Year." For

an organization with a distinguished history of combatting the use of politically prejudicial labels because name-calling causes deep personal injury and debases the character of public debate, this behavior by the ACLU, designed to play the media game of argument by accusation, is deeply disturbing. The ACLU ought to be a model for responsible discussion of public issues, not a modern day Sen. Joseph McCarthy.

Furthermore, not only was the ACLU on the attack against Professor MacKinnon, but it was also at that time seriously engaged in fighting a bill to regulate pornography then before the United States Senate (known at the time as the Craig Bill). Given, therefore, the posture and way of thinking of the ACLU and its Arts Censorship Project, this particular controversy arising out of the symposium arranged by U-M Law School students must have seemed like a stroke of good luck.

There can be no doubt that Ms. Heins wanted to use the controversy to discredit Professor MacKinnon. Without any real evidence that Professor MacKinnon had caused the removal of the video — indeed in the face of Professor MacKinnon's explicit denials of having done so (and here I must give credit to Nat Hentoff of the *Village Voice*, who refused to write a story condemning Professor MacKinnon because of her denials) — the ACLU recklessly issued a news release two weeks after the symposium, which began with this statement: "A coalition of feminist First Amendment advocates has condemned the actions of anti-pornography crusader Professor Catharine MacKinnon and a group of her students at the University of Michigan Law School, who censored an art exhibit expressing the views of prostitutes because it did not conform to their own beliefs."

This is the practice of demagogues: You do not wait for facts to support your position. You simply accuse your enemy of bad behavior and wait to see what develops. And you open by suggesting the wildest possibilities of what happened — here the statement could be read (and I know for a fact was read) as saying a group of students unconnected with the symposium decided on their own, like vigilantes, to take the law into their own hands. Only later, after the initial predisposition of the reader has been set, do you let some — but not by any means all — of the facts emerge through your statement.

The press release continues in this vein. It says, falsely, that the symposium was "sponsored by the U-M Law School." It continuously reduces the students to minions of Professor MacKinnon, with statements like "Followers of Professor MacKinnon organized the journal and the symposium as a way of promoting her theories." (I can personally testify that that is untrue.) And it repeats the idea that this was all Professor MacKinnon's handiwork.

Now, I want to be clear about my points. I am not saying that the ACLU is wrong in taking the position that the First Amendment should not be interpreted to permit regulation of pornography. That, in my view, is a reasonable position that can be supported by powerful arguments. I also believe that the arguments for regulating pornography, many of which are made forcefully in Professor MacKinnon's writings, are reasonable and powerful. I


**American Jewish Committee panel —**

*The American Jewish Committee Law School Project and the Jewish Law Students' Union co-sponsored a panel discussion on the topic, "Federal Sentencing Guidelines: A Formula for (In)Justice" in November. Panelists were (from left): the Hon. Gerald Rosen of the U.S. District Court, Eastern District of Michigan; the Hon. Richard Suhrheinrich of the Sixth Circuit Court of Appeals; Professor Jerold Israel, who moderated; Miriam Siefer, of the Federal Public Defender's Office in Detroit; and the Hon. Avern Cohn, J.D. '49, also of the U.S. District Court, Eastern District of Michigan.*

myself have a view about this issue which is probably closer to the ACLU's than to Professor MacKinnon's, but that is not my point. Nor am I saying that the anti-pornography movement in this country is always free of the tactics I have charged the ACLU with employing.

My point is that it is deeply hurtful and destructive, not only to individuals such as Professor MacKinnon and the students, but also to the quality of public discourse, for the ACLU to employ the tactics it has in this controversy — to engage in smearing by labels, in making undocumented allegations, rather than meeting argument with argument. The ACLU, like universities in this country, should be committed to participating in public debate with the highest standards of honor and decency, which means at the very least recognizing the complexity of public issues even when you have decided to come down on one side, acknowledging the good arguments in your opponent's case, and avoiding ad hominem — or ad feminem — attacks.

The real tragedy of the controversy, therefore, in my view, is that the ACLU has failed to meet these standards.

*Joan Heifetz Hollinger, a reporter for the proposed Uniform Adoption Act, touched off a lively discussion about parents' rights when she discussed national adoption law reform during bridge week.*

# Bridge week explores 'The DeBoer Dilemma'

Two sets of parents, two states and a little girl with two names added up to a custody battle that tugged heartstrings all summer.

This fall, law students had an opportunity to go beyond the two sides in the highly-publicized battle for Baby Jessica. At a bridge week entitled "The DeBoer Dilemma," students and visiting experts used the case to explore many perspectives on child custody and adoption law.

Most students knew the details of Roberta and Jan DeBoer's fight to adopt Jessica while her biological parents, Dan and Cara Schmidt of Iowa, fought to regain custody of the child they called Anna. Guest speakers at bridge week helped them look behind the emotions and headlines to examine legal, social and cultural issues. Several speakers made students think about their roles and responsibilities as attorneys who might someday handle complex cases in family law.

Bridge weeks are a key feature of the New Section, a program that offers one-fourth of the first-year students a more multidisciplinary approach to standard courses and more frequent evaluation. Bridge weeks bring together faculty and other experts to discuss a specific, current socio-legal issue across the boundaries of course work, and this one was no exception.

David M. Scobey, a U-M assistant professor of history and American culture, began the week with a talk on the cultural context that shaped events in the case and made it a cause celebre. A panel of three mental health experts who testified at Jessica's best interest hearing in Washtenaw County discussed the value of expert witnesses. Elinor Rosenberg, M.S.W., a clinical assistant professor of psychiatry at the U-M Medical School, spoke of the long-lasting trauma adoption may cause for all parties involved.

Suellyn Scarnecchia, the clinical professor of law who represented the DeBoers in Michigan courts, talked to students about what she'd learned along the way. Washtenaw County Circuit Court Judge William Ager spoke to students about his decision to allow Jessica to remain with the DeBoers. Marian Faupel, the Schmidts' Michigan attorney, spoke to students at the Law School last summer but did not participate in bridge week.

However, Ann Agiroff, a local attorney who helped Faupel appeal Ager's decision, paired up with Scott Bassett, J.D. '81, to discuss children's constitutional rights in custody battles. Bassett filed lawsuits last summer on Jessica's behalf, separate from the DeBoers' case.

Other legal experts were on hand to discuss the laws that control adoption and custody as well as the related issues of children's and father's rights.

Rhoda Berkowitz, a professor of family law at the Toledo Law School, explained the difference between agency and private adoption procedures. She said the DeBoer case illustrates all the risks of open adoptions arranged by private parties.

Linda J. Silberman, J.D. '68, a professor at New York University Law School, explained the jurisdictional provisions in the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction Act. These provisions are intended to prevent parties in battles like the DeBoer case from appealing from state to state in search of a more favorable ruling. Under those laws, Iowa, not Michigan, was Jessica's home state; therefore, Michigan was compelled to honor the Iowa court rulings, she said.

Silberman pointed out that the laws applicable to the case were not necessarily written with adoption in mind. Drafting uniform national adoption laws to replace them is enormously difficult, said Joan Heifetz Hollinger. As a reporter for the proposed Uniform Adoption Act of the National Conference of Commissioners on Uniform State Laws, she has faced the challenge of shaping laws to fit expanded social views of adoption, parenthood and family. "There is no consensus on most critical issues. Who gives parental consent to give a child up for adoption? When can you dispense with consent? What procedures do you follow to get it? Who selects the adoptive parents?" questioned Hollinger of the University of California - Berkeley, Boalt Hall. In an age of artificial conception, the commission struggled mightily just to come up with definitions to replace the term "natural mother," she said.

While Silberman and other bridge week participants felt that the Iowa courts ruled correctly, they also felt that the best interests of the child weren't adequately considered in Iowa. Donald Duquette, professor of law and director of the U-M Law School's Child Advocacy Clinic, asked students to consider whether "best interest" really is an appropriate standard for determining custody. One student responded that inevitably, we determine the best interest of a child based on the parents' economic status, which may have nothing to do with good parenting. Another student questioned how we would ever objectively quantify best interest. A third suggested that if it is difficult to determine a child's best interest, perhaps we should try instead to rule out the option that is in the child's *worst* interest.

Expert witnesses helped determine Jessica's best interests when they finally were considered in Washtenaw County Circuit Court. Thomas Horner, M.D., Jack Novick, Ph.D., and Vicki Bennett, A.C.S.W, all testified that she would suffer if, at age 2, she was removed from the only home and parents she'd known and returned to the Schmidts. However, they disagreed on how accurately an expert can foresee the impact of a decision in court. Horner, a professor of child psychiatry at the U-M Medical Center, said experts can't predict the future; Novick, a

**Word-processing power —**

*Students are delighted with the new equipment installed to upgrade the computer lab last fall. Old IBM computers were replaced with more powerful Gateway PCs, and more Macintoshes and faster laserprinters were added. Students are making good use of new software and better linkages to LEXUS, WESTLAW, campus computer networks and more. Since the upgrade, usage records show the number of pages printed in the lab is up by 50 percent.*

child and adult psychoanalyst, and Bennett, a clinical social worker, said that based on other children's experiences, they can offer a good idea of what a child might go through.

Horner, who has considerable experience as an expert witness and has studied their use in trials, told students their expertise is sometimes taken for granted. "They are believed just because they say they are experts. Too often, expert witnesses are not subject to sufficient voir dire examination." He added that adversarial proceedings in court seem to require firm, final statements in subjective situations where nothing is clearcut. "My problem with experts is not that the courts push them into black-and-white statements, but that many experts often march right into them."

Throughout the week, students asked questions about the values underlying our views of adoption, fitness for parenting and fathers' rights. Scarnecchia told them, "It's exciting to me that during this week, you have so naturally raised issues about the racism, sexism and classism that shape adoption policies and this case. Not long ago, students seldom raised those issues."

She told the future lawyers that the case demonstrated the complexity, excitement and challenges to be found in the field of family law. It also made her think about children's rights more than ever before. "I never thought of children as an oppressed group. I found that the legal system said it was going to worry about the rights of adults and explicitly say a child's rights are irrelevant," she said. In cases like this, she noted, lawyers and judges won't always be thinking of the child's best interests. She advised students, "Think about what you can do as lawyers to make sure your clients and the courts keep this in mind."

## Art in our architecture

A new book by U-M professor Ilene H. Forsyth explores the artistry of the University of Michigan Law Quadrangle.

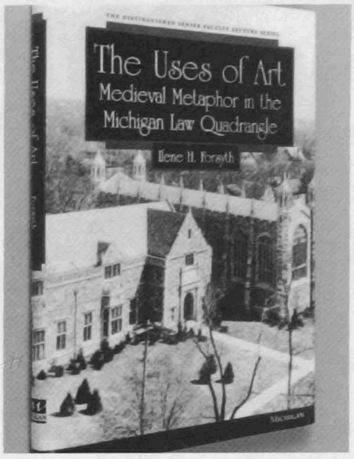
By design, the great Gothic buildings create an atmosphere of devotion to learning and the law, Forsyth writes in *The Uses of Art: Medieval Metaphor in the Michigan Law Quadrangle* (University of Michigan Press, 1993).

Forsyth, the Arthur F. Thurnau Professor of History of Art and an expert in Romanesque art, finds meaning in the beauty of the quadrangle by examining its origins. She shows how the granite Gothic structures express the ideals of William W. Cook, the near-mythical donor who inspired, financed and closely supervised the plans for all four buildings. His thoughts on law school and the legal profession are literally carved in stone throughout the quadrangle.

"He wished to put the Michigan Law School into the first rank, . . . and he was aware that one could elevate the status of an institution through uses of art," Forsyth writes. She shows how Cook and his architects drew elements from medieval monasteries, Gothic cathedrals and the residential inns at Oxford and Cambridge to create an inspiring, cloistered yet communal space for reflection.

Forsyth analyzes not only the art and architecture but the personalities and social forces that shaped construction of the quadrangle. Based on Cook's own extensive correspondence, she paints a fascinating portrait of a man of many contradictions. He expressed scorn for philanthropists while providing a gift of astonishing magnitude. He wished his gift to remain anonymous and refused to put his name on the buildings, yet ensured his place in history by willing to the University all his papers related to the Quadrangle. Through his letters, he controlled every aspect of the design and construction, right down to lawn size and limestone color, but he never laid eyes upon the buildings.

Although his influence was enormous, Cook wasn't acting alone. He worked closely with architects Edward Palmer York and Philip Sawyer.




Forsyth describes the relationship as akin to that of the medieval artist and his sponsor. As Cook once suggested to York, "you [are] furnishing the art and I the philosophy."

University President Harry Burns Hutchins and Law School Dean Henry Moore Bates were furnishing support, ideas and guidance as well. Forsyth depicts the quadrangle project as a unique collaboration between these four men, their ideals, historical values and modern times. Anyone who has felt the grandeur of the quadrangle's graceful arches and towers will enjoy the story of how they came to be.

# DeRoy Fellow discusses the future for gays and lesbians

The time has come for a federal civil rights bill for gay men and lesbians, according to Paula L. Ettelbrick, the Law School's 1993 Helen L. DeRoy Fellow.

The Law School welcomed Ettelbrick, the director of public policy for the National Center for Lesbian Rights, for a four-day visit in October. She spoke in classes and met informally with students and faculty. The highlight of her visit was her Oct. 27 lecture entitled "Gay and Lesbian Civil Rights: Current Issues, Future Directions."

Ettelbrick, the former legal director of the Lambda Legal Defense and Education Fund, said significant progress has been made for gay and lesbian rights, but discrimination persists in many areas. "This is a very potent time in our country. Our movement is at a crossroads and it sometimes feels stagnant," she remarked. "We can continue to 'sneak in' and make progress where we can, or we can challenge the existing order for all constituencies in the United States." Clearly advocating the latter, Ettelbrick noted, "The time is now for a federal civil rights bill for gays and lesbians." She said such a bill could be introduced in Congress early in 1994.

Legal education is one area where gays and lesbians have gained some respect. Ettelbrick praised the current legal academic environment for "finally recognizing and taking seriously gay and lesbian issues." A 1984 graduate of Wayne State University Law School, she recalled that in her student days, very few gay and lesbian law students went public with their sexual orientation, so many felt isolated. "Today, in very few law schools is there a feeling of being alone. Support is now very strong in the legal education community," she said. This was clearly evidenced by the attentive and enthusiastic crowd of students, faculty, alumni and visitors filling Room 120 in Hutchins Hall.

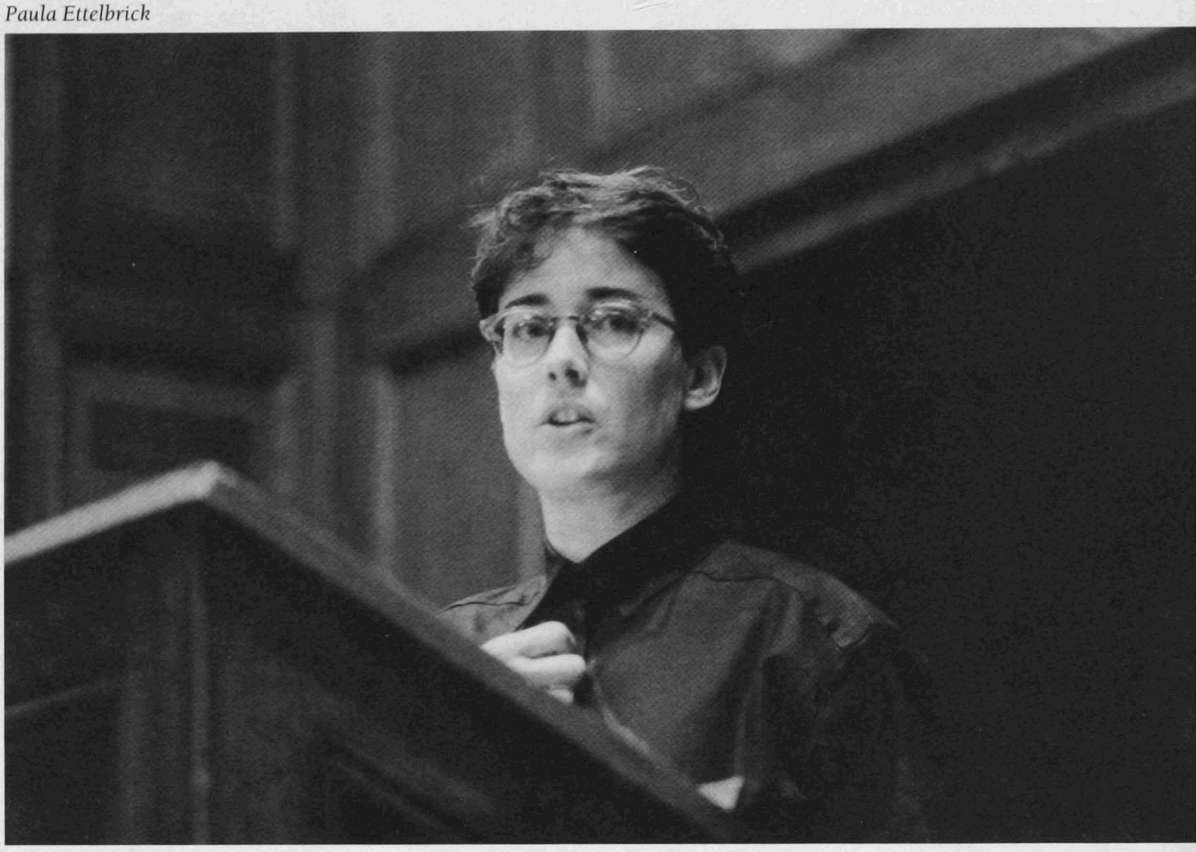
Ettelbrick, formerly a litigator at Miller, Canfield, Paddock and Stone in Detroit, spent seven years with the Lambda Legal Defense Fund, the last five as legal director. She joined the National Center for Lesbian Rights in June 1993. She also is an adjunct professor at New York University Law School. In all these roles, she has gained a perspective on the most pressing issues for gays and lesbians.

She highlighted three major issues in her talk. The first was the ban on gays in the military. President Bill Clinton tried to overturn the ban in his first major initiative in the White House. Ettelbrick gave Clinton credit for being "at least a vocal supporter of gay and lesbian rights," but said the military ban was not the issue she would have picked first to improve gay rights. The core problem with Clinton's move was the lack of a substantial grass-roots support for the military

**Senior Day —**

*December graduates listened intently while Dean Lee Bollinger told them to keep aspirations high through daily contact with works of greatness. "Become and stay breathless before achievement," he advised. Fifteen graduates earned master of laws degrees and 97 earned juris doctor degrees.*

*Paula Ettelbrick*



among the gay and lesbian communities. "There is a basic lack of commitment to this issue. Many of our strongest supporters come out of the anti-war movement and they are asking themselves, 'Why would I want to fight in the military, anyway?'

"Clinton simply chose the wrong forum at this time, as the military is very much a macho, male-oriented institution. We [the gay and lesbian movement] just don't have the numbers there to back it up, and Congress feels burned on this issue because they see no constituency," she said.

Family relationships are another area where gay and lesbian rights are at a crossroads. The expanding definition of "family" recently has produced numerous cases over matters such as adoption, employee benefits and housing. Ettelbrick challenged the notion that rights in all these areas should only be afforded to married heterosexuals, who today constitute roughly one-half of the nation's rapidly changing population.

"If a heterosexual couple was married for a year and one of the partners died, the other would be entitled to full social security benefits," she explained. "On the other hand, if this same situation happened to a homosexual couple of 30 years, the surviving partner would receive absolutely no benefits. It is unfair that marriage is held up as a reason for benefits."

While some progressive companies and cities now offer unmarried-partner health benefits, very few eligible employees sign up for these benefits. "The major problem with getting the benefits is that you have to admit publicly that you are gay or lesbian. The fear of discrimination at work is so widespread that most people remain closeted," said Ettelbrick. The recipients of such benefits would also have to pay taxes on them because the Internal Revenue Service does not recognize unmarried partners as dependents.

Gays and lesbians are winning recognition as parents, too, according to Ettelbrick. Since the mid-1980s, more than 100 lesbians have legally adopted their partner's child. Most of these were uncontested private adoptions which attracted very little public attention. In one such adoption, New Jersey Superior Court Judge Philip M. Freedman wrote, "The Court's recognition of this family unit through the adoption can serve as a step along the path toward the respect which strong, loving families of all varieties deserve."

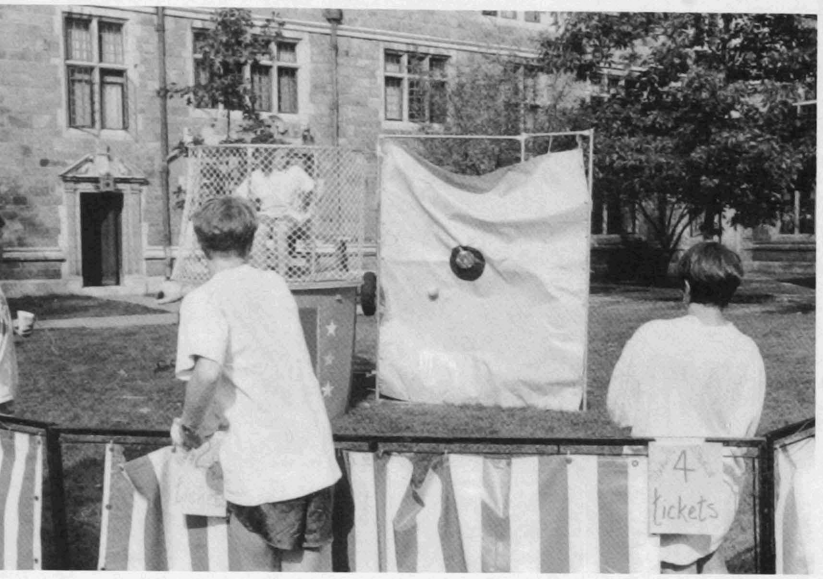
The third prominent issue that concerns Ettelbrick was the active efforts of many groups to limit gay and lesbian rights through state laws and constitutional amendments. "This is an issue we will be fighting for the rest of our lives," she said. Specifically, Ettelbrick mentioned the Colorado state law, recently ruled unconstitutional, which dictated that gays and lesbians could not receive minority status. Proponents of that law said it simply prevented "special treatment" for gays and lesbians; Ettelbrick argued that the measure stripped gays and lesbians of their right to redress. "The law basically institutionalizes the right to discriminate. We have been given 'special treatment' all right — and it's been all bad," she said.

In closing, Ettelbrick listed several ways for the gay and lesbian rights movement to move forward. A civil rights bill is a key element, but she also called for a new and improved self-image for the gay and lesbian community, noting, "We need to stand up and take a more positive view of ourselves."

*— by Frank Potter*

# BRIEFS

**"In Celebration of Creativity Throughout the Diaspora"**
*was the theme of a poetry reading presented by the Black Law Students Alliance at a campus coffee shop. Artists (including non-students) were invited to present their creative writing, songs, dances or rap. Here, one participant reads his poem.*




**Getting wet for a good cause —**
*A dunk tank was part of the fun and games at an Oktoberfest fund-raiser for the Loan Forgiveness Program. The Law School Student Senate and the Basement Groups sponsored the event. Participants enjoyed other carnival games and festive refreshments like sno-cones.*

**In tune with the season —**
*The Law School observed the holiday season with the Seventh Annual Reading Room Concert, featuring cellist Jerome Jelinek and pianist Joseph Gurt. The Headnotes, the Law School's a capella student singers, also performed.*

PHOTO BY PETER YATES

# ALLAN F. SMITH, 1911-1994

ALLAN F. SMITH, professor emeritus and former dean of the University of Michigan Law School, died Jan. 21 in Sarasota, Florida. He was 82.

Smith, who served as interim president of the University in 1979, was a respected scholar in real estate transactions and personal property law and a beloved teacher.

"In Allan Smith's classroom, you felt that nothing in life was more important than the law — except people," recalled Theodore St. Antoine, a law professor, former Law School dean and one of Smith's students. "When you were with him outside the classroom, you knew there were lots of other important things — music and the theater and the Michigan Wolverines — and always, people. The warmth of the man simply glowed.

"An occasional academic could come up with more brilliant insights; no one surpassed Allan in drawing out the best in everyone around him. The careers he fostered and the lives he enriched will be his memorial."

U-M President James J. Duderstadt said, "Allan Smith had an extraordinary impact on the U-M. He served as vice president and chief academic officer during a period of both great challenge and opportunity for the University, and provided exceptionally strong leadership. I will always be personally grateful to him for the advice, counsel and mentorship he provided me, and for his enthusiastic and spirited companionship in the president's box at Michigan football games. He will be missed very much by the Michigan family."

Dean Lee Bollinger said of his predecessor, "He was one of the great deans of this law school. He was a wonderful teacher who also had enormous personal charm."

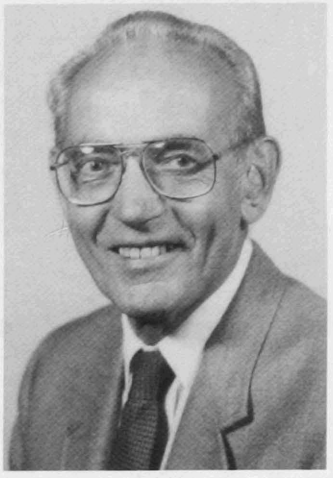
Born in 1911, Smith earned an A.B. from Kearney State Teachers College in Nebraska in 1933. He followed with an LL.B. from the University of Nebraska in 1940, and an LL.M. in 1941 and an S.J.D. in 1950 from the U-M Law School. He received several honorary degrees, including a D.C.L. from New Brunswick and an LL.D. from Michigan.

He served as senior attorney in the U.S. Office of Price Administration from 1941-43, and in the Army in military intelligence from 1943-46. He then taught at Stanford University for a year, joining the law faculty at Michigan in 1947. He became a professor in 1953 and was dean from 1960-65. He then went on to serve the University as vice-president for academic affairs from 1965-74; he was named emeritus in 1982. Upon his retirement, the University recognized Smith and his wife by establishing the Allan F. and Alene Smith Professorship. The addition to the Law Library completed in 1981 also was named in their honor.

The author of numerous articles and books, including *Personal Life Insurance Trusts* and *Cases on Property,* Smith held visiting appointments at Stanford, the University of Georgia, Hastings College of the Law and the University of Hawaii. Smith was active in Phi Delta Phi, a legal fraternity. He was a life member of the Lions Club and an honorary member of the Rotary Club. He was a long-time member of the First United Methodist Church of Ann Arbor, where he was active in the music ministry.

Smith is survived by his wife Alene; two children, Stephanie Smith of Ann Arbor and Gregory Smith (and wife Barbara) of Berkeley, Calif.; three grandchildren, Elizabeth Niederhuber, Pamela Smith and Michelle Risch-Smith; a great-grandson, Cory Risch-Smith; a brother, Donald Smith, of Madison, Wis. and a sister, Hallie Dryden, of Tuscon, Ariz.

A memorial service was held at Feb. 5 at the First United Methodist Church of Ann Arbor. The family has requested that memorial contributions be directed to the Allan F. and Alene Smith Professorship at the U-M Law School, 721 S. State, Ann Arbor, Mich. 48104-3071, or the University of Michigan Medical Center Division of Cardiology Research, 3910 Taubman Center, Box 0366, Ann Arbor, Mich. 48109.



*Allan F. Smith*

**"An occasional academic could come up with more brilliant insights; no one surpassed Allan in drawing out the best in everyone around him. The careers he fostered and the lives he enriched will be his memorial."**

— THEODORE ST. ANTOINE

## Workshop lets students study scholarship

Law students explored the cutting edge of contemporary legal scholarship in a unique seminar course offered for the first time in the fall term.

Professors Richard Pildes and Debra Livingston organized the Legal Theory Workshop in part to bridge the gap between what legal academics are writing and what is presented in the classroom. Participants read the work of leading legal academics from around the country, critiqued the work and then discussed it in person with the scholar.

"For all the efforts to reform legal education, there's still too much of a gulf between what goes on in the classroom and what faculty members are doing with their academic work," Pildes said. "Our goal was to expose students to a broad range of the best legal scholarship while it was still in the process of being produced. Students develop confidence from seeing the struggle that good work entails for even established academics, and there is so much intellectual ferment these days, it's important for students to be exposed to more than any one faculty can provide."

Each week, students read a manuscript and wrote papers responding to it. These papers were forwarded to the author, who then visited the workshop the following Friday to discuss and sometimes defend the article. Each week, a U-M faculty member with expertise in the relevant area volunteered to serve as a commentator on the paper. Other U-M faculty also sat in on the Friday sessions, so students gained a new opportunity to debate theories and academic issues with a range of professors.

Visitors and topics included: Mark Barenberg of Columbia University Law School, on new structures for labor-management negotiations; Lorraine Weinrib of the University of Toronto Law School, on comparative assessments of the Canadian and American constitutional systems; Samuel Issacharoff of the Texas Law School, on alternative approaches to dealing with employment discrimination; and Tom Grey of the Stanford Law School on pragmatist conceptions of judicial decision-making.

Said Livingston, "With each new visitor, we attempted to explore the questions that were the underlying themes of the workshop: What is legal scholarship? What is theory, and what are the connections between legal theory and the practice of law? What does it mean to read works of modern legal scholarship critically?"

Students found the workshop stimulating. "I was intrigued by the idea of bringing in bright young scholars or prolific academics. It was interesting to see how people generate ideas and defend them," said Peter Beckerman, a second-year student. "It exposed us to more theory than we had in most classes. It was very different from other classes, but I found it was valuable. It's the best course I've had so far."

Steven Coberly, also a second-year student, observed, "The thing that really sets this class apart from other classes is that the faculty is here. You felt like you were part of the academic discourse." Third-year student Mark Witt added, "Normally in class you are getting the point of view of one professor and one teaching style. In this class, we often had five or six professors and the visitor, so there was a real mix of very informed views."

The workshop involved much more writing than most typical courses. Several students said that being forced to write each week was invaluable. Said Witt, "We were critiquing an area that the visiting professor had been studying for years, which was a little intimidating. It was very challenging to try to give a critique that was useful to them, that would help them improve their ideas." Added third-year student Heather Gerken, "We knew they would read it, so I felt like a colleague."

Students met the challenge admirably, producing first-rate work. "Virtually all the outside academics commented on the quality of their work and said they benefitted enormously from student input," Livingston said. Students, in turn, were encouraged because the visiting scholars read and reacted warmly to their ideas. "I gained a lot of confidence because I could say something that was interesting to them," Coberly said.

Many students took the course because they were interested in pursuing an academic career someday, and they appreciated the chance to see scholarship in process. "The class confirmed my interest in becoming an academic. I have a much better insight into the kinds of interactions professor have and the kind of work they are doing," said Linda Terry, a second-year student.

*Debra Livingston*

*Richard Pildes*

The workshop required considerable investment of time and resources. "That commitment of resources reflects Dean Lee Bollinger's vision. He wants students to become full participants in the intellectual life of the Law School," Pildes said.

Both faculty and students felt the workshop was an extraordinary success. Students grew intellectually from confronting first-rate scholarship as equal participants, while faculty discovered that students were excited participants in discussions of contemporary legal scholarship. Another unexpected benefit was that the course offered an opportunity to show outside academics how talented and intellectually sophisticated U-M law students are. At the end of the class, Pildes told students, "thanks to the quality of your involvement and writing, this has been an exceptional teaching experience."

## Alvarez joins faculty

The Law School added to its ranks of international law experts when Jose E. Alvarez joined the faculty in winter term 1994.

Alvarez, formerly an associate professor at George Washington University's National Law Center, will initially teach the survey course in international law and a course in international

*Jose Alvarez*

organizations. Thereafter, he expects to teach additional courses and seminars in the areas of international legal theory and foreign investment law.

His particular scholarly interest is in how international institutions such as the United Nations make law. These organizations quietly make binding policy, often without any input from outside interest groups, he says. In fact, the public has little access to internal deliberations of entities like the U.N. Security Council. "International organizations make more law than people are aware of, in areas that most people never thought about," he explains. "I'm interested in the prospect that we may be creating an international bureaucracy without a lot of accountability."

This lack of accountability leads to an irony Alvarez calls "the democracy deficit." The U.N., and the United States within the U.N., increasingly are purporting to "democratize" the world, while the U.N. itself does not function as a truly representational democracy. "We've created *de facto* 'legislatures' people have difficulty participating in," he says. "To the extent that we are going to rely on international regulation, we may have to rethink how we make these rules, because legitimacy is what makes them effective or ineffective."

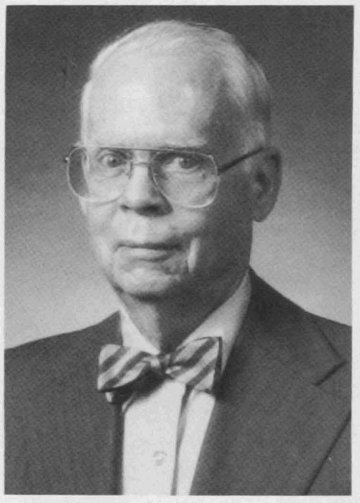
A native of Cuba, he holds bachelor's and law degrees from Harvard and a special bachelor's (the equivalent of a master's) degree with highest honors from Magdalen College, Oxford University. He clerked for the Hon. Thomas Gibbs Gee of the U.S. Court of Appeals for the Fifth Circuit, and practiced with Shea and Gardner in Washington, D.C. in 1982-83. From 1983-88, he was an attorney adviser to the U.S. Department of State and an adjunct professor at the Georgetown University Law Center. At the Department of State, he worked on various investment and trade issues and for the Administration of Justice Program, an Agency for International Development effort to assist judiciaries in Central and South America.

From 1989-93, he was a member of the George Washington University faculty. He and his wife, Susan Damplo, also an attorney, hold fond memories of Ann Arbor, because their son Gabriel was born here while Alvarez was a visiting associate professor at the Law School in 1992.

## Chicago honors Allen

For his important contributions to criminal law, former U-M Law School Dean Francis Allen was awarded an honorary doctorate of laws from the University of Chicago in October. He received the degree at a special convocation that coincided with the inauguration of Hugo F. Sonnenschein, the 11th president of the university.

At the University of Chicago, honorary degrees are awarded on the basis of outstanding scholarship. Allen is one of the pre-eminent criminal law scholars of his



*Francis Allen*

generation. His work has profoundly influenced both theory and practice in criminal law, drawing together insights from law, philosophy and the social sciences to serve the ends of justice.

Allen now is professor of law and the Hubert C. Hurst Eminent Scholar at the Univesity of Florida College of Law. The author of 11 books and more than 60 articles, he has illuminated the complex relationship between crime

and punishment. His writings on the purposes of punishment have shaped both sentencing and correctional practices, and his work decisively influenced the American Law Institute's Model Penal Code.

Allen taught at Chicago from 1956 to 1962 and again from 1963 to 1966. He served on the Michigan faculty from 1966-86 and was dean from 1966-71. Since 1986, he has been Michigan's Edson R. Sunderland Professor Emeritus. He also served on the faculty at Northwestern and Harvard.

He received his bachelor's degree in 1941 from Cornell College and his LL.B. in 1946 from Northwestern.

Allen was one of eight scholars from around the world recognized with honorary degrees at the convocation.

## Post-Communist constitution-making

Eric Stein, the Hessel E. Yntema Professor of Law Emeritus, was a member of an international group advising the Czech and Slovak authorities on their constitutional problems in 1990. A Czecho-slovakian by birth, he returned to the country to offer advice on foreign affairs as the country restructured itself in the wake of the Communist regime. He addressed matters such as the allocation of power, participation in international organizations and the role of foreign relations in the internal legal system.

Ultimately, the two regions ended up splitting into separate nations. Drawing on this experience, he has published two articles: "Devolution or Deconstruction, Czecho-Slovak Style," 13 Mich. Journal of International Law, 786-805 (Summer 1992); and "Post-Communist Constitution-Making: Confessions of a Comparatist (Part I)," 1 New Europe Law Review 421-475 (No. 2, Spring 1993). Several other articles are in the process of publication in both Europe and the United States.

## Duquette's work shapes national report

A new national report on the effectiveness of legal representation for children is based on a conceptual framework drawn from Donald Duquette's book on child advocacy.

In his 1990 book *Advocating for the Child in Protection Proceedings,* Duquette outlines five roles and 10 specific responsibililites of the guardian ad litem. The National Center on Child Abuse and Neglect used this framework to prepare a congressionally-mandated report on the use of guardians ad litem and court-appointed special advocates.

The report, issued this winter, includes empirical research on child representation and an analysis of existing state laws. Duquette is clinical professor of law and director of the Child Advocacy Law Clinic.

# IN PRINT

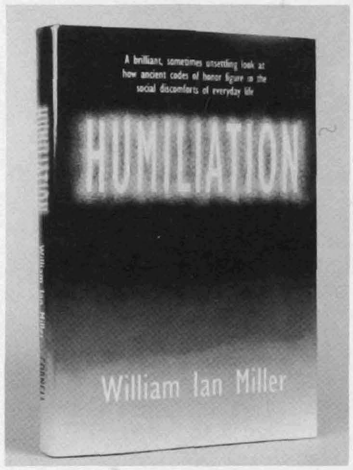
## New books by faculty

### *HUMILIATION*, BY WILLIAM IAN MILLER, CORNELL UNIVERSITY PRESS 1993.

What do other people think of us, really? Professor William Ian Miller explores our deep-seated anxieties about self-presentation in his new book, *Humiliation and Other Essays on Honor, Social Discomfort, and Violence.*

Wise and witty, the book explores the humiliation, shame and embarrassment we risk in everyday social encounters and the strategies we use to avoid these painful emotions.

Shame was once the flipside of honor; today,

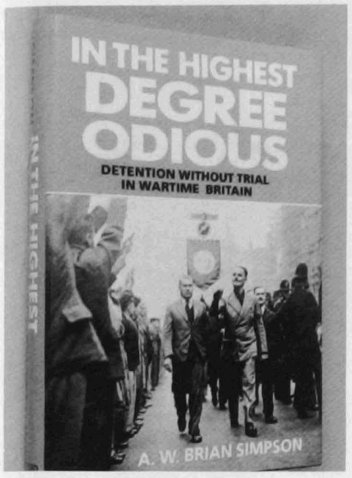



honor keeps a low profile, but it's not extinct. "It has hidden its face, moved to the back regions of consciousness, been kicked out of public discourse, (but) honor still looms large in many areas of our social life," Miller writes. Honor's opposite, shame, has been replaced by humiliation and embarrassment, the key emotions that support our self-esteem and self-respect.

Miller is a professor of law, a historian of medieval Iceland, a literary critic, a philologist and a sharp social observer. He uses dinner parties, Valentine exchanges and the multitude of pains inherent in routine social interaction along with Shakespeare, crimes, and the occasional saga to illuminate how we are driven by humiliation (or fear of it) to protect our image and self-image. The effect is both entertaining and unsettling. The book, which the publisher nominated for a Pulitzer prize, has drawn positive reviews. *Kirkus Reviews* said it is written "with ranging and learned references, a wry and unpretentious style and a genuine respect for the power of those ancient, forgotten sources on which modern social exchange depends."

### *IN THE HIGHEST DEGREE ODIOUS - DETENTION WITHOUT TRIAL IN WARTIME BRITAIN*, BY BRIAN SIMPSON, OXFORD UNIVERSITY PRESS, 1992.

During World War II, the British government detained without trial just under 2,000 of its own citizens, on the grounds that they were a threat to national security. In his new book about this practice, Professor Brian Simpson offers a comprehensive history of the origins and




evolution of the power of detention without trial. He describes the uses of detention, its effect upon the detainees, the administrative and legal mechanisms involved, and the military, political and legal pressures in play.

Simpson bases his account on interviews with surviving detainees and their families as well as extensive archival research. He says his research was hindered by the British government's refusal to release all surviving official records of detention.

The book's title is taken from a wartime cable by Winston Churchill, who wrote: "The power of the executive to cast a man into prison without formulating any charge known to law, and particularly to deny him the judgment of his peers, is in the highest degree odious and is the foundation of all totalitarian government, whether Nazi or Communist."

Paradoxically, Churchill himself was an advocate of detention during the 1940s. Simpson's book provides the historical context of those dark days that is necessary to understand how detention took place.

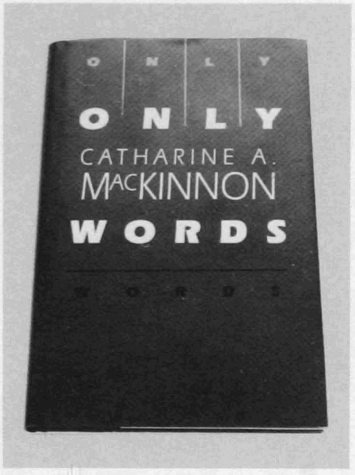
## *Only Words* by Catharine A. MacKinnon, Harvard University Press 1993.

In her new book, Law Professor Catharine MacKinnon argues that pornography, protected by U.S. courts as a form of expression, is not "only words" that do no harm. Rather, pornography is a practice of sexual abuse that discriminates against women, she writes. Her three lectures in *Only Words* explore how First Amendment law conflicts with principles of social equality in the areas of sexual and racial harassment and hate propaganda as well as pornography.

The legal regulation of pornography was cast in First Amendment terms long ago, when women's voices were silenced in society and pornography was mostly in printed form. Since the camera came along, pornography has required "live fodder"— real women forced to commit real sexual acts for the pleasure of the viewing audience, MacKinnon writes. Pornography films don't merely express the idea of sex; they *are* a form of sex, she says. When writing about nude dancing, she says, "To express eroticism is to engage in eroticism, meaning to perform a sex act. To say it is to do it, and to do it is to say it. It is also to do the harm of it."

Still, pornography is "defended as only words, even when it is pictures women had to be directly used to make . . . even when a woman is destroyed in order to say it or show it, or because it was said or shown."

MacKinnon contrasts the legal approaches to pornography and to sexual and racial discrimination. In cases of discrimination, words routinely are regulated as acts. For instance, a "whites only" sign posted on a door is an illegal act of segregation, not protected speech. On the other hand, she points out,




"Pornography essentially is treated as defamation rather than discrimination, conceived in terms of what it says, rather than what it does. Protecting pornography means protecting sexual abuse as speech."

Because courts have shown few qualms about restricting verbal or written discrimination in sexual and racial harassment cases, universities have tried to control expressions of racial hate cropping up on campus by drafting speech codes based on existing, accepted sexual harassment prohibitions, MacKinnon writes. However, in the current trend of First Amendment interpretation, campus anti-discrimination codes are being struck down in the name of academic freedom, and threatening to take sexual harassment policies with them.

"The law of equality and the law of free speech are on a collision course in this country," she writes, pointing out that too often, our reverence for free expression overrides our interest in equality. With issues of social inequality, "law's proper concern here is not with what speech says, but with what it does."

# Imagining reality

SOME SORT OF CHRONICLER I AM,
MIXING EMOTIONAL PERCEPTIONS
AND DIGRESSIONS,

CHOLER, MELANCHOLY,
A SANGUINE VIEW.
THROUGH A TRANSPARENT EYE,
THE NEED, SOMETIMES

TO SEE EVERYTHING
SIMULTANEOUSLY
— STRANGE NEED
TO CONFRONT EVERYONE

WITH EQUAL RESPECT . . .

FROM "SOME SORT
OF CHRONICLER I AM"
IN *BEFORE OUR EYES*

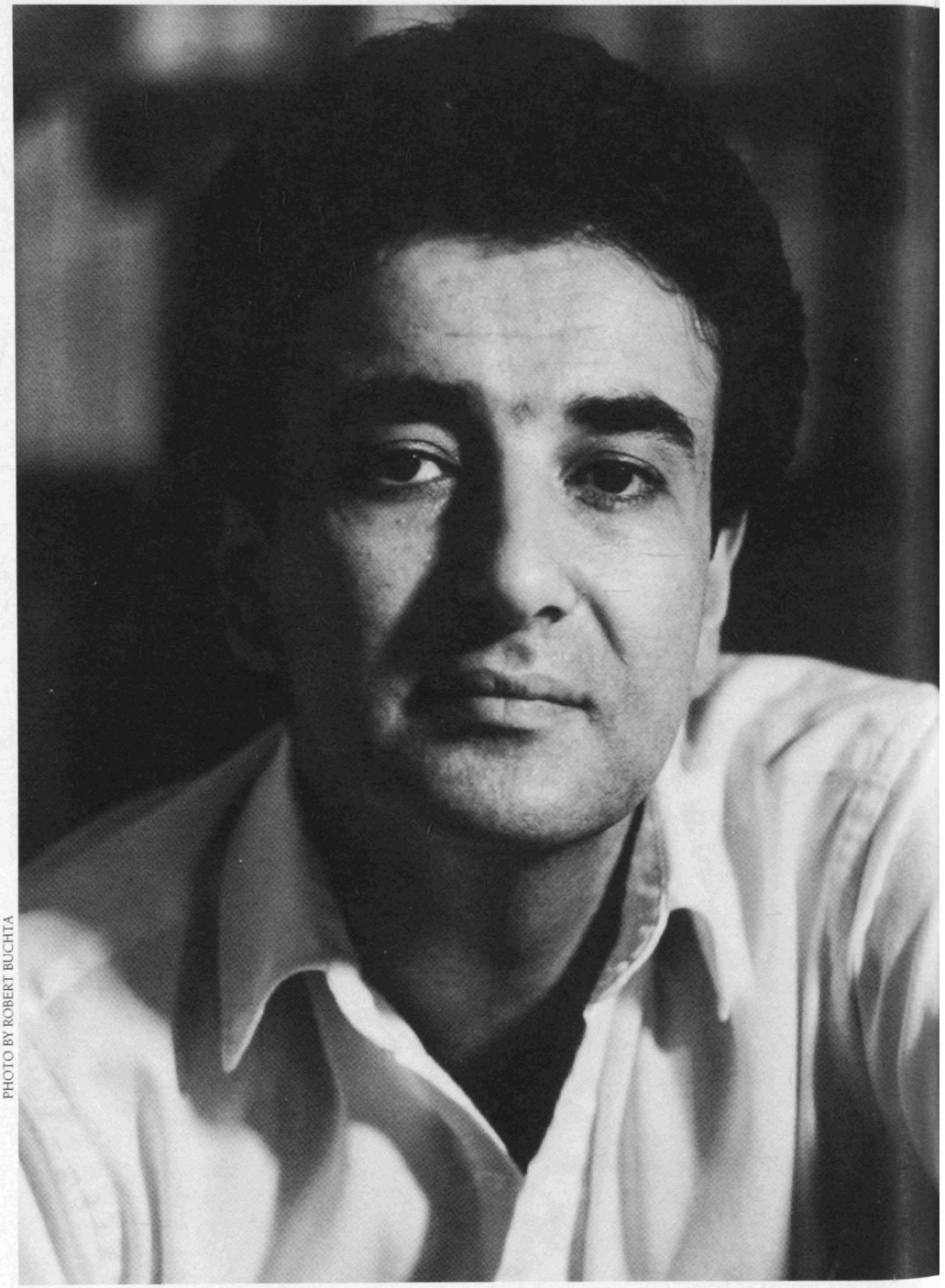


PHOTO BY ROBERT BUCHTA

*Lawrence Joseph*

IN A CONVERSATION with Lawrence Joseph, J.D. '75, imagination and reality are mentioned often.

Opposite concepts? Not for Joseph, a professor at St. John's University School of Law and an accomplished poet. In his new book, *Before Our Eyes* (Farrar, Straus & Giroux, 1993), Joseph uses both his legal and his poetic imagination vividly to portray the realities of our times.

Joseph may be the only legal academic in the country who is also a recognized poet and literary critic. The book, like the two that preceded it, is winning warm reviews. Joseph was in Ann Arbor in October for a book signing, and stopped by the Law School to discuss his poetry.

As he writes in the poem above, Joseph's work sees everything: a bas-relief of Confucius on the wall of a new jail, the chilled colors of a fresh September morning, a flake of light that moves and hypnotizes. In a starred review of *Before Our Eyes, Publisher's Weekly* writes, "In a feast of opposites and tangents, the sensual, the intellectual, the visual, the political and even the corporate and legal come together in Joseph's poems. [This] pays off in luminous observations and revelations, reminding us that this is the stuff for which we turn to poetry in the first place." Of his earlier work, *The Hudson Review* has declared, "Joseph's poems cut to the quick. They gleam with the sharp edge of their truth. They are hard to forget."

Both as a poet and a lawyer, Joseph is intensely attentive to social reality; that's the place where his literary and legal lives overlap. "Because law is a system of practical problem solving, it's a discipline that requires you to become imaginatively involved with different social situations," he says. His poetry may express similar problems, although it does not, as art, resolve them. Instead, poetry paints word pictures that show us, with emotional force, the various worlds we are part of.

U-M Law School Professor Theodore St. Antoine — a former professor of Joseph's, a friend, and a long-time admirer of his poetry — observes, "Surely, at their best, law and poetry share something of a common goal: to use the creative imagination to impose a sense of order on the daunting chaos of everyday phenomena. But so bald a statement does not even hint at the power and the color, the drama and the pain permeating the art with which Larry accomplishes that objective. It may not be long before we can speak of Lawrence Joseph in the same breath with such other worldly-wise poets as Wallace Stevens and William Carlos Williams."

Quite naturally, Joseph at times draws on his lawyer's vocabulary to create poetic images. "Legal language is everywhere in society. There is no reason why poetry can't incorporate it, too. It is part of my verbal palate, part of my vocal range," he says.

Often, Joseph pairs legal terms with a religious metaphor. His work also shows an awareness of social violence. "I think being a lawyer has something to do with that. Lawyers are always dealing with violence. Because there is also a moral side to my imagination, I can't see how not to deal with it, so I bring it to bear as a subject of poetic language."

Joseph sometimes draws images from his own background. The grandson of Lebanese Catholic immigrants, Joseph grew up in Detroit. In *Shouting at No One* (1983), visions of the 1967 Detroit riots and the killing grounds of the Middle East show up alongside more systemic social disintegration. In *Curriculum Vitae* (1988), Joseph explores issues of personal and cultural identity. "The personal side of it isn't important, though," Joseph emphasizes. "My experiences are meant to be metaphorical. They are manifestations of a world anyone could experience.

"In the new book, I continue to confront 'what's before our eyes.' I try to create a poetic space between social pressures and beauty. I put that right up front in the book, in the opening poem: 'The point is to bring/depths to the surface, to elevate/sensuous experience into speech and the social contract.'"

Although for the most part Joseph keeps his poetry separate from his legal work, he combines lawyerly analysis with literary criticism in a fascinating essay, "Theories of Poetry, Theories of Law," published in the *Vanderbilt Law Review* (Vol. 46. No. 5, 1993). In it, he explores the points where ideas about the meaning of language in poetry and in jurisprudence intersect. Even in this abstract area, he doesn't stray too far from reality. He explores these theories by analyzing the opinions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. He concludes that much of the confusion and conflict about legal texts such as *Casey* make more sense if viewed in the light of certain theories of poetic modernism.

Joseph had early recognition as a poet, winning a major Hopwood Award while an undergraduate at the U-M. After earning an honors degree in English

**"In the new book, I continue to confront 'what's before our eyes.' I try to create a poetic space between social pressures and beauty. I put that right up front in the book, in the opening poem: 'The point is to bring/depths to the surface, to elevate/sensuous experience into speech and the social contract.'"**

— LAWRENCE JOSEPH

literature, he did graduate work in English at Cambridge University on a Power Foundation fellowship. Still, he says, "I never thought about being a full-time poet. I wanted to protect the integrity of writing poetry by having another profession. In retrospect, I realize that I've always had the imagination for the kinds of things that law involves."

After law school, Joseph clerked for Michigan Supreme Court Justice G. Mennen Williams. After his clerkship, he taught at the University of Detroit School of Law until 1981. He and his wife, painter Nancy Van Goethem, then moved to New York City, where he was a litigator with Shearman & Sterling. He presently is a professor of law at St. John's; he teaches torts, employment law, jurisprudence and a seminar course in legal interpretation. In the classroom, as in his poetry, his emphasis is on reality. "I frequently ask my students to see themselves in different contexts: a defendant, a plaintiff, a judge. I try to give them an imagined sense of the world in which they'll practice."

Joseph points out that legal language must be carefully crafted to reflect meaning that corresponds to social reality. Poetry must do the same, he argues. "Poetry has to enter into the language of its place and time. Wallace Stevens — he was one of the most respected surety bond lawyers of his time — once said, 'poetry is the transaction between reality and the sensibility of the poet from which it springs.'

"I have, of course — at least in part — a lawyer's sensibility. What my poetry does, in part, is imaginatively transact this sensibility into what is common to us all."

*— by Toni Shears*

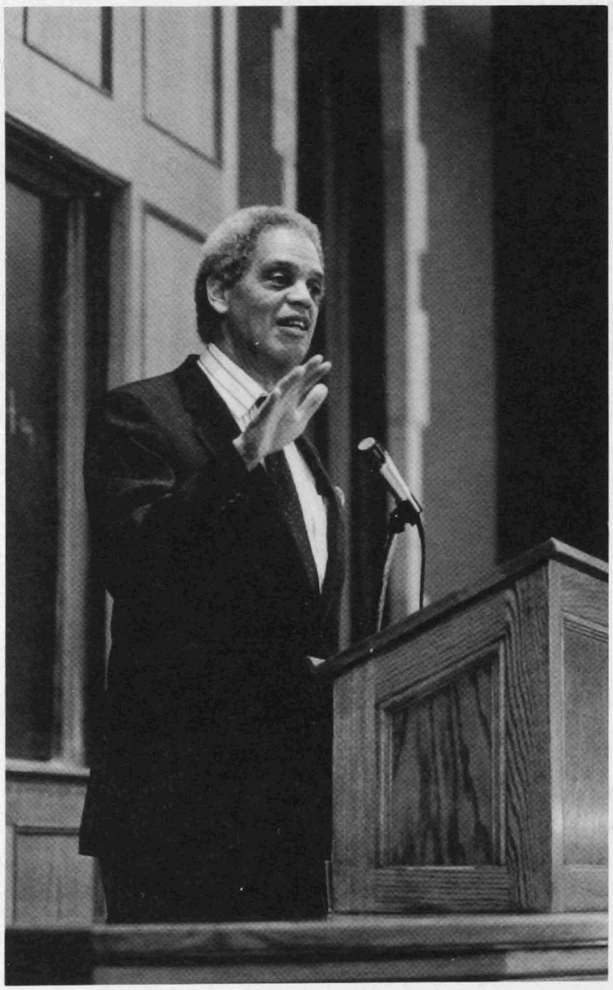
## Wilkins earns honorary doctorate

Roger Wilkins — journalist, lawyer, teacher and former assistant attorney general of the United States — added doctor to his already lengthy list of titles in December.

Wilkins, J.D. '56, A.B. '53, received an honorary doctorate of humane letters from the University of Michigan at winter commencement exercises. He was honored for his efforts to secure civil rights and challenge racism in all his endeavors.

In a brief address to the 2,000 graduates, he shared "Old Doc Wilkins' Three Rules of Life":

1. Nothing you do in life will be more important than being a parent.
2. You have an obligation to help the most vulnerable people and this vulnerable planet.
3. Have fun.



*Roger Wilkins*

Wilkins practiced law for two years before joining the U.S. Department of State in 1962. He served as assistant attorney general from 1966-69. The Law School's only Pulitzer Prize-winning graduate, Wilkins was an editorial writer at the Washington Post during the Watergate years. He was a member of the editorial board and a columnist at the New York Times from 1974-79. He now is the Clarence J. Robinson Professor of History and American Culture at George Mason University and a network commentator for National Public Radio.

A Grand Rapids, Mich. native, Wilkins was proud to come home to his alma mater to receive another degree. "You know, you can get honorary degrees in other places, but when they say, 'Hey, c'mon home, we like you,' that's the best thing that can happen," he told the crowd.

## Tropical Justice

*Peter T. Hoffman points to the tropical islands where he now is a Supreme Court Justice.*

NEBRASKA STATE BAR ASSOCIATION PHOTO

Peter T. Hoffman, J.D. 71, has traded the classroom for the courtroom bench and the winter winds of Nebraska for tropical islands.

Hoffman, the Earl Dunlap Distinguished Professor of Law at the University of Nebraska, took a two-year leave of absence to become a Supreme Court justice in the Republic of Palau. Palau is a chain of islands in the western Pacific Ocean, about 500 miles east of the Philippines.

Hoffman knows the islands because his wife, De Lora Nobuo, was born there. He had hoped to take a sabbatical there, but hadn't planned on becoming a justice. A friend told him about an opening on the court, so he submitted his name to the Judicial Nominating Commission along with about 250 other contenders. After an interview with commission members in San Francisco, Hoffman made the list of seven candidates submitted to Palau President Kuniwo Nakamura, who tapped him for the post.

Palau is a United Nations Trust Territory which has been administered by the United States for 50 years. It's scheduled to become independent next year. Hoffman will be one of four justices on the court. He expects to face a docket with a fair proportion of property disputes. "There is a heavy docket delay, and I've been informed there will be a substantial number of cases when I assume the post," he told the *Nebraska State Bar Association News.*

With a total population of about 1,600, the islands are a relaxed and beautiful place. Hoffman is planning to slow down and spend more time with his family, he said. His wife is looking forward to visiting her home and being surrounded by ocean instead of corn. Daughter Sarah, 12, wants to try scuba diving, and 1-year-old Alice is practicing to climb coconut trees by scaling their furniture, he joked.

Hoffman was director of the U-M Law School's Clinical Law Program in 1972-73. He joined the Nebraska faculty in 1974, and is coordinator of clinical legal education there. He was the Sherman S. Welpton Jr. Professor of Trial Advocacy from 1988-90 and the Law College Distinguished Professor of Trial Advocacy in 1991.

*— Adapted with permission from the* Nebraska State Bar Association News *and the National Institute for Trial Advocacy's* Docket.

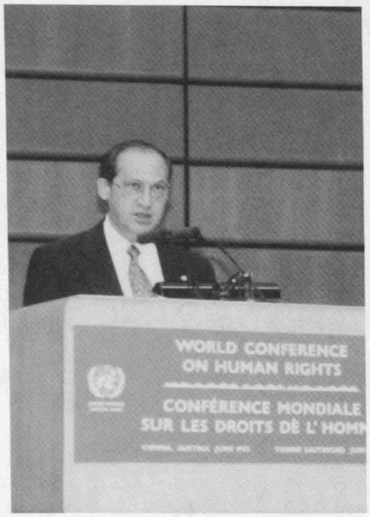
## Fiske named independent counsel

Robert B. Fiske, Jr., J.D. '55, has been named independent counsel for an investigation of President Bill Clinton's real estate investments.

U.S. Attorney General Janet Reno appointed Fiske and gave him broad jurisdiction to look into the president and Hillary Rodham Clinton's involvement with the Whitewater real estate development, its developer, James McDougal, and the now-defunct Madison Guaranty Savings and Loan Association McDougal owned. According to news accounts, Fiske will take testimony directly from the Clintons about these matters. He'll also look into the death of former White House Deputy Counsel Vincent Foster, a longtime Clinton associate, who had the Clintons' Whitewater papers when he committed suicide.

Fiske is a partner at Davis, Polk & Wardwell of New York. He served as U.S. Attorney in New York from 1976-80, and chaired the American Bar Association Committee on the Federal Judiciary from 1984-87. He is known for his integrity and thoroughness. He has handled many complex, high-profile cases, including Clark Clifford's role in the Bank of Credit and Commerce International scandal — a case that did not go to trial because of Clifford's ill health.

PHOTO BY HEINZ PFEIFER FOTO STUDIO




*Ricardo Castaneda, El Salvador's ambassador to the United Nations since 1989, presided over the World Conference on Human Rights held in Vienna in 1993. Castaneda also has been involved in negotiating and implementing the 1992 peace agreement between the government of El Salvador and the former guerrilla rebels. He studied corporate, tax and public international law at the Law School in 1967-68.*

## Moving up in Washington

LQN recently learned of several more Law School graduates named to posts in the federal government.

Washington, D.C. lawyer Susan Esserman, J.D. '77, has been nominated as the assistant secretary of commerce for import administration. A partner at Steptoe & Johnson, she is an expert in international trade policy. The U.S. Trade Representative appointed her to serve on the U.S.-Canada Binational Panel from 1989-91.

At the Securities and Exchange Commission, Simon Lorne has been named general counsel. Lorne, formerly a Los Angeles securities and corporation lawyer with Munger, Tolles and Olson, is a 1970 graduate. Gary Sundick, J.D. '66, has been promoted to associate enforcement director for the SEC. In his new role, he will oversee several groups responsible for enforcement investigations and will be in charge of the division's Office of Market Surveillance.

## Kane named dean at Hastings

Mary Kay Kane, J.D. '71, A.B. '68, has been named dean of Hastings College of the Law. She is the first female to lead California's oldest and largest law school.

Kane, 47, has been a member of the Hastings faculty since 1977 and academic dean since 1990. As academic dean, she has revamped the first-year curriculum to include more focus on how administrative agencies and complex regulations shape laws.

A nationally-known expert on civil procedure, she has written eight volumes of the treatise *Federal Practice and Procedure* and several other books. She served as associate reporter for the American Law Institute's Complex Litigation Project, and has been active in national legal education affairs.

Kane earned a bachelor's degree in English with honors at the U-M before pursuing her law degree. She began her academic career as a research assistant to Professor Arthur Miller, first at the U-M and then at Harvard Law School. From 1971-74, she was co-director of a National Science Foundation project on privacy and social science. She taught at State University of New York at Buffalo Law School before joining the Hastings faculty.

U-M Law School Associate Dean Edward Cooper knows Kane as a teacher from her visit here and as a "co-author once removed." He noted, "Her achievements as a scholar, a teacher and an active worker in law reform efforts are superb, fully matching her towering reputation. Her involvement in the affairs of legal education and her years as academic dean ensure that she will excel in her new role as dean."

PHOTO BY BRUCE COOK PHOTOGRAPHY

*Mary Kay Kane*

*Ria Majeske*

## A Good Match

Ria Majeske, J.D. '83, has a new job helping single mothers find and keep jobs.

Majeske, a former litigator and corporate lawyer, is an administrator for Project Match, a welfare-to-work program for women in Chicago's Cabrini-Green housing development. She joined the program in the fall of 1992. She's an example of an attorney who is finding great rewards putting her skills to work outside the legal world.

"I like making wheels move; I like seeing the impact of what I do. Sometimes as an attorney, what I did seemed to be miles away from any decision that would have any impact on anybody. Here, I feel like I am contributing to improving our clients' lives," she says.

Project Match, which has both a research and service mission, helps clients move toward economic independence. It helps place clients in jobs and training or education programs. More importantly, it provides clients with crucial support for three to five years to help them *keep* their jobs, find new ones if they lose their jobs and advance to better jobs when they are ready.

"Many job welfare-to-work programs stop working with clients when they place them in a job, but a high percentage of people don't stay placed," Majeske says. "We're there to support clients any way we can, for as long as we can, to help them overcome barriers to stable employment."

In part, clients lose jobs because they haven't acquired the work habits needed to keep one. "People who have never had jobs have never learned to be on time, to call in when they will be absent or to resolve problems with co-workers. Entering the work world is a real adjustment process and it's easy to slip off track," she explains.

Sometimes, clients struggling to get ahead are held back by family and friends who feel threatened by a member of the community who is trying to improve her situation.

On top of that, clients have little experience at success. They often have struggled in school, lost jobs or dropped out of training programs. "Most of our clients consider themselves failures. They are going into a new job with many fears, expecting more failure. We to help them see that there are reasons why they failed and try to help them to overcome their fears and expect success," Majeske says.

Since the Project Match staff is small, Majeske does a bit of everything. "I write grant proposals, prepare position papers for policymakers, manage finances, order supplies and serve as my own secretary," she says with a laugh. "The part I like best is working with program participants and their children. I do that as editor of two client newspapers and as the coordinator of our two service offices, both in Cabrini's health clinic."

Majeske "retired" from legal practice in 1989 after four years as a litigator and two years in corporate law in a large firm. She found that neither job was a good match for her personality. Still, she didn't go straight from the firm to the projects. When she left the law, she pursued a doctorate in Latin and ancient Greek. She also began tutoring young students from Cabrini-Green. That helped her realize that she really wanted to work with inner-city residents. When the Project Match job turned up, however, Majeske wasn't sure she had the skills for the job.

"I thought, 'What in the heck can I do except write briefs,'" she recalls. "I just threw myself into it , learned as I went and found out that I adapted quite easily." She had in hand her basic lawyering skills like analytical thinking and strong writing, which translated nicely. "Law gave me practice at directing my writing toward a specific audience, which has been helpful in preparing grant proposals and policy reports. The harried pace I worked at as an attorney has helped, too." Project Match runs at the same hectic activity level found in large firms, and she thrives working under those conditions. "If I can't work on several projects simultaneously, clients simply won't get the support they need," she says.

# CLASS *notes*

## 1930

**James Montante,** a retired judge of the Third Judicial Circuit of Wayne County, recently was honored by the Italian American Bar Association for his service as president of that organization 50 years ago.

## 1932

Southfield attorney **Albert Silber** was inducted into the Jewish Sports Hall of Fame in November. A track and field athlete in the 1920s and '30s, he narrowly missed competing on the 1932 U.S. Olympic track team. He was selected for the U.S. Touring Team and finished second in the Canadian National Championships in 1932.

## 1938

**R. Stuart Hoffius,** the retired chief judge of Kent County Circuit Court, received a Champion of Justice Award at the State Bar of Michigan annual meeting in October. The award recognizes his extraordinary professional accomplishments, competence, integrity and community involvement.

**Isadore A. Honig** recently was recognized for more than 40 years of federal service, including 17 years as an administrative law judge for the Federal Communications Commission. The Federal Bar Association of Washington, D.C. presented him with a plaque in gratitude for his service to the legal profession and the association.

## 1940

**Eugene Gressman** co-authored the seventh edition of *Supreme Court Practice,* published late in 1993. This reference standard contains detailed descriptions of procedures involved in arguing every kind of case before the court. He and Robert L. Stern wrote the first edition of the book published in 1950. Gressman is a professor of law emeritus at the University of North Carolina and a visiting professor at Seton Hall University School of Law.

## 1945

**William Houston** has been named chair of the Pennsylvania Joint State Government Commission's Advisory Committee on Decedents' Estates Laws. The committee assists a legislative task force in drafting probate and trust law. Houston has served on the committee for 22 years.

## 1951

**Shelton C. Penn,** a retired Calhoun County district judge, and his wife, Sadie, jointly received the Distinguished Citizen Award from the Southwest Michigan Council of the Boy Scouts of America. They are Battle Creek residents.

## 1952

**John Jay Douglass,** dean of the National College of District Attorneys, recently attended a workshop on election law in Kiev, Ukraine. The workshop was held to review a draft of an election law, which was needed to hold a national election in March 1994. Douglass took part in the workshop as a representative of the Central and Eastern Europe Legal Initiative, a program of the American Bar Association.

## 1954

40TH REUNION

**The Class of '54 reunion will be Sept. 23-25, 1994**

**Stephen A. Bromberg,** a director and shareholder in the Birmingham office of Butzel Long, has been named to the board of directors of Detroit Symphony Orchestra Hall, Inc.

## 1956

**Eric Bergsten** has been appointed visiting professor of international organizations and international commercial transactions at Pace University School of Law in White Plains, N.Y.

**Charles B. Renfrew,** legal vice president at Chevron since 1983, retired in October. Before joining Chevron, he was a deputy U.S. attorney and a U.S. district judge in California.

## 1959

35TH REUNION

**The Class of '59 reunion will be Sept. 23-25, 1994.**

**Paul K. Gaston** has been named chairman of the board of directors for Guardsman Products Inc. of Grand Rapids, Mich. A specialist in corporate law, he has served as lead counsel in more than 100 acquisitions and divestitures. He has served as a director on the Guardsman board since 1986.

**Lawrence A. Jegen III,** professor of law at Indiana University School of Law — Indianapolis, was granted the Thomas Hart Benton Mural Medallion. This is the highest award granted by Indiana University for service to the school and fulfillment of its ideals.

## 1960

**Norman L. Miller,** a Navy captain, recently received the Navy Commendation Medal for meritorious service at the Naval and Marine Corps Reserve Readiness Center in Phoenix, Ariz., where he is assigned.

## 1962

**William M. Brukoff** has joined the Southfield, Mich. firm of Sommers, Schwartz, Silver and Schwartz as a principal.

**Thomas P. Scholler** now is of counsel to the Grand Rapids law firm of Smith, Haughey, Rice & Roegge. He specializes in business law and estate planning.

**Gerald J. Strick** is "retiring" from his law practice for the second time, to teach as a visiting professor at the Arizona State University College of Law during winter term 1994. A partner at Treon, Strick, Lucia & Aguirre in Phoenix, Strick is listed in The Best Lawyers in America in the personal injury litigation section. His first "retirement" was from 1971-1983, when he served as judge of the Superior Court of Arizona.

## 1963

**Robert Z. Feldstein** is listed in The Best Lawyers in America.

**James W. Smith,** formerly of Hatch & Smith, has joined the Kalamazoo, Mich., firm of Dietrich, Zody, Howard & VanderRoest as a shareholder.

## 1964

30TH REUNION

**The Class of '64 reunion will be Sept. 23-25, 1994.**

**Frank L. Hartman** has been promoted to vice president and general counsel for Cleveland-Cliffs Inc. The corporation's subsidiaries manage six iron ore mines in North American and Australia.

**James J. Nack,** of the firm Nack, Richardson & Kelly in Galena, Ill., has been re-elected to a three-year term on Attorneys' Title Guaranty Fund, Inc. board of directors.

**James F. Traer** has been named the 18th president of Westminster College in Fulton, Mo.

## 1965

**Paul F. Dauer** has been named chair of the California Continuing Education of the Bar Governing Board. He served as chair of the board for two terms in 1985-87; he is the only person in the group's history to serve a third term.

## 1966

**E. Edward Hood,** a partner at Dykema Gossett, has been elected to the firm's executive committee. Hood, a former Ann Arbor city council member, specializes in the areas of commercial litigation, libel law, and construction litigation.

**Richard E. Rassel,** a director and shareholder in the firm of Butzel Long, has been elected to the executive committee of the board of directors of Lex Mundi.

**Stuart Unger** has been named vice president-senior associate general counsel for ITT Real Estate Services. He will oversee all legal affairs relating to the company's real estate transactions.

## 1967

**Samuel J. Goodman** has been elected to a three-year term on the American Bar Association Family Law Section Council. He will represent Region 3, which includes Indiana, Illinois, Ohio, Kentucky, Michigan and Wisconsin. Goodman practices law in Highland, Ind., with the firm of Goodman, Ball & Van Bokkelen, P.C.

**James J. Podell** has been elected chair of the American Bar Association Family Law Section. He previously served as chair of the family law sections of the Milwaukee and Wisconsin bar associations.

## 1968

**Joseph J. Kalo,** a professor at the University of North Carolina School of Law, has been named the Graham Kenan Professor of Law there. He teaches courses on property, ocean, admiralty and coastal law as well as water law policy, civil procedure, evidence and trial advocacy.

**John M. Kamins** of Honigman Miller Schwartz and Cohn has been elected chair of the Public Corporation Law Section of the State Bar of Michigan.

**Harvey A. Rosenzweig** joined the Atlanta firm of Troutman Sanders as a partner. He represents corporate clients in environmental regulatory and litigation matters before the Environmental Protection Agency, state agencies and state and federal courts.

**Lee Zelle** of Springfield, Ill. has been recognized as the top producer of title insurance policies for the Attorneys' Title Guaranty Fund Inc.

## 1969

25TH REUNION

**The Class of '69 reunion will be Sept. 23-25, 1994.**

**J. Richardson Johnson** has been appointed by Michigan Gov. John Engler to the Kalamazoo County Circuit Court. He was a partner in the Kalamazoo firm of Early, Lennon, Peters & Crocker, P.C.

## 1970

**Caryl. A. Yzenbaard,** a professor of law at Chase College of Law, Northern Kentucky University, recently received the Justice Robert O. Lukowsky Award for teaching excellence from the Student Bar Association. It was the third time she has received this award. She recently has completed supplements to her books, *Kentucky Real Estate Contracts* and *Residential Real Estate Transactions,* as well as two chapters for the forthcoming treatise Thompson on Property.

## 1972

**Robert D. Brower,** a managing member of Miller, Johnson, Snell & Cummiskey in Grand Rapids, Mich., has been elected chair of the Council of the Probate and Estate Planning Section of the State Bar of Michigan.

## 1973

**Steven Greenwald** has joined the firm of Davis Wright Tremain in San Francisco, where he practices energy and regulatory law. He formerly was with Skadden, Arps, Slate, Meagher and Flom.

**Jan. D. Halverson** has been elected to the board of directors at Felhaber, Larson, Fenlon & Vogt, P.A., in Minneapolis-St. Paul.

**Kathleen McCree Lewis,** a partner at Dykema Gossett, has been named to the board of directors of Jacobson's Stores, Inc.

**Philip J. Prygoski** was awarded the 1992-93 Outstanding Professor Award by the Student Bar Association at the University of Tennessee College of Law. He is the first visiting professor to win the award at Tennessee.

## 1974

20TH REUNION

**The Class of '74 reunion will be Oct. 28-30, 1994.**

**Arnold P. Borish** has opened a law practice in Norristown, Pa. He previously was a shareholder in the Philadelphia firm of Hangley Connolly Epstein Chicco Foxman & Ewing, There, he was president for five years and managing shareholder from 1987-91.

**Michael A. Snapper** now is chair of the 20-member Employment Law Section at the Grand Rapids firm of Miller, Johnson, Snell & Cummiskey. His classmate, **J. Michael Smith,** has been appointed to chair the firm's Environmental Practice Section.

# Class notes

## 1975

**Eric Eisen,** formerly a partner of Birch, Horton, Bittner & Cherot, recently established his own practice in Washington, D.C. He represents state government agencies and energy users in utility regulatory matters.

**Martin T. McCue** has joined Rochester Tel as the vice president of corporate planning. He will lead a newly formed group of strategic planners that will assess the short and long-term business strategies of the corporation.

**David H. Paruch,** a partner in the Detroit firm of Clark, Klein & Beaumont, recently completed a year of service as chair of the Antitrust, Franchising and Trade Regulation Section of the State Bar of Michigan. He has been elected chair of the Michigan Chapter of the American Immigration Lawyers Association for 1993-94. He also has been elected chair of the board of directors of the Boys & Girls Club of South Oakland County.

**Matthew Van Hook** of the American Forest & Paper Association has been promoted to vice president of its Pulp Group and international environmental counsel.

## 1977

**Vincent Chiappetta** has joined Tektronix Inc. as vice president and general operations counsel. Tektronix is a leading manufacturer of electronics products for testing and measurement, computer graphics and television systems. Chiappetta previously was associate general counsel with Levi Strauss & Co.

## 1979

15TH REUNION

**The Class of '79 reunion will be Oct. 28-30, 1994.**

**Steven M. Fetter** has joined Fitch Investors Service Inc. of New York City as senior vice president and director of regulatory and governmental affairs in the firm's Global Power Group.

**Miriam J. Frank** has joined the Chicago office of Major, Wilson & Africa, an attorney search consultant firm.

## 1980

Chicago-area graduates from the classes of 1979 and '80 met informally for dinner and discussion at Maggiano's Restaurant in November. The group plans to meet periodically to discuss topics of common interest. In attendance from the class of '80 were **Sylvia L. Bateman, Tracy C. Beggs, Jill Merkovitz Coleman, G.A. Finch, Steven L. Gillman, Daniel S. Hefter, Geoffrey L. Isaac, David M. Lesser, James K. Markey, William J. Noble, Beatriz M. Olivera, Joseph E. Tilson** and **Steven A. Weiss. Miriam J. Frank** represented the class of '79. Classmates interested in attending future gatherings should contact any of the attendees for information.

**Paula R. Latovick** has joined the faculty of the Thomas M. Cooley Law School in Lansing, where she will teach courses in property law.

**Michael F. Keeley** now is deputy mayor for city services in Los Angeles. He oversees the city's Department of Water and Power, Airports Department and Harbor Department. Formerly a law partner of new L.A. Mayor **Richard Riordan,** J.D.'56, Keeley now serves as the mayor's eyes and ears for the city's Public Works, General Services, Information Services and Telecommunications departments. He is responsible for privatizing certain city services. Keeley reports that he is also the city's first openly gay deputy mayor.

**Elizabeth C. Yen,** a partner at Pullman & Comley in Bridgeport, Conn., has been appointed chair of the Connecticut Bar Association Publications Committee.

## 1981

**William H. Fallon** has been named vice chair of the 20-member Employment Law Section at the Grand Rapids firm of Miller, Johnson, Snell & Cummiskey.

## 1982

**Robert D. Kraus** has been promoted to senior counsel at American Express Travel Related Services Co. He is in charge of Amex's domestic banking businesses, with responsibility for corporate finance needs, marketing, legal issues and regulatory compliance. He also counsels a data-based marketing subsidiary.

*Crain's Detroit Business* named **Michael P. McGee** to its "40 Under 40" list for 1993. The list profiles accomplished executives younger than age 40. McGee, of Miller, Canfield, Paddock and Stone, practices in the area of municipal finance law, with an emphasis on solid waste management and regulation, school finance and economic development law. He is a member of the Livonia City Council, the Wayne County Solid Waste Planning Committee, the Schoolcraft College Foundation and the Livonia Chamber of Commerce.

**Ellen S. Carmody** has been named shareholder at the Grand Rapids firm of Law Weathers & Richardson. She specializes in civil and commercial litigation and in special education and mental health law.

**Hugh Hewitt** now writes a column on political and business topics for the Orange County Business Journal in California. Formerly an assistant counsel to the Reagan White House, Hewitt also co-hosts a television show called "Life & Times" that airs three times a week on Los Angeles station KCET-TV and hosts a weekly radio show on KFI-AM.

## 1984

10TH REUNION

**The Class of '84 reunion will be Oct. 28-30, 1994.**

**Marjorie Sybul Adams** has been named a partner at Gordon Altman Butowsky Weitzen Shalov & Wein in New York, where she specializes in corporate and securities law.

**Leonard M. Niehoff,** an attorney with Butzel Long in Ann Arbor, wrote about the life and career of David Davis in the Supreme Court Historical Society book, *The Supreme Court Justices: Illustrated Biographies 1789-1993.* Niehoff recently attended a publication ceremony in Washington, where the book was presented to Chief Justice William Rehnquist.

**Steven R. Heacock,** a partner in the Grand Rapids firm of Warner, Norcross & Judd, has been appointed by Michigan Gov. John Engler to the Interagency Coordinating Council for Handicapped Infants and Toddlers.

**Eric J. Sinrod** recently published an article entitled "Blocking Access to Government Information Under the New Personal Privacy Rule" in the Seton Hall Law Review, Vol. 24, No. 1 (1993).

## 1985

**Emil Arca** has been named partner at Winston & Strawn in New York City. He practices in the area of structured finance/ asset securitization.

**Kathryn L. Biberstein** has been named general counsel and head of the corporate legal department for the Ares-Serono Group, a leading Swiss developer of pharmaceutical and medical diagnostic products. The group operates subsidiaries and production facilities in more than 20 countries.

**Thomas N. Bulleit Jr.** has been elected to the partnership of Hogan & Hartson in Washington, D.C. He specializes in health care law and technology transfer law.

**Michael J. Mueller** has become a partner in the firm of Akin, Gump, Strauss, Hauer & Feld in Washington, D.C. He specializes in complex commercial litigation.

**John R. Turner** has been named partner at the Detroit law firm of Clark, Klein & Beaumont. He and his wife, Jennifer, live in Birmingham with their three children.

## 1986

**John M. Genga** has been named partner at the Los Angeles firm of Hill Wynne Troop & Meisinger. His practice is in business litigation, with an emphasis on copyright and entertainment matters.

**Paul C. Nightingale** has been named partner at the Boston firm of Goodwin, Procter & Hoar. His practice concentrates in environmental law.

## 1987

**Susan Bragdon** has been appointed to the seven-member interim secretariat of the Convention on Biodiversity in Geneva. The secretariat helps governments implement the treaty on biodiversity signed at the Rio Earth Summit in 1992. Bragdon, an environmental lawyer and biologist, has been deeply involved in convention negotiations.

**Sally J. Churchill** now is an associate at Honigman Miller Schwartz and Cohn. She concentrates her practice in environmental law at the firm's Detroit office.

**Edward L. Friedman** has been named partner in the Houston firm of Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P.

**Frances W. Hamermesh** has moved from Lansing, Mich. to Austin, Texas and has joined the law firm of Davis & Wilkerson, P.C., as an associate concentrating in health care and housing law.

**Lori F. Hirsch** now is senior attorney at Merck & Co. at Whitehouse Station, N.J.

**James M. Recker** has been named vice president and chief counsel of AT&T Systems Leasing Corp., an AT&T subsidiary in Bloomfield Hills, Mich.

**Mary Ann Sarosi** has been named the executive director of the coordinated advice and referral program for Legal Services in Chicago.

**Paul D. Seyferth** has joined the Kansas City office of Husch & Eppenberger.

**Jianyang Yu** left the patent agency of CCPIT to join the newly formed law firm of Liu, Shen & Associates as a partner. This is the first private law firm in China focusing on transnational intellectual property and related laws.

## 1988

**Jacqueline K. Lisle** has joined the law offices of Herbert S. Klein in Telluride, Co.

**Mark Morton** has been named partner at Honigman Miller Schwartz and Cohn. He concentrates his practice in tax, estate planning and litigation at the firm's Lansing, Mich. office.

## 1989

5TH REUNION

**The Class of '89 reunion will be Oct. 28-30, 1994.**

**Diane I. Bonina** rejoined Jenner & Block as an associate in August 1993.

**Denise D. Couling** has joined her father's law practice in Grand Blanc, Mich. The firm now is named Sheehan & Couling, P.C.

**John O. Knappmann** recently was elected president of the Michigan Young Democrats. He is currently practicing with the Wayne County Prosecutor, specializing in juvenile delinquency cases.

## 1990

**David A. Breuch** has been named associate at the Detroit firm of Clark, Klein & Beaumont.

**Adam I. Fuezy** has joined the firm of Carroll, Burdick & McDonough in Sacramento as an associate in its corporate and real estate departments.

**Mary I. Hiniker** has been named publications director for the Institute of Continuing Legal Education. She worked in ICLE's Publications Department for 13 years before earning her law degree and practicing for three years with Dykema Gossett in Ann Arbor.

**Duncan MacDonald** has joined the litigation practice at Gutierrez & Associates, the largest Hispanic-owned law firm in Northern California. MacDonald previously practiced at Rogers, Joseph, O'Donnell & Quinn in San Francisco.

**Christopher White** has joined Brown, Rudnick, Freed & Gesmer as an associate in the firm's corporate practice. He is based in the Boston office.

# CLASS *notes*

## 1991

**David Bulbow** has joined the Dallas County Public Defenders Office as a trial attorney. He formerly was associated with Gardere & Wynne of Dallas.

**Kevin T. Conroy** has joined the Chicago office of McDermott, Will & Emery as an associate in the litigation department.

**Barbara L. McQuade** has joined Butzel Long as an associate at the firm's Detroit office.

## 1992

**Andrea Hansen** has become an associate at Honigman Miller Schwartz and Cohn. She concentrates her practice in litigation at the firm's Lansing office.

**Charyn A. Sikkenga** has joined the Lansing law firm of Fraser Trebilock Davis & Foster.

## 1993

**Amy J. Broman** has joined the Ann Arbor office of Miller, Canfield, Paddock and Stone. She is an associate in the firm's Health Law Department.

**Diane Benedict Cabbell** has joined the Detroit office of Miller, Canfield, Paddock and Stone. She is an associate in the Business Services Department.

**Daniel M. Halprin** has joined the firm of Honigman Miller Schwartz and Cohn as an associate. He concentrates his practice in real estate law at the firm's Detroit office.

**Daniel M. Israel** has joined the Cleveland, Ohio firm of Baker & Hostetler as an associate.

Through a fellowship with the Black Congressional Caucus, **Kirra Jarratt** is working on the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee. She works primarily on criminal law and Civil Rights Commission issues.

**S. Lee Johnson** has joined Honigman Miller Schwartz and Cohn as an associate. He concentrates his practice in environmental law at the firm's Detroit office.

**James J. Pecora** has opened a solo practice in Pittsburgh specializing in construction law.

**Mark D. Sanor** has joined the Cleveland firm of Hahn Loeser Parks as an associate. He will work in the area of business and corporate law.

**Michelle Epstein Taigman** has joined Honigman Miller Schwarz and Cohn as an associate. She concentrates her practice in bankruptcy and commercial law at the firm's Detroit office.

**Robynn L. Van Patten** has joined Cohen, Shapiro, Polisher, Shiekman and Cohen of Philadelphia as an associate in the firm's health care department.

**James R. Wierenga** has joined the Grand Rapids, Mich. firm of Miller, Johnson, Snell & Cummiskey, where he practices in the areas of business law and litigation.

# IN *memoriam*

| | | |
|---|---|---|
| '22 | Fredric P.G. Lattner | Aug. 1, 1993 |
| '23 | George F. Malcolm | |
| '26 | Arnold T. Fleig | Dec. 21, 1993 |
| | William D. Gowans | |
| '27 | Milo Tipton | Oct. 26, 1993 |
| '29 | Stuart W. Hill | |
| | Albert E. Sawyer | Dec. 30, 1993 |
| | Miles G. Seeley | |
| | Gerald E. White | |
| '30 | Elizabeth Quinn | Aug. 23, 1993 |
| | Norton P. Rider | Sept. 1, 1993 |
| | Louis Gomberg | Nov. 15, 1993 |
| | Howard A. Mills | Sept. 1, 1993 |
| '33 | Walter R. McLean | Oct. 29, 1993 |
| '34 | Lee Olwell | May 29, 1993 |
| '35 | Herbert Milliken | Feb. 13, 1993 |
| | Milton C. Selander | Aug. 7, 1993 |
| '37 | Max B. Maloney | |
| | Ray L. Potter | Aug. 20, 1993 |
| '38 | M. Howard Vielmetti | |
| '40 | John C. Clark | Oct. 14, 1993 |
| | Moffatt Hancock | Dec. 5, 1993 |
| '41 | George E. Bowles | |
| '42 | Elihu M. Hyndman | Oct. 24, 1993 |
| '43 | Malcolm M. Davisson | Oct. 26, 1993 |
| '46 | R. Arnold Kramer | July 14, 1993 |
| '48 | Edward M. Hinde | Aug. 11, 1993 |
| | Roderick J. Luther | Oct. 4, 1993 |
| | Kenneth A. Millard | July 24, 1993 |
| | Robert J. Pattee | April 20, 1993 |
| | William V. Sowers | Sept. 15, 1993 |
| '49 | John C. Emery Jr. | Aug. 10, 1993 |
| | William Peterson | |
| '50 | Thaxton Hanson | Sept. 30, 1993 |
| | Francis M. Krohn | July 15, 1993 |
| '51 | M. Richard Leitz | Oct. 3, 1993 |
| '52 | William A. Young | July 7, 1993 |
| '54 | Kenneth H. Otten | Nov. 4, 1993 |
| | Robert H. Pick | Aug. 25, 1993 |
| '66 | Donald A. Guritz | Nov. 7, 1993 |
| '69 | Fredric Rosenblatt | Sept. 22, 1993 |
| '74 | Ellen J. Alter | Sept. 18, 1993 |
| '75 | Elaine W. Milliken | Oct. 6, 1993 |
| '78 | Stephen J. Field | Dec. 5, 1993 |
| | Thomas N. Moss | |
| '79 | Kathleen J. Beck | May 1, 1993 |
| | Stephen H. Whitmore | Oct. 27, 1993 |
| '80 | Daniel P. Ramthun | Dec. 24, 1993 |
| '83 | Joan E. Nelson | March 9, 1993 |
| | Steven Seidler | |

# Reunion '93 — reliving memories, renewing friendships

Ever wanted to do dishes in the Lawyers Club for old times' sake? Or spend an afternoon with friends on the porch at Dominick's? Or roam the Legal Research stacks searching for that one favorite carrel where you logged in hundreds of hours preparing for exams?

These are just a few of the Law School memories that more than 900 graduates of the fifth through the 50th reunion classes relived with their families during Reunion 1993.

But reunions at the U-M Law School offer much more than nostalgia. They provide an opportunity for graduates to renew old friendships and make new acquaintances from other reunion classes; to catch up on current goings-on at the school; and to refresh their perspectives on the legal profession.

The Law School hosted a series of successful reunions on Oct. 1-3, Oct. 22-24 and Nov. 5-7. Returning graduates enjoyed talking with Dean Lee Bollinger and faculty members — as well as with each other — at the kickoff receptions on Friday evenings. The receptions led into an "evening on the town," an opportunity to revisit favorite Ann Arbor restaurants and night spots with classmates and families.

Reunion class members participated in lively exchanges of ideas on emerging trends in law at Saturday morning panel discussions with faculty members Debra Livingston, Terry Sandalow, Bill Miller, Alex Aleinikoff and Dean Bollinger. The conversations ranged from political correctness on campus to multicultural legal education and other pedagogical issues. Others opted to go on a guided tour to visit familiar and new Ann Arbor sights and introduce their spouses to the campus.

Picnic lunches in the Law Quadrangle prepared everyone for an afternoon of football; 1993's reunion record was 2-1, with Michigan victories against Iowa and Purdue and a narrow loss to Illinois. Neither the mixed football record nor some unfortunate problems with fish dinners could dampen spirits at the Saturday night class banquets. The class pictures, receptions and dinners capped off full and exciting weekends and occasioned welcoming remarks, reminiscences and words of friendship among the gathered graduates.

At the Class of 1968's 25th reunion dinner, the Class Gift Committee announced that the class had raised $300,000 in gifts and pledges and was on track to top the Class of 1963's record-breaking $780,000. Gifts of such magnitude are significant accomplishments for the classes and a real boost to the Law School Fund as well. Next year's reunion classes are already seeking leadership gifts to set new standards of reunion giving.

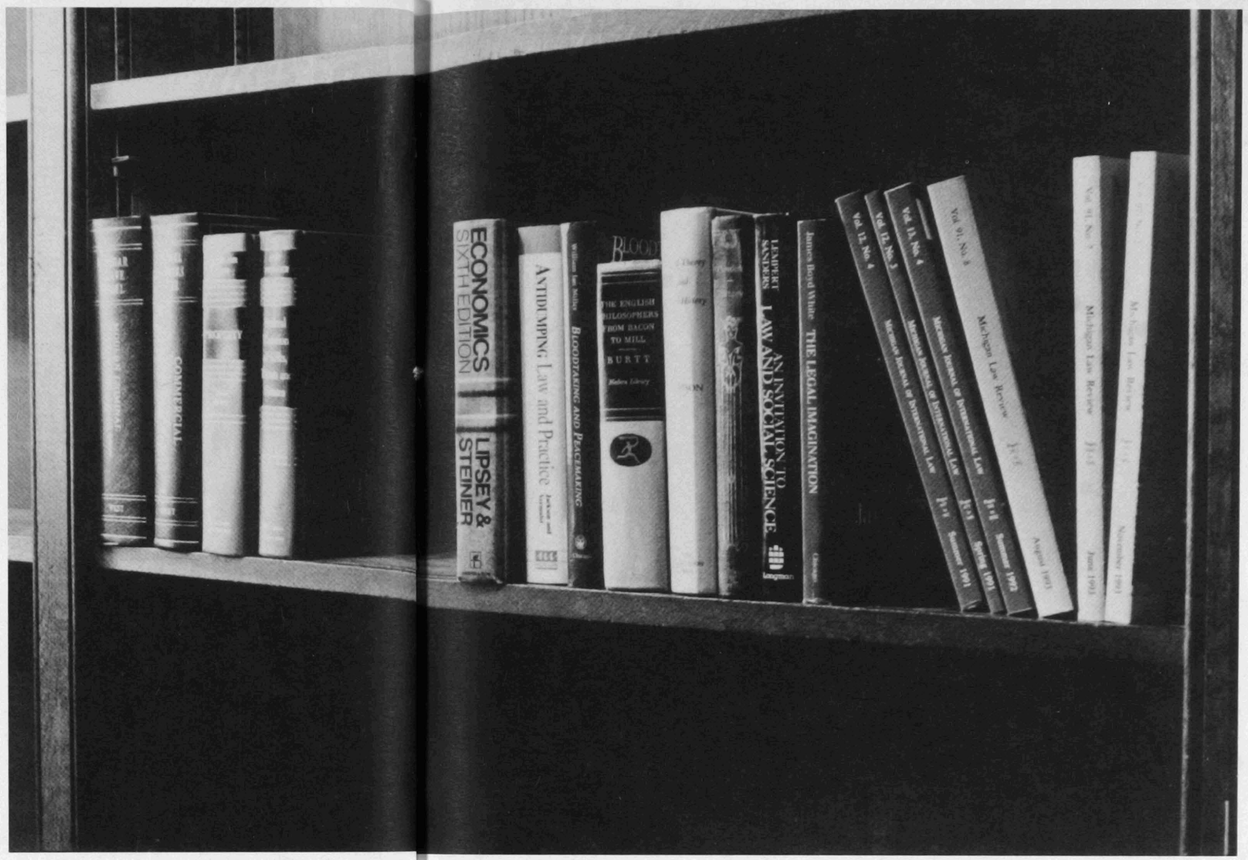
After the Sunday farewell brunches, graduates returned home with a renewed sense of the vitality of the Law School and — through reconnecting with friends and colleagues from around the world — the profession. In the words of one enthusiastic 1993 participant, "We look forward to reunion 1998!"

*— by Linda Bachman*

*Above: John Petrovski, J.D. '83, of Chicago, greets Joan Gilchrist, wife of his classmate Greg Gilchrist of San Francisco.*

*Left: Class of '83 members and their wives were reunited at an October reunion brunch. From left are: Angela Karikas, Ron Lopez, Joe Harding, Jeff and Martha Kinzel and Brian Takahashi.*

# 'The Growing Disjunction' revisited




**While exploring the gap between legal education and law practice, Judge Harry T. Edwards clearly hit a nerve.**

**His October 1992 *Michigan Law Review* article, "The Growing Disjunction Between Legal Education and the Legal Profession," drew an impassioned response from both practitioners and academics.**

**His thesis was this: Law schools and law firms are moving in opposite directions. Many law schools, especially the so-called "elite" ones, now emphasize abstract theory at the expense of practical courses and doctrinal scholarship. Faculties are filled with "impractical" scholars who are disdainful of the practice of law. As havens for nontraditional "law and" scholars who write about law from the perspective of other disciplines, law schools are at risk of becoming glorified graduate schools. They no longer produce scholarship that judges, legislators and practitioners can use, argued Edwards, J.D. '65, circuit judge of the U.S. Court of Appeals for the D.C. Circuit.**

At the same time, many law firms have also abandoned their place. Rather than ensuring that associates and partners practice law in an ethical manner, some firms are pursuing profit above all else. "While the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground — ethical practice — has been deserted by both," Edwards wrote.

The response to this charge, Edwards reported, has been nothing short of extraordinary. He was flooded with letters from practice and academia, and much of the mail agreed with his views. "The responses were beyond bitter. People are very, very angry with what's going on," he said. In defense of law schools, legal academics, including four from the U-M Law School, filled a symposium issue of *The Michigan Law Review* (August 1993) with articles that acknowledged some of Edwards' points while politely taking exception with others. (See story, p.34.)

The debate is still flourishing a year after "The Growing Disjunction" hit print, so Dean Lee Bollinger invited Edwards and alumni from practice, legal education and the bench to continue the discussion at the Committee of Visitors weekend in October.

The event gave Edwards a chance to correct misinterpretations of his article. "I never said law students should learn only doctrine. I never said professors should write only doctrine. I never said all theoretical scholarship is bad, and I never said professors shouldn't criticize the profession," he said.

"I am *not* against theory or theoretical work. In my view, the ideal law school includes a healthy *balance* of practical and theoretical teaching and scholarship. Indeed, even in courses geared toward doctrinal literacy, one cannot teach or learn without a theoretical construct.

"And I am not against interdisciplinary scholarship, but I believe that interdisciplinary work should enrich, not displace, an emphasis on the law."

In the attempt to broaden the scope of their curriculum, law schools "have made many changes for good in recent years, but I'm not sure that these changes have made legal education more open-minded," Edwards said. Topping the list of problems he sees in law schools were these:

- Faculty hiring is tilting toward candidates with academic credentials in fields like philosophy, sociology or literature and away from those who have a serious interest in legal practice.
- Advanced courses in many important practice areas are no longer offered; they've been crowded off schedules by nontraditional interdisciplinary courses.
- There is too little attention given to written work, clinical training and ethics.
- Some academics show no sense of obligation to write for the profession.
- Schools refuse to do any real cost/benefit analysis on what's useful in education, preferring instead to teach what interests the faculty.
- Too many law teachers hold practicing lawyers and judges in disdain and communicate that attitude to students.

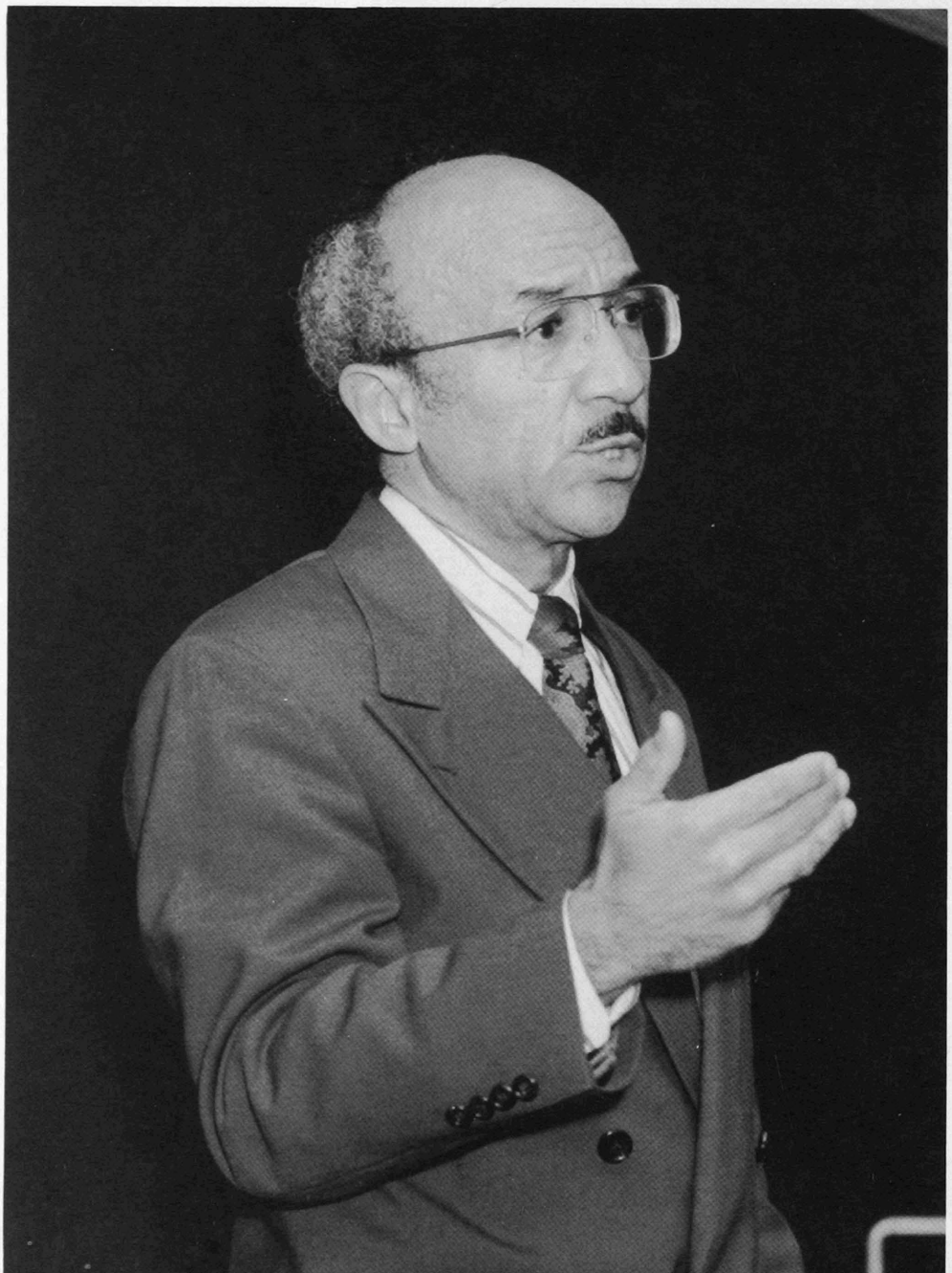
Perhaps the last was the most upsetting for Edwards and other practicing lawyers on the Visiting Committee. Said Edwards, "In my education, I was taught by people who loved the law and thought the law had possibilities. I don't hear that now."

William Jentes, J.D. '56, respectfully disagreed with Edwards "on almost every point." He remarked that Edwards' dismay sounded like nostalgia for "golden days that loomed larger in fond memory than reality." Said Jentes, "It's easy to say how wonderful it was in my day, but decry that law schools have now gone to heck and are not turning out ethical, practical lawyers," he noted. However, in Jentes' experience as a Chicago attorney and a professor at both the Michigan and Chicago law schools, that's not true. "The students and young lawyers I meet are extraordinarily well educated, well read in the law and beyond, and extremely sophisticated," he said. As for practicing lawyers, he noted, "I reject the notion that all the people I deal with are dishonest money-grubbers."

Jentes said he felt law schools were doing a better, not worse, job of teaching professional responsibility and ethics. He also applauded recent inclusion of "law and" other subjects into law courses. "If anything is missing, it's the same thing that was missing when I came to the Law School — the sense of law as one of the humanities and an important one. There is no good trial lawyer, in my judgment, who does not know Shakespeare, not just

**The students and young lawyers I meet are extraordinarily well educated, well read in the law and beyond, and extremely sophisticated. As for practicing lawyers, I reject the notion that all the people I deal with are dishonest money-grubbers.**

— WILLIAM JENTES



**I am *not* against theory or theoretical work. In my view, the ideal law school includes a healthy *balance* of practical and theoretical teaching and scholarship. Indeed, even in courses geared toward doctrinal literacy, one cannot teach or learn without a theoretical construct.**

— JUDGE HARRY T. EDWARDS

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to quote him but to help understand our fellow humans." He told Bollinger, "You're missing a first-year course devoted to exploring the larger responsibilities of lawyers and their place in the community. It's important and students are hungering for it."

U-M Professor J.B. White, the L.Hart Wright Professor of Law, also is a professor of English and adjunct professor of classical studies. His scholarship on law and literature reflects the balance that Edwards seeks. White agreed with much in the judge's essay. However, he felt Edwards was wrong to cast theoretical and practical scholarship as polar opposites. "The whole of law school and

law practice argue that the two are not mutually exclusive," he said. The real split in legal scholarship is between "work that manifests interest in, and respect for, what lawyers and judges do, and work that does not."

White said he feared that legal education is focusing too much on rules, tasks to be performed and skills to be mastered. "I hate to encourage the view of law as rules. There is a danger of collapsing all law into policy analysis. What's missing is a sense of responsibility. We should train students to think about law while acting constantly out of a sense of responsibility to clients."

Ellen Borgersen, J.D. '76, now associate dean for academic affairs at Stanford Law School, agreed with Edwards that much theoretical scholarship is of poor quality and little value. "I lament the number of trees that have given their lives in pursuit of tenure," she quipped. But, she added, the same could be said of legal doctrine. "I also lament the number of pages of Federal Supplement and Federal Reporter that faithfully reproduce Rule 23 on class actions, but give no adequate account of what courts are doing in these cases. I've found a historical analysis of class actions is far more illuminating, so that's what I teach my students," she said.

She told visitors that newer fields of scholarship such as critical legal studies offer perspectives of social reality that will enhance rather than detract from students' sense of professional responsibility. "A central insight of critical theory is that you cannot justify what you do simply by saying 'the law' requires it, because 'the law' is malleable and indeterminate. There is no wizard behind the curtain. What that means is that we are all profoundly professionally responsible for what we do."

Bollinger also acknowledged that looking back to the beginnings of the theoretical scholarship movement in the 1960s and '70s, much of the work was weak. Still, he said, "If we look at legal education from a longer, larger perspective, the inclusion of other fields has enriched the study of law, and to be impervious to these fields would hurt law. I'm troubled by an insensitivity to one of the changes in legal education that I think is most admirable."

Judge Ralph Guy, J.D. '53, of the U.S. Court of Appeals for the Sixth Circuit, said he wasn't too alarmed about the emphasis on theory. "I'm not concerned about what else is taught besides nuts and bolts; I'm concerned about the spin put on it," he said. "If law schools are teaching life, not teaching law, whose version of life will they teach?"

Political spin also explains why academics lost interest in the judiciary, Guy said. He cited Bollinger's law review essay, which called the judiciary a "beleaguered institution" with rising workloads, declining salaries, increasing bureaucracy and little opportunity for creative engagement. "I resemble that remark," Guy joked, but more seriously, he disagreed. "Disdain has nothing to do with slipped salaries and a higher workload. What's turned off academics is who's been in the White House and who's been appointing judges."

The increased workload is a symptom of problems in the legal profession, Guy said. "The judiciary needs law schools badly. There is a lot of stuff in court that has no business being there. Something's wrong and we need your help figuring it out."

No doubt Michigan and other law schools across the country will continue to figure out what might be wrong with legal education. Borgersen summed it up as a quest "not for what Harry Edwards wants, but a cry for balance" between practical and theoretical education. Terrence Elkes, J.D. '58, National Chair of the Law School Campaign, reminded the Committee of Visitors that it perennially worries about what's taught. "We've always come to the consensus that the able teaching of doctrine is important, and we've recognized that here, that is done quite well," he said.

Added another member of the audience, "Michigan does a great job of teaching students to think like lawyers. That's why I hire Michigan graduates. Now you have to figure out what to do with the other two years of school."

**LQN**

# Some thoughts on theory

## Faculty members respond to Judge Harry Edwards

**In his article on the growing disjunction between law schools and law practice, Judge Harry Edwards highlighted what he thinks is wrong with legal education. In thoughtful responses published in a *Michigan Law Review* symposium on the topic (August 1993), four U-M Law School faculty members discussed what's right, and what could be improved.**

All four authors believe legal education is something special; they worry about it losing its unique nature and turning into economics or history or sociology. And all four give serious consideration to problems in legal education and possible solutions. Since U-M Law School is known as a center of "law and" scholarship that worries Edwards, it's hardly surprising that while faculty seconded some of the judge's ideas, they quibbled with others.

In an essay called "The Mind in the Major American Law School," Dean Lee Bollinger suggested that Edwards went too far in his "diagnosis of a highly contagious and debilitating disease of theory." Bollinger wrote, "One comes away with the impression that a majority of the faculty at [law] schools has turned its back on its professional identity and given up focusing on basic questions of law. This is simply not the case."

A check of legal literature reveals that scholars still produce solid doctrinal work, even at elite schools, and Bollinger offered his own diverse faculty as an example. "Out of a productive tenured faculty of about 40 professors, eight are authors of major treatises; fifteen are authors of casebooks; at least 25 have published works about significant and practical legal issues within the last year or two; six are engaged in major law reform efforts; and at least 18 others have been involved as consultants or active participants in some concrete legal issue in the last year." Clearly, Bollinger wrote, "The overwhelming majority of the faculty think of themselves as *professional* legal scholars and teachers concerned with understanding major legal problems in their field."

Still, he acknowledged that interdisciplinary legal studies have transformed modern legal thought — for the better. "Virtually every field of human knowledge is being mined for what it can contribute to our understanding of the processes of law and legal issues. This is an intellectual shift so right, so compelling, as to be properly irreversible."

In fact, Bollinger worried that interdisciplinary scholarship hasn't penetrated the classroom. He wrote, "I think our most serious problem in modern legal education is, ironically, that it is not 'theoretical' enough. For all of the efforts to draw upon the knowledge of related disciplines, legal scholarship has benefited from these efforts more than legal education has been enhanced.

"The source of the problem is the continued dominance of the casebook as the primary form of educational material in law schools. Coverage of doctrine and fields of law is the predominant classroom activity. Students learn quickly that any effort to develop a sophisticated grasp of related fields will not be rewarded on the examination. The fundamental problem facing modern law schools, therefore, is how to combine doctrine with the development of critical reasoning skills," Bollinger wrote.

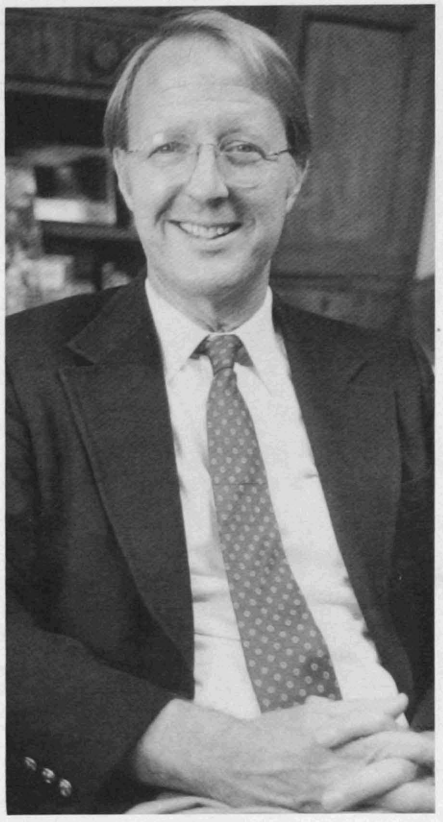
James J. White, the Robert A. Sullivan Professor of Law, also addressed this perennial question. "Law professors do not agree and never have agreed about what we can and do teach," he wrote in his response to Edwards. "Some (Terry Sandalow is one) argue that there is not much point in teaching a large amount of substantive law because any law so taught will soon be forgotten or out of date and, in any case, can easily be learned after law school. That attitude

**Theorists are the academic meritocracy; traditional doctrinal scholars are the equivalent of "solid B students" and practitioners not inclined toward theory are viewed as "a rung down the intellectual ladder." Reingold called for tolerance, diversity and increased emphasis on clinical legal education to balance the trend.**

— Paul Reingold

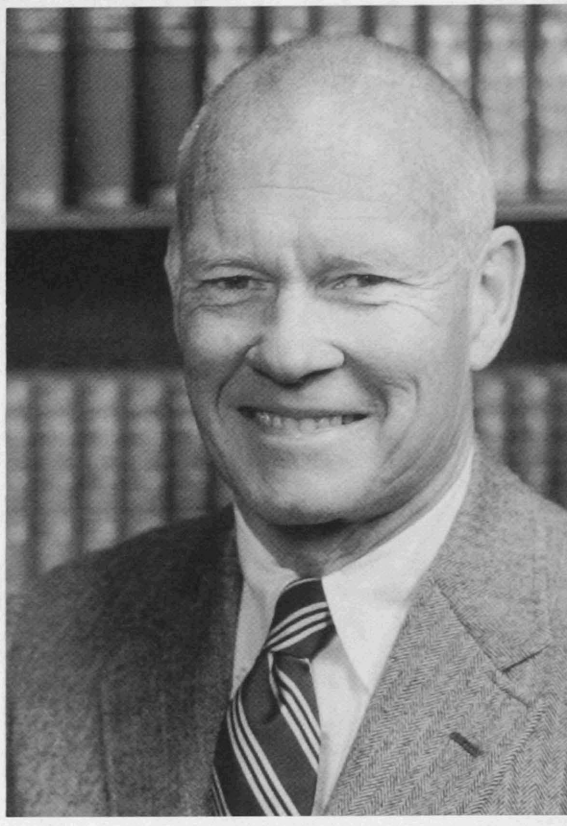
**The education of the lawyer should therefore involve training in the process of translation, the art by which the lawyer can learn from other fields and disciplines, yet at the same time criticize them.**

— James Boyd White



**We claim that we teach our students to think like lawyers and perhaps do. But by the time they reach us, students' minds and souls are set in cement that is fast hardening. Far from making lawyers of malleable students, mostly we bloody our nails.**

— James J. White



naturally favors fewer substantive law courses, with more courses on theory and perhaps even on skill development. You and I would argue that much substantive law can be efficiently taught in the classroom and that knowledge of substantive law is an important ingredient in successful practice."

He argued that essential legal doctrine is still taught well, even by the interdisciplinary faculty he dubs "AC/DCs." He wrote, "One would think that a faculty of AC/DCs would bring undergraduate teaching styles to the Law School and might dilute our precious Socratic and case-study methods. This has not happened. I suspect that if you compared AC/DC teaching to lawyers' teaching in traditional courses, you would not be able to tell which was which." In fact, he added, some professors who have a Ph.D. but no law degree "are so conscious of their nonlawyer status that they are even more careful to be good lawyers than the lawyers themselves."

J.J. White said some nontraditional subjects taught by these "Ph.D.s w/o's," such as Andy Watson's course on law and psychiatry and Phoebe Ellsworth's course on the jury, are more practical than traditional classes. "These subjects are more relevant to a lawyer's success than any appellate decision ever could be," he wrote. However, he added, "I maintain that highly theoretical courses are of smaller value to most of our students than my colleagues claim."

J.J. White felt Edwards' fear that law schools are abandoning law exaggerates their role. "We have a modest influence on the students and an even more limited impact on the law," he wrote. "We claim that we teach our students to 'think like lawyers,' and perhaps we do. But by the time they reach us, students' minds and souls are set in cement that is fast hardening. Far from 'making lawyers' of malleable students, mostly we bloody our nails." As for shaping the law, he wrote, "Apart from occasional giants like Karl Llewellyn, few professors can claim to change the law fundamentally. Even those of us who write for judges and lawyers and who are cited in the opinions of appellate courts have modest impact.

"Even if I am wrong about our influence on law and lawyers, there is reason for hope. I see our young faculty moving back toward the bar. Both Kent Syverud and Jeff Lehman are writing things that are of interest to lawyers and judges. Both had an interesting law practice before they came to the law school. Debra Livingston came to us from the

*Continued on page 48*

# Some reflections on BANKRUPTCY

## THE BANKRUPTCY BENCH AND THE BANKRUPTCY BAR

**Congress is considering a bill to amend the 1978 Bankruptcy Code. According to Professor Frank R. Kennedy's historical view of bankruptcy, this reform effort is about 20 years too early. "Curiously, major overhauls have come at 40-year intervals — in 1898, 1938 and 1978," he says. Here, Kennedy shares an insider's view of the 1978 reform and the development of the bankruptcy bar and bench before and since. This article is adapted from a speech he gave at the American College of Bankruptcy induction ceremony at the U.S. Supreme Court in 1991.**

— BY FRANK R. KENNEDY

BANKRUPTCY DISPLACES GRAB LAW by providing for orderly liquidation of debtors' estates. Historically and in many countries, that is its only role. In its origins and for many years, bankruptcy was quasi-criminal, and stigmatization of the bankrupt was one of bankruptcy's distinctive characteristics. In this country, to a far greater extent than in other countries, bankruptcy embraces the fresh start principle. Today, American bankruptcy exhibits a compassionate countenance.

Contrary to a widely-held opinion, I had no role in the drafting of the Bankruptcy Act of 1898 or the General Orders in Bankruptcy promulgated in that year by the Supreme Court. Rather, I encountered bankruptcy as a law student in 1938, the year of the enactment of the Chandler Act, the first overhaul of the Act of 1898.

Although I have always found bankruptcy an intriguing subject of study and field in which to work, the years from 1940 to 1970 were not exciting for bankruptcy buffs. I learned to my dismay that the bankruptcy practice and bankruptcy bar were not generally held in the high esteem to which I was wont to accord them.

Of course, bankruptcy business underwent a severe depression during World War II and for some time thereafter. Referees in bankruptcy, as they were called, had to derive their compensation and expenses from fees collected in the cases, and tenure for a referee was two years. A referee could be reappointed by the district judge or judges who made the original appointment, but the general perception was that a referee was so beholden to the district judge who would have the power of reappointment that confidence in the independence of the referee's judgment was often impaired.

Recall that in those days the referees had no law clerks, opinions of referees were rarely seen, and district judges' opinions in bankruptcy cases were not frequent. I think I can detect some murmurs of yearning for a return to that state of affairs. It is easy to sympathize with that point of view, and I have been importuned to lead or support an effort to place limits on the number and length of bankruptcy court opinions. I must confess that while I wish some bankruptcy judges would be less generous with their contributions to the new bankruptcy jurisprudence, I am disinclined to silence them or to deprive them of research assistance. I am of the opinion that the benefits of the present system outweigh the costs.

By the mid-'40s, bankruptcy referees' offices became so impoverished that the bankruptcy system was severely crippled. In 1946, Congress recognized the referees' plight and enacted the Referees' Salary Act of 1946, extending referees' tenure to six years and removing the basis for a constitutional challenge that their compensation was tied to their decisions in particular cases.

## COMPREHENSIVE REFORM

Through the '50s and '60s, consumer bankruptcies increased at an alarming rate, and consumer advocates became increasingly active and successful in obtaining amendments of the Bankruptcy Act that enhanced the benefits obtainable by consumer debtors. Meanwhile, Senator Quentin Burdick of North Dakota, while sitting on the Senate Judiciary Committee, had come to the conclusion that the piecemeal legislation chipping away at the Bankruptcy Act was uncoordinated and unintelligent. In 1968, he filed a bill to create a Congressional commission to undertake a comprehensive study of the Bankruptcy Act and make recommendations for amendment if needed. Hearings were held and witnesses were unanimous that such a study and amendments were needed.

The bill to create the Commission on Bankruptcy Laws of the United States passed in1970, and the commission was given a two-year life, with $400,000 to do the job. There were to be nine members — three appointed by the President, two by the President of the Senate, two by the Speaker of the House, and two by the Chief Justice. Due largely to the Chief Justice's delay in naming the two representatives of the judiciary, only 13 months remained in the commission's original two-year term when the small staff moved into its quarters and began its work. The commission spent considerable time and energy during the first year convincing Congress that an extension was needed — an awkward burden when no track record had been made. It was not clear that the effort would succeed until near the end of the original two-year period.

Only by the wonder-working of Commission Chairman Harold Marsh, Deputy Director Gerald K. Smith and other members of the small staff was it possible for the commission to complete its work. We also were aided by generous dollops of assistance by committees and members of the National Bankruptcy Conference, the National Conference of Bankruptcy Judges, the Commercial Law League, the National Association of Credit Men, the Securities and Exchange

# *All the media are proclaiming*

**that bankruptcy and bankruptcy practice are no longer embarrassed by an ill-favored image. Rather, the reports from the bankruptcy front for the last three years have been upbeat if not euphoric: Bankruptcy business is booming, and bankruptcy is the hot area of practice.**

Commission, and other organizations and agencies.

Three bound volumes were published, but only two were important; the first contained an exposition of findings and recommendations, and the second contained a draft of a completely new Bankruptcy Act, designated the Bankruptcy Act of 1973. The National Conference of Bankruptcy Judges, disagreeing with the commission's decision to combine all the reorganization provisions into a single chapter, filed an alternative set of proposals. Both sets of proposals were embodied in bills introduced in both houses, but Congress was diverted by the crisis created by the break-in at Watergate, which had occurred while the commission staff was slaving over its perverse Xerox machine. Extensive hearings on the bankruptcy bills were nevertheless held.

## THE NITTY GRITTY

There was unanimity of opinion in 1970 favorable to Congressional overhaul of the Bankruptcy Act, but the unanimity ended as soon as the harsh truth — the nitty gritty — of specifying the reforms to be enacted was confronted. Activity on the part of those involved in perfecting the proposed bankruptcy bills during 1977 and 1978 can only be described as feverish. In view of the objections of the Chief Justice, not to mention some members of the Commission on Bankruptcy Laws and representatives of various interest groups, the miracle of miracles occurred on Nov. 8, 1978, when President Carter signed the bill before it expired.

One aspect of the operation of the bankruptcy system under the Bankruptcy Reform Act that has been the focus of criticism is that debtors increasingly resort to relief under the act for reasons of business strategy rather than liquidation or reduction and/or extension of an overwhelming debt load. The *Manville, Robins, Continental Airlines* and *Texaco* cases have been most frequently mentioned as illustrative of an abuse of the law. Typically, it is argued that the elimination of the requirement that a debtor be insolvent to be eligible for or amenable to administration under the bankruptcy laws caused this form of abuse. In response to this criticism, I have argued that the bankruptcy court is the best forum for resolving conflicting claims against a debtor in a manner that affords all the interests the best assurance of fair treatment. The development of confirmable plans for dealing with the future as well as the existing claims in the *Manville* and *UNR* cases, notwithstanding formidable obstacles in the form of statutory and procedural limitations and hostile opposition at every crossroad, is a monumental achievement that is a tribute to the lawyers and judges and other participants in the process.

## NO SCARLET LETTER

Shortly after the commission began its work in 1972, it received an unexplained barrage of correspondence from Shelbyville, Ind. with the theme, "The first thing you should do is to restore the stigma to bankruptcy." Instead, the commission removed the stigmatizing noun "bankrupt" from its proposed Bankruptcy Act. The Bankruptcy Reform Act of 1978, drafted in large part by Richard Levin and Kenneth Klee of the House Judiciary Committee staff with assistance from Robert Fiedler and Harry Dixon of the Senate Judiciary Committee staff, followed the commission's recommendation. The last time I checked, the rule substituting "debtor" for "bankrupt" has not been violated in any subsequent amendments of the code.

More than a hundred years ago, the President of the American Bar Association remarked on the tendency of American laws governing creditors' rights to intervene for the protection of debtors, thus attesting to "the higher, purer, more beneficent morality of our day and people." So, when critics foment against bankruptcy reform and against the tidal wave of rhetoric about debtors' rights to a fresh start, they ignore or are ignorant of the development of bankruptcy law that has roots extending back for two hundred years. And it is anachronistic to say, as a recent commentator did, that: "Twenty years ago bankruptcy had a scarlet letter, but not today."

*The New York Times, The Wall Street Journal, The National Law Journal,* the networks — all the media are proclaiming that bankruptcy and bankruptcy practice are no longer embarrassed by an ill-favored image. Rather, the reports from the bankruptcy front for the last three years have been upbeat if not euphoric: Bankruptcy business is booming, and bankruptcy is the hot area of practice. Bankruptcy lawyers are no longer the Rodney Dangerfields of the profession. Not surprisingly, there are other views and voices. Bankruptcy has been trashed by such works as Sol Stein's *A Feast for Lawyers,* which trumpets eleven lies about Chapter 11 and faults the system for the high rate of failures of Chapter 11 petitioners.

To me, however, it is a gratifying phenomenon that a many knowledgeable critics and defenders with diverse perspectives are constructively criticizing

the bankruptcy system. A comprehensive Critique of the First Decade Under the Bankruptcy Code with an Agenda for Reform was organized and presented at Williamsburg in October of 1988. Since that time the National Bankruptcy Conference, an organization devoted to the improvement of bankruptcy law and administration with which I have worked for more than 40 years, has engaged in an examination of problems that require legislative attention.

The American Bankruptcy Institute has launched a project looking toward the establishment of a Congressional Commission on Bankruptcy comparable to the commission of 1972 and 1973. The Bankruptcy Committees of the Business Law Section of the American Bar Association have studies under way that contemplate legislative reform, and I am confident without being informed that the National Conference of Bankruptcy Judges, the Commercial Law League and other organizations that conferred with and assisted the Commission on Bankruptcy Laws in the early '70s are seriously studying the function of bankruptcy laws with a view to supporting changes that will improve them.

The American College of Bankruptcy is an ideal conception and force to support the laudable effort to improve bankruptcy law and administration by recognizing and enlisting as participants the leaders of the bench and bar and related professions and activities.

## THE CASE FOR FUTURE REFORM

There are numerous, enormous challenges awaiting those willing to confront the problems facing bankruptcy reformers: solving conflicts between the demands of the environmental law advocates and the principles of bankruptcy law (*i.e.*, fairness and equality of distribution and provision of a fresh start); the treatment of victims of mass torts, including those whose injuries are not manifested until after the estates of the liable parties have been administered; the administration of claims for retirement, health, and welfare benefits owed by insolvent enterprises; the unwinding of leveraged buyouts. There are troubling signs that insurance companies and financial institutions may be heading toward conditions that will precipitate a need for application of the experience and expertise developed under the bankruptcy laws.

Professor Morris Shanker of Case Western Reserve University Law School recently presented a persuasive argument that bankruptcy should be a required course in law school. His argument emphasized its intersections with every other area of law, its toughness as a subject of study and its importance in focusing on the necessity of planning for all legal transactions. In their study of consumer bankruptcy, *As We Forgive Our Debtors*, Professors Elizabeth Warren of the University of Pennsylvania and Theresa Sullivan and Jay Westbrook of the University of Texas emphasized the uniqueness of American bankruptcy law, not only in its protection of the fresh start but in its highly individualistic character and minimization of the role of government regulation of the process.

A lively debate has developed, however, regarding bankruptcy policy. Dean Thomas Jackson of Virginia and Professor Douglas Baird of the University of Chicago, both espousing the law-and-economics approach, have been questioning the justification for bankruptcy laws. They argue that these laws fall short of meeting tests of economic accounting and efficiency. There are, however, many voices in opposition to the "economic account;" they argue that many values in addition to efficiency must be considered in appraising the adequacy of the bankruptcy system and in formulating reform measures. There are exciting times ahead for bankruptcy buffs.

I conclude these reflections by acknowledging that while there have been disappointments and setbacks in the development of bankruptcy law, practice, and administration during the last 48 years, my conclusion is that there has been dramatic improvement. Moreover, there is reason to believe that notwithstanding the challenges and difficulties ahead, the improvement will continue. A principal reason for this optimism is the increase in the number of laborers in the vineyard, who have lent their energy, interest, intelligence and experience to improving bankruptcy administration.

LQN

*Frank Kennedy is Thomas M. Cooley Professor Emeritus and counsel of Sidley & Austin, Chicago. He served as executive director for the Commission on Bankruptcy Laws of the United States during its 21-month existence in 1971-73.*

# LIMITING THE ROLE of patents in technology transfers

**This article was adapted from remarks presented to the Congressional Biomedical Research Caucus in Washington, D.C., June 28, 1993. Reprinted with permission from the *Journal of NIH Research*, Vol. 5, No. 10, October 1993.**

— BY REBECCA S. EISENBERG

FEDERAL POLICY SINCE 1980 has reflected an increasingly confident presumption that patenting discoveries made in the course of government-sponsored research is the most effective way to promote technology transfer and commercial development of those discoveries in the private sector. Policymakers in the past may have thought that the best way to achieve widespread use of government-sponsored research was to make the results freely available to the public; the new pro-patent policy stresses the need for exclusive rights as an incentive for industry to invest in bringing new products to market.

Although this pro-patent policy may make a good deal of sense for some government-sponsored discoveries, there are reasons to suspect that it makes little sense for others. In our eagerness to avoid the inadequacies of the public-domain approach, we may have moved too quickly and too emphatically in the opposite direction, to the point that patent rights in some government-sponsored discoveries may actually be undermining, rather than supporting, incentives to develop new products and bring them to market.

It is time to re-evaluate the role of patents in technology transfer — on the basis of more than a decade of actual experience rather than uncorroborated fears — and consider how the present system might be improved.

## Laws call for patents

In 1980, Congress passed the Stevenson-Wydler Innovation Act, which made technology transfer an integral part of the research and development responsibilities of federal laboratories and their employees, and the Bayh-Dole Act, which reversed the prior practice of some agencies of retaining public ownership of discoveries made through federal research funding in universities and small businesses. Later legislative enactments and executive orders have broadened the provisions of Bayh-Dole and Stevenson-Wydler Acts and closed loopholes that might have left potentially valuable discoveries unpatented.

Under the system we have in place today, whether federally-sponsored inventions are made in government, university, or private laboratories, if anyone involved in the research project wants the discovery to be patented, chances are it will be patented. Thus, for example, if a government agency or university has no interest in pursuing patent rights in a discovery, the individual investigator who made the discovery may step in and claim them.

Now, all of this makes a good deal of sense if we want all government-sponsored research discoveries to be patented. But do we?

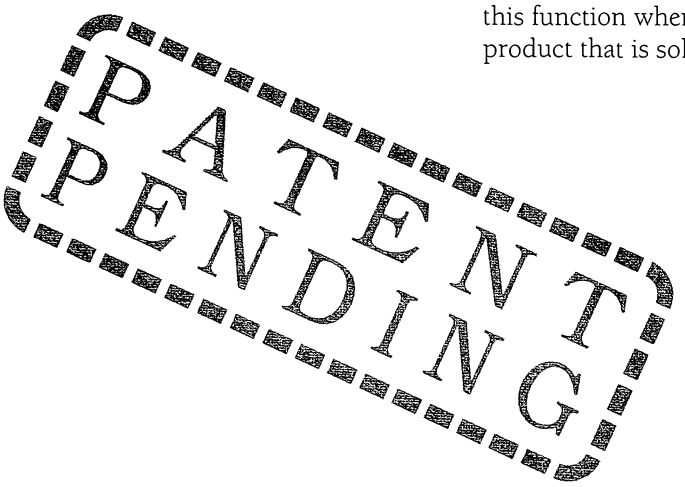
One sign of trouble in paradise for federal technology transfer policy is the reaction of industry trade groups when the National Institutes of Health filed patent applications in 1991 on thousands of randomly selected partial complementary DNA (cDNA) sequences of unknown function. This sequence information was discovered in an NIH laboratory as part of the Human Genome Project, a government-sponsored effort to map and sequence all of the DNA in the human chromosomes.

Position statements from the Pharmaceutical Manufacturers Association (PMA) and from two biotechnology trade groups that have since merged, the Industrial Biotechnology Association (IBA) and the Association of Biotechnology Companies (ABC), contradicted the hypothesis that government patents on these cDNA sequences are necessary to protect the interests of firms that might develop related products in the future. PMA and IBA both urged that NIH not seek patent protection on cDNA sequences of unknown biological function. ABC supported the NIH decision to seek patent protection, but only as a means of generating revenues for the government. Indeed, even ABC urged that the patents be licensed on a nonexclusive basis so as not to block development projects in industry.

These trade groups are not composed of naive, idealistic scientists who have limited experience with patents and limited interest in product development. Their members are the same hard-nosed, profit-maximizing firms that Congress is trying to entice into developing products out of government-sponsored inventions through its patent policy. Their reactions to the cDNA patent applications alone are enough to call into question the strong pro-patent tilt of the NIH policy. [Editor's note: In February, the NIH reversed its policy and withdrew patent applications for the cDNA partial sequences. In announcing this decision, NIH Director Harold Varmus explained that seeking these patents was not in the best interest of science or the public. Varmus said that input from Professor Eisenberg, who served on a panel convened to advise him on this issue, heavily influenced his decision.] It may be that under current law NIH had little choice but to pursue patent rights itself or leave them to the inventor, even though later product development would probably be better served by leaving the DNA sequence information in the public domain. This suggests at the very least that federal agencies ought to have more flexibility to determine that some inventions would be better left in the public domain.

## Do patents help?

But how can an agency determine when patent protection is likely to facilitate technology transfer and product development and when it is likely to interfere with those processes? The logic of the pro-patent strategy itself suggests certain limitations. The argument for patenting research discoveries as a means of promoting their later development into useful products is this: patents permit the firms that invest in product development to reap the rewards of their investment through commercially effective monopolies. Patents are most likely to perform this function when they cover an end product that is sold to consumers.



**PATENTS HAVE A CRITICAL ROLE TO PLAY IN PROMOTING TECHNOLOGY TRANSFER. BUT THE INCENTIVES CREATED BY PATENT RIGHTS IN GOVERNMENT-SPONSORED INVENTIONS WOULD DO LITTLE TO COMPENSATE FOR THE DAMAGE WE COULD DO TO OUR RESEARCH ENTERPRISE IF WE ALLOCATE TOO MUCH OF OUR NEW KNOWLEDGE TO PRIVATE OWNERS AND TOO LITTLE TO THE PUBLIC DOMAIN.**

Somewhat less effective are process patents covering a specific use of an unpatented product. The trouble with these so-called use patents is that as long as there are other uses for the product that are not covered by the patent, the patent holder cannot stop competitors from selling the unpatented product itself and thereby driving down its price. If the product is available from a variety of sources, it may be impossible to monitor what purchasers are using it for.

Another even less effective type of patent covers starting materials or processes used in making an unpatented end product. Such patents do not prevent a competitor from making the product from different materials or through a different process, or even from using the patented materials overseas and then importing the end product into the United States. Such a patent may also be difficult to enforce because of the practical problems involved in detecting and proving infringement in the manufacturing process.

Weaker still, as a device to keep competitors out of the market, is a patent covering products or processes that are used only during product development. Not only is it difficult to detect and prove infringement of such a patent, but often the only effective remedy will be monetary damages because an injunction against future use of the invention will not thwart the efforts of a competitor who has already finished using it.

For these reasons, firms that are interested in developing end products for sale to consumers are unlikely to see patents on research tools as a very effective means of protecting their market exclusivity. Such patents may generate royalty income, and that prospect may make it profitable to develop further research tools in the private sector, but patents are unlikely to enhance the incentives of firms to develop end products through the use of those research tools.

On the other hand, one firm's research tool may be another firm's end product. This is particularly so in the contemporary biotechnology industry, in which research is big business, and there is money be made by developing and marketing research tools for use by other firms.

Thus, even as the trade groups were calling on NIH to dedicate its cDNA sequence information to the public, new firms were forming to do further cDNA sequencing in the private sector, presumably with the hope of obtaining their own patent rights. It may well make sense to have this particular task performed in the private sector, and patents may enhance the incentives of firms to step in and do it. On the other hand, it may make more sense to leave this information in the public domain, even if that means that the government has to continue to bear the cost of generating it.

## Potential harm to research

There are reasons to be wary of patents on research tools. Competing firms may hesitate to request licenses for fear of revealing the directions of their own research. Moreover, a large research project might require access to a great many research tools; if each of these tools requires a separate license and royalty payment, the costs and administrative burden could mount quickly. Another danger is that a company might refuse to make a patented research tool available to competitors at any price. Or, patent holders might find it more lucrative to license research-tool patents on an

exclusive rather than a nonexclusive basis, thus choking off the research and development of other firms.

Basic research activities might also be affected. For years, this country has sustained a flourishing biomedical research enterprise, in which investigators have drawn heavily on discoveries that their predecessors left in the public domain. Even if exclusive rights enhance private incentives to develop further research tools, they could do significant harm to the overall research enterprise by inhibiting the effective use of existing ones.

Research tools may therefore be one example of the sort of discovery for which exclusive rights do more harm than good. There are undoubtedly others as well. Certain fundamental inventions with a wide range of applications may be more effectively exploited if left in the public domain or otherwise made freely available to all than if patented and licensed on an exclusive basis. For example, the absence of patent protection on fundamental techniques for producing hybridomas and monoclonal antibodies does not seem to have significantly retarded the development and patenting of commercial products using those technologies.

## Time to analyze impact

The time is ripe to take a critical look at the actual operation of our technology-transfer policy over the past decade and see how well it is working. This task calls for more than an examination of aggregate statistics on the percentage of patented inventions that have been licensed. It would be useful to know whether those inventions have led to the development of commercial products, and whether those products are protected by other patents that would provide a comparable degree of market exclusivity even if the government-sponsored invention had been left in the public domain. It would be useful to know what effect those patents have had on the research and development of the licensee's competitors, or on other firms that failed in their bids for exclusive licenses.

The rhetoric surrounding federal technology-transfer policy suggests that whatever is good for industry must be in the public interest. This is a vast oversimplification of a complex issue. The private sector responds to the profit incentives created by whatever policies the government puts in place. Whenever the government offers new property rights, one would expect someone to step forward to claim them. It doesn't necessarily follow that those property rights are, on balance, creating new social value that will make all of us better off.

Patents have a critical role to play in promoting technology transfer. But the incentives created by patent rights in government-sponsored inventions would do little to compensate for the damage we could do to our research enterprise if we allocate too much of our new knowledge to private owners and too little to the public domain. Government is uniquely situated to enrich our public domain. We should be wary of disabling the government from performing this critical function in our eagerness to enhance private incentives to put existing discoveries to use.

LQN

*Professor Eisenberg has taught intellectual property at the Law School since 1984. Her research interests are in the areas of biotechnology patents and the impact of intellectual property law on research science. She has recently obtained a research grant from the Department of Energy to study the role of patents in technology transfer in the Human Genome Project.*

# RESPONSE & Reply

## PROSECUTORS' PEREMPTORY CHALLENGES

WE READ WITH INTEREST Professor Richard Friedman's article advocating the elimination of the prosecution's peremptory challenges. Based on our extensive practical familiarity with the topic, we do not think that Friedman's proposal is a desirable change in the law.

We believe that Friedman has seriously overestimated the litigative costs of *Batson v. Kentucky*, 476 U.S. 79 (1986), while he has seriously underestimated the litigative and other significant costs of abolishing the government's peremptories. He has misinterpreted the historical record, and as a result, he has proposed an idea that is radical and unjust, and that invites mischief.

As we understand Friedman's position, his justification for eliminating the prosecution's peremptories is that the mess created by *Batson* has made the retention of those peremptories expensive in terms of extra litigation. Indeed, Friedman claims that *Batson* has made prosecutors' peremptories a "frightfully expensive procedural nightmare" that very often threatens to append a mini-case of discrimination onto the criminal trial. We agree that *Batson* has made a conceptual mess of what was once a straightforward rule of procedure. However, based on our own practical experience, our knowledge of cases other than our own in the Eastern District of Michigan, and our contact with other federal prosecutors around the country, we strongly disagree with Friedman's assessment of the actual litigative cost of the decision.

In the vast majority of cases, the question of improperly exercised peremptories does not even arise, and accordingly, there is *no* litigative cost. When it does arise, most *Batson* claims are dismissed by the district court immediately, because the defense fails to establish a prima facie basis for believing that any improper challenge has been exercised. In these cases, the only litigative cost is the few seconds or minutes it takes for the court to hear and deny the defense motion.

This is not to say that *Batson* hearings are never held. In our experience, district courts are very sensitive to the issue of discrimination in jury selection. Because of this sensitivity, many Batson hearings take place even though one could not fairly say that a prima facie case of discrimination has been established, on the apparent theory that the district court is better off being safe with a hearing than being sorry with a reversal on the prima facie issue. The appropriate hearing is also held, of course, in any cases in which a prima facie violation is really established.

However, even in these cases and even with this degree of judicial caution, the actual litigative costs have proven to be minimal. Typically, *Batson* hearings are a five- to 15-minute interlude during the jury selection process. The government explains its reasons for excusing particular jurors, those reasons are almost always deemed to be neutral, and the most common result is that the *Batson* claim is denied. We have not checked court records so we cannot say categorically that a court in this district has never found a *Batson* concern to be substantiated, but if it has happened, it is extremely rare. Further, if such a case occurs, the remedy is to restart the jury selection process, *before* the tremendous

*Continued on page 46*

**Lynn A. Helland, Sheldon N. Light and William J. Richards, all experienced federal trial attorneys, wrote this detailed response to Professor Richard Friedman's LQN article proposing the elimination of peremptory challenges for the prosecution (Vol. 36 No. 2, 1993). Helland, J.D. '80, and Light have both been trial attorneys in the U.S. Attorney's Office in the Eastern District of Michigan for 11 years. Richards, J.D. '72, has been a trial attorney for the past 19 years, including eight as an assistant U.S. attorney and 10 in private practice. All are currently a part of the unit in the U.S. Attorney's Office that investigates and prosecutes public corruption and complex financial crimes. The views they express below are their own, and not necessarily those of the Department of Justice. Friedman's reply follows.**

## ASSYMETRICAL PEREMPTORIES DEFENDED

I AM NOT SURPRISED that three prosecutors — even such able and thoughtful advocates as Messrs. Helland, Light, and Richards — regard as distasteful to the point of abhorrence my proposal that peremptory challenges be eliminated for the prosecution but retained for the defense. For that matter, I am equally unsurprised that defense counsel seem to think this is a great idea. And perhaps the biggest non-surprise is that I adhere to my view.

The prosecutors do not disagree with me that peremptories for the defense ought to be retained; our debate is whether they ought to be retained for the prosecution. I concede the prosecutors' point that *Batson* has not yet made the administrative burden of prosecutorial peremptories intolerable. I suspect, though, that the prosecutors would not belittle that burden if they practiced in other jurisdictions, such as in the Deep South, where — perhaps for a combination of reasons of history, demography, procedure, and personnel — the administrative burden has been far greater than in Michigan federal court, and where extensive *Batson* hearings and reversals have been far more common.

Even in their own court, the prosecutors can find an excellent example of how probing an investigation a careful judge may have to conduct to follow *Batson* conscientiously. In *Echlin v. LeCureux*, 800 F. Supp. 515 (E.D. Mich. 1992), Judge Avern Cohn held six days of hearings before granting habeas corpus on the ground that a state prosecutor had discriminatorily exercised peremptories. The Sixth Circuit reversed, 995 F.2d 1344 (1993), but only by using a rather dubious avoidance mechanism — denying the petitioners standing on the ground that *Powers v. Ohio*, one of the progeny of *Batson*, created a "new rule" and could not be applied retroactively.

*Echlin* is not atypical. Many courts have limited the burden imposed by *Batson* by doing their best to avoid the case. Some use the same approach as in *Echlin*. More commonly, courts avoid difficulty by according extremely hospitable treatment to the reasons proffered by counsel, particularly by prosecutors, for exercising their peremptories. Some of these reasons — "It wasn't that the juror is Hispanic; it was that she speaks Spanish and so would listen to the actual testimony rather than to the transcript" — should not pass the "straight face" test.

And so I have difficulty with the idea that the rule of *Batson* creates a "conceptual mess" but not a practical mess. There are doctrines on which this "tough in theory, easy in practice" type of argument might have some force — doctrines for which the difficult conceptual issues arise only occasionally, out on the fringes where law professors love to roam. *Batson* is different. Take, as a straightforward example, a criminal case with a black defendant. Any time the prosecutor peremptorily challenges a black juror, a potential *Batson* issue arises. How can we be satisfied that race did not enter into the decision? By offering peremptories, we invite prosecutors to indulge their hunches as to how a potential juror will likely behave. But then we tell them that they must put out of mind one of the most critical facts about that person, one that may critically affect her perspective on the world and the relationship of the state to the individual. This makes the exercise of peremptories, as well as the doctrine governing them, incoherent.

Aside from race, gender and religion are also crucial facts that a party predicting a juror's attitudes in a given case may well want to know. Does *Batson* apply to these factors? If the answer is yes — the answer I expect the Court will give, with respect to gender, in the pending case of *J.E.B. v. T.B.* — the problem of incoherence will be extended and aggravated. But a negative answer — the answer given by the Alabama courts in *J.E.B.* and, with respect to religion, by several state courts — is even more troublesome: It is hard to look benignly on blatant sex or religious discrimination in a context that the Court has actively sought to rid of racial discrimination.

Perhaps the courts will continue in large part to avoid the consequences of this incoherence by turning their eyes away from violations of *Batson* principles. We ought to be suspicious of a rule when one argument for it is that it is widely ignored.

These difficulties would all be tolerable if there were any compelling need to allow prosecutors to exercise peremptory challenges. I do not believe there is. Wisely, my prosecutorial critics do not appear to argue strongly that prosecutorial peremptories are necessary to prevent inaccurate pro-defendant verdicts. Rather, they emphasize the harm that an outlier, perhaps an irrational juror, might do by causing a hung jury.

I agree that this is a problem that must be addressed. But relying on the prosecutor to address the problem, and on a peremptory basis no less, is the wrong

*Continued on page 47*

expenses of a trial have been incurred. We are not aware that any judges in this district have granted a new trial after conviction because of a *Batson* issue.

Because *Batson* claims are usually groundless, and because of the judicial caution summarized above, they are rarely a significant issue on appeal. Although the case law is confused, it is clear enough to permit the parties to address virtually all real-life *Batson* issues with a minimum of effort. Further, the judicial confusion that has occurred as the courts search for principles in the *Batson* area has not resulted in a significant number of reversals. In fact, in our collective recollection, not a single conviction has been reversed in this district because of *Batson.* For these reasons, while we find *Batson* to be a minor irritant and conceptually difficult, it has by no means created the expensive procedural nightmare Friedman suggests.

On the other hand, we think that Friedman has seriously understated the costs of abolishing the prosecution's peremptory. He notes, more or less in passing, that the inclusion of a few more biased jurors is more likely to cause a hung jury than to render a verdict inaccurate. In fact, we see this as an immense cost of his proposal.

In this district, it is not uncommon for trials to last several weeks or months. The financial costs associated with retrying such a case, including witness and juror expenses and court and attorney time, are tremendous. Other significant costs include serious inconvenience to witnesses and victims, who also have rights, after all. We have no doubt that the number of hung juries that would result from abolishing the prosecution's peremptories would be substantial — and substantially higher than the insignificant number of retrials that result from confusion surrounding *Batson.*

Most often, a hung jury is not the result of a close factual question. Criminal jury verdicts, whether for conviction or acquittal, must be unanimous. Hung juries most commonly are the result of one or two jurors refusing to deliberate or adopting an irrational view that is not supported by the evidence. A significant value of peremptories is that they permit us to act on our judgment that a particular juror is not up to the task of participating fully and rationally in deliberations.

This is not an idle concern. Many people who qualify for jury service are poor decision-makers — a fact that might not be obvious unless one has participated in a number of trials. However, there is rarely a basis for excusing such jurors for cause. Typically, each juror is in the selection "spotlight" for only seconds or a few minutes. Even if the parties had ample time to study each juror and could adequately articulate why a particular juror appears problematic, it is not apparent that our subjective evaluation that a juror is a poor decision maker, no matter how accurate, is a basis for a successful challenge for cause.

The defense has no motive to remove such "fringe" jurors. The defense often considers a hung jury to be a victory. A mistrial improves the defendant's bargaining position, particularly in a complex or lengthy case. Indeed, especially in some complex cases, a hung jury may result in a complete victory for the defense. In our experience it is not uncommon for the defense to try to hang a jury, simply because it improves the defendant's position so greatly. It is the rare prosecutor who has not witnessed the glee of a defense attorney who perceived that the government has permitted a "loose cannon" juror to remain on the jury.

The most useful purpose of the government's peremptory is therefore to remove those fringe jurors who do not appear to be able to deliberate meaningfully with fellow jurors, and it is the only means with which to accomplish this important goal. If the government lost that ability, there would be a large increase in hung juries, and this increase in litigative cost truly would be "frightfully expensive."

Aside from the costs involved, we also do not agree that the other considerations Friedman cites make the case for eliminating government peremptories. He is not persuasive when he argues that his proposed asymmetry is somehow permissible because other asymmetries already exist in the criminal justice system. The existence of some asymmetry in the system is hardly a justification for more. Furthermore, almost every existing asymmetry is the necessary result of some specific protection for defendants, or the logical result of the different positions in which government and defendant find themselves at trial.[1]

For example, Friedman's most prominent example of an existing asymmetry is the requirement that the government prove its case beyond a reasonable doubt. It is not clear to us that this even is an asymmetry. Rather, it reflects the standard practice that the burden of proof is placed on the moving party, while the level of proof in criminal cases is weighted to reflect society's view that we would rather wrongfully free ten guilty than wrongfully convict one innocent. Nothing in that burden of proof suggests that the procedure by which we determine whether it has been met should also be weighted against the government.[2]

Indeed, Justice Marshall's concurring opinion in *Batson* explicitly rejected of the notion that government peremptories should be eliminated, based on his

[1]The only exception is the current asymmetry in the federal system between prosecution and defense peremptories. Rule 24(b), Fed. R. Crim. P., permits the government six peremptories while the defense is permitted ten (except in capital cases and misdemeanors, where each side receives an equal number). The existence of this disparity does not justify any greater disparity. In fact, we have never found a satisfactory justification for the present asymmetry.

[2]If the burden of proof *is* an asymmetry, then it surely is important that it carries with it some significant pro-prosecution asymmetries. These include the right to speak first to the jury, the right to present evidence first and to rebut the defendant's evidence if any is offered, and the right to argue the case to the jury first and last, compared with only one argument for the defense.

Assuming that the burden of proof is an asymmetry, there is no evidence that additional asymmetry is necessary to attain the goal it serves. There is no reason to believe that the current system wrongfully convicts as many as one innocent person for every 10 or even 50 that are wrongfully acquitted. Nor is every incremental increase in the ratio of wrongful acquittals to wrongful convictions a good thing. There is, after all, a cost to letting the guilty go free. It is not clear that society would or should support changes that will increase that cost.

# Reply

recognition that both the government and the defense are entitled to an equally fair trial: "Our criminal justice system 'requires not only freedom from bias against the accused, but also from any prejudice against the prosecution. Between him and the State the scales are to be evenly held'" (*Batson*, 476 U.S. at 107).

Several of Friedman's other examples of existing asymmetry result directly from constitutional requirements. For example, he points out that the government must disclose exculpatory evidence, yet the defense need not disclose inculpatory evidence. The government's duty to disclose arises from a desire for accurate trial results. The goal of accuracy calls for disclosure of inculpatory evidence as well, but for the defense, this goal is preempted by the Fifth Amendment's protection against self-incrimination. The same protection gives the defendant the sole choice of whether or not she will testify. Similarly, the defense right to confront witnesses arises directly from the Sixth Amendment. No similar constitutional imperative supports the one-sided right to peremptories.

The defense interest at issue in the peremptory debate is the right to an impartial jury of the defendant's peers. Friedman has not explained how his proposed new asymmetry is like the others he cites in that it is somehow necessary to protect the relevant defense interest. A defendant's right to an impartial jury is protected by the process of voir dire, by challenges for cause and by the defendant's peremptories. Elimination of the government's peremptories does not advance any of these defense interests. Rather, it permits the defense a greater opportunity to have jurors who might be biased in its favor. We cannot understand what the societal interest might be that is furthered by such an imbalance.

One benefit of peremptories to the government, and the main benefit to the defense, is to eliminate extremists who might favor the other side. So long as both sides have them, peremptories are useless for stacking the jury in one's favor. This is because each side uses roughly similar criteria in judging jurors, and each side uses peremptories to eliminate those jurors that the other side would most like to keep. If only one side had peremptories, it would be much more possible to stack a jury, instead of arriving at a jury of moderates.

Although Friedman's article describes his proposal as moderate, the historical record suggests otherwise. Prosecution peremptories were part of the common law we inherited from the English. Whether they were called peremptories or something else, the government's ability to disqualify jurors predates defense peremptories. As the Supreme Court noted in Swain v. Alabama, 380 U.S. at 219, "the persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Abolition of government peremptories would reverse the common law rule we inherited from the English, as well as the law in all 50 states plus the federal system. This is hardly a moderate proposal.

The government (read "people" or "society") is entitled to a fair trial by competent, rational, qualified jurors, just as the defense is. In the long run, public acceptance of not guilty verdicts requires that the public perceive that it has received a fair trial. A "fair" trial does not mean a trial that is biased in one's favor. There is no principled reason for adopting a rule that would decrease the government's ability to eliminate bias, or would increase the defendant's ability to benefit from bias. Society is not well served by changes that hamper the government's ability to receive a fair trial.

In our view, eliminating the government's peremptories would not only increase the cost of litigation, it would decrease the fairness to the government and society without providing the defendant with any justifiable benefit. Friedman's proposal would also reverse the well-considered rule of all 50 states, the federal courts, and the common law. We propose instead that the present rule, which balances the competing interests of society and the accused, be retained.

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way to go. It gives an advocate a blunderbuss, when what is needed is judicial use of a scalpel. For one thing, most often prosecutors do not use their peremptories to remove outliers. Federal prosecutors ordinarily get six peremptories; in picking a jury of twelve, there can't even be that many outliers. Prosecutors, I believe, use most of their peremptories the way defense lawyers do — for comparison shopping.

Furthermore, if a venire member exhibits characteristics making her unlikely to be an adequate juror, the trial judge should be persuadable of that fact. If the judge — taking into account the interest that the court and the prosecutor share in preventing a hung jury — is not persuaded, why should an advocate's peremptory contrary desire carry the day?

So I conclude that, while defense peremptories are important for reasons discussed in my earlier essay, prosecutorial peremptories are not worthwhile. This leads me to advocate an asymmetrical solution. Asymmetries in our rules of criminal justice should not be adopted out of soft-headed sympathy for the defendant. Rather, they should be adopted only when justified by the fact that the defendant and the prosecution that seeks to punish him are in asymmetrical positions with respect to the adjudication. Current law in the federal courts and in many state systems usually gives more peremptories to defendants than to prosecutors. Thus, I do not even suggest creating a new asymmetry; I would merely extend one that already exists.

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*Friedman's original essay was adapted for* Law Quadrangle Notes *from* 28 Criminal Law Bulletin 507 *(Nov.-Dec. 1992).*

Continued from page 35

U.S. Attorney's Office and private practice in Manhattan, and Deborah Malamud came to us from a Washington law firm. Even the AC/DCs are respectful of lawyers and are deeply interested in how the law works. I certainly see none of this distain from our young people."

James Boyd White, the L. Hart Wright Professor of Law, wrote that this sense of disdain, not theoretical content, makes some scholarship irrelevant. "It is often the most theoretical work that will prove to be of surprising practical value. For me, the relevant line is not between the 'theoretical' and the 'practical' as Judge Edwards defines these terms, but between work that manifests interest in, and respect for, what lawyers and judges do, and work that does not.

"Often associated with calls for more 'practical' education and writing is an image of the law as a series of tasks to be performed more or less correctly, an image that I think is deeply debilitating. Learning to 'read a judicial opinion' is not a 'skill' to be 'mastered' in the first weeks of law school, before one gets to the really important matter of deciding what kind of society we should have. Learning to read a judicial opinion well and criticize it intelligently . . . is a task for a lifetime," wrote White, who is also a professor of English and adjunct professor of classical studies.

Lawyers seldom simply do what's right or wrong, but make choices in uncertain circumstances, so their judgment is their most basic resource. That's why law should be linked to other disciplines, he argued. "By its nature, the law is a discourse that calls upon others. It creates a space in which other languages can be heard, their findings and judgments employed. The education of the lawyer should therefore involve training in the process of translation, the art by which the lawyer can learn from other fields and disciplines, yet at the same time criticize them."

Clinical professor Paul Reingold echoed those thoughts in his response. "Central to (legal practice) is an idea that is antithetical to academic thinking: that what matters is not who is right, but what works. All first-rate practice will share certain features, but the issue of 'rightness' is literally an academic question. Success outside of the university is measured not in terms of theoretical rightness, but in cases or convictions won, or profits made or policies changed to favor a client's interest. The successful practitioner must be open to all sources of help, from all disciplines. The question is never who has the more elegant theory, but which discipline or argument will work best."

Reingold, director of the U-M's General Law Clinic, said that to clinical faculty, the disjunction between legal education and practice has always been apparent. He agreed with Edwards that much legal scholarship today has become so theoretical that it has little to offer practicing lawyers, judges or legislators. Like Edwards, he points out that the interdisciplinary movement that has broadened the scope of legal education has paradoxically made it less diverse in some ways.

Faculties of theorists are replicating themselves, hiring like-minded scholars and granting tenure to those who demonstrate prowess with legal theory. Theorists are the academic meritocracy; traditional doctrinal scholars are the equivalent of "solid B students," and practitioners not inclined toward theory are viewed as "a rung down the intellectual ladder." Reingold called for tolerance, diversity and increased emphasis on clinical legal education to balance the trend. He wrote:

"How do we legal academics learn to value and respect work that is different from our own? How do we instill in students and in faculty a sense of appreciation for what others do, be it writing about doctrine or practicing law? How do we get the academy to practice what it preaches — that diversity (of opinion, of style, of thought, of ethnicity and gender and age, of scholarship, of work) is inherently important?

"In my view, clinical legal education may well provide an answer. When clinical legal education is integrated fully into the law school curriculum, then theory and practice have a chance to merge. This is not to say that theory should play a lesser role than it does now, but theory would be regarded differently for having to compete daily with the issues of doctrine, procedure, policy, strategy, ethics, and business and personal skills that are more important to lawyers.

"Theory may have overtaken doctrine at the 'elite' schools, but Judge Edwards is still right that the best legal education will have to include doctrine, theory, clinical instruction and probably something from a range of other disciplines as well, in order to cover all the bases."

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**How do we legal academics learn to value and respect work that is different from our own? How do we instill in students and in faculty a sense of appreciation for what others do, be it writing about doctrine or practicing law? How do we get the academy to practice what it preaches — that diversity (of opinion, of style, of thought, of ethnicity and gender and age, of scholarship, of work) is inherently important?**

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