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THE UNIVERSITY OF MICHIGAN LAW SCHOOL

VOLUME 41 • NUMBER 2
SUMMER 1998

# LAW QUADRANGLE NOTES

Law School Coll MI

Genocide: Then and Now

Enlightenment

Law and Literature

UNIVERSITY OF MICHIGAN
LAW SCHOOL

# UPCOMING EVENTS

| | |
|---|---|
| September 9-11 | Cook Lectures: Stephen Jay Gould, Museum of Comparative Zoology/Louis Agassiz Museum, Harvard University |
| September 11-13 | Reunions of the classes of 1953, '58, '63, '68 and '73 |
| September 18-20 | Reunions of the classes of 1978, '83, '88 and '93 |
| October 1 | Dean's Forum with Jack D. Sweet, '57, Chairman, Guardian Mortgage Co., Inc. (by invitation) |
| October 16-17 | "What's the Prognosis?" Symposium on Managed Care in the Next Century |
| October 21 | Dean's Forum with Stuart Ho, '63, Chairman, Capital Investment of Hawaii, Inc. (by invitation) |
| October 22-24 | Committee of Visitors |
| October 24 | Scholarship Breakfast |
| November 19 | Dean's Forum with Lester L. Coleman III, '68, Executive Vice President/ General Counsel, Halliburton Co. (by invitation) |
| December 5 | Senior Day |
| February 19-20, 1999 | Symposium on Terrorism |
| March 27 | Butch Carpenter Dinner |

*This calendar is correct at deadline time, but entries may change.*

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**Cover: The warmth and light of summer make a refreshing time for conversation on the lawn of the Law Quadrangle.**

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# MESSAGE FROM DEAN LEHMAN

Over the past four years, I have used my messages in *Law Quadrangle Notes* to comment on the attributes of an outstanding attorney. I have noted the great lawyer's commitments to intellectual growth and renewal, integrity, teaching others about the law, and serving as citizen. During the coming year, I will explore a related theme: that of the great lawyer as keeper of our profession's image.

The legal profession has long inspired a broad range of public images. Throughout the ages, great lawyers have stood as champions of the underdog, bulwarks against injustice, diplomats, and civic leaders. We have had countless opportunities to take pride in the lives of lawyers who exemplify the highest aspirations of our craft, lawyers such as Patrick Henry, Abraham Lincoln, Clarence Darrow, Learned Hand, and Thurgood Marshall.

To be sure, there are other images as well. While it may be easy to romanticize the way lawyers have traditionally been viewed, in truth the caricature of an attorney as venal, unscrupulous, and self-centered has been a longstanding feature of popular culture. And to our great chagrin, the practicing bar has all too obligingly provided examples to reinforce that caricature.

In conversations with our graduates today, I often hear concern expressed that the average citizen holds the profession of law in ever-growing disdain. Even more unsettling, I have observed that lawyers themselves increasingly deride, sometimes with justification, the work and behavior of their colleagues.

I have yet to see a compelling analysis of the presumed decline in public attitudes toward lawyers. No doubt any investigation would take into account changing societal attitudes towards authority, especially towards government, with which lawyers have been closely associated since the framing of the Constitution. Other sources include a shift in media portrayals of the lawyer as an authority figure with special public responsibilities, the rapid growth in the number of practicing attorneys, increased economic pressure on both lawyers and clients alike, and changes in our understanding of a "successful" life.

Photo by LARIME PHOTOGRAPHIC

**I believe that we must consider how individual lawyers, sensitive to the importance of sustaining public appreciation for the law as a noble calling, can contribute to that appreciation.**

Whatever such a study might conclude, I believe that we must consider how individual lawyers, sensitive to the importance of sustaining public appreciation for the law as a noble calling, can contribute to that appreciation. And I believe that, as critical as lawyering skills are to the profession, so too are the links that lawyers offer to their colleagues, their families, their friends, and their communities. A case in point is Michigan-trained lawyer Clarence Darrow.

A recently discovered treasure trove of Darrow's correspondence, currently on loan from his granddaughters to the University's Bentley Library, provides elegant evidence of the ways in which people from Mother Jones to Theodore Dreiser to Helen Keller came to depend on Darrow for comfort, support, and encouragement. In their letters to him, some of the most prominent and influential people of their time acknowledged the ways in which he supported their aspirations. [Ed.: For more on the Darrow papers, see the story on commencement, page 24.]

I have no doubt that our profession's image benefited enormously from the courage and leadership of Clarence Darrow. Yet I also know that it benefited enormously from Darrow's humanity, from the kindnesses that he showed to friends and acquaintances. And, simple as it sounds, this is where I think we must all start to rebuild the image of the legal profession, among ourselves and within our communities.

The crushing demands of modern life, the long hours spent on tasks which are considered necessary for professional success, can make it difficult for a lawyer to find time for others, to make room for small gestures of kindness. At the same time, those very demands make us even more likely to recognize and appreciate the moments when people go out of their way to be a friend. And when lawyers, whose history is filled with a generous sense of community leadership and model citizenship, are willing to do so, they help to rehabilitate an awareness that our profession is filled with people who are imbued with a generous spirit. And that generosity of spirit lies at the core of the image we wish for the public to associate with those who have chosen a life in the law.

Jeffrey S. Lehman

# Jessup team wins top U.S. spot, fifth worldwide

Law School team members were ecstatic at the final results: U.S. champion and fifth place worldwide in the Jessup International Moot Court Competition held in the spring at Washington, D.C., in conjunction with the annual meeting of the American Association for International Law (ASIL). It was the best performance by a Law School team since 1969, when the team placed second.

"This year's performance was the third year in a row of improved performance by the Michigan team, which has won our region all three years," said second-year law student Jeff Silver, who coached this year's team after competing as a team member last year. Silver won a third place for speaking when he competed last year.

"Michigan's performance is all the more impressive because our team has historically consisted largely of 1Ls, some of whom have not taken international law. Most schools compete with 2Ls and 3Ls."

The Law School team — made up of Eric Moutz, Brian Newquist, Ken Pippin and Matt Roskoski — counted a team from New York University Law School among its victims before finally falling to the University of Canterbury, New Zealand, in the quarterfinals.

The competition involved 59 teams from the world, Silver explained. "Michigan was one of 11 teams to have won a region of the U.S.—a total of 119 U.S. schools sent teams to the regional competitions — and advanced to the international rounds to compete against 48 other teams from more than 40 other countries," he said. "In the preliminary rounds, Michigan went 4-0, soundly beating teams from the University of Texas, Villanova, Ukraine and the Czech Republic. That performance earned Michigan the No. 3 seed in the "sweet 16," bested only by New York University and a team from Mexico.

"Because the competition rules allow a maximum of one team from each country in the final eight, Michigan was forced to argue against New York University in the first round of elimination. We prevailed in a close match, only to miss by a slim margin in the quarterfinals."

Earlier this year, in regional competition at Michigan State University in February, the Law School team went undefeated in six rounds to beat out 10 competitors and earn the right to compete in the International Rounds at Washington, D.C., March 30-April 4.

"As a first-year student I couldn't compete in the Campbell [competitions]," said Pippin. Taking part in the Jessup competition offered the chance to learn about international law and to develop skills in writing briefs and oral argument, he said.

Continued on page 4

*Dean Jeffrey S. Lehman, '81, congratulates the Law School's Jessup International Moot Court team for winning first place in the United States and fifth place worldwide in competition at Washington, D.C., March 30-April 4. From left are: Ken Pippin, Keisha Talbett, Brian Newquist, LL.M. candidate, Matthias Wolf (who acted as a practice judge and resource person), Eric Moetz, Jeff Silver (coach) and Matthew Roskoski.*

*Continued from page 3*

Preparation meant keeping up with cases at the International Court of Justice, which ruled during the team members' preparation that it has jurisdiction to consider a country's challenge to a UN Security Council action. The case involved Libya's refusal to give up two nationals for trial in the Pan American Flight 103 bombing case over Lockerbie, Scotland, in 1988.

The Jessup case had many parallels. Typically for the mock trial competition, the problem posed for participants was complex and paralleled current issues. This year's problem involved an accused war criminal from a country that has broken up after civil war who has fled to a third state. One of the successor states seeks his extradition to face charges of murder, treason and sedition and seeks damages against the country to which he has fled. A UN tribunal, modeled after the Yugoslavian and Rwandan tribunals, also seeks to try him.

The extradition issue is amply complicated, but Jessup would not be Jessup if it did not further thicken the legal soup. In this case, the accused war criminal has sheltered some $20 million in a country that has extremely strict bank secrecy laws and refuses to release any information about the accused's funds.

Newquist and Moetz researched the issues of extradition and Security Council authority; Pippin and Roskoski dug into the issues surrounding bank secrecy and claims for damages. Moutz and Pippin argued for the plaintiff; Newquist, the only second-year student on the team, and Roskoski argued for the respondent.

First-year law student Keisha Talbot worked in preparing briefs but was unable to take part in the competitions. LL.M. candidate Matthias Wolf of Switzerland served as a resource person and practice judge for the participants.

Professor José Alvarez and Associate Dean for International Programs Virginia A. Gordan also supported the team. Alvarez, Visiting Professor Bruno Simma of the University of Munich, and John Crook, Assistant Legal Adviser for UN Affairs at the U.S. State Department, judged a dress rehearsal in January. During his visit to the Law School Crook also spoke on the Lockerbie case for the International Law Workshop (see story page 16).

Team members practiced together at least five hours weekly, and spent countless hours individually researching and preparing their cases.

"Speaking for myself, I have learned a tremendous amount about international law," said Newquist. "It's a tremendous learning opportunity."

The issues in the Jessup competition also sharpened participants' interest in events in the former Yugoslavia and the Balkans, added Pippin. And being part of the team meant that any member could call on any other member if necessary. "I tried out because I wanted to be a member of a team," said Pippin. "I learned that my first year. It was very nice to be in an environment where I can say, 'Matt, I need help on this.'"

## Client counseling team places third

The team of first year law students Bruce Manning and Chung Han Lee placed third in the regional round of Client Counseling competition in February at Queens University in Kingston, Ontario.

This year's competition focused on landlord and tenant issues, but competitors were given only sketchy, general information ahead of time. Much of their effort had to be focused on getting detailed information from their clients.

Teams from about 100 law schools participated in the annual competition. The contest is sponsored by the ABA Law Student Division to promote awareness of and interest in "the preventative law and counseling functions" of legal practice and to further students' development of "interviewing, planning, and analytical skills" and the "lawyer client relationship."

Manning and Lee beat out 21 teams in the intraschool round on February 7 to win the right to go to the regional competition the following weekend. At Queens University, they placed third behind teams from Ohio Northern University and the University of Louisville.

## Advocacy competition team looks beyond 'Legal Practice'

First-year law student Matthew Scott enjoyed his mock trial experience as an undergraduate at the University of Maryland. And he enjoyed the oral advocacy and persuasive writing skills that he honed in Legal Practice Program classes during his first two terms as a law student. So, as his Legal Practice classes neared completion, he and some of his fellow summer starters began to look around for an advocacy competition or a competition that they could join which would enhance their advocacy and legal analysis skills.

They discovered the ABA-sponsored National Appellate Advocacy Competition, secured Law School support for their participation, and in March competed so successfully against more established and more experienced teams that they came within two points of toppling the defending champion.

"We got a taste for it, and realized that that's where the process ended after the first year," explained team member Nora FitzGerald, who had worked closely with Scott and team member Jackson Lewis in the Legal Practice class taught by Clinical Assistant Professor Carolyn Spencer. The other two team members, Bill Henn and Margo Schneidman, had worked together in the Legal Practice class taught by Clinical Assistant Professor Lorray S.C. Brown. Brown, who coached the Frederick Douglass Moot Court team (see story on page 5), also served as a judge for the National Appellate Advocacy Competition practice rounds.

The issue for the advocacy competition was two-pronged:

1. Does a public high school violate the Establishment Clause when it permits a student-initiated, student-led prayer at its graduation ceremony?

PHOTO COURTESY CLINICAL ASSISTANT PROFESSOR CAROLYN SPENCER

*Members of the Law School's National Appellate Advocacy Competition are shown at Houston, where they came within two points of toppling defending champion South Texas College of Law in the regional contests of the ABA-sponsored competition. From left are: Clinical Assistant Professor Carolyn Spencer, the team's coach; Nora FitzGerald, Jackson Lewis, Matthew Scott, Margo Schneidman and Bill Henn. The team members say the experience sharpened their litigation and brief-writing skills.*

2. Does a public high school violate the Establishment Clause when its choir director selects and its choir performs two songs that reflect Christian religious beliefs at its graduation ceremony?

The case is presented to the competitors as an appeal to the U.S. Supreme Court.

Law School team members FitzGerald, Lewis and Scott concentrated on writing the brief for the respondent; Henn and Schneidman concentrated on the case for the petitioner. Both teams, however, had to be ready to argue either side.

"We taught each other," said Schneidman. "That's the advantage of having two sides."

Research, brief writing, and practice required at least 10 hours per week, and often more, team members said. "It was about like having an extra class," FitzGerald said.

"It was a learning issue," she said. "I was petrified of oral advocacy." Added Schneidman: "Now I have a pretty good sense of what oral advocacy is about."

Team members and Spencer, their coach, said support from Law School officials, faculty, fellow students, graduates and others helped them greatly. For example, the Honorable Richard Suhrheinrich, of the U.S. Court of Appeals for the Sixth Circuit Court, acted as judge for one practice session and had high praise for the quality of the briefs that the students prepared. Help also came from graduates like Thomas Blaske, '76, Megan Fitzpatrick, '97, Jean L. King, '68, and James Moore, '72, and from professors like Yale Kamisar, Nick Rine, Suellyn Scarnecchia, John Beckerman, Howard Bromberg and Brown.

Spencer also praised the team members themselves for "the way they cooperated and taught each other." When practice was ended and regional competition was real, they faced 29 competitors and more than held their own.

"After two days of intense arguments, we made it to the championship round, where we came within two points of defeating South Texas College of Law, the defending national champions," Spencer said.

"Our two teams of summer starters, who scored above average on their briefs, competed against second and third year students from other law schools. Everyone did their best and did U-M proud. We look forward to competing again next year."



# Law School team argues in Frederick Douglass Moot Court Competition

A team of two Law School students advanced to the third round of competition in the National Black Law Students Association's (BLSA) Frederick Douglass Moot Court Competition at Indianapolis in February.

The students, summer starters Bizunesh Talbot and Paula Osborne, had to prepare their case on two issues: the admissibility of polygraph tests; and the sentencing disparity between conviction for possession of crack and the sentence given for conviction of possession of cocaine.

"Specifically," explains Clinical Assistant Professor Lorray S.C. Brown, who coached the team, "possession of one gram of crack is punished as heavily as possession of 100 grams of cocaine. The argument here is that since most users of crack are African Americans, Congress discriminated against African Americans. Thus, Congress violated the Equal Protection component of the Fifth Amendment Due Process Clause when it enacted the legislation that created this 100:1 ratio."

"There were 32 teams and six rounds," Brown explained of the competition, which was held in conjunction with BLSA's Midwest Regional Convention. "The team advanced to the third round. In each round, the team received very high marks in the oral arguments. In fact, after the first two rounds, the team had the fourth highest score for oral arguments."

Talbot, BLSA's newly elected National Vice Chair, will supervise next year's Frederick Douglass Moot Court Competition.

# Lecture/discussion series aims at 'Understanding Race'

"Why should 51 percent of voters determine the outcome for 100 percent of the people?" asks Lani Guinier, whose contested nomination as Assistant U.S. Attorney General for Civil Rights was withdrawn by President Clinton in 1993 before she had an opportunity to defend her views. "Why should 51 percent of the voters have power over 100 percent of the voters?" asks Guinier, the University of Pennsylvania law professor who this fall becomes the first tenured black woman on the Harvard Law School faculty.

These percentages, which Guinier cited during a talk at the Law School on April 28, came from her work as a civil rights attorney battling Arkansas voting procedures during the 1980s. The issues of participation in our democracy that she wrestled with then remain major questions today, she says. They reflected "the problem of having a simple majority decide" and convinced her that "a more diverse set of problem solvers is useful in solving the problems" of modern American life. Looking for solutions to the issues of democratic participation has led her to examine creative measures like proportional representation, affirmative action and others, she said.

Guinier's appearance at the Law School concluded the five-part series "Understanding Race: (De)Constructing Paradigms and Implications for Legal Education," which took place during the Winter Term under the sponsorship of the *Michigan Journal of Race & Law.*

Guinier, who details the story of her nomination and its withdrawal in her new book, *Lift Every Voice*, read two excerpts during the first part of her program. She devoted the second part to a discussion of the different impact of California's elimination of affirmative action and the introduction of a "10 percent" rule in Texas to replace affirmative action in admission to the state's two flagship public universities.

In California, she said, political leaders have pinned the problem on Scholastic Aptitude Test (SAT) scores and become demagogic toward racial minorities and immigrant groups. But in Texas, she said, leaders have embraced diversity as an economic benefit and part of the training they want for the state's new generation of leaders. As a result, they grant admission to the University of Texas-Austin and Texas A&M University without taking the SAT to anyone who graduates in the top 10 percent of his or her high school class. As of March 1998, when the 10 percent law went into effect, the number of African American enrollees has increased 7 percent, the number of Mexican American enrollees has jumped 21 percent and the number of white students from poor, rural backgrounds also has increased, she said.

"And so I would urge you in Michigan to take stock of the lessons of Texas and California, and see that excellence and diversity are not enemies, but the opposite," she said. "This is really about democracy, about having a different kind of public communication, about all the affected parties having the opportunity to think, to discuss and to problem solve. This is the challenge of converting a crisis into an opportunity."

*University of Pennsylvania Law School Professor Lani Guinier, who this fall will become the first black woman to be part of the tenured faculty at Harvard Law School, tells a Law School audience that creative approaches, like proportional voting and a new law in Texas that grants university admission to the top 10 percent of high school graduates, are needed to address current problems of participation in the U.S. democracy. Guinier, who visited the Law School in April, was the final speaker in the five-part program "Understanding Race: (De)Constructing Paradigms and Implications for Legal Education," presented by the* Michigan Journal of Race & Law.

"I am not here to sell the 10 percent approach," she told a questioner. "I am here to advocate reframing the conversation in a way to meet the needs of this situation and this state."

The "Understanding Race" series began in January as part of the Law School and University of Michigan's celebration of Martin Luther King Day. As Professor of Law Deborah C. Malamud noted in her introduction to the first program, "this is the first gathering in the shadow of the pending

*Cheryl Harris of the Chicago-Kent College of Law explains how U.S. Supreme Court decisions are maintaining the status quo in race relations during the program "An Introduction to Critical Race Theory" at the Law School in January. Other panelists, from left, are: Juan Perea of the University of Florida College of Law; Garry Peller of Georgetown University Law Center; and Keith Aoki of the University of Oregon School of Law.*

lawsuit." Her reference was to the suit that the Washington, D.C.-based Center for Individual Rights has brought that challenges the Law School's admission policies. Earlier, the Center also had brought a similar suit against the University's College of Literature, Science and the Arts, the U-M's largest undergraduate unit.

"Both sides of the affirmative action debate want to have Dr. King on their sides, and truth to tell, there is something in his writing for both sides," Malamud said in her introduction to the first program. (See page 10.) "Dr. King seems to have seen both the uses and the limitations of race-based affirmative action."

Noting that the series of programs grew out of a student-run reading group that studied critical race theory, Malamud praised the organizers and called the series "an example of taking the curriculum into your own hands."

Critical Race Theory (CRT), according to organizers of the series, "seeks to incorporate the unique experiences of members of various racial and ethnic backgrounds. . . . Central to CRT is the recognition that racism is ordinary, not aberrant or exceptional in American society, and must be addressed contextually."

The other four programs in the series were:

**1. An Introduction to Critical Race Theory**, a panel discussion that featured Keith Aoki, Associate Professor at the University of Oregon School of Law; Cheryl Harris, Associate Professor, Chicago-Kent College of Law; Garry Peller, Professor, Georgetown University Law Center; and Juan Perea, Professor, University of Florida College of Law.

Aoki, a Japanese American whose parents moved to Michigan from the west coast to avoid internment during World War II, said that he did not identify himself as an Asian American until 1994, when a colleague at the University of Oregon asked him to teach a course called Asian Americans in U.S. Law and Culture. As he prepared to teach the course, he found himself asking "Why didn't I learn that in Law School, if not before?"

Harris said that "a conservative majority of the Supreme Court" has the goal of "maintenance of the status quo and its attendant inequality and privilege." Race is "historically and legally defined" and the Supreme Court is "ethnicizing race" and making it "a false or illusory character."

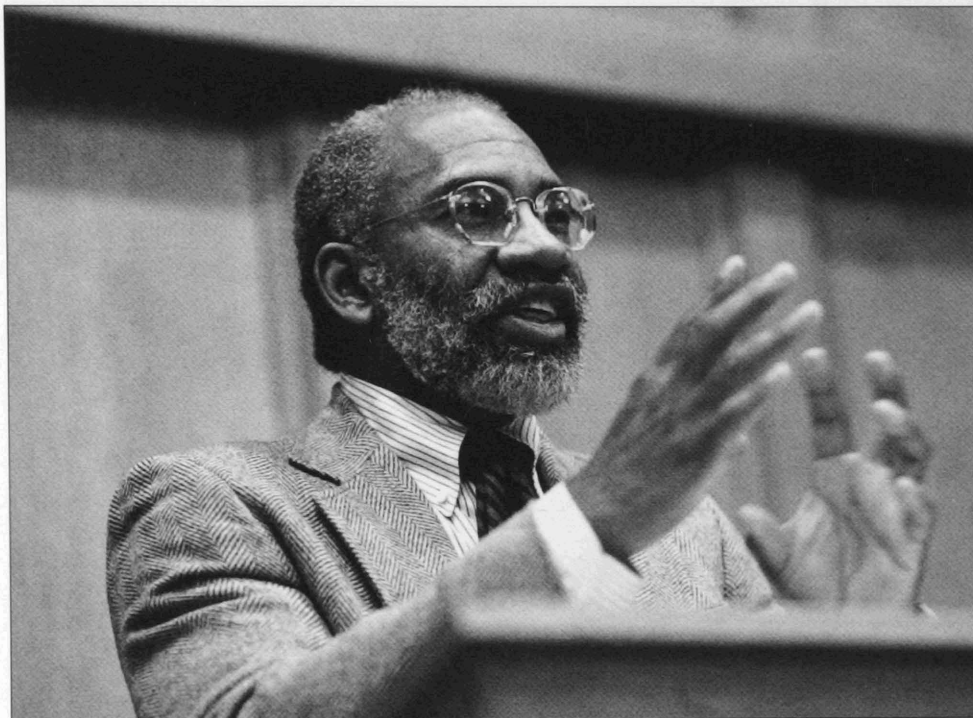
Race consciousness can be a social bond, said Peller. Black nationalism, for example, sees the issue in terms of a distribution of power. "The solution is a re-distribution of power."

Perea said that the "black-white binary paradigm" that dominates the discussion of race in the United States leaves out Latinos and others. "Those that do not fit the box are often not seen at all," he said. He noted that three cases involving Latinos preceded better known cases involving black Americans but drew virtually no attention and had virtually no impact: *Lopez v. Seccombe* 71 F. Supp.

*Continued on page 8*

## 'Understanding Race'

*Critical Race Theory brings an important, different perspective to discussions of race, Roy L. Brooks, Warren Distinguished Professor of Law at the University of San Diego School of Law, tells his audience during a program on "Civil Procedure, Race and Ethnicity," at the Law School in February. The program was the second in the five-part series "Understanding Race," sponsored by the Michigan* Journal of Race & Law.

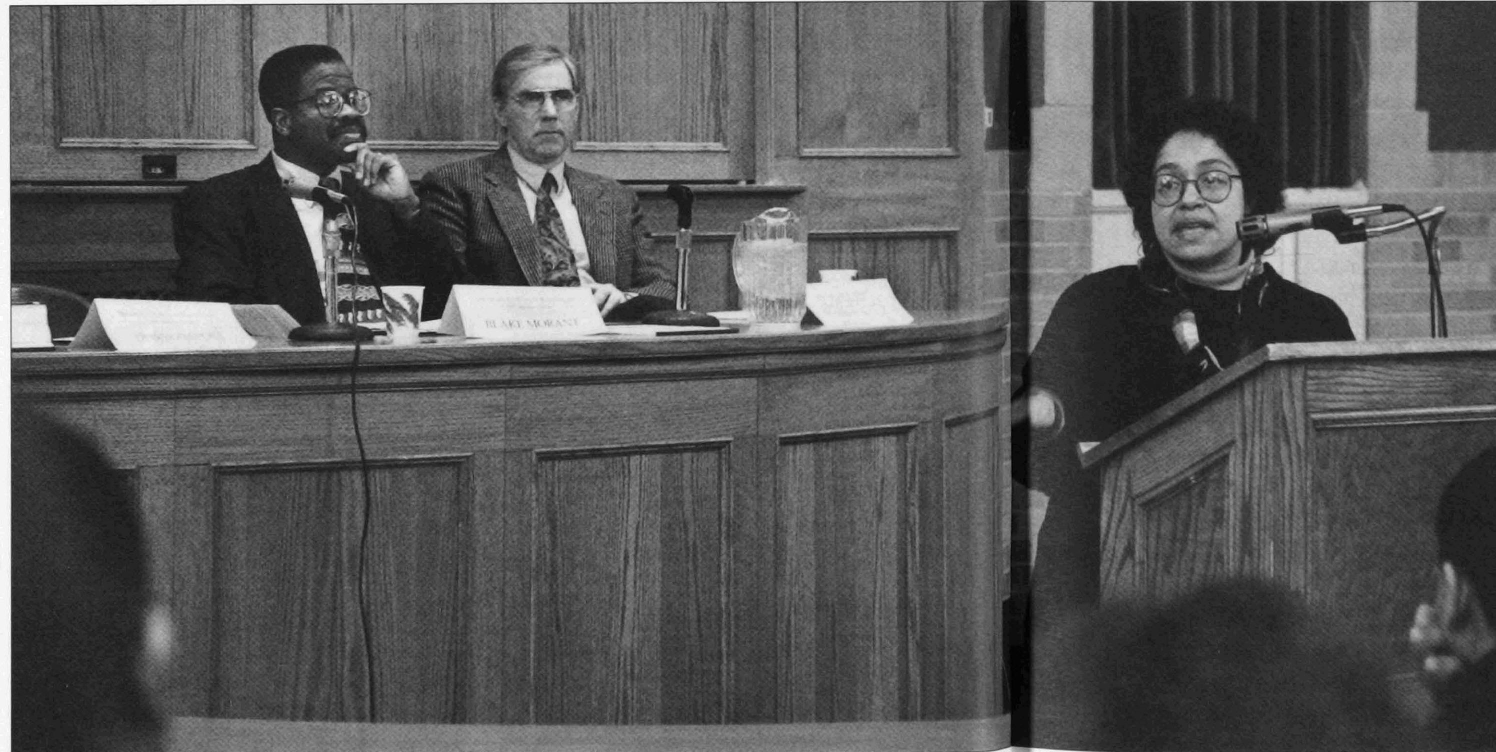


*Continued from page 7*

769 (S.D. Cal. 1944), in which people of Mexican descent sued for access to a public park in San Bernadino; *Hernandez v. Texas* 347 U.S. 475 (1954), in which the U.S. Supreme Court ruled two weeks prior to *Brown v. Board of Education* that exclusion of Mexican Americans from juries in Jackson County, Texas, violated the Equal Protection clause of the U.S. Constitution; and *Mendes v. Westminster School District* 64 F. Supp. 544 (S.D. Cal. 1946), in which the U.S. District Court ruled that separate schools in Orange County, California, for Mexican Americans violated the equal protection clause. "The omission of this history is extraordinarily damaging to Latinos and Latinas," Perea said.

**2. Civil Procedure, Race and Ethnicity,** a talk by Roy L. Brooks, Warren Distinguished Professor of Law, University of San Diego School of Law. Brooks indicated that civil procedures might be different if they had been developed in a crucible that included questions raised by critical race theorists, feminists and others. "Law tends to project and protect a built-in cultural bias that is slanted toward and protects cultural insiders," he said. "The value, to me, of critical theory is not so much in the answers that it provides as in the dialogue that it brings to the table," he said.

**3. Does Race Belong in Contracts Law?** Featuring Blake Morant, Associate Professor at Washington & Lee Law School, and Deborah Post, Professor at Touro College, Jacob D. Fuchsberg School of Law. Moderated by Philip Soper, James V. Campbell Professor of Law. Race is a factor in the development and negotiation of contracts, both speakers said. "Intersectionality actually is a tool that works very well for bringing race into contract law," said Post. She added: "The pretense of neutrality and the taboo that surrounds it continue to make race invisible." To Morant, "the analysis of contract problems is a contextual exercise" that involves racial, gender and other questions. In contract talks, the perceptions of the more powerful negotiator can have a major impact on the eventual agreement, according to Morant. "We can't move back, because conceptualism and realism must be employed to determine if the contract is fair [and] if the parties are getting what they expect."





*Deborah Post, Professor of Law at Touro College, answers a listener's question during the program "Does Race Belong in Contracts Law?" With her are fellow speaker Blake Morant, left, Associate Professor at Washington & Lee School of Law, and moderator Philip Soper, James V. Campbell Professor of Law. The program was the third in the five-part series "Understanding Race," sponsored by the* Michigan Journal of Race & Law.

*"What is being remedied?" should be the question in any discussion of affirmative action, Berta Hernandez-Truyol of St. John's University School of Law tells listeners during a program on "Race, Racism and Affirmative Action" in March. At left is fellow panelist John O. Calmore of the University of North Carolina School of Law. The discussion was part of the five-part series "Understanding Race," presented by the* Michigan Journal of Race & Law.

**4. Race, Racism and Affirmative Action.** A panel discussion with John O. Calmore, Professor at the University of North Carolina School of Law; Berta Hernandez-Truyol, Professor at St. John's University School of Law; and Frank Wu, '91, Associate Professor at Howard University School of Law. The moderator was Tracey Meares, Visiting Professor at the Law School and Associate Professor at the University of Chicago Law School. Wu outlined ironies that he sees in using colorblindness as a legal doctrine that, for example, does not see traditionally black colleges like Howard University as unconstitutional; he also noted the inconsistencies that he sees in rhetorically applying merit as a measure of people but continuing also to give preference to certain groups, like military veterans and children of university graduates. In discussing the dynamics of affirmative action, he said that the upturn in Asian American enrollments is the real cause of any downturn in white enrollment. "It is this factor more than any other factor that has produced white anxiety" over losing ground, he said. Hernandez-Truyol, defining affirmative action as "a system of preferences," said it is the wrong question to ask "Should we get rid of it?" Instead, she said, we should ask "What is being remedied?" The debate must move "beyond equality" because the "unattainability model" of equality is based on having everyone copy the white male model. Calmore, espousing the idea of "open society [and] multi-racial democracy, " said he was asking his listeners "to re-commit, quite frankly, to some values that transcend civil rights." The "heavier questions of racism" need to be dealt with, like how to shape educational systems and how to get the government to enforce antidiscrimination laws, he said. "The new racism" often is in the guise of neutrality and equal rights and is more subtle, indirect and ostensibly nonracial, he said.

## 'Understanding Race'

# Martin Luther King, critical race theory and a new way to see

— by Deborah C. Malamud

*The following essay is based on remarks introducing "An Overview of Critical Race Theory," the first of the five parts of the series "Understanding Race: (De)Constructing Paradigms and Implications for Legal Education," sponsored by the* Michigan Journal of Race & Law *and held at the Law School. The programs began in January as part of the University of Michigan's annual Martin Luther King, Jr., Day Symposium and concluded in late April.* *(See story on page 6.)* *Deborah C. Malamud is a Professor of Law whose recent research has focused on issues of affirmative action.*

Americans on both sides of the race divide seem to have been trained to respect the towering moral significance of Dr. Martin Luther King, Jr., so both sides of the affirmative action debate want to see Dr. King as on their side. And, truth to tell, there is something in Dr. King's writings for everyone.

Let me start with the anti-race-based-affirmative action side. Richard Kahlenberg, who has written extensively to advocate the use of class-based rather than race-based affirmative action, is quite correct that in Dr. King's later writings he called for a major attack on poverty. Speaking in opposition to the rising Black Power movement, King argued that "what is most needed is a coalition of Negroes and liberal whites that will work to make both major parties truly responsive to the needs of the poor." He called for a major program that "would benefit *all* the poor, including the two-thirds of them who are white." On that basis, Kahlenberg and others think that if Dr. King were alive today, he'd be waving a banner reading "class, not race."

But would he? In the same book from which these quotes were drawn [*Where Do We Go From here: Chaos or Community?*, 1967], Dr. King also endorsed a project called Operation Breadbasket, in which ministers, through negotiations and threats of boycotts, sought to attain economic justice for African Americans. As Dr. King explained, "if a city has a 30 percent Negro population, then it is logical to assume that Negroes should have at least 30 percent of the jobs in any particular company, and jobs in all categories rather than only in menial areas, as the case almost always happens to be." That sure sounds like an endorsement of quotas. And, on a more philosophical level, Dr. King argued for a modern notion of equality that could readily embrace affirmative action.

"It is important to understand," he argued, "that giving a man his due may often mean giving him special treatment. I am aware of the fact that this has been a troublesome concept for many liberals, since it conflicts with their traditional ideal of equal opportunity and equal treatment of people according to their individual merits. But this is a day which demands new thinking and the re-evaluation of old concepts. A society that has done something special *against* the Negro for hundreds of years must now do something special *for* him, in order to equip him to compete on a just and equal basis."

Then again, Dr. King did not think that tokenism would do the job. He spoke with particular concern for the "new Negro middle class," which, he said, "often finds itself in ghettoized housing and in jobs at the mercy of the white world. Some of the most tragic figures in our society now are the Negro company vice presidents who sit with no authority or influence because they were merely employed for window dressing in an effort to win the Negro market or to comply with federal regulations in Title VII of the 1964 Civil Rights Act."

So what can we say of Dr. King's legacy on the issues of color-blindness and affirmative action? Probably that the pull and tug of litigation would not do justice to his complex views. Dr. King seems to have foreseen both the uses and the limitations of race-based affirmative action. And, perhaps, Dr. King was unduly optimistic about the capacity of the civil rights movement to use the fight against poverty as a race-neutral, coalition-building rallying cry. Dr. King wrote before the white image of poverty became the "unworthy" black welfare mother.

Indeed, Dr. King was quick to admit, late in his short life, that all of his perspectives on civil rights had been shaped by the experience of the American South, and that he was only beginning to think of solutions to the problem of race and racism in the North. He said, in 1967, that civil rights leaders had "miscalculate[d]" by believing that "opposition in the North was not intransigent, that it was flexible and was, if not fully, at least partially hospitable to corrective influences." We cannot expect to find answers in Dr. King's writings to problems that he only barely began to see late in his life.

What of critical race theory? Here, too, we have a movement that has a kind of dual consciousness on the subject of affirmative action. Critical race theorists are in the forefront of academic support for affirmative action. Here I will mention only Charles Lawrence and Mari Matsuda, whose recent book, *We Won't Go Back: Making the Case for Affirmative Action* (1997), shouts "We Won't Go Back!" as a battle cry. But in the canonical critical race literature, one can also find Richard Delgado's well-known article, "Do You Want to be a Role Model?" ["Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?", 89 *Michigan Law Review* 1222 (1992)]. Written as it was, before the launching of the serious contemporary attack on affirmative

**Besides, in evaluating the contribution of critical race theory to the affirmative action debate, it is a mistake, I think, to focus on what critical race theorists have *said* about affirmative action. I think it is far more important to focus on what they have *done*.**

action from the right, Delgado raised serious questions about whether affirmative action *really* is an acceptable substitute for true racial justice.

It is no act of incoherence simultaneously to support affirmative action and to argue that it ought not be viewed as a panacea. One of the strengths of critical race theory is that it is taking seriously the task of documenting the many forms that white privilege and minority disadvantage take in the late twentieth century. It ought to come as no surprise that it is difficult to move from nuanced understandings of race and racism to easy solutions.

Besides, in evaluating the contribution of critical race theory to the affirmative action debate, it is a mistake, I think, to focus on what critical race theorists have *said* about affirmative action. I think it is far more important to focus on what they have *done*. Back in the days of *Bakke* [*Regents of the University of California v. Bakke*, 438 U.S. 265 (1979)], scholars and educators probably thought that all that was necessary to make the dream of "diversity" in education a reality was to bring the right mix of students into the classroom. But it turns out that this notion of diversity was incomplete. Classrooms are not friendly gatherings of equals, such that the diversity of the discussion depends solely on the diversity of the student body. Classrooms, it turns out, are structured by power. It matters who is up there teaching. And it matters whether "diverse" viewpoints are identified as part of the official canon of the field, as part of the official curriculum of the course. Because if one group of students — a minority group at that — is constantly forced to step outside the official curriculum to get its viewpoint heard, the result is not a diverse education. The result is the formation of an in-group and an out-group, and the sending of an official message that the minority group and its concerns have second-rate status.

And that's where critical race theory has come in. The critical race theory movement was born of the decision of a group of law students of color to take the race curriculum into their own hands. And it has permitted generations of law students to do the same. *The Michigan Journal of Race & Law* is an example. A mixed-race, mixed-gender group of law students got together to form a reading group to learn about critical race theory. That reading group eventually institutionalized itself as a journal. *The Michigan Journal of Race & Law* has been, in its three years of existence, a genuinely integrated institution which has forcefully demonstrated the benefits that diversity can offer to legal education.

But there remains the question of the official curriculum. And here, the critical race theorists are showing that they understand the way canons are made. There are now numerous anthologies available that excerpt key works in the field. Indeed, critical race theory writings are now showing up in mainstream casebooks and interdisciplinary readers. Now, law professors who want to keep the voices of scholars of color out of their classrooms have to make an embarrassingly blatant decision to do so — one that becomes perfectly transparent to any student reading the table of contents. And furthermore, the tremendous generosity of the critical race community towards law students around the country who invite them to symposia like this one makes it *impossible* for law faculties to deny their students access to critical race scholars and their scholarship. Critical race theorists have helped to make diversity a major force in legal education. How? Simply by being read and by being here.

**After Word —**

*Issues of history, social and individual practices come in for review as this panel of faculty members discusses the film* Rosewood, *presented by the* Journal of Race & Law *in February. Panelists include, from left, Visiting Clinical Assistant Professor of Law Mark P. Fancher, Clinical Assistant Professor Lance R. Jones, and Suellyn Scarnecchia, Associate Dean for Clinical Affairs. Historically, the practice of slavery made it necessary for dominant groups to "dehumanize people of color," said Fancher. The practice also produces a version of history that disregards the significant contributions that Africa has made to western culture. Jones, who criticized some of the film's more sentimental strains, like the 11-year-old who leaves home because of his disgust with his father's role in the lynchings, said that individual actions can help improve understanding: "Sentimentality is not the way out of the morass this country is in. Go outside your comfort zone." Scarnecchia noted that many films about such incidents portray them from white people's point of view and "it is important that this film is from a black point of view." The 1997 commercial film, directed by John Singleton and starring Jon Voight and Ving Rhames, is based on lynchings of residents of a mostly black town in Florida in the 1920s by white residents of a neighboring town. A journalist's investigation in the 1980s concluded that fewer than 12 to about 20 people died in the incident. In 1994 Florida's House of Representatives approved $4 million to be paid to survivors and their descendants, the first time that reparations were paid to victims of mob violence.*

## Erica Munzel, '83, named Assistant Dean and Director of Admissions

Erica A. Munzel, '83, Associate Director of Admissions since 1993 and interim director since January, has been named Assistant Dean and Director of Admissions.

Dean Jeffrey S. Lehman, '81, announced the appointment in April. "All of you who have come to know Erica over the years will understand why I am so very excited to have her assume this role," Lehman said in his announcement. "I know that she will be an effective leader, administrator and ambassador for the Law School."

"I am pleased and honored to be selected as the new Assistant Dean and Director of Admissions," said Munzel. "I'm looking forward to working with students, faculty and alums in continuing to attract and enroll a talented, diverse and exciting class of students each year. I have enjoyed my return to the Law School, but I miss my practice days in Chicago. I'm fortunate, though, that I can draw on my experience practicing law, both in the private and public sectors, when discussing law school with prospective students."

Munzel practiced law in Illinois for a decade before family needs and the associate directorship of Law School admissions brought her back to Ann Arbor. She says she thoroughly enjoyed her years

*Erica A. Munzel, '83*

of practice. Prior to returning to the Law School, she spent three and one-half years as an Assistant Public Guardian with the Cook County Public Guardian's Office in Chicago. Appointed by the Juvenile Court as guardian ad litem and attorney for abused and neglected children, she was responsible for nearly 300 cases involving approximately 1,000 minors and their families. She supervised six attorneys and support staff in management of an additional 2,200 cases.

Prior to that she was an associate in the private sector in Chicago. Active in commercial litigation, she handled cases in medical and legal malpractice, product liability, lead poisoning, breach of contract and breach of lease. She also managed hundreds of asbestos personal injury and property damage cases and was active in organizing a defense network of 170 defendants.

A Phi Beta Kappa member, Munzel also received her B.A. from the University of Michigan.

## Events mark 25-year-old *Roe v. Wade*

The Supreme Court's decision in *Roe v. Wade* in January 25 years ago that abortion is legal has remained one of the most contentious, debated decisions that the court has rendered. Anti-abortion groups have continued to try to outlaw the medical procedure, or at least deny public funding for it, and court rulings have chipped away and narrowed women's rights to the procedure. Other groups, meanwhile, have defended the *Roe v. Wade* decision and fought against later restrictions.

So the quarter-century mark since the decision became a momentous time for those on both sides of the issue. Events at the Law School mirrored those across the country, with some activities celebrating the 1973 decision and others opposing it. The programs also showed how advancing medical technology, public education and more open discussion of the issue of abortion have made the issue increasingly complex.

The complications that advancing medical capabilities have brought to the debate perhaps were most apparent in the talk presented by Dr. Mildred Fay Jefferson on "Abortion: A Breach in the Wall of Civil Rights Protection?" Jefferson, a physician and the first black woman to graduate from Harvard Medical School, spoke at the Law School in January under the sponsorship of the Christian Law Students.

The first woman to intern in surgery at Boston City Hospital and to be elected to membership in the Boston Surgical Society, Jefferson is a longtime opponent of abortion. She served three terms as president of the National Right to Life Committee and is a past chairman of the Board of Directors of the National Committee.

The late-stage pregnancy procedure commonly known as "partial birth abortion" was not available when the *Roe* decision was handed down, Jefferson said. The procedure is not an emergency one — in obstetrical emergencies speed is critical — and is performed over a three-day period, she said. In simple terms, the procedure calls for partial delivery of the fetus, then emptying the fetus' skull so that it can be pulled completely through the birth canal.

On the pro-choice side, Law Students for Reproductive Choice joined other campus groups to present the film *When Abortion Was Illegal: Untold Stories* at the Law School in January. The film, by Dorothy Fadiman, was followed by a "speakout" in which speakers related their experiences with abortion. The program was part of a campus-wide celebration of the *Roe* ruling that included a showing of the film *If These*

*Walls Could Talk* and a talk and autograph session by feminist author Marge Piercy.

And in a wide-ranging discussion of the impact of *Roe v. Wade* and events since 1973, the Women Law Students Association presented a national broadcast downlink of the Blackmun Lecture on Privacy, a symposium on the constitutional and American values embodied in the court case. Presented by the Center for Reproductive Law and Policy, the program was moderated by former *New York Times* columnist and author Anna Quindlan, who outlined the 7-2 *Roe* decision this way:

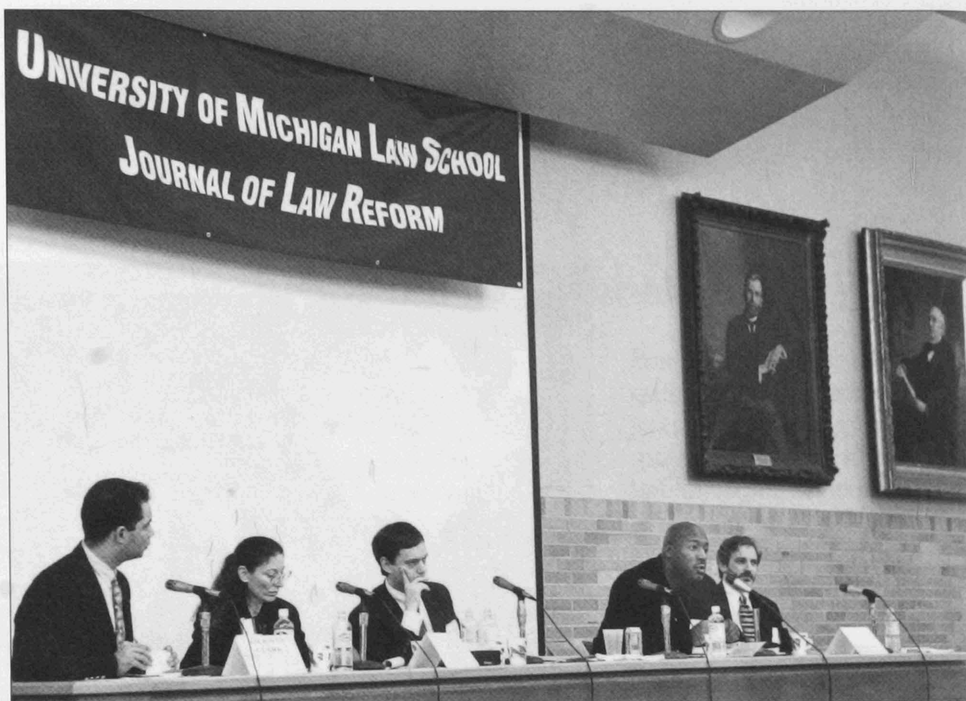
- The state cannot interfere with abortion during the first trimester.
- The state can regulate abortion in the second trimester.
- The state can prohibit abortion in the third trimester.

Among those participating in the program were: Laurence Tribe, Professor of Constitutional Law at Harvard Law School; Janet Benshoof, President of the Center for Reproductive Law and Policy; Shirley Hufstedtler, former judge with the U.S. Court of Appeals for the Ninth Circuit; David Garrow of the Emory School of Law; Helen Rodriguez-Trios, Vice-Chairman of Physicians for Reproductive Choice and Health; and representatives of a variety of religious faiths.

**Luck Is A . . .**

*Top, Grace Tonner, Director of the Legal Practice Program, seems to have the touch for the roulette wheel, while Clarence Darrow Distinguished University Professor of Law Yale Kamisar, above left, takes his blackjack dealing very seriously during Casino Night in March. Above right, dealer Phil Frost, Clinical Assistant Professor in the Legal Practice Program, remains impassive despite the exuberant reaction of a student gambler. The annual event is sponsored by the Law School Student Senate.*

# Making juries work




*Working as a prosecutor in Washington, D.C., showed him "how thoughtful, serious and dedicated" juries are, Professor Paul D. Butler, second from right, of the George Washington University College of Law, explains during a panel discussion on "Jury Nullification" that was part of the symposium "Jury Reform: Making Juries Work" in March. Butler said the experience of having juries refuse to convict young African American men of "victimless" drug crimes led him to advocate "selective" nullification by juries as a civil rights measure. Others pictured are, from left: Assistant Professor and moderator Sherman Clark; Professor Nancy S. Marder, University of Southern California Law School; Professor Andrew D. Leipold, University of Illinois College of Law; and Roger Parloff, Senior Writer with* The American Lawyer. *The symposium was presented by the* University of Michigan Journal of Law Reform.

Juries seem to have as many personalities as the jurors who constitute them. They can be as serious, quirky, sensitive or single minded as any individual. That's their strength.

None of these strong points, however, makes juries the ideal way of settling or weighing disputes. And none of these shortcomings rules them out of the verdict-making business. Juries, simply, are the best the American system of justice has got. They are not perfect, probably not perfectible, and can be improved.

This is the conclusion you'd be drawn to after attending the two-day symposium "Jury Reform: Making Juries Work" at the Law School in March. Organized by the *University of Michigan Journal of Law Reform,* the symposium featured Judge Richard P. Matsch, '53, of the U.S. District Court of Colorado as keynote speaker (see story on page 52) and a variety of discussions on subjects ranging from jury decision making to jury reforms.

Social scientists have contributed mightily to knowledge about the workings of juries since the 1970s, Kirkland & Ellis Professor of Law Phoebe Ellsworth explained as she introduced a discussion of "Jury Decisionmaking and Collaboration: 'Inside the Jury'." Their work has shown that jurors can have trouble understanding the law and do better when legal concepts are explained to them in plain language.

"I want to weigh in on the side of juries. They are not dumb, they are doing a good job, and they should get credit for what they do," said panelist Beth N. Bonora, President of the National Jury Project/West, who showed a video that delved into how a jury made its decision and what jurors felt they needed to do a good job.

But fellow panelist Reid Hastie, a Professor at the University of Colorado, said that "the legal system should ask juries to do things and make decisions that they are good at." Juries are "not doing a good job" in punitive damages cases, he said.

Other panels addressed "Pretrial Prejudice and the Effects of Courtroom Cameras," "Jury Nullification," "The Proper Use of Jury Consultants," "The Role of Affirmative Action on Jury Panels," "Complex Litigation and Jury Trials" and "Jury Reforms: What's Working and What's Not?"

On the question of cameras in the courtroom, panelist Christo Lassiter, a Professor at the University of Cincinnati College of Law, said that unless a constitutional principle is at stake there is no inherent public interest in a case that warrants the presence of cameras in the courtroom. Countered Jeff Ballabon, Senior Vice President, Corporate Affairs, Court-TV, "When do we ever say that Americans are better off knowing less?" There's a difference "between cameras in the courtroom and the spin that takes place on the courthouse steps," he said.

Judge Michael B. Dann, of the Arizona Superior Court, detailed many of the reforms that Arizona has instituted since 1995 to aid juries in civil and criminal trials. Jury trials had changed little in 200 years and Arizona took advantage of social scientist's studies of how juries work to improve their operation, Dann explained. Among the changes: setting and enforcing time limits for lawyers and expert witnesses; delivering instructions in plain English and providing written copies; reinstructing the jury; allowing non-argumentative "mini-openings" of cases; allowing jurors to take notes and providing them with note-taking materials; allowing discussion of the evidence in criminal cases; answering jurors' questions during the trial; and re-opening a case when there is a jury impasse.

The symposium was presented by the *University of Michigan Journal of Law Reform* with support from Dykema Gossett; Jones, Day, Reavis & Pogue; and Sonnenschein, Nath & Rosenthal.

**Winning Response —**

*Above, law student Michael Dickler argues for the respondent, while his teammate, Raj Niranjan Shah, at desk, right, listens, as part of their winning representation in Henry M. Campbell Moot Court final arguments in April. Representing the petitioner, their opponents, Bryn Sappington and Sharad Khandelwal, are seated to Dickler's right. Sappington received the award as best oralist, and he and Khandelwal won the award for best brief. Left, the Hon. Joseph E. Stevens, '52, of the U.S. District Court in Kansas, asks a question of the moot court attorneys. The other judges, from left, are: the Hon. Cornelia G. Kennedy, '47, of the U.S. Court of Appeals for the Sixth Circuit; the Hon. Warren K. Urbom, '53, of the U.S. District Court in Nebraska; and the Hon. Deanell R. Tacha, '71, of the U.S. Court of Appeals for the Tenth Circuit. The case involved two issues:*

*1. Does a university's refusal to apply its hate crime provisions to victims targeted because of their sexual orientation or to amend the provision to include sexual orientation as a protected category constitute a violation of the Equal Protection clause?*

*2. Does the university's decision to suspend official recognition of the Lesbian and Gay Student Association and to deny the organization the right to meet on campus violate the member's First Amendment rights?*

# An insider's look at arguing before the **International Court of Justice**

*U.S. State Department Assistant Legal Advisor for UN Affairs John Crook, addressing the International Law Workshop (ILW) in January, outlines the U.S.-British argument that he and others made in the Pan Am 103 case before the International Court of Justice (ICJ) in fall 1997.*

The International Law Workshop (ILW) opened its Winter Term in January with an inside look at the battle in the International Court of Justice (ICJ) over whether a national or an international court ought to have jurisdiction in the case of the in-air bombing of Pan American Airways Flight 103 over Lockerbie, Scotland, in December 1988. Two hundred seventy people died.

"It's a difficult and interesting case," explained John Crook, who argued the United States' side before the ICJ last fall. An Assistant Legal Adviser for UN Affairs with the U.S. State Department, Crook was the first of eight speakers in the ILW lineup for Winter Term. The winter sessions were coordinated by Professor José Alvarez.

The United States and Great Britain quickly brought charges for the blast against two Libyan intelligence operatives, but Libya has refused to give them up for trial before Scottish or U.S. courts. The UN Security Council passed a series of resolutions imposing sanctions on Libya. Libya in turn took its case to the ICJ under the Montreal Convention.

At the ICJ, the U.S. and U.K. argued that the international court lacks jurisdiction in the case, that a country [Libya] accused of complicity in the case cannot credibly investigate and punish the offense, and that the action of the Security Council in passing its resolutions against Libya overrules the Montreal Convention's remedy.
Libya argued that the Security Council resolutions exceeded its authority, that jurisdiction for the case lay with the ICJ and that the ICJ review the legality of the Security Council's action.

"I don't think that the Lockerbie cases are an international analog for *Marbury v. Madison*," said Crook, referring to the 1803 U.S. Supreme Court decision that established judicial review. He added that others, however, see the Pan Am 103 case as an international parallel to the issues involved in *Marbury v. Madison*.

Crook also provided a first hand look at how such a case is argued before the ICJ. It was very time consuming, he said, requiring the use of both French-speaking and English speaking lawyers. He indicated that the U.S. and British legal teams worked well together and had a natural affinity for different aspects of the case that neatly meshed their respective emphases into a cohesive legal argument, even though both sides had to consider the political inclinations of the nine justices on the ICJ bench.

In February, ICJ ruled that it has jurisdiction in the case and Libya's claims will now be considered on the merits. Other speakers in the Winter Term ILW included:

- **Karthigasen Govender**, LL.M. '88, Professor at the University of Natal Department of Public Law and member of the South African Human Rights Commission, speaking on "Achieving Substantive Equality in a Society Founded Upon Inequality: the South African Experience." (See excerpt, page 17.)
- **Roy Lee**, Principal Legal Officer of the UN Office of the Legal Counsel, speaking on "Prospects for the Permanent International Criminal Court."
- **Tim Dickinson**, '79, of Dickinson Landmeier and chair of the ABA Section on International Law, speaking on "Lessons Learned from the Russian Crown Jewel Museum Tour Case: International Law at Work."

Dickinson, a Visiting Professor at the Law School, represents the Russian Federation in the Crown Jewels Case.

- **Nuala Mole**, Director of Advice on Individual Rights in Europe Center in London, speaking on "David v. Goliath? Equality of Arms Before International Tribunals."
- Professor of Law **Peter Hammer**, '89, speaking on "Politics, the Bar, and the Future of Legal Aid in Cambodia."
- **Dr. Mohammad Abdel Haleem**, Director, Islamic Studies Center at School of Oriental and African Studies, University of London, speaking on "Human Rights in Islam and the United Nations Instruments." This talk was presented at Rackham Amphitheatre and was co-sponsored by the Law School and the U-M Center for Middle Eastern & North African Studies.
- **Michel Waelbroeck**, '69 and '98 Visiting Professor, of Liedekerke Wolters Waelbroeck & Kirkpatrick in Brussels and Professor, Faculty of Law, University of Brussels, speaking on "The Constitution of Europe: From Economic Rights to Human Rights."

# The dilemma of equality

*Karthigasen Govender, LL.M. '88*

*The following excerpt is from "Achieving Substantive Equality in a Society Founded Upon Inequality: the South African Experience," a talk delivered to the International Law Workshop at the Law School on January 28, 1998. The author, a Visiting Professor during Winter Term, is a Professor in the Department of Public Law at the University of Natal at Durban and a member of the constitutionally established South African Human Rights Commission.*

— By **Karthigasen Govender, LL.M. '88**

The full impact of the apartheid legacy and the monumental difficulties faced by a society seeking to shed an inegalitarian past for an egalitarian future was fully demonstrated in the *Soobramoney* judgment (1998 [1] SA 765 [CC]).

Addington Hospital, a public hospital situated on the Durban beachfront, was restricted to the exclusive use of white people in the old order. It was able to provide excellent facilities and offered good care to white patients. After the end of apartheid, its facilities were opened to all. The hospital is now only able to provide dialysis treatment to a limited number of patients because of limited facilities and budgetary constraints. Its limited resources have compelled it to only provide a patient suffering from chronic renal failure with dialysis treatment if the patient is eligible for a kidney transplant. A patient suffering from cerebra-vascular disease would not be eligible for a kidney transplant and would thus not be afforded dialysis treatment.

Soobramoney was such a patient. The consequence of not providing treatment was death. The tragedy was that had Soobramoney been wealthy he would have been given dialysis treatment at a private facility and thus be able to live. He argued before the Constitutional Court that the refusal of the hospital to give him dialysis treatment violated his right to life and the obligation on the state not to refuse emergency medical treatment, an obligation guaranteed in Section 27(3) of the Final Constitution. The dilemma facing the Constitutional Court was this: Should the court direct that Soobramoney be given dialysis treatment knowing that there were no resources to treat all the patients in similar positions and that funding would

*Continued on page 18*

*Continued from page 17*

have to be redirected from other sources, thereby jeopardizing other health or socio-economic programs? In other words, should the interests of the individual predominate over societal interests?

The court, recognizing the absolute and urgent need to provide access to housing, food, water, employment opportunities and social security and thus enable the disadvantaged to share in the experience of humanity, held that there will be times when it is permissible for the state to adopt "a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within the society."

The court held that the right not to be refused emergency medical treatment referred to the right not to be refused immediate medical treatment when one suffers a sudden catastrophe. The right did not apply to ongoing treatment necessitated by an incurable condition. An interpretation which required the state to prioritize the rights of the terminally ill would make it significantly more difficult for the state to attain the crucial objective of providing health care services for all.

The judgment recognizes that, given our history, it may be legitimate to promote societal interests even if the consequence is to deny an individual desperately needed medical care.

Accordingly, Mr. Soobramoney did not succeed in the application. The Soobramoney tragedy reflects the divide and the consequences of this divide in the South African society and provides evidence, if evidence were needed, that the task of achieving a society based on social justice, equality and freedom in South Africa is a monumental one.

**Looking Ahead —**

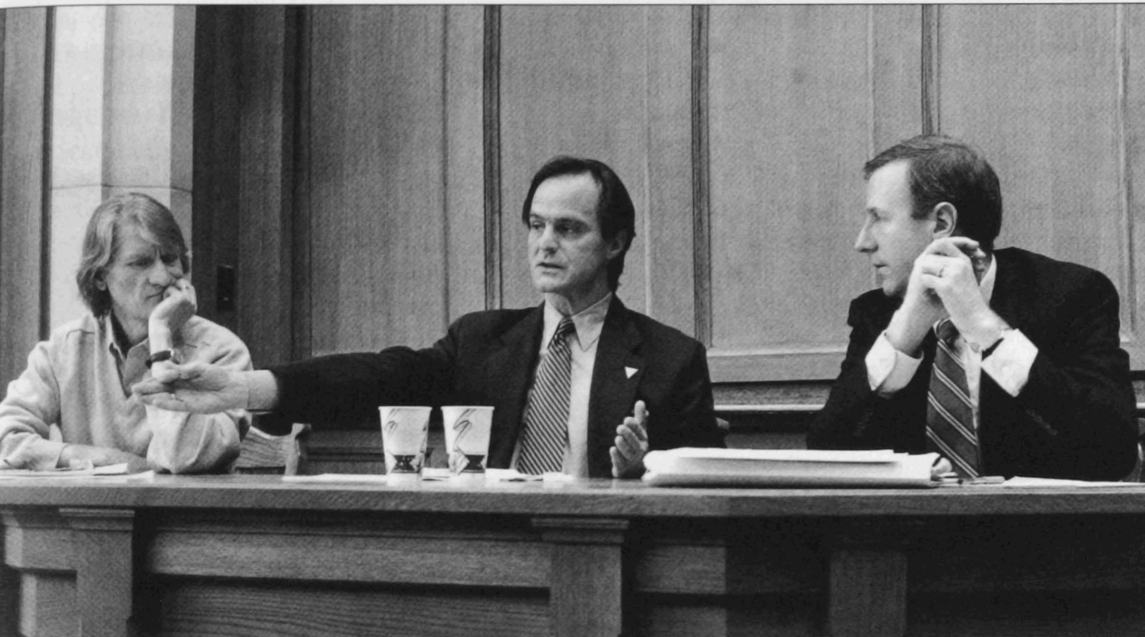
*Professor of Law José Alvarez and Virginia B. Gordan, Assistant Dean for International Affairs, discuss international law plans and course options with law students who may sign up for the courses in the future. At far right is David Baum, '89, Director of Student Services. The program was one of six parts of the Course Advising Series that the Records and Student Affairs offices sponsored in March "to provide students with some insights on choosing their courses and extracurricular pursuits during their upper-class years at the Law School." In addition to this program on international law, the series included sessions on public interest and government practice; prosecution and criminal defense; litigation; commercial, taxation and corporate practice; and concluded with a general overview.*

## *Debaters' focus:* Should private employers use sexual orientation in hiring?

Discrimination against homosexuals in the workplace is not a serious enough national problem to give Congress authority over it through the Constitution's commerce clause, argues Roger Clegg, General Counsel for the Washington, D.C.-based Center for Equal Opportunity.

Nonsense, counters Jeffrey Montgomery, Interim Executive Director for the Detroit-based Triangle Foundation. If the threshold that gave Congress authority to outlaw racial discrimination has not been reached in relation to gay rights, where is it? "The basic reason is that this is the right thing to do," Montgomery said.

The debate between Clegg and Montgomery, sponsored by the Federalist Society for Law and Public Policy Studies and the Law School student group OutLaws, took place in the shadow of congressional discussion of the proposed Employment Non-Discrimination Act (ENDA), which would extend the employment protection of the Civil Rights Act of 1964 to cover discrimination based on sexual orientation. The debate took place at the Law School in March. William W. Bishop, Jr., Collegiate professor of Law Donald H. Regan moderated.



*William W. Bishop, Jr., Collegiate Professor of Law Donald H. Regan, left, who acted as moderator, and Roger Clegg, General Counsel for the Center for Equal Opportunity in Washington, D.C., right, listen to Jeffrey Montgomery, Interim Executive Director of Triangle Foundation, as he and Clegg debate at the Law School in March. The topic was "Sexual Orientation and Private Choice: Should Private Employers Be Barred from Considering Sexual Orientation in Hiring Practices?" The program was sponsored by the Federalist Society for Law and Public Policy Studies and the OutLaws, a Law School student group.*

Clegg said the bill should not be passed because:

1. Congress lacks the authority under the Commerce Clause to make such a regulation.
2. Even if Congress had authority to do so, this is not a serious enough national problem that only the federal government can address it.
3. There also should be "a strong presumption" against government intervention into the private marketplace, especially when freedom of association and privacy rights are involved.
4. Some people think homosexual behavior is wrong. They should be allowed to think that way and act on those beliefs.

A ban on considering sexual orientation could sometimes hurt homosexuals, Clegg added. A gay bookstore might prefer to hire gay people, "but the legislation before Congress right now would prevent this," he said.

Most employers would not consider sexual orientation in their hiring practices and recent research indicates that 80 percent of Americans oppose such discrimination, he added.

Montgomery countered that even a single case of discrimination because of a person's sexual orientation is too much. "In the workplace, especially in public workplaces and large workplaces supported by public money, this is not what we do in America," he said. "We don't discriminate."

The American legal system protects minorities, he said. "In a civil sense, as a society and a system that exists on the basis of law and rational thinking, the moral thing to do here is to ensure that the best people are doing the best job they can, and they have a right to pursue that and not have to fear that they can lose their job for a reason that has nothing to do with their performance."

# AFFIRMATIVE ACTION debate generates rich variety of programs

As attorneys for the Law School, the University of Michigan and the Center for Individual Rights (CIR) have labored to crystallize and defend their respective positions on affirmative action and its reflection in admissions policies, students, faculty, staff and visitors at the U-M have been searching for their own answers in a wide-ranging series of seminars, panel discussions and private conversations.

Affirmative action has been a topic of conversation across the United States for some time, and CIR's filing of suits against the Law School and the University's College of Literature, Science and the Arts last fall unleashed on-campus discussion of the issue like a loosed spring. In public programs and private discussions, panel discussions and late night conversations, the subject of affirmative action has taken on a high profile in university life.

"Regrettably," Dean Jeffrey S. Lehman, '81, noted in the preceding issue of *Law Quadrangle Notes* (41.1, Spring 1998, page 2), "the national conversation about university admissions can easily turn querulous and accusatory. At times like this, I have great faith in the ability of well-trained lawyers to take the conversation to a higher plane, where competing values are acknowledged and discussed, where intensely held beliefs can coexist with self-criticism and mutual respect."

Members of the Law School family have been active in keeping the issue in the forefront of people's awareness and keeping the discussion of it on a high plane. Law School faculty members have figured prominently in the campus-wide discussion of affirmative action that began last fall even before CIR filed its suit against the Law School in December.

In addition, because the subject of affirmative action can reach out so broadly, a number of programs reported on elsewhere in this issue of *Law Quadrangle Notes* deal with it directly or indirectly. (Among them are programs reported about on pages 6, 28 and 54).

And, of course, the subject also often has been part of individual, informal and small group conversations in the hallways of the Law School, Quadrangle, over coffee and wherever concerned people talk. Through Law School student efforts, the Student Affirmative Action Coalition (SAAC) was formed to provide a computerized forum for people to "seek resources for affirmative action-related projects" and to "engage members of the Law School community in a thoughtful dialogue on affirmative action." SAAC can be contacted by e-mail at saac@umich.edu.

It is impossible to tally the total of Law School members' participation in the private and public discussions of affirmative action that have become daily parts of campus life, but it is possible to give you a sense of the type and level of participation. Here are several examples:

- In the initial program of a series of four evening presentations on affirmative action sponsored by student groups in November, Edson R. Sunderland Professor of Law Terrance Sandalow outlined the constitutional law background of affirmative action, from the "separate but equal" doctrine of *Plessy v. Ferguson* in 1896, to the separate-cannot-be-equal doctine of *Brown v. Board of Education* in 1954, to *Bakke v. the University of California at Davis Medical School* in 1978, the decision that has guided affirmative action admissions policies in higher education ever since. In *Bakke,* the court ruled that the white candidate was unfairly denied admission because of the specific operation of UC-Davis' admissions policies, but the court also said that race could be considered as one of a broad range of measures that determine admission. Sandalow, a former Dean of the Law School, wrote the American Association of Law Schools' brief for the *Bakke* case.
- In January, as part of the University's 11th annual Dr. Martin Luther King, Jr., Symposium, Visiting Professor Tracey L. Meares joined two other panelists to respond to Harvard University Professor Lawrence Bobo's address on "Race, Public Opinion and the Welfare State." The program was cosponsored by the Law School, School of Public Policy, Department of Sociology and the Program on Poverty, the Underclass and Public Policy. Meares, an Associate Professor of Law at the University of Chicago Law School, said that issues of poverty, crime and racism are linked and that "the law and order approach" reduces human capital in minority communities. She noted that in one large U.S. city, inner city black churches and the police have joined forces in a "congenial" effort to reduce truck trafficking and improve inner city life. Bobo, of Harvard's Department of Sociology and African American Studies, said that "Jim Crow racism" has been replaced by "laissez faire racism" and that the United States must continue to wrestle with the twinned issues of racism and economic inequality. "Dr. King was right," said Bobo, who received his Ph.D. in sociology from the University of Michigan in 1984. "We're going to have to wrestle with these things in tandem." Other panelists were David Harris, Assistant Professor of Sociology and Assistant Research Scientist at the Institute for Social Research's Survey Research Center, and Donald R. Kinder, Philip E. Converse Collegiate Professor of Political Science and Professor of Psychology.

■ Also in January, on a blustery, overcast day whose midday temperature hovered at freezing, Associate Dean for Clinical Affairs Suellyn Scarnecchia, '81, told an outdoor audience that women should be aware of the benefits that affirmative action has brought to them and that its end would hurt them as well as other under-represented minorities. Scarnecchia also said that earlier that month in San Francisco, several hundred participants at the American Association of Law School's annual meeting had marched to show their support of affirmative action. "Educate, don't segregate," the marchers said in a chant that Scarnecchia's audience at the Diag quickly adopted.

■ Law School faculty and students participated in the National Day of Action in support of affirmative action on February 24. Professors Roderick M. Hills, Deborah C. Malamud and Mark P. Fancher were panelists for a discussion of "Theoretical Perspectives on Affirmative Action" and Professors Marc Rosenbaum and Lance Jones were members of the panel that discussed "Social/Practical Perspectives on Affirmative Action." The programs were sponsored by Law Students for Affirmative Action and United for Affirmative Action at U-M.

■ In March, Malamud was one of four respondents to *Atlantic Monthly* correspondent Nicholas Lemann's talk on "Meritocracy: The Late Debate." The talk was part of the "Evenings at Rackham" series, sponsored by the Dialogues on Diversity program.

**Pro and Con —**

*Left, law student Allen Graves answers a questioner, and right, Professor Sallyanne Payton poses a question, during "The Student Affirmative Action Debate" held at the Law School in April under the sponsorship of the Student Affirmative Action Coalition. Payton and Professors Deborah C. Malamud and Terrance Sandalow questioned the respective panels; panelists representing the opponents of current affirmative action practices included Graves, Eric Moutz and Wayne Song; panelists representing supporters of current affirmative action practices included Tracy Gonos (not shown), Francois Nabwangu and Randi Vicker.*

# Marching to a different [Cambodian] drummer

Sathavy Kim is one of those people who shoulders loads in order to pull a better future a little closer. One of only seven women among the 132 judges of her native Cambodia, she sometimes feels like a paddler headed upstream — toward a goal that is worth every effort. She struggles against Cambodia's traditionally patriarchal ways while helping to forge a democracy that is appropriate for Cambodia and training lawyers and judges to replace those who were wiped out during the Khmer Rouge regime of the 1970s. Indeed, only a handful of judges survived those days in Cambodia.

Kim, a member of the Cambodian Ministry of Justice and one of two Cambodian judges who spent the 1997-98 academic year at the Law School as research scholars, still marvels that she survived those bloody days. As she explained in March for a program sponsored by the Women Law Students Association:

"On April 17, 1975, the Khmer Rouge invaded Phnom Penh. Within [no] more than two days the entire city had been evacuated. For the next three years, eight months and twenty days, I was forced to work in the labor camps of the Pol Pot regime. The conditions were harsh and often inhuman. I was very lucky to have survived, for anyone suspected of having an education was killed."

After her release in 1979, the communist Vietnamese regime that governed Cambodia made her a leader of a district women's association. In 1982 the Cambodian government sent her with a group of other leaders to take legal training in the capital. "Upon graduation, I was selected as a judge and later as vice president of the SIEM REP Court."

*Sathavy Kim*

Eleven years later, in 1993, the year of Cambodia's first elections and the birth of its now fragile democracy, she again was sent to ENM (Ecole Nationale de la Magistrature) in France. "I was the first Cambodian to complete the program and graduated with highest honors. I was able to fulfill a long held dream of mine and my father's, finishing my traditional legal education with the Faculté de Droit Lumière Lyon-2.

"After successfully completing the program, I returned to Cambodia, where I have worked as a judge in charge of training judges. I have also taught for the Cambodian Court Training Project (a project of the International Human Rights Law Group), the Cambodian Bar Association, the Faculté de Droit et de Sciences-Economiques and the Ecole Royale d'Administration."

"I have two destinies," she says:

- "I have survived the Khmer Rouge regime.
- "I can get an education."

She is a rare person in Cambodia — an umarried woman dedicated to a career overwhelmingly practiced by men.

"There are only seven women judges in Cambodia. I think it is very difficult, because when you see our culture and traditions and see the role of men and women in that country, you know why we have only seven women judges.

"In the beginning we were only three, not seven, and it was very hard because it seemed unacceptable. I remember people coming up and addressing me as 'Mr.' Because they thought I was a man."

Cambodian daughters traditionally are trained in household duties and child care, and their movement outside of the family home is restricted, Kim said. Although Cambodia's constitution, adopted in 1993, says that every citizen

**I was forced to work in the labor camps of the Pol Pot regime. The conditions were harsh and often inhuman. I was very lucky to have survived, for anyone suspected of having an education was killed.**

is equal and has the same rights, "I have to convince people in my court and in different services, because we did not have women judges before. It's very hard for me because I grew up in the same culture and the same country, but I got some education."

Her mother, she said, still is shocked to see her shake hands.

"We have five judges in my court, and I try to do my best," she continued. "If the male judges work eight hours a day, I work more than 10."

She is keenly aware of the role model's burden that she bears. She attends every public gathering and formal reception she can, not because she loves a frenetic schedule, but because "I try to expose what I can do."

"I have different ideas, a different education," she said. "It is difficult to work with them. But I try to work there because it is important. I feel that Cambodia needs educated people, and I can be useful."

## Golden wins Skadden Fellowship

Deborah M. Golden, of Clarks Summit, Pennsylvania, has received a Skadden Fellowship for 1998-99 to work with the Appalachian Research and Defense Fund of Kentucky. She will represent women and children survivors of domestic volence in protection order hearings, divorce and custody proceedings.

Golden is the fifth member of the Law School family to win a Skadden Fellowship since 1995. The prestigious fellowships, sponsored by Skadden, Arps, Slate, Meagher & Flom through the Skadden Fellowship Foundation, are in their ninth year. They were launched to commemorate the 40th anniversary of Skadden, Arps, Slate, Meagher & Flom, offset federal legal services cutbacks, find young attorneys for public interest work and establish opportunities for young attorneys to be mentored by leaders among legal services attorneys.

Skadden Fellowship recipients also are known for helping and consulting with each other during and after their fellowships and make up an informal but growing mutual help network. Dean Jeffrey S. Lehman, '81, is a member of the board of the Skadden Fellowship Foundation.

# Commencement speaker: keep higher education open to all

There has been progress in opening equal opportunity to everyone, says U.S. Civil Rights Commission Chair Mary Frances Berry, '70, but not so much that it's time to close off the kind of opportunity that made such change possible.

When her friend Roger Wilkins, '56, a Pulitzer Prize winner, former U.S. Assistant Attorney General and Professor of History and American Culture at George Mason University, graduated from the Law School there were "only three African Americans in his class," Berry told the Law School graduating class in May. "And in my class you still could count on two hands minus one finger the number of blacks. So we've come a long way," but efforts to maintain equal access to higher education must continue.

"I do not believe it is seemly to take down the ladder up which I climbed," Berry said in a talk she called "Equal Opportunity in the Twenty-First Century: The Struggle Continues."

A native of Nashville, Tennessee, Berry earned her bachelor's and master's degrees at Howard University and her J.D. and Ph.D. in history at the University of Michigan. During what Dean Jeffrey S. Lehman, '81, described in his introduction as "a truly remarkable career, one that has hit the highest levels of achievement" in the academic world and in public service, Berry has written six books, been Provost of the University of Maryland at College Park, Chancellor at the University of Colorado at Boulder and Assistant Secretary for Education under President Jimmy Carter. She also was a founder of the anti-apartheid Free South Africa Movement, where her support of demonstrations got her arrested and jailed several times.

Her university and Law School education prepared her for "inside" work in the academic world as well as "outside" work like that on the Civil Rights Commission and in the Free South Africa Movement, said Berry, who also is the Geraldine R. Segal Professor of American Social Thought at the University of Pennsylvania.

Named to the Civil Rights Commission by Carter, Berry was fired from the Commission by President Reagan for criticizing his administration's civil rights policies. She sued and won reinstatement — the court ruled that you "can't fire a watchdog for biting," she told her commencement audience — and was named Chair of the Commission by President Clinton in 1993.

"When I got fired, I told the press it was the happiest day of my life, because I was doing what I was supposed to do," she said.

The University of Michigan and the Law School should be proud of their roles in maintaining equal opportunity in admissions, she said. They should be proud of their history of evaluating applicants' resourcefulness, dedication, resilience and commitment in overcoming unequal primary and secondary educational opportunities and refusing to adopt a "one size fits all" approach to admissions, she said.

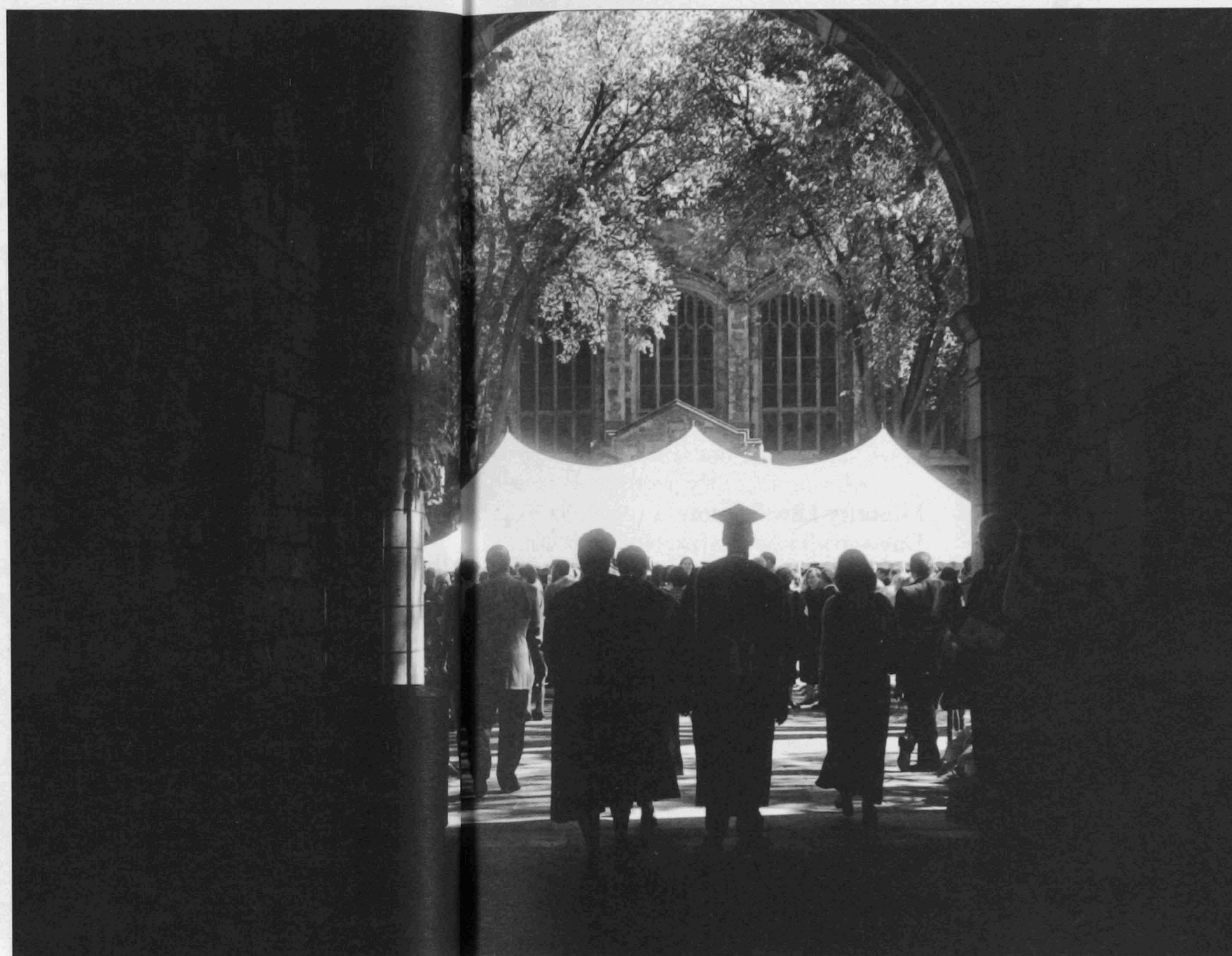
"These children are racially isolated, which is a polite word for segregated — 44 years after *Brown v. Board of Education*. . . . Everybody deserves an opportunity to learn, but we don't give it."

The issue of equal opportunity to education is a national one, she said. "If we want to have prosperity and the material comforts we all want we must educate the population that we have." By the year 2020, Latinos, Asian Americans and African Americans will make up more than half of the American population. "The 'we' in 'We the people' has changed and will be ever changing in the twenty-first century. So we have to figure out what to do with the people we have, not wish for the people we don't have."

She concluded: "We all have work to do if we are to create a society with opportunity and liberty and justice for all."

Berry spoke in Hill Auditorium, the traditional site of the Law School's commencement ceremonies in May. Lehman welcomed friends and families of the graduates, and suggested in his remarks that extending and receiving friendship is one of the qualities that will enrich graduates' lives and make them better lawyers.

For examples, Lehman cited from letters to famed attorney Clarence Darrow, who attended the Law School, that were on loan to the University for display at the University's Bentley Library at the time of commencement. "The most obvious aspect of the papers is that Darrow was a friend to many of the most famous people of the century," Lehman said. "There are letters from Jane Addams, Eugene Debs, Theodore Dreiser, W.E.B. DuBois, Sinclair Lewis, H.L. Mencken, Franklin D. Roosevelt, Upton Sinclair, Woodrow Wilson and Frank Lloyd Wright."



Noting that "what is far more impressive from the letters is the quality of Darrow's friendship," he cited two examples:

- From Helen Keller in 1931: "I am touched at the secret places of my heart where all precious things are kept by your renewed expression of kindness towards me. Very soothing to my guilty conscience is your last letter. The praise of a valued friend is always sweet, and when it is undeserved, it has a salutary effect. One is humbled, and stimulated to start another page of affection."
- From Mother Jones in 1920: "I have trampled over the stormy pathways, and it has been the word of encouragement come from such souls as you that have lighted the way. . . I have always felt that when all the world got dark, there was one I could always go to and that was to Clarence Darrow."

"I hope that you will enjoy the professional success and satisfaction that your predecessor Clarence Darrow enjoyed," Lehman said. "But even more, I hope that you will all make space in your lives and hearts to build quality friendships. I hope that you will make the effort that is required to gaze into the soul of another, to understand who they are, to help them become who they want to be. Your lives will be fuller, and you will be better lawyers."

Law School Student Senate president Susan D. Wood noted the change that law students undergo as they proceed in their legal education — learning to question and argue, for example — and the anxiety that they still face over passing bar exams. But, she advised, savor the joy of what you have accomplished by graduating.

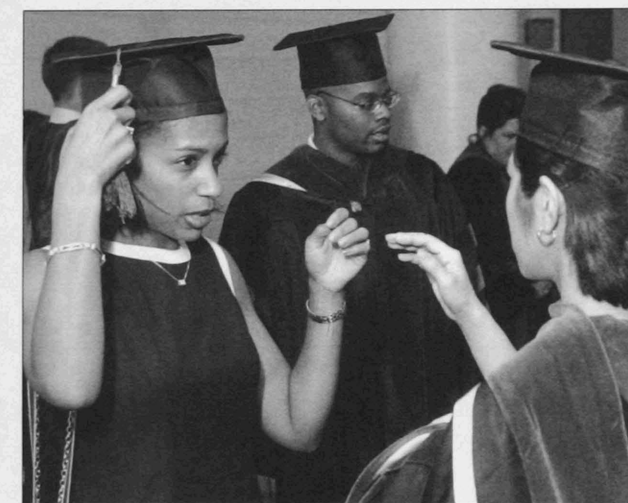
"In three short years (I can say 'short' only because they're over), we have pushed ourselves farther than we might have thought possible," Woods said. "We have wonderful careers ahead of us — some of us will go on to be senior partners at private firms, some will become judges or professors, others will work for the government or in public interest jobs, still others will leave the field of law entirely in search of new challenges. But whatever lies ahead, keep in mind what the success of today says about each one of us individually and also as a group.

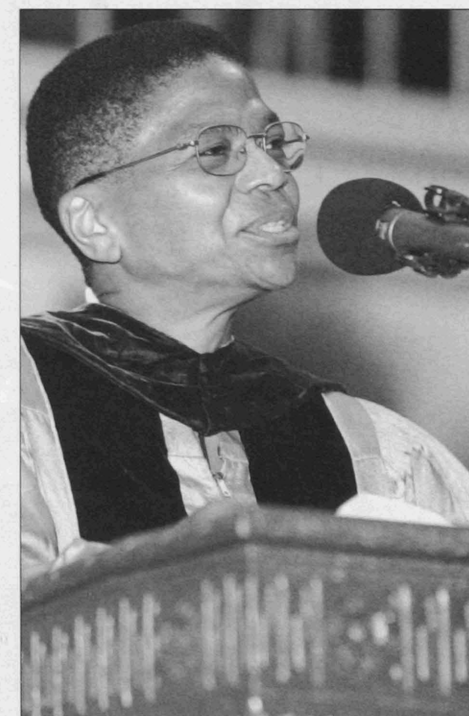
"Congratulations. You've made it."



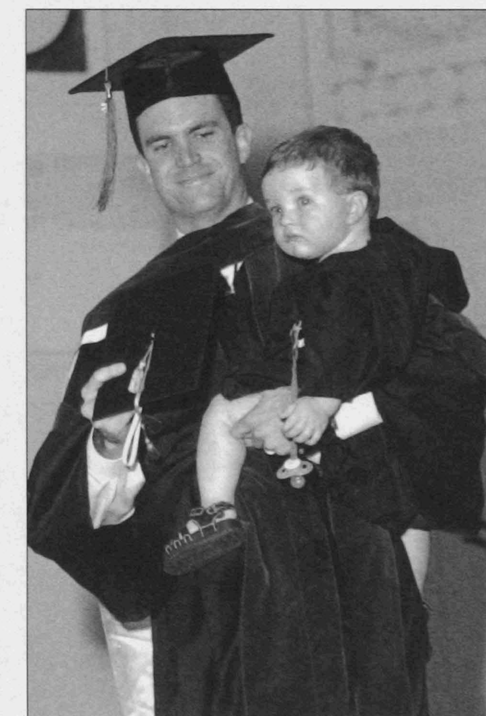
*Graduates are silhouetted against the white tent set up in the Law Quadrangle for the reception that followed commencement ceremonies at Hill Auditorium in May.*

*Graduate Donyele Fontaine gets assistance from a classmate as she prepares for Law School commencement ceremonies. This year's class included some 340 graduates.*





*"I do not think it is seemly to take down the ladder up which I climbed," U.S. Civil Rights Commission Chair Mary Frances Berry, '70, tells Law School graduates in a talk she called "Equal Opportunity in the Twenty-First Century: The Struggle Continues."*



*Paul Hunter prepares to complete son Jacob's graduation attire by placing a mortarboard atop his head as the elder Hunter crosses the stage at Hill Auditorium during Law School commencement ceremonies.*

### Minority Law School Day —

*Dana Roach, 2L, responds to a high school student's questions during Minority Law Student Day at the Law School in February. At left is Delmar Thomas, 2L, and at right is Tony Miles, a J.D. and Ph.D. student. The students were members of a panel of students who described life and study at the Law School and answered questions from the visiting high school students.*

PHOTOS BY THOMAS TREUTER

*Spotting a raised hand, Professor José Alvarez signals to a volunteer to answer his question during a law class simulation for high school students from Ann Arbor. Other classes were taught by Assistant Professor Roderick M. Hills and Assistant Clinical Professor Nick Rine. Minority Law School Day drew about 90 students from three public high schools in Ann Arbor. It was sponsored by the Law School and the Ann Arbor Public Schools and underwritten by a grant from the Law School Admissions Council as part of National Minority Recruitment Month.*

# Women lawyers overseas: something old, something new

Female lawyers overseas wrestle with many of the same issues that face women attorneys in the U.S., like the difficulty of balancing personal and professional lives, being competitive without losing the feminine side of their personalities, and meshing their expectations of themselves with what others expect of them.

But in many countries, the laws, social practices, and the structure of the legal profession give women more latitude than in the United States. In Belgium and France, for example, women make up a significant percentage of sitting judges, and the number of women law students has equaled or surpassed the number of male law students, LL.M. candidates from these and other countries explained during a midday program in March sponsored by the Women Law Students Association.

The speakers were: Gyedre Carneiro of Brazil; Leonor Dicdican of the Philippines; Dina Kallay of Israel; Cecile Loiseau of France; Vanessa Marquette of Belgium; Lenka Mrazkova of the Czech Republic; Jackie Nowlan of Germany; and Hilde Vanparys of Belgium.

Although there were differences among the countries, the speakers indicated that women law school graduates have a tendency to become judges or work in family, public interest or government employment and still account for a small minority of partners in major firms. There are exceptions in every country. And, with women accounting for growing percentages of law school graduating classes, women's presence in major firms and partnerships is expected to increase.

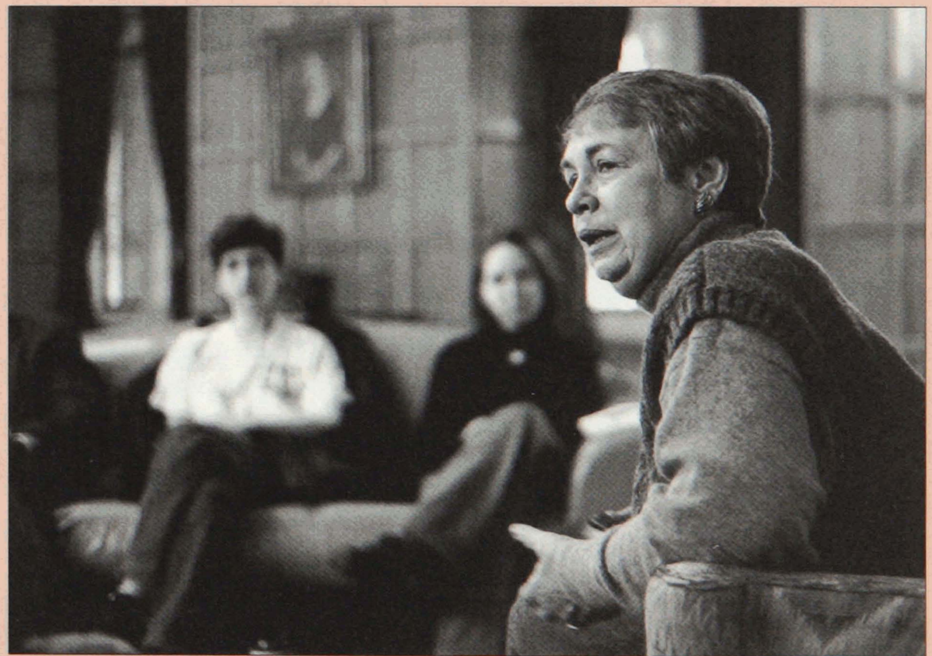
In Western Europe, at least, women spend little effort trying to minimize their femininity in order to compete. As one woman said, "No one expects you to hide your femininity. When you go to an interview, nobody cares what you wear."

In other ways, the women reported, legal practice in their countries mirrors practice in the United States. For example, major big city law firms overseas tend to be more stressful work environments than smaller, rural or provincial firms. And work for the government usually is more predictable and less stressful than private practice.

The women also drew a picture of tensions in male-female, career-family, and personal-professional relations that are familiar to most Americans. Most of the speakers indicated that women still bear the major share of housekeeping and child rearing, although in countries like Belgium there is a greater degree of personal and professional equality and across the nation men are taking a greater role in childcare.

"Discrimination is not a problem," one of the Belgian students said. "We always have been equal."

In Europe, some of the women said, it also appears that the dropout rate from law school is higher for men than for women. The result is that although the entering class may have more men than women, the ratio in the graduating class is reversed.



**Seeking Reconciliation —**

*Helping the families of murder victims deal with the emotional trauma and law enforcement and legal involvement that follows a homicide "seems to reduce their desire for revenge," Pat Bane, Executive Director of Murder Victims Families for Reconciliation (MVFR), explains during a talk at the Law School in February. MVFR helps victims of violence, advocates for moves that reduce homicide and promote crime prevention, and opposes the death penalty. Bane said that she opposes the death penalty because "I think the message that we send when we kill people is that it's okay to kill people." Her talk was sponsored by the Law School's Student Senate and Office of Student Affairs. Clinical Assistant Professor of Law Andrea D. Lyon introduced Bane.*

# Rethinking racial divides

**Visiting Ambassador —**

*Czech Republic Ambassador to the United States Alexandr Vondra brings listeners up to date during a visit to the Law School in April. Listening, from left are Barbara Zezulka-Brown, a secretary at the Law School, and Professor Merritt B. Fox. Hessel E. Yntema Professor Emeritus Eric Stein hosted Vondra on his visit.*

Like the immense spread of land and water that is their ancestral cradle, Asian Pacific Americans are unified more by the label that others put on them than by language, religion or ethnic or national ties. As Frank Wu, '91, succinctly put it during a symposium at the Law School in February: Immigration is the single issue that unites Asian Americans; otherwise they look like all other Americans in their political party allegiances, liberal or conservative persuasions and every other demographic and socioeconomic trait.

The characterization drawn by Wu, a law professor at Howard University, was re-sketched repeatedly in the course of the symposium, called "Rethinking Racial Divides: Asian Pacific Americans and the Law" and presented by the Asian Pacific American Law Students Association (APALSA).

"Traditional legal discourse has often ignored APA [Asian Pacific American] issues and glossed over the effect that law has on our daily lives," said law student Abhay Dhir, who chaired APALSA's Symposium Committee. "Conventional discussions tend to consider APAs as a uniform community, ignoring the enormous diversity among APAs. Our goal for this conference is to change these misperceptions and raise the community's awareness of the uniqueness of APA issues and their place in modern-day American life."

The symposium included a day-long series of plenary sessions that explored the issue through the prisms of immigration, affirmative action, and gender and sexuality, and brought them together in a wrapup roundtable discussion. Many panelists from earlier in the day joined the roundtable to explore each other's viewpoints and answer questions from the audience.

Roundtable participants made it clear that they want the APA experience to become better known throughout American life. The emerging Asian American jurisprudence should focus on the case law of the Asian American experience — and then also include sociology, said Keith Aoki, a professor at the University of Oregon Law School. Make Asian American awareness very broadly based and don't give it a political agenda, pleaded Pat Chew, a professor at the University of Pittsburgh School of Law. A "disproportionate number" of law professors are of Chinese or Japanese descent, "so this is where we need more diversity as well," she added. Asian American studies is "beginning to be fairly widely recognized as a field," said Gail Nomura, Director of the U-M's Asian/Pacific American Studies Program and a faculty member of the Program in American Culture. "Adding the Asian American component teaches you something new," said Wu.

A panel with such participants was "inconceivable" when he was in law school, said Peter Kwan, a professor at Santa Clara University School of Law. "I was the only Asian in my class."

The plenary sessions included:

- **Immigration**, moderated by Professor Peter Hammer, '89. With panelists T. Alexander Aleinkoff, Professor at Georgetown University Law Center and Visiting Professor at the University of Michigan Law School in Spring Term, former Executive Associate Commissioner for Programs at the U.S. Immigration and Naturalization Service, and a former University of Michigan Law School professor; Wu; and Aoki.
- **Affirmative Action**, moderated by Professor Deborah C. Malamud. With panelists Chew; Gabriel Chin, '88, Professor at Western New England College School of Law; Sumi Cho, Professor at DePaul University College of Law; and Marina Hsieh, Professor at University of California, Berkeley, School of Law.
- **Gender and Sexuality**, moderated by Christina B. Whitman, '74, Associate Dean, University of Michigan Law

*Continued on page 30*

*"We, too, are assumed to be foreigners despite our long history in the United States," keynote speaker Daphne Kwok, chairman of the National Council of Asian Pacific Americans, tells participants in the symposium "Rethinking Racial Divides: Asian Pacific Americans and the Law" at the Law School in February. Sponsored by the Asian Pacific American Law Students Association, the symposium was designed to "raise the community's awareness of the uniqueness of Asian Pacific American issues and their place in modern-day American life."*

*Visiting Professor T. Alexander Aleinikoff, a professor at Georgetown University Law Center and a former Law School faculty member, tells listeners that if current trends continue two-thirds of U.S. population growth will be from immigration and most of these newcomers will be people of color. A former U.S. Immigration and Naturalization Service official, he predicted that U.S. immigration policies will shift toward favoring nuclear families and skilled immigrants. Also shown are fellow panelist Keith Aoki, professor at the University of Oregon Law School, right, and Assistant Professor of Law Peter Hammer, '89, who moderated.*

*Continued from page 28*

School. With panelists Kwan; Leti Volpp, an attorney with the National Employment Law Project; and Nancy Ota, Professor at Albany School of Law.

The symposium also included a presentation of student papers on the afternoon preceding the discussion sessions. Stephen J. Arpaia, of Cornell University Law School, presented "A Non-Natural Born President?: The Qualifications for President Clause," and Jennifer Fan, a University of Pennsylvania Law School student visiting for a year at Columbia University Law School, presented "English-Only Rules in the Workplace and Their Effect on Asian Americans."

Dean Jeffrey S. Lehman, '81, welcomed participants and praised the symposium organizers for presenting a program that is "as fine an example as any that I've experienced." He noted that audio recordings of symposium programs will be accessible through the Law School's worldwide web homepage (www.law.umich.edu) "for the benefit of the entire world."

Presented by APALSA and the Law School, the program was sponsored by the Center for Education of Women, Office of Academic Multicultural Initiatives, Rackham Graduate School, Student Affairs Programming Council, U-M Business School, U-M Programs for Educational Opportunity, U-M School of Public Policy, U-M Medical School Diversity and Career Development Committee, U-M Multi-Ethnic Student Affairs, Ashley's and Cottage Inn.

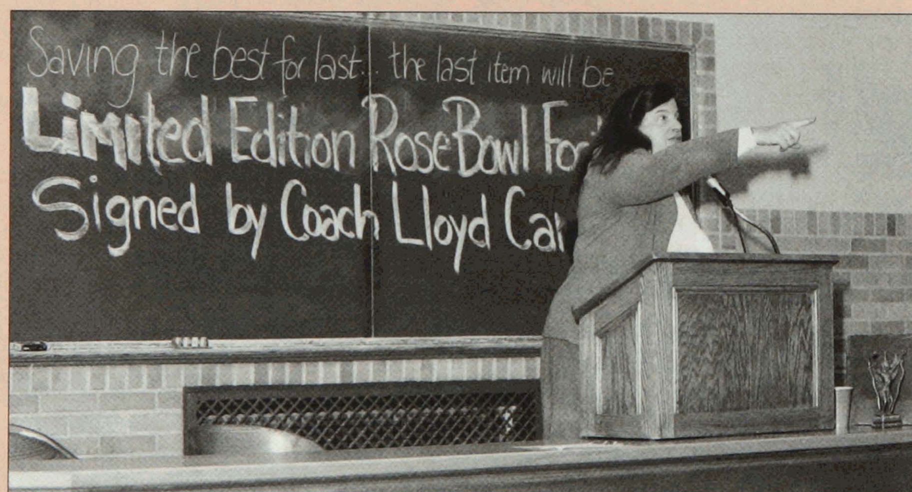
In a separate but related event on the evening prior to the main part of the symposium, readers re-enacted portions of *Korematsu v. United States*, the 1944 U.S. Supreme Court case that upheld the conviction of an American citizen of Japanese descent for refusing to leave his home as part of the U.S. removal of Japanese Americans to internment camps, and the *coram nobis* hearing 40 years later in U.S. District Court to exonerate Korematsu. (See Special Feature, page 64.)

# DNA samples must be returned, attorney argues successfully

During 1992-94 Ann Arbor was haunted by a serial rapist whose attacks spread fear throughout the city and frustrated police efforts to find him. Fear became so widespread in the face of the scanty description of the culprit — African American, young to middle-aged, medium height — that law enforcement officers resorted to stopping African American men, questioning them and asking them to donate DNA samples to clear themselves of any possible involvement in the case. Finally, on Christmas Day 1994, a taxi driver's tip to police led to the arrest of the suspect who eventually was convicted and sentenced to life in prison.

Blair Shelton, a 37-year-old black Ann Arbor home owner at the time, was one of more than 700 African American men whom police questioned. At first, Shelton told a Law School audience in January, he refused to provide blood for DNA profiling, but agreed after officers said that otherwise they would get a search warrant and take the sample they needed. Shelton and his attorney, Michael J. Steinberg, appeared together at the Law School in a program sponsored by the Health Law Society.

Shelton said that he was stopped for questioning again less than an hour after giving his blood sample as he rode the bus to his second job. The officer




**What Am I Bid? —**

*Clinical Assistant Professor Andrea D. Lyon turns auctioneer for the annual student-run auction to benefit the Student Funded Fellowships (SFF) program, which raised a record $23,000 this year. SFF's previous auction record was $18,000. The program provides funds for law students to work in public interest law during the summer; it gave out 50 grants of $3,000 each this year. Among the auction's hottest items were Wolverines football coach Lloyd Carr's autographed football, two tickets to one of the last of the season's games for the Chicago Bulls (read: Michael Jordan), and a faculty-student basketball game. The faculty team was coached by Assistant Professor Kyle D. Logue, a former all-state high school star, who scored 30 of the faculty's 42 points in its 7-point loss to the students. The faculty led until the last period. More than 100 fans attended the game.*

stopped his questioning when Shelton showed his receipt from making his blood donation for DNA testing. He continued: "Those records were basically a passport over the next two months" during the eight additional times that he was stopped for questioning.

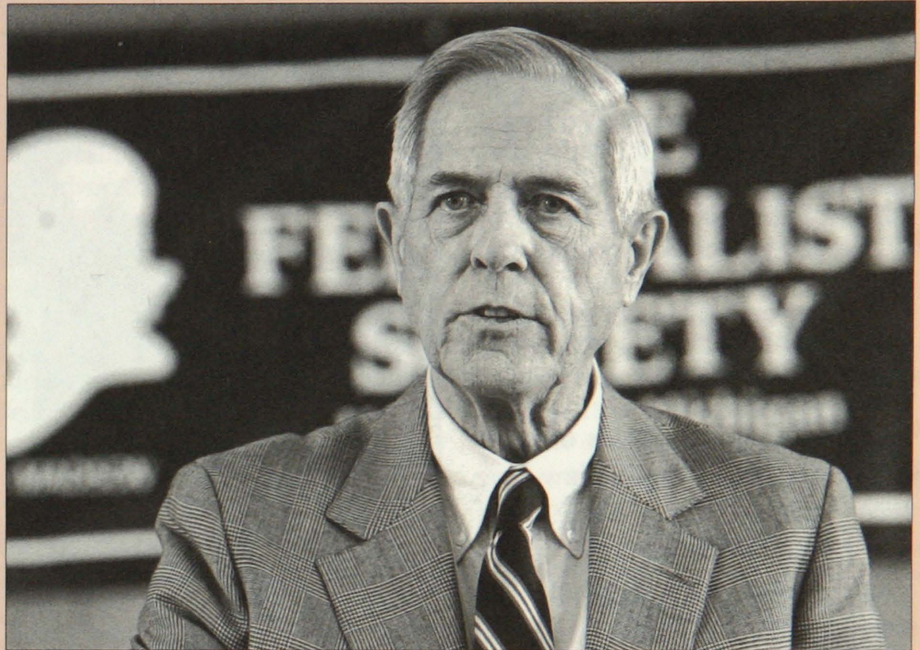
Once, he said, he was stopped outside a theater, another time as he waited in line to buy bagels, and on Thanksgiving Day, as he jogged around a baseball field, an officer drove his patrol car onto the diamond to stop him and question him.

The police action angered Shelton and he turned to the National Lawyers Guild (NLG) for help. NLG, led by then-local chapter president Michael J. Steinberg, won Shelton's case at trial but faced state appeals to the Michigan Court of Appeals and the Michigan Supreme Court. Both Courts refused to grant leave to appeal, however, and let stand the trial court ruling that more than 150 DNA samples that police had continued to hold from the investigation must be returned to the donors if they sought them. Final notices about returning the samples and profiles made from them went out in December 1997.

Steinberg, now Interim Legal Director for the American Civil Liberties Union of Michigan, said that the NLG team filed a nine-count complaint alleging constitutional violations and breaches of common law. Among them: that Ann Arbor police, in collusion with other law enforcement agencies, followed a policy of illegally searching and seizing people and that they had no probable cause for demanding DNA samples from people they questioned.

Law enforcement officials' actions violated the Equal Protection clause of the Fourteenth Amendment and state law, Steinberg argued.

"The major question of whether we were successful in this litigation is how the city and the police will respond next time," Steinberg said.

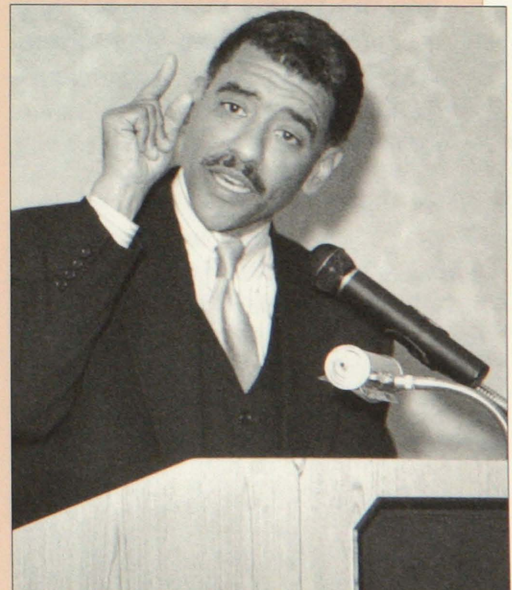



**Religion and Policy —**

*The Hon. James L. Buckley of the U.S. Court of Appeals for the District of Columbia tells listeners that elected government leaders who consult their religious convictions in making policy should not be criticized any more than those who oppose tobacco. "There are those who think that the health of your soul is at least as important as the health of your lungs," he said during a talk on "Religion and Public Service: May Public Officials Consult Religious Beliefs in Making Policy?" "Your position will reflect what you believe," he said. His visit to the Law School in April was sponsored by the student chapter of the Federalist Society for Law and Public Policy Studies. Two days later the chapter presented Warren Farrell, author of* The Myth of Male Power, *a three-time member of the Board of Directors of the National Organization for Women and a former board member of the National Congress of Fathers and Children. Farrell discussed "Is Male Power a Myth?"*

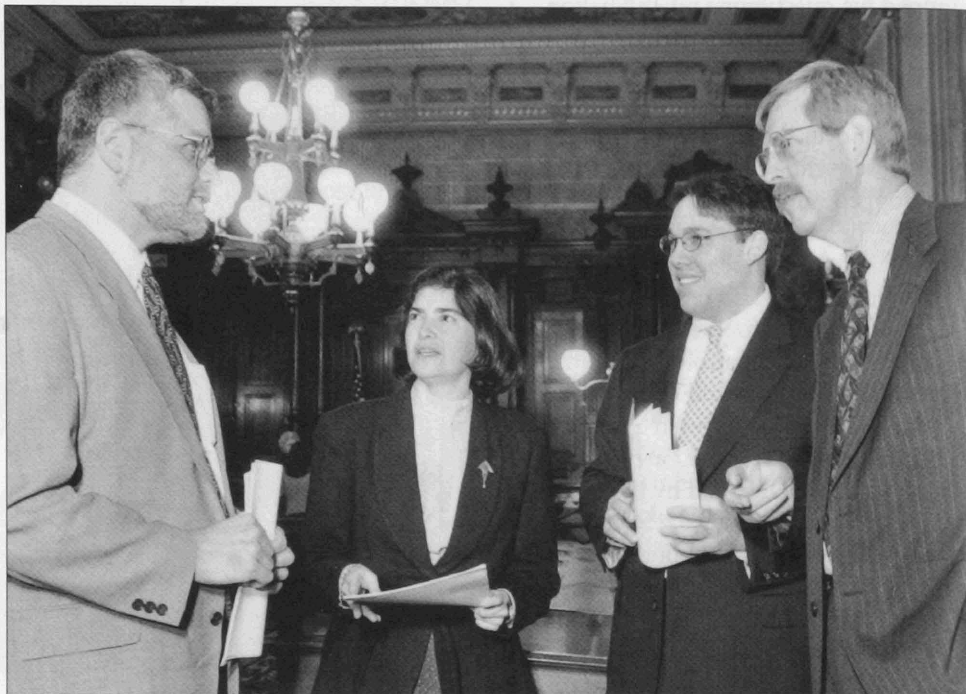
**Keynoter —**

*Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr., delivers the keynote address at the annual Butch Carpenter Banquet in April. Mallett told listeners that a "good, carefully-constructed, well-executed affirmative action plan" is important and offers people a "way in" to compete rather than a "way up" the ladder. Mallett also discussed jury reform and the need for a family court to handle the variety of cases that now affect families but go to separate courts. The annual banquet is sponsored by the Black Law Student Alliance.*



Frank E. Vandervort, Naomi J. Woloshin, Albert E. Hartmann and Donald N. Duquette compare notes after testifying before a joint Senate/House hearing at the State Capitol in Lansing. The room in which the hearing was held formerly served as chambers for the Michigan Supreme Court.

# Law School experts testify on 'child-attorney' bills, children's justice center



**Leaders in the fields of child protection and children's law long have looked to the University of Michigan Law School for its experience and expertise. That standing was reflected in Lansing in March when four members of the Law School testified on bills concerning the appointment and duties of a child-attorney to represent the best interests of children in court cases and the idea of a Children's Justice Center Pilot Program. Testimony was before a joint meeting of the Senate Families, Mental Health and Human Services Committee and the House Human Services and Children Committee.**

The bills, Senate Bills 954, 955 and 956, would, respectively, revise the family division of circuit court, amend the revised probate code, and amend the Child Custody Act of 1970. Explained one of those who testified: "The bills ensure the proper representation of children because they lay down a clear, effective and child-centered definition of the role for the child-attorney." A Michigan Children's Justice Center Pilot Program is under discussion as a way to provide specially trained legal representation for children's interests.

Those from the Law School who testified were:

- Donald N. Duquette, Clinical Professor of Law and Director of the Law School's Child Advocacy Law Clinic, currently on leave as a legal consultant to the U.S. Children's Bureau as part of President Clinton's Initative on Adoption and Foster Care. Duquette served as co-chair, with the Hon. Cynthia Stephens of Wayne County Circuit Court, of the Michigan State Bar Children's Task Force.
- Albert E. Hartmann, a third-year law student who has written in favor of such legislative proposals ("Crafting an Advocate for the Child," 31 *Michigan Journal of Law Reform* 237 at 238, Fall 1997).
- Frank E. Vandervort, Program Manager of the Michigan Child Welfare Law Resource Center at the Law School.
- Naomi J. Woloshin, Program Manager for Child Welfare Career Development at the Michigan Child Welfare Law Resource Center at the Law School, where she runs the national summer child welfare law fellowship program supported by the Kellogg Foundation's Families for Kids Initiative and identifies and develops child welfare law career opportunities.

Following are excerpts from Duquette's and Hartmann's testimony on the child-attorney bills and Vandervort's and Woloshin's testimony on the Children's Justice Center.

## 'The child needs an advocate'

— By Donald N. Duquette

A child faced with any complex bureaucracy — a school, a hospital, or the child welfare system — needs someone to guide him or her through the complex system. The child needs an advocate. Usually the parents look out for a child's interests. In legal cases, however, where custody of the child is at stake, and the suitability of the parents to care for the child is often the question, parents cannot be depended upon to protect the best interests of the child or to look out for the needs of the child. Fundamental aspects of the child's life are being threatened in these legal proceedings and they need their interests competently protected.

In child protection proceedings, both state and federal law provide that children should have an independent legal advocate. Since 1974, the federal government has required, as a condition to receiving federal child welfare funds, that each state provide for the appointment of an advocate for the *child's best interests* in civil child protection proceedings. Federal law, however, does not define the duties of that child advocate.

Michigan law has required that an attorney be appointed to represent the child at least since the early '70s, but, unfortunately, Michigan statutes do no better in defining the legal advocate's role than does the federal law. As my friend and former student Albert Hartmann points out in his law review article ("Crafting an Advocate for the Child," 31 *Michigan Journal of Law Reform* 237 at 238, Fall 1997), Michigan statutes are confusing and inconsistent regarding the proper role of the child's legal representatives. The juvenile code requires appointment of an "attorney" to represent the child in all proceedings, thus implying a traditional attorney-client relationship advocating for the wishes of the child. The child protection law, on the other hand, requires appointment of a legal counsel charged with representing the child's best interests. Which is it?

Unfortunately, the legal duties of the child advocate are not clear and provide inadequate guidance to lawyers representing children. As a result, each lawyer makes her own decision about the role. This ad hoc approach produces confusion among clients, other involved individuals and the courts. It also has the effect, overall, of reducing the quality of legal representation for children.

The Michigan State Bar Children's Task Force's Guidelines for Child Advocates recommend a role for the child advocate consistent with the bills presented here. The American Bar Association's Standards of Practice for Lawyers Who Represent Children in Child Abuse and Neglect Cases, adopted on February 5, 1996, are also consistent with these bills — except that the ABA Standards require the lawyer to act as champion for the wishes of the child, that is as a traditional attorney. The ABA Standards, therefore, would require the lawyer to advocate for the wishes of the child even if the child is three or four. The National Association of Counsel for Children adopted the ABA standards for lawyers for children except for reservations on the best interests/wishes question.

These bills endorse the best interests role, but in a way that treats the individual child fairly and with respect while recognizing the special needs and immaturity of children. This proposal, where the court appoints a "child-attorney" to represent the best interests of the child, is a simple but elegant — and practical solution to this problem. The bill requires that the court always be informed of the child's wishes, even when they conflict with the advocate's best interests recommendation. In case of a conflict between the child-attorney's best interests view and the child's wishes after discussion and counseling, the bill provides that the child-attorney must raise the matter with the court for the court's determination. The court can then take any action it deems appropriate. Presumably, in the case of an older mature child, the court would appoint a legal counsel to represent the child's wishes and that legal counsel would serve along with the child-attorney. It is not expected that this dual representation of the child would occur very often. Around the country, those who have studied and thought about this dilemma have nearly always agreed that the number of cases in which a conflict between lawyer and child is unresolvable are fairly small.

My own research has revealed that when lawyers are given a defined role as child advocate, they meet those expectations AND that aggressive and individual representation of children actually benefits the court process and the child welfare system because it reduces the number of hearings necessary and reduces the amount of time in out-of-home care.

Better defined roles for the child-attorney does not mean more litigation. Note that one of the duties is to promote a cooperative resolution of the matter. Our research experience was that aggressive representation of the child actually promoted timely resolution of the litigation.

These bills do not expand the circumstances under which the child would be independently represented, but merely define the role more specifically. Under these bills the child-attorney remains mandatory in protection proceedings, but optional in child custody or guardianship where the court is to appoint a child-attorney only if the court determines that the child's interests are not adequately represented.

## 'The real issue is the future of the child'

**— By Albert E. Hartmann**

It is essential that the role of the child-attorney is clear. An unclear role causes confusion when the child-attorney faces the difficult ethical dilemmas inherent in child protection cases. A well-defined role may make representation easier because more guidance will keep the child-attorney on the right track. A well-defined role will help the other parties to better understand and form accurate expectations about the goals and behavior of the child-attorney.

Clarity is also important because of the different roles for attorneys under the proposed system. Like the current system, the proposed system contemplates two types of attorney representation for children in abuse and neglect cases. The two types of representation are the child-attorney and the legal counsel, and the duties and obligations of each role vary considerably.

The bills also clearly define the role of the child's legal counsel in terms of the traditional attorney-client relationship. This role allows for the possibility that the child will require a traditional advocate, whose loyalties and duties are clear. The legal counsel is usually appointed after the child-attorney and the child have a disagreement about the child-attorney's recommendation. Thus, it is clear to the child from the beginning that his or her legal counsel will represent his or her wishes.

The role of the child-attorney is effective because it is flexible and comfortable. The bills give the child-attorney the flexibility to be an investigator, an officer of the court, an advocate, or some combination of those three. Even with this flexibility, however, the proposed system sets the outer boundaries of this flexibility, and the child-attorney must work within those boundaries.

The proposed system is comfortable because it gives the child-attorney the clarity and flexibility necessary for him to use his training as an attorney. Attorneys are trained to evaluate a legal situation and arrive at a satisfactory resolution based on the goals of the representation. The child-attorney will seek a resolution that furthers the best interests of the child.

The system is also comfortable because it allows the child-attorney to be an advocate for the best interests of the child. The child-attorney is not barred from being an advocate for the child and can be an effective advocate for the child and ensure that the child's story is propertly presented to the court. The child-attorney will also know when and how to ask the judge to appoint a legal counsel for the child.

The proposed system is child-centered because it sends the message that the resolution of child protection cases should be based on an objective determination of the child's best interests, balanced with the wishes and interests of the child. It also sends a message that adversarial advocacy is not always the proper model in child protection proceedings.

The disclosure provisions allow the child-attorney to disclose all relevant facts to the judge, despite the attorney-client privilege, or any other privilege, that would normally protect confidential information. This disclosure ensures that the judge is aware of all relevant information before making vital decisions about the child's future. The child-attorney, however, must tell the child when he will reveal information to the judge so that the child knows what to expect.

There is so much at stake in these proceedings, especially where there are allegations of physical and sexual abuse, that allowing the child-attorney to disclose relevants facts to the judge is warranted. This demonstrates that the real issue in the case is the future of the child, and the system is tailored to give the judge and the child-attorney the tools necessary to make the child's future a good one.

## 'Children need more effective legal representation'

**— By Frank E. Vandervort**

Since at least the early 1970s there has been discussion within the legal profession about how to provide legal services to children. Unfortunately, in my view, we have gotten it wrong for too long. Time and again the American Bar Association has suggested that attorneys volunteer their time to provide services to children and their families. We do not ask other segments of our society to accept the services of volunteer attorneys. Rather, we have provided specialists to protect the interests of corporations, public bodies, and adults. Stop for a moment and imagine what would happen to children's health care if the American Medical Association did away with Pediatrics and simply urged doctors in other specialities to provide medical services to children in their spare time, when they are not too busy with their "real" work. How absurd! But this is what children for far too long have had to rely upon to meet their legal needs.

There is a growing recognition across the country that children need more effective legal representation. In states as diverse as California, Massachusetts, and Kentucky we have seen, in the last few years, the establishment of Children's Law Centers. While each of these Centers is different, they have commonalities: the independent legal representation of children, involvement in a broad array of cases — guardianship, child protection, custody, special education, school expulsion to name but a few. Most fundamentally, these organizations are a tangible recognition that the legal representation of children is a complicated and demanding specialty which requires individuals to commit careers to the study of a large body of applicable law as well as have a working knowledge of child development, social work, psychology, and medicine.

One such Center was established in Grand Rapids in 1991. From 1995 until 1997, I was the Executive Director of the Children's Law Center (CLC). During that time we provided consultation, informal advocacy, and legal representation to approximately 3,000 children. While this number is impressive, more so because it was achieved with a very small staff, there were large segments of the community that were unaware of our existence. It is impossible to know how many people would have requested our help if they knew that CLC existed. In addition to individual children, we received hundreds of inquiries from lawyers, judges, social workers, psychologists, medical professionals, and educators regarding various child related legal questions. These inquiries involved a diversity of questions, from which court to file a termination of parental rights petition in to whether a hospital could treat a child for venereal disease without parental consent. I believe that the experience of the Children's Law Center clearly demonstrates the need for such services in Michigan.

The Children's Justice Center concept holds great promise for going a long way toward meeting the largely unmet legal needs of children. First, law centers recognize the need for specialization. The law has grown increasingly complicated over the last two decades, requiring ever increasing specialization for effective representation. Secondly, law centers recognize the unique developmental needs of children.

In Grand Rapids, for example, we employed a full-time clinical psychologist as a caseworker to assist the attorney in defining "the best interest" of our young clients and making recommendations about their welfare. Finally, law centers offer the very real possibility of using a combination of private and public money to provide a better quality of service to children than is currently being provided in a financially responsible manner.

## Many lawyers would like to work at children's justice center

— By Naomi Woloshin

I encourage you to move forward with the Children's Justice Center concept. As a child advocate and family lawyer, I know that there is great need for lawyers who are specially trained to represent children in abuse and neglect, child custody and special education proceedings. I can assure you that there will be hundreds of talented, well trained attorney child advocates to staff the Children's Justice Centers.

I make this assurance based upon my experience at the Resource Center. For each of the four years of the summer child welfare law fellowship, between 180 to 250 students have applied for twenty fellowship positions. We have received this level of response from law students who either attend law school or come from one of the 11 sites of the Families for Kids Initiative (Arizona, Kansas, Massachusetts, Michigan, Mississippi, Montana, New York City, North Carolina, Ohio, South Carolina, and Washington state).

Last spring, I conducted a survey of our former summer fellows. Many of the fellows were pursuing their dreams of representing children, but too many were not. Unfortunately, the major obstacle they identified in pursuing a child welfare law career was the lack of available positions.

These committed, well trained lawyers have put aside the dream of high salaries and luxurious offices for the opportunity to give a child a voice in the legal system and a chance for a better life. They would be eager to work at a Children's Justice Center in Michigan.

**My Funny Valentine —**

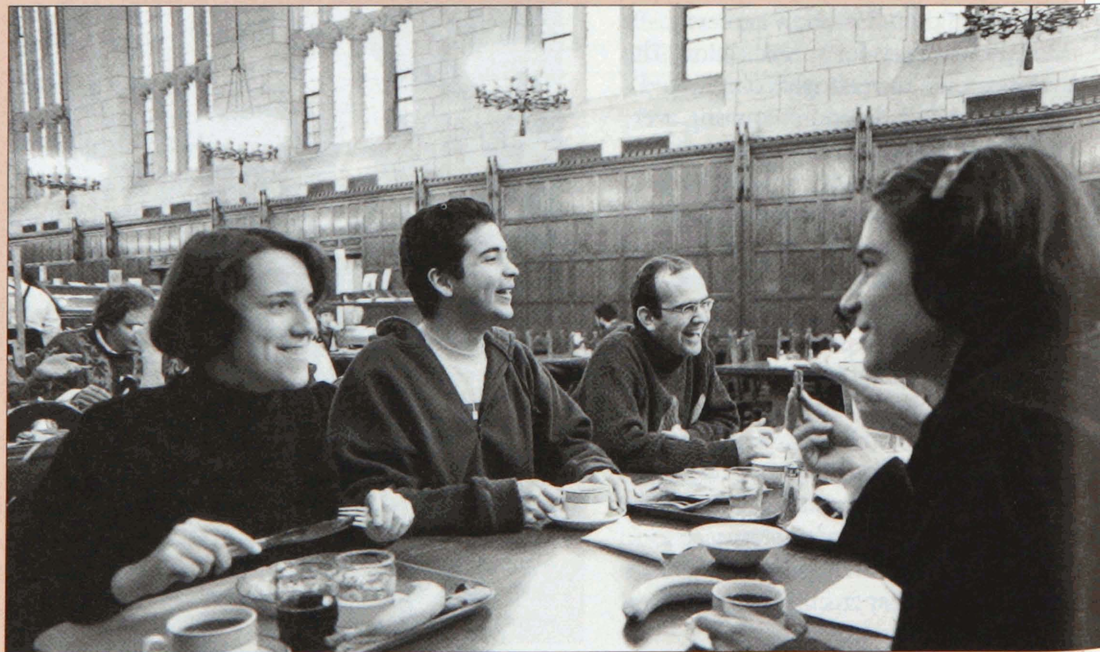
*Headnotes vocalists Stuart Lurie, 2L, Beth Milnikel, 2L, Jasmine Abdel-Khalik, 1L, and Derek Johnson, 1L, serenade December 1997 graduate Andrew Gifford with a "vocal valentine" — their version of "Rubber Ducky" from "Sesame Street" — during a lunch hour at the Lawyers Club in February. Other options included "Embraceable You" and a personalized version of "My Funny Valentine." The Headnotes, made up entirely of law students, took orders and brought their vocal valentines to fellow students, faculty, staff and others for two days to celebrate Valentine's Day. The messengers consider the identity of the sender to be privileged information. Asked who sent the vocal valentine to Gifford, the singers referred the question to him. Gifford's answer? "Just call it a question mark."*

## Criminal Law —

*Practicing criminal law — from either side of the courtroom — is preferable to other legal specialties, Assistant U.S. Attorney David Debold, left, and defense specialist Douglas R. Mullkoff, gesturing to emphasize his point, agreed when they spoke at the Law School in February. Debold, who joined the U.S. Attorney's office in Detroit in 1986 after clerking for the Honorable Cornelia Kennedy, '47, of the U.S. Court of Appeals for the Sixth Circuit, said his Justice Department post attracted him because it offered, "in cases where a victim is visible, a way to try to do something that provides them with some satisfaction and to do something for the betterment of the community." He added that criminal law is "a very satisfying" field that "is very interesting, no matter what side of the courtroom you are on." Mullkoff, of Kessler & Mullkoff in Ann Arbor, said he sees his role as political — he's active among those who have lobbied for repeal of Michigan's 20-year-old drug-lifer law that requires life imprisonment without parole for conviction of dealing or intent to deal more than 650 grains of cocaine or heroin. He said he chose his career "because I think that law reform is something I can help make happen" and "I believe that the Constitution and amendments should be more broadly interpreted;" he added: "In criminal law you'll find the happiest clients, people who really need a lawyer." The program was sponsored by the Office of Public Service. At right is Office of Public Service Director Robert Precht, who introduced the speakers.*

## Lunch-Time Languages —

*During the academic year the Office of International Programs established tables in the Lawyers Club cafeteria where students could gather to practice or speak in French, German, Hebrew, Japanese or Spanish with fellow students. Here, clockwise, Hilda Vanparys, of Belgium, Ruben Edwardo Lujan, of Venezuela, Dimosthenis Papakrivopoulos, of Greece, and Cecile Loiseau, of France, share lunch and a conversation in Spanish. The special tables draw U.S. students as well as law students from overseas, some to speak in their main language, some to practice a second, third, fourth or other language.*



# *Elizabeth Long's gift*

## endows three new faculty chairs

**Three faculty members, Samuel R. Gross, Catharine A. MacKinnon and William I. Miller, have been named to newly established endowed chairs at the Law School, thanks to the generosity of Elizabeth A. Long, daughter of a founder of Butzel Long in Detroit.**

*Elizabeth A. Long*

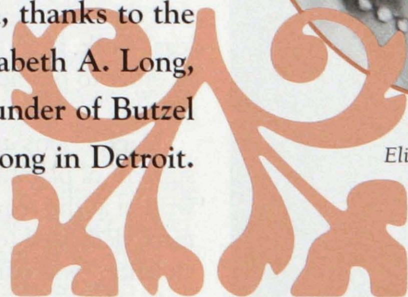


PHOTO COURTESY BUTZEL LONG

The chairs were announced during a gala "Evening in Celebration of the Life of Elizabeth A. Long," held at the Lawyers Club in March. The banquet celebration featured live musical entertainment, remarks by Dean Jeffrey S. Lehman, '81, and testimonials from Richard E. Rassel, '66, Senior Partner of Butzel Long, and remembrances of Elizabeth Long by her lifelong friends, retired Michigan District Court Judge John R. Mann, '40, and his wife, Mary Lou Mann.

Elizabeth Long died last year. Her bequest, expected to exceed $10 million, allowed the University to establish chairs honoring her; her father, Thomas G. Long, '01; and her parents, Thomas G. and Mabel Long. Lehman introduced the new chair holders to the celebrants.

The first Thomas and Mabel Long Professor of Law is Samuel Gross, who was unable to attend the celebration. Lehman described Gross as "one of the world's foremost authorities on the death penalty. His writings on capital punishment, politics, race, and crime have been widely read and discussed.

"In the classroom, Professor Gross, who teaches evidence and criminal procedure, has been a pioneer in helping our students to understand the uses and abuses of social science research in the legal context."

Gross earned his undergraduate degree at Columbia College and his J.D. from the University of California at Berkeley.

MacKinnon will be the first Elizabeth A. Long Professor of Law. "What can one say about Professor MacKinnon?" Lehman asked. "Only that she is, without a

*Below: Professor William I. Miller, right, shares a laugh with his wife, Kathleen Koehler, and the Honorable John R. Mann, '40, during the "Evening in Celebration of the Life of Elizabeth A. Long" in April. Miller was named the first Thomas G. Long Professor of Law, one of three endowed chairs made possible by Elizabeth Long's bequest to the Law School. Thomas G. Long, '01, was her father and a founder of Butzel Long.*

PHOTO BY D.C. GOINGS, UNIVERSITY PHOTO SERVICES

*Professor Samuel R. Gross, below, has been named the first Thomas and Mabel Long Professor of Law, one of three chairs endowed through the bequest of their daughter, Elizabeth A. Long.*

PHOTO BY D.C. GOINGS, UNIVERSITY PHOTO SERVICES

*Professor Catharine A. MacKinnon, right, chats with the Honorable John R. Mann, '40, Mary Lou Mann and Richard E. Rassel, '66, Senior Partner of Butzel Long, during the "Evening in Celebration of the Life of Elizabeth A. Long," whose bequest to the Law School has endowed three professorships. MacKinnon was named the first Elizabeth A. Long Professor of Law.*

doubt, the most influential feminist legal scholar in the world. That her seven books have completely transformed the legal landscape, changing the ways in which topics from sexual harassment to free speech to pornography are understood and debated. That her classes are extraordinarily popular, and that many students choose to come to Michigan simply because they would like the opportunity to study with her. And that she continues to participate in active legal work, from legislation to litigation, in order to promote the cause of women's equality."

MacKinnon's *amicus curiae* brief in support of plaintiff Joseph Oncale, written at the request of 14 groups of men "dedicated to ending sexual violence," was part of the legal package in *Joseph Oncale v. Sundowner Offshore Services, Inc., et al,* that led to a unanimous decision by the U.S. Supreme Court in March that same sex-harassment violates civil rights to sex equality the same as opposite-sex harassment does. MacKinnon holds a B.A. from Smith College, a J.D. from Yale

Law School and a Ph.D. in political science from Yale University.

Miller, named as the first Thomas G. Long Professor of Law, "epitomizes the level of scholarly distinction that the members of our faculty aspire to," Lehman said.

"Professor Miller's scholarly research has concerned the relationship between legal norms and social norms, and the complex ways in which legal and political institutions are shaped by the social practices of their societies. He has published dozens of articles and four books.

"His most recent book, *The Anatomy of Disgust*, has won academic prizes for its quality, and has made Professor Miller an international celebrity. He has been written up in scholarly and popular magazines from Brazil to Italy, and he has been the subject of commentary in the *New Yorker*, the *New Republic*, and in a forthcoming edition of ABC's "Primetime Live." He has brought that scholarly erudition into the classroom, teaching the subject of property law with insight and perspective that his students describe in the most glowing terms imaginable."

Miller received his undergraduate degree from the University of Wisconsin, his Ph.D. in English from Yale University, and his J.D. from Yale Law School.

Elizabeth Long graduated from the University of Michigan in 1936. For 60 years she worked as a volunteer with the Monica Guild, a group of women who raised funds for charity, including the Salvation Army and Goodfellows. She also was a lifelong, devoted bridge player and belonged to seven bridge groups.

Long's father, who practiced with Butzel Long for 64 years, died in 1973. During his long career, Thomas G. Long drafted the Dodge Act to simplify the administration of estates, worked with Elliott Stevenson and William Carpenter on the reorganization of General Motors, and represented Michigan Bell Telephone Company for 40 years in rate proceedings. He served on the boards of directors of several companies and on the Detroit Library Commission for 25 years, including five terms as president. He received honorary degrees from the University of Michigan, Lawrence Institute of Technology and Olivet College.

Thomas Long "was a giant throughout his 64 years of practice with this firm," said Butzel Long Senior Partner Rassel. "We fly daily under the banner of his name."

Thomas Long married Mabel A. Somers of Dearborn on August 13, 1912. She died in 1956. They had one child, Elizabeth.

Elizabeth Long's gift to the Law School is expected to exceed $10 million, making it the second largest the Law School ever has received and the largest cash gift. As Lehman said, "$10 million is much more than most of us will have the opportunity to deploy in a single act in our lifetimes," but the true significance of her gift "lies in what it will mean in practice for the future of this Law School, and the expression of values that lies behind it."

Said Lehman: "Elizabeth Long's bequest adds a resounding exclamation point to the statement that nothing is more important to this institution than its ability to attract and retain the very finest teachers that may be found anywhere in the legal academy."

He continued: "But an endowed professorship does more than add resources to the financial base of the institution. It also brings prestige and honor to the very finest members of the faculty. The title remains with the professor throughout his career as a faculty member.

"Moreover, by linking the names of those faculty members to the names associated with the professorships, the faculty members reflect that honor back to the eternal credit of the benefactor who made the professorships possible."

**"Elizabeth Long's bequest adds a resounding exclamation point to the statement that nothing is more important to this institution than its ability to attract and retain the very finest teachers that may be found anywhere in the legal academy."**

— DEAN JEFFREY S. LEHMAN, '81

# ALICS:

## Celebrating ten years teaching U.S. law in Germany

*Mathias W. Reimann, LL.M. '83*

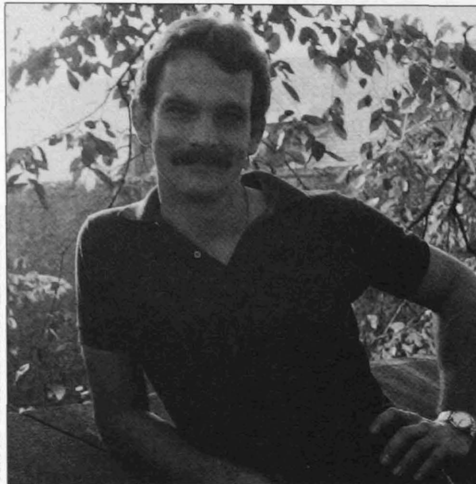


PHOTO BY SUZANNE COLES-KETCHAM

*Carl E. Schneider, '79*

Each year in August, a miniature Michigan Law School blossoms in Germany. It is the American Law Introductory Courses (ALICS).

Ten years ago, ALICS was born out of the recognition in Germany that, in a global economy, lawyers from different countries have to be able to understand each other. Ten years ago, representatives from a German foundation — the Friedrich Ebert Stiftung — and the German American Lawyers Association asked the Law School to help them set up a program.

Several faculty members, including Professors Mathias W. Reimann, LL.M. '83, and Carl E. Schneider, '79, helped create a program based on the principle that the only way truly to understand American law is to experience American legal education. American law schools, they thought, are primarily institutions for socializing students into the ways American lawyers think.

ALICS attempts to give German law students, *Referendare* (legal apprentices), and lawyers in two weeks a taste of what American law students get in three years. Participants study Torts, Civil Procedure, Property and American Legal Method. Classes meet five hours a day and are conducted exclusively in English. Students are assigned cases to prepare, and instruction is exclusively Socratic. Nights are spent in poring over cases, consulting German-American legal dictionaries, and wondering what the professor will ask the next day.

Faculty and students live together in a conference facility which allows extensive interaction. They share meals, walks, wine, and conversation over beer when studying is finished for the night.

Both the students and the faculty speak glowingly of ALICS. German law students are used to large lecture classes, but they soon become enamored of the Socratic method. As one participant said, "It's very challenging, because it really makes you think. And it's such a pleasure being called on in class, because it shows that the professors really care about what you learn."

Many ALICS graduates go on to do graduate work at America's best law schools — including Michigan — work for which they feel ALICS has prepared them well. Indeed, ALICS students are so enthusiastic about their experience with the program that this year a tenth anniversary reunion is planned for August 7. Graduates from all over Germany are expected to come to Neustadt an der Weinstrasse to celebrate their introduction to American law.

ALICS' faculty find that they learn a good deal about their own legal system by trying to explain it to adepts in another system. They say ALICS attracts strong and rewarding students. And they feel that ALICS' intensity, rigor and excitement make it, as Schneider says, "the best program of its kind in the world."

## Faculty members open Portuguese window on U.S. law

"Well done," is how Professor Merritt B. Fox describes the new program of the Lisbon Council of the Portuguese Bar Association that uses Law School faculty members to acquaint Portuguese lawyers with U.S. law.

Fox was the first of six Law School professors who have or will teach in the program. During the week of April 13 he delivered three lectures of more than an hour each during the week's three 3-hour sessions. His audience was made up about 40 lawyers from both private and government practice.

Speaking in English, Fox concentrated on American securities law, mandatory disclosure, insider trading and the application of U.S. securities law to transnational transactions. Most participants used English throughout the sessions, although instant translation was available for those who preferred to listen in Portuguese.

Sessions also included talks by Portuguese legal specialists who compared their nation's law with that in the United States. "It was well done, and there was some opportunity to have some comparative discussion," Fox said. Other faculty members taking part in the program and their teaching times in Lisbon are:

- Thomas and Mabel Long Professor of Law Sam Gross, and Kirkland & Ellis Professor of Law Phoebe Ellsworth, week of May 4.
- Henry M. Butzel Professor of Law Thomas E. Kauper, '60, week of May 18.
- Thomas M. Cooley Professor of Law Edward H. Cooper, week of June 22.
- Robert A. Sullivan Professor of Law James J. White, '62, week of September 21.

Mario M. Mendes, LL.M. '85, organized the program for the Lisbon Council of the Portuguese Bar Association. The program acquaints Portuguese attorneys with aspects of American law and gives them an opportunity to compare it with Portuguese law. The council established the program with aid from the Luso-American Development Foundation.

## 'A rich source of intelligent discussion'

*Twenty years ago, then-law student and* Michigan Law Review *Editor in Chief Carl E. Schneider, now Professor Carl E. Schneider, '79, launched the first of the* Review*'s now-annual book review issues. This year, in celebration of the 20th anniversary of the annual review of books related to the law, Schneider recalls those first days and offers some ideas for the future. Here, with permission, we offer some preview excerpts from Schneider's introduction prepared for 96* Michigan Law Review *(forthcoming 1998).*

**By Carl E. Schneider, '79**

- "Interminable as law articles often are, their compass is too small for some ideas. The increasingly interdisciplinary nature of law and legal studies also impels us toward writing books. Many people trained in fields other than law were taught to write books. And if lawyers want to reach readers outside law schools, we must usually write books, since law review articles are usually hard for non-lawyers to find."
- ". . . book reviews do more than reward authors for their years of travail. They also continue the professional discourse of which a book is a part. A book's ideas may eventually influence the work of other scholars. But reviews are often the only forum in which those ideas and their rationales are directly confronted and analyzed. Scholars engaged in their own work will often take a book's arguments at face value; reviewers must ask whether those arguments are convincing."
- "I believe that over the last twenty years, the book review issue has been a rich source of intelligent discussion of the books that most affect the way we think about the law. Its roll of authors contains a startling proportion of the country's most thoughtful legal scholars. And it is read. Indeed, I suspect it is the best-read issue of any law review in the country. It is certainly the only one that may sometimes be found on the towel at the beach, the shelf in the bathroom, and the table by the bed. What more could we have hoped for?"

# The death of a friendly critic

— By James J. White, '62

**Our colleague, Andy Watson, died April 2. Andy was one of the handful of preeminent law professor/psychiatrists. In that role he wrote dozens of articles and several important books, including *Psychiatry for Lawyers*, a widely used text. I do not write to remind us of his scholarly work, of his strength as a clinical and classroom teacher, or of his prominence as a forensic psychiatrist. I write to remind us of his powerful criticism of our teaching. On the occasion of his death, it is right to recognize his influence on the law school curriculum and to consider whether his criticism of the law school classroom calls for yet greater changes.**

From his first association with law teaching, Andy worried and wrote about the collision of the first-year law school classroom with our students' expectations. In Andy's mind students are drawn to law by three important factors: "First, many if not all law students have a strong psychological need to come to grips with the powerful and disquieting emotion of aggression. This primeval instinct in us all provides the driving force for many of the things we do in life, and is the locus for a large part of all the socializing activity every culture imposes upon its members." According to him, "the second important emotional need in those who choose law, is to seek a high degree of order and predictability in life. While all human beings have this need to predict, law students have it to a higher degree". Finally, he argued that "law students have a substantial amount of sheer idealism, coupled with the desire to help people through the use of law as an instrument for social reform". So students come here to find an acceptable channel for aggression, to find a place where things are certain and predictable and to give tangible expression to their idealism.

According to Andy, these needs are in conflict with and in many cases crushed by the first-year classroom. In a 1963 article he describes the first year of law school as follows: "When an eager and intelligent freshman law student begins his studies, he plunges zealously into the task of learning about the law. He will likely memorize the cases and come to class fully prepared to rattle back the substance of his reading. However, he immediately runs into the fact that regardless of how he presents his material, the teacher will inevitably ask more questions that either directly or by implication indicate he does not understand the case. While a sophisticated observer may know the student has done a good or perhaps even excellent job of dealing with the questions put to him, there is little tangible evidence of this fact to most students. Though it takes some time to make full impact, usually by Thanksgiving holidays, most members of a freshman class are brought nearly to panic by their awareness that they do not understand what is being demanded of them, nor can they figure out how to meet the pressure. The great anxiety produced by this process progressively forces students to make some kind of psychological defense adjustment to avoid and diminish ongoing pain. The anxiety-muting defensive maneuvers, instead of settling on the specific stress situations of the classroom, will be generalized progressively to block emotional awareness." The student's hope to find expression for his powerful feelings of aggression is frustrated, for the student finds himself the object of others' aggression, particularly the professor's. His layman's belief that law is certain and predictable is subjected to early and repeated attack; in fact those who openly seek certainty — "tell me the rule" — are likely to receive a sarcastic or dismissive response.

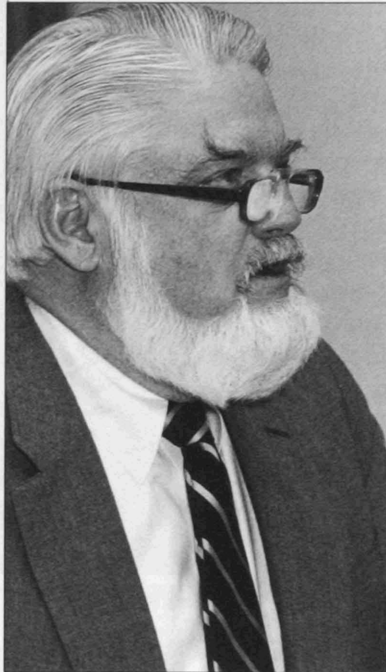
The effect of the first-year classroom on the student's idealism is only slightly more subtle. Idealistic thinking or expression of emotional concern for a particular class, plaintiff or defendant is "sloppy," not "lawyerlike," and generally failing "to think like a lawyer." Of course, all of these descriptions are unconscious condemnations of the student's idealism.

And for law professors, the operators of this asylum, Andy saves his sharpest bite: "It would not be kind or generous, or even true, to say that law teachers, electing to avoid the living adversaries of the courtroom, express their fighting instincts by demolishing law students' heroes and hero worship. It is true, however, that law students feel this has happened." Elsewhere he is even more harsh: "I also observed that law faculties

have what might be fairly described as a strong antipathy for so-called 'bread and butter' matters and for the work-a-day 'messy' or 'grubby' details of dealing with law practice. . . . I would state categorically that what attracts interest and curiosity is that which ties in with one's needs, drives and internalized attitudes and is psychologically compatible with them. I view this rejection of the practical by law professors as a reflection of psychological conflict in them." So Andy was not bashful in stating the problem or identifying its cause.

Of course, many things have changed since Andy wrote these words in the 1960s. Clinical law has come to the law schools. Fewer classes are taught by the Socratic Method than formerly. And I suspect the "Socratic Method" of today has far less sarcasm, ridicule and anger than in 1963. We should give Andy credit for some of these changes. It is always difficult to trace new ideas and practices to their source, but surely one of the sources of these changes is Andy's advocacy. In his prime Andy was a prodigious writer, a frequent and outspoken panelist at law schools and elsewhere, and a contributor to journals such as *The Journal of Legal Education*. I believe he justly deserves some of the credit for our new willingness to recognize our students' emotions, to deal more fully with the grubby details of law practice and to free our students to acknowledge their feelings. We can take pleasure in the incremental changes that have occurred in our classrooms partly because of Andy's criticism of our old ways. And even today we should give grudging heed to Andy's admonitions, for surely his work is not done.

## ANDREW S. WATSON



*Andrew S. Watson*

Andrew S. Watson, 77, died peacefully at home in Ann Arbor on April 2. He joined the University of Michigan faculty in 1959 and held joint appointments in law and psychiatry.

"More than most, he taught not only his students, but also other members of his faculty," the University of Michigan Board of Regents said in announcing his emeritus status in 1990. (See accompanying story by Robert A. Sullivan Professor of Law James J. White, '62.)

A native of Highland Park, Michigan, Watson earned his Bachelor of Science from the University of Michigan in 1942 , served with the U.S. Army Medical Service Corps in Europe during World War II, and received his M.D. from Temple in 1950. After a rotating internship at the Graduate Hospital of the University of Pennsylvania, he returned to Temple University Hospital in 1951 for three years of residency training in psychiatry. He received his Master of Science in Medicine from Temple in 1954 and joined the staff of the University of Pennsylvania Department of Psychiatry. In 1955 he was appointed Associate Professor of Psychology and Law at the University of Pennsylvania Law School. He completed his training as a psychoanalyst at the Philadelphia Psychoanalytic Institute in 1959.

His book *The Lawyer in the Interviewing and Counseling Process* grew out of his abiding interest in the lawyer-client relationship. Another of his books, *Psychiatry for Lawyers*, has been a standard text for many years.

A burly man who in his later years developed a snow white beard, Watson never lost sight of the singularity of each client or patient. As he told the Law School graduating class in 1985, "grapple closely with the *people* aspects of the law in cases in which you become involved. If you do that, I can assure you that no two cases will ever be alike. Each may puzzle, perplex, aggravate, frustrate, thrill, or amaze, but you'll never be bored."

A memorial service for Watson was held April 19 at the Lawyers Club. Memorial contributions may be made to the University of Michigan Law School or to Individualized Hospice, 3003 Washtenaw, Ann Arbor, Michigan 48104.

## St. Antoine heads U-M search for vice president/general counsel

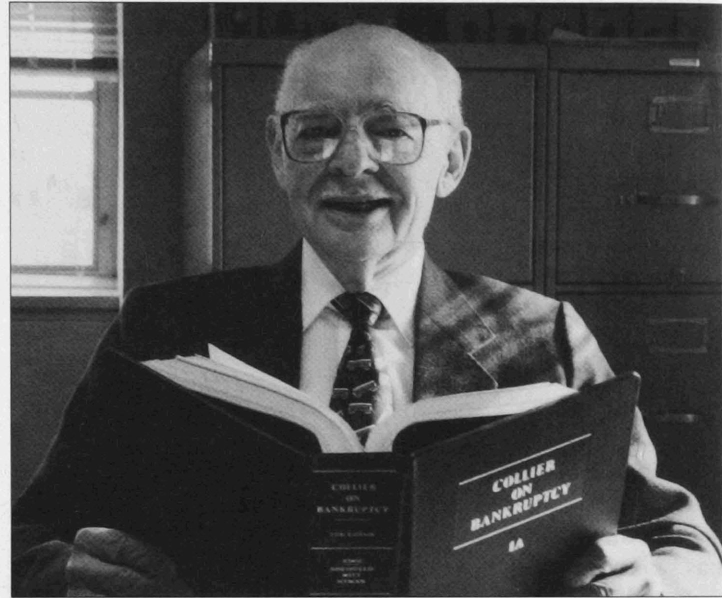
Theodore J. St. Antoine, '54, James E. and Sarah A. Degan Professor of Law and former Dean of the Law School, is chairing the search committee to find a Vice President and General Counsel for the University of Michigan.

At deadline time, committee members were evaluating applications and scheduling interviews with some applicants.

St. Antoine began his duties as chairman of the Vice President and General Counsel Search Advisory Committee in March. He has been a member of the Law School faculty for more than 30 years and recently retired from active teaching. He served as dean during the 1970s and twice chaired Law School committees charged with naming a new dean.

According to the University, "The Vice President and General Counsel is the University executive officer responsible for the University's legal affairs and for overseeing the provision of legal services to the University. The Vice President, who reports to the President, establishes goals and strategies for the University in legal matters, serves as senior legal counsel to the Board of Regents and the University administration and units, and supervises the professional staff required to carry out these activities. The Vice President determines when to retain outside counsel and whom to retain, and manages relationships with outside counsel."

## Grateful Kennedys establish scholarship




*Frank Kennedy*

Professor Emeritus Frank Kennedy and his wife Patricia have established a scholarship in their name for a Law School student.

The gift reflects the Kennedys' appreciation of the eight years of scholarship aid that Frank Kennedy received during the years 1931-40. The assistance made it possible for him to study at Southwest Missouri State College for four years, law school at Washington University in St. Louis for three years and do a year of graduate work at Yale University Law School.

"Without that financial assistance his life would have undoubtedly followed a dramatically different pattern," according to the announcement of the new scholarship.

"The example he set as the oldest of five brothers, by attending college and professional schools without interruption immediately following graduation from high school, undoubtedly exerted enormous influence on the directions followed by the brothers in their careers and by the succeeding generations of the Kennedy family."

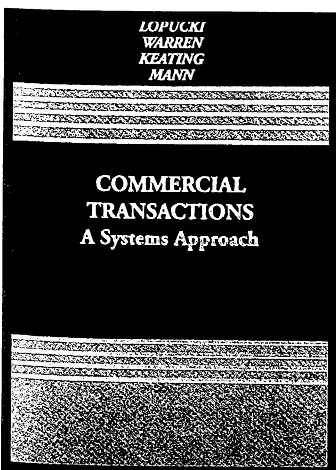
"Frank and Patricia have honored the value of a Michigan legal education through the creation of this scholarship," said Dean Jeffrey S. Lehman, '81. "During his career on the faculty, Frank made a lasting difference in the lives of countless numbers of our graduates. Now, through this wonderfully generous gift, Frank and Patricia are ensuring that future generations of students will have the opportunity to take advantage of the opportunities that are created through study in the Law Quadrangle."

## *Commercial Transactions* keeps world of commerce in mind

Assistant Professor Ronald J. Mann and his co-authors kept their sights firmly on the real world of commerce to prepare their new casebook, *Commercial Transactions: A Systems Approach*, published by Aspen Law & Business in March.

"Our philosophy is that learning proceeds best when students are given all of the information they need to solve the problems," Mann and his fellow authors, Lynn M. LoPucki, Elizabeth Warren and Daniel L. Keating, write in the Introduction. "The intellectual task is for them to apply the material. Consequently, the text we provide is considerably more extensive than in traditional casebooks, and at the same time excerpts from cases are considerably less extensive.

"At bottom, the goal is to maximize the value of each page that the student is asked to read and to minimize the time the student spends studying details of cases that do not directly advance the student's understanding of the system at hand."




LoPucki is A. Robert Noll Professor of Law at Cornell Law School; Warren is Leo Gottlieb Professor of Law at Harvard University; and Keating is Associate Dean and Professor of Law at Washington University.

The book uses the "assignment approach" and includes 56 self-contained assignments, each "designed to provide adequate material for one 50-60 minute class session."

"Our attention to the systems that commercial law supplements has a pervasive effect on the texture of the assignments," the authors say. "First, to get a sense for how those rules operate in context, we conducted more than 40 interviews with business people and lawyers who use the various systems in their daily work. Similarly, to help students get a feel for how the systems operate in practice, we include a substantial number of sample documents and forms. Finally, because we organize our presentation by reference to the systems in which commerce operates — rather than the sections into which statutes are divided or the categories of legal doctrine — our presentation frequently cuts across the arbitrary legal standards that divide commercially similar activities."

## ACTIVITIES

Professor of Law **José Alvarez** in April served as interlocutor to Professors Louis Sohn and Louis Henkin as part of a panel at the American Society of International Law's annual meeting in Washington, D.C. In March, he spoke on "Genocide: Then and Now" at the ABA Conference Commemorating the 50th Anniversary of the United Nations Universal Declaration of Human Rights and the Genocide Convention at the UN and served as a panelist with Nobel Peace Laureate Elie Wiesel and Ambassadors William J. vanden Heuvel and Robert F. Van Lierop. (See article on page 72.)

He also addressed the International Studies Association Annual Conference in Minneapolis on "Compliance and Sovereignty." He will be a visiting professor at Columbia University Law School during Fall Term.

**David L. Chambers**, Wade H. McCree, Jr., Collegiate Professor of Law, has been appointed chair of the Association of American Law Schools (AALS) Commission on Pro Bono and Public Service Opportunities. He is in the second year of his three-year term on the AALS Executive Committee.

**Donald N. Duquette**, Director of the Child Advocacy Law Clinic, has been awarded the 1998 Adoption Activist Award by the North American Council on Adoptable Children (NACAC). "Your dedicated work in advocating for children with special needs has rightfully earned you much respect from your colleagues, adoption organizations, adoptive families and kids throughout the United States, and your achievements definitely merit official recognition," NACAC Executive Director Joe Kroll wrote Duquette in informing him of the award.

Kirkland & Ellis Professor of Law **Phoebe C. Ellsworth** has been named the Robert B. Zajonc Collegiate Professor of Psychology in the College of Literature, Science and the Arts, and delivered the Zajonc Lecture in March on "Emotion, Cognition and Culture." (Zajonc, who joined the University faculty in 1954, is Charles Horton Colley Distinguished University Professor Emeritus in the School of Public Health.) In October, she spoke on "Jury Reforms" at Ohio State University. In addition to her joint teaching appointments, she is a Faculty Associate with the Research Center for Group Dynamics at the Institute for Social Research.

Professor of Law **Richard Friedman**, on leave this academic year to do research, spoke on "Media and Trials" at Brunel University in May and at a conference on Judges and Juries in Belfast in April, the latter by videotape. In February, he spoke on the Louise Woodward "nanny" case at St. Hugh's College, Oxford, and on confrontation

## ACTIVITIES, *continued*

rights at the University of Wales, Cardiff. In January, he was a member of an American Association of Law Schools panel discussing the 1937 "judicial revolution." During the fall he spoke on "Logic and the Law" at a symposium at Notre Dame University and on "Truth and Its Rivals in the Law of Evidence" at Hastings. He also has provided commentary on the Woodward case for the BBC, three private television channels in England, and MS-NBC.

**Thomas A. Green**, John Philip Dawson Collegiate Professor of Law, is serving as President-Elect of the American Society for Legal History through 1999 and will serve as President during 2000-2001.

Henry M. Butzel Professor of Law **Thomas E. Kauper**, '60, in April delivered the Lewis Bernstein Lecture at St. John's University Law School. He is chairing the ABA Antitrust Section's Public Service Task Force and in October lectured at the Golden State Antitrust Institute in San Francisco. In October and again in March he participated in the roundtable before the Federal Trade Commission on Joint Venture Guidelines Project, and in October served as chair and principal lecturer for a short course on antitrust law for the Southwestern Legal Foundation at Dallas.

Francis A. Allen Collegiate Professor of Law **Richard O. Lempert**, '68 is one of 18 recipients nationwide of a Russell Sage Foundation Fellowship to spend next year in New York working at the Foundation; he will be working on a book about public housing evictions and working on alternative dispute resolution. He served on the Law School Admissions Council's Test Development and Research Committee and on its Grants Review Subcommittee, and is on the advisory committee for a Tucson, Arizona, study of the effects of allowing jurors to deliberate while trials are ongoing. He recently has participated in panels at the annual meeting of the Law and Society Association, a conference in Madison, Wisconsin, on "Do the 'Haves' Still Come Out Ahead?" in a University of Arizona conference of "Courts on Trial" and at Depaul Law School on "The American Civil Jury: Illusion and Reality." In December he took part in a conference in Leiden, The Netherlands, on complex litigation.

Assistant Clinical Professor **Andrea D. Lyon** argued before the Illinois Supreme Court in March that her client, convicted in 1990 of murder and arson, should get a new trial because of the destruction of evidence in the case and the pattern of torture of suspects at the station where police said her client confessed to them. The decision is expected this summer. In March, she also taught Continuing Legal Education classes at the National Criminal Defense College in Atlanta and presented the Clarence Darrow Lecture at the Museum of Science and Industry in Chicago. In February she taught at the Annual Death Penalty Seminar of the California Attorneys for Criminal Justice. Last fall she lectured to the Massachusetts Committee for Public Counsel Services annual training seminar, coached the Michigan Trial Team in the National Association of Criminal Defense Lawyers' Bennett trial competition in New York, and lectured on sentencing advocacy to the Michigan Assigned Counsel training program.

Assistant Professor **Ronald J. Mann** won the American College of Commercial Finance Lawyers' Grant Gilmore Award for the outstanding article of the year on commercial credit by a young author for "Explaining the Pattern of Secured Credit," 111 *Harvard Law Review* 625 (1997). In April, he presented his paper "The Role of the UCC in Facilitating Financing of Intellectual Property" at the Conference on Intellectual Property and Contract Law in the Information Age at the University of California at Berkeley. He delivered his paper "Information Technology and Institutions for Verifying Information" at workshops at the Ohio State University College of Law, Vanderbilt University School of Law and the Law and Economics Workshop at the University of Michigan Law School.

The Association of American Publishers has selected *The Anatomy of Disgust* (Harvard University Press, 1997), by Thomas G. Long Professor of Law **William Ian Miller**, as the best book of 1997 in the Anthropology/ Sociology category.

Professor of Law and Roy F. and Jean Humphrey Profitt Research Professor **Richard H. Pildes**, a visiting professor at Harvard Law School and a fellow in Harvard's Program in Ethics and the Professions this past academic year, presented faculty workshops on legal regulation of democratic politics at Harvard and the universities of Chicago and Southern California in February and the University of Texas in November. In October he lectured on "Experts and Democrats" at the conference "The Proceduralization of Law: Transformation of Democratic Regulation," sponsored by the Center for Philosophy of Law at the Catholic University of Louvain in Brussels.

Professor of Law **Mathias Reimann**, LL.M.'83, has been chosen as National Reporter by the International Academy of Comparative Law for the topic "The Role of History in Comparative Law;" the report will become part of the 1998 World Conference of the Academy in Bristol, England. In March he lectured on "Punitive Damages in American Law — Recent Developments" at the University of Torino and in September co-organized the conference on "New Directions in Comparative Law" at San Francisco (a follow up conference to one held at the

University of Michigan in September 1996). He spent last summer teaching at the University of Trier in Germany and has served on the Long-Range Planning Committee of the American Society of Comparative Law.

Edson R. Sunderland Professor of Law **Terrance Sandalow** has been elected vice-president of the Order of the Coif. His term is for three years.

Harry Burns Hutchins Collegiate Professor of Law **Joseph Vining** in March spoke at Notre Dame University on the topic "On the Future of Total Theory: Science, Antiscience, and Human Candor," to inaugurate the university's Erasmus Institute. In the fall he spoke on "Fuller and Language" at a conference on "Rediscovering the Jurisprudence of Lon Fuller" at Tilburg Law School and also was a respondent at a conference on "Rethinking Law and Ethics" at Tilburg's Center for Legislative Studies. During the summer he was a panelist at the U.S. Justice Department symposium on the National Crime Commission.

**Lawrence W. Waggoner**, '63, Lewis M. Simes Professor of Law, in May presented the second installment of the "Restatement (Third) of Property (Wills and Other Donative Transfers)" to the membership of the American Law Institute. If approved, this installment will be published as the first hardbound volume of the new "Restatement."

# New faculty

*Faculty members make up the heart of any law school, and those who choose to teach at the University of Michigan Law School rank with the best. At deadline time, these new teachers had elected to join the Law School family:*

**Juliet M. Brodie**

An assistant attorney general for the Wisconsin Department of Justice since 1993, Juliet M. Brodie joins the University of Michigan Law School as a clinical assistant professor in association with the Michigan Clinical Law Program. Last fall, she assisted with the Law School's establishment of the Poverty Law Clinic, which this year is being incorporated into the overall clinical law program.

Brodie received her J.D. from Harvard Law School and her A.B. from Brown University, both *magna cum laude*. At Harvard, she was president and student attorney with the Harvard Legal Aid Bureau. In Wisconsin, she was co-founder and president of the board of directors of Action Wisconsin: A Congress for Human Rights and did extensive public speaking as project coordinator with the Wisconsin Supreme Court's Committee on Court-Related Needs of People with Disabilities, a project to study the implementation of the Americans with Disabilities Act within the court system. She joined the Wisconsin Department of Justice as Children's Justice Act Coordinator and then became a prosecutor in the Medicaid Fraud Control Unit. Also a freelance writer, she has published essays and reviews on cultural subjects.

**James C. Hathaway**

James C. Hathaway, a specialist in international immigration law and international human rights law, will join the Law School faculty as a professor this year. He has been on the faculty of Osgoode Hall Law School of York University, Canada, since 1984.

Hathaway holds a J.S.D. and LL.M. from Columbia University and an LL.B. (Honors) from Osgoode Hall. He also studied for two years in Honors International Political Economy at McGill University.

The author of two books, *Reconceiving International Refugee Law* (Kluwer Law International, 1997) and *The Law of Refugee Status* (Butterworths and Co., 1991), Hathaway has written more than 40 articles and several monographs and expects to complete a book on refugee rights in international law for Kluwer Law International next year.

He has received research grants from many sources, among them the Social Sciences and Humanities Research Council of Canada, the John D. and Catherine T. MacArthur Foundation, the Ford Foundation, the Immigration and Refugee Board of Canada and the Canadian Immigration Appeal Board.

At Osgoode Hall, he was Director of Clinical Education, Associate Dean of Law, Founding Director of the Refugee Law Research Unit at York University's Centre for Refugee Studies, and Co-Director of the Intensive Program in Immigration and Refugee Law.

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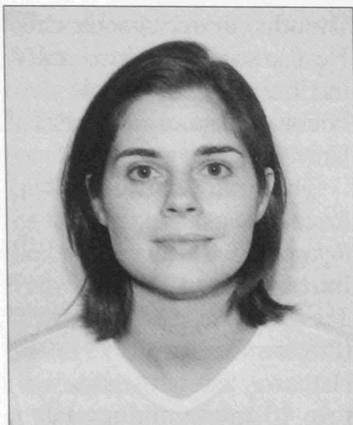
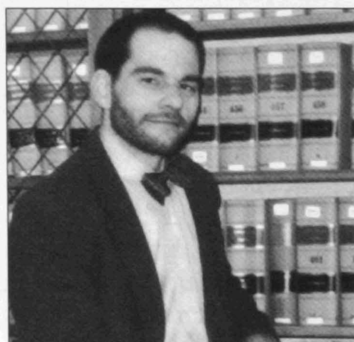


**Bridget M. McCormack**

Bridget M. McCormack, who has been a Robert M. Cover Fellow in Clinical Teaching at Yale Law School since 1996, joins the Law School as a clinical assistant professor in association with the Michigan Clinical Law Program. As a Cover Fellow, she taught and supervised students in the Community Legal Services Clinic and the Prison Litigation Clinic.

McCormack earned her law degree from New York University School of Law and her bachelors degree, with honors in political science and philosophy, from Trinity College, Hartford, Connecticut. She has worked as a staff attorney with the Office of the Appellate Defender and the Criminal Defense Division of the Legal Aid Society, both in New York City.



**Adam C. Pritchard**

Adam C. Pritchard, a Visiting Assistant Professor at Northwestern University School of Law during the 1997-98 academic year and formerly an attorney in the Appellate Section of the Securities and Exchange Commission's Office of the General Counsel, has joined the Law School faculty as an assistant professor.

Pritchard graduated second in his class from the University of Virginia School of Law, where he was a member of the Order of the Coif and articles development editor for the *Virginia Law Review*. While at Virginia, Pritchard also won the Robert E. Goldsten Award for Distinction in the Classroom, the Olin Prize for Best Paper in Law and Economics, the Law School Alumni Association Best Note Award and the Olin Fellowship in Law and Economics.

After receiving his J.D., Pritchard clerked for the Honorable. J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit, served as a Bristow Fellow with the Office of the Solicitor General in the Justice Department, and practiced as an associate with Bickel & Brewer in Washington, D.C.

He holds a Master of Public Policy Studies from the University of Chicago and a B.A. from the University of Virginia. His research concentrates where law and economics intersect and in issues of forfeiture. Pritchard's writings have appeared in the *American Criminal Law Review, Arizona Law Review, Cato Journal, San Diego Law Review, Missouri Law Review, Taxing Choice: The Predatory Politics of Fiscal Discrimination* (William F. Shughart II, ed., 1997), *Supreme Court Economic Review, Constitutional Political Economy, Fordham Law Review* and *Virginia Law Review.*

Last December Pritchard received the SEC's Law and Policy Award for his work on the brief in the case of *United States v. O'Hagan*, 117 S. Ct. 2199 (1997), in which the Supreme Court accepted the "misappropriation" theory of insider trading.

**Jane S. Schacter**

Jane S. Schacter, who earned her J.D. at Harvard Law School and her bachelors degree from the University of Michigan, joins the Law School faculty as a professor after teaching here as a visiting professor in the Fall Term of 1997.

She comes to Michigan from the University of Wisconsin Law School, where she joined the faculty in 1991. At Wisconsin, she taught courses in administrative law, civil procedure, legislation, sexual orientation and the law, and statutory interpretation and the democratic ideal.

As a law student, Schacter served as articles editor for the *Harvard Women's Law Journal* and worked as a faculty research assistant. After graduation, she clerked for the Hon. Raymond J. Pettine of the U.S. District Court in Providence, Rhode Island. She also has worked as an assistant attorney general in the Government

Bureau of the Massachusetts Department of the Attorney General and as a litigation associate with Hill & Barlow in Boston. Her publications have appeared in a number of law journals.

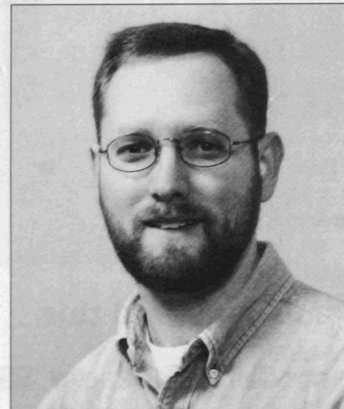
**Anne N. Schroth**

Anne N. Schroth, who came to the Law School in 1997 to help develop the new Poverty Law Clinic, joins the faculty this year as a clinical assistant professor associated with the Michigan Clinical Law Program. The Poverty Law Clinic, part of the Michigan Poverty Law Program, is being incorporated into the overall clinical law program.

Schroth earned her J.D. at Harvard Law School and her bachelors degree at the University of Chicago. While in law school, she served as a student attorney and executive director of the Harvard Legal Aid Bureau and worked with the Alliance for Public Interest Alternatives and the Harvard Women's Law Association.

She clerked for the Hon. Mary Johnson Lowe of the U.S. District Court of the Southern District of New York and practiced as an associate with Bernabei & Katz in Washington, D.C. She also has been a lecturer and visiting assistant professor at The Catholic University of America, Columbus School of Law, Columbus Community Legal Services, in Washington, D.C.

Prior to coming to the Law School, she was a staff attorney with AYUDA/Clínica Legal Latina in Washington.



**Mark D. West**

Mark D. West, an Abe Fellow in 1997-98 at the Tokyo University Faculty of Law/Graduate School of Law and Politics, has joined the University of Michigan Law School faculty as an assistant professor.

A 1993 graduate of Columbia University School of Law, where he was Notes and Comments Editor for *Columbia Law Review*, West's current research focuses on extortion by shareholders of management in U.S. and Japanese corporate law regimes. He also has lectured in Japanese on comparative corporate governance and advised the Japanese Bar Association on deregulation issues.

At Columbia, West was a Harlan Fiske Stone Scholar and won the Shapiro and Kashiwagi Fellowships in Japanese law and the Foreign Language and Area Studies Fellowship. He earned his B.A. *magna cum laude* in international studies in 1989 from Rhodes College.

After law school, West clerked for the Honorable Eugene H. Nickerson, U.S. District Judge, Eastern District of New York, where he worked on litigation involving gays in the military, the Kostabi art forgery case and organized crime cases.

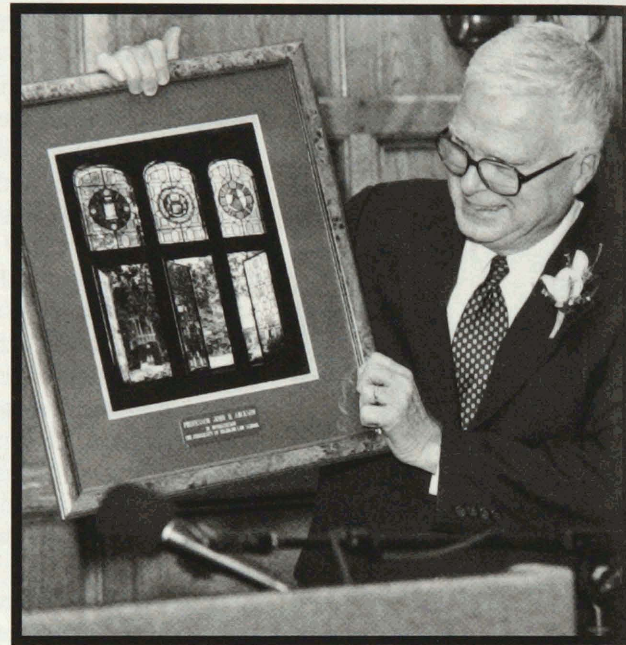
He also has practiced with Paul, Weiss, Rifkind, Wharton & Garrison in New York and Tokyo, concentrating in cross-border transactions and the internal investigation in Tokyo of Sumitomo Corporation of unauthorized copper transactions. He earned a research certificate from Hakodate University in Hokkaido in 1988 and worked with the Japanese Ministries of Foreign Affairs, Home Affairs and Education in Oita to develop internationalization programs, translate documents and teach English.

Admitted to the Bar in New York and to the District Courts for the Southern and Eastern Districts of New York, West has had articles published in *The Journal of Legal Studies* of the University of Chicago Law School, *Northwestern University Law Review* and *Columbia Law Review.*

# Hail! Hail! Hail!

**Three veteran faculty members retired this academic year — Professors John Jackson, '59, Beverly Pooley and Theodore J. St. Antoine, '54 — after a total of nearly 100 years of noted legal scholarship and of service and inspiration to the Law School. They will be missed.**

**We wish them well.**



The World View —

*After more than 30 years on the Law School faculty, Hessel E. Yntema Professor of Law John H. Jackson, '59, has been given emeritus status and moved to Washington, D.C., to teach at Georgetown University Law Center. A giant among world trade scholars, Jackson has been a prolific writer of articles and books like* The World Trading System: Law and Policy of International Economic Relations *(1997),* Restructuring the GATT System, The World Trading System *(1989) and* World Trade and the Law of GATT *(1969). Colleagues and friends honored him in a celebration in February. Here, he displays one of the Law School gifts to him at the celebration. "From an early stage, his advice and counsel became much sought after by practitioners and policy makers alike," said Professor José Alvarez. "Even now, thirty years after his first book on the GATT, John Jackson continues to dominate the field he virtually singlehandedly created. There is no legal specialty that I can think of that is dominated by a single scholar in the same way." Jackson thanked his wife, Joan, and noted of his Law School career: "One of the great principles of international trade is reciprocity — and I've gained at least as much as I've given." A graduate of Princeton University's Woodrow Wilson School of Public and International Affairs, Jackson joined the Law School faculty in 1966, served in Washington, D.C., as General Counsel of the U.S. Office of the Special Trade Representative, and served in 1988-89 as the University of Michigan's Associate Vice President for Academic Affairs, with responsibility for international studies.*

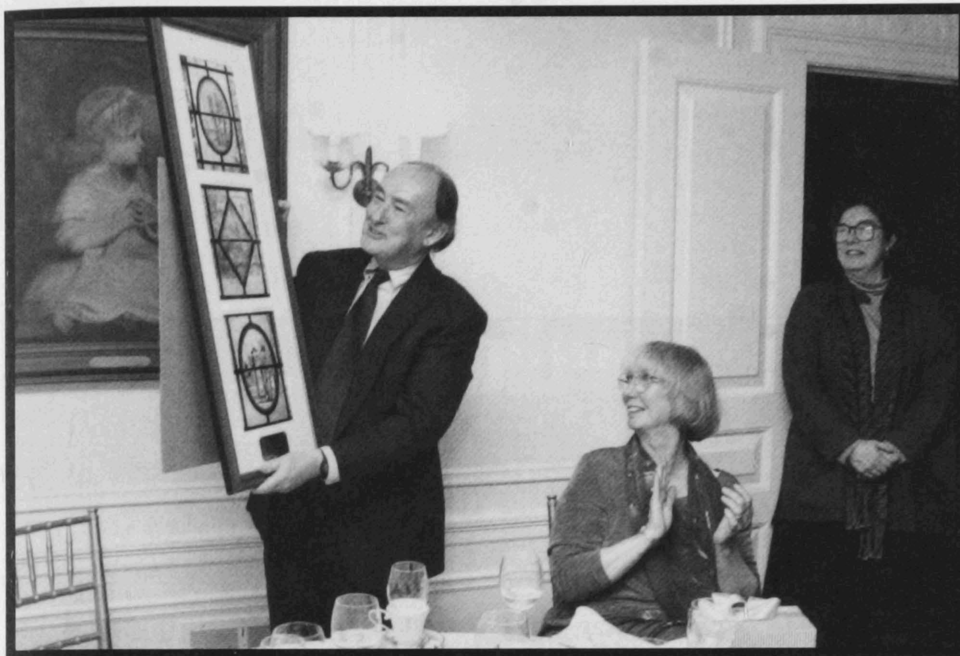


PHOTO BY D.C. GOINGS, UNIVERSITY PHOTO SERVICES

## The Teacher's Teacher —

*"He ended his career as a spectacular teacher, just as he began it," Associate Dean for Academic Affairs Christina B. Whitman, '74, at far right, said of Professor of Law Beverley J. Pooley at his retirement celebration in April. Pooley, who holds two degrees from Cambridge University and three from the University of Michigan, came to the Law School in 1962 after teaching at the University of Ghana. As Director of the Law Library, he oversaw fundraising and development of the Law School's world-renowned 77,000 sq. ft., $9.5 million underground Alan and Allene Smith Library Addition. Under Pooley's directorship, library holdings burgeoned from about 338,000 volumes to more than 600,000 volumes (and more than 820,000 today). Pooley also has been a mainstay of the University's Gilbert and Sullivan Society and is known to many theater goers who never knew him as a teacher. But to those who did, like former Associate Dean Kent Syverud, '81, now Dean of Vanderbilt University Law School, who returned to Ann Arbor for Pooley's retirement celebration, "he certainly appeared to have fun" as he taught. Here, Pooley, with his wife Pat, co-founder of the restaurant The Moveable Feast in Ann Arbor, holds the framed portrait of three cartoons from the Law School's stained glass windows that he received. The illustrations depict cartoonized versions of malicious mischief, mayhem and contracts. "It has been an extraordinary event to be on this faculty," Pooley said.*

## The Master Arbitrator —

*James E. and Sarah A. Degan Professor of Law Theodore J. St. Antoine, '54, shown here with his wife, Lloyd, combines "topflight academic work and topflight public service," Professor Deborah C. Malamud noted during a retirement celebration for St. Antoine in March. Many people know of his work with ABA labor committees and the National Academy of Arbitrators, but fewer know that he represented the UAW during negotiation of the Civil Rights Act of 1964, she said. His strength has been that he "consistently has eschewed the role of the ideological purist." St. Antoine is a graduate of Fordham College and spent a year as a Fulbright Scholar at the University of London. He joined the Law School faculty in 1965, served as Dean from 1971-78, twice headed the search committee for a new Dean, and now chairs the University's search committee for a General Counsel. Clarence Darrow Distinguished University Professor of Law Yale Kamisar, who also joined the Law School faculty in 1965, described St. Antoine as an effective mix of the idealism of Don Quixote and the practical savvy of Sancho Panza: he has shown the mark of the great lawyer, "finding ways to transform the great goals of society into tangible accomplishments." Said Dean Jeffrey S. Lehman, '81: "As the history of the Law School is written, your name will appear on many pages in many capacities." St. Antoine expressed appreciation to his wife, and thanked his colleagues for "three decades of a wonderful association with all of you."*

Any reform of the jury system should proceed cautiously, Judge Richard P. Matsch, '53, Chief U.S. District Judge of the U.S. District Court of Colorado, tells a standing room only audience in his keynote speech for the symposium "Jury Reform: Making Juries Work" at the Law School in March. A report of the symposium appears on page 14.

# One judge's verdict:

## jury system is working just fine

The jury system is the best way yet found to solve civil disputes and adjudicate criminal charges, says a judge who ought to know, the Hon. Richard P. Matsch, '53, Chief Judge of the U.S. District Court of Colorado. Named to the bench in 1974, Matsch has presided over several pressure cooker criminal cases, the most recent ones involving suspects in the bombing of the Murrah Federal Building in Oklahoma City in 1995.

Many observers believe that Matsch's no-nonsense courtroom style did much to restore luster to the jury and justice system after their tarnishing in another highly publicized trial, the criminal proceedings against O.J. Simpson for the murder of his former wife and her male friend.

Matsch returned to the Law School in March to deliver the keynote address for a symposium on "Jury Reform: Making Juries Work," sponsored by the *Michigan Journal of Law Reform* and other supporters. (See story on page 14.) No drop-in drop-out keynoter, Matsch attended each session of the two-day symposium, taking in discussions of topics like "Jury Decisionmaking and Collaboration," "Pretrial Prejudice and the Effects of Courtroom Cameras," "Jury Nullification" and "The Proper Use of Jury Consultants" with the same full attention that is his trademark in presiding over courtroom proceedings.

His stewardship of the prosecution of the Oklahoma City suspects was "truly exceptional," Dean Jeffrey S. Lehman, '81, said in introducing Matsch. "He is held up as a model of what a great judge can aspire to."

Juries are not asked to determine truth, Matsch said. They are simply the best vehicles yet devised for settling criminal disputes through the reasoned application of information provided in the adversarial proceedings of the courtroom.

"We arrive at the truth, not by reason only, but by the heart," he said, quoting French scientist/philosopher Blaise Pascal (1623-1662).

"What is truth?" Matsch asked. "The question has bedeviled human beings since we've had the power of reflection. But jurors are not asked to determine that.

"We ask that jurors reach a decision that is true to the law and to the evidence presented to them during the trial. So it is not perceived truth. It is presented truth."

"The fundamental fact is that jury trials, indeed all trials, are human events," he added. "All participants — juries, judges, plaintiffs, defendants, attorneys — are subject to all the human frailties. No two trials of the same issues will yield exactly the same results, because the results emerge from an infinite number of variables that defy both predictability and analysis."

"I hope that all here share a common belief, strong enough to be called a faith, that jury trials are the fairest means of adjudicating criminal trials and solving criminal disputes," he told his standing room only audience.

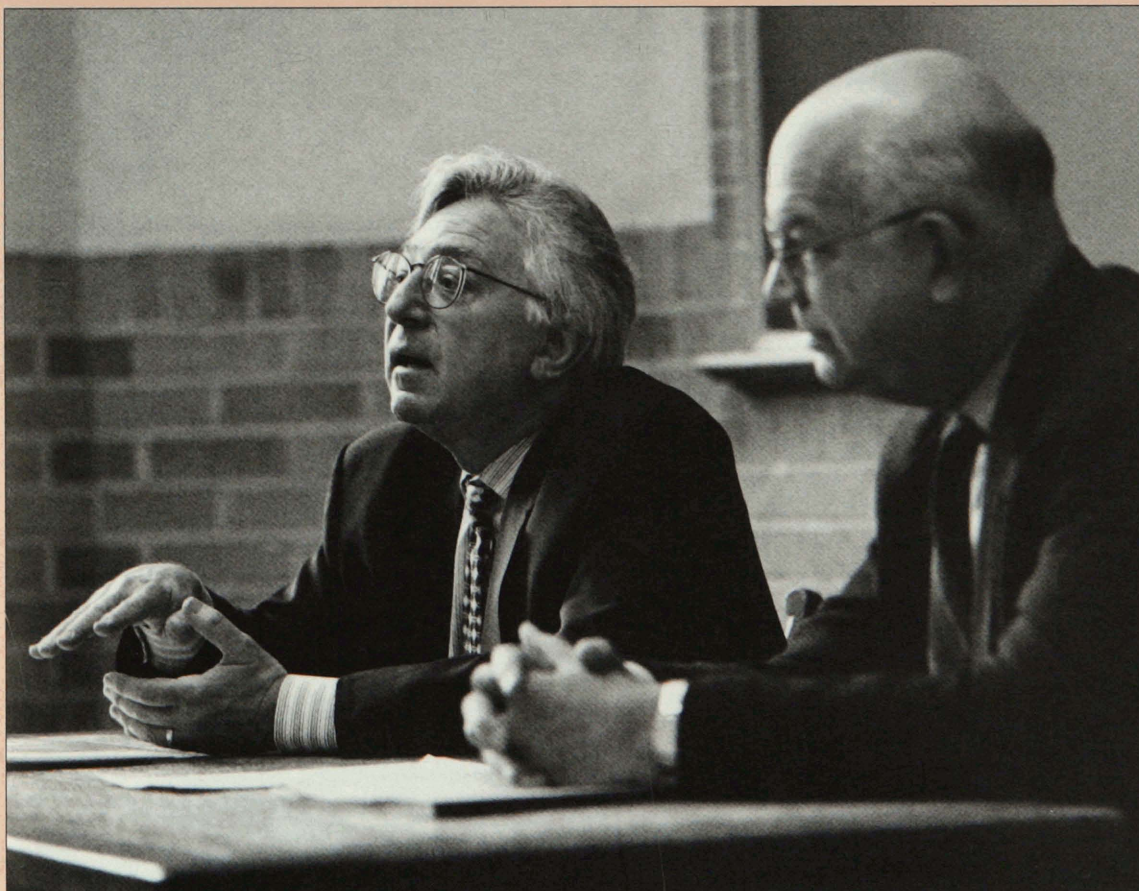
Asking if the jury system works is like asking if the institution of the presidency works, or if the institution of Congress works, he said. "The courts are no different from the executive and the legislative branches in being subject to the court of public opinion." The framers of the sixth and seventh amendments to the U.S. Constitution obviously wanted to embed the English common law principle of trial by jury in the basic law of the new United States, he explained. The subsequent evolution of the U.S. jury system reflects American history and populism, and any reform of the system should be slow and incremental.

"I am wary of reform," Matsch said. "The last reform, juries of less than 12, was a big mistake." Later, in response to a questioner, he elaborated:

Six people do not represent the community, especially as society becomes more multi-ethnic and diverse. And with six people instead of 12 there is less chance for leaders to emerge. "The more people, the more experience, the more perceptions — the better the result. The dynamics of 12 people talking about a case are far different from six. I'm more satisfied with the outcome reached by 12 people than by six."

Other questions and his answers:

- **Can a canny advocate unfairly influence the feelings of the jurors?** "That's why the other side is there and the judge is there."
- **On cameras in the courtroom:** "The biggest problem is not so much the camera being there but what is being done with the film. If you had gavel to gavel coverage and had a panoramic view of the courtroom the same as the spectators, and if the whole trial were given to the public rather than soundbites and clips, I might not be so opposed to it."
- **On jury nullification:** There's nothing wrong with that if the jury believes this person should not be convicted. "I am much more concerned about nullification going the other way, of not giving the defendant a reasonable doubt."
- **On the jury system succeeding in the face of unequal advocacy:** "The judge always has a moral dilemma with that. Do you come down off the bench and get involved? All I can say is, what happens if you go to a bad doctor?"



**Teaming Up —**

*A. Paul Victor, '63, left, a partner in Weil, Gotshal & Manges in New York, joins Henry M. Butzel Professor of Law Thomas E. Kauper, '60, as a guest lecturer for Kauper's International Antitrust class. Victor was a visiting lecturer several times for the class.*

# Success, *Women, and* the law

*Robin Walker-Lee, '85, General Motors' Practice Area Manager for Latin America, Africa and the Mid-East, explains how she helped GM leaders appreciate how international operations are interconnected. Others on the panel include, from left: Donica Varner, '93, of Lewis & Munday, P.C.A.; MaryAnn Sarosi, '87, Associate Executive Director of the Michigan State Bar Access to Justice Project; and Patricia Curtner, '78, Managing Partner with Chapman & Cutler in Chicago. Second from right is moderator Naomi Woloshin, an attorney with the Child Advocacy Law Clinic and member of the Office of Student Affairs staff. At far right is Anne Harrington, a lecturer in communications in the School of Business.*

No one ever said that chiseling out your niche in the legal profession would be easy. Challenging, yes. Strenuous, yes. Perhaps satisfying, yes. And if you're a woman, perhaps all these and more.

If you looked around at the Law School's second annual Women's Professional Development Workshop in March, there could be no doubt that many women have found success throughout the legal profession. More than 30 accomplished alumnae came back to the Law School to share their secrets of advancement with women law students who hope to follow their lead.

So "why a workshop for women in particular?" asked Associate Dean for Student Affairs Susan M. Eklund, '73, a member of the workshop planning team. "Studies conducted by bar organizations, judicial task forces and law schools make it clear that equity for women within the profession has not become inevitable simply as the numbers of women graduating from law school has increased."

For example:

- Women make up 23 percent of U.S. lawyers and 44 percent of law students, but the American Bar Association reports that in 1994 women in practice from one to three years earned $30,806 while men practicing for the same period of time earned $37,500.
- Women general counsels earned $152,000 compared to $205,000 for men.
- Women accounted for 37 percent of the lawyers admitted to practice between 1985 and 1994, but they made up only 13 percent of law firm partners.

"There is clearly a long way to go," Eklund said. The annual Women's Professional Development Workshop grew from what women graduates said they wished they had known when they entered practice but instead learned along the way.

"Overwhelmingly," said Eklund, "they told us that they thought women need to know that they must advance their *own* professional interests, that they needed to think about the integration of their personal and professional lives, that they believed that potential professional land mines, some specifically based on sex discrimination, intentional or otherwise, could be described, identified and negotiated with the right skills.

"They said women should understand the need for support — that professional success was seldom achieved in isolation, that women could learn when to take risks and what kinds of risks are worth taking.

"And, our graduates have responded beyond our wildest imagination to our requests to participate, with 30-some returning at their own expense this weekend to share their strategies for success." They are sharing their experiences in "a gift of honest personal reflection," Eklund said.

Exploring the theme of "Effective Communication Strategies for Women in the Legal Profession," the day-long workshop included panel discussions on "Developing Professional Opportunities: Obstacles Faced and Strategies Implemented," "How Gender Communications Issues Vary by Workplace — With Clients, Colleagues and Supervisors," and "Surviving and Thriving: Law School and Beyond."

The program also included more than 15 small group gatherings on topics ranging from "Academic Careers," "Corporate Firms" and "Criminal Law" to "Health Care Law," "Litigation" and "Mediation." One or more women graduates who had succeeded in each specialty led each discussion.

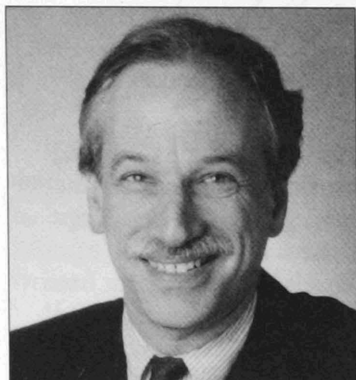
At the end of the day, after banqueters had dined, the Honorable Margaret G. Schaeffer, '45, retired Michigan District Court Judge, and her sister the Honorable Cornelia G. Kennedy, '47, of the U.S. Court of Appeals for the Sixth Circuit, retraced their parallel but different, pioneering lives in the legal profession.The women are thought to be the only two sisters who occupied judicial benches at the same time, and they were instrumental in forming the National Women Judges Association, which now counts hundreds of members. Schaeffer took time out from her legal career to raise her family and participated in local politics in her home town in Michigan. Kennedy was the first women to clerk for the Appellate Court in Washington, D.C., and the first woman to be on the Board of Directors of the Detroit Bar Association. When she tried a case against another woman attorney in the late 1950s, Kennedy recalled, "lawyers looked in to see this unusual event."

"The importance of women's voices in our Law School and in the profession of law continues to blossom, and we owe you a huge debt of gratitude for working with us, and with each other, to keep us focused on the important issues which have been raised here," Kathy A. Okun, Assistant Dean for Development and Alumni Relations told the participants.

**"They said women should understand the need for support — that professional success was seldom achieved in isolation, that women could learn when to take risks and what kinds of risks are worth taking."**

*The Honorable Margaret G. Schaeffer, '45, retired Michigan District Court Judge, and her sister, the Honorable Cornelia G. Kennedy, '47, of the U.S. Court of Appeals for the Sixth Circuit, were special guests for the workshop banquet and presented a thoughtful and humorous account of their rich legal careers.*

## Nannes, '73, named Deputy Assistant Attorney General for Antitrust



*John M. Nannes, '73*

John M. Nannes, '73, has been named Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. He will supervise the work of three sections, reporting directly to Joel I. Klein, Assistant Attorney General in charge of the Antitrust Division.

In announcing the appointment, Klein said, "John's tremendous knowledge of antitrust issues, combined with his prior experience at the Antitrust Division, means that he will hit the ground running and make immediate and substantial contributions to the work of the Antitrust Division. He is well-known and respected within the Antitrust Division and the private antitrust bar. The Antitrust Division will be well served by a person of his tremendous talents."

Nannes previously worked in the Antitrust Division as a special assistant to Thomas E. Kauper, '60, who was then Assistant Attorney General of the Antitrust Division and is now Henry H. Butzel Professor of Law at the Law School. "It was my good fortune to have Tom both as a teacher and a boss. I learned a great deal from him not only about antitrust law, but also about how the Antitrust Division should be run," Nannes said.

A *magna cum laude* graduate of the Law School, Nannes clerked for Justice William H. Rehnquist on the Supreme Court and for Judge Roger Robb on the U.S. Court of Appeals for the District of Columbia Circuit.

For more than 20 years, Nannes has been associated with the Washington, D.C., office of Skadden, Arps, Slate, Meagher & Flom LLP, where he has been a partner since 1981 and has specialized in antitrust. He has taught antitrust at Georgetown University Law Center, chairs the D.C. Circuit's Rules Advisory Committee, and is a trustee of the Supreme Court Historical Society. He has also been an active supporter of the Law School, chairing the Law School Fund from 1993 to 1995 and serving on the Law School's Committee of Visitors.

## Gay Secor Hardy, '56, Michigan's first, only woman Solicitor General

Gay Secor Hardy, '56, the first and only woman to become Michigan Solicitor General, died March 6. She was 69.

One of the few women to graduate in her Law School class, Hardy joined the Michigan Attorney General's office after graduation. At first, she handled liquor violation proceedings and consumer protection cases, and by 1969 was in charge of the Health Professionals unit of the Licensing and Regulation Division.

She was named Solcitor General in 1990. In that post, she was responsible for cases argued before the Michigan Court of Appeals, the Michigan Supreme Court and the U.S. Supreme Court.

"In the '50s, the mentality was totally different than it is now and I thought when I graduated from law school the best that I could hope for would be some position where I would be able to do research," Hardy told a reporter at the time of her appointment as Solicitor General. "I never anticipated I would be doing any type of trial work or in the courtroom." Michigan Attorney General Frank Kelley called her "a scholar and a leader" and said that she helped "to establish women as an equal force for justice in the profession of law."

In 1990 the YWCA presented Hardy with its Diana Award for her role as an outstanding woman in government service, and in 1995 the Michigan State Bar Association elected her as Fellow.

# Earlier cases prepared solo practitioner for Michigan Supreme Court victory

As Richard W. McHugh, '78, sees it, his 20 years of legal practice steadily moved him toward the case that he successfully argued before the Michigan Supreme Court in January — *Cindy Warren v. Caro Community Hospital*, Sup. Ct. Nos. 103953-103955.

McHugh had argued before the state's highest court twice before — also in cases involving the employment law issue of voluntary leaving — but this time he was appearing before the justices as a solo practitioner backed up by his former employer, the UAW. Here are the facts of the case as McHugh outlined them for a program at the Law School in February:

Cindy Warren, a hospital aide at Caro Community Hospital in Caro, Michigan, had worked at the hospital for three years, but had been a full-time employee less than a year when she asked for a leave because her physician had recommended that she stop working because of the imminent birth of her child. The hospital denied her request because its policies grant a leave only to a full-time employee after that employee has worked at the hospital full-time for a year. Warren stopped working on her doctor's orders 10 days before her baby was born and returned to the hospital four weeks after her baby's birth and asked to be put back on the work schedule. She was not returned to the work schedule and applied for unemployment compensation benefits because she had not voluntarily left her job. Administrative agency decisions were in favor of Warren, but the hospital won on appeal to Tuscola County Circuit Court.

Enter McHugh, who took the case unsuccessfully to the Michigan Court of Appeals while he still worked for the UAW. The case stayed with him when he left the UAW to launch his solo practice, and the UAW paid him to take the case before the Michigan Supreme Court.

He has become a specialist in such cases, first as a practitioner in Little Rock, Arkansas, later for the UAW, and now as a solo practice attorney in Ann Arbor, where he shares an office address with Law School graduate Jean Ledwith King, '68. McHugh left the UAW and established his practice in Ann Arbor to have more time with his wife and two young children. His appearance at the Law School was sponsored by the Employment and Labor Law Association.

McHugh is "one of the country's best lawyers in this field, and now other lawyers and judges are listening to him," says Michigan Clinical Law Program Director Paul Reingold, one of those from whom McHugh sought advice in preparing his brief for the Michigan Supreme Court. McHugh always has made it a habit to consult with such colleagues on major cases. For example, Robert Gillett, '78, Director of Legal Services of Southeastern Michigan, and Dean Jeffrey S. Lehman, '81, had helped him previously in preparing a case to argue before the U.S. Supreme Court.

*Continued on page 58*

**Greetings —**

*Barrie Loeks, '79, center, Chairman of Sony Theatres, greets students as she visits the Law School in March for a Dean's Forum luncheon. The luncheon programs, held periodically throughout the academic year, give invited students the opportunity to talk with Law School graduates who have been successful in fields other than the practice of law. At left are Dean Jeffrey S. Lehman, '81, and Assistant Dean for Development and Alumni Relations Kathy A. Okun.*

*Continued from page 57*

In his brief for the Michigan Supreme Court, McHugh "stressed very heavily" that:

- The employer controlled Warren's schedule.
- Warren did not file for unemployment until after her baby was born.
- Warren tried to return to work only four weeks after her baby was born.

His brief also stressed that "when the Michigan legislature wrote 'voluntary'" in the law, "it meant 'voluntary'."

McHugh was pleased and grateful for help that he received from the UAW's legal office, where he had been employed when the case was heard in the circuit and appeals courts. The names of two UAW lawyers appeared on the brief, and UAW lawyers remained involved with the case from beginning to end. In addition, McHugh got help from others who often had assisted him in the past, like Gillett and professors Deborah C. Malamud and Reingold of the Law School. Some advised him on his brief, others helped with the mock trial that he arranged as part of his preparation for appearing before the state's Supreme Court.

The Law School's Law Library also loomed large in his preparation. McHugh says he searched hundreds of employment cases there and found more than 60 that involved voluntary leaving and pregnancy. "One of the glories of solo practice in Ann Arbor is that you have access to one of the best law libraries in the world," he says.

He learned of the Supreme Court's decision in May.

## Graduates bring Women's History Month to Washington, D.C.

Law School graduates Anne Gilson LaLonde, '94, Emily McCarthy, '97, and Kathleen Wilson, '97, this year organized the first Women's History Month celebration to be conducted at the E. Barrett Prettyman Courthouse in Washington, D.C.

The courthouse houses both the U.S. District Court and the U.S. Court of Appeals for the District of Columbia Circuit.

The celebration, which took place in March, included a variety of activities. Thoughout the month, judges and courthouse employees took part in an e-mail quiz and several "brown bag" panels that focused on the history of women within the D.C. Circuit and in the legal profession generally.

The highlight of the month was a program to honor pioneering women in the judiciary. Supreme Court Justice Sandra Day O'Connor delivered the keynote address. More than 200 people attended.

Organizers expect the celebration to become an annual event at the courthouse.

LaLonde and McCarthy are law clerks for the Honorable Norma Hollway Johnson, Chief Judge of the U.S. District Court. Wilson clerks for U.S. District Judge Louis F. Oberdorfer.

**On Point —**

*"The most relevant on-point case for talking about affirmative action in higher education admissions programs is the* Bakke *case [1978]," Elizabeth Barry, '88, Interim Co-General Counsel for the University of Michigan and a Winter Term Visiting Professor, explains during a Law School program in February. In* Bakke*, the U.S. Supreme Court ruled that affirmative action programs at the University of California-Davis Medical School had prevented the admission of the white plaintiff, but also that race may be considered as one of a variety of factors for admission in a program of admission requirements that is narrowly tailored to the specific school. Since that decision concerning UC-Davis, the Supreme Court has struck down a number of affirmative action style programs that were applied in employment, broadcast licensure and other fields, Barry said, "but in fact the Supreme Court has not explicitly ruled on affirmative action in higher education since the* Bakke *case." Barry's program, "Affirmative Action and the Law of Higher Education," was the first of three workshops on "Issues Surrounding Affirmative Action" sponsored by the Law School Student Senate and the Black Law Students Alliance. The series was "designed to encourage collective engagement with the issues surrounding affirmative action" and "to create a space for intelligent and informed discussion about affirmative action, while increasing student-faculty interaction outside of the classroom and across disciplines, ideologies and politics." In the series' other programs: on March 31 the speaker was Kerwin Charles of the University of Michigan, Assistant Professor of Public Policy, Assistant Professor of Economics and a Faculty Associate with the Survey Research Center, who spoke on "The Economics of Diversity;" and on April 7, James S. Jackson, Daniel Katz Distinguished Professor of Psychology at the University of Michigan, spoke on "Race and Social Behavior."*

**1941**

**John W. Cummiskey**, a founding member of the law firm Miller, Johnson, Snell & Cummiskey, P.L.C., was awarded a Special Presidential Honor by the State Bar of Michigan for his exemplary efforts in promoting civil legal services for the poor and for his guidance in developing the State Bar's expanded role in access to justice for all. He also received the Michigan State Bar Foundation Access to Justice Award for his exemplary leadership and vision in support of the Foundation's programs promoting access to justice.

**1950**

**Donald Patterson**, founder and senior partner in the Topeka, Kansas, law firm Fisher, Patterson, Sayler & Smith, was selected as the first recipient of the Defense Research Institutes Lifetime Professional Service Award. During Patterson's 32-year involvement in the Institute, he has been hailed for his commitment to the profession and his untiring devotion to the practice of law. He has widely varied trial experience, including two appearances before the United States Supreme Court, as well as numerous professional activities and accomplishments. Defense Research Institute is the nation's largest association of civil litigation defense lawyers.

**45TH REUNION**

**The class of 1953 Reunion will be September 11-13**

**1957**

Senior Retired Allegheny County, Pennsylvania, Common Pleas Judge **Livingstone M. Johnson** has received the Pennsylvania Bar Association Minority Bar Committee Lifetime Achievement Award. According to Committee Chair Stephanie Fielder, Johnson spent his career as a tireless advocate for equity and fairness for the minority community.

**40TH REUNION**

**The class of 1958 Reunion will be September 11-13**

**1961**

**Raymond H. Drymalski** was elected vice chair of Chicago's Northwestern Memorial Hospital Board of Directors and its parent company, Northwestern Memorial Corporation. He has served as a member of the board since 1978 and as secretary since 1994. A partner in the Corporate Department of the Chicago law firm Bell, Boyd & Lloyd, Drymalski counsels technological, manufacturing and service industry companies and not-for-profit organizations on their corporate and business transactions.

**35TH REUNION**

**The class of 1963 Reunion will be September 11-13**

**1964**

**Lloyd A. Semple**, chairman of the law firm Dykema Gossett P.L.L.C., was named chairman of the Detroit Medical Center Board of Trustees, of which he has been a member for eight years. He resides in Grosse Pointe Farms.

**1965**

The Honorable **Harry T. Edwards**, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, delivered the inaugural lecture of the David W. Adamany Endowed Program at Wayne State University in February. The lecture was on "A New Vision for the Legal Profession."

**Mark E. Schlussel** has been named a vice-chair to the Board of Trustees for The Detroit Medical Center. Schlussel, who resides in Southfield, Michigan, is an attorney with the Detroit law firm Pepper Hamilton & Scheetz.

**1968**

**30TH REUNION**

**The class of 1968 Reunion will be September 11-13**

**Edward B. Goldman**, Medical Center Attorney for the University of Michigan, was appointed by Governer Engler to chair the Governor's Commission on Genetic Privacy. The commission was created to advise the governor and the Michigan Legislature about model statutory and administrative policies to protect the privacy of genetic information and prevent discrimination based on genetic information.

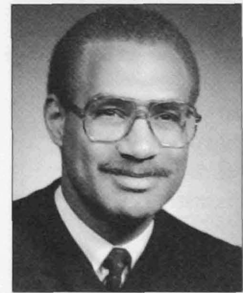
**1969**

**W. Neil Thomas III**, has been appointed by the Governor of the State of Tennessee to the Circuit Court bench.

**1971**

**Ralph G. Wellington** was elected to a three-year term as chairman of the Philadelphia law firm Schnader Harrison Segal & Lewis, L.L.P., where he has been practicing since 1971. He litigates at both the trial and appellate levels, and concentrates his practice in securities, antitrust, products liability, and commercial litigation. He resides in Philadelphia.

**1972**



The Honorable **Gershin A. Drain** of the Wayne County Circuit Court has been named a Michiganian of the Year by the *Detroit News*. Once a month Drain visits the Mound Road Correctional Facility in Detroit to minister to the spiritual needs of inmates, some of whom he had sentenced. I am ministered to as much as I minister, he says.

# Class notes

Charles D. Reite has been appointed a United States Administrative Law Judge, with chambers located in the Office of Hearings and Appeals in San Rafael, California. He was previously in private practice specializing in alternative dispute resolution with Accord Dispute Resolution; prior to that, he was a litigation partner with several major Minneapolis law firms.

**25th Reunion**

**The class of 1973 Reunion will be September 11-13**

## 1973

**Paul F. Hultin** is a director of the new national trial and appellate litigation firm, Wheeler Trigg & Kennedy, P.C., Denver, Colorado. The firm focuses on complex civil litigation, class action lawsuits, and pattern litigation in the areas of antitrust, commercial, defamation, intellectual property, product liability, professional malpractice, RICO, securities, and toxic torts. Hultin was formerly a partner with the Denver law firm Parcel, Mauro, Hultin & Spaanstra, P.C.

In the Spring of 1997, **Lawrence R. Smith** led a group of Chicago Lawyers who presented a mock trial to the Association of Insurance and Risk Managers (AIRMIC) conference in Nottingham, England. The trial demonstration discussed a pharmaceutical liability case. This was the first time the AIRMIC conference experienced the intricacies of a U.S. product liability trial. Smith was among 52 lawyers who left Chicago's Querrey & Harrow Ltd. to start the new law firm O'Hagan, Smith & Amundsen, L.L.C. In addition to its Chicago office, the firm has five suburban locations. It concentrates its practice in litigation and insurance law.

**William A. Newman** has joined the expanding New York City corporate department of Greenberg Traurig as a shareholder. He will continue to focus on significant business transactions, including mergers, acquisitions and debt and equity financings. He was previously a partner with the law firm Blumenthal & Lynne.

## 1974

**Gene D. Hansen** has joined the law firm Judge, James & Dutton, Ltd., of Park Ridge, Illinois.

**Craig A. Wolson**, previously a partner with William & Harris L.L.P. in New York City, has become counsel to Brown & Wood L.L.P. He will be resident in William & Harris New York City office and will be focusing on structured derivative products.

## 1975

**John R. Cook** has been elected to a two-year term as a managing director of the law firm Miller, Canfield, Paddock and Stone, P.L.C. Cook, who is resident director of the firm's Kalamazoo office, practices in the areas of banking and loan transactions, securities law, and commercial and corporate law.

**Peter D. Holmes** has qualified at the Master level as a Certified Hazardous Materials Manager. This credential provides national recognition to professionals engaged in the management of hazardous materials or related areas who have attained the required level of education, experience, and competency. Holmes, who was recently elected to the Environmental Section of the State Bar of Michigan, heads the environmental practice at the Detroit law firm Clark Hill P.L.C.

## 1976

**Irene S. Alpert**, associate general counsel of Joseph E. Seagram & Sons, Inc., of New York City, has been appointed to the additional position of vice president. She has been with Seagram since 1985. Alpert resides in Great Neck, New York, with her husband and two children.

**Thomas W. Linn** has been reelected to a two-year term as a managing director of the law firm Miller, Canfield, Paddock and Stone, P.L.C. He practices in the Detroit office in the areas of municipal law and securities, and commercial and banking law.

## 1977

**Colin C.S. Phegan**, LL.M., has been appointed a judge in the District Court of Sydney, Australia. He was formerly a Faculty of Law member at the University of Sydney.

Howard & Howard Attorneys, P.C., has announced the addition of **Jeffrey A. Sadowski** to the firms Bloomfield Hills, Michigan, office, where he specializes in intellectual property. He concentrates his practice in litigation and prosecution in various aspects of patent, trademark, copyright, computer law, and franchising. He resides in Birmingham, Michigan, with his wife and three sons.

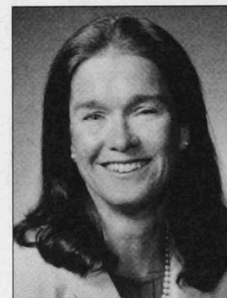
## 1978

**20th Reunion**

**The class of 1978 Reunion will be September 18-20**

**Nancy L. Olah** has become a partner in the law firm Kennedy Covington Lobdell & Hickman, L.L.P. Resident in the firm's South Carolina office, she concentrates in commercial real estate development, finance and leasing, and commercial contracts. She was formerly a partner in the law firm Shefte, Pinckney & Sawyer.

## 1980

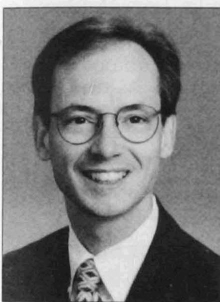


**Elise E. Singer** was elected to the National Association of Women Lawyers Executive Board, where she will serve as a member-at-large through July 1998. A partner in the Philadelphia law firm Duane, Morris & Heckscher, she concentrates in class action litigation, securities law, antitrust law, intellectual property, and complex commercial litigation. The Association promotes the advancement and welfare of

women in the legal profession and champions action to eliminate discrimination against women in society.

**Stephanie M. Smith** has opened a law office in her home state of Kansas, in the town of Prairie Village, where she practices primarily in the area of estate planning. She also is of counsel to the Las Vegas law firm Jolley, Urga, Wirth & Woodbury.

## 1981



**Kenneth C. Mennemeier** has announced the formation of Mennemeier, Glassman & Stroud L.L.P., a Sacramento, California, law firm specializing in complex civil litigation.

**Susan K. Pavlica** has become counsel to the law firm Mayer, Brown & Platt. She practices litigation in the firm's Houston, Texas, office.

**Lawrence M. Shapiro** is the founder and managing partner of Shapiro Professional Association, Minneapolis, Minnesota, which specializes in the resolution of complex business disputes and represents clients in litigation, arbitration, and other creative dispute resolution strategies. Clients work with Shapiro Professional Association in hiring, on a temporary basis, attorneys who have special experience to handle a variety of complex matters. Shapiro previously spent sixteen years as a litigation attorney with the Minneapolis law firm Maslon Edelman Borman & Brand.

## 1982

**Richard Krzyminski** has been named as a principal in the Cincinnati firm Baxter Hodell Donnelly Preston, Inc., where he has been Chief Financial Officer since 1995. Baxter Hodell is a Cincinnati-based architectural firm.

The 15th Reunion Booklet reported incorrectly that **Jonathan A. Levy** is employed by the District Attorney's Office in Philadelphia. He continues to spend his days in the scenic beauty of Portland, Oregon. Another Law School graduate, **Jonathan M. Levy**, 89, practices law as an Assistant District Attorney with the Philadelphia District Attorney's Office.

**Michael P. McGee** received the 1997 Regional Ambassador Award from the Southeast Michigan Council of Governments. The annual award recognizes leadership and service in fostering intergovernmental cooperation and representing the concerns of local government. McGee is a principal in the Detroit office of the law firm Miller, Canfield, Paddock and Stone, P.L.C., where he practices municipal finance law.

## 1983

### 15TH REUNION

**The class of 1983 Reunion will be September 18-20**

**Daniel E. Champion** has opened his own law firm, the Law Offices of Daniel E. Champion & Associates, based in Blue Springs, Missouri, with offices in Canoga Park, California, and Farmington Hills, Michigan. He continues to focus his practice on commercial litigation, with an emphasis on commercial collections, creditors' rights, enforcing judgments and the collection of unpaid legal fees. Champion was formerly an attorney with Graham & James, L.L.P.

## 1984

**Gary A. Rosen** was elected to serve on the executive committee of the Philadelphia law firm Connolly Epstein Chicco Foxman Engelmyer & Ewing. Chair of the firm's Intellectual Property Group, he concentrates his practice in intellectual property litigation, commercial litigation, and appellate practice. Rosen also served on the faculty at the American Conference Institute's program on Intellectual Property Insurance Coverage in New York City in January. He resides in Wynnewood, Pennsylvania, with his wife, Dr. Lisa Stein Rosen, and their children, Emily and Gregory.

## 1985

**Daniel A. Ladow** has been named a partner in the New York office of the law firm Graham & James L.L.P. He has overall responsibility for complex litigation case management within the Intellectual Property Department, with an emphasis on pharmaceutical and biotechnology patent litigation.

**James R. Lancaster, Jr.**, of the Lansing office of the law firm Miller, Canfield, Paddock and Stone, P.L.C., has been elected principal. His practice includes all aspects of environmental law, general civil litigation including construction, MIOSHA, land use, and zoning law. He resides in DeWitt, Michigan.

**Dennis Terez** has accepted a position with the Federal Public Defender's Office serving the United States District Court for the Northern District of Ohio. He was previously a partner of Squire, Sanders & Dempsey L.L.P., where he worked since 1989 in the litigation department.

## 1986

**Sandra Hoffmann** has advanced to candidacy in the Ph.D. program in the Department of Agricultural and Resource Economics, University of California, Berkeley. Her dissertation looks at irreversible health outcomes and environmental risk policy. Hoffman also was selected to sing with the San Francisco Symphony Chorus for the 1997-98 season, and she serves on the board of the East Bay Sanctuary Covenant, an interfaith coalition that provides legal and social services and advocacy for recent immigrants and refugees. This continues *pro bono* work she has done for the past ten years on legal representation in political asylum cases.

# Class notes

## 1987

**Michael L. Caldwell** has become a shareholder of Fink Zausmer, P.C., a law firm with offices in Farmington Hills, Detroit, and Lansing. Caldwell focuses on a broad range of environmental litigation, including Superfund, toxic tort, and insurance coverage litigation. He resides in Wixom, Michigan.

**Jeffrey O. Davidson** has been admitted to partnership with the law firm Baker & Daniels. Resident in the Fort Wayne, Indiana, office, Davidson is a member of the firm's Intellectual Property Team, concentrating his practice primarily in the areas of trademark, unfair competition, and copyright law.

**John P. Flynn** has become a partner in Dewey Ballantine L.L.P., where he is a member of the Litigation Department in the firm's Los Angeles office.

**Robert J. Hill** has been elected partner in the Washington, D.C., office of the law firm Reed Smith. A member of the Health Care and Corporate & Finance Groups, he specializes in corporate transactions for the health care industry, including mergers and acquisitions, joint ventures, managed care contracting, securities offerings, and general corporate counseling.

**Michael D. Kaminski** was elected to partnership in the Washington, D.C., office of Foley & Lardner. He practices in the Intellectual Property Department, where he counsels clients in the areas of patent litigation, prosecution, and licensing.

## 1988

**10th Reunion**

**The class of 1988 Reunion will be September 18-20**

**Vincent Atriano** has been admitted to partnership with the law firm Squire, Sanders & Dempsey L.L.P. He works out of the Columbus, Ohio, office and is a member of the firm's environmental practice.

**Daniel H. Golub** has been elected partner in the Philadelphia office of the law firm Reed Smith Shaw & McClay L.L.P., where he is a member of the Intellectual Property Group. His practice emphasizes all aspects of intellectual property law including client counseling, intellectual property transaction agreements, litigation of patent, trademark and trade secret matters, and preparation and prosecution of domestic and foreign patents.

**Robert P. Perry** has been elected as shareholder of the law firm Butzel Long, where he practices in the areas of probate, estate planning, and trust administration. He is based in the firm's Birmingham, Michigan, office, and is a resident of Livonia, Michigan.

## 1990

**Zora E. Johnson** has been elected to membership in the law firm Dykema Gossett, where she is a member of the Litigation Practice Group. Her practice focuses on commercial litigation in both state and federal courts, with emphasis on zoning, condemnation, insurance, contracts, securities, defamation and Uniform Commercial Code issues. She resides in Royal Oak, Michigan.

**Richard K. Kornfeld** has been made a director of Isaacson, Rosenbaum, Woods & Levy, P.C. He is a member of the firm's Litigation Department, and his practice emphasizes criminal and civil matters at the trial and appellate levels in both federal and state courts.

**Steven M. Levitan** has been named partner in the law firm Skjerven, Morrill, MacPherson, Franklin & Friel L.L.P. in San Jose, California, which specializes in intellectual property and commercial litigation for high technology clients.

**Valissa A. Tsoucaris** has been elected a member/director of Kelly/Haglund/Garnsey & Kahn L.L.C., of Denver, Colorado. She continues to practice commercial litigation, emphasizing labor and employment law, and media law. She also has an active health care policy practice which includes lobbying in the Colorado General Assembly.

## 1991

**Barbara L. McQuade** and **Daniel R. Hurley** announce the birth of their first child, John McQuade Hurley, on October 16, 1997. McQuade recently joined her husband as an Assistant United States Attorney in Detroit.

## 1992

**Roman Arce** has been made a partner with the law firm Marshal & Melhorn, Toledo, Ohio. He specializes in the areas of labor and employment law.

**Karen Gruen** has joined the legal department of Alaska Airlines, Seattle, Washington. Her responsibilities include litigation and contract and regulatory matters. She was previously an associate attorney at Short, Cressman & Burgess, in Seattle.

## 1993

**5th Reunion**

**The class of 1993 Reunion will be September 18-20**

**Courtney W. Wiswall** has joined the Portland, Oregon, office of the law firm Stoel Rives

L.L.P., as an associate attorney in the Labor and Employment Law Practice Group. Her practice is devoted exclusively to counseling employers in all aspects of employment-related issues and employment litigation.

**1996**

**Kenyatta L. Brame** has joined the law firm Miller, Johnson, Snell & Cummiskey, P.L.C., as an associate. He will concentrate his practice in the areas of employment law, labor relations, and immigration.

**1997**

**Jennifer G. Anderson** and **Angela R. White** have joined the Ann Arbor office of the law firm Dykema Gossett P.L.L.C., as associates. Anderson, a resident of Ypsilanti Township, is a member of the Litigation Practice Group. She was previously the community service director at Ann Arbor's National Institute for Burn Medicine. White is a member of the Taxation and Estates Practice Group, and concentrates in all areas of federal and state law, as well as general estate planning. She resides in Livonia.

**Nathan D. Plantinga** has joined the law firm Miller, Johnson, Snell & Cummiskey, P.L.C., as an associate practicing in the area of employment law.

## IN *memoriam*

| | | |
|---|---|---|
| '17 | Frank M. Gunter | |
| | Shelby G. Ogden | March 1, 1987 |
| '26 | Max E. Stein | January 20, 1997 |
| '27 | Walter A. Kleinert | |
| | Cyrus M. Poppen | June 15, 1996 |
| '28 | Howard T. Horrell | January 10, 1990 |
| '29 | Roy H. Callahan | February 13, 1997 |
| | George B. Christensen | December 21, 1997 |
| | Charles E. Daugherty | December 31, 1997 |
| | Archibald J. Weaver | May 16, 1997 |
| '30 | Jeanne H. Breitel | October 30, 1995 |
| | Theodore R. Skinner | August 1, 1981 |
| '33 | George L. Gisler | November 24, 1997 |
| '36 | Wyman P. Boynton | May 26, 1997 |
| | The Honorable Frank T. Theis | January 17, 1998 |
| '37 | Russell V. Carlton | March 14, 1993 |
| | Craig Spangenberg | March 17, 1998 |
| | John Jack Wierengo, Jr. | February 12, 1998 |
| '38 | Charles E. Marsh | |
| '40 | Dwight M. Cheever | October 8, 1997 |
| | Irving M. Edelberg | May 1, 1997 |
| '41 | The Honorable James M. Teahen | June 1, 1997 |
| | Josephus T. Thomas | April 14, 1993 |
| '42 | Lon Hamilton Barringer | April 19, 1994 |
| '43 | C. Blake McDowell, Jr. | |
| | E. George Rudolph | May 18, 1997 |
| '47 | J. Earle Roose | November 20, 1997 |
| '48 | Richard C. OConnor | |
| | The Honorable John C. Statter | November 30, 1997 |
| '49 | Herbert H. Liebhafsky | January 21, 1993 |
| | Luther S. Stewart | December 13, 1997 |
| '50 | Colonel Lysle I. Abbott | |
| | Dick Buddingh | July 14, 1997 |
| | John A. Michael | January 18, 1997 |
| '51 | John B. Barney | |
| | Leland W. Carr, Jr. | January 16, 1997 |
| | Nolan W. Carson | |
| | Harry R. Dumont | April 7, 1993 |
| | Martin A. Eisenstadt | |
| | Francis E. Lindsay | December 19, 1997 |
| '52 | Arthur S. Bond, Jr. | |
| | Lenamyra S. Margules | January 8, 1998 |
| '53 | Robert G. Russell | |
| '55 | Gerald J. Helfenbein | February 3, 1997 |
| '56 | Gay Secor-Hardy | |
| '57 | E. Dexter Galloway | June 28, 1997 |
| '58 | Henry D. Baldwin | |
| '61 | James B. Bradley | |
| '62 | David N. Brook | |
| '65 | Louis B. Potter | October 29, 1997 |
| '66 | William A. Herman | June 4, 1997 |
| '68 | Roger L. Stouder | December 28, 1997 |
| '72 | James L. Harlow | |
| '77 | Stephen Michael Gatlin | |
| '79 | Robert William Archer | January 27, 1997 |
| | Ray McNulty OHara | September 7, 1997 |
| '85 | Elizabeth Battelle Clark | |

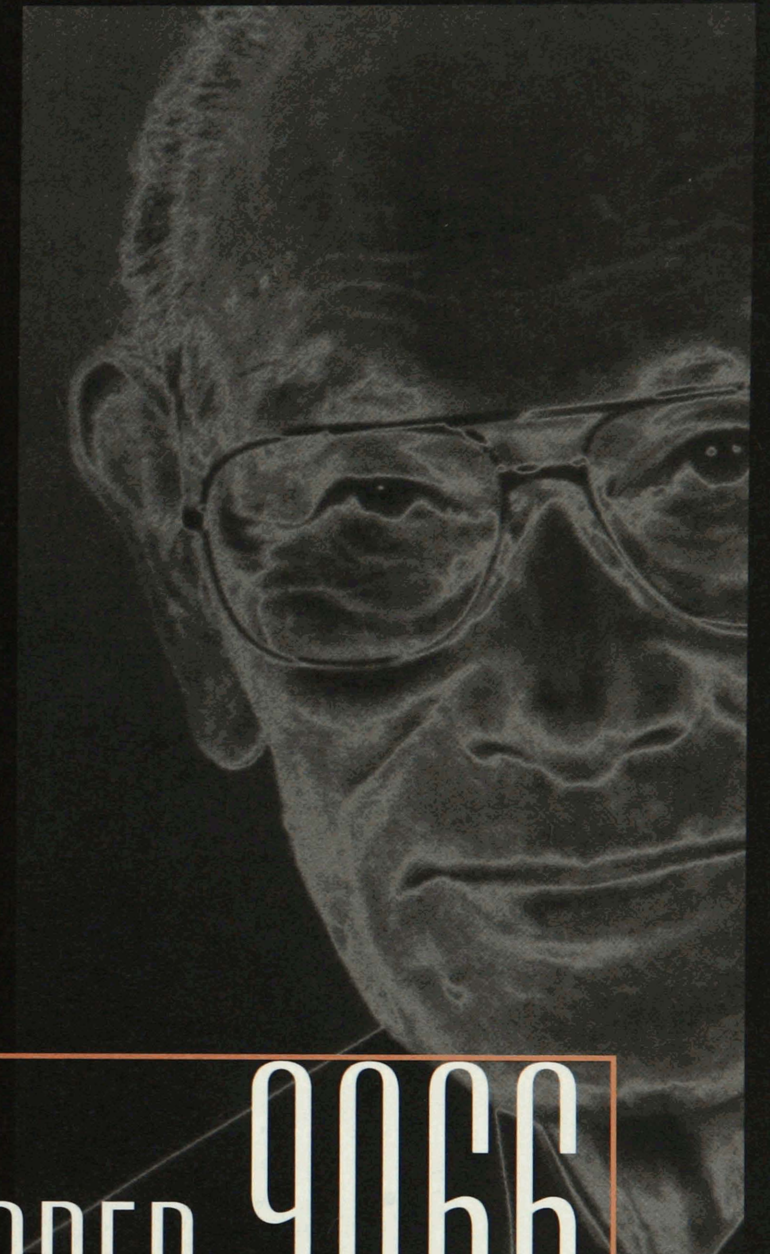
# Korematsu & Executive Order 9066

## A Re-enactment

For a couple of hours, the years seemed to reverse to World War II, when Executive Order 9066 authorized the wartime security measure of collecting Americans of Japanese descent who lived in military-designated zones into assembly areas and confining them to internment camps.

*Continued on page 66*

PHOTO COURTESY STATE BAR OF MICHIGAN



In a re-enactment at the Law School in February, presented as part of a national Day of Remembrance and in conjunction with the Asian Pacific American Law Students Association's symposium on "Rethinking Racial Divides" (see story on page 28), readers revived the words of *Korematsu v. United States*, the 1944 case in which the U.S. Supreme Court upheld the U.S. government's right to curtail the civil rights of some citizens as a wartime security measure, and the decision of the U.S. District Court for the Northern District of California in 1984 to grant Fred Korematsu's *coram nobis* petition, in effect saying that Korematsu had been unjustly convicted in the court nearly 40 years earlier. In 1988 the U.S. government apologized for the forced internment and paid each internee $20,000 in compensation.

Despite these gestures, the Supreme Court's 6-3 decision in the case still stands as the law of the land. But in one of those rare verdicts of life over law, the 79-year-old Korematsu last January traveled to the White House to receive the Presidential Medal of Freedom from President Clinton. "In the long history of our country's constant search for justice, some names of ordinary citizens stand for millions of souls," Clinton said as he presented the award. "Plessy, Brown, Parks. To that distinguished list, today we add the name of Fred Korematsu." For his part, Korematsu told a reporter, "I'm accepting this award for all Japanese Americans taken to the camps, for all their suffering and embarrassment."

The Law School re-enactment was presented by the Asian Pacific American Law Students Association, the United Asian American Organizations and the Asian/Pacific American Studies Program.

The following text is based on the U.S. Supreme Court decision, the *coram nobis* hearing before the U.S. District Court of Northern California, and District Court Judge Marilyn Hall Patel's ruling in that hearing.

# A RE-ENACTMENT

## THE CAST

**Narrator:** Assistant Professor of Law Roderick M. Hills

**U.S. District Court Judge Marilyn Hall Patel:** Gale M. Nomura, Director of the University of Michigan's Asian/Pacific American Studies Program and lecturer in the Program in American Culture and the Residential College.

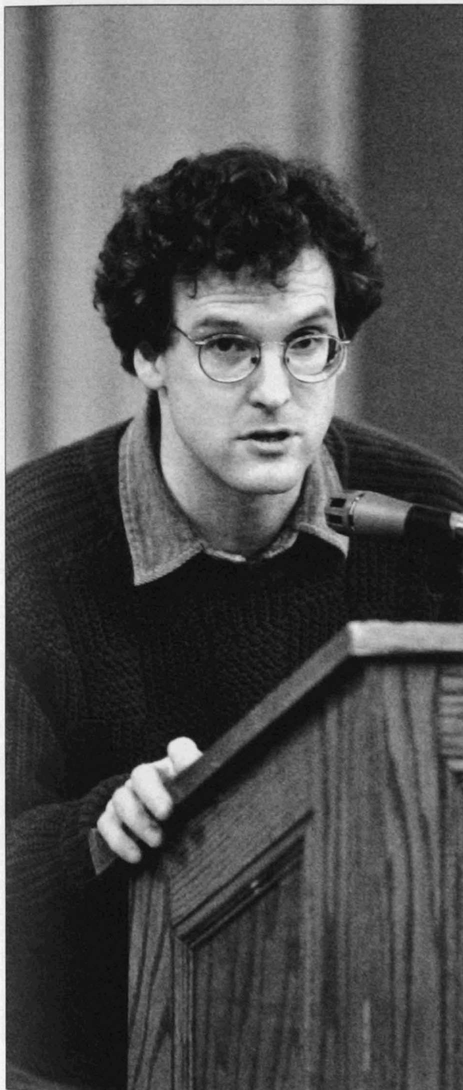
**Dale Minami, counsel for Fred Korematsu:** Stephen H. Sumida, Associate Professor of English Language and Literature and American Culture and Faculty Director of the Rackham Summer Institute.

**Fred Korematsu:** Yuzuru J. Takeshita, Professor Emeritus, University of Michigan School of Public Health and a survivor of an internment camp for Japanese Americans during World War II.

**Victor Stone, representing the United States:** Ihan Kim, first-year law student.

# THE SCENE

**The scene is Room 250 of Hutchins Hall, and the Narrator is detailing the 1944 Supreme Court decision to set the stage for the readings from *coram nobis* arguments that were made 40 years later.**



*Assistant Professor of Law Roderick M. Hills sets the stage.*

"All legal restrictions which curtail the civil rights of a single racial group are immediately suspect and must be rigidly scrutinized, though not all of them are necessarily unconstitutional," Supreme Court Justice Hugo Black's now-famous words open the Supreme Court's written decision in *Toyosaburo Korematsu v. United States* 323 US 214 (1944). But the rigid scrutiny that he prescribed upheld the curtailment of the rights of Korematsu, an American citizen of Japanese descent who was convicted for refusing to leave his home in a portion of a military area from which persons of Japanese ancestry had been ordered excluded.

This was World War II, Japan was an enemy, and "Korematsu was not excluded from the Military Area because of hostility to him or his race," Black wrote. "He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities fear an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot — by availing ourselves of the calm perspective of hindsight — now say that at that time these actions were unjustified."

**The date moves ahead nearly 40 years to the U.S. District Court for the Northern District of California. "The posture of this litigation is as follows: That in January of this year a petition for writ of *coram nobis* was filed by Petitioner Korematsu in this Court, this Court being the Court in which he was convicted in September of 1942, that conviction having been affirmed by the Supreme Court in 1944."**

**Minami:** We are here today to seek a measure of the justice denied to Fred Korematsu and the Japanese American community 40 years ago. The allegations we put forth are perhaps unique in legal history, challenging that high government officials suppressed, altered and destroyed information and evidence in order to influence the outcome of a Supreme Court decision.

The case itself is enormously significant; as Fred Korematsu says, "My name must be known by every law student and lawyer in this country."

This is not just a 40-year-old misdemeanor, as the government characterizes it. This is a monumental precedent which affected deeply and irrevocably the lives of a hundred thousand Japanese Americans, and countless numbers of friends and neighbors by mass banishment of a single racial minority group.

The total in lost property, lost opportunities, broken families and human suffering was staggering. This case also established some of the most criticized and controversial precedents in legal history.

First, the mass exclusion of an identifiable minority based on race without notice, without hearing, without an attorney was justified.

Secondly, military judgments in times of crises are virtually unreviewable by the courts, even though the courts are functioning and no martial law has been declared.

*Continued on page 68*

*Continued from page 67*

*Korematsu v. United States* has never been overruled and has never been reversed. Today we know that this Supreme Court decision rests on a non-existent factual foundation.

Some brief examples. Agencies responsible for the investigation and monitoring of Japanese Americans felt that they presented no danger great enough to warrant mass exclusion.

Their opinions and reports were suppressed from the Supreme Court. Department of Justice officials felt an ethical duty to reveal evidence contrary to that offered to and accepted by the United States Supreme Court.

This evidence was likewise suppressed. Responsible government agencies, such as the Federal Communications Commission and the FBI flatly refuted claims presented to the Supreme Court as facts that Japanese Americans were implicated in illegal signaling through radio and light transmissions to enemy vessels.

This evidence of refutation was also suppressed.

President Ford, on February 19, 1976, rescinded Executive Order 9066 calling the uprooting of loyal Americans a setback to fundamental American principles.

Even the major participants in the exclusion and detention decisions eventually repudiated their actions. Earl Warren, who later became a great Chief Justice of the United States Supreme Court; Justice William O. Douglas, who voted to uphold the government's position in *Kirabayashi* and *Korematsu,* recanted in his later years and also Tom Clark, as a U.S. Attorney then, who later became a United States Supreme Court Justice, also repudiated his role. Only the judicial system has not yet had the opportunity to recognize this wrong.

**Judge Patel:** Thank you. Is there anything further, Mr. Minami?

**Minami:** If we may beg the Court's indulgence, Mr. Korematsu would like to make a statement to the Court.

**Judge Patel:** I will allow him to do so at this time. Mr. Korematsu?

**Mr. Korematsu:** Your Honor, I still remember 40 years ago when I was handcuffed and arrested as a criminal here in San Francisco. As an American citizen being put through this shame and embarrassment and also all Japanese American citizens who were escorted to concentration camps, suffered the same embarrassment, we can never forget this incident as long as we live. The horse stalls that we stayed in were made for horses, not human beings.

According to the Supreme Court decision regarding my case, being an American citizen was not enough.They say you have to look like one, otherwise they say you can't tell the difference between a loyal and a disloyal American. As long as my record stands in federal court, any American citizen can be held in prison or concentration camp without a trial or a hearing. That is if they look like the enemy of our country. Therefore, I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American of any race, creed or color.

**Judge Patel:** Thank you, Mr. Korematsu. Does the Government have a response at this time?

**Mr. Stone:** Good morning, Your Honor. As the Court is well aware, the government has requested that the Court make the same substantive ruling and grant the same substantive relief which Mr. Korematsu, as petitioner, has requested, namely that the conviction be vacated and the underlying information be dismissed. We do that in the context of a long history by the executive and legislative branches, which has recognized that this was a very unusual situation in this history of this nation that resulted in legislation on at least six, seven occasions to remedy different facets of this problem.

And then in 1980, President Carter signed a bill which we have described at some length in our pleadings and which resulted in the formation of a Commission and the appropriation and expenditure of over a million dollars, so that Commission could again attempt to lay bare the record of what President Ford and President Nixon, and the Congress in 1948 as well, recognized was apparently done wrong during World War II, both as a lesson and as a mechanism which would forever guarantee the rights of these and all American citizens.

To the extent that we are in a court of law and dealing with legal matters, that Commission's report has concluded and we find ourselves, I think, unanimous in agreeing with it, that it says "Today the decision in *Korematsu* lies overruled in the court of history."

*Continued on page 70*

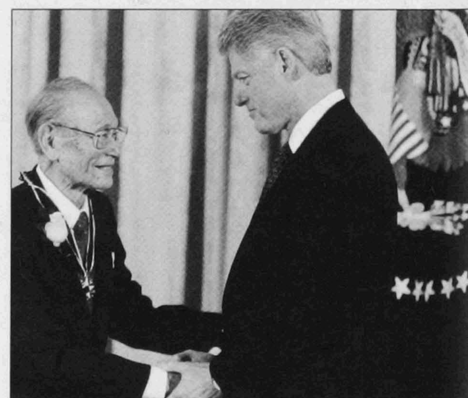
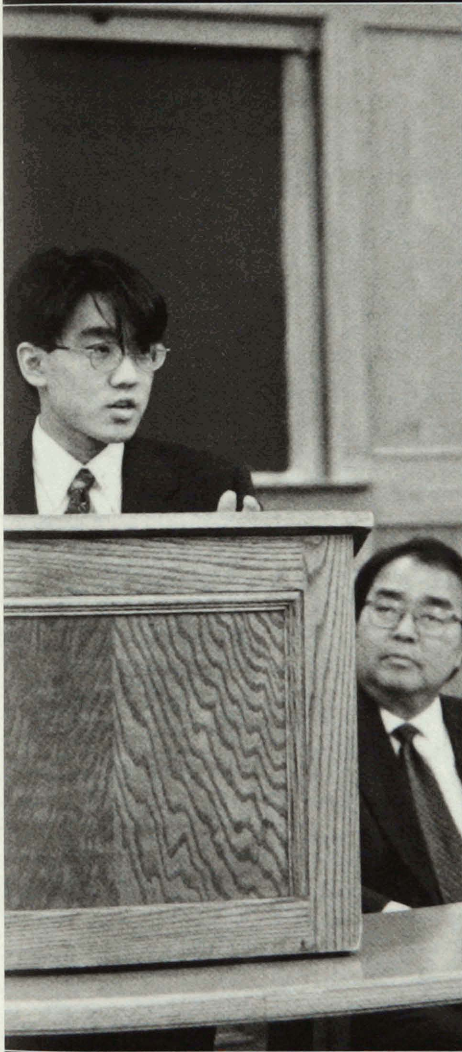


PHOTO COURTESY OF THE WHITE HOUSE

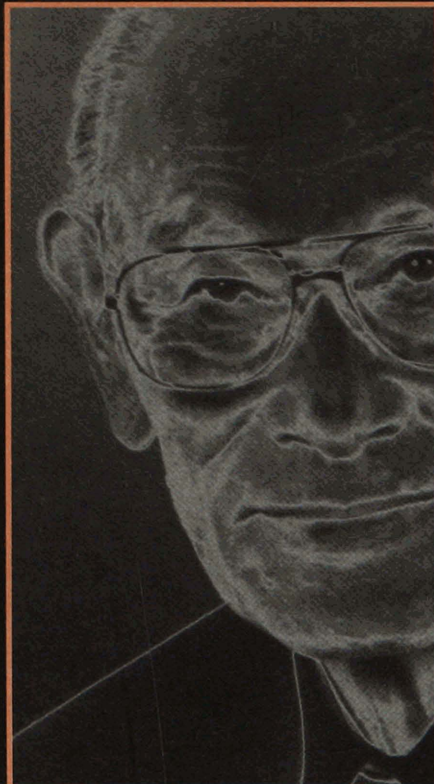
*President Clinton presents the Presidential Medal of Freedom to Fred Korematsu at the White House last January.*

*Japanese American internment camp survivor Yuzuru J. Takeshita takes the stand as Fred Korematsu. At left is law student Ihan Kim as United States counsel Victor Stone. At rear is Gail Nomura as Judge Marilyn Hall Patel.*

# A RE-ENACTMENT



*First-year law student Ihan Kim takes the stand as United States counsel Victor Stone. At right is Stephen H. Sumida as Dale Minami, counsel for Fred Korematsu.*



*Continued from page 68*

**Judge Patel issued her written opinion on April 19, 1984. It was the first time that a judge had vacated a criminal conviction that had been upheld by the Supreme Court on final appeal.**

**Judge Patel:** A writ of *coram nobis* is an appropriate remedy by which the court can correct errors in criminal convictions where other remedies are not available. The petition is appropriately heard by the district court in which the conviction was obtained. This is so even though the judgment has been appealed and affirmed by the Supreme Court. Appellate leave is not required for a trial court to correct errors occurring before it.

In this case, the government is not prepared to confess error. Yet it has not submitted any opposition to the petition, although given ample opportunity to do so. Apparently the government would like this court to set aside the conviction without looking at the record in an effort to put this unfortunate episode in our country's history behind us.

The government has, however, while not confessing error, taken a position tantamount to a confession of error. It has eagerly moved to dismiss without acknowledging any specific reasons for dismissal other than that "there is no further usefulness to be served by conviction under a statute which has been soundly repudiated." In support of this statement, the government points out that in 1971, legislation was adopted requiring congressional action before an Executive Order such as Executive Order 9066 can ever be issued again; that in 1976, the statute under which petitioner was convicted was repealed; and that in 1976, all authority conferred by Executive Order 9066 was formally proclaimed terminated as of December 31, 1946.

Moreover, there is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court's determination, although it cannot now be said what result would have obtained had the information been disclosed. Because the information was of the kind peculiarly within the government's knowledge, the court was dependent upon the government to provide a full and accurate account. Failure to do so presents the "compelling circumstance" contemplated by *Morgan (United States v. Morgan*, 346 U.S. 502, S. Ct. 247 [1954]). The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court.

*Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to protect all citizens from the petty fears and prejudices that are so easily aroused.

In accordance with the foregoing, the petition for a writ of *coram nobis* is granted and the counter-motion of the respondent is denied.



# THE DISSENT

## Dissent of Frank Murphy, '14, becomes Michigan Legal Milestone

ank Murphy, '14

PHOTO COURTESY STATE BAR OF MICHIGAN

Law School graduate Frank Murphy's fervent dissent in *Korematsu v. United States*, 323 US 214 (1944) is memorialized in a plaque outside his boyhood home in Harbor Beach, Michigan. Erected in 1996 as part of the State Bar of Michigan's ongoing Michigan Legal Milestones series — with Fred Korematsu among the dedication speakers — the plaque reads in part:

> "In his dissent Justice Murphy condemned the majority's decision and rejected its reasoning. Justice Murphy wrote that the decision was nothing more than the 'legalization of racism' and concluded, 'Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.'

Murphy's dissent joined those of Justices Owen Roberts and Robert Jackson. A 1914 graduate of the Law School, a former Michigan governor and a former Detroit mayor, Murphy wrote:

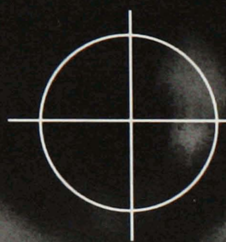
"The exclusion of 'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."

"The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States," he said. "No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country.

"But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy.

"To give constitutional sanction to that inference in this, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow."

He concluded: "All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution."



# GENOCIDE THEN AND NOW

— BY JOSÉ E. ALVAREZ

*The following essay is based on a talk delivered at the UN during the American Bar Association's Conference Commemorating the Fiftieth Anniversary of the United Nations Universal Declaration of Human Rights and the Genocide Convention, March 12-13, 1998. The panel on which Professor Alvarez participated, charged with examining the legacy and future of the Genocide Convention, also included John F. Murphy, professor at Villanova University Law School, Ambassadors William J. vanden Heuvel and Robert F. Van Lierop, and Nobel Laureate Elie Wiesel.*

**An assessment of the Genocide Convention requires comparing the goals of its drafters to its achievements. The goals of the Genocide Convention, as adopted in 1948, were, first, symbolic: to stigmatize actions specifically intended to destroy people because of stable and largely immutable characteristics, integral to their human identity. Branding at the international level certain acts of violence directed at groups defined by nationality, ethnicity, religion or race served notice that these constitute unique affronts to humanity because they target the right of existence of entire communities, along with the cultural and other contributions of human collectives.**

**There is abundant evidence that gender-specific violence has long been a common tool of genocide. If it is true, as many reports suggest, that rape, enforced prostitution, enforced sterilization, enforced impregnation, enforced maternity, and sexual mutilation are used to specifically target women as women then I think we have a case for amending the Genocide Convention at the international level or for expanding the definition of "genocide" at the national level through domestic laws in order to recognize that the crime includes, in addition to those categories mentioned in Article II, victimization because of gender.**

Second, they hoped to give fair warning — so that future perpetrators could not claim, as revisionist critics of Nuremberg maintained, that the international community was imposing "ex post facto" criminal liability.

Third, drafters hoped that by legalizing the duty to prevent and to punish genocidal acts they were helping to ensure that such acts would "never again" occur. They were hoping to promote the many lofty goals pursued at Nuremberg: namely, to deter future perpetrators; to tell the truth of what occurred, thereby preserving an accurate collective memory; to vindicate victims and their families; to channel the thirst for revenge into the more peaceful channels of a courtroom; to make atonement possible for perpetrators; to affirm that national and international "rule of law;" and to help restore the lost civility of torn societies and thereby achieve "national reconciliation."

Fifty years and numerous mass atrocities later, we must acknowledge that they failed. The Convention has failed to stigmatize as "genocide" many mass atrocities of our time that target people based on political beliefs or other characteristics. While acts by the Khmer Rouge directed at Vietnamese, Chinese and Thai minorities, or against religious groups, such as the Buddhist monkshood, appear to be acts encompassed by the Convention, atrocities against the general Cambodian population are more difficult to encompass if victims were targeted solely as members of political, professional, or economic groups. Similar difficulties arise with respect to the treatment of Kurds by Iraqis, Mengistu's actions in Ethiopia before 1991, or the treatment of political opponents throughout Latin America.

In addition, the Convention's requirement that specific intent "to destroy" a group "as such" needs to be shown has led to intractable arguments over the characterization of other massacres. There are even some who suggest that Balkan "ethnic cleansing," if intended "merely" to displace populations for the sake of acquisition of territory, is not cognizable as "genocide." Indeed, some affirm that there were only three real "genocides" in this bloody century: the slaughter of the Armenians by the Young Turks in 1915, that of the Jews and Gypsies by the Nazis, and that of the Tutsis by the Hutu in 1994.

Although I am sensitive to the need to avoid verbal inflation for this most infamous of crimes, I think that we should avoid making this crime an irrelevancy. I agree with Ambassador Van Lierop that it is time to revisit the all too narrow political compromises contained in the Genocide Convention. As was done in the wake of WWII, we need to look around today and respond to the realities of what we see. As in 1948, we need to ground genocide in reality and stigmatize as the gravest of crimes acts of violence that target human beings because of inherent characteristics that they share with others. While Ambassador Van Lierop addressed the need to address groups targeted because of their politics, I want to address a different issue.

There is abundant evidence that gender-specific violence has long been a common tool of genocide. If it is true, as many reports suggest, that rape, enforced prostitution, enforced sterilization, enforced impregnation, enforced maternity, and sexual mutilation are used to specifically target women as women then I think we have a case for amending the Genocide Convention at the international level or for expanding the definition of "genocide" at the national level through domestic laws in order to recognize that the crime includes, in addition to those categories mentioned in Article II, victimization because of gender.

The evidence that we have suggests that "ethnic cleansing" in the former Yugoslavia sought to eliminate unwanted groups through odious but diverse methods to humiliate, shame, degrade and terrify, causing groups to disappear from areas. It appears that there, as elsewhere, rape has been used as a tool of expulsion: to humiliate or emotionally destroy victims and their family members; to provoke chaos and terrified flight; and to render victims submissive and subordinate. Perpetrators, aware of the impact of rape in traditional societies (including Muslim cultures), seem to have consciously deployed rape to degrade not just the individual woman but also to strip the humanity from the larger group(s) of which she was a part. There is abundant evidence that both in Rwanda and in the former Yugoslavia, being a woman was a significant risk factor; being female was all too often the predominant reason for assault or a significant factor in being singled out, even for death. In Rwanda and Bosnia and elsewhere, sexual assaults have been used as a specific tool in pursuit of ethnic liquidation but also as a weapon that specially targeted women, particularly professional women such as judges, for special treatment. It is alleged that rape was such a formalized part of the policy of the Yugoslav conflict that soldiers were threatened with castration or death for refusing to rape.

Sexual assaults reportedly have been used in all the ways anticipated by Article II of the Genocide Convention. Sometimes such acts have been used to cause the death of the victim; sometimes to prevent births within the group by causing physical damage to the woman's body; sometimes to inflict mental injury on a female so that she might refuse to engage in future consensual relations or be refused by her husband. Most diabolical of all are the allegations that systematic rapes, sometimes in specially created brothels for the purpose, have been used to impregnate non-Serb victims to produce "ethnically pure" Serbian babies, with women detained as hostages until they were past the point of abortion. This last, rape for reproduction as ethnic liquidation, seems most squarely within even existing definitions of genocide.

Of course, genocidal rape, including the abuse of women's reproductive capacities, was not unheard of even in 1948. International criminal law has been slow to recognize the needs of women and has repeatedly failed to bring actions against persons guilty of those sex-specific crimes that have been, for a long time, accepted as violations of the laws and customs of war (including forced prostitution in Asia during WWII). Insofar as gender and genocide are concerned, women have been caught in a "Catch-22." As one of my colleagues has put it: "What is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women." Indeed, after reviewing all relevant international legal instruments, including the Genocide Convention, Kelly Dawn Askin concluded in her book, *War Crimes Against Women* (1997), that "museums, paintings, buildings, and armed combatants have been provided with far more protections over the years than have female civilians." Although the existing international tribunals for Rwanda and the former Yugoslavia appear ready to acknowledge gender-specific violence as crimes against

**The reasons for recognizing the gender of genocide are both practical and philosophical. Genocide is the most infamous of crimes. Prosecutors are less likely to drop a charge of genocide, as they now do a charge of "mere" rape, on the basis that it is "too difficult" to prosecute or that it is merely "duplicative" of other offenses charged in an indictment. A charge of genocide rectifies the impression, created by its perpetrators, that its victims are "less than human," "deserve what they get," or have been somehow "complicit" in their victimization. No where is the need to correct these falsehoods more acute than with respect to victims of gender-specific violence.**

humanity and as war crimes, they have yet to call such acts "genocidal" even when such crimes are deliberately inflicted upon a group in an effort to cause that group's destruction, wholly or partially, physically or emotionally.

While it is of course possible to prosecute individuals for sex-specific violence under national law as domestic offenses or as violations of the laws of war, the same is true for all other acts that are now included as genocide. Gender needs to be expressly included in our definition of genocide for the same reason nationality, religion, ethnicity, and race now are: because when we ignore groups that are targeted because of their inherent collective status, we fail to tell the full truth of the barbarism that occurred. When we call what happened in the former Yugoslavia or in Rwanda merely an "ethnic war," and refuse to acknowledge the special victimization of women as women, we fail to preserve a part of collective memory, we fail to vindicate the interests of a particular group of victims, we fail to warn perpetrators that sexual assault is no longer part of the fruits of war, and, of course, we may fail to fully enforce the rule of law.

The reasons for recognizing the gender of genocide are both practical and philosophical. Genocide is the most infamous of crimes. Prosecutors are less likely to drop a charge of genocide, as they now do a charge of "mere" rape, on the basis that it is "too difficult" to prosecute or that it is merely "duplicative" of other offenses charged in an indictment. A charge of genocide rectifies the impression, created by its perpetrators, that its victims are "less than human," "deserve what they get," or have been somehow "complicit" in their victimization. Nowhere is the need to correct these falsehoods more acute than with respect to victims of gender-specific violence. Moreover, women deserve to be protected under the Genocide Convention for the same reason other victims do: because genocide is the most widely accepted of international crimes, applies to both situations of armed conflict or peace, international wars or internal conflicts, and, unlike crimes against humanity, is subject to a specialized convention that gives the crime a precision that many other international crimes lack. The Genocide Convention correctly identifies the interest all humanity has in protecting the interests of distinct nationalities, races, creeds and ethnicities. Symbolically, it is important that the law recognize the interests of one half of humanity that happens to be female. While there are, of course, considerable issues that would need to be worked out if the Genocide Convention were expanded as proposed here, including whether certain "cultural" practices, such as female infanticide, would therefore qualify as genocide, it is important that such issues be put (finally) on the international agenda for discussion.

A second problem with the Genocide Convention is more obvious and has been noted by others here today. The Convention's biggest flaw was its failure to give any substance to the ostensible duty on states to "prevent" genocide. The Convention failed to put in place any mechanism by which the international community, or significant elements of it, could be compelled to act to prevent the preventable or even to provide early warning of potential cases. Instead, the parties to the Genocide Convention merely undertake to "call upon" competent organs of the UN.

But a third critical flaw is all our own and cannot be blamed on the drafters of 1948. Today, the international community, especially international lawyers, appear to be so enamored of the international that we risk ignoring the virtues of the local. At present, we are devoting far greater attention and resources to the two ad hoc international tribunals for Rwanda and the former Yugoslavia (not to mention negotiations to establish a permanent international criminal court) than we are to aiding local Ethiopian or Rwandan war crimes prosecutions or to assisting governments elsewhere that are struggling with the aftermath of mass atrocities. While the international community is right to be concerned about the fairness of local processes to deal with war crimes, we have not devoted anywhere near as much attention to correcting the possible problems with local attempts to render justice as we have to attempts to perfect international justice.

And what have we achieved through our internationalist priorities?

Five years after establishing the first international war crimes tribunal since Nuremberg and four years after establishing the second, the international community has managed to conclude one full trial for a war crimes suspect — to sentence one low level functionary to effectively 10 years in jail after a trial that lasted nearly a year and cost approximately $20 million. Four years after one of the largest genocides of the modern era, in Rwanda, we have yet to convict at the international level anyone of genocide for that massacre. While I agree that establishment of these tribunals has tremendous symbolic importance and has increased awareness of international humanitarian law, we should not pretend that we have fulfilled the goals of the Genocide Convention merely by establishing these bodies. The struggle against genocide continues to require engagement on a multitude of levels, domestic and international, along with a multitude of fora, civil and criminal.

Like Ambassador Van Lierop, I entertain considerable doubts about the wisdom of our priorities with respect to Rwanda. I fear that the operations of the Rwandan international tribunal, created by the Security Council, may not be fully consistent with the goals of the Genocide Convention. I fear that we may be turning our hopes for international criminal trials into a nearly religious crusade, thereby losing sight of the manifold, sometimes conflicting, goals that we need to simultaneously advance.

The present Rwandan government has reluctantly acceded to an international tribunal that, contrary to local Rwandan sentiments, enjoys "primacy" with respect to jurisdiction over perpetrators (whether or not it is shown that such an individual can receive a fair trial within Rwanda), is incapable of imposing the death penalty, is restricted to crimes committed only in 1994 and not before, is far removed from the territory in which the crimes occurred, is unfamiliar to the victims of the genocide, and does not include a Tutsi or a Hutu on its bench. Under the present scheme, it appears that some of those guilty of killing the greatest number of people will face a leisurely international trial with the full panoply of rights followed by a relatively short detention in a prison that is up to international standards, while many of those guilty of lesser offenses will face imperfect and expedited Rwandan justice followed by the death penalty. Such "anomalies of inversion" (see Madeline H. Morris, "The Trials of Concurrent Jurisdiction: The Case for Rwanda," 7 *Duke Journal of Comparative and International Law* 349 [1997]) will do precious little to affirm the international or the national rule of law in the eyes of the Rwandan people. For Rwandans there is considerable hypocrisy in being told not to impose the death penalty on genocidal murderers by countries such as the United States — a nation that continues to impose the death penalty for far less serious offenses and that is loathe to relinquish national jurisdiction with respect to mere serious offenders, including those accused of masterminding the Lockerbie bombing. Moreover, the international tribunal for Rwanda will do precious little to relieve the plight of the one percent of Rwanda's population now languishing in its jails and nothing to prevent the continuing acts by Hutu militants and reprisals by the Tutsi military. In the wake of such realities, it seems absurd for international lawyers to pat themselves on the back for their "success" in establishing this

"worthy heir to Nuremberg." We need to ask ourselves whose priorities are most furthered by the international tribunal in Arusha: the international community's or the Rwandan people's?

With respect to mechanisms for punishment, the Genocide Convention wisely stressed the role of national courts. It only mentioned the possibility of an "international penal tribunal" with respect to states that "accept . . . its jurisdiction." Although this was probably a concession to real politick at the time, there are in fact substantial reasons to prefer that war crimes prosecutions be conducted by national courts, particularly but not solely in the region where they occurred, and, yes, even involving individuals who were among those "complicit." However difficult it may be to make sure that such trials are conducted fairly, with full respect for the rights of defendants and victims, at least some of those proceedings are more likely to enjoy the legitimacy of the people we most hope to affect and only such proceedings are likely to help restore the rule of law where it matters most — at the local level where all of us, including international elites, live.

Further, it is not as if we have created perfect international courts in place of flawed national ones. Although we international lawyers like to point out the problems with local proceedings, we are disinclined to be totally frank about the flaws of the international processes we have put in place in their stead. Despite our best efforts, we have not managed to correct the flaws of Nuremberg and Tokyo: the accusations of victor's justice, novel criminal liability, and defective collective memory. While the international war crimes tribunals at The Hague and in Arusha were not put in place by victors after a war, they remain subject to a politicized body with questionable representative credentials: the Security Council — a UN organ that threatens to apply international humanitarian law selectively and certainly not to the actions of permanent members of the Security Council itself. There are doubts that these tribunals are enforcing "universal values evenhandedly applied" and suspicions that international prosecutions are driven by, and are certainly not above, international politics.

Nor have we managed to eradicate charges of that we have been unfair to litigants through the imposition of "novel" criminal liability. Although international humanitarian law has developed much in the 50 years since Nuremberg, most of those developments have occurred on paper but not in practice. The gaps in international criminal law, including with respect to the meaning of the crime of genocide, are legion and large. We do not really know, at least not until an international judge at The Hague or in Arusha tells us, what needs to be demonstrated to prove the requisite "subjective intent" for genocide; much less what "complicity," "attempt" or "conspiracy" in genocide means. We have no idea if the "hate speech" of Rwandan radio broadcasters will be encompassed or whether a prosecutor will be forced to show a direct link between words uttered on Rwandan radio and particular killings. We, and more significantly potential defendants, do not know whether the international tribunals now in place will convict systematic rapists of "genocide" or whether prosecutors and judges will take the view that the tribunals' respective statutes would have to be modified to bring this about. As all of these issues suggest, much of the scope of international criminal law remains for future caselaw development — a prospect that is likely to lead to accusations that international judges are "legislating" new rules from the bench. At least some of the problems and many of the gaps in existing law could be more easily filled by national courts able to draw on established national criminal law.

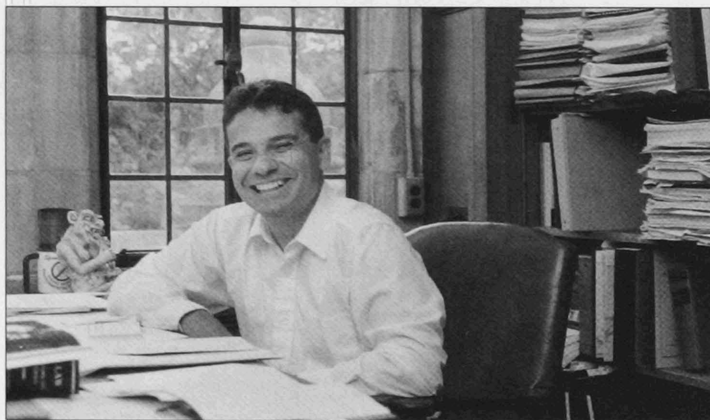
Finally, there is the issue of preservation of collective memory. Most agree that the history of the Holocaust is still being written, and that the proceedings at Nuremberg, which made the waging of aggressive war the linchpin of all charges, were historically flawed as they left unrecorded the plight of the Jews and Gypsies, not to mention women, homosexuals, and others. The major Nuremberg trials were conducted as if the Holocaust was incidental to the waging of war. If today we have achieved a fuller sense of the dimensions of the Holocaust and its implications, we owe this more to people like my fellow panelist Elie Wiesel than to Nuremberg's Robert Jackson. Developing an accurate historical record that is just to the full dimensions of mass atrocity is not the forte of specialists in international law — or of international judges who are not from the afflicted regions, who operated far from where these horrors occurred, and who are usually totally unprepared to deal with a criminal trial.

It may be that perpetrator-driven courtroom narratives are an inherently weak and defective tool with which to preserve history. Even so, we may need to acknowledge that national proceedings enjoy better prospects in this respect. Accurate history requires listening to the stories of many victims. It requires many trials, not just a selective few, and it requires trials for low level functionaries — that can show us how barbarism was routinized — as well as for the "big fish." Most of all it requires extensive public deliberation in many fora — including literature and the arts as well as the law. The didactic functions of war crimes trials may best be furthered at the local

level, through hundreds of trials that truly resonate within a local culture and whose lessons do not appear to be imposed, in top-down fashion, by the "international community."

We must assume that those who drafted the Genocide Convention were intent on defining and giving effect to a real crime. To this end, they recognized that governments needed to "enact . . . necessary legislation" — that is, to take action within their internal legal systems. As we know, achieving this has not been easy. Still, 50 years later, an increasing number of countries are recognizing that genocide is a universal crime over which they have jurisdiction, even if it did not occur on their territory or involve their nationals as victims or perpetrators. In some cases, some brave courts, including federal courts in Manhattan, are accepting jurisdiction over civil suits against genocidal culprits. Alien tort claims involving alleged perpetrators from both Rwanda and the former Yugoslavia are now creating civil components to Nuremberg. Whether or not monetary damages (or injunctions) arising from such suits are ever enforced, these proceedings are permitting victims to tell their stories through processes that they, not international prosecutors with distinct agendas, control, and through such suits, victims are securing public acknowledgment of what they suffered. In addition, such suits are at least as symbolically important as many of the activities of the ad hoc international war crimes tribunals. Certainly they unequivocally put the U.S. judiciary on the side of saying to people like the Serbian leader Karadzic that they are not welcome to come to the United States. In addition, interestingly enough, at least the Karadzic suit seems more likely to recognize the gender of genocide than are trials at The Hague.

Let me not be misunderstood. International tribunals, including the proposed permanent international criminal court, remain part of a many sided approach to dealing with genocide. The Genocide Convention anticipates and we need to continue a multi-pronged effort that includes such trials as well as suits in the World Court, civil suits and criminal proceedings in national bodies, diplomatic negotiations (as at Dayton), and other unilateral and multilateral action to mobilize shame and penalize guilty governments and state actors. But we should not give up on the opportunity (and the challenge) of effective preventive measures or local remedies. And we should not use the establishment of international courts as an excuse not to do more about these. In the end we may come around to appreciating, once again, that prevention is the best cure and that in national courts may lie the best hopes for securing many of the goals of the Genocide Convention when we regrettably fail to prevent genocide. It may be that we will only rid the world of genocide when it is treated as a crime under laws everywhere and when it is prosecuted by the most effective means any of us are likely to see in our lifetimes — by local police, by local prosecutors, and by local courts. Only if millions of national courts are serious about punishing genocide wherever it occurs, only if they turn the agents of genocide into real pariahs, will we be able to say "never again" and this time achieve it.



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*The following excerpt is adapted from* Poisoning the Minds of the Lower Orders, *by Don Herzog, to be published in August by Princeton University Press. Publication here is by permission.*

# ENLIGHTENMENT

— BY DON HERZOG

It's a curious broadside, a work of austere graphics and polite prose far removed from the mischievous engravings and bawdy ballads usually appearing on such sheets. Drawn from an address that 345 printers had signed and 138 had presented to the queen, the original text was committed to parchment "and accompanied by a Copy superbly printed on white Satin, edged with white Silk Fringe, backed with Purple Satin, and mounted in an Ivory Roller with appropriate Devices." Even in the published version, the arch is full of intricately detailed work. The printers took pride in their craftsmanship: "This Specimen of the Typographic Art," they bragged, "was surrounded by the Border and Ornaments on this Sheet, which alone contain upwards of Twenty-six Thousand moveable Pieces of Metal." The quantitatively inclined will want to know that it measures 21 5/8 by 15 1/4 inches.

On the top, an arch marked Lords on one end, Commons on the other, supports a crown. So much is unremarkable, a casual reference to very old theories of mixed government: English politics was a balance of monarchy, aristocracy, and democracy. But on the bottom, an equally impressive display of filigree work surrounds, of all things, a printing press.

The published version reproduces the printers' address to the queen, presented on 14 October 1820, and adds her response. (Well, not precisely her response. The queen's English wasn't very good; she couldn't have turned out the impeccably clipped cadences of the published response, and through the tawdry events of 1820 her advisers produced one text after another published in her name.) The printers congratulate the queen on her safe arrival in England and accession to the throne. They describe themselves as "the humble instruments of that mighty power," the press, "which, in advocating your Majesty's cause, so energetically sustains the declining liberties of England"; they advert ominously to a conspiracy against her; they close with a bravado flourish:

> In future times, should the page of History record the present era as one in which overwhelming Power combined with Senatorial Venality to crush an unprotected Female, we trust it will also preserve the gratifying remembrance, that the base Conspiracy was defeated by the irresistible force of Public Opinion, directed and displayed through the powerful medium of a *Free, Uncorrupted,* and *Incorruptible British Press.*

Posterity, even history's page, has no particularly sharp memory of the matter, gratifying or otherwise. As far as it has survived, though, it usually hasn't been framed quite this way.

Whatever her own beliefs about posterity, the queen exhibits a doughty courage in responding. She too embraces public opinion: "It is Public Opinion which has supported me in the otherwise unequal conflict with numerous adversaries, who not only possess unbounded resources, but who have never scrupled any means by which their vengeance could be gratified. This Public Opinion is the concentrated force of many enlightened minds, operating through the medium of *The Press.*" Not all the press, concedes the queen, serve as the medium of enlightenment. Thanks to the vicious tactics of her nameless adversaries, their tireless efforts to intimidate and corrupt the press, some are "busily employed in fabricating the most atrocious slanders against myself. . . ." But the queen is sanguine, pleasantly surprised that in the face of such tactics, so much of the press has remained honest, smugly confident that "The force of truth is ultimately irresistible:—but truth, without some adventitious aid, moves with a slow pace, and sometimes its motion is so slow as to be imperceptible — *The Press* is its accelerating power — *The Press* gives it wings — *The Press* does more for truth in a day, than mere oral teaching could in a century."

But why the lionization of the press? Who was the queen? Who her nefarious enemies? I don't mean to be coy. The queen was Caroline. Her husband was George IV, finally about to take the throne in 1820 after a painfully long tenure in that trying role of Prince of Wales. As prince, George had a nasty habit of running up fabulous gambling debts and turning to Parliament to pay them off. Hundreds of thousands of pounds later, George faced an arranged marriage with Caroline of Brunswick in an attempt to make him properly settled. George already was secretly married to a Catholic widow, Mrs. Maria Fitzherbert. Or sort of secretly: rumors had swirled through London. But Charles James Fox, the great Whig leader, assured Parliament that there was nothing to the rumors; and George married Caroline in April 1795.

They didn't live happily ever after; apparently, one night together was enough to disgust the groom. Unluckily enough, though, George managed to get Caroline pregnant. "I shudder at the very thoughts of sitting at the same table with her," George confided in one friend about a year later, "or even of being under the same roof with her." Watching her dance, one observer was appalled: "Such an over-dressed, bare-bosomed, painted eye-browed figure one never saw!" Though the prince's father, George III, was her staunch ally, Caroline departed in 1814 for a career of continental travel — and, or so it seemed to many, of carousing and sexual escapades. She befriended and rapidly promoted one Bartolomeo Bergami to ever more prestigious and intimate positions in her household. Their relationship scandalized observers.

George III died on 29 January 1820; Caroline landed in England on 5 June, with every intention of asserting her place as crowned queen. Eyebrows were raised, curiosity provoked, appetites for gossip inflamed: indefatigable diarist Charles Greville moaned on 25 June that the affair was "an intolerable nuisance," monopolizing conversation in polite society. What was George to do?

Years before Bergami's appearance on the scene, George already was charging Caroline with sexual infidelities, trying in vain to rid himself of her. A "delicate investigation" in 1806, pursued behind the scenes and kept fairly quiet, cleared her. Quiet, but not quiet enough: Caroline and her advisers got as far as printing, but not publishing, *The Book*, a collection of confidential negotiations and accusations. Writers learning about the proceedings approached George for hush money. 1813 saw a flurry of activity — shades of the seven-year itch — and the appearance of *The Book* for public delectation. Now George was ready to move more decisively. A green bag, the ordinary parliamentary device for conveying documents but soon to become infamous in radical circles as a dread symbol of secrecy and corruption, revealed to Parliament the case against Caroline. Soon the House of Lords considered a special Bill of Pains and Penalties designed to abrogate the marriage. So ensued what amounted to a trial, beginning 17 August, with lawyers for both sides introducing evidence and interviewing witnesses. Monarchy was on display in all its tattered and seedy glory. Legal proceedings on adultery ("crim. con.," short for criminal conversation, in the thinly veiled parlance of the day) had long made for popular reading; so too had stories about sexual antics at court. The intersection of these two genres was sizzling, even explosive. Perhaps the dignity of the House of Lords was threatened by the endless days of testimony on the particular positions of hands, postures in carriages, bodies gliding silently through dark chambers, stains on bed sheets, and the like testimony that came for the most part from an apparently disreputable band of foreign servants. But the nation found the spectacle enticing, even riveting. These were issues of momentous constitutional import. They were inescapably also issues of titillating folly. The gossip, already bubbling up before Caroline's return to England, comes fast and furious in contemporary sources.

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Caroline dressed like a man! Bergami was a woman! Caroline was actually crazy!

George, who didn't appear himself, had a hard time posing as the innocent and injured husband, and not only because he was a bigamist. Portly, even bloated, providing an easy target for hostile cartoonists and pamphleteers, "the dandy of sixty" remained inordinately fond of pretty women and had one intimate affair after another. This notorious fact gave Whig lawyer Henry Brougham, the queen's chief advocate during the proceedings, an opportunity that he exploited to excruciating effect. Calmly instructing the Lords that he was happy to draw a veil over what had transpired between Caroline's initial arrival in 1795 and her departure for the continent in 1814, Brougham declared airily that the queen's cause "does not require recrimination at present," but he added that later he might need to explore those years. A legal advocate, he continued, must be relentless in pursuing his client's interest: "He must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection!" Insinuated, retracted, and finally pressed forcibly home, the threat was palpable. Should the king approach victory, his own inglorious sexual history would be explored.

George was laboring under burdens besides those of dalliance and girth. Memories of his spendthrift days stood in poignant contrast to the burdens of taxation and poverty created by war with France. (I wonder how many knew of his fetching proposal that an £8 million budget surplus be transferred "to my private coffer, in consideration of my exertions & all I have done for the country as well as for the whole world. Such are my deserts, at least such I feel them to be.") Some, too, thought George's apparent eagerness to assume the regency in the days of his father's madness unseemly. So George's enemies found Caroline a convenient weapon; much of the apparently warm affection for her is nothing but poorly disguised hostility to him. "Poor woman," wrote Jane Austen, "I shall support her as long as I can, because she is a Woman, & because I hate her Husband. . . ." Protagonists be damned, thought some radicals, relishing the stakes in public discussion of these matters. Leigh Hunt told the poet Shelley that the proceedings would help topple belief in monarchy and provide discussion of "questions of justice respecting the intercourse of the sexes."

Others were irritated or appalled by the transparency of the sexual double standard. David Ricardo complained, "The question of her innocence or guilt is not the important one, — she has been abominably treated, and no grounds have been, or can be stated, to prove this disgusting enquiry either just, or necessary for the public good." Similarly, Samuel Taylor Coleridge, a decidedly dyspeptic Tory by then, conceded years later, "The People were too manly to consider the Queen was guilty. 'What right had the King to complain!' was their just argument." Caroline starred as darling of the radical press, some of the mainstream press too, in maudlin celebrations: "History has no example," gushed one writer, "of a spirit so noble in unmerited suffering, a fortitude so meek and so immovable." Whatever the impact of public opinion, the proceedings didn't go well for George. Witnesses faltered: "Non mi ricordo," one Italian witness's favorite dodge, became proverbial in English as a way of avoiding saying something embarrassing. On 10 November 1820, a scant majority of nine votes on the bill's third reading forced the government to withdraw the bill.

A joke limped its way among the nobility: "If anybody asks you why the Queen is like the Bill of Pains and Penalties, you must say because they are both abandoned." In the streets, the crowds were jubilant. In time-honored fashion, all over England, they demanded illumination: home owners could display candles in their windows at night, joining the celebration, or risk having their windows broken. Robert Southey, poet laureate and sidekick of Wordsworth and Coleridge, sullenly refused to join one such celebration and was grudgingly relieved to find his windows intact. "Lord, what a stupid monster John Bull is," scoffed Walter Scott.

A dour George withdrew from the public eye for a couple of months, stewing over what to do with a detested wife neither convicted nor cleared by the parliamentary proceedings. Others had to face the question: Was she going to be crowned queen? Fumbling over what title to assign Caroline, the *Anti-Jacobin Review* retailed some of the salacious details:

> But not contented with traveling in Europe, the princess hired a vessel to take her to Asia; and among her suite was Bergami. On board the *Polacco* many acts of gross indecency are sworn to have taken place. Bergami accompanied her when she was bathing; he was seen kissing her on a gun; a tent was erected on the deck of this vessel, which was on various

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occasions closed during the day . . . the Queen and Bergami remaining under it; and finally under this tent Bergami and the Princess slept for thirty-five nights!

Such are a few, and only a few, of the *Facts* of this case; do they not speak for themselves? Is such a woman fit to be Queen of England?

Guided by the broadside, one presumes that the *Review* was part of the dishonest press, intimidated and bribed by George and his underlings. So too, perhaps, was *John Bull*, a caustic Sunday newspaper launched precisely to combat public affection for Caroline: "I have not the slightest respect for your Majesty," sneered the paper in one of its many blistering editorials. Readers were aghast: "There is the most infamous newspaper just set up that was ever seen in the world — by name *John Bull*," wrote one observer the day after this editorial. "Its personal scurrility exceeds by miles anything ever written before." But the paper had one notable fan. A year or so later, George would expatiate on *John Bull's* literary and political virtues — it had done more for the country, he insisted, than he and his ministers and Parliament and the courts — and would add that he had been obliged to recall a judge, in part for finding the editors guilty of libel.

Caroline did her best to join George at his coronation on 19 July 1821. But the guards had been ordered to refuse her entry. Besides, she hadn't a ticket. Riding around Westminster Abbey, Caroline tried persistently to get in, but in vain. Suddenly, public opinion turned against her. She died less than a month later. (One must relish the delicious accidents of timing: word of Napoleon's death wound its way to England about the same time. Someone hustled to bring George the news: "Sir, your bitterest enemy is dead. 'Is she, by God!' said the tender husband.") This disorderly woman wasn't the enemy of social order as such; she was the champion or figurehead of a new order against an old one.

Unattractive as George was, duplicitous as his efforts against her, it's hard to believe in Caroline's pristine purity. The exigencies of political debate might seem to require that we pretend that our side, whatever it is, has no vices, the other side no virtues. If historical distance is good for anything, though, it's good for overcoming such Manichaean fantasies. So the handbill's easy dichotomies — the incorruptible press against base conspiracy, the honest press against the hireling press — are glib, moralized, unhelpful. The printers offer them to flatter Caroline and demonize George, but they're as plausibly available to her opponents. *Blackwood's*, in fact, charged that "the radical newspapers were bribed into daring activity." Caroline is at best an ironic badge of enlightenment, the press's frenetic attention to the debacle at best an uneasy sign of the march of truth.

Afflicted by a bit of a misanthropic streak, I relish the irony, but I also want it for theoretical purposes. Everyone knows the tiresome off-the-shelf tropes of enlightenment: the age of reason, the assault on priestcraft and statecraft, *écrasez l'infâme*, and all the rest. No doubt they could be rehabilitated. Still, they're lifeless. Enlightenment-bashing may not be all the rage, but it's a perfectly well-respected academic activity. The enlightenment has come to stand for a commitment to "reason," whatever that is, or to "foundationalism" or "universalism" or "human nature" or some such naive category that we (enlightened ones?) have outgrown in the name of some comfortable if vague communitarian relativism and some fashionable if equally vague set of views about social construction. All too soon we are back in the land of ghostly and puerile abstractions, moths drawn to noxious theoretical flame. I'm never sure what the political stakes of such debates are.

I am, though, confident that launching an investigation by pondering this tacky affair doesn't load the dice in favor of — or against — a scarecrow named enlightenment. And I'm pretty sure I know what's at stake in the printers' missive to Caroline. Or at least I know how to start thinking about a text that in the midst of a vulgar scandal makes a printing press an almost sacred icon and burbles on about the redemptive power of public opinion.

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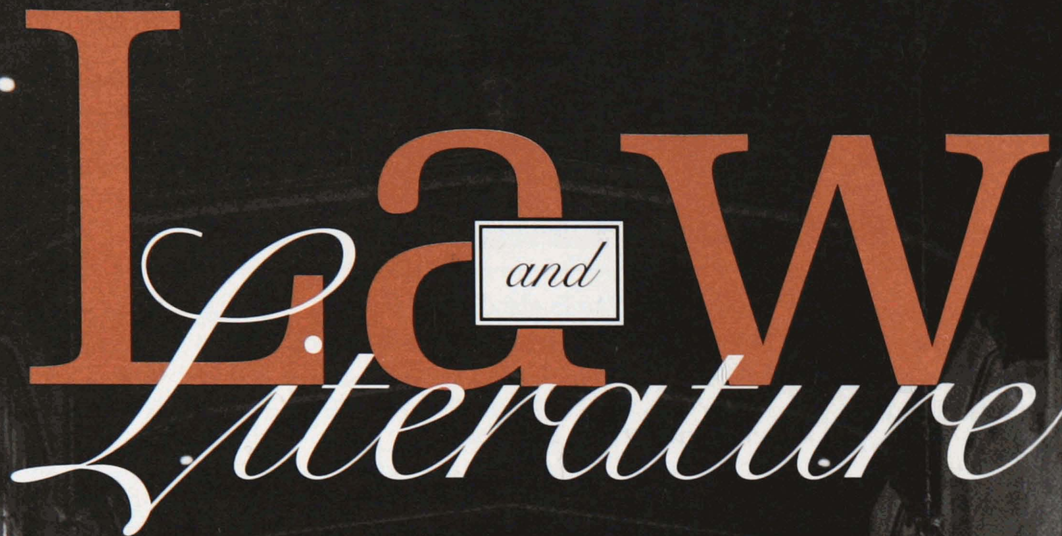


# Law and Literature

— BY SHERMAN J. CLARK

**According to Justice Frankfurter, "[t]he best way to prepare for the law is to come to the study of law as a well-read person." Why so? One answer may be that well-read lawyers will, on the whole, be able to argue more persuasively.**

*The following essay is based on the talk "Law and Literature: Examining the Limited Legal Imagination in the Traditional Legal Canon," delivered at the Fourth Annual Mid-Atlantic People of Color Legal Scholarship Conference at Rutgers University-Camden in February. The complete talk will be part of the conference proceedings that are forthcoming from Rutgers University Press.*

Persuasion, I suggest, should not be understood as an exercise in argument and counter-argument, as if it were a tennis match — won by hitting shots an adversary is unable to return. Instead, persuasion is best thought of as a process of making or finding space for a given outcome in another person's world view. Rather than looking for arguments an adversary will be unable to deny, we should look for arguments an adversary will be able to affirm. This in turn depends upon developing as full and nuanced as possible an understanding of that adversary's view of the world. Thus persuasion depends upon imagination, and in particular upon a certain imaginative capacity to see the world from the perspective of others. Reading may be the best way to develop that capacity.

In this light, I offer an argument for understanding and engaging with the inner life of even those who refuse to return the favor. While author Martha Nussbaum advocates the individualized understanding promoted by literature as a check on selfish reason, I offer a selfish reason for individualized understanding. We need the capacity to understand others — to engage fully and honestly with other people's individualized views of the world — because it is that capacity which enables us to persuade.

As evidenced by the subject matter of this conference, substantial attention has been focused on the way in which literature (along with literary methods) can bring to the table voices and perspectives which might otherwise go unrecognized or unappreciated. Most essentially, powerful narrative voices may help debunk the notion of "perspectivelessness" whereby a dominant mode of thought becomes so familiar and accepted that it begins to seem so natural as not to seem a "perspective" at all, but rather a value-free objective stance. Literature can in this way broaden the scope of legal discourse. By pressing the limits of what can be imagined, we can encourage or enable those in power to see issues from the perspectives of those who have been excluded. I suggest that we might, pedagogically at least, benefit from a steady dose of our own medicine.

A willingness to engage is of little use without the capacity to do so. And capacity, in this context, means imagination. Reading may be the best way to develop the capacity for, and to become comfortable with, the required sort of imaginative leap. When one reads *Anna Karenina*, for example, one comes to know life as it is experienced by Anna, and not only by Anna. One sees also the world as it appears to Vronsky, and how the same world is a very different place indeed to Levin. Or consider Toni Morrison's *Beloved*, through which one enters into a view of the world in which the most unthinkable of acts become frighteningly comprehensible. Reading accustoms one to the imaginative leap, and illuminates the difference between fitting a person into our world and understanding the world as it appears to that person. An education in great books, therefore, is in part a continuing exercise in exposure to and immersion in different worlds.

To a substantial extent, of course, we can gain this sort of exposure through interactions with real people. Ideally, we should travel broadly and with an open mind. We should engage and interact with those whose perspectives are different from ours — even, or perhaps especially, when we have nothing in particular to gain from the interaction, where we are *not* trying to persuade. We should, but we too often do not. Life is short, and circumstances constrain our intercourse. We naturally, if not inevitably, form communities consisting largely of those whose views on basic matters are similar to our own. Reading has the potential to let us get to know more people, and more different sorts of people, than we could hope to engage with face to face in even the fullest life. Moreover, there are reasons to believe that the exposure possible through reading is in some ways superior, at least pedagogically, to the sorts of interactions we can have in the real world.

Consider, for example, Kazuo Ishiguro's masterful short novel *The Remains of the Day*. The novel is a first person account of the life, during the years surrounding the second world war, of an English butler named Stevens. Seen from the outside, Stevens appears the very picture of those for whom we have the least respect, and the least success persuading. He is a product of an established order. In defense of that order, in defense of his place within it, he lives and acts in a way which we can only find cold and uncaring, if not cruel. Not only does he live what seems to us

like a pinched and narrow emotional existence, he as well takes actions which are utterly unacceptable. He serves a boss, Lord Darlington, who epitomizes the British aristocratic tendency toward pre-war Nazi appeasement. More damning, Stevens, with an apparently unquestioning willingness to accede to Darlington's desire not to discomfort his German guests, fires two Jewish housemaids. From our perspective, Stevens' choices appear inexplicable. More precisely, they appear explicable only as the actions of a narrow, small-minded man — interested only in preserving his place in a fading, insular world.

But Ishiguro lets us see Stevens from his own perspective. He show us how such terrible choices could be, to Stevens, not only acceptable but required. We come to comprehend the conception of dignity to which Stevens, like his father before him, has devoted his life. We recognize the central role that a particular vision of duty and obligation plays in his world view. We can even learn to appreciate the appeal of that vision — in which the very notion of duty implies an ongoing tension between "ought" and "must." In short, we come to understand the way in which Stevens understands the world.

Understand, but not share. We can comprehend Stevens without feeling any obligation to share his perspective. And we can do this, I think, because we have no stake in Stevens himself. He is neither a friend, whom we might be reluctant to condemn, nor an enemy, with whom we might be reluctant to engage. He is, after all, just a character in a book. And therein lies the power of literature to offer fuller engagement with lower risk. It allows us to go down into the mud without getting dirty, or at least without being irreparably stained. Knowing that we can close the book — that we can break the suspension of disbelief — we feel safe, or at least safer, engaging. In this way reading not only allows us to get to know more people, and more different sorts of people, than would be possible otherwise, it lets us get to know them from just the right distance.

Real people, by contrast, are often too far away, or too close. On the one hand, people will rarely be willing to open up their minds and hearts to us in the way a novelist reveals the inner worlds of fully drawn characters. Even were they willing, it is not clear that many would be able to, given the opacity of our own world views even to ourselves. Most people are in this sense too far away. Or they are too close. Given the difficulty, we can come to know well very few people in our lives, and each represents a terrible investment. By the time, therefore, that we have come to know a person, a real person, as well as an artist lets us come to know a well drawn character, we will often have lost the ability to think about them clearly. By the time we get fully into their heads, they will have often worked their way into our hearts. We can love or hate, admire or despise, but we will often find it hard simply to evaluate.

But that is what sympathetic engagement demands. And that is what reading lets us do. We can recognize and appreciate the world view which led Stevens to believe what the choices he made were right and appropriate. But we do not really care about Stevens himself because, really, there is no Stevens. There is no danger of finding bad faith in a person we have come to love, and, more to the point, there is no danger of finding good faith in a person or group we have committed ourselves to seeing as an enemy. We can let ourselves go more fully because we know, in the back of our minds, that we are relatively safe. Engagement, like high-wire walking, is not death defying when done with the benefit of a net.

I do not mean to present an oversimplified or falsely rosy picture of the ways in which we can and do engage with great literature. We enter into the lives of fully drawn characters in complex ways and with varying motives. Nor would it be accurate to say that engagement through literature is risk free, in the sense that we will emerge from our encounters with literary characters unchanged. If I am correct in saying that what we know — what we have come to comprehend — becomes a part of who we are, then learning means change. Many of us can point to certain books which opened up such new intellectual and conceptual vistas they "changed our lives." If so, it may be that much of what we read has gradual and imperceptible impact on identity. In the end, however, if we are unable to face growth and change — if our world views are too fragile to survive even the relatively safe engagement made possible by great books — we will have little hope of facing successfully the risks inherent in true engagement with the real people we must come to terms with in our life and work.

What sort of books should we read? My focus here is on the pedagogical value of reading itself, rather than on the particular insights to be gleaned from this book or that. The goal is to get used to the idea that the worlds of others are as rich and nuanced as our own. To that end, the great thing is to search out works which bring to life worlds, and world views, other than our own. I recognize the appeal of books which seem to capture our own perspectives — to give expression and validation to our own thoughts and understandings. The capacity required for persuasion, however, hinges on triangulating life from alternative points of view.

In this context, however, I do not embrace diversity as the sole or even primary criterion. I reject this reading of my argument because I believe it encourages a misunderstanding of the way in which literature develops one's capacity to understand others. Sympathetic engagement is a process of understanding the perspectives of others, not of attributing to others one or another of some previously acquired catalogue of perspectives. One does not understand people by fitting them into ready-made boxes. Thus I recommend Ralph Ellison not because he reveals the "black perspective" as if there were such a single, undifferentiated thing, but rather because he brings to life world views very different from those held by many of the students and lawyers I encounter, and because he does so with unparalleled force and art. For the same reason, I recommend Jane Austen, despite the fact that the perspectives of the characters she portrays are hardly those which we are likely to encounter on a regular basis. Rather than the substance of the different world views one encounters through literature, it is the *process* of entering fully into those world views which develops the sort of imagination necessary to sympathetic engagement. Thus the key is to read

carefully those rare works which make that full entry possible. It is important for those works to represent as wide as possible a range of perspectives, but it is critical that they portray the worlds they do with the verisimilitude and narrative strength required to make them real.

We might hope that literature, in addition to helping us understand those we seek to persuade, could do more to help us figure out how actually to go about persuading. Might certain works model for us the very process of persuasion itself — the very act of a mind being changed? Consider the scene from *Macbeth* in which Lady Macbeth persuades Macbeth to go through with the plan to murder Duncan.

Macbeth, in the soliloquy which opens the scene, decides not to go through with the murder. The reasons he gives are fundamentally moral, rather than prudential. To kill Duncan would be to violate the cardinal values of loyalty and hospitality. Moreover, Duncan is such a decent man, and such a good king, that the very heavens would cry out against the deed. Macbeth simply cannot bring himself to do it. Enter Lady Macbeth. The reasons he gives her, however, are not those he has given himself. He argues to her that, instead of killing Duncan, that they should instead revel in the honors which Duncan has recently bestowed upon Macbeth. Lady Macbeth does not buy it for a minute. In fact, she does not even respond to Macbeth's reasons. Rather, she strikes the chords she knows will resonate with Macbeth's struggle to understand himself and his place in the world. She challenges his courage, his constancy, and his manhood. Macbeth goes for it, and Duncan's fate is sealed.

Above all, this familiar episode illustrates the extent to which persuasion is not a process of meeting and defeating arguments. Lady Macbeth's successful arguments are hardly responsive to Macbeth's stated reasons. This does not mean that Macbeth was arguing dishonestly. We have no reason to believe that Macbeth did not really care about loyalty and hospitality, and perhaps even about the honors he described to Lady Macbeth. What we do know, however, is that Lady Macbeth found things he cared about more.

What she found in particular, was that while Macbeth may have been unwilling to betray Duncan, his king, kinsman, and guest, he was even less willing to betray himself. Lady Macbeth does not rely on moral principles, or prudential arguments. The only thing she holds before Macbeth is Macbeth himself:

> ". . . Art thou afeard
> To be the same in thine act and valor
> As thou are in desire? Would'st thou have that
> Which thou esteem'st the ornament of life,
> And live a coward in thine own Esteem."

And that does it. Lady Macbeth persuades by showing Macbeth that going through with the murder is the least troubling fit with his evolving sense of who he wants to be.

In addition to reminding us that persuasion is not simply, or even primarily, about refuting our adversaries' arguments, what Lady Macbeth's success suggests is that arguments do not always need to "change" another person's mind. It will not always be necessary to effect a marked alteration in the features of a person's mental landscape, even where a person's current opinions and stated arguments appear diametrically opposed to our own. Instead, arguments in some cases need only highlight or emphasize certain features — increase or decrease the tension between different aspects of a person's world view.

On one hand, this scene highlights the importance and potential power of engagement. On the other hand, it can be misleading. Moments of dramatic catharsis are the exception, not the rule, and it would be a mistake to look in most cases for a magic key of the sort used by Lady Macbeth to unlock the psyche of her recalcitrant husband. In particular, Lady Macbeth's appeal to Macbeth's self-understanding, while illustrative, is more direct than will often be possible with real-world persuasive arguments. It will rarely be effective to simply assert that a given course of action is the best or only fit with an adversary's self-understanding. We more often face the daunting task of trying to demonstrate or suggest — through arguments, examples, analogies, and all the varied tools of rhetoric — that our desired outcome does in fact have a home in that person's world.

*Reading* **has the potential to let us get to know more people, and more different sorts of people, than we could hope to engage with face to face in even the fullest life.**

In this context, it might be further suggested that the study of literature can help develop the capacity for this final step in persuasion — the actual making or delivering of arguments. Perhaps exposure to excellent forms of expression can help us learn to express ourselves more effectively. I do not reject this possibility, but nor am I willing to defend the claim that reading great books amounts to an education in the arts of rhetoric. The essentially passive capacity for immersion in competing world views seems to me distinct from the active capacity for expression in its various forms. Fortunately, a lack of rhetorical skill, *per se,* does not appear to be our problem. We are more than sufficiently articulate. What we seem to lack is an understanding of how to focus that rhetorical talent.

Nothing I have said is intended to reject the possibility that literary *techniques* might play a more active, as opposed to diagnostic, role in the persuasive endeavor. Narrative can be an effective form of argument. But narrative arguments, like all others, must be both well made and well directed if they are to be persuasive. As to the need for arguments of all sorts to be well made, it should go without saying that heavy-handed amateur fiction will be no more persuasive than weak or poorly supported logic. More to the point, just as the most elegant logical argument will fail to connect unless guided by an understanding of the person it seeks to reach, the most powerfully told story will not hit home unless informed by a thoroughly imagined understanding of the world view in which it must resonate.

## Conclusion

I recognize that the argument offered here will strike some as misplaced, even perverse, given the forum in which it is presented. A central theme of the emerging narrative and critical race scholarship has been "naming our own reality." The fundamental project, in a sense, has been to create or recover our own ways of thinking — to force the dominant social order to acknowledge our experiences, our lives, our stories. And here I am talking about how we can better learn to understand the perspectives of those we seek to persuade.

But there you have it. The more we need to make ourselves understood, the more it becomes necessary that we strive to understand. It has been asserted by Nancy L. Cook, in her article "Outside the Tradition: Literature as Legal Scholarship" (63 *University of Cincinnati Law Review* 95, 110 [1994]) that "because of the social realities, the very act of writing, done by any person of color, necessarily becomes either a threat or an appeasement." Wrong. We should and do under some circumstances write in ways designed to threaten, or at least provoke, in order to pave the way for change. But to suggest that we must either threaten or appease is to rule out a major part of what lawyers do. We argue. We reach out to others as people, rather than as anonymous representatives of "the dominant social order." And, at least through some of our writing and speech, we try to get results.

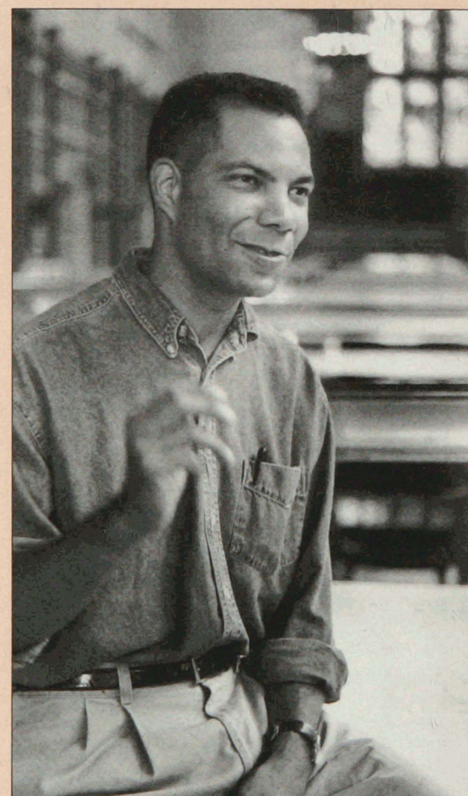
Just as some will find my argument misplaced, others will find it utterly unremarkable. The interesting thing about a plea for sympathetic engagement is that people tend to find it either perverse or banal, depending on whether it is directed at them or at their adversaries.

Although references to Richard Wright's *Native Son* seem to have become something of a trope in law and literature scholarship, I fear that I must follow suit:

> "For the first time in his life he had gained a pinnacle of feeling upon which he could stand and see vague relations that he had never dreamed of. If that white looming mountain of hate were not a mountain at all, but people, people like himself, and like Jan — then he was faced with a high hope that the like of which he had never thought possible, and a despair that the full depths of which he knew he could not stand to feel."

One reading of this passage is that Bigger experienced both high hope and deep despair because he perceived, from the depths of his misery, two things at once. He saw the possibility of reaching as individuals those he once saw as faceless sources of hate. And he saw the terrible difficulty and risk which would attend such an effort.

The uniqueness of each person means that it may be possible to reach any one of them as to any given issue — that there may be toeholds on what sometimes looks like a sheer mountain of hate. But it means as well that that mountain will have to be surmounted one person at a time. It means that there is no magic bullet — no single political or rhetorical move which will break through the prejudice and open up a new world. Instead, persuasion, and therefore progress, is and will remain a painfully slow, person by person exercise in difficult undramatic coming to terms.



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