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THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

VOLUME 41 • NUMBER 3
FALL/WINTER 1998

LAW QUADRANGLE NOTES

Same Sex Harassment, A Serious and Neglected Social Problem

Upstream Patents = Downstream Bottlenecks

The Life of the Sick Person

Can International Refugee Law Be Made Relevant Again?

UNIVERSITY OF MICHIGAN
LAW SCHOOL

UPCOMING EVENTS

October 1	Dean's Forum with Jack D. Sweet, '57, Chairman, Guardian Mortgage Co., Inc. (by invitation)
October 5	"Inspiring Paths: Conversations with Lawyers" series: Mary K. Warren, '92, Shearman & Sterling, New York
October 8	First Bishop Lecture: "The New South African Constitution: The Importance of Comparative Law," Justice Richard J. Goldstone, member of the South African Constitutional Court
October 9	Second Bishop Lecture: "International War Crimes Prosecutions: Restrospect and Prospect," Justice Richard J. Goldstone, member of the South African Constitutional Court
October 12	"Inspiring Paths: Conversations with Lawyers" series: the Hon. Harry T. Edwards, '65, Chief Judge, U.S. Court of Appeals for the D.C. Circuit
October 14	International Law Workshop (ILW): "Taiwan — Alternatives to Statehood," Bruno Simma, Dean, University of Munich Law Faculty and Member, International Law Commission
October 16-17	Symposium: What's the Prognosis? Managed Care in the Next Century
October 21	Dean's Forum with Stuart Ho, '63, Chairman, Capital Investment of Hawaii, Inc. (by invitation)
	ILW: "International Trade Law and the Protection of Endangered Species: The Sea Turtles Dispute," Robert Howse, Professor, University of Toronto Law School
October 22	Inaugural Sperling Seminar with Bernard Petrie, '52 (by invitation)
October 22-24	Committee of Visitors
October 24	Scholarship Breakfast
October 25	Negotiation Competition
October 28	ILW: "Can International Refugee Law Be Made Relevant Again?", Professor James Hathaway

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MESSAGE FROM DEAN LEHMAN

In my last message, I discussed the great lawyer's role as keeper of our profession's image. I pointed to Clarence Darrow, who leavened his professional contributions with simple kindnesses to friends and acquaintances. I argued that ultimately such 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.

A lawyer's professional training reinforces such generosity of spirit in many ways. Law School provides innumerable formal opportunities outside the classroom for active community involvement. More informally, dorm life and the world of first-year study groups allow students to learn the value of individual-to-individual mutual support.

I also believe that the classroom itself, through its core intellectual training, nurtures lawyers' ability to reach outward. One of the qualities that leads people such as Darrow to be recognized for their generosity of spirit is also a quality that undergirds effective professional representation. That quality is the ability to listen.

The ability to be well-spoken is fundamental to good lawyering. Lawyers speak to clients when they advise. They speak on behalf of clients as advocates. Indeed, one rationale for the attorney-client privilege builds on the need to provide ordinary citizens access to an expert voice within a complex and specialized legal system.

But to speak well, one must first listen well.

When my mind's eye envisions the characteristic mode of an ideal attorney, I see the mouth closed. The eyes are opened wide. The brow shows intense concentration. I see a person who is both intensely engaged and studiously detached, someone struggling to practice a skill that is not innate to most people.

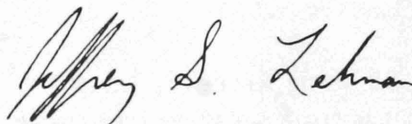
Without training, our ears betray us. They attune themselves to comfortable frequencies. They send our brains information that reinforces our sense of how the world works. They filter out sounds that are dissonant and potentially destabilizing.

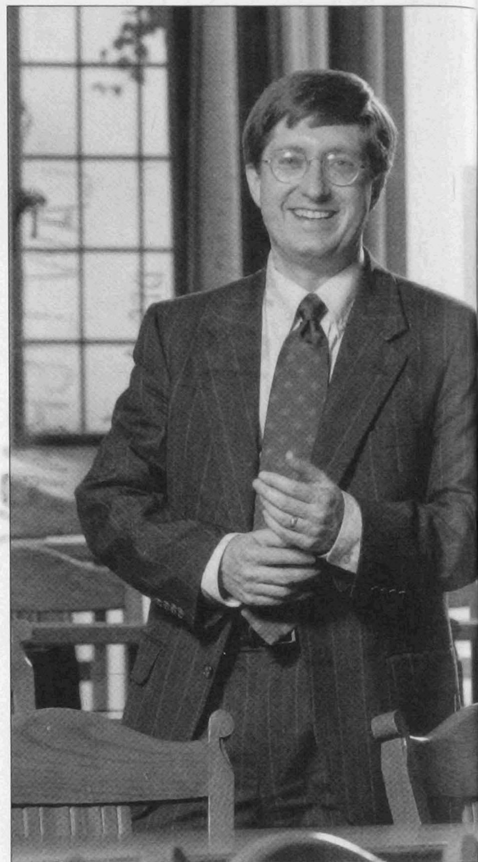
To be a good lawyer, one's ears must be tuned differently. They must be especially sensitive to information that challenges our hypotheses about the world. They must feed us a steady diet of difficult data, so that our brains have no choice but to contend with the world as it truly is, in all its unsettling complexity.

Frank M. Coffin, former Chief Judge of the First Circuit, has written that the very best lawyers know how to "go for their own jugulars." They engage sympathetically with counterargument. They listen with openness, respect, and even appreciation to those who challenge them.

Law school is where we learn to listen. We learn that we cannot answer a professor's question effectively if we do not force ourselves to hear every factual wrinkle, and to think about what it might mean. We learn that we cannot respond persuasively to a classmate's argument if we do not force ourselves to understand her or his premises, to empathize with them, and to respond to them directly. We learn how to deploy all of our intellectual resources in the effort to understand another's words.

We thus help our students to heighten their ability to analyze by first deepening their ability to empathize. Empathy is what allows us to listen effectively, to step outside ourselves and think critically. And the foundation of empathy can undergird more than just analytic power. It can also sustain a way of life that is open, engaged, and generous. Ultimately, that is every bit as important to our professional image as the ability to think a problem through from beginning to end.





To be a good lawyer, one's ears must be tuned differently. They must be especially sensitive to information that challenges our hypotheses about the world. They must feed us a steady diet of difficult data, so that our brains have no choice but to contend with the world as it truly is, in all its unsettling complexity.

FOCUS *on* FACULTY

OUTSTANDING FACULTY ARE THE CORE OF EVERY GREAT LAW SCHOOL.

Throughout its 140-year history, Michigan has sustained a special pride in the quality of its professors. From Thomas Cooley to Jack Dawson, Edson Sunderland to William Bishop, Michigan professors have made enduring contributions to the world of legal scholarship, to the intellectual development of their students and the practice of law.

To know Michigan, therefore, is to know its faculty. Readers of *Law Quadrangle Notes* become acquainted with our current faculty members by reading their scholarly writings and following their activities and accomplishments.

In this issue, we present eight members of the current faculty from three perspectives: their own, that of a colleague, and that of a student. The professors profiled in the pages that follow were not selected to be representative of the faculty as a whole. With a faculty as diverse as ours, no gang of eight can begin to capture the full range and quality of the whole.

Nonetheless, one can begin to get a sense of the vibrancy of the faculty community by getting to know Donald N. Duquette, Rebecca S. Eisenberg, Richard D. Friedman, Catharine A. MacKinnon, William I. Miller, Richard H. Pildes, Mathias W. Reimann, and Carl E. Schneider. They speak with radically different voices. They pursue breathtakingly different goals. But they share a passion for their intellectual calling, and an originality and clarity of vision, that are truly in the best tradition of the University of Michigan Law School.

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DONALD N. DUQUETTE

CLINICAL PROFESSOR OF LAW AND DIRECTOR, CHILD ADVOCACY CLINIC

B.A. MICHIGAN STATE UNIVERSITY, J.D. UNIVERSITY OF MICHIGAN LAW SCHOOL

I AM OBSESSED WITH HOW SOCIETY responds when mothers and fathers fail to care for their children. Clinical teaching in the Child Advocacy Law Clinic allows me to pursue this obsession while also serving the "trinity" of the University's mission statement: teaching, research and service.

Teaching/service: Individual child protection cases provide the base and inspiration for all my other professional work. Sometimes I am asked, "Don't you ever get tired of handling child cases? Doesn't it get boring or repetitive?" To which I answer a resounding "No!" Each child is different. Each family, each court — and each team of student attorneys — adds to the diverse mix that fuels the rest of my work. Besides, students like the Child Advocacy experience because of the immense satisfaction they get from using their new legal skills to help a specific child. My satisfaction is doubled because not only do I share in the pleasure of providing the very best legal service for a child or parent, but I also revel in the students' performance and their introduction to a humane and altruistic aspect of the law.

Teaching/research: Real cases ground me in the real world but also provide a data base for the question of "What's wrong with this picture?" Part of my job is to understand the real world and teach students to work effectively in it, but another part of the job, and a part I really like, is the creative "visioning," — that is, seeing things that are not there and devising alternatives to a reality so many accept. People sometimes look askance when I say part of my job is to "see things that aren't there." I suppose this is a variation on the old saw "you don't have to be crazy to do this job, but it helps."

My research and writing rests on the experiences of particular cases and often involves student work of some sort. One of my most influential books, *Advocating for the Child in Protection Proceedings*, was co-authored by an interdisciplinary group of graduate students in the Bush Program on Child Development. When the U.S. Congress mandated a national evaluation of legal representation of children, that book formed the conceptual framework for a National Center on Child Abuse and Neglect study. In Michigan child welfare reform, the Supreme Court, Governor's office or State Bar

have often appointed me to task forces and commissions and I have tried to involve students in various ways when appropriate. Michigan child protection and foster care statutes include sections initially drafted by Michigan law students. Going back to the early '80s, Lisa D'Aunno and her partner Jennifer Levin, both '84, helped draft sections of the bills that made Michigan's child welfare court process one of the most efficient in the nation. One of the best and most recent examples of student involvement in research/public service is a bill to define the role of the child's attorney in child protection cases. Greg Stanton, '95, helped draft a set of recommendations subsequently adopted by the State Bar Children's Task Force, of which I was co-chair. When Lt. Governor Binsfeld asked for our help in drafting legislation, Rachel Lokken,'97, and Kristin Schutjer, '98, developed some very important bill language. Albert Hartmann, '98, wrote a law review article on the topic (Hartmann, "Crafting an Advocate for the Child," 31 *Michigan Journal of Law Reform* 237 [Fall 1997]) and last March, he and I, at the Lt. Governor's invitation, testified in support of the bills before a joint committee of the Michigan

Senate and House. (See 41.2 *Law Quadrangle Notes* 32-35 [Summer 1998]). These bills passed the Michigan Senate unanimously and as this is being written, are pending in the Michigan House.

Research/Service: I just completed a sabbatical year in Washington, D.C., where I worked on President Clinton's Initiative on Adoption and Foster Care. The Clinton Administration asked me to draft guidelines for state legislation governing permanence for children. These guidelines are technical assistance to the states and address court and legal process and lawyers' roles in child protection and foster care cases. Recommendations include: enforceable post-adoption contact with siblings and extended family; a new form of permanent guardianship to achieve stable homes for children and non-adversarial case resolution such as mediation and family group conferencing. Extended family are engaged early in the process and given more power to influence the planning for a child. Grounds for termination of parental rights are proposed that reflect the growing consensus that children cannot wait indefinitely for their parents to get it together. The overall effect of the guidelines is nothing short of recasting the entire jurisprudence of child protection to achieve safety and permanence for the child in a disciplined court process.

For over 20 years I have been blessed by challenging students and supportive and insightful colleagues, like Suellyn Scarnecchia, '81, and David Chambers. It has been exhilarating to pursue justice for children and to participate in the redefinition of child welfare jurisprudence. Our Child Advocacy Law Clinic is looked upon as the model of such clinics around the nation and we are often called upon to advise other schools in the development of similar programs. Where else but at the University of Michigan Law School could one get the level of institutional and intellectual support necessary to sustain such an enterprise? I look forward to the next 20 years.

SUELLYN SCARNECCHIA
Associate Dean for Clinical Affairs
and Clinical Professor of Law
B.A. Northwestern University,
J.D. University of Michigan Law School

"It's impossible to sum up in a few words all that Don has done for children and for future lawyers. Over the past 20 years, Don and his students have been involved in just about every advancement in child welfare law and practice in Michigan. Over the past few years, through the Kellogg Families for Kids Initiative and his most recent sabbatical year in Washington, D.C., he has taken his message of the need for high quality representation of children to a national audience. Don promotes the interests of abused and neglected children with an incomparable amount of patience. In spite of the apparently slow progress and seeming defeats that you must absorb in this work, Don greets each new challenge with optimism, conviction and good humor. Thanks to his efforts, children receive better representation and treatment in the legal system.

"At the beginning of each semester, Don promises our students 'the best clinical law experience available.' He's not kidding when he makes that promise. Don believes that students should be entrusted with the decision making power that will push them to be fine attorneys. He guides them, through their cases, to the point in each semester when they are truly representing their clients; not as his assistants, but as the front-line advocates. They get angry at him at times throughout this process. They would like him to tell them what to do! With a great deal of respect, he calmly pushes the question back to the students. Before long they realize what a gift he has given them: a confidence in their own judgment that will serve them well as new attorneys. Many of Don's students have gone on to be leaders in the field of child protection law, but even those who have not carry with them the first lessons he provided in what it takes to be an excellent and caring lawyer."

Laura Cerasoli, '96
Children's Law Center,
Washington, D.C.
B.A. Michigan State
University

"Don Duquette has done more for my career in child advocacy than all of my other professors. He was an outstanding professor. The Child Advocacy Law Clinic was the closest thing to practicing law that I ever encountered as a student. More important, Professor Duquette was always available to talk to us about our cases or the practice of law in general. His knowledge of the law and dedication to helping his students continue to work in child advocacy are the reason the Child Advocacy Law Clinic is the premier learning ground for child advocates today.

"After I graduated, Don never hesitated in helping me find the crucial connections I needed to land a job in this highly competitive area of public interest law. He has become a valued friend and trusted colleague upon whom I rely for advice in all areas of my work. I would not be where I am today without him."

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REBECCA S. EISENBERG

PROFESSOR OF LAW

A.B. STANFORD UNIVERSITY, J.D. UNIVERSITY OF CALIFORNIA AT BERKELEY SCHOOL OF LAW

AS A TEENAGER, I HAD A PASSION for studying foreign languages. I loved immersing myself in an unfamiliar idiom, struggling to make sense of another system for parsing words and sentences to describe experiences and observations. I reveled in subtle differences in the meaning of words that were sometimes, but not always, equivalents in translation. Most intriguing of all were the occasional insights I gained into the limitations of my own language when I recognized that a foreign locution simply has no English equivalent.

I gave up the study of foreign languages at some point in college, or so I thought. But as I reflect upon what I'm doing in mid-career, I wonder if I've become a lifelong exchange student of sorts, continually struggling to make sense of a foreign idiom, and always trying to figure out what is getting lost in the translation.

I am trained as a lawyer and have been teaching intellectual property to law students since 1984. Although I think I carry out this job in plain English, other observers might report that I speak some sort of "IP" dialect of legalese. But my research continually takes me outside the community of lawyers and future lawyers to attempt conversation with people who work in a very different idiom. I study how intellectual property operates in the setting of biomedical research, and that task brings me into communities of research scientists on a regular basis. Sometimes my formal role is more or less that of a guest lecturer or author, trying, without benefit of a translator, to make patent law concepts comprehensible to people who don't know my dialect. But once my own presentation is finished, I revert to the role of exchange student, listening or reading along while scientists talk to each other in a language that makes a little more sense to me each time I hear it.

What fascinates me in both of these roles — presenter and observer — is not simply trying to follow the scientific jargon, nor even the far greater challenge of following the science that the jargon describes, but rather the challenge of recognizing the similarities and differences in the categories and concepts that are salient in the discourses of intellectual property and research science. Why is it, for example, that a publication announcing the identification and characterization of a new gene may list fifty authors, while the patent application on the same gene will list only two or three inventors? How is authorship on a scientific publication like or unlike inventorship on a patent application? And what are the implications of these similarities and differences for patent controversies within the

scientific community? Patent law repeatedly invokes the judgment of a fictitious practitioner of ordinary skill in the field of the invention in setting legal standards, but is it framing questions that such a practitioner would find meaningful and appropriate, and is it correctly understanding the answers?

To some extent, differences in the vernaculars of law and science correspond to cultural differences between industry and the academy in biomedical research. Much of my work focuses on the role of intellectual property at the public-private divide in research science. Recently I served as chair of a working group on research tools for the National Institutes of Health. In that capacity, I spent many hours talking to people in universities and private firms about difficulties they encounter in negotiating mutually agreeable terms of exchange for research tools — materials, information, and reagents — for use in biomedical research. Just about everyone agrees that there is a growing problem, but they tell different stories about what the problem is. Those who administer the patent system often take it for granted that owners of inventions will be adequately motivated to transfer proprietary technology to potential users if the stakes are high enough, yet in this particular setting, the costs of bargaining seem to be consuming the gains from exchange. Why are exchange mechanisms that have worked tolerably well in other fields less successful in the market for biomedical research tools?

When I left practice for teaching, I worried that after a few years I would be bored in the Ivory Tower, too far removed from emerging problems in the real world. In practice, I was constantly presented with new problems, and my challenge was to describe the issues in a way that made the resolution favored by my client seem like the most modest, unexceptionable increment over prior resolutions of similar problems that had long been settled. In the academy, I feared that I would never see a new problem, that I would instead be doomed to rehashing old issues, and my challenge would be to repackage old ideas in a way that seemed new and unprecedented.

Instead, to my great delight, the field I observe is constantly presenting new problems, shifting in ways that turn my questions around and reveal new angles I hadn't thought of. My telephone keeps ringing, although I have no clients to control how I spin an issue. My greatest challenge is to be sure I understand all that I've heard before I speak, and to be sure that my own words are not misunderstood.

RONALD J. MANN
Assistant Professor of Law
B.A. Rice University, J.D. University of Texas, Austin

"As a scholar, Becky Eisenberg has staked out for herself a daunting task: to understand the law-related aspects of biotechnology from the inside out. Unlike many things that we do as law professors, that is not a task that can be carried very far sitting at a desk reading statutes and judicial decisions. All that you can learn by reading law books is what the law says, which does not take you very far toward understanding how the industry works, especially in a rapidly developing scientific field like biotechnology. To master her field, Becky had to learn not only the law of intellectual property (a major task in itself) but also to become sufficiently expert in biochemistry and molecular genetics to understand the forces that drive the lab researchers, universities, private companies, and other institutions that constitute the world of biotechnology.

"Working in that field, Becky has produced a string of impressive articles analyzing many of the most central issues relating to biotechnology research. She has studied topics ranging from the differing cultures in academic and commercial research environments, to the scope of patent exemptions for research, to her current work on the policies that justify public funding of research that competes with privately funded research efforts. In all of those areas, Becky's work has broken new ground, bringing serious thought to important topics not previously examined in the scholarly literature. Given the seminal quality of her work on those topics, it is not an exaggeration to say that Becky has defined the field in which she works. We are lucky to have her here.

"Having said all of that, consider my state of mind shortly after I accepted the Dean's offer to come to Michigan to teach commercial transactions. About the time that I decided to come here, I had the novel idea that it would be interesting to start studying intellectual property. I decided that I should call up Professor Eisenberg (whom I had not yet met in any significant way) to see what she would think about my deciding to work in that field. I remember making the call with some trepidation: Will she think I'm intruding into her domain? Will she think I can't possibly know enough to teach intellectual property at her school? My concerns were completely unfounded. I was overwhelmed immediately with her excitement at the prospect that one of her colleagues had decided to study intellectual property. Since then, she has been one of my closest friends on the faculty, giving generously of her time and expertise in the field."

Ira Finkelstein, '98
B.S.E., B.S. University of Michigan

"There have been so many times and ways Professor Eisenberg has had an influence on my law school experience that it's hard to keep track of them. Of course, she's a great teacher. Being called on in her classes is more like a conversation than an inquisition, and in going through the cases she is never afraid to let us know when she thinks the court has completely blown the call.

"She has also been among the most accessible of my professors at Michigan: whenever I felt that I needed advice, whether about work, clerkship applications, the bar exam, or law school in general, she has always been willing to make some time to help me.

"Finally, Professor Eisenberg is a superior legal scholar. Her writings on IP (intellectual property) law, her field of expertise, are clear and persuasive and address important issues. I wish everything I read in law journals was like that!"

FOCUS *on* FACULTY

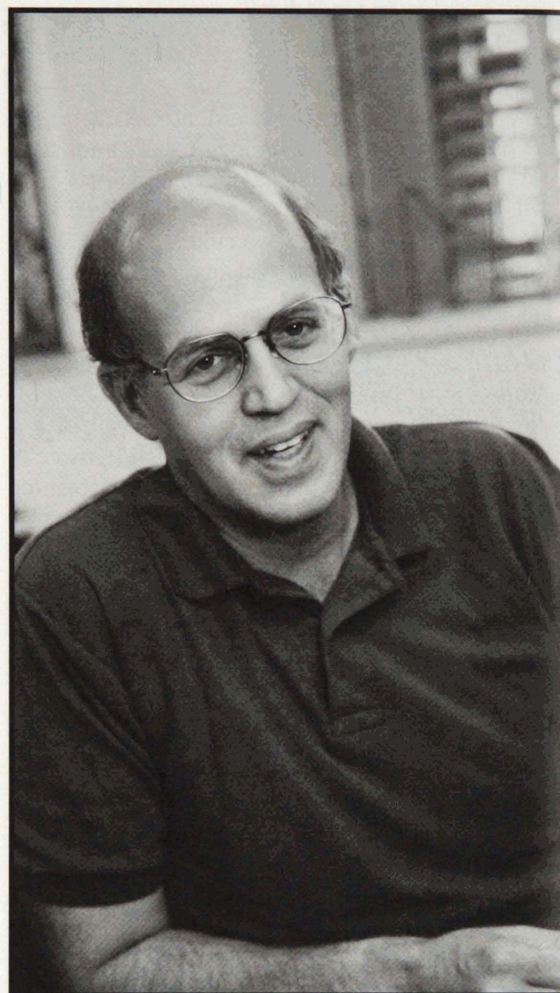
RICHARD D. FRIEDMAN

PROFESSOR OF LAW

B.A. HARVARD COLLEGE,
J.D. HARVARD LAW SCHOOL,
D.PHIL. OXFORD UNIVERSITY

IF MY WIFE ORDERS A MEAT DISH at a restaurant, I'll usually get seafood — but if she orders fish I won't. We'll share, and I like variety. This may help explain not only why I am dilettantish in the courses I teach but also why my two biggest academic projects have absolutely nothing to do with one another.

A dozen years ago, I agreed to become general editor of *The New Wigmore*, the successor treatise to *Wigmore on Evidence*. And I also decided to write the portion of the treatise on the law of hearsay. As anyone who has taken a course in evidence knows, hearsay is a baffling doctrine, much disliked and manipulated. But I believe that if we dig deep enough under the muck, we find a principle of enormous importance, which lies at the heart of the Sixth Amendment's Confrontation Clause: the adjudicative system must not allow a person, whether in court or outside, to create testimony for use against a criminal defendant unless the witness is testifying under oath, in the presence of the defendant, and subject to cross-examination. This is a narrow principle — it only applies to a limited set of out-of-court statements, those that are in some sense "testimonial" — and I wouldn't ring it with an array of exceptions. (The defendant's right is subject to forfeiture if his own misconduct makes confrontation infeasible.) I believe that if this principle were well understood and protected, we could happily do with a much simpler body of law dealing with secondary evidence, or even with no such law at all. This reconceptualization would work a large change in the way litigation is conducted — but it would be more efficient, better informed, and also more protective of defendants' rights.



I've churned out a fair number of articles on evidentiary law, and two editions of a coursebook, and much of this writing has been on hearsay and confrontation. But working out my ideas in the treatise itself is painfully slow work. I am trying to offer help to lawyers and judges on a vast array of doctrinal issues — but at the same time to nudge the law rather unsubtly from its current framework into the one I favor. I have about 1,000 pages of manuscript done, and I am hoping to publish the first part within a couple of years. Recognizing the finiteness of life, I have taken on a co-author — an excellent scholar from Indiana University named Aviva Orenstein — for the second part.

By the time we get done, I hope to have made substantial progress on my other project. It has an

interesting history. When Justice Holmes died in 1935, he left much of his estate to the government. The principal project that has been sponsored with the money is a multi-volume history of the Supreme Court. Paul Freund of Harvard was supposed to write the volume on the Hughes Court (1930-41), but he was unable to finish the job. I was lucky enough to get the assignment, in part because I had written a doctoral dissertation on Charles Evans Hughes as Chief Justice. This period was one of huge constitutional transformation — I call it "the crucible of the modern Constitution" — with FDR's attempt to pack the court as its dramatic centerpiece. In my view court-packing has less to do with the transformation than is sometimes supposed, a view I have elaborated at some length in "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *University of Pennsylvania Law Review* 1891 (1994). I love this work; I love dealing with the manuscripts, the personalities, and the disputes of an era that is bygone but still familiar. I can't wait to turn fuller attention to it.

I am very fortunate — above all in my family, and in having the blessings of health and liberty, but also in having work, in the classroom and out, that I wake up to each day with zest, and the opportunity to do it in the stimulating, humane, and supportive environment that the Law School provides.

SAMUEL R. GROSS
Thomas and Mabel Long Professor of Law
A.B. Columbia College, J.D. University of California at Berkeley School of Law

"Rich Friedman is simply an energy machine. He is an extraordinarily productive scholar. His main field is evidence law, where he staked out an early claim as a central figure in the application of statistical reasoning (Bayesian analysis) to evidentiary issues, and developed an original framework for understanding the hearsay rule.

"But he doesn't stick to any specified turf. In evidence law he has also written about the confrontation clause, conditional relevance, the use of photographs in evidence, and impeachment with character evidence, among other issues, not to mention taking on the arduous role of General Editor of the new re-written version of Wigmore's classic treatise.

"And that's not nearly it; he writes in other areas entirely: antitrust, the vice presidency of the United States, Chief Justice Hughes, the use of peremptory challenges in criminal trials, and so on.

"You might think that someone who writes that much must simply recirculate bland, well-worn notions. Not in the least. Rich is nothing if not original, and quite frequently controversial. He doesn't hesitate to push new ideas, and — judging from the volume of published responses to his articles — is quite successful at provoking other scholars. But he is the most lovable provocateur one can imagine.

"Not only is Rich one of the most friendly, outgoing and generous people I have met, he manages to maintain that personality even as he enrages people with his unconventional ideas. In a recent article responding to one of Rich's proposals, a severe critic complained: 'How does one maintain the requisite fire for a proper academic quarrel with a man who first quotes his wife's disparaging judgment [about his own work] and follows with a reassuring footnote citation to the birth certificate of his daughter [attesting to the continued success of his marriage all the same]? I am altogether disarmed.' (H. Richard Uviller, "Unconvinced, Unreconstructed and Unrepentant: A Reply to Professor Friedman's Response," 43 *Duke Law Journal* 834 (1994).

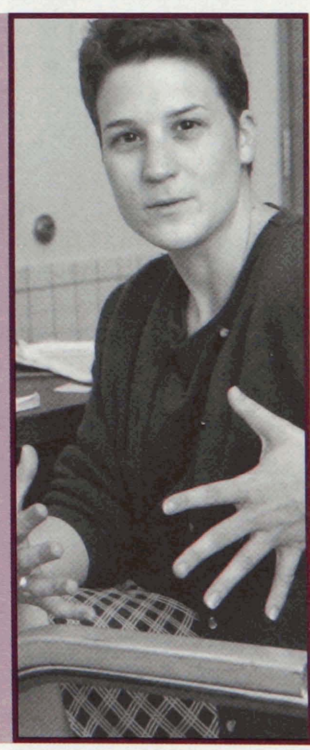
"We are all disarmed, and lucky to have Rich among us."

Emily K. Paster
Third Year Law Student
A.B. Princeton University

"Professor Friedman is both a great teacher and a great mentor. He has been an important part of my two years at the University of Michigan Law School, both in and out of the classroom. In the classroom, Professor Friedman's openness and honesty enable him to facilitate frank discussion, even on such controversial matters as abortion and affirmative action. Professor Friedman never hides behind the podium, but is instead forthcoming with his own opinions, which, rather than intimidating students, makes them feel more comfortable sharing their opinions.

"Outside of the classroom, Professor Friedman is one of the most accessible professors in the Law School. He is genuinely interested in his students, both as people and as young lawyers. He is always willing to talk to students struggling to decide on a career path, and is candid about his own experiences as a lawyer and a professor.

"He also has great insight into people. After witnessing my participation in the heated discussions in our Constitutional Law class, he knew I would enjoy being a litigator even though I was still unsure myself. 'You seem to like the give-and-take of the classroom,' he said to me. Well, there is never a shortage of that when Professor Friedman is around."



CATHARINE A. MacKINNON

FOCUS *on* FACULTY

CATHARINE A. MacKINNON

ELIZABETH A. LONG PROFESSOR OF LAW

B.A. SMITH COLLEGE,
J.D. YALE LAW SCHOOL,
Ph.D. YALE UNIVERSITY

HOW I DO WHAT I DO in law became clear to me one morning in the winter of 1994 in a dim halting hotel elevator in Zagreb, on the way to my third solid day of listening to women speak the unspeakable atrocities of genocide.

My part of the work itself started in the early 1970s when women in New Haven — students, workers, housewives, Black and white — told me about a then nameless oppression that became "sexual harassment" and a law against it. It went on through the 1980s, and is going on still, as women — prostitutes, daughters, wives, more students, anyone, now in the hundreds — tell of being violated through pornography: being used to make it or assaulted or molested by men who use it. Their violations became a civil rights law against pornography, each cause of action silently bearing their names.

In 1991, Muslim and Croat women from Bosnia and Croatia — lawyers, bus drivers, factory workers, resistance fighters, small business owners, children, grandmothers — asked me to work with them, first to tell the world that they had been raped in the Serbian genocide, then to represent them in 1992 in holding the perpetrators accountable. Now rape as an act in genocide is becoming recognized under international law.

In that elevator in Zagreb, I realized that I have spent most of my adult life listening to women, and sometimes men, trust me with their violation, and the rest of the time trying to do something about it.

What I have learned of making life into law, representing hurt people accountably, is this. First there is the women's movement. You have to be part of a community. Then you don't find people; they find you. You don't invent abstractions and go hunt down clients or evidence to fit them; the people who come to you bring the theory that has yet to be born in you. What they know is not in any book and what has happened to them may not be against any law. Sometimes they want you to do something, and believe you will where others haven't or won't. Sometimes they just want you to know what is real, and believe it will matter that you know it. They want what happened to them to leave a trace. Most of all, they want what happened to them never to happen to anyone else ever again. Figuring out how is up to you. You do nothing alone, but the responsibility is all yours.

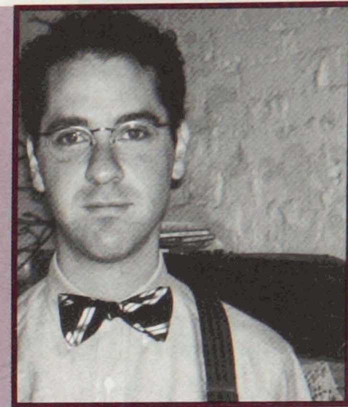
The survivors become part of me. I hear their voices, see their faces. I will not let them down. I will not stop.

C H R I S T I N A   B .   W H I T M A N
Associate Dean for Academic Affairs
B.A., M.A. University of Michigan,
J.D. University of Michigan Law School

"Catharine MacKinnon is one of those rare thinkers who has fundamentally changed the way we look at the world. In the early days of the second wave of the women's movement, feminist writing by legal scholars fit neatly into the tradition of the racial equality cases by arguing that women and men are similarly situated for legally relevant purposes. This perspective, which promoted gender neutrality, ran into a theoretical and practical wall when faced with cases that concerned problems, such as pregnancy, that were thought to reflect bedrock biological differences between men and women.

"MacKinnon broke through this dilemma by powerfully reconceptualizing the problem in terms grounded directly in the experience of women. She challenged the assumption that legal solutions are to be found by comparing women to men, and argued that feminists should focus instead on the unique mechanisms through which women are made subordinate to men. Witty, prolific, extraordinarily articulate, and willing to talk openly about those matters that define women's lives but are often considered inappropriate for public or academic discourse, Professor MacKinnon argues that the key to understanding the subordinate status of women lies in the social construction of sexuality from a male perspective. Sex coerced in fact but socially described as consensual became, after MacKinnon, the central subject of feminist jurisprudential inquiry because it explains why sex inequality can be seen by law as the consequence of free individual choice. Viewed through this framework, sexual harassment is seen as employment discrimination rather than office romance. Pornography becomes as much a means of silencing women as an expression of rebellious individuality. And abortion rights are an inadequate alternative to the power to say no in the first place.

"MacKinnon's work changed feminist scholarship throughout the academy and has provided both the theoretical groundwork and the legal tools for significant change in the lives of women. Most recently, she has initiated litigation seeking sanctions in international human rights law for rape as a tool of terrorism, war and genocide. It is not an exaggeration to say that for the last 25 years, Professor MacKinnon has had more influence, both inside and outside the academy, than any other American law professor."



Marc S. Spindelman, '95
Reginald F. Lewis Fellow, Harvard Law School
B.A. Johns Hopkins University

"If the measure of a fine teacher is her willingness to take ideas seriously and to encourage her students to do the same for themselves, Professor Catharine MacKinnon is a great teacher. If the measure of an effective teacher is whether she provides her students with a set of analytic tools with which better to understand how to think critically about their own and others' ideas, and, through that process, to grow intellectually and personally, Professor MacKinnon is a remarkably effective teacher. If the measure of an inspiring teacher is her ability to demonstrate to her students that ideas, among them legal ideas, can and do have a real impact on the lives that people lead, and to demonstrate, by her example, the importance of developing one's own, independent way of thinking — no matter how high the stakes may be or seem, Professor MacKinnon is a truly inspiring teacher.

"For years now, people have invoked Harvard Law School Professor Thomas Reed Powell's famous definition of a legal mind: a mind that can think about something that is related to something else without thinking about the thing to which it is related. University of Michigan Law School Professor Catharine MacKinnon goes one step farther, instructing her students not to forget that a legal mind, so trained and so defined, has its limitations. And, perhaps more significantly, Professor MacKinnon educates her students to appreciate that that thing a legal mind may not — indeed, might prefer not to — think about, can sometimes turn out to be the most important thing of all."

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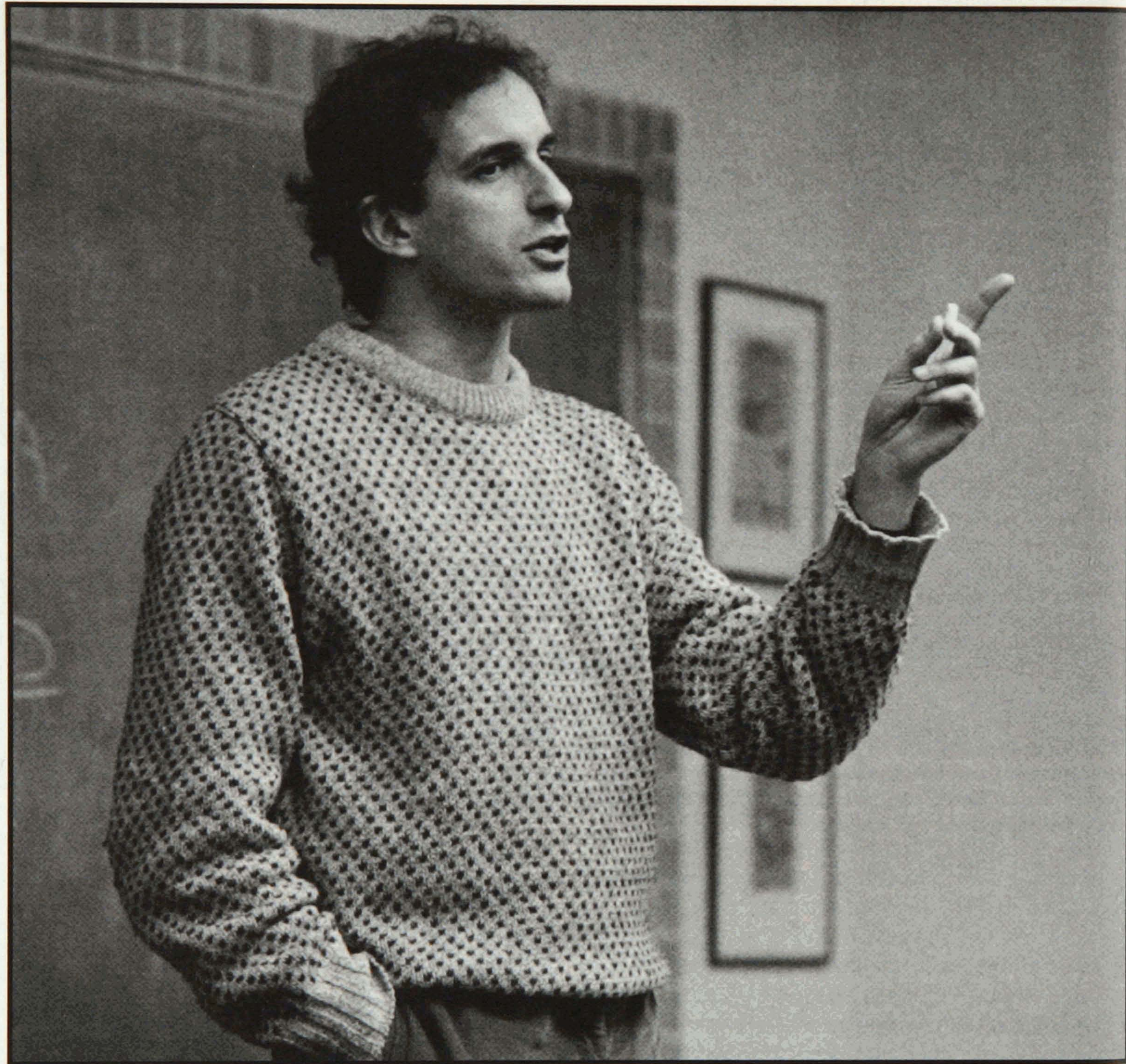
WILLIAM I. MILLER

THOMAS G. LONG PROFESSOR OF LAW

B.A., M.PHIL. UNIVERSITY OF WISCONSIN, Ph.D. YALE UNIVERSITY, J.D. YALE LAW SCHOOL



I WAS A VISITING TEACHER at the University of Michigan Law School in 1984 on leave from the University of Houston Law School. Some four months into my visit I was engaged in conversation by a most influential and estimable member of the faculty. He indicated that he thought my talk on tenth-century Icelandic blood feuds was, well, he supposed, interesting, even entertaining, but, how should he put it: "Can you tell me, what in the world is the point of studying that?" he blurted. "And why, in any event, should we have someone doing *that* in a *law school*?" (I suspected he felt I had meant purposely to mock him not only by placing my feuds in the tenth century, a century from which no one, not even a Jeopardy player can name an event, but also by placing them in Iceland, which is to countries as the tenth century is to centuries).

I could not deny that I wanted a job offer bad and knew that convincing those people, such as my

interlocutor, who might wonder what my hobbyhorses might have to do with the UCC or the latest Supreme Court pronouncement on the Fourth Amendment, was going to be no easy task. There were, to their minds, departments just right for me, paying minimum wage, in which people did get to read things that were actually fun to read and edifying too.

So I hemmed and hawed and was slavishly mealy mouthed: "One could say that a law school might find it interesting to look at materials that show law operating at degree zero," I said, struggling hard to hit on the right thing, "law with no state where you have to enforce your own judgments; moreover, bargaining problems get more interesting and people get smarter about them when they are negotiating for their lives — whether Egil, for instance, is going to bury an axe in your head — rather than over legislative redistricting or proxy control."

But I could see his eyes glaze over, so I gambled on a strategy, risky, because generally considered uncivil, downright rude in fact: *I told the truth.* "I do it because I love the sagas," I said, "but surely you must have some idea why what I do belongs in a law school. You were on the committee that invited me here." He did not seem offended in the least but immediately offered some five or six elegant arguments for the centrality of saga blood feuds to the law school enterprise. They, unfortunately, have slipped my mind or I would set them forth right here.

Of late my interests, by free association and devious paths, have shifted to the emotions, especially those passions that accompany our moral and social failures. Roughly, our own failures cause us shame, embarrassment, humiliation, and remorse; while the failures of others elicit our disgust, contempt, and on occasion our pity, which is a kind of contempt anyway. But I must admit that as central as tenth-century Norse blood feuds are to the legal enterprise, disgust is perhaps somewhat of a frolic and detour or the frosting on the cake, depending on whether you are seeing this from your point of view or mine. Yet even here there are some connections.

I am presently struggling to write a book on courage and cowardice, just as I am struggling to find a graceful way to end this sketch, neither an easy chore. So I'll just show the white feather and conclude thus.

JAMES BOYD WHITE
L. Hart Wright Professor of Law
A.B. Amherst College, M.A. Harvard Graduate School,
J.D. Harvard Law School

"I once spent a great deal of time reading and rereading the Icelandic sagas, especially the greatest of them, the *Njalsaga.* These works should be of interest to any lawyer, for they define a world which, though in material ways simple, carries law to an extraordinary degree of sophistication. I could see this much, and see as well that the relation between law, especially procedural law, and the violence by which the Icelanders also regulated their lives was complex and significant. But I still could not quite understand what I was reading. I needed to know more, and the secondary literature I found did not provide it.

"When I read Bill Miller's book, *Bloodtaking and Peacemaking,* I felt as though I had received an extraordinary gift. This book, which combines anthropological and literary methods in the study of this highly legalistic universe, was just the book I had been wanting, the book no one had written, the book I wished I had known enough to write myself. A great treat, and the beginning of many years' conversation with a well-read mind, full of life and interest, as he turned his talents to the striking and original work on the emotions that has earned him such acclaim."

Jonathan Van Horn
Third Year Law Student
B.B.A. University of Wisconsin

"Professor Miller offers the students at the University of Michigan Law School a perspective that is unique to this, and probably any other, law school. Through his Icelandic sagas class, Miller introduced me to a fascinating and highly entertaining body of literature that I'd never have discovered on my own. He is engaging inside the classroom and a genuinely nice guy outside of it. An added bonus — he's also a Packers fan!"

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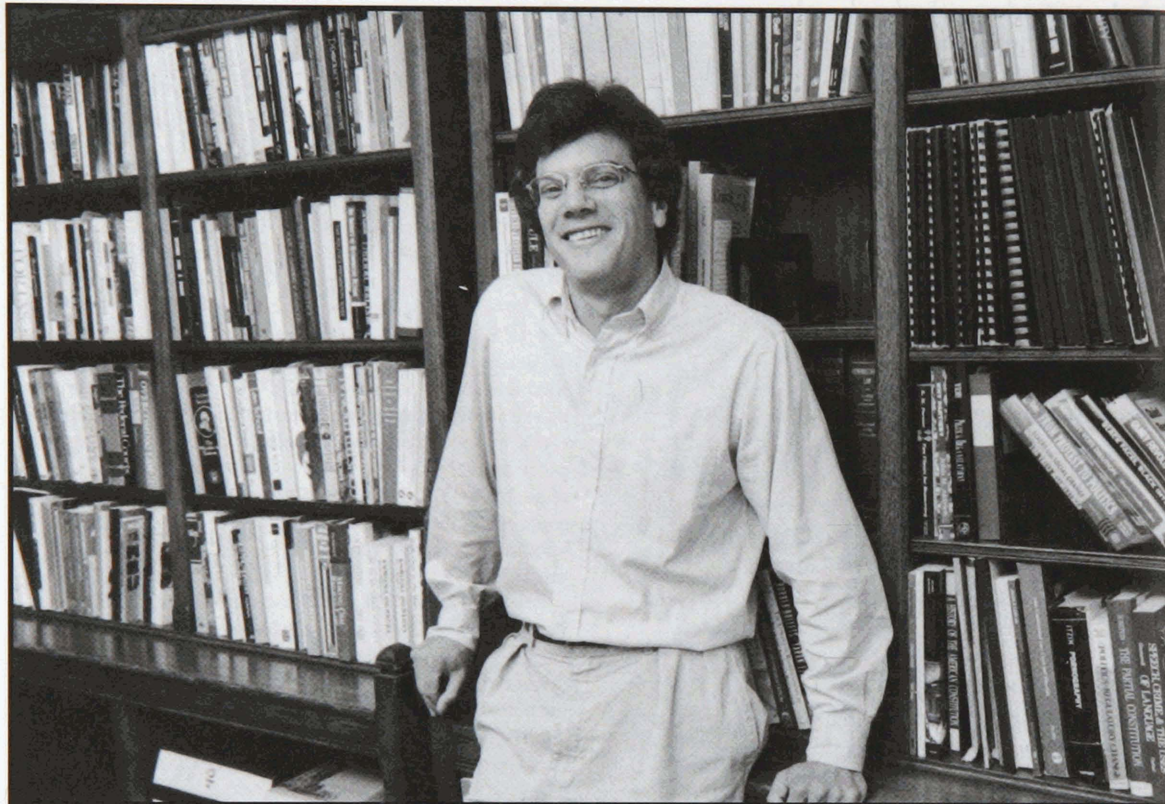
RICHARD H. PILDES

PROFESSOR OF LAW

A.B. PRINCETON UNIVERSITY, J.D. HARVARD LAW SCHOOL



DEMOCRACY HAS ALWAYS BEEN THE IDEA and the practice that has most intrigued me. That is only more so now, in what might be thought of as the Age of Democracy, when the foundations of democracy are being thrown open as at few previous moments. With the dramatic upsurge of new democracies in diverse contexts — South Africa to the former Soviet Union — basic questions in democratic theory and practice are being confronted anew: How should political representation be understood? What is at stake in the choice between different democratic structures countries might adopt? How much can institutions shape a country's formal politics and political culture?

At the same time, assumptions about democratic structures long taken for granted in the United States now face pressure along several fronts. Issues centered on democracy today dominate the Supreme Court's docket. Some challenges stem from the way the Voting Rights Act, first enacted in 1965, has been reshaping the political process in the enduring struggle to reconcile majority rule with respect for the interests of political minorities. Others arise from the role of money in politics, or the renaissance of direct democracy in states like California and Colorado.

Yet somewhat mysteriously, law schools historically have not taught courses in the legal structures that

create democracy. In my view, there is too little appreciation of the extent to which the democracy we experience is a product of particular choices of institutional structures and legal rules. Our ability to imagine other possibilities is also stunted by the taken-for-grantedness of our current legal structures. One way I've tried to encourage more systematic and creative thought about democracy is through a recent casebook, the first of its kind, entitled *The Law of Democracy: Legal Structure of the Political Process* (1998).

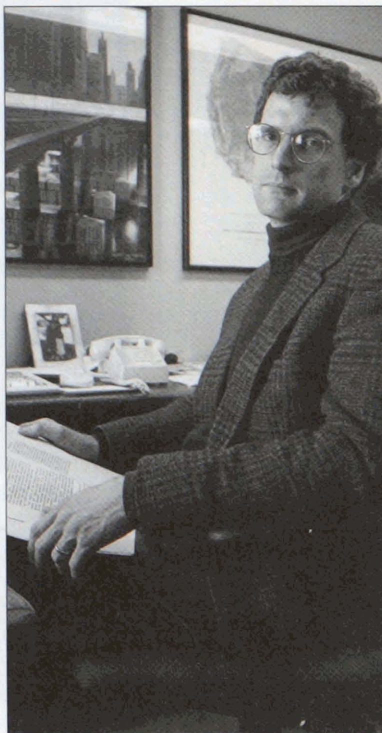
In my academic scholarship, I've tried to disregard the purported line between theoretical and empirical work and instead explore democracy through approaches that unite the two. As an alternative to the traditional American system of electing officials from territorial districts, I've endorsed alternatives, like cumulative voting, after examining how these systems actually work in the few places in the United States where they now exist. In writing about regulation of risks in the environmental, health, and safety fields, I've examined the reasons experts and lay people evaluate risks so differently. From developing an understanding of those differences, I've proposed policymaking structures that would better deal with these conflicts. In the highly charged area of race and politics, I've tried to demand that polarized debates contend with knowledge about the way electoral institutions operate in practice. I've written on the cultural consequences of public policies, and on what public-law thought might learn from scholarship in private-law fields.

In all these efforts, I've remained intrigued with what an ongoing cultural, legal, and political achievement democracy is, and I've tried to convey to students how contingent and constantly changing understandings of democracy are and ought to be. In other disciplines, a world-weary cynicism all too often passes for intellectual sophistication. One of the wonderful qualities of those drawn to law, be they students or academics, is the high level of passionate engagement with important moral and political issues.

RODERICK M. HILLS
Assistant Professor of Law
B.A. Yale University, J.D. Yale Law School

"Rick Pildes epitomizes the best aspect of law faculties — the ability to bring different academic disciplines to bear on practical legal problems. He has co-written articles with philosophers (Elizabeth Anderson) and political scientists (Harold Niemi), and he has written an astute analysis of Bernard Grofman's technical statistical work on voting rights litigation. This capacity to appreciate and use both the humanities and quantitative social science is a welcome antidote to the babel that afflicts the research university, where different disciplines are often mutually unintelligible, even when they are analyzing the same problem of human society.

"All of Rick's different academic interests are unified by his commitment to understanding real-world legal problems. It is an occupational hazard of interdisciplinary legal research that its practitioners too often become uninterested — and even disdainful of — the practical world of legal controversy. But Rick has entirely avoided this danger: he embraces the world of legislation and litigation with zeal. Rick has served as a court-appointed expert in Detroit-area vote dilution litigation, and he has journeyed to an Alabama county to study how proportional representation has been used as a remedy in a voting rights case. His research on the boundaries of electoral districts has been prominently cited and discussed by the U.S. Supreme Court, and his casebook on the law of democracy (co-written with Pamela Karlan and Samuel Issacharoff) goes beyond appellate opinions to include congressional testimony and agency findings. To my mind, Rick's commitment to academic theory and the nitty-gritty of litigation shows that, even in an increasingly specialized world of academic research, it is still possible to be a public intellectual engaged with both action and ideas."



Heather Gerken, '94
Jenner & Block,
Washington, D.C.
A.B. Princeton University

"Professor Pildes' voting-rights course and legal theory workshop were among the most exciting classes I attended in law school. These classes encompassed the very best aspects of legal education at the University of Michigan, where scholars, who have devoted their careers to studying the law, teach students who plan to practice it.

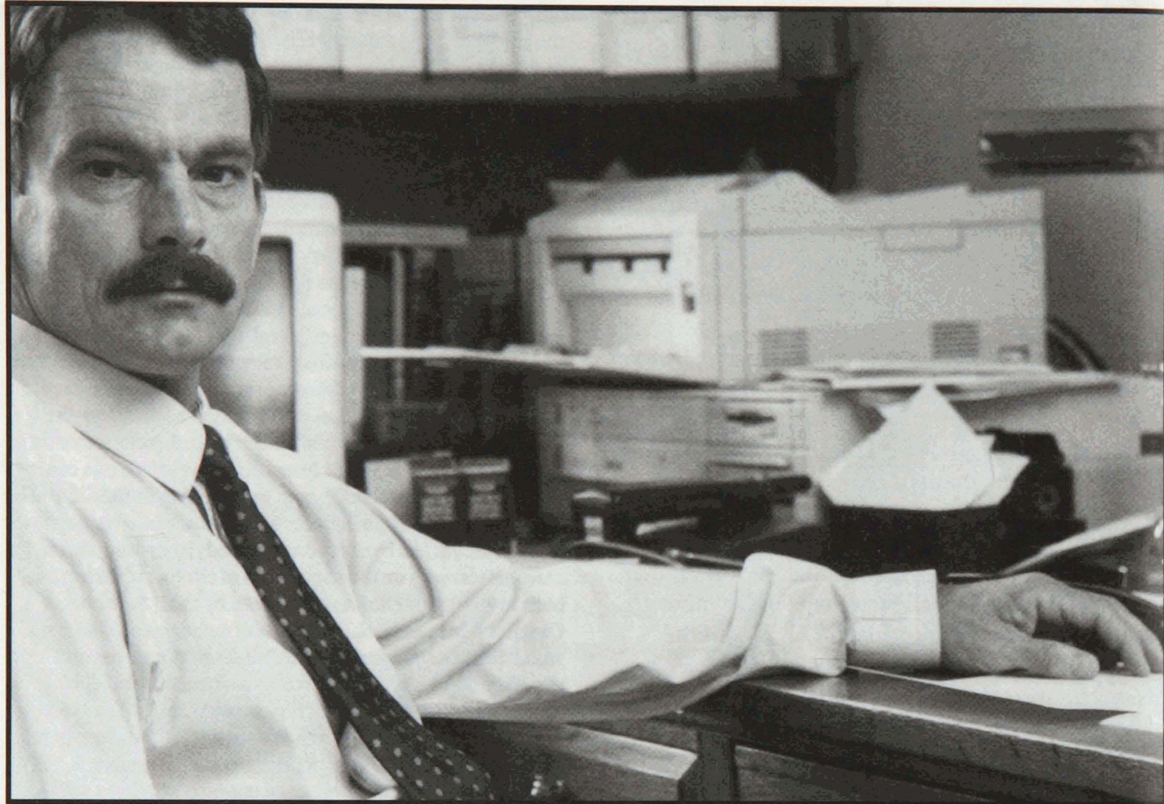
"Professor Pildes easily bridges the gap between practice and academia, as he is able to identify both what is scintillating about black letter law, and what useful lessons can be drawn from abstract legal theory. It is Professor Pildes' ability to be critical of, and respectful for, the law that inspires his

FOCUS *on* FACULTY

MATHIAS W. REIMANN

PROFESSOR OF LAW

DR. IUR. UTR. UNIVERSITY OF FREIBURG LAW SCHOOL, LL.M. UNIVERSITY OF MICHIGAN LAW SCHOOL



IF I HAD TO CHARACTERIZE MY ACADEMIC LIFE in one word, it would be "schizophrenic": my work has an American and a European side and the two never quite match. I am the only permanent member of this faculty who is at home in the common law as well as in the civil law tradition, and I continue to teach and write in both legal cultures. In the 1998-99 academic year, for example, I will teach Jurisdiction as well as International Litigation at Michigan, the basic Private Law course as well as European Legal History at the University of Trier in Germany, a short course on American product liability law at the Sorbonne in Paris, and give a few lectures in Italy and Austria.

This may sound like a glamorous jet-set life, but the reality is much more sober. Not only does it involve a burdensome amount of traveling and an endless juggling of tight schedules. It also requires constant gear shifting since the topics, teaching styles, and customs of writing and publishing are quite different here and there. So why do I do it? There are essentially two reasons.

First, perhaps the most important contribution I can make at Michigan is to maintain existing ties and to build new bridges across the Atlantic — through teaching, contacts between scholars, conferences and workshops, etc. This is important not only because of the rapidly intensifying transatlantic intercourse but also because American and European lawyers can learn a lot from each other. In order to help them do that, I need to stay involved in both worlds.

Second, I am deeply interested in the relationship between the common law tradition and the civil law culture. I am trying to understand where and why they overlap, differ, converge, and diverge. This requires a thorough knowledge of their historical background, their major characteristics, and current developments. Sometimes I despair because it all seems way too much to grasp, but often I am thrilled at what I find and think I begin to understand.

In the last two years, I have spent a lot of time and energy trying to overhaul the study of comparative law in the United States. The discipline, founded by the immigrant European scholars in the 1940s and 1950s, has aged and is in dire need of reform. Comparative law is perhaps more important than ever, but it has to develop new methods and agendas to meet modern needs. My efforts have been threefold. With regard to teaching, I have developed an agenda to integrate comparative and foreign law aspects into the curriculum as a whole (see 11 *Tulane European & Civil Law Forum* 49 [1996]). All students need to understand that there is a world out there beyond the United States — a world that will affect their work whether they like it or not. On the side of scholarship, I organized two conferences together with an Italian colleague, one in Ann Arbor, the other in San Francisco, on "New Methods and Directions in Comparative Law." The papers will be published this fall in a symposium issue of the *American Journal of Comparative Law* and hopefully will stimulate further discussion. Finally, as a member of a Long Range Planning Committee, I have helped to develop a reform strategy for the American Society of Comparative Law. The measures enacted at the society's annual meeting in Bristol, England, are important steps in the direction of greater diversity and more attractiveness for younger scholars as well as practitioners.

Thus it is, and will remain, an academic life marked by schizophrenia. Yet, I take comfort in the fact that this schizophrenia is as inevitable as it is rewarding.

JOSÉ E. ALVAREZ
Professor of Law
B.A. Oxford, A.B. Harvard, J.D. Harvard

"At a time when neo-isolationism seems on the rise, Mathias is a valuable reminder to our students that other answers to legal problems than those suggested by the common law are possible and worth considering. His civil law expertise is an invaluable counterpoint that all of our students ought to be exposed to at some point during their three years here.

"Mathias has ambitious plans to incorporate comparative law insights into our first-year curriculum instead of relegating the study of foreign law to one comparative law elective selected by only a handful of upper level students. For our sake, and for the sake of our students — who increasingly will need such insights to engage in transnational practice and to be thoughtful lawyers — I hope he succeeds. His courses on jurisdiction and conflict of laws and international civil litigation are among the most popular in the school.

"Mathias is also a constant reminder of the excellence of our graduate program. His success suggests how valuable Michigan's LL.M. program has been — not merely for those who have received degrees but for the institution itself. Although trained in German legal institutions, especially at the University of Freiburg, Mathias is also a graduate of our own LL.M. program. Luckily for us, this is one foreign lawyer who we brought to Ann Arbor for good: a German import who helps this institution maintain its competitive edge in European and international law."

Ana Maria Merico-Stephens, '95
Assistant Professor of Law, University of Arizona College of Law, B.A. University of Cincinnatti

"From my first day in Jurisdiction and Choice of Law to the final discussion of my paper in International Litigation, Professor Reimann's depth of knowledge, enthusiastic teaching style, and encouragement for informative intellectual exchanges never ceased to amaze me. It takes someone genuinely special to make *in rem* jurisdiction fascinating, conflicts amusing, and the multiple Hague Conventions alluring.

"Professor Reimann is more than an outstanding teacher and scholar, however. He is an inspiring human being who cares about his students. He ably melds the often abstract instruction of law with a compassionate approach, which reaches his students in a meaningful way. He is one of the reasons I am teaching law school today. I thank him."

FOCUS *on* FACULTY

CARL E. SCHNEIDER

PROFESSOR OF LAW

B.A. MAGNA CUM LAUDE HARVARD COLLEGE, J.D. UNIVERSITY OF MICHIGAN LAW SCHOOL

I WANT TO KNOW TWO THINGS. First, how do moral ideas shape life and law? Second, how does law shape life and life law?

The first of these questions explains the subject of the book I have just completed — *The Practice of Autonomy: Patients, Doctors, and Medical Decisions.* It examines the role patients ought to have in making medical decisions and suggests that the conventional legal and medical position is moving toward what I call "mandatory autonomy": the idea that patients have a moral duty to be autonomous and thus to make their own medical decisions. The second of my questions explains my book's method. I want to know what principle would work best in the lives of patients, so I have tried to find out what the lives of patients are actually like. Therefore I not only consulted all the empirical literature I could find, but I interviewed and observed doctors, patients, patients' families, nurses, and social workers, and I read many memoirs patients have published.

These investigations convince me that a substantial number of patients do not want to make medical decisions. Have these patients failed in their moral duty? I don't think so. Decisions of all kinds are repellently hard; but medical decisions are even more daunting than most. Being sick robs you of the energy and will to make medical decisions and concentrates your attention on life's most troubling question — have I led a good life? — and its most constant question — how can I make it through the day? And sometimes sick people even want to be dissuaded from choices they would make left to their own devices. For all these kinds of reasons patients often make bad decisions and often would rather delegate their decisions to someone likely to do better.

The two questions I opened with also animate the book I am now starting. For some years I have argued that American family law has been transformed by its diminishing willingness to talk about its work in moral language. For example, the law used to be obliged to discuss whether each person seeking a divorce was morally entitled to one. In the age of no-fault divorce, however, that discussion is unnecessary. And, for example, in *Roe v. Wade* the Court reached its decision without evaluating the moral status of abortion.

Family law wants to eschew moral language, but family life is one moral problem after another. Can family law resolve family disputes intelligently and justly without considering their moral aspects? And why should it want to do so? I find part of the answer to this last question in experiences I have had in the classroom. When I have led discussions of divorce both here and in other law schools I have been struck by the number of students who think divorce raises no moral issues. Practical problems, yes. Psychological issues, yes. But not moral issues. My book will thus try to understand family law's avoidance of moral language in terms of broader changes in the way late-twentieth-century Americans think about their lives and duties.

My opening questions have also led me to establish a new course — Law as a Profession. It will be about the moral life of lawyers. It will therefore ask what makes a lawyer's life morally justifiable or unjustifiable. But it will also consider what it is that leads people to behave ethically. We hope, of course, that law school is one such influence. But to help find out whether this is true, the course will require a paper — due on graduation — which recounts and reflects on law school experiences which might shape students' ethical views. And this, I see, brings me back again to the questions with which I began.

YALE KAMISAR
Clarence Darrow Distinguished University Professor of Law
A.B. New York University, LL.B. Columbia Law School

"Although until fairly recently his main interests were in family law, constitutional law and the legal process, Carl Schneider has quickly become one of the nation's leading law professors in the increasingly important field of bioethics. (Of course, his earlier work in these other fields gave him an excellent background when he turned to bioethics.)

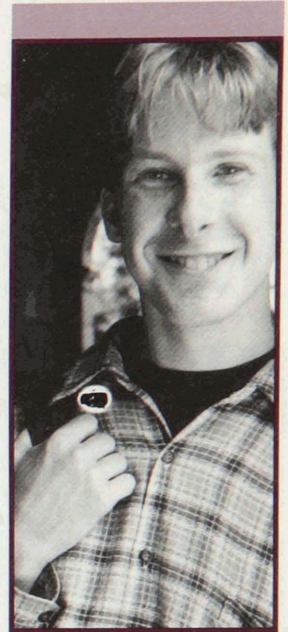
"Earlier this year Carl picked up another title: Professor of Internal Medicine at the University of Michigan Medical School. This is only fitting and proper. Carl's work is of great interest to the medical profession and for years he has taught medical students, often co-teaching with physicians. So, to a large extent, a joint appointment only formalizes Carl's joint role.

"Carl has great analytical powers. For example, I consider his article, "Cruzan and the Constitutionalization of American Life," *Journal of Medicine & Philosophy* (1992), the most thoughtful and most trenchant commentary ever written on the Cruzan case, the much-analyzed first U.S. Supreme Court case on what is loosely called the 'right to die.'

"Carl is a splendid writer. He writes with power, clarity and style. For example, I think his 'Bioethics in the Language of Law,' a piece that appeared several years ago in the *Hastings Center Report* (a publication for which Carl writes a regular column), is a wonderful piece of writing. To refer to but one passage from this article, Carl warns that although the language of the law 'may have penetrated into the bosom of society,' it must still 'compete with the many other languages that people speak more comfortably, more fluently, and with much more conviction.' 'The danger for bioethicists,' continues Carl, 'is believing too deeply that law can pierce the babel, can speak with precision, can be heard.'

"As is well demonstrated by his new book *The Practice of Autonomy: Patients, Doctors, and Medical Decisions* (Oxford University Press, 1998), Carl is not only an analyst and thinker, but an empiricist. In examining the role patients should have in making medical decisions and in determining what the lives and decision-making of patients are actually like, Carl interviewed and observed doctors, nurses and social workers as well as patients and their families. He also read the memoirs of hundreds of patients.
(An excerpt from the book begins on page 98.)

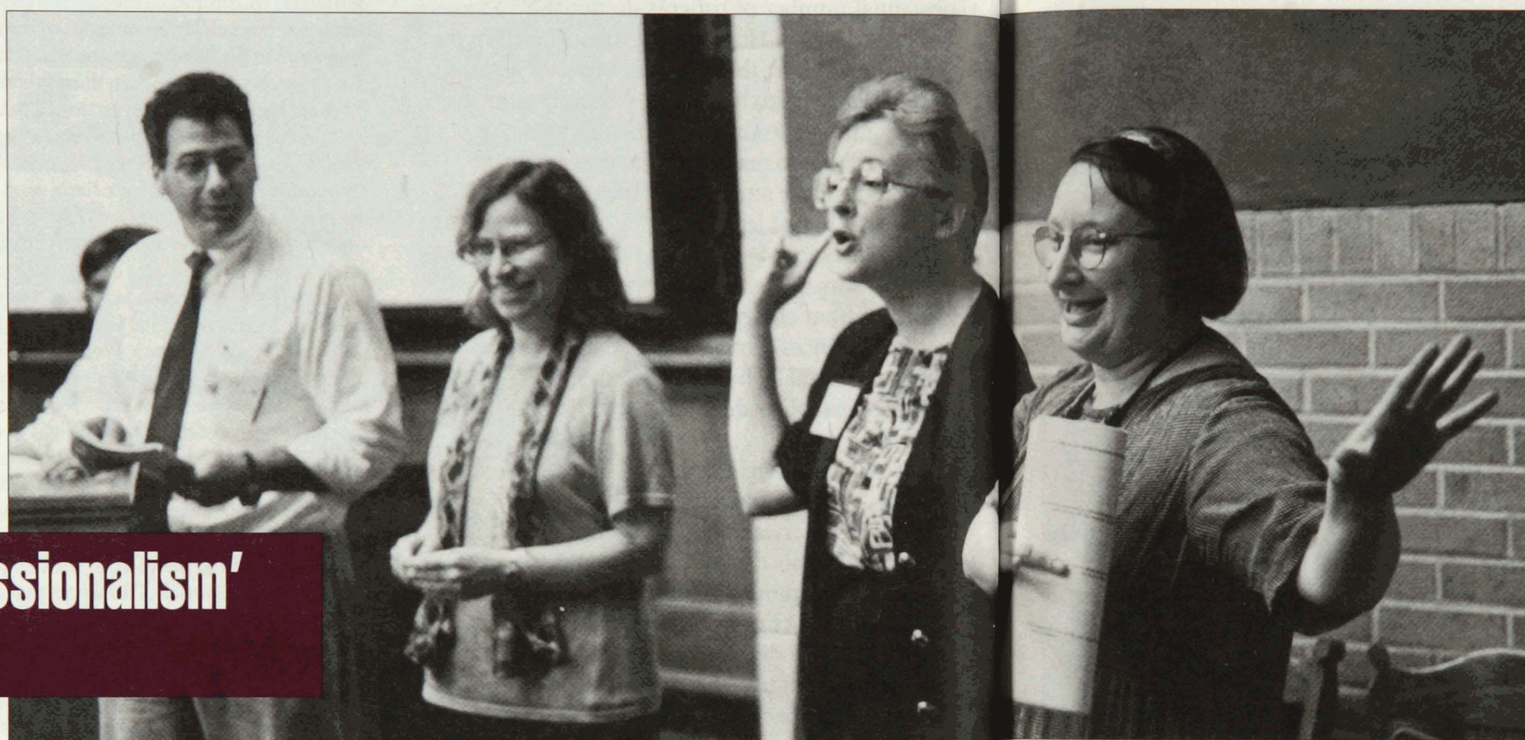
"For a number of years now, Carl has been interested in the moral life of health professionals. But he is also interested in the moral health of lawyers. This has led him to establish a new course (Law as a Profession), which will consider such questions as what makes a lawyer's life morally justifiable and what leads people to act ethically."



Michael Katz, '98
B.A. State University of New York at Binghampton

"While at the University of Michigan Law School I took three courses taught by Professor Schneider: Property, Law and Medicine, and Bioethics. Whether teaching about fox hunting, the quasi-marital woes of Lee Marvin, or the latest hot topics in bioethics, Professor Schneider never failed to simultaneously educate, enlighten, and entertain. That he could spark a heated debate over negative easements is alone a testament to his teaching style, one that allows for a surprisingly uninhibited, important exchange of ideas among the students in his courses. After a summer spent watching uninspiring videotaped bar review lectures, I appreciate even more what Professor Schneider brings to this law school and to my own and fellow students' experiences here."

Legal practice pros take three-day look at 'Advancing Professionalism'



LEFT: Five legal practice teachers lead the session on "Professional Development Through Teacher Portfolios" that was part of the Legal Writing Institute Summer Conference held at the Law School in June. From left are Marcia Speziale (in background), Mark Schroeder, Gail S. Stern, Sharon A. Pocock and Carolyn Spencer. All are members of the Quinnipiac College School of Law Legal Skills faculty except Spencer, a former Quinnipiac faculty member who is the Assistant Director of the Law School's Legal Practice Program.

BELOW: Jan Levine, left, of Temple School of Law and Grace Tonner, Director of the University of Michigan Law School's Legal Practice Program, trade comments in a lunchtime point/counterpoint discussion of the issue "Publication is Essential for Legal Writing Faculty."

A glance at the program for the Legal Writing Institute's biennial conference, held at the Law School in June, immediately reveals the breadth of professional interests of those who work and teach in legal writing programs.

The three-day conference included more than 50 sessions and workshops. Subjects ranged from "Advice to New Legal Writing Teachers" and "Developing Exercises for Specific Objectives" to "Teaching Advanced Research Using the Web" and "Collaborating with Doctrinal Faculty in Developing Research and Writing Assignments."

Under the theme "Advancing Professionalism," three successive days of the conference were devoted to "Professionalism in Teaching," "Professionalism in Writing" and "Research & Potpourri." Some 330 participants attended.

In his session on "The Art of the Fact," Jethro K. Lieberman said that law students seldom are taught how to solve the legal problems they will face as practicing attorneys. "I want to suggest that what we teach is rule analysis, and rule analysis is only a small part of the whole enterprise," said Lieberman, who directs New York Law School's writing program and also teaches political science at Columbia University.

"The important question for our students is how the rules are to be used," Lieberman said. "Law schools ought to be schools of legal problem solving. The mechanics of practice are not the issue, but the theory of practice is."

He had three recommendations for teaching students to understand "the art of the fact":

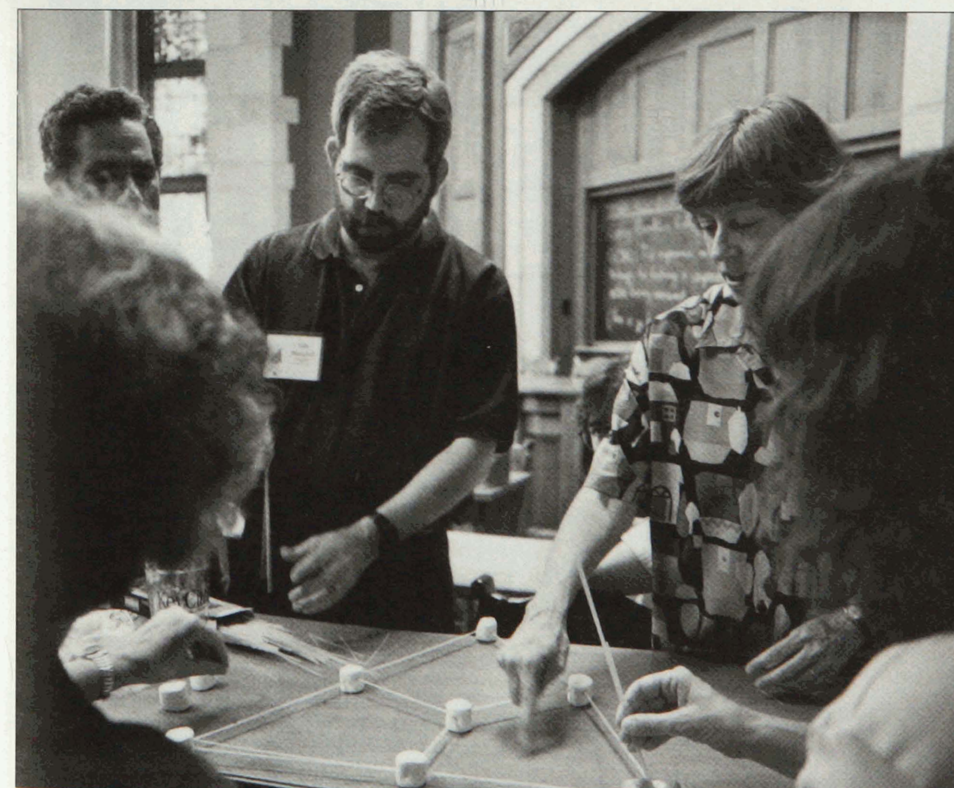
- "First, we must show students how difficult it is to uncover facts, and how testimony about an event is a 'fact' of a very different order."
- "Second, we should devise means of permitting students to efficiently extract facts from a situation."
- "Third, we must force students to analyze the nature of facts and to learn that facts are like animals; they come not only in different species but in different genuses and families."

Whether called Legal Writing, Legal Practice, or by another name, courses in legal writing, research and analysis that all law students must take are widespread in U.S. law schools. Students normally are taught how to use different writing techniques to craft briefs, pleadings, depositions and other types of legal documents.

"In practice lawyers engage in some kind of writing every day, whether it is a letter, a memo, a brief, or a contract," according to Clinical Assistant Professor of Law Grace Tonner, Director of the Law School's Legal Practice Program. "Because oral argument is perfunctory in many cases, it is more important than ever for lawyers to develop strong writing skills. We're professional writers."

Participants also considered the youth of their profession and its developing role in the life of law schools. "We're pioneers," Tonner noted during a lunchtime point-counterpoint program on "Publication is Essential for Legal Practice Faculty."

"This discipline is new. We should define what we expect of this discipline."

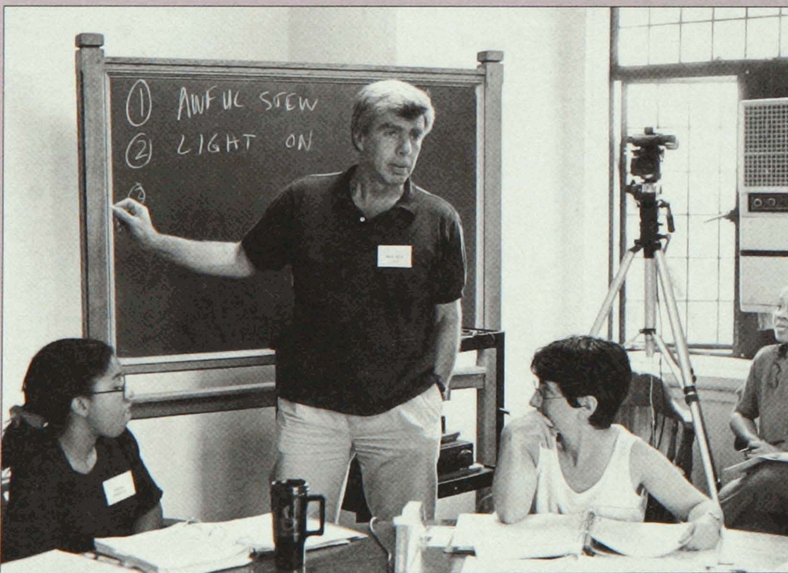


"I think it's really important, as teachers of legal writing, to write concisely and in plain English," she added.

"If you haven't written, it's the single best thing you can do to enhance your self-esteem," said her point-counterpoint partner, Jan Levine of Temple University Law School. "That's the purpose of writing, to pass on ideas. When you get home, start writing."

The conference was hosted by the Law School and Wayne State University Law School and sponsored by the Legal Writing Institute. The Association of Legal Writing Directors held its meeting at the Law School the evening before the conference opened.

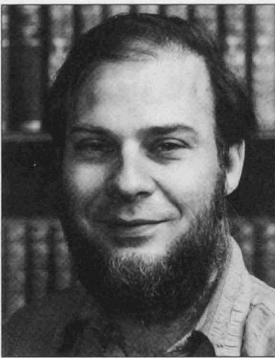
Some unusual teaching tools get drafted into service during a session on "Team Building in Legal Writing Courses (or How Marshmallow and Pasta Can Help Teach Legal Writing)," part of the Legal Writing Institute Summer Conference held at the Law School in June. Leading the demonstration is Gregory Bendlin of Duke University School of Law.



Honing Trial Skills —

Framed on one side by a copy of the Declaration of Independence, above, Bonnie Tenneriello,'96, of the Michigan Migrant Legal Assistance Project, delivers her opening statement on behalf of the plaintiff in the mock trial Jay v. Hunt and Talbot *during Trial Advocacy Skills Training conducted at the Law School and Washtenaw County Courthouse in August. Acting as judge is Clinical Assistant Professor Rene Birnbaum, who teaches in the Law School's Legal Practice Program. The mock trial took place in the courtroom of the Hon. Melinda Morris, '64, Chief Judge of the Washtenaw County Circuit Court. This is the first time that the training, organized by and for a group of legal aid provider agencies from Michigan, Ohio and West Virginia, used facilities at the Law School and in Ann Arbor. The program was presented by the Committee on Regional Training and sponsored by the Michigan Poverty Law Program. The training included sessions on opening statements, closing arguments, direct and cross examination and the use of demonstrative evidence. Paul Reingold, Director of the Michigan Clinical Law Program at the Law School, and Clinical Assistant Professor Nick Rine were among the instructors for the program; others from the Law School who played roles in the program were Anne Schroth, Jim Schaafsma and Delphia Simpson, all of the Michigan Poverty Law Program. At left, Rine teaches a Trial Advocacy Skills Training session at the Law School.*

Professor, student join forces to study deterrent power of capital punishment



Richard O. Lempert, '68

Katherine Y. Barnes

In a teaming of law professor and law student, Francis A. Allen Collegiate Professor of Law Richard O. Lempert, '68, and first-year law student Katherine Y. Barnes have developed and are testing a new way to determine if or how capital punishment works to deter killings.

Barnes and Lempert presented their preliminary report on "The Death Penalty Today: Is There Even Slight Deterrence?" at the annual meeting of the Law and Society Association in June at Aspen. Lempert, who on June 30 completed a term as chairman of the University of Michigan Sociology Department, and Barnes, who also is a master's and Ph.D. candidate in statistics at the University of Minnesota, brought a special pairing of skills to the task.

The two met in 1995 at a preview weekend for newly admitted law students and recognized how each complemented the other's interests. "I should mention that it was this interaction with professors at the preview weekend that made me decide to come to Michigan," notes Barnes, who deferred her entry for a year after admission. "The reason it is a joint paper is that that is what Rick originally felt it should be — I think because we both put a great deal of thought into the paper, and because I had a particular skill, statistics, that he felt he wanted help with."

"Kathie is a full partner in this research and a pleasure to work with," says Lempert.

"Thanks to her, the statistical modeling will be quite a bit more sophisticated than anything I could have done on my own."

"In 30 years on the law faculty I have had some excellent research assistants but this is the first year I have had a law student whom I could work with as a co-author, and I have two of them," he adds. "The other is Richard Lee, with whom I am working on a paper exploring the summer clerkship experiences of law students, with a special focus on the experiences of racial minorities."

Barnes and Lempert say they must do much more research before they can release any replicable findings. Basically, their approach starts from the point of view that deterrent effect, if any, is small, and that any deterrent that does exist operates because the potential killer thinks about the punishment before or during commission of the crime.

"Our research is still in its early stages, and we do not believe any of our results are definitive," they reported at the LAS meeting. "There are other models we shall explore and sensitivity tests we want to perform."

Success would answer a nagging question that policy makers and researchers have been asking for a long time. As Barnes and Lempert noted in introducing their report: "Social scientists have been searching for deterrent effects to the death penalty for over 50 years. The search is motivated by the sense that execution is the most terrible punishment we currently inflict, which suggests it should be the most feared punishment, from which it follows that death should, more than alternative punishments, deter those crimes for which it is a sanction. The chain of logic seems reasonable, yet when investigators have searched for the expected deterrent effect of the death penalty, it has proven remarkably elusive."

Barnes and Lempert say they must do much more research before they can release any replicable findings. Basically, their approach starts from the point of view that deterrent effect, if any, is small, and that any deterrent that does exist operates because the potential killer thinks about the punishment before or during commission of the crime.

Bergstrom Foundation endows summer training for child welfare specialists

If you care about children and families, you could not avoid being impressed as the 24 young people took turns introducing themselves:

Rachel Chazin, in her second year of a joint degree program in law and social work at New York University.

Joy Davis, in her third year at Mississippi College School of Law. A volunteer at the Hinks and Rankin County Youth Courts, where she mentors and tutors children.

Andrew Don, attending Boston College Law School after 13 years of working with children as a residential treatment program supervisor, high school and university teacher, and with street children at Kuleana in Mwanza, Tanzania.

Jacqueline Kozlik, a Peace Corps veteran who created programs and counseled low-income families in Belize and now studies at the University of Arizona College of Law.

Sara W. Clash, first-year student at the University of Michigan Law School and a graduate of Dartmouth College, where, while a student, she was Coordinator of Volunteers for Dartmouth Community Services. She also interned with Women Helping Battered Women in Burlington, Vermont, where she served as a legal advocate for victims in court and with welfare and housing assistance agencies.

Matthew H. Drexler, also a first-year U-M Law School student, a graduate of Duke University. After graduation, he worked with the New York City Urban Fellows Program in the Department of Homeless Services, where he negotiated budgets and contracts to upgrade facilities for the homeless.

These six fellows and seventeen others made up this year's class of Kellogg Summer Fellows, who underwent three days of intensive training at the Law School in May before heading out to their summer internships. The summer training program is part of the Families for Kids Initiative that the W.K. Kellogg Foundation launched three years ago with a $1.5 million grant to the Law School. The Initiative identified 11 sites across the country for Fellows to do their internships: Arizona, Kansas, Massachusetts, Michigan, Mississippi, Montana, New York City, North Carolina, Ohio, South Carolina and Washington State. This was the last summer of Kellogg Foundation funding for the fellowship.

For two years, the Bergstrom Foundation of Pittsburgh, Pennsylvania, has supported University of Michigan summer training fellows. This year, however, the Foundation guaranteed the long-term survival of the summer program with a $500,000 endowment whose earnings will fund University of Michigan Law School fellows and the presentation of the summer program. The newly named Henry A. Bergstrom Child Welfare Law Program honors the late Henry A. Bergstrom, '35, a Pittsburgh attorney and 1989 U-M Presidential Society Leadership Award recipient.

As active in his delivery as his subject is serious, James Henry, of the School of Social Work at Western Michigan University, explains to Child Welfare Summer Fellows that being the victim of sexual abuse alters a child's view of the world, his self concept and can affect his overall development. Henry, one of several speakers during the Fellows' summer training at the Law School in May, dealt with the effects of sexual abuse on children and techniques for interviewing the victims of such abuse.

Henry Bergstrom, in his own words, had a lifelong "love affair with the University of Michigan," said his son, Hank Bergstrom, a Pittsburgh businessman who now heads the foundation that his parents established.

Hank Bergstrom credits Larry E. Phillips, '67, one of the foundation's three board members, with suggesting the gift to the Child Welfare Law Program. The foundation focuses its aid on programs for education and children, he said. "There are a lot of children out there who need advocacy, who can't afford it. [This gift reflects] what we can do to help children and also what we can do to help young lawyers learn about child advocacy. Hopefully, more young lawyers will want to get into this field on a permanent basis."

"I think that endowing this program is going to benefit society for years to come," he added.

The gift memorializes Henry A. Bergstrom and his affection and longtime support for the Law School, adds Phillips. "Making a gift to the University of Michigan Law School was the most appropriate way for us to honor his memory. Additionally, the child centered

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Law students and Bergstrom Fellows Sara W. Clash and Matthew Drexler say the three-day training program was intense and beneficial and have found their summer internship in the Law School's Child Advocacy Law Clinic to have been a rich learning experience. A supporter of the summer program in the past, the Bergstrom Foundation this year endowed it to guarantee its continuation as the Henry A. Bergstrom Child Welfare Law Program.

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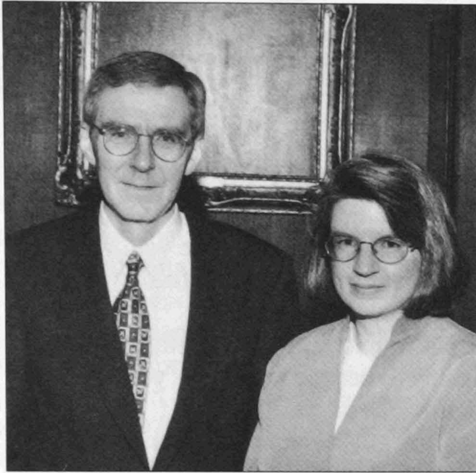

PHOTO COURTESY OF THE BERGSTROM FOUNDATION

Bergstrom Foundation board member Larry E. Phillips, '67, and Suellyn Scarnecchia, '81, Associate Dean for Clinical Affairs, are shown during a July 2 dinner at the Duquesne Club in Pittsburgh to mark the foundation's $500,000 gift to endow the child welfare law summer fellows training program. The program now is called the Henry A. Bergstrom Child Welfare Law Program.

aspect appealed to us. Many of the other programs the foundation supports are for children and women."

Associate Dean for Clinical Affairs Suellyn Scarnecchia, '81, praised the Bergstrom Foundation gift. "The Bergstrom Program will help solidify the Law School's reputation as the preeminent center for the training of lawyers in the field of child protection. The extensive history of interdisciplinary child welfare law training through the Law School's clinic will be shared with a broad, national audience through the summer program, improving child welfare law practice nationally."

In his greeting to the summer fellows, Dean Jeffrey S. Lehman, '81, noted "how much we count on you to actually go out and make a difference in the world. This is one of the groups that make a difference right away."

The program also is designed to build a network of child protection lawyers across the country, added Naomi Woloshin, who manages the fellowship program. "We're trying to create a career ladder in child welfare law," Woloshin told the students. "I hope you stay in touch with each other."

Fellows heard programs on changes driven by passage of the federal Adoption and Safe Families Act of 1997, the child protection and foster care legal process, child sexual abuse/interview techniques, a comparison of state laws and practice, drug abuse and parenting, and child development. They also discussed and role-played through the stages of a case and took part in a court simulation.

Clash and Drexler, the two Bergstrom Fellows supported in their summer training by the Bergstrom Foundation, said the training was rigorous and useful. They both did their summer internships with the Law School's Child Advocacy Law Clinic, where the experience of dealing with cases showed them the complexity and challenge of such work.

"This summer at the Child Advocacy Law Clinic has been an incredible learning experience — exciting, challenging and extremely eye-opening," Clash said.

"My work with clients, both children and parents, as well as with therapists, social workers and foster parents, has provided me with a view from multiple perspectives of the difficult legal and ethical challenges involved in serving a child's best interests. Working in the clinic enabled me to confront these issues directly in a setting that provided invaluable guidance, feedback and support."

Drexler, too, found his summer assignment to be an eye-opener. "Working in the Clinic has been a very rewarding and educational, yet emotionally difficult experience," he said. "The most compelling and difficult part of the summer has been trying to address the many ethical issues and dilemmas that arise in each of the cases.

"I was surprised and overwhelmed to discover the difficulty and complexity of the decisions that have to be made in the field. I quickly realized the importance of interdisciplinary work as I struggled with my lack of knowledge of social work and child developmental psychology. The clinic, though, has provided a supportive environment to tackle and struggle with these issues."

Wide-ranging looks at healthcare, terrorism, technology and international law

Law school classes — and the legal cases that you take on after graduation — usually focus narrowly, laser-like, on their central issue. The energy that goes into early preparation may be spent widely, but finally it will focus on the goal of defining and proving your case against the claims of your opponent. Like learning the outline of criminal defense before you take on the appeal of the long-time death row inmate. Or learning the mechanics of Arizona-to-California water transfer before narrowing to one fruit grower's claim that he's not getting his share of Colorado River water.

Like late-night conversations, however, conferences and symposia let your mind grow expansive, let your thinking follow the variety of leads that intrigue you, let you get a glimpse of the whole that is made of so many parts.

That's why conferences are a regular part of the Law School's academic year. Often initiated by law student organizations, each brings together a variety of experts whose individual presentations and informal conversations each contributes to a wider, deeper, more thorough understanding of the overall subject. Three student-planned conferences and an additional major professional conference will be held at the Law School during the 1998-99 academic year: What's the Prognosis: Managing Care in the Next Century (October 16-17); "It Takes a Planet": Defining and Fighting Transnational Terrorism (February 19-20, 1999); Challenging Traditional Legal Paradigms: Is Technology Outpacing the Law? (March 12-13, 1999); and Current Issues in International Law (March 25-27, 1999). Here is a snapshot of each:

What's the Prognosis: Managing Care in the Next Century. Presented by the University of Michigan Health Law Society and the *University of Michigan Journal of Law Reform*, the symposium is designed "to tackle the timely and crucial issue of the evolution of regulating managed care," its organizers say. After appearing to control rising healthcare costs, many managed care programs now face rising costs again. In addition, some highly publicized cases of managed care shortcomings have created a growing public wariness and some doctors have expressed resentment about having their clinical judgement questioned or controlled by non-physicians.

"Many experts agree that managed care is at an impasse and must reconfigure itself to survive in some form in the next century," according to symposium organizers. "This requires instilling new confidence in managed care's dedication to quality patient care. It is anyone's guess as to

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Judge Richard P. Matsch, '53, Chief U.S. District Judge of the U.S. District Court of Colorado, delivers the keynote address for the symposium "Jury Reform: Making Juries Work" at the Law School last March. Matsch presided over trials of defendants in the Oklahoma City bombing case. Other conferences and symposia at the Law School during the 1997-98 academic year dealt with physician-assisted suicide; Asian Americans, critical race theory and the law; taxation in an international economy; and clinical legal education.

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whether the industry will take up this mantle on its own, government regulation will be required, or a rebellion of employers, doctors and patients will ensue."

"Why hold this conference at a law school?" they ask. "The law has played, and will continue to play, a crucial role in shaping shifts in managed care, through legislation, judicial rulings, and administrative oversight." And, they add, legal impacts on managed care are "broadranging, from mergers/acquisitions and antitrust to tort actions and jurisdictional decisions."

"It Takes a Planet": Defining and Fighting Transnational Terrorism. This symposium, marking the 20th anniversary of the *Michigan Journal of International Law*, will examine the growth in the power of what former CIA General Counsel Elizabeth Rindskopf, '68, calls "interstitial actors," like drug barons, Hamas, the IRA and others who neither act for nor claim to act for an internationally recognized nation state, yet whose power and sophistication make them resemble a nation state. "The organized crime families and terrorists who have spread like a menacing cancer throughout the globe are undermining humanity, our day-to-day lives, and financial progress," symposium organizers say. They also note that events like the 1993 World Trade Center bombing point up the United States' susceptibility to terrorist attack. Threats from transnational terrorists and organized crime families have caused U.S. agencies like the CIA and National Security Administration to re-think their roles, they add.

"One nation's law enforcement and intelligence agencies can no longer single-handedly apprehend all those accused of committing acts of transnational terrorism and organized crime," symposium organizers say. "Organized crime and terrorism have rapidly grown into an international problem demanding a concerted, global effort. This plague is not unique to the United States, as this new common enemy has compelled nation-states to call on their neighbors for support, information, assistance and advice in the apprehension and prosecution of such criminals."

Challenging Traditional Legal Paradigms: Is Technology Outpacing the Law? Presented by the *Michigan Telecommunications and Technology Law Review*, this symposium will examine this evergreen issue in its most contemporary rounds. "Modern technologies transcend geographic boundaries, stretch the definitional boundaries of intellectual property, and call into question assumptions on which commerce and public policy are conducted," organizers say. "Complete overhauls of traditional legal regimes may be rash and indeed inefficient in times of radical technological change," they say. "On the other hand, adaptations of current paradigms may be necessary for continued growth."

Panel discussions will

East Meets West —

Yuok Ngoy, left, Dean of the School of Law and Economic Services in Phnom Penh, confers with Assistant Professor of Law Peter Hammer, '89, during a visit to the Law School in March. Hammer, President of Legal Aid of Cambodia and Director of the Law School's Cambodian Law and Development Program, hopes to re-establish internships and other programs in Cambodia for law students. The programs had to be discontinued temporarily because of the coup that took place in the southeast Asian country in summer 1997. Recent national elections in the country may foster a suitable climate for re-activating such programs there. At deadline time Hammer still was evaluating conditions in Cambodia.

focus on antitrust, intellectual property and other issues. Program organizers plan to broadcast the conference live in RealAudio format over the Internet via the Law School web page (www.umich.law.edu).

Current Issues in International Law. The first program of this sort mounted by the Law School's new Center for International and Comparative Law, jointly sponsored with the European University Institute's Law Department and the board of editors of the *European Journal of International Law* (*EJIL*). Developed as a Euro-American symposium, the program will "confront the views of European and North American internationalists on the dubious legitimacy of unilateral action officially aimed at the promotion of the international rule of law," according to organizers. There will be sessions on international economic law, the maintenance of peace and international law making. Proceedings will be published in *EJIL*.

New seminars offer look at character-building, civic responsibility

The chance to talk with some of the Law School's most accomplished graduates is precious and rare to most law students. Students' and graduates' paths simply do not meet long enough for the unhurried conversation that graduates say they enjoy and students find refreshing and inspiring.

For some time now, the Dean's Forum program has brought successful graduates who have risen to the top in fields other than law together with small groups of law students who share an interest in the graduate's field. The guest and students meet for lunch and more than an hour of informal, small group conversation. Last year, two of the Dean's Forum guests included Barrie Loeks, '79, then chairman of Sony Theatres, and Arnold M. Nemirow, '69, Chairman and Chief Executive Officer of Bowater, Inc.

A new program this year, the Sperling Seminars, is using a similar approach to bring together small groups of first-year law students with inspiring graduates. Supported by George E. Sperling, Jr., '40, of Buckley & Sperling in Santa Monica and made possible through the Sperling Project on Character-Building and Civic Responsibility, the seminars "coordinate and implement numerous presentations and/or discussions on practicing law in today's legal environment while maintaining principles of character and responsibility."

Bernard Petrie, '52, a solo practitioner in San Francisco and a graduate of the U.S. Military Academy, will lead off the seminars on October 22. Petrie, who works in the areas of general practice, trials and appeals, corporate, antitrust, libel and international law, also is of counsel to Brown & Bain of Palo Alto, a firm that is highly regarded in the fields of high technology and complex litigation. Petrie was among the attorneys who represented Apple computer in 1992 in a copyright infringement suit against Microsoft Corporation and Hewlett-Packard.

Other Sperling Seminar guests who were confirmed by deadline time were:

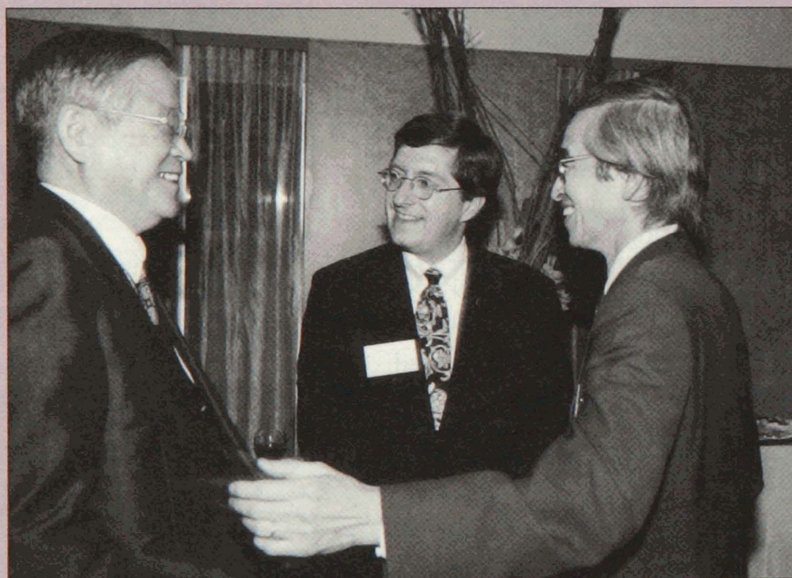
November 5 — Brian O'Neill, '74, with Faegre & Benson in Minneapolis; and

December 2 — Robert B. Fiske, Jr., '55, former independent counsel in the Whitewater affair and a partner in Davis Polk & Wardwell of New York.

Sperling supports the program "to show how attorneys have a higher duty than making money and that they can be a force in developing society and strengthening the legal system." He said the idea for the seminar also reflects the sentiments that Dean Jeffrey S. Lehman, '81, discussed in his Dean's Message in 40.2 *Law Quadrangle Notes* 2 (Summer 1997) and with Law School graduate and benefactor William W. Cook's letter to the U-M Regents in April 1922.

"I would have a selected body of law students, just as Oxford and Cambridge have a superior class of young men," Cook wrote the Regents. "The goal sought is the character of the law students to be reflected later in the character of the Bar. When the University graduates law students unsurpassed anywhere in character and scholarship, the effect on the Bar and the country will be very great."

Lehman, writing of "the great lawyer as citizen," said the best lawyers "have not been uncritical slaves to their clients' tastes and preferences. Nor have they encouraged their clients to distance themselves from the larger community by speaking of the law as a set of impersonal barriers with no interest in the client's particular situation. Rather, they have tried to help their clients understand the law as a point of engagement with their fellow citizens, through which tensions and competitions among goals and perspectives are, and can be, worked through."



Far East —

Above, Dean Jeffrey S. Lehman, '81, and Virginia Gordan, Assistant Dean for International Programs, stand on either side of Dean Wu Zhipan, center, during a meeting at the University of Beijing Law Faculty. Others in the group are from the University of Beijing Law Faculty. During his trip to China in June, Lehman attended the first U.S.-Sino Law School Deans Conference in Beijing. The conference was hosted by the People's University School of Law and the U.S. State Department. Lehman was joined at the conference by deans of the law schools at Columbia, Stanford and Yale. In other activities in China, Lehman and Gordan met with legal education leaders from many of the country's major law departments, studied Chinese legal education and explored ways that the Law School may establish ties with some of the leading legal education programs in China. Most Chinese legal education occurs as part of undergraduate training rather than at the graduate level, as is done in the United States and Canada. Some Chinese legal education leaders, however, are working to establish programs more like those in the West. Lehman and Gordan also attended alumni reunions in Beijing and Shanghai and in Tokyo, Japan. At left, Lehman and Yoichiro Yamakawa, LL.M. '69 and '91-93 Visiting Professor, right, chat with Japanese Supreme Court Justice Itsuo Sonobe, '57-58 graduate student, during the Law School alumni reunion in Tokyo. Sonobe is one of the speakers for the Law School's International Law Workshop during the fall term. His topic: "Reflections on the Japanese Supreme Court." In other Law School activity in China this year, Professor of Law José Alvarez and Assistant Clinical Professor of Law Grace Tonner, Director of the Legal Practice Program, delivered lectures in China.

Videoconferencing opens new doors for interviews

Computer, camera, action. Interviewers and interviewees this year can begin to take advantage of a new Law School service that allows potential employers and students in search of jobs, internships and other placements to talk "live" and "face to face" although they may be many miles apart.

The new service, which uses videoconferencing equipment and computers, allows interviewers to remain in their hometowns — perhaps even in their offices — to interview a candidate at the Law School. Both interviewer and interviewee sit in front of specially equipped computers and talk with each other as they would if they were seated across a table from each other. They speak in normal conversational tones and reap the benefit of normal give-and-take conversation.

The only difference is a slight delay in sound transmission that makes the computer screen image slightly ahead of the audio. It's a little like watching a movie done in one language with a sound track dubbed onto it in another language. But those who have used the system say that they quickly become used to the tiny audio delay and are not bothered by it.

The new service is made possible through a gift from Samuel Zell, '66, chairman of Equity Group Investments, Inc., of Chicago. Zell's gift also includes funds to establish facilities for linking specially equipped classrooms at the Law School with other law schools — schools in Toronto and Cambridge, England, are under consideration — so that a single instructor can teach classes simultaneously at several schools. The program, now in the preparation stages, will allow students and their teachers to see and talk with each other "live," no matter where they are located.

The new interview capability is expected to be especially useful to smaller firms, public service providers and others whose budgets and staff size do not allow them to send a recruiter to the Law School. It also will benefit students who might not be able to afford the costs of traveling elsewhere for interviews. For more information about the program, call the Office of Career Services, 734.764.0546, or send an e-mail to lawcareers@umich.edu.

The new service worked well in its trial run last spring.

When first-year law student David V. Gubbini settled into the chair and lined up with the computer-top camera for his job interview, he wasn't thinking of the precedent that he was setting.

He was thinking instead that the Law School's new videoconferencing equipment meant that he could meet with his interviewer, Steve Baker, Director of the Federal Trade Commission's regional office in Chicago, without going to Chicago, or driving to Cleveland, Ohio, where the FTC also has videoconferencing equipment, and without using personal funds to rent a private videoconferencing setup.

For his part, Baker was glad to use live videoconferencing to get to know a potential summer intern. He sees interns as important staff members — interns from his office have uncovered evidence that the FTC continues to use to counter computer and Internet scams — but he does not feel comfortable asking them to pay to come to Chicago to interview for the unpaid positions. Nor does he have a large enough staff to send people out as interviewers.

When Baker interviewed Gubbini on March 19, Gubbini sat before a computer with a small camera connected atop it. In Chicago, Baker did the same.

"I thought the experience was far superior to a phone interview," said Gubbini. There was a slight, barely noticeable lag in the audio transfer between the two sites, and sometimes the video image stumbled, but Baker and Gubbini both adapted quickly and conducted their interview much as they would have if they had been seated across from each other in Room 200 of Hutchins Hall or the FTC offices in Chicago.

"I didn't have any of that surreal feeling," said Gubbini, who had worked previously for an electronic resumé service in Ann Arbor. As for Baker, he and his staff frequently use their in-office videoconferencing equipment for remote training and inter-region communication, but only once before had they used it for a one-on-one interview.

"The advantage is that you get to see somebody face to face," said Baker. "A lot of the act of interviewing is that you're trying to find out not only the person's academic credentials, but also what kind of person you're dealing with."

Baker liked what he saw and heard. He offered Gubbini an internship on the spot.

"The advantage is that you get to see somebody face to face. A lot of the act of interviewing is that you're trying to find out not only the person's academic credentials, but also what kind of person you're dealing with."

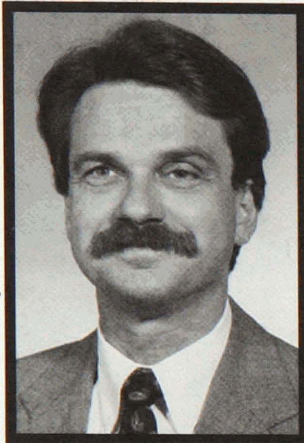


PHOTO COURTESY QUINN EVANS/ARCHITECTS

DAVID EVANS

tailoring the new to invigorate the old

In some ways, David Evans, who died August 4 at age 50, knew the Law Quadrangle better than anyone else. For more than a decade, his hands and eyes and deep respect for history guided restoration and renovation of classrooms and other facilities here.

Evans, a University of Michigan graduate and the Ann Arbor-based half of Quinn Evans/Architects of Ann Arbor and Washington, D.C., spent hours matching wood stains, paints and other aspects of the Law School's 60-plus-year-old original construction with modern updates. In his last work for the Law School, the Alcoves Project (see adjoining photos), which created nine new offices from the formerly open alcoves that flanked the north and south sides of the Reading Room, Evans painstakingly matched old stains and new coatings so that even he barely could tell the difference.

Evans previously had been architect/overseer for five projects at the Law School:

Room 120, the Squires, Sanders, and Dempsey Classroom. Renovated in 1991, featuring white limestone trim contrasting with the deep blue of the carpeting, walls and draperies.

Room 132, the Varnum, Riddering, Schmidt, and Howlett Classroom. With the most medieval aura of any renovated classroom, Room 132 takes its focus from the arch that frames the dais and rostrum. The renovation included the installation of a wooden framework in the ceiling to hide new air conditioning equipment.

Rooms 232 and 234, the Moot Court and Jury rooms. Renovation included installation of state-of-the-art video equipment, an audio system, and a moveable

Over the past decade Quinn Evans/Architects renovated several classrooms and the Moot Court Room, shown here. Renovation of the practice courtroom facilities included installation of state-of-the-art video equipment, an audio system and the specially designed wooden cabinet that conceals the complex electronic controls for the room's systems. Quinn Evans principal David Evans, who died in August, was a specialist in designing such items and matching the shade and tint of their wood stains with original staining in the rooms he was renovating.

PHOTO BY THOMAS TREUTER

podium and remote control cameras.

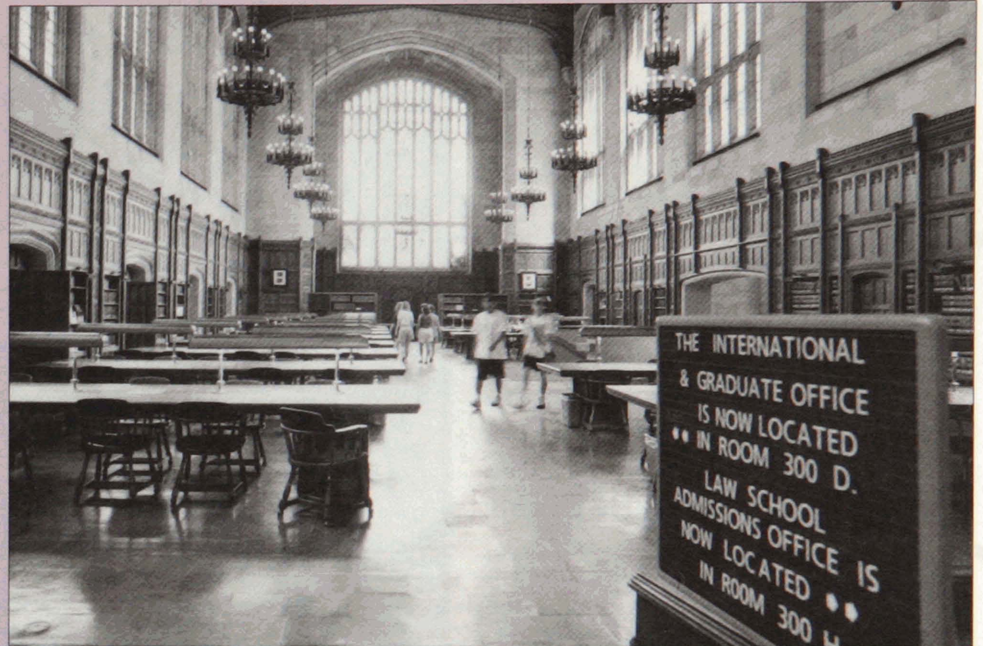
Room 236, the Robert and Ann Aikens Seminar Room. Here, Quinn Evans' work included installation of a table that converts from a first-row writing surface to a conference table. Addition of the table allowed the room to function as a seminar room or as a formal small classroom.

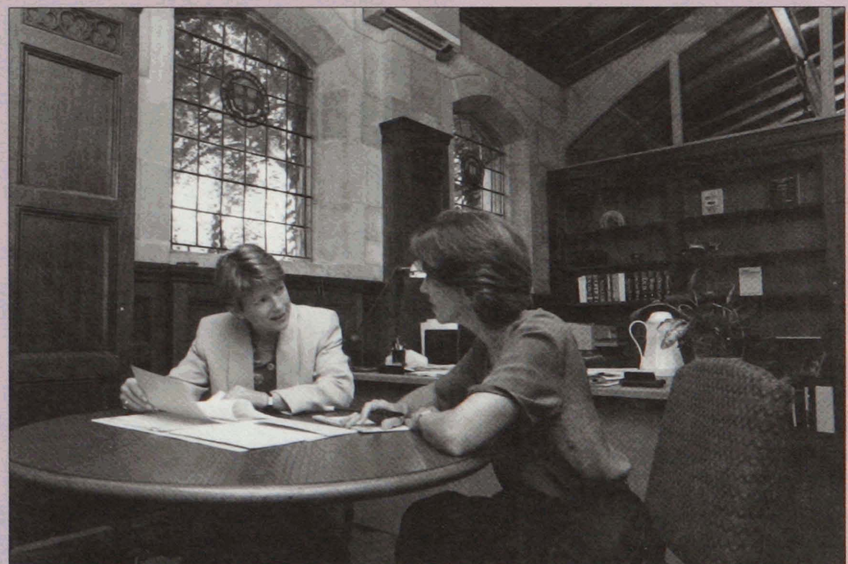
Room 250, the Dykema Gossett Classroom. Renovation included giving the walls a rusticated plaster surface and using sage green as the unifying color for the room's walls, draperies and carpeting.

In 1996, Quinn Evans' work at the Law School won the Special Recognition Awards for the Creative Use of Architectural Materials and for the Creative Use of Architectural Details from the Michigan Chapter of the International Interior Design Association. In 1994, the firm's work at the Law School won the Design Award from the Michigan Chapter of the American Institute of Architects (AIA). Quinn Evans' work here also has been cited in the AIA's *Historic Resource Facilities 1997 Review; The Michigan Law Quadrangle: Architecture and Origins,* by Kathryn Horste; and in *Creative Lighting: Custom and Decorative Luminaires*, by Wanda Jankowski.

Quinn Evans/Architects is widely respected for its accomplishments in the functional renovation of historic buildings. Among its renovation projects to win awards are the Michigan State Capitol in Lansing; the Treading Barn Reconstruction at Mt. Vernon; the Old Exeuctive Office Building, Smithsonian Arts and Industries Building, U.S. Soldiers' and Airmen's Home, Library of Congress and Old Post Office Building, all in Washington, D.C.; and the Idaho State Capitol.

In Ann Arbor, the firm's projects have included the Michigan Theater, the Argus Building, the Miller/Main Building, the Goodyear Building and the West Park Band Shell. Shortly before his sudden death Evans learned that his firm, in association with Albert Kahn Associates, had been awarded the contract for the renovation of the University of Michigan's Hill Auditorium, a highly regarded concert hall built early in this century.





New Occupants —

Once-secluded alcoves along the north and south sides of the Reading Room now hum with activity as the new locations for Admissions, international and graduate programs, and some faculty offices. As the result of a $1 million project designed and coordinated by the Ann Arbor-and-Washington, D.C.-based Quinn Evans/Architects, nine new offices now occupy spaces that formerly housed bookshelves and study desks. Workers carefully restored the canvas-on-plaster ceilings, used original bookshelf sideboards to shield utilities conduits, and painstakingly matched wood stain color and intensity to create new office spaces that mesh perfectly with the 65-year-old building's original lines and decor. The new offices' leaded glass windows have been cleaned and restored to their original clarity and beauty. Here, Assistant Dean and Director of Admissions Erica Munzel, '83, and Assistant Admissions Director Marcea Metzler confer in one of Admissions' new offices. Clear glass panels rise from each office's bookshelves to the arched ceiling, lending a sense of the continuity of the space.

Faculty Commons designer Mark Hampton, law student-turned-decorator

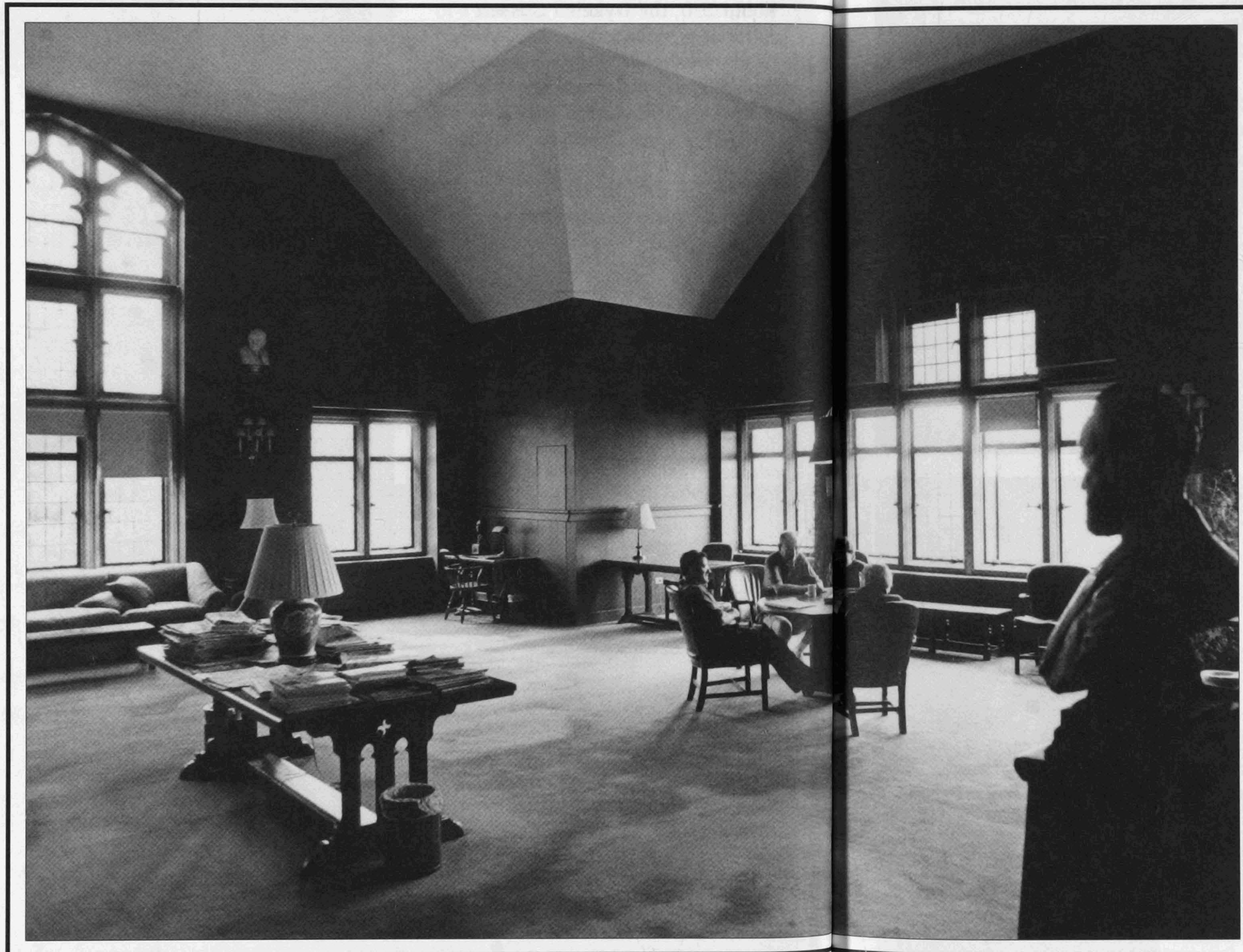
Mark Hampton, the debonair decorator who counted George Bush, Jacqueline Onassis and the Law School among his clients, died July 13 in New York of complications from liver cancer. He was 58.

Hampton, known for his uncanny ability to meld classic elements into understated reflections of his clients and their times, designed the Faculty Commons Room at the Law School, which was renovated into its present use in 1980-82. The space previously had been used as a faculty and *Law Review* library, which in turn was moved to the eighth floor of the Legal Research Building.

Hampton knew the Law School well; he had been a law student in 1962-63.

Envisioning a room that fostered conversation, Hampton created a space with windows on two sides, a two-story-high ceiling, bookcases, small groups of furnishings and two central tables: a round table, with its obvious actual and symbolic value, surrounded by chairs; and a nearby rectangular table for displaying current publications of a legal and academic nature.

"Hampton based his treatment of the space around certain ideas and associations that the concept of a commons room called up for the Law School faculty," Kathryn Horste explained in *The Michigan Law Quadrangle: Architecture and Origins* (University of Michigan Press, 1997). "Most important was the idea that the room must foster collegiality, community, and a sense of shared purpose among those who used the room.



The bronze bust of Thomas M. Cooley, a charter member of the faculty of the Law School and for many years its dean, gazes over the Faculty Commons, a meeting ground for conversation, debate and relaxation. The round table plays an actual and symbolic role as a catalyst for conversation. Decorated by the late Mark Hampton, a former law student, the Commons is a popular spot for faculty members to repair to between classes and for special programs and receptions. Law School faculty meetings are held there regularly. The bust of Cooley was a gift from the class of 1895.

Mark Hampton relaxes in one of the chairs that passed muster for the renovated Faculty Commons on the third floor of Hutchins Hall. The space was renovated in 1980-82. Hampton died July 13 at age 58.

"In this respect, tradition played a strong role. The faculty expressed its desire to include a round table — in both the literal and figurative sense — as the one required element in the room's furnishings, since a table of that type had been so important as a gathering place in the old Faculty Lounge."

Hampton's design made for a space that is "both comfortable and personal, even as it emphasizes the dramatic spatial features of the room," Horste said.

Comfortably upholstered furnishings invite faculty members and their guests to relax and chat. Small tables at either end of the east wall offer space for writing correspondence or individual reading or contemplation.

Two of the Law School's three Renaissance tapestries of hunting scenes grace one interior wall. Busts of Rousseau and Voltaire, replicas of those in the private library of Law School benefactor William W. Cook, flank the large central lancet window on the east wall. Bookshelves house writings by faculty members and others.

Among Hampton's other clients were George and Barbara Bush, both during and after the Bush presidency, Jacqueline Kennedy Onassis, Pamela Harriman, Henry Kravis, Mike Wallace and Estee Lauder. "All looked to him to provide a polished, well-ordered backdrop for their high-profile lives," Jura Koncius wrote in *The Washington Post*. "His decorating never upstaged them."

"I have absolutely no interest in a trademark style," Hampton once said. "Some would say, 'He has no style, no look.' Well, I don't get it. That isn't what I set out to do. I just set out to be a decorator, to do a good job and have fun. I've wondered with envy at people who like one thing and work at it and it becomes their realm. Those people who can say, 'I love Winterthur but I hate Lyndhurst,' those people who have these enormous, refined senses of hate. I love Winterthur, Lyndhurst, Greek Revival and French houses. Of course, I daydream constantly about English houses, and those shingle-style American houses built in 1905 full of furniture from jillions of other periods."

James B. White on

AMERICAN HIGHER EDUCATION

James Boyd White

This past academic year, L. Hart Wright Professor of Law James Boyd White visited colleges and universities as a Phi Beta Kappa Visiting Scholar. As he did so, he developed an ever sharper view of the remarkable role that higher education plays in American culture.

White visited the universities of Idaho, South Dakota, and Georgia, Alma College, Ohio Wesleyan, Southwestern University, Agnes Scott College and Kalamazoo College. "In each I spent a couple of days, giving a formal lecture, visiting classes and meeting with students and faculty informally," he explains. His formal lectures dealt with "Reading and Writing in Philosophy, Literature and Law" and "The Humanities and the Law."

He came away from each visit reinforced in his regard for the teachers and students who people such schools. "What is it, I wondered, that gets all these teachers up in the morning, off to offer once more a class about the origins of the French revolution, or Shakespeare's comedies, or basic biology?" he asks in his report for the *Phi Beta Kappa Key Reporter*. "And what is it that brings these students to class after class, arriving usually on time, having done most of the reading, performing adequately and often well on exams and papers? Not everyone meets the ideal, of course, but my impression is that all this is an enormous and collective act of faith, of belief in the value of education itself, a belief that can never be proved. These institutions, and others like them, represent a kind of institutional miracle."

Colleges and universities, he concludes, are like "the medieval cathedrals of our time."

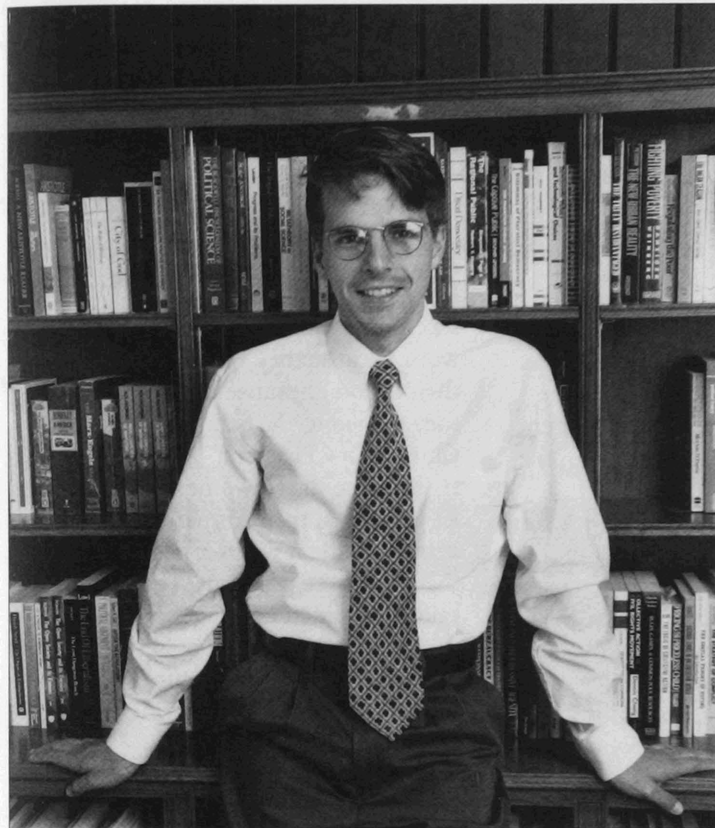
"Not as beautiful as the great cathedrals, of course — though sometimes handsome enough — but like the cathedrals in the extraordinary complexity and variety of their organization, in the simultaneous multiplicity and unity of life that they provide, and in their foundation in a faith so deeply shared that no one knows it is there."

He continues: "The comparison with the cathedral is in a way not surprising after all, for the cathedrals were the great architectural creations of the middle ages and the universities their great educational inventions. We now live in a world in which institutions of all kinds are subject to systematic attack, theoretical and political in nature, on the grounds that they restrain or modify forces that would otherwise be more rationally and efficiently expressed in the market.

"But the college or university works on very different principles from those of the market, especially in its recognition that all the participants in it have something to learn, both from the past and from each other, indeed from the very tone and atmosphere of the institution itself, which is not reducible to the views or minds of its present population."

Colleges and universities, he concludes, are like "the medieval cathedrals of our time. Not as beautiful as the great cathedrals, of course — though sometimes handsome enough — but like the cathedrals in the extraordinary complexity and variety of their organization, in the simultaneous multiplicity and unity of life that they provide, and in their foundation in a faith so deeply shared that no one knows it is there."

Steven P. Croley



Croley, Logue and Malamud named full professors

Three members of the Law School faculty have been named full professors with tenure: Steven P. Croley, Kyle D. Logue and Deborah C. Malamud.

Croley, who specializes in issues of administrative law and torts, has been a member of the Law School faculty since 1993. He received his A.B. from the University of Michigan and his J.D. from Yale Law School, where he was articles editor for the *Yale Law Journal*. He clerked for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and practiced law in Washington, D.C., before coming to the Law School.

Logue, also a graduate of Yale Law School and former articles editor for the *Yale Law Journal*, earned his bachelor's degree at Auburn University. He clerked for Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit and practiced law in Atlanta, Georgia. A member of the Law School faculty since 1993, he specializes in the tax treatment of insurance and other risk funding mechanisms and recently has drawn attention for his work in analyzing tobacco products control proposals.

Malamud joined the Law School faculty in 1992 after practicing labor and employment law in Washington, D.C. She received her B.A. from Wesleyan University and graduated *cum laude* from the University of Chicago Law School, where she was articles editor of the *University of Chicago Law Review* and a member of the Order of the Coif. She served as law clerk to Judge Louis H. Pollak of the U.S. District Court for the Eastern District of Pennsylvania and for Justice Harry A. Blackmun of the U.S. Supreme Court. Much of her recent research has centered on the bases and consequences of affirmative action.

PHOTO BY RICHARD LEE

Deborah C. Malamud

Kyle D. Logue

Dissecting cases to show the larger picture

Andrea D. Lyon

Dissecting the life histories of real cases offers insights to law students that the abstract issues of hypotheticals are hard-put to equal. Each case is different, and, to play off the popular saying, "the doing is in the details."

Clinical Assistant Professors Nick Rine and Andrea D. Lyon showcased this approach during two midday presentations in June in which they laid out the details of individual cases as examples of some of the wider-ranging aspects of legal practice. The programs were sponsored by the Office of Student Services.

Rine, dissecting "The Anatomy of a Civil Case: The Pregnancy Discrimination Cases," explained how the Michigan case had begun in 1990 when three clients were forced out of work because they were pregnant. When their union grievance brought no relief, they turned to the School's Michigan Clinical Law Program.

The case pitted women who had been let go against their former employer, who dismissed them when it became known that they were pregnant. The employer said the women no longer reliably could do their job of locating cassette tapes and compact discs on warehouse shelves, collecting them and preparing them for shipment.

A series of clinic students worked on the case for more than seven years, "the original three clients grew to a total of eight," and the case went through the

Nick Rine

"When I was in Law School it never occurred to me that sometimes the biggest decision in the case is making up your mind where you try the case. Where is the best place to protect your clients' rights?"

— NICK RINE

State Civil Rights Commission (CRC), the federal Equal Employment Opportunity Commission (EEOC), a Michigan county circuit court and the State Court of Appeals, Rine said. Principals still were awaiting the Appeals Court ruling at the time of Rine's program, so he did not name the petitioners or the amounts of damages and liability findings.

This is "a medium complexity case," Rine explained. It offered the choice of trying the case in several places: the administrative agency, a state court in one of several counties, or through federal agency proceedings and possible appeal to a Federal District Court.

"When I was in Law School it never occurred to me that sometimes the biggest decision in the case is making up your mind where you try the case," Rine said. "Where is the best place to protect your clients' rights?"

Rine and the clinic students opted for the CRC, with the idea of eventually bifurcating the elements of liability and damages. The decisions of where to take the case and trying to split its elements of liability and damages "probably doubled the value of the case," he said.

The CRC referee accepted the bifurcation proposal, decided each part of the case in favor of the employees, and awarded interest on the damages, but the full Commission reduced the award by 50 percent and eliminated the interest. The case grew more complex when some plaintiffs returned to work with the employer but later were fired and filed claims of retaliation with the EEOC. Some of the petitioners also dropped the Law School clinic and hired private attorneys.

By the time that Rine presented his program, the case had been before the Michigan Court of Appeals for two years and principals were awaiting a hearing. By late May the retaliation case was scheduled for trial in federal court.

Getting a trial date can be like the starting gun for serious negotiation, Rine said. Sometimes there can be little movement in a case until its trial date is set; then facing the choice of settling before trial or going to a court trial, opposing sides often genuinely will try to negotiate.

Over the years that the case has run, students who have worked on it have learned much of the nuts and bolts steps of filing and working a lawsuit. They've also, Rine hopes, learned something of the predilections of clients and attorneys and the records of judges. "I'm on a side, and you should take what I say in the context of my being on a side," Rine said. "Even when they are people with titles like professor or judge, people have positions on cases."

"Learning the theoretical stuff in the classroom is important," he added. "Learning how it works in the courtroom is important, too."

The following week, in another presentation, Lyon retraced her battle to get Madison Hobley off of Illinois' death row, where he had spent 11 years. Last March the Illinois Supreme Court, in *The People of the State of Illinois v. Madison Hobley* 81609, 1998, reversed the lower court's refusal to grant Hobley an evidentiary hearing as part of his post-conviction petition.

Here are the facts of the case: In 1987, a fire on the South Side of Chicago killed seven people, including Hobley's wife and infant son. Hobley was charged and convicted of murder and arson and sentenced to death. In the automatic direct appeal, the Illinois Supreme Court upheld his conviction and sentence. The trial judge also dismissed the post-conviction petition, so Lyon turned to the state Supreme Court.

"This is a case where strong evidence exists showing that Madison Hobley is innocent of the arson and murders for which he has been sentenced to die," she said in her brief to the Supreme Court.

"This is a case where exculpatory fingerprint testing reports regarding the gasoline can used as an exhibit at his trial for arson and murder were not turned over to him, and where a second gasoline can found at the scene of the fire was hidden from him by a ruse of the police who filed it under a police record number ('RD number') with which he was not provided at trial.

"Once Mr. Hobley discovered the existence of the second gasoline can during his investigation for his petition for post-conviction relief, the police destroyed the second can within a month of receiving Mr. Hobley's subpoena seeking its production as well as all information concerning it.

"If it were not enough that material, central and exculpatory information was hidden from Mr. Hobley, the juror misconduct which stands uncontroverted in this record certainly shows a trial that had spun out of control and a verdict which is not only unfair, but just plain wrong. Mr. Hobley presented direct evidence from the jurors themselves that, among other things, they were threatened during deliberations, that the jury foreman, who was himself a police officer, held himself out during deliberations to be an expert on the 'appropriate' behavior of the police in this case and 'testified' to his fellow jurors on that subject, that the same foreman made references to his gun, which frightened some jurors and engaged in intimidating behavior toward other jurors, and that some jurors simply flat out disobeyed the sequestration order of the trial court.

"Madison Hobley presented compelling evidence that his trial did not even come close to being a fair one. Yet the lower court dismissed his second amended post-conviction petition

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without holding an evidentiary hearing and without presuming the facts pled by Mr. Hobley to be true, notwithstanding that the law required the court to do so. The Illinois Post-Conviction Hearings Act has an essential purpose — to ensure that justice is done. The lower court failed to effectuate that purpose, and in failing to do so an innocent man may die. The strong evidence of Mr. Hobley's actual innocence and the uncontroverted evidence of his constitutionally defective trial show that Mr. Hobley is entitled to a new trial."

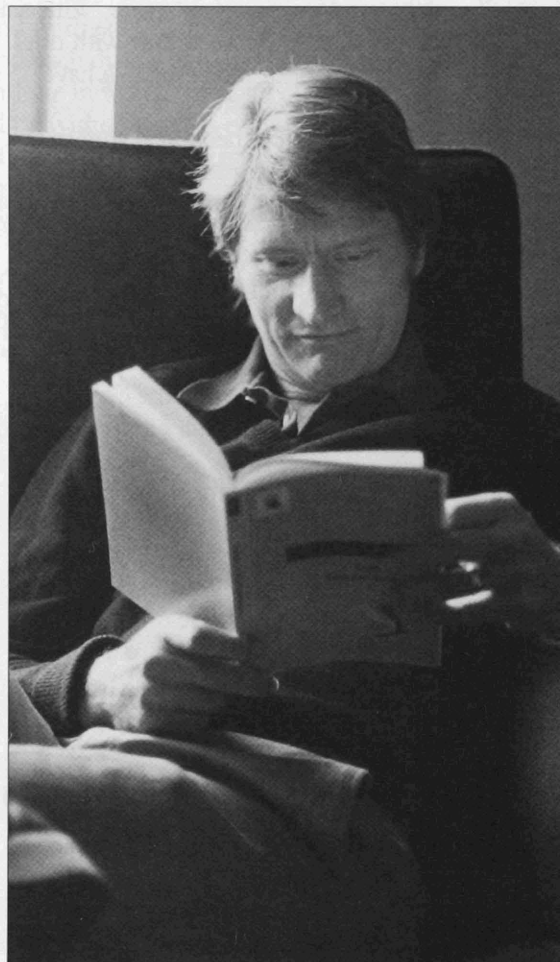
Lyon stressed these matters in her oral argument before the court, where she wrapped her facts into a package that reminded the justices that a man's life was at stake in this case. Following her own guideline to argue "in a way that is legally cognizable and emotionally compelling," she stressed gaps in procedure that had kept Hobley on death row. "Why no questions?" from the lower court in the post-conviction petition process? she asked. "Why no explanations?" from police about evidence that was hidden or destroyed?

"When I finished," Lyon told her Hutchins courtyard audience, "one of the justices of the Illinois Supreme Court asked the prosecution the same questions, and they made the cardinal error in oral argument — they didn't answer the question. They evaded it."

You have to learn to both believe and not believe everything the prosecution says, Lyon said. "I don't want to make you cynical. I just want to make you want to keep fighting."

Regan named Fellow of American Academy of Arts and Sciences

Donald H. Regan, William W. Bishop, Jr., Collegiate Professor of Law, has been elected a Fellow of the American Academy of Arts and Sciences. Regan is the ninth current Law School faculty member elected to membership in the Academy, which was founded in 1780 to cultivate the arts and sciences.



Donald H. Regan

Regan, a graduate of Harvard and the University of Virginia Law School, was a Rhodes Scholar at Oxford University, where he earned a degree in economics. He also holds a Ph.D. in philosophy from the University of Michigan, where he began his academic career in 1968.

Regan's election to the prestigious Academy is the most recent to recognize the standing of Law School faculty members. Other Law School faculty members who are Fellows of the Academy are Professors Phoebe Ellsworth, Bruce W. Frier, Yale Kamisar, Richard O. Lempert, '68, Terrance Sandalow, A.W. Brian Simpson, Joseph Vining and James Boyd White. In addition, University of Michigan President Lee C. Bollinger, a former Dean of the Law School, is a member of the Academy.

A specialist in constitutional law and moral and political philosophy, Regan is the author of *Utilitarianism and Co-operation*, which shared the Franklin J. Matchette Prize of the American Philosophical Association for 1979-80.

The Academy includes more than 4,400 Fellows and some 600 Foreign Honorary Members. It is headquartered at Cambridge, Massachusetts, and has regional centers in Chicago and Irvine, California.

Child and family agencies honor Duquette

Agencies that work for the welfare of children continue to recognize the contributions made by Clinical Professor of Law Donald N. Duquette, Director of the Law School's Child Advocacy Law Clinic. Last spring the Michigan Federation of Private Child and Family Agencies honored Duquette with its Gerald G. Hicks Child Welfare Leadership Award.

Duquette previously had received the Outstanding Legal Advocacy Award from the National Association of Counsel for Children and the Adoption Activist Award from the North American Council on Adoptable Children.

His book, *Advocating for the Child in Protection Proceedings*, "formed the conceptual framework for the first national evaluation of child representation, mandated by the U.S. Congress," the Federation said in announcing the award. "Here in Michigan his leadership in child protection is widely recognized."

Duquette has served on the Governor's Task Force on Children's Justice each year since its creation in 1992. He also has worked with the Coleman Commission on Permanency Planning, the Riley Supreme Court Probate Court Task Force and the State Bar of Michigan's Children's Task Force. He co-chaired the Task Force from 1993-95.

He spent the 1998-99 academic year in Washington, D.C., working with the U.S. Children's Bureau on President Clinton's Initiative on Adoption and Foster Care. (Duquette and others discuss his work on page 5.)

Donald N. Duquette testifying before a joint state House-Senate hearing last spring at Lansing.

In Harm's Way gives voice to pornography's victims

For the decade from 1983-93, officials in Minneapolis, Indianapolis, Los Angeles and Boston held public hearings as part of efforts to develop local ordinances to forbid pornography as sex discrimination and therefore a civil rights violation.

In Harm's Way: The Pornography Civil Rights Hearings, collects the testimony from these hearings into a searing testament to the courage and degradation of victims of pornography who came forward to testify. Published by Harvard University Press, *In Harm's Way* appeared last March. It is edited by Elizabeth A. Long Professor of Law Catharine A. MacKinnon and feminist writer Andrea Dworkin, who together developed the proposed ordinances.

"For those who survived pornography, the hearings were like coming up for air," MacKinnon writes in her introduction. "Now the water has closed over their heads once again. The ordinance is not law anywhere."

Despite legislative and judicial defeat, supporters of the ordinances have made inroads into power bases that pornography commands. As MacKinnon writes:

"Most stunningly, Congress in 1994 adopted the Violence Against Women Act, providing a federal civil remedy for gender-based acts of violence such as rape and battering. In so doing, Congress made legally real its understanding that sexual violation is a practice of sex discrimination, the legal approach that the antipornography civil rights ordinance pioneered in legislative form.

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"More broadly, the exposure of pornography's harms has moved the ground under social theory across a wide range of issues. The place of sex in speech, including literature and art, and its role in social action has been thrown open to reconsideration, historically and in the present. The implications of visual and verbal presentation and representation for the creation and distribution of social power — the relation between the way people are imaged and imagined to the ways they are treated — are being rethought. The buying and selling of human flesh in the form of pornography has given scholarship on slavery a new dimension. More has been learned about the place of sexuality in ideology and about the importance of sexual pleasure to the exercise of dominant power. The hearings are fertile ground for analyzing the role of visceral belief in inequality and inferiority in practical systems of discrimination, and of the role of denial of inequality in maintaining that inequality. The cultural legitimation of sexual force, including permission for and exoneration of rape and transformation of sexual abuse into sexual pleasure and identity is being newly interrogated. New human rights theories are being built to respond to the human rights violations unearthed. As events that have been hidden come to light, the formerly unseen appears to determine more and more of the seen. The repercussion for theory, the requisite changes in thinking on all levels of society, have only begun to be felt."

But on the down side for supporters: "The debate over pornography that was reconfigured by the survivors' testimony to make harm to women indispensable to the discussion has increasingly regressed to its old right/left morality/freedom rut, making sexual violence against women once again irrelevant and invisible. Politicians are too cowed by the media even to introduce the bill. Truth be told, for survivor and expert both, it has become more difficult than it was before to speak out against pornography, as those in these hearings did. The consequences are now known to include professional shunning, and blacklisting, attacks on employment and publishing, deprivation of research and grant funding, public demonstration, litigation and threats of litigation, and physical assault."

ACTIVITIES

Professor of Law **José Alvarez** delivered a series of lectures on "The U.S. Constitution and Foreign Affairs" in May at Beijing University, and Fudan University, Shanghai, in the People's Republic of China. In May he also participated in a public forum held in Ann Arbor by U.S. Representative Lynn Rivers, D-Michigan, on "The United Nations: Cooperation or Domination?" In March he took part in a program on "Understanding Compliance with International Law: The Case of Soft Law," as part of the International Studies Association's annual meeting in Minneapolis.

Thomas M. Cooley Professor of Law **Edward H. Cooper** has begun duties as Reporter for the Judicial Conference Working Group on Mass Torts and continues to serve as Reporter for the Advisory Committee on the Federal Rules of Civil Procedure. He also served as adviser for the American Law Institute's Federal Judicial Code Project and Transnational Procedure Project. In April he took part in a meeting of European and Israeli advisers for the Transnational Procedure Project at Bologna, delivered a paper on class actions at the University of Arizona's Institute for Law and Economic Policy's "Courts on Trial" symposium and addressed the annual plenary session of the American Bar Association Litigation Section in New York. Last October he delivered a paper at a two-day symposium honoring Charles Alan Wright at the University of Texas.

Professor of Law **Steven P. Croley** spoke on "Defenses in U.S. Products Liability Law" in May at the Products Liability Conference of the Association of Italian Alumni of Yale Law School at the University of Bologna Faculty of Law in Italy.

Douglas A. Kahn, Paul G. Kauper Professor of Law, spoke on "Tax Planning Opportunities With Life Insurance" at the Washtenaw County Estate Planning Association in February.

Henry M. Butzel Professor of Law **Thomas E. Kauper**, '60, is a member of the ABA Antitrust Section's Task Force on International Antitrust and Trade Policy.

Margaret A. Leary, Director of the Law Library and adjunct instructor in the Law School, was named 1998 Volunteer of the Year by Habitat for Humanity of Michigan. As President of the Huron Valley Habitat for Humanity, she led the way to hiring a full-time executive director, part-time financial administrator, and part-time construction supervisor and oversaw the construction of five houses during the Huron Valley group's '97 Blitz Build. "Ms. Leary has been a true inspiration to the Huron Valley Habitat affiliate, providing the leadership to build homes for needy family partners at three times the rate prior to her presidency,"

Habitat for Humanity of Michigan said in announcing the award.

Francis A. Allen Collegiate Professor of Law **Richard O. Lempert**, '68, has been named to the Editorial Board of *Law & Society Review*, the journal of the Law and Society Association (LSA). In June he delivered a paper, "The Death Penalty Today: Is There Even Slight Deterrence?", at the LAS Annual Meeting in Aspen; the paper, co-authored and co-delivered with law student Katherine Barnes, 1L, used a new research model to search for deterrent effects of capital punishment. (See story page 23.) On June 30 he completed a term as chairman of the University of Michigan Sociology Department.

Professor of Law **Kyle D. Logue**, addressing the Law School's Honors Convocation in May, provided a fictionalized description of the "ideal" first day of Tax I. In March he spoke on "How Best to Tax Cigarettes: Ex Ante or Ex Post?" at the Joseph A. Cannon Memorial Law Review Symposium and on "Tobacco Regulation: Personal Rights v. Public Welfare" at the University of Toledo Law School. In February he testified on his Smokers' Compensation Proposal before the U.S. Senate Committee on Labor and Human Resources.

Professor of Law **Deborah C. Malamud** spoke on "The Jew Taboo: Jewish Difference and the Affirmative Action Debate" at The Ohio State University Law School in April as part of the symposium "The Future of *Bakke*: Socio-Legal Perspectives on Affirmative Action in Education." The same month she spoke on "Affirmative Action, Diversity and the Black Middle Class" at the University of Colorado Law School as part of the symposium "Affirmative Action: Diversity of Opinions."

Professor of Law **Richard H. Pildes** was a visiting lecturer on comparative constitutional law in June at the Zussman Institute for Israeli Judges in Jerusalem. He spent the 1997-98 academic year as a fellow in the Program in Ethics and the Professions at Harvard University and served as a Visiting Professor of Law at Harvard. He also is a court-appointed independent expert to the Federal District Court for the Eastern District of Michigan to provide formal reports and testimony regarding Voting Act challenges to the reorganization of the Michigan system of criminal trial courts.

Thomas M. Cooley Professor Emeritus of Law **John W. Reed** served as editor of volumes 31-32 of the *International Society of Barristers Quarterly* through 1997.

William W. Bishop, Jr., Collegiate Professor of Law **Donald H. Regan** spent the summer on a Visiting Fellowship at Australian National University, where he gave talks to the Law Program and to the Philosophy Program in the Research School of Social Sciences. He also spoke to the Philosophy Department at Flinders University in Adelaide, Australia. In addition, Regan was named to the American Academy of Arts and Sciences (see story page 40).

Professor of Law **Mathias W. Reimann**, LL.M., '83, is teaching a course on American product liability law this fall in the Graduate Program of the University of Paris I (the Sorbonne).

Clinical Professor of Law **Paul D. Reingold**, Director of the Law School's Clinical Office, serves on the executive committee of the Clinical Law Section of the American Association of Law Schools. He chaired the planning committee for the 1997 Midwest Clinical Conference, held at the Law School last November.

Theodore J. St. Antoine, '54, James E. and Sarah A. Degan Professor Emeritus of Law, has been chosen President-Elect of the National Academy of Arbitrators for 1998-99. In recent months he has spoken on labor law and labor arbitration at programs in Chicago, Lansing, Montreal, Detroit, Nashville, Orlando, San Diego, San Francisco and Washington, DC.

Clinical Assistant Professor of Law **Grace Tonner**, Director of the Law School's Legal Practice Program, addressed the Bar Association of Beijing, China, in June on "Doing Research and Writing in American Law." That same month she was a panelist at the Southeastern Conference of the American Association of Law Schools to discuss the question, "Is There A Better Way to Teach Legal Writing in the First Year?" She also serves as assistant editor of the *Journal of the Legal Writing Institute.*

Lewis M. Simes Professor of Law **Lawrence W. Waggoner**, '63, serves as Reporter for the Restatement (Third) of Property, Wills and Other Donative Transfers and as Director of Research for the Joint Editorial Board for the Uniform Probate Code. He also is an adviser for the Restatement (Third) of Trusts.

L. Hart Wright Collegiate Professor of Law **James B. White** spent the 1997-98 academic year as a Phi Beta Kappa Visiting Scholar (story on page 36). In June he delivered the lead paper at a colloquium on "Law and Literature" at University College, London.

James J. White, '62, Robert A. Sullivan Professor of Law, spoke on "UCC Update: Recent Case Developments and Code Revisions in UCC Articles 2, 2A, 2B and 9" in June for a seminar for the Oregon State Bar Continuing Legal Education program. In April he spoke on "Legal and Economic Aspects of the Tobacco Settlement" at the University of Kansas Law School, in January he conducted a Short Course on negotiation at the University of Arizona Law School, and in November he delivered the Forrest B. Winbert Memorial Fund Lecture at the Cleveland-Marshall College of Law at Cleveland State University.

Ted St. Antoine: An Appreciation

— BY TERRANCE SANDALOW

The following essay is based upon remarks that Edson R. Sunderland Professor of Law and former Dean of the Law School Terrance Sandalow made last May upon the occasion of the retirement of James and Sarah A. Degan Professor of Law and former Dean of the Law School Theodore J. St. Antoine, '54. A version appears in 96 Michigan Law Review *as part of a tribute to St. Antoine. Publication here is by permission. The issue also contains articles in praise of St. Antoine's career and impact by Benjamin Aaron, Professor Emeritus at UCLA, and by the Hon. Harry Edwards, '65, Chief Judge, U.S. Court of Appeals, Washington, D.C.*

As I began to think of what I might say this evening, it occurred to me that I was fortunate the occasion had not been billed as a roast. It would not be easy — and, indeed, might be sacrilegious — to direct attention to the foibles of a man whom thousands call "the Saint." That title, by which he has been known by generations of students, is, of course, a measure of their affection and their esteem for him. For more than three decades, Ted has been one of our most popular teachers. Although I have learned a great deal from him over the years — though probably not as much as I should have, and surely not as much as Ted thinks I should have — I have never observed his classes. And so I must leave it to others to sing his praise as a teacher. Unfortunately, I am also not competent to comment on the importance of his scholarly achievements or on his many contributions to the profession, both as an arbitrator and as a leading member of the labor bar.

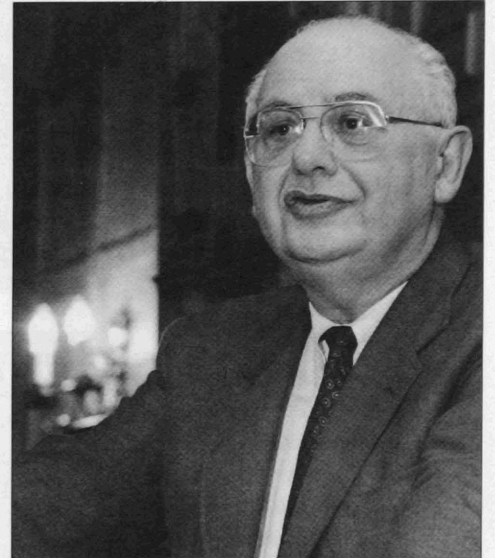
Ted and I have, however, been colleagues for 32 years, for all but one of the years that he has served as a member of the faculty. I have, therefore, had more opportunity than all but a few people to observe and consequently to appreciate the importance of his contributions as one of the Law School's leading citizens. Younger members of the faculty, those who have only known Ted as an august personage, may not appreciate that in his early years on the faculty he was one of a band of Young Turks who, in the view of at least some of their elders, were intent upon depriving Michigan students of a

sound legal education. Of course, being Ted, he was a very sober Young Turk. (I should explain that by sober I mean that Ted's manner was, as my dictionary puts it, "marked by seriousness, gravity, or solemnity," not that he was, in the dictionary's primary definition of the word, "habitually abstemious in the use of alcohol." Far from it, for in those days social occasions at the St. Antoines' were brightened by a bottle of Tanqueray gin that Ted kept in his freezer so that his martinis would not be diluted by ice — or, if truth be known, by much vermouth either. And the martinis were not only for guests.)

The issues that divided the faculty in those days were central to the intellectual life of the Law School. Faculty members held widely differing views about the extent to which allied disciplines should be incorporated into the curriculum, about the importance of adding to the faculty individuals competent in those disciplines, and about clinical education. Those issues have long since passed into history. At the time, however, they threatened to create deep fissures in the faculty. Ted's skills as a negotiator and mediator and the soundness of his judgment played a vitally important role not only in bringing the issues to a happy conclusion, but in doing so in a way that held the faculty together during a difficult time. Those qualities, together with universal respect for his integrity and confidence that he would not pursue an agenda different from its own, have repeatedly led the faculty to turn to Ted, initially to become its Dean and later to handle a variety of other sensitive assignments.

Ted has, without fail over more than three decades, justified the faculty's confidence in him. Not the least of his achievements, it should be said, is the remarkable underground addition to the library. The structure is a permanent tribute to Ted, without whose prodigious efforts and considerable diplomatic skills it could not have been built. Ted has said, I know, that he would prefer not to be remembered for the addition. But in this, I believe, he is mistaken. Curricular innovations come and go and, it must be said, so do faculty. But the addition will endure when all of us are forgotten. Anyone who has spent time with our alumni will appreciate just how much their affection for this place and their sense of the importance of what goes on here depends upon the buildings that make up the Quad. Ted's addition, for that is how I think of it, will continue to enrich the experience of students for generations to come. He should be proud of it, and we should be grateful to him for it.

While he was Dean, Ted often said that his goal was to build a faculty so strong that he could not gain appointment to it. In that respect, I believe he failed, or at least I hope he did, for no institution can prosper without individuals who bring to it the strengths and the dedication that Ted has brought to the Law School during the past 33 years.



Ted's skills as a negotiator and mediator and the soundness of his judgment played a vitally important role not only in bringing the issues to a happy conclusion, but in doing so in a way that held the faculty together during a difficult time. Those qualities, together with universal respect for his integrity and confidence that he would not pursue an agenda different from its own, have repeatedly led the faculty to turn to Ted, initially to become its Dean and later to handle a variety of other sensitive assignments.

— TERRANCE SANDALOW

Visiting faculty offer new insights, fresh perspectives in and out of classroom

Each year the Law School welcomes a variety of visiting faculty members whose training and experience enrich the curriculum in an exchange that also inspires the visitors themselves. Students benefit from the different, fresh approaches visitors bring to the classroom, as well as the formal programs and informal conversations that are so significant to the Law School years.

In addition, the Law School has launched a special program of continuing ties with highly regarded faculty members from universities outside of the United States who have agreed to teach here regularly over the next several years. These Affiliated Overseas Faculty add a valuable component to the Law School's international programs as well as domestic law programs. Here are the Affiliated Overseas Faculty, the visitors for the 1998-99 academic year and visitors for the current fall term:

Affiliated Overseas Faculty

Christopher McCrudden is teaching two courses this fall: European & Comparative Human Rights Law and Incorporating International Human Rights Law into Domestic Law.

Bruno Simma is co-teaching International Law with Assistant Professor of Law Michael Heller in the fall and also is teaching Modern International Lawmaking.

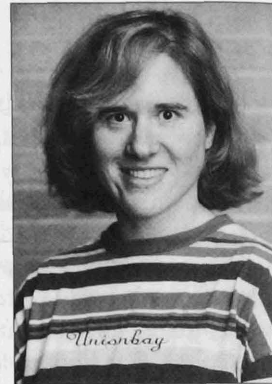
For more on the Affiliated Overseas Faculty program, see story on page 79.

1998-99 Academic Year

Cynthia Baker, '88, is teaching Bankruptcy this fall and will teach Commercial Transactions and Real Estate Restructuring in the winter term. Baker, a member of the faculty of Emory University Law School, specializes in contracts and commercial transactions.

John Beckerman is teaching Legal Profession and Legal Ethics in the fall and Civil Procedure and Enterprise Organization in the winter. Beckerman has a doctorate in history from the University of London and his J.D. from Yale Law School. A visiting faculty member during the 1997-98 academic year also, he previously has taught at Yale Law School, Rutgers-Camden and Benjamin Cardozo Law School. He clerked for the Hon. José A. Cabranes, U.S. District Judge for the District of Connecticut, and has practiced in New York City.

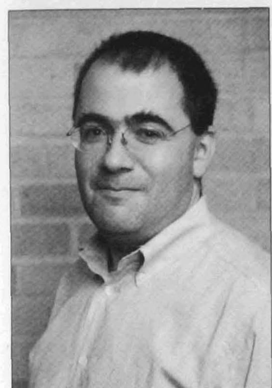
Omri Ben-Shahar is teaching Contracts this fall and Law and Economics in the winter term. Ben-Shahar holds a doctorate in economics and multiple law degrees. He is a Professor of Law and Economics at Tel-Aviv University, a research fellow at the Israel Democracy Institute, and a panel member of Israel's Antitrust Court. He has written widely in law and economics, including the areas of international agreement enforcement and criminal law. He is visiting at the Law School for two years.



Anita Bernstein is teaching Torts this fall and Legal Profession and Legal Ethics and Products Liability in the winter term. A Professor at Chicago-Kent Law School, Bernstein has practiced law in New York City and taught courses including products liability, comparative tort law and legal system analysis.

Laurence D. Conner, '65, is teaching Mediating Legal Disputes in the fall and Alternate Dispute Resolution in the winter. A specialist in complex business and tort litigation, trials, appeals and alternative dispute resolution, he is a senior litigation member of Dykema Gossett in Detroit. He chairs the Michigan State Bar section on alternative dispute resolution and has

published several articles on alternative dispute resolution. He earned his B.A. from Miami University.



Hanoch Dagan is teaching Unjust Enrichment this fall and will teach Legal Realism and Property Theory in the winter term. He is a lecturer on the Buchman Faculty of Law at Tel-Aviv University, where he has taught property law, jurisprudence and legal realism. He has been an associate with an Israeli law firm and has written widely on property law and contract law.

Cyril Moscow, '57, is teaching Enterprise Organization and Business Planning for Closely Held Corporations in the fall and Business Planning for Publicly Held Corporations in the winter term. The co-author of textbooks on Michigan corporate law and securities regulation, he is a partner with Honigman, Miller, Schwartz & Cohn in Detroit, where he practices corporate and securities law. He earned his A.B. at Wayne State University.

Paul H. Robinson is teaching two courses, Criminal Law and American Criminal Codes this fall; in the winter term he will teach Advanced Criminal Law. Currently Edna and Ednyfed Williams Professor of Law at Northwestern University, he formerly taught at Rutgers and Georgetown and served as a special assistant to the U.S. Attorney and counsel for the Subcommittee on Criminal Laws and Procedure of the Senate Judiciary Committee. He was one of the original commissioners of the U.S. Sentencing Commission that drafted the current Sentencing Guidelines that bind federal judges.

Fall 1998

Reuven Avi-Yonah is teaching Multi-national Enterprises and the Law, and Tax II. He is an Assistant Professor at Harvard Law School.

Paul D. Borman, '62, is teaching White Collar Crime with Nancy King, '87, (see page 48). Borman, a U.S. District Court Judge for the Eastern District of Michigan, is a former law professor at Wayne State University Law School. He has practiced privately and has served as a staff atttorney for the U.S. Commission on Civil Rights, an assistant U.S. Attorney for the Department of Justice, an assistant prosecuting attorney in Wayne County and a chief federal defender for the Detroit Legal Aid and Defender Association. Borman holds an A.B. from the University of Michigan and an LL.M. from Yale University.

Evan Caminker is teaching two courses, Introduction to Constitutional Law and Sovereignty and Federalism. Caminker is a Professor of Law at UCLA, where he has taught civil procedure, constitutional law and federal courts. He has served as an associate at a law firm in Washington, D.C. and for the Center for Law in the Public Interest in Los Angeles.

Thomas P. Gallanis is teaching Trusts & Estates I and Trusts & Estates II this term. An Assistant Professor of Law at The Ohio State University, he holds an LL.M. and a Ph.D. in English legal history in addition to his J.D. He has worked as an associate for a law firm in Chicago. At Ohio State he teaches estate and gift taxation and trusts and estates.

Carol Hollenshead, '74, is teaching the Domestic Violence Seminar. Hollenshead practices in Ann Arbor with Reach & Hollenshead, where her caseload includes representation of domestic violence victims. She has been actively involved with the Family Law Project, Domestic Violence Project and Michigan State Bar Committee on Domestic Violence. She earned her A.B. at the University of Michigan.

Robert Howse is teaching two courses this fall, International Trade and Internatonal Economic & Financial Institutions. A specialist in international trade issues, Howse teaches at the University of Toronto Law School and is Associate Director of the Centre for the Study of State and Market at the University of Toronto.

William R. Jentes, '56, is teaching Complex Litigation. A partner at Kirkland & Ellis in Chicago, he has lectured at the University of Chicago Law School and for the

Continued on page 48

Continued from page 47

American, Federal, Texas, Illinois and Chicago Bar Associations. He also has taught previously at the Law School. He earned his A.B. at the University of Michigan.

Nancy King, '87, is teaching Criminal Procedure: Bail to Post-Conviction Review and co-teaching White Collar Crime with Paul D. Borman (see page 47). King, who earned her B.A. at Oberlin College, is a Professor of Law at Vanderbilt University Law School, where she teaches civil procedure, criminal law, criminal procedure and evidence.

Marjorie Kornhauser is teaching Tax I and Tax Policy: Social, Economic, Rhetorical Aspects. Kornhauser is a Professor of Law at Tulane University, where she teaches business enterprise, business tax, estate and gift federal tax, individual federal income tax, international tax and tax policy. She has practiced privately in Cleveland.

Jeffrey Miro, '67, is teaching Real Estate Tax. Chairman at Miro, Weiner & Kramer in Bloomfield Hills, he also has lectured in taxation at Detroit College of Law and been an Adjunct Professor of Law at Wayne State University and is a member of the faculty of the Michigan Bar Review Center. Miro earned his A.B. at Cornell University and holds an LL.M. from Harvard University.

Roberta Morris is teaching Advanced Patent Law. Morris has practiced in New York City and served as Assistant General Counsel for Mount Sinai Medical Center. She holds a law degree from Harvard Law School and a doctorate in physics from Columbia University.

Maria Ontiveros is teaching two courses this fall: Alternative Dispute Resolution and Labor Law. Ontiveros formerly was an arbitration representative for the United Auto Workers and practiced as an associate with a Palo Alto law firm. She currently is on the faculty at Golden Gate University, where she teaches alternative dispute resolution, employment discrimination, evidence, and international and comparative labor law.

Rebecca Scott is co-teaching Race and Citizenship in Latin America and the U.S. with Professor of Law Richard H. Pildes. Scott is Professor of History and Chair of the History Department at the University of Michigan, and holds a joint appointment with the University's Center for Afro-American and African Studies. An authority on Latin American history, she has written three books on slavery in various Latin American countries.

FACULTY

FACULTY PUBLICATIONS

Faculty members regularly share their knowledge in the classroom, in conversations with students, colleagues and others, and in lectures to professional associations and community groups. Only publications, however, defy the ephemeral and offer the recipient the opportunity to return to the source at will. Publications also offer the freedom to take in the information, ponder it, re-evaluate it, and incorporate it at one's own time, pace and place.

Through their publications, faculty members reach audiences far beyond the classroom and the sound of their voices. Faculty members devote considerable time to this part of their work, and regularly produce an impressive body of publications that reflects the depth, variety and energy of the teachers at the University of Michigan Law School. Here is a list of faculty publications from 1996-present. The list includes items that at deadline time were scheduled for publication in 1998.

LAYMAN E. ALLEN

"Some Examples of Using Legal Relations Language in the Legal Domain: Applied Deontic Logic," 73 *Notre Dame Law Review* 535-575 (1998).

"The Legal Argument Games of Legal Relations on the Internet," *The Journal of Law and Information Science* (forthcoming) and *E-Law* (forthcoming). (Paper presented at the first Australasian Legal Information Institute Conference on Computerisation of Law via the Internet, AusLII, University of Technology, Sydney, 25-27 June 1997).

"Achieving Fluency in Modernized and formalized Hohfeld: Puzzles and Games for the Legal Relations Language," *Proceedings of the Sixth International Conference on Artificial Intelligence and Law,* June 29-July 3, 1997, University of Melbourne, Melbourne.

"From the Fundamental Legal Conceptions of Hohfeld to Legal Relations: Refining the Enrichment of Solely Deontic Legal Relations," pp. 1-26 in *Deontic Logic, Agency and Normative Systems,* Mark A. Brown and José Carmo, eds., Springer and the British Computer Society (1996). Presented at DEON '96: Third International Workshop on Deontic Logic in Computer Science, Sesimbra, Portugal (January 11-13, 1996); volume in the *Workshops in Computing* series, C.J. van Rijsbergen, ed.

JOSÉ E. ALVAREZ

"Foreword: Why Nations Behave," 19 *Michigan Journal of International Law* 303-17 (1998).

"Genocide: Then and Now," 41.2 *Law Quadrangle Notes* 72-79 (Summer 1998).

"Rush to Closure: Lessons of the Tadic Judgment," 96 *Michigan Law Review* (forthcoming).

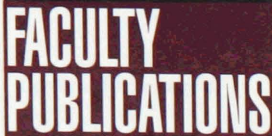
"Remedies for War Crimes," forthcoming in *Journal of the International Institute,* University of Michigan (1998).

Review: *A Critical Study of the International Tribunal for the Former Yugoslavia,* 8 *European Journal of International Law* 198-200 (1997).

Review: *Les Nations Unies et le Droit International Humanitaire* (The United Nations and International Humanitarian Law), *European Journal of International Law* (forthcoming 1998).

"A New Nuremberg?", 40.3 *Law Quadrangle Notes* 84-92 (Fall/Winter 1997).

"International Law: Some Recent Developments," 46 *Journal of Legal Education* 557-568 (1997).



FACULTY PUBLICATIONS

Revised chapter on "Financial Responsibility" for paperback edition of Christopher Joyner, ed., *The United Nations and International Law,* Christopher (1997).

"Critical Theory and the North American Free Trade Agreement's Chapter Eleven," 28 *Inter-American Law Review,* Vol. 2, 303 (1996-97).

"El Estado de derecho en Latinoamérica: problemas y perspectivas," in T. Buergenthal and A. Cancado Trindade, eds., *Estudios Especializados de Derechos Humanos, (1996).*

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

"The United States' Financial Veto," in *Proceedings of the 90th Annual Meeting,* American Society of International Law 319 (1996).

"Foreword: What's the Security Council For?", 17 *Michigan Journal of International Law* 221-28 (Winter 1996).

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

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

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

ERIC BILSKY

"Metaphysical and Ethical Skepticism in Legal Theory," *75 Denver University Law Review* 187 (1997).

LORRAY S.C. BROWN

"From Product to Process: Evolution of a Legal Writing Program" (with Durako, Stanchi, Edelman, Amdur and Connelly), 58 *University of Pittsburgh Law Review* 719 (Spring 1997).

DAVID CHAMBERS

"Polygamy and Same-Sex Marriage," 26 *Hofstra Law Review* 53-83 (Fall 1997).

"Honesty, Privacy and Shame: When Gay People Talk About Other Gay People to Nongay People," 4 *Michigan Journal of Gender & Law* 255-73 (1997).

"25 Divorce Attorneys and 40 Clients in Two Not So Big But Not So Small Cities in Massachusetts and California: An Appreciation," 22 *Law and Social Inquiry* 209-231 (1997).

"What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples," 95 *Michigan Law Review* 447-491 (November 1996). Reprinted in 40.2 *Law Quadrangle Notes* 60-70 (Summer 1997).

SHERMAN CLARK

"A Populist Critique of Direct Democracy," 112 *Harvard Law Review* (forthcoming).

"To Thine Own Self Be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine," 49 *Hastings Law Journal* (forthcoming).

"Law and Literature," 41.2 *Law Quadrangle Notes* 84-88 (Summer 1998).

EDWARD H. COOPER

Proposed revisions, Federal Rules of Civil Procedure 4, 5, 12, 26, 30, 34, 37, Admiralty Rules B, C, E (as Reporter, Advisory Committee of the Federal Rules of Civil Procedure), August 1, 1998.

1998 Supplements, Vols. 13, 13A, 15A, 15B, 16, 16B, 17, 18, *Federal Practice and Procedure,* with C.A. Wright and A.R. Miller.

"The Structure of Pretrial and Trial: A United States Perspective," a paper delivered in August, 1997, at an international symposium held by the Japanese Association of the Law of Civil Procedure and published only in Japanese.

"Civil Rule 53: An Enabling Act Challenge," 76 *Texas Law Review* 1607-35 (1998).

"The Jurisprudence of Yogi Berra," 46 *Emory Law Journal* 697-790, with G. Tonner et 37 alii (1997).

Annual 1997 Supplements, Vols. 13, 13A, 15A, 15B, 16, 16B, 17, *Federal Practice and Procedure: Jurisdiction 2d,* Vol. 18, 1st edition.

Vols. 16, 16A, 16B, *Federal Practice and Procedure: Jurisdiction 2nd* (with C.A. Wright and A.R. Miller).

"Rule 68: Freeshifting and the Rulemaking Process," in *Reforming the Civil Justice System* 108-49 (L. Kramer, ed.) (1996).

"Rule 23: Challenges to the Rulemaking Process," 71 *New York University Law Review* 13-63 and App. 64-73 (April-May 1996).

Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1 (1997).

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

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

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

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

"Class Action Rule Changes: A Midpoint Report," 39.3 *Law Quadrangle Notes* 78-81 (Fall/Winter 1996).

STEVEN P. CROLEY

"Theories of Regulation: Incorporating the Administrative Process," 98 *Columbia Law Review* 1-168 (January 1998).

"The Federal Advisory Committee Act and Good Government" (with William Funk), 14 *Yale Journal on Regulation* 451-557 (1997).

"WTO Dispute Panel Deference to National Government Decisions: The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine" (with John H. Jackson), in *International Trade Law and the GATT/WTO Dispute Settlement System,* 187-210, Kluwer (1997).

"Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness," 69 *Southern California Law Review* 1705-38 (July 1996).

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

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

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

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

DONALD N. DUQUETTE

"Lawyers' Roles in Child Protection," in Helfer, Kempe and Krugman, eds., *The Battered Child*, 5th edition, University of Chicago Press (1997).

"We Know Better Than We Do: A Policy Framework for Child Welfare Reform" (with Danziger, Abbey and Seefeldt), 31 *University of Michigan Journal of Law Reform* 93 (Fall 1997).

Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity," monograph, June 1996. Reprinted in 31 *University of Michigan Journal of Law Reform* 1 (Fall 1997). Reprinted in *A Judge's Guide to Improving Legal Representation of Children*, ABA Center for Children and the Law (1998).

REBECCA S. EISENBERG

"Can Patents Deter Innovation? The Anticommons in Biomedical Research" (with Michael A. Heller), 280 *Science* 698-701 (May 1998). Excerpted in 41.3 *Law Quadrangle Notes* 93-7 (Fall/Winter 1998).

"Do EST Patents Matter?" *Trends in Genetics* (forthcoming).

"Commentary: The move Toward the Privatization of Biomedical Research," in C. Barfield and B. Smith, eds., *The Future of Biomedical Research,* American Enterprise Institute and Brookings Institution (1997).

"Structure and Function in Gene Patenting," 15 *Nature Genetics* 125 (1997).

"Intellectual Property at the Public-Private Divide: The Case of Large-Scale cDNA Sequencing," 3 *University of Chicago Law School Roundtable* 557 (1996).

"Public Research and Private Development: Patents & Technology Transfer in Government-Sponsored Research," 82 *Virginia Law Review* 1663 (1996).

"Genomic Patents and Product Development Incentives," published as part of the proceedings of the First International Conference on DNA Sampling, Montreal, Quebec, Canada (1996).

"Intellectual Property Rights and Research Tools in Molecular Biology" (with co-authors), summary of a National Academy of Sciences workshop, National Academy Press (1997).

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

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

PHOEBE ELLSWORTH

"Psychology and Law" (with R. Mauro), in D. Gilbert, S. Fiske and G. Lindzey, eds., *Handbook of Social Psychology,* New York: McGraw Hill, 684-731 (1998).

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

MERRITT B. FOX

"Securities Disclosure in a Globalizing Market: Who Should Regulate Whom," 95 *Michigan Law Review* 2498-2632 (1997).

RICHARD D. FRIEDMAN

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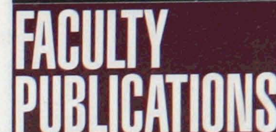

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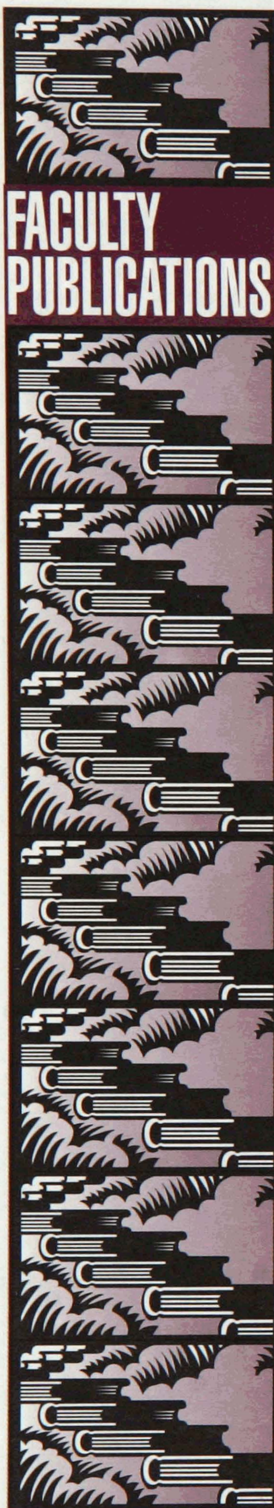

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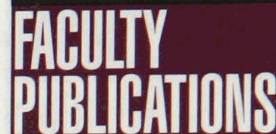

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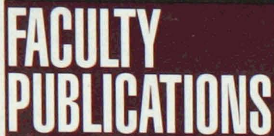

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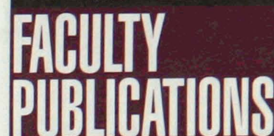

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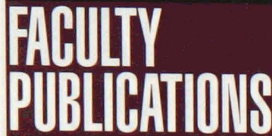

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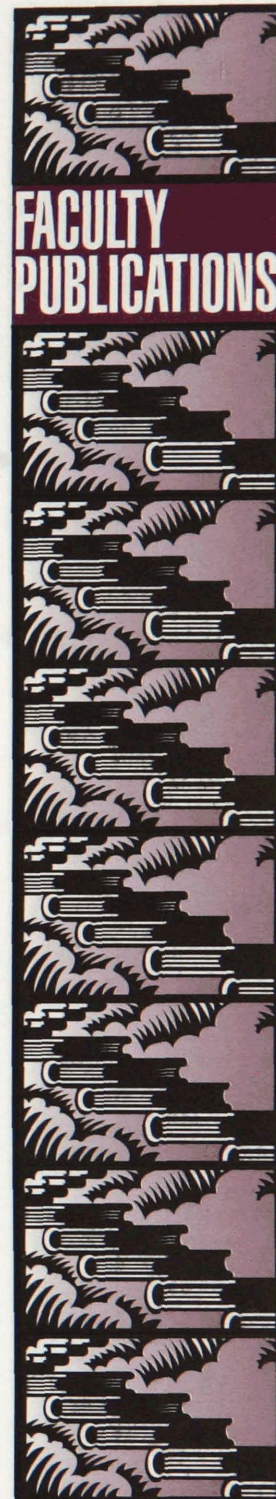

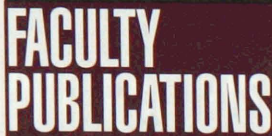

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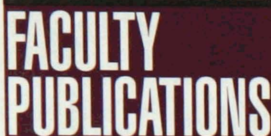

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Lynda J. Oswald

Law School graduate's solution part of Supreme Court decision

Lynda J. Oswald, '86, knew that Congress had spread a wide, loose net when it passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980. She suspected — quite correctly, according to a recent U.S. Supreme court decision — that the law's broad-brush approach would lead to considerable work for lawyers and decision making for judges.

Oswald understood that CERCLA's approach to corporate liability was unclear and she quickly noticed that some court decisions that tried to clarify the law actually put it at odds with traditional corporate liability law. "It's an awful statute," she explained during an interview in her office at the University of Michigan Business School, where she is an Associate Professor of Business Law. "Congress did a poor job of drafting it, and that has led to much more litigation than necessary."

In 1994 she published her proposal to "bring order to the current chaos of CERCLA owner and operator liability," an article called "Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control" (72 *Washington University Law Quarterly* 223-85). Her solution had two parts:

- "The courts should bifurcate the owner and operator analyses, so as to explicitly acknowledge that owner liability is indirect, and operator liability is direct."
- "The courts should abandon the pervasive control test, which has tended to discourage courts from engaging in careful, reasoned analyses of owner and operator liability."

"Bifurcation of owner and operator liability," she said, "coupled with an explicit rejection of the pervasive control test, are necessary to ensure that courts reach the correct outcome in cases involving CERCLA liability of parent corporations and other shareholders."

"Parent corporation liability under CERCLA need not be the morass that it currently is," she wrote. "The courts simply need to recognize that parent corporation liability can be either direct (based upon the parent's role as an operator) or indirect (based upon its role as an owner). Direct liability requires an actual exercise of control over the facility; indirect liability requires an application of traditional piercing law. Thus, courts have two clear, separate tests to use. Both tests are grounded in traditional legal doctrines and are reasonably easy to apply."

Last June the U.S. Supreme Court agreed, citing Oswald's work several times in its decision in *United States v. Bestfoods* et al 97-454. Like Oswald, the court noted that CERCLA "is not a model of legislative draftsmanship." A parent company, the court said, is not directly liable for cleanup of a polluted site operated by its subsidiary unless the parent company is actively involved in operation of the site.

The case involved a polluted chemical manufacturing site near Muskegon, Michigan.

Justice David Souter wrote the unanimous opinion: "The issue before us . . . is whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary. We answer no, unless the corporate veil may be pierced. But a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility."

The decision does not elaborate on the "eccentric" behavior that the court said would define a parent company as an operator of its subsidiary's facility, but it does move the question of liability under CERCLA ahead, according to Oswald. The decision also brings questions of liability under CERCLA much closer to traditional corporate liability law, she says.

A specialist in environmental law, Oswald says she will be following future CERCLA litigation attentively. She also is closely watching the development of business practices and environmental

policies in eastern Europe, where private enterprise is burgeoning and governments have little experience with environmental regulation.

"Fully one-half of my research focuses on the environmental area and questions of corporations' role in the environmental area and how companies perceive their roles," she says.

She's currently working with a Business School colleague to examine how business firms view environmental issues in the formerly communist countries of eastern Europe. In many cases, she notes, western companies that are moving into these new markets have more expertise in environmental protection than the governments that are fashioning environmental policies to regulate them.

Examining eastern European environmental issues from the perspective of business organizations has seldom been done before and Oswald finds herself in uncharted territory with the issue. But she's used to being out in front. She was one of the first Law School students to earn a joint J.D. and MBA, an accomplishment that her undergraduate study of archaeology and political science did not predict. She says she paired law and business to see how they worked together. Since the program took four years, it gave her the opportunity to become one of the handful of students who worked on the *Michigan Law Review* for three years.

After graduation she clerked for the Hon. Cornelia Kennedy, '47, of the U.S. Court of Appeals for the Sixth Circuit. She joined the University of Michigan Business School faculty in 1988 and was an Assistant Professor at the University of Florida Law School in 1993-94.

John Pickering, '40, receives William J. Brennan, Jr., Award

John H. Pickering, '40, considered U.S. Supreme Court Justice William J. Brennan, Jr., "my hero and friend," so he was especially pleased to receive the District of Columbia Bar's award named after the late jurist. "The justice's career shows the difference one person can make in the life of our nation, and is an example for all of us to follow," Pickering, a former president of the D.C. Bar, said of Brennan.

The award was presented to Pickering, senior counsel to Wilmer, Cutler & Pickering in Washington, "in recognition of his exemplary legal career dedicated to service in the public interest which has made a significant difference in the quality of American justice."

Pickering "has worked to advance the cause of civil rights, to encourage pro bono legal services to the poor and disadvantaged, and to improve the administration of justice for all," the D.C. Bar said in announcing the award in June. "Among the many notable cases during his career, Pickering worked on *NAACP v. Claiborne Hardware*, in which the U.S. Supreme Court overturned a lower court decision by holding that an organized boycott was a permissible exercise of economic speech."

Pickering used the occasion of the presentation dinner to draw on his 50-year perspective on legal practice to compare the past with the present. "Believe you me, they were not so good," he said of the "good old days." He recalled how D.C. Bar membership was limited to white men, Harvard Law School did not open to women until well after World War II, major law firms fixed associates' salaries because the legal profession was not subject to antitrust laws, law firms did not offer such things as child care, flex and part time working arrangements or maternity leave for fathers, and there was neither a Legal Services Corporation nor a tradition of pro bono service.

Today, he said, "is a great time to be a lawyer," because, among others, the D.C. Bar is a leader in providing pro bono service, women and minorities are entering the legal profession in increasing numbers and the ABA is leading the fight to save the Legal Services Corporation.

"Justice Brennan showed us the difference one person can make," Pickering said. "Let us be true to his legacy by doing what each of us can to see that the poorest among us receives justice."

PHOTO BY PETER YATES

John H. Pickering, '40

Many graduates enjoy benefits of clerkships

The learning opportunities offered by a clerkship in a federal, state, local or international court are rich and varied. Many graduates seek positions as clerks in the country's courts as a way to expand their education and learn the ways of their chosen profession before turning to the practice or teaching of law. Some serve more than one clerkship.

Clerks have the opportunity to work closely with judges and learn how judicial rulings are reached. In trial courts especially, clerks often can watch attorneys in action and learn courtroom litigation techniques as well. Some graduates, including two this year, reap insights into the country's highest court by clerking for justices at the U.S. Supreme Court.

Graduates voluntarily notify the Law School of their clerkships, and the following list reflects information that graduates have provided.

Graduates in the first section have completed one clerkship and are beginning their second clerkship this fall. This year's clerkship is listed first; the completed clerkship is listed second.

Jeffrey L. Fisher, '97
The Hon. John Paul Stevens
U.S. Supreme Court
and
The Hon. Stephen Reinhardt
U.S. Court of Appeals for the Ninth Circuit

Alex Romain, '97
The Hon. Sandra L. Lynch
U.S. Court of Appeals for the First Circuit
and
The Hon. Reginald C. Lindsay
U.S. District Court for the District of Massachusetts

Scott F. Llewellyn, '97
The Hon. Diarmid O'Scannlain
U.S. Court of Appeals for the Ninth Circuit
and
The Hon. Clarence A. Brimmer
U.S. District Court for the District of Wyoming

Eric J. Hecker, '97
The Hon. David Tatel
U.S. Court of Appeals for the District of Columbia
and
The Hon. Thelton E. Henderson
U.S. District Court for the Northern District of California

Eugene W. Whitlock, '95
The Hon. Edward B. Davis
U.S. District Court for the Southern District of Florida
and
The Hon. Alfred T. Goodwin
U.S. Court of Appeals for the Ninth Circuit

The following graduates begin their clerkships this fall. All are December 1997 or May 1998 graduates unless otherwise indicated.

Linda Terry Coberly, '95
The Hon. Stephen Breyer
U.S. Supreme Court

Scott D. Pomfret
The Hon. Norman H. Stahl
U.S. Court of Appeals for the First Circuit

Todd S. Aagaard, '97
The Hon. Guido Calabresi
U.S. Court of Appeals for the Second Circuit

Matthew A. Hamermesh
The Hon. Edward R. Becker
U.S. Court of Appeals for the Third Circuit

Michael B. Fisch
The Hon. Diana Gribbon Motz
U.S. Court of Appeals for the Fourth Circuit

Speaking From The Bench —

The Hon. Paul Borman, '62, of the U.S. District Court for the Eastern District of Michigan, explains how his work with the U.S. Civil Rights Commission during the 1960s, his first job after earning his graduate law degree, showed him "why the legal profession is so important in maintaining our belief in the Constitution, our faith in the Constitution, and exercising our rights under the Constitution." Borman spoke at the Law School in August in a program sponsored by the Office of Student Services. Named to the bench in 1994, Borman said being a judge is "the best job in the world" and advised that although partisan political activity is out of place for a judge "I think it is important that a judge get out from behind the bench and maintain vitality in the community." Asked about the value of clerkships to graduates, Borman said a clerkship is "a great experience and I recommend it." Different judges use clerks' assistance differently, he said. "I'm kind of hands on in my opinions. My clerks edit my opinions. . . I really enjoy working with clerks because they bring in new ideas, and I like them to challenge [me], not just say what you want." Borman, who has co-taught courses in white collar crime at the Law School with Alene and Allan F. Smith Professor Emeritus of Law Jerold H. Israel, was an Assistant U.S. Attorney, vice president and general counsel for a private firm, counsel to the mayor of Detroit, taught and was assistant dean at Wayne State University Law School, and served as an assistant prosecutor before being named to the bench.

Jordan B. Hansell
The Hon. J. Harvie Wilkinson III
U.S. Court of Appeals for the Fourth Circuit

Elana J. Tyrangiel
The Hon. M. Blane Michael
U.S. Court of Appeals for the Fourth Circuit

Sharad S. Khandelwal
The Hon. Carl E. Stewart
U.S. Court of Appeals for the Fifth Circuit

Daniel E. Laytin
The Hon. Carolyn Dineen King
U.S. Court of Appeals for the Fifth Circuit

Tammy L. Alspector
The Hon. David A. Nelson
U.S. Court of Appeals for the Sixth Circuit

Robert J. Lundman
The Hon. Cornelia G. Kennedy
U.S. Court of Appeals for the Sixth Circuit

Edward M. Rossman
The Hon. R. Guy Cole, Jr.
U.S. Court of Appeals for the Sixth Circuit

Nicole B. Young
The Hon. James L. Ryan
U.S. Court of Appeals for the Sixth Circuit

Robert J. Maguire
The Hon. Andrew J. Kleinfeld
U.S. Court of Appeals for the Ninth Circuit

Mary T. Mitchell
The Hon. Michael A. Hawkins
U.S. Court of Appeals for the Ninth Circuit

Tung Chan
The Hon. Stephanie K. Seymour
U.S. Court of Appeals for the Tenth Circuit

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Susan E. Mortensen
The Hon. Deanell R. Tacha
U.S. Court of Appeals for the
Tenth Circuit

John J. Molenda
The Hon. Alan D. Lourie
U.S. Court of Appeals for the
Federal Circuit

Gregory C. Gerdes, '97
The Hon. Evan J. Wallach
U.S. Court of International
Trade

Josh F. Oboler
The Hon. Delissa Ridgeway
U.S. Court of International
Trade

Jason P. Gluck
The Hon. Roger Andewelt
U.S. Court of Federal Claims

Brian R. Hinton
The Hon. William H. Albritton III
U.S. District Court for the
Middle District of Alabama

Geula J. Basinger and
Scott L. Darling
The Hon. A. Andrew Hauk
U.S. District Court for the
Central District of California

Alexandra W. Miller
The Hon. William D. Keller
U.S. District Court for the
Central District of California

Jason De Bretteville
The Hon. Vaughn R. Walker
U.S. District Court for the
Northern District of California

Mark R. Gordan
The Hon. Richard P. Matsch
U.S. District Court for the
District of Colorado

Gillian N. Flory
The Hon. Colleen Kollar-Kotelly
U.S. District Court for the
District of Columbia

Elizabeth A. O'Brien
The Hon. Orinda D. Evans
U.S. District Court for the
Northern District of Georgia

Anthony S. Baish
The Hon. Suzanne B. Conlon
U.S. District Court for the
Northern District of Illinois

Natalie M. Cadavid, '95
The Hon. Harry D. Leinenweber
U.S. District Court for the
Northern District of Illinois

Julie C. Rodriguez
The Hon. Joan B. Gottschall
U.S. District Court for the
Northern District of Illinois

David A. Agay
The Hon. Paul E. Riley
U.S. District Court for the
Southern District of Illinois

Samantha J. Morton
The Hon. Morton A. Brody
U.S. District Court for the
District of Maine

Garrett B. Duarte, '94
The Hon. Deborah Chasanow
U.S. District Court for the
District of Maryland

Kevin V. Ruddy
The Hon. Robert E. Keeton
U.S. District Court for the
District of Massachusetts

William E. Dornbos
The Hon. John Feikens
U.S. District Court for the
Eastern District of Michigan

Lewis H. Miller
The Hon. Gerald E. Rosen
U.S. District Court for the
Eastern District of Michigan

Brian A. Salvan
The Hon. Paul Borman
U.S. District Court for the
Eastern District of Michigan

Shana G. Radcliffe
The Hon. David W. McKeague
U.S. District Court for the
Western District of Michigan

Bryan R. Walters
The Hon. Gordon J. Quist
U.S. District Court for the
Western District of Michigan

Jason D. Sanders
The Hon. Frederic Block
U.S. District Court for the
Eastern District of New York

Zachary M. Ratzman
The Hon. Harold Baer, Jr.
U.S. District Court for the
Southern District of New York

Tyler B. Robinson
The Hon. Thomas P. Griesa
U.S. District Court for the
Southern District of New York

Stacy A. Berman
The Hon. James G. Carr
U.S. District Court for the
Northern District of Ohio

Kathleen M. Marcus
The Hon. David A. Katz
U.S. District Court for the
Northern District of Ohio

Joel B. Kalodner
The Hon. Jan E. DuBois
U.S. District for the Eastern
District of Pennsylvania

Matthew N. Shea
The Hon. Thomas N. O'Neill, Jr.
U.S. District Court for the
Eastern District of Pennsylvania

Kelly L. Schmitt
The Hon. Clarence A. Brimmer
U.S. District Court for the
District of Wyoming

Curtis J. Weidler
The Hon. E. Stephen Derby
U.S. Bankruptcy Court for the
District of Maryland

Jocelyn R. Normand
The Hon. Michael L. Bender
Colorado Supreme Court

Ann E. Jochnick
The Hon. Ellen Ash Peters
Connecticut Supreme Court

Carl J. Schifferle
The Hon. Noel Kramer
District of Columbia Superior
Court

Andrew R. Gifford
The Hon. Robert C. Buckley
Illinois Court of Appeals for the
First District

Daniel J. Brown
The Hon. Patricia Boyle
Michigan Supreme Court

Ethan D. Dettmer and
Sean F. Kelly
The Hon. James H. Brickley
Michigan Supreme Court

Diana S. Ortiz
The Hon. Conrad L. Mallett, Jr.
Michigan Supreme Court

Noah D. Hall
The Hon. Alexander M. Keith
Minnesota Supreme Court

Matthew S. Volkert
The Hon. Duane Benton
Missouri Supreme Court

Long-time soccer leader Alan I. Rothenberg, '63, right, winner of the National Soccer Hall of Fame's first National Soccer Medal of Honor, enjoys the occasion with former U.S. Secretary of State Henry Kissinger, left, who presented the award, and Will Lunn, President of the National Soccer Hall of Fame.

Soccer Hall of Fame honors Rothenberg, '63

LIKE A BREAKAWAY DEFENSEMAN headed toward an empty net, U.S. soccer has a place reserved for it on the sport's worldwide scoreboard. A youngster among organized and professional sports in this country, soccer is growing exponentially in popularity — as anyone who has driven by a soccer field or shuttled kids to and from games will testify.

Much of the inspiration for this growth is Alan Rothenberg, '63, until recently President of the U.S. Soccer Federation and mastermind behind World Cup USA '94, the most successful World Cup in the history of the world soccer championship competition.

The National Soccer Hall of Fame recognized Rothenberg's pivotal role this year by presenting him with its first National Soccer Medal of Honor for his role in developing and changing soccer. The Hall of Fame is located at Oneonta, New York.

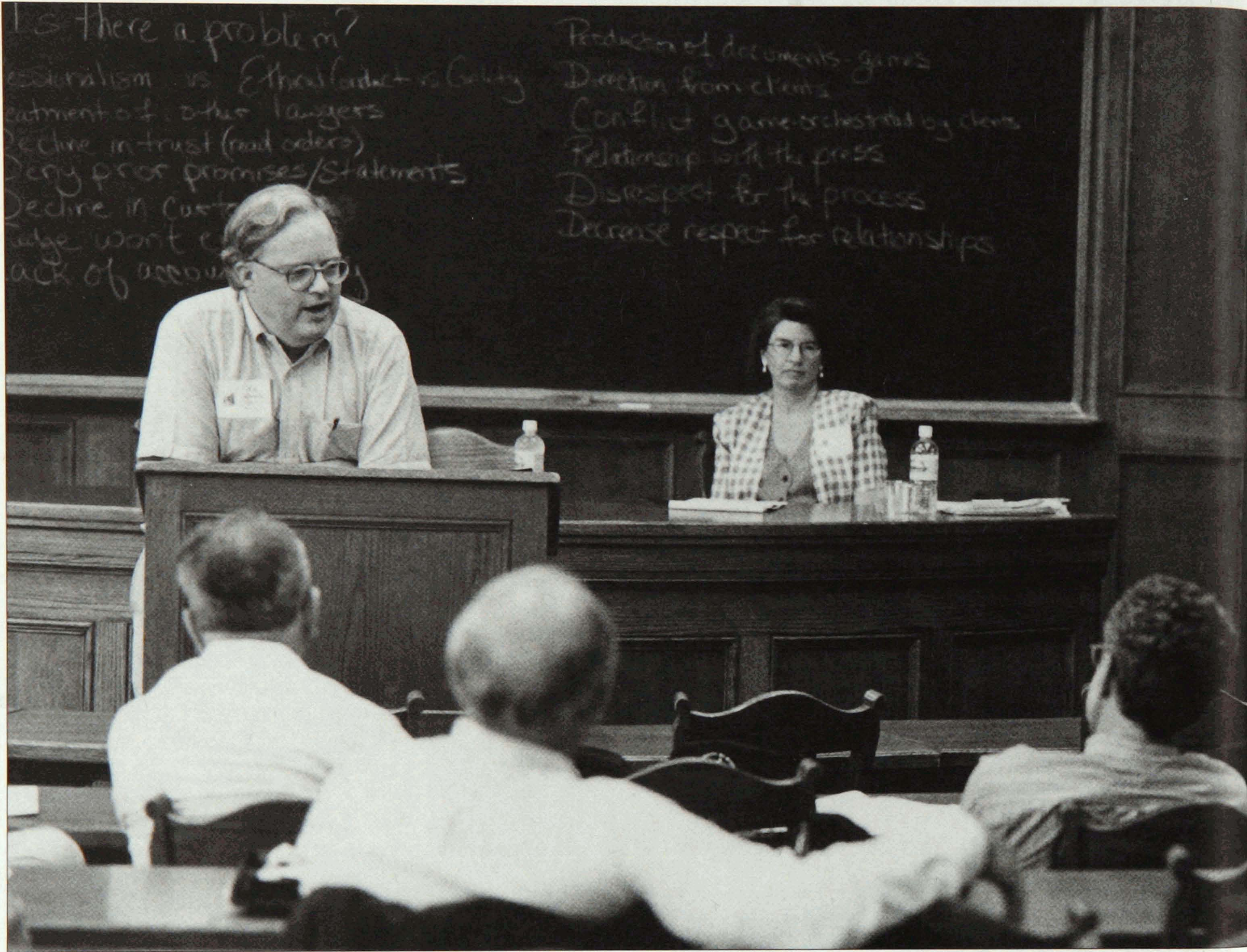
Known for putting in 18-hour work days and for an exacting attention to detail, Rothenberg used the occasion to credit the thousands of known and unknown supporters who have been instrumental in the growth of the sport. "I accept this honor," he said, "on behalf of the millions of players, coaches, referees, administrators and fans whose passion and dedication to the sport has elevated soccer to its current lofty position."

Lofty is right. Major League Soccer began in the U.S. in 1996, and the league honored Rothenberg by naming its championship trophy the Alan I. Rothenberg Trophy. The new professional league grew out of the success of World Cup USA '94, the most successful World Cup in the competition's then-64-year history. The surplus of nearly $80 million from World Cup USA '94 almost quadrupled initial estimates and made it possible to establish the U.S. Soccer Foundation, which has distributed $7 million in grants over the past three years.

"I can't imagine how it could have gone better," Rothenberg told *Law Quadrangle Notes* shortly after the conclusion of World Cup '94. "It was magical. It went better than anyone expected, including me. No one was more outspoken than I in predicting success, but it exceeded even my expectations."

Rothenberg, a senior litigation partner with Latham & Watkins in Los Angeles, has been involved with soccer for about 20 years. He was an owner of the National American Soccer League's Los Angeles Aztecs from 1977-80 and was a member of NASL's Board of Directors from 1977-80. He also has served on the National Basketball Association Board of Governors and as President of the National Basketball Association's LA Clippers.

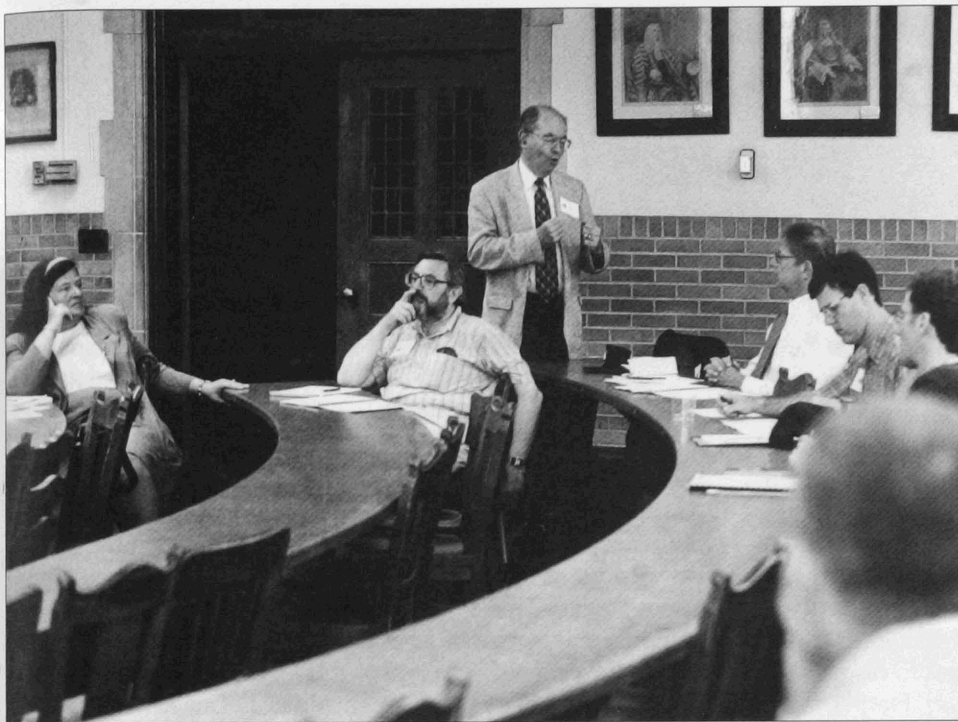
Rothenberg received the National Soccer Medal of Honor at a press luncheon in New York in June. "Alan Rothenberg is one of the most significant individuals in the history of soccer in the USA," said Will Lunn, President of the Natonal Soccer Hall of Fame. "The Rothenberg Era will be remembered as a period of unprecedented advancement for the sport."



Coming back home

Continuing education — whether formal or informal — is a prerequisite for successful legal practice. Seldom, however, do the need to keep up to date and the chance to plumb legal issues with colleagues and former classmates come packaged with a return to the Law School Quadrangle, its classrooms and even some of the teachers who taught you as a law student.

The Spring Seminars do all this.



Above, Professor of Law Yale Kamisar discusses the life of the Miranda Rule during the morning portion of the criminal law seminar that was part of the Law School's Spring Seminars for Michigan graduates in June. Listening at left is Assistant Clinical Professor Andrea D. Lyon, who led the afternoon portion of the session. Left, Professor of Law Carl E. Schneider, '79, and Associate Dean for Clinical Affairs Suellyn Scarnecchia, '81, listen to a participant's question during the seminar on ethics.

More than 100 graduates from southern Michigan signed up to return to the Law School in June to attend seminars on criminal law and ethics, discuss these and other issues in their profession, re-acquaint themselves with former classmates and re-live Law School memories. Lawrence J. Gagnon, '76, an attorney and business consultant whose solo practice is in Fort Gratiot, said the seminar on ethics attracted him to the program. "I think there is a lot of unethical behavior that is shielded by the phrase 'vigorous representation of the client'," he said.

Former Law School classmates Sandra Collom Wright, '92, of Livonia, and Virginia Carlson Caldwell, '92, of Ypsilanti, welcomed the seminars as an opportunity to see each other again and to recapture some of the flavor of their law student days. Said Wright: "I don't do any criminal law, but [came] because Kamisar [Clarence Darrow Distinguished University Professor of Law Yale Kamisar] is speaking. I knew that he'd be entertaining and informative. I wasn't disappointed."

In his portion of the criminal law session, Kamisar noted that one consequence of the Miranda warning can be that "the police, in a sense, are supposed to convince the suspect not to confess." There also are questions about what happens when a suspect waives his rights to counsel and then tells police that he had nothing to do with the crime they are investigating.

"What can police do then, dust off the old interrogation manuals?" Kamisar asked. "Most courts seem to lose interest in the issue once the person waives his rights," he said. "We still don't know how far the police can go."

In the session on ethics, participants compiled a list of problems plaguing the legal profession — ranging from clients directing their lawyers to judges' refusal to enforce rulings. They agreed that ethical problems always have plagued the profession but felt that a lack of professional civility and competition probably have increased.

"The core question is," as Professor of Law Carl E. Schneider, '79, summarized the session, "Are we happy where we are?"

Butzbaugh, '66, Turner, '87, elected to Michigan State Bar leadership

Two graduates of the Law School, Alfred M. Butzbaugh, '66, and Reginald M. Turner, Jr., '87, have been elected to leadership roles in the State Bar of Michigan.

Butzbaugh, a senior member of Butzbaugh and Dewane, PLC, of St. Joseph, was the unanimous choice of the State Bar of Michigan Board of Commissioners as President-elect for 1998-99; he automatically will become President of the 33,000-member Bar in September 1999. Turner, a partner in Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh, P.C., of Detroit, was chosen treasurer. Both assumed their new duties at the conclusion of the State Bar's annual meeting in September in Lansing.

Currently Vice President of the State Bar, Butzbaugh represents southwest

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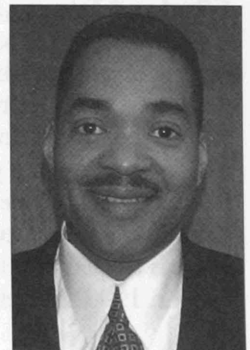
Alfred M. Butzbaugh, '66



Reginald M. Turner, '87

Continued from page 69

lower Michigan on the Bar's Board of Commissioners. He chairs the Access to Justice Task Force and Election Districts Review Committee, and is a member of the Fiscal, Executive, Member Insurance, Awards, Long Range Planning and Legislation committees. Butzbaugh has been a leader in development of the Bar's "Access to Justice for All" program to provide legal help for Michigan residents regardless of their economic standing. The program recently won the American Bar Association's top award for a legal services program and is considered a model for similar programs sponsored by other state bar associations.

Butzbaugh is a Michigan State Bar Foundation Fellow, past president of the Berrien County Bar Association, and a member of the State Bar of Texas, the American Bar Association and the Federation of Insurance and Corporate Counsel. A resident of Berrien Springs, he founded Youth Sports for Benton Harbor and initiated the Teachers Lawyers Children Partnership in the Benton Harbor Area Schools. He also teaches chess to elementary school students at Benton Harbor Area Schools Gifted and Talented Academy.

Turner, who represents Wayne County on the State Bar's Board of Commissioners, has served on the Board since 1995 except for the year that he served as a White House Fellow in Washington, D.C. He was elected to a three-year term in 1998. He serves on the Long Range Planning, Rules, and Structure and Governance committees and the Access to Justice Task Force.

During his year as a White House Fellow, Turner served as Special Assistant to the Secretary of Housing and Urban Development. He coordinated a nine-agency presidential task force to address issues in riot-plagued St. Petersburg, Florida. He also chaired a White House delegation that toured South Africa and Mozambique. After graduation from the Law School, Turner clerked for then-Michigan Supreme Court Justice Dennis Archer. Archer now is in his second term as mayor of Detroit.

In 1995 Turner received the State Bar's Outstanding Young Lawyer Award. He is a member of the National Bar Association Board and Executive Committee, past president of the Wolverine Bar Association, past director of the Detroit Bar Association and past president of the Barristers of the Detroit Bar Association. He is a member of the boards of directors of the Detroit Institute of Arts and the American Civil Liberties Union. He lives in Detroit.

Patricia White, '74, named Dean at Arizona State University College of Law

Law School alumna and former faculty member Patricia White, '74, has been named Dean of the College of Law at Arizona State University. She assumes her duties January 1. She currently is Professor of Law at the University of Utah College of Law.

White has "an exceptional intellect," said Milton Glick, Arizona State's Senior Vice President and Provost. "Perhaps equally important are her versatility and ability to balance multiple worlds. She has been an active practicing attorney as well as a teacher and scholar. She has published in top journals in both taxation and legal philosophy. We at Arizona State feel extremely fortunate to attract her to a leadership position in our law school."

White joins another former Law School faculty member, Joel Seligman, as dean of an Arizona law school. Seligman is Dean of the Law School at the University of Arizona.

White was a Visiting Professor at the University of Michigan in 1984-85 and from 1988-94. Popular with faculty colleagues and students alike, she won the L. Hart Wright Outstanding Teaching Award. She also has been a fellow in the Program in Society and Medicine at the University of Michigan Medical School.

A specialist in taxation, estate planning and the philosophy of law, White earned her bachelor's and master's degrees at the University of Michigan. She graduated from the Law School *cum laude* and was Associate Editor of the *Michigan Law Review*. She has taught at the University of Utah College of Law since 1994.

Many of White's recent publications have dealt with medical treatment decisions and the law. In addition to teaching at the University of Utah College of Law, she is of counsel at Parsons, Behle & Latimer in Salt Lake City.

Patricia White, '74

1943

Robert L. Ceisler, a former Washington County (Pennsylvania) Bar Association president who has been a member of the PBA for more than 50 years, received the 1998 Conference of County Bar Leaders Gilbert Nurick Award. The award is given in recognition of an individual's outstanding service to the organized bar. Ceisler lives in Washington, Pennsylvania, with his wife, Constance.

1955

Robert G. Strodel, a personal injury and medical malpractice attorney from Peoria, Illinois, was elected president of the Civil Justice Foundation, the only national organization devoted exclusively to the protection of injured consumers and the prevention of injuries. The Foundation's sole source of funding is donations from personal injury trial lawyers.

1957

Lawrence P. King, editor-in-chief of all Collier on Bankruptcy publications from Matthew Bender & Company, Inc., has been named to the Collier on Bankruptcy Editorial Board, where he will serve as a consultant in the company's efforts to expand and enhance its coverage of bankruptcy practice for the Collier on Bankruptcy treatise. King is the Charles Seligson Professor of Law at New York University School of Law and counsel to Wachtell, Lipton, Rosen & Katz. **Myron M. Sheinfeld, '54**, a senior shareholder at Sheinfeld, Maley & Kay in Houston, also is on the board.

1959

John M. Barr is listed in the 1998 edition of *Who's Who in American Law*, published by Marquis Who's Who. According to the publisher, inclusion is limited to persons who have significantly contributed to society through "outstanding achievement in their own field of endeavor." Barr has been in private practice in Ypsilanti since 1959, has served as Ypsilanti City Attorney since 1981, and serves as a Commissioner of the State Bar of Michigan. He and his wife, Marlene, have three grown children.

1961

William Y. Webb was elected president-elect of the Sports Lawyers Association, an international professional organization whose goal is to promote the understanding, advancement, and ethical practice of sports law. He will officially become president on May 20, 1999. Webb is a partner at Ballard Spahr Andrews & Ingersoll, L.L.P., and is secretary and general counsel of the Philadelphia Phillies.

1963

Lee D. Powar has been elected to membership in the American Law Institute and will be inducted in 1999. Membership is awarded to attorneys who have, on the basis of professional achievement, demonstrated interest in the improvement of the law. The Institute formulates comprehensive Restatements of the law in numerous areas, and it drafts important law such as the Uniform Commercial Code. Powar is a partner with Hahn Loeser & Parks, L.L.P., and co-chair of the firm's Creditors' Rights, Reorganization and Bankruptcy practice area. He concentrates his practice in the areas of creditors' rights, commercial finance, general corporate law, and real estate. He lives in Moreland Hills, Ohio.

1964

Alan R. Kravets has been promoted to president and chief operating officer of Sheldon Good & Company International, Chicago. He joined the firm in 1989 and has a background in real estate law.

1965

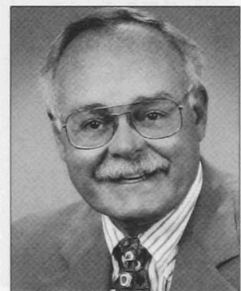
Neil R. Mitchell was elected to the Hall of Fame of the College of Engineering of the University of Utah (his undergraduate school), and he delivered a centennial lecture to the Engineering School. The lecture, "Parallel Universes, Adversarial Relationship or Dialogue" can be found on the University's website, www.eng.utah.edu/alumni/mitchell.html. Mitchell is of counsel to Eikenburg & Stiles, a commercial law firm in Houston, Texas, and he is on the executive corps of a buy-out group which purchases, owns, and manages industrial companies.

The Honorable **Rosemary S. Pooler**, who had been a United States District Court Judge for the Northern District of New York since 1994, has been elevated to the Court of Appeals for the Second Circuit. She was sworn in June 10. Her chambers will continue to be in Syracuse, New York, but she will sit with the Court of Appeals in Foley Square, New York City.

1966

Ronald L. Olson was elected to the Board of Trustees of the California Institute of Technology in Pasadena, California. A senior partner at the law firm Munger, Tolles & Olson in Los Angeles, Olson specializes in the field of commercial litigation, including antitrust and securities law. He and his wife, Jane, live in Pasadena.

1967



John C. Hartranft was named president-elect of the Columbus (Ohio) Bar Association. He is a partner with Porter Wright Morris & Arthur, and has extensive experience in financial institution regulation work, commercial litigation, bankruptcy, and loan documentation. Hartranft and his wife, Linda, are residents of Upper Arlington, Ohio, and have three sons.

Class notes

Joel D. Kellman has joined the law firm Dykema Gossett P.L.L.C. as a member of the Real Estate Group in the firm's Detroit office. His practice focuses on real estate, with an emphasis on construction lending on behalf of lender clients, commercial leasing, the acquisition and sale of real estate, community redevelopment, and non-profit activities. He is a resident of Huntington Woods.

1968

Robert W. Stocker II, has published *The State of Michigan Gaming Law Legal Resource Book*. The book is designed to assist businesses and individuals wanting to take advantage of the new opportunities offered by the gaming industry. It is intended to help both lawyers and non-lawyers wade through the new and complicated laws relating to gaming in Michigan. Stocker is a shareholder with the Lansing law firm Fraser Trebilcock Davis & Foster, P.C., where he is chair of the Business and Tax Department.

1969

President Bill Clinton has conferred upon White House Deputy General Counsel **Steven Y. Winnick** the rank of Distinguished Executive, the highest award given to government employees. He was cited for sustained, extraordinary accomplishment in managing federal programs, and for leadership exemplifying the highest standards of service to the public. In September 1997, he received the first Distinguished Service Award given by the United States Office of Government Ethics for his leadership in strengthening the Department of Education's ethics program.

1970

Butzel Long has announced that **Alexander Bragdon** has joined its Employee Benefits Practice as a senior attorney in the firm's Detroit office. He has extensive experience in employee benefits law and pension and profit sharing law, as well as healthcare law. He was previously a member of the firm Jaffe, Raitt, Heuer & Weiss.

Steven G. Schember, senior litigation partner at the Tampa office of Shumaker, Loop & Kendrick, L.L.P., has become certified in business litigation by the Florida Bar. He is also a board certified civil trial attorney, one of fewer than one percent of all Florida attorneys to hold both certificates.

1971

Donald H. Silverman has been elected president of the Suffolk County Criminal Bar Association.

1973

Gerard Dumont, Consul General of France in Chicago, has announced the appointment of **Robert L. Weyhing** as Honorary Consul of France in Detroit. As Honorary French Consul, his duties include assisting French citizens and furthering political, economic, and cultural exchanges between Detroit and France. A member of the Detroit law firm Clark Hill P.L.C., Weyhing specializes in business law.

1981

1974

James C. Adams has rejoined the law firm Dykema Gossett P.L.L.C., and will be located in the Ann Arbor office. He was previously a partner in the Traverse City firm Running, Wise, Wilson, Ford & Phillips. His background is in real estate and construction law.

1976

Linda Schwartzstein was appointed Vice Provost for Strategic Planning at George Mason University, Fairfax, Virginia. She previously taught tax law as a professor on the faculty of the George Mason University School of Law.

1977

Gary Klotz has joined the Labor and Employment Practice Group of the law firm Butzel Long. His practice includes employment litigation, traditional labor, collective bargaining, and preventive counseling. He was previously a partner in the law firm Keywell & Rosenfeld.

1978

Dennis W. Fliehman has become of counsel to the law firm Kitch, Drutchas, Wagner & Kenney, P.C. He practices in the firm's Lansing office in the areas of business litigation, professional liability defense, and insurance coverage matters. He was formerly a partner in the San Diego law firm Klinedinst, Fliehman & McKillop.

1979

Beverly Hall Burns, a principal in the Detroit office of the law firm Miller, Canfield, Paddock and Stone, P.L.C., has accepted a nomination to the Fellows of the Michigan State Bar Foundation. Members are nominated by other Fellows based on notable achievements and committed service to the legal profession and the community. No more than five percent of the total membership of the Bar is affiliated with the group. A Grosse Pointe resident, Burns is a member of the firm's Labor and Employment Law Practice Group.

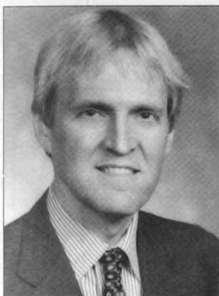
1980

G.A. Finch offered a talk on the "Indispensability of Private Secondary Schools" at the June 14 wrap-up celebration of The Campaign for Commonwealth School in Boston, Massachusetts. Finch, an alumnus of the school, was a trustee leading national alumni donation efforts for the school's $2.3 million capital campaign. He is a partner at the Chicago office of the law firm Querrey & Harrow, where he practices corporate law.

Dwight King, head research librarian at the Kresge Law Library of the Notre Dame Law School, was featured in the Spring 1998 issue of the *Notre Dame Lawyer*. The article, "Dwight King: On the Cutting Edge," highlighted King's self-taught wood carving skills.

Brent Graber has joined the Chicago law firm Bates Meckler Bulger & Tilson as a partner in its Insurance Coverage and General Litigation Practices. In addition to environmental coverage, he specializes in other insurance coverage work, as well as product liability and healthcare litigation. Graber was formerly co-chair of the Environmental Coverage Practice at Blatt, Hammesfahr & Eaton. He and his wife, Jean, live in Glenview, Illinois, and have three children.

1982



Kit A. Pierson has joined the Antitrust and Intellectual Property Litigation Practice of Heller Ehrman White & McAuliffe as a shareholder in the firm's Washington, D.C., office. He was formerly a partner with the Washington, D.C., office of Jenner & Block.

1983

Jerome Hill has joined the law firm Butzel Long in an of counsel capacity. He has extensive professional experience with China and will concentrate primarily on the firm's growing practice relating to China. He also serves as an adjunct instructor in the Oakland University Department of International Programs.

Justin H. Perl has been reelected to the Governance Committee of Maslon Edelman Borman & Brand, L.L.P., a Minneapolis-based law firm. He is a litigation partner focusing his practice in the areas of general commercial litigation, complex transactional disputes, business torts, and family law.

1984

Leonard M. Niehoff, a shareholder in Butzel Long's Ann Arbor office, was appointed to the Board of Advisors of the C.S. Mott Children's Hospital at the University of Michigan. He practices primarily in the fields of litigation and constitutional law.

1985

Emil Arca authored the section on Emerging Markets for *Securitization Yearbook 1998*, a special supplement to the June 1998 issue of the *International Financial Law Review*. He also authored an article on cross-border securitizations, "Legal Keys to Future Flows," which appeared in the May 1998 issue of the *International Securitization & Structured Finance Report* and is being reprinted in the *International Finance & Treasury Newsletter* and the *Latin American Law & Business Report*. Arca is a partner in the New York City office of Dewey Ballantine L.L.P., and has spoken on related topics at several securitization conferences in the past year.

Cynthia B. Cohen, Senior Research Fellow at the Kennedy Institute of Ethics, Georgetown University, co-edited the June 1998 special issue of the *Kennedy Institute of Ethics Journal*. The issue focuses on genetic testing and includes a feature article by Cohen as well, "Wrestling with the Future: Should We Test Children for Adult-Onset Genetic Conditions?" Another contributor to the issue was **Sonia M. Suter, '94**, who wrote on "Value Neutrality and Nondirectiveness: Comments on 'Future Directions in Genetic Counseling'."

David J. Herring, a winner of one of the 1998 Chancellor's Distinguished Teaching Awards at the University of Pittsburgh, has been named interim Dean of the University of Pittsburgh School of Law. He had been serving as Associate Dean for Academic Affairs.

Eugene Killian, Jr., is with his own firm, Killian & Salisbury, P.C., which recently celebrated its third birthday. The East Hanover, New Jersey, law firm specializes in business litigation. Killian spends a lot of his time dealing with insurance companies on disputed claims, and last year obtained a $2.4 million verdict in *Universal-Rundle Corp. v. American Motorist Insurance Company*, an environmental insurance coverage case.

Raymond Rundelli has joined the Cleveland office of the law firm Benesch, Friedlander, Coplan & Aronoff L.L.P. as a partner in the Intellectual Property Practice Group. He will focus his practice on the protection and enforcement of intellectual property rights. He was previously a partner with Baker & Hostetler L.L.P.

Ron Yolles has been named one of the Best 250 Financial Advisers in the country by *Worth* magazine, which used an extensive review process, with hundreds of industry peers, to make its selection. He is president of Yolles Investment Management, Inc., a Southfield, Michigan-based investment firm. Yolles is also the author of the investment book *You're Retired, Now What?*, which is being released nationally by John Wiley & Sons, Inc., this fall.

CLASS *notes*

1986

Freddy Codner has joined his wife, Candy, in the management of Jamison Shaw Hairdressers in Atlanta, where he will focus on the business, financial and marketing aspects of the salon. Codner had practiced with King & Spalding since 1987, where his practice had been predominantly in litigation.

Kenneth V. Zichi and David W. Brauer have announced the formation of a new law firm, Zichi & Brauer, P.C., of Howell, Michigan.

1987

James M. Dworman has been elected to the Board of Directors of Dean & Fulkerson, P.C., where he has been a shareholder since 1994. He focuses his practice on business law, commercial and real estate litigation, and appeals. He resides in West Bloomfield with his wife, Heidi, and their two sons.

Douglas A. Mielock has become a shareholder in the law firm Foster, Swift, Collins & Smith, P.C. He is a member of the firm's Business and Tax Department, and his practice focuses in the areas of trusts and estate planning.

1988

Kevin J. Murphy, an associate in the Singapore office of White & Case, was made a partner of the global law firm White & Case L.L.P. His practice focuses on international transactions, including project and equipment financings, capital markets transactions, joint ventures, and investments in Southeast Asia. He also advises lenders and borrowers in bank financings and restructurings.

1989

Mark E. Boulding has become a partner in the Washington, D.C., office of Long Aldridge & Norman L.L.P., a 160-lawyer corporate firm based in Atlanta. He specializes in health care and technology law, with particular focus on FDA regulation. His current special interests include the developing law of the Internet and government regulation of health information and medical software.He is co-author of the ABA Business Law Section's recent book *Web-Linking Agreements: Contracting Strategies and Model Provisions.*

Robert E. Malchman is an Associate Professor of Legal Research and Writing at the Georgetown University Law Center. He also works part-time in the Litigation Department at Gibson, Dunn & Crutcher L.L.P., where he was a full-time associate from 1991 to 1997.

Lisa A. Olsen was elected to partnership in the Chicago-based law firm Chapman and Cutler. She practices in the Banking Group, where she primarily deals with transactional matters. She represents lenders in secured and unsecured loans and pre-bankruptcy workouts.

Lynda (Homerding) Schuler has become a member of the law firm Williams & Connolly, Washington, D.C.

1990

Scott J. Campbell is serving as Legal Counsel to the President of the Republic of Palau, a newly-independent country located in Micronesia. He was formerly serving as Assistant Attorney General for the Republic. He is on leave from the Milwaukee office of Michael, Best & Friedrich.

Jerry Gidner has taken the position of Environmental Compliance Coordinator for the Bureau of Indian Affairs in the Department of the Interior. He has previously worked at the Environmental Protection Agency and in two private law firms.

Randall E. Kay was elected partner in the law firm Gray Cary Ware & Freidenrich, where he is a member of the firm's Technology and Intellectual Property Litigation Practice Group. He works in the firm's San Diego and Palo Alto, California, offices.

William V. Saracco was elected partner in the Chicago law firm Marks, Marks and Kaplan, Ltd., where he continues to practice in civil, commercial and land use litigation, and appellate practice.

1992

Victoria T. Aguilar was named Vice President of Interconnect Implementation at U.S. West Communications. In her new position, she is responsible for coordinating interconnection negotiations, providing witness support for arbitration proceedings, and tracking contractual requirements contained in interconnect agreements for the purpose of assuring compliance. She was formerly a senior attorney in the U.S. West, Inc. Law Department, where she served as the lead New Mexico State Regulatory attorney and the company's right-of-way subject matter expert.

Margaret B. McLean has been appointed International Counsel, with responsibilities for all international legal affairs, by CH2M Hill Inc. She also was elected to the 1998-99 Board of Directors of the World Trade Center in Denver, Colorado, where she will be based.

Patrick Romain has been named Vice President and Senior Corporate Counsel for Merrill Lynch & Co. and is responsible for intellectual property matters. He is admitted to practice before the U.S. Patent and Trademarks Office.

CLASS *notes*

DeAnn Foran Smith has been named principal in the Troy-based intellectual property law firm of Harness, Dickey & Pierce, P.L.C. In addition to litigation, she concentrates her practice in obtaining, enforcing and licensing patents and trademarks for clients in various biotechnical and chemical fields.

1994

Jennifer B. Anderson has joined the Arizona Center for Law in the Public Interest in Phoenix, as a staff attorney. She was formerly an associate at Lewis and Roca in Phoenix.

1995

Bentina D. Chisolm has joined Carolina Power and Light as Associate General Counsel. Her practice consists of labor employment law, and she resides in Raleigh, North Carolina. She previously practiced labor and employment law with Troutman Sanders, L.L.P., in Atlanta, Georgia.

CORRECTION

E. Dexter Galloway, '57, of Hutchinson, Kansas, incorrectly was reported as deceased in the Summer 1998 issue of *Law Quadrangle Notes*. Noting the exaggeration of the report, he says "I am alive and well, and still engaged in the general practice of law on a daily basis." *Law Quadrangle Notes* regrets the error.

Deborah K. Johns and **George E. King** were married on Sanibel Island, Florida, in May. They now reside in Hong Kong.

Cheryl A. Leanza has become a staff attorney with Media Access Project, a non-profit public interest law firm which promotes the public's First Amendment right to receive information in a diverse marketplace of ideas. She has been an attorney with the Federal Communications Commission's Common Carrier Bureau since 1995, where she worked on implementing the Universal Service provisions of the 1996 Telecommunications Act.

Christian Tietje has received his Ph.D. (Dr. iur.) *summa cum laude* from the University of Hamburg, Germany, with a thesis on non-tariff trade barriers and the WTO/GATT legal system. In July he became Assistant Professor of Law at the Walther-Schuecking-Institut for International Law at the University of Kiel, Germany.

1996

Amy O'Meara Chambers has joined the law firm Warner Norcross & Judd L.L.P. as an associate practicing in the area of employee benefits. She was previously associated with the law firm Howard & Howard, Bloomfield, Michigan. She lives in Grand Rapids with her husband, Randy.

Jeffrey Hodges Kahn, an associate with McDermott, Will & Emery in Chicago, is the author of "Deducting Year 2000 Costs," an article in *Tax Notes* 1621-27 (June 22, 1998) that addresses the tax issues associated with the "Year 2000" computer crisis. Some $600 billion will be spent worldwide to correct the problem, Kahn writes. "With that much money at stake, the question of how the tax law will treat year 2000 expenses is a major issue. The tax treatment will have a large impact on the bottom line of many companies."

1997

Garrett D. Evers and **Gregory R. Farkas** have joined the law firm Thompson Hine & Flory L.L.P., as associates. Evers practices in the firm's corporate and securities practice area, while Farkas practices in the firm's litigation practice area. Both reside in Cleveland, Ohio.

IN *memoriam*

'26	Robert G. Jamieson	
'30	James Montante	May 5, 1998
'32	Karl Y. Donecker	April 7, 1998
	Robert P. Small	November 22, 1997
'33	Robert P. Russell	
	Halford I. Streeter	March 24, 1997
'34	Samuel H. Kaufman	October 8, 1997
'35	Edgar B. Galloway	June 28, 1997
	Clarence B. Slocum	February 8, 1997
	Leonard H. Weiner	May 11, 1998
'36	Robert A. Choate	April 7, 1998
	Shiro Kashiwa	March 13, 1998
	Robert L. Pierce	May 2, 1998
'37	Katherine Stoll Burns	January 9, 1998
	Craig Spangenberg	March 17, 1998
'38	Howard A. McCowan	May 16, 1998
	John H. Thomson	May 19, 1998
	Lloyd Yenner	July 15, 1997
'39	Marie I. McHenry	
	Charles E. Thomas	June 29, 1998
'41	Robert L. Refior	June 4, 1997
'40	Julian E. Clark	April 4, 1998
'45	Harold Elbert	July 1, 1998
'46	Paul J. Keller	April 7, 1998
'48	John D. Nies	December 6, 1997
	William A. Yolles	May 29, 1998
'49	Frank L. Adamson	January 1, 1997
	John S. Crandell	May 6, 1998
	Gilbert A. Currie	February 13, 1998
	J. Edward Line	November 18, 1997
	Edgar H. Schmiel	April 29, 1998
'50	Thomas Schick	January 27, 1997
'51	Thomas A. Rothwell	April 1, 1998
'53	Nobuki Kamida	October 1, 1997
	Charles E. Oldfather	June 20, 1998
	James L. Weldon	January 15, 1998
'54	Charles M. Smith	January 20, 1998
'57	Robert E. Fremlin	June 2, 1998
'58	Wolf Haber	August 25, 1997
	Richard R. Roesch	March 16, 1998
'61	George W. Sallade	June 18, 1997
'63	John M. Price	

CENTER FOR
INTERNATIONAL & COMPARATIVE LAW

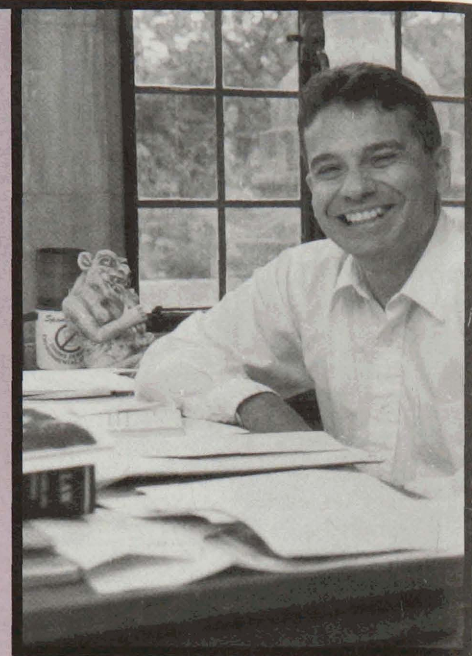
A CAPSTONE TO THE *past*

FEATURE

A springboard to the *future*

Some borders are falling — as in trade and travel, while others are stubbornly re-arising — as in the fracturing of Yugoslavia and the inter-tribal warfare in parts of Africa. We are aware of these events in our world as never before, and to say that the world is shrinking seems trite and simplistic. Yet only as these seismic facts seep into our daily lives do we begin to cope with their geometrically expanding impact. Legal systems that evolved in individual countries must operate in the international spotlight, if not context. International law is assuming an ever higher profile.

The Law School has a long and rich history of international involvement and international education. This tradition is being reinvigorated with creation of the Center for International and Comparative Law, a capstone to the past that also is a springboard to the future. The following articles highlight aspects of the Center's official opening this fall and discuss three of the many activities that benefit from the Center's support — the Affiliated Overseas Faculty program, the Asylum and Refugee Law Program and the International Law Workshop.



New Center a boon to Law School's international program

ALVAREZ

Professor of Law José Alvarez is elated at the possibilities created by the Law School's new Center for International and Comparative Law.

True, he says, the Law School has a long and laudable history of innovation and involvement in international law programs. Professors like Hessel E. Yntema, William W. Bishop and Eric Stein, and more recently John H. Jackson, charted new paths in their exploration of the fields of international, comparative and trade law.

True, Alvarez says, the Law School each year attracts some of the most outstanding students from around the world to its advanced degree programs in international law and international economic law.

True, he continues, the Law School offers opportunities for its faculty to teach overseas and its students to study overseas and work on internships and externships in countries like Cambodia and South Africa.

But now, through the Center, the Law School has a single locus for many of these and other programs, even though each will retain the independence and specially tailored aspects that have nourished their individual personalities and attractions. In addition, the Center offers faculty members from the Law School and elsewhere, as well as visitors and current and prospective students, a central place to begin their inquiries into the Law School's international offerings.

Establishment of the Center also reflects the Law School's commitment to international programs that both offer opportunities overseas to students and faculty and bring to the School some of the leaders in international law from higher education and government around the world.

Official opening of the Center is in October, coinciding with Judge Richard J. Goldstone's delivery of the William W. Bishop Lectures in International Law October 8 and 9. (See accompanying story.) At deadline time, other activities associated with the opening include a luncheon for the Center's board members and a banquet on October 9 and a working session for board members on October 10.

"The new Center for International and Comparative Law is a great boon to the Law School's already strong international programs," says Alvarez. "It improves our ability to offer high quality courses in many aspects of international law as well as to bring highly regarded scholars and leaders to the Law School to lecture, meet with students and faculty, and do research in our library, which has one of the best collections in international law of any law library in the country."

The Center, headquartered in renovated office spaces off the Reading Room (see photos, page 33) is the Law School's "focal point for visiting foreign faculty as well as members of the permanent faculty and students with interests in international law, including international economic law and foreign and comparative law," according to information prepared for distribution at the opening. The Center also coordinates and provides support for faculty-initiated programs dealing with South Africa, Cambodia, and refugee studies. It assists with the Law School's faculty exchanges with the University of Tokyo and Cambridge University, and future faculty exchanges with the universities of Toronto and Munich and schools in the People's Republic of China. The Center also is coordinating an American-European conference on current issues in international law at the Law School March 25-27, 1999.

Virginia Gordan, Assistant Dean of International Programs, is responsible for the administration of the Center. "This year we are offering more than 25 courses on international and comparative topics, welcoming visiting distinguished jurists and practitioners in the international arena, putting on conferences on such topics as refugee law, European law and international terrorism, and offering for the fourth year our weekly International law Workshop, which brings exciting speakers on hot topics in international law to the School," said Gordan. "The Center will serve as welcome mat, organizer, supporter, guide and focus for these many energetic endeavors of faculty and students."

Affiliated Overseas Faculty program strengthens international offerings

Overseas visitors help to globalize the views and experiences that are part of Law School life, and the School has a long history of attracting teachers and lecturers from countries around the world. Sometimes these visits are for a full term or more, sometimes for as short a time as it takes for the visitor to give a single lecture or to teach a compressed short course.

The Law School has begun a program of longer-term arrangements with faculty from overseas. Called Affiliated Overseas Faculty, these scholars will teach at the Law School at least one term a year for the foreseeable future.

Two Affiliated Overseas Faculty are teaching at the Law School this year: Christopher McCrudden and Bruno Simma. Both previously have taught at the Law School and are acquainted with Law School faculty, staff and students.

McCrudden, a Reader in Law at Oxford University and a Fellow at Lincoln College, Oxford, has an LL.B. from Queens University, an LL.M. from Yale Law School, and an M.A. and D. Phil. from Oxford. He serves on the editorial boards of the *Oxford Journal of Legal Studies*, the *Review of Employment Topics*, and the *International Journal of Discrimination and the Law*.

McCrudden is teaching two courses this fall, European & Comparative Human Rights Law and Incorporating International Human Rights Law into Domestic Law. He is co-teaching the latter courses with Charles F. and Edith J. Clyne Professor of Law A.W. Brian Simpson.

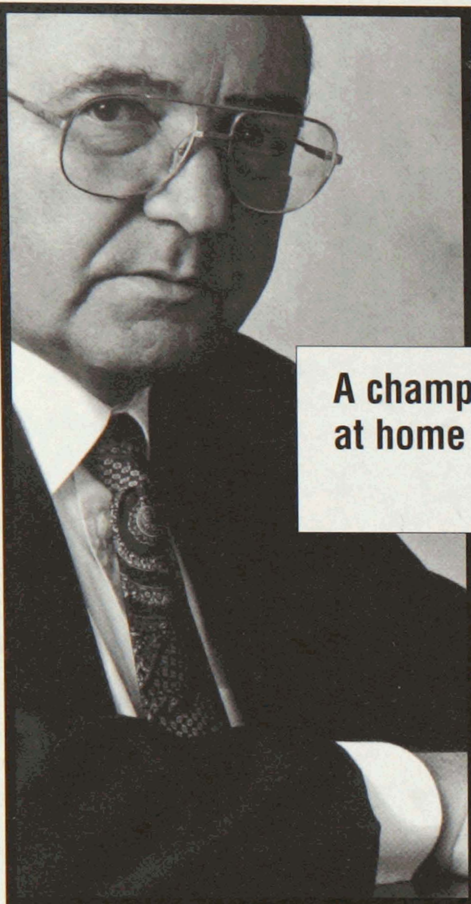
Simma, Professor and Dean of the Law Faculty at the University of Munich, was a member of the Law School faculty from 1987-92. He is co-founder and co-editor of the *European Journal of International Law*, has served as vice-president of the council of the German Society of International Law, and served as counsel for Cameroon in a boundaries dispute with Nigeria before the International Court of Justice. He is a member of the International Olympic Committee's Court of Arbitration in Sports and of the UN Committee on Economic, Social and Cultural Rights. He is an expert on conflict-prevention activities of the UN Secretary General.

This fall Simma is teaching Modern International Lawmaking and is co-teaching International Law with Assistant Professor of Law Michael Heller.

At deadline time, plans for fall 1999 included having Affiliated Overseas Faculty member Christine Chinkin, Professor of International Law, London School of Economics, co-teach Feminism and International Law with Elizabeth A. Long Professor of Law Catharine A. MacKinnon.

Christopher McCrudden

Bruno Simma



A champion of justice at home and abroad

GOLDSTONE

Justice Richard J. Goldstone's commitment to justice knows no borders. A tireless opponent of apartheid in his native South Africa, he now is a key player in the construction of a new nation under law in South Africa, where he is one of the 11 justices of the Constitutional Court, South Africa's highest court.

But when the call came, he took leave from the court from 1994-96 — at the urging and with the blessing of South African President Nelson Mandela — to serve as Chief Prosecutor for the International Criminal Tribunals for Rwanda and the former Yugoslavia. Both his view from the bench and his work as prosecutor are subjects for his William W. Bishop Lectures in International Law at the Law School this year: on October 8 his subject is "The New South African Constitution: The Importance of Comparative Law," and on October 9 his topic is "International War Crimes Prosecutions: Retrospect and Prospect."

The lectures honor William W. Bishop, who taught at the Law School from 1948 until he took emeritus status in 1977. Bishop, the Edwin DeWitt Dickinson University Professor of Law from 1966-76, was Editor in Chief of the *American Journal of International Law* from 1953-55 and again from 1962-70. He served as honorary President of the American Society of International Law from 1982-84 and was a member of the Permanent Court of Arbitration from 1975-81. Twice he was invited to deliver the prestigious Hague Lectures at The Hague Academy of International Law.

Goldstone's delivery of the Bishop Lectures is one of the activities associated with official opening of the Law School's new Center for International and Comparative Law. (See accompanying story.) His experience as war tribunals prosecutor and in interpreting the young South African constitution, which was fashioned after exhaustive study of constitutions from many of the world's countries, makes him the ideal speaker to help launch the Center.

"Was it a difficult decision to take leave from the Constitutional Court given the fledgling nature of democracy in South Africa?" Goldstone once was asked for the journal *Transnational Law & Contemporary Problems*.

"It was an extremely difficult decision, but it was made easier by President Mandela's feeling that it was important for me to accept the invitation from the United Nations to work as the Chief Prosecutor," Goldstone answered. "This was essentially the first opportunity for a South African to have an important position with the United Nations since South Africa rejoined the international community."

"I have no doubt that you cannot get peace without justice," Goldstone elaborated later in that interview. "This is especially true in regions such as the former Yugoslavia and Rwanda, where there is such a long history of ethnic violence and murder, going back in both cases to the last century. In both of those regions, people have never been called to account. This, I have no doubt, is one of the reasons, if not the main reason, for cycles of violence having become the order of history in recent decades. If people are not brought to account, it means that justice is being denied for the victims, and we are dealing with millions of victims here. If there is no justice, there is no hope of reconciliation or forgiveness because these people do not know whom to forgive. People in that situation end up taking the law into their

own hands, and that is the beginning of the next cycle of violence."

Goldstone was aware of the difficulties he faced in getting the international support that he needed to prosecute those whom the tribunals indicted. After leaving the post, he rued the small number of trials that had occurred and criticized the lack of due process protections for those who were tried in Rwandan national courts.

Still, he noted in a talk at the U.S. Holocaust Memorial Museum early last year, the tribunals are the "first really international war crimes tribunals — the Nuremberg and Tokyo trials after World War II were held by the victors in that war — and are a very significant precedent. International law has been moved forward in very important areas." At home, he views South Africa's Truth and Reconciliation Commission as another way of bringing about "healing" after past wrongs. The Commission, chaired by Bishop Desmond Tutu, can grant immunity from prosecution if past wrongs were politically motivated or for some other reasons. "A truth commission is high risk," Goldstone told his audience at the Holocaust Memorial, "but in the South African case, it is succeeding beyond expectations. Over 4,000 applications for indemnity from prosecution have been received. Had all these people been prosecuted, the trials would have taken years."

In addition, he noted in the Commission's case of South African police officers who admitted complicity in the murder of black leader Steven Biko, traditional trials might not have brought out the truth. "If criminal trials would have been favored, it is possible the relatives and the nation would never learn what happened because the police officers would not voluntarily come forward," he said.

Dealing with war crimes and systematic human rights violations requires at least a four-pronged approach, according to Goldstone:

- "Exposure of the truth so that there is no collective guilt attached to an entire people."
- "A detailed record of the history" of the violations.
- "Public acknowledgment to the victims."
- "A deterrent example set."

Goldstone graduated from the University of Witwatersrand in 1962 and began practice as an Advocate at the Johannesburg Bar. He became Judge of the Transvaal Supreme Court in 1980 and nine years later he was appointed Judge at the Appellate Division of the Supreme Court. During the years 1991-94 he chaired South Africa's Commission of Inquiry regarding Public Violence and Intimidation, whose investigations of political violence led to charges against some government officials.

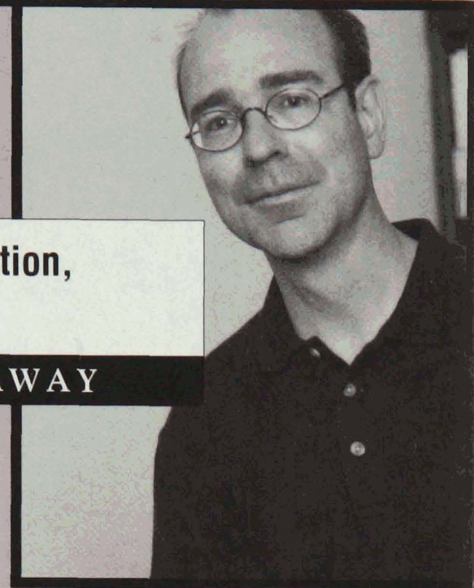
Goldstone also is Chancellor of the University of Witwatersrand, Johannesburg, and a member of the board of its School of Law. He heads the board of the Human Rights Institute of South Africa, is a Governor of the Hebrew University in Jerusalem, and chairs the Standing Advisory Committee of Company Law. Last year he was named a member of the International Panel established by the Argentine government to monitor its inquiry into Nazi activities in Argentina.

Board reflects multinational ties, expertise

The Board of Directors of the Law School's new Center for International and Comparative Law, whose seats still were being filled at deadline time, includes international law specialists from the public and private sector and higher education, both in the United States and abroad. Here is the board as constituted at deadline time:

■ **Aharon Barak**, Visiting Professor '90-'93, Justice of the Supreme Court of Jerusalem. ■ **Giorgio V. Bernini**, LL.M. '54, S.J.D. '59, '59 Visiting Professor, Studio Bernini e Associati, Bologna, Italy, and Chair of Arbitration and International Commercial Law and Director of the Department of Law and Economics, University of Bologna. ■ **Emilio J. Cárdenas**, M.C.L. '66, Ambassador-at-Large for Argentina, of HSBC Roberts, Buenos Aires. Former President of the UN Security Council. ■ **Timothy L. Dickinson**, '79, of Dickinson Landmeier and recent chair of the ABA Section on International Law. ■ **Claus-Dieter Ehlermann**, '55-'56 Graduate Student, European University Institute, San Dominico di Fiesole, Italy. ■ **Susan G. Esserman**, '77, Assistant Secretary of Commerce; recently nominated by President Clinton as Deputy United States Trade Representative. ■ **Wolfgang Fikentscher**, LL.M. '54, '66 Visiting professor, '87 Research Scholar, University of Munich Faculty of Law, Munich. ■ **Jochen A. Frowein**, M.C.L. '58, '92-'93 Visiting Professor, Max-Planck-Institut, Heidelberg, Germany. ■ **Koichiro Fujikura**, '88 and '94-'95 Visiting Prorfessor; member of the Faculty of Law, Waseda University, Tokyo. ■ **John H. Jackson**, '59, Hessel E. Yntema Professor Emeritus of Law, currently teaching at Georgetown Law Center. ■ **Jane Olson**, founder and co-chair of Human Rights Watch/California; Vice President of Women's Commission for Refugee Women and Children; board member, Santa Barbara International Film Festival; President of the Board of Trustees, Polytechnic School, Pasadena; President, Los Angeles host committee for World Cup '94; and founder and former president, Pasadena Art Workshops. ■ **Ernst-Ulrich Petersmann**, '91-'92 and '96 Visiting Professor, Volkerrecht, Europarecht & Schweizerisch, Saint Gallen, Switzerland. ■ **Elizabeth Rindskopf**, with the Washington, D.C., office of Bryan Cave and former CIA General Counsel. ■ **James F. Sams**, '57, President/CEO of American Development Services Corporation, Chevy Chase, Maryland. ■ **Henry G. Schermers**, '68-'69 and '95-'96 Visiting Professor, Van Asbeck Professor of Human Rights, University of Leiden. ■ **Gare A. Smith**, '83, Deputy Assistant Secretary, U.S. Department of State. ■ **Yoichiro Yamakawa**, LL.M. '69, '68-'69 graduate student, '91-'93 Visiting Professor; Koga & Partners, Tokyo.

At deadline time, most board members planned to attend activities associated with the opening of the Law School's Center for International and Comparative Law in October.



Refugee law is about protection, not immigration

HATHAWAY

Listen to Professor of Law James Hathaway and you'll hear the word "relevant" again and again. Refugee law, says the international refugee and asylum law specialist, rarely determines how states respond to involuntary migration. Even as armed conflict and human rights abuse continue to force individuals and groups to flee their home countries, Hathaway observes that many countries are withdrawing from the legal duty to provide refugees with the protection they require. While governments proclaim a willingness to assist refugees as a matter of political discretion or humanitarian goodwill, they appear committed to a pattern of defensive strategies designed to avoid international legal responsibility toward involuntary migrants. "Can refugee law be made relevant to current conditions?", he asks in person and in print. (See "Can International Refugee Law Be Made Relevant Again?", page 106).

Part of the problem, Hathaway explains, is that the duties under international refugee law are fundamentally misunderstood. While refugees are commonly thought of as immigrants — because it was politically, economically, and socially logical to assimilate post-World War II refugees into Western countries — the real obligation owed to refugees is instead simply to provide dignified protection for the duration of risk in their home country. When governments treat refugees as nothing more than a class of immigrants, the public loses sight of the human rights basis for their need to flee. And because refugees today rarely arrive with the skills industrialized countries value — and also have lost their political value in the post-Cold War era — Western countries are increasingly trying to keep refugees from leaving their home countries in the first place. The result is that refugees are trapped in dangerous conditions in or near their home countries.

The key, Hathaway says, is to get back to basics. He recently has directed a five-year, interdisciplinary research effort to re-work the mechanisms of international refugee law. The proposed model — the basis for a new law now being drafted in South Africa — responds to refugees' needs and offers them safety and dignified treatment until and unless they can return home. It also shares the duty of protection equitably among states, with each country contributing in accordance with its own capabilities and strengths.

"The most important remedy for human rights abuse in the world today is refugee protection," he says. "Other forms of international protection all hinge on political goodwill. Refugee law is the only truly autonomous international remedy to human rights abuse. It guarantees people at risk of persecution the right to get out of harm's way."

Hathaway, formerly a professor at Osgoode Hall Law School in Toronto, joined the Law School faculty this year with a vision of making this school "the world leader in refugee law." He plans to reach that goal through a five-part approach that combines Law School courses, summer internships for law students, recruitment of top graduate student candidates from around the world, junior and senior Visiting Scholars, and an annual workshop of creative refugee law experts to tackle cutting-edge concerns. This year, the Law School hosts refugee law experts Erik Röxstrom, Assistant Professor of Law at the University of Bergen, Norway, during the fall term, and Philip Rudge, founding General-Secretary of the European Council on Refugees and Exiles, during part of the spring term.

Hathaway launched the new curriculum this fall by teaching International Refugee Law, a course designed to provide "a comprehensive introduction to the international legal regime for the protection of involun-tary migrants."

"The essential premise of the course is that refugee law should be understood as a mode of human rights protection, the viability of which requires striking a balance between the needs of the victims of human rights abuse, and the legitimate aspirations of the countries to which they flee," he said in a preview of the class. He added that the course "will clearly define and apply contemporary legal standards, situate United States asylum law within its international legal context, and subject the present protection regime to critical, interdisciplinary scrutiny."

Winter term offerings will include International Human Rights Law and a seminar in Comparative Asylum Law. An interdisciplinary research seminar on Emerging Responses to Forced Migration, drawing on the rich social sciences resources of other parts of the University of Michigan, will complete the roster of core courses in the field beginning next fall.

An advanced clinical program in asylum law is being designed, and summer internships at Amnesty International, the United Nations, and other key organizations around the world have been arranged.

Hathaway is committed to giving Michigan law students an exceptional range of learning opportunities in refugee law, combining doctrinal and policy work, theoretical and hands-on learning, and a solid mix of U.S. and international law perspectives.

Lecture series sharpens 'cutting edge' view of world's issues

Speaking to the Law School's International Law Workshop last January, John Crook, U.S. State Department Assistant Legal Advisor for UN Affairs, describes his role in arguing the Lockerbie bombing case before the International Court of Justice in late 1997. The court issued its decision in Feburary.

Those who attended the Law School's International Law Workshop (ILW) lectures had an insider's view of the issues when the International Court of Justice (ICJ) ruled last February that it had jurisdiction in the case pitting Libya against the United States and Great Britain over extradition of Libyan suspects in the Lockerbie bombing case.

Two hundred seventy people died in that 1988 bombing of Pan American Airways Flight 103 over Lockerbie, Scotland. The U.S. and Great Britain quickly brought charges against two Libyan intelligence operatives for the bombings, but Libya refused to give them up for trial in Scottish or U.S. courts. The UN Security Council passed resolutions imposing sanctions on Libya, and Libya had turned to the ICJ to review the legality of the Security Council actions.

Only a month before the ICJ handed down its decision, U.S. State Department Assistant Legal Advisor for UN Affairs John Crook, who had argued the U.S. side before the ICJ, laid out the issues and tactics of the case for an International Law Workshop lecture at the Law School. "I don't think that the Lockerbie cases are an international analog for *Marbury v. Madison*," he said at the time, referring to the 1803 U.S. Supreme Court decision that established judicial review. The ICJ felt otherwise, however, and said that it had jurisdiction in the case.

ILW is one of the programs that operates through the Law School's new Center for International & Comparative Law. It's typical of ILW's nearly weekly lectures to present leaders in international legal activities speaking on current, ongoing issues. For example, last year's list of speakers also included Karthigasen Govender, LL.M. '88, a member of the South African Human Rights Commission, speaking on "Achieving Substantive Equality in a Society Founded Upon Inequality" (an excerpt of his talk appeared in 41.1 *Law Quadrangle Notes* 17-18 [Spring 1998]), and Dr. Mohammad Abdel Haleem, Director of the Islamic Studies Center at the School of Oriental and African Studies, University of London, speaking on "Human Rights in Islam and the United Nations Instruments." The latter talk was co-sponsored by the Law School and the University of Michigan Center for Middle Eastern & North African Studies. This year the ILW continues its practice of presenting a series of speakers whose talks illuminate the inside workings of some of the most thorny, stubborn issues in international law today. The lineup for this fall term includes a professor from Oxford University, a justice of the Supreme Court of Japan, a senior counsel with the World Bank and a justice of the Constitutional Court of South Africa who also has served as Chief Prosecutor for the UN International Criminal Tribunals for Rwanda and the former Yugoslavia. The latter speaker, Judge Richard J. Goldstone (see story on page 80), is delivering the William W. Bishop Lectures in International Law, which this year are associated with official launching of the Law School's new Center for International and Comparative Law.

At deadline time, ILW's schedule for this term looked like this:

- **September 16: "The Northern Ireland Peace Agreement," talk by Christopher McCrudden, Reader in Law at Oxford University.**
- **September 23: "Reflections on the Japanese Supreme Court," talk by Justice Itsuo Sonobe, '57-'58 graduate student, Justice of the Supreme Court of Japan.**
- **September 28: "The Gabcikovo-Nagymarus Project Case: Does the International Court Contribute to the Development of the International Law of the Environment?", talk by Pierre Dupuy, Professor at the University of Paris II and Director of the Institut de Hautes Etudes Internationales de Paris.**
- **October 8-9: The William W. Bishop Lectures in International Law: "The New South African Constitution: The Importance of Comparative Law" and "International War Crimes Prosecutions: Restrospect and Prospect," Judge Richard J. Goldstone, member of the South African Constitutional Court.**
- **October 14: "Taiwan — Alternatives to Statehood," talk by Bruno Simma, Professor and Dean of the University of Munich Law Faculty.**
- **October 21: "International Trade Law and the Protection of Endangered Species: The Sea Turtles Dispute," talk by Robert Howse, Professor, University of Toronto Law School.**
- **October 28: "Can Refugee Law Be Made Relevant Again?", talk by Professor James Hathaway of the Law School (see story on page 82).**
- **November 4: "Jubilee 2000: The International Debt Relief Challenge and the Limits of International Law," Jonathan Pavluk, Senior Counsel, Europe and Central Asia Division, Legal Department of the World Bank.**
- **November 11: "National Interest in the International Tax Game," Tsilla Dagan, Bar Ilan University, Israel.**

At deadline time, talks on November 18 and during the winter term had not been announced.

SAME SEX HARASSMENT

a serious and neglected social problem

— BY CATHARINE A. MACKINNON

The following excerpt is from the amicus curiae *brief on behalf of 14 groups of men and their advocates "dedicated to ending sexual violence" that was filed with the U.S. Supreme Court in support of the petitioner in* Joseph Oncale v. Sundowner Offshore Services, Inc., et al. *The court's unanimous opinion agreed that same-sex harassment violates civil rights protections just as opposite-sex harassment does and ruled in March that the case should be tried. The brief was written on behalf of the National Organization on Male Sexual Victimization, Men Stopping Rape, Oakland Men's Project, Men Against Pornography, Sexual Exploitation Education Project, Men Overcoming Sexual Assault (a project of Bay Area Women Against Rape), Stop Prisoner Rape, Men Overcoming Violence, Community United Against Violence, Emerge: A Men's Counseling Service on Domestic Violence, Men Stopping Violence, Men's Rape Prevention Project, New York City Gay & Lesbian anti-Violence Project, and National Coalition Against Sexual Assault (NCASA). Citations are largely eliminated. A full copy of the brief can be found at* 8 UCLA Women's Law Journal *9-46.*

Amici recognize that when women and men are sexually violated, verbally or physically, they are targeted and harmed as women and as men. *Amici* are united in the view that same-sex sexual harassment, no less than opposite-sex sexual harassment, violates civil rights to sex equality under law. They believe that citizens should have a right to seek redress of such injuries.

Through their experiences and work, *amici* have learned that sexual abuse of men by men is a serious and neglected social problem inextricably connected to sexual abuse of women by men. Male sexual aggression has widespread negative effects and deep roots in sex inequality in society. *Amici* believe that perpetrators of sexual harassment should derive no legal immunity from the gender of their victims. *Amici* thus share an interest in the legal recognition of Joseph Oncale's right to sue for sexual harassment by his male superiors as sex discrimination under Title VII of the Civil Rights Act of 1964.

FACTS

Joseph Oncale was employed from August to November of 1991 by Sundowner Offshore Services, Inc., as a roustabout on an oil rig in the sea for $7 an hour, seven days on, seven days off. It was a dangerous, isolated job in an all-male environment. As accepted on this motion, three men sexually harassed him there: John Lyons, his Sundowners supervisor, and Danny Pippen and Brandon Johnson, two Sundowner coworkers.

On October 25, 1991, Oncale was first sexually attacked physically. Pippen grabbed him, pulled him down and held him immobile in a squatting position on his knees while Lyons unzipped his pants, pulled out his penis, and stuck it onto the back of Oncale's head. Lyons and Pippen

The many courts that have recognized the actionability of same-sex harassment claims before and since *Goluszek* have relied on the plain language of the statute, the clear weight of authority in sexual harassment cases, and deference to E.E.O.C. guidelines. They have used simple logic, equality principle, life experience and common sense.

laughed. Oncale later that day learned that most of his coworkers had seen the assault.

The next day, Brandon Johnson chose a dangerous moment on the job to grab Oncale and force him to the ground again. Lyons pulled his penis out and put it on Oncale's arm. Oncale complained to superiors.

That same night, Lyons and Pippen attempted to rape Oncale as he was taking a shower. As Oncale recalls it: Pippen grabbed him lifting him off the ground by the knees, while "John Lyons grabs the bar of soap and rubbed it between the cheeks of my ass and tells me, you know, they're fixing to fuck me. . ." He believed the intentions of Lyons were "to rape me" and those of Pippen were "to assist and/or help. . . rape me, too."

Oncale complained further and tried to arrange to get off the rig. The sexual advances and sexual threats continued. Oncale "felt that if I didn't leave my job, that I would be raped or forced to have sex . . . that if I didn't get off the rig, that I would be sexually violated."

Oncale continued to try to work but "couldn't sleep because I was afraid that they would do something to me, I couldn't fight, and I felt disgraced." Oncale quit soon thereafter, stating on his pink slip that he "voluntarily left due to sexual harassment and verbal abuse." On December 5, 1991, he filed a complaint for sexual harassment with the Equal Employment Opportunity Commission (E.E.O.C.). His suit for sexual discrimination under Title VII complained of both hostile environment and *quid pro quo* sexual harassment: "I felt that it was almost to a point where it was my livelihood."

In 1993, Oncale began experiencing severe panic attacks and other episodes of long-term post-traumatic stress. He became dizzy, numb in his hands, and had a rapid heartbeat, symptoms that he continues to attempt to control and treat with medication and counseling.

SUMMARY OF AGREEMENT

Men raping men is a serious and neglected social problem with deep roots in gender inequality. Courts generally permit men who have been sexually assaulted and otherwise sexually harassed by other men at work to sue under Title VII of the Civil Rights Act of 1964, as women can. The Fifth Circuit decision under review [here] is a pernicious legal anomaly, categorically precluding equality relief on summary disposition simply because the victim and victimizer are of the same sex. Its double standard of gender justice denies men rights because they are men — with negative implications for gay and lesbian rights as well, as exemplified by the related Fourth Circuit approach, under which heterosexual perpetrators may commit acts for which homosexual perpetrators are held legally responsible. These decisions make accountability for sex discrimination turn on who one is, not on what is done.

The better approach advanced by *amici*, building on the vast body of judicial precedent, is not abstract but concrete. Whether an assault is "because of sex," triggering Title VII, is a factual determination. Other legal requisites being met, if acts are sexual and hurt one sex, they are sex-based, regardless of the gender and sexual orientation of the parties.

The Fifth Circuit decision at bar is bottomed on misconceptions about the gendered nature of the sexual abuse of men, particularly its connections to the inequality of women to men and of gays and lesbians to heterosexuals. Male rape — whether the victim is male or female — is an act of male dominance, marking such acts as obviously gender-based and making access to sex equality rights for Joseph Oncale indisputable.

The Equal Protection Clause of the Fourteenth Amendment, as well as clear statutory principles, requires recognizing same-sex sexual assault as unquestionably actionable as sex discrimination under Title VII as a matter of law. The decision of the Fifth Circuit in this case must accordingly be reversed.

AGREEMENT

The foundation of *Oncale* and fountainhead of its legal error is *Goluszek v. Smith,* 697 F. Supp. 1452 (N.D. Ill. 1988). *Goluszek* held that while women sexually harassed by men have a Title VII remedy, because women are unequal to men at work, men sexually harassed by men have none, because an all-male male-dominated environment cannot discriminate against a man as a man. Sexually victimized men are thus denied access to civil rights remedies when other men sexually violate or demean them at work in circumstances in which identically situated women have clear claims.

The many courts that have recognized the actionability of same-sex harassment claims before and since *Goluszek* have relied on the plain language of the statute, the clear weight of authority in sexual harassment cases, and deference to E.E.O.C. guidelines. They have used simple logic, equality principle, life experience and common sense. The handful of courts that have refused to recognize the claim rely on *Goluszek.*

I. Sexual abuse of men by men is a serious social problem of gender inequality.

Amici — as survivors of and experts on male-on-male sexual abuse — submit that *Goluszek*, hence the Fifth Circuit reliance on it, incorrectly analyzed the sexual abuse of men by men. Men *are* discriminated against based on their sex when sexually aggressed against by other men. They are targeted as men — usually as certain kinds of men — to be victimized through their masculinity, violated in their minds and bodies as individual members of their gender, as gender is socially defined.

A. Male dominance in society includes sexual dominance of some men over other men as well as over women.

Amici strongly agree with the *Goluszek* court that Title VII — certainly as amended and interpreted over time — is aimed at rectifying sex-based power imbalances and stopping male abuses of power in the workplace. But men abuse male power over other men as well as over women. To conclude, from the fact that women are differentially sexually abused at work, that men who are sexually abused are not abused as men, and should have no Title VII relief, reflects not only faulty analysis but false assumptions, misreadings and incomplete information.

The *Goluszek* opinion displays several common myths about male-on-male sexual abuse with which *amici* are familiar in their work: that men, acting as members of their gender, cannot and do not dominate other men as well as women; that when a man sexually abuses another man, the actions are not sexual and not gender-based; and that male domination of some men over other men is not part of the social system whereby men dominate women.

In the world of *Goluszek*, men in all-male environments do not oppress other men in sex-specific ways. As one district court, in following *Goluszek*, put it: "This theory focuses on whether there is an atmosphere of oppression by a 'dominant gender,' and thus assumes that the harasser and victim must be of opposing genders." Masculinity is assumed to be uniform, gender making all men sufficiently equal to one another that no man can be in a significant position of powerlessness relative to another man. But as study after study has shown and Michael Scarce discussed in his 1997 book *Male on Male Rape: The Hidden Toll of Stigma and Shame*, all-male environments are frequently characterized by extreme hierarchy well-documented to breed sexual abuse of men by men, whether from "a sense of macho competition, violence as a right of passage, an expression of dominant status, or an initiation of hazing."

Men are most often raped by other men when there are no women around: in prisons, in confined and isolated work sites, in men's schools and colleges, in the military, in athletics, in fraternities. Men sexually abuse those they have power over in society: first, women and children; then other men, typically on the basis of their status as men of a particular age, physical stature, ethnicity, race, disability, or perceived or actual sexual orientation, that makes them attractive for, or vulnerable to, male sexual aggression.

The *Goluszek* court held that a man cannot be made inferior as a man in an all-male setting. Both Goluszek and Oncale were treated as inferior men in very standard ways – Oncale more violently. Oncale's attackers were asserting male dominance through imposing sex on a man with less power. Men who are sexually assaulted are thereby stripped of their social status as men. They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors. In terms that apply to male-on-male rape generally, Susan Brownmiller, in *Against Our Will: Men, Women, and Rape* (1975), analyzes prison rape of men as "an acting out of power roles within an all-male, authoritarian environment in which the weaker, younger inmate . . . is forced to play the role that in the outside world is assigned to women." This lowers the victim's status, making him inferior as a man by social standards. For a man to be sexually attacked, by placing him in a woman's role, demeans his masculinity; he loses it, so to speak. This cannot be done to a woman. What he loses, he loses through gender, as a man.

Often it is men perceived not to conform to stereotyped gender roles who are the targets of male sexual aggression. Goluszek was taunted for appearing unwilling to oppress women sexually. Because he did not conform to his male coworkers' view of what his gender behavior ought to be, because he was not seen to be practicing sexual objectification and subordination of women, he was seen as less a man according to their sex-stereotyped standards. Goluszek was punished, ostracized, insulted and forced to consume pornography to make him conform to their stereotype of how a man should be a man by subordinating women sexually. Having his gender questioned in this way marked Goluszek's abuse as sex-based. Title VII's goal of "strik[ing] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" clearly intercepts such acts.

The reading of Title VII by *Goluszek* and its progeny did nothing for women except use their powerlessness to justify doing nothing for relatively powerless men. The errors in *Oncale* predicated upon it should not be followed by this Court.

B. Denial of sex and gender in male-on-male sexual abuse maintains male dominance.

The gravamen of *Goluszek* is that male same-sex aggression is not gendered in the sense that Title VII requires. Implicit is an insistence that men cannot be sexually dominated in their social status or roles *as men*. The denial that interactions among men can have a sexual component, and that sexual abuse of men is gendered, are twin features of the social ideology of male dominance with which *amici* are familiar as experts. In this ideology, men are seen as sexually invulnerable. This image protects men from much male sexual violence and naturalizes the sexual abuse of women, making it seem that women, biologically, are sexual victims. Denying that men can be sexually abused as men thus supports the gender hierarchy of men over women in society. The illusion is preserved that men are sexually inviolable, hence naturally superior, as the sexual abuse of men by men is kept invisible.

Accordingly, some courts jump to de-sexualize and de-gender male-on-male sexual aggression in denying access to equality relief; they call the behavior at issue "horseplay," "mere locker room antics," being "razzed;" and "a personal grudge match." They pass it off as "puerile and repulsive," "diffuse" and "ambiguous," "offensive and tasteless," obsessive, insecure, vulgar, insensitive, and mean, "crude and offensive," "physically violent and sadistic. . . malevolence and spite," "cretinous," and "trash talk." The point is to call the behavior anything but sexual and attribute it to anything but gender. Amazingly, even gender is used to deny gender, for example, "boys will be boys" — a gendered description if ever there was one — being considered not gender-based. That the behavior described may be everything these courts say it is does not mean that it is not sexual and gendered, hence sex-based.

Denial that sexual abuse of men by men is sexual in nature is a common feature of male dominance. When a man's testicles are aggressively grabbed, it takes a lot to deny that the attack has something to do with the fact he is a man, but the district court managed it in *Quick v. Donaldson Co., Inc.* 895 F. Supp. 1288 (S.D. Ia. 1995). Attacks focused on male sexual organs are sexual attacks, hence sexual. With the Seventh Circuit in *Doe v. City of Belleville*, 1997 WL 400219 (7th Cir. July 1, 1997), "frankly we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender."

As Rus Ervin Funk notes in *Men Who Are Raped*, "Men's rape of women is a hateful act designed to reinforce male supremacy. So is men's rape of men." He was abused as women are so often abused — except that women, when their sexuality hence their gender is assailed by men at work, have a Title VII remedy.

II. Sexual harassment of men by men is sex-based abuse under sex equality guarantees as a matter of law.

A. Sex discrimination law, hence sexual harassment law, protects both sexes.

Sexual harassment is legally recognized as a form of sex-based discrimination. There is no question that both Title VII and the Equal Protection Clause of the Fourteenth Amendment, under which sexual harassment is also actionable, protect both sexes equally, even if, due to gender inequality in society, these provisions, as applied, do not always affect the sexes in precisely the same way.

The plain language of Title VII protects all individuals from sex discrimination: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." In deciding that this prohibition on discrimination "because of such individual's sex" applied to men, this Court stated in *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.* in 1983 that "male as well as female employees are protected against discrimination."

Other than in the *Goluszek* line of cases, sexual harassment law has uniformly followed the same rule for over 20 years, prohibiting unequal sexual predation at work regardless of the gender of the parties. As the Ninth Circuit put this principle in *Nichols v. Frank* 42 F. 3d 503 (9th Cir. 1994), "*all* individuals — male or female — belong to a 'protected' group for purposes of determining discrimination on the basis of their sex." Just as men unquestionably can bring Title VII claims when sexually harassed by women, and women when sexually harassed by men, nothing except *Goluszek* and the Fifth Circuit says that men cannot bring the same claims women can bring, including claims against men.

No one has legal carte blanche to discriminate against members of their own racial or gender group. Nor does any basic principle of equality law or the Supreme Court's recognition of the claim for a sexually hostile working environment restrict the relief available to survivors based on the gender of discriminator or victim. As noted by the Eleventh Circuit in ruling that same-sex harassment is actionable under Title VII, "There is simply no suggestion in these statutory terms that the cause of action is limited to opposite gender contexts."

Title VII and the protections of the Constitution's Equal Protection Clause, as interpreted, form a single body of equality law on this point. Not only is the standard of review for women and men the same, but this Court's basic sex equality doctrine has been largely built in cases of men seeking sex equality rights.

Equality rights, while based on group membership, are personal rights. While the Constitution, like Title VII, is rightly concerned for members of groups who have traditionally been subjected to systematic discrimination, it has never confined individual access to equality relief to members of such groups. Individual men may need equality rights particularly when, as here, their situation is exceptional among men and/or they are in situations in which women, as members of the subordinated gender group, are more typically found.

B. Same-sex harassment is facially sex-based when it is sexual and one sex is victimized.

To be actionable as sex discrimination, an impugned behavior must be "because of sex." When a man sexually harasses another man, how do we know it was "because of sex"?

Drawing on over 20 years of judicial development of the legal claim for sexual

harassment, the answer is the same for men as for women, for gay men and lesbian women as for heterosexual women and men. It is a question of fact. For purposes of motions testing the legal sufficiency of sexual harassment claims, sexual allegations are facially gender-based. When, in addition, one sex is disadvantaged, sex-based discrimination is unambiguously claimed as a matter of law.

1. Whether alleged acts are "based on sex" is a question of fact.

The first two appellate cases to establish the legal claim for sexual harassment, *Barnes v. Costle,* 561 F.2d 983 (D.C. Cir. 1977) [*quid pro quo*], and *Bundy v. Jackson,* 641 F.2d 934 (D.C. Cir. 1981) [hostile environment], took the view that whether or not behavior was sex-based under Title VII was a question of fact. To overcome motions to dismiss arguing that sexual harassment of a woman by a man was not sex-based as a matter of law because the same thing could have been done to a man, the D.C. Circuit thought that what mattered was not what could have been done but what was done.

Thus, in *Barnes*, the D.C. Circuit held: "But for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. . . . " Sticking to facts circumvented the sophistic argument that because sexual harassment could be done to either or both sexes, it was not sex-based when done to one. To the *Barnes* court, the plaintiff's allegations were sex-based due to "the fact that [defendant] imposed upon her . . . a condition which ostensibly he would not have fastened upon a male employee." As the *Barnes* court further clarified, "Appellant flatly claims that but for her gender she would not have been importuned, and nothing to the contrary has as yet appeared, and there is no suggestion that appellant's allegedly amorous supervisor is other than heterosexual. These are matters for proof at trial. . . ."

In *Bundy,* the D.C. Circuit glossed this formulation, considering same-sex as well as opposite-sex harassment: "in each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?" In other words, the conceptual possibility of bisexual or homosexual harassment was not allowed to preclude a trial on the facts of heterosexual harassment, in this case, of a woman by a man.

Later courts followed the "but for sex" test in case after case of male-on-female harassment. The widely followed opinion in *Hensen v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), formulated it: "In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion. It will therefore be a simple matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment."

Why "obvious"? Do courts assume that if behavior is heterosexual, it is gendered? They may. But there was no allegation to the contrary. Nothing else appearing, courts infer that the behavior is gender-based as heterosexuality is gender-based.

Denials of facial challenges in the same-sex harassment context have taken the same approach: factual.

Some judges believe that opposite-sex harassment cases make knowing that the behavior is sex-based relatively easy, while same-sex cases make it comparatively hard. *Amici* disagree. The facts are no more likely to be clear or murky in same-sex than in opposite-sex cases. The view that opposite-sex settings are easily gendered while same-sex settings are not reflects a presumption of heterosexuality. Correctly understood, the same tests developed to determine whether harassment is gender-based in cases between women and men — is it sexual? is one sex harmed? — apply equally in cases between women and between men.

2. Aggression that is sexual has been treated by courts as facially sex-based.

Sexuality is gendered in societies of sex inequality. As a result, for better or worse, in most instances, "[I]t is the essence of sexual conduct between two individuals that the one initiating or inviting the conduct normally does so because of the other's sex," as the court said in *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495 (E.D. Va. 1996). Courts adjudicating sexual harassment claims reflect this state of affairs when they unproblematically consider that sexual allegations are gender-based allegations. As the court said in *Nichols v. Frank*: "Sexual harassment is ordinarily based on sex. What else could it be based on?"

Without requiring genital proof, courts routinely deem opposite-sex harassment "unquestionably based on gender" simply because the facts alleged are sexual facts. The view "if it's sexual, it's gendered" has also guided same-sex cases. In one male-on-male case, *Tietgen*, "[t]he earnest sexual solicitation alleged . . . provides a firm basis for the inference that [plaintiff] was harassed because of his gender."

The underlying question of whether impugned treatment is or is not sexual is itself a question of fact — subtle at times, often anything but. Behavior can be hostile, produce anguish or distress (and intend to), or aim to demean, and still be sexual. Producing fear in another, or abusing power, can be sexually arousing or potentiating to the perpetrator.

But the genders of the perpetrator and the victim do not dispose of whether a given behavior is sexual or not. One cannot presume that behavior that is sexual in opposite-sex contexts is not sexual in same-sex contexts. Just as acts do not automatically become sexual simply because they are engaged in by members of different sexes, acts do not become nonsexual simply because they are engaged in by members of the same sex. No differential presumptions are appropriate.

3. Harassment is sex-discriminatory when sexual and one sex is victimized.

Concurring in *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993), a case of male-on-female sexual harassment, Justice Ruth Bader Ginsburg clarified that, in proving discrimination based on sex, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." The E.E.O.C.'s directive on same-sex harassment uses precisely these terms: "The victim does not have to be of the opposite sex of the harasser. Since sexual harassment is a form of sexual discrimination, the crucial inquiry is

whether the harasser treats a member or members of one sex differently from members of the other sex." Same-sex harassment courts have applied this "singles out one sex" rule with no difficulty. Counting heads across the gender line may not capture every sex-based disparity, but only one sex is harmed in every federally reported sexual harassment case to date.

Although not a question raised by this appeal, even when both sexes are victimized by sexual harassment, sex discrimination can result, some dicta to the contrary notwithstanding. The so-called bisexual harasser, eluding equality snares by indiscriminately sexually harassing men and women alike, stalks the judicial imagination, cutting quite a figure in legal hypotheticals. But in more than 20 years, an actual equal-opportunity harasser has yet to be sighted in federal court. It is settled law in sexual harassment cases that (1) plaintiff must allege one sex is harmed to state a legally sufficient prima facie case; (2) defendant must plead and prove the defense that both sexes are harmed, not raise it as a defect in law pre-trial; and (3) to prevail, the harm must be proven to be actually equal. Nothing in the same-sex context disturbs these resolutions.

C. Neither the rights of victims nor the liabilities of perpetrators of sexual harassment should turn on their sexual orientation.

The sexual orientation of the parties inevitably arises in, and is implicated in ruling on, same-sex harassment. The sexual orientation of the parties is, however, properly irrelevant to the legal sufficiency of sexual harassment claims. An accused perpetrator's being gay or lesbian does not make that person's behavior sex-based, but sexual orientation may be pertinent in determining whether particular behavior is based on sex in the totality of the circumstances.

1. Access to sex equality relief for acts of sexual abuse depends on the acts, not on the sexual preference of the actors.

Wright v. Methodist Youth Services, 511 F. Suppl. 307 (N.D. Ill. 1981), the first reported case of same-sex sexual harassment, held that a man fired because he rejected the sexual advances of his male supervisor stated a claim for sex discrimination under Title VII. *Wright* described the behavior as "homosexual advances," although so far as is known, most men who sexually abuse other men are heterosexual. The *Wright* ruling thus established that same-sex sexual advances were sex-based within the meaning of Title VII in a context that linked that result to the sexual preference of the perpetrator.

The emerging rule is to regard sexual orientation as not determinative of the legal sufficiency of same-sex claims as a matter of law but to admit it as relevant on the facts. Perpetrator sexual orientation does not make unwanted sexual initiatives sex-based any more than victim sexual orientation makes unwanted advances welcome, although both can be relevant (if sometimes only minimally) to both factual determinations. It is not categorically irrelevant, as the court noted in *E.E.O.C. v. Walden Book Co., Inc.* 885 F. Supp. 1100 (M.D. Tenn. 1995), because "[w]hen a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, and not doing so to employees of the opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to that treatment." Although care must be taken that this approach does not create an opening for homophobic attacks, the rule itself merely applies the same standard to everyone.

Sexual orientation on its face disposes of nothing. Gay men do not initiate unwanted sex to all men any more than lesbian women welcome sexual attention from all women. Needless to say, from knowing a person is gay, one cannot deduce that they sexually harassed another person. But the fact that a perpetrator of same-sex harassment is not gay — or not known to be gay or provably gay — also does not render same-sex sexual behavior *not* sex-based. By definition, sexual harassment is unwanted, so victim sexual orientation is as irrelevant on same-sex facial challenges on sex-basis as it is on opposite-sex ones. The sexual orientation of the victim cannot convert aggression that is sex-based into aggression that is not, or vice-versa.

Will Title VII access now turn on the sexual feelings and imagined or real sexual identities of perpetrators? Will it have one sexual harassment rule for gay sexual harassers and another for straight ones? One for those whose sexual feelings have coalesced, another for those whose sexual feelings are diverse, diffuse, denied, deniable, unknown, or simply unprovable? Oncale sued for forced sex. Why should the gender of those with whom Lyons and Pippen are sexual, when others want to be sexual with them, determine Oncale's rights against them for violating (what is conventionally considered) his manhood?

2. Harassment because of homosexuality is harassment because of sex.

In practical terms, harassment because of homosexuality cannot be separated from harassment because of sex. The gender of sexual object choice (although not all there is to sexual orientation) partly defines gender in society. The gender of a person with whom one has sex, or is thought to have sex, is a powerful constituent of whether one is considered a woman or a man in society.

The pitfalls of trying to separate the two are illustrated by *Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. January 15, 1992). Dillon was taunted, ostracized and physically beaten by coworkers because they believed he was gay. They called him "fag" and other terms of homophobic abuse, he said, because he was a man. The Sixth Circuit, admitting his harassment was "clearly sexual in nature," rejected his Title VII claim, saying it was because of homosexuality, not sex. So far as is discernible in the opinion, Dillon is heterosexual. In the view of *amici*, he was harassed as a male. Women are not called "fag." When women are seen as effeminate, they are rewarded, or sexually harassed in ways clearly marked as sex-specific. Dillon should not have had to prove facts that did not exist, such as that "his coworkers would have treated a similarly situated woman . . . differently," or to argue that "a lesbian would have been accepted." Hypothetical counterfactuals cannot be proven. That

the behavior was sexual, and that no women were, in fact, subjected to it (supported in Dillon's case by evidence of clearly homophobic attacks) should be enough.

Only men are subject to denigration by gay-bashing taunts like "faggot." Only women are subject to denigration by the use of terms like "dyke" as epithet and insult. Such abuse is inherently socially gendered. Using sex with members of one's own sex as derision, insult and hostility denigrates the target's gender-adequacy. Such terms, when part of sexual harassment, create a hostile environment for men *as men* and for women *as women,* whether directed at straights or gays. Because they attack individuals as members of their gender group, they are based on sex.

Separating sexuality from gender, hence harassment due to gender from harassment due to sexual orientation, is impractical and should lead to anomalous results, as *Valadez v. Uncle Julio's of Ill., Inc.*, 895 F. Supp. 1008 (N.D. Ill. 1995), illustrates. The male defendant had "crudely discussed his desire to engage in sexual activities with [lesbian] plaintiff and other female employees, both lesbian and non-lesbian. He made advances "to plaintiff . . . because she was a woman as well as a lesbian." He made such comments to other women, lesbians and nonlesbians, and no men. The court found this conduct gender-based. It did not find defendant's advances to straight women actionable as sex-based and those to lesbian women not actionable as based on sexual orientation. As the *Valadez* court perceptively noted, "defendant argues that because [he] was aroused by the fact that plaintiff is a lesbian his subsequent conduct is not actionable. Whether plaintiff would have enjoyed having sex with [him] is not the issue." The advances were doubly gender-based: because she is a woman, and because she is a woman who loves women. Disallowing such claims will, as a practical matter, leave lesbian women often without recourse.

Although this appeal does not require resolution of the question, *amici* submit that sexual harassment because of sexual orientation is sex-based discrimination. When individuals are sexually harassed because of the sex of their sexual partners, real or imagined, they are harassed because of sex.

First, formally speaking, those harassed because they are gay men or lesbian women are harassed because of the *gender* of their sexual partners and identification. If their own gender, or that of their loved ones, were different, they would not be so treated. They are precisely similarly situated to heterosexuals in having sexual relationships *based on gender* yet are treated differently because of their own gender, the gender of their sexual partners, or both.

Second, more substantively, gay men and lesbian women, through challenging the naturalness and inevitability of gendered-unequal roles in sex, challenge the sexual dimension of gender inequality under which sexual violence by men against women, and some men, is widespread.

Third, usually both gay men and lesbian women are not sexually harassed by the same harasser. Equal oppression — discrimination seen as based not on gender but on sexual orientation, hence not covered, however misguidedly — may occur in this context scarcely more often than bisexual harassment appears to. In any case, sex equality rights are individual rights. It is no answer to victimization based on the supposed gender-inappropriateness of one's sexuality that others of another sex who make the corresponding "error" are also discriminated against. Equal discrimination in this sense is sex discrimination two times over, not no discrimination at all.

III. The Equal Protection Clause forbids exempting same-sex harassment claims from Title VII coverage.

The Fifth Circuit's approach in *Oncale* creates a blatant double standard in sexual harassment cases based on gender, and potentially on sexual orientation as well, that denies survivors equal protection of the laws. Men are denied legal protection women have. Under the Fourth Circuit's extension, straight perpetrators can freely commit sexual aggression for which gay perpetrators are held accountable. And because sexual harassment due to sexual orientation, wrongly, is regarded as not covered by Title VII, some courts have concluded

Although this appeal does not require resolution of the question, *amici* submit that sexual harassment because of sexual orientation is sex-based discrimination. When individuals are sexually harassed because of the sex of their sexual partners, real or imagined, they are harassed because of sex.

that "Title VII does not protect homosexuals from harassment . . . since such treatment arises from their affectional preference rather than their sex" (*Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 139 n.2 [S.D. Tex. 1993]).

A dual system of rights on an arbitrary ground violates every equal protection standard known. As this Court said in *Plessy v. Ferguson* in 1896, the Constitution "neither knows nor tolerates classes among citizens." Surely, if officially ignoring men's complaints of sexual harassment while taking women's seriously violates the sex equality component of the Equal Protection Clause, and of Title VII, and of Title IX, judicially interpreting Title VII to ignore men's complaints of sexual abuse by men, while allowing women's complaints of sexual abuse by men, does as well. And this Court taught in *Romer v. Evans*, 116 S. Ct. 1620 (1996) that homosexuals, as such, may not be excluded from the ordinary civil processes for asserting their rights that are available to everyone else.

Without question, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to [another] person," Justice Powell, joined by Justice White, wrote in the affirmative action case of *Bakke v. University of California-Davis* in 1978. But the parallel between this case and the "reverse discrimination" cases is more formal than substantive. Those who claim "reverse discrimination" say they are treated the way the historically powerless are treated. However, affirmative action designed to redress and end arbitrary social exclusion and white/male supremacy does not violate the legal equality rights of individual members of socially dominant groups who thereby lose their customary group-based privileges. At the same time, it would be perverse to allow members of dominant groups to use equality laws to reassert their dominance while denying access to equality relief to individual members of dominant groups who fail to meet their group's standard for dominance and/or are treated like members of historically powerless groups are so often treated.

Oncale presents a real, not imagined, a direct, not reverse, act of discrimination based on sex. It cannot be the case that whites, wrongly claiming racism, can destroy equality programs for people of color while sexually assaulted men, rightly claiming sexism, cannot sue their victimizers. And far from undermining the rights of those who most often need the claim, allowing Oncale to sue under Title VII not only takes nothing from them but, by reducing the stigma of sexual assault and increasing accountability for it, benefits all sexual abuse survivors.

Much sexual harassment jurisprudence reasons that, had a sexually harassed woman been a man, she would not have been so treated, therefore she is harassed "because of sex." The present case poses the question, What if she had been a man and the same thing happened? The answer is at once sex-specific and sex-neutral: both sexes are covered for injuries through their gender. Women do not have sex equality rights only because men couldn't be treated in the same way, this case suggests, but because men could be and are not. And when they are? Had he been a woman, Oncale might not have been treated the way he was. But if he were, his sex equality rights would be recognized.

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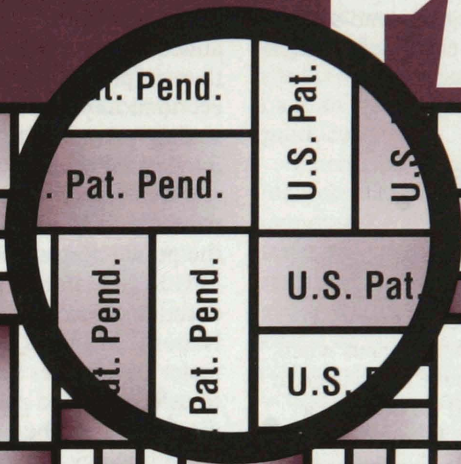
Upstream PATENTS = Downstream BOTTLENECKS



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— BY MICHAEL A. HELLER AND REBECCA S. EISENBERG

The problem we identify is distinct from the routine underuse inherent in any well-functioning patent system. By conferring monopolies in discoveries, patents necessarily increase prices and restrict use — a cost society pays to motivate invention and disclosure. The tragedy of the anticommons refers to the more complex obstacles that arise when a user needs access to multiple patented inputs in order to create a single useful product.

Thirty years ago in *Science*, Garrett Hardin introduced the metaphor "tragedy of the commons" to help explain overpopulation, air pollution, and species extinction. People often overuse resources they own in common because they have no incentive to conserve. Today, Hardin's metaphor is central to debates in economics, law, and science and powerful justification for privatizing commons property. While the metaphor highlights the cost of overuse when governments allow too many people to use a scarce resource, it misses the possibility of underuse when governments give too many people rights to exclude others. Privatization can solve one tragedy, but cause another.

Since Hardin's article appeared, biomedical research has been moving from a commons model toward a privatization model. Under the commons model, the federal government sponsored pre-market or "upstream" research and encouraged broad dissemination of results in the public domain. Unpatented biomedical discoveries were freely incorporated in "downstream" products for diagnosing and treating disease. In 1980, in an effort to promote commercial development of new technologies, Congress began encouraging universities and other institutions to patent discoveries arising from federally supported research and development and to transfer their technology to the private sector. Supporters applaud the resulting increase in patent filings and private investment, while critics fear deterioration in the culture of upstream research. Building on Heller's theory of anticommons property, this article identifies an unintended and paradoxical consequence of biomedical privatization: a proliferation of intellectual property rights upstream may be stifling life-saving innovations further downstream in the course of research and product development.

THE TRAGEDY OF THE ANTICOMMONS

Anticommons property can best be understood as the mirror image of commons property. A resource is prone to overuse in a *tragedy of the commons* when too many owners each have a privilege to use a given resource, and no one has a right to exclude another. By contrast, a resource is prone to underuse in a *tragedy of the anticommons* when multiple owners each have a right to exclude others from a scarce resource, and no one has an effective privilege of use. In theory, in a world of costless transactions, people could always avoid commons or anticommons tragedy by trading their rights. In practice, however, avoiding tragedy requires overcoming transaction costs, strategic behaviors, and cognitive biases of participants, with success more likely within close-knit communities than among hostile strangers. Once an anticommons emerges, collecting rights into usable private property is often brutal and slow.

Privatization in post-socialist economies starkly illustrates how anticommons property can emerge and persist. One promise of transition to markets was that new entrepreneurs would fill stores that socialist rule had left bare. Yet after several years of reform, many privatized storefronts remained empty, while flimsy metal kiosks, stocked full of goods, mushroomed up on the streets. Why did the new merchants not come in from the cold? One reason was that transition governments often failed to endow any individual with a bundle of rights that represents full ownership. Instead, fragmented rights were distributed to various socialist-era stakeholders, including private or quasi-private enterprises, workers' collectives, privatization agencies, and local, regional, and federal governments. No one could set up shop without first collecting rights from each of the other owners.

Privatization of upstream biomedical research in the United States may create anticommons property that is less visible than empty storefronts, but even more economically and socially costly. In this setting, privatization takes the form of intellectual property claims to the sorts of research results that, in an earlier era, would have been made freely available in the public domain. Responding to a shift in U.S. government policy in the past two decades, research institutions such as the National Institutes of Health (NIH) and major universities have created technology transfer offices to patent and license their discoveries. At the same time, commercial biotechnology firms have emerged in research and development (R&D) niches somewhere between the proverbial "fundamental" research of academic laboratories and the targeted product development of pharamaceutical firms. Today, upstream research in the biomedical sciences is increasingly likely to be "private" in one or more senses of the term — supported by private funds, carried out in a private institution, or privately appropriated through patents, trade secrecy, or agreements that restrict the use of materials and data.

In biomedical research, as in post-socialist transition, privatization holds both promises and risks. Patents and other forms of intellectual property protection for upstream discoveries may fortify incentives to undertake risky research projects and could lead to a more equitable distribution of profits across all stages of R&D. But privatization can go astray when too many owners hold rights in prior discoveries that constitute obstacles to future research. Upstream patent rights, initially offered to help attract further private investment, are increasingly regarded as entitlements by those who do research with public funds. A researcher who may have felt entitled to co-authorship or a citation in an earlier era may now feel entitled to be a co-inventor on a patent or to receive a royalty under a material transfer agreement. The result has been a spiral of overlapping patent claims in the hands of different owners, reaching ever further upstream in the course of

biomedical research. Researchers and their institutions may resent restrictions on access to the patented discoveries of others, yet nobody wants to be the last one left dedicating findings to the public domain.

The problem we identify is distinct from the routine underuse inherent in any well-functioning patent system. By conferring monopolies in discoveries, patents necessarily increase prices and restrict use — a cost society pays to motivate invention and disclosure. The tragedy of the anticommons refers to the more complex obstacles that arise when a user needs access to multiple patented inputs in order to create a single useful product. Each upstream patent allows its owner to set up another tollbooth on the road to product development, adding to the cost and slowing the pace of downstream biomedical innovation.

HOW A BIOMEDICAL ANTICOMMONS MAY ARISE

Current examples in biomedical research demonstrate two mechanisms by which a government might inadvertently create an anticommons: either by creating too many *concurrent fragments* of intellectual property rights in potential future products or by permitting too many upstream patent owners to *stack licenses* on top of the future discoveries of downstream users.

Concurrent Fragments. The anticommons model provides one way of understanding a widespread intuition that issuing patents on gene fragments makes little sense. Throughout the 1980s, patents on genes generally corresponded closely to foreseeable commercial products, such as therapeutic proteins or diagnostic tests for recognized genetic diseases. Then, in 1991, NIH pointed the way toward patenting anonymous gene fragments with its notorious patent applications on expressed sequence tags (ESTs). NIH subsequently abandoned these patent applications and now takes a more hostile position toward patenting ESTs and raw genomic DNA sequences. Meanwhile, private firms have stepped in where NIH left off, filing patent applications on newly identified DNA sequences, including gene fragments, before identifying a corresponding gene, protein, biological function, or potential commercial product. The Patent and Trademark Office (PTO), in examing these claims, could create or avoid an anticommons.

Although a database of gene fragments is a useful resource for discovery, defining property rights around isolated gene fragments seems at the outset unlikely to track socially useful bundles of property rights in future commercial products. Foreseeable commercial products, such as therapeutic proteins or genetic diagnostic tests, are more likely to require use of multiple fragments. A proliferation of patents on individual fragments held by different owners seems inevitably to require future costly transactions to bundle licenses together before a firm can have an effective right to develop these products.

Patents on receptors useful for screening potential pharmaceutical products demonstrate another potential "concurrent fragment" anticommons in biomedical research. To learn as much as possible about the therapeutic effects and side effects of potential products at the preclinical stage, firms want to screen products against all known members of relevant receptor families. But if these receptors are patented and controlled by different owners, gathering the necessary licenses may be difficult or impossible. A recent search of the Lexis patent database disclosed more than 100 issued U.S. patents with the term "adrenergic receptor" in the claim language. Such a proliferation of claims presents a daunting bargaining challenge. Unable to procure a complete set of licenses, firms choose between diverting resources to less promising projects with fewer licensing obstacles or proceeding to animal and then clinic testing on the basis of incomplete information. More thorough *in vitro* screening could avoid premature clinical testing that exposes patients to unnecessary risks.

Long delays between filing and issuance of biotechnology patents aggravate the problem of concurrent fragments. During this period of pendency, there is substantial uncertainty as to the scope of patent rights that will ultimately issue. Although U.S. patent law does not recognize enforceable rights in pending patent applications, firms and universities typically enter into license agreements prior to the issuance of patents, and firms raise capital based on the inchoate rights preserved by patent filings. In effect, each potential patent creates a specter of rights that may be larger than the actual rights, if any, eventually conferred by the PTO. Working into the calculations of both risk-taking investors and risk-averse product developers, these overlapping patent filings may compound the obstacles to developing new products.

Stacking Licenses. The use of reach-through license agreements (RTLAs) on patented research tools illustrates another path by which an anticommons may emerge. As we use the term, a RTLA gives the owner of a patented invention, used in upstream stages of research, rights in subsequent downstream discoveries. Such rights may take the form of a royalty on sales that result from using the upstream research tool, an exclusive or nonexclusive license on future discoveries, or an option to acquire such a license. In principle, RTLAs offer advantages to both patent holders and researchers. They permit researchers with limited funds to use patented research tools right away and defer payment until the research yields valuable results. Patent holders may also prefer a chance at larger payoffs from sales of downstream products rather than certain, but smaller, upfront fees. In practice RTLAs may lead to an anticommons as upstream owners stack overlapping and inconsistent claims on potential downstream products. In effect, the use of RTLAs gives each upstream patent owner a continuing right to be present at the bargaining table as a research project moves downstream toward product development.

So far, RTLAs have had a mixed reception as a mechanism for licensing upstream biomedical research patents, but they appear to be becoming more prevalent. When Cetus Corporation initially proposed RTLAs on any products developed through the use of the polymerase chain reaction (PCR) in research, they met strong resistance from downstream users concerned with developing commercial products. Later, Hoffmann-La Roche acquired the rights to PCR and offered licenses that do not include reach-through obligations. The resulting pay-as-you-go approach increases the up front cost of a license to use PCR, but it decreases the likelihood of an anticommons emerging.

More recently, some universities and other nonprofit research institutions have balked at terms DuPont Corporation has offered for licenses to use patent oncomouse and cre-lox technologies, although others have acquiesced in the license terms. These patents cover genetically engineered mice useful in research that could lead to products falling outside the scope of the patent claims. DuPont has offered noncommercial research licenses and sublicenses on terms that seem to require licensees to return to DuPont for further approval before any new discoveries or materials resulting from the use of licensed mice are passed along to others

or used for commercial purposes. DuPont thereby gains the right to participate in future negotiations to develop commercial products that fall outside the scope of their patent claims. In effect, the license terms permit DuPont to leverage its proprietary position in upstream research tools into a broad veto right over downstream research and product development.

As RTLAs to use patented research tools multiply, researchers will face increasing difficulties conveying clear title to firms to develop future discoveries. If a particularly valuable commercial product is in view, downstream product developers might be motivated and able to reach agreements with multiple holders of RTLAs. But if the prospects for success are more uncertain or the expected commercial value is small, the parties may fail to bargain past the anticommons.

TRANSITION OR TRAGEDY?

Is a biomedical anticommons likely to endure once it emerges? Recent empirical literature suggests that communities of intellectual property owners who deal with each other on a recurring basis have sometimes developed institutions to reduce transaction costs of bundling multiple licenses. For example, in the music industry, copyright collectives have evolved to facilitate licensing transactions so that broadcasters and other producers may readily obtain permission to use numerous copyrighted works held by different owners. Similarly, in the automobile, aircraft manufacturing, and synthetic rubber industries, patent pools have emerged, sometimes with the help of government, when licenses under multiple patent rights have been necessary to develop important new products. When the background legal rules threaten to waste resources people often rearrange rights sensibly and create order through private arrangements. Perhaps some of the problems caused by proliferating upstream patent rights in biomedical research will recede as licensors and licensees gain experience with intellectual property rights and institutions evolve to help owners and users reach agreements. The short-term costs from delayed development of new treatments for disease may be worth incurring if fragmented privatization allows upstream research to pay its own and helps to ensure its long-run viability. Patent barriers to product development may be a transitional phenomenon rather than an enduring tragedy.

On the other hand, there may be reasons to fear that patent anticommons could prove more intractable in biomedical research than in other settings. Because patents matter more to the pharmaceutical and biotechnology industries than to other industries, firms in these industries may be less willing to participate in patent pools that undermine the gains from exclusivity. Moreover, the lack of substitutes for certain biomedical discoveries (such as patented genes or receptors) may increase the leverage of some patent holders, thereby aggravating hold-out problems. Rivals may not be able to invent around patents in research aimed at understanding the genetic basis of diseases as they occur in nature.

More generally, three structural concerns caution against uncritical reliance on markets and norms to solve biomedical anticommons tragedy: the transaction costs of rearranging entitlements, heterogeneous interests of owners, and cognitive biases among researchers.

Transaction Costs of Bundling Rights. High transaction costs may be an enduring impediment to efficient bundling of intellectual property rights in biomedical research. First, many upstream patent owners are public institutions with limited resources for absorbing transaction costs and limited competence in fast-paced, market-oriented bargaining. Second, the rights involved cover a diverse set of techniques, reagents, DNA sequences, and instruments. Difficulties in comparing the values of these patents will likely impede development of a standard distribution scheme. Third, the heterogeneity of interests and resources among public and private patent owners may complicate the emergence of standard license terms, requiring costly case-by-case negotiations. Fourth, licensing transaction costs are likely to arise early in the course of R&D when the outcome of a project is uncertain, the potential gains are speculative, and it is not yet clear that the value of downstream products justifies the trouble of overcoming the anticommons.

Even when upstream owners see potential gains from cooperation and are motivated to devise mechanisms for reducing transaction costs, they may be deterred by other legal constraints, such as antitrust laws. Patent pools have been a target of antitrust scrutiny in the past, which may explain why few, if any, such pools exist today. Although antitrust law may be less hostile to patent pools today than it was in 1975 when a consent decree dismantled the aircraft patent pool, the antitrust climate changes from one administration to the next. Even a remote prospect of facing treble damages and an injunction may give firms pause about entering into such agreements.

Heterogeneous Interests of Rights Holders. Intellectual property rights in upstream biomedical research belong to a large, diverse group of owners in the public and private sectors with divergent institutional agendas. Sometimes heterogeneity of interests can facilitate mutually agreeable allocations (you take the credit, I'll take the money), but in this setting there are reasons to fear that owners will have conflicting agendas that make it difficult to reach agreement. For example, a politically-accountable government agency such as NIH may further its public health mission by using its intellectual property rights to ensure widespread availability of new therapeutic products at reasonable prices. When NIH sought to establish its co-ownership of patent rights held by Burroughs-Wellcome on the use of AZT to treat HIV, its purpose was to lower the price of AZT and promote public health rather than simply to maximize its financial return. By contrast, a private firm is more likely to use intellectual property to maintain a lucrative monopoly on a high-priced product. When owners have conflicting goals, and each can deploy its rights to block the strategies of the others, they may not be able to reach an agreement that leaves enough private value for downstream developers to bring products to market.

A more subtle conflict in agendas arises between owners that pursue end product development and those that focus primarily on upstream research. The goal of end product development may be better served by making patented research tools widely available on a nonexclusive basis, whereas the goal of procuring upstream research funding may be better served by offering exclusive licenses to sponsors or research partners. Differences among patent owners in their tolerance for transaction costs may further complicate the emergence of informal licensing norms. Universities may be ill-equipped to handle multiple transactions for acquiring licenses to use research tools. Delays in negotiating multiple agreements to use patented processes, reagents, and gene fragments could stifle the creative give-and-take of academic research. Yet academic researchers who fail to adopt new discoveries and instead rely on obsolete public domain technologies may find themselves losing grant competitions. Large corporations with substantial legal departments may have considerably greater resources for negotiating licenses on a case-by-case

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basis than public sector institutions or small start-up firms. This asymmetry may make it difficult to identify mutually advantageous cross-licensing arrangements. Patent owners are also likely to differ in the time frames they can tolerate for recouping current investments in transaction costs.

Owners are also likely to differ in their willingness and ability to infringe the patents of others, leading to asymmetrical motivations to negotiate cross-licenses. Use of a patented invention in an academic laboratory or a small start-up firm may be inconspicuous, at least if not described in a publication or at a scientific meeting. Patent owners may still be more reluctant to sue public sector investigators than they are to sue private firms. Differences in institutional cultures may make academic laboratories and biotechnology firms more tolerant of patent infringement than large pharmaceutical firms. Owners who do not feel vulnerable to infringement liability may be less motivated to enter into reasonable cross-licenses than owners who worry more about being sued.

Cognitive Biases. People consistently overestimate the likelihood that very low probability events of high salience will occur. For example, many travelers overestimate the danger of an airplane crash relative to the hazards of other modes of transportation. We suspect that a similar bias is likely to cause owners of upstream biomedical research patents to overvalue their discoveries. Imagine that one of a set of 50 upstream inventions will likely be the key to identifying an important new drug, the rest of the set will have no practical use, and a downstream product developer is willing to pay $10 million for the set. Assuming no owner knows ex ante which invention will be the key, a rational owner should be willing to sell her patent for the probabilistic value of $200,000. However, if each owner overestimates the likelihood that her patent will be the key, then each will demand more than the probabilistic value, the upstream owners collectively will demand more than the aggregate market value of their inputs, the downstream user will decline the offers, and the new drug will not be developed. Individuals trained in deterministic rather than probabilistic disciplines are particularly likely to succumb to this sort of error.

A related "attribution bias" suggests that people systematically overvalue their assets and disparage the claims of their opponents when in competition with others. We suspect that attribution bias is pervasive among scientists because it is likely adapative for the research enterprise as a whole. Over-commitment by individuals to particular research approaches ensures that no hypothesis is dismissed too quickly, and skepticism toward rivals' claims ensures that they are not too readily accepted. But this bias can interfere with clear-headed bargaining, leading owners to overvalue their own patents, undervalue others' patents, and reject reasonable offers. Institutional ownership could mitigate these biases, but technology transfer offices rely on scientists to evaluate their discoveries. When two or more patent owners each hope to dominate the product market, the history of biotechnology patent litigation suggests a likelihood that bargaining will fail.

CONCLUSION

Like transition to free markets in post-socialist economies, privatization of biomedical research offers both promises and risks. It promises to spur private investment, but risks creating a tragedy of the anticommons through a proliferation of fragmented and overlapping intellectual property rights. An anticommons in biomedical research may be more likely to endure than in other areas of intellectual property because of high transaction costs of bargaining, heterogeneous interests among owners, and cognitive biases of researchers. Privatization must be more carefully deployed if it is to serve the public goals of biomedical research. Policymakers should seek to ensure coherent boundaries of upstream patents and to minimize restrictive licensing practices that interfere with downstream product development. Otherwise, more upstream rights may lead paradoxically to fewer useful products for improving human health.

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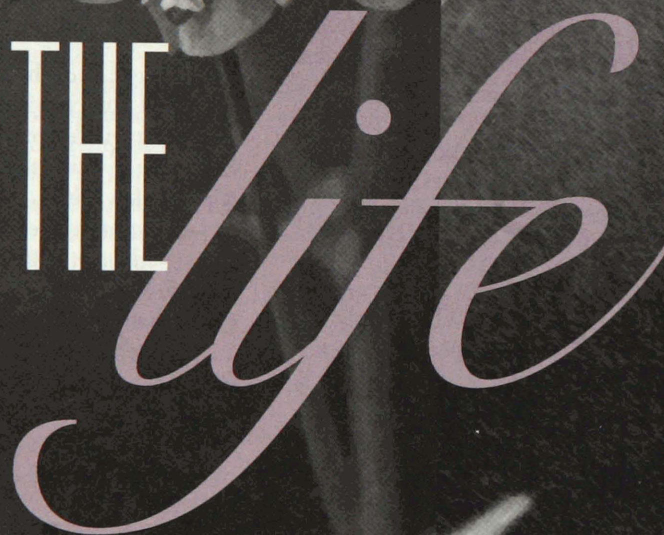
Michael A. Heller

Rebecca S. Eisenberg

THE *life* of the sick person



— Carl E. Schneider, '79

PHOTOS BY THOMAS TREUTER

It takes time for an ill person to understand her needs. The caregiver cannot simply ask "What do you need?" and expect a coherent reply. A recently diagnosed person's life has already changed in more ways than she can grasp, and changes continue throughout critical illness. Part of what is "critical" is the persistence of change. Being critically ill means never being able to keep up with your own needs. Except for the need to hear that it is all a mistake — the lab results had the wrong name on them: I'm fine, really — the ill person does not know what she needs, though the needs are very real.

— Arthur W. Frank, *At the Will of the Body*

In The Practice of Autonomy: Patients, Doctors, and Medical Decisions *(Oxford University Press, 1998), Professor Carl E. Schneider, '79, examines the law of bioethics by looking at the lives of patients. He argues that bioethics has reached a point of paradox: Bioethicists increasingly seem to think patients have a duty to make their own medical decisions, but it is increasingly clear that many patients do not want to do so. The following excerpt, from the chapter "The Reluctant Patient," is part of Schneider's attempt to show why patients may be reluctant to seize the gift of autonomy that the law of bioethics seeks to offer them. This edited excerpt is printed with permission.*

To appreciate the force of the second reason patients might reject the leading role in their medical decisions, we should recall the syllogism that lies silent at the heart of the autonomist paradigm: People want to make all decisions that shape their lives. Few decisions matter more than medicine's life-or-death, sickness-or-health, fit-or-frail choices. Therefore patients want to make their own medical decisions. This syllogism is flawed because some patients conclude they will reach wiser decisions by deferring to the expertise and judgment of someone else. But the syllogism errs in other ways, ways suggested by what Talcott Parsons called the "sick role, with how people feel when they are ill." The autonomy paradigm rests on assumptions about the natural desire of all people to control themselves and their surroundings. These assumptions are overstated even for the population at large. But sick people differ from healthy people, for they often feel frightened, discouraged, dull-witted, abstracted, uninterested, and weary. These feelings, I will now suggest, may inhibit them from making medical decisions.

The Work of the Sick

We have just seen how arduous and distressing medical decisions can be. Even healthy people sometimes (indeed, regularly) cede control over decisions in the face of untoward demands on their energy, intelligence, interest, time, and attention. How much more, then, might sick people — even sick people who felt intellectually prepared — wish to escape so onerous and unpromising a burden? Oliver Sacks, surrounded by fellow patients, realized that "[w]e had all, in our ways, been undermined by sickness, had lost the careless boldness, the freedom, of the well." Thus some patients will accept that they lack — if only temporarily — the vigor, the persistence, the dispassion, the alertness, the concentration, the courage, the will — to resolve the riddles and face the bafflements of their medical distress. Such sick people may avoid all kinds of work, especially the fierce, foreign, and forbidding work of medical decisions. As one doctor-turned-patient observed, "Too sick at first to respond in any other than an automatic 'reflex' way, it was only now that I could bring out any new response which took into account the new facts. It was as though all before had been on a low level and only along lines ingrained from previous beliefs and behavior patterns. While words made sense, evaluations and thoughts did not. Nature seemed to reserve all energy for combating the disease. The transition of response was gradual and the evolution of critical appraisal and facing facts cannot be labeled as having occurred on any one day or in any one week."

And another observer, Reynolds Price, "was plunged into degrees of pain and realistic depression that produced a dangerously passive state. In that psychic bog of helplessness, like most trapped sufferers, I was transfixed by the main sight

in view — my undiminished physical pain. And in such a trance state, for that's what a heavily drugged life is, any personal crusade for sane alternative therapies was literally unthinkable to me. It was all I could do to focus my scarce strength and clarity on one main aim beyond plain endurance."

Exhaustion dogs patients' lives. Their reserves of energy depleted, the severely ill barely stumble through the day. They lose the physical strength and emotional fortitude to keep their houses clean, their families cared for, and their friendships alive, much less to earn a living. They can hardly rise out of bed, brush their teeth, or make breakfast. One cancer patient was so weary he could not "read a newspaper for more than 15 minutes." Another said: "Weakness was the central experience — a bankruptcy of strength and energy. A few hours in the morning used it all up, and there was no reserve account on which to draw. I was overdrawn at the energy bank." In these straits, the labor of living preempts the work of medical decisions.

All these are calls on patients' reserves that are a normal part of life. But those reserves are also sapped by the special demands of illness. Patients must devote resources to recovering from their disease and coping with it physically, mentally, and spiritually. Some of this effort is tiring because it is hard physical work, like rehabilitation after a stroke. Some of it is psychologically wearing. As Herzlich and Pierret write, "Mentally, some persons find it very difficult to be responsible for their own treatment. . . . The young secretary acknowledged: 'Always, always having to pay attention, that . . . is something that people have trouble accepting. This is the thing that's hard to learn, because the shots. . . . I am always worried, but I do it. The analyses are not hard to do, but what is so constraining is that one has to pay attention at all times.' The older diabetic also said, 'That is why we who are sick are so tired, because we always have to gather up our will power to do the things that have to be done, and that one couldn't deal with if one let oneself go.'"

Many patients also must strive to manage their emotions, to sustain their spirits, to stop the slide into soul-sickening anger, frustration, and depression. As a doctor with cancer wrote, "I only know that during this time I felt blighted physically and overrun psychologically. I am sure that deep within me I was furious at the fates which had brought me to my knees in youth. Had I had the energy and a target or even a surrogate target, I imagine I would have broken out in rage. But I was past being angry. What I do remember feeling was despair." In addition, patients must work to adjust to the fact of their illness and their damaged future. Thus Michael Kelly says the decision to have surgery for colitis "is not about the absence or presence of particular information nor about its distortion, it is about the individuals changing their view of themselves so that they define themselves as sick. . . . The process is one of aligning the self with the public identity of prospective and actual surgical case."

These kinds of work can mount up to become all-demanding, so that medical decisions seem too expensive a distraction which can better be shuffled off onto intimates or experts. James Johnson, for example, had to decide about a skin graft after a long hospitalization for dire heart problems. He could hardly face even this relatively trivial decision, for he "suffered from battle fatigue. I'd had my fill of doctors and hospitals." So "[a]t this point, I knew I could not go on trying to figure it out." When considering whether she should make her own medical decisions, Joie McGrail concluded "it would be wasteful to use energy that would be desperately needed to fight my disease in simply asserting my personality, so I allowed myself to be trundled about, poked, prodded, kept waiting and rushed." Eileen Radziunas wrote sorrowfully that she "carried the burden of being the one to suggest ideas, ask about tests, and question possible diagnoses. I felt overwhelmed with all this responsibility, and I needed the *doctors* to take control so that I could use all my energy for recovering." Thus Kenneth Cohn found it "comforting to be treated by competent dedicated professionals. Their skill allowed me to eschew the medical literature on lymphoma and to focus on being a patient."

Agnes de Mille captures so many of the reactions of so many sick people to making medical decisions that she must be quoted at length. When she had a stroke, she was not young, but as a dancer, she had lived vigorously. As a choreographer she had bustled with energy until she was, literally and figuratively, stricken: "I was taken up with the minutiae of living. Everything was so extraordinarily difficult and so new to perform. Every single act became a contest of skill; and games can be tiring. I did not concern myself with the medical details. There are patients who do, and presume, after a short while, to advise the doctors and to interfere in their conferences. I wanted none of that. . . . I watched them at it and I was glad for their expertise, but I did not seek in any way to share it, and even when they tried to explain it to me I resisted. I was reluctant to learn because I didn't think the horrid details would help me to keep my energies where they belonged — on survival. The dreadful possibilities were entirely the doctor's business."

In sum, illness lays strength and stamina to waste. Thus the sick may decline to make their own medical decisions because they have too little vitality and too much to spend it on.

The Burdens of the Sick

Recall what it is like to be sick: "[A] little cooling down of animal excitability and instinct, a little loss of animal toughness, a little irritable weakness and descent of the pain-threshold, will bring the worm at the core of all our usual springs of delight into full view, and turns us into melancholy metaphysicians." The

only benefit, the only comfort, you may find in being sick is that other people will care for you, and you can let them, let them fix your meals, bring your pills, rub your back. May Sarton captures both these aspects of the sick person's life: "How I have enjoyed complete passivity! Being 'looked after' like a Paddington bear — listening to the bustle in the corridor as though from very far away so even the noisy voices didn't trouble my floating. But I still feel frightfully tired and so I dread going home." Even patients who always resented dependence may savor it when they are ill. Agnes de Mille reflects, "Up to May 15, as far as it was possible for a woman to be independent, I had been independent. Now, not so. I cared nothing. Let me lie still. Let me be. As far as I was concerned people could wait on me, serve me, help me in every way." And a doctor fallen ill found "for one of the few times in my adult life, I felt that I was being taken care of completely. Everything was being provided for my care. I did not have to make any decisions or take any responsibility for my thoughts or actions. It was an especially good feeling to be cared for, and secretly I still cherish those days that I spent in the hospital although not the reason why I had to be there."

As that doctor gratefully recognized, people may particularly spare you the travail of decisions. As another patient put it, "I allowed myself the forgotten luxury of childhood: other people were in charge." Jay Katz remorselessly disparages "the regression to more childlike functioning that can result from illness [and that] becomes augmented by a patient's wish for caretaking by a patient-physician who, as memory informs, will immediately alleviate all suffering." But I believe Sacks speaks with wiser tongue when he observes more sympathetically that, "though as a sick patient, in hospital, one was reduced to moral infancy, this was not a malicious degradation, but a biological and spiritual need of the hurt creature. One had to go back, one had to regress, for one might indeed be as helpless as a child, whether one liked it, or willed it, or not. In hospital, one became again a child with parents (parents who might be good or bad) and this might be felt as 'infantilizing' and degrading or as a sweet and sorely-needed nourishing." Such patients may accept the comfort of relief from the burdens of decision.

In addition, even more than most of us, the sick may wish to escape not just the wearisome labor of medical decisions, but also the responsibility for such savagely difficult choices, choices on which their own happiness and that of their friends and families may so much depend but which are so bewildering. When decisions go wrong, many patients blame themselves and feel blamed. Thus one study of kidney donors concludes, "[W]here the costs of failure on both sides are so great, our impression is that individuals frequently wish to absolve themselves of the responsibility of the decision. Deliberation and a conscious decision emphasize the freedom of one's choice and one's responsibility for the choice. To hold oneself responsible for a potentially disastrous outcome is painful, however."

Robert Murphy, an anthropologist dying of a spinal tumor, put this observation into more personal form. He acknowledged that "the patient is responsible for his own recovery, and this has many positive aspects." However, he learned it has its drawbacks too: "[I]f his efforts can yield improvement, then any failure to improve can be an indication that he isn't trying hard enough, that he is to blame for his own condition. This load of culpability is often added to a lingering suspicion among family and friends that the patient was responsible, somehow or other, for what happened to him. And the patient, too, is often beset with guilt over his plight — a seemingly illogical, but very common, by-product of disability."

The authors of a study comparing the desires of cancer patients and the general public for participation in medical decisions generalize this point: "The strong effect [on the desire to make decisions] of the presence or absence of cancer suggested that decision making preferences might be influenced by diagnosis of a life-threatening illness. In that context, being

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Medical decisions may repel patients for yet another reason. Such decisions cannot ordinarily be made well without acquiring thorough information about one's illness and analyzing it carefully. But not everyone finds that learning and thinking interesting, or pleasant, or even tolerable, particularly at the level of intensity and persistence needed to make complex and unfamiliar decisions.

freed of responsibility for making treatment decisions can produce an immense sense of relief, with treatment failures becoming the responsibility of the practitioner rather than the patient."

The problem is not just that a baneful sense of responsibility may impede decisions in the first place and make living with them tormenting. It is also that that sense warps decisions. Thus the study of kidney donation I quoted a moment ago found that people burdened with this sense "are motivated to regard the decision [to donate] as inevitable — as the only possible alternative, given the enormous moral obligation, or the social pressure, or the fact that another family member volunteered first, or the perception that this issue is not one's moral responsibility. Thus, while the outsider sees the potential donor as making a choice, the potential donor himself is likely to describe it as 'no decision at all'."

Medical decisions may repel patients for yet another reason. Such decisions cannot ordinarily be made well without acquiring thorough information about one's illness and analyzing it carefully. But not everyone finds that learning and thinking interesting, or pleasant, or even tolerable, particularly at the level of intensity and persistence needed to make complex and unfamiliar decisions. Some patients — like William Martin, the sociologist with prostate cancer — may "want to keep on looking stuff up and trying to make sense of it for as long as I can," and they may become "totally engrossed in trying to unravel the riddles of prostate cancer, sometimes almost to the point of forgetting just why I had developed such a keen interest in the subject." But other patients will not have made research their life's work, will not know how to do it, will not enjoy it, will not like learning a new vocabulary and thinking in foreign ways, and will find better things to do with their time. Indeed, some people find medicine, and even their own ailments and treatments, boring. Few subjects are universally fascinating, and medicine is not one of them. As Wilfrid Sheed writes, "I've never been the least interested in the nuts and bolts of sickness and health. In fact, even when I've been so ill myself that there's been no avoiding them, my position has always been 'just tell me what I'm supposed to do, and who do you like in the World Series?' or the Oscars, or any damn thing that doesn't require thermometers and blood tests every half hour."

Even people who once were fascinated by medical questions may see them pall after months of the tedium of patienthood. One couple put the point bluntly: *"We are both so weary of this medical junk."*

Furthermore, many patients — especially the gravely ill — will not relish having to think about the terrible and terrifying things that are happening to them, the cruel uncertainties they must endure, the wretched alternatives they confront, or the bitter prospects they face. For just such reasons many people resist buying life insurance, writing wills, preparing advance directives, signing organ-donor cards, seeing the doctor, and even visiting sick friends. In short, some patients will be disqualified from making decisions by their reluctance to learn enough about their illness. For Lance Morrow, "Having a heart attack and waiting for another at any moment results in an especially wearing and unlikable introspection. It is a physical introspection entirely, an in-peering anxiety, my focused self standing like a peasant outside the castle walls, awaiting the caprice of a lord who is given to drunken rages." Joseph Heller says wryly: "My attending doctors . . . had adopted the sensible approach of not giving me any distressing information about my illness unless they had to; and I had adopted the sensible defense of not seeking any." The mother of a child with cancer wrote that "the few articles and newspaper paragraphs I have read are certainly inadequate; yet I do not intend to become an authority on Carol's leukemia. Intuitively, I desire to keep all bitter informants at bay, to study no discouraging life expectancy charts or bleak percentages." Ernst Hirsch, a psychologist and a thoughtful man with multiple sclerosis, shunned the literature on his disease, since in it "the illness tends to be described in its most acute, extreme and often final form. Such an account naturally makes reading about the illness depressing, particularly to a patient who is afflicted with it." Reynolds Price, a writer with cancer of the spinal cord, reports, "From the start of the trouble, I made a conscious choice not to open my file and confront what doctors believed was the worst — I saw in their eyes that they had slim hope, and I knew I must defy them. On balance I think the choice of a high degree of ignorance proved good for me. All my life I've tended to try to meet people's hopes. Predict my death and I'm liable to oblige; keep me ignorant and I stand a chance of lasting." Finally, Molly Haskell reports that when a doctor told the mother of her desperately sick husband that he (the doctor) "couldn't promise he wouldn't have brain damage," Haskell was "stunned, outraged, first, that he should say such a thing to her, and second, because it was a possiblity I hadn't allowed myself to even think about. How dare he answer a question that nobody had asked! I told him from now on not to volunteer grim information unless we asked for it."

Such patients do not warmly welcome the practice of informed consent: "I signed everything without reading any of it, and tried not to listen while he told me in great detail what would happen later that morning. All I wanted to know was, would it hurt?" And: "I signed it quickly, not noticing too much of any of it. If it were going to happen, it would happen. But it was a bit frightening as I thought of that long list." Even less formal communications can be disturbing: "Another sort of drowning is inflicted on us patients by doctors who think out loud while they examine you. These physicians not only expose you to their full conclusions, they expose you to the full process by which they reach these conclusions. As your examination proceeds you hear all the malfunctions you might have, as well as those you do have, and

you have twice as much to worry about." Thus one ill doctor "learned how simple words from a physician can strike absolute terror into the hearts of patients. A well-meaning internal medicine resident remarked, offhand, as he pushed on my belly, that my liver seemed 'a little enlarged.' The fear of metastatic malignancy nearly turned me to jelly."

As this last example suggests, even patients who are professionally equipped to understand their illness may not wish to know too much. One doctor afflicted with cancer wrote, "I am terrified at the thought of examining my own chart for fear that someone has recorded in it a poor prognosis. I know that's illogical and that I should look to see if there's an error that could be corrected. But I am no longer able to function as my own doctor. My confidence has been worn down — by my fears about my illness, of course, but also by something more subtle, something that's happened psychologically over these past months." Another doctor with cancer observed, "I knew as much as anyone about X-rays and easily could have examined my own on the way back to the clinic. I never did. The possibility that I would again discover trouble in my chest was so horrifying to me that it quenched my curiosity." Yet another doctor acquired an aversion "to learning anything new or even remotely pessimistic about my disease and its complications." He reasoned, "It is a doctor's job to search diligently for the worst. The patient hopes eternally for the best. When they are the same person, the conflict becomes extremely difficult (perhaps impossible) to reconcile."

But even if patients' curiosity is not quenched, even if they want information, the same fear that deters them from asking for it may keep them from assimilating it. When some of the colitis patients Michael Kelly studied were told they needed surgery, they "expressed great surprise when the operation was first mentioned to them, this in spite of the fact that several had been attending surgical outpatient clinics over many months." One such patient "tried not to think about it. 'I just blocked it out. I just didn't want to know. I just couldn't picture it at all. All I knew was that you have a bag. I just didn't want to know.'" Another patient "refused to acknowledge that she was a prospective surgical case, even after she had been admitted to hospital for the operation. . . . She claimed that she thought she was going into hospital for tests." And Gerda Lerner believed her husband "undoubtedly 'knew' before I told him of his brain tumor, and certainly many times refused to 'know' after I told him. He was already deeply caught up in the process of dying and conscious knowledge was only a minor aspect of it. Just so it is with me now: the fact of his death, his absence, is incontrovertible. I 'know' it in many different ways and with many different modes of perception. Yet, to this day, I still do not 'know' it the way I know other facts. It shifts; it wavers — sometimes it is as true as a rock; sometimes it is as true as a bad dream. I imagine it must be that way for the dying until that final stage when they really 'know' — then they let go."

To put the point somewhat differently, patients may prefer to "deny" their illness, avoid information about it, suppress thoughts of it, and try to go about their business as though they were well. Popular psychology has cursed "denial" with a bad name, perhaps with some cause. But denial has its uses, for happiness "has blindness and insensibility to opposing facts given it as its instinctive weapon for self-protection against disturbance." Paul Monette observes, "This force of life continuing is what they mean by 'positive denial'." Robert Murphy said he "once asked the neurologist how bad it could get, and, with a pained expression, he answered, 'Do you really want to know?' I didn't." Murphy commended the well-tuned repression mechanism, the ability to become detached from one's emotions, to benumb the inroads of fear." He acknowledged that "[t]his kind of repression is bought at considerable emotional cost, but it has its positive uses. Some fears and sentiments are better left unstated, and those that I harbored as I entered the hospital in 1976 were among them. What I refused to contemplate was the progressive and total destruction of my body, the reduction of all volition to quietude, the entombment of my mind in inert protoplasm." And a seriously ill doctor thought "psychiatrists only preach nonsense when they say: 'Adjust to reality.' We can only really endure life if we cherish healthy illusions, if we have faith no matter how fantastic, or the kind of healthy-mindedness that shakes off, as a dog shakes off water, the disagreeables of now and the future."

These opinions have even found scholarly defenders. Arthur Kleinman, for instance, writes, "[D]enial and illusion are ready at hand to assure that life events are not so threatening and supports seem more durable. . . . In short, self-deception makes chronic illness tolerable. Who can say that illusion and myth are not useful to maintain optimism, which itself may improve physiological performance. . . ?" And Kelly argues, "Rather than perceiving denial in these circumstances as evidence of a malformed psyche incapable of dealing with reality or as an automatic psychological defence, it is better to regard it a *realistic* response in the absence of the necessary skills to deal with the illness." Evidence that "denial" can sometimes be sensible also comes from empirical studies showing, for instance, that "[a]lthough some patients seek out information prior to surgery, such information does not always reduce their arousal levels or promote recuperation from surgery. . . . Indeed, information may actually increase arousal and retard recovery. . . " Thus, Miller and Mangan note that while laboratory studies show that most people want information about an aversive event, "in less artificial studies that mirror real life . . . , the preference reverses: The majority of individuals then prefer to distract themselves from threat-relevant information. . ."

Many memoirists put these opinions in terms of hope, "the only fuel that keeps them going." Natalie Spingarn writes: "I have found no skill more important (no matter how it is gained) than the ability to

The concerns I have been describing not only consume patients' time but are emotionally and intellectually draining. The sick will often prefer to treat their medical decisions as fixed points about which they need not worry and around which they can work.

believe in my survival, for at least a bit longer. For this, I am dependent on how my fellow human beings — doctors and nurses, family and friends — . . . reinforce the hope that sustains my life." She tried "to avoid the medical mighties who with their harsh 'honest' words — and I cannot say it often enough — deprive me of the hope that I can fend off my enemy, death." Their "blunt, tell-it-like-it-is" way of speaking may reflect "the common wisdom that *knowing all the news, whatever it may be, is 'good' for you,* conversely, [that] it *is 'weak' to try to avoid even a single cancer statistic inferring bad news, even if it helps deprive you of hope.*" But Spingarn disapproved: "Hope, I repeat once again is the essential ingredient. Without it, we patients can find no reason for struggling to survive; without it, we find it easy to give up and stay in bed." Thus she remained "peeved at the physician who told me over the telephone when my second breast cancer was diagnosed, 'We have to stop talking in terms of cure and begin talking in terms of control — one year, maybe two.'" In sum, while some patients may cope with disease by visiting a medical library and tackling the relevant literature, others will be anxious to avoid learning about their illness, contemplating their perilous condition, acknowledging their grim choices, imagining their possible fates, or making medical decisions."

Many of my points about how being sick disinclines one to seize control of one's medical decisions are captured in a provocative article by Franz Ingelfinger, an editor of the *New England Journal of Medicine* stricken with the very illness he had specialized in as a physician. He "received from physician friends throughout the country a barrage of well-intentioned but contradictory advice. . . . As a result, not only I but my wife, my son and daughter-in-law (both doctors), and other family members became increasingly confused and emotionally distraught. Finally, when the pangs of indecision had become nearly intolerable, one wise physician friend said, 'What you need is a doctor.' He was telling me to forget the information I already had and the information I was receiving from many quarters, and to seek instead a person who would dominate, who would tell me what to do, who would in a paternalistic manner assume responsibility for my care. When that excellent advice was followed, my family and I sensed immediate and immense relief. The incapacity of enervating worry was dispelled, and I could return to my usual anxieties. . . ."

Ingelfinger is not alone. The editors of an anthology of doctors' accounts of illness report, "Autonomy may be lauded for modern patients, but it is not something sick physicians usually choose for themselves once they have found a doctor. Sick doctors want to be taken care of, even if they try to remain in control; we find the most relief when someone else takes over. Here we are, a group with special knowledge, and often trying to exert control beyond the bounds of reason, and yet almost to a man or woman sick doctors who express an opinion suggest that they want to be taken care of so that they can give up their lonely vigil. Most of them want to be cared for, have decisions made for them."

Perhaps doctors' testimony on this score should be doubted (although they seem especially suited to make their own medical decisions). But a similar reaction appears in the memoirs of lay patients. One wrote, "I think my husband helped me to transfer worry and responsibility to the doctors' shoulders instead of carrying the burdens myself. That was very important. It gave all of us something to lean on." A patient with infertility found "something reassuring in the order that [her doctor] imposed on the situation, the idea that there was a definite path to tread, and she'd take me by the hand. When I left the office, I was excited and relieved." Another kind of evidence comes from Ellen Annandale's study of a birth clinic which appealed to women who wished to be unchained from the bonds of medical authority. Even there, studying clients who were presumably vigorous, independent-minded, and healthy, Annandale witnessed the relief of abdicated autonomy: " 'I didn't need to worry about making decisions and could leave it all to [the midwives]. . . . I felt utterly relaxed being at home and having complete faith in those around me.' "

I have been suggesting reasons the sick may be in no mood to plunge into medical decisions. Let me close with one other. The standard argument is that patients should make their own decisions because those decisions so much affect them. By the same token, becoming immersed in your medical decisions means thinking intensively about yourself. Even in our psychologized, therapeutic society, not everyone believes this is a good idea. Some see a moral duty to temper their interest in themselves and invest it in their neighbors. Others are skeptical on prudential grounds. Sheed, for example, counsels against self-absorption. He admonishes advice columnists: "So tell your readers to go dancing, overeat at least once, or buy a book about Napoleon (*not* about self-help, or self-anything. Tell them to forget themselves for five minutes. The air outside is wonderful)." Sheed's attitude is so resonant that we have a word — valetudinarian — for people too fascinated by their illness and themselves.

Conclusion

The points I have made in this section may helpfully be seen in light of patient's memoirs. As I suggested earlier, often they are not primarily about making medical decisions, or even about patients' relationships with doctors. Rather, they are about what it means to be a person who is sick. They are about how illness ravages the body, staggers the rhythms of daily life, distorts personal relationships, and destroys the familiar. They are about how illness savages the mind and leaves it brooding and afraid. They are about how people struggle with pain and uncertainty. They are about how people labor to make sense of their pasts and their futures, their lives and their deaths. These memoirs suggest, then, that while medical decisions may have crucial consequences for patients,

they will not always be most central, most pressing, or even most interesting to patients. To people "wrestling with the crises of their fate," medical decisions may seem a distraction, not a duty.

For many patients, medical decisions are both above and beneath their attention. Above, because patients are concentrated on day-to-day coping. They try to perdure with their lives despite their disease, to make it to work, to get a full night's sleep, to see their families, to get the laundry done and the lawn mowed, to pay the bills and call the plumber. They do not ignore their illness. But their attention is concerned with adapting to it, not treating it. They ask how they can learn to walk after a stroke, find a ride to dialysis sessions, avoid insulin shock, cope with incontinence, follow their diet, or manage their drugs and lives to reduce the risk of seizures.

On the other hand, medical decisions fall beneath patients' attention because illness urgently presents the largest kind of questions to them, questions about their religious faith, about whether their lives have been well led, about what a good life is. Patients ask why they became sick, whether they managed their careers well, whether they loved and were loved, whether they enjoyed their lives, whether lives were spiritually fulfilling, and, as to all these questions, how to do better in whatever future might remain. This leads some patients to become preoccupied with their emotional and spiritual development. For patients who have sought "alternative" therapies, the psychological, the spiritual, and the medical can become as one and become everything in their lives. Thus David Tate's experience with Hodgkin's disease (and later a heart attack) helped take him from Roman Catholicism and a career in the law and real estate to life as a psychotherapist and a New Age stand-up comic who found meaning in, among other things, Silva Mind Control, Edgar Cayce readings, acupuncture, psychic healing, Carlos Castaneda, Johnathan Livingston Seagull, Paramahansa Yogananda, spiritualism, Esalen, and transpersonal psychology, particularly psycho-synthesis.

Even if patients are not preoccupied with their spiritual situation, they may be absorbed by moral crisis. As Sheed writes, "The details of any illness are too tedious and repetitive to occupy you for more than part of the time and what you do with the rest is critically important in this case, as you bet your whole self against death." Thus "[t]he interesting part is all provided by you, an average citizen and image of God, finding out for probably the first time what's been in you all along." Here Sheed is reflecting on his three illnesses — the polio he endured as an adolescent, the depression and addiction he fought in middle age, and the cancer he suffered as he emerged from the depression and addiction. To Sheed, illness is crucially a battle of character and courage. The news he brings from the front is hopeful. He writes, for instance, "Numerous people who had had to care for critically injured patients have testified, as polio nurses once did, to how amazingly quickly the patient's spirit seems to take over and begin to pull *them* through, as if it were a new presence in the room, preternaturally strong and self-assured." Nevertheless, much of what absorbed his attention and energy in his illnesses was the moral problem of managing his response to the depredations of disease and the menace of death.

Now in principle, none of these concerns — whether quotidian or cosmic — has to preclude a patient from making medical decisions. But in practice, such concerns often divert patients' interest, attention, and energy away from the process of informed consent and the tasks of medical choice. The concerns I have been describing not only consume patients' time but are emotionally and intellectually draining. The sick will often prefer to treat their medical decisions as fixed points about which they need not worry and around which they can work.

Patients who cede authority to make medical decisions for the reasons I have examined in this section obviously run risks — the risks classically associated with paternalism. But the reason they run those risks differs from the usual justification for paternalism. These patients do not necessarily say someone else knows their situation and interests better than they. Rather, they say that, whoever might make the best choice, they do not wish to bear the weight of formulating a decision. Nor are these patients necessarily delegating decisions to the ordinary paternalists — their doctors. In my research, I have often encountered people who instead (or as well) ceded authority to their families, in whose concern, vigor, wisdom, and faithfulness they reposed their trust.

We may admire people who take on the burdens of illness, chart their own course, and, resolute, remain captains of their fates and masters of their souls. But surely we can understand sick people who shudder at the labors of analyzing their own medical problems, who ask to forget the terrors that assail them, who yearn to share the responsibilities that crowd upon them, who hope to husband their resources for other conflicts, who long for comfort and for care. For such patients, shrugging off the mantle of decision can be appealing, appropriate, and liberating.

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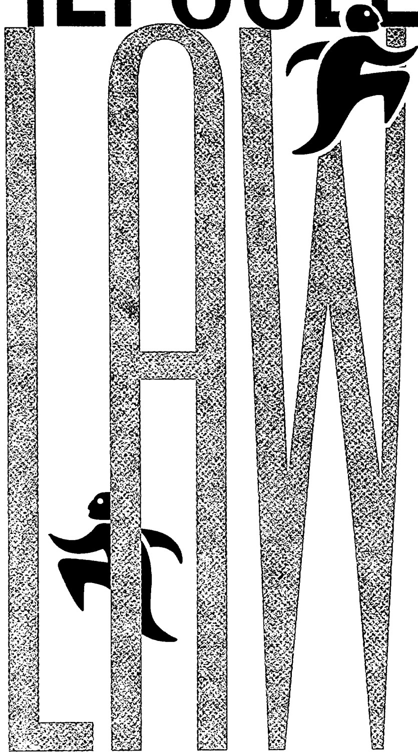
Can INTERNATIONAL REFUGEE LAW be made relevant again?



— BY JAMES C. HATHAWAY

The following essay is based on a similar discussion that appeared in World Refugee Survey 1996 *(© 1996 U.S. Committee for Refugees). Publication is by permission.*

International refugee law rarely determines how governments respond to involuntary migration. States pay lip service to the importance of honoring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders. Although the advocacy community invokes formal protection principles, it knows that governments are unlikely to live up to these supposedly minimum standards. The United Nations High Commissioner for Refugees (UNHCR) shows similar ambivalence about the value of refugee law. It insists that refugees must always be able to access dignified protection, even as it gives tacit support to national and intergovernmental initiatives that undermine this principle. So long as there is equivocation about the real authority of international refugee law, many states will feel free to treat refugees as they wish, and even to engage in the outright denial of responsibility toward them.

Ironic though it may seem, I believe that the present breakdown in the authority of international refugee law is attributable to its failure explicitly to accommodate the reasonable preoccupations of governments in the countries to which refugees flee. International refugee law is part of a system of state self-regulation. It will therefore be respected only to the extent that receiving states believe that it fairly reconciles humanitarian objectives to their national interests. In contrast, refugee law arbitrarily assigns full legal responsibility for protection to whatever state asylum-seekers are able to reach. It is a peremptory regime. Apart from the right to exclude serious criminals and persons who pose a security risk, the duty to avoid the return of any and all refugees who arrive at a state's frontier takes no account of the potential impact of refugee flows on the receiving state. This apparent disregard for their interests has provided states with a pretext to avoid international legal obligations altogether.

The Demise of Interest-Convergence

Much of the debate during the drafting of the Refugee Convention [of 1951] was devoted to how best to protect the national self-interest of receiving states. The Convention grants states wide-ranging authority to deny refugee status to criminals and persons perceived to endanger national security. Perhaps most fundamentally, there was agreement that international refugee law would not impose a duty on states permanently to admit all refugees who arrive at their borders. Instead, refugees are to be afforded protection against *refoulement.* States are required only to avoid returning refugees to an ongoing risk of persecution. If and when the risk of serious harm ends, so too does refugee status. In this sense, refugee law is clearly based upon a theory of temporary protection.

The absence of a duty to grant permanent residence to refugees was critical to the successful negotiation of the Convention. While willing to protect refugees against return to persecution, states demanded the right ultimately to decide which, if any, refugees would be allowed to resettle in their territories. While the refugee flows of post-war Europe were felt to be logistically and politically impossible to stop, the formal distinction between refugee status and permanent residence reassured states that their sovereign authority over immigration would be respected.

Despite this legal prerogative to admit refugees only as temporary residents, many developed states initially believed their domestic interests would be served by granting permanent resident status to refugees. Because refugees seeking protection in the years following the Second World War were of European stock, their cultural assimilation was perceived as relatively straightforward. Refugees also helped to meet acute post-war labor shortages. The reception of refugees opposed to Communist regimes moreover reinforced the ideological and strategic objectives of the capitalist world. This pervasive interest-convergence between refugees and the governments of industrialized states resulted in a pattern of generous admission policies.

The reasons that induced this openness to the arrival of refugees have, however, largely withered away. Most refugees who seek entry to developed states today are from the poorer countries of the South: their "different" racial and social profile is seen as a challenge to the cultural cohesion of many developed states. The economies of industrialized states no longer require substantial and indiscriminate infusions of labor. Nor is there ideological or strategic value in the admission of most refugees. To the contrary, governments more often view refugee protection as an irritant to political and economic relations with the state of origin.

In these circumstances, it is not surprising that governments have rejected the logic of con-

tinuing to grant refugees a "trump card" on the usual rules of immigration control. States have not, however, responded by reverting to the Refugee Convention's duty to admit refugees only temporarily. Such a policy shift was proposed by Norway, but the governments of most other industrialized countries have instituted temporary protection only on a situation-specific basis.

This resistance to treating temporary protection as the norm is partly explained by deeply ingrained policy preferences in traditional countries of immigration, such as the United States, Canada, and Australia. Any attempt to end the now-routine linkage between refugee status and permanent residence in these states would require fundamental amendments to domestic immigration legislation built up during the era of openness to Cold War refugees. While European governments have historically been more receptive to the admission of temporary residents, they are concerned with ensuring that temporary protection of refugees can truly be brought to an end. When large-scale guestworker programs closed down in the 1970s, there were still nearly 12 million "temporary" residents living in Western Europe. The guestworkers' social and personal attachments to their host states made deportation a politically unrealistic option, forcing governments ultimately to allow them to remain. European policymakers worry that a generalized temporary protection system for refugees would similarly be no more than "a slow way of saying yes" to permanent admission.

The viability of temporary protection as a way of reconciling the needs of refugees to the national interests of receiving states has not, however, been seriously explored to date. This is because governments of the industrialized world have new options to prevent refugee flows from challenging their sovereign authority over immigration. States now believe that technologies of border control can prevent most asylum-seekers from ever reaching their territories. They also see promise in the kind of in-country intervention undertaken in Iraq and Bosnia, which prevented would-be refugees from even leaving their own states. In sum, governments today see little reason to accept the compromises inherent in the Refugee Convention. Since legal duties to refugees arise only once refugees successfully access a state's jurisdiction, why not simply keep refugees at arms-length? Why depend on international law's temporary protection regime to safeguard sovereign authority over immigration if it is possible simply to prevent the arrival of refugees in the first place? Governments increasingly deal with refugees on a harsh and unregulated basis because they see international refugee law's mechanism to reconcile state interests to refugee interests as an anachronism.

Politics of *Non-Entrée*

Instead of embracing the Refugee Convention's solution of temporary protection, the response of developed states to the end of the interest-convergence between refugees and receiving states has been to avoid receiving claims to refugee status altogether. Most Northern states have implemented *non-entrée* mechanisms, including visa requirements on the nationals of refugee-producing states, carrier sanctions, burden-shifting arrangements, and even the forcible interdiction of refugees at frontiers and in international waters. The simple purpose of *non-entrée* strategies is to keep refugees *away from us.*

Non-entrée is an explicable, if reprehensible, response to the breakdown of the social and political conditions that previously led industrialized states to assimilate refugees. Seeing no need to accept the risks assumed to follow from a generalized temporary protection system, states have taken the more brutal (yet less visible) step of keeping refugees as far away as possible from their territories.

The "Right to Remain"

Northern governments have recently extended their prophylactic program by championing the refugee's "right to remain" in his or her own state. The "right to remain" is superficially attractive. After all, the best solution to the refugee problem is obviously to eradicate the harms that produce the need to escape. It is such a seductive notion that even the UNHCR has joined in the call for a redefinition of refugee protection to focus on what the Report of the United Nations High Commission for Refugees (1995) called "preparedness, prevention and solutions."

In reality, however, no international commitment exists to deliver dependable intervention to attack the root causes of refugee flows, clearly a condition precedent to the exercise of any genuine right to remain. There is no credible evidence that intervention will ever evolve into more than a discretionary response to the minority of refugee-generating situations that is of direct concern to powerful states. The interventions in both Iraqi Kurdistan and in the former Yugoslavia were responses to the clear risk of refugee flows *toward the developed world.* Most perniciously, these two examples of intervention to enforce the "right to remain" suggest that this so-called "right" is essentially a means to rationalize denying at-risk persons the option to flee. Each UN intervention was inextricably tied to border closures that left no way for would-be refugees to access meaningful safety abroad.

Relegation of Burdens to the South

This blunt assault by the North on refugee migration has reinforced the confinement of most of the world's refugees to their regions of origin in the South. Africa shelters more than double the number of refugees protected in all of Europe, North America, and Oceania combined. The Ivory Coast alone protects nearly twice as many refugees as are presently in the United States of America. In desperately poor countries like Jordan, Djibouti, Guinea, Lebanon, and Armenia, the ratio of refugee population to total population is about 1:10. Yet refugee law establishes no burden-sharing mechanism to offset the enormous contributions made by these reception states of the South.

Some degree of solidarity is achieved by "good offices," UNHCR assistance, *ad hoc* regimes such as the Comprehensive Plan of Action for Indochinese Refugees, and the like. But because these efforts are orchestrated outside international refugee *law*, in the realm of discretion or voluntarism, there are few *guarantees* of meaningful support for the states of the South. With assistance from the developed world normally provided after the fact and on a situation-specific basis, Southern governments are increasingly turning away from traditions of hospitality toward refugees. While they normally lack the resources and sophisticated border control systems used by the North to enforce *non-entrée*, the governments of less developed countries have coerced refugees to return to their countries of origin. Some also engage in absolutely blunt denials of access, such as the decision by Zaire simply to close its border to Rwandan refugees.

Principles for a New Paradigm of Refugee Protection

International refugee law's unilateral imposition of absolute responsibility on the asylum state is not problematic if, as during the postwar era, there is a pervasive interest-convergence between refugee and host populations. Absent such a natural symmetry, however, refugee law can function only if there is a mechanism in place to mitigate the burdens of receiving states. The plight of Tanzania — faced with massive, immediate, and potentially destabilizing refugee flows from Rwanda and Burundi — raises starkly the absurdity of a refugee protection regime in which obligations are not adjusted to take account of circumstances in states of destination. While less profound, the perceived impact of refugee flows on societies in industrialized countries ought also to be factored into the protection equation. Refusal to balance the claims of refugees with those of receiving states simply invites a continuation of present trends toward *en bloc* denials of access.

The time is right to focus on preserving the essence of international refugee law as a system for the protection of persons whose basic human rights are at risk in their own state, until and unless it is possible for them to return in safety and dignity. A reformulation of the mechanisms of refugee law should be dedicated to securing this fundamental goal, taking into account the real circumstances of an increasingly self-interested world. Four basic principles are suggested to govern this transition.

First, refugee protection should not be bartered away as part of the current upsurge of interest in addressing the "root causes" of involuntary migration. While intervention may or may not evolve as a more practical and globally accessible answer to human rights abuse, refugees ought not to be guinea pigs in that experiment. Until and unless there is a dependable response to the risk of human rights abuse, the autonomous right to seek protection outside the frontiers of one's own state should not be compromised.

Second, we should be open to the enhanced flexibility that a robust system of solution-oriented, temporary protection could provide. To be attractive to states, temporary protection will need to be constructed with a strong emphasis on preparation for return. Return itself will be a realistic option only if supported by an empowering process of repatriation and development assistance. So conceived, temporary protection could regularly regenerate the asylum capacity of host states.

To advocate the value of temporary protection is not to argue that immigration is bad: it is simply not the same as refugee protection. While the admission of outsiders to permanent residence in a state may be a matter of legitimate debate for each country's body politic, the basic protective role of refugee protection should not be a captive in that debate. Simply put, the human rights function of refugee law does not require a routine linkage between refugee status and immigration. If the protection of refugees is both durable and respectful of human dignity, it need not be permanent. Dignified temporary protection is not simply a matter of meeting the minimum standards set by international human rights instruments, but rather requires full respect for the needs and reasonable aspirations of refugees. It must also be finite. It would not be reasonable to allow a "temporary" protection regime to force refugees to wait indefinitely before being allowed to rebuild their lives for the long-term. If it incorporates these critical safeguards, temporary protection can be a meaningful response to involuntary migration.

Third, we ought to dispense with the Refugee Convention's unnecessarily rigid definition of state responsibilities. Beyond a common duty to provide first asylum, there is no reason to expect every state to play an identical refugee protection role. Some states will be willing to provide temporary protection, but not be disposed to the permanent integration of refugees. Traditional immigration countries could readily serve as sites of permanent resettlement for those refugees whose countries remain unsafe at the end of the period of temporary protection. Still other states will be in a position to admit special needs cases that should be diverted from the temporary protection system. There will also be governments that assume a mix of these roles, or which provide major financial or logistical support to the refugee protection system. A renewed international refugee law based on this kind of common but differentiated responsibility toward refugees would provide a principled yet flexible framework within which to reconcile the needs of refugees to the legitimate concerns of states.

Some will argue that a shift to equitable, open-textured obligations would weaken international refugee law. This criticism does not take into account, however, that the practical value of formal refugee law has been decimated by policies of *non-entrée* and the containment of refugees in their country of origin. I believe that it is morally irresponsible to insist on the sanctity of traditional legal standards that we know do not in fact constrain the self-interested conduct of states. If the international protection of refugees is to be meaningfully regulated, then we must temper the demands of moral criticality to meet the constraints of practical feasibility. International law is, after all, a consensual system of authority among states. If states are not convinced that their interests are taken into account by international refugee law, then in practice — despite whatever formal standards are proclaimed — international law will not govern the way refugees are treated.

Fourth and finally, the institutions of international refugee protection need to be retooled to promote and coordinate a process of collectivized responsibility. UNHCR's recent efforts to prove its relevance to governments have, regrettably, lent credibility to the politics of *non-entrée* and to the containment of refugees. UNHCR should instead focus on the development of dependable mechanisms equitably to share-out responsibility for the protection of refugees among states. By proposing the standards and mechanisms to implement common but differentiated responsibility toward refugees, UNHCR could prove that international law is still an effective framework within which to manage involuntary migration.

Critical Thinking is Required Now

Refugee law serves fewer and fewer peopl less and less well, as time goes on. Refugee la as traditionally conceived is being undermine by a combination of *non-entrée* tactics and disingenuous insistence of the "right to remai We should seize the moment actively to promote a new paradigm of refugee protectio that is both human rights-based and pragmat Refugee law should be redesigned to take account of the legitimate state preoccupation that have undermined the value of law in governing refugee protection, but without compromising the essential commitment to protection.

A renewed model of international refugee law, built on the principle of common but differentiated responsibility, would allow mor good to be done for more refugees than is possible under the present regime. The small minority of refugees that presently finds solid protection in developed states may see a reduction of its relative privileges under such system, but a reduction in the Cadillacs of th few could, I believe, provide bicycles for the many. It is time to reconcile the need for a secure and dignified refugee protection syster to the legitimate interests of the countries in which refugees are sheltered. Refugee law so conceived would regain its relevance.

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