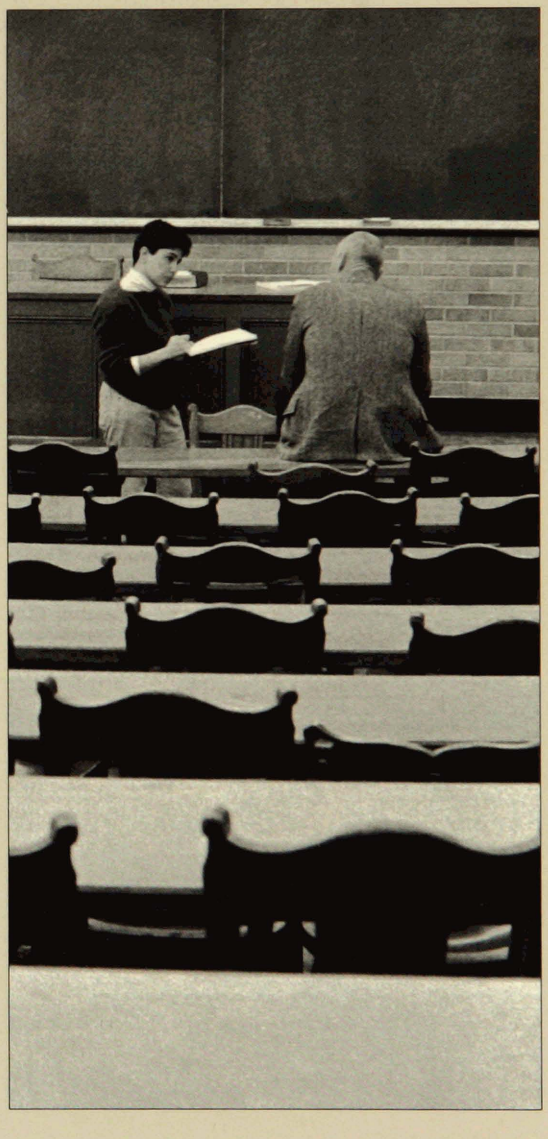
THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

VOLUME 39 • NUMBER 3
FALL/WINTER 1996

LAW QUADRANGLE NOTES



Class-Based Affirmative Action — A Case of Look (Carefully) Before You Leap

Goodbye GATT, Hello WTO

Class Action Rule Change: A Midpoint Report

Physician-Assisted Suicide: A Bad Idea

UNIVERSITY OF MICHIGAN
LAW SCHOOL

Upcoming Events

Nov. 2	Financial Survival Workshop
Nov. 5	International Law Workshop (ILW): Markus Schmidt, U.N. Center for Human Rights, Geneva, "Protection or Prevention? Dealing With Human Rights Violations in U.N. Fora"
Nov. 7	Law and Economics Workshop
Nov. 12	ILW: José Alvarez, University of Michigan Law School, "Likely Legacies of the New Yugoslav War Crime Tribunal: A New Nuremburg?"
Nov. 14	Law and Economics Workshop
Nov. 15-17	Mediation Workshop
Nov. 18	Alumni Dinner, London, England
Nov. 19	International Law Workshop
Nov. 20	Alumni Dinner, Paris, France
Nov. 21	Law and Economics Workshop
Dec. 7	Senior Day
Jan. 2-6, 1997	AALS Conference, Washington, D.C.
Jan. 9	Law and Economics Workshop
Jan. 19-20	Martin Luther King Day Symposium
Jan. 23-26	Model U.N. Conference (tentative)
Jan. 24	Alumni Luncheon, New York Marriott Marquis, New York City
Jan. 24	Alumni Luncheon, Wisconsin State Bar, Milwaukee
Feb. 7-8	Conference: Public Interest Organizations and the Media
Mar. 21-22	Symposium: Constitutional Law-Making in Post-Apartheid South Africa
Winter 1997	Conference: "Landmines and Development: Legislating for a Sustainable Future"
	Colloquy: "Equal Access to Civil Justice: Looking for Feasible, Justifiable Reforms"
	Symposium: Cyberspace and the Constitution
April 24	Senior Celebration
May 10	Senior Day/Commencement
Oct. 16-19	International Reunion, Ann Arbor

NOTE: *This calendar is correct at printing deadline and may be subject to change.*

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Cover:
A student and a teacher — the heart of Law School life.

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LAW QUADRANGLE NOTES

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MESSAGE FROM DEAN LEHMAN

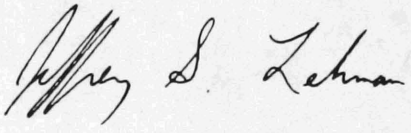
There is much to learn from our new faculty — about the law, about scholarship, and about the legal profession. But I hope that you will pay special attention to their thoughts on teaching. They convey a great deal of wisdom.

In my last message I indicated that I have decided to select as my theme for this year the great lawyer's inclination to teach others about the law. I posed some of the many contexts in which lawyers are called upon to teach others. I emphasized how the role of teacher implies a significant amount of intellectual solidarity with, and respect for, the audience that is being taught. And I mentioned how well I recalled my professors at Michigan having exemplified those qualities of intellectual solidarity and respect.

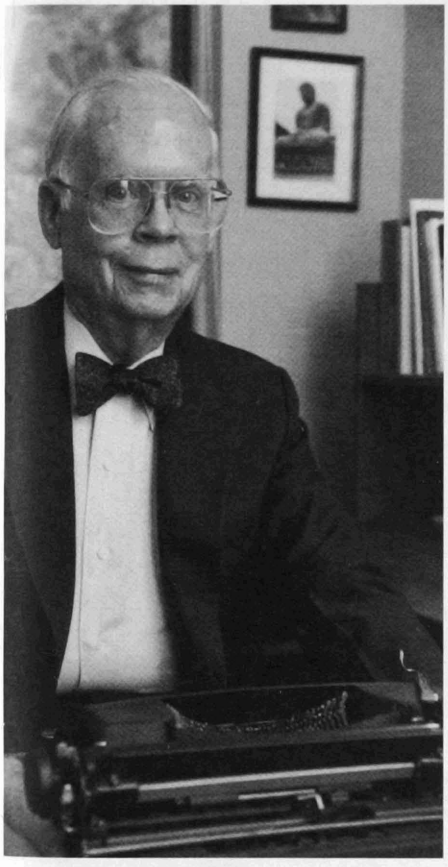
In this special issue of *Law Quadrangle Notes*, we are featuring the newest generation of teachers to carry on that proud tradition. On the page opposite, Dean Emeritus Francis Allen sets the stage, reinforcing the centrality of teaching to the life of a faculty member and explaining the importance of intellectual collegiality to a law teacher's professional development. We then introduce twelve faculty members who have joined our ranks during the past five years.

These twelve people speak, directly and personally, about why they have chosen the career of teacher. Since they joined the faculty, I have come to know all of these new colleagues extremely well. Even so, I found it exhilarating to read these twenty-four pages. For in a single pass I was given the chance to appreciate the range of intellectual breadth and power that have invigorated our school during the past half-decade.

There is much to learn from our new faculty — about the law, about scholarship, and about the legal profession. But I hope that you will pay special attention to their thoughts on teaching. They convey a great deal of wisdom. And much of that wisdom can be carried forward beyond the Law Quadrangle, into our graduates' lives as practicing lawyers who are committed to teach others about the law.



In the modern world most of us are so drawn to comparisons and superlatives — Who is better? and What is best? — that we too rarely find ourselves asking, What is good?



Francis A. Allen, *J.D. Cornell College, LL.B. Northwestern, A.B. Cornell College, Edson R. Sunderland Professor Emeritus of Law and Dean Emeritus of the Law School*

Anyone seeking a definition of the good in American legal education could hardly do better than read the statements that follow, written by young teachers recently added to the faculty of the Michigan Law School. These young people speak in very different voices and thus display a broad spectrum of style and personality. What is fascinating, however, is that despite the writers' diversities of articulation, background, and experience, they display striking uniformities in the interests and convictions they express. These are young people committed to the fields they cultivate and to which they have already made important contributions. It is always invigorating to encounter a group of persons of any age excited by what they are doing and not-so-secretly convinced that what they do is of the greatest possible importance. Another common strand is their dedication to teaching. One of the current clichés of higher education is the assertion of an irreconcilable conflict between the active pursuit of scholarship and great teaching. Those holding to this popular misconception could well note the deep respect for their students expressed by these young scholars and the efforts they are expending in the students' behalf.

A faculty containing a group of highly talented young teachers, broadly experienced and committed to academic goals, is an important part of the good in university education. But it is not the entire definition. The grand strategy of all great educational institutions is to create environments in which the total is greater than the sum of the parts. There is nothing fanciful or paradoxical about this. The effort is to create an atmosphere in which individual faculty members contribute knowledge, insights, and enthusiasm to a common fund, from which all members may derive support, stimulation, and strengthened purpose. Such a goal is not achieved overnight, nor is it reached by accident. What is required is a special kind of collegiality.

In speaking of collegiality, I am not referring to social compatability, although frequent and rewarding social contacts among the faculty play an important role. I am referring, instead, to what may be called an intellectual collegiality — an atmosphere congenial to the development of young talent and one which provides to all faculty members benefits not likely to be available to persons functioning in isolation. I believe that it is more than institutional bias and affection that leads me to say that no other law school has been more successful throughout the years in maintaining such a collegiality than the University of Michigan Law School.

Young faculty members, who are among the principal beneficiaries of such an institutional environment, also play a crucial role in developing and maintaining it. The plain fact is that they know many things not known by older faculty members, and often possess a more accurate instinct for present realities. It is at least possible, on the other hand, that the older members have contributions to make to the young. On occasion, for example, they may be able to convince a young scholar that it is not necessary that he or she reinvent the wheel.

It would be irresponsible to ignore the fact that there are today new and serious difficulties in maintaining this aspect of the good in legal education. The terrain has greatly altered since I became a law teacher soon after the end of the second world war. The society that surrounds the universities has drastically changed. Legal education is today a larger, more complex, more pluralistic enterprise. Legal scholarship is broader, more ambitious, and more competitive than in the past. Students bring to us different and more perplexing needs. It follows that maintaining the intellectual collegiality that constitutes so much of the good in university education will demand greater, more conscious and sustained efforts than in years gone by. It is of great importance that these efforts succeed, for the interests of faculty, students, and alumni are strongly implicated. The following pages provide basis for optimism. Most persons will find it difficult to read the comments of our young faculty and still doubt that the challenges will be met at the University of Michigan Law School.

— Francis A. Allen

José E. Alvarez

Professor of Law

At present I am engaged in a gargantuan, some would say impossible, task: to synthesize in one, hopefully readable, volume of 12 chapters the law of international organizations.

Thanks to a semester-long sabbatical, the first in seven years of full time teaching, I am nearly halfway there. Five chapters now cover "international institutional law" and deal with such issues as whether international organizations (such as the organizations of the U.N. system or the European Union) can sue and be sued, enter into contracts and treaties, expansively "reinterpret" their constitutions, have legal personality respected both internationally and under domestic law, and enjoy privileges and immunities. Next up: chapters assessing international organizations' techniques for "law-making," including tools for standard-setting, facilitation with compliance, and enforcement. Finally, I hope to address the "bigger picture": the difference these organizations make from a broader (including jurisprudential) perspective.

Why do it? Because my students have convinced me that such a book is needed. And because, even though any eventual book will not be a bestseller, these issues are likely to be of considerable import over the coming decades. Global institutions have accompanied the increasing internationalization of commerce, security and human rights, yet few of us, least of all policymakers, have come to terms with the rules by which these institutions govern themselves and even less with the rules that might govern these institutions. As this suggests, my book is aimed at three audiences: students of international law, practitioners, and fellow academics.

I hope to render organizational achievements and flaws a bit more transparent, while addressing fundamental questions their operations raise. Do institutions like the World Trade Organization or the International Labor Organization make a difference to the degree of states' compliance with rules governing trade or labor rights respectively? International lawyers like to think so but would a political realist agree? If organizational processes make a difference to how nations (and individuals) behave, how do they do so? Are the rules these organizations help to promulgate or enforce similar to those that Grotius (arguably the first international lawyer) wrote about in the early 17th century? Are they the kind of rules the drafters of the U.S. Constitution had in mind when they wrote its supremacy clause or the treaty clause in article II, section 2(2)? Can we afford to leave such organizations essentially in the hands of the executive branches of governments or should this "new world order" of dynamic processes for international lawmaking be subject to other checks and balances? (See, in this connection, *Law Quadrangle Notes*, Vol. 39, No. 1, at 40, and Vol. 37, No. 3, at 40.)

Although I am trying to convey what I have for years taught, writing the book has been far more rewarding (and daunting) than I had anticipated. I am learning, with humility, how little I really know about a subject I have taught for 13 years (including five years as an adjunct professor at Georgetown). There are greater risks associated with this project than with respect to my usual law review articles on more manageable topics, such as the role of judges in the International Court of Justice and in the war crimes tribunal for the Former Yugoslavia. (See 90 *American*

Eric Stein, J. D. University of Michigan Law School, J.U.D. Charles University, Prague, Hessel E. Yntema Professor of Law Emeritus

"José Alvarez has brought to the Law School international program an extraordinary combination of skills and interests: Thorough grounding in theory (Harvard, Oxford, First Class Honors), six years experience on the firing line of legal diplomacy, negotiating investment treaties and facilitating American companies' claims before the U.S.-Iran Claims Tribunal, an extensive stint in teaching, rich professional and scholarly links to the United Nations and other national and international organizations, and last but not least a heritage in Spanish culture and language with a natural interest in Latin America. A sympathetic teacher, warm and cooperative faculty colleague and prodigious scholar cited in national media."

Journal of International Law 1 [1966] and 7 *European Journal of International Law* 245 [1996].) My task is especially challenging because it demands crossing "public" and "private" divides within my field and compels forays into others, including "non-legal" specialties. It also requires the patience to deal with restive organizations that refuse to stand still long enough for their picture to be taken.

I have no idea as yet whether the entire project will jell. Nor do I know how successful other on-going projects will be — such as planning next year's annual meeting of the American Society of International Law or a new course this fall, with my colleague John Jackson, dealing with "compliance with international law."

Scholarship and teaching involve such risk-taking. It is what makes them so intoxicatingly attractive.

José E. Alvarez,
J.D. Harvard,
B.A. Oxford; A.B. Harvard

Kathleen A. Wilson,
Third-Year Law Student

"José Alvarez is a dynamic teacher who brings an enormous amount of energy to the classroom and to the international law program more generally. He works hard to foster students' enthusiasm for international law, and devotes an unusually generous amount of time to student projects such as the Michigan Journal of International Law *and the Jessup International Moot Court competition. As a teacher, he continually pushes students to consider traditional principles of international law in light of contemporary developments in scholarship and state practice, e.g., the impact of feminism on international law. As a mentor, he encourages students to think creatively about a wide range of career options through which they can pursue their interest in international law."*

Sherman J. Clark

Assistant Professor of Law

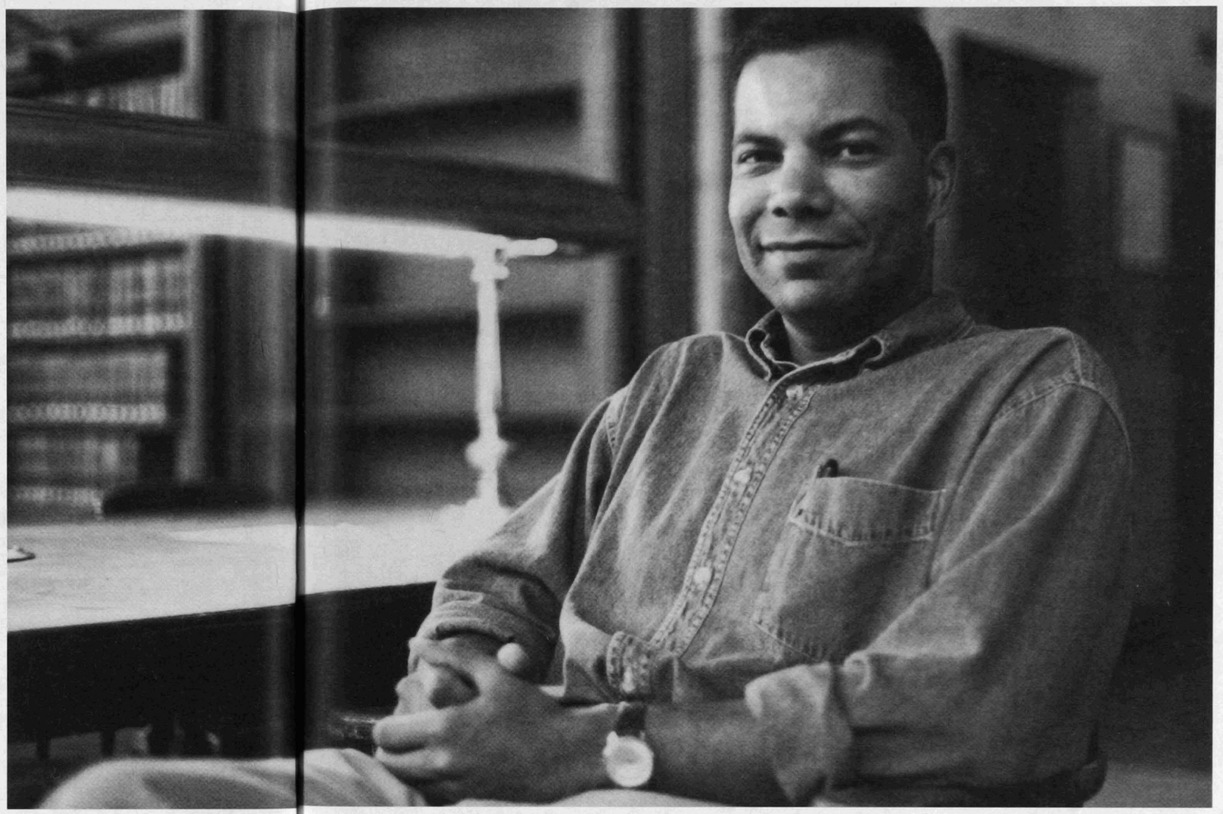
James Boyd White,
LL.B., A.M. Harvard, A.B. Amherst College,
L. Hart Wright Collegiate Professor of Law and
Professor of English

"In a profession particularly subject to the vice of narrowness, Sherman combines remarkable intellectual acuity, a real sense of the practical, and a deep ethical interest. In a rare and intense way he brings his whole mind to bear on what he thinks about. He is widely and deeply read, and accordingly has a vision of legal education not as merely technical training, but as a true education of mind and character, for himself and for his students. In addition — and it seems almost unfair that there should be anything more — he is a gifted and articulate speaker, able to bring his ideas and understandings into public form, and a master of tact to boot. As one of my colleagues said to me, 'Whenever I hear Sherman speak, on any occasion, it makes me proud that I teach at this Law School.'"

Having completed my first year of teaching, I am, if possible, more enthusiastic about the Michigan Law School than I was a year ago when I arrived. My colleagues on the faculty, the administration, and the alumni have welcomed me with open arms and have made me feel completely at home. I reserve the largest measure of my enthusiasm, however, for the students of this law school. They are as interesting and intelligent a group of individuals as one could ever hope to meet. Moreover, they are on the whole a tremendous group of human beings.

I have had the opportunity to teach in a variety of circumstances: a first year section of torts, a large section of evidence, and a small seminar on political philosophy. In each arena, I found my students to be receptive, energetic and extraordinarily capable. Teaching for the first time can be an intimidating experience, but is also exhilarating. I found that my students welcomed my energy, and more than rewarded my preparation. Along with the substantive material, I feel (at least I hope) that I was able to communicate some sense of my excitement about the study of law.

One thing does concern me, however. I truly enjoyed law school as a student, and I love working in this environment, but many students do not share my enthusiasm about the process. Too many students find law school to be stressful and disorienting, rather than primarily stimulating and engaging. The formal literature on legal education, as well as my own conversations with those at other schools, confirm my sense that this state of affairs is hardly unique to Michigan. Law students generally experience high levels of psychological stress and even depression. Why is this the case? Must it be so?



Sherman J. Clark,
J.D. Harvard,
B.S. Towson State University

No doubt, much of the stress experienced by students is the inevitable effect of setting out upon a new and challenging task. The study of law is not only difficult; it is difficult in ways for which students are not always prepared. But I am not prepared to throw up my hands. I am convinced that we can do more to reach out to our students — to help them get the most out of what should be a satisfying and engaging experience.

I have come to believe that perhaps the single biggest cause of confusion and disorientation among law students is that they often do not see what we as teachers are trying to accomplish. What are we looking for? Why are we "hiding the ball?" We are quite good at telling students what law school is not, as in "law school is not about memorizing cases and statutes." Unfortunately, we are less adept at telling them, and others, what law school is or ought to be. I believe that students will get more out of the law school experience to the extent that we as teachers of law continue to strive to articulate to them a compelling and coherent vision of legal education. Why do we teach the things we teach in the way we teach them? What do we offer our students?

Along with several more focused projects, my ongoing intellectual goal is to articulate and bring to life such a vision. I am convinced that the key — the thing we should seek above all else to teach — is the habit of mind which Dean Lehman describes as sympathetic engagement. It is the moral and intellectual act of fully and truly understanding the person with whom you are trying to come to terms, whether that be a judge in a particular case, an adversary in negotiation, or a colleague in deliberation. This is my grail. Through my writing, as in my classroom teaching, I hope most of all to make the power of sympathetic engagement real to my students. What is it, precisely? How is it done? Must it be so unsettling? And, most critically, what makes this particular skill so central to the successful student and practice of law? My aim as a teacher is to share with my students the ways in which legal education, by fostering this habit of mind, can not only prepare one for the practice of law, but can make as well for a richer civic and intellectual life.

Charles E. Duross, J.D. '96

"Professor Clark loves to teach. He enjoys knowledge and insight for their own sakes, and enjoys imparting his knowledge to his students and instilling in them that same desire for understanding. He is at his best when engaging a student about the law, whether in a lecture hall, a seminar room, or his office."

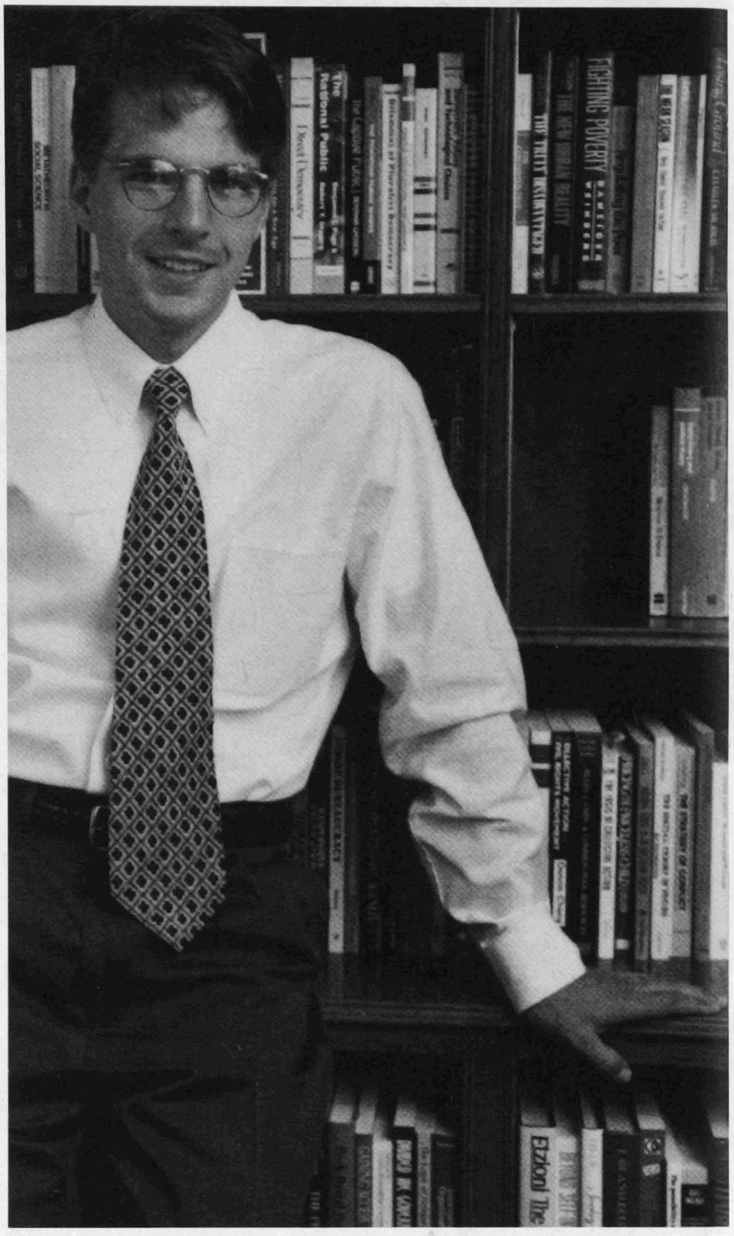
Steven P. Croley

Assistant Professor of Law

I joined the faculty here at Michigan in 1993. During the past three years, I have taught Administrative Law and Torts. I have also taught seminars in related areas, including "Products Liability," "Collective Action," and "Costs and Benefits." This academic year, I again am teaching Administrative Law, as well as a seminar, "Advanced Topics in Administrative Law." From a teaching standpoint, torts and administrative law make for a nice combination, allowing me to teach both first-year and upper-level courses and to benefit from students' perspectives on two very different legal institutions with overlapping functions.

Naturally, the classes I teach reflect the areas of research and writing that interest me most. On the torts side, almost all of my scholarship has focused on products liability. With Jon Hanson of the Harvard Law School, I have co-authored several articles that enter the products liability debate. Our most recent work, which appeared last year in the *Harvard Law Review,* explores the insurance implications of tort damages for pain and suffering. In it, we challenge a conventional wisdom among most products liability scholars — that tort damages for pain and suffering undermine tort law's insurance goal — by trying to bring a fresh theoretical perspective to that issue. Sometime next year, Jon and I will continue to explore questions about alternative theoretical perspectives by publishing a piece that addresses certain methodological issues implicated in some of the law-and-economics scholarship on products liability.

On the administrative law side, much of my work has focused on the Federal Advisory Committee Act (FACA), an interesting if sometimes overlooked statute that governs agency solicitation of policy advice from certain groups composed of non-government personnel. The FACA's applicability raises intriguing questions that have made news in the last couple of years, first in connection with the White House's Health Care Reform Task Force, and again in the context of the recent controversy between environmentalists and the lumber industry in the Pacific Northwest. In an article recently appearing in the



Steven P. Croley,
J.D. Yale, M.A. Princeton,
A.B. University of Michigan

Dara J. Diomande,
Third-Year Law Student

"Steven Croley is an inspiring, vibrant, charismatic professor who is a priceless asset to the law faculty and an invaluable resource to the student body. He has the unique ability to intellectually challenge students without intimidating them (which is a blessing to first-year law students) and turn mundane discussions of law and economics or cost-benefit analysis into lively, spirited debates in his Torts and Administrative Law classes. What distinguishes 'good' teachers from 'great' teachers is not the amount of knowledge they have (or how many books they've written) but their ability to effectively convey that knowledge to their students, and convey it in a way that motivates their students to think about, debate, and discuss legal issues outside of the classroom. Professor Croley is truly one of the 'great' teachers at the Law School!"

Administrative Law Journal, I try to provide agencies and courts with a set of criteria that aid understanding of the FACA's uncertain scope. Later next year, William Funk of the Lewis & Clark Northwestern School of Law and I will publish an article, based on a report done originally for the Administrative Conference of the United States, that provides a comprehensive overview of the FACA and offers several suggestions for improving its interpretation, administration, and implementation.

My largest ongoing research project in the administrative law area aims to connect some of the theoretical scholarship on regulation (mostly by economists and political scientists) with some of the legal-doctrinal scholarship on administrative procedure (mostly by legal academics). The animating premise of this project is that the theoretical and doctrinal literatures on administrative regulation need each other, notwithstanding that they largely ignore one another. Theories of regulation not connected to existing legal institutions and practices lack real-world bite, while proposals for reforming the legal rules of administrative decisionmaking not embedded in some broader understanding of the administrative state lack foundation. I hope to show what the social-science and legal-doctrinal literatures imply about each other, and what the most fruitful future work on administrative regulation might look like.

While I have concentrated on products liability and administrative law and regulation, my interests have at times led me into other areas. In recent years, I have written about legislator behavior, the constitutional-theoretical implications of state systems of judicial selection, and, with my colleague John Jackson, dispute resolution in the World Trade Organization. Currently, my colleague Kyle Logue and I are working on an article on insurance regulation that considers whether insurance is best regulated (assuming it should be regulated at all) at the state level, the federal level, or somewhere in between.

I have found Michigan to be an extremely friendly research environment. Several ongoing workshops and discussion groups provide many opportunities to get feedback on works in progress. At least as importantly, my colleagues here are always ready to talk ideas, in the halls or over lunch. In fact, I like to think that my sometimes-wandering interests owe much more to my intellectual climate than to a short attention span. With so many colleagues working on a wide variety of topics from a range of methodological approaches, new interests are hard to resist. In any event, Michigan is a great place to teach and to write, and I am proud to be a part of it.

Christina L.B. Whitman,
J.D., M.A., B.A. University of Michigan, Professor of Law and Professor of Women's Studies

"Steve Croley is a wonderful colleague, a person of astute perception and great good humor. He is also full of surprises. Superficially appearing to be reserved, he has turned out to be an original and creative teacher, even a bit of a showman in the classroom. His scholarship surprises, too. Steve skillfully uses prominent methods to reach unexpected results. His training in political science (undergraduate honors at the University of Michigan, and graduate work at Princeton) and his interest in neoclassical economics have made him an accomplished internal critic of 'law and economics.' Steve pursues its agenda and uses its methods without adopting its political rhetoric. Since his days as a law student he has challenged prominent practitioners of the genre on their own terms. In another context, writing about elected judges, Steve again reverses expectations. He inverts Alexander Bickel's familiar critique of judicial review by posing a 'majoritarian' difficulty: how can judges who are politically accountable be justified in a nation committed to constitutionalism? He writes with such extraordinary care that as he surprises, he persuades."

Heidi Li Feldman

Assistant Professor of Law

I feel terrifically lucky: I love my job. I enjoy scholarship, teaching, advising students, and even my administrative responsibilities. Each component of my career as a Michigan Law School faculty member allows me to think deeply about theory, practice, law and education — all prominent among what matters most to me.

I write and teach about tort law, legal theory and legal ethics. In my scholarship, I usually draw upon my knowledge of both law and philosophy — a field in which I hold a doctorate. Bringing philosophy to bear on law deepens our grasp of legal issues; rooting philosophy in law keeps the analysis relevant to live human concerns. In my most recent publication, "Harm and Money: Against the Insurance Theory of Tort Compensation," I attack the leading scholarly theory opposed to tort recovery for pain and suffering, arguing that it relies on an impoverished idea of human welfare. I claim that an Aristotelian notion of flourishing better captures both our ordinary and traditional legal thoughts about well-being and justifies awarding tort victims damages for pain and suffering. Given the last decade's legislative efforts to cap such damages, I wanted to remind myself — and others — of their moral and practical significance.

In my other major articles, I have explored the relationship between legal analysis and ethical deliberation; the connection between the scientific approach to information about causation and mass exposure tort litigation; and the availability of genuine objectivity in legal judgment.

I experience an ongoing interplay between research and teaching. For example, after teaching first-year torts for two years, I became eager to investigate, in the classroom, broader economic, ethical, political and historical issues relevant to torts generally and to particular, specialized areas of tort law. I designed a new course, Advanced Torts: Theory and Practice. I have offered it twice, each time starting with scholarly and theoretical materials and then examining mass exposure litigation, workers' accident law from the nineteenth century to the present, and defamation. Both of my torts-related publications benefited greatly from the sophisticated exchanges I had with my Advanced Torts students.

Michigan Law School students delight me. Whether in first year torts, a small legal ethics seminar, or the quite demanding upper-level torts course, the students display dedication, intelligence and willing eagerness to meet a challenge. In every class, I try to engineer extremely rigorous dialogue. One of my favorite results is when a student says to me, as one did, almost verbatim, "I never thought I would like speaking in class, and I usually don't. But in your class, I get so absorbed, I find myself talking before I realize what I'm doing." Then I know that I have succeeded in my primary aspiration as an educator: to engage and excite students first delving into their chosen field.

Scott Llewellyn,
Third-Year Law Student

"Professor Heidi Li Feldman's class is like the Marine Corps: demanding and challenging, incredibly rewarding daily and even more so in hindsight, it inspires near cult-like devotion (though fewer tattoos) in those who survive. Hyperbole (slight) aside, Professor Feldman's excellence in teaching is a product of and demonstrated by her unmatched preparation of both materials and classes, her constant innovation in the presentation of materials, the respect she has for her students, their views, and their abilities, and the cookies and other treats she occasionally provides to lighten some rather glum Ann Arbor days."

It has also been fulfilling to work with students individually, whether supervising independent study, using their research assistance or counseling them on how to cope with law school or approach the job search. In these situations, I become acquainted with my students at a deeper level. What I learn makes me excited that they will be among the people who will strongly affect their communities and beyond. When Michigan Law students probe tough issues, complex ideas and important life choices, they consistently show thoughtfulness, curiosity and enthusiasm.

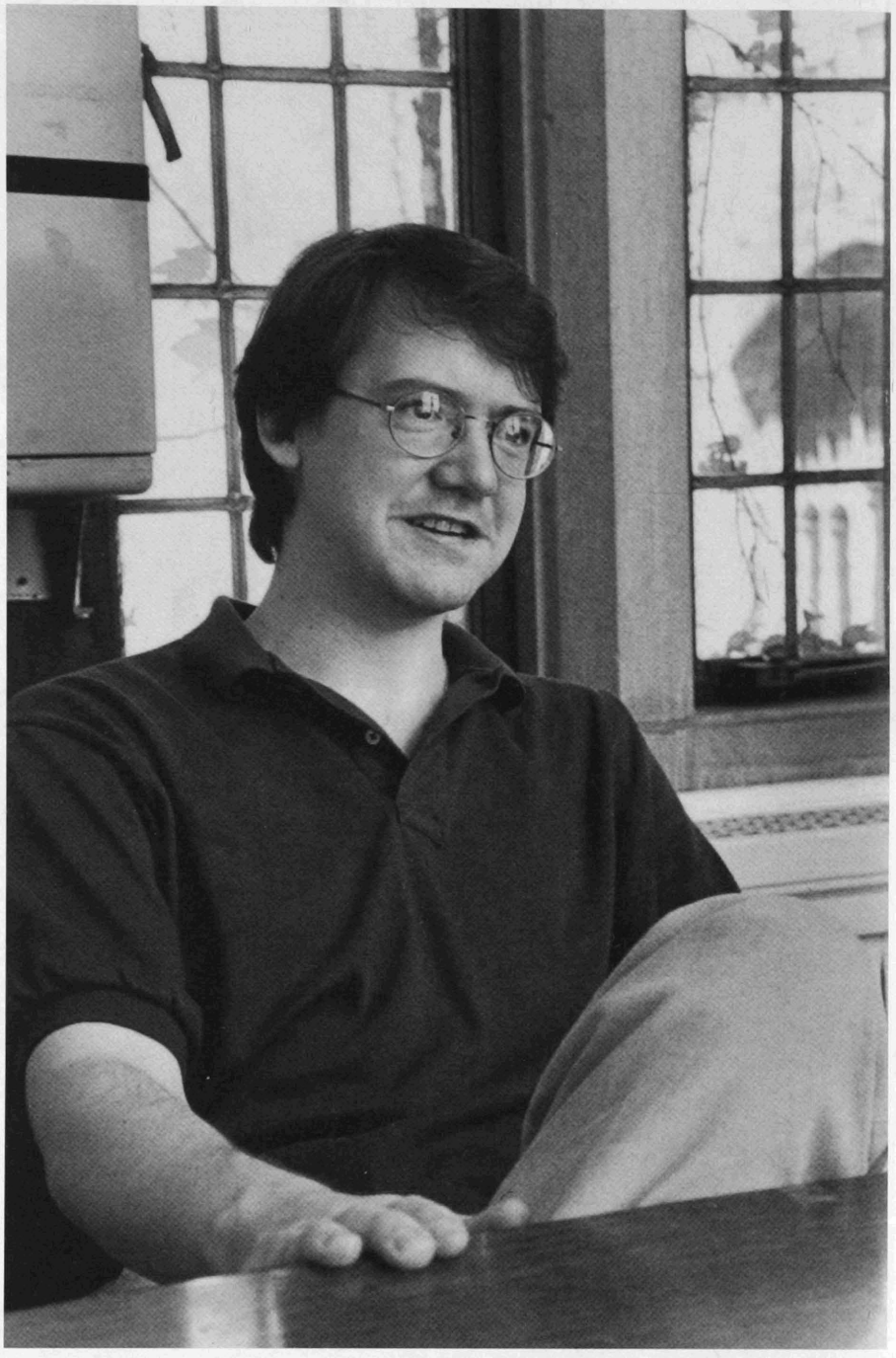
Finally, a word about faculty administration: While this is officially the drudgery of an academic's job — and admittedly it can be dreary — I nonetheless regularly find that through working with my colleagues on matters such as faculty hiring or setting educational policy, I learn. Together, we shape the Law School, the institution that makes my scholarship and teaching possible. It gratifies me to give back to the place that gives me so much.

Lest it seem that I lack interests outside the legal academy, I will conclude by sharing my most cherished dream. I want to do the alley-oop with Shaquille O'Neal. (Basketball fans everywhere know what I mean.) I'm realistic, though — I plan to pass to Shaq, and he'll do the dunk. I informed my Winter 1996 Advanced Torts students of this ambition. They kindly drafted a letter to the sportscaster Marv Albert, explaining, as only lawyers can, why he should convince Shaq to cooperate in the dream. We haven't heard from Marv yet. Help from *Law Quadrangle Notes* readers welcome.

Heidi Li Feldman,
J.D. University of Michigan Law School, Ph.D. Michigan, B.A. Brown

Terrance Sandalow, J.D., A.B. University of Chicago, Edson R. Sunderland Professor of Law and former Dean of the Law School

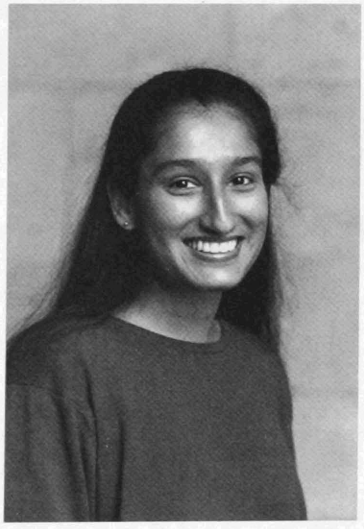
"As a student in several of my classes, Heidi added so much to the quality of class discussion that I was sorely tempted to fail her as a way of keeping her around. Now that she's a member of the faculty — probably a more sensible way of keeping her here — the intellectual vitality that made her so valuable as a student has contributed greatly to the intellectual life of the faculty. At faculty meetings and in workshops, we've come to count on her for comments and questions that are both interesting and penetrating."



Peter J. Hammer,
J.D. University of Michigan Law School,
Ph.D. Michigan,
B.A. Gonzaga

Sharan Suri,
Second-Year Law Student

"Intelligent, warm, respected and respectful, confident yet modest, Professor Hammer is one hundred percent professional and one of the best teachers at this law school. It is refreshing to see a faculty member so young and so accomplished master the art of commanding hard work from his students by treating them like the adults they are and the professionals they will soon be."



Peter J. Hammer

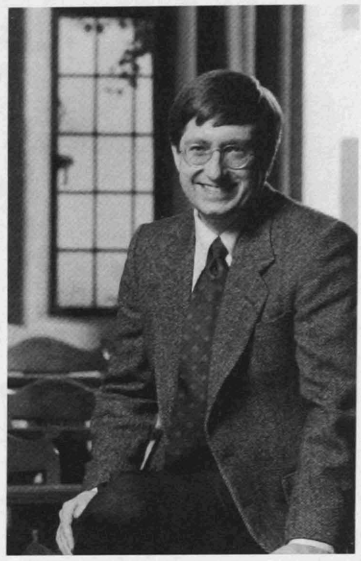
Assistant Professor of Law

For me, this job combines a commitment to teaching, a commitment to research and a commitment to public service. When done right, these activities will overlap and complement each other, which is a large part of the fun. Education and learning involve the continual discovery of interrelationships. Magic in the classroom occurs when students discover these patterns for themselves. Successful research takes place with the discovery and careful exposition of similar sets of interconnections.

I teach courses in antitrust law, contracts and health care. The antitrust course involves the study of how markets function. The contracts course examines how private parties reach agreements, and what types of agreements should be enforced. My seminar, "Health Care: The Firm, the Market and the Law," is largely devoted to examining how contracts, markets, and firms are really different instruments designed to accomplish the same objective, and then exploring with the students the implications of this lesson for law and policy in the context of modern health care markets.

My current research is closely related to the topics covered in the seminar. My most recent work, "An Evaluation of Physician and Hospital Proposals for Antitrust Reform: Arrow, Coase and the Changing Structure of the Firm in Emerging Health Care Markets," looks at proposals to reform federal antitrust laws. The piece develops a framework in which to assess when non-market interventions in medical markets might be appropriate, applies the framework to antitrust reform proposals, and ultimately rejects physician and hospital reforms that would permit greater levels of provider cooperation in medical markets. The modern trend of integrating physician services, hospital services and medical insurance into a single economic entity is defended as a rational Coasian reformation of the firm. Vigorous antitrust enforcement is advocated as a means of counteracting the incentives that integrated health care providers may have to under-provide medical care.

Jeffrey S. Lehman, J.D./M.P.P.
University of Michigan,
A.B. Cornell, Dean of the
Law School and Professor
of Law and Public Policy



"Peter was a spectacular addition to our faculty. He combines a powerfully analytical mind with extraordinarily broad interests. I have never before known someone who, in a single conversation, can offer original insights into antitrust law, health policy, and international economic development. It is no wonder his students adore him!"

In addition to health care, I have a strong interest in issues relating to Cambodian law and development. I have participated in a number of different Cambodian law reform programs and currently serve as president of the board of directors for Legal Aid of Cambodia — an organization dedicated to meeting the legal needs of Cambodia's rural poor. In an effort to integrate this work into my research and teaching, I plan on putting together a seminar devoted to Cambodian law and development issues and devising ways for Michigan law students to engage in supervised research projects that would provide assistance to organizations working in Cambodia. This past summer, three Michigan law students worked as interns for Legal Aid of Cambodia, making valuable contributions to the organization.

As I write this, I am preparing to travel to Cambodia to continue this work. The goal is to combine teaching, research and public service in the kind of way that I find most satisfying: teachers continuing their own education and sharing it with students; students learning and improving their own skills, whether in the legal or academic arenas; and the two efforts combining in a way that helps people who might not otherwise get help. Who could ask for more?

Michael A. Heller

Assistant Professor of Law

"No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." Although I teach the Rule Against Perpetuities and use the Socratic method, I try to infuse Property Law classes with the drama of current disputes in the field. Debates over takings doctrine, zoning powers, environmental protection, and housing policy make for lively classroom exchange. The courses I teach — Poperty Law, International Law, and a seminar called "From Marx to Markets" — touch on my main academic concerns: How does a country create private property? What property rights are essential for well-functioning markets?

Over the past decade, I have worked with governments in a dozen countries to help create land and housing markets. In Latin America, I worked for USAID to bring basic infrastructure to shantytown communities. In Bangladesh for the Ford Foundation, I researched how funds flow out from the central government and down into poor communities. While at the World Bank from 1990 to 1994, I helped develop a methodology that shows quantitatively the effect that government policies have on land and housing markets —in brief, housing policy matters more than policy-makers realize. During my years at the Bank, as an "agent of international monopoly capitalism," I also worked in Albania, Armenia, Hungary, Poland, Romania, and Russia developing the legal framework for real property rights.

This practical experience motivates my current research — which focuses on the creation of private property in the move from socialism to capitalism. Working with reforming governments, I saw that standard western property theory has some surprising gaps. Our property law — developed over centuries in response to historical peculiarities — does not offer much useful guidance for rapidly emerging property markets. When I was working in Moscow, a senior Russian official called my attention to a puzzle: privatization of some state-owned assets such as apartments was quickly creating private markets; privatization of other assets such as commercial space created mostly empty storefronts. What could the Russians do to help new entrepreneurs move out of their cold street kiosks and into retail stores? How do you create secure rights in real property? I hope my research can help plug some of the gaps in property theory and offer some useful advice for transition reformers.

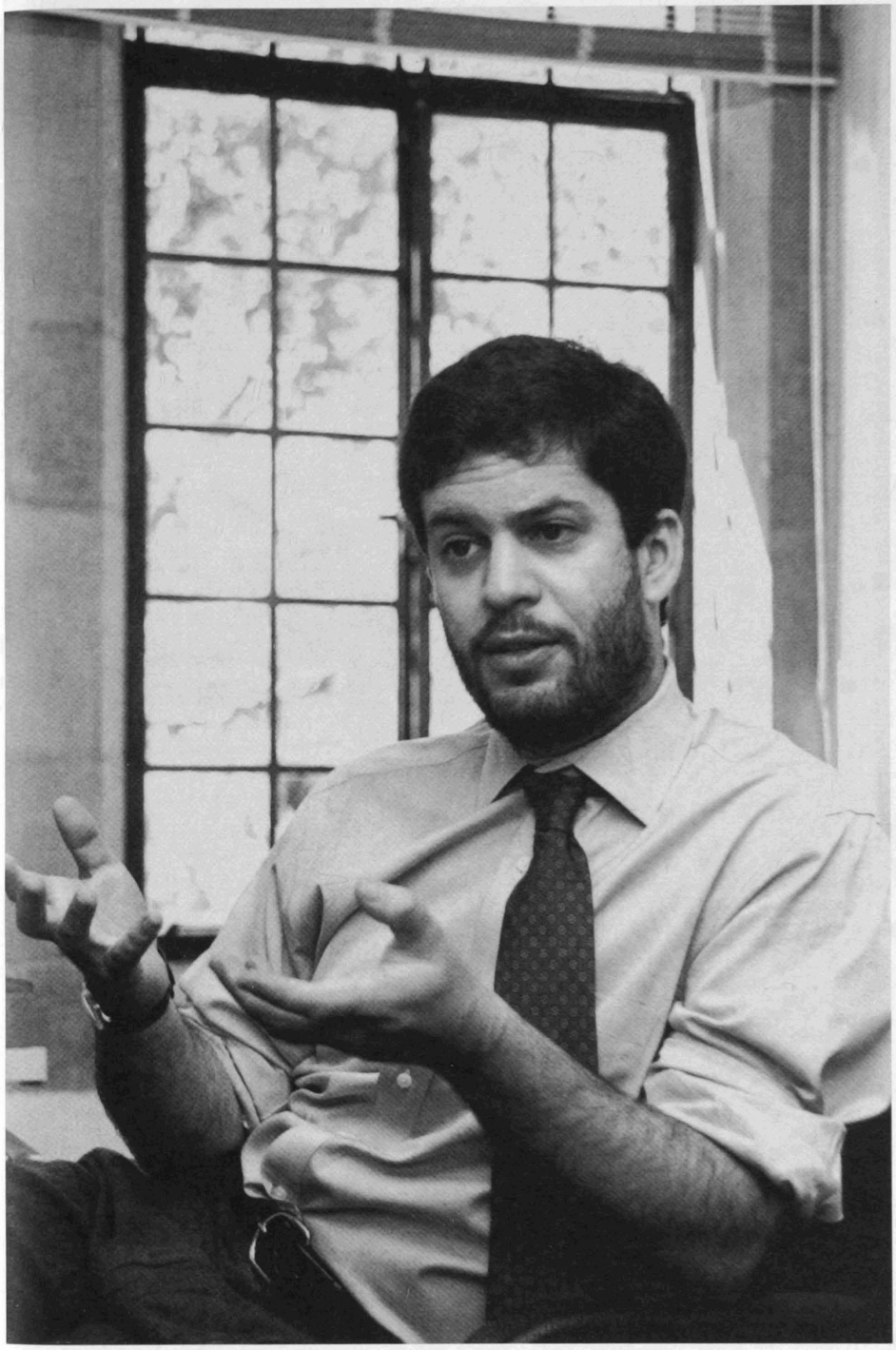
My first article uses the transition experience as an accidental laboratory for thinking about property. Property theory does not explain a range of strange phenomena — such as empty storefronts in shopping-deprived Moscow — that have emerged during the early years of transition. Understanding these phenomena requires going back to the basics of property: the starting point of transition and end point toward which market reformers aim. I use the example of empty storefronts to illustrate what I call anticommons property, a type of property where multiple "owners" each hold a few sticks in the property rights bundle. More concretely, as to a single piece of commercial real estate, rights to sell may be divided among several local government agencies and enterprises; rights to receive the revenue from the sale given to other owners; rights to lease, to receive lease revenue, to occupy, and to determine use given to yet more owners. The tragedy of the anticommons emerges when privatization creates excessive rights of exclusion — owners of storefronts hold on to their initial endowment of property sticks, each excluding use by the others, and end up wasting the resource. In other words, if property rights are split up too much ex ante, people may not be able to bargain ex post to reassemble those rights into useable property.

The article has three main punch lines: First, the standard theories do not well describe the starting point for transition: what comes before private property? Second, theory does not well describe the available end points of property: what happens when property rights are oddly bundled during the transition? Third, the article concludes that the particulars of bundling property rights matters more than has been recognized in property theory and transition practice.

A second project that I am working on concerns poster law. Students place tens of thousands of posters around the Law School each year: in staircases, on walls, and on bulletin boards. Rarely, however, have formal disputes about postering arisen. Students know how far to go — and go no farther despite numerous avenues for postering deviance: plastering, blizzarding, mega-signs, or door posting. How do the informal norms and formal law of postering interact? Is poster law efficient? Is it just? What is the cutting edge of poster law? I would appreciate recollections of postering experiences from alumni posterers.

John H. Jackson,
J.D. University of Michigan Law School, A.B. Princeton, Hessel E. Yntema Professor of Law

"Michael Heller has an extraordinary, lively mind and has greatly enhanced our international program with his lively teaching and his efforts in directing the International Law Workshop series of lectures. He is a welcome new colleague!"



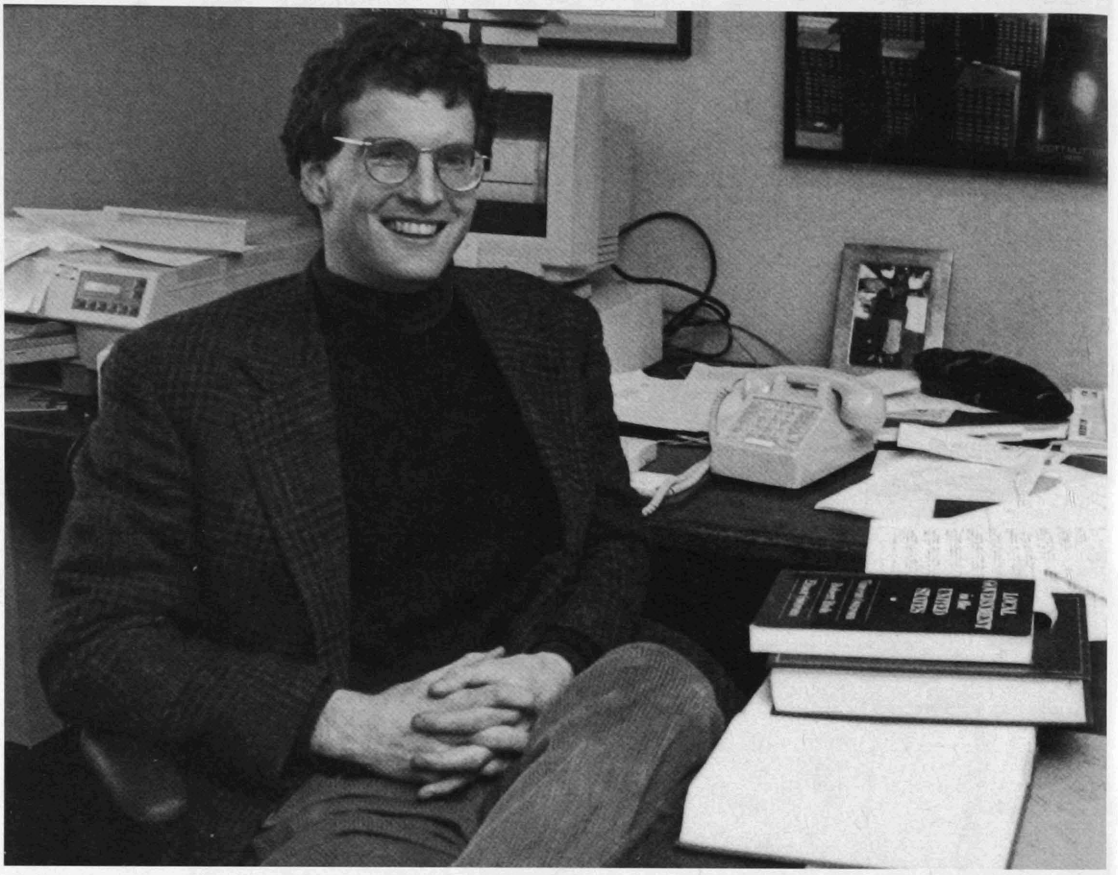
Michael A. Heller, J.D.
Stanford, A.B. Harvard

Elizabeth Provencio,
Third-Year Law Student

"Professor Heller's method of drawing on the talents and experiences of his students adds the necessary dimension to the classroom that fosters critical thought and effective advocacy. He challenges students to move beyond the limits of their own experience by encouraging diversity of thought and the inclusion of perspectives from all groups of people. Not one to discourage debate, he has no qualms about admitting his own limitations and lack of experience. His teaching awards (including the sidewalk chalk bestowed upon him by his first-year section) reflect the unique and powerful impact Professor Heller has on his students."

Roderick M. Hills, Jr.

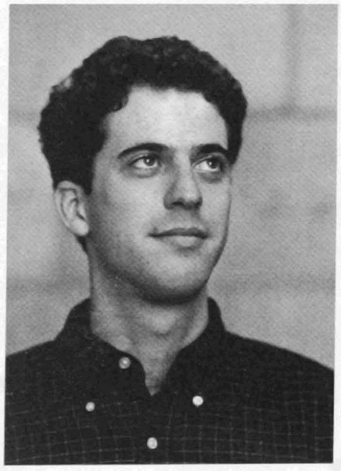
Assistant Professor of Law



Roderick M. Hills, Jr., J.D., B.A. Yale

David Mendel,
Third-Year Law Student

"Professor Hills brings incredible energy to every aspect of his job. In class, he creates a highly charged intellectual atmosphere. I appreciate the fact that he asks questions for which he does not have set answers. Although this approach makes for humbling exams, his students know that he is genuinely interested in their ideas. In addition, as judicial clerkship advisor for the class of '97, Professor Hills really has made a great effort to encourage students to apply for clerkships and to help them strategize about the application process."



My three greatest areas of scholarly interest are in local government law, land-use controls, and constitutional law (the last with a strong emphasis on constitutional federalism and intergovernmental relations). It is not immediately obvious to many people that these three topics have a lot in common, but I tend to think of them really as a single topic. All three involve the question of territorially based self-government: how can a community give one subgroup of persons within the community special powers over a piece of territory while simultaneously preserving the community's control over the same piece of territory? How should such powers be divided up between community and subgroup?

My current research revolves around this central question about the arterial allocation of powers. One currently unsettled issue of constitutional law is the degree to which the national government can order state and local governments to implement

national law. The issue is practically and theoretically important, for it defines the terms under which intergovernmental relations — so-called "cooperative federalism" — takes place between different levels of government. In dozens of regulatory schemes ranging from the Clean Air Act to the Occupational Safety and Health Act, the national government uses states to implement national law. To what extent can the national government unconditionally demand such services from the states? In 1992, the U.S. Supreme Court held by a bare majority that the national government could not impose such unconditional mandates on the states. But the meaning and scope of this prohibition is up for grabs: for instance, the Court already has granted certiorari to decide whether the Congress can force local law enforcement officers to implement the Brady Act, a statute regulating the ownership of firearms.

I think that some light can be shed upon this problem by examining it in light of the literature from transaction costs economics and constitutional theory on how to allocate property rights in private entitlements like land use. In land use law, the government can sometimes demand private action unconditionally and sometimes can demand such action only upon payment of "just compensation": in an eminent domain proceeding. A rich and detailed economic and constitutional literature discusses the practical advantages and disadvantages of each method of transferring control over land use, considering the risk of "holdouts," the costs of bargaining, the courts' ability to calculate "just compensation," etc.

I am interested in exploring the degree to which these sorts of issues are reproduced in, and might help to resolve, disputes about whether the national government can "commandeer" the regulatory processes of the states. Does Congress need to commandeer the state's regulatory processes as a practical matter? What are the risks that useful schemes of "cooperative federalism" will be derailed by state "holdouts"? Should the national government be barred from "commandeering" the states' regulatory processes unconditionally, or should Congress, at least in some cases, be able to require state implementation of national law, just so long as Congress pays compensation for such use? If Congress can have some sort of "eminent domain" power to impose funded mandates upon the states, then how should one go about measuring "just compensation"? These sorts of issues are endemic to land use, but I suspect that they are also at the core of this constitutional struggle over Congress' power to use the states.

I am also conducting research on the state laws that govern the incorporation of municipalities. One goal of such laws is to create voting communities with common interests and to protect persons from being improperly included within a municipality so that such persons are not forced into municipalities where they will be consistently outvoted by a majority with differing views or interests. But what about wrongful exclusion? Should there be limits on the degree to which new municipalities can be formed to exclude low-income persons from the new municipal boundaries and, thus, its voting population, tax base, and range of public benefits? In exploring this question of wrongful exclusion, I am examining other areas of law (e.g., the formation of collective bargaining units in labor law), the theory of voting rights, and constitutional doctrines governing the formation of electoral districts.

Finally, in addition to these questions of federalism and local government, I am also working on an essay examining the meaning of the [U. S. Supreme] Court's recent decision in *Evans v. Romer*. In *Romer*, the court held unconstitutional a Colorado state constitutional provision, "Amendment 2," barring the state from creating or enforcing claims of discrimination based on gay or lesbian orientation or conduct. I had helped to draft the plaintiff-respondents' brief urging the Court to overturn Amendment 2. But I remain uncertain about the implications of the favorable decision that we received. In particular, I am interested in exploring the Court's apparent contention that Amendment 2's breadth — its elimination of all laws protecting gay and lesbian persons from public or private discrimination — suggests an improper purpose of "animosity." This relationship between breadth and improper legislative purpose might shed some light on some important legal questions — for instance, the proper construction of state law in the context of a facial challenge or the specific meaning of terms like "animosity" or "private bias" in equal protection jurisprudence.

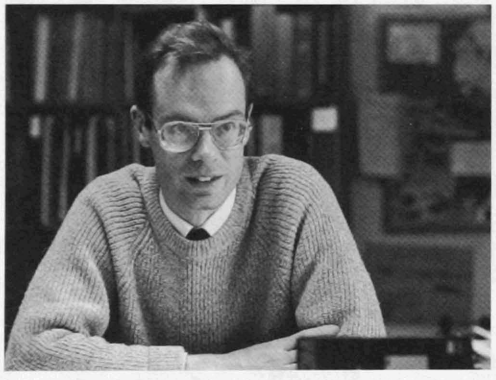
Thomas E. Kauper,
J.D., A.B. University of Michigan,
Henry M. Butzel Professor of Law

"Rick Hills is a young person whose contributions to the Law School have already greatly exceeded his years. His keen intelligence, enthusiasm, energy and spontaneity in the classroom, his dedicated and highly successful efforts in assisting students in their quest for clerkships, and his engagement with the faculty at large have won him the respect and admiration of everyone in the Law School community. We are proud of him and of our own collective wisdom in bringing this warm and caring young man to the faculty."

Kyle D. Logue

Assistant Professor of Law

Kyle D. Logue,
J.D. Yale, B.A. Auburn



Kent D. Syverud,
J.D., M.A. University of Michigan,
B.S.F.S. Georgetown,
Associate Dean for Academic Affairs
and Professor of Law

"I am excited about Kyle's scholarship because his combined research expertise in tax and in insurance issues make his conclusions uniquely insightful and valuable for public policy. Kyle also is a spectacular teacher and likely to become one of the country's premier scholars in his fields."

Most of my teaching and research efforts are currently spent in two general fields of law — taxation and insurance. Which raises an interesting question: Why would a rational person decide to devote a good portion of his academic career to areas of law that many people — lawyers and nonlawyers alike — find painfully boring and unreasonably complicated? The tax and insurance lawyers in the audience, of course, already know the answer — that taxation and insurance are exceptionally interesting topics and that, if one wants to understand how the real world works (in particular, the world of commerce), one must understand how the existence of taxes and insurance shape things. To provide a clearer picture of what I find interesting and important in these areas, let me briefly summarize three of my recent research projects.

The first, an article that appeared in the March 1996 issue of the *Michigan Law Review*, is a theoretical piece that addresses the following question: Assuming a decision has been made to change the tax laws in a particular way (for example, to repeal a whole slew of income tax deductions and exclusions in an effort to simplify the Internal Revenue Code), what should be done about the potential transition effects of the change? The problem

is that some taxpayers will inevitably have made investments in reliance on the prior law and will therefore stand to suffer a financial loss if the new law is applied to investments made before the transition. Should those taxpayers who so relied be protected by some form of transition relief, perhaps a grandfathered effective date that prevents the new law from applying to pre-transition investments? Or should such losses be left where they fall, on the theory that those taxpayers who make investments in reliance on such provisions should (and should be induced to) take into account the possibility that their cherished deduction or exclusion will someday be eliminated? This is an especially important topic in today's political climate with its frequent calls for radical tax reform — including the outright repeal of the Internal Revenue Code lock, stock, and barrel.

Applying standard economic analysis, I conclude in the *Michigan* article (Ed. note: which the U.S. Supreme Court cited on July 1 in *U.S. v. Winstar,* No. 95-865, 1996 U.S. Lexis 4266, n. 29), that with certain types of tax provisions it may often be efficient to provide guaranteed grandfather protection in the event of repeal. Such provisions would consist of those that induce detrimental reliance on the part of taxpayers, that is, decisions by taxpayers to increase their level of investment in some socially desirable activity. An example might be an incentive tax credit. I also conclude, however, that certain types of tax changes probably should not give rise to automatic grandfathering. That category would include corrections of obvious legislative errors as well as small changes in the income tax rates. Although my argument has its limitations (not the least of which being, for example, the difficulty of drawing an administrable line between "obvious legislative errors" and other tax-law changes), it provides a theoretical framework with which we can begin the difficult job of making hard decisions in this area.

Switching from taxes to insurance, I spent much of this past summer working on an article with Professor Steven P. Croley (a colleague here at Michigan) in which we explore one of the fundamental issues of insurance regulation: What is the optimal level at which to regulate insurance — state or federal? Our interest in this question was aroused, at least initially, by the remarkable fact that, of all the heavily regulated industries in this country, insurance is the only one regulated almost exclusively at the state level, with the possible exception of certain types of public utilities (such as water) that are also regulated primarily at the state or local level. Our study focuses on solvency regulation and rate regulation in insurance markets; and it explores the overlaps between the market failures that give rise to the need for regulation in the insurance industry and those that give rise to the need for regulation in other areas, such as banking, securities, and public utilities.

Finally, I consider one project that contains issues of both insurance regulation and tax law. In an article that will appear in a forthcoming issue of the *Virginia Law Review*, I examine the extent to which the Tax Reform Act of 1986 (TRA), and accounting decisions made by insurance companies in anticipation of that Act, might have influenced the pricing and availability of certain lines of property-casualty insurance during the mid-1980s. That paper looks back at the much-written-upon "liability insurance crisis," the period when liability insurance premiums went through the roof and when certain types of coverage temporarily were unavailable, and it re-examines the prevailing theories of the crisis in light of a previously unexplored tax-arbitrage opportunity that was presented to insurance companies as a result of the TRA. I conclude by offering a composite explanation of the crisis that builds on previous theories but that incorporates the effects of tax law and tax-law changes on insurance markets.

These three projects address the types of issues, normative and empirical, that I find intriguing in the study of taxation and insurance — or, for that matter, any other area of law. What's more, contrary to what you might think, I do not carry any mechanical pencils in my shirtpocket.

Steve Seeger
Third-Year Law Student

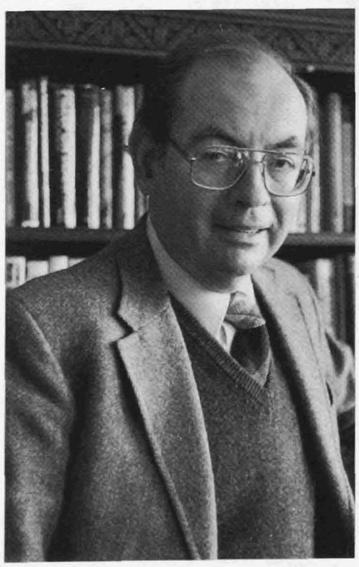
"Kyle Logue offers everything a student could want in a professor: enthusiasm, expertise, clarity and accessibility. He creates a dynamic (and delightfully amusing) classroom setting, which yields both an optimal learning environment and an exceptional rapport with his students."

Andrea D. Lyon

Clinical Assistant Professor of Law

Yale Kamisar,
LL.B. Columbia,
A.B. New York University,
Clarence Darrow Distinguished
University Professor of Law

"Because of her tremendously rich experience 'fighting in the trenches,' Andrea Lyon will contribute greatly to the U-M Law School community. Before founding and directing the Illinois Capital Resource Center, Andrea spent a decade and a half in the office of the Cook County Public Defender, where she supervised more than twenty lawyers and did an outstanding job in the 130 homicide cases she personally tried. In addition, Andrea wrote the Illinois Death Penalty Defense Manual. *No one aware of Andrea's many contributions to the criminal justice system was surprised when last year she received the Reginald Heber Smith Award honoring outstanding achievements and dedicated service of a lawyer working as a public defender or legal aid attorney."*

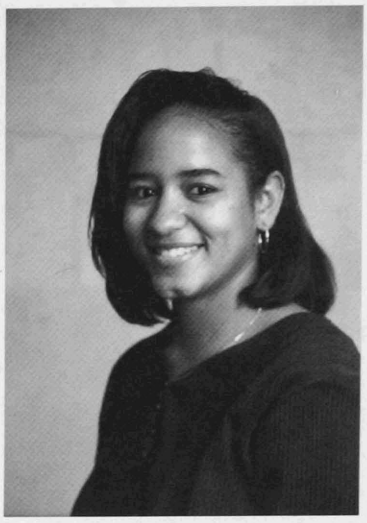


Andrea D. Lyon, J.D.,
Antioch School of Law,
B.A. Rutgers

I have been a criminal defense attorney, and more specifically a public defender, my entire professional life. When I joined the clinical faculty here, I brought with me a predilection for the defense of the underdog, and the true believer's commitment to the ideas in our Constitution that characterize the best of the profession. I also hope that I can teach others to care deeply about the things that move me. They are not just skill, preparation, imagination and the drive you need to coalesce them, although I do not mean to denigrate the importance of any of these and spend a great deal of time teaching them. But of greater importance, it is learning to represent your client with objectivity and compassion. It is the sense that the words "equal justice under the law" are not merely words, but a living, breathing reality. They live because we made them breathe, because we fight for the ideal as well as the individual, and because we speak when others may not or cannot.

The primary focus of my professional and intellectual life has been defending death penalty cases, both as a "line" public defender and member of the Homicide Task Force in the Cook County Public Defender's Office, then as its chief, and then as the first director of the Illinois Capital Resource Center, which represented the death row inmates throughout the state of Illinois on collateral review. I have spent a lot of time looking at how the jurisprudence of capital cases drives the criminal justice system, and more particularly, how it does so in the complex context of federal habeas corpus. In one article I wrote I discuss one of the unintended consequences of the United States Supreme Court's ever-tightening restrictions on access to the great writ. In order for a state prisoner to challenge his conviction and/or sentence in federal court, he must have "exhausted" state remedies. In simple terms, he must have given the state the chance to right the constitutional wrong first. This used to mean that a defendant had to have pled his constitutional claim, in federal terms, in state court. Then it became more restrictive and required the presentation of all facts to the state court. In other words, if you didn't ask the right question in state court, you can't ask it later in federal court unless you could show both "cause and prejudice". In other words, at the time I wrote the article, you had to show that you had a good reason (like the state hid the evidence from you, for example) and that it would have made a difference to the conviction and/or the sentence. This is a hard standard to meet, but this year's Congress has made it even harder. Now if you don't say everything there is to say in state court you have to not only show cause, you have to show innocence of the crime. The intended (and actual) effect of these changes is to make it harder for a state prisoner to get relief in federal court. But the unintended and very real consequence is to increase the length, complexity and expense of capital cases at the trial level. For who would want to chance not making an objection, asking for a hearing or presenting evidence which might one day save her client's life? And who would not investigate prosecutorial misconduct, for example, even with no strong basis to do so, for fear that should it later turn out to have occurred, it is forever waived and her client might be executed with no federal review on the merits?

Perhaps now it is clearer why the belief in the ideal of justice, and the perfectibility of a system of justice motivates me, and I hope those I teach. After all, if we are going to be pushing such a large stone up such a steep hill, we must believe the top is worth reaching.



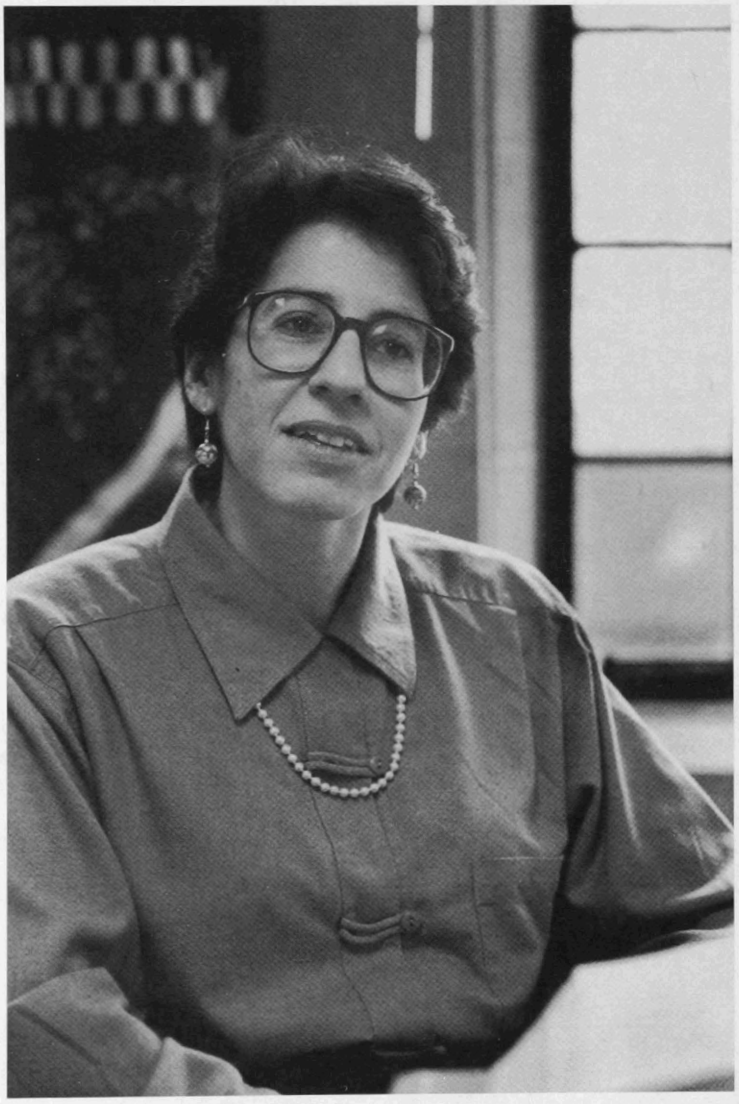
Liquita F. Lewis
Third-Year Law Student

"Professor Lyon is an excellent addition to this law school. She has the unique ability to teach her students how to mold their individual personalities, talents, and idiosyncrasies into effective trial advocacy. More importantly, she is a dedicated, caring person who tirelessly gives her all to her family, her clients, her colleagues and her students."

Deborah C. Malamud

Assistant Professor of Law

I came to law teaching at Michigan after two clerkships (federal district court and U.S. Supreme Court) and four years in union-side labor practice in Washington, D.C. That sounds like a perfectly traditional entry route. But in reality, my pathway was less traditional: it began with an undergraduate major in religion and several years of graduate study in anthropology. The link among law, anthropology, and religion is that they all are routes of access into a people's most fundamental debates about its identity and values. I chose law because of its activist stance on matters of social justice, and became fascinated by the societal implications of the law's interventions (or its failures to intervene) in debates on class, race, and ethnicity in American society. It was obvious to me when I went to law school that civil rights and labor would be where all of my interests would meet, and I was right. Both are



Deborah C. Malamud,
J.D. University of Chicago,
B.A. Wesleyan University

Theodore J. St. Antoine,
J.D. University of Michigan Law School, A.B. Fordham College, James E. and Sarah A. Degan Professor of Law and former dean of the Law School

"It took the faculty a dozen years to find someone good enough to succeed Harry Edwards in labor and employment law. Deborah Malamud was worth the wait. She has everything that makes for a great teacher and scholar: a love of ideas, a genuine affection for students, a personal point of view — and the courage to take positions that none of her various constituencies will necessarily applaud."

fields through which all of us, in our daily lives, send and receive powerful messages about whose views and interests count in America. What I was less able to predict was how fascinating I would find the law outside of my specific areas of interest.

In my first article, "The Last Minuet: Disparate Treatment After Hicks" (*Michigan Law Review*, August 1995), I reexamined the long-established three-step procedure for proving intentional discrimination in individual cases in the aftermath of a much-criticized conservative Supreme Court decision. I concluded that the Court had reached the correct conclusion, in light of unresolved tensions in the procedure's rationale. Those tensions are reflected in the actual practice of the district courts in summary judgment cases: the district courts recite the official procedure but the best of them struggle to break out of the procedure and approach the cases holistically when the procedure impedes a full understanding of the facts.
I concluded that plaintiffs are often hurt by rigid adherence to the procedure, and that abandoning it in favor of open-ended factfinding would be the best course both for them and for the coherency of the law.

My second and third articles deal with the issue of class. Our legal system deals explicitly with race, gender, ethnicity, religion, national origin, disability — but class is not a recognized category in American law. That may soon change. Race-based affirmative action is under attack in this society, and it has become popular to suggest that class-based affirmative action ought to take its place. In my second article, "Class-Based Affirmative Action: Lessons and Caveats," in the June 1996 issue of the *Texas Law Review* (and excerpted beginning on page 61 in this issue of *Law Quadrangle Notes*), I examine what it would mean for the legal system to define "class" for purposes of a program of class-based affirmative action. On the empirically-grounded assumption that programs of class-based affirmative action would be of little help to those at the bottom of the American socioeconomic hierarchy, I review relevant literatures from the social sciences and humanities and discuss what they reveal about the complexity of defining and measuring class, particularly when lines must be drawn within the middle classes. I express (and defend) the fear that the government would likely opt for an over-simplified model that would, in particular, fail to capture the complex interactions among class, race and gender in American society.

My third article returns to the issue of class and the law, and examines a concrete historical instance of legal class line-drawing: the exemption from the overtime requirements of the Fair Labor Standards Act for "executive, administrative, and professional" employees. The article will look at the origins of the FLSA "white-collar exemptions" (as they are often wrongly called) in the National Recovery Administration, and will situate them in the context of the debates of the time on whether there is a meaningful difference between blue-collar and white-collar work, and on where the line between routine and upper-level white collar work ought to be drawn. The broader project is to examine the enterprise of governmental class definition itself: to ask whether the government was attempting simply to mirror the societal consensus on these issues, to model the "best" academic thinking of the day, or to reach an independent judgment on questions of occupational classification.

I have the good fortune to be teaching in my core areas of academic interest: I teach courses in Labor Law, Employment Discrimination, and Individual Employee Relations (a survey course of other aspects of employment law), and seminars on labor law and policy, anthropological perspectives on race, class and ethnicity, and Supreme Court decisionmaking. I love teaching Michigan students, and I consider it a privilege to be a part of our students' professional decisionmaking, both by sharing my own enthusiasm for the field of labor and civil rights and, most important, by helping them ask the right questions about themselves and about legal practice.

Jessica Lind,
Final-Year Student J.D./M.P.P. Program

"In addition to a keen intellect, Professor Malamud brings enthusiasm and humor to her teaching. Her enthusiasm for employment law is contagious, and her students develop a genuine excitement for this challenging area of law. Outside the classroom, no professor is more willing to counsel students in both the professional and personal realm. Her advice is insightful, honest and sensible. Professor Malamud has been a true inspiration to me as well as many other students who have been fortunate enough to sit in her classroom"

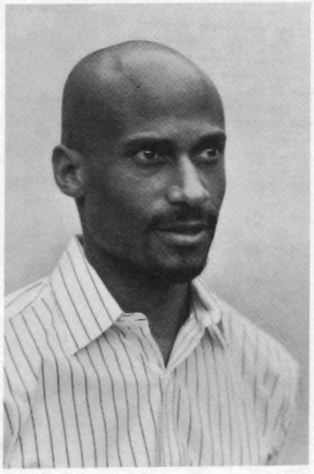
Nicholas J. Rine

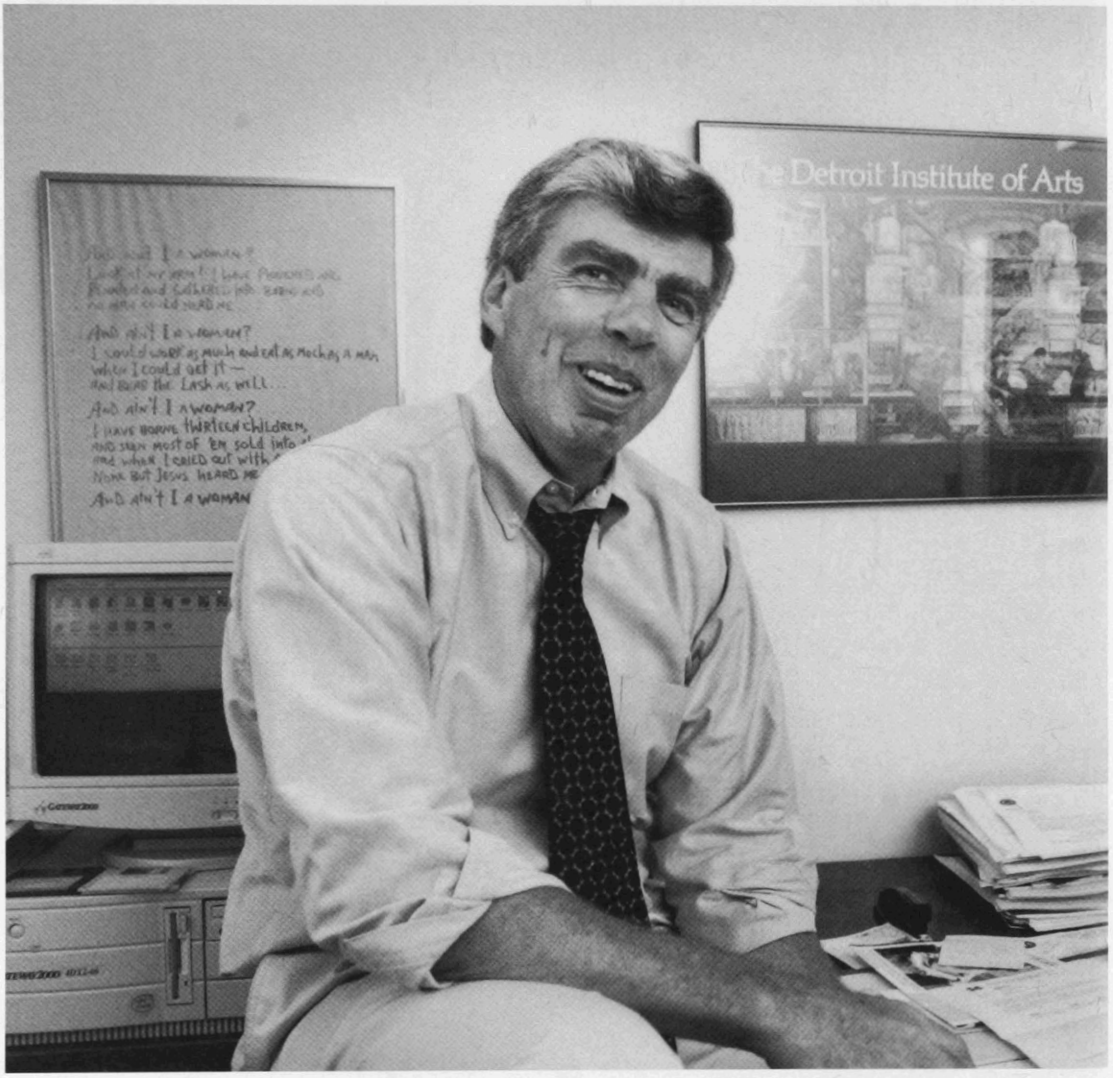
Clinical Assistant Professor of Law

With each year that I'm here pretending to be a clinical teacher, two separate things become more and more striking. The first is that nobody has yet found out that I don't know what the hell I'm doing as a teacher. (Or, at least, nobody has squealed yet to whoever it is — if anyone — that runs this place). The second is that the most important things that the students get out of any law school course — clinical or otherwise — are those things that are self-taught.

Freeman Farrow,
Third-Year Law Student

"Nick is very honest, straightforward and easy to talk with. He helps you see more realistically that often what you want to do and what the law allows are not the same. He's demanding but not unreasonably so because he's such a keen assessor of students' abilities. And he's accessible day or night, comes to student events because he's interested, and particularly contributes to and supports efforts to make this Law School a good place to be no matter what your background."





Nicholas J. Rine,
J.D., B.A. Wayne State University

A part of what we offer the students the opportunity to learn in a clinic is skills training. Hopefully that means training in the simpler things like anticipating evidentiary problems or differences in approach between direct and cross examination. But it also means addressing much more sophisticated communications issues. Good trial lawyers, for example, understand that the dynamic of questioning a witness actually consists of multiple simultaneous communications with different audiences: jury, judge, witness, appellate record, all at the same time. In one short term, our students don't learn all of the nuances of controlling that dynamic, but all of them get a start and some of them get a good ways down the road.

Beyond trial or negotiation or interviewing skills, though, the more important things we have to offer to students are opportunities to learn how to handle that volatile intersection between the classroom world of legal theory and the real world of human behavior. And the clinics are most valuable to the students when we've done that in an atmosphere of safety and support so that students leave telling themselves: "I know I can handle this."

The range of ethical and professional issues that we have to help the students address is always changing with the cases that make up our current docket. But the most important thing that students get to teach themselves is advocacy. No legal "issue" can possibly be understood in all its complexity unless it has attached to it the faces and voices of living, breathing, worrying (and sometimes crazy) people. Approaching those people's problems from an advocacy perspective may be the most difficult adjustment for students coming into the clinic. Partly that's because the classroom perspective is so different; partly it's because representing another person's interests is always a daunting experience. Clients, after all, are what define lawyers. That's so even when those clients are completely irresponsible liars for whom a lawyer has to work real hard in order to call up the least bit of personal sympathy. (And we always have a few of those around the clinic, as well as the other, more likable, kind.)

The best part of what I do is getting to work each term with a whole new set of professional colleagues as each new group of student-lawyers comes into the clinic. That's because each term I get to sit back and watch another group of smart, interesting people teach themselves to stop thinking like students and start acting like lawyers. The second best part of what I do is that (unlike the courtroom) I can say anything I think, even where it gives fits to the editors of *Law Quadrangle Notes* in trying to make this sound respectable.

(Ed. Note: Rine may make light of sounding respectable, but he certainly sounds good to Law School students. Last year they awarded him, along with Assistant Professor Steve Croley, their L. Hart Wright Award for teaching excellence.)

Paul D. Reingold,
J.D. Boston University,
B.A. Amherst College,
Director, Clinical Office and
Clinical Professor of Law

"Nick is a savvy, street-smart lawyer who manages to combine a dead-on sense of people with an equally keen sense of justice. His judgment and his directness make Nick a favorite sounding board for faculty and students alike, and he never says no when people need help."

Grace C. Tonner

Legal Practice Program Director and Clinical Assistant Professor of Law

When I was asked to write about what I do, why I do it, and why I like it, it struck me that I have one of the best jobs in this law school. As a Legal Practice Professor, I spend most of my time meeting with students and reviewing the papers and assignments they prepare for my class. Often I am asked how I ever can get any "real work" accomplished when the majority of my time is spent seeing students or evaluating their papers. I can only reply that my "real work" is to help students develop the skills they will need to become effective lawyers, and the only way I can accomplish that task is to spend a great deal of time working on a one-to-one basis with students, either by providing written comments on their papers or by meeting with them in student conferences. That is what makes the Legal Practice course different from many other Law School classes, and that is why I love what I do.

PHOTO BY THOMAS TREUTER

I have taught legal writing, research, and legal reasoning over the past 17 years in a variety of ways, and each year I am more and more convinced that I can find a better way to teach this course so that students will be better prepared to tackle the practice of law. The practice of law is a constantly evolving enterprise, and I must stay abreast of the changes in the practice so my students will be able to handle the challenges that await them. That means that I stay in touch with practicing lawyers and occasionally practice myself. My area of practice has been insurance litigation and coverage — an area many lawyers find arcane and unreasonably complicated — but I am constantly intrigued by how much I learn from every new case I handle. I have learned about environmental issues and construction methods and I have learned how to educate myself on almost any topic. It is this process of self-education that has kept me excited about my work as a lawyer. And it is my hope that I can convey to my students that the law offers them a lifetime of learning, which will help them find enjoyment in their careers as lawyers.

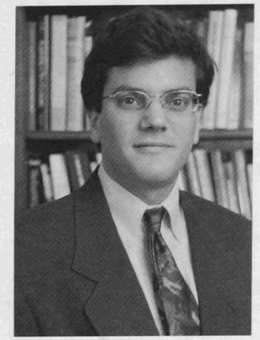
However, I do not believe that my students will enjoy their careers unless they learn the fundamental skills that all well-prepared lawyers should possess. Along with legal reasoning, legal research, and legal writing skills, my students need to know how to economically and ethically handle the problems their clients will some day bring to them. That means that they have to be thoughtful about not only how to accomplish their clients' goals, but also to do so in an efficient, economical, and ethical manner. While I know that I cannot teach them everything they will need to know as practicing lawyers, at least I can introduce them to the basic skills they will need and give them the tools they will need to teach and improve themselves throughout their careers.

So it is this constant striving for the perfect way to teach these essential skills that keeps me involved in teaching the Legal Practice course. I am realistic enough to know that I may never achieve my goal, but along the way I have the pleasure of working with enthusiastic, bright, and motivated first-year students and they make the hours of grading and evaluating worth it. Watching their progress throughout the year is very rewarding and it keeps me coming back for more.

Edward A.G. Wigglesworth,
First-Year Law Student

"Professor Tonner's experience as an attorney is very beneficial in Legal Practice. Her ability to relate the various assignments to specific problems and issues she has encountered prevent the course from being too abstract or theoretical."

Grace C. Tonner,
J.D. Loyola, B.A. California State University, Long Beach



Richard H. Pildes,
J.D. Harvard; A.B. Princeton,
Professor of Law

"Michigan is embarking on one of the most significant innovations in the first-year teaching of legal practice skills, particularly legal writing, that any major law school has undertaken in years. Grace has both the professional experience and personal qualities to lead this transformation. In her first year here, she succeeded in hiring a staff of eight full-time Legal Practice Professors who possess an extraordinary range of skills; this year, Grace and her staff will get the new program off the ground and running. Grace understands the varied demands of contemporary legal practice and the difficulties students confront in learning to write persuasively. Through her role here, Michigan students should become far more effective at entering the profession with well-justified confidence in their abilities to write effectively."

Gábor Halmai

Left? Right?

It depends on where you're standing

Professor Gábor Halmai confesses that American political labels have caused him a bit of confusion. Halmai, chief counsellor to the president of the Constitutional Court of Hungary — and the Hungarian Liberal Party's candidate for a judgeship on the 11-seat court — has to keep reminding himself that American liberals can be very different from Hungarian Liberals, and that conservatism on one shore of the Atlantic often can mean the opposite of conservatism on the other shore.

American liberals tend to support affirmative action and campus speech codes, but Hungarian Liberals would decry them as unjustified limits on people's freedom, explains Halmai, who spent spring and summer at the Law School studying how the social boundaries that Americans call "political correctness" affect freedom of expression. He says he quickly found that he could not understand "PC" and speech codes without also delving into the issues of affirmative action.

Halmai, who also teaches constitutional law at the Budapest University Law School and wrote *The Boundaries of Freedom of Expression,* published in Hungary in 1994, says he will incorporate what he learned at the Law School into a new edition of his book. A specialist in issues of freedom of expression, he has been one of the steady stream of scholars who each year visit the Law School to take advantage of its massive library holdings, renowned faculty, exceptional students and other resources.

"The Visiting Scholar Program is a wonderful opportunity for our faculty and students to exchange ideas with distinguished scholars like Professor Halmai from all over the world," says Virginia Gordan, Assistant Dean for International Programs.

Halmai, who came to the Law School on a Fullbright Fellowship, says Michigan was the perfect place to center his research because of its recent involvement in freedom of expression issues. A few years ago the courts overturned the University of Michigan's interim code for student non-academic conduct. Last year Judge Avern Cohn, J.D. '49, of the U.S. District Court, Eastern District of Michigan, dismissed charges against a then-U-M student who had sent stories about rape, kidnapping and torture over the Internet. The student had named a fellow student as a victim in his writing and then engaged in electronic correspondence in which he discussed how to accomplish some of the things he had described in his fiction.

Halmai is returning to Hungary this fall — perhaps to a seat on the Hungarian Constitutional Court. As he spoke last summer, appointment to the court seemed remote, both in time and in terms of politics. Two seats on the court were vacant at the time, but nominations were caught in a stalemate between the five minority parties that control the nominating committee and the two majority parties that control parliament, which must make the appointment. Halmai said no compromise was in sight at the time, although he said one will be needed by spring, when another retirement of a justice will drop court membership below the eight judges that are necessary for a quorum.

His enthusiasm for the seat came through despite the political stalemate that has strangled his nomination. "It would be fun," he says. "It's really a job I would like. It's a very challenging job for me. I think I would have some ideas."

Unlike U.S. courts, Hungary's Constitutional Court neither is integrated into the country's overall court system nor decides cases of alleged lawbreaking. Instead, it hears cases that question constitutional norms — and even can be called on to give an opinion on the constitutionality of a law that has been passed by parliament but not yet gone into effect. Its role as interpretor of the norms that underlie the constitution has made the court a powerful, perhaps critical player in the legal/political life of Hungary.

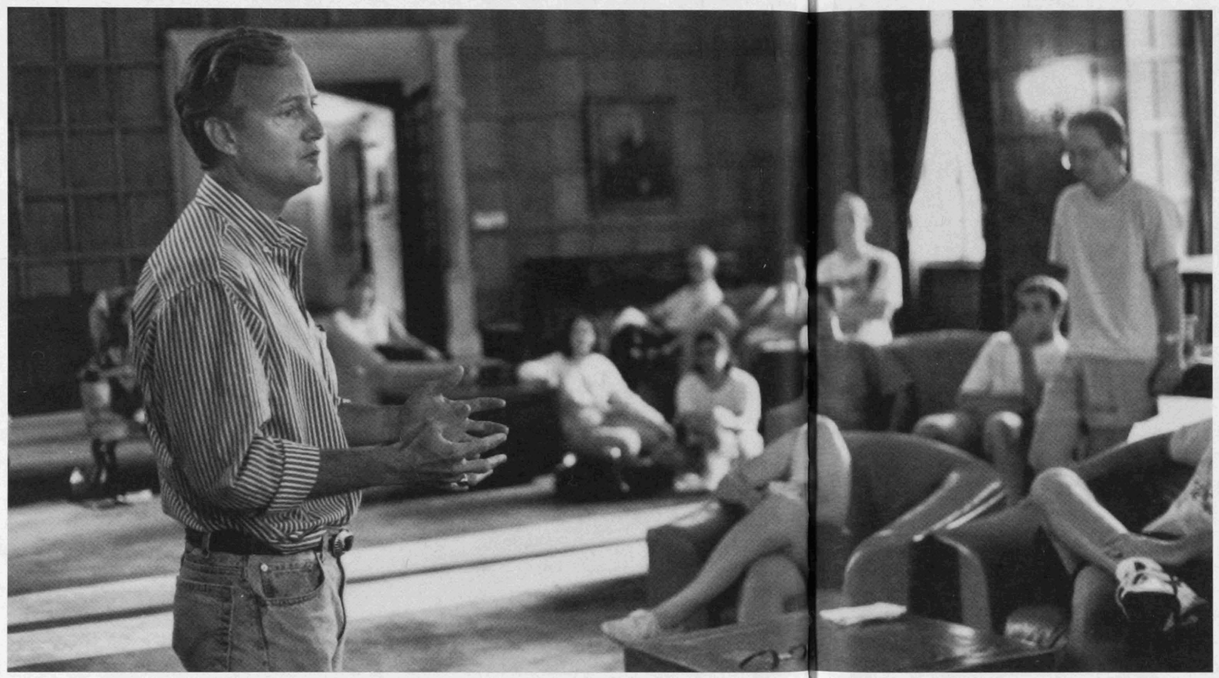
For example, the then-brand new Hungarian Constitutional Court abolished capital punishment in 1990. The following year its ruling on abortion said that abortion is a subject of basic human rights that must be regulated by law. The ruling had the effect of abolishing executive orders that previously had governed abortion, but the court instead let them stand and gave parliament one year to pass an abortion law.

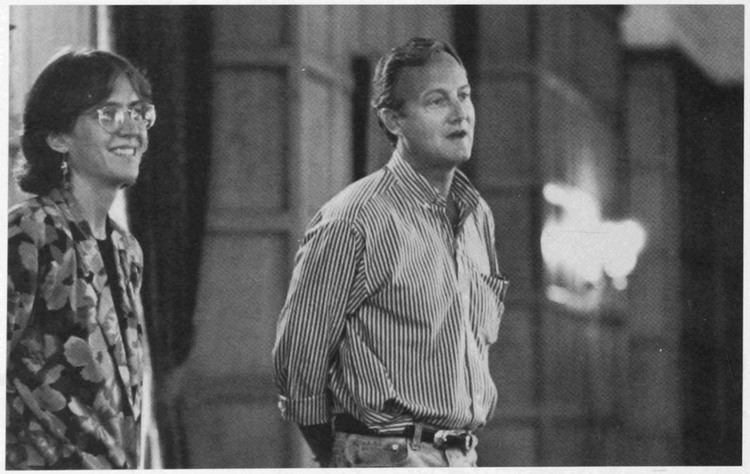
Since it began work in 1990, decisions like these have made the court a critical player in establishing Hungary's post-Soviet era legal foundation. "It's a once in a lifetime experience," Halmai says of six years as a counselor at the court. "This court has the power to establish a new constitutional order, to interpret the text behind the decision. I'm very glad to be there and to live in this very exciting time."

Unlike U.S. courts, Hungary's Constitutional Court neither is integrated into the country's overall court system nor decides cases of alleged lawbreaking. Instead, it hears cases that question constitutional norms — and even can be called on to give an opinion on the constitutionality of a law that has been passed by parliament but not yet gone into effect. Its role as interpretor of the norms that underlie the constitution has made the court a powerful, perhaps critical player in the legal/political life of Hungary.

New Law School programs:
'nuts and bolts' to global opportunities

The Law School is like the law itself, continually changing and evolving to meet new realities. As a result, the Law School is a place where new programs continually are being launched to meet new sets of needs. Here is a sampling of three new programs this year:





Timothy L. Dickinson, J.D. '79, above, a partner in Gibson, Dunn & Crutcher, discusses opportunities in international law during a program in July at the Lawyers Club Lounge. Opportunities are available in private practice, as in-house counsel, in federal, state and local government, academics and non-governmental organizations (NGOs), Dickinson said. Sign up for a semester abroad, if possible, he advised, and use courses that can be taken outside of the Law School to "focus on a foreign language." Master the basics of being a good lawyer, he added, because "basic academics, basic skills are very important." In the same program, Virginia Gordan, Assistant Dean for International Programs, at left with Dickinson, listed Law School programs that will help prepare students for careers in international law, like externships in Cambodia and South Africa, visiting speaker programs, faculty members who specialize in international legal subjects, and opportunities to study abroad. The program was sponsored by the Law School's new First-Year Information Program.

FYI: Answers to those questions you may not know enough yet to ask

Remember what it was like to begin law school? For many students, it was like learning a new language, cramming for make-or-break exams, and digging, digging, digging for parallels and precedents — all at the same time.

Third-year law student Julia Caputo and second-year student Sonja Kassebaum recall the ups and downs of their first year in law school keenly enough that they have volunteered to help this year's first-time students as two of the more than 20 FYI Fellows in the Law School's new First-Year Information Program. Caputo worked in a similar but less formal program last year and began with FYI this fall; Kassebaum started with the abridged FYI program that began this summer.

FYI offers a variety of formal and informal activities to acclimate first-time students to legal studies and help them learn to get the most out of their professional education at the Law School. Organized by Associate Dean for Student Affairs Susan Eklund and David Baum, J.D. '89, Special Assistant to Dean Eklund, FYI includes informal gatherings of small groups of students, social activities, lectures, discussions and biweekly meetings devoted to topics related to the legal profession and the study of law.

For example, FYI's startup schedule last summer included discussions with practitioners, faculty members and administrators on subjects like structure and change in the court system, the legal and practical strategies of a lawyer involved in the World Trade Center bombing case, and other subjects. Summer students also benefitted from sessions aimed at helping them improve study techniques and at giving them an opportunity to experience and receive feedback on practice examination questions prior to taking their first exams at the end of the term.

This fall's expanded schedule continues programs like these as well as biweekly sessions featuring upper-class students and guest faculty members discussing specific topics.

"While orientation is a good beginning for new students, they also benefit from programming throughout the first year of law school, which provides them with support as they become accustomed to legal studies and explore questions about the practice of law," Eklund and Baum say.

"Our vision with the programming for fall — and the special biweekly meetings where first-year law students can come together — is to make available for every small section two upperclass students who provide guidance and support on an individual basis as well as help develop and implement informative programming for small groups of first-year students."

In other words, says Baum, FYI "picks up where orientation leaves off."

Many of the questions that first-year students encounter turn out to be widely shared, but each person usually feels that his challenges are uniquely his, says Caputo. Having an upperclass student as a mentor who will safeguard your confidences can be very helpful, she says.

Adds Kassebaum: "The FYI program provides new students with the academic support that I needed during my first semester, such as instruction in briefing cases, preparing for class, and preparing for exams. Additionally, the FYI Fellow serves as a contact person for students in trouble or who need assistance of some kind."

Also, she says, working with the program "can be tremendously rewarding and enjoyable, while at the same time helping me further develop my skills in interpersonal communication and public speaking — skills that are essential to success as a lawyer."

First year students' participation in the program is voluntary.

Graduate programs highlight international law, international economic law

Cho Sungjoon already is an experienced lawyer and government official in his native South Korea, but he wants to get a better grasp on the dynamics and intricacies of international economic law before he returns to his government career. So he feels fortunate to be among the first students to enroll in the Law School's new economic law concentration within the graduate LL.M. degree program.

"One of the main reasons I came to the University of Michigan Law School is that it has a good reputation in the international area," says Cho, a former deputy director of the Financial Corporation Division of South Korea's Ministry of Finance and Economy. "Moreover, the concentration programs in international law and international economic law will enhance the comprehensive understanding of the fields."

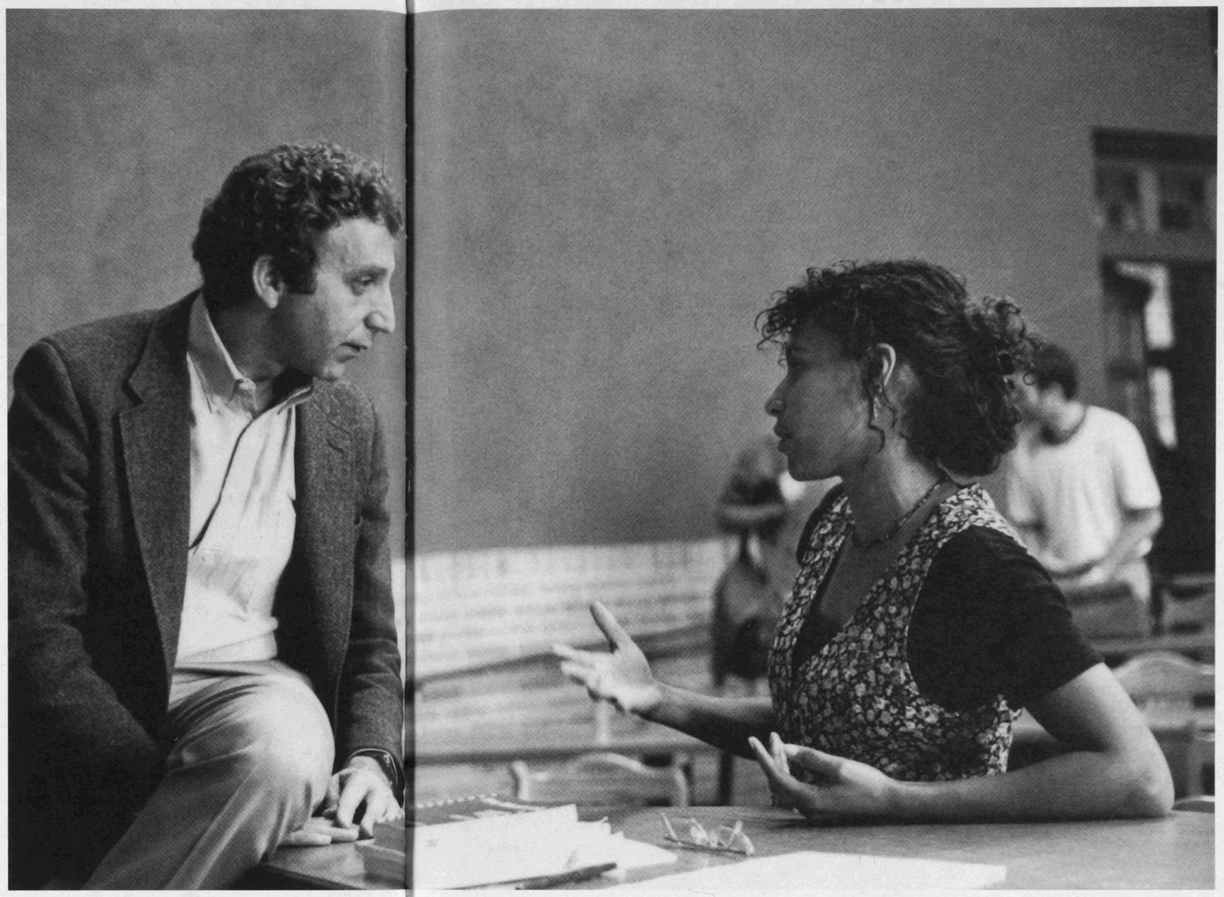
As of late summer, Cho was one of about 15 graduate students who planned to enroll in the Law School's new international concentrations within the LL.M. degree. "We are expecting 40-45 outstanding LL.M. students this year, with a broad range of interests," said Virginia Gordan, Assistant Dean for International Programs. "Of course, many are drawn here by the strength of our faculty's reputation in international trade and international law and about one-third have expressed interest in participating in the new program."

The concentrations began this fall and reflect expanding worldwide opportunities in the legal profession as well as growing interest among students. Last winter, in proposing the new concentrations, the Law School's International Legal Studies Committee reported that graduate students' choices of courses and recommendation letters that accompanied their applications showed "that a designated degree could be interesting and attractive to a number of very worthy candidates for the graduate program."

The new concentrations are designed "to give graduate students an opportunity to participate in an advanced curriculum of international law, with an option to focus on general international law, or on international economic law," the committee said last spring in its proposal for faculty approval. "The program would be relatively small and elite, and would likely include attention to the important linkages between general international law and international economic law, to international norms and national law (including constitutional law), and to disciplines other than law."

Students in the new concentrations must take at least 12 hours of courses in international or comparative law as well as a special seminar designed for the concentrations and coordinated by Professor of Law Jose E. Alvarez and John H. Jackson, Hessel E. Yntema Professor of Law.

About half the seminars feature invited guests. Seminar participants also are being encouraged to attend the ten International Law Workshop lecture/discussion sessions that take place during the fall semester. Among seminar guests this fall are Kenneth Abbott of Harvard University, Abram and Antonia Chayes, authors of *The New Sovereignty*, a textbook for the seminar, and Trevor Hartley of the London School of Economics and Political Science. Hartley also is a speaker in the International Law Workshop.



This year's seminar theme is "Implementation, Compliance and Effectiveness," the same subject as the American Society of International Law will focus on during its annual meeting in April at Washington, D.C. Alvarez, who is chairing the ASIL annual meeting, says that seminar participants will be encouraged to attend the sessions in Washington.

"This course will canvas the work of those who have examined these issues, often through visits by the prominent authors of the works under study," Alvarez says of the seminar. "Whether the naysayers are right or wrong, we think we can learn from the quest."

Legal Practice Program brings "nuts and bolts" to first year

"What is the difference between an affadavit and a deposition?"

The question may bring a snicker from case-hardened attorneys and veteran law students. But learning the difference between a signed statement given under oath and a written submission that can be subjected to cross examination is among the fundamental first steps that a future attorney takes.

The question came up in Assistant Clinical Professor Larry Cohen's Legal Practice class, and students quickly learned the technical meanings of the two words.

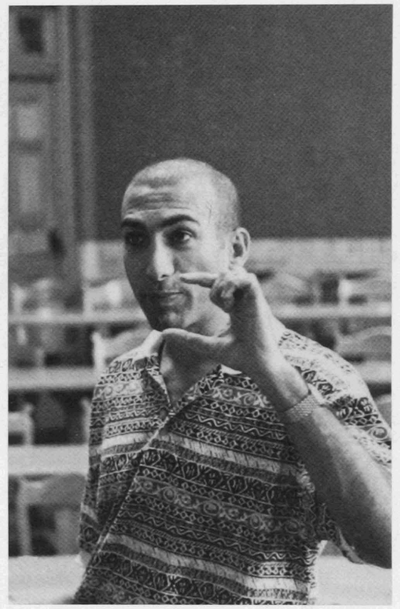
A moment later, another student asked "What is evidence?" Ah, here's a term with much less definition. "Welcome to the wild and wonderful world of the law," answered Cohen.

That's the way Legal Practice classes work. The new program, launched in the summer and fully functioning this fall, is designed to give first-year students two semesters of learning and practicing legal research, legal writing, advocacy and other skills that practicing attorneys and law professors use daily. The core of the program is writing: learning and properly using legal terms and using all words accurately and precisely.

"This is a different kind of writing than many students have ever been exposed to," says Legal Practice Program Director Grace Tonner. "Lawyers are writers, professional writers. That's what we do. Write. Persuade. And to be able to construct and communicate an argument and persuade is an absolute necessity for a lawyer."

Every first-year law student takes a Legal Practice course under Tonner or one of the other Legal Practice Program faculty members, and in many ways the Legal Practice classes are where law students find their common ground. Students come to Law School from a

Left: Legal Practice Program faculty member Larry Cohen chats after class with first-year student Rachel Chatman. The two-semester Legal Practice course teaches students various forms of legal writing, legal vocabulary, research techniques and other basic skills of the legal profession that make up the basic equipment of legal practitioners and scholars. Chatman especially praises the tutoring that she used to improve her legal writing. Below, Dar Adli, a first-year student in the same class, describes Legal Practice as a real "nuts and bolts kind of class."

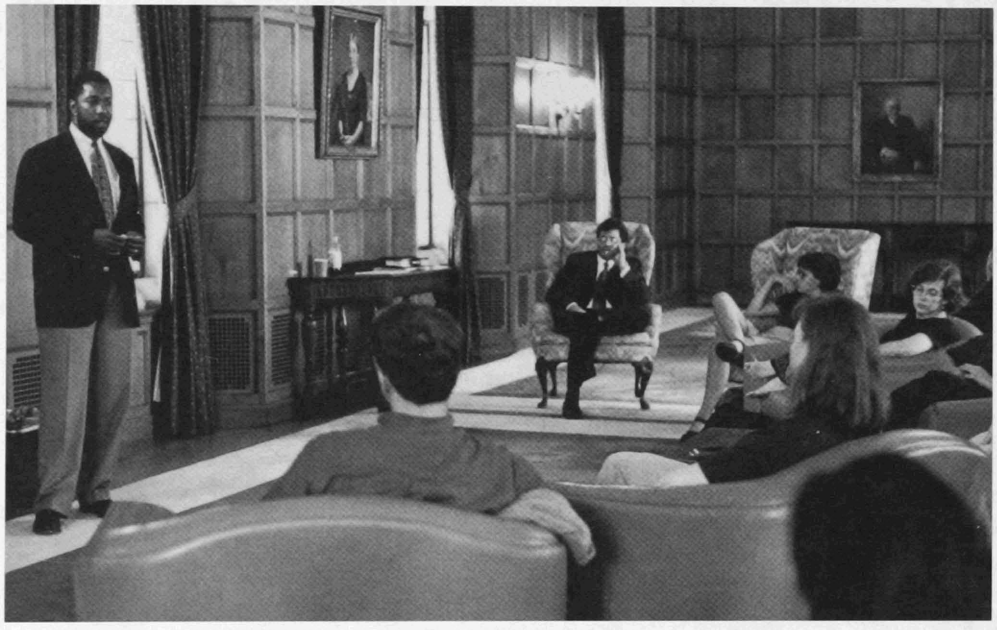


variety of educational levels and backgrounds, from bachelor's degree to Ph.D. holders. Some come directly from university classes and others enter the Law School after a time of work or other experience. Some have experience in the legal field, others do not.

"It's a nuts and bolts kind of class," says Dar Adli, who did his undergraduate work at the University of Michigan. Rachel Chatman, who did her undergraduate work at the Unversity of California-Berkeley, praises the tutoring in writing that is available to students.

Rand Hutcheson, who has a Ph.D. from Columbia University and taught English there, says he needs to learn the language of the law but gets impatient with the writing skills portions. "It's certainly learning by doing," says Brian Steinhardt, who graduated in economics from McGill University in Canada.

"Students will learn to research and to write memos, briefs, and client letters — the building blocks for most of the legal writing they will do in practice," according to Tonner. "Additionally they will learn to edit their own work. They will come to understand that good writing must support their goal. They should be aware of their audience, aware of their goal or goals for a document, memo, or brief, and to write with that audience and goal in mind."



View from the bench —

Circuit Judge Kurtis Wilder, J.D. '84, chief judge of the trial courts for Washtenaw County, explains "The Legal Profession: A View From the Bench" in a program sponsored by the First-Year Information Program in July at the Lawyers Club Lounge. Seated at rear is David Baum, J.D. '89, Special Assistant to the Assistant Dean for Student Affairs, who introduced Wilder. Washtenaw County's 14 judges are part of a demonstration project for court reform in Michigan that has eliminated jurisdictional barriers among courts in an effort to improve the handling of cases, Wilder explained. "Over the last four years there has been great interst in the state of Michigan over where the court system should be headed for the twenty-first century," he said. Changing technology and alternative dispute resolution activities are among major issues court reform must face. Wilder also had five recommendations for becoming a good lawyer:

- *Be ethical: "There's nothing worse for a lawyer than to have a judge develop the idea that a lawyer is unethical."*
- *Be well prepared: "It's the lawyers who are best prepared who get the best outcomes for their clients."*
- *"Know the rules."*
- *Listen and watch attentively: Notice what jury members take note of, understand that judges' questions are indications of what they consider important.*
- *Have balance: "Your practice can't be your life, because if it is you won't do as well. You'll burn out."*

Clerkships continue strong Law School presence at Supreme Court and federal courts

Recent University of Michigan Law School graduates continue their significant presence at the U.S. Supreme Court, federal courts of appeal and federal district courts as 68 graduates work in clerkships this year.

For the second year, the Hon. David Souter, Associate Justice of the U.S. Supreme Court, is using a clerk from the Law School. Gerald F. Leonard, J.D. '95, is a clerk for Souter this year. Last year, Heather Gerken, J.D. '94, served as Souter's first clerk from Michigan.

Nineteen graduates are serving as clerks in U.S. appeals courts, and 36 graduates are working as clerks in U.S. district courts. Seven graduates have clerkships at state supreme courts, and one, Lisa A. Murray, J.D.'96, is clerking for the Hon. Dominick DiCarlo at the U.S. Court of International Trade.

A few clerks were graduated prior to 1996, and, indeed, some judges prefer clerks who have been working for a time because they have more on-the-job experience.

The number of clerkships for Michigan Law School graduates has more than doubled since 1987, the first year that records were kept. Here is the list of this year's clerks and judges and courts for which they are working; all graduates are 1996 unless otherwise noted:

Gerald F. Leonard, '95
The Hon. David H. Souter
United States Supreme Court

Jason R. Factor
The Hon. Conrad K. Cyr
United States Court of Appeals
for the First Circuit

Joseph S. Lieber
The Hon. Sandra L. Lynch
United States Court of Appeals
for the First Circuit

E. Ashby Jones
The Hon. J. Edward Lumbard
United States Court of Appeals
for the Second Circuit

Jacqueline E. Coleman
The Hon. Theodore
Alexander McKee
United States Court of Appeals
for the Third Circuit

Benjamin H. Barton
The Hon. Diana Gribbon Motz
United States Court of Appeals
for the Fourth Circuit

Michael D. Dobbins
The Hon. J. Harvie Wilkinson, III
United States Court of Appeals
for the Fourth Circuit

David I. Frazee
The Hon. James Dickson
Phillips, Jr.
United States Court of Appeals
for the Fourth Circuit

Amy S. Bennett, '95
The Hon. Patrick E.
Higginbotham
United States Court of Appeals
for the Fifth Circuit

Melanie D. Plowman
The Hon. Robert M. Parker
United States Court of Appeals
for the Fifth Circuit

Carol J. Banta
The Hon. Karen Nelson Moore
United States Court of Appeals
for the Sixth Circuit

Guy-Uriel E. Charles
The Hon. Damon J. Keith
United States Court of Appeals
for the Sixth Circuit

John A. Drennan, '95
The Hon. David A. Nelson
United States Court of Appeals
for the Sixth Circuit

Stephanie J. Gold
The Hon. Cornelia G. Kennedy
United States Court of Appeals
for the Sixth Circuit

Thomas L. Kenyon
The Hon. James L. Ryan
United States Court of Appeals
for the Sixth Circuit

Eric R. Phillips, '95
The Honorable Diana Murphy
United States Court of Appeals
for the Eighth Circuit

Laura A. Pagano, '95
The Hon. Sydney Thomas
United States Court of Appeals
for the Ninth Circuit

Marc S. Reiner, '95
The Hon. Cynthia H. Hall
United States Court of Appeals
for the Ninth Circuit

Peter J. Krumholz
The Hon. Paul J. Kelly
United States Court of Appeals
for the Tenth Circuit

Deborah L. Hamilton
The Hon. Harry T. Edwards
United States Court of Appeals
for the District of
Columbia Circuit

Lisa A. Murray
The Hon. Dominick DiCarlo
United States Court
of International Trade

Edward A. Deibert, '95
The Hon. Alicemarie Stotler
United States District Court for
the Central District of California

Seth M. Friedman
The Hon. John G. Davies
United States District Court for
the Central District of California

Miranda C. Nye
The Hon. Laughlin E. Waters, Sr.
United States District Court for
the Central District of California

Jessica F. Toll
The Hon. Zita L. Weinshienk
United States District Court
for the District of Colorado

Lisa J. Stevenson
The Hon. James Robertson
United States District Court
for the District of Columbia

Oren Rosenthal
The Hon. Lenore Nesbitt
United States District Court
for the Southern District of Florida

Eugene E. Whitlock, '95
The Hon. Edward B. Davis
United States District Court
for the Southern District of Florida

Andrea D. Axel, '95
The Hon. Milton I. Shadur
United States District Court
for the Northern District of Illinois

Jeremy D. Feinstein
The Hon. Marvin E. Aspen
United States District Court
for the Northern District of Illinois

Colin G. Owyang, '95
Both Walter J. Skinner and
W. Arthur Garrity
United States District Court
for the District of Massachusetts

Andrea M. Gacki
The Hon. Avern Cohn
United States District Court for
the Eastern District of Michigan

Emily M. Houh
The Hon. Anna Diggs Taylor
United States District Court for
the Eastern District of Michigan

Matthew B. Kall
The Hon. Nancy G. Edmunds
United States District Court for
the Eastern District of Michigan

Judith E. Levy
The Hon. Bernard A. Friedman
United States District Court for
the Eastern District of Michigan

Ellen C. Meyer
The Hon. Horace W. Gilmore
United States District Court for
the Eastern District of Michigan

Michelle M. Motowski
The Hon. John C. O'Meara
United States District Court for
the Eastern District of Michigan

James A. Renigar
The Hon. Gerald E. Rosen
United States District Court for
the Eastern District of Michigan

Alison M. Sawka
The Hon. Paul V. Gadola
United States District Court for
the Eastern District of Michigan

Michael F. Tenbusch
The Hon. John Feikens
United States District Court for
the Eastern District of Michigan

Bonita P. Tenneriello
The Hon. John Feikens
United States District Court for
the Eastern District of Michigan

David J. Zack
The Hon. Patrick J. Duggan
United States District Court for
the Eastern District of Michigan

James A. Mitzelfeld
The Hon. David W. McKeague
United States District Court for
the Western District of Michigan

Donald W. Wiest, '95
The Hon. Douglas Hillman
United States District Court for
the Western District of Michigan

Jeff E. Butler
The Hon. Thomas P. Griesa
United States District Court
for the Southern District
of New York

Patrick S. Kim
The Hon. Jed S. Rakoff
United States District Court
for the Southern District
of New York

Joseph C. Klein, '95
The Hon. Thomas P. Griesa
United States District Court
for the Southern District
of New York

Stacy R. Stoller
The Hon. Morris E. Lasker
United States District Court
for the Southern District
of New York

Marla D. Clark
The Hon. Terry C. Kern
United States District Court
for the Northern District
of Oklahoma

Elise M. Bruhl
The Hon. Marvin Katz
United States District Court
for the Eastern District
of Pennsylvania

Stephanie T. Schmelz
The Hon. Robert S. Gawthrop
United States District Court
for the Eastern District
of Pennsylvania

Scott L. Warner, '95
The Hon. Jay C. Waldman
United States District Court
for the Eastern District
of Pennsylvania

Naomi M. Wiesen
The Hon. Jay C. Waldman
United States District Court
for the Eastern District
of Pennsylvania

Morton D. Dubin, '95
The Hon. Sidney A. Fitzwater
United States District Court
for the Northern District of Texas

Robert B. Tierney
The Hon. Thadd Heartfield
United States District Court
for the Eastern District of Texas

Catherine E. Maxson, '95
The Hon. Thomas S. Zilly
United States District Court
for the Western District
of Washington

Miles A. Yanick
The Hon. Carolyn R. Dimmick
United States District Court
for the Western District
of Washington

Rachel D. Barbour
San Francisco Superior Court

Richard A. Berson
San Francisco Superior Court

Seth R. Klein
The Hon. David M. Borden
Connecticut Supreme Court

Carol E. Dixon
The Hon. Ellen S. Huveller
District of Columbia
Superior Court

Ariana R. Levinson
The Hon. Myra Selby
Indiana Supreme Court

Richard W. Fanning
The Hon. James H. Brickley
Michigan Supreme Court

David A. Portinga
The Hon. Conrad L. Mallett, Jr.
Michigan Supreme Court

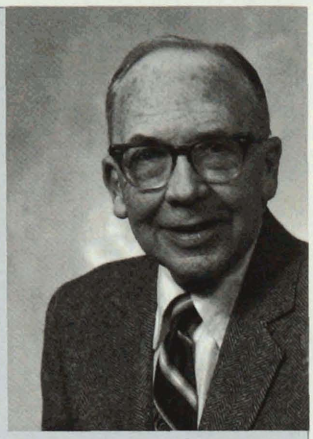
Antonio F. Ortiz
The Hon. Joseph F. Baca
New Mexico Supreme Court

Norman M. White, '95
The Hon. Leonard H. Russon
Utah Supreme Court

Michael J. Thomas
The Honorable Harris L. Hartz
New Mexico Court of Appeals

Christopher M. Cahill
Ohio, Ninth District Court
of Appeals

Law School's first federal clerkship at U.S. Supreme Court



John J. Adams

Michigan started at the top: The Law School's acquaintance with clerkships at the U.S. Supreme Court goes back more than 50 years, to the first federal clerkship ever held by a Law School student.

The year was 1940, and Supreme Court Justice Frank Murphy, himself a Law School graduate from 1914, was looking for a clerk. In those days each associate justice had only one clerk, so the young people had to be masters of many skills.

"The first Michigan Law School graduate to receive a federal clerkship was John J. Adams, A.B. '38, J.D. '40, who was clerk for the years 1940-41 for United States Supreme Court Justice Frank Murphy," according to Adams' brother, E.W. Adams, J.D. '42, of Adams, Adams and Adams in Marshalltown, Iowa. John J. Adams died in 1989.

Murphy, who had been Franklin Roosevelt's attorney general as well as governor of Michigan and mayor of Detroit, already knew the high caliber of Michigan's law students because of his own study at the Law School. At the time, Supreme Court clerks usually came from Harvard, Yale or Columbia.

But, says Adams, "Dean [E. Blythe] Stason had hoped to get a Michigan graduate in as a Supreme Court clerk" and John J. Adams fit the bill. Stason knew John Adams well because the young man worked for the dean. In addition, says his brother, he "had been first in his class, had been on the Case Clerk Finals winning team, and [had been] an editor of the *Michigan Law Review*."

"Dean Stason was able to get Justice Murphy to interview John, and Justice Murphy liked what he saw."

The rest, as they say, is history.

Visiting and adjunct faculty enrich Law School offerings

Gail Agrawal heads Medical Management for Aetna Life and Casualty, where she specializes in medical-legal issues. She received her J.D. in 1983 from Tulane University School of Law; she earned concurrently a Master of Public Health degree from Tulane. She clerked for the Honorable John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit and then for U.S. Supreme Court Justice Sandra Day O'Connor. Agrawal, the W.M. Keck Foundation Visiting Professor, is teaching a seminar on the Law of Managed Health Care in the fall and Professional Responsibility in both the fall and winter.

Susan Bart, J.D. '85, clerked for the Honorable Richard D. Cudahy of the Seventh Circuit Court after graduation. She is a partner at Sidley & Austin in Chicago, concentrating in estate and gift tax planning for wealthy families, including charitable planning, generational wealth transfer, closely-held business planning, complex trust arrangements, administration of complex estates and trusts, and fiduciary counsel. She is teaching Trusts and Estates I and Estate and Gift Taxation in the fall term.

Janine Benedet, S.J.D. '96, holds an LL.B. from the University of British Columbia. She clerked for the Hon. Justice Frank Iacobucci of the Supreme Court of Canada. Her area of research is pornography and sexual harassment. She will teach seminars on sexual assault and on contemporary issues in first amendment law in the winter term.

William Bogaard, J.D. '65, is a senior attorney and finance executive with domestic and international experience in corporate finance, mergers and acquisitions, securities law, and regulated industries, including utilities. He has significant experience advising boards of directors of public companies and in directing legal and compliance activities of banks and bank-holding companies, mutual funds, investment advisers and broker-dealers. In addition, he is a former council member and mayor of Pasadena. He is teaching Securities Regulation.

Andrew Buchsbaum is principal staff attorney for the midwest office of the National Environmental Law Center (NELC). He is also program and legal director of the Public Interest Research Group in Michigan (PIRGIM). He received his J.D. from the Boalt Hall School of Law. Buchsbaum is teaching Federal Environmental Law during the fall.

Anthony Derezinski, J.D. '67, is of counsel to the Ann Arbor firm of Cooper, Walinsky & Cramer, specializing in litigation, particularly personal injury and employment, municipal, administrative and health law. He is a former Michigan state senator and has also served as a legal advisor to the Parliament of Ukraine, assisting with drafting a new Constitution. He will be teaching legislation in the winter.

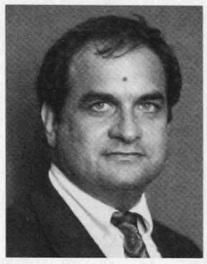
Richard Drubel, J.D. '77, is a shareholder at the firm Susman Godfrey in Houston, Texas. While he was at Michigan Law School, Drubel served as an editor on the *Michigan Law Review.* Following his graduation from Michigan Law School, he earned an LL.M. from the Free University of Brussels in 1978 and then clerked for the Honorable Louis F. Oberdorfer of the U.S. District Court for the District of Columbia from 1978-79. Drubel is co-teaching Ethics and the Business of Law this fall.

Deborah Geier is an associate professor at the Cleveland-Marshall College of Law in Ohio, where she has taught since 1989. She earned her J.D. from the Case Western Reserve University School of Law in 1986. Following law school, Geier clerked for the Honorable Monroe G. Mackay of the U.S. Court of Appeals for the Tenth Circuit. She was also an associate at Sullivan & Cromwell in New York from 1987-89, where she practiced in the tax group. She has co-authored a book on federal income tax and published numerous articles on tax law. Geier is teaching Tax I and Taxation of Corporate Reorganizations this fall.

FACULTY

Susan Gzesh, J.D. '77, is of counsel to Gessler Flynn Fleischmann Hughes and Socol in Chicago, where she represents clients in immigration matters. She has previously been an adjunct professor here at Michigan Law School teaching Immigration Law and Policy, and Immigration and Nationality, the latter of which she is teaching again during fall term.

Trevor Hartley received an LL.B. in 1961 from Cape Town University and an LL.M. in 1964 from the London School of Economics and Political Science, where he has been a professor of law since 1989. Hartley's areas of interest include conflict of laws, transnational law, and European Community law. He previously taught as a visitor at Michigan Law School in 1985. His recent publications include "Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the Case of the Dissatisfied Sub-Purchaser" in the *European Law Review* and "Constitutional and Institutional Aspects of the Maastricht Agreement" in *The International and Comparative Law Quarterly*. Hartley is teaching European Community Law and International Litigation.



Carey Heckman has directed the Stanford University Law and Technology Center since 1992. He is a 1979 graduate of Northwestern University Law School. Before going to Stanford, he worked as an associate at Morrison & Forrester in San Francisco and as a partner at Ware & Freidenrich in Palo Alto. From 1989-92, he was vice president and senior corporate counsel at Novell, Inc. He has written extensively about legal issues in connection with the computer and communications industries, and has been active as a director and advisor to the Software Entrepreneur's Forum. This fall, Heckman is teaching a course on Law and Technological Change and a seminar on Computer Product Distribution and Licensing: A Transactional Perspective.

Laura Hines, J.D. '91, is an associate at the firm of Arnold & Porter in Washington, D.C., where she has been involved in complex litigation cases. While a student at the Law School, she served as a Note Editor on the *Michigan Law Review*. Immediately following law school, she clerked for the Honorable Donald P. Lay, Chief Judge of the U.S. Court of Appeals for the Eighth Circuit. She is teaching a section of Civil Procedure I.

William Jentes, J.D. '56, is a partner at Kirkland & Ellis in Chicago. He has served as lead counsel on cases involving a number of the nation's largest corporations and has been a lecturer at the University of Chicago Law School and for the American, Federal, Texas, Illinois and Chicago bar associations. He taught a seminar on complex litigation here in 1991, 1994 and 1995 and is doing so again this fall.

Susan Kornfield is a partner with the firm of Bodman, Longley & Dahling. She specializes in the protection of proprietary rights, including copyrights, trade secrets, trademarks, confidential business information, rights of publicity and rights of privacy. She chairs her firm's Intellectual Practice Group. Kornfield received her J.D. from Indiana University School of Law in 1982. She will teach copyright during winter term.

Jeffrey Liss, J.D. '75, is a partner at Piper & Marbury in Washington, D.C. Along with his law degree, he also holds a master's degree in History from the University of Michigan. Immediately following law school, he served as a law clerk to the Honorable Charles R. Richey of the U.S. District Court for the District of Columbia. His recent publications include "Remedies in Business Torts Litigation" (co-authorship), which appears as a chapter in *Business Torts Litigation*, and "Judicial Nominations: Continuing the Struggle for Equal Justice" (co-authorship), which appears in a chapter of *Lost Opportunities*. Liss is teaching Remedies.

Christopher McCrudden has been a Fellow and Tutor in Law at Lincoln College and a Lecturer in Law at the University of Oxford since 1980. He received an LL.B. from Queen's University, Belfast, in 1974, an LL.M. from Yale Law School in 1976, and an M.A. and D. Phil. from Oxford in 1980 and 1981, respectively. He is currently serving on the editorial boards of the *Oxford Journal of Legal Studies*, the *Review of Employment Topics*, and the *International Journal of Discrimination and the Law*. His recent publications include "The Constitutionality of Affirmative Action in the United States: Reflections on Adarand," in the *International Journal of Discrimination and the Law* (in press, 1996) and "Third Time Lucky?: the Pension Act of 1995 and Equal Treatment in Occupational Pensions," in the *Industrial Law Journal* (in press, 1996). McCrudden is teaching Human Rights Law and a seminar with Professor Brian Simpson, European Convention on Human Rights, in the winter.

Cyril Moscow, J.D. '67, has been an adjunct professor since 1973. He is a partner at Honigman, Miller, Schwartz & Cohn in Detroit, where he practices corporate and securities law. He is the co-author of texts on Michigan corporate law and securities regulation, and is chair of the State bar subcommittee on the revision of the Business Corporation Act. He is teaching Business Planning for Closely Held Corporations this fall and Business Planning for Publicly Held Corporations in the winter.

Linda Mullenix is the Bernard J. Ward Centennial Professor at the University of Texas School of Law. She obtained her J.D. from Georgetown University Law Center in 1980 and earned a Ph.D. in Political Science from Columbia University in 1977. Following law school, Mullenix practiced as an associate in the Washington, D.C., law firm Pierson, Ball & Dowd from 1980 to 1981. She has recently published a textbook entitled *Mass Tort Litigation: Cases and Materials* and has written numerous other articles on that and other topics. Mullenix is teaching Civil Procedure II: Mass Tort Litigation and a seminar entitled Civil Justice Reform.

Eric Orts, J.D. '88, is an assistant professor of legal studies at The Wharton School, University of Pennsylvania. He earned an M.A. in Political Science from the New School for Social Research in 1985 and an LL.M. and J.S.D. from the Columbia University School of Law in 1992 and 1994, respectively. He was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison in New York from 1988-90. He has taught at the University of Pennsylvania Law School; his research interests are in corporate law, environmental law, and jurisprudence. His recent publications include "Reflexive Environmental Law" in the *Northwestern University Law Review* and "The Legitimacy of Multi-national Corporations," which appears as a chapter in *Progressive Corporate Law*. Orts will teach Enterprise Organizations and Corporate Governance in the winter term.

Ernst-Ulrich Petersmann is professor of international law, European Community law and Swiss public law at the University of St. Gallen in Switzerland. He is also director of the Institute of European Law, Economic Law and Comparative Law at the university. Widely published in the areas of constitutional law, international law, and European economic law, he is the Dean's Distinguished Visiting International Scholar during the fall term.

Radhika Rao has been an assistant professor at the Hastings College of Law, University of California, since 1993. She earned her J.D. from Harvard Law School in 1990, where she served as an editor of the *Harvard Law Review*. Thereafter, she was a law clerk to the Honorable Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit; she then went on to clerk for U.S. Supreme Court Justices Harry Blackmun and Thurgood Marshall. She has recently published "Constitutional Misconceptions" in the *Michigan Law Review*. Rao is teaching First Amendment and a seminar entitled The Constitution and the Family this fall.

Steven Rhodes, J.D. '72, was appointed U.S. Magistrate for the Eastern District of Michigan in 1981. He is now a judge in the U.S. Bankruptcy Court in the Eastern District of Michigan and he has also served a one-year term as chief judge of that court. Rhodes will teach a seminar entitled Advanced Chapter 11 Bankruptcy in the winter.

FACULTY

William Richman is a professor of law at the University of Toledo College of Law. His subjects there include civil procedure, conflict of laws, evidence, and judicial administration. Richman received his J.D. from the University of Maryland School of Law. He is the author of several books on conflict of laws, including *Understanding Conflict of Laws*. He is teaching Jurisdiction and Choice of Law.

Mitchell Seider is a partner in the firm Sheinfeld, Maley & Kay in Houston, Texas. He earned his J.D. from the Fordham University School of Law in 1987. He recently co-authored an article (with Myron Sheinfeld) entitled "A Contemporary Analysis and Guide to Ethical and Responsible Representation of Debtors, Committees and Other Parties by Estate Retained Professionals." Seider is co-teaching the Ethics and the Business of Law course this fall.

Myron Sheinfeld, J.D. '54, is a partner in the firm Sheinfeld, Maley & Kay in Houston, Texas. Sheinfeld clerked for the Honorable Benjamin C. Donnally of the U.S. District Court for the Southern District of Texas from 1960-61. He was also an Assistant United States Attorney in that same district from 1958-60. He was an adjunct professor of law at the University of Texas School of Law from 1975-91. His recent publications include "LBO: Legitimate Business Organization or Large Bankruptcy Opportunity?" and "A Rejoinder to 'The Untenable Case for Chapter 11'," both of which appear in *Bankruptcy Law and Practice*. He is co-teaching the course Ethics and the Business of Law.

Dan Sperber is director of research at CNRS in Paris. He holds degrees in sociology and anthropology from the Sorbonne and Oxford University, respectively. Co-author of four books and dozens of articles, his recent work includes *Relevance: Communication and Cognition*. He has held numerous visiting professorships and fellowships, including posts at Cambridge University, the Princeton Institute for Advanced Study and the British Academy in London. He visited Michigan Law School in the fall of 1994 and taught a seminar entitled Meaning in Context: Cognitive Perspective. Sperber will be co-teaching a seminar in the winter with Professor Heidi Li Feldman.

Edward Stein, J.D. '66, specializes in civil litigation at the firm of Stein, Moran & Westerman in Ann Arbor. He has participated widely in continuing legal education seminars and institutes for the past twenty-five years and has frequently lectured on trial techniques and expert witness testimony. Stein will teach an intensive course on Trial Practice in March.

Martin Stone is an associate professor of Law and Philosophy at Duke University School of Law, where he has taught since 1989. He received his J.D. from Yale Law School in 1985. Following law school, stone was an instructor at Balliol College, University of Oxford from 1987-88, where he also earned an advanced degree in Philosophy. His publications include "Focusing the Law: What Legal Interpretation is Not," in *Law and Interpretation* and "The Trouble With Interpretation" in *Duke Law Magazine*. Stone is teaching Torts.

Sonia Mateau Suter, J.D. '94, also has a masters degree from the University of Michigan in human genetics and was a genetics counselor at Henry Ford Hospital from 1989-91. At the Law School, she was executive articles editor for the *Michigan Law Review*. Following her graduation, she clerked for the Honorable John Walker of the U.S. Court of Appeals for the Second Circuit. She has published "Whose Genes Are These Anyway?" in the *Michigan Law Review* as well as several papers in the basic sciences. She is teaching Torts in the fall and a seminar on Medical Decision-making and co-teaching Genetics and Law in the winter.

Scarnecchia named academic leadership program fellow

Suellyn Scarnecchia

Suellyn Scarnecchia, the Law School's recently appointed Associate Dean for Clinical Affairs and a Clinical Professor of Law, has been named a 1996-97 Fellow of the Academic Leadership Program sponsored by a consortium of Big Ten universities and the University of Chicago.

Scarnecchia is the first Law School faculty member to be named a Fellow in the eight-year-old program, which is sponsored by the Committee on Institutional Cooperation (CIC). She is one of six Fellows named this year from the University of Michigan.

As a Fellow, she will attend special seminars at Michigan State University, Purdue University and the University of Wisconsin-Madison, as well read materials assigned for the program and meet with officials of the U-M.

According to the CIC, the Academic Leadership Program "is specifically oriented to the challenges of academic administration at major research universities and is designed to help faculty members prepare to meet these challenges."

This year's other U-M Fellows are from the School of Music, English, Graduate Studies and Engineering, the College of Pharmacy and the School of Dentistry.

St. Antoine first Law School professor to win faculty governance award

Theodore J. St. Antoine, James E. and Sarah A. Degan Professor of Law, has received the Distinguished Faculty Governance Award in recognition of his more than 30 years of service to the University of Michigan and the Law School.

St. Antoine is the first Law School faculty member to receive the annual award since the Senate Advisory Committee on University Affairs (SACUA) established it in 1986. The award recognizes faculty members "who consistently place University interests before personal or departmental interests" and whose "concern with the general welfare protects and nourishes our individual welfare."

At the Law School, St. Antoine served as dean from 1971-78, as chairman of the personnel committee during the 1970s, and as chairman of dean search committees in the mid-1980s and early 1990s. He joined the Law School faculty in 1965.

Within the University, he chaired University Council in the early 1970s, headed the State Relations Committee in the early 1990s, has chaired the Tenure Appeals Committee, served as president of the University Research Club, and served in 1995-96 as chairman of the Academic Affairs Advisory Committee, which nominated him for the award.

Also, in August St.Antoine was installed as one of the charter Fellows of the new College of Labor and Employment Lawyers.

KUDOS

Professor of Law **Rebecca S. Eisenberg** was a Senior Fellow at the Green Center for the Study of Science and Society at the University of Texas-Dallas in the spring. In February, she chaired the National Academy of Sciences workshop on "Intellectual Property and Research Tools in Molecular Biology" at Washington, D.C.

Assistant Professor of Law **Michael A. Heller** won the L. Hart Wright Award for Excellence in Teaching, awarded last May. The award is voted by students in the Law School.

The *Michigan Law Review* issue in August was dedicated to **Jerold H. Israel**, Alene and Allan F. Smith Professor of Law who retired on Aug. 31 after 35 years at the Law School. The issue includes tributes from Dean Jeffrey S. Lehman; Wayne R. LaFave of the University of Illinois, a co-author with Israel; Debra Ann Livingston, formerly on the faculty at Michigan Law School and now at Columbia; the Hon. Paul D. Borman, J.D. '62, of the U.S. District Court for the Eastern District of Michigan; and Yale Kamisar, Clarence Darrow Distinguished University Professor of Law. LaFave also had an article in the issue. Other article writers included Carol S. Steiker of Harvard, Jordan M. Steikere of the University of Texas, Albert W. Alschuler of the University of Chicago; and Nancy J. King of Vanderbilt. Look for an excerpt from the dedication issue in an upcoming issue of *Law Quadrangle Notes*. Israel will be teaching at the University of Florida.

Hessel E. Yntema Professor of Law **John H. Jackson** lectured on "The World Trading System With a WTO" in June at the Max Planck Institute in Hamburg, Germany. In May he addressed an Institute of Advanced Legal Studies seminar at the University of London on "The WTO and the New Constitution for the World Trading System: Appraising the First Year" (also published in the *IALS Bulletin* and a version appears in this issue of *Law Quadrangle Notes* beginning on p. 73) and "Exploring Possible Future Developments" and presented lectures at Queen Mary and Westfield College on "The WTO Institutional Structure and Its Relationship to Economic Development" and "Impact of the GATT/WTO Dispute Settlement Procedures on Developing Countries."

Margaret A. Leary, Director of the Law Library, Adjunct Instructor in Law Librarianship, and Lecturer in Library Science for the School of Information, has been named to a three-year term on the City of Ann Arbor Planning Commission. Earlier this year she was re-elected president of Habitat for Humanity of Huron Valley and chosen by the Senate Advisory Committee on University Affairs (SACUA) to serve on the university's Civil Liberties Board.

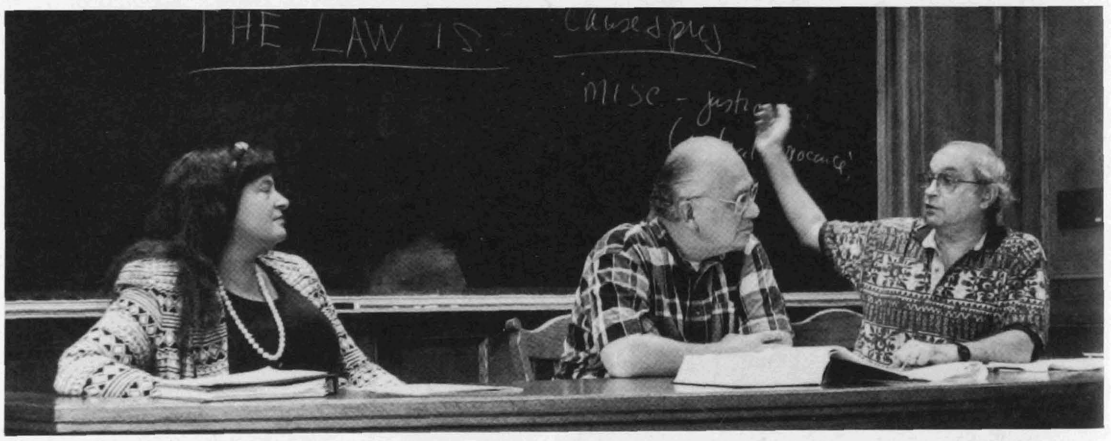
Francis A. Allen Collegiate Professor of Law **Richard O. Lempert**, also a professor of sociology, has completed his first year as chairman of the University of Michigan Sociology Department. He also recently presented a paper at the Law and Society Association meeting in Glasgow.

William I. Miller, Professor of Law, addressed the Law and Society Association annual meeting in Glasgow on the topic "Remember Me: Revenge and the Making of the Person." This spring he will be a visiting professor in the history department at the University of Bergen, Norway.

Professor of Law **Mathias W. Reimann** in March gave the Tulane University Law School's annual Eason Weinman Lecture on Comparative Law, speaking on "The End of Comparative Law as an Autonomous Discipline."

Kent D. Syverud, Associate Dean for Academic Affairs and Professor of Law, spoke on "Getting Started: Organizing and Enjoying a Course the First Time Through" at the American Association of Law Schools' New Law Teachers Workshop in July.

James J. White, Robert A. Sullivan Professor of Law, also holds the Louis and Myrtle Moskowitz Research Professorship in Business and Law for a one-year term that began Sept. 1. The professorship rotates between a faculty member from the Law School and the School of Business Administration.



Habeas Corpus —
Jerold H. Israel, Alene and Allan F. Smith Professor of Law who retired Aug. 31, makes a point during a panel discussion in August on the U.S. Supreme Court's denial of certiorari last June to convicted murderer Ellis Wayne Felker and the tightened restrictions on writs of habeas corpus that are part of the Antiterrorism and Effective Death Penalty Act of 1996. Other panelists are Andrea Lyon, Clinical Assistant Professor of Law, and Terrance Sandalow, Edson R. Sunderland Professor of Law. Israel discussed the historical antecedents of the law; Sandalow outlined its constitutional aspects; and Lyon focused on its modern origins and potential impact.

Faculty Publications

Sometimes we wonder how faculty members squeeze the time for scholarly inquiry and writing into their schedules of teaching, service, mentoring and other work. But they do. Impressively. Here, *Law Quadrangle Notes* offers an overview of faculty publishing since 1994:

Francis A. Allen

The Habits of Legality: Criminal Justice and the Rule of Law, based on the 1994 Cooley Lectures, Oxford University Press (1996).

"The Scholarship of Kenneth Pye," 49 *SMU Law Review* 439-61 (March-April 1996).

Layman Allen

"Controlling Inadvertent Ambiguity in the Logical Structure of Legal Drafting by Means of Prescribed Definitions of the A-Hohfeld Structural Language" (with Charles Saxon), 9 *Theoria* No. 21 135-172 (1994).

José E. Alvarez

"Constitutional Interpretation in International Organizations," *Working Paper Series*, Global Peace and Conflict Studies Institute (1996).

"The United States' Financial Veto," in *Proceedings of the 90th Annual Meeting*, American Society of International Law (1996).

"Foreword: What's the Security Council For?", 17 *Michigan Journal of International Law* 221 (1996).

"Nuremberg Revisited: The Tadic Case," 7 *European Journal of International Law*, Issue No. 2 (1996).

"Judging the Security Council," 90 *American Journal of International Law* 1-39 (1996).

"Researching Legal Issues in the United Nations," in *Introduction to International Organizations*, L. Louis-Jacques, J.S. Korman, eds. (1996).

"Theoretical Perspectives on Judicial Review by the World Court," in *Proceedings of the 89th Annual Meeting*, American Society of International Law 85 (1995).

"Legal Issues," chapter in *A Global Agenda: Issues Before the 50th General Assembly of the United Nations*, J. Tessitore, S. Woolfson, eds. (1995).

"Financial Responsibility of Members," chapter in *The United Nations and the International Legal Order*, O. Schachter, C. Joyner, eds. (1995).

"The Once and Future Security Council," 18 *Washington Quarterly* 5 (1995) (reprinted in *Order and Disorder after the Cold War*, B. Roberts, ed., 1995).

"Legal Issues," in *A Global Agenda: Issues before the 49th General Assembly*, (September 1994).

Faculty Publications

"Positivism Regained, Nihilism Postponed," (review essay) 15 *Michigan Journal of International Law* 747-84 (1994).

"'The Right to be Left Alone' and the General Assembly," in 5 *ACUNS Reports and Papers* 5.

Book reviews of *United Nations, Divided World, About Face? The United States and the United Nations*, and *Financing an Effective United Nations*, in 88 *American Journal of International Law* 827-31 (1994).

David Chambers

"Fathers, The Welfare System and the Virtues and Perils of Child-Support Enforcement," 81 *Virginia Law Review* 2575-2605 (1995).

"AIDS, Gay Men, and the Code of the Condom," 29 *Harvard Civil Rights/Civil Liberties Law Review* 353-85 (1994).

Edward Cooper

1994, 1995 and 1996 Supplements, Volumes 13, 13A, 15A, 15B, and 17, *Federal Practice and Procedure: Jurisdiction 2nd* (with C.A. Wright and A.R. Miller).

1994, 1995 and 1996 Supplements, Volumes 16 and 18, *Federal Practice and Procedure: Jurisdiction* (with C.A. Wright and A.R. Miller).

Proposed revisions, Federal Rules of Civil Procedure 9(h), 26 (c), 47 (a), and 48, with Committee Notes (as reporter, Advisory Committee on the Federal Rules of Civil Procedure); 91 F.R.D. 123-147.

Vol. 19, *Federal Practice and Procedure: Jurisdiction 2d* (with C.A. Wright and A.R. Miller).

"Discovery Cost Allocation: Comment on Cooter and Rubinfeld," 23 *Journal of Legal Studies* 465-80 (1994).

"Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act," 54 *Louisiana Law Review* 897-906 (1994).

A Summary of the Dec. 1, 1993 Amendments to the Federal Rules of Civil Procedure, reprinted in 1 *Resource Materials: Civil Practice and Litigation* 1, S. Schreiber, ed.

Steven P. Croley

"Practical Guidance on the Applicability of the Federal Advisory Committee Act," 10 *Administrative Law Journal American University* 111-78 (1996).

"The Administrative Procedure Act and Regulatory Reform: A Reconciliation," 10 *Administrative Law Journal American University* 35-49 (1996).

"Libertarianism as Critical Theory," 1 *Michigan Law and Policy Review* 179-97 (1996).

"WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (with John Jackson), 90 *American Journal of International Law* 193-213 (1996).

"The Nonpecunary Costs of Accidents: Pain-and-Suffering Damages in Tort Law," (with Jon Hanson), 108 *Harvard Law Review* 1785-1917 (1995).

"Making Rules: An Introduction," 93 *Michigan Law Review* 1511-38 (1995).

"The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 *University of Chicago Law Review* 689-790 (1995).

"Imperfect Information and the Electoral Connection," 47 *Political Research Quarterly* 509-23 (1994).

Don Duquette

"Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity," monograph, June 1996.

"Michigan Child Welfare Law: Child Protection, Foster Care, and Termination of Parental Rights," *Michigan Department of Social Services Publication*, No. 374, revised (1994).

"Liberty and Lawyers in Child Protection," in Helfer, Kempe and Krugman, Eds., *The Battered Child* (5th Edition, 1994).

"Scottish Children's Hearings and Representation for the Child," in Stuart Asquith, Ed., *Justice for Children*, Martinus Nijhof, Amsterdam (1994).

Book review of Myers, *Legal Issues in Child Abuse and Neglect* (Newbury Park, Calif.: Sage Publications, 1992) in *Community Alternatives: International Journal of Family Care*, Vol. 6, No. 2 (Fall 1994).

Rebecca Eisenberg

"Intellectual Property Issues in Genomics," 14 *Trends in Biotechnology* 302 (1996).

"Patents: Help or Hindrance to Technology Transfer?", in *Biotechnology: Science, Engineering, and Ethical Challenges for the 21st Century*, National Academy Press, 1996.

"Corporate Strategies and Human Genome," in *Intellectual Property in the Realm of Living Forms and Materials*, Institut de France-Académie des Sciences, 1995.

Opinion Letter as to the Patentability of Certain Inventions Associated with the Identification of Partial cDNA Sequences (with Robert Merges), 23 *American Intellectual Property Journal Association Quarterly Journal* 1-52 (1995), and Reply to Comments, 23 *American Intellectual Property Law Association Quarterly Journal* 61-63 (1995).

"A Technology Policy Perspective on the NIH Gene Patenting Controversy," 55 *University of Pittsburgh Law Review* 633-52 (1994).

"DNA Patenting, Technology Transfer, and Genome Research," with Robert Cook–Deegan, 5 *Human Genome News* No. 6 at 6 (March 1994).

"Technology Transfer and the Human Genome Project: Problems with Patenting Research Tools," 5 *RISK — Health Safety and Environment* 163-175 (Spring 1994).

Phoebe Ellsworth
"The Right Way to Study Emotion," 6 *Psychological Inquiry* 213-216 (1996).

"Who Should Stand Next to the Suspect?" (with R. Gonzalez and J. Davis), 80 No. 4 *Journal of Applied Psychology* 525-31 (1995).

"Some Reasons to Expect Universal Antecedents of Emotion," in P. Ekman and R.J. Davidson, eds., *The Nature of Emotion: Fundamental Questions*, New York: Oxford, 150-154 (1995).

"Levels of Thought and Levels of Emotion," in P. Ekman and R.J. Davidson, eds., *The Nature of Emotion: Fundamental Questions*, New York: Oxford, 192-196 (1995).

"Déjà vu all over again: Elliott's Critique of Eyewitness Experts" (with S. Kassin and V. Smith), 18 *Law and Human Behavior* 203-10 (1994).

"William James and Emotion: Is A Century of Fame Worth a Century of Misunderstanding?", 101 *Psychological Review* 222-229 (1994).

"Stress and Health in First-Year Law Students: Women Fare Worse" (with D.M. McIntosh, J. Keywell, and A. Reifman), 24 *Journal of Applied Psychology* 1474 (1994).

"Sense, Culture and Sensibility," in S. Kitayama and H. Markus (eds.), *Emotion and Culture: Empirical Studies of Mutual Influence.*

"Hardening of the Attitudes: American' Views on the Death Penalty" (with Sam Gross), 50(2) *Journal of Social Issues* (1994).

Heidi Li Feldman
"Enriching the Legal Ethics Curriculum: From Requirement to Desire," 58 *Journal of Law and Contemporary Problems 51 (1996).*

"Libertarianism With a Twist" (book review), 94 *Michigan Law Review* 1883-97 (1996).

"Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?" 69 *Southern California Law Review* 885-948 (1996).

"Science and Uncertainty in Legal Judgment," 74 *Texas Law Review* 1-48 (1995).

"Objectivity in Legal Judgment," 92 *Michigan Law Review* 1187-1255 (1994).

Robben W. Fleming
Tempests into Rainbows: Managing Turbulence (an autobiography), University of Michigan Press, 1996.

Merritt Fox
"The Legal Environment of International Finance: Thinking About Fundamentals," 17 *Michigan Journal of International Law* 721-31 (1996).

"Insider Trading Deterrence v. Managerial Incentives: A Unified Theory of Section 16(b)," 92 *Michigan Law Review* 2088-2203 (1994).

"Insider Trading in a Globalizing Market: Who Should Regulate What?" 26 *Securities Law Review,* 355-94 (1994).

"Thinking to be Paid v. Being Paid to Think," 19 *Journal of Corporate Law* 761-67 (Summer 1994).

Richard D. Friedman
"Chief Justice Hughes' Letter on Court-Packing," 1996 *Journal of Supreme Court History.*

"Assessing Evidence," review of C.G.G. Aitken's *Statistics and the Evaluation of Evidence for Forensic Scientists*, Bernard Robertson and G.A. Vignaux's *Evidence: Evaluating Forensic Science and the Courtroom*, and David A. Schum's *Interpreting Evidential Foundations of Probabilistic Reasoning*, 94 *Michigan Law Review* (1996).

"Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket," 1995 *Supreme Court Review* 277-321 (1996).

"Is Barking Up the Wrong Tree Assertive Conduct?", 16 *Mississippi College Law Review* 87-115 (1995).

"Refining Conditional Probative Value," 94 *Michigan Law Review* 457-65 (1995).

"Limitations on Admissibility and Rationales for Exclusion," introduction as general editor to David P. Leonard, *Selected Rules of Limited Admissibility*, *The New Wigmore*, at xxxv (1996).

"The New Wigmore in Perspective," introduction as general editor to *The New Wigmore: A Treatise on Evidence*, included in the first volume published, David P. Leonard, *Selected Rules of Limited Admissibility*, *The New Wigmore*, at xxiii (1996).

"Asymmetrical Peremptories Defended: A Reply," 31 *Criminal Law Bulletin* 337-40 (1995).

"Probability and Proof in *State v. Skipper*: An Internet Exchange" (with several other authors), 55 *Jurimetrics Journal of Law, Science and Technology* 277-310 (1995).

"Still Photographs in the Flow of Time," 7 *Yale Journal of Law and Humanities* 243-65 (1995).

"Character Impeachment Evidence: The Assymetrical Interaction Between Personality and Situation," 43 *Duke Law Journal* 816-33 (1994).

"The Death and Transfiguration of Frye," 34 *Jurimetrics Journal of Law, Science and Technology* 133-48 (1994).

"Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *University of Pennsylvania Law Review* 1891-1984 (1994).

"A Reaffirmation: the Authenticity of the Roberts Memorandum, or Felix the Non–Forger," 142 *University of Pennsylvania Law Review* 1985-95 (1994).

"Conditional Probative Value: Neoclassicism Without Myth," 93 *Michigan Law Review* 439-77 (1994).

Faculty Publications

Bruce Frier
"Early Classical Private Law," *The Cambridge Ancient History* vol. X. 43 B.C. to A.D. 69 (1995), 959-78.

"Why Did the Jurists Change Roman Law? Bees and Lawyers Revisited," Index 22 (*Omaggio a Peter Stein,* ed. L. Labruna, 1994).

"The Demography of Roman Egypt," with R.S. Bagnall (Cambridge University Press, in the series *Cambridge Studies in Population, Economy and Society in Past Time* No. 23).

"Natural Fertility and Family Limitation in Roman Marriage," 89 *Classical Philology* 318-33.

Review of A.W. Lintott, *Judicial Reform and Land Reform in the Roman Republic* (1993), in 84 *Journal of Roman Studies* 211-12.

Review of J.M. Davidé, *Le Patronat Judiciare au Dernie Siècle de la Republicque Romaine* (1992), 89 *Classical Philology* 290-93.

Thomas A. Green
"Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice," 93 *Michigan Law Review* 1915-2053 (1995).

Samuel R. Gross
"Substance and Form in Scientific Evidence: What *Daubert* Didn't Do," in L. Kramer, Ed., *Reforming the Civil Justice System*, NYU Press, 1996 (also printed in Shepherd's *Expert and Scientific Evidence Quarterly*, vol. 3, number 1, at p. 129 (1995).

"Don't Try: Civil Jury Verdicts in a System Geared to Settlement" (with Kent Syverud), 44 *UCLA Law Review* 1 (1996).

"The Risks of Death: Sources of Error in Capital Prosecutions," 44 *Buffalo Law Review*, Issue 2 (1996).

Reply to Daniel Polsby, 44 *Buffalo Law Review*, Issue 2 (1996).

"Hardening of the Attitudes: Americans' Views on the Death Penalty" (with Phoebe Ellsworth), 50 *Journal of Social Issues* No. 2 (1994).

Michael Heller
"Property Rights: A View from the Trenches," 19 *Yale Journal of International Law* 203-5 (1994).

Don Herzog
"The Trouble with Hairdressers," *representations*, Issue 53 (Winter 1996).

Jerold Israel
"Federal Criminal Procedure As A Model For The States," 543 *Annals of the American Academy of Political and Social Science* 130 (1996).

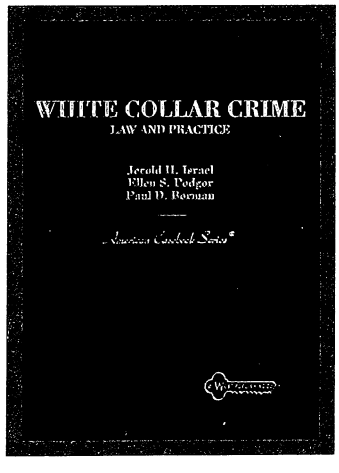
White Collar Crime: Law and Practice (with Podgor and Borman), West Publishing (1996).

Criminal Procedure and The Constitution (with Kamisar and LaFave), 1995 edition.

1995 Supplement to *Modern Criminal Procedure* (with Kamisar and LaFave).

Modern Criminal Procedure (with Kamisar and LaFave), 8th edition (1994).

Criminal Procedure and the Constitution (with Kamisar and LaFave), (1994).



John Jackson
"The New Constitution for the World Trading System — a WTO is Born," *IALS Bulletin* (Institute for Advanced Legal Studies, London, England), Issue 23 (May 1996).

"Reflections on International Economic Law," 17 *University of Pennsylvania Journal of International Economic Law*, 17-28 (1996).

"WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (with Steven P. Croley), 90 *American Journal of International Law*, 193-213 (1996).

"The Uruguay Round, World Trade Organization, and the Problem of Regulating International Economic Behaviour" (Hyman Soloway Lecture), in *Policy Debates/Debats Politiques*, Ottawa: Centre for Trade Policy and Law (1995).

"The World Trade Organization: Watershed Innovation or Cautious Small Step Forward?", *The World Economy* 11-31 (1995).

"Greening the GATT: Trade Rules and Environmental Policy," Chap. 2, pp. 39-51 in *Trade and the Environment: The Search for Balance*, Cameron May Publishers, London (1995).

"From GATT to the World Trade Organization: Implications for the World Trading System," Thomas Cottier, ed., *GATT-Uruguay Round*, Institut fur Euorpa-und Wirtschaftsvolkerrecht, Verlag Stampfli+Cie AG Bern (1995) pp. 29-50.

"International Economic Law: Reflections on the 'Boilerroom' of International Relations," 10 *American University Journal of International Law and Policy* 595-606 (Winter 1995).

"The World Trade Organization and the 'Sovereignty' Question," *Law Review of the Europa Instituut*, University of Amsterdam (Netherlands). Special issue dedicated to Professor Richard Lauwaars (Autumn 1995).

Legal Problems of International Economic Relations, 3rd ed., with William J. Davey and Alan O. Sykes, West Publishing (1994).

"Alternative Approaches for Implementing Competition Rules in International Economic Relations," *Aussenwirtschaft — Swiss Review of International Economic Relations*, No. 2/94, pp. 2-25.

Strengthened Dispute Settlement Procedures in the Uruguay Round, Organization for Economic Cooperation and Development, Paris, France.

"The Uruguay Round and the WTO — New Opportunities for the Bretton Woods System," article prepared at the request of the Bretton Woods Commission, Commission Report — Background Papers, pp. C-219-226 (July 1994).

"Managing the Trading System: The World Trade Organization and the Post-Uruguay Round GATT Agenda," Chapter 3 in Peter B. Kenen, *Managing the World Economy: Fifty Years After Bretton Woods*, Institute for International Economics (September 1994).

"Restructuring the GATT System," in *Trade Policy in the 1990s*, M.G. Smith and D. P. Steger, eds., Center for Trade Policy and Law.

"Problems of Regulating Economic Activity in a World of Increasing Interdependence" (with A. Deardorff), for the NBER Conference, Oct. 28, 1994.

"The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections," in *Towards More Effective Supervision by International Organizations — Essays in Honor of Henry G. Schermers*, Vol. 1, N. Bloker and Same Muller, eds., Kluwer Academic Publishers.

"International Legal Perspectives on Japan-North American Economic Relations," ASIL.

Douglas A. Kahn

Federal Income Tax, 3d edition.

Corporate Income Taxation (with Jeffrey S. Lehman), 4th edition.

"Compensatory and Punitive Damages for a Personal Injury: To Tax or Not to Tax?", 2 *Florida Tax Review* 327 (1995).

"Section 338 and Its Foolish Consistency Rules — The Hobgoblin of Little Minds," 14 *Quinnipiac Law Review* 31-81 (1994).

"Taxing Punitive Damages in Personal Injury Claims," 65 *Tax Notes* 487-90.

Yale Kamisar

Modern Criminal Procedure (with Israel and LaFave), 8th edition, (1994).

Constitutional Law (with Lockhart, Choper, Shiffrin and Fallon), 8th edition (1996).

Criminal Procedure and the Constitution (with Israel and LaFave), 1994 and rev. edition, 1995.

"On the 'Fruits' of *Miranda* Violations, Coerced Confessions, and Compelled Testimony," 93 *Michigan Law Review*, 929-1010 (1995).

"The Warren Court and Criminal Justice: A Quarter-Century Retrospective," 31 *Tulsa Law Journal* 1-55 (1995).

"Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia," in *Euthanasia Examined* (John Keown, ed., 1995), pp. 225-60, Cambridge University Press.

"Against Assisted Suicide — Even a Very Limited Form," 72 *University of Detroit Mercy Law Review*, 735-69 (1995).

"The Rights of the Accused in a 'Crime Crisis'" in *Postmortem: The O.J. Simpson Case* 211-18, Jeffrey Abramson, ed. (1996).

"Hard Time" (review of *The Oxford History of the Prison*, Norval Morris and David J. Rothman, eds.), *New York Times Book Review*, Feb. 11, 1996.

"This Judge Was Not for Hanging" (review of Lois Forer, *A Rage to Punish*), *New York Times Book Review*, July 17, 1994.

"The Great Persuader" (review of Roger Newman, *Hugo Black*), New York Times Book Review, Nov. 6, 1994.

"The Right to Assisted Death: Abortion Right is No Support," *Chicago Tribune*, March 14, 1996, p. 27; reprinted in *Legal Times*, March 25, 1996, p. 23.

"It Started with *Quinlan*: The Ever Expanding 'Right to Die'" (commentary on the 20th anniversary of the *Karen Ann Quinlan* case), *Los Angeles Times*, March 31, 1996, p. M2-M6; reprinted in *The Detroit News*, April 21, 1996, p. 6B.

"Thirty Years after Miranda Reading Suspects Still Talk," *Los Angeles Times*, June 9, 1996, p. M2.

"Miranda Does Not Look So Awesome Now," *Legal Times*, June 10, 1996, p. 22.

"Why the Jury? A Call for Reform of Historical Proportions," *Los Angeles Daily Journal*, October 17, 1995.

"Death, Dying and the Right of Privacy, *Michigan Bar Journal* (Feb. 1994).

Crime Watch: Who Said What When?" *Boston Globe*, Jan. 30, 1994; reprinted and expanded as "A Crime Crisis Conventional Wisdom Test" in *Legal Times*, Feb. 7, 1994; reprinted as "Who Said What When: A Crime Quiz" in *Police Beat*, March/April 1994.

"Pondering the Kevorkian Question," *Chicago Tribune*, May 6, 1994.

"After Assisted Suicide, What Next?" *Legal Times*, May 30, 1994.

"Assisted Suicide and Euthanasia: The Cases Are in the Pipeline," *Trial* (December 1994).

"When Is There a Constitutional 'Right to Die'? When Is There No Constitutional 'Right to Live'?", reprinted in *Modern Constitutional Theory: A Reader*, J. Garvey and A. Aleinikoff, eds., 3d ed. (1994).

Thomas A. Kauper

"Misuse of the Antitrust Laws: The Competitor Plaintiff" (with Edward Snyder), reprinted in 25 *Journal of Reprints for Antitrust Law and Economics* 655 (1995).

Faculty Publications

"The Justice Department and the Antitrust Laws: Enforcer or Regulator?", revised and reprinted in *The Antitrust Impulse* 435-74 (T. Kovaleff, ed., 1995).

"The Treatment of Cartels Under the Antitrust Laws of the United States," in *Proceedings of the Symposium on International Harmonization of Competition Laws*, Taipai: Fair Trade Commission of Taiwan.

Frank R. Kennedy
"The Origins and Growth of Bankruptcy and Reorganization Law in the 20th Century, An Oral History Perspective" (77 pages), interview by Harvey R. Miller, brochure published by the Second Circuit Committee on Historical and Commemorative Events and the Federal Bar Council (1995).

"Some Suggestions for the Bankruptcy Commission" (with Gerald K. Smith), in *Annual Survey of Bankruptcy Law 1995-1996*, pp. 477-83.

"The Bankruptcy Court and Its Jurisdiction," in *Annual Survey of Bankruptcy Law 1995-1996*, pp. 485-507.

"Reform of Partnership Provisions," in *Annual Survey of Bankruptcy Law 1995-1996*, pp. 657-664.

"Let the UST Be," *Norton Bankruptcy Law Adviser*, May 1995, No. 5, pp. 1-4.

"Partnership Bankruptcy and Reorganization: Proposals for Reform" (with Morris W. Macey), 50 *Business Law* 879-923 (1995).

"The Bankruptcy Court," chapter in *The Development of Bankruptcy & Reorganization Law in the Courts of the Second Circuit of the United States*, pp. 1-34 (1995).

Outline, "Proposals of the Ad Hoc Committee on Partnerships in Bankruptcy" and "Amendments of the Bankruptcy Code Proposed by the Ad Hoc Committee on Partnerships in Bankruptcy," in *Partnership Problems in Reorganization and Bankruptcy: Solutions and Proposed Amendments to the Bankruptcy Code*, American Bar Association Section of Business Law Spring Meeting, Washington, D.C., April 8, 1994.

"Tribute to George Treister," 22 *California Bankruptcy Journal* 17-18.

James E. Krier
"Takings from Freund to Fischel," 84 *Georgetown Law Journal* 1895-1911 (1996).

"Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide under Futtermittel," 74 *Texas Law Review* 1247-50 (1996).

"Property Rules and Liability Rules: The Cathedral in Another Light," with Schwab, 70 *New York University Law Review* 440-83 (1995).

"Risk and the Legal System," *Annals of the American Academy of Political and Social Science* (May 1996), at 176.

"On the Topology of Uniform Environmental Standards in a Federal System — and Why It Matters," 54 *Maryland Law Review* 1226-41 (1995).

"Science, Environment, and the Law" (Round Table), 21 *Ecology Law Quarterly* 356.

"Marketable Pollution Allowances," 25 *University of Toledo Law Review* 449-55 (1994).

"The End of the World News," 27 *Loyola L.A. Law Review* 851-66 (1994).

Jeffrey S. Lehman
"Neighborhood Effects and Federal Policy" (with Timothy Smeeding), Chapter 11 of *Neighborhood Poverty: Context and Consequences for Children, Volume 1*, J. Brooks-Gunn, G.J. Duncan, J.L. Aber, eds., New York: Russell Sage Foundation Press (1996).

"How Will Welfare Recipients Fare in the Labor Market?" (with Sheldon Danziger), *Challenge* (March-April 1996).

"Updating Urban Policy," Chapter 9 in *Confronting Poverty: Prescriptions for Reform*, Sheldon Danziger, et. al (Cambridge: Harvard University Press, 1994).

Corporate Income Taxation (with Douglas A. Kahn), 4th edition.

Richard Lempert
"The Honest Scientist's Guide to DNA Evidence," 96 *Genetica* 119-124 (1995).

"Impeaching Tapes," West Publishing Co. (electronic), August 1995.

"O.J. At the Half," West Publishing Co. (electronic), July 1995.

"Cultural Differences and Discrimination: Samoans Before a Public Housing Eviction Board," 59 *American Sociological Review* 890–910 (1994).

"Comment: Theory and Practice in DNA Fingerprinting," 9 *Statistical Science*, 255–58 (1994).

Under the Influence? Drugs and the American Work Force, with J. Normand and Charles O'Brien, Washington, D.C.: National Academy Press.

Rochelle E. Lento
"Community Development Banking Strategy for Revitalizing Our Communities," 27 *Michigan Journal of Law Reform*, 773-812 (1994).

Kyle Logue
"Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment," 94 *Michigan Law Review* 1129-96 (1996).

"Solving the Judgment-Proof Problem," 72 *Texas Law Review* 1375-94 (1994).

Andrea Lyon
"Affirmative Defenses," Chap. 8, *Defending Illinois Criminal Cases*, Illinois Institute of Continuing Legal Education (1996).

"Capital Punishment: Is There Any Habeas Left in This Corpus?" panel presentation quoted (by Ronald J. Tabak), 27 *Loyola Chicago Law Journal* 523, *587 (1996).

Catharine MacKinnon
"Vindication & Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace," 83 *Georgetown Law Journal* 1959-67 (1995).

"Pornography Left & Right," 30 *Harvard Civil Rights-Civil Liberties Law Review* 133-68 (1995).

"Rape, Genocide, and Women's Human Rights," 17 *Harvard Women"s Law Journal* 5-16 (1994).

Only Words (Harvard University Press, 1993), British edition with new preface, revised (Harper Collins, 1994); reprinted in German (Fisher Verlag, 1994).

Deborah Malamud
"Class-Based Affirmative Action: Lessons and Caveats," 74 *Texas Law Review* 1847 (1996).

"The Last Minuet: Disparate Treatment After *Hicks*," 93 *Michigan Law Review* 2229-2324 (1995).

William Ian Miller
"Upward Contempt," 23 *Political Theory* 476-99 (1995).

"Deep Inner Lives, Individualism, and People of Honour," 16 *History of Political Thought* 190-207 (1995).

"I Can Take a Hint: Social Ineptitude, Embarrassment, and *The King of Comedy*," *Michigan Quarterly Review* 33 (1994).

"Giving the Gift of Humiliation," a short excerpt from Chapter 1 of *Humiliation*, in *Harpers* 288 (Feb. 1994).

Richard Pildes
"The Destruction of Social Capital Through Law," 144 *University of Pennsylvania Law Review* 2055 (1996).

"No Place for Political Gerrymandering," *The Texas Lawyer* (Aug. 5, 1996) (with Samuel Issacharoff).

"Racial Redistricting Redux," *The American Prospect* 15 (Winter 1996).

"Cumulative Voting in the United States" (with Kristen Donoghue), 1995 *University of Chicago Legal Forum* 241-303 (1995).

"The Politics of Race," 108 *Harvard Law Review* 1359-92 (1995).

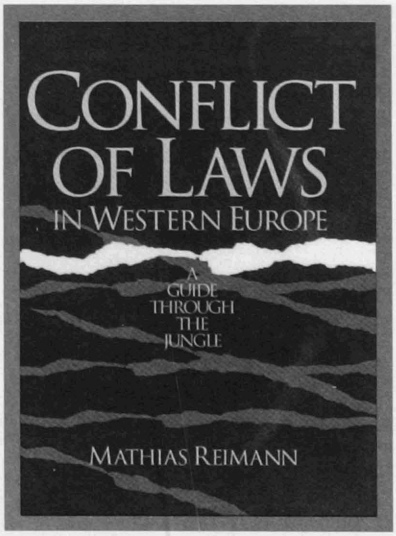
"Reinventing the Regulatory State" (with Cass Sunstein), 65 *University of Chicago Law Review* 1-129 (1995).

"The Price of Colorblindness: Facing the Hard Facts About the Voting Rights Act," *Washington Post* Outlook Section C1, April 16, 1995 (reprinted in the *Dallas Morning News*, Sunday Reader p. 1J, May 1995, and the *Washington Post* National Weekly Edition, p. 23, April 24-30, 1995).

"Against Balancing: The Role of Exclusionary Reasons in Constitutional Law," 45 *Hastings Law Journal* 711-51 (1994).

"The Supreme Court, Racial Politics, and the Right to Vote: *Shaw v. Reno* and the Future of the Voting Rights Act," 44 *American University Law Review* 1 (1994) (symposium).

"Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election District Appearances After *Shaw v. Reno*," 92 *Michigan Law Review* 483-587 (1993).



Donald Regan
"How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez*," 94 *Michigan Law Review*, 554-614 (1995).

"Response to Thomson," *Boston Review* (1995).

Mathias Reimann
Conflict of Laws in Western Europe: A Guide Through the Jungle, Transnational Publishers, Irvington, New York, 1995.

"A Human Rights Exception from Sovereign Immunity," *Michigan Journal of International Law* 16, 403-32 (1995).

"Nazi-Verbrechen und Staatenimmunität: Kann die Bundesrepublik Deutschland von KZ-Opfern vor US-amerikanischen Gerichten verklat verden?", *IPRax* 1995, 123.

"Vom Deutschen Staatsdiener zum amerikanischen Anwalt — Rollenverstandnis als Mittel gegen 'Rechtskulturschock' beim Studium in den USA," *JuS* 1994, 282.

"Beyond Fishing: Weitreichende Neurerungen in amerikanischen Discovery-Verfahren," *IPRax* 1994, 152.

"Zustellung von Klagen auf punitive damages," mit F. Juenger, *NJW* 1994, 3274.

Paul D. Reingold
"Why Hard Cases Make Good (Clinical) Law," 2 *Clinical Law Review* 545-71 (Spring 1996).

Terrance Sandalow
"Keynote Address: Equality and Freedom of Speech," 21 *Ohio Northern Law Review* 821-44 (1995).

"The Limits of Municipal Power Under Home Rule: A Role for the Courts," 48 *Minn. Law Review* 643 (1964), reprinted 1994.

Faculty Publications

Suellyn Scarnecchia
"A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case," 2 *Duke Journal of Gender Law and Policy* 41-7 (1995).

"Imagining Children's Rights," 12 *Thomas M. Cooley Law Review* 1-20 (1995).

"Judging Girls: Decision Making in Parental Consent to Abortion Cases" (with Julie Kunce Field), 3 *Michigan Journal of Gender and Law* 75 (1995).

"Who is Jessica's Mother? Defining Motherhood Through Reality," 3 *American University Journal of Gender and the Law* 1-13 (1994).

"Responding to Gender Bias in the Courts: Progress Without Accountability," *Michigan Bar Journal* Vol. 73, No. 3 (March 1994).

Carl Schneider
"The Law and the Stability of Marriage: The Family as a Social Institution," in *Promises to Keep: Decline and Renewal of Marriage in America*, David Popenoe, Jean Bethke Elshtain and David Blankenorn, eds., Rowman and Littlefield, 1996.

"Medical Decisions in the Moral Lives of Patients," 3 *Bulletin of the European Society of Philosophy of Medicine and Health Care* (Special Issue, 1995), (with Patricia D. White and Lee Teitelbaum).

"On the Duties and Rights of Parents," 81 *Virginia Law Review* 2477-91 (1995).

"From Consumer Choice to Consumer Welfare," Special Supplement, 25 *Hastings Center Report* S25 (Nov.-Dec. 1995).

"Medical Decisions at the End of Life: Cruzan, Advance Directives, and Individual Autonomy," *Jurisuto*, 1076 go, 130 page (1995).

"The Socratic Method and the Goals of Legal Education: With Some Thoughts Inspired by Travel, *Hogaku Kyoshitsu*, 180 go, 130 page (1995).

"Triumph and Crisis: The Autonomy Principle in the American Law of Medicine," *Jurisuto*, 1064 go, 86 page (1995).

An Invitation to Family Law: Principles, Process, and Perspectives (with Margaret Friedlander Brinig), West Publishing (1996).

"The Decision to Withdraw from Dialysis," 1 *Advances in Renal Replacement Therapy* 264 (1994).

"Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse," 1994 *Utah Law Review* 503-85 (1994).

"Bioethics in the Language of the Law," 24 *Hastings Center Report* 16 (1994).

"Bioethics with a Human Face," 69 *Indiana Law Journal* 1075-1104 (1994).

A.W. Brian Simpson
"*Coase v. Pigou* Reexamined," 25(1) *The Journal of Legal Studies*, 53-97, 99-101 (1996).

"Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights" (The Ninth Annual Brendan Brown Lecture, March 1995),41 *Loyola Law Review* 630-711 (1996).

"The Agincourt Campaign and the Law of War" (book review), *16 Michigan Journal of International Law* 653-66 (1995).

"Victorian Law and the Industrial Spirit" (Selden Society Annual Lecture), London Selden Society (1995).

Philip Soper
"Law's Normative Claims," in *The Autonomy of Law: Essays on Positivism*, (R. George, ed.: Oxford University Press, 1996).

"Legal Systems, Normative Systems, and the Paradoxes of Positivism," 8 *Canadian Journal of Law and Jurisprudence* 363-76 (1995).

Theodore J. St. Antoine,
1995 Supplement, *Labor Relations Law: Cases and Materials* (with L. Merrifield and C. Craver), Michie Co. (1995), Pp. iii, 59.

Labor Relations Law: Cases and Materials (with L. Merrifield and C. Craver), 9th edition, Charlottesville: Michie Co., pp. xxii, 1040.

"The Making of the Model Employment Termination Act," 69 *Washington Law Review* 361-82 (1994).

"Divergent Strategies: Union Organizing and Alternative Dispute Resolution," in *Proceedings of the 1994 Spring Meeting of the Indus. Rel. Res. Assn.* 465-70, reprinted in 45 *Labor Law Journal* 465-70 (1994).

"The Model Employment Termination Act: A Fair Compromise," 536 *Annals of the American Academy of Political and Social Science* 93-102.

Eric Stein
"Musings at the Grave of a Federation," Festschrift for H. Schermers, Vol. 3, 641-649, Kluwer, the Netherlands (1994).

"International Law in Internal Law: Toward Internationalization of Central-East European Constitutions," 88 *American Journal of International Law,* 428–50 (July 1994).

Peter Steiner
"Academic Freedom and Tenure: Bennington College," *Academe*, March-April 1995.

Thursday-Night Poker: How To Understand, Enjoy — and Win. Random House (1996).

Kent D. Syverud
"The Professional Responsibilities of Insurance Defense Lawyers" (with Charles Silver), 45 *Duke Law Journal* 255-363 (1995).

"Don't Try: Civil Jury Verdicts in a System Geared to Settlement" (with Samuel R. Gross), 44 *UCLA Law Review* 1 (1996).

"Bargaining Impediments and Settlement Behavior," with Charles Silver and Samuel Issacharoff, chapter in *Dispute Resolution: Bridging the Settlement Gap*, D. Anderson, ed., JAI Press (1996).

"Revising Michigan's Lemon Laws," study report with Tracey L. Prosser and Helen Melia, 30th *Annual Report of the Michigan Law Revision Commission* 7-41 (1996).

Special Project on the Professional Responsibilities of Insurance Defense Lawyers, Part I: Full Coverage Cases (monograph with Charles Silver), International Association of Defense Council and Defense Research Institute (1995), and in 62 *Defense Counsel Journal* 503-8 (1995).

"On the Demand for Liability Insurance," 72 *Texas Law Review* 1629-54 (1994).

Joseph Vining

From Newton's Sleep, Princeton University Press, 1995.

"Justice, Bureaucracy, and Legal Method," *The Long Term View*, Vol. 3, No. 1, 1995.

"Law and Belief," *Forward Movement Publications*, 4 Pentecost 1995.

"Antigone's Reply," with James Boyd White and W. Albright, Edition Peters: No. 67291, New York: C.F. Peters, 1994. (Text of Sophacles, translated from the Greek by Joseph Vining and J.B. White).

Lawrence Waggoner

"The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts," 94 *Michigan Law Review* 2309-51 (1996).

Restatement (Third) of Property (Donative Transfers), Tentative Draft No. 1, approved by the American Law Institute in May 1995.

Restatement (Third) of Property (Donative Transfers), Preliminary Draft No. 4, 1995.

"Marital Property Rights in Transition," 59 *Missouri Law Review* 21-87 (1994).

"The Revised Uniform Probate Code," 133 *Trusts and Estates* 18.

Restatement (Third) of Property (Donative Transfers), Preliminary Draft No. 3, 1994, and Council Draft No. 1, 1994.

James Boyd White

"On the Virtues of Not Understanding," in C. Maier and A. Needham, eds., *Between Languages and Cultures*, University of Pittsburgh Press (1996).

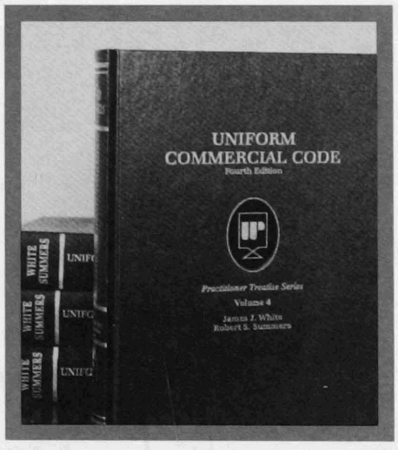
"Reading One Poet in Light of Another: Herbert and Frost," in *George Herbert in the Nineties: Reflections and Reassessments*, J.S.F. Post and S. Gottlieb, eds., 1996, and in 18 *George Herbert Journal* 59-80 (1996).

"What's an Opinion For?" 62 *University of Chicago Law Review* 1363-69 (1995).

Acts of Hope: Creating Authority in Literature, Law and Politics (University of Chicago Press, 1994). Paperback 1995.

This Book of Starres: Learning to Read George Herbert (University of Michigan Press, 1994). Paperback 1995.

Justice as Translation: An Essay in Cultural and Legal Criticism, (University of Chicago Press, 1990). Paperback 1994.



"Plato's *Crito*: The Authority of Law and Philosophy," 63 *University of Cincinnati Law Review* 11-50 (1994) and in *The Greeks and Us: A Festschrift in Honor of Arthur W. H. Adkins*, University of Chicago Press.

"Teaching Law and Literature," 27 (4) *MOSAIC* 1-13 (1994).

"The Ethics of Meaning," in *The Happy Couple: Law and Literature*, J. Neville Turner and Pamela Williams, eds., 1994.

"Imagining the Law," in *The Rhetoric of Law*, A. Sarat, ed., University of Michigan Press, 1994.

"Antigone's Reply," with J. Vining and W. Albright, Edition Peters: No. 67291, New York: C.F. Peters, 1994. (Text of Sophocles, translated from the Greek by Joseph Vining and J.B. White).

James J. White

"The Influence of International Practice on the Revision of Article 5 of the UCC," 16 *Northwestern Journal of International Law and Business* 189-214 (1996).

Handbook of the Law Under the Uniform Commercial Code, 4th Edition, with Summers, West Publishing Company, 1995 (four volume practicing lawyers edition and one volume student edition).

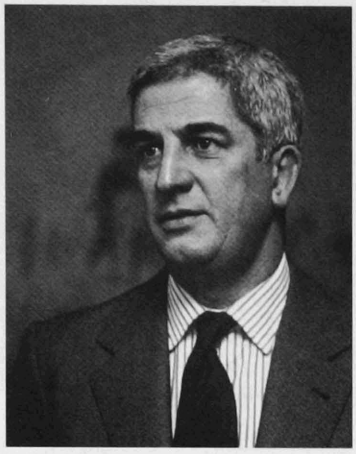
"Harvey's Silence," 69 *American Bankruptcy Journal* 467-80 (Fall 1995).

"Trade Without Tears, or Around Letters of Credit in 17 Sections," *UCC Bulletin* 1 (December 1995).

"Reforming Article 9 Priorities in Light of Old Ignorance and New Filing Rules," 79 *Minnesota Law Review* 529-63 (1995).

"Work and Play in Revising Article 9," 80 *Virginia Law Review* 2089-2102 (1994).

"The Influence of American Legal Realism on Article 2 of the Uniform Commercial Code," in *Prescriptive Formality and Normative Rationality in Modern Legal Systems — a Festschrift for Robert S. Summers*, W. Krawietz, N. MacCormick and G.H. von Wright, eds., Berlin: Duncker & Humblot.



Emilio J. Cárdenas, M.C.L. '66

Former Argentine U.N. ambassador will keynote international reunion

Argentina's former ambassador to the United Nations, Emilio J. Cárdenas, M.C.L. '66, will be keynote speaker for the Law School's second International Reunion, to be held Oct. 17-19, 1997 at Ann Arbor.

Cárdenas served as ambassador to the U.N. from 1992-96 and as president of the Security Council in 1995. While at the U.N. he was chairman of the Sanctions Committee for the former Yugoslavia and vice president of the U.N. Economic and Social Council.

He returned to the private sector in March and now is executive director of Roberts S.A. de Inversiones in Buenos Aires. He also serves as an ambassador-at-large for Argentina. During his time at the U.N. he also served as Argentina's ambassador to Dominica and Guyana.

Cárdenas graduated from the University of Buenos Aires Law School in 1964 and has studied at Princeton University and the University of California-Berkeley. From 1966-92 he practiced law and advised national and foreign clients on international business transactions, oil and gas issues, joint ventures, privatization, infrastructure projects and financing. He was senior partner at Cárdenas, Cassagne & Associados, a firm that he helped to establish. From 1988-92 he was president of the Association of Argentine Banks.

While practicing law, Cárdenas became a member of the board of directors of several companies, among them the Bank of New York S.A., Michelin Argentina S.A., Industrias Reconquista S.A. CIAMAR S.A., Ellerstine S.A., the Exxel Group S.A., Inversiones y Representaciones S.A. and Quantum Emerging Fund.

Cárdenas has lectured widely at home and abroad, written several books and many articles on oil and gas issues, foreign investment topics, privatization and financial matters. He has taught at the University of Buenos Aires, Catholic University of Argentina and the University of Illinois.

AN INVITATION. . .

Plans for the International Reunion Oct. 16-19, 1997 are moving ahead and promise an enjoyable, stimulating time for all who attend.

"Our alumni, research scholars and visiting faculty from abroad will join us in Ann Arbor, together with the Law School's Committee of Visitors," note Dean Jeffrey Lehman and Virginia Gordan, Assistant Dean for International Programs.

"We are planning a weekend that will offer a rich mixture of intellectual substance and opportunities for relaxation and enjoyment. We are delighted to announce that Ambassador Emilio Cárdenas, M.C.L. '66, of Argentina will deliver the keynote address.

"Events of the weekend will include panels and workshops on legal topics of professional interest, reserved seats at the Iowa v. Michigan football game, a very special banquet, tours of the Law School highlighting architectural renovations and developments in information technology, and trips to local museums of art and history."

This is the Law School's second reunion especially for international alumni. American alumni also are welcome. For more information contact:

Julie Levine, Development and Alumni Relations
721 South State Street
Ann Arbor, MI 48104-3071
313.998.7969, ext. 218
jalevine@umich.edu

Thomas Ford, J.D. '49, endows dispute resolution program

Silicon Valley real estate developer Thomas W. Ford, J.D. '49, has permanently endowed the Thomas W. Ford Program in Dispute Resolution at the University of Michigan Law School, making the school one of the few in the country to have a permanent, full-fledged program of teaching and research in ways to solve disputes short of full trial.

Ford, who also holds bachelors degrees in economics and industrial administration from Yale University, has known his share of disputes, as a member of the U.S. Navy in the Pacific Theater during World War II, in practice in business law in Youngstown, Ohio, as legal counsel and later director of land development for Stanford University, and, since 1964, as founder of his own Ford Land Company.

His experiences have taught him, however, that there often are several avenues that can lead to settlement, like arbitration, mediation, discussion and compromise. And he believes that the more that future lawyers can learn about different approaches to settling disputes the better the chances will be for settling issues short of trial.

"As a long-time advocate of settling disputes as opposed to litigating, I was really pleased at the enthusiastic response of [Law School Dean] Jeffrey Lehman and [Associate Dean] Kent Syverud to my offer to fund a program in dispute resolution, first on a trial basis, and now as a permanent part of the Law School curriculum," Ford says.

In his first step, Ford provided funding for the Law School's 1995-96 alternative dispute resolution program that included a workshop, simulation and symposium. That pilot program was "designed to inform students and faculty about alternatives to litigation and trial, to improve student skills in conflict resolution, and to promote research and teaching in the alternative dispute field," according to Sterling Speirn, Executive Director of the Peninsula Community Foundation, which Ford used to fund the pilot program.

Now, Ford has given a significant gift to permanently endow an Alternative Dispute Resolution (ADR) program at the Law School. The new program will include an ADR Bridge Week for first-year students, an ADR course for upper-year students, and an ADR library collection.

"This is a spectacularly important gift," says Dean Lehman. "I believe that the finest lawyers of the next century must be conversant with the full range of dispute resolution techniques. Tom Ford's vision and generosity will ensure that henceforth every Michigan graduate will have an intensive introduction to the field. No gift has been more important to the campaign than this one."

Adds Syverud, Associate Dean for Academic Affairs: "Tom Ford's generous gift will assure that Michigan students, who have long benefitted from strong course offerings on litigation, will also benefit from ample opportunities to study litigation's alternatives. We are very grateful."

Alumni group forms in Korea; Fujikura heads alumni in Japan

Law School graduates in Korea have formed an alumni association and a frequent visiting professor at Michigan has become leader of the Law School's alumni organization in Japan.

The new University of Michigan Law School Korean Alumni Club is that country's first organization of Law School graduates. Formed in the spring, the new group is headed by Kim Jin Ouk, M.C.L. '67, LL.B. '60. Kim is a founding partner of Kim, Shin and Yu, an international law firm based in Seoul.

In Japan, Professor Koichiro Fujikura has been chosen to replace Professor Emeritus Ryuichi Hirano as head of the Law School's alumni organization.

Professor Fujikura was a visiting professor at the Michigan Law School in 1988, 1994 and 1995; formerly with Tokyo University Faculty of Law, he now is with the Waseda University Faculty of Law in Tokyo. Professor Hirano, a research scholar at the Law School in 1967-68 and a former president of Tokyo University, was with the Tokyo University Faculty of Law.

Long-time secretary Yoichiro Yamakawa, LL.M. '69, a partner in the Tokyo law firm Koga and Partners, will continue as secretary of the organization.

A member of the Law School's Committee of Visitors, Yamakawa also has been a visiting faculty member and co-taught a seminar on "Freedom of the Press in Japan and the U.S." with then Dean Lee Bollinger.

ANITA SANTOS, J.D. '89, seeks ways to keep **Legal Aid** available

Anita Santos, J.D. '89, watches the tightening reins on publicly funded legal services with a mix of foreboding and anticipation. Her entire professional career has been spent in legal services work and her dedication to it runs deep. At the same time, as the director of the newly formed Philadelphia Legal Assistance (PLA), she is excited by the challenge of fashioning new ways to provide free or inexpensive legal assistance in the face of growing restrictions and shrinking federal appropriations.

"It's been a struggle for the past two or two and one-half years," Santos says. "I feel very fortunate that I was able to find a role in public interest law after leaving Michigan when times were not the best. They're still not good and I really feel for young attorneys looking for positions in public interest work.

"It's been a struggle for a few years, but it's also a changing and evolving world that keeps us thinking about new ways to provide services. We have to be creative. The demands for services are increasing dramatically."

[Ed. Note: The Law School is also working to respond to the increasing demand for legal assistance for the poor in the face of shrinking federal appropriations. The Office of Public Service (OPS), opened in spring 1995, helps place students in volunteer legal positions in a variety of public service organizations, including legal aid offices, to assist under-served communities and individuals. Such volunteer work can help these organizations stretch their efforts to address unmet legal needs. In addition, OPS works with alumni in private practice to integrate pro bono work into their law firm practices.]

Santos became executive director of PLA in May after working there as an attorney specializing in Chapter 13 bankruptcies, mortgage foreclosures and consumer fraud cases. PLA was incorporated by the leadership of the Philadelphia Bar Association nearly a year ago after CLS decided to give up federal funding instead of curtailing its services to abide by federal prohibitions against helping illegal immigrants, working in class action suits and representing prisoners. PLA became the recipient of federal Legal Services aid; CLS continues to operate with state, local and private funds.

A native of Brownsville, TX, just across the border from Matamoros, Mexico, Santos found Michigan Law School's reputation, midwestern location, and southern Michigan's Mexican-American population to be an irresistible draw. "I wanted to experience the midwest and also knew that there was a significant population of Mexican-Americans in the area," she says. She found Law School to be congenial, and happily reports that her class included about 30 Hispanic graduates. She recalls with pleasure her opportunity to study law and take graduate courses in the Chicano Studies program at the same time. She also recalls with gusto the Mexican dancing and food she found available at Michigan. "I met incredible people there and I encourage a lot of people to go to Michigan," she says. Reluctant to single out teachers, she says professors were "all wonderful at what they taught."

Some students come to law school and find themselves changed by it. Others, like Santos, find themselves reinforced in their original goals. For Santos, the goal was public assistance legal services. And Philadelphia was the place.

She had fallen in love with Philadelphia during her undergraduate years at the University of Pennsylvania. She returned there for internships after her first and second years at Michigan Law School and moved back after graduation in 1989 to take a full-time post with CLS. "A big town with a small town feel," she says of the city that calls itself the City of Brotherly Love.

Santos has not restricted her involvement to her job. In December she winds up her second one-year term as

president of the Hispanic Bar Association of Pennsylvania and sits on the board of directors of the association's Legal Education Fund. She also serves on the boards of the Education Law Center of Pennsylvania, Family Service of Philadelphia, Philadelphia Health Services and the Delaware Valley Voter Registration and Education Project. She is a member of the Philadelphia Bar Association's Judicial Selection and Retention Commission and of the Chancellor of the Bar Association's Task Force on Racial Bias in the Justice System.

Santos specialized in Chapter 7 bankruptcy during her years as a CLS attorney, and for a time supervised the agency's Consumer Bankruptcy Assistance Project. The project referred clients mostly to students of local law schools who helped them with cases typical of Chapter 7 actions, like utility cutoffs and evictions. The referral program handles 400 to 500 cases a year, Santos says.

But she longed to take on more and didn't have to think twice when the PLA directorship came along. "I was looking for opportunities to learn more about running a nonprofit [agency] and looking for opportunities to get involved in the legal community and the community in general," she says. "So for me this was an opportunity for career advancement, an opportunity to actually run a program. But at the same time it is also a challenge to be part of this new change, dealing with this new environment, dealing with hostile legislation and legislators and trying to keep legal services alive."

PLA is trying to establish its own identity despite having offices in the same building as CLS. With a dozen lawyers, 15 paralegal helpers and a lay staff, PLA divides into four units to handle family law issues, employment, public benefits and consumer housing. One of the ways that PLA is trying to stretch dollars and provide low cost or free legal assistance is through its Custody and Support Assistance Clinic, which is staffed primarily by University of Pennsylvania Law School students who draft pleadings and teach people to represent themselves in Family Court.

Santos also is considering how to get the word about PLA into Philadelphia's neighborhoods without violating federal restrictions against drumming up business. One possibility is to work through community organizations to set up information sessions in the city's neighborhoods. Another is to have the organizations refer people to PLA.

In early August, when Santos spoke with *Law Quadrangle Notes,* congressional proposals held promise for slowing the decline in federal funding. But the overall trend remains downward, and Santos does not expect pro bono work by sympathetic private firms to take up the slack. "The Philadelphia community has a strong commitment to pro bono services," she says. "There has been an effort by the Philadelphia Bar leadership to encourage more pro bono. But pro bono is not going to make up services that we lose as a result of funding cuts and restrictions.

"Working with the Consumer Bankruptcy Assistance Project, I worked with, supervised and mentored newly admitted attorneys. Ninety-nine percent of them were unemployed and found it very difficult to find jobs. Many are still looking for jobs. A job search could go on for a year or a year and a half.

"The legal community is going through its own financial problems. There aren't as many jobs available, so I understand that it is difficult to increase and encourage pro bono work when firms are having to make decisions whether or not they can hire an attorney. Pro bono is not going to fill in the gap.

"The kind of work that we do is specialized. You don't have too many attorneys who know how to look up a Social Security regulation. We fit a specific need. We're trained to do this. We're committed to do this. All we want is to have the ability and the resources to continue to do this."

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PHOTO COURTESY THE LEGAL INTELLIGENCER

Anita Santos, J.D. '89

Working on the CYBEREDGE

Timothy Stanley, J.D. '92, telephoned right on time: 7 a.m. Not so early, he explained, just the windup of another night of work when traffic is lowest on the Internet. Late afternoon to early morning is the best time to work on the world wide web, he says, so pioneers in electronic services like himself often work hardest when most other people are sleeping.

Timothy Stanley, J.D. '92

Stanley, with his wife, Stacy Stern, and Martin Roscheisen, a doctoral student in computer science at Stanford University, have developed and run FindLaw, an award-winning guide to legal information on the web. (If you want to take a look, the address is http://www.findlaw.com.; the Law School's web site also has links to FindLaw and LawCrawler.) FindLaw recently was named "Best Research Site-Overall" by Legal, Online, a newsletter for legal professionals using the Internet. The FindLaw team's LawCrawler, an Internet search service, won Legal. Online's award as Best Legal Search Tool. Findlaw also has won the Microsoft Network Weekly Top Pic, the Magellan 4 Star Award and Point Survey Top 5%.

Needless to say, Stanley, a Ph.D. candidate in engineering-economic systems and operations research at Stanford, believes that the electronic road is the one to follow to keep up with legal scholarship and case research in the future. There are "thousands" of legal subject sites on the world wide web already, and the count "probably doubles every three months," he says.

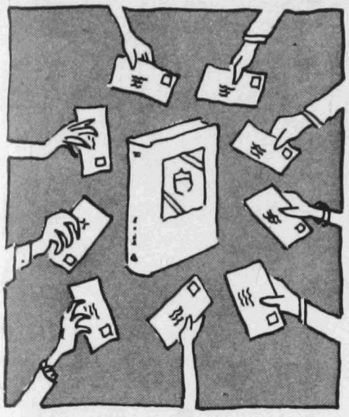
Stanley and his co-workers continually have been expanding their services since they founded FindLaw in 1995. LawCrawler lets legal professionals "search codes, case law and other legal information online." The FindLaw Index includes "resources in various legal subject areas, state, federal and international law, and listings of lawyers and legal employment opportunities, law schools, experts and consultants, legal associations and continuing education providers. Law Review Services lets you "search the full text of law journals and law reviews that have articles online, and/or receive e-mails of law journal abstracts in a variety of legal subject areas." There's also an online Continuing Legal Education program, approved by the State of California, that provides most of FindLaw's current income. In addition, by the end of summer Stanley planned to start adding U.S. Supreme Court cases all the way back to formation of the court.

Stanley also serves on the board of directors for *The Encyclopedia of Law and Economics*, a compilation of research being funded by the University of Ghent. Parts of the *Encyclopedia* will go onto the web early next year, Stanley predicts. "This will be constantly updated on the Internet. Over the short period we will only put up parts of it while the book sells. Eventually the whole thing will be on line."

For now, FindLaw and all of its related services except Continuing Legal Education are free because they use computer servers at Stanford University. Free availability makes FindLaw especially attractive to small law firms and other organizations that do not subscribe to services like Westlaw, Stanley says. In this murky world of electronic reproduction and intellectual property, Stanley also says that he scrupulously avoids reproducing anything that is copyrighted.

Eventually, however, FindLaw will have to generate more income. "My gut feeling is that right now by being out there early we'll be able to establish a name brand and get certain reputational benefits," Stanley says. "We'll probably be able to be one of the companies driven by advertising revenue and ancillary programs like CLE and value-added services. A lot of sites go out and they realize they're not making any money and they fade away. So keeping things financed is important."

So far, feedback from practicing attorneys and scholars has been positive, Stanley adds. "Both like it a lot. The people I have received e-mail and comments from think it's great, both academics looking for information and lawyers looking for material for briefs."



Law School alumni directory will be out in March

The new Law School directory of alumni is scheduled for release by March 1997. Those who already have ordered a directory should receive it in March.

For alumni who did not order a directory but would like to, a limited number of books may still be available from the publisher, Harris Publishing.

For information on availability, and to place an order, contact Harris Publishing toll-free at (800) 361-0221. Harris will fill orders for remaining directories on a first-come, first-serve basis.

1940

John H. Pickering is chair-elect of the American Bar Association's Senior Lawyers Division and chairman of the Commission on Legal Problems of the Elderly.

1953

Richard Pogue was elected to the Board of Directors of Continental Airlines by its stockholders.

1954

Myron M. Sheinfeld, of the Houston firm Sheinfeld, Maley & Kay, is cited in a "Guide to World's Leading Insolvency Lawyers Supplement" distributed by *International Financial Law Review*.

1955

Robert Fiske Jr., of New York's Davis Polk & Wardell, was ranked eighth among U.S. litigators in the May issue of London-based *International Commercial Litigation*.

1956

Thomas Ricketts, Standard Federal Bank chairman and president, was named the silver award winner within the category of savings bank (revenues exceeding $1 billion) in Financial World's Chief Executive Officer of the Year Competition, for "executive excellence." Also, the Wall Street Transcript Corporation gave him its gold award in the savings and loan category, for year after year "tak[ing] this company farther, building a commanding geographic position and an extensive portfolio of products and services." Ricketts is listed among *Forbes'* 800 top executives. He has been with Standard Federal for 40 years.

1959

Paul K. Gaston, formerly chair of Guardsman Products, has joined the Board of Directors of Lilly Industries, Inc.

1960

Stephen Marcus has been reappointed trustee of the Medical College of Wisconsin.

1961

Laurence Scoville, of the Detroit law firm Clark Hill, P.C., was elected to the Board of Directors of the Metropolitan Affairs Coalition. He will serve as vice chairman.

1962

Walter Dartland has returned to the Tennessee Attorney General's office to oversee the agency's Lemon Law Arbitration Program and to develop consumer protection strategies for the attorney general. He previously served as executive director of Consumer Fraud Watch and engaged in private law practice.

1963

David J. Strupp was named as an associate investment banker in *Investment Dealers' Digest's* list of who's who in healthcare financing.

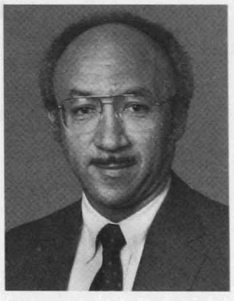
1964

Martin B. Dickinson, Jr., was awarded the Kansas Bar Association's Phil Lewis Medal of Distinction. He received the honor for "outstanding and conspicuous service to the state, national and international level of administration of justice, science, the arts, government, philosophy, law or other fields of endeavor offering relief or enrichment to others."

Lawrence G. Meyer, a specialist in federal antitrust and trade regulation law, has joined the Washington, D.C., office of Gadsby & Hannah L.L.P. as a partner. Before joining Gadsby & Hannah, he was a partner with the Washington firm Arent Fox Kintner Plotkin & Kahn.

Allan H. Tushman was elected president and chief operating officer of Levine, Benjamin, Tushman, Bratt, Jerris and Stein, P.C. He represents injured parties in personal injury lawsuits and handles estate administration matters.

1965



The Honorable Harry T. Edwards, chief judge of the U.S. Court of Appeals for the D.C. Circuit, was the subject of cover stories in the July 8 issue of *Legal Times* and July/August issue of *The American Lawyer*. The articles feature Judge Edwards as one who has brought harmony to a court deeply divided by political issues for decades.

Class notes

Mark E. Schlussel, a director of Veridien since May 1995, was elected chairman of the board of directors. He also is counsel to Pepper, Hamilton & Scheetz of Detroit. His background is in corporate law, principally in the medical industry.

1966

President Ramos of the Philippines has named **Renato L. Cayetano,** LL.M. '66, S.J.D. '72, to his cabinet as Presidential Chief Legal Counsel. A founding partner of Ponce Enrile, Cayetano, Reyes and Manalastas (PECABAR), Cayetano is a former president of the Integrated Bar of the Philippines and was elected to the Philippine congress in 1984. Cayetano organized the Law School reunion in the Philippines that coincided with the visit of Law School Assistant Dean Virginia Gordan last spring.

Henry Ewalt, associate general counsel for litigation and employment law at Westinghouse Electric Corp., is the author of the book *Through the Client's Eyes,* published by the American Bar Association Law Practice Management Section. He also was quoted in a March *ABA Journal* article discussing lawyer/client relationships.

1967

Michael Adelman is one of the defense lawyers featured in the book *Mississippi Mud*, a non-fiction account of the Biloxi, Mississippi, murders of Circuit Judge Vincent Sherry and his wife Margaret, and the subsequent federal conspiracy trial in the U.S. District Court for the Southern District of Mississippi. *Mississippi Mud* was authored by Edward Hume and published by Simon & Shuster, Inc.

Thomas M. Boykoff was named administrator of savings institutions in the Wisconsin Department of Financial Institutions, which regulates Wisconsin savings banks and savings and loans in the newly-formed department. He had been general counsel in the predecessor agency since 1984.

Leonard A. Chinitz of the Bangkok, Thailand, office of the law firm Russin & Vecchi, L.L.P., was reelected to a fifth three-year term as managing partner of the multi-national firm.

1968

Henry S. Gornbein is a founder and publisher of *Divorce On Line*, an Internet resource for people involved in, or facing the prospect of, divorce. The site, which is logging more than 1,500 visits per week by people worldwide, is located at http://www.divorce-online.com. Gornbein also is a partner with the law firm Bookholder, Bassett, Gornbein & Cohen, P.L.L.C.

Harry W. Keidan was elected chairman of the Phoenix, Arizona, Board of Adjustment, which hears all appeals from actions of the Phoenix zoning administrator, including variances, use permits and signage permits. He previously served as co-chair of that committee. Keidan also operates his own law practice, focusing on civil litigation and business and real estate representation, and he is a member of the Phoenix Sister Cities Commission Board, which strives to develop social and economic interchanges between Phoenix and its "sister cities" in other countries.

1969

Arnold Nemirow, chief executive officer of Bowater, Inc., is included in this year's Forbes list of 800 top executives. He has been with Bowater for two years.

1971

Geoffrey L. Gifford was named president of the Illinois Trial Lawyers Association (ITLA), which seeks to protect the rights of victims and consumers injured through the negligence of third parties. Gifford is a senior partner in the Chicago law firm Pavalon & Gifford.

Michael E. Huotari was named senior vice president and general counsel of Rocky Mountain Health Care Corporation, the management company for the Blue Cross and Blue Shield Plans of Colorado, Nevada, and New Mexico. He joined the corporation after 15 years as a partner in the Denver law firm Yu, Stromberg, Huotari and Cleveland, where he specialized in managed care and other health care law.

Edward A. Porter has been named vice president-general counsel and secretary for Walter Industries, Inc., of Tampa, Florida, with responsibility for corporate legal affairs. Porter was formerly senior vice president-administration, general counsel and secretary for National Gypsum Company, Charlotte, North Carolina, where he served in various legal capacities for 15 years.

1972

J. Phillip Adams has been named vice president and general tax counsel for Westinghouse Electric Corporation, where he will be responsible for developing tax strategies for the company. He also will have primary responsibility for the corporation's compliance with all federal, state, local, and applicable foreign tax laws and regulations. Adams previously was a partner with Skadden Arps.

Claud Gingrich, vice president and founding partner of L.A. Motley and Company, was appointed to the Board of Directors of The Panda Project, which was developed to produce innovative computer and semiconductor technology. L.A. Motley and Company is a consulting and lobbying firm with a practice in international trade and investment.

Joseph I. Goldstein, a partner at Crowell & Moring in Washington, D.C., is featured in an *American Banker* article discussing illegal insider trading by banking officials.

Richard M. ("Rick") Lavers was elected vice president, secretary, and general counsel of RMT, Inc., an international engineering and consulting firm headquartered in Madison, Wisconsin, and secretary of the parent Heartland Environmental Holding

Company, and the two companies' affiliates. He also is in charge of RMT's international business development efforts, and is of-counsel on international transactions to the firm of Whyte, Hirschboeck, Dudeck, S.C. , which has offices in Milwaukee, Madison, and Zurich, Switzerland.

Norman H. Roos has joined the Hartford, Connecticut, office of the New York City-based law firm Brown Raysman & Millstein, Roos' practice concentrates in bank regulatory and finance law. He previously was a name partner at the recently disbanded Hartford firm Leventhal, Kraso & Roos, P.C.

1973

William D. Meyer, a member of the law firm of Hutchinson Black and Cook, L.L.C., in Boulder, Colorado, was elected chairman of the International Law Section of the Colorado Bar Association.

Philip J. Prygoski, LL.M. '83 and J.D. '73, authored an outline of constitutional law for West Publishing.

1974

Brian O'Neill is featured in *The National Law Journal* as head of a team based on an effective "horizontal integration" of the firm. The term is used to describe how, in the Exxon Valdez case, plaintiffs drew on more than 70 law firms whose work was distilled to the point that only four plaintiffs' attorneys appeared in court and only one lead counsel, O'Neill, spoke for their side. The author believes there is a trend toward increased collegiality or teamwork in American trials.

1975

Peter D. Holmes has become of counsel to Kelley, Casey & Clarke, P.C. He focuses his practice on environmental and administrative law, and is a shareholder with Butzel Long.

Bella Marshall of Waycor Development Corp. of Detroit, was named to the Detroit Board of United Way Community Services.

1978

Donn A. Randall has joined the law firm Sally & Fitch as a partner. He previously spent 10 years at Shawmut Bank, where he was responsible for directing all litigation involving Shawmut National Corporation and its subsidiaries.

1979

Steven F. Plfaum was selected as outside general counsel of the Chicago Bar Association. Pflaum is a partner with McDermott, Will & Emery, where his practice involves complex appellate and business litigation.

1980

Lenell Nussbaum of Seattle, Washington, was elected president of the Washington Association of Criminal Defense Lawyers. Her private law practice emphasizes criminal defense trials and appeals.

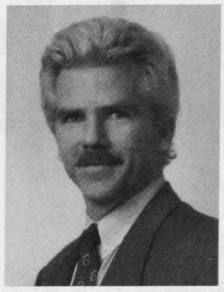
1981

Benjamin Calkins has become a partner in the law firm Spieth, Bell, McCurdy & Newell Co., L.P.A. Resident in the firm's Cleveland, Ohio, office, he continues to practice in the areas of corporate, banking, and business law.

Charles M. Denton, a partner with Varnum, Riddering, Schmidt & Howlett, L.L.P., was named "Chairperson of the Year" by the Detroit Metropolitan Bar Association, for his work as chair of the association's Environmental Law Section. Denton co-chairs Varnum Riddering's Environmental Law Practice Group and is a member of the firm's Management Committee.

Daniel Petree was promoted to executive vice president, corporate development, and chief financial officer of Arris Pharmaceutical Corporation.

1982



Daniel Bergeson and the San Jose, California, law firm he founded, Bergeson, Eliopoulos, Grady & Gray, were profiled in the book *The Making of Silicon Valley: A One Hundred Year Renaissance*. The firm specializes in complex commercial litigation, with an emphasis in securities and intellectual property and litigation.

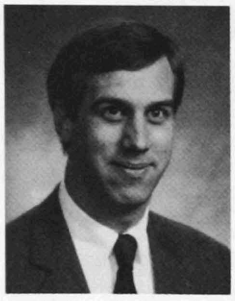
Randall K. Rowe has become a member of the National Realty Committee in Washington, D.C.

1983

Mark L. Kowalsky has become a partner in the Bloomfield Hills, Michigan, law firm Hertz, Schram & Saretsky, P.C. His practice concentrates in commercial and securities litigation and arbitration.

Class notes

Jamil Nasir has authored his second novel, *The Higher Space,* a science fiction book released in June by Bantam Books. He resides in Maryland with his wife and two daughters, and he is employed part-time at the Washington, D.C., law firm Swidler & Berlin.



Carl Oosterhouse, a partner in the Corporate Law Department of the law firm Varnum, Riddering, Schmidt & Howlett, L.L.P., was elected to the firm's Management Committee, which is responsible for the administration and governance of the firm. Oosterhouse concentrates his practice in the areas of providing corporate counsel, mergers and acquisitions, and tax exempt financing.

Patricia Lee Refo has joined the law firm Snell & Wilimer, L.L.P., as a partner in the Commercial Litigation practice of the firm's Phoenix office. In addition to her trial experience, she has extensive knowledge of litigation and class action issues.

1985

Craig Jones has become Counsel, Corporate Tax Division, at the Dow Chemical Company in Midland. He is responsible for partnerships and mergers and acquisitions on a global basis. Jones previously practiced tax law in Washington, D.C., at the New York-based law firm Chadbourne & Parke. Working with Jones in Dow's tax department are **Anita H. Jenkins**, J.D. '74, and **Valorie Anderson Gilfeather**, J.D. '76.

1987

Eric S. Tooker was named general counsel and corporate secretary of Central Newspapers, Inc., the fifteenth largest U.S. newspaper company, which publishes daily, Sunday, and weekly newspapers. He was previously associate general counsel and assistant secretary at Conesco for seven years.

Tina S. Van Dam, assistant secretary of Dow Chemical Company and senior attorney for financial law, was named director of Dow's office of the corporate secretary. She will be responsible for the daily operation of that office, and will continue her current counseling responsibilities in the financial law section.

1989

Anita Santos was appointed executive director of Philadelphia Legal Assistance, a new legal service provider which handles family law, public benefits, and consumer housing. (Ed. Note: A profile of Santos apears on p. 54.)

1993

David Morrison has joined the Chicago law firm Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd., to practice commercial and employment litigation. Prior to joining Goldberg, Kohn, he left the Chicago office of Seyfarth, Shaw, Fairweather & Geraldson, where he practiced labor and employment law, to serve as a law clerk to Judge Suzanne B. Conlon in the United States District Court, Northern District of Illinois.

1994

Nancy Laethem has joined the Chicago firm of Gardner, Carton & Douglas, after completing a two-year clerkship with Judge Robert H. Cleland, U.S. District Court for the Eastern District of Michigan.

Bryan Sladek of Sacramento, California, has been appointed as an attorney for the Office of District Counsel for the Internal Revenue Service, part of the Office of Chief Counsel for the Internal Revenue Service.

1995

David Barringer is the author of an article on lawyers and exercise which appeared in the *ABA Journal.*

Allyson D. Goodwin has joined the law firm Ruden, McClosky, Smith, Schuster & Russell, P.A. Goodwin, an associate in the Litigation Department, is resident in the firm's Fort Lauderdale, Florida, office.

Matthew Latimer received a master's degree in journalism from Columbia University, New York. He served as a leader of youth activities at the 1996 Republican National Convention in San Diego, having been chosen from among more than 600 candidates.

1996

William McCarty has been appointed interim dean of the Western Michigan University Haworth College of Business by the WMU Board of Trustees. The appointment runs through June 30, 1997. McCarty has been a faculty member at WMU since 1970.

In memoriam

'25	Laurens L. Henderson	July 30, 1996
	Solomon K. Riblet	June 12, 1996
'29	Amos M. Pinkerton	May 27, 1995
'37	Benjamin P. Jacobs	April 26, 1996
	Jack L. White	June 7, 1996
'38	C. Shelby Dale	June 26, 1996
'41	Herbert C. Houson	January 1, 1996
	Stanley C. Miner	January 30, 1996
'42	Ethel Tunison	May 18, 1996
'43	William A. Bell, II	July 1, 1996
'45	Tin C. Goo	January 1, 1996
'49	Raymond S. Davis, Jr.	August 20, 1993
	Donald A. Lewis	January 27, 1996
'51	Alan R. Waterstone	June 25, 1996
'58	Ann Middleton Durea	June 3, 1996
'59	Erin N. Griswold	November 19, 1994
'61	Douglas M. Black	
'63	Robert D. McVeigh	
'64-65	John T. Blanchard	

class-based AFFIRMATIVE ACTION

look [carefully] before you **leap**

— BY DEBORAH C. MALAMUD

When the Supreme Court applied "strict scrutiny" to federal race-based affirmative action programs in *Adarand Constructors, Inc. v. Pena* (1995), it suggested that the constitutional-law coast remains clear for affirmative action programs based on relative economic disadvantage — usually called "class-based" affirmative action. "Class, not race" is a conservative war cry in contemporary American politics. But it should not be forgotten that legal thinkers on the *left* have long sought the legal recognition of economic inequality — or, even better, of "class" — as a force in American life and that *Adarand* is a step in that direction

Until now, American legal institutions have not developed a coherent discourse on the nature of economic inequality. Nor has American society at large. In particular, there has long been debate as to whether the economic inequality that exists in this country can fairly be called a "class system." It would thus be a major step for legal institutions to operationalize a definition of "economic disadvantage" or (even more so) of class — let alone to do so in the hotly contested arena of affirmative action. The stakes of the enterprise reach beyond the law itself: there is every reason to believe that the law will help to *create*, rather than merely *reflect*, the dominant discourse on class and inequality in this country — just as the law has done in the case of race. For those who seek a place for economic inequality or class in American legal and political discourse,

This essay is adapted from the article "Class-Based Affirmative Action: Lessons and Caveats," which originally appeared in 74 Texas Law Review *1847.*

There is strong reason to believe on theoretical and empirical grounds that class must be measured differently for men and women and that the same economic factor (for example, educational level, a "professional" career) will often have different meanings for whites and blacks. But any attempt by a legislature or other public body to adopt a class metric that recognizes interactions among race, ethnicity, gender, and class might well be struck down by the Court as a subterfuge, a reintroduction of race- and gender-based affirmative action through the back door.

then, *Adarand's* invitation is good news only if the legal system can be expected to "get it right."

When I speak of "getting it right," I place a dual burden on governmental actors charged with creating or supervising programs of class-based affirmative action. One aspect of "getting it right" is to operationalize the phenomenon of economic inequality in a way that accomplishes the redistributive task of class-based affirmative action and makes the results seem legitimate. I refer to a program that "gets it right" to this extent as "technically adequate." A program can be technically adequate, however, while at the same time contributing nothing (or nothing positive) to the public understanding of the phenomenon on which it operates. For example, those responsible for class-based affirmative action could attempt to legitimate the program by bringing it into harmony with the public's misapprehensions of the nature of economic inequality. What I mean by "getting it right" is achieving the technical goals of class-based affirmative action in a manner that also advances public discourse on the question of economic inequality. A program that meets this second, more ambitious, goal is not merely "technically adequate" but also "culturally adequate." This paper is animated by the view that government policy-makers should be concerned with the cultural adequacy of their programs, particularly where (as here) they touch on fundamental issues of personal and group identity.

CLASS AND THE LAW: MODELS AND CONSTRAINTS

Two basic models of economic inequality compete in the American ideological marketplace, each with two major versions. Any coherent attempt by the legal system to implement a program of class-based affirmative action will inevitably embrace one of these competing perspectives.

One view — which I will call economic individualism — depicts the American economic order as completely open to economic mobility for those individuals with the gumption to pursue it. The economic individualist view admits (as it must) that at any given moment individuals occupy a wide range of positions on a continuum of economic attainment. But this distribution is seen as a result of, rather than a constraint on, free market forces. So long as there is sufficient mobility by individuals, the inequalities in the rewards accorded to different positions are of no theoretical or political importance.

A more moderate version of economic individualism — and the only form of economic individualism that an advocate of class-based affirmative action could embrace — is what one might call pro-interventionist economic individualism. Here, it is admitted that past economic position is a constraint on future economic position; for example, that lack of economic resources can interfere with an individual's capacity to make the investments in human capital necessary for advancement. It is thus perceived as necessary to make a modest level of economic assistance available on the basis of need at certain key junctures of personal economic development — financial aid for college, for example. Once modest assistance is given, previous experiences of economic disadvantage are deemed no longer relevant to future success.

The other major perspective on economic inequality posits the existence of class — a structured system of inequality (as opposed to a simple unequal distribution of economic outcomes among individuals) that is intrinsic to the economic realm and that is not fundamentally altered by the economic mobility of individuals. What distinguishes class perspectives from individualist perspectives on economic inequality is that class perspectives are inherently social (as opposed to individual) and diachronic (as opposed to synchronic). Class is social in the dual sense that the class system is inherent in and perpetuated by the structure of economic relations in the society and that shared class position has the potential for being mobilized as the basis for both group identity and political action. Class is diachronic in the triple sense that class position is (1) intergenerationally transmitted, (2) mediated through the strategic behavior of social actors over time, and (3) incapable of being

understood without reference to patterns of change in the economic organization of the society.

Finally, there is an alternative version of a belief in class, which builds on the meaning of class just described, but goes beyond it. In this view, class is said to interact with race, gender, and ethnicity (and perhaps other elements of social identity, such as place of residence) in interlocking and mutually defining structures, and it is their interaction that is seen to shape both consciousness and life chances. One of the many consequences of this view, if it is correct, is that class analysis can never be race- or gender-blind and therefore cannot strictly be viewed as an *alternative* to the traditional foci of antidiscrimination law and policy.

The Supreme Court would enter this debate on the nature of economic inequality (should it choose to do so) with a predisposition toward economic individualism (albeit in its pro-interventionist form). Indeed, that predisposition is the underpinning for the very willingness of the *Adarand* Court to evaluate disadvantage-based affirmative action using the lowest level of constitutional scrutiny. In the post-*Lochner* (post-1905) world of Footnote Four of *Carolene Products* (1938), the Court understands the Fourteenth Amendment to mean that legislatures are free to legislate in the economic realm (including, as the New Deal cases establish, to legislate remedies for excesses of economic inequality) because economic relations are not seen as involving "discrete and insular minorities" incapable of taking care of themselves through the political process. The notion that some economic interests and relations may divide people into "groups" (as class analysis would suggest) and do so in a manner bearing at least a family resemblance to divisions by race, religion, or national origin, was not entertained in *Carolene Products* when it heralded a regime of "rationality review" for all economically based distinctions.

Furthermore, Equal Protection Clause constraints might well stand in the way of any effort to introduce into the law a view of class (or even of economic inequality in the economic individualist sense) that is inextricably linked to race or gender. Under the three-tiered structure of constitutional scrutiny under the Equal Protection Clause, economically based distinctions are subject to rationality review, gender-based distinctions to intermediate scrutiny. and race-based distinctions to strict scrutiny. There is strong reason to believe on theoretical and empirical grounds that class must be measured differently for men and women and that the same economic factor (for example, educational level, a "professional" career) will often have different meanings for whites and blacks. But any attempt by a legislature or other public body to adopt a class metric that recognizes interactions among race, ethnicity, gender, and class might well be struck down by the Court as a subterfuge, a reintroduction of race- and gender-based affirmative action through the back door. This means that even if the Court were to approve a legislative embrace of class theory, the constraints of equal protection doctrine might nonetheless bar the view that class is inextricably linked to race and gender — the view of class that, I argue, most fits the facts of contemporary American life.

MEASURING ECONOMIC INEQUALITY

In choosing a model of economic inequality or class for class-based affirmative action, the legal system will be constrained not only by ideology but by practical and conceptual problems of measurement. All of the social sciences are replete with literature on the question of economic inequality and economic mobility. The legal system has much to learn from the efforts of other disciplines to capture this complex phenomenon.

Because a method of measuring economic inequality must be well suited to the particular problem to be solved, it is important to note at the outset the specific line-drawing problem that must be faced by a system of class-based affirmative action. It has been persuasively argued, chiefly by sociologist William Julius Wilson, that affirmative action programs tend to benefit those who have already risen out of the lower classes. In periods of growth of good unskilled jobs, affirmative action can reach, and seems to have reached, less advantaged workers. But our economy is no longer creating family-supporting jobs for unskilled workers with poor literacy and numeracy skills — especially not in inner cities. Instead, one must have already attained a certain level of education to benefit from affirmative action programs in economic sectors with jobs that have career-wage potential. To benefit from set-aside programs, a business has to be sufficiently capitalized to do the contract work. To be a candidate for affirmative action in higher education, one must have finished high school and taken college-preparatory courses, prerequisites that place those in the bottom of the economic hierarchy out of contention. It is thus important to recognize, popular tropes notwithstanding, that class-based affirmative action is not about "Appalachian coal miners" or the "underclass." Any system of class-based affirmative action is likely to have the task of distinguishing among candidates who occupy positions within the broad middle of the American socioeconomic structure. Unfortunately, theorizing and operationalizing distinctions within the middle classes is the most difficult task faced by social scientific scholarship on class, one on which there is little consensus.

THE SHAPE OF ECONOMIC INEQUALITY: CONTINUA, CATEGORIES, AND CONFLICTS

On the broadest level, economic inequality can be represented in one of three ways. Under one view, relative economic advantage is represented as *gradational*: as a continuous sliding scale of relative economic position, rank ordered according to one or more specified criteria. The continuum may then be divided for convenience into categories (such as "lower class," "lower middle class," "upper middle class," etc.) by assigning labels to certain ranges on the continuum. But the validity of the gradational model does not turn on any notion that the theorist's groupings

identify groups of people with similar patterns of consciousness and action.

Under the *categorical* approach, economic space is divided in a noncontinuous manner on the basis of the criterion that is, according to the relevant theory, the most significant indicator of economic status. The classic example of a categorical approach is the importance placed by some scholars on the distinction between blue-collar (manual) and white-collar (nonmanual) employment. It is generally contended that the theorists' categories capture "native" distinctions — in other words, that they describe patterns of affinity and difference that motivate social action.

Finally, under the *relational* approach, the groups that matter for the analysis of economic inequality are identified not merely by patterns of affinity and difference, but also by their intrinsically antagonistic social relations with other economic groups. Just as the elements within such classic pairings as "parent and child" and "master and servant" take their meaning only in relationship to each other, relational perspectives see each economic grouping as existing only with reference to and in tension with the others.

Legal decisionmakers designing programs of class-based affirmative action will most likely be drawn to the gradational approach. It most suits the economic individualist view that economic attainment is a matter of market ordering rather than of group formation or group-based experience. It also appears, at least at first glance, to be relatively well suited to the task at hand. A system of affirmative action exists — so it seems — to choose among different candidates for positions (be they college admissions slots, jobs, or government contracts). A gradational approach makes it possible to compare the ranked economic positions of the different candidates and give the position to the qualified person with the lowest economic rank. Best of all, its major flaw — its inability to define discrete classes — hardly seems relevant if the task of affirmative action is so defined.

The gradational approach, however, has a less obvious but no less relevant flaw. Of all the rival approaches, it provides the weakest basis for defending class-based affirmative action on moral grounds. Class-based affirmative action is likely to do its work by redistributing economic opportunities among individuals who stand relatively close together in the gradational hierarchy — it offers opportunities to the strongest "have-nots" at the expense of the weakest "haves." Slight differences in relative economic position are hardly strong justifications for governmental intervention, and the intervention is likely to generate all the more resentment as a result. Inevitably, defenders of the program would seek stronger alternative justifications — justifications that cannot readily be supported under the gradational approach. Class-based affirmative action could be defended as promoting diversity, but gradational approaches do not claim to identify lines of especially salient difference in group attitudes and social experience (in "consciousness"). For that, one needs a categorical or relational approach. The program could be defended through claims of distributive justice that work best when the gains of the economic "haves" are ill-gotten, but only relational approaches claim that the current distribution of economic assets is due to the exercise of illegitimate power by the "haves" over the "have-nots."

WHOSE ECONOMIC INEQUALITY? INDIVIDUAL VERSUS HOUSEHOLD OR FAMILY AS THE RELEVANT UNIT OF ANALYSIS

In discussing economic inequality, one cannot go far without confronting the question of whose economic position is to be measured. Many studies use the individual worker as the unit of analysis. But in any household or family with more than one worker, each worker's economic position is potentially modified by that of the others — not only as to the availability of second (or third) incomes, but in all the many ways in which economic position affects life chances. Indeed, the household or family is the most appropriate unit of analysis without regard to the number of income earners in the household.

Family and *household* are not the same concept. Family may or may not involve blood or marital ties, as work on gay and lesbian kinship demonstrates. Divorce creates families and households of numerous shapes, and decision rules must be developed to determine the economic saliency of noncustodial parents, of custodial stepparents, of the subsequent spouses of noncustodial parents, and so forth. Even in the absence of divorce (or widowhood), families may not fit the nuclear family image: family-based households often include other relatives whose economic experiences can be quite salient to all members of the household well beyond the effects of any income-sharing that may take place. Substituting the "traditional" nuclear family for the isolated individual as the unit for measuring class position is thus only a small step in the right direction, and it creates myriad problems of its own. Furthermore, class not only is shaped by family and household composition, but at times also shapes family and household composition. Measuring class position with reference to the nuclear family mirrors middle class kinship ideology, but fails both to accord validity to other classes' conceptions of family life (a flaw on the level of cultural adequacy) and to make available for measurement the wide range of relationships upon which individuals are empowered to draw for resources under these alternative conceptions (a flaw on the level of technical adequacy).

Furthermore, it is the *intergenerational* family or household that is the appropriate unit for understanding a family's economic status, as is demonstrated by an example used by British sociologist Frank Parkin. Picture two families, in each of which the father is a blue-collar worker and the mother is a high school graduate who is not employed outside the home. In one family, the mother is the child of a blue-collar worker: she has married within her own class. In the other, the mother is the child of a white-collar worker, meaning that she has "married down." According to a study cited by Parkin, the son of the within-class marriage has a forty-two percent chance of going to college, while the son of the mother who "married down" has an eighty percent chance of going to college. In the dimension of space, it is the child's interaction with his nonworking mother that is determinative of his college prospects. In the dimension of time, the key to understanding the

child's life chances lies in the grandparental generation. Without considering the economic status of the high school boys in light of their families viewed in the dimensions of time and space, the boys would appear to be similarly situated. In reality, they are not.

TRAJECTORY

Sophisticated analyses of economic inequality take into consideration not merely a *snapshot* of an individual's (or household's or family's) economic circumstances, but a longer view. Jobs that require significant investments in human capital tend to have rising trajectories. In contrast, some occupations are quintessential "young man's (or woman's) games" — such as sports, dance, or physically dangerous service or industrial jobs — in which work opportunities and earnings *decline* over time. There can be doubt as to whether the downwardly mobile family (intra- or intergenerational) is better or worse off than the upwardly mobile family at the point at which their trajectories cross. But it is clear that a snapshot is an oversimplification of the true position of economically mobile families.

MEASURING RELATIVE ECONOMIC STATUS: THE CONSTITUENT ELEMENTS OF ECONOMIC INEQUALITY

Up to this point, I have mentioned in passing a number of factors that shape the economic situations of individuals and families: occupation, income, education, orientation toward educational attainment, and numerous extra-economic characteristics (including race and gender). When I have asked students to identify their "class," they have referred to a good number of these factors and some others. But each factor raises its own problems of definition and measurement, and their interactions are complex.

1. Wealth. I mention wealth first precisely because it is so invisible in most studies of economic inequality: indeed, it is common to think of socioeconomic status as a product of earned income, occupation, and education, with no regard to wealth at all. Perhaps wealth is ignored because Americans are far more private about their wealth than about their incomes. As one working man is quoted as saying, classes "can't be [defined by] money, because nobody ever knows that about you for sure."

Wealth is distributed far less equally than income in American society. Wealth barriers are strongly resistant to intergenerational mobility, and inequalities in wealth have greatly increased in the United States since the mid-1970s.

One could grant the relevance of wealth to a culturally adequate account of class without granting that wealth has any relevance to the technical project of implementing class-based affirmative action. It is admittedly difficult to imagine that individuals we think of as "wealthy" will enter the affirmative-action competition. But that failure of the imagination stems from our failure to recognize that "wealth" is a significant factor in the lives of the middle classes. Consider two competitors for a high-wage job. Applicant A has a higher current salary than applicant B — perhaps substantially higher. But Applicant B's house down payment has been provided for by a few nontaxable $10,000 yearly gifts from relatives, who can also be counted on to help out with the children's college tuition. Applicant A receives no family help and is entirely dependent on savings from wages. Applicant B would look to be the less "advantaged" of the two if income were the only consideration. But Applicant B has the wealth advantage — and that advantage may be large enough to tip the scales.

2. Occupation. Occupation is of central importance to the sociological study of class; indeed, it is common for studies that claim to be about "social mobility" to in fact be solely concerned with occupational mobility.

The central tool of occupation-based class analysis is some sort of scheme for grouping and ranking occupations. These scales are works of social construction on a number of different levels, in which some principled basis must be found for decisionmaking — from the level of deciding how many occupational "classes" there are, to defining and labeling them, to assigning "jobs" to them.

Class-based affirmative action is likely to do its work by redistributing economic opportunities among individuals who stand relatively close together in the gradational hierarchy — it offers opportunities to the strongest "have-nots" at the expense of the weakest "haves." Slight differences in relative economic position are hardly strong justifications for governmental intervention, and the intervention is likely to generate all the more resentment as a result.

The field is wide open for social scientists to theorize the emerging economic order (or orders) — and, in particular, to theorize the elements of comparative advantage among the different segments of the middle classes. As a result, there is no reliable and timely theory "out there" for the law to borrow with any reasonable sense that it represents a consensus view of the contemporary economy of work.

Occupations might be ranked according to one or more of a number of criteria, some of which are the "social prestige" or honor they command, the quantity and quality of credentials or training necessary to perform them, the degree of supervisory or managerial authority they involve, the amount of autonomy they afford, and their income-earning potential. Unless the ranking system is to be unworkably complex, choices must be made that are bound to produce unnuanced results. Indeed, the results often seem counterintuitive or downright wrong to lay sensibilities (and perhaps to expert sensibilities as well). For example, where collar color plays a central role in the occupational hierarchy, it is considered "upward mobility" to move, via deindustrialization, from a position as a skilled machinist to one as a file clerk. The problem may be that many leading occupational schemes are insufficiently sensitive to the progressive deskilling of the more routine forms of white-collar employment. But I am prepared to surmise that the problem is a broader one and is inherent in any effort to transpose a multidimensional phenomenon onto a single vertical continuum. Furthermore, it is efforts to rank "the middle" that are least likely to be stable — a fact that does not bode well for a program of class-based affirmative action.

The picture within categories is no more compelling. Take, for example, the "top" category in the occupational scheme of British sociologists Erikson and Goldthorpe, which includes occupations that involve the exercise of "delegated authority or specialized knowledge and expertise" and therefore require the employees to be accorded a fair measure of autonomy. Within it are placed "supervisors of non-manual workers," "large proprietors" and "higher-grade professionals" — meaning that Bill Gates of Microsoft is grouped together with the Microsoft employees who have the power to hire and fire secretaries. All professionals and high-level technicians are included in the top category as well (meaning, for example, that a high school teacher and a physician would be in the same category).

These problems of aggregation have important consequences. Frank Parkin has observed that "there is what might be called a social and cultural 'buffer zone'" between classes and that "[m]ost mobility, being of a fairly narrow social span, involves the movement into and out of th[ese] zone[s] rather than movement between the class extremes." This means that the ability to detect mobility between groups crucially depends on where the lines between the groups are drawn.

Even after "occupations" have been defined and ranked, the work of social construction continues. The process of assigning a person's "job" (in either sense) to one of a restricted number of "occupational" categories is a complex process, one that produces inevitable distortions. Consider the job of "professor," likely to be classified as "professional/managerial" in most scales. Then examine the differences between a professor who strings together part-time and temporary teaching jobs and a tenured professor at a major research university. Both individuals in the pair would be classified as having the same "occupation," but there are likely to be gaps between them in prestige, autonomy, job-related social networks, job benefits, and other aspects of life and work (beyond differences in income) that would go uncaptured by their occupational classification.

Finally, the problems inherent in systems of occupational classification go far deeper than mere problems of measurement. Many of the leading occupational frameworks have an anachronistic quality to them: they are based on theories that no longer match the realities of work. With the demise of private-sector unions, there are likely to be fewer reasons in the future to be concerned about the class placement of good blue-collar jobs. Privatization is putting pressure on the line between public and private employment. Overseas outsourcing and decreasing stability of tenure in white-collar work, including such highly trained "knowledge" work as computer programming, is increasing the commonality of job conditions across the collar color line. Cost containment pressures are limiting the autonomy of the traditional professions. The middle classes are far from becoming an undifferentiated proletariat. But the field is wide open for social scientists to theorize the emerging economic order (or orders) — and, in particular, to theorize

the elements of comparative advantage among the different segments of the middle classes. As a result, there is no reliable and timely theory "out there" for the law to borrow with any reasonable sense that it represents a consensus view of the contemporary economy of work.

A program of class-based affirmative action could achieve a level of legitimacy by relying on distinctions that have more currency in popular culture than they in fact deserve. If a low-level white-collar worker "loses" to a skilled blue-collar worker in a competition for an affirmative action slot, the white-collar worker might well not complain. After all, the government's explanation reinforces his much-threatened sense of occupational superiority, and the reinforcement might be worth the loss. But cultural adequacy requires a more thoughtful effort to capture the changing structure of occupations — for all the difficulties inherent in the effort.

3. Income. Many scholars focus on income rather than on occupation as the major force in determining relative economic advantage. So do many lay people. For a number of reasons, income-based measures are particularly compatible with the economic individualist perspective. A stress on income suggests that the "goodies" that constitute relative economic advantage (for example, knowledge, education, cultural refinement, residence in safe suburbs, etc.) are commodities that can be purchased with money. An income measure is (at least potentially) agnostic as to the source of income and therefore tacitly rejects the theoretical position that the labor process is at the center of economic relations. Finally, mobility studies that focus on income tend to show higher rates of intergenerational economic mobility in the United States than do occupation-based studies.

Income-based measures also have the practical advantage that the measurement of income is more straightforward than the construction and implementation of occupational hierarchies. But income measurement presents a number of methodological problems that are capable of generating troublesome inaccuracies, both in measuring individual cases and in depicting economic mobility.

First among the issues in income measurement is the question of whose income it is appropriate to measure. Many studies of income inequality look solely at the incomes of individual earners, in part because this information is easily obtained (from employers and from tax returns, for example). But households routinely pool income, so that the more accurate measure of economic position is "family" or "household" income — the measurement of which is complex. Even at the level of the individual, conventional measures of income tend to understate the economic position of high-income individuals and families by excluding the value of employee benefits (for example, pensions and health benefits). And high-income taxpayers have the greatest opportunities to shelter income from taxation, which means that relying on tax returns as the source of income data understates their economic advantage.

Once a measure of income is agreed upon, there remains the question of how (if at all) to determine which income levels correspond to meaningful "breaks" — whether for purposes of a gradational or a categorical scheme. The first question is whether the breaks are to be determined in absolute terms, in relative terms, or in terms of the purchasing power of the income. Another important question is the *number* of groupings to use. A fairly common approach is to divide individuals into quintiles according to income and then study mobility between quintiles. But mobility between two adjacent quintiles — the most common form of mobility — may not be much mobility at all: it may simply represent a trading of positions between those with income locations at the quintile boundaries. As is the case with occupations, aggregation is necessary for the sake of simplicity, but the data loss inherent in aggregation makes the data harder to interpret — and may well overstate the degree of income mobility in this country.

4. Education. Education is a vital component of economic well-being: for many, it is the cornerstone of middle class self-definition. The intergenerational transmission of educational advantage is a subtle and diffuse phenomenon. In the home environment one internalizes a set of understandings based at their core on the family's economic position — understandings about time, about the body, about what it is proper to want and what it is possible to achieve, about what it means to understand the world. James Coleman's studies of racial inequality in education, which looked at the transmission of educational advantage from parents to children, starkly concluded that family impact is so pervasive and so impossible to duplicate that truly equal educational opportunity cannot be achieved without "removing the child from the family, the single institution that provides opportunity most differentially and unequally, and placing that child in another social environment, the same for all children." In a sense, then, dispositions toward education transform inherited economic advantage into what appears to be "individual" achievement.

The advantages transmitted by educated parents to their children are precarious, however. Education is not only the major method of intergenerational transmission of economic advantage. It is also the major route for overcoming (at least to some extent) the effects of intergenerational economic disadvantage. The very societal orientation toward educational credentials that in the aggregate serves to perpetuate status across generations is an *imperfect* mechanism for status inheritance at the level of the individual family: the most successful of the educationally underprivileged are always waiting to take the place of the least successful of the children of the elite. Thus, whether a particular family will succeed in the vital intergenerational game of transmitting educational advantage is always unknown while the game is being played. Although the advantaged win in the aggregate, every advantaged family is potentially at risk. This means that the stakes in the game of class-based affirmative action in education (which is the field in which relative familial educational status is most likely to be considered) are likely to be very high — and, with them, the demand for accurate measures of relative educational advantage.

In that light, the difficulties in measuring educational attainment and its intergenerational transmission are particularly salient. Education is most often quantified as the number of years studied or the highest degree attained. But to treat education as a commodity in

this fashion is to miss differences that are palpably relevant in work and in life. On the college level, for example, educational attainment is routinely judged in real life by type of school (four-year college versus community college, accredited versus unaccredited, day versus night program, and so forth); quality of school (often measured by selectivity or by academic reputation); content of study (with superiority of attainment measured for different purposes along a number of potentially conflicting dimensions ranging from raw difficulty to likelihood of producing cultural literacy); grades and honors; outside enrichment activities (overseas studies, for example); and numerous other more subjective judgments about the student's "character" as reflected through her curricular choices. It is highly unlikely that these distinctions would work their way into the legal system's official class metric. This means that if individuals from less advantaged backgrounds are less likely to have acquired their (quantitative) educational credentials in the most valued (qualitative) form, the socioeconomic worth of their educations will be systematically overstated.

5. Consumption. Just as inflation can be measured by the relative cost of a fixed "basket" of food items, middle class status is often described as the possession of a "basket" of middle class goods. When middle class status is so defined, mobility into the middle classes is made easier to the extent that the items in the basket are easy to identify (through advertising, popular culture, and so forth) and easy to afford (as the Levittowns democratized suburbanization for white urbanites).

At first glance, it would seem easy to create a quick material index to capture the key elements of middle class material consumption. The consumption choice that most defines ascent into the middle classes is home ownership — which is why federal tax policy subsidizes home ownership and why the fact that young people cannot afford homes is viewed as a breach of faith with the middle class. A conventional consumption index might include such elements as home ownership; type of home (stand-alone versus townhouse versus mobile home); location (with suburban rating highest, except for the most exclusive city homes); home size; the ownership of cars (divided by old and new); the purchase of private primary or secondary education; number and kind of home electronics (with class ascending as the ratio of computers and cellular phones to televisions increases); the eating of meals outside of the home; and perhaps the nature of preferred leisure activities. Such a list, reworked as required by location (for example, the lack of home ownership and cars for many affluent New Yorkers), could provide broad brush strokes to draw a line between lower and middle classes.

But as anyone with a good ear for the culture knows, these elements of consumption are not so much measures of class unity as they are fields for the social process (and processing) of distinction. Houses can be large because they have many bedrooms (for many children) or because they offer grand spaces for entertaining. Their grounds can be groomed "just right," too poorly, or too well. (As Paul Fussell has noted: "If there's no crabgrass at all, we can infer an owner who spends much of his time worrying about slipping down a class or two. . .") The living room can be furnished from antique markets or from Sears. Cars can be utilitarian objects or displays of wealth and taste; they can be old in order to demonstrate patrician nonconcern with material values or because the family cannot afford new. Food cooked at home can be traditional or gourmet. The gulfs in consumption within the "middle class" category are, in short, huge. The advertising industry knows this, and it markets goods not to some broad aggregate "middle class," but to very carefully defined segments within it, defined as much by class aspiration and cultural orientation as by income.

The material world is a minefield for the class-mobile, and every dollar spent a potentially fatal misstep. Consumption choices shape opportunities for conversation and for the formation of friendships and professional networks. (If tennis is the game of choice at your office, being a top-notch bowler does you no good; and try inviting your boss to dinner if your only table is in the kitchen.) They are, at the very least, the most easily observed markers of who you are and where you fit into the social hierarchy; they may in fact be an important part of the constitution of the self.

In sum, consumption is central to our (often unarticulated) cultural understandings of class. It is likely, however, that the legal system would choose to ignore consumption as a factor in determining relative economic disadvantage. Consumption seems too "soft" a criterion to belong in a legal analysis. Alternatively, the law might formulate an easy-to-implement analysis of consumption that would make the mistake of treating differences as commonalities.

6. Consciousness. Consciousness is most relevant to class-based affirmative action as a desirable foundation upon which to build claims of "diversity" in hiring and education. Taking student-body diversity as an example, the expectation is that students from certain backgrounds will be able to speak for distinct perspectives that arise from shared economic circumstances. For example, Professor Clyde Summers, a scholar and teacher of labor law at the University of Pennsylvania, expressed concern that "I have almost no students whose parents are union members and very few students who come from what you would call the blue-collar working class . . . . What that means is that no one has any idea what life is like on the other side of the tracks." Similarly, the claim can be made that diversity of economic backgrounds is of value among teachers and other public servants who must interact with an economically diverse population.

Because class consciousness is itself so problematic, diversity arguments for class-based affirmative action are not straightforward. Again my example is drawn from the educational setting. Among the various student mutual support organizations that are a part of the life of American law schools (for example, the Black Law Students Alliance, Latino Law Students Association, Women Law Students Association), one rarely finds support groups for students from less privileged backgrounds. The reasons are many. Part of the problem is the question of how much "less" privileged a student would need to be to join. But I suspect that an even greater obstacle to organizing is the unwillingness of "the natives" to define themselves in terms of class — particularly once they have distinguished

themselves as undergraduates and entered professional school, thereby breaking all the most obvious constraints of intergenerational class transmission. Students from less advantaged backgrounds have the opportunity to try to "pass," although they will occasionally give themselves away through such telltale signs as dress, hairstyle, use of cosmetics, accent, and visible discomfort in formal settings. Such students are also encouraged to deny class-based commonalities of experience, both by prevailing individualistic class ideologies and by easy access to psychologized explanations of whatever stress they may feel.

More fundamentally, to the extent that affirmative action is a mechanism of upward class mobility, it is likely that the most successful of the less privileged candidates will be those who have already broken with much of what typifies their original class position. Given the strains on family relationships inherent in children's upward mobility (even when it is desired by their parents), it is not clear that the less advantaged students will have the capacity to describe fairly their parents' view of the world. The diverse perspectives of students from less privileged economic backgrounds will likely be the conflicted perspectives of young adults at a key moment of upward class mobility — not the pure perspectives of their classes of origin.

"Consciousness" is the "softest" of all of the factors that contribute to class. It is obviously the most difficult factor to measure, and for that reason governmental agencies might well hesitate to consider it at all. But a program of class-based affirmative action cannot wash its hands of the problem of consciousness, because the very existence of the program will affect consciousness and will do so in conflicting ways.

The fact that the government is attending to economic disadvantage will weigh in favor of individuals accepting their economic disadvantage as a part of the identity they present in public life. Furthermore, it seems likely that class-based affirmative action programs will be structured to require candidates to self-identify as "economically disadvantaged." Those who have best internalized the government's views of the meaning of economic disadvantage are most likely to succeed in presenting themselves as candidates. In these ways, class-based affirmative action will increase the level of consciousness of economic disadvantage among its beneficiaries and also increase the likelihood that they will speak publicly from "class" perspectives. On the other hand, at least some of the potential beneficiaries of class-based affirmative action might prefer to be viewed as having gained admission under the rules applicable to mainstream candidates. In circumstances in which stigmatization is associated with a characteristic that it is possible to deny, denial becomes an attractive strategy. Denial is particularly attractive where, as in the case of class, a person seeks admission to a class that is constituted in part by its belief that class as such does not exist and that past economic inequality does not impede future mobility.

In sum, defenders of class-based affirmative action ought not to exaggerate the degree to which beneficiaries of class-based affirmative action programs will share a common consciousness of economic disadvantage. The transmission from parent to child of the consciousness appropriate to the child's class of origin is fundamentally changed by the project of class mobility itself. What is likely, however, is that the manner in which the government defines "economic disadvantage" for the purpose of class-based affirmative action will itself become the center of a new public "class" identity — albeit a contested one.

7. Interactions Among the Elements of Economic Inequality. The relationships among the elements of economic privilege are not simply additive or multiplicative. They are structural. The factors contributing to relative economic advantage exist in a delicate balance and interact in space and time, as is generally true of the elements of society and culture. Their effects are likely to be different for different groups: for example, those who are better off financially are in a better position to take advantage of elite-college degrees than are those of more modest economic backgrounds. Thus, the analysis of important socioeconomic factors and their inter-relationships must be "disaggregated," with an eye to spotting relevant discontinuities. No easily administered, quantitative, composite index of the

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elements of economic inequality can capture their complex interrelationships. Indeed, it is most likely that the legal system will follow its ideological and practical predilections: it will perceive complex structures and patterns as the *absence* of all structure or pattern and will conclude that "individual differences" are the key to inequality and that therefore the economic individualist theory of economic inequality is correct after all.

8. Outside Interactions: Race, Gender, and the Danger of False Claims of "Holding Class Constant." Up until this point, we have discussed class as though it were a hermetically sealed category, impervious to other forms of inequality. But it is not. Just as economic variables interact, there are important interactions between each of those elements (and their interactions) and "outside" elements, such as race and gender.

Gender issues in class analysis are obscured (or perhaps underscored) by the fact that studies of social mobility commonly look only at the experience of men. The reason is that one of the most vexing problems in research on class and economic inequality is how to determine the economic position of women — both their individual status and their contributions as wage-earners and domestic producers to the economic status of their households and families. It should be obvious that ignoring the economic participation of women distorts the picture of household or family economic status in important ways. It should be even more obvious that an affirmative action program cannot be based on an operationalization of economic inequality or class that is systematically erroneous in the measurement of women's economic status. Indeed, there is ample evidence that the interactions among economic factors differ for men and women, that women are less able than men to take personal advantage of inherited and earned economic and social capital, and that occupational schemes developed for men are less accurate for women.

Theorizing and measuring the economic status of members of racial and ethnic minority groups pose problems of equal magnitude. I will limit myself to only a few illustrations of the many ways in which strategies for the transmission of economic advantage from parents to children have historically been less successful for blacks than for whites.

The past and present effects of discrimination mean that blacks and whites who appear to have the same occupation, education, or residential situation when a simple metric is used may well not occupy the same status in reality. When black families live in the suburbs, they tend to live in predominantly black suburbs that lie closer to the inner city and that are less advantaged in their public and private services. Blacks are more likely to be employed in the public sector, where civil-service employment rules diminish the ability of parents to use their influence to provide jobs for children in their community. Although patterns of segregation are breaking down, black professionals are historically more likely to serve within the black community, which means that having professionals in the family opens up a less advantaged social network for blacks than for whites. Blacks in the professions remain more likely than whites to be employed in occupations at the lower end of the category in credentials, prestige, and income. Blacks have less wealth than whites of the same income level. And skin color remains a powerful obstacle to the translation of wealth, occupation, income, education, and cultural capital into even the most basic dignity in public life. As one Jewish carpenter explained to an ethnographer in Brooklyn, New York, my hometown: "The problem is that we see blacks as a mass. It is unfortunate. We can't tell the difference between a black pimp and a black mailman. When I look at a white man, I can tell what social class he is, but if he is colored, I can't tell." There is little gain to be had from class mobility if its public indicia are overwhelmed by the more socially salient reality of race.

These examples demonstrate that if an overly simplistic measurement of class is used, systematic differences in the present and historical economic condition of blacks will be ignored, and the socioeconomic privilege of middle class blacks will be overstated. The law's official discourse will falsely proclaim that in the contest for economic equality, class has been "held constant" — and that if blacks still lose, their loss must be because of some postulated lack of individual or collective merit. That is a significant danger for anyone concerned with racial justice in this country.

IMPLICATIONS FOR CLASS-BASED AFFIRMATIVE ACTION

My expectation is that the most frequent class metric for affirmative action purposes will be a standardized quantification of highly simplified measures of income, occupation, and/or education. I refer to this as the "inequality index." I further expect that governmental actors (with the possible exception of college admissions officers) will resist any efforts to require them to engage in a more subjective and holistic analysis of economic position. I do not think that the inequality index is adequate on either technical or cultural grounds, and my expectation that it will be used is therefore the source of my pessimism about the operationalization of economic inequality for purposes of class-based affirmative action.

Let me first explain why I am convinced that the inequality index will be the metric of choice for class-based affirmative action programs. One reason is captured by the "rules versus standards" debate in its critical legal studies variant. Class-based affirmative action decisions are bound to be controversial, and the makers of controversial decisions often prefer to blame them on "the rules" rather than on their own judgments. "Standards" may well be fairer — as I think they would be in these circumstances — but that does not make them popular with the decisionmakers who are required to use them.

My other reasons are more case-specific. There is, first and foremost, the sheer difficulty of doing anything more, for reasons described in the last section. Social scientists who specialize in the analysis of *one specific* element of economic inequality have great difficulty in reaching agreement on its proper definition and measurement. Working sophisticated versions of multiple elements into a legal definition of economic inequality would be beyond the technical capacity of most social scientists, let alone most governmental agencies. It is of course true that governmental agencies often make

complex decisions: for example, occupational safety and health standards or social security disability determinations. But those decisions are within the expertise of the agencies. They are what the agencies exist to do. In contrast, judgments about how to measure economic inequality for class-based affirmative action programs will often fall well outside the expertise of staffs that are assembled to do the work of the agencies (for example, promoting small business, protecting the environment, supervising the use of public funds in education), not for their expertise in affirmative action or in class analysis. Even if the individual decisions on who is to be a beneficiary of class-based affirmative action are made by human resources professionals, they are not trained in the fine points of sociology and labor economics. What is needed is a standard of complexity appropriate to nonexperts. I suspect that nothing greatly more complex than the inequality index will be seen to suffice.

Another consideration is the highly personal nature of the information that government agencies would need to collect to perform a more sophisticated analysis of economic inequality. College financial aid applicants and bidders on government contracts are already required to disclose information about their financial circumstances. However, the range of information now required is far narrower than would be required by a multidimensional and intergenerational approach to economic inequality. In any event, job applicants are not currently expected to provide financial information to their prospective employers at all, beyond basic salary history. The fact that the information would be largely unverifiable makes it all the less likely that government decisionmakers will burden the public and themselves with its collection and analysis.

Finally, on the ideological level, the inequality index is likely to seem satisfactory to the managers and professionals who will be in the position to make class-based affirmative action policy. As I have explained, the ideology of economic individualism, with its denial that some groups suffer structural economic barriers to mobility, is a favored ideology within the American middle classes, particularly among successfully mobile members of the middle classes. The simpler the metric — the more it describes an individual's (or family's) momentary circumstances rather than the deeper family-historical roots of her (or its) economic position — the more it resembles the picture of economic inequality that helps to define the professional-managerial class.

Having accounted for my view that the inequality index is the most likely class metric for class-based affirmative action programs, I now turn to why that is cause for pessimism — not merely on cultural grounds (those reasons are too obvious from my previous discussion to require repetition here), but also on technical grounds.

I would object to the inequality index on technical grounds even if it could be proven that it correctly sorts individuals by their relative economic status in a substantial majority of cases. Because class-based affirmative action decisions will be controversial, I suspect that we as a society will require a high level of accuracy from the measurements that underlie class-based affirmative action decisions. Legitimacy is, in my definition, a problem of technical adequacy, and I doubt that the answer "the result is wrong for you, but would be right for most people with your numbers" will be very satisfying. I am not claiming that a technically adequate metric must reach correct results each and every time it is used. But I suspect it will take only a few stark examples of distributional injustice to turn public opinion against class-based affirmative action.

Furthermore, the question of technical adequacy turns not only on the *quantum* of error (which is difficult to estimate in any event), but also on the *distribution* and *social cost* of error. The quantum of error could be extremely low and still be unacceptable if, as I have suggested, errors are likely to occur disproportionately in the evaluation of the economic status of members of groups that suffer discrimination in this country.

The remaining question, then, is what implications to draw from my conclusion that class-based affirmative action will most likely be implemented in a technically and culturally inadequate form. Does that conclusion require me to reject class-based affirmative action altogether? The purist in me says yes. But the pragmatist in me finds the answer less

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straightforward, on both cultural and technical grounds.

My concern for the cultural adequacy of class-based affirmative action programs stems from my desire to see the law advance rather than hinder public discourse on class. Given the law's power to shape dominant ideologies in this country, my fear is that the "legal" view of class — its specific operationalization for class-based affirmative action — will tend to be transformed into the only legitimate view of class within public discourse. But the best might prove the enemy of the good. The law is already implicated in the sorry state of current public discourse on class. Class is invisible to American society in part because it is invisible to American law. While I suspect that it is easier to counter the present invisibility of class to the law than it would be to destabilize an inadequate legally endorsed definition of class, I cannot be sure. It might be instead that any legal definition of class is more adequate than no legal definition of class, because at least a definition puts class on the agenda.

If there might be cultural value to having class on the legal agenda, even if it is inadequately defined at the outset, the question once again becomes a technical one. How might officials charged with drafting class-based affirmative action plans keep open the possibility of moving beyond the inequality index toward a more adequate conceptualization of economic inequality? The answer is suggested by the concept of "systematic experimentation" in policymaking. Systematic experimentation is a continuous process of "developing new methods, trying them out, modifying them, trying again," engaged in while the program is under way with a view toward future improvements. In that spirit, I close by suggesting some ways in which the officials charged with drafting and implementing class-based affirmative action plans might move forward but keep open the possibility for ongoing technical and cultural innovation.

1. Modesty. Officials should make only the most modest of claims for their models and definitions of class. They should always be ready to admit that their measures leave much to be desired. The defense should not go beyond the claim that the definitions are the best reasonable minds could do under the circumstances. The programs will thereby be denied the right to claim greater legitimacy than their flawed models permit.

2. Task Specificity. Officials should avoid the claim that they have found a single definition of class that will be good for all situations. Definitions should be specific to the particular affirmative action program in question and should, to the degree possible, be based upon an articulable theory of which kinds of economic disadvantage are most relevant to the program at issue.

3. Experimentation. Programs of class-based affirmative action should be initiated on a small scale, and pilot projects should be chosen with care. Even if a simple metric is used at the outset, administrators should aim to collect a wider range of information from at least a sample of program applicants, so that more sophisticated metrics can be developed in the future.

4. Openness. To the extent possible, task-specific definitions should leave open the opportunity for affirmative action candidates to explain why, in their specific circumstances, the official metric leads to incorrect results. Such explanations should be considered, at least in close cases. But even if these explanations are not considered in individual cases, they will provide valuable information about dimensions of economic inequality that might be included in improved metrics in the future.

5. Race and Gender Sensitivity. It should be acknowledged that there is a substantial likelihood that any simple metric will make the economic status of members of some minority groups seem better than it is and that most of the available metrics were designed with men rather than women in mind. Data should be collected on the racial and gender effects of class-based affirmative action programs, and experimentation in measurement methods should include attempts to make measures more accurate for women and minorities. If these experiments fail, or if courts rule even this level of race and gender consciousness unconstitutional under *Adarand*, class-based affirmative action should be abandoned.

6. Disclosure. The social distribution of the costs and benefits of class-based affirmative action should be measured and made public. If, as I suspect, affirmative action decisions will operate to advantage and disadvantage members of the middle class who are quite close together in their economic status, that fact needs to be admitted to the public. If governmental actors cannot persuade the public that the type of economic redistribution the program in fact achieves is worthwhile, then class-based affirmative action should cease.

7. Theoretical and Normative Clarity. Advocates of class-based affirmative action should aspire, over time, to a theory of the nature of economic inequality in this country and should then independently evaluate whether that theory is normatively compatible with the use of affirmative action as a mode of redress. That inquiry should, in the end, address the age-old question whether aiding the class mobility of individuals is the best approach to ending class inequality.

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GOODBYE GATT HELLO WTO

—BY JOHN H. JACKSON

On Jan. 1, 1995 the placards on the front of the large building on the shore of Lake Geneva were changed from GATT to WTO — World Trade Organization. On this date, a new organization came into being for the purposes of assisting governments in the world to better manage problems of international economic interdependence. This event occurred 50 years after the establishment of the Bretton Woods System (with the World Bank and IMF Charters), and almost 50 years after the establishment of the GATT (General Agreement on Tariffs and Trade) and the failure of the ITO Charter (International Trade Organization), which would have been the institution to complete the Bretton Woods system.

WTO

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The WTO was one of the major results of the extended Uruguay Round negotiations on trade, under the auspices of GATT. The Uruguay Round was the eighth major trade negotiating round of GATT, and had been underway since September 1986. This was a massive undertaking, resulting in a final Act signed at Marrakesh, Morocco, on April 15, 1994, consisting of 26,000 pages (undoubtedly a record for a treaty length). The length of time for the negotiation as well as the number of pages indicate the enormous complexity of the endeavor which had been undertaken. Although most of these pages are detailed schedules of tariff and service obligations, nevertheless about 1,000 pages of carefully negotiated treaty text covers subjects such as tariffs, financial services, intellectual property, antidumping measures, escape clause and safeguard measures, textile trade, agricultural trade, and many more crucial questions of international economics. But perhaps the most significant measure included in the Marrakesh Final Act was the new "Charter" for a "World Trade Organization," which would now replace the GATT as the central institution for international trade cooperation in the world today.

1. A Bit of History: Gatt and Its Birth Defects

It is common knowledge that the GATT itself was never intended to be an organization. Rather, after the other Bretton Woods institutions were established (in 1945), world government leaders determined that it would be necessary to add another institution, one devoted to trade — an "ITO - International Trade Organization." The GATT was merely designed to be a multilateral trade and tariff agreement which would depend on the ITO for its institutional infrastructure. When the ITO did not come into force because parliaments, particularly the U.S. Congress, would not approve it in the late 1940s, the GATT gradually became the central focus of coordinating activity among nations regarding trade.

Despite this inauspicious beginning, the GATT has been remarkably successful during its nearly five decades of history. Partly this is because of ingenious and pragmatic leadership, particularly in its early years. Nevertheless, because of this unfortunate history, the GATT had endured a number of "birth defects" which proved increasingly troublesome in recent years as world economic affairs became more complex and harder to manage. These defects include:

- Provisional application and grandfather rights exceptions embraced by the Protocol of Provisional Application.
- Ambiguity about the powers of the contracting parties to make certain decisions.
- Ambiguity regarding the waiver authority and risks of misuse.
- Murky legal status leading to misunderstanding by the public, media, and even government officials.
- Certain defects in the dispute settlement procedures.
- Lack of institutional provisions generally, so constant improvisation was necessary.

2. The New "Charter": A World Trade Organization

Although not originally included in the Uruguay Round agenda, the idea to develop a new organization began to take form in 1990, partly as the need for a better institutional mechanism for implementing the Uruguay Round became apparent. The notion of a new organization charter would essentially continue the GATT institutional ideas in many of its practices but would correct some of the "birth defects;" improve the

institutional structure so that it would be better understood by the public, media, government officials and lawyers; and extend the new organizational structure to some of the new subjects taken up in the Uruguay Round for the first time, such as trade in services and intellectual property.

The structure of the WTO agreement includes the "Charter" itself, and a series of Annexes. The contents of these Annexes are the detailed substantive obligations undertaken as a result of the Uruguay Round negotiation. These include the entire text of the GATT, as changed through the years and embellished by certain "side-agreements" derived from texts negotiated in the Tokyo Round of the 1970s, and improved in the Uruguay Round. The new Agreements on Services Trade and Intellectual Property also became part of the Annexes of the Charter.

There are many achievements as a result of the Uruguay Round, but with respect to the institutional achievements, the Charter, and the new rules for dispute settlement, are the most important.

3. The New Rules for Dispute Settlement in the World Trading System

One of the many achievements of the GATT, despite its "birth defects," had been the development of a reasonably sophisticated dispute settlement process. The original GATT Treaty contained very little text covering this process, but as time went on, practice evolved towards a "rule-oriented" system, with panels of experts making findings in dispute cases. During the last several decades in particular, the contracting parties of GATT utilized the procedure more and more. The number of cases and the number of these reports is several times the number of cases in the World Court (ICE - International Court of Justice). Indeed, by the late 1980s many governments and world leaders considered the dispute settlement procedure to be the centerpiece of the GATT.

The dispute process, however, suffered from some important defects derived from the larger context of the GATT "birth defects." Most significant was the practice that had developed by which a panel report must be adopted by the GATT Council before it became binding. The Council acted by consensus in these cases, which gave any contracting party the right to block the adoption. Thus the losing party under a panel report could block its adoption and argue that the panel report was not binding on it. One of the important goals of the Uruguay Round negotiation was to resolve this problem, and under the new Dispute Settlement Understanding (DSU), the new rules prevent blocking. Thus panel reports will be virtually automatically brought into force. This result, however, was not acceptable without some additional procedural measures. Most particularly, the Uruguay Round negotiators decided that the *quid pro quo* for automatic adoption was a right to appeal from a panel opinion. An appeal can now be taken to an appellate body established under the WTO. This appellate body consists of a permanent roster of seven individuals who serve for four-year terms on a rotating basis. When an appeal is lodged, three persons from that roster will be selected to be the appellate panel which will examine the appeal. The result of the appellate deliberations is an appellate report and findings, which also will not be subject to blocking. This is an extraordinary step under international law, and virtually unique in international dispute settlement procedures.

4. WTO Decisions and the "Sovereignty" Problem

One of the difficult negotiating problems faced by governments in the Uruguay Round as they formulated the new trade constitution was the worry often generally and ambiguously expressed as "encroachment on national sovereignty." In particular, there was a worry that the WTO as an organization could make decisions that would impose new binding obligations on governments without their consent, in the context of a one-nation one-vote, majority vote system. The problem was most acutely felt by the large and powerful economic entities who clearly would not accept an institutional structure which would give rise to the possibility of large numbers of "mini-states" outvoting a major economic power. Under the GATT, there was always a risk of this occurring because the GATT was relatively weak as an institution. Thus some of its rather brief clauses were never designed to establish an organization, and were quite ambiguous. Under the WTO "Charter," however, the diplomats worked to provide checks and balances on the various decision-making procedures. Thus, certain types of actions require a super majority (such as three-fourths of the membership). Procedures for amending the charter are particularly intricate, with a number of fall-back measures to protect members against being outvoted on at least important questions.

5. The First Year — Stresses on the System

The new organization, as of this writing, has now been in operation for slightly more than a year. There are more than 110 members. The processes (during 1994) of ratifying and implementing the Uruguay Round Treaty results were extraordinarily involved and occasioned very large debates, at least in

some countries (such as the United States). Yet, almost miraculously, the major participants completed their ratification decisions by the end of 1994, so that the organization could be formally established on Jan. 1, 1995.

During the first year of its operation the organization has faced several stresses. Yet in each of these, the organization has overcome the problem successfully. The first such stress was the selection of a Director-General. This caused a considerable amount of diplomatic footwork, but in the end, and almost inevitably, the current Director-General (Renato Ruggiero) was selected.

A second stress was the announcement by the United States of its intention to apply tariff increases on luxury automobiles imported from Japan if the Japanese did not satisfy certain U.S. trade demands. The threat involved action that would have been a clear violation by the U.S. of its obligations under the WTO. This was extraordinarily unfortunate, giving the impression that the largest economic power in the world was suggesting within a half year of accepting the massive Uruguay Round treaty obligations that it was prepared to deviate from those obligations upon its own initiative, without any reasonable justification. Fortunately, the disputing parties (the U.S. and Japan), after various threats and cross-threats of bringing a WTO dispute settlement procedure, settled their case. Indeed, the result of this may have been to strengthen the WTO system, because at least to careful observers it appeared that the U.S. backed down from its threat.

Finally, during a good part of 1995, the leadership of the organization strove to develop the necessary consensus to appoint the seven appellate body roster members. This occasioned a large amount of diplomatic interchange and concern, but by December the list of seven names for the roster was formally approved, and these persons were sworn in at the Geneva WTO Headquarters on Dec. 13, 1995.

All in all, it appears that the first year of the WTO has been reasonably successful. Clearly there are clouds on the horizon that could bring some stormy weather in the future, but that is to be expected for an organization that is already playing an extraordinary central role in international economic diplomacy.

6. Future Prospects and Perspectives

Almost any reflective consideration of the rapidly increasing international economic interdependence leads to recommendations for increasing international cooperation in order to cope with the problems that interdependence is thrusting upon us. No longer can nations effectively implement their national economic regulations (ranging from interest rates to prudential banking measures, to fairness in the stock markets, even to labor standards) because too often there are international constraints and implications related to almost any national measure, even those of the largest economies. Some policy makers at least have realized this. However, the more one turns to international cooperation institutions, the more it begins to be clear that attention must be paid to the "constitution" of these international institutions, just as extensive attention is given to national level "constitutions."

This raises issues about governance, such as preventing abuse of power, effectively channeling important information to decision makers, giving constituencies the opportunity to be heard and to have weight of influence on the decision making processes. These concepts inevitably lead to questions about the appropriate distribution of power over economic affairs in the world, and the degree to which power should be located in an international institution, or a national/federal institution, or in sub-federal or even very local governmental units. The word "subsidiarity" is sometimes used to describe these general concepts of distribution of power, and the opposing goals of urging government decisions to be made at the lowest level possible so as to be close to constituents that are affected, but on the other hand to empower higher levels of government to take measures that can be effectively implemented by appropriate measures at such higher level.

The WTO as an institution continues to require attention, including attention to problems such as the following:

- First, an important question is whether the new dispute settlement procedures will work effectively. There will indeed be temptations of some member nations, probably the largest, to ignore or undermine the results of dispute settlement procedures when those procedures are not entirely satisfactory to the member concerned. Obviously, if too much of that approach occurs the dispute settlement procedure will begin to lack credibility, and thus will fail in its primary purpose of establishing and maintaining a creditable rule-oriented system.

- Second, the decision-making and voting procedures of the WTO, although much improved over the GATT, still leave much to be desired. It is not clear how the consensus practice will proceed, particularly given the large number of countries now or soon involved. It may be necessary at some point to develop certain practices about voting to constrain misuse of the various voting rules.

- Third, with a likelihood of well over 120 nation members, the WTO must soon face up to its internal procedures for effective governance and administration. This suggests the need for some sort of small steering group to guide and advise the Director-General, and other officers of the WTO, in developing priorities for agenda and secretariat work, as well as initiatives to meet new problems in the world. The question of such a steering group has been controversial in the past; every country that suspects it would not be a member of such a group tends to oppose its establishment. However, without such a group, informal mechanisms arise that may be even more exclusive and biased to certain types of economic structures than would

otherwise be desired by the membership. For example, the "quad" group consisting of the U.S., the EU (European Union), Japan and Canada, has been very influential in the GATT system. Surely that influence will continue, but the question is if those four governments will be joined by a broader group of representative governments while still maintaining a number small enough to be an effective guiding mechanism for the WTO.

- Fourth, an important institutional problem will be how to integrate into the WTO new or emerging subjects which arise in the future, such as the problem of environment and trade rules. The amending rules of the WTO may (as they did in GATT) turn out to be too rigid and difficult to fulfill. If that is the case, how will new subjects be integrated into the system? As mentioned above, it may be that new "plurilateral agreements" under Annex 4 will be a major device for this, but the more that occurs, the more we will go back to the old GATT difficulty of "a la carte" choices.

- Fifth, there is the broad and important issue of enhancing the public understanding of the WTO and its work. This leads to the subject of "transparency," commonly understood to mean adequate information and openness of the procedures, advocacy, meetings, etc., so that the media and scholarly endeavors can assist in informing the world public about the operation of the WTO, which can have such an important influence on the lives and welfare of people.

- Sixth, there has already been much comment about the "agenda" after the Uruguay Round for the World Trading System. One question often raised is whether there should be another "round," or whether the procedures for pursuing future subjects should try to avoid rounds which tend to be so complicated and cumbersome. The arguments in favor of rounds, however, may still prevail, namely that a larger round gives more opportunity for trade-off between different subjects, and raises the issues to the highest level of national governments where definitive decisions can usually be made (whereas lower level officials and technicians would not be able to make such compromises).

Without necessarily providing a complete inventory of substantive issues to be faced in the future by the organization (in addition to the so-called "left over issues" mention above), the following seem to be appropriately included on most lists:

1. A series of subjects, already newly facing the organization:
   - Competition policy in relation to trade rules.
   - Non-market economies, state trading, and economies in transition and their relation to the trading rules (e.g., China, Russia, etc.).
   - Product (and service) standards and the use of science, raising questions of harmonization or other techniques of facilitating trade flows.
   - Cultural, social policy, and structural impediments to trade.

2. There are also a series of subjects that we could call "link issues," which are subjects that are often separately considered, but which have important interlinkages with trade. These include:
   - Environmental rules and trade policy.
   - Labor standards and rules of trade policy.
   - Human rights and trade policy (including economic sanctions).
   - Monetary policy and its relation to trade policy.
   - Arms control and non-proliferation issues and their relation to trade policy.

3. Apart from these subjects for a post-Uruguay Round agenda, there are certain basic GATT concepts that need to be reconsidered and possibly altered so that they will be more effective in the future economically interdependent world. These include:
   - The most-favored-nation clause (and problems of the free rider).
   - Regionalism and its relation to the multilateral system.
   - Reciprocity and whether this concept can effectively handle the problems of rule making.
   - National treatment and the need for minimum standards that go beyond non-discrimination or "equal" treatment.
   - Antidumping rules (as previously mentioned) and the question of whether these rules are in reality safeguards or escape clause measures, rather than unfair trade measures.

In short, we have put in place an evolutionary watershed structure of institution and rules to round out the international economic system, but any close look quickly reveals that there is much more to do.

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Class Action RULE CHANGES

Professor Cooper has been Reporter of the Advisory Committee for the Federal Rules of Civil Procedure since 1992. This note reports on the Advisory Committee's current work on the class action rule, Civil Rule 23. The rulemaking process has become the subject of increased attention in recent years, and it is hoped that this report will stimulate additional interest and responses.

A Midpoint Report

BY
EDWARD H.
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This is a midpoint progress report of the Reporter on current proposals to amend the class action rule, Rule 23 of the Federal Rules of Civil Procedure. In part, it is one of many calls for help. The proposed amendments have been published for comment. It is important that the rulemakers hear from as many interested observers as possible. One of the pitfalls of the comment process — at least one of the pitfalls that the rulemakers like to believe in — is that there are many observers who believe that the rulemakers have got it right, and do not need to be told that they have got it right. The record of comments may make proposals seem more controversial, or less well advised, than they are. And in other part, this report is an illustration of the care that is taken in the largely invisible process that continually reviews, and periodically amends, the rules.

The rulemaking process is easily sketched from the bottom up. The process begins in the committee structure of the Judicial Conference of the United States. First-line responsibility falls on the Advisory Committee on the Federal Rules of Civil Procedure. The Advisory Committee reports to the "Standing" Committee on Rules of Practice and Procedure. Amendments tentatively endorsed by the Standing Committee are published for comment and public hearings. After publication, the Advisory Committee reviews all of the written comments and oral testimony and again reports to the Standing Committee. If substantial changes have been made, a proposal may require a second period of publication and public comment. When a proposal is ready to proceed further, the Standing Committee recommends approval by the Judicial Conference, a group of more than two dozen federal judges chaired by the Chief Justice. If the Judicial Conference approves, it transmits the proposal to the Supreme Court. The Supreme Court bears ultimate responsibility for adopting the rules and revising them. Once the Supreme Court has approved a revision, it sends the revision to Congress. Revisions adopted by the Supreme Court become effective unless Congress acts to disapprove them.

Rule 23 was extensively amended in 1966. The amendments created a new "common question" class action under Rule 23(b)(3). (b)(3) class actions were designed to facilitate enforcement of claims too small to bear the cost of individual litigation. This new device has taken on a role far beyond the dreams of its creators, enhancing the actual effect of many substantive provisions. In the last few years, it has been pressed to serve in quite a different setting as one of the many alternative

strategies used in the effort to manage vast numbers of related actions. Asbestos litigation provides the most familiar example, but other examples are almost as familiar. Attempts to win class certification have met with mixed success in dealing with such problems as silicone gel breast implants, cigarettes, sidesaddle pickup trucks, and heart valves.

The dramatic growth of (b)(3) class actions generated lively debate. For more than two decades, however, a tacit moratorium on Rule 23 proposals was observed by the Civil Rules Advisory Committee. The process of shaping Rule 23 into a working and reasonably familiar procedure was left to the creative efforts of the bar and the wisdom of the bench. In 1991, however, the report of an ad hoc Judicial Conference committee on asbestos litigation led the Judicial Conference to recommend that the Standing Committee and Advisory Committee study Rule 23. The Advisory Committee has been working on this chore ever since.

The first effort of the Advisory Committee was based in large part on proposals made by an American Bar Association committee several years ago. As refined by the Advisory Committee, then chaired by Chief Judge Sam C. Pointer, Jr., of the Northern District of Alabama, this draft would have made many changes. None of the changes was fundamental, and even together they would not have been revolutionary. Rule 23 would have been restructured. This proposal softened the long-familiar categorical distinctions between inconsistent-obligation and limited-fund (b)(1), injunction (b)(2), and "common question" (b)(3) classes. The softening was designed in large part to serve other goals, strengthening notice requirements for some actions but reducing them for others, expanding but also contracting opportunities to opt out, creating new opt-in classes, and so on. These proposals were reviewed by extensive groups of academics, lawyers, and judges. There was widespread agreement that they were relatively modest. But the lawyers in particular were concerned that the main effect would be to create at least a decade of uncertainty while they collectively worked to instruct judges on proper use of the new rule.

The questions raised by these reactions suggested to the Advisory Committee that it must undertake a broader inquiry. The central question was whether the time had come to propose any amendments whatever. Faced with a lack of helpful empirical data, the Advisory Committee enlisted the help of the researchers at the Federal Judicial Center (FJC). The FJC study set out to address a series of questions raised by widespread anecdotal observations about class actions by reviewing the files of all class actions concluded during a two-year period in four of the busiest class-action districts. The first lesson was that class actions have been dramatically undercounted. Each of the four districts had at least twice as many class-action filings as had been reported. Other lessons were more complex, and always subject to the qualifications that attach to any study based on a sample, even one carefully chosen. The Advisory Committee — now chaired by Judge Patrick E. Higginbotham of the Fifth Circuit — also reached out for the views of academics, lawyers, and judges with rich personal experience in class litigation. Lawyers were invited to address the Advisory Committee at its regular meetings. The Committee met in conjunction with, or attended, class-action symposia at law schools in Dallas, New York, Philadelphia, and Tuscaloosa. Experienced class-action practitioners also were invited to attend committee meetings, and contributed valuable suggestions. Two veterans of the 1966 amendment process, John P. Frank of the Phoenix Bar and Professor Arthur R. Miller of Harvard Law School, were actively involved in these efforts.

With all of these activities, the Advisory Committee moved to the top of several hills (none was really a mountain). It stayed on some, and moved back down from others. It has won Standing Committee approval to publish several amendments for public comment in the form submitted to the Standing Committee. The Standing Committee made it clear, however, that it was approving publication as the next logical step in a process that still must include careful reconsideration of each item in the proposal.

So what is proposed, and what earnestly considered proposals were put aside?

One proposal would create a permissive interlocutory procedure that would establish court of appeals discretion to permit appeal from an order granting or refusing class certification. Both judges and lawyers commonly greet this proposal with skepticism, fearing that bootless attempts to appeal will be made in virtually every class action. And, just as commonly, they have come to agree that the courts of appeals should be able to manage this procedure as an improvement on the unsatisfactory alternatives now available. Appellate judges in particular believe that experience with the similar permissive appeal provisions of 28 U.S.C. § 1292(b) shows that the new appeal procedure can be controlled with little burden or delay.

The other proposals that should command general interest focus on (b)(3) common-question classes. Changes are made in the list of enumerated factors that bear on the determination whether common questions "predominate" and whether a (b)(3) class is superior to other means of adjudication. These changes focus on both ends of the spectrum defined by the size of individual class-member claims. In a variety of ways, the factors are revised to encourage care in certifying classes that include many members whose claims would support individual litigation. Although class certification of mass tort cases is not prohibited, these changes reflect concern that in some situations class actions are less desirable than individual litigation or aggregation by some means other than a single large class.

At the other end of the spectrum lie claims that promise to return only minuscule recoveries to individual class members. A new factor (F) would be added, permitting the court to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." This provision has become known in the vernacular as

the "just ain't worth it" provision. It is bound to be controversial. To some, it will seem a retreat from the great strides made by (b)(3) toward enforcing important social policies that are imperfectly fulfilled by public enforcement. The point of class actions, on this view, is not only to secure individual redress but also to take the profit out of violating the law. The proposal takes a rather different view, founded in the belief that private litigation is an imperfect means of enforcing public values. Adversary litigation as we know it is cumbersome and expensive. Often it is called upon to enforce the uncertain commands of obscure statutory or other policies that may be violated despite diligent and sincere efforts to comply. The costs and risks of this enforcement are justified by the prospect of meaningful individual relief. If there is no prospect of meaningful individual relief, and no one but the class lawyers stands to benefit, the costs and burdens of class litigation may not be justified.

(An attractive alternative to refusal to certify a class may be to provide for relief that need not incur the frequently crippling expenses of administering individual distribution. "Fluid" class recovery may provide attractive means of substitute relief. Rather than distribute a dollar of damages to each individual consumer injured by a short-lived pricefixing conspiracy, the defendants could be ordered to reduce prices as a way of compensating present consumers without bothering to address the discontinuities between past and present consumers. The Advisory Committee concluded that such alternatives should be put aside because they raise serious questions under the Rules Enabling Act requirement that the rules not abridge, modify, or enlarge any substantive right.)

Another new item in the list of (b)(3) factors is the "maturity" of the class claim, issue, or defense. This factor addresses problems that arise from glaring gaps in factual knowledge. Claims that a product causes an injury, for example, may rest on very uncertain science. Experience with individual litigation of related issues may show that courts regularly reach inconsistent results. In either setting, it may be unwise to risk all claims on a single throw of the class action die.

A final important (b)(3) provision is proposed by adding a new paragraph (b)(4). This proposal would permit certification of a (b)(3) class for purposes of settlement only, even though the court would not certify the same class for litigation purposes. Settlement classes have evolved gradually over the years, but recent Third Circuit decisions have adopted the limit that a class may be certified for settlement purposes only if the same class would be certified for litigation. The proposal draws from the belief that settlement classes may prove useful in addressing a variety of problems that cannot be resolved by litigation classes. Choice-of-law problems offer one clear example. Application of different state laws to dispersed events may defeat class-based litigation of some claims because common questions no longer predominate. Settlements can be achieved that bypass these problems, and that provide the additional advantage of achieving similar treatment for people suffering similar injuries. Manageability problems offer another example. A single court may be hard-pressed to resolve litigation that embraces not only common class issues but also the individual issues that must be resolved as to each class member. Settlement can bypass these problems too, at times by providing alternative means of resolving individual disputes under the court's aegis but without making impossible demands on the court.

The decision to address (b)(3) settlement classes through a new paragraph (b)(4) has already generated a modest drafting controversy. Paragraph (b)(4) would allow "certification under subdivision (b)(3) for purposes of settlement." Following drafting guidelines created for the Standing Committee by Bryan Garner, author of *A Dictionary of Modern Legal Usage*, "under" is used in place of the familiar but ungainly "pursuant to." The explicit intention of the Advisory Committee is that a class authorized by (b)(4) is a (b)(3) class. As a (b)(3) class, it must satisfy all of the prerequisites of subdivision (a) and also must satisfy all of the (b)(3) requirements. In addition, it carries the usual consequences of all (b)(3) classes, including the specific (b)(3) notice requirements and the right to request exclusion from the class. Many observers, however, have supposed that the (b)(4) class is a new entity, cut adrift from any of these requirements. This reaction is cause at once for chagrin and reconsideration. More words can be used to convey the same thought. It will be interesting to see whether there is such general concern that the drafting must be revised.

This description of the changes proposed for public comment leaves aside other changes that were carefully pursued to the final step before recommending publication. Two deserve specific comment.

Preliminary consideration of the merits was one change that rose to win great favor, met doubts, and then died. There is great concern that class actions may be brought on insubstantial claims, just one step beyond the level that can win precertification dismissal by motion for failure to state a claim or for summary judgment. Part way through the Advisory Committee's deliberations, it was suggested that the rule should be amended to reject the Supreme Court ruling that the merits of the claim must not be considered in ruling on class certification. Much comfort was drawn from the imperfect analogy to the tentative evaluation of the merits made in

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ruling on preliminary injunctions. Alternative drafts were prepared. One set a low threshold, requiring only that the class claims, issues, or defenses be "not insubstantial on the merits." The other set a higher threshold, invoking a balancing process that weighed the prospect of class success against the costs and burdens imposed by certification. To the surprise of all concerned, the defense lawyers who initially championed this proposal had second thoughts. Consideration of the merits even in a tentative fashion would justify substantial discovery on the merits before the certification decision. Worse, a finding that a sufficient showing had been made could affect all subsequent events, particularly the settlement process that resolves most class actions just as it resolves most other litigation. These concerns were not assuaged by adding the qualification that the merits need be considered only at the request of a party opposing class certification. Despite some lingering regrets, this proposal was abandoned.

The other near miss was part of the "just ain't worth it" proposal. In addition to consideration of the probable relief to individual class members, interim drafts provided for weighing the public interest in class relief against the costs and burdens of class litigation. This language was meant to confirm the importance of enforcing small claims that, in the aggregate, represent significant public enforcement values. In the end, however, it was feared that explicit reference to the public interest might seem to invite judicial evaluation of the relative importance of different substantive policies. Different judges will assess differently the benefits of enforcing any of the many modern regulatory statutes. Rather than encourage such substantive distinctions, it was thought better to assume an unvarying public interest in enforcing any valid statutory or commonlaw policy. This approach has manifest attractions. At the same time, it may encourage sweeping enforcement against technical violations of ambiguous enactments at the farthest reach of meaning, committed by persons who diligently sought to comply. Some will regret the passing of this proposal.

Much activity will occur before any final action on the Rule 23 proposals. Much hard work will be done, most of it by lawyers and judges who voluntarily assume the burdens of responsible participation in the public comment process. All of the proposals that have been advanced, and many of those that have been put aside, will be carefully reconsidered.

Evidence that the outcome of the Rule 23 proposals is not settled by the decision to publish can be found in many earlier experiences. Many proposals have been advanced and then substantially changed, deferred, or abandoned. Recent history provides examples enough. In 1995, the Committee published four proposals. One was beyond controversy, probably because it affected a corner of interlocutory admiralty appeal practice that affects few litigants or lawyers. A second seeks to restore the 12-member civil jury; this proposal has been recommended for approval by the Standing Committee to the Judicial Conference, but remains controversial because 12-member juries cost more than 6-member juries. A third, advanced in tandem with a parallel change in the Criminal Rules, sought to ensure attorney participation in voir dire examination of prospective jurors. The comments and hearings on this proposal showed a wide difference between the perceptions of lawyers and judges. Lawyers believe that many judges conduct inadequate voir dire examinations, while many judges believe that lawyers will deliberately subvert the process in search of adversary advantage. The Advisory Committee concluded that it would be unwise to attempt reconciliation through present rule changes. Instead, efforts will be directed toward mutual education of bench and bar in the hope that the present rule can be made to work better. A majority of federal judges now permit direct lawyer voir dire examination, and believe that it is effective so long as there is unquestioned authority to terminate or withhold the opportunity. If more come to permit lawyer participation, the present rule may prove better than the proposed alternative. Fourth and finally, a revised proposal to amend the provisions for discovery protective orders was republished. The comment process left the Advisory Committee uncertain whether any change is needed. More important, the Committee has decided to turn its attention again to the broader discovery questions that have been on — or close to — the Committee agenda without interruption for three decades. Should significant changes be made in the broad scheme of discovery, protective orders may be affected in ways that cannot be accommodated by present drafting.

Public comment taught much about these recent proposals. It will teach much about the current Rule 23 proposals. The broader the base of participation, the better the process will work. No more able group of commentators can be found than the readers of *Law Quadrangle Notes*. Your comments should be addressed to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Washington, D.C. 20544.

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Physician-Assisted Suicide

A bad idea

PHOTOS BY THOMAS TREUTER

The following essay is a shorter version of an article that is being published in the October 1996 issue of Issues in Law and Medicine. *That article in turn is based on a talk given at the 1996 Annual Meeting of the American Psychiatric Association in May at New York.*

Why so many people support Physician-Assisted Suicide

And why these reasons are not convincing

— BY YALE KAMISAR

It would be hard to deny that there is a great deal of support in this country — and ever-growing support — for legalizing physician-assisted suicide (PAS). Why is this so? I believe there are a considerable number of reasons. I shall discuss five common reasons — and explain why I do not find any of them convincing.

I.
The compelling force of heartrending individual cases

Many people, understandably, are greatly affected by the heartwrenching facts of individual cases, e.g., a person enduring the last stages of A.L.S. ("Lou Gehrig's disease"), who gasps: "I want . . . I want. . . to die." In this regard the media, quite possibly inadvertently, advances the cause of PAS.

A reporter often thinks that the way to provide in-depth coverage of the subject of assisted suicide and euthanasia is to provide a detailed account of a particular person suffering from a particular disease and asking: "How can we deny this person the active intervention of another to bring about death?" Or "What would you want done if you were in this person's shoes?"

But we should not let a compelling individual case blot out more general considerations. The issue is not simply what seems best for the individual who is the focal point of a news story, but what seems best for society as a whole.

Every one interested in the subject of PAS and active voluntary euthanasia (AVE) has heard emotional stories about people suffering great pain and begging for someone to kill them or help them bring about their death. But people like Kathleen Foley, the Memorial Sloan-Kettering Cancer Center's renowned pain control expert, and Herbert Hendin, the American Suicide Foundation's executive director, can tell very moving stories, too — stories militating against the legalization of PAS and AVE. They can tell us how suicidal ideation and suicide requests commonly dissolve with adequate control of pain and other symptoms — or how, for example, after much conversation with a caring physician, a suicidal patient — one who would have qualified for PAS if the procedure had been legal — changed his mind, how his desperation subsided, and how he used the remaining months of his life to become closer to his wife and parents.

I can hear the cries of protest now. Let terminally ill people (and perhaps others as well) do what they want. They're not bothering anybody else. Letting them do what they want won't affect anybody else.

But I am afraid it will. We are not merely a collection of isolated individuals; we are connected to each other in many different ways. Therefore, PAS and AVE are social issues and matters of public policy.

Suppose a healthy septuagenarian, who has struggled to overcome the hardships of poverty all his life, wants to assure that his two grandchildren have a better life than he did. So he decides he will sell his heart for $500,000 and arrange to have a trust fund established for his grandchildren. This does not strike me as an irrational or senseless act. But would "society" allow this transaction to take place? I think not. But why not? How can a prohibition against selling one's body parts be reconciled with the view that we have full autonomy over our lives and our bodies?

It is noteworthy, I believe, that although, when it issued its report in 1994, the New York Task Force on Life and the Law recognized that PAS or AVE "may be morally acceptable in exceptional cases," all of its twenty-four members concluded that compelling exceptional cases did not justify changing the law governing assisted suicide and voluntary euthanasia.

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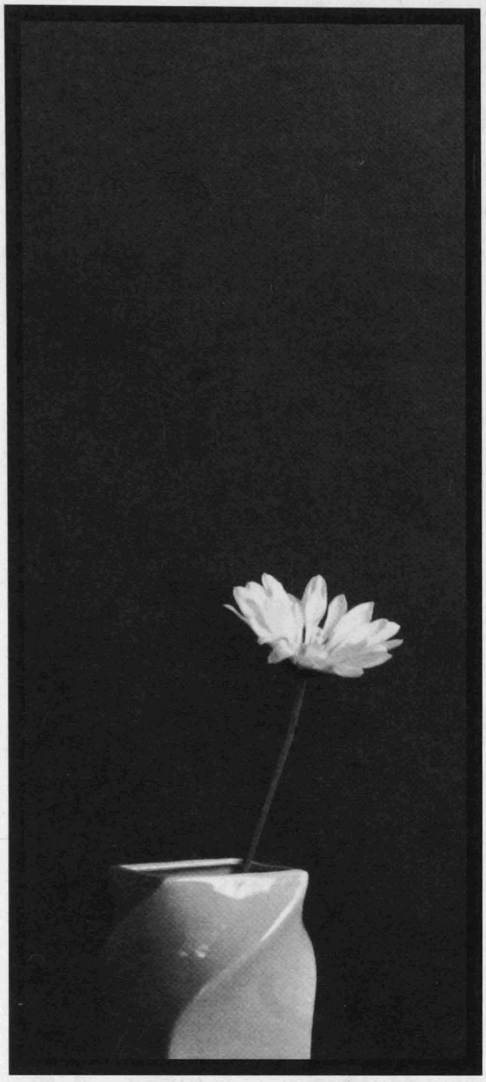
Late last year, a member of the Task Force, philosopher and bioethicist John Arras, looked back on his work on the project and recalled that he and his colleagues were deeply moved by the sufferings of some patients, but that all twenty-four members were ultimately convinced that these patients "could not be helped in a public way," that is to say, could not be given publicly-sanctioned assistance in committing suicide, without endangering a far greater number of highly vulnerable patients.

Professor Arras noted that he and the other members of the Task Force were painfully aware that whether they maintained the total prohibition against PAS and AVE or whether they lifted the ban for any group of patients, "there were bound to be victims." He added: "The victims of the current policy are easy to identify; they are on the news, the talk shows and the documentaries, and often on Dr. Kevorkian's roster of 'patients.' But who would be the victims of a more permissive policy?"

Professor Arras then maintained, as had the Task Force, that whatever criteria and procedures for justifiable PAS and AVE are ultimately chosen, "abuse of the system is highly likely to follow." If PAS were legalized, many requests for PAS would not be sufficiently voluntary given "the highly predictable failure of most physicians reliably to diagnose and treat reversible clinical depression, especially in the elderly population." As for exploring all reasonable alternatives to PAS, "given the abysmal track record of physicians in responding adequately to pain and suffering, we can also confidently predict that in many cases all reasonable alternatives will not have been exhausted."



Professor Arras noted the inaccessibility of decent primary care to some 37 million Americans, "the appalling lack of training in palliative care" even among cancer specialists, and discrimination on the basis of race and economic status in the delivery of pain control and other medical treatments. And he voiced serious doubts, as did the Task Force Report, that any reporting system would be sufficiently effective to adequately monitor these practices. For as the Dutch experience has demonstrated, physicians will be most reluctant to report instances of PAS and AVE to public officials, for fear of highlighting these instances at a time when family privacy is most needed. The likely result of this lack of oversight will be the inability of society to respond appropriately to disturbing incidents and long-term trends.

I think Professor Seth Kreimer of the University of Pennsylvania Law School recently summarized the "fearsome dilemma" presented by the assisted suicide issue very well when he observed:

"Forbidding [assisted suicide] leaves some citizens with the prospect of being trapped in agony or indignity from which they could be delivered by a death they desire. But permitting such assistance risks the unwilling or manipulated death of the most vulnerable members of society, and the erosion of the normative structure that encourages them, their families, and their doctors to choose life."

II.
Objections to legalizing PAS or AVE are limited to religious grounds

Another reason I think the assisted suicide-active voluntary euthanasia movement has made so much headway is that its proponents have managed to convince many that the only substantial objections to their proposals are based on religious doctrine.

In November of 1994, Measure 16, the Oregon ballot initiative, was narrowly approved by the voters and Oregon became the first state to legalize PAS. According to press reports, Oregon Right to Die and other proponents of PAS hammered away at the Roman Catholic Church or, a bit vaguely, at those who "think they have the divine right to control other people's lives."

I can only say that, so far as I know, I have never made a religious objection to PAS or AVE. Indeed, the primary reason I first wrote about this subject way back in 1958 was that I strongly disagreed with the view of British law professor Glanville Williams, the leading Anglo-American proponent of active voluntary euthanasia at the time, who maintained that "euthanasia can be condemned only according to a religious opinion." (In resisting Professor Williams' proposals, I took pains to call my article "Some Non-Religious Views Against Proposed 'Mercy-Killing' Legislation.")

I think many people share Professor Williams' view and that proponents of PAS and AVE have done their best to exploit this feeling. But I believe the New York State Task Force Report is strong evidence that Glanville Williams and other proponents of PAS are wrong. The Report spells out many nonreligious objections to legalizing PAS, a number of which were summarized by Professor Arras, whom I quoted earlier. It was these nonreligious concerns that led all twenty-four members of the Task Force to reach the unanimous conclusion that the total ban against assisted suicide should be kept intact.

III.
PAS and AVE are facts of modern life, so we ought to legalize and regulate them

Another argument for PAS that appeals to a goodly number of people goes something like this: A significant number of physicians have been performing assisted suicide anyway, so why not legalize it? Wouldn't it be better to bring the practice out in the open and to formulate clear standards than to keep the practice underground and unregulated?

It is not at all clear how prevalent the underground practice is. As Daniel Callahan (President of the Hastings Center) and Margot White (a lawyer specializing in bioethics) have pointed out in a recent article, however, if it is truly the case that current laws against euthanasia (and assisted suicide) are widely ignored by doctors, "why should we expect new statutes to be taken with greater moral and legal seriousness?" Evidently no physician has ever been convicted of a crime for helping a suffering patient die at her request. But, as Callahan and White ask, why should we expect that there will be any more convictions for violating the new laws than there have been for violating the laws presently in effect?

What Dr. Herbert Hendin said this spring in testimony before a Congressional subcommittee about the impact of legalizing euthanasia applies to the legalization of PAS as well: Absent "an intrusion into the relationship between patient and doctor that most patients would not want and most doctors would not accept," no law or set of guidelines covering euthanasia (or assisted suicide) can protect patients. Adds Hendin:

"After euthanasia [or assisted suicide] has been performed, since only the patient and the doctor may know the actual facts of the case, and since only the doctor is alive to relate them, any medical, legal, or interdisciplinary review committee will, as in the Netherlands, only know what the doctor chooses to tell them. Legal sanction creates a permissive atmosphere that seems to foster not taking the guidelines too seriously. The notion that those American doctors — who are admittedly breaking some serious laws in now assisting in a suicide — would follow guidelines if assisted suicide were legalized is not borne out by the Dutch experience; nor is it likely given the failure of American practitioners of assisted suicide to follow elementary safeguards in cases they have published."

IV.
There is little difference between ending life support and intervening to promote death

This March, in the course of ruling in a case called *Compassion in Dying v. Washington* that mentally competent, terminally ill patients, at least, have a constitutionally protected right to assisted suicide, an 8-3 majority of the U.S. Court of Appeals for the Ninth Circuit (covering California, Washington, Oregon and other western states) wrote that it could see "no ethical or constitutionally cognizable difference between a doctor's pulling the plug on a respirator and his prescribing drugs which will permit a terminally ill patient to end his own life." According to the Ninth Circuit, the important thing is that "the death of the patient is the intended result as surely in one case as in the other."

The Ninth Circuit found the right to assisted suicide grounded in the Due Process Clause. A month later, in a case called *Quill v. Vacco*, a three-judge panel of the U.S. Court of Appeals for the Second Circuit (covering New York, Connecticut and Vermont) struck down

but what seems best for society as a whole.

New York's law against assisted suicide on equal protection grounds. The Second Circuit was no more impressed with the alleged distinction between "letting die" and active intervention to bring about death than the Ninth circuit had been. It "seem[ed] clear" to the Second Circuit that "New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for being attached to life-sustaining equipment, are not allowed to [do so]."

The Ninth Circuit's due process analysis would seem to apply to active voluntary euthanasia as well as PAS. So would the Second Circuit's equal protection analysis. If persons off life support systems are similarly situated to those on such systems, why aren't terminally ill people who are unable to perform the last, death-causing act themselves, but who want the active intervention of another to bring about death, similarly situated to terminally ill people who are able to perform the last, death-causing act themselves and want to enlist the assistance of another in bringing about death?

If a mentally competent, terminally ill person is determined to end her life with the active assistance of another, but needs someone else to administer the lethal medicine, how can she be denied this right simply because she cannot perform the last, death-causing act herself? Applying the reasoning of the Second Circuit, wouldn't denial of the latter person's right constitute — and at this point I am quoting the very language the Second Circuit used — a failure to "treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths"?

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The phrase has been used at various times to refer to (a) the right to refuse or to terminate unwanted medical treatment, including life-saving treatment; (b) the right to assisted suicide, i.e., the right to obtain another's help in committing suicide; and (c) the right to active voluntary euthanasia, i.e., the right to authorize another to kill you intentionally and directly.

Until March of this year the only kind of "right to die" any American appellate court, state or federal, had ever established — and the only right or liberty that the New Jersey Supreme Court had recognized in the Karen Ann Quinlan case (1976) and the Supreme Court had assumed existed in the Nancy Beth Cruzan case (1990) — was the right to reject life-sustaining medical treatment or, as many have called it, the right to die a natural death. Indeed, the landmark Quinlan case had explicitly distinguished between "letting die" on the one hand and both direct killing and assisted suicide on the other.

When all is said and done, both the Second and Ninth Circuit rulings turn largely on the courts' failure to keep two kinds of "rights to die" separate and distinct — the right to terminate life support and the right to assisted suicide. And their failure to do so indicates that, when faced with the specific issue, they are unlikely to keep a third kind of "right to die" separate and distinct — active voluntary euthanasia.

I believe the Ninth Circuit was quite wrong when it claimed an inability to find any "constitutionally cognizable difference" between a doctor's "pulling the plug" on a terminally ill patient and his providing a patient with lethal medicine so that she could commit suicide. I think

the Second Circuit was equally wrong when it concluded that terminally ill patients on life-support systems and those not on such systems are "similarly situated" or "similarly circumstanced."

The reasons that the cases decided by the Ninth and Second Circuit are so difficult is that they involve two competing doctrines or traditions. The right to terminate life support grows out of the doctrine of informed consent, a doctrine firmly entrenched in American tort law. The logical corollary of that doctrine, of course, is the right to reject medical treatment. The other tradition, which has continued to exist alongside the first one, is the anti-suicide tradition. This is evidenced by society's discouragement of suicide (indeed, by the state's power to prevent suicide, by force if necessary) and by the many laws criminalizing assisted suicide.

In the 1990 Cruzan case, the only "right to die" case ever decided by the U.S. Supreme Court up to now, a majority of the Court, perhaps as many as eight justices, evidently decided that the termination of artificial nutrition and hydration was more consistent with the rationale of the cases upholding the right to reject medical treatment. So far as we can tell, only Justice Scalia, who wrote a lone concurring opinion, thought the case implicated the anti-suicide tradition.

Justice Scalia's opinion in Cruzan was almost totally ignored by his colleagues. The other eight justices all framed the issue in terms of a right to be free from "unwanted medical treatment" or, more specifically, "unwanted artificial nutrition and hydration." None of them had anything to say about a "right to suicide."

The Ninth and Second Circuit opinions to the contrary notwithstanding, there are a number of important differences between withholding or withdrawal of life-sustaining medical treatment and active intervention to promote or to bring about death.

For one thing, the refusal of life-sustaining treatment is an indispensable part of medical practice. Approximately 70 percent of all hospital and nursing home deaths follow the refusal of some form of medical intervention. If society prohibited the rejection of life-sustaining treatment, vast numbers of patients would be at the mercy of every technological advance in medicine. Moreover, if people could refuse medical treatment that might turn out to be lifesaving, but not discontinue it once initiated, many would not seek such treatment in the first place.

In short, letting a patient die at some point is a practical condition upon the successful operation of medicine. But the same cannot be said of PAS or physician-administered AVE. This is especially so if patients' pain is adequately treated (although presently it frequently is not) and patients understand they have a right to refuse treatment or to demand the withdrawal of burdensome treatments (although presently they often do not).

Not only would a prohibition against rejecting life-sustaining treatment oppress many more people than would a ban on PAS, it would impose a much more severe burden. The prohibition against assisted suicide does foreclose an "avenue of escape," but it does not totally occupy a person's life or make affirmative use of his body. To deny a person the right to terminate life-support, however, is as Yale Law Professor Jed Rubenfeld has put it, to force one into "a particular, all-consuming, totally dependent, and indeed rigidly standardized life: the life of one confined to a hospital bed, attached to medical machinery, and tended to by medical professionals."

To allow a patient to resist unwanted bodily intrusions by a physician is hardly the same thing as granting her a right to determine the time and manner of her death. The distinction between a right to refuse medical treatment and the right to PAS is a comprehensible one and a line maintained by almost all major Anglo-American medical associations.

I am well aware that the distinction I am defending is neither perfectly neat nor perfectly logical. But what line is? Surely not the line between those who are terminally ill and those who will have to endure what they consider an intolerable life for a much longer period. Nor the distinction between assisted suicide and active voluntary euthanasia.

I believe the line between "letting die" and actively intervening to bring about death represents a cultural and pragmatic compromise between the desire to let seriously ill people carry out their wishes to end it all and the felt need to protect the weak and the vulnerable. On the one hand, we want to respect patients' wishes, relieve suffering, and put an end to seemingly futile medical treatment. Hence we allow patients to refuse life-sustaining treatment. On the other hand, we want to affirm the supreme value of life and to maintain the salutary principle that the law protects all human life, no matter how poor its quality. Hence the ban against assisted suicide and active voluntary euthanasia.

I venture to say that one of the purposes of the distinction between the termination of life support and assisted suicide (or active voluntary euthanasia) — or at least one of its principal effects — is to have it both ways. The two sets of values are in conflict, or at least in great tension. Nevertheless, until now at any rate, we have tried to honor both sets. We should continue to try to do so.

V.
If a right to PAS were established, it would only apply to the terminally ill

Most proponents of the right to PAS speak only of — and want us to think only about — such a right for the terminally ill. (Terminal illness is commonly defined as a condition that will produce death "imminently" or "within a short time" or in six months.) Such advocacy is quite understandable. A proposal to legalize PAS, but to limit that right to the terminally ill, causes less alarm and commands more general support than would a proposal to establish a broader right to assisted suicide. A proposal to permit only terminally ill patients to enlist the aid of physicians to commit suicide is attractive because it leads the public to believe that adoption of such a proposal would

constitute only a slight deviation from traditional standards and procedures. And, as Justice Frankfurter once observed, "the function of an advocate is to seduce."

But there are all sorts of reasons why life may seem intolerable to a reasonable person. To argue that suicide is plausible or understandable in order to escape intense physical pain or to end a physically debilitated life but for no other reason is to show oneself out of touch with the depth and complexity of human motives.

A few proponents of assisted suicide have taken the position that it would be arbitrary to exclude from coverage persons with incurable but not terminally ill progressive illnesses, for example, a person in the early stages of Alzheimer's disease. But why stop there? Is it any less arbitrary to exclude the quadriplegic? The victim of a paralytic stroke? One afflicted with severe arthritis? The disfigured survivor of a fire? The mangled survivor of a road accident? One whose family has been wiped out in an airplane crash?

If personal autonomy and the termination of suffering are supposed to be the touchstones for physician-assisted suicide, why exclude those with non-terminal illnesses or disabilities who might have to endure greater pain and suffering for much longer periods of time than those who are expected to die in the next few weeks or months? If the terminally ill do have a right to assisted suicide, doesn't someone who must continue to live what she considers an intolerable or unacceptable existence for many years have an equal — or even greater — right to assisted suicide?

If a competent person comes to the unhappy but firm conclusion that her existence is unbearable and freely, clearly and repeatedly requests assisted suicide, and there is a constitutional right to some form of assisted suicide, why should she be denied the assistance of another to end her life just because she does not "qualify" under somebody else's standards? Isn't this an arbitrary limitation of self-determination and personal autonomy? As Daniel Callahan has observed: "How can self-determination have any limits?" If a person is mentally competent and determined to commit suicide with the assistance of another, why aren't her desires or motives — whatever they may be — sufficient?

There is another reason I very much doubt that a right to assisted suicide could or would be limited to the terminally ill for very long — the analyses of the two federal appellate courts that handed down the "right to die" decisions I have discussed earlier. Both the Second and Ninth Circuits seemed to share the view of proponents of assisted suicide who insist that there is no principled difference in terms of constitutional doctrine and precedent between the alleged right to assisted suicide and the established right to terminate life support. The problem is that the right to reject life-sustaining treatment has not been limited to the terminally ill.

One need only recall the Elizabeth Bouvia case, which arose a decade ago. At the time of the litigation, Ms. Bouvia, a young woman afflicted with severe cerebral palsy, had a long life expectancy. Nor was she unconscious or mentally impaired. Indeed, the court described her as both "intelligent" and "alert." Nevertheless, she was granted the relief she sought — the right to remove a nasogastric tube keeping her alive against her wishes.

To be sure, neither the Bouvia case nor other cases upholding the right of non-terminally ill persons to reject life-sustaining treatment were decided by the U.S. Supreme Court. But Bouvia and these other cases have been well received by bioethicists and medico-legal commentators. As Professor Alan Meisel pointed out in the new edition of his treatise on the "right to die," "the right of a competent person to refuse medical treatment is virtually absolute." If so, and if there is no significant distinction between "letting die" and active intervention to bring about death, how can the latter right be limited to the terminally ill?

A Final Remark

Four decades ago, Glanville Williams, a leading proponent of assisted suicide and euthanasia, admitted that he "prepared for ridicule" whenever he described these practices as "medical operations" or "medical procedures." "Regarded as surgery," he acknowledged, these practices are "unique, since [their] object is not to save or prolong life but the reverse." Today, few people chuckle when PAS is classified as a medical procedure — or even when it is called a "health care right."

As my former colleague Robert Burt recently observed, at a time when tens of millions of Americans lack adequate health care and Congress has refused to do anything about it, it would be most ironic if the judiciary were to select PAS as "the one health care right that deserves constitutional status."

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