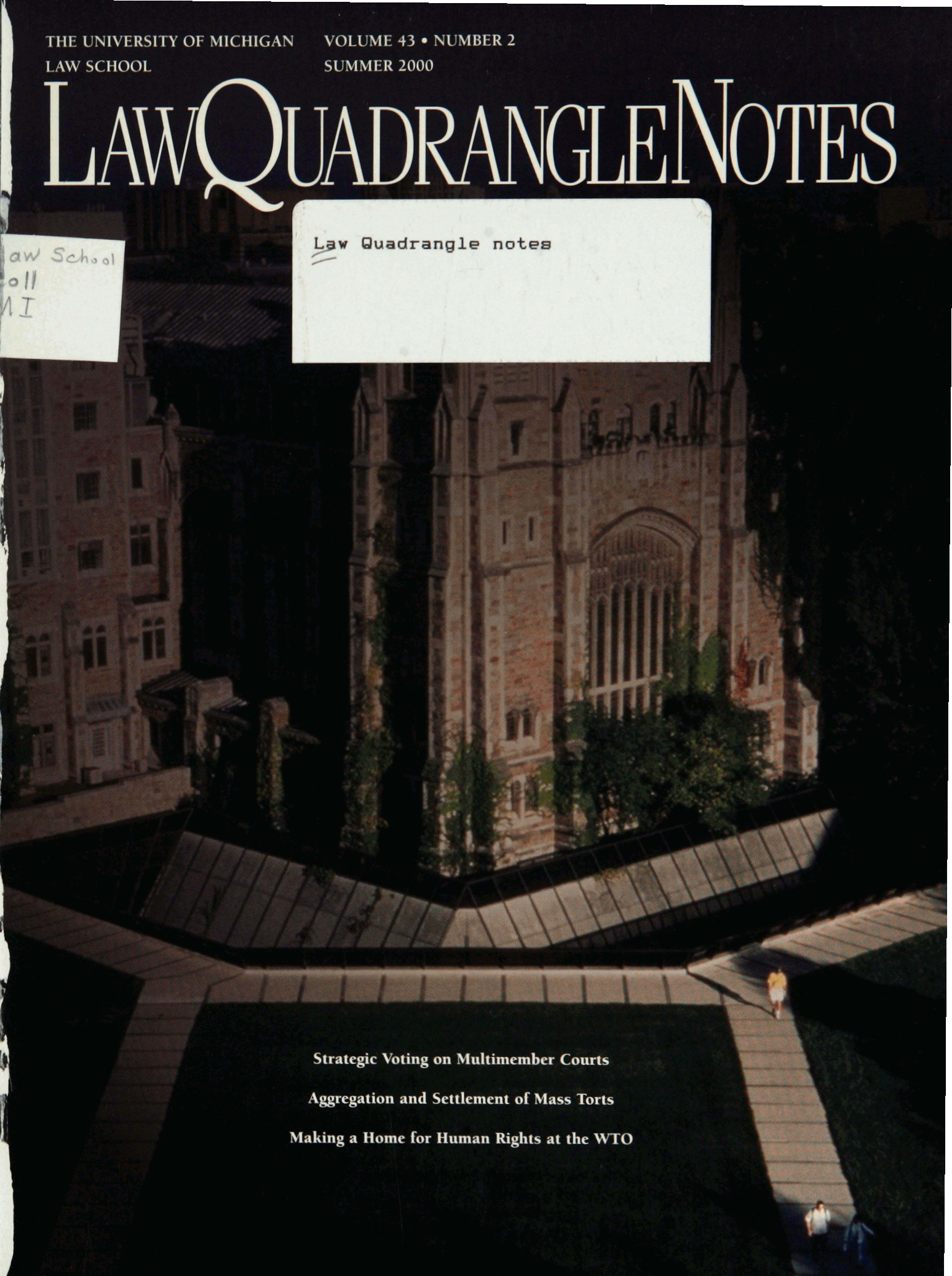
THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

VOLUME 43 • NUMBER 2
SUMMER 2000

LAW QUADRANGLE NOTES



Strategic Voting on Multimember Courts

Aggregation and Settlement of Mass Torts

Making a Home for Human Rights at the WTO

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Upcoming Events

July 6-12	ABA Meeting, New York
July 15-20	ABA Meeting, London
September 8-10	Reunions of classes of 1975, '80, '85, '90, '95
October 7	Tenth Anniversary of Academic Freedom Lecture Fund
October 13-15	Reunions of classes of 1950, '55, '60, '65, '70
October 19-21	Committee of Visitors
November 3-4	Symposium — Directions for Reform: The American Disabilities Act (*Michigan Journal of Law Reform*)
November 17-18	Symposium — The State of Confession Law after *Dickerson* (Professor Yale Kamisar, *Michigan Law Review*, and Criminal Law Society)
December 16	Senior Day (tentative)
January 3-7, 2001	AALS Annual Meeting, San Francisco
January 15	Martin Luther King Day observed
January 26	Symposium — Factory Farming in the 21st Century: Are the Financial Benefits Worth the Environmental and Social Costs? (Environmental Law Society)
April 6-7	Japanese Law Conference (Assistant Professor Mark West/Center for International and Comparative Law)
August 2-8	ABA Annual Meeting, Chicago

This calendar is correct at deadline time, but is subject to change.

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Cover:
Looking over the Law Quadrangle from atop the University of Michigan Business School.

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MESSAGE FROM DEAN LEHMAN

Each year I use my messages in *Law Quadrangle Notes* to examine a quality that helps to define an outstanding attorney. I have discussed how great lawyers pursue intellectual growth and renewal, maintain integrity, teach others about the law, serve as community citizens, bolster our profession's image, and exhibit patience. In the coming year, I would like to explore the quality of optimism.

As a philosophical concept, optimism has had a rough go. It originated in the early eighteenth century theological writings of Gottfried Leibniz, who contended that our world is an "optimum" in the mathematical sense. Leibniz asserted that there had been a divine decision to create "the best of all possible worlds," and that evil and suffering are necessary elements of a universal order.

Relatively few people read Leibniz today, thanks largely to Voltaire. A few years after an earthquake devastated Lisbon in 1755, Voltaire began to depict optimism, at least as it had been popularized by Alexander Pope, as a form of complacent speculation, irrelevant to the real-world problem of how we might alleviate suffering and evil. In *Candide*, Voltaire satirized Pope with the memorable character of the tutor, Dr. Pangloss, who prattled on insipidly about how everything must be for the best. "He could prove to admiration that there is no effect without a cause; and, that in this best of all possible worlds, the Baron's castle was the most magnificent of all castles, and My Lady the best of all possible baronesses."

Over a century later, in Oscar Wilde's *The Picture of Dorian Gray*, the character Lord Henry expressed his contempt for optimism as follows: "The reason we all like to think so well of others is that we are all afraid for ourselves. The basis of optimism is sheer terror."

Nowadays popular portrayals of lawyers suggest that we are all Lord Henry. The attorneys who capture the greatest media attention often exude disdain for high-minded ideals of truth and justice. Their actions appear to be the product of a profound alienation, leavened only by a manipulative and cynical self-interest.

Yet my own experience of our profession is otherwise. The best lawyers I have known can properly be described as optimistic at their core. Why is that? In what sense can one say that an optimistic spirit has infused the people who most effectively serve their clients and have the greatest impact on the world around them?

One may begin by recognizing a breed of optimism that stops short of being Panglossian. Active rather than complacent, pragmatic rather than foolish, this optimism can motivate competent lawyering.

During the coming year, I look forward to exploring that breed of optimism in this column and elsewhere in my work as dean. For if I am right that such a quality characterizes the most effective practitioners of our craft, then we should be asking what role our law school can appropriately play in nurturing that quality in the lawyers of the twenty-first century.

The best lawyers I have known can properly be described as optimistic at their core. Why is that? In what sense can one say that an optimistic spirit has infused the people who most effectively serve their clients and have the greatest impact on the world around them?

Student Funded Fellowships auction sets new record

Student Funded Fellowships make it possible for law students to take summer jobs with organizations that cannot pay them enough to cover their expenses. In many cases, winning a fellowship is what allows students to work where they want to gain experience — usually in the public or nonprofit sector — without regard to what they will earn.

The SFF program is supported by the Law School, student and alumni donations, and — in a day of fun and generous bidding — the annual SFF auction. This year's auction, held in late March, earned a new record of more than $42,000. This is the second consecutive record-setting year; last year's auction raised more than $29,000.

This year's new high "means an extra four people will get grants as a result," SFF Board member Sean Grimsley said in the announcement of the auction's success that he distributed to the Law School community.

"We voted earlier this year to raise the grant amount from $3,000 to $3,250, and we all feared that the increase might signal a drop in the number of grants given out," Grimsley said. "But, amazingly, we will give more grants this year than ever before. The students, faculty, staff, and administration have all stepped up this year to help out this great cause.

"One would have to look long and hard at other law schools to find a greater sense of community than has been expressed through SFF's fundraising activities over the past few months."

Good-natured bidding and the fun of auction day disguises the months of work that go into collecting the items offered for bid. And when you glance down the list of biddable items, you can see why people dig deep into their checkbooks come auction time.

The top bid attraction? Lunch for two with Judge/author Richard Posner, a prolific writer and a pioneer in the law and economics movement in academic and professional circles who tried unsuccessfully to mediate a settlement in the high stakes battle between the U.S. government and Microsoft. Here's the entry that appeared on the bid list: Save on Transaction Costs. Let Judge Richard Posner, chief judge of the Seventh Circuit Court of Appeals and noted efficiency monger, choose the restaurant in Chicago. You and a friend can dine with the judge when he finds time to eat between running the Seventh Circuit, teaching at the University of Chicago Law School, and writing three books a year. Get the inside track on the Microsoft negotiations, see why he wears only one suit to save on search costs, and then ask him about the efficiency rationale for his recent adoption of a baboon in a downtown park.

Runner-up in the bid department? Lunch for three with CBS Newsman Mike Wallace.

The highest faculty-related item? — They Got Game. Kyle "The Taxman" Logue, "General" Sherman Clark, and David "Da" Baum, '89, head up a five faculty member basketball tour de force. They'll take on any group of five student bidders in a 3-on-3 game of hoops. Let the trash talking begin as you and four others bring your ups out to the court to take on the kids on their 2000 comeback tour. We hear that "Da" Baum likes to throw the elbow as he clears his shot from the arc, so be warned.

And here are a few others:

- A Preview of the A.L.C.S.? Clinical Professors Bridget McCormack (a born and bred New Yorker and lifelong Yankees fan) and Nick Rine (a born and bred Detroiter and lifelong Tigers fan) will take six people to the Tigers/Yankees game at the brand-new stadium in Detroit on Sunday, May 14, 2000.
- Want to Sleep in Class? No problem. Turn your notetaking duties over to a brilliant constitutional lawyer, Professor

Continued on page 4

Continued from page 3

Evan Caminker. He'll take notes in a class of your choice, type them up for you, and lead the class in a rendition of the Michigan fight song before he goes.

- Foods of Trade Contention. You and two friends go with World Trade Organization (WTO) specialist Professor Robert Howse to a local sushi bar to sample foods such as tuna, shrimp, and salmon that have been the subject of WTO contention. Sochu supplies willing, you will also be able to make the taste comparison between sochu and vodka, and see whether they are actually "like products," as the WTO dispute settlement authorities have claimed.
- A Technicality? A Technicality? A Technicality Called the Fourth Amendment. Professor Yale Kamisar donates his pocket Constitution and will give it a personalized inscription for the lucky bidder when he returns from sunny, southern California.
(If you're skeptical, the listing comes with this testimonial: "I want to express my thanks to the SFF Auction Committee. The Kamisar Constitution has changed my life. . . . When I carry the Constitution with me, cops pull over, smile, and wave to me as I drive by, airport security lets me just walk right in, and euthanasia proponents everywhere cower in fear. The U.S. Constitution backed by the power of Y.K. . . . I wouldn't leave law school without it."
- Have the Dean Flip Your Pancakes. Dean Jeffrey S. Lehman, '81, will cook brunch for up to six students at his home on a mutually convenient Sunday morning. Be humbled as his children ask you for help with their math homework while posing the question, "What's your record time for solving the Rubik's cube?"

Baum, '89, Johnson, '88, named assistant deans

David H. Baum, '89, and Charlotte H. Johnson, '88, each have been named assistant dean of students.

Baum earned his B.A. in Honors English with High Distinction from the University of Michigan and served as an instructor in the Writing and Advocacy Program while in Law School. He had served as director of the Law School's Office of Student Services since May 1998. He joined the Law School in 1995 as special assistant to the associate dean for student affairs after working as an assistant U.S. attorney in Washington, D.C. and clerking for the Hon. Noel Anketell Kramer.

In his new position, Baum supervises the Office of Student Records as well as course advising and the application of academic standards. He also will oversee safety, disabilities, and Freedom of Information Act issues, as well as student orientation and service day, and the organization of career development lectures and programs.

Johnson practiced in Detroit as a litigator and become a shareholder of her firm prior to joining the Law School in 1997 as director of academic services. She earned her A.B. *summa cum laude* in psychology from the University of Detroit.

In her new position, Johnson continues to serve as a primary counselor for students and is also responsible for other academic support activities. She supervises a variety of academic programs, including the tutorial, minority support, and joint degree programs, and is responsible for disciplinary matters, student organizations, leadership training, and the Honors Convocation.

Trial of admissions suit delayed until January 2001

Trial of the lawsuit challenging Law School admissions policies, previously scheduled to begin in August 2000, has been delayed until January 2001 to give intervenors additional time to gather expert opinion.

The attorney for the student intervenors said it was "critically important" to have the additional time for experts to complete their reports. Judge Bernard Friedman of the U.S. District Court of the Eastern District of Michigan granted the extension in March after intervenors sought reconsideration of his original rejection of their request.

The Washington, D.C.-based Center for Individual Rights brought suit against the Law School and the University's College of Literature, Science, and the Arts (LS&A) in separate lawsuits in late 1997 charging that their admissions policies discriminate in favor of minority applicants. The suits originally were scheduled for trials in late summer 1999, but were delayed when student groups were allowed to intervene in the cases. Trial in the LS&A suit is expected to begin this fall.

Smithsonian honors three Law School projects

Three Law School projects have been honored in competition for the Computerworld Smithsonian Award. The three projects are among 18 from the University of Michigan that were nominated; each nominated project becomes part of the Permanent Research Collection on Information Technology at the Smithsonian's National Museum of American History.

The three nominees from the Law School were:

1. *The Michigan Telecommunications and Technology Law Review.* This journal was a pioneer in the field of electronic student-run publications. Recently, it also has begun to collect each year's articles into a single volume that is published on paper once each year.
2. Wireless Network. The system of computers in the Reading Room that utilizes transmissions from a remote site elsewhere in the Reading Room to link the computers with the rest of the Law School and the Web.
3. Refugee Caselaw Site. A Web-based access to substantive refugee laws and court decisions in multiple nations that supports advocates, decision-making, and policymakers. Linkage will be through the Law School's homepage: *www.law.umich.edu.*

PHOTOS BY SUSANA BYERS

U.S. Supreme Court Justice Antonin Scalia, right, chats with Dean Jeffrey S. Lehman, '81, during the Law School's dinner for justices of the Supreme Court and the Court of Justice of the European Communities in Washington, D.C., in April.

Law School, ECJ celebrate unique, lasting ties

At a gala dinner at the Hay-Adams Hotel in Washington, D.C., the faculty of the University of Michigan Law School and a delegation from the European Court of Justice celebrated a unique relationship that has lasted more than 40 years.

Guests at the dinner this past April 18 included 18 delegates from the ECJ, Justices Antonin Scalia and Stephen Breyer of the U.S. Supreme Court, Chief Judge Harry Edwards, '65, of the D.C. Circuit, and a broad array of distinguished guests from the executive branch of the U.S. government.

The ECJ (successor to the Court of Justice of the European Coal and Steel Community) has emerged as the principal architect of Europe's quasi-constitutional infrastructure. In 1955, Professor Emeritus Eric Stein, '42, wrote the first scholarly article about the Court in the English language and then proceeded to teach the first American law school course on EC law; ever since, Michigan has been this continent's center for studying the legal institutions of an integrating Europe.

The evening was marked by a series of reminiscences, tributes, and testimonials. Before dinner, Dean Jeffrey S. Lehman, '81, welcomed the members of the Court in French, the official language of the Court, concluding, "Il nous donne une satisfaction exceptionnelle d'avoir l'occasion de célébrer la Cour de Justice, et le rôle qu'elle joue dans le projet historique d'intégration européenne." ("It gives us exceptional satisfaction to be able to celebrate the Court of Justice and the role that it plays in the historic project of European integration.") On behalf of the Supreme Court, Justice Breyer then thanked the Michigan faculty for providing the evening's celebration, noting Michigan's "long history of distinguished faculty members who have been particularly interested in the European Community."

During the meal, the Court heard reflections from six Michigan faculty members — Stein, Mathias Reimann, LL.M. '83, Brian Simpson, Catharine MacKinnon, Merritt Fox, and Daniel Halberstam. Each offered reminiscences about how developments in Europe had influenced their work as scholars and teachers. Professor Halberstam, the newest member of the faculty, is the only American law professor to have served as a law clerk at both the United States Supreme Court and the ECJ. First Advocate General Nial Fennelly, speaking on behalf of the ECJ, expressed the Court's appreciation for the scholarly attention that Michigan has paid to the Court's work over the years.

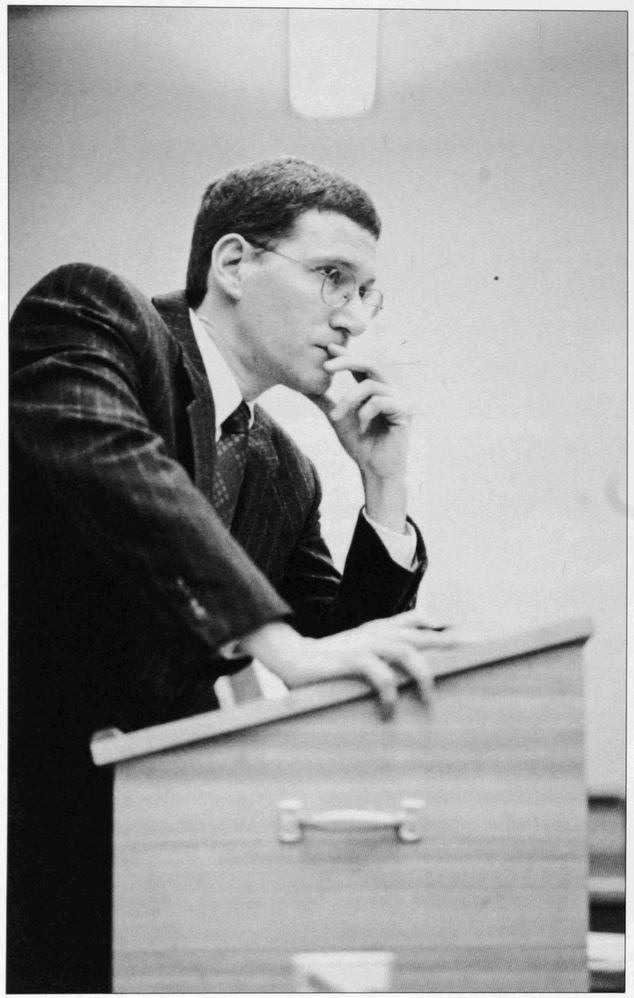
U.S. Supreme Court Justice Stephen G. Breyer, below, welcomes the delegation from the Court of Justice of the European Communities, Law School faculty, and guests, to the University of Michigan Law School dinner for members of the two high courts.

ABOVE: *Hessel E. Yntema Professor Emeritus Eric Stein, '42, reflects on "the connection between Ann Arbor and Europe" during the Law School's dinner honoring the delegation of the Court of Justice of the European Communities. A pioneer in the field of comparative law, Stein has been a key player in the shaping and study of international law since the founding days of the United Nations.* *(See related story on page 35.)*

After dinner, the gathering was treated to saxophone music by Professor Donald Sinta and the University of Michigan Saxophone Quartet. Professor Sinta, often described as the world's greatest living saxophonist, brought tears to many eyes with his interpretation of Leonard Bernstein's "Maria," from *West Side Story*. After the student members of the quartet closed the evening with an excerpt from the *William Tell Overture*, Justice Breyer shook their hands and offered his congratulations for an outstanding performance.

The Hon. Gil Carlos Rodriguez Iglesias, president of the Court of Justice of the European Communities, enjoys conversation with Law School faculty members Roderick M. Hills Jr., right, and David Halberstam, left.

Constitutional limits and other constraints make the European Union's internal and external reactions to human rights different, Grainne de Burca, right, LL.M. '87, professor of European Union law at the European University Institute in Florence, tells an International Law Workshop audience in April. DeBurca was the final speaker in the winter term series.



Oren Gross, opening speaker in the International Law Workshop winter term lecture series, ponders a question from the audience after his talk. Economic and trade issues must be resolved if an Israeli-Palestinian peace settlement is to be effective, Gross, a professor at Tel Aviv University Faculty of Law, explained during his talk.

The Hon. Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit, above, seated at left, talks with Law School students and faculty at a private gathering prior to her International Law Workshop lecture in March on "The Evolution of International Antitrust Law." Wood, a senior lecturer at the University of Chicago Law School, where she teaches in the field of international economic law, is a recognized authority in the field of international antitrust. She formerly was deputy assistant attorney general in the Antitrust Division of the U.S. Department of Justice, where she was responsible for international antitrust policy and enforcement.

Scanning the world view

How would a peace agreement affect the Israeli and Palestinian economies? Why does the European Union seem to put two faces on human rights — one that promotes human rights, the other that moves with great caution?

These are the kinds of complex questions that speakers in the Law School's International Law Workshop (ILW) discuss. Each program features the main lecture, response from a Law School faculty member, the speaker's rejoinder, and, finally, questions and comments from the audience of law students and faculty members. The result is a considered look at, and reactions to, an act in the international arena.

Winter term workshop programs, presented through the Center for International and Comparative Law, also offer unique perspectives that may get little mainstream media coverage or draw little general attention. For example, while negotiators focus on peace and land issues in the Middle East, the economic and trade impacts of Israeli-Palestinian settlement talks seldom get attention, according to Oren Gross, a professor of law at Tel Aviv University Faculty of Law and a former advisor to the Israeli military.

Israel is the economic giant of the Middle East, with an economy more than 20 times larger than that of the Palestinians', Gross explained in the opening talk of the International Law Workshop series for the winter term. Nearly one-third of the Palestinian workforce is employed in Israel, and the Palestinian economy depends on Israel for 90 percent of its imports and 75 percent of its exports.

Two years ago, Israel and the Palestinians began an informal project that blended aspects of a free trade area, economic union, and customs union, he said. Labor flowed freely, customs officials gathered information only, and governments made customs payments to each other. "Is this going to work? I don't know," Gross said.

Professor Omri Ben-Shahar, a former member of the law faculty at Tel Aviv University, agreed with the idea "but unfortunately I'm much more skeptical." Ben-Shahar, now a member of the Law School faculty, was respondent for Gross' talk.

There is a great need for joint projects in the Middle East, like an oil pipeline from the Persian Gulf to the Mediterranean Sea, regional water purification, and agricultural projects in the desert, Ben-Shahar said.

The series of talks that make up the International Law Workshop is presented each term during the academic year. The winter term series was coordinated by Assistant Dean for International Programs Virginia Gordan and Professors Robert Howse and Daniel Halberstam. Other speakers, their affiliations, and their topics were:

- Frank Garcia, associate professor at Florida State University College of Law, "Problems in the Moral Theory of International Trade Law."
- Karima Bennoune, visiting scholar, University of Michigan Law School, and legal advisor to Amnesty International, London, "What is Torture? One Working Human Rights Lawyer's Perspective."
- The Hon. Diane Wood, U.S. Court of Appeals for the Seventh Circuit, "The Evolution of International Antitrust Law."
- Karen Knop, associate professor, University of Toronto Law School, "Diversity and Self-Determination in International Law."
- Kevin Davis, assistant professor, University of Toronto Law School, "Self-Interest and Altruism in the Deterrence of Transnational Bribery." (Co-sponsored with the Law School's Law and Economics Workshop.)
- Grainne de Burca, LL.M. '87, professor of European Union Law, European University Institute, Florence, "The Constitutional Limits of the EU." De Burca, co-author of *EC Law: Text, Cases, and Materials* (Oxford University Press, 1995), the leading English language casebook in the field, cited three major restrictions on European Union (EU) human rights activity: the text of the treaty establishing the Union; the challenges posed by national constitutions and national courts within the EU; and legal restraints posed by international obligations that EU accepts. Indeed, she noted, the latest draft of the EU's Charter on Fundamental Rights offers a "classic" statement of "no increase in competence" for the Union in the human rights arena. There is "a real sense of caution and restraint" to recognize human rights on the part of the EU, she said. But in its foreign policy, the EU is outspoken in its support of human rights.

Annual banquet, scholarships honor Butch Carpenter

Good times, dinner, and dancing marked the annual Alden J. "Butch" Carpenter Scholarship Banquet in April.

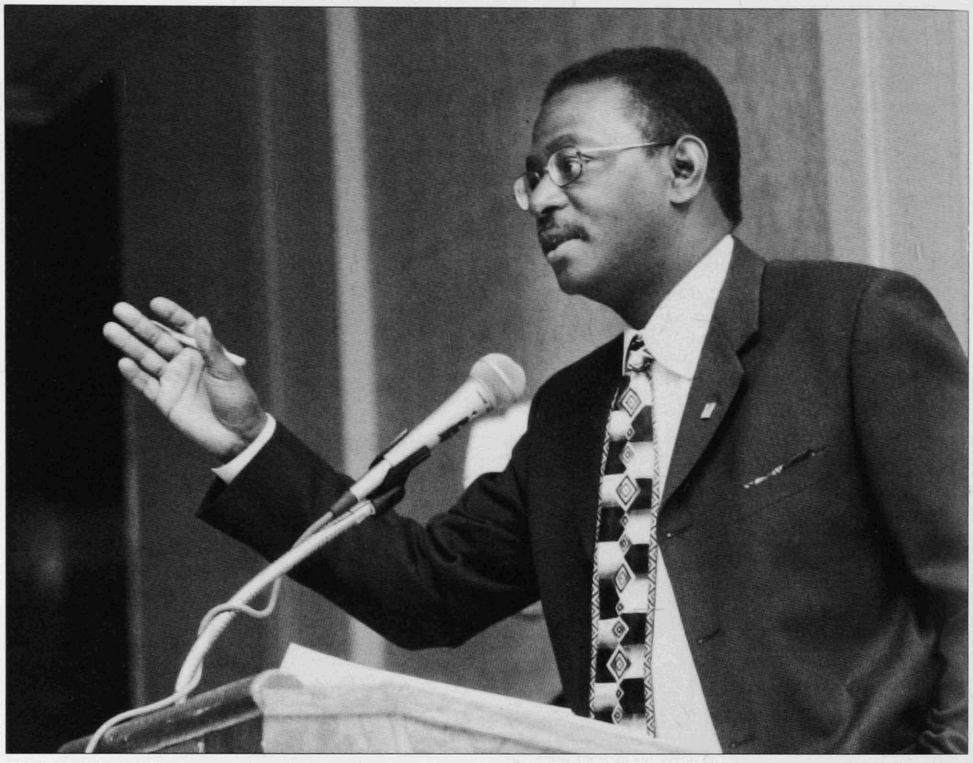
The banquet and the Butch Carpenter Memorial Fund, established in 1978, honor Carpenter, an African American law student who was devoted to using business and professional success for community service. "Before his legal education was terminated by his untimely death, Butch had befriended many in the Michigan Law School community," said the banquet program. "Those who knew Butch were impressed with his enthusiastic spirit and his singularity of purpose to return to the urban community in which he had resided and make available to it his professional skills."

The first scholarship award in 1978 was $100, Ena Weathers, '88, explained. "Now recipients get as much as $5,000." The scholarships assist first-year students who are members of the Black Law Students Alliance, which sponsors the annual banquet and administers the scholarships.

Scholarship winners must be students who "have demonstrated a propensity to practice business law; who indicate an intent to apply their legal training in a legal manner that will assist in the development of an economically depressed area; and whose career paths, graduate training, community involvement, or personal drive may have contributed significantly to the decision to admit them to law school."

This year's scholarship winners were Markeisha Miner and Karen Miniex.

Dinner speaker Harold D. Pope, president of the National Bar Association, the nation's oldest and largest organization of African American attorneys, recounted the history of black people in the United States starting with the indentured servants



The landmark 1954 decision in Brown v. Board of Education *did not end segregation in the United States, Harold D. Pope, president of the National Bar Association, tells those attending the Butch Carpenter Banquet in April. But "by 2050 more than 50 percent of the U.S. population will be people of color. Quite frankly, the real minority in this country will be the European-American males."*

Markeisha Miner and Karen Miniex, winners of this year's Butch Carpenter Scholarship, display the plaques they received at the annual Butch Carpenter Scholarship Banquet. Both are first-year law students.

who arrived in 1619. Slavery arose in response to the need for cheap, easily identified labor, he said.

Until 1865, an African American in the United States was legally a second-class citizen and counted as only three-fifths of a person, Pope said. The 13th, 14th, and 15th amendments really ended slavery, not the Emancipation Proclamation, and the first affirmative action came with post-Civil War reconstruction, he added. But the *Plessey v. Ferguson* Supreme Court decision in 1896 re-legitimated the "separate but equal" doctrine for many more years.

"We fought World War II, the war to end racism, with a segregated army," he said, and the *Brown v. Board of Education* decision of 1954 "wasn't the end of segregation in this country. If it had been, Rosa Parks never would have refused to give up her seat, there would not have been George Wallace blocking admission to the University of Alabama, [and] there would not have been James Meredith at the University of Mississippi."

Affirmative action programs were designed to provide equal opportunity, he said. "Affirmative action does not equal quotas, does not mean unqualified people get chosen. It means that all can participate, so that this country can utilize its entire talent pool."

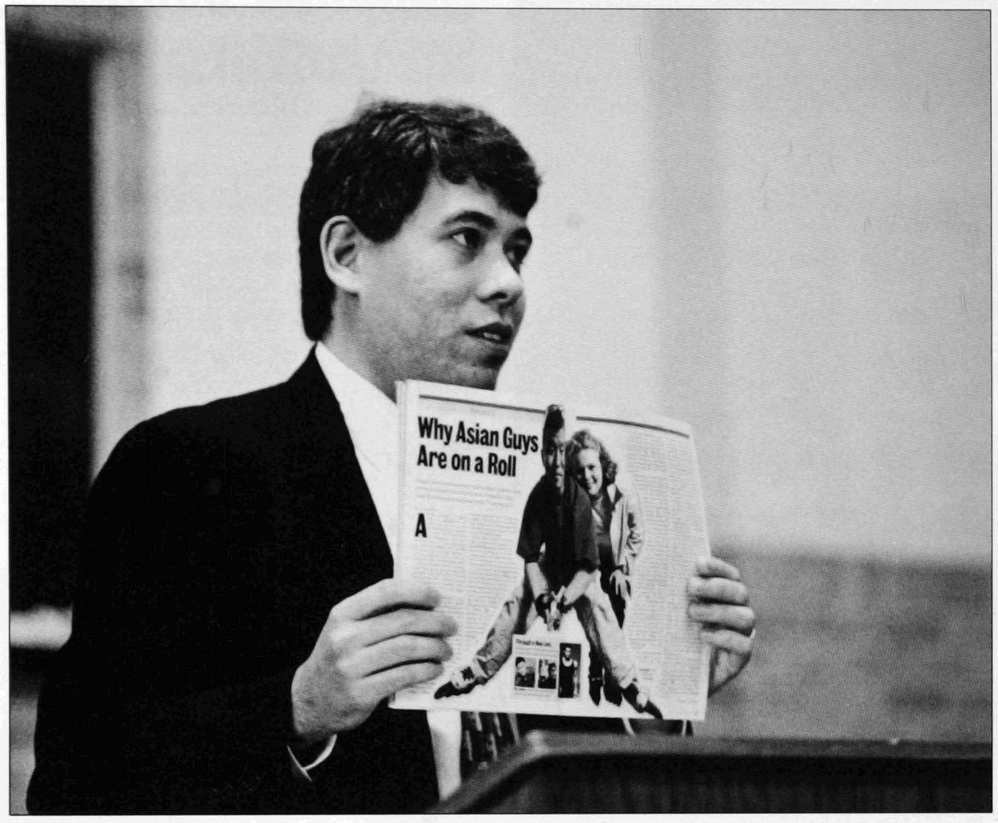
"The battle is right now in Michigan, and anything you can do to support the University of Michigan in its fight is important," he said. "We want the 21st century to be the shining light of America, when all people can share in the American dream. Without affirmative action that won't happen."

Pope was referring to the lawsuits that the Center for Individual Rights (CIR) brought against the Law School and the University of Michigan's College of Literature, Science, and the Arts in late 1997 to challenge their admissions policies. The Law School considers race as one of many factors that go into the decision to admit an applicant. The case is expected to go to trial in January. (See story on page 5.)

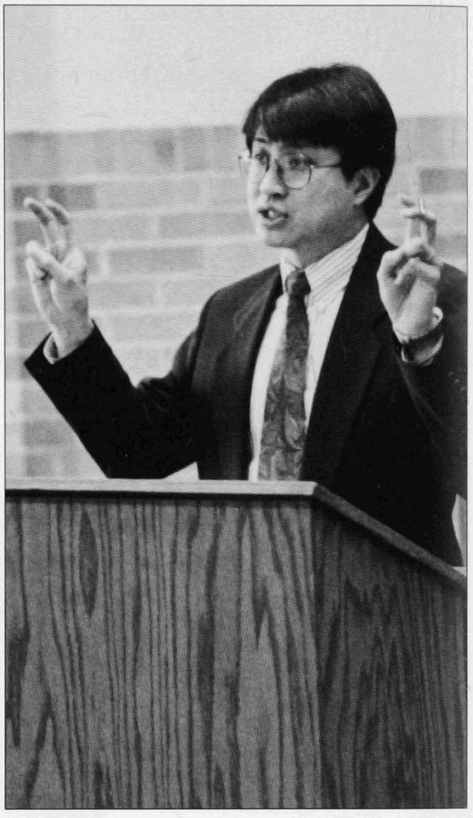
Law School Sampler —

David L. Chambers, the Wade H. McCree Jr. Collegiate Professor of Law, helps acquaint potential Law School students with academic life at the school as part of the first of two Preview Weekend programs the Law School presented during the spring for admitted students. Six additional faculty members participated in this panel — Professors Grace Tonner, Ellen Katz, James J. White, '62, Bridget McCormack, A.W. Brian Simpson, and Roderick M. Hills Jr. Among the weekend's other activities were a student panel; tours of the Law School and Ann Arbor; real and mock Law School classes; dinner with faculty members; an alumni panel; and student-sponsored events. The weekends provide admitted students the opportunity "to meet our faculty and students, to observe our classes, to tour the Law School and the U-M campus, to get a feel for Michigan, and to see for themselves the variety of activities and issues they may engage in if they accept our offer of admission," according to Assistant Dean and Admissions Director Erica Munzel, '83. About 80 admitted students attended the Preview Weekend in March and more than 100 in April. Attendance set new records both weekends.

Gabriel J. Chin, '88, professor at the University of Cincinnati Law School, describes the parallels between treatment of African Americans and treatment of Asian immigrants.



Professor Howard Chang of the University of Pennsylvania Law School explains that relaxed rather than restrictive immigration policies offer economic benefits for both the immigrants and their new homeland.



Speakers apply historical, economic measures to **Asian immigration**

Traditional immigration policies toward Asians have been much like Jim Crow laws, but modern-day trade and labor needs make it wiser to relax immigration restrictions than continue them, according to two speakers who addressed the issue in a program at the Law School in February.

Gabriel "Jack" Chin, '88, a professor at the University of Cincinnati Law School, and Howard Chang, a professor at the University of Pennsylvania Law School, made their remarks as part of the Asian Pacific American Law Students Association's Speaker Series.

During the late 19th century, observed Chin, the U.S. Supreme Court used the Plenary Power Doctrine, which placed immigration issues outside of constitutional protection, to uphold race-based Asian exclusion laws. The laws did not apply to white people entering the United States from Asia and were similar to Jim Crow laws, maintained Chin, because they saw the targeted group — Asians — "as posing the same threat to the social fabric as African Americans."

However, he added, in 1965 Congress changed the Immigration and Nationality Act to eliminate these abuses and today one-third of U.S. immigrants are from Asia.

In a second visit to the Law School the following month, Chin elaborated on the 1965 changes as a panelist for the *Michigan Journal of Race & Law* symposium "Identities in the Year 2000 and Beyond." During a discussion of immigration, transnationalism, and due process issues in relation to foreign identity, Chin pointed out that immigration law evolves with changing social attitudes, and since the *Brown v. Board of Education* decision in 1954 race has not been used to stop immigration. "Where is *Brown v. Board of Education* in immigration?" asked Chin. "In immigration issues, Congress tends to change the law. Congress eliminated racial testing for immigration."

"The Immigration and Nationality Act amendments of 1965 basically have been completely successful. . . . The overall pie

in immigration is bigger now," he said. Since then there have been "huge increases" in Asian and African immigration.

Chang, who focused his remarks on the economic impact of immigration, emphasized that liberalizing immigration is more beneficial to all sides than restricting it. If you compare the export of labor to other exports, he said, "in a sense immigration barriers are like trade barriers.

"Exclusion is the more costly option because it excludes immigrants from both our services and our labor force."

Grant funds major conference in Japanese law

Assistant Professor Mark D. West and the Law School have received a $35,000 grant from the Japan Foundation to present a conference on Japanese Law in April at the Law School.

The conference will be held April 6-7, 2001.

No conference details were available at deadline time, but West said that the program may be the most thorough presented on the subject outside of Japan.

The Law School's involvement with Japan is extensive and longstanding. Six faculty members — Professors Donald J. Herzog, Robert Howse, Richard O. Lempert, '68, Ronald J. Mann, Mathias Reimann, LL.M. '83, Carl E. Schneider, '79, and West — are teaching, speaking, or participating in conferences in Japan this summer or in the fall. In a longstanding exchange, many Law School faculty members have taught at the University of Tokyo and teachers from Japan have taught at the Law School.

West has enlarged that relationship in the past year to offer a course in Japanese law that uses Japanese documents and is taught in Japanese. He and a Japanese visitor teach the course.

Taking in summer's environmental view

Summer work often is an important part of the future lawyer's education, but sometimes students find it difficult to find the temporary summer work in the field that they hope eventually to enter fulltime. In an effort to help students who are considering careers in environmental law, the Environmental Law Society in January presented a program to acquaint students with the kinds of summer opportunities available to them in the environmental law area.

Half a dozen students described their past summer work — from the do-it-all approach that accompanies work with a small private firm to highly specialized work with the Environmental Protection Agency.

Speaker Paul Bennington described how his work with the National Wildlife Federation's Great Lakes Resource Center in Ann Arbor gave him "insight into how legal counsel fits in with the staff and operation of a nonprofit [agency] like NWF." One of his assignments, he said, was to research the legislative history of the Clean Water Act for a presentation to the International Joint Commission on the Great Lakes on the question of applying the act to smokestack emissions.

Polly Synk, who worked in the office of the Michigan Attorney General, said she put many hours into a case about the ownership of a shipwreck found on the floor of Lake Michigan. Chris Evers concentrated his summer work with EPA's regional counsel in Philadelphia on issues of U.S. Army and U.S. Navy practices that may violate underground storage tank regulations.

Michael H. Higuera spent his summer with Olson, Noonan & Bzdok of Traverse City, a small firm that specializes in environmental cases. He described the do-it-all nature of work with such a firm. Nancy Wang, who had an environmental internship with Faegre & Benson L.L.P. in Minneapolis, compared her work to that of a summer associate and noted that the firm's environmental work is done *pro bono.* Brian Gruber concentrated on Clean Water Act work during his summer with the U.S. Department of Justice's Environmental Enforcement Section.

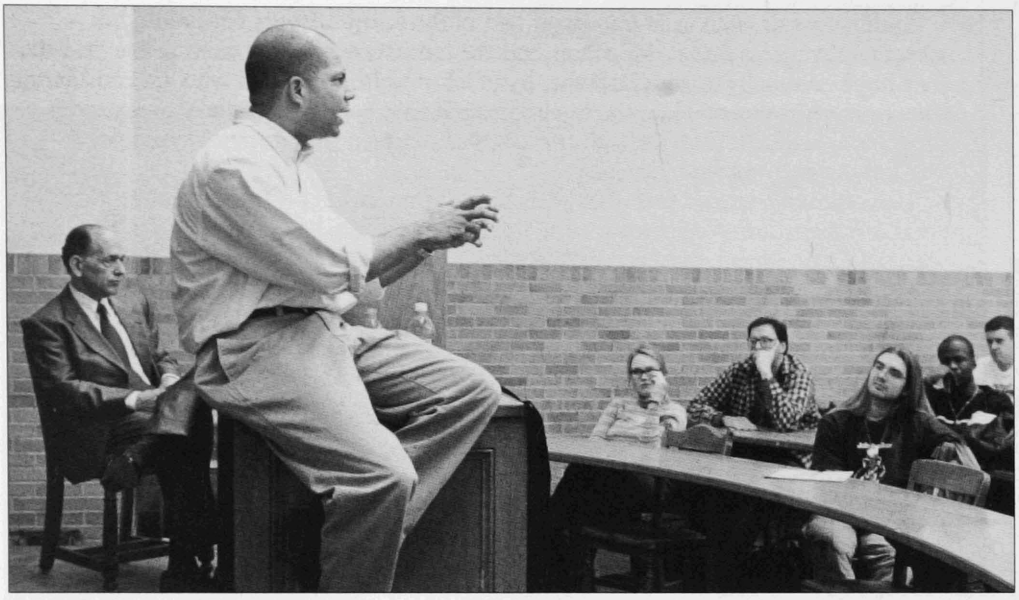
Confession after *Dickerson*

Although the U.S. Supreme Court had not yet handed down its decision in *Dickerson v United States* by the end of the academic year, no one questioned that the decision on the constitutionality of the *Miranda* warning would profoundly affect the role of confession in American law. With that in mind, the *Michigan Law Review* and the Criminal Law Society, working closely with *Miranda* specialist Yale Kamisar, the Clarence Darrow Distinguished University Professor of Law, have been organizing a conference on "The State of Confession Law after *Dickerson,*" to be held at the Law School November 17-18.

Moderated by Kamisar with assistance from Visiting Professor Joan Larsen, the conference will bring together the nation's leading scholars on confession law. At deadline time, these speakers had been confirmed for the conference:

- Ahil Reed Amar, Southmayd Professor of Law at Yale Law School.
- Paul G. Cassell, professor at the University of Utah College of Law who has fought for many years to overturn *Miranda* and argued that position before the U.S. Supreme Court in *Dickerson.*
- Richard Leo, of the University of California at Irvine, both a sociologist and a lawyer, who has observed many interrogations.
- Laurie Magid, a special assistant district attorney and a lecturer at Villanova Law School.
- Stephen Schulhofer, Julius Kreeger Professor of Law and Criminology and director of the Center for Studies in Criminal Justice, University of Chicago Law School.
- William J. Stuntz, who has recently moved from the University of Virginia School of Law to Harvard Law School.
- George C. Thomas III, professor at Rutgers School of Law.
- Charles D. Weisselberg, professor and director of the Center for Clinical Education, Boalt Hall School of Law, University of California at Berkeley.
- Welsh White, professor at the University of Pittsburgh School of Law.

Firearms makers are the only industrial producers who know nothing about the end users of their products, Assistant Professor Sherman Clark tells listeners during a debate on lawsuits against gunmakers. In background is Clark's debate opponent, Robert A. Levy, senior fellow in constitutional studies at the Cato Institute in Washingrton, D.C. Levy called the lawsuits against gunmakers "thinly veiled blackmail" that bypasses the legislative process. Their debate was sponsored by the Law School chapter of the Federalist Society for Law and Public Policy Studies.



Ready. Aim. Fire.

Debating suits against gunmakers

Judging Constitutions —

There is a "huge difference" between "doing justice as opposed to doing justice under law," Michigan Supreme Court Justice Stephen J. Markman explains during the Federalist Society for Law and Public Policy Studies' second annual "battle of the judges" in April. The issue: "Constitutional Interpretation: The Role of the Judge." Said Markman:

"Interpretation of the constitution according to its original meaning is the only way to be consistent with our constitutional system." Judges, he said, should read "the law as it is, not as they would like it to be." In reference to segregation, passage of the 13th, 14th, and 15th amendments to the U.S. Constitution "eradicated, pretty significantly, the flaws that were in our constitution. The original constitution was defective, and it was changed. That's my whole point." He added that "not to look at the hard words of the constitution is to have a constitution written on water."

Countered the Hon. Avern Cohn, '49, (seated at right) of the U.S. District Court for the Eastern District of Michigan: "A judge dealing with constitutional issues has a high degree of informed discretion in deciding a case." Precedent plays a role, but what is more important is the judge's view of whether the outcome is fair or unfair. In addition, "lawyers are not historians and historians are not lawyers," he said. "As social policy changed in the United States, so did the law. It is appalling to read some of the cases from Plessy v. Ferguson *and leading up to* Brown v. Board of Education. *As times change, constitutional doctrine changes. There is not the rigidity in constitutional law that Justice Markman would have us believe." In addition, he said, "the vast majority of the law that governs us is the common law, judge-made law."*

Dean Jeffrey S. Lehman, '81, left, moderated the debate.

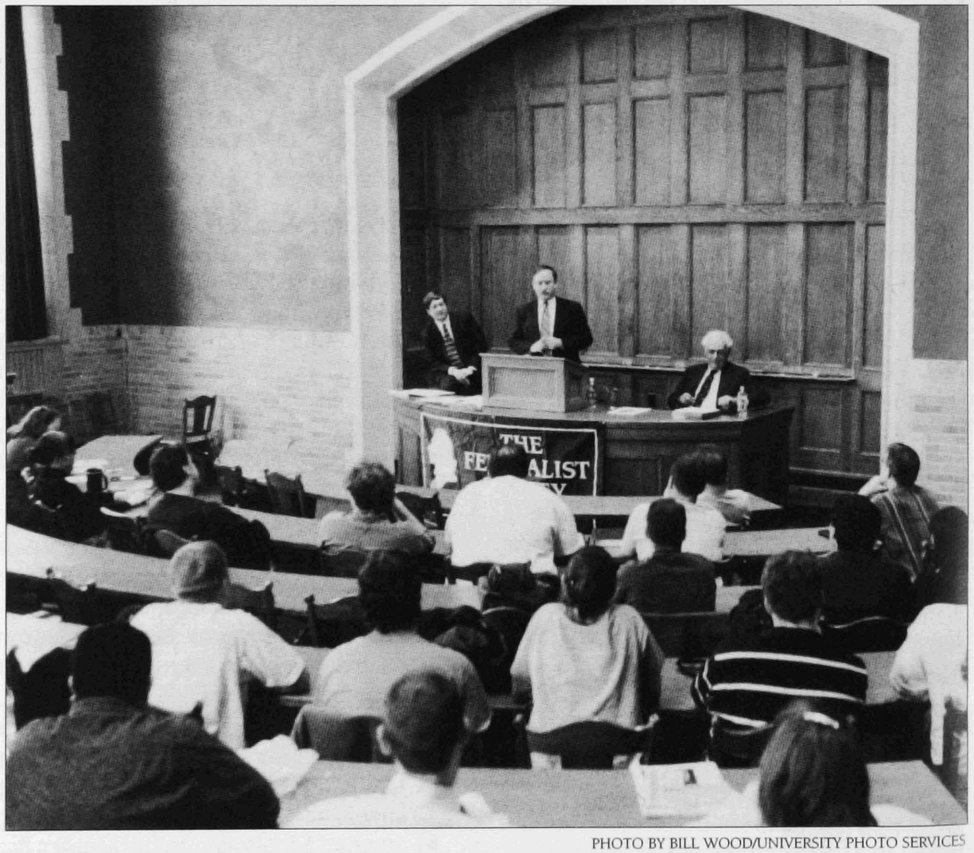


PHOTO BY BILL WOOD/UNIVERSITY PHOTO SERVICES

Hitting the bullseye means reducing the numbers of crimes that involve firearms. But sighting in on the target has resulted in holes all around that coveted center circle.

For example, Cato Institute Senior Fellow Robert A. Levy feels that the lawsuits recently filed against gunmakers for their responsibility in such crimes is "thinly veiled blackmail" that enriches trial attorneys and bypasses the legislative process that should be used to solve the problem. Assistant Professor Sherman Clark, consultant to the City of Detroit in its suit against gunmakers, counters that gunmakers know they can rely on some dealers to supply criminals "and if they set up distribution right they can make those extra profits."

Levy and Clark squared off in debate in March in a program sponsored by the student chapter of the Federalist Society for Law and Public Policy Studies. "Pistol Whipped: Has Gun Litigation Gone Too Far?", as the program was called, illustrated both sides' agreements as well as disagreements.

Agreed: Guns and criminals should be kept away from each other.

Agreed: A small proportion of the guns in the United States are used in crimes.

Disagreement arises over how to keep guns and criminals apart and the significance of that small proportion of firearms being used in crimes. For Levy, prosecuting the dealers who knowingly sell to criminals is the way to staunch the flow. Current law provides for the prosecution of dealers for knowingly allowing "straw" purchases, he said. To Clark, dealers can be prosecuted, but dealers are always changing. "It's a leaky barrel and there are hundreds of dealers," he said.

On percentages, only one-quarter of one percent of guns ever are used in crimes, said Levy. Countered Clark: "It is not an insignificant number of guns that are used in crimes" and "a substantial number" of guns used in crimes represent "straw purchases" through legitimate dealers.

Lawsuits against gunmakers are "rubbish," said Levy. Gunmakers would be liable only if there are "foreseeable" harms from their product, not just "possible" harms.

If there is a gunmakers' strategy of selling weapons to minors and criminals for profit, "you can't pretend not to know what you know," Clark said. "If it's true that there's nothing manufacturers could have done differently, then there's no case." But "it's negligent to sell guns to felons for profit."

"I'm entirely in favor of holding dealers liable if they knowingly sell to criminals, but that's different from holding the makers liable," Levy concluded.

Why don't gunmakers gather information on gun buyers? Clark asked. "There's only one industry where manufacturers know nothing about their end users," he said.

In another program, in April, the Federalist Society presented Wayne State University Law School Professor Kingsley R. Browne in a talk called "An Evolutionary Perspective on Women in the Workplace."

"The division of labor by sex is a human universal," Browne said. In modern western societies this is breaking down into "evolutionarily novel" settings. But looking at large numbers of people reveals that sex-based temperaments and behaviors, sometimes called stereotypes, still are hallmarks of the division of labor. Individual exceptions are widespread, but generally women tend toward helping and service professions or levels and men tend toward more risk-taking.

"What I'm talking about are statistical patterns, and do not think that any individual needs to be that way," Browne said. But it would be a mistake entirely to disregard gender in studying employment patterns. For example, if you want to hire someone to carry 100-pound grain sacks, you can open applications equally to women and men, but male applicants who can handle 100-pound sacks will outnumber female applicants who can handle them.

The cultural environment, in other words, cannot be the total determinant. "There is more of the environmental in the biological view than there is biology in the environmental view," Browne said.

Women's Health —

Professional and personal demands on women today have brought to the fore issues of health and health care delivery for women that are calling for new resourcefulness and inventiveness, Lisa Kane Low, of the University of Michigan Nursing-Midwifery Practice, tells a Law School audience in March. Low's program, "Perspectives in Women's Health: Combining Policy and Practice," was presented by the Women Law Students Association in celebration of Women's History Month. Low is a lecturer in the U-M School of Nursing and teaches in the University's Women's Studies Division.

Many Ask, But Few Are Chosen —

With more than 250 petitions arriving each month, justices of the Michigan Supreme Court and their staffs — "I have three clerks of my own and I often use law student interns, too" — do a great deal of weighing and sifting as they decide which cases to hear, Michigan Supreme Court Justice Marilyn Kelly tells members of the Criminal Appellate Practice class during a visit to the Law School in March. Most cases are not suitable for relief and only one-fourth of them receive summary action or get sent back to the lower court, Kelly said. Approximately one-tenth of the petitions receive direct action from the justices, and only half of that 10 percent actually comes to oral argument before the court, she noted. Seated on either side of Justice Kelly are Visiting Professors Paul E. Bennett, '76, and Valerie Newman, who teach the class. Bennett and Newman are assistant defenders in the State Appellate Defender's Office.

Challenging suburban sweatshops —

The classic urban sweatshop where many people work for low wages and in poor conditions has given way to a suburban version whose workers, like live-in domestics, busboys, dishwashers, and day laborers, are more dispersed and difficult to organize using traditional labor organizing tools, Jennifer Gordan, a MacArthur Award winner and Open Society Institute Fellow, explains during a program in January sponsored by the Office of Student Services. Gordan, founder of the Workplace Project on Long Island, described how the Project organized day laborers and landscapers to improve their wages. A legal analysis of the situation of these workers, if done alone, might not reveal the injustice of their situation, she said.

Counseling team wins regional honors

Competent legal counseling can solve many legal problems before they get to court, and law students with counseling experience have an added, important skill in their practitioner's repertoire. That's what first-year law students Chandra Davis and Vernon P. ("VP") Walling thought when they entered the ABA-sponsored student Client Counseling Competition.

In addition, they thought, "it would be fun." And it has been. With victories at the Law School and at the regional level, Davis, Walling, and their coach, Career Services Attorney-Counselor Carolyn Spencer, have racked up an impressive run. In March, the team tied for third place at the national competition, held at Northern Illinois University School of Law in DeKalb.

Walling noted that few competitions are open to first-year students. In addition, he said, the timing of this one early in the winter term was favorable, and the training session conducted by Assistant Dean of Students David Baum, '89, convinced him to enter. Davis said she entered because the experience would complement her co-curricular activities and "help me as a practitioner."

Last year's Law School winners, Shelly Fox and Dennis Westlind, helped to train this year's team.

Davis and Walling already were friends, and quickly found that they worked well together. In the first round, they were accused of being the "feeler-thinker team," Walling laughed. He chuckled even more as he explained that usually he relies on Davis' brains but this label turned things around.

"The purpose of the competition is to promote greater knowledge and interest among law students in the preventive law and counseling functions of law practice and to encourage students to develop

interviewing, planning, and analytical skills in the lawyer-client relationship in the law office," according to the competition rules.

"The competition simulates a law office consultation in which law students, acting as attorneys, are presented with a client matter. They conduct an interview with a person playing the role of the client and then explain how they would proceed further in the hypothetical situation." The interview and a post-interview discussion between the two student attorneys take place under timed conditions. The competition is sponsored by the ABA's Law Student Division.

Clients are played by undergraduate pre-law students in the Law School competition, law students at the regionals, and drama students and a law professor at the national competition. Competitors only can prepare generally; they do not know what specific question the "client" will bring to them. This year's competition involved consumer law issues, like these taken from the questions presented at the regional competition:

- "You have an appointment with Lynn Lonesome for him/her to discuss a complaint he/she has regarding the purchase of an SUV."
- "You have an appointment with Sam/Samantha Grant, a third-year law student, to discuss concerns about the state bar Character and Fitness Committee."
- "You have an appointment with Morris/Maureen Mentum to discuss problems he/she has with a car lease."
- "You have an appointment with John/Joan Harris, who is very upset about losing his/her house because of a debt."

The Davis/Walling team beat five opponents to win Region Six in a competition held at Claude Pettit School of Law, Northern Ohio University, in February. In March, they won high praise for their performance as the only team made up of first-year law students when they faced the other 11 U.S. regional winners in the national competition at Northern Illinois University at DeKalb.

Judges at the national competition noted the team's "very focused, problem-solving" approach as well as their ability to formulate a "very specific action plan" while operating under time constraints. Davis and Walling are considering whether they'll participate in next year's Client Counseling Competition, which will focus on elder law issues.

Client Counseling Competition coach Carolyn Spencer, left, a Career Services attorney-counselor, and team members Vernon P. ("VP") Walling and Chandra Davis share a happy recollection of their competition in the ABA's Client Counseling Competition earlier this year. The law students won at the Law School level and also won the regional competition in March against other winners from Michigan and Kentucky.

New clinic focuses on asylum, refugee cases

The Elian Gonzalez case and the opening of the Law School's new Asylum and Refugee Law Clinic are not related events — except that the Gonzalez case is like the tip of the mast of a shipload of such cases.

The case of the six-year-old Cuban boy whom American fisherman found clinging to an inner tube after his mother drowned trying to flee Cuba with him to the United States is unique for the emotion-charged attention it has drawn, from the concentration of U.S. Attorney General Janet Reno and presidential candidates in this election year to millions of American families watching their daily television news. Its heated blending of family schisms and family law, politics, ideology, and emotion-charged media attention has made it seem to be one of a kind. But it really is one of many very complicated kinds of immigration, refugee, and asylum cases that students in the Law School's new clinic are learning in a hands-on way to prepare and to try.

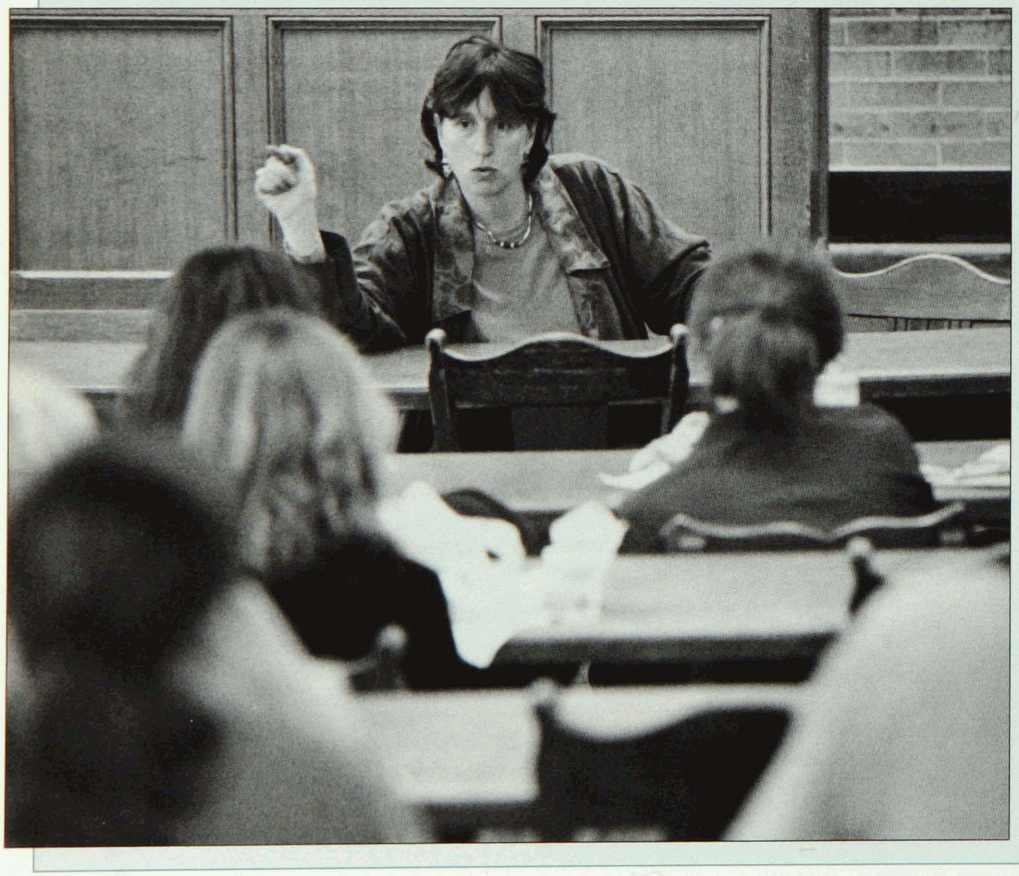
Begun in January, the Asylum and Refugee Clinic was launched by clinical faculty members Nick Rine and Bridget McCormack, with assistance from Visiting Professor Lori Cohen, a specialist in asylum law.

The clinic operates as "a small, specialized law firm in which the students will represent refugees seeking grants of political asylum," according to the formal course description. "Cases will include 'affirmative cases' requiring investigation and preparation of an asylum application as well as 'defensive cases' that require trial of deportation hearings in which students will defend on the basis of asylum claims. A typical case will entail extensive client and witness contact, wide-ranging investigation into human rights issues in the client's home country, and location and preparation of appropriate expert witnesses."

The seminar portion of the clinic focuses on the U.S. asylum system and trial practice training.

Clinic enrollees must have completed the course International Refugee Law.

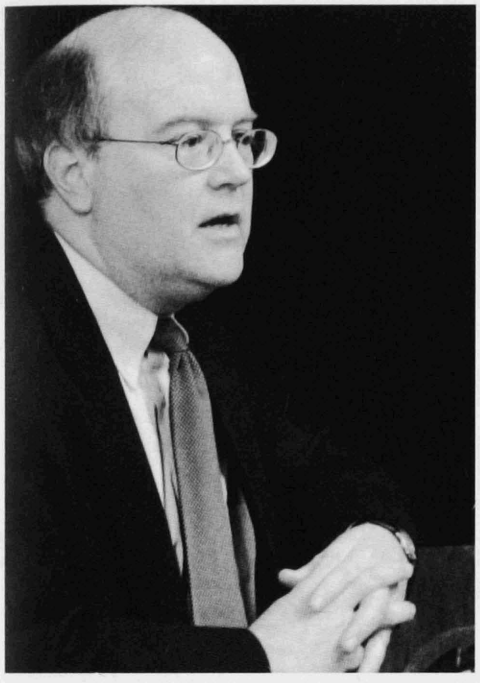
The new clinic joins the Law School's other five clinical programs: the Child Advocacy Law Clinic, Environmental Law Clinic, Legal Assistance for Urban Communities, Criminal Appellate Practice, and Clinical Law I and Advanced Clinical Law. It also complements the Law School's two clinic-related programs, the Clinical Welfare Law Program and the Michigan Poverty Law Program.



On the front line —

"In our view the stakes couldn't be higher," Elizabeth "Betsy" Cavendish, general counsel of the National Abortion Action Rights League (NAARL), says of the 2000 presidential election during a talk at the Law School in February. Pro-choice forces have lost all but about 13 of the more than 120 abortion-related congressional votes during the previous two years, she said. In addition, NARAL filed briefs in two abortion-related cases before the U.S. Supreme Court in its most recent term, she said. Cavendish also spoke the same day in the seminar on general counsels taught by Visiting Professor Marvin Krislov, general counsel of the University of Michigan. Her talk was sponsored by the Law School's Office of Career Services.

Dennis Clark, of Plunkett & Cooney in Detroit, left, and Terri L. Stangl, '82, executive director of the Center for Civil Justice in Saginaw, discuss their work in talks for the Office of Public Service's "Inspiring Paths" series in February.



Speakers' advice: Follow your muse

Dennis Clark and Terri L. Stangl, '82, practice in very different settings — he with a powerful, well-known firm in Detroit, she with a nonprofit legal services spin-off in Saginaw — but both devote their careers to helping those who can't usually go out and buy legal assistance.

Clark is a criminal defense specialist with Plunkett & Cooney, a firm that is not known for specializing in criminal defense work. He is a highly regarded specialist in criminal defense, and even the *pro bono* case that he described in a talk at the Law School in February is "part of the path I have chosen to take for my career."

Clark and Plunkett & Cooney are providing *pro bono* representation for Chris Brooks to fight his conviction for murder and death sentence in Alabama. With the support and backup of his firm, Clark took on the case after Dean Jeffrey S. Lehman, '81, Office of Public Service Director Robert Precht, and Bryan Stevenson, a former visiting teacher at the Law School and founder of the Montgomery-based Equal Justice Initiative (EJI) in Alabama, sought the help of Detroit law firms in Alabama's capital offense cases.

It's a time-consuming, costly commitment, said Clark, who joined Plunkett & Cooney in 1988 as the firm's first criminal defense lawyer. But the poor representation that capital crime suspects like Brooks often get at the original trial later demands quality legal assistance if their constitutional rights are to be protected.

In 1998, Alabama sentenced more people *per capita* to death than any other state, Clark said. Seven of those 27 people were sentenced to die for crimes committed before they were 20 years old. Two were younger than 18 when the crimes were committed.

There are more than 3,500 death row inmates in prisons across the United States and two-thirds of them are "poor, undereducated, and people of color," Clark said during a February visit to the Law School to present one of the "Inspiring Paths" talks sponsored by the Office of Public Service. In Alabama, there are 183 people on death row, he said.

"There are numerous people on death row in Alabama without competent counsel, some without counsel at all," Clark explained. His *pro bono* work is not just to save a death row inmate's life, said Clark — although he personally opposes the death penalty. It is "an effort to insure the protection of his constitutional rights and fair treatment. If the ultimate punishment does come, at least due process will have been served."

Clinical Assistant Professor Andrea D. Lyon, a nationally recognized expert on death penalty defense, and law students Katherine Dawson and Shannon Ewing, are assisting Clark on the case.

Stangl, also a speaker in the "Inspiring Paths" series during the winter term, said she had three goals when she graduated from Yale:

Continued on page 20

Continued from page 19

- "I was deathly afraid of being bored."
- "I also was very concerned with whom I would work with every day because I believed that my co-workers would shape the person I would become."
- "I wanted to do something where I felt I really could make a difference."

One day in Ann Arbor she ran into attorney Jean Ledwith King, '68, who suggested that Stangl attend an upcoming conference on Women in the Law.

Stangl followed King's advice, and that was the beginning of the rest of her story. "A light went on," she recalled. "This doesn't look boring," she thought to herself. "These are people I can work with."

As a student, she worked at Michigan Legal Services, and thoroughly enjoyed it: "You learned to ask what could be. You don't just take what is given to you. You think, and you think creatively: Is there a way we can solve this problem now and keep other people from experiencing the same problem in the future?"

After graduation from the Law School, she spent three years at Legal Services of Eastern Michigan (LSEM) in Flint, then became manager at LSEM's Saginaw office. Among her accomplishments in Saginaw was to work with staff to develop *pro se* and eviction clinics that freed Legal Services attorneys to concentrate on more complex cases. When Congress cut back aid and restricted the types of cases that Legal Services can handle, LSEM gave up some of its own non-federal funding so it could be used instead to support the Center for Civil Justice, a nonprofit legal aid organization that is not subject to congressional restrictions. Stangl became its director.

Within or outside of congressional restrictions, however, some aspects of poverty law remain the same. For example, Stangl said, the problem that poverty law clients bring to an attorney often is not the major difficulty they face. Attorneys, she said, must learn to ask, "What's going on in this picture — and how can I use the law to help?"

The Center for Civil Justice itself focuses on issues that affect large numbers of low-income persons, using law-related strategies such as class actions and policy advocacy, as well as partnerships with human services organizations.

"One of the wonderful things about doing poverty law is the community of advocates out there. . . . Information is power and we share it with clients and their advocates to make things better," Stangl said.

In addition, "legal services attorneys have expertise that attorneys in private practice don't have." For example, she asked, how many private practice attorneys know their way through Medicaid regulations or have worked out how a proposed settlement will affect an indigent client's various types of assistance?

"I feel incredibly fortunate to be able to do what I went into this work to do," she said. "It's definitely more interesting and challenging than I imagined. It certainly has not been boring."

Celebrating the memory of

The air of festivity was contagious — from pre-dinner music by Mariachi Mexico to the post-speeches salsa dancing to music by the group Sensacional — as the Latino Law Students Association (LLSA) presented its 16th annual Juan Tienda Scholarship Banquet in February.

More than 230 law students and members of the Law School community attended, setting a new record for the second year in a row. And throughout the evening, through the rumble of conversation and laughter, the spirit of Juan Luis Tienda was a reminder of the value of concern for others.

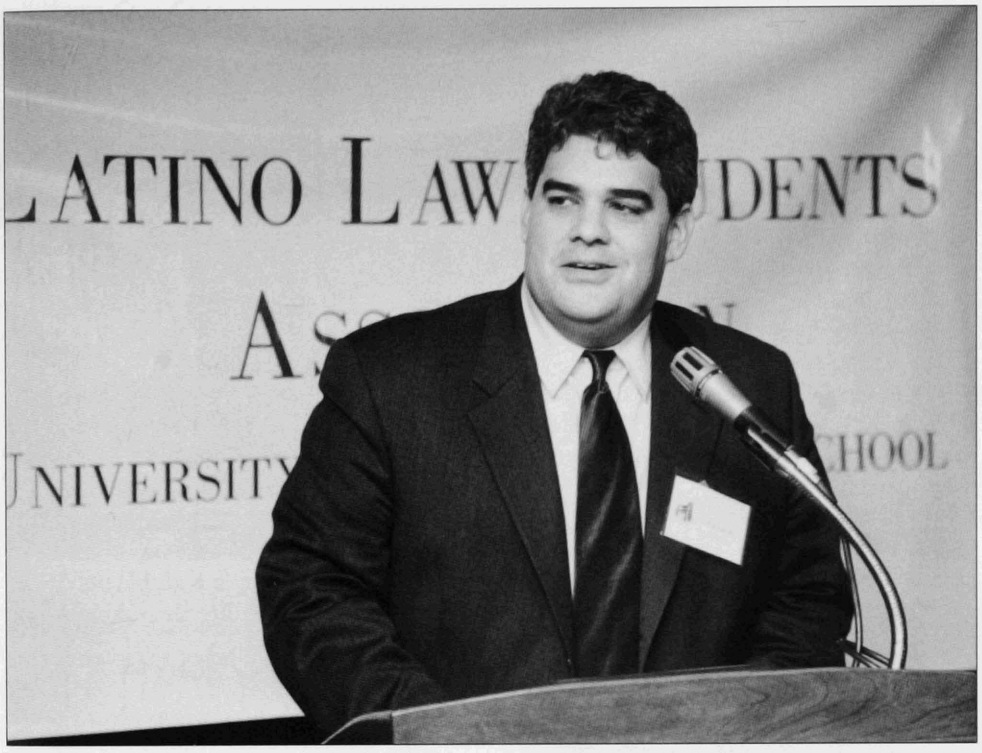
Tienda, who died in an automobile accident in 1976 as he was about to begin his third year at the Law School, had been president of La Raza, the precursor to the current LLSA, and actively recruited minority law students. He also worked with the Migrant Legal Assistance Project in Hart, Michigan, and visited prison inmates at the Milan Federal Correctional Institution south of Ann Arbor.

Each year LLSA presents scholarships named for Tienda to first-year law students who best reflect his memory. This year's Juan Tienda Scholarships went to three students: Isela Morales of Chicago; Ginessa Avalos, of Edinburg, Texas; and Mariela Olivares, of Corpus Christi, Texas. LLSA's president, Marcela Sanchez, editor in chief of *Michigan Law Review,* was one of two Juan Tienda Scholarship winners last year.

Keynote speaker Margaret E. Montoya, a professor at the University of New Mexico School of Law, spoke "in praise of those who struggle to give meaning to principles of inclusion and equality."

"The Juan Tiendas of the world are the ones who are giving new meaning to citizenship by opening doors of opportunity to others," Montoya said. She

Alexander Sanchez, '93, received the annual J. T. Canales Distinguished Alumni Award, named for the first Hispanic graduate of the Law School. Sanchez is executive director of the Hispanic National Bar Association.



Juan Tienda Scholarship recipients display the plaques that accompany their awards. From left are Isela Morales, of Chicago; Ginessa Avalos, of Edinburg, Texas; and Mariela Olivares, of Corpus Christi, Texas.

noted the similarities between minorities' struggles today in the United States and those she found while she researched affirmative action-style programs in India and Malaysia during the 1970s. Looking to other countries, as well as backward in time, offers "a sense of historicity to the current struggles," she said. "These are transnational programs."

Alexander Sanchez, '93, executive director of the Hispanic National Bar Association (HNBA) in Washington, D.C., received the annual J. T. Canales Distinguished Alumni Award. Canales, the first Hispanic graduate of the Law School, was a Texas state legislator in the late 1800s.

Keep aware of what is happening around you, Sanchez advised. Stay open-minded for new, perhaps unexpected opportunities. And stay focused on your goals.

Keynote speaker Margaret E. Montoya, professor of law at the University of New Mexico Law School, tells listeners that "cultural citizenship is a process by which rights are claimed and expanded." She praised "those who struggle to give meaning to principles of inclusion and equality."

Studying for career choices

Two goals loom at the end of the law school years: getting that J.D. and landing the job you seek for its satisfaction and challenge. Progress toward these paired goals runs together like railroad tracks: courses build on one another toward graduation, and summer work between first- and second-year studies contributes to the career decision that accompanies graduation.

Faculty members concentrate on the in-class portion — and often help with professional suggestions and placements, too — and the Office of Career Services and Office of Public Service focus on the out-of-class portion. (See related story on Office of Public Service's "Inspiring Paths" speakers series, page 19.)

The career-decision regimen can be rigorous and commands considerable attention from law students. For example, one day in early April law students nearly filled the 400-seat Honigman Auditorium (Hutchins Hall room 100) for a session blandly billed as "Judicial Clerkship Information Panel." The nearly full-house program was part of an exceptionally busy week for career-oriented programs; bracketing the clerkship information program were three "How to Succeed" sessions geared to summer clerks, first-year attorneys, and judicial clerks.

A glance at Career Services' Web page (www.law.umich.edu/careers) that week showed 13 sessions from the start of winter term through the first few days of April, and other programs were presented on notice too short to include them on the advance list. The programs ranged from careers in teaching law, with Professors Doug Kahn, Ellen Katz, and Daniel Halberstam, to a talk by Beth Nolan, the White House Counsel. Other programs featured a discussion of careers in sports law and a mock interview session.

In the case of clerkships, law school graduates often seek them out as post-graduation, hands-on-learning jobs to hone and practice skills before they move on in their legal careers, Halberstam, faculty advisor for clerkships, said in opening the program on judicial clerkship information.

"I firmly believe that every law school graduate should clerk," Halberstam said. "A clerkship provides the opportunity to see up close how judges make their decisions. . . . There is nothing else that really substitutes for that experience."

The Hon. James L. Ryan of the U.S. Court of Appeals for the Sixth Circuit, a former judge of the Michigan Supreme Court, said that he seeks clerks with a solid grounding in the liberal arts — especially writing skills — and proof that the applicant has "done very well in a challenging law school."

Panelist Melissa Tatum, '92, of the University of Tulsa College of Law, praised the value of clerking for a federal magistrate judge. Her first clerkship was with a magistrate judge; her other two clerkships were with federal appeals court judges. A clerkship offers "insight into the legal process and how it works" and "you also get responsibility and a breadth of experience," she said.

But, she warned, "the clerkship process is a very idiosyncratic process. There are far more people out there who want appellate court clerkships than there are appellate court clerkships to go around."

Noceeba Southern Gordon, '96, who clerked for a federal district judge, a circuit judge, and now is with the U.S. Attorney's Office for the Eastern District of Michigan, noted that trial court clerkships let you "see what it takes to be a good litigator" and are good places to develop a rapport with court staffers. It's a plus if you clerk where you plan to practice, because "you get to look at the firms before they get to look at you," she said.

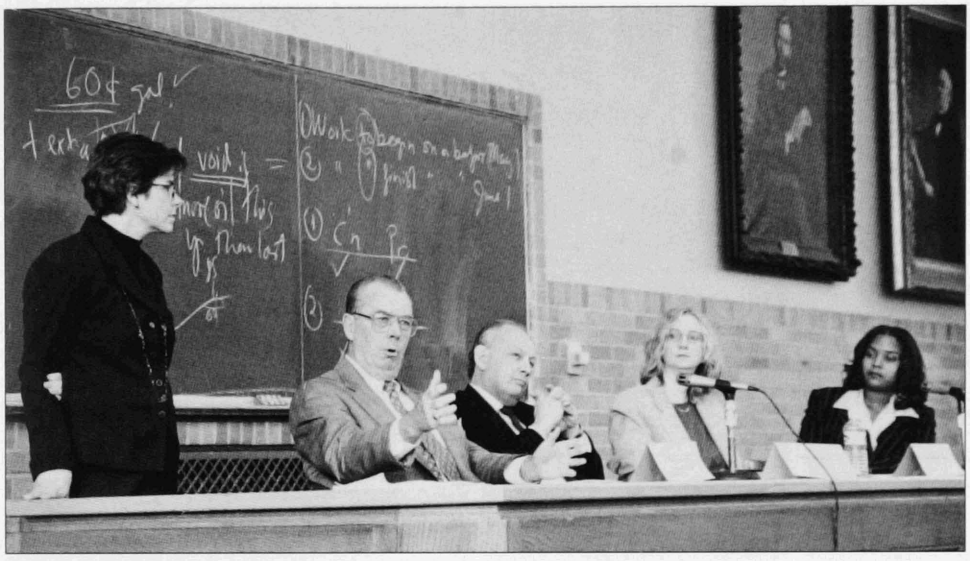
Abraham Singer, managing partner of Pepper Hamilton L.L.P.'s Detroit office, said his firm looks upon those who have clerked as "a very good pool of potential talent." The clerking experience of writing, learning court rules, and other duties provides "substantially more information" about applicants than is available on graduates who apply directly from law school, he explained.

And, he noted, "we always check with the judge."

The "How to Succeed" programs were sharing places for the nuts-and-bolts information that helps beginning lawyers launch their careers well. During one program, for example, students heard that "first impression means absolutely everything."

"Come out of the box strong. You can't make a first impression a second time," Megan A. Fitzpatrick, '97, an attorney with Fuller & Henry Ltd. in Toledo, advised during the program "How to Succeed as a Summer Clerk." Get to know the secretaries in your firm, and the librarian, Fitzpatrick said. They'll be "invaluable."

"Recognize that the social life and the work life are connected. It's all an extended interview," Jason Factor, '96, of Cleary,



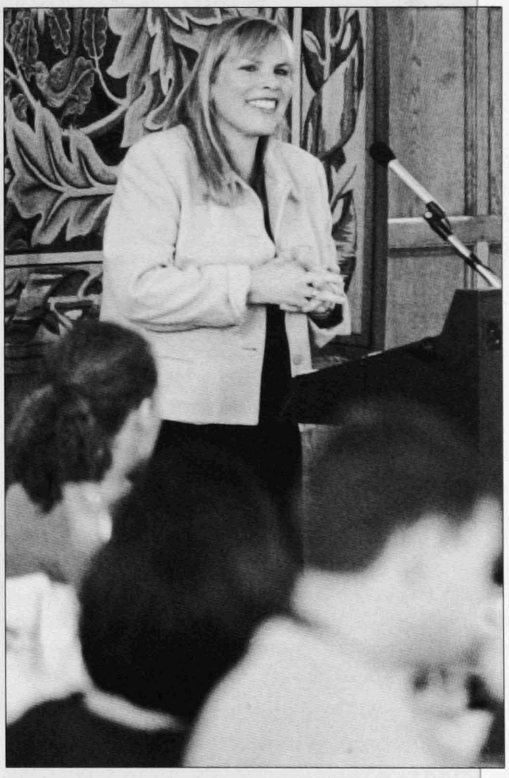
The Hon. James L. Ryan, of the U.S. Court of Appeals for the Sixth Circuit, responds to a questioner during the "Judicial Clerkship Information Panel" presented by the Office of Career Services in April. From left, the other panelists are: Abraham Singer, managing partner of the Detroit office of Pepper Hamilton L.L.P.; Professor Melissa Tatum, '92, of Tulsa College of Law; and Noceeba Southern Gordon, '96, of the U.S. Attorney's Office for the Eastern District of Michigan. At left is Office of Career Services Attorney-Counselor Sarah Zearfoss, '92, the panel moderator.

Gottlieb, Steen & Hamilton in New York City, said on the same program. Other members of the panel included third-year law student Amy Lowen and David A. Sutphen, '96, general counsel to Senator Edward Kennedy, D-Massachusetts, and formerly campaign director for Law School fellow graduate U.S. Rep. Harold E. Ford Jr., '96, D-Tennessee.

The panelists returned the same afternoon to present the program "How to Succeed as a First-Year Attorney."

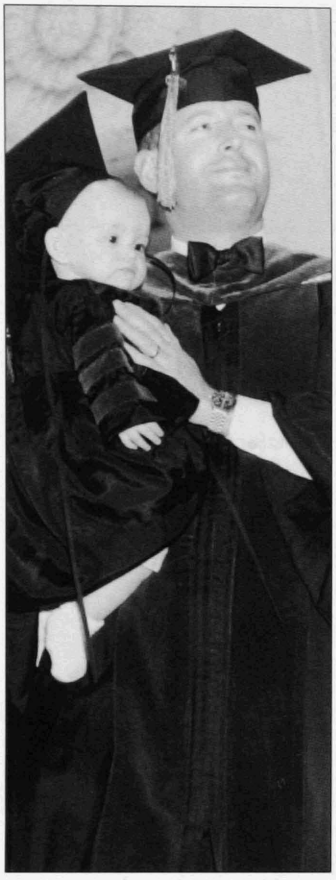
Three days later, clerks Diana Ortiz, '98, and Jeff Silver, '99, shared insights from their experiences working with judges. "Short and sweet, formulaic, plain language, basically as simple as you can get," Ortiz advised for memo writing. Formerly a clerk for two justices at the Michigan Supreme Court, Ortiz now clerks for the Hon. John Corbett O'Mera of the U.S. District Court for the Eastern District of Michigan.

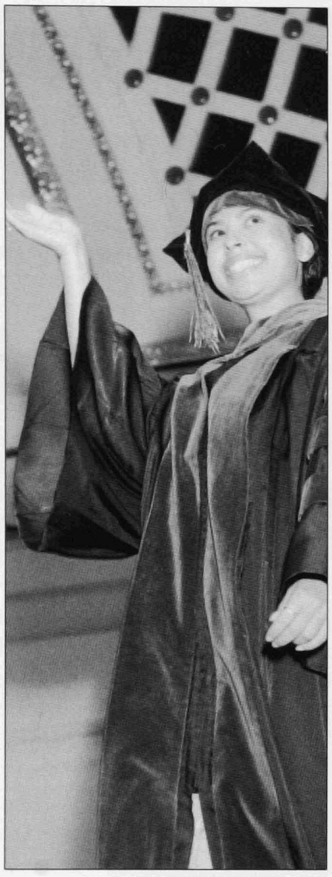
Silver, a clerk for the Hon. Paul Borman, '62, of the same court, praised the training available through the Law School's Legal Practice Program as a major step to success as a clerk. "If you write well and express your thoughts well, that is really what the judge is looking for," he said.

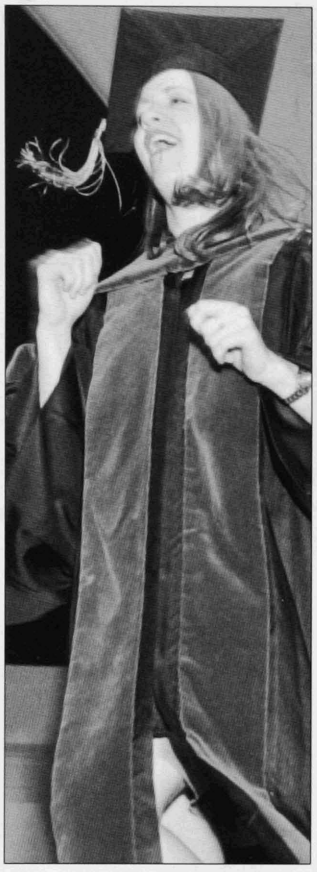


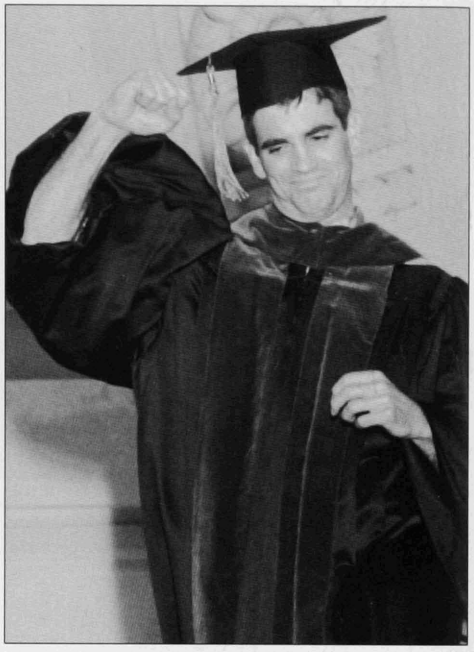
The President's Lawyer —

Beth Nolan, counsel to President Clinton, outlines her career path during a talk at the Law School in March. Nolan is the first woman named counsel to the President of the United States.









The Celebration Walk —

Law School graduates' commencement walks across the stage of Hill Auditorium often are accompanied by whistles, chants, and shouts of their names from well-wishers throughout the 1,400-seat auditorium. This year, there even was a well-wisher who brought along a bell to ring as the graduate he came to see walked across the stage. Many graduates loose their own enthusiasm as their name is read. With 344 graduates listed for May's commencement, we only can offer a sample of the signs of joy that graduates display as they cross the stage. Clockwise: Jeffrey Klain carries daughter Zipporah, appropriately garbed as a future graduate; Meera Deo waves; Jodi-Marie Masley breaks into the dance that took her across the stage; Russell Morris McGlothlin raises a fist to mark the moment; and Jeannine E. Del Monte lifts her arms in celebration.

'Trust yourself,' urges graduation speaker

In his introduction of Senior Day Speaker Sally Katzen, '67, Dean Jeffrey S. Lehman, '81, focused on her many accomplishments. Katzen is counselor to the director of the Office of Management and Budget (OMB) in the Clinton administration, and, at the time of her address, was awaiting action on her nomination to be deputy director of OMB. She also served in the Carter administration, leaving a partnership with Wilmer, Cutler & Pickering to take the post in the executive branch.

"I had been on a set path — or so it seemed — a clerkship following graduation, becoming an associate in a well-respected law firm, making partner with a growing list of clients who seemed to appreciate me and value my contributions," she said. "Then, one day I got a call from a senior advisor to President Carter — some of you are too young to remember that he was the last Democratic president before President Clinton. The advisor offered me a position in the administration — high visibility, a lot of autonomy, a lot of responsibility; I said no, emphatically.

"He persisted; I resisted.

"He invited me to lunch at the White House. I have to agree with one of the messages in the most recent episode of *West Wing* — the trappings of the White House can be most intoxicating to an impressionable person. I was an impressionable person. We had lunch at the White House Mess, and there he introduced me to the President, saying 'She won't say "yes" to me; but I'm sure she wouldn't say "no" to you.' I accepted their offer."

Katzen often used anecdote to make her point. Here's another example from her first days of practice, when there were far fewer women attorneys than today:

"As I look out at the graduating class, I see a lot of women. That's a big change from my time, when we had 10 girls — and we were 'girls' then — in a class of 400. Well, during my first year in the law firm, I learned a lot about being in a 'man's world.' One episode sticks in my mind that illustrates my point about style. It was early one morning. I got a call from one of the senior partners to drop everything and meet him in the conference room. I walked in, saw a whole lot of pin-striped suits. One of the pin-striped suits asked me for coffee. I didn't miss a beat and asked, 'Cream? Sugar? Both?,' got my answer, and promptly left to fetch the coffee.

"When I returned, he had taken his seat at the conference table and the chair next to him was empty. I put the coffee down and sat in the empty seat. The senior partner came in and introduced me, and I could see the color rising slowly up the coffee man's neck. As the meeting proceeded, I cautiously offered my view about something. 'She's absolutely right,' the coffee man proclaimed. I tried again later, and he said, 'Sally is on target here,' and so it went with several other not-so-brilliant comments from me and enthusiastic support from him.

"As we recessed for lunch, the senior partner asked me to come into his office and closed the door — I figured I had done something wrong. 'He's a pluperfect (expletive deleted),' the partner said to me. 'He's always negative about everything and you've got him eating out of your hand.'

'No,' I said, 'he's drinking my coffee.'

"Important lesson learned, for both of us."

"Don't be afraid of taking risks," Katzen advised. "The skills you have will stand you in good stead in lots of different fields: law, business, even politics. Indeed, you should be taking risks even if everything seems to be going well. Staying on a single, well-defined road may be simple, and it may even be efficient, but it may not take you where you want to go, or let you be everything you can be."

Katzen also advised:

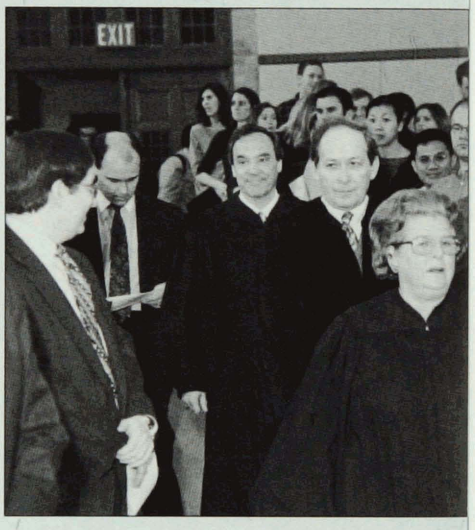
- "You will be spending a lot of time at work — so have some fun. Truth be told, there are rewards from crafting an intriguing argument, from drafting a convincing brief, from piecing together a complex transaction, from helping someone get a just result, from restoring faith in the system."
- "Trust yourself. When something feels right, it probably is right, and if it is right, then go for it. . . . [Y]ou are all quite smart and talented or you wouldn't have gotten into the Law School — and now you have the added benefit of a superb education. Draw on that both in your professional work and in your personal choices. Go with your instincts — there are none better."
- "Subtlety has its advantages. Humor has its advantages. Lowering your voice can speak volumes. In a word — there are lots of ways to be effective other than by being heavy-handed, overbearing, or unduly confrontational."

"Don't be afraid of taking risks," advises commencement speaker Sally Katzen, '67, counselor to the director of the Office of Management and Budget. "The skills you have will stand you in good stead in lots of different fields: law, business, even politics."

Katzen suggested that graduates consider government work — for its satisfaction, early assumption of significant responsibility, and the excitement of sometimes seeing your ideas become policy.

"The fact is that working in government is tremendously exciting and fulfilling," she said. "This is true at the state and local level as well as the federal level. You are helping real people deal with real problems. It really does matter if people get their Social Security checks without a hassle, if health care is available to all children, if everyone who wants to go to college can do so, if the air we breathe and the water we drink are clean, and the food we eat is safe.

"The people I work with feel they are making a difference — every day. They are working on the people's business — providing benefits, services, and results that the American people care about."



Final Arguments —

William G. Jenks' exuberance can't be quelled, even before the Henry M. Campbell Moot Court Competition finals begin. Beneficiaries of his enthusiasm include his competition partner, Abigail V. Adams, left, and opponents Sean C. Grimsley and Eric R. Olson. As judges enter for the competition — from left, the Hon. George Steeh III, '73, of the U.S. District Court for the Eastern District of Michigan, the Hon. Bruce Selya of the U.S. Court of Appeals for the First Circuit, and the Hon. Norma Shapiro of the U.S. District Court for the Eastern District of Michigan — the mood grows more somber, and more serious still as the finalists, Jenks and Carter at left, Grimsley and Olson at right, take their positions for argument to begin. Carter and Jenks won the competition as respondents to two questions:

1. *Does the Child Online Protection Act, the successor to the Communications Decency Act, violate the First Amendment?*
2. *Does a warrantless search of electronic mail violate the Fourth Amendment? "No," they successfully answered both questions.*

Secret evidence is unconstitutional: Bonier

The Anti-Terrorism and Death Penalty Act of 1996 is unconstitutional and "one of the most pernicious laws that I have seen in my 28 years of lawmaking," Congressman David Bonier, D-Michigan, told a Law School audience during a program on secret evidence in March.

Passed in the wake of the bombing of the Murrah Federal Building in Oklahoma City, the law's antiterrorism section permits the use of evidence against foreign nationals that the accused person is not allowed to see or counter. At the time of his talk, Bonier had secured 70 co-sponsors for his bill to repeal the secret evidence law.

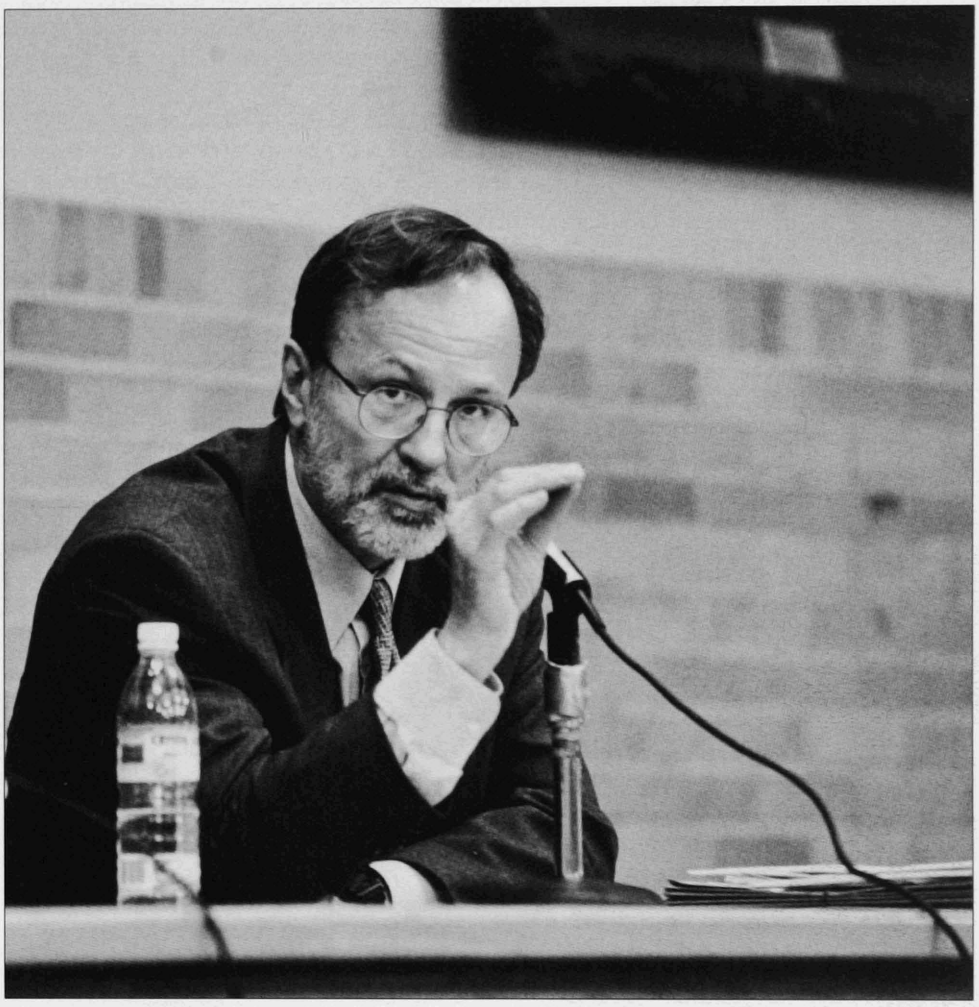
Mostly, said Bonier, who is the Democratic Whip, secret evidence has been used against Muslims and people of Arab descent. Nineteen of the 20 current cases reflect this bias, he said; one man has been held for almost three years.

Bonier's fellow panelists, Hani Azzam, an Ann Arbor attorney, and Imad Hamad, who faced accusations based on secret evidence, echoed Bonier's opposition to the use of secret evidence.

"It is obscene to have a law that allows any executive agency to just pick up anybody and tell him he has to leave the country because it has an anonymous tip that he is dangerous," said Azzam.

In Hamad's case, "even the judge was astonished" to discover that he had to have security clearance to see the secret evidence in the case, said Hamad. After seeing the evidence, he dismissed the case. "I believe that if they have a case there is no need for secret evidence," Hamad said.

The program was sponsored by the Middle Eastern Law Students Association, Arab-American Anti-Discrimination Committee, and five other University of Michigan groups. In an earlier program, the groups showed the video documentary "Uncivil Liberties: Secret Trials in America," which traces the story of a defendant in a case involving secret evidence.



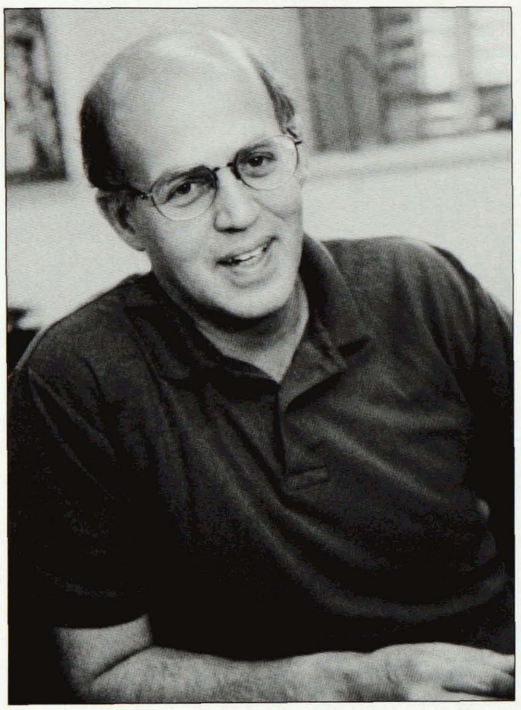
U.S. Representative David Bonier, D-Michigan, tells listeners that the 1996 federal antiterrorism law is "unconstitutional" and "pernicious" because it allows secret evidence to be used against immigrants. Bonier, the Democratic Whip, was one of three panelists who discussed the issue during a program at the Law School in March. The other panelists were Hani Azzam, an Ann Arbor attorney, and Imad Hamad, who had secret evidence used against him in a trial.

Friedman named Ralph W. Aigler Professor

Professor Richard D. Friedman has been named the Ralph W. Aigler Professor of Law.

The professorship was established earlier this year with a gift from Jack Sweet, '57, and his wife Margaret Sweet of Dallas, Texas. It is named for Jack Sweet's professor of property law at the Law School.

Friedman joined the Law School faculty in 1988. He earned his B.A. and J.D. from Harvard and his D.Phil. in modern history from Oxford University. He clerked for Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit and practiced as an associate of Paul, Weiss, Rifkind, Wharton & Garrison in New York City.



Richard D. Friedman

His research focuses on evidence and U.S. Supreme Court history. He is general editor of *The New Wigmore*, a multi-volume treatise on evidence, and has been designated to write the volume on the Hughes Court in the *Oliver Wendell Holmes Devise History of the United States Supreme Court*.

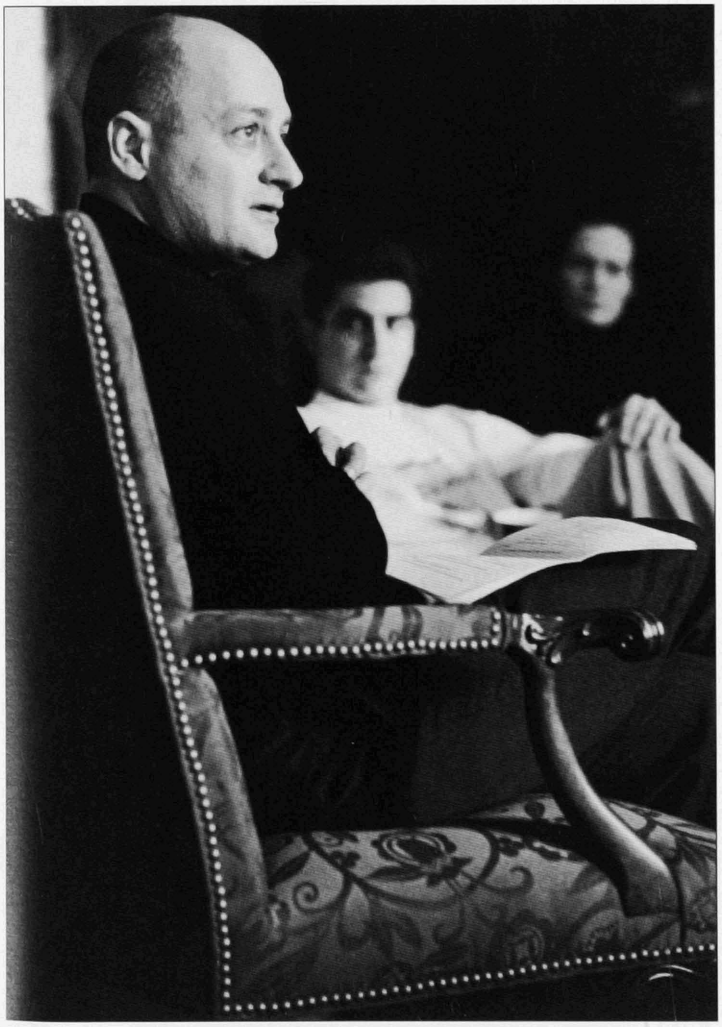
Friedman is a prolific author of journal articles. Among the journals his writing has appeared in are *Michigan Law Review*, *Hastings Law Journal*, *Criminal Law Review*, *Notre Dame Law Review*, *Yale Law Journal*, and *Georgetown Law Journal*. He is the author of *The Elements of Evidence*, 2nd edition (West Publishing Company, 1998), which includes a teacher's manual.

Ben-Shahar heads Law School's new Olin Center for Law and Economics

Assistant Professor Omri Ben-Shahar has been named director of the Law School's new Olin Center for Law and Economics. Ben-Shahar, whose academic background includes advanced degrees in both law and economics, will direct the new center with the assistance of an executive committee that also includes Professors Merritt Fox and Kyle Logue.

The new center, which reflects the growing intersection of law and economics issues, is being launched with a two-year grant from the John M. Olin Foundation, whose support for similar centers and programs in higher education has been extensive. The new center is the Law School's second; the other is the Center for International and Comparative Law, which was established in 1998 and is directed by Fox.

"The center will provide opportunities for scholars — faculty and students alike — to study and explore the way legal rules affect behavior," explains Ben-Shahar. "By understanding how legal rules create incentives for parties, and by observing actual data on the market reactions to different legal resumes, the law-and-economics movement can help policymakers choose regimes that are best fitted to implement any set of desired goals."



Omri Ben-Shahar

"Modern legal education is interdisciplinary, and without question the other academic discipline that has had the greatest influence on legal scholarship is the field of economics," commented Dean Jeffrey S. Lehman, '81. "Professor Ben Shahar brings enormous energy and creativity to the development of our new center."

Ben-Shahar joined the Law School faculty in September 1999. He previously taught law and economics at Tel-Aviv University, was a research fellow at the Israel Democracy Institute, served as a panel member of Israel's Antitrust Court, and clerked at the Supreme Court of Israel. He holds a B.A. in economics and LL.B. from Hebrew University, and an LL.M., S.J.D., and Ph.D. in economics from Harvard. He was a Fulbright Fellow and, at Harvard, was an Olin Fellow in Law and Economics and a Senior Fellow.

His research focuses on the intersection of law and economics and his writings have appeared in, among others, the *Yale Law Journal, University of Chicago Law Review; Journal of Law, Economics and Organization*; the *American Law and Economics Review;* and the *University of Pennsylvania Law Review*. He frequently presents papers at annual meetings of the American Law and Economics Association and presented two papers at the association's annual meeting last year.

"The study of law and economics has become part of mainstream legal scholarship in every major law school," according to the proposal to establish the center that the Law School faculty approved in March. "The appointments of scholars specializing in this methodology to teaching positions, the prominence of law and economics peer-reviewed journals, and the growth of the American Law and Economics Association have all cemented the position of law and economics as an established school of jurisprudence."

Three objectives guide the center:

1. To advance student training in "economic analysis of law," that is, the systematic study of the consequences of legal rules and the subsequent evaluation of the desirability of these rules;
2. To support faculty research in law and economics; and
3. To foster a better understanding of the economic approach by the bar and public through the dissemination of faculty and student research.

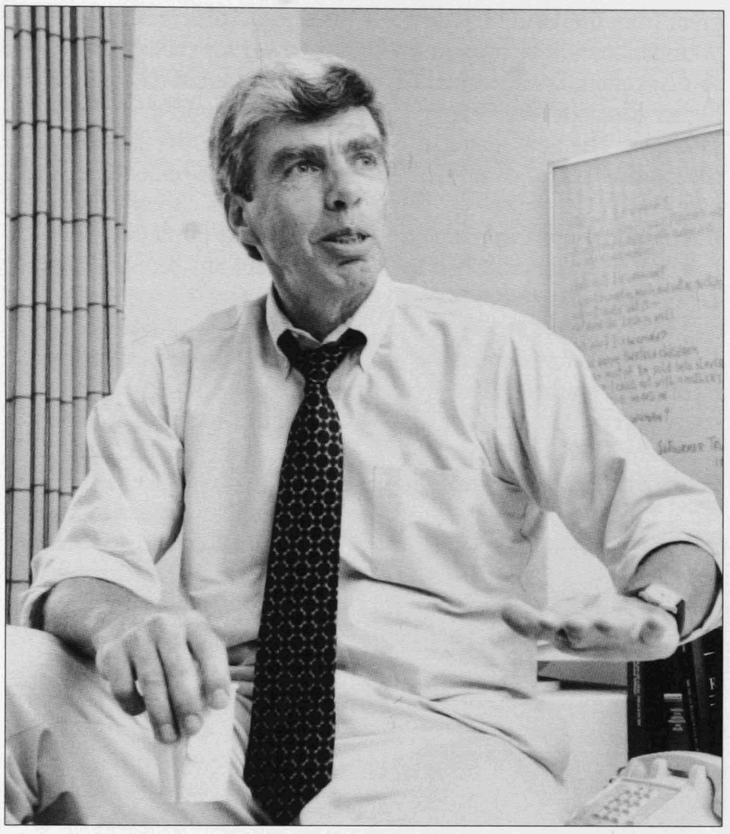
Continued on page 30

Continued from page 29

Program areas for the new center include:

- The Law and Economics Workshop Series, which is expected to include a dozen presentations by Law School faculty and guests each term during the academic year.
- Student Fellowships. Up to 10 fellowships per academic year, with each fellow, working under the supervision of a faculty adviser, writing a law and economics paper in addition to regular credit work. Also, several two-month summer stipends will be offered to students to stay in Ann Arbor and write similar papers.
- Faculty Research. The center will fund faculty research projects in the area of law and economics.
- Faculty Fellowships. The center may offer one faculty fellowship to a junior faculty member from another school. The center also will sponsor one-week Olin fellowships to several visitors to the Law and Economics Workshop who are able to remain at the Law School for up to a full week.
- Discussion Papers Series. The center will pre-publish working papers that apply a law and economics methodology in paper form and also will present them on its Web site, to be accessible via a link from the Law School homepage (www.law.umich.edu).

Rine wins Fulbright award to work in Cambodia



Nick Rine

Clinical Professor Nick Rine is working this summer and fall in Cambodia under a Fulbright Scholar award to strengthen Cambodian legal education and the procedures that examine and license practitioners.

Cambodia's legal community was virtually eliminated during the reign of the Khmer Rouge during the 1970s and only in recent years has begun to rebuild. Rine's eight-month stay in Cambodia represents the longest continuous visit of a Law School faculty member to the country to work with its legal leaders and educators.

The Law School, through its Cambodian Law and Development Program, has sent students to work in Cambodia for several years. That program is headed by Assistant Professor Peter J. Hammer, '89, who has worked on a variety of human rights and law reform projects in Cambodia since 1993. At deadline time, Hammer and Rine expected to have five volunteer student interns working with NGOs in Phnom Penh this summer and one student doing an externship there this fall.

"Cambodia is a difficult environment to work in, requiring both substantial creativity and endless patience," Hammer said. "There is no one more qualified or capable of working there than Nick. No matter how stressful or difficult the situation, Nick projects calm and confidence. This Fulbright combines a rare combination of real need with real talent."

Rine, who has worked with Law School students in Cambodia for the past two years, said his Fulbright-sponsored efforts are three-pronged:

- Co-teaching and consulting with faculty members of the law school (Faculte de Droit et des Sciences Economiques) in Phnom Penh, with curriculum development work concentrated in the fields of professional responsibility and professional skills development.
- Co-teaching and consulting with faculty members at the Cambodian Community Legal Education Center, which is associated with the National Institute of Management (NIM), also in Phnom Penh. Here, too, curriculum development work concentrates on professional responsibility and professional skills development.
- Consultation with Cambodia's Bar Association to accelerate development of regulations and procedures for testing and licensing law school graduates to practice.

Both the Faculte de Droit and NIM offer many substantive law courses, "but, like most American law schools until the 1970s, neither offers any education directed to issues of professional responsibility or professional practice-oriented skills," Rine explained.

"In the U.S., it was the Watergate scandal which prompted much of the movement toward incorporation of professional responsibility teaching into the law school curriculum. The almost endemic level of corruption in many Cambodian institutions, including the legal system, argues strongly for the need for similar development in Cambodian legal education."

In addition, development of a training and examination program is progressing slowly, and the president of the Cambodian Bar Association has sought help in the process.

"Finally," Rine noted, "the Cambodian legal scene is further complicated by the fact that the nation's history in the latter half of the 20th century has been a succession of very different governments with very different legal systems. The current system is a mix of French civil law, socialist law, and a growing body of adaptation of common law.

"This has left a system in which the parameters of 'legal representation' are far from clearly defined. Development, and formal teaching, of a clear picture of what it means to be a lawyer is an absolute necessity."

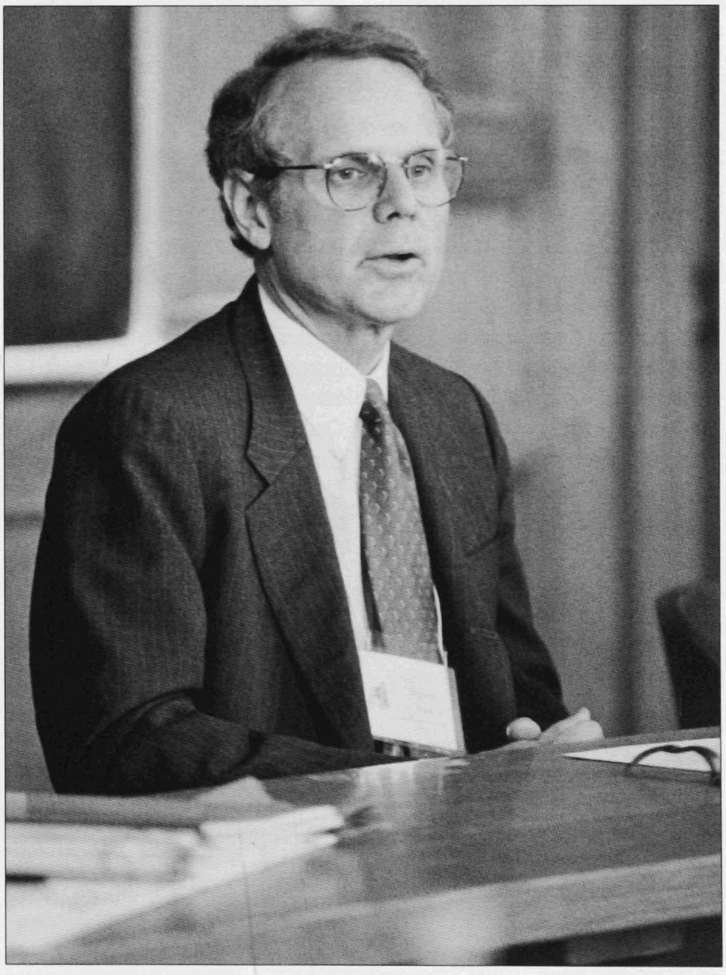
Fox named Moskowitz Research Professor

Merritt B. Fox, director of the Center for International and Comparative Law and a member of the Law School faculty since 1988, has been named the Louis and Myrtle Moskowitz Research Professor of Business and Law.

Established in 1990 to honor former Republic Bank of New York Chairman Louis Moskowitz and in memory of his wife, Myrtle Moskowitz, the Moskowitz Professorship is awarded on a rotating basis to a member of the Law School faculty and then to a member of the Business School faculty. The professorship provides salary and research funds for a six-month period.

"Professor Fox is widely recognized for his work and influence on the body of knowledge surrounding international corporate and securities law," said the nomination for the professorship submitted by the deans of the law and business schools and the provost of the University.

Fox received his J.D. from Yale Law School and his B.A. and Ph.D. in economics from Yale University. His academic interests center on corporate and securities law, law and economics, and international law. He is the author of many journal articles, as well as the books *Finance and Industrial Performance in a Dynamic Economy* (1987), and *The Signature of Power: Buildings, Communication and Policy* (with H. Lasswell, 1979).



Merritt B. Fox

Some of Fox's recent articles have included: "Required Disclosure and Corporate Governance," 62 *Law and Contemporary Problems* (forthcoming at deadline time); "Retaining Mandatory Securities Disclosure: Why Issuer Choice is Not Investor Empowerment," 85 *Virginia Law Review* 1335 (1999); and "Securities Disclosure in a Globalizing Market: Who Should Regulate Whom?" 95 *Michigan Law Review* 2498-2632 (1997), reprinted in 39 *Corporate Practice Commentator* 565 (1998).

Last fall, Fox was the recipient of an Elkes Fund grant from the Law School to pursue writing and research.

Fox practiced with Cleary, Gottlieb, Steen & Hamilton in New York, and taught at Yale University, Fordham Law School, and Indiana University Law School in Bloomington before joining the faculty at the University of Michigan Law School.

ACTIVITIES

Professor **Evan H. Caminker** is on leave from the Law School to serve as Deputy Assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice until January 20, 2001.

Professor **Steven P. Croley** is associate reporter for the American Bar Association's forthcoming Statement of Federal Administrative Law, Adjudication Volume, and concludes his five-year service this year as research consultant to the Michigan Law Revision Commission's administrative procedure project. In March he presented a paper at the Legal Theory Workshop at Vanderbilt Law School and in February presented a paper on "Regulatory Theory and Administrative Law" at Florida State University Law School.

Kirkland and Ellis Professor of Law **Phoebe C. Ellsworth** has been named vice chair of the board of trustees of the Russell Sage Foundation. She also has been named a consulting editor for the journal *Emotion*.

Professor Emeritus **Whitmore Gray** spoke on "Crossing Borders: International Dispute Resolution" last November at the Michigan Conference on Dispute Resolution, sponsored by the Dispute Resolution Center of Washtenaw County. In June last year he was a presenter at the Association of American Law Schools Workshop on Teaching Contracts in Washington, D.C.

Professor **Michael A. Heller** presented the paper "The Liberal Commons," co-authored with Professor Hanoch Dagan, a visiting professor at the Law School during the fall term, at the annual meeting in May of the American Law and Economics Association, and previously had presented versions at faculty workshops at the University of Texas, University of Virginia, Vanderbilt University, and Hebrew University. Since last fall he also has presented the paper "Three Faces of Private Property" at the University of Oregon Conference on New Approaches to Law and Economics and the paper "A Dynamic Approach to Property Analytics" at the Tel Aviv University Conference on Achievements and Prospects in Legal Scholarship.

Professor **Robert Howse** in June presented a paper on trade and the environment after the World Trade Organization's (WTO) appellate ruling in the Shrimp/Turtle case at an international law and relations theory conference at Hebrew University of Jerusalem; the same month he presented a paper on WTO legitimacy at a conference on the world trading system at Harvard University's Kennedy School of Government. In May, he was a panelist for a colloquium on restorative justice at the University of Alberta, Edmonton, gave a pre-conference presentation at the Global Partnerships Project on Japan/U.S. trade relations in Tokyo, and presented a paper he co-authored on the WTO Agreement on Technical Barriers to Trade and the Canada/U.S. asbestos dispute at a conference on the European Union/WTO relationship at European University Institute, Florence. In April, he discussed "globalization and human rights" as a panelist for the American Society of International Law's annual meeting and participated in a colloquium on structural bias in international and comparative law at Harvard Law School and the Harvard Center for European Studies. In February, he gave a presentation on the legitimacy of the WTO for delegates and officials at UN headquarters, and in January, with **Donald H. Regan**, the William W. Bishop Jr. Collegiate Professor of Law, he gave a presentation on the product/process distinction in international trade law for the WTO in Geneva.

Yale Kamisar, Clarence Darrow distinguished University Professor of Law, was a visiting professor at the University of California-San Diego Law School during the winter term and made a number of presentations as attention focused on *Miranda*. On April 19, the U.S. Supreme Court heard oral arguments in *Dickerson v. United States*, a case to decide the constitutionality of a 1968 federal statute (commonly called § 3501) that purports to "overrule" *Miranda*. On March 2, Kamisar discussed the future of *Miranda* in the DeWitt Higgs Lecture, co-sponsored by the University of California-San Diego (Earl Warren College) and California Western School of Law. On March 7, at the University of San Diego Law School, he debated the constitutionality of § 3501 with Paul Cassell, professor of law at the University of Utah College of Law, who was appointed by the Supreme Court to defend the constitutionality of the statute in the *Dickerson* case. (The Cassell-Kamisar debate was later aired on C-Span.) On March 15, Kamisar delivered the Frank Irvine Lecture at Cornell Law School: "Can (Did) Congress 'Overrule' *Miranda*?" (An expanded version of the lecture was published in the May, 2000 issue of the *Cornell Law Review*.) The following month, at Wayne State University Law School, Kamisar debated the wisdom and constitutionality of *Miranda* with Michigan Supreme Court Justice Stephen Markman, who, when head of the U.S. Justice Department's Office of Legal Policy in 1987, had issued a massive report calling for the abolition of *Miranda*. As this issue of *Law Quadrangle Notes* went to press in July, Kamisar was scheduled to discuss the meaning and impact of the *Dickerson* case during the annual meeting of the American Bar Association in New York City.

Richard O. Lempert, '68, the Francis A. Allen Collegiate Professor of Law, gave talks on "American Legal Education" and "The American Jury System" to university and bar association audiences in Japan in May and June. In April, he participated in a University of Michigan Institute of Medicine conference on "Medical Evidence in Legal Proceedings."

Professor **Ronald Mann** presented oral argument on behalf of the United States in the case of *United States v. Hubbell* before the U.S. Supreme Court in February. In February he also presented his research on payments policy to the Colloquium on Commercial Law at the University of Virginia School of Law and hosted a symposium on "Empirical Research in Commercial Transactions" at the Law School. He also has begun serving as reporter for a joint American Law Institute-National Conference of Commissioners On Uniform State Laws project to revise the bank-related provisions of the Uniform Commercial Code (Articles 3, 4, and 4A).

Professor **Sallyanne Payton** has been named president-elect of the Association of American Law Schools' Administrative Law Section.

Assistant Professor **Adam C. Pritchard** presented a variety of talks earlier this year: at the conference on law and finance at the University of Virginia School of Law in May; at the annual meeting of the American Law Economics Association in May; at the Law School's Law and Economics Workshop in April, and, in March, at the Center for Corporate Law, University of Cincinnati College of Law, and at the F. Hodge O'Neal Corporate and Securities Law Symposium at Washington University School of Law.

Professor **Mathias W. Reimann**, LL.M. '83, was a discussant for the section on "Foundations of Realism in Comparative Law" at Northwestern University Law School's conference in March on "Re-Thinking the Masters of Comparative Law." Last fall, he spoke on "An International Court of Jurisdiction: A Modest Proposal to Resolve the Dilemmas of Concurrent International Civil Litigation" as part of the external speaker series associated with American University College of Law's Jessup Moot Court proceedings.

Theodore J. St. Antoine, '54, James E. and Sarah A. Degan Professor Emeritus of Law, has been elected to the board of directors of the American Arbitration Association, the major private organization in the United States engaged in designating arbitrators to resolve commercial and labor disputes. He also presented a talk on "Sports Arbitration" at the Law School in March in a program sponsored by the Employment and Labor Law Association.

Associate Dean for Clinical Affairs **Suellyn Scarnecchia** '81, has been named to the Association of American Law Schools' (AALS) committee on sections and the annual meeting; she was a panelist for AALS' Clinical Section meeting in May in New Mexico. She also has been appointed to the University of Michigan search advisory committee for an athletic director.

Affiliated Overseas Faculty **Bruno Simma** has been elected a member of the board that assesses performance of the Max Planck Institute for Comparative and Public International Law in Heidelberg. In February, he served as a judge for the national competition of the Philip C. Jessup International Moot Court Competition, which included teams from 10 German universities, and in January he participated in a brainstorming session organized by the Centre of International Law at the University of Cambridge to deal with the future course of the work of the International Law Commission. In November he lectured at the Centre for International Securities Studies in Geneva, and in October spoke at the United Nations headquarters in New York on the international litigations in which he has been involved.

The Association of American Law Schools has appointed Lewis M. Simes Professor of Law **Lawrence W. Waggoner**, '63, chairman of the planning committee to present a two-day joint workshop next year on the intersection of family law and the law of donative transfers.

Assistant Professor **Mark D. West** is serving on the executive committee of the University's Center for Japanese Studies. In January he moderated the panel on Japan at the University of Michigan Business School's conference on Asian business.

Hart Wright Professor of Law **James Boyd White** served as commentator for a panel on his work at the meeting of the Rhetoric Society of America in May. He also ran the two-week interdisciplinary seminar "Talking about Religion in the Languages of Our Disciplines" at Notre Dame University for faculty from throughout the United States and lectured at Erasmus University in Rotterdam on his most recent book, *From Expectation to Experience: Essays on Law and Legal Education* (University of Michigan Press, 1999).

James J. White, '62, the Robert A. Sullivan Professor of Law, presented his article "Governments, Citizens, and Injurious Industries" at the conference on "Tobacco's Future" in June at the University of Michigan. In March he discussed revision of Article 2 in a talk at Cornell University Law School and in February delivered closing comments for the conference "Empirical Research in Commercial Transactions" at the Law School.

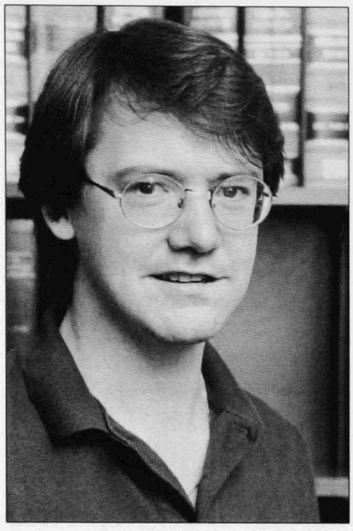
VISITING AND ADJUNCT FACULTY

Adjunct Professor of Law **Laurence D. Connor**, '65, co-authored the chapter "Settlement, Negotiation, and Alternative Dispute Resolution" in *Michigan Civil Procedure,* recently published by the Institute of Continuing Legal Education. Connor wrote the section on alternative dispute resolution; his co-authors are Rick A. Pacynski and Richard L. Hurford.

Hammer, Lyon win teaching award

Law students each year get the chance to vote for their favorite teachers — an honor that gives the winners in this student balloting the L. Hart Wright Outstanding Teaching Award. The award is named for the late L. Hart Wright, a Law School faculty member who commanded the respect and drew the affection of his students during the many years that he taught here.

This year's winners of the award are Professor Peter J. Hammer, '89, and Clinical Professor Andrea D. Lyon.



Peter J. Hammer, '89

Andrea D. Lyon

Hammer has been a member of the faculty since 1995. A graduate of Gonzaga University, he earned his J.D. and Ph.D. in economics at the University of Michigan. His research focuses on health care markets, and he also has been deeply involved in establishing a public defender program in Cambodia. He is director of the Law School's Program in Law and Development in Cambodia.

Lyon was director of the Capital Resource Center in Chicago, which trained, assisted, and selected attorneys who represented death row inmates on collateral review. Prior to that she was on the staff of the Office of the Cook County Public Defender, also in Chicago, where she handled cases in the felony trial division, post-conviction/*habeus corpus* unit, misdemeanor unit, the appeals division, and served as the chief of the homicide task force, a 22-lawyer unit representing persons accused of homicides. She received a J.D. from Antioch School of Law in 1976 and is a nationally-recognized expert in death penalty defense. She regularly teaches Continuing Legal Education programs around the United States.

The awards were presented at the annual Honors Convocation in May, the day before commencement. Lyon also won the prize last year.

Four faculty members present papers at Law and Economics Association

Delivering a paper at the annual meeting of the American Law and Economics Association is considered a high honor, and this year four members of the Law School faculty — an unusually large number from a single school — were presenters.

Professors Omri Ben-Shahar and Michael A. Heller and Assistant Professors Adam C. Pritchard and Mark D. West presented papers at the annual meeting in May.

Ben-Shahar, recently named director of the Law School's new Olin Center for Law and Economics (see story on page 29), presented the paper "Compensation of Victims of Crime: An Economic Analysis," co-authored with Alon Harel of Hebrew University, Jerusalem.

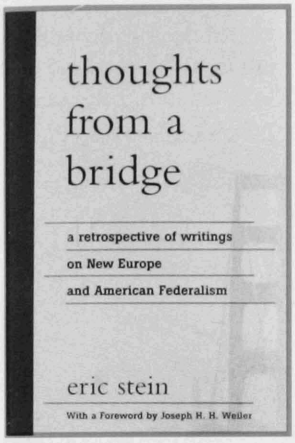
Heller, who also is a research director for the Davidson Institute at the University of Michigan Business School, presented "The Liberal Commons," which he co-authored with Hanoch Dagan, a law professor at Tel Aviv University and a visiting professor at the Law School during fall term 1999.

Pritchard delivered the paper "Stock Market Effects of Securities Fraud Class Actions Under the Private Securities Litigation Reform Act," co-authored with Stephen P. Ferris, professor of finance at the University of Missouri-Columbia.

West, who directs the Law School's Japanese law program, presented the paper "Corporate Law, Institutions, and Convergence: Statutory Development in Japan and the United States."

Ben-Shahar, Pritchard, and West also presented papers at the association's ninth annual meeting last year. Faculty colleagues Peter J. Hammer, '89, and Ronald J. Mann also presented papers at last year's conference.

Stein's *Thoughts From a Bridge* offers timeless insights



Eric Stein, '42, has been participating in, observing, and writing about international law for half a century, and the timelessness of his most recent collection of writings proves the lucidity of his insights. Stein's latest book, his second in three years, gathers many of his essays over the past 30 years, and also includes a chapter based on a prescriptive, forward-looking talk he gave last June in Pittsburgh at the International Conference of the European Community Studies Association.

All these come together between the covers of *Thoughts From a Bridge: A Retrospective of Writings on New Europe and American Federalism*, published this year by University of Michigan Press.

"One cannot approach any of these essays as archaeology or anthropology," Harvard Law Professor Joseph H.H. Weiler, a former member of the Law School faculty, notes in his foreword. "Each . . . has the power to assault our present day sensibilities with their abiding relevance to the most current debates. . . . Unfolding in this volume is the intellectual life of a master Europeanist, internationalist, and comparativist. Each essay is a picture in a carefully selected human and scholarly retrospective and should be read as such. Each is worthy of study not only in terms of the information and insights it contains, but also in its lessons about approach, perspective, and style."

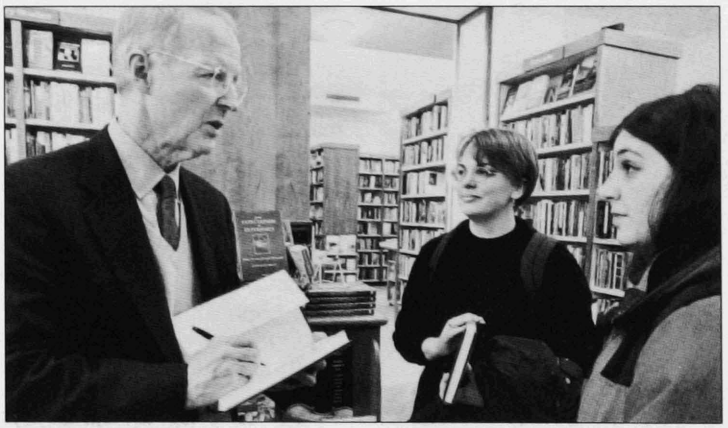
The three main parts of *Thoughts From a Bridge* focus on "Constitutionalizing, Harmonizing," "European Integration and the American Federal Experience," and "Europe's Burden of History." The Coda includes Stein's "Reminiscences of the Embryonic EEC" and the delightful "Million Footnotes," by Virginia Stein, who notes that the first article in the book, on Europe's then-emerging Coal and Steel Community, "was written in the course of our courtship in Washington. When other couples were out picnicking or spooning under the moon on Saturday nights — where were we? Sorting documents and checking the footnotes on this new institution."

Stein's previous book, *Czecho/Slovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (University of Michigan Press, 1997), also has been published in Czech and has received favorable reviews in both Europe and the United States.

"As Americans should know from their own history, constitution-writing is a very political process, and, as Stein ably illustrates, it affords an excellent vantage point from which to follow the making and breaking of states," Robert Legvold commented in *Foreign Affairs*. "His is a wistful reflection on the effects of nationalism, and not at all a technician's guide to constitutions."

Právník, the leading Czech legal periodical, reviewed *Czecho/Slovakia* last February, and the journal *International Affairs* said: "For students of the post-communist transition, this work is a treasure trove for several reasons. Stein is a Czech-American and an expert in international and comparative law, and consequently a well-balanced critic. Having acted as a legal advisor to the Czech and Slovak authorities, he has managed to unearth a wealth of detailed primary sources. Few writers have the American and 1920 Czechoslovak constitutions equally at their fingertips, and the author is utterly convincing when he illustrates how, with greater legal capacity and exposure to the outside world — both long denied by communism — much of the legal pedantry and pseudo-legal dogmatism of the negotiations might have been avoided."

Choice called *Czecho/Slovakia* "a solid and perceptive work, certainly useful to those doing research on modern developments in Central Europe" and *The American Journal of International Law* said the book is "a major achievement" and "the first comprehensive account of the Czecho-Slovak split." Said the *American Political Science Review*: "Stein provides a truly comprehensive case study of the profound difficulties faced by citizens and their leaders in multiethnic political communities in post-communist central and Eastern Europe in not only preserving a workable unity but also developing a viable Western-style liberal democracy."



Signing In — *Hart Wright Professor of Law James Boyd White autographs his new book,* From Expectation to Experience: Essays on Law and Legal Education, *for law students Elizabeth Stephan and Rachel Lessem during a book signing in February at an Ann Arbor bookstore. The University of Michigan Press published the book in late 1999. Writes White: "The central question addressed in each of these essays is what kind of imaginative and expressive life the law offers, first to its practitioners, and then to the rest of us, as we live in the world of meaning it defines."*

Hirshon, '73, will head American Bar Association

Robert E. Hirshon, '73, a shareholder in Drummond Woodsum & MacMahon of Portland, Maine, has been unanimously selected president-elect of the 400,000-plus-member American Bar Association (ABA). He will take office in August 2001.

He will succeed Martha Barnett of Tallahassee, Florida, who begins her one-year term in August this year as successor to ABA President William Paul of Oklahoma City. Hirshon said after his election in February that he plans to use his presidency to ensure that ABA members receive "the services that will make them better lawyers." The ABA is the largest voluntary professional association in the world.

Hirshon has received the Howard Dana *Pro Bono* Award from the Maine Bar Foundation and the Reece Smith Special Service Award from the National Association of *Pro Bono* Coordinators.

He has served since 1997 as chair of the ABA's Standing Committee on Membership, has been a member of the House of Delegates Nominating Committee since 1992, and chaired the Tort and Insurance Practice Section in 1996. He also has chaired the section's International Tort and Insurance Law Practice Committee, and served as vice-chair of its Public Regulation of Insurance Law Committee.

In addition, he has chaired the ABA's Steering Committee for the Center for *Pro Bono*, the Standing Committee on Lawyers' Public Service Responsibility, and the ABA Section Officers Conference Fall Meeting Planning Committee. He also has been a member of the ABA's Standing Committee on Bar Activities and Services.

In Maine, he served as president of the Maine State Bar Association (MSBA) in 1986 and as a member and chair of MSBA's Continuing Legal Education Committee from 1974-85. He has been a director and president of the Maine Bar Foundation and chaired the foundation's Bankers' Advisory Committee.

Much of Hirshon's work has centered on providing legal services to the poor. He said that he will bring to the ABA presidency experience with and sensitivity to smaller law firms and the issues of legal practice in smaller communities. Portland, where he practices, has a population of about 65,000 people and is Maine's largest city.

Hirshon is the fourth member of the University of Michigan Law School family to be elected president of the ABA. Thomas McIntrye Cooley, a charter faculty member and the school's first dean, was ABA president in 1893-94; Wallace D. Riley, '52, president of Riley & Roumell in Detroit, was president in 1983-84; and George E. Bushnell Jr., '51, of Miller, Canfield, Paddock & Stone in Detroit, was president in 1994-95.

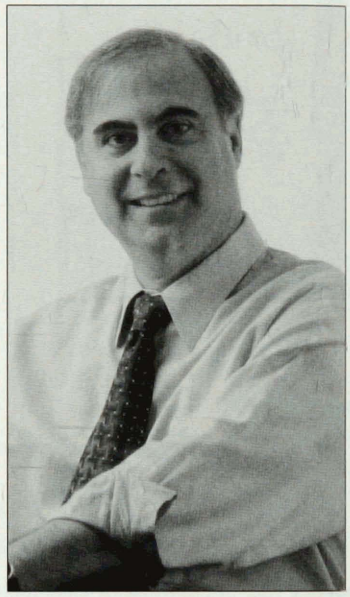


PHOTO COURTESY OF THE AMERICAN BAR ASSOCIATION

Robert E. Hirshon, '73

Mittleman, '79: Courts should provide 'reasoned explanations'

Thanks to Elaine J. Mittleman, '79, an idea born at the Bar Association of the District of Columbia (BADC) has become a resolution passed by the American Bar Association and forwarded to U.S. Supreme Court Justice William H. Rehnquist for possible action. Rehnquist is the presiding chair of the Judicial Conference of the United States.

The resolution asks that federal, state, and territorial appeals courts provide "reasoned explanations" for their decisions and that the appropriate legislative bodies provide resources for the courts to do so.

BADC member Elaine Mittleman "conceived the idea of the resolution and doggedly pursued it and urged us all into making it happen," according to Association President Jack Olender.

"This success demonstrates to me what one local bar association can do on a national scale when we work together and also seek the support of other District of Columbia Bar colleagues."

The resolution was adopted at the ABA mid-year meeting in February. Mittleman, a solo practitioner in Falls Church, Virginia, said she was pleased to work on the resolution. The complete resolution reads:

"Resolved, that the American Bar Association urges the courts of appeals, federal, state, and territorial, to provide in case dispositions (except in those appeals the court determines to be wholly without merit), at a minimum, reasoned explanations for their decision.

"Further resolved, that the Association urges the Congress and state and territorial legislatures to provide the courts of appeals with resources that are sufficient to enable them to meet their responsibility."

Mary Kay Kane, '71, named president-elect of AALS

Mary Kay Kane, '71, dean of the University of California Hastings College of the Law, has been named president-elect of the Association of American Law Schools (AALS). She was elected at the association's annual meeting in January and will assume her duties in January 2001.

Kane has been dean at Hastings since 1993. She joined the faculty in 1977, and has served as associate academic dean, acting academic dean, and academic dean. The author of many journal articles, she is co-author, with J. Friedenthal and A. Miller, of *Hornbook on Civil Procedure* (3rd ed. 1999). With D. Levine, she is co-author of several editions of *Civil Procedure in California.*

A frequent speaker and panelist for AALS programs, Kane chaired the association's Professional Development Committee and has been a member of the AALS Executive Committee, the ABA/AALS Joint Commission on Financing Legal Education, and the Special Committee on Faculty Recruitment Services. She is a member of the American Law Institute (ALI)-American Bar Association (ABA) Special Committee on Establishing a National Resource Center and has served on the ALI-ABA Rawle Award Subcommittee and the Committee on Continuing Professional Education.

PHOTO BY PEG SKORPINSKI

Mary Kay Kane, '71

Ronald M. Gould, '73, becomes U.S. Appeals Court judge

The Hon. Ronald M. Gould, '73, began his duties as a U.S. Appeals Court judge in January and judges of the U.S. Court of Appeals for the Ninth Circuit conducted his investiture in March.

Gould was editor in chief of the *Michigan Law Review* while enrolled at the Law School.

After graduation, he clerked for Justice Potter Stewart at the U.S. Supreme Court and for Circuit Judge Wade H. McCree Jr., who later became U.S. Solicitor General and taught at the Law School. Gould and McCree maintained their friendship after the clerkship, and McCree's widow, Dores, now retired from the Law School, attended Gould's investiture.

Gould was a partner at Perkins Coie L.L.P. in Seattle before joining the court. He maintains his chambers in Seattle.

Judge Ronald Gould, '73, front row center, is shown during his investiture as a judge of the U.S. Court of Appeals for the Ninth Circuit. Gould's wife, Suzanne, is at left front. At right front is Doris McCree, widow of the late Wade H. McCree Jr., for whom Gould clerked when McCree was a judge on the U.S. Court of Appeals for the Sixth Circuit. Behind them are, from left, Barbara and Chief Judge Proctor Hug Jr.; and Hazlehurst and Judge Robert R. Beezer.

One more final exam?

An invitation to relive the agonies of yesteryear by taking an examination question, even a brief one, may seem easy to refuse. Admitting that the subject is Civil Procedure may seal the issue. But this question triggers a reflex that should be common to all lawyers. Try it. After thinking about the question — if you frame your answer without writing it out, less than 20 minutes will do — go on to the explanation of the question's origin and my own answer.

AN INVITATION

This case comes to this court on appeal from a judgment by Judge I.N. Decisive. It forces us to consider fundamental questions regarding the nature of the burden of persuasion in a civil action and the factfinding duties of a district judge when a case is tried to the court without a jury.

20 MINUTES

— EDWARD H. COOPER
Thomas M. Cooley Professor of Law

Victim sued Driver, claiming that Driver struck Victim's automobile when Driver drove Driver's automobile through a red light at an intersection. Victim testified that the traffic signal was green for Victim, and produced an apparently disinterested witness, Green, who also testified that the signal was green for Victim. Driver testified that the light was green for Driver, and produced an apparently disinterested witness, Rouge, who also testified that the signal was green for Driver.

Judge Decisive, faced with two witnesses on each side of the color-of-the-signal issue, announced that he could not find any reason in the demeanor of the witnesses or the circumstances of the accident to find the witnesses for Victim more persuasive than the witnesses for Driver. The evidence was in "equipoise." Reasoning that Victim has the burden to prove by a preponderance of the evidence that the light was red for Driver, Judge Decisive found that Driver was not negligent and entered judgment for Driver.

On appeal, Victim argues that when there is a conflict in direct testimony a judge or jury cannot avoid the responsibility to decide by simply concluding that all witnesses are equally credible. Victim urges that it is not enough to conclude that it would be reasonable to believe either Victim's witnesses or Driver's witnesses; instead, the court is responsible to choose which witnesses to believe, however difficult that task may be.

Finish the court's opinion, *explaining whether the court of appeals is bound by the "clearly erroneous" standard of review and whether Judge Decisive properly understood his responsibilities as finder of fact.*

MY 18-MINUTE ANSWER

The inspiration for the question was a flat statement in *Collier v. Turpin*, 155 F.3d 1277, 1285 (11th Cir.1998). The trial judge, facing conflicting testimony, concluded that the evidence was in equipoise and that the burden of persuasion had not been carried. The court of appeals responded that this determination was not a finding of fact. Equipoise is possible only when dealing with the inferences to be drawn from circumstantial evidence. A direct conflict of testimony must be resolved one way or the other:

> The evidence offered by both sides constituted direct, not circumstantial, evidence, and a factfinding required a choice between the two contradictory versions of events. Because the district court did not make such a choice, its determination that the evidence is 'in equipoise' is entitled to no deference.

This passage served as inspiration because it triggered an automatic response: "That cannot be right, can it?" The question seemed worth about 20 minutes. Following a long personal custom, I did not particularly think about the issue until the examination had been administered. Then I devoted 18 minutes to writing my own answer, not as a model of what to expect from the student answers but as a framework for thinking further. Rather than protect the innocent — me — it is presented without change. None of the answers, mine or the students', persuaded me to agree with the court. But students have the same happy position as the court — it makes no difference whether I agree with them. Unlike the court, however, students are graded on the inventiveness of their answers in comparison to the whole set of answers. On the whole, they did well.

See next page.

continued from page 39

MY 18 MINUTE ANSWER

The beguiling argument made by Victim need not detain us long. He is wrong.

Under Civil Rule 52 (a), findings made by a district court sitting without a jury can be reviewed only for clear error. We could escape this limit only if there were no finding at all; and if there were no finding, our duty would be to remand with directions that the trial judge make a finding. We are in no position to make an original finding. The role of the court of appeals does not properly extend to original factfinding even when the trial court acted on an entirely written record, all of which is before the court of appeals. The amendment of Rule 52 (a) that entrenches application of the clear-error rule to findings made on a written record makes that clear if ever there were any doubt.

Here we do have a finding. And it is a finding based on oral testimony. The trial judge is explicit in seeking to take account of the witnesses' demeanor. Duty has been tended to. There is no means to enable us to find clear error when a trial judge has based a decision on consideration of the demeanor of live witnesses whose testimony is in direct conflict. (Of course it is possible that the traffic signal was not working, showing red in both directions; if that were the situation, Victim still would lose because Driver did not enter the interesecton on a green light.) We cannot say that it was clear error to conclude that demeanor did not furnish any satisfactory basis to find whether the truth lies in the mouths of Victim and Green or Driver and Rouge.

The only remaining basis for Victim's argument is that although we cannot find clear error, we can find as a matter of law that Judge Decisive misunderstood the nature of the factfinder's duties. The argument that the evidence somehow "must" preponderate in favor of one party or the other fails to appreciate the nature of the preponderance-of-the-evidence test.

First, even if we take the preponderance test literally, in its usual forms of statement, it allows for precise equipoise. The plaintiff in this case must persuade the court that the light was red; many courts would say that the plaintiff must show that it was more probably red than not red. That is all that it says. It does mean that if the plaintiff fails to do this, the court can award half damages because it finds equal possibilities that the light was red and that it was green. The famous Louisiana case in which the trial judge got reversed for awarding one cow and one calf each to the plaintiff and to the defendant, being unable to find a reason to tip the balance, is a perfect illustration. For many reasons, both abstract and practical, we avoid splitting the difference. We seek to be right, not to compromise the truth. Pursuit of this lofty ideal will make the parties and factfinders more careful in approaching the tasks of presentation and decision.

Second, the preponderance test should not be taken literally. What it requires is a rough, intuitive sense of whether the party assigned the burden of persuasion has reduced unavoidable uncertainty to a point that justifies action in favor of that party. It requires acceptance of uncertainty, not rejection of uncertainty.

So to the question whether a judge must find some excuse to believe one set of witnesses rather than another. There simply is no reason why one set must be more persuasive. Our ability to determine the truth is limited, and it is a wise — not a lazy — judge who understands that the shortcomings of our assessments of demeanor may very well lead to the conclusion that no sufficient reason can be found to believe the plaintiff's witnesses over the defendant's witnesses. There is no need to force the judge to say the plaintiff's witnesses are less truthful, or not as persuasive. There is no indication that the judge has surrendered without conscientiously attempting to find a reason to credit one or more witnesses more than others. That conscientious attempt is all that is required.

That's it. How did you do?

1948

William R. Forry was honored by the Berks County (Pennsylvania) Bar Association for 50 years of service as a lawyer. He is a retired senior partner with Forry, Ullman, Ullman & Forry, Green Hills, Pennsylvania.

50TH REUNION

The Class of 1950 reunion will be October 13-15

1952

Judge **Richard D. Simons** of Rome, New York, was one of two recipients of the New York State Bar Association's Gold Medal Award, the highest honor the state bar can bestow on a member of the legal profession. He has had a long and distinguished legal career as both a New York attorney and a judge, having previously served as New York State Court of Appeals associate judge and acting chief judge. Past recipients of the award include judges Ruth Bader Ginsburg, William J. Brennan Jr., Thurgood Marshall, Potter Stewart, Lewis F. Powell Jr., and Jack B. Weinstein, as well as John Foster Dulles, Cyrus R. Vance, and Sol M. Linowitz.

45TH REUNION

The Class of 1955 reunion will be October 13-15

1955

Irwin Roth, chairman and CEO of On-Line Entertainment Network Inc., says that his firm's arrangement with EMI Recorded Music to provide on-demand, pay-to-use programming like live concert netcasts over the Internet "will allow OEN to bring EMI's artists interactively into homes worldwide." Roth sees live Internet programming as "a crucial new arena of entertainment distribution."

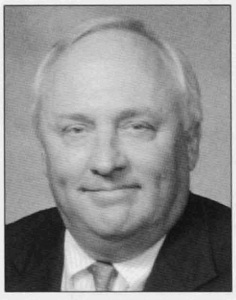
1958

Judge **Thomas W. Hoya**, an administrative law judge with the United States Environmental Protection Agency, taught environmental law in the Law Faculty of International University in Moscow, and he taught the same course in Russian to students at the University's School of Ecology. He also has been mediating a settlement of administrative enforcement cases pending between the EPA and various companies around the United States.

40TH REUNION

The Class of 1960 reunion will be October 13-15

1961



William C. Barnard has been elected to the executive committee at Sommer & Barnard, P.C., of Indianapolis. The executive committee serves as the governing body for the firm.

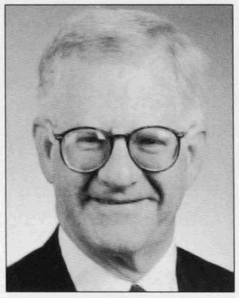
William Y. Webb has become vice president, general counsel, and secretary of the Philadelphia Phillies. He began his new duties in February.

1962

The State Bar of Michigan's Board of Commissioners unanimously has adopted a resolution honoring former board member **Joel M. Boyden Sr.**, who died last year. A partner in Boyden, Waddell, Timmons & Dilley of Grand Rapids, Boyden is remembered by his colleagues as "a fiercely devoted attorney who put his heart into each case." Boyden served as the State Bar of Michigan president in 1983-84.

The Maine State Bar Association has honored **Elton Burky** for providing leadership in *pro bono* participation through his work with the Volunteer Lawyers Project (VLP). The program provides legal services for low-income clients throughout Maine by arranging for private attorneys to take VLP cases without pay.

1963



Lee D. Powar of Moreland Hills, Ohio, was named one of the Outstanding Bankruptcy Attorneys in 1999 by *Turnarounds and Workouts*, the leading national publication for professionals in the creditors' rights and bankruptcy field. A partner with Hahn Loeser & Parks L.L.P., he is co-chair of the Creditors' Rights, Reorganization and Bankruptcy practice area.

1964

Richard A. Rossman has rejoined the law firm Pepper Hamilton L.L.P. as a senior litigation partner, after having served since 1998 as chief of staff to the assistant attorney general in charge of the Criminal Division of the U.S. Department of Justice. He has resumed his practice involving complex civil litigation and white-collar criminal defense, reinforcing the firm's capabilities particularly in Detroit and Washington, D.C. He is a member of the firm's Corporate Investigations and White Collar Criminal Defense Practice Group.

35TH REUNION

The Class of 1965 reunion will be October 13-15

1965

James M. Kieffer has been named president of the Western New York Trial Lawyers Association, an organization of more than 500 trial lawyers dedicated to facilitating the prompt and just disposition of legal proceedings and to improving the administration of justice in the courts. Kieffer is a partner with the Buffalo law firm Feldman, Kieffer & Herman L.L.P.

Class notes

1966

Robert M. Meisner of Meisner & Associates P.C., Bingham Farms, Michigan, was appointed as an adjunct professor of community association law for the 1999-2000 academic year at Michigan State University-Detroit College of Law.

1967

J. Kay Felt was appointed by Governor John Engler as the only attorney on the 12-member Michigan Commission on End of Life Care. The team is to consider recommendations and produce a guide and final report by February 2001. Felt also was appointed to the Advisory Committee on Pain and Symptom Management, which works with the state boards that license health care professionals. She is a member of Dykema Gossett P.L.L.C., and concentrates her practice in health care and nonprofit corporation law.

1969

The Hon. **Donald S. Owens** was appointed to the Michigan Court of Appeals by Governor John Engler, after having served as Ingham County Probate Judge for 25 years. He also was named Michigan Judge of the Year by the Michigan Association of Court Appointed Special Advocates.

30th REUNION

The Class of 1970 reunion will be October 13-15

1973

Bankruptcy Judge **Samuel L. Bufford**, '73, has been appointed to his second 14-year term on the U.S. Bankruptcy Court for the Central District of California. The re-appointment was made by the judges of the U.S. Court of Appeals for the Ninth Circuit, who appoint the 68 bankruptcy judges throughout the nine-state Ninth Circuit. He first was named to the court in 1985, after teaching law at Ohio State University College of Law and practicing in San Francisco and Los Angeles. He has been editor of *American Bankruptcy Law Journal* and is an adjunct professor of law at the University of Southern California Law Center.

Max R. Hoffman Jr. presented the program "Responses Before Government Investigation" as part of the program "Preparing your Company for the 'Knock at the Door'," presented by Butzel Long Attorneys and Counselors Corporate Compliance/Criminal Defense Group at Birmingham, Michigan, in May. Hoffman is a Butzel Long shareholder resident in the firm's Lansing office, where he concentrates his practice in health care law, health care fraud, professional licensing, state agency practice, administrative and regulatory law, and civil law.

George E. Kuehn, of Ann Arbor, has joined the law firm Butzel Long, where he will concentrate his practice in various aspects of business and corporate law including complex corporate transactions such as mergers and acquisitions, joint ventures, and corporate financing issues. He previously worked as senior vice president, general counsel, and corporate secretary to Stroh Brewery Company.

25th REUNION

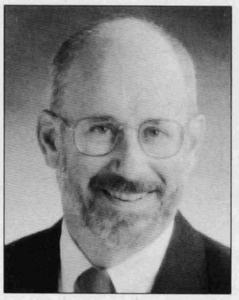
The Class of 1975 reunion will be September 8-10

1975

Robert J. Bernstein, Esq., a partner in the New York law firm of Cowan Liebowitz & Latman P.C., began his two-year term as president of the Copyright Society of the U.S.A. in June. He welcomes inquiries about the Copyright Society at RJB@cll.com.

Joseph C. Fenech and **James G. Pachulski**, **'82**, have formed a cyber law practice, TechNet Law Group P.C., with offices in Washington, D.C., and Oakbrook Terrace, Illinois.

Mark F. Pomerantz has joined the New York office of the law firm Paul, Weiss, Rifkind, Wharton & Garrison, as a partner in the Litigation Department. He was previously head of White Collar and Regulatory Practice at Clifford Chance Rogers & Wells.



James N. Sicks has joined the Business Department of the law firm Montgomery, McCracken, Walker & Rhoads L.L.P. as of counsel. He previously was general counsel of Berwind Group. Sicks has 24 years of business and transactional law experience, with emphasis in mergers and acquisitions, licensing and distribution, international transactions, employment law, and natural resource law.

1979

Samuel H. Press writes that he has good reasons for missing the 1999 reunion. "To begin, I had a rejuvenating sabbatical at the Kennedy School of Government in Cambridge, Massachusetts. Graduating with an MPA in June of 1997, I resisted the strong temptation to stay on in Boston, and returned home to establish and be managing director of Vermont Energy Future Inc., a nonprofit organization that promotes consumer-owned companies in competitive energy markets. This work was exactly what I had hoped to get into. Despite too much protest about being a 'recovering' lawyer, I couldn't resist practicing as of counsel. A highlight in 1998 was representing Ben & Jerry. The controlling event hit on November 22, 1998, when I awoke having suffered a cranial vascular accident, commonly known as a stroke. . . . I'm on indefinite medical leave from the firm while working hard to recover. Progress is slow but seems steady. I was in great

shape, and free of risk factors for an event like this. After much diagnostic puzzlement, the medical opinion is that a congenital condition was the root cause, not hard work or my late career as a route. I recovered enough to marry long-time fiance Sue Griessel (she really is from Kalamazoo) in October 1999, in a small civil ceremony at home. Sue is a professional potter who shows her work at the Frog Hollow Vermont State Craft Centers. My faculties are intact, and with work, time, and good fortune, I have a fair chance to recover much of what I've lost. The physical recovery process is the hardest thing I've ever done. All in all, Sue and I are living happily in Burlington, Vermont. E-mail welcome to shpress@together.net."

20TH REUNION

The Class of 1980 reunion will be September 8-10

1980

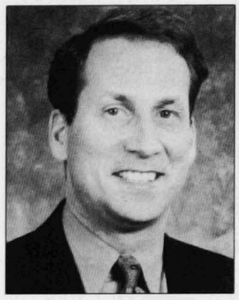
Jeffrey M. McHugh of Plymouth, Michigan, was elected to a three-year term on the Board of Directors of the National Association of Bond Lawyers. A principal in the Detroit office of the law firm Miller, Canfield, Paddock and Stone P.L.C., McHugh practices public law.

Darrell W. Pierce and **John F. Birmingham Jr.**, **'92**, have been elected to membership in the law firm Dykema Gossett. Pierce, formerly of counsel, practices in the Chicago office, in the Corporate Finance Practice Group, where he concentrates on commercial lending transactions; workouts and restructurings; mergers and acquisitions; corporate finance transactions, including securitizations; organization of business entities; joint ventures; and corporate counseling for closely-held businesses. Birmingham, previously an associate, practices in the Detroit office in the Employment Practice Group, where he concentrates on employment-related litigation, labor law matters, and general litigation.

Peter Shinevar has become a partner in the New York office of the law firm O'Melveny & Myers L.L.P., where he focuses on employee benefits matters in the context of corporate and litigation engagements for the firm's tax practice. **Laura Bremer** and **David Eberhart**, both **'92**, were promoted to special counsel in the Litigation Department of the San Francisco office. **Debbie Gezon, '88**, was promoted to special counsel in the Corporations Department in the Los Angeles office, and **Scott Schrader, '92**, has been made special counsel in the Litigation Department in the New York office.

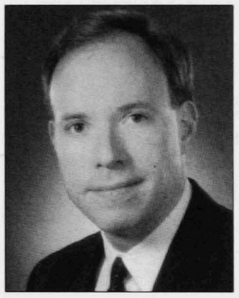
Greg Sumner, associate professor of American history at the University of Detroit Mercy, has won a Fulbright Fellowship to teach at the University of Rome during the first six months of 2001.

1981



Robert Quicksilver was named president, Network Distribution, for FOX Broadcasting Company, where he was previously executive vice president. He has assumed additional operating responsibilities within FOX Broadcasting Company, while also continuing to work with senior News Corporation and Fox Television executives on overall media strategies.

1982



C. Daniel Motsinger was elected as a member of the Board of Directors of the American Board of Certification. The national non-profit organization is dedicated to serving the public by improving the quality of the bankruptcy bar, and administers the only national bankruptcy and creditors' rights specialist programs. Motsinger is a partner at Krieg DeVault Alexander & Capehart L.L.P. of Indianapolis, where he chairs the Creditors' Rights and Bankruptcy Practice Group.

Charles M. Shumaker III and **Matthew S. Meza, '87**, have joined the recently opened Los Angeles office of the law firm Scarola & Reavis. Shumaker's practice emphasizes corporate law and complex commercial and real estate transactions; Meza's practice focuses on complex business transactions in the areas of corporate law, real estate, entertainment, and finance.

1983

Irasema T. Garza has been sworn in as director of the Women's Bureau of the U.S. Department of Labor. The fourteenth director of the Women's Bureau, Garza is one of the highest-ranking Hispanic officials in the Clinton administration.

Mark L. Kowalsky of Hertz, Schram & Saretsky P.C. in Bloomfield Hills is author of "The Need for Local Counsel in Federal Court for the Eastern District of Michigan," which appeared in the March 2000 issue of *Latches*.

1984

Marjorie Sybul Adams has joined the law firm Piper Marbury Rudnick & Wolfe L.L.P., New York, New York, as a partner in the Business and Technology Group. She continues to concentrate in corporate and securities law, with an emphasis on mergers and acquisitions, venture capital, and corporate finance.

Class notes

15th REUNION

The Class of 1985 reunion will be September 8-10

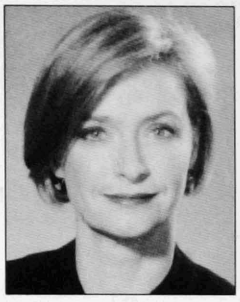
1985

The Hon. **Marjory A. German** began serving as a justice of the Suffolk County Juvenile Court in Boston, Massachusetts, in February 1999. She was previously attorney in charge of the Roxbury Defenders Unit of the Committee for Public Counsel Services in Massachusetts.

Ronald S. Okada has been appointed Litigation Group Coordinator for the Cleveland, Ohio, office of the law firm Baker & Hostetler. He is responsible for coordinating the efforts of 50 trial lawyers in the Cleveland office. Okada concentrates his practice in employment and commercial litigation.

Charles Allen Yuen of Short Hills, New Jersey, has been named counsel to the New Jersey-based law firm Pitney, Hardin, Kipp & Szuch L.L.P., where he is a member of the Litigation Department. His practice focuses on complex litigation matters involving insurance coverage, franchise disputes, and product liability, and he assists clients with general questions concerning the purchase of insurance.

1986



Amy S. Farrior has become a shareholder in the Tampa, Florida, law firm Schropp, Buell & Elligett P.A. The firm concentrates on plaintiff's personal injury, insurance coverage and bad faith, appeals, owner and tenant condemnation, and commercial litigation.

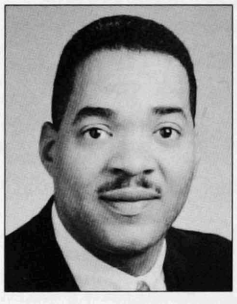
Andrew Gaudin has been named deputy general counsel for DoubleClick Inc., San Francisco, California.

Melody Lynn McCoy, a staff attorney with the Native American Rights Fund (NARF) and former president of the Colorado Indian Bar Association, was the subject of an interview in the winter 2000 issue of *Natural Resources & Environment*, a publication of the ABA Section of Environment, Energy, and Resources. Asked "what do you like most about your job?" she answered: "I like the people I work with. NARF is known for having highly professional, reasonable attorneys. I like my clients, the Indian tribes. My work in the area of Indian education especially gets me close to the tribal communities. I like the legal issues. They are a unique blend of historical, governmental, and social issues. And then being an enrolled tribal member myself [she is enrolled in the Cherokee Nation in Oklahoma] kind of personalizes all that I like about my job."

Anthony Pacheco has joined Manatt Phelps & Phillips L.L.P. in San Francisco as a partner practicing in the areas of litigation and special investigations/white collar defense. He previously served as an assistant U.S. attorney for the Central District of California.

James E. Thompson of East Grand Rapids, Michigan, was promoted to director and associate general counsel of Amway Corp., where he previously served as senior manager, International Legal Department. He now heads the department, provides and coordinates legal services for Amway's international affiliates and operations outside of Japan, and is responsible for legal support of corporate strategic initiatives and transactions.

1987



Reginald M. Turner Jr. has joined Clark Hill's Employment Practice Group in the firm's Detroit office. He is Steering Committee co-chair with Mayor Dennis Archer of the Medical-Education-Legal-Law Enforcement Team Program, an anti-drug and violence prevention program in Detroit schools that reaches more than 5,000 children directly and thousands more through television each year.

1988

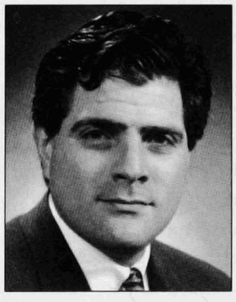
Scott M. Kosnoff, a partner and co-chair of the insurance team at the Indiana law firm Baker & Daniels, has become a member of the Federation of Regulatory Counsel (FORC), a nationwide association of insurance regulatory lawyers formed to uphold the standard of excellence in the practice of regulatory law and to promote the abilities of its members. Kosnoff is one of only two FORC members who practice in Indiana.

1989

Daniel M. Miller, a member of the Trusts and Estates Group of Reed Smith Shaw & McClay L.L.P. in Pittsburgh, has become a partner in the firm. His practices emphasizes estate planning in connection with closely held businesses, life insurance, qualified retirement plans, and charitable trusts.

10th REUNION

The Class of 1990 reunion will be September 8-10



1990

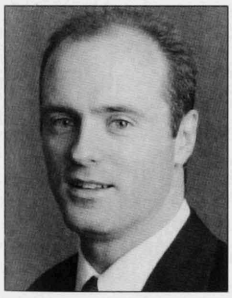
Andrew S. Doctoroff was elected partner in the Litigation Department of the Detroit-based law firm Honigman Miller Schwartz & Cohn. He specializes in labor and employment law, media law, and complex commercial litigation.

1991

Jennifer Lee Taylor has been elected a partner in Morrison & Foerster L.L.P. in San Francisco. She is a member of the litigation department and the Trademark Group. Her practice emphasizes patent and trademark litigation and trademark and copyright registration and counseling.

Robert F. Ware Jr. was elected to partnership with the law firm Thompson Hine & Flory L.L.P., where he is a member of the firm's competition practice area. Resident in the Cleveland, Ohio, office, he focuses on counseling and litigation regarding antitrust, intellectual property, and unfair competition issues.

1992

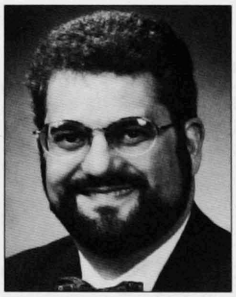


Randy A. Bridgeman, formerly an associate of the law firm Bell, Boyd & Lloyd, has been named a partner in the firm's Corporate Department. He concentrates his practice in mergers and acquisitions, securities law, and general corporate matters.

John C. Everhardus and **Kathleen H. Klaus** were named members of the Chicago-based law firm D'Ancona & Pflaum L.L.C. Everhardus concentrates his practice in litigation and environmental law, representing corporate clients in a variety of commercial disputes from breaches of duty to products liability and trade secrets misappropriation. Klaus, with seven years of experience as a litigator, has helped numerous clients cost-effectively resolve disputes out of court and obtained winning results in actions before state and federal courts, administrative agencies, and alternative dispute resolution forums.

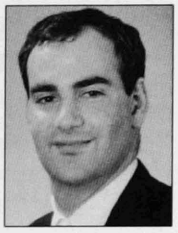
Jeffrey D. Featherstun was elected partner in the Indianapolis-based firm Plews Shadley Racher & Braun. He concentrates on environmental and other complex litigation, regularly serving as counsel on behalf of policyholders seeking insurance coverage for environmental liabilities. He also has a substantial practice in the area of appeals, underground storage tank law, and toxic torts.

Charles K. Maier has become principal with the Minneapolis-based law firm Gray Plant Mooty, where he practices primarily in the areas of complex commercial litigation, creditors' rights, and product liability.

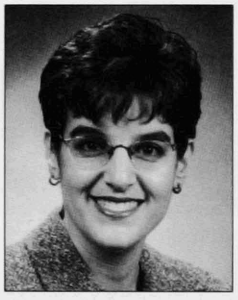


Michael David Warren Jr. of Beverly Hills, Michigan, has been elected a partner of the Detroit-based law firm Honigman Miller Schwartz & Cohn, where he concentrates in mergers and acquisitions, securities, and other corporate transactions, including private placements and other equity investments.

1993



Daniel M. Halprin and **Daniel M. Israel** were admitted as members of the Bloomfield Hills, Michigan, law firm Dawda, Mann, Mulcahy & Sadler P.L.C., where they were previously associates. Halprin concentrates his practice on a broad spectrum of real estate and corporate matters; Israel concentrates in the areas of corporate law, secured and unsecured financing, and real estate law.



Michelle Epstein Taigman of West Bloomfield, Michigan, was elected partner in the Detroit-based law firm Honigman Miller Schwartz & Cohn, where she specializes in the representation of commercial lenders in all aspects of commercial finance and corporate transactions.

1995

Lawrence T. Garcia has joined the Lansing, Michigan, law firm Fraser Trebilcock Davis & Foster, P.C. He will practice in the firm's Litigation Department, primarily in the area of medical malpractice. He was previously a litigation associate at Saubier, Siegan & Sanfield, Detroit.

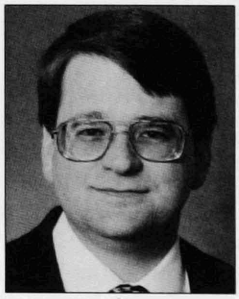
5TH REUNION

The Class of 1995 reunion will be September 8-10

Mitchell Gordon has been named vice president and general counsel of New York City-based Official Payments Corporation, a leading provider of electronic payment options to government entities. His responsibilities include managing the firm's internal legal staff and various outside legal counsels. Gordon was previously a corporate attorney at Skadden, Arps, Slate, Meagher & Flom L.L.P.

William S. Hammond of Southfield, Michigan, was elected partner in the Health Care Department of the law firm Honigman Miller Schwartz & Cohn, where he specializes in working with physicians, hospitals, and health plan clients on regulatory and reimbursement matters and contractual relationships.

1996



Randall L. Shoemaker has been named a shareholder of the law firm Howard & Howard Attorneys P.C. Based in the Bloomfield Hills, Michigan, office, he concentrates his practice in intellectual property law. He resides in Bloomfield Hills with his wife, Anne, and their daughter, Rachel.

Class notes

1997

Joel A. Schoenmeyer has joined Barnes & Thornburg in Chicago as an associate in the Business, Tax, and Real Estate Department. His practice concentrates in the area of trusts and estates and the handling of probate and trust administration matters. He is a member of the Chicago Bar Association's Trust Law Committee and is co-chair of the Greater Chicago Food Depository's Planning Giving Committee. He lives in LaGrange, Illinois.

Michael J. Thomas has written "The American Lawyer's Next Hurdle: The State Based Bar Examination System," which appears in the June 2000 issue of *The Journal of the Legal Profession.* The article discusses the need for a national bar examination system under which states could impose a limited, supplemental exam. Admitted in Michigan, New Mexico, and Arizona, he is currently a law clerk to Judge J. William Brammer Jr. of the Arizona Court of Appeals in Tucson.

1998

Nancy Klain and **Jeffrey Klain, '00**, announce the October 17 birth of their daughter, Zipporah Lila Klain. Nancy Klain is with the law firm Miller, Canfield, Paddock and Stone, Bloomfield Hills, Michigan.

Kristen M. Tsangaris, Dante A. Stella, '99, and **Corina Pena Andorfer, '99**, have joined the law firm Dykema Gossett P.L.L.C. as associates. Practicing in the Ann Arbor office and a resident of Novi, Michigan, Tsangaris joined the firm's Taxation and Estates Practice Group. Stella, a Detroit resident, practices in the Detroit office in the Litigation Practice Group, where he concentrates on products liability. Andorfer is a resident of Eaton Rapids, Michigan, practices in the Lansing office in the Corporate Finance Practice Group.

1999

F. Jackson Lewis has joined the litigation department of Tonkon Torp L.L.P. of Portland, Oregon, as an associate. His practice emphasizes commercial litigation.

Todd W. Roeser of Birmingham, Michigan, has joined the Detroit office of the law firm Miller, Canfield, Paddock and Stone P.L.C. as an associate in the International Business Department. He is involved in representation of foreign companies in U.S. business activities, mergers and acquisitions, joint ventures, licensing, and international cross-border transactions. He was previously a consultant with Almega Environmental and Technical Services Inc., Carson, California, and a project manager for ENSA Environmental Inc., Northbrook, Illinois.

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Fax: 734.615.4539
E-mail: jteichow@umich.edu

In memoriam

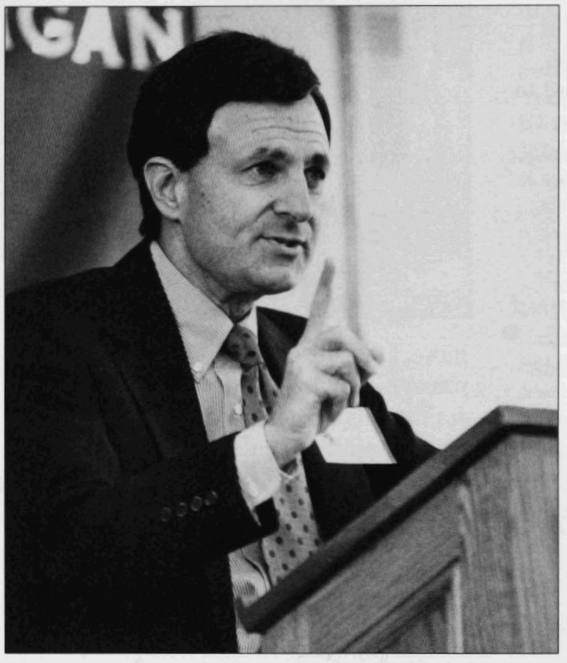
'31	Richard P. Whitker	February 18, 2000
'33	Robert E. A. Boyle	October 1, 1999
	Frederic E. VanDorn	November 14, 1999
'35	Oscar W. Baker	March 19, 2000
	Jack J. Lande	December 1, 1999
	Edward D. Wells	February 18, 2000
'36	Henry J. Merry	January 24, 2000
'37	Malcolm L. Denise	December 30, 1999
	Albert D. Early	March 11, 2000
'39	Menefee D. Blackwell	March 13, 2000
	Bruce M. Smith	March 20, 1999
'40	D. Charles Marston	December 15, 1999
'41	Alan R. Johnston	December 24, 1999
	Frederick C. Ziem	March 24, 2000
	Fred L. Zschoerner	January 7, 2000
'42	Dr. Harold J. Holshuh	March 4, 2000
'46	Hon. Edward D. Deake	February 17, 2000
'47	Robert R. Day	February 19, 2000
	William H. Reller	November 23, 1999
'48	Bayard E. Heath	March 2, 2000
	John Hambly Norton	January 27, 2000
	John B. Olsen	September 27, 1999
	John W. Yager	January 31, 2000
'49	Earl F. Riley	February 18, 2000
	Robert T. Swengel	November 29, 1999
'50	A. Dale Stoppels	January 17, 2000
	Stanley G. Thayer	February 27, 2000
'51	David M. Michaelson	January 3, 2000
	Robert F. Savard Jr.	April 3, 1999
'53	William M. Griffith	January 9, 2000
'55	Ira A. Brown Jr.	January 26, 2000
	Theodore W. Swift	February 25, 2000
'56	Mrs. Jean McKee	October 24, 1999
'57	Charles E. Keller	February 27, 2000
	Robert B. McAlister	December 10, 1999
	Donald W. Miller	January 5, 2000
'58	David Hume Northrop	February 13, 1999
'59	Paul McDonough	January 7, 2000
'60	Robert W. Sawdey	February 27, 2000
'63	Frank Joseph Kerwin Jr.	March 16, 2000
'66	William R. Steckler	March 19, 2000
'67	Hon. George W. Alexander III	February 23, 2000
	Thomas E. Allen	February 29, 2000
	John R. LaParl	July 3, 1999
	James A. Rodgers	November 30, 1999
'75	Robert F. Pearl	February 25, 2000
'78	Suzanne Weller	March 12, 2000
'98	David J. Camp	March 26, 2000

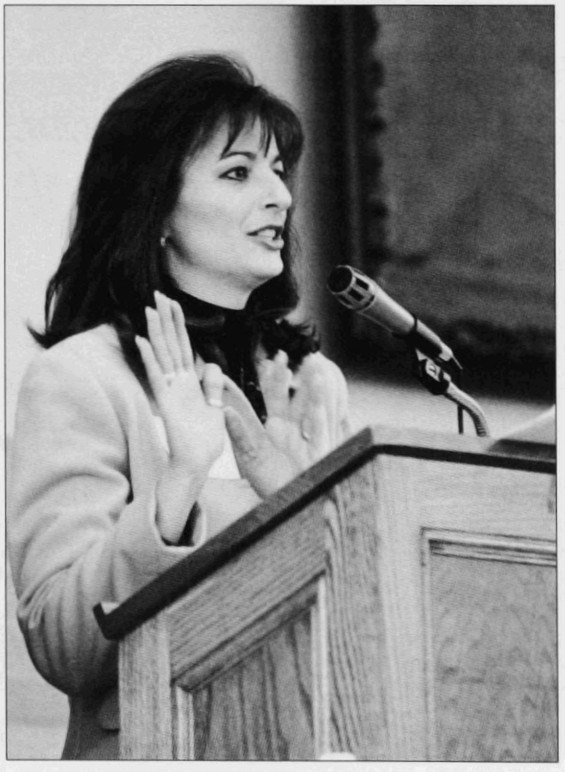
CONFERENCES & symposia

Taking a deeper look:
Conferences reflect richness, diversity of life in the law

Conferences and symposia held at the Law School each year reflect and reinforce the rich diversity of a life in the law. This past winter term, for example, hewed true to the tradition, with programs on juvenile justice, gender and athletics, empirical research into commercial transactions, racial and ethnic identity in the 21st century, and issues associated with Native Americans.

This active latter half of the academic year continued the cutting edge quality of the double bill of symposia that had opened the fall term: a conference that brought European and U.S. perspectives face-to-face to examine the role and appropriateness of unilateral and multilateral action in the international arena, and a simultaneous program to identify lessons to be learned from economies that are shaking off their past to embrace a free marketplace. Reports on these latter two programs appeared in the feature "'The Borders are Coming Down'" (43.1 *Law Quadrangle Notes* 75-82) last spring.





ABOVE: *"Is it constitutional?" Daniel Bagdade asks of the Michigan law that gives prosecutors the right to determine if a juvenile defendant is to be tried as an adult. "I don't know," and it's a question that the U.S. Supreme Court should decide, he explains during a symposium on juvenile justice at the Law School in January. Bagdade was co-counsel for the defense of Nathaniel Abraham, a Michigan juvenile who was tried as an adult and convicted of murder.*

RIGHT: *Lisa Halushka, the assistant Oakland County prosecutor who tried the murder case against Nathaniel Abraham after her office decided he should be tried as an adult, tells juvenile justice symposium participants that "the evidence being presented to us justified a first degree murder charge." She also noted that trying Abraham as an adult gave the trial judge wider options in sentencing.*

Conferences occurring during the second half of the academic year included:

Minors in adult courts?

Winter term conferences began in January with the Criminal Law Society's "Symposium on Juvenile Justice," a day-long program that included presentations by the prosecutor and co-counsel for the defense in the Nathaniel Abraham murder case, a Michigan trial that drew national attention because the 13-year-old defendant was tried as an adult and convicted. Abraham, however, did not receive the "adult" sentence of life imprisonment without parole. Instead, Oakland County Probate Judge Eugene Moore, '60, exercised the option that the law allows and ordered imprisonment of Abraham and review of his case when he reaches 21.

Daniel J. Bagdade, co-counsel for Abraham, spent two and one-half years trying to prevent his client's trial as an adult, including an attempt to get the Michigan Supreme Court to hear the case. By the time the case came to trial, "I had a 13-year-old who was almost 14," Bagdade said. "He was taller, the body language was different. The jury that was making the decision did not see the Nathaniel who allegedly committed the crime."

"I truly think that this is an issue that has to get to the U.S. Supreme Court," Bagdade said of the

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Michigan law that allows prosecutors to decide if a defendant should be tried as an adult. "Other states are looking at it. Is it constitutional? I don't know. The only way we'll know is if it goes to the highest court of the land."

Assistant Oakland County Prosecutor Lisa Halushka, who prosecuted the case against Abraham after her office decided to charge him as an adult, said that in her 10 years as a prosecutor she has seen "younger and younger juveniles committing more serious crimes." Abraham had a series of escalating encounters with police since he was nine years old, she said. "At the time, the evidence being presented to us justified a first degree murder charge," she stated. Choosing to try the defendant as an adult also gave the judge wider options in sentencing, from a typical sentence for a juvenile to life imprisonment without parole, she noted.

"The decision to end a kid's childhood should not be made by the prosecutorial side of government without oversight," said Randolph Stone, director and clinical professor of law at the University of Chicago Law School's Mandel Legal Aid Clinic.

There is "an increasing willingness to treat youth as adults," noted Jeffrey J. Shook, a University of Michigan doctoral student who is studying juvenile justice issues. More than 40 states allow trying juveniles as adults, and judicial waivers to bring juveniles into adult courts increased from 7,200 in 1985 to 12,300 in 1994, Shook noted. But "the issue of youth crime is complex and we must refrain from the simple solution of treating children as adults," he said.

Traditional judicial waiver deals adequately with the small numbers of juveniles who should be tried in adult courts, Clinical Professor of Law Donald N. Duquette argued during a lunchtime debate with Michigan Senator William Van Regenmorter, chairman of the Judiciary Committee that reported out Michigan's prosecutorial discretion bill for eventual passage. "Just looking at the 'get tough' approach is oversimplifying, and it's not going to work," Duquette said. Countered Regenmorter: The Juvenile Justice Reform Act recognizes that most juveniles are rehabilitatable but there are a few "so incredibly dangerous" that we need to give the system a way to protect itself.

A few juveniles are "so incredibly dangerous" that treating them as adults is justified, Michigan State Senator William Van Regenmorter, chairman of the Judiciary Committee, explains during a luncheon debate that was part of the symposium on juvenile justice. Seated is Clinical Professor Donald N. Duquette, his debate opponent, who argued that the case-by-case system of judicial waivers deals adequately with the issue. Seated at left is Kelly O'Donnell of the Criminal Law Society, which sponsored the symposium.

Gender, Competition, and the Future

Title IX, parents who grew up during the civil rights movement and want equal opportunity for their daughters, and growing numbers of women now or formerly in sports will hold open the door for women in athletics and extend the demand for equal opportunity once they are inside, says Donna A. Lopiano, executive director of the Women's Sports Foundation and a keynote speaker for the symposium "Competing in the 21st Century: Title IX, Gender Equity, and Athletics." The symposium was presented by the *University of Michigan Journal of Law Reform* at the Law School in February.

"The next step is not only to make sure women get the chance to get in the door, but to ensure what they get when they get in," like coaches whose skills and experience match male sport counterparts, she said. "The next challenge is the make or break challenge. . . . Do we let them stay

in sports and make their living? Once we let them in and give them the skills, are we going to give them encouragement?" she asked. Salaries, television coverage, and television advertising will be required for success, she predicted.

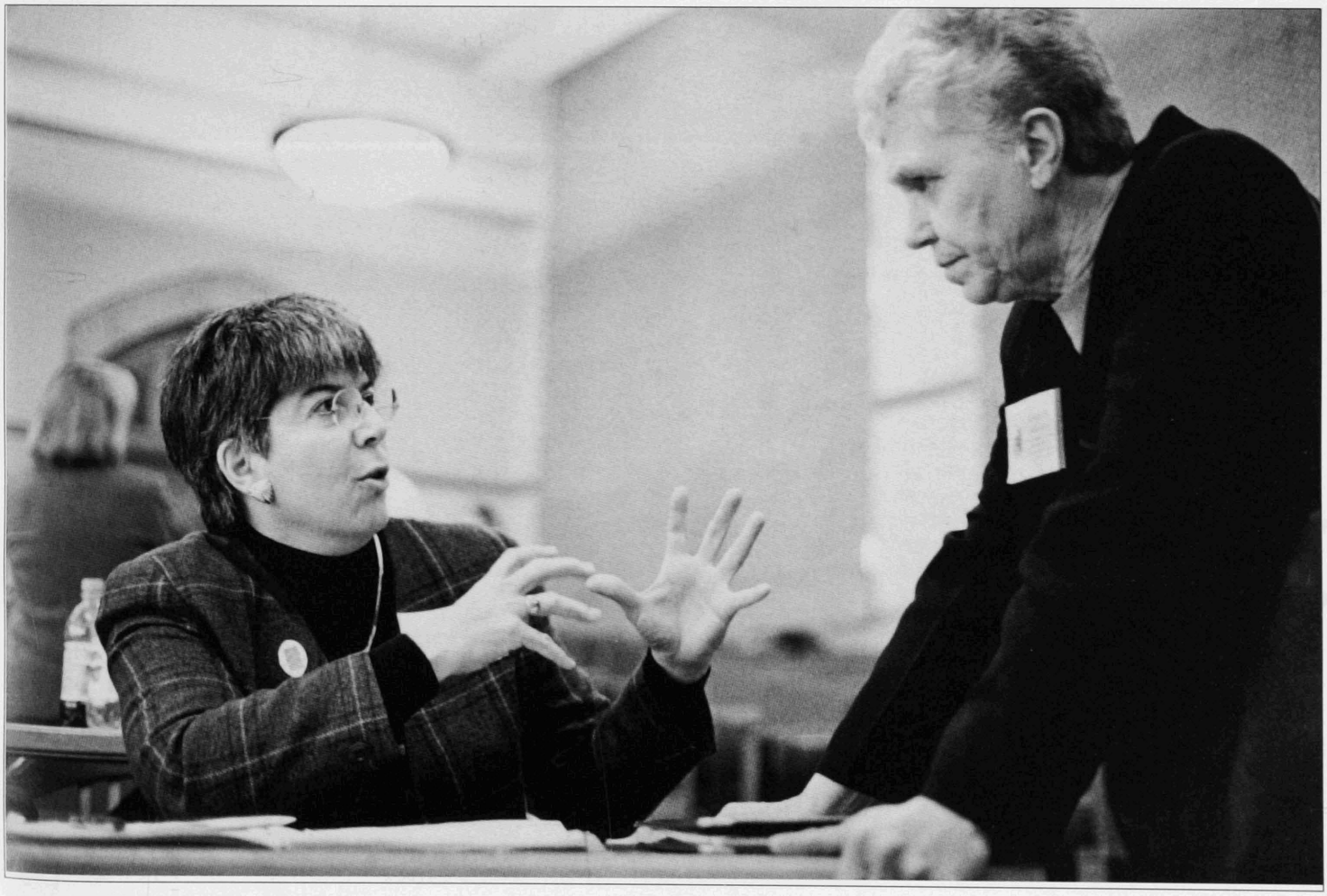
"The name of the game for women's pro sports is breaking the television logjam," she said.

At the same time, "we must retain our points of difference." The world no longer values men's traditional martial skills — the skills that spawned most sports — the way it formerly did, Lopiano added. "Women's rules abhor violence" and they should be promulgated, she said.

The symposium's other keynote speaker, Christine H.B. Grant, women's athletic director at the University of Iowa, said that "for every new dollar that has gone into women's programs since 1972 three brand new dollars have gone into men's programs." More than half of women's teams are coached by men, women make up 38 percent of participating athletes, and get $179 million less each year in scholarships than men, she reported. "Sports is an educational opportunity. How can we deny that opportunity to our women student athletes?" she asked.

Other portions of the symposium included panel discussions on "Who Should Enforce Gender Equity in Sports?"; "How Should We Determine Gender Equity in Sports?"; "The Use of Title IX in High School Sports"; "Race, Gender, and Sports"; "What is the Future of Gender Equity in Sports? Do We Need to Go Beyond Title IX?"; and a concluding roundtable discussion.

Donna A. Lopiano, executive director of the Women's Sports Foundation, seated, and Christine H.B. Grant, women's athletic director and an associate professor in the Department of Sports, Health, Leisure and Physical Studies at the University of Iowa, confer during the symposium "Competing in the 21st Century." Lopiano, keynote speaker for the symposium's closing banquet, predicted there will be a television network for women's sports in the near future. Grant, keynote speaker for the symposium's first day, said that women college athletes in the United States receive $179 million less in scholarships than their male counterparts: "Sports is an educational opportunity, and the question before us is: Should we offer equal opportunity to our boys and girls and our men and women?"



CONFERENCES & symposia

Empirical Research in Commercial Transactions

It's a daunting task to bring empirical rigor to the study of commercial transactions, which are expanding at dizzying speed in their embrace of new information-based and digital capabilities and simultaneously continuing to rely on time-tried, traditional, hand-shake-era ways of doing business. Participants in the conference "Empirical Research in Commercial Transactions," presented at the Law School in February by the *Michigan Law Review*, reflected that complexity in papers they presented.

There was a consideration of how "rules, norms, and institutions" create value in the cotton industry and the paper "*Ex Ante* Bargaining in the Shadow of the Forms," the latter by Daniel L. Keating of Washington University. Japan, ancient and modern, came under the microscope in Assistant Professor of Law Mark D. West's examination of the 17th century Japanese trading operation that was the world's first futures market and a study of subcontracting in the modern Japanese auto industry.

Discussions touched on the role of gossip in cotton markets, the tension between private and public ordering — "Private ordering is not a substitute for public ordering. . . . I argue that public ordering is needed to curb the abuses that are found in private ordering," Assistant Professor of Law Ellen Katz noted in her comment on "Private Ordering Under Dysfunctional Public Ordering," by John McMillan of Stanford University and Christopher Woodruff of the University of California, San Diego.

"Sometimes I think that in the academe there is too much theory chasing too little information, and of course this conference is about having it the other way around," A.W. Brian Simpson, the Charles F. and Edith H. Clyne Professor of Law, noted in his comments on West's paper, "Sophisticated Private Ordering in Commercial Markets: The Evidence from the World's First Futures Exchange." West's historical research opens the way for analytical points, said Simpson:

- How does the transition take place to a futures market — how do you know that there is so much rice in the warehouse for this receipt?
- What is the contrast between private and public norms?
- Why does futures trading exist with some commodities and not others?

But empirical evidence, convincing as it may be, has many hurdles to overcome if it is to be used as raw material for the formation of new law, warned conference closing speaker James J. White, '62, the Robert A. Sullivan Professor of Law. White is reporter for the revision of Article 5 of the Uniform Commercial Code, a member of the drafting committee to revise the article, and a member of another committee for Articles 2 and 2A.

Assistant Professor Ellen Katz, responding to a symposium paper, notes that public ordering is needed to correct "abuses" of private ordering.

"I think the evidence is quite strong that at best the traditional legislatures are quite immune to the effects of empirical work," White said. "I know of no single instance where the ALI (American Law Institute) or NCCUSL (National Conference of Commissioners on Uniform State Laws) has been significantly influenced by any empirical research." Any or all of these — timing, conflicts between commitment and ideology, skepticism, legislators' lack of familiarity with the empirical world, indeterminant findings, or the emotion-laden power of the gripping anecdote — may reduce or eliminate the impact of empirically derived findings, he said.

Professor Ronald Mann opens the symposium "Empirical Research in Commercial Transactions," presented by the Michigan Law Review *at the Law School in February. The two-day series of presentations considered value creation in the cotton industry; relations of public and private ordering; letters of credit; the world's first futures exchange; relationship-specific investments like automobile industry subcontracting; and the bargaining that may arise in reaction to commercial forms.*

James J. White, '62, the Robert A. Sullivan Professor of Law, poses a question during the symposium on empirical research in commercial transactions. In his address that closed the conference, White raised the issue of how little professional and political legislatures pay attention to even the most carefully gathered empirical research. It may not arrive at an opportune time, he said, or it may not fit an already held ideology, or it may be eclipsed by a gripping anecdote.

CONFERENCES & symposia

"How will we view ourselves in 2000 and beyond?"

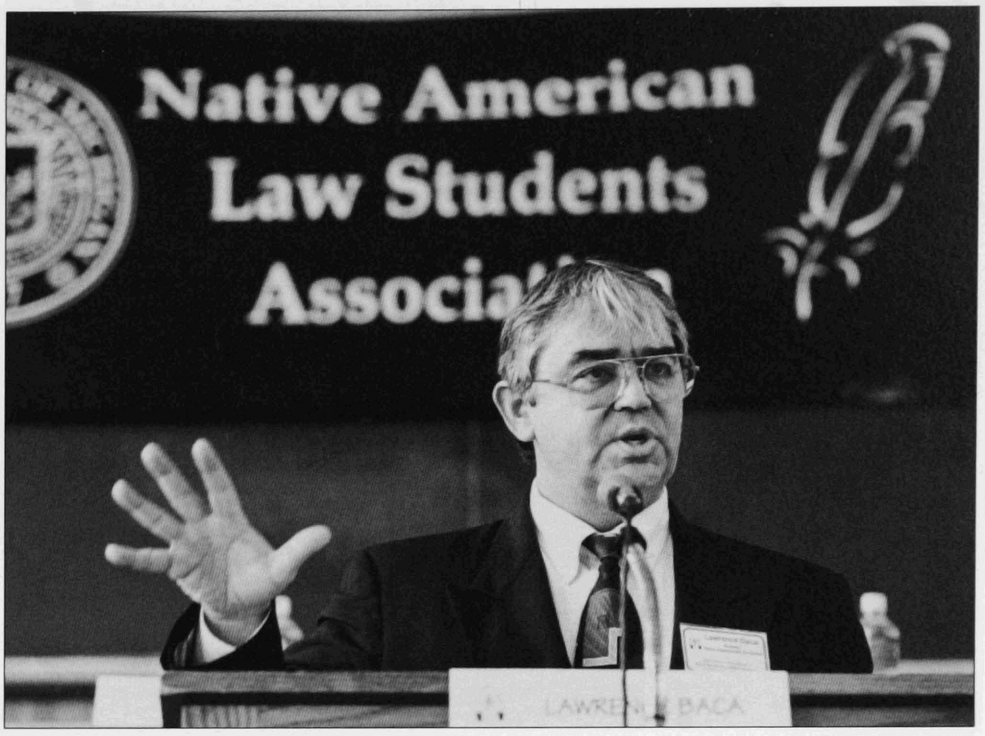
Each person's "identity" includes many "identities" — nationality, gender, race, religion, marital status, and others, Adrien Wing of the University of Iowa College of Law explains during the sympsoium "Identities in the Year 2000 and Beyond." At left is panel moderator Bridget McCormack, a clinical assistant professor. Wing's fellow panelists include Kathryn Abrams of Cornell University Law School; Sylvia Lazos of the University of Missouri School of Law; and Darren Hutchinson of Southern Methodist University School of Law. The symposium was presented by the Michigan Journal of Race and Law. *At far left is Clinical Assistant Professor Bridget M. McCormack, who introduced the panelists.*

Take a look at the Census 2000 form that you got in the mail and you'll see "the centrality of issues of race and social identity," Dean Jeffrey S. Lehman, '81, noted in his welcome to participants in the symposium "Identities in the Year 2000 & Beyond," held at the Law School in March. Indeed, in a determined effort to measure the racial makeup of the United States, this year's census form allows for a total of 63 racial combinations.

Yet race alone does not define who we are, according to Adrien Wing, of the University of Iowa College of Law, a panelist at the symposium. "We are under-representing the complexity that leads to identity," said Wing. Nationality, gender, race, skin color, minority status, religion, ethnicity, language, class, marital status, geographic location, and political ideology all combine to create a person's sense of self, she said. "My view is that identity is not additive, and therefore it is not intersectional. . . but that it is multiplicative, that every day of our lives our identities are multiplied together, that every day I am black times female times . . ."

The theme of the complexity of identity continued in the discussion of the current census. "What box represents all that I am?" asked Tanya Hernandez, of St. John's University School of Law and a panelist for discussion of "Census 2000: New Standards of Racial Identification." There is no box marked "multiracial," she reported. Census data emphasizes socio-political characteristics, but people themselves use cultural measurers to identify themselves with racial groups, she said. "The personal identification that a person has is obviously very important, but it isn't necessarily salient to the census inquiry."

But concentrating on single aspect identity has been helpful for Native Americans, affiliated faculty member Riyaz Kanji countered in another panel discussion on "Indigenous Peoples." The "special" place for Native Americans has advantages when you walk it through the courts, said Kanji, who specializes in cases that seek rights guaranteed to Native Americans in treaties. Fighting for these rights is not demanding special treatment for Native Americans, he tells critics. "Lay aside your views of affirmative action, of special rights," he explains. "What we're talking about here is fulfilling a promise. The notion of keeping a promise is a simple one . . . an idea that resonates."



Keynote speaker Lawrence Baca tells the American Indian Law Day 2000 audience that Native Americans too often are "invisible" in U.S. society. Said Baca, the highest ranking trial attorney in the Civil Rights Division of the U.S. Department of Justice: "When two men meet there are actually six men present: each man as he sees himself; each man as the other man sees him; and each man as he truly is."

The view from American Indian Law Day 2000

American Indian Law Day 2000 keynote speaker Lawrence Baca drew his bead precisely:

"When two men meet there are actually six men present: each man as he sees himself; each man as the other man sees him; and each man as he truly is."

Baca, who spoke at the Law School in April, is a Pawnee, the highest ranking trial attorney in the Civil Rights Division of the U.S. Department of Justice, the eighth American Indian to graduate from Harvard Law School, the first American Indian hired through the Department of Justice's Honor Law Program, president of the Native American Bar Association — a position to which he has been elected three times — and a member of the Federal Bar Association, where he is chairman of the Indian Law Section. He is well known for his work in the areas of credit, voting rights, and education.

"Because Indians are such a small population in America, we are invisible to most of America," he explained in his talk, which included several personal anecdotes reflecting the role that racial consciousness and stereotypes continue to play in the United States. "The Gauze of Our Invisibility," the title of his talk, was based on the 1950s television show *The Invisible Man*, in which the key character wrapped himself in gauze to be seen. Baca said that Indians, too, must wrap themselves in the "gauze" of stereotypes or they will go unnoticed. Some of the stereotypes he identified included appearance issues — do we expect to see a "bead- and feather-wearing, tomahawk-toting, Navajo blanket-wearing" person when we anticipate meeting a Native American? Do we expect every "real" Indian to be brought up on a reservation? Should every Native American's father be the chief? Must Native Americans pretend to fit one or more of these stereotypes to be accepted or "seen"?

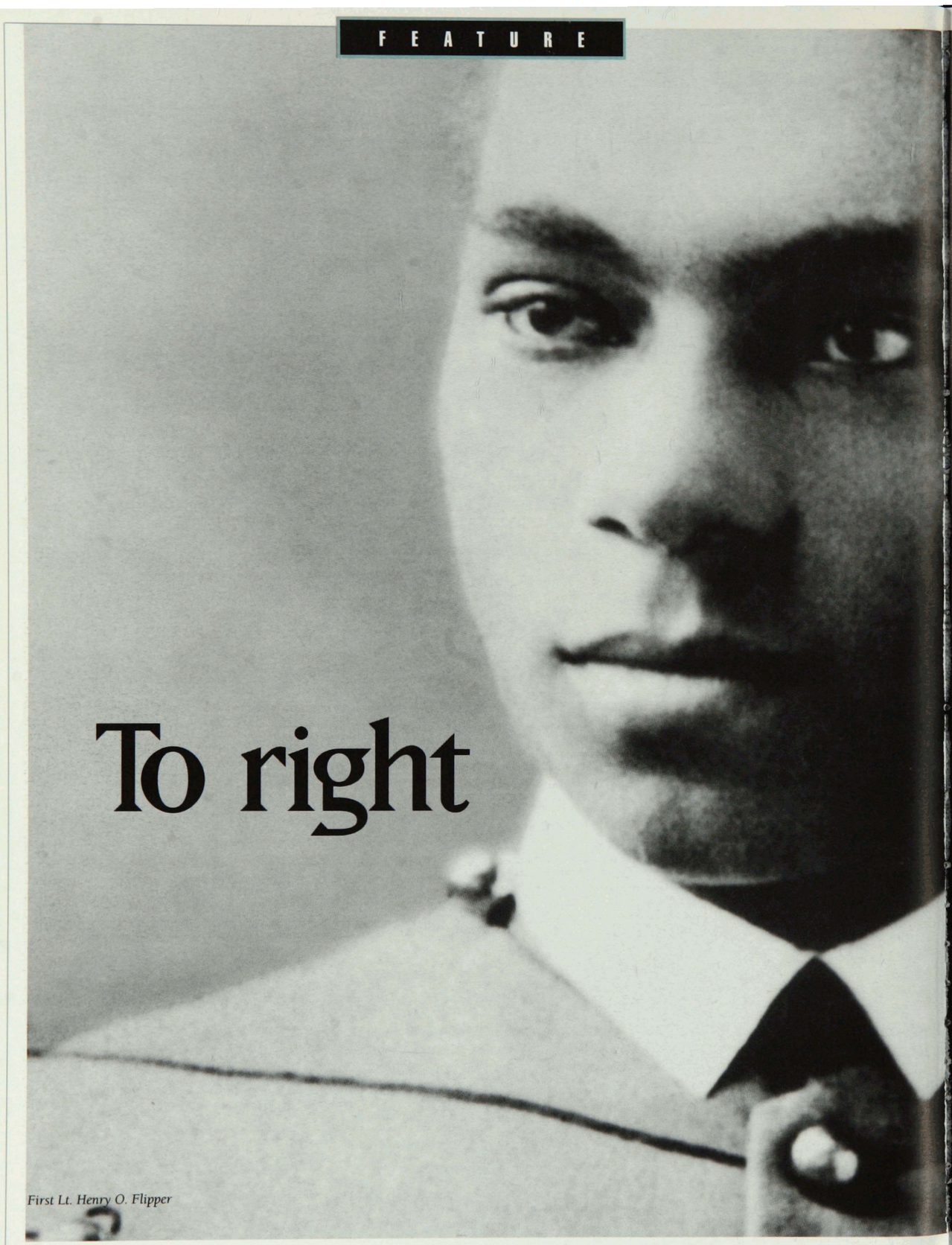
With these questions as a backdrop, Baca discussed why race continues to be an important issue in America. He noted that 100 years ago W.E.B. DuBois predicted that the problem of the 20th century would be the color line, and said that if DuBois were alive today he probably would say that not much has changed.

Baca said that all of the underpinnings of court decisions and legal decisions involve race. Using federal Indian law as an example, he pointed out that not a single case has been written by a Native American. The good news, he said, is that President Clinton has become the first U.S. president to appoint an Indian to a federal judgeship — Judge Michael Burrage serves in the U.S. District Court for the Eastern and Northern District of Oklahoma.

Baca also asked the audience to ponder whether a stereotype ever has worked positively for Native Americans. He recalled hearing calls that he "ran like an Indian" when he ran cross country in college. What did that mean? he asked. If Native Americans are thought to excel in running, why haven't we heard of one receiving a college scholarship for running? he asked.

He posed this test: in the history of American Indian participation in the Olympic Games, two Native American runners have won medals for the 10,000-meter event. Some audience members guessed the more recent — Billy Mills, who won the event in 1964 and about whom a movie was made — *Running Brave*, with Robby Benson playing Mills. Nobody guessed the first winner — Louis Tewanima, a Hopi Indian who won the silver medal in the same event in 1912. Tewamina's accomplishment was overshadowed by Native American Jim Thorpe's gold medals in the pentathlon and decathlon during the same Olympic Games.

American Indian Law Day, sponsored by the Native American Law Students Association, also included panel discussions of tribal governments, tribal courts, federal-tribal-state relations, and land-resource management and the trust responsibility. The symposium was held in March in conjunction with the annual Pow Wow — Dance to Mother Earth, which brings Native Americans to Ann Arbor from throughout the country.



To right

First Lt. Henry O. Flipper

a very old wrong

History matters.

But without help it can be forgotten.

Lt. Henry O. Flipper's case, for example...

. . . nearly disappeared into the dusty legends of the Indian wars in the American Southwest. Flipper was a former slave who became the first African American to graduate from West Point. He died in 1940, a highly successful career as a mining engineer, translator, and international negotiator behind him — all stained by his unjust conviction in 1881 for conduct unbecoming an officer and dismissal from the U.S. Army.

That historical miscarriage mattered too much to Jeffrey H. Smith, '71, and Thomas M. Carhart III, '73, to let it rest. They spent five years working to put it right. Eventually, their determined research, persuasiveness, contacts with high military and federal officials, and contagious personal conviction that Flipper had been wronged, led to the White House, where on February 19, 1999, President Clinton signed the first posthumous pardon in U.S. history:

"Now, therefore, be it known, that I, William J. Clinton, president of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant a full and unconditional pardon to Lieutenant Henry Ossian Flipper for the above-described offense against the United States."

"History matters," says Smith, former general counsel of the CIA and now a partner at Arnold & Porter of Washington, D.C. The Flipper case "was a chance to right a very old wrong."

Arnold & Porter's *pro bono* committee agreed, eventually putting three additional attorneys on the case: associate Edward Sisson, now a partner; partner Darryl Jackson, a former assistant U.S. district attorney; and associate Helene T. Krasnoff, '97. Krasnoff supervised evidence gathering and shepherded the brief that used state precedents to convince the Justice Department that a pardon could be granted posthumously. The team marshaled "an amazing record" of historical and legal documents in favor of granting the pardon, says Krasnoff, now an attorney with the Planned Parenthood Federation of America.

Like Flipper, class of 1871, Smith is a West Point graduate, class of 1966. "It was a West Pointer taking care of another West Pointer," he says, "but with a much broader purpose. We did this for the United States writ large. It is one of the things of which I'm most proud."

After graduating from West Point, Flipper served with the Tenth Cavalry, also known by what the Indians called its members, the Buffalo Soldiers. In 1880 he was transferred to Ft. Davis, a frontier post that was part of a necklace of forts that stretched across west Texas.

At Ft. Davis, Flipper oversaw the commissary and its finances. In 1881 he came up about $1,700 short, did not immediately notify his superior, and tried to make up the shortfall from his own funds. When the situation surfaced, he was charged with embezzlement. Fellow soldiers and civilians contributed money to meet the shortfall and pay for his defense.

Flipper was acquitted of embezzlement, and instead convicted of conduct unbecoming an officer. He was dishonorably discharged from the U.S. Army in 1882, a sanction that Smith and his colleagues have shown did not get imposed on white officers convicted of more serious crimes.

Flipper, they discovered, had learned during his lonely years at West Point that he could not expect help from his white fellow cadets. The solution for him was to keep quiet and solve his own problems, and he followed the pattern during his service at Ft. Davis.

Coming on the case a century later, the time was right for pardon, Smith says. "There's a more sympathetic American public now and the time had come to do it. . . . We argued not just that it was needed for historical purposes, but that it was needed because Flipper remained an uncomfortable chapter in the history of American military justice, and his case cast a shadow on the current military system.

"For those of us who have served, everybody recognizes that the military system is delicate and the fair and equal administration of justice is absolutely crucial to good order and discipline of the armed forces, which in turn is essential to their ability to do their job to defend us.

"As commander in chief, we argued, the president had an obligation to insure that there was no hint of a shadow on the military justice system, and that he, as commander in chief, is responsible for good order and discipline of the armed forces. Therefore, pardoning Flipper was not only the correct historical thing to do, but also had impact today to demonstrate that the chain of command will not tolerate inequality in the military."

"I wanted very much to do this not just for Flipper, but for all blacks in the army — more broadly, in the nation as a whole," says Smith, whose firm was named *Pro Bono* Firm of the Year last year by the District of Columbia Bar. Arnold & Porter won the award largely for its dedication to the Flipper case, but the firm also has a long tradition of providing *pro bono* assistance. In the 1950s, for example, when then-future Supreme Court Justice Abe

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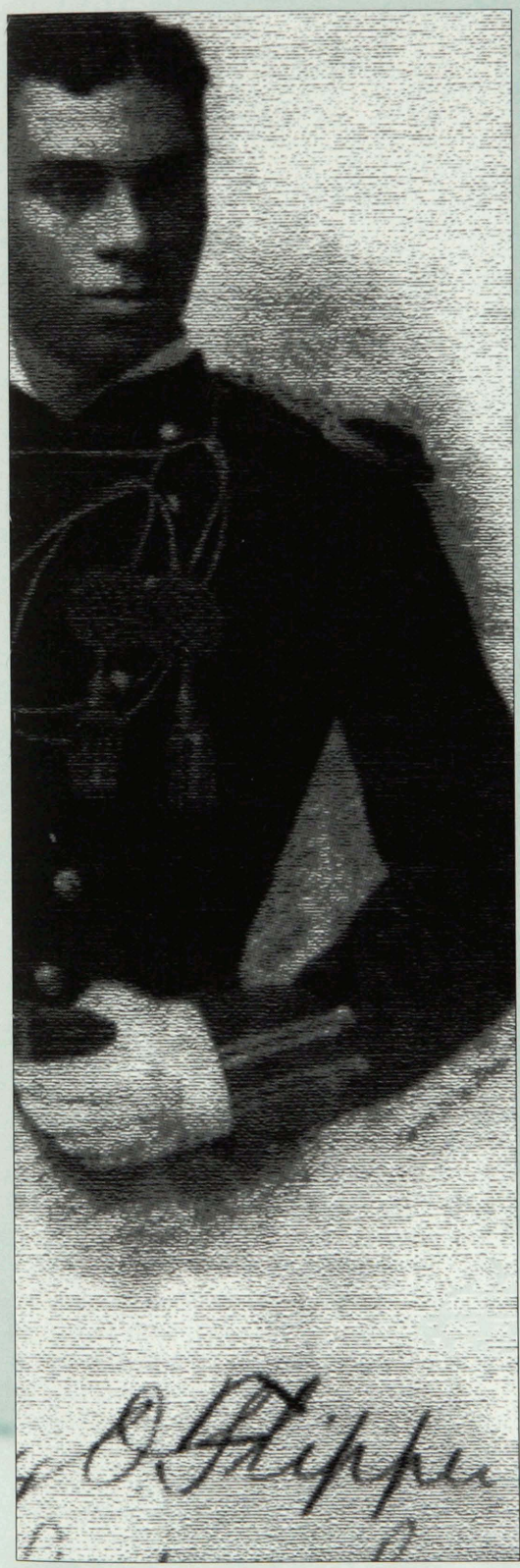


PHOTOS COURTESY OF ARNOLD & PORTER

Continued from page 56

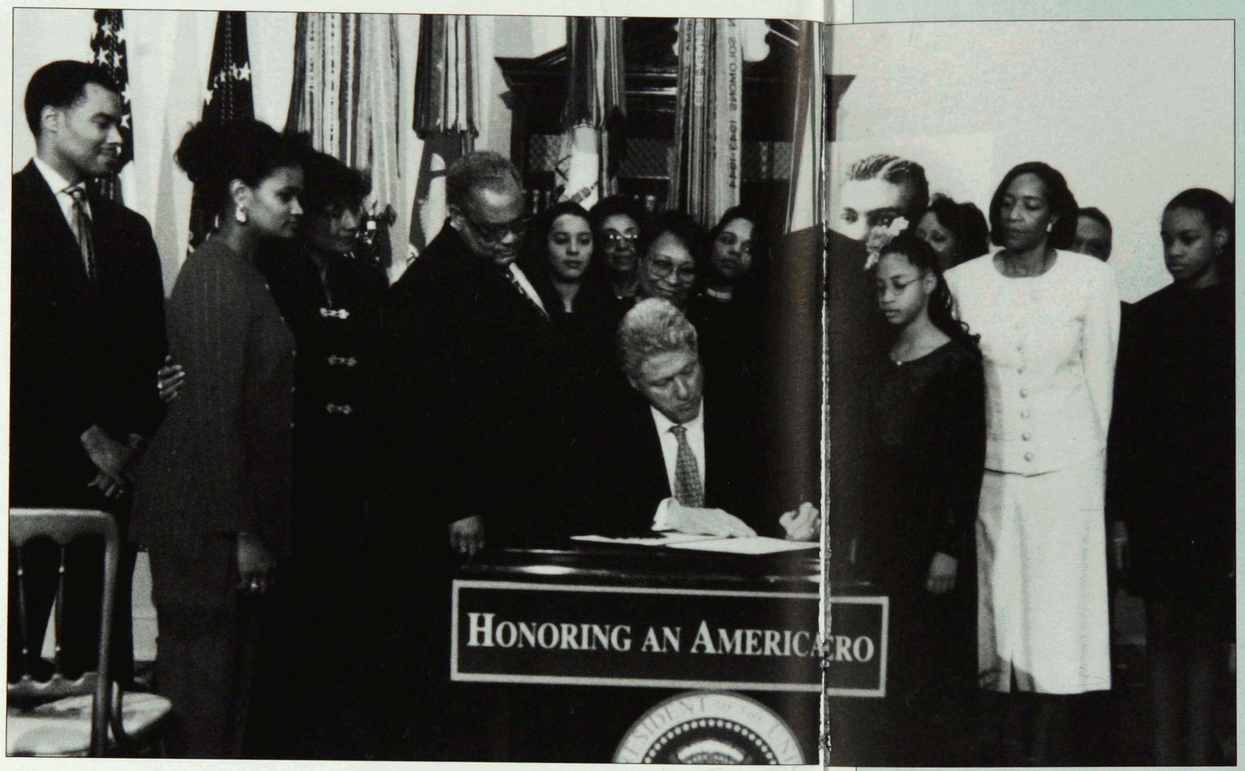
Fortas was with Arnold & Porter, the firm provided the *pro bono* work that led to the Supreme Court's decision in *Gideon v. Wainwright* that free counsel must be provided to every defendant.

Flipper waited much longer than Gideon. "In spite of the unfairness of his treatment, Henry Flipper went on to a distinguished career as the first professional African American civil and mining engineer," notes Arnold & Porter's report on the pardon effort. "He was appointed as a special agent for the U.S. Department of Justice, joined the staff of the Senate Foreign Relations Committee as an expert on political developments in Mexico, and served as special assistant to the Secretary of the Interior. Between his periods of government service, Lt. Flipper was employed by several large American corporations as a mining engineer, surveyor, and legal expert on Mexican and South American law."

Despite efforts on his behalf by members of Congress and Interior Secretary Bernard Fall, Flipper died in 1940 still bearing the blot of his conviction and dishonorable discharge. He left behind no direct descendants. But in 1976, diehard supporters led by Ray McColl of Valdosta, in Flipper's home state of Georgia, convinced the Army to change Flipper's discharge to an honorable one. Over the years the Army has honored Flipper in other ways, too:

- Gen. Colin Powell kept a portrait of Flipper on his wall during his tenure as chairman of the Joint Chiefs of Staff;
- West Point's annual Flipper Dinner and Award honors the cadet who has overcome the most personal obstacles; and
- Flipper's Ditch at Ft. Sill, Oklahoma, the drainage channel that Flipper designed to make the site suitable for military use, became a National Landmark in 1977.

Surrounded by descendents of Henry O. Flipper, President Clinton signs Flipper's pardon, the first posthumous pardon ever granted by a U.S. president.



Flipper's 1882 conviction for conduct unbecoming an officer was appealed to the President of the United States, the only appeal authority available in those days for a conviction by a military court martial. Although Flipper's formal appeal received impressive support from legal authorities along the way, President Chester Arthur refused to overturn it. So, despite the successful efforts of McColl and Flipper's family members to have his discharge upgraded in 1976, the conviction remained on the books. In the eyes of the law, Henry O. Flipper remained a convicted criminal. The clock on this last stain on Flipper's memory started ticking when Smith learned about Flipper from West Point classmate and fellow Law School graduate Tom Carhart.

History matters to Carhart, a military historian and writer. After graduating from West Point, he served with the Screaming Eagles in Vietnam. He was wounded there twice, and for the first time lived, fought, and suffered in close quarters with many African Americans. "They were soldiers and they died just like everybody else," he recalls. "They died, black and white, indiscriminant deaths. And I knew that when the survivors went home that the blacks were not going back to as happy or prosperous or promising a life as the whites. I felt bad about that, even guilty, but am ashamed to say I did nothing.

"Then, 20 years later, I went to school at Princeton. . . I wanted to learn about black history and I learned a lot." Eventually, he devoted two of the 14 chapters of his Ph.D. dissertation to Flipper — one to Flipper's years as a Military Academy cadet, the other to his court martial. Carhart and Northern Illinois University Press have an early agreement to publish his dissertation, "A Narrative History of African American West Pointers in the Nineteenth Century."

"I was writing the dissertation and I was a lawyer and I saw that a wrong had been done," Carhart says. The wrong should be righted, he felt, and "although a lot of people told me 'You can't get there from here,' that did not deter me."

"If I can change the record and formally put right the wrong, then I am not free to not do that. I must do that."

A judge friend, who was also a West Point graduate and had learned of Flipper separately from another West Point graduate, encouraged Carhart to find a way to get Flipper's conviction reversed. Carhart in turn sought out lifelong friend Jeff Smith. "I went to Jeff Smith and said, 'Will you do this?'"

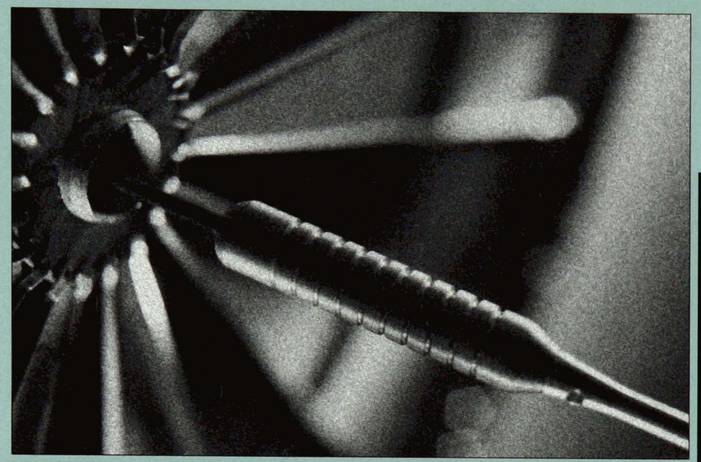
Yes, Smith answered immediately.

"Even if it's 100 years old, it's still wrong," the men agreed. History matters.

Thomas M. Carhart III, '73, speaks at the celebration of the pardon of Lt. Henry O. Flipper.

Jeffrey Smith, '71, of Arnold & Porter and leader of the pro bono team that fought for Henry O. Flipper's pardon, addresses supporters gathered to celebrate President Clinton's signing of the pardon.

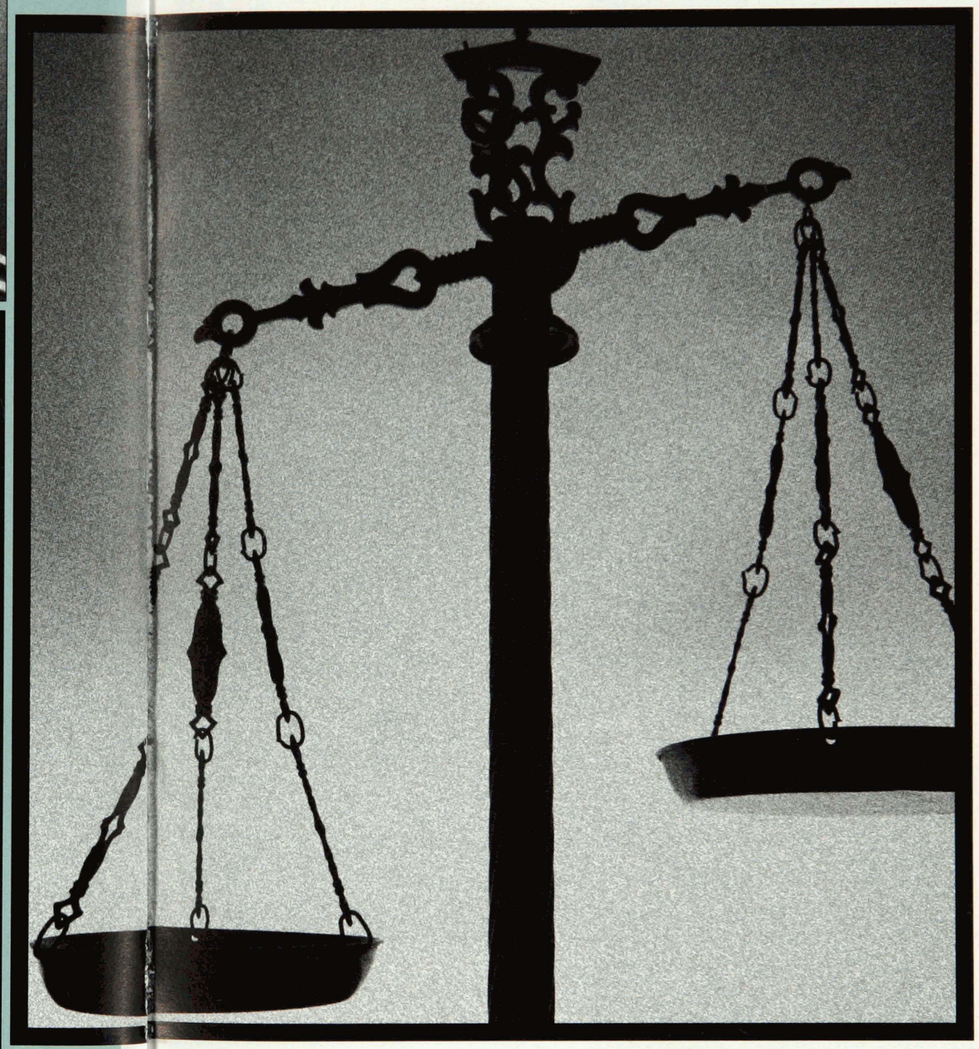
Helene Krashoff, '97, coordinated preparation of the brief that convinced the federal government to change its policy and grant a posthumous pardon.



Strategic voting

on multimember courts

— BY EVAN H. CAMINKER



In appellate adjudication, decisions are rendered by a multimember court as a collective entity, not by individual judges. Yet legal scholars have only just begun to explore the formal and informal processes by which individual votes are transformed into a collective judgment. In particular, they have paid insufficient attention to the ways in which the vote of each individual judge is influenced by the views of her colleagues on a multimember court.

In recent years, a growing number of political scientists exploring judicial behavior have modeled this aspect of adjudication. Some theorists have recognized, as Lee Epstein and Jack Knight write in *The Choices Justices Make* (1998), that judges "are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act." In certain contexts, a rational judge will deviate from her *personal* sincere views about the law in order to secure the most desirable *collective* decision possible, given the views held by the other relevant participants (judges or other governmental actors) who share input into that final collective decision.

This political science scholarship is either empirical or predictive, identifying when strategic behavior does or is likely to occur. It tells us nothing about how judges *ought* to operate. This normative question is my focus here: Under what circumstances, and for what ends, may a judge appropriately engage in strategic behavior as a member of a multimember court? Not infrequently, as Lewis Kornhauser and Lawrence Sager have noted ("The One and the Many: Adjudication in Collegial Courts," 81 *California Law Review* 1 [1993]), a judge will discover that by supporting an outcome or rationale with which she disagrees, she can prevent her court's adoption of some other outcome or rationale that she thinks worse either for justice in the case before her or for the state of the law in general. When such

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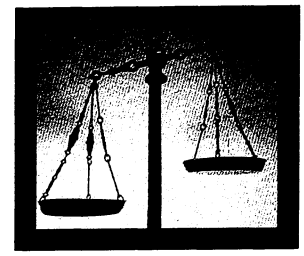
The more capacious or multivariate a justice's jurisprudential methodology, the more facts will become relevant to her comparison and ranking of alternative legal rules.



opportunities arise, must a judge always vote for rules that reflect her best personal judgment as to how a legal issue ought to be addressed without considering how her input will affect the Court's collective output? Or may the judge vote to secure what she deems the best possible collective resolution of the case, even if to do so she must strategically suppress or misrepresent her sincere personal views?

Throughout this article, I shall use the term "sincere voting" to refer to the vote that represents an individual judge's top-ranked or ideal judgment as to what constitutes the best response to resolve a discrete legal controversy, without considering the impact of his vote on the substantive collective result in his court or in other institutions. In other words, a judge votes sincerely if he supports the position that he honestly thinks should win and that he would endorse were he alone on the court. I shall use the term "strategic voting" to refer to a judge's decision to vote for a position that does not truly reflect his "sincere" judgment in order to secure the best feasible outcome given the influence of his colleagues in the decisionmaking process. To make this inquiry more manageable, I confine my focus to strategic behavior in merit determinations by justices on the U.S. Supreme Court.

Strategic decisionmaking

At the outset, let me identify this project's central premise concerning judicial motivation: Subject to resource constraints, judges endeavor to discern and render their best judgment as to the proper resolution of cases according to their best conception of the law. By this assumption I intend to distinguish my analytical approach from that employed by much recent literature concerning judicial behavior, which posits that judges employ instrumental rationality to advance one or more personal agendas (such as a desire to imbue the substantive content of the law with their personal policy preferences, to enhance their professional reputation and personal prestige, and to enhance leisure).

The strategic pursuit of legitimate adjudicatory values falls into two categories: strategic voting to improve the institutional efficacy of the Court's collective product through its quantitative form ("form-driven" strategies); and strategic voting to improve the substantive content of the Court's collective product ("content-driven" strategies). Before delving into the details, however, let me introduce an analytic approach that is relevant for assessing the attractiveness of strategic voting across a range of circumstances.

A. Assessing the magnitude of perceived error (MPE) of the Court's output.

On a multimember court, sincere voting by a justice will often lead to a collective outcome that she believes is wrong. She might, through strategic voting, be able to improve the collective outcome from a position she considers wrong to one she considers less wrong. To decide whether it is worth seizing this opportunity, she must first consider how important it is for her to supplant the greater error with the lesser one.

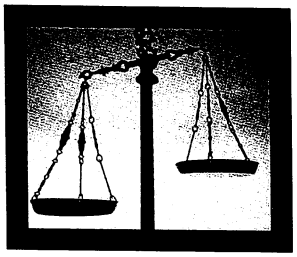
To make this assessment, she must determine not only her sincere order of preference for various rules (R1 through Rn); she must also establish the relative degree of error in adopting each suboptimal rule. This latter determination I shall call the "magnitude of perceived error" (MPE). The following factors, among others, may be relevant to this calculation:

- **Error costs.** What principles are at stake in the choice between two rules? What tangible benefits or burdens are being allocated? A justice might care more about articulating the best rule when it will determine issues of personal liberty, say guilt/innocence or imprisonment/execution, than when the rule will determine issues of financial consequence, say availability of punitive damages, or amoral policy concerns, say a procedural pleading requirement.
- **Error size.** What is the size of a rule's perceived error? If the legal issue involves personal liberty, how much will be wrongly granted or denied? If the legal issue involves money, how much will be wrongly allocated?
- **Error rigidity.** Can those governed by the rule circumvent its erroneous application? A justice might care more about correctness with rules that impose immutable requirements on private conduct than with those that merely establish default rules around which private parties can maneuver.
- **Error duration.** How much precedential significance will the legal rule have? The more frequently the same or substantially equivalent issues will arise in the future, the greater the temporal "ripple effect" created by the Instant Case, and thus the more important it is to be correct today.
- **Error certitude.** How confident is the justice in her rankings based on the aforementioned variables? The more certain she is about R1, the more she will perceive any error as significant.

An MPE assessment of this sort, in one form or another, determines a justice's incentive to engage in form-driven and content-driven strategic voting. Of course, the particular factors (and weights thereof) included in a justice's MPE assessment are derived from her jurisprudential paradigm, and, more specially, the judgment criteria that guide her legal interpretations. The more capacious or multivariate a justice's jurisprudential methodology, the more facts will become relevant to her comparison and ranking of alternative legal rules.

B. Strategic voting to improve the form of collective decisions.

The form of a multimember court's product refers to the size of the justice's agreement (e.g., unanimous, majority, plurality, or singular). Specific coalition sizes can promote various institutional values, and occasionally a justice's desire to shape a particular coalition will incline her to endorse an outcome she views as substantatively suboptimal. She might vote insincerely with respect to substance to forge a majority coalition supporting a disposition of the case, she might do so to forge a majority coalition supporting an opinion articulating a specific legal rule, and she might do so to forge a supermajority coalition such as a unanimous opinion.



1. Formation of majority-disposition coalitions.

If the Instant Case presents three or more plausible dispositions, sincere voting might mean that no majority agrees on a single preferred disposition (for example, the justices might split among affirm, reverse, and remand). Under the Court's prevailing aggregation rules, such a division prevents the Court from deciding the case.

The Court could avoid the potential impasse through various voting protocols, including: (a) adopt the disposition with largest plurality support (if any); (b) hold a "run-off" vote between the top two vote-getting dispositions; or (c) compare dispositions two at a time, and select the option that defeats all other alternatives in head-to-head competition if one emerges.

The Court has eschewed these structured routes. Rather, individual justices "play chicken" until one faction gives in and shifts to its second-ranked rather than top-ranked disposition. In the final set of opinions issued, each of the factions (which might include from one to four justices) articulates its sincere position. But one of the minority factions then explains that, in order to construct a majority-disposition coalition necessary to decide the case, the faction members will join another faction by voting for what they consider to be the second-best disposition.

A justice's willingness to switch from his sincere to second-best disposition should depend on both institutional and substantive variables. First, how much value does he place on constructing a majority-disposition coalition such that the Court can issue a judgment in the Instant Case? Second, based on the magnitude of perceived error assessment, how strong is his preference for his top-ranked disposition (D1) over his second (D2), and his second-ranked over the third (D3)?

It is difficult to determine just how frequently sincere voting generates such three-disposition impasses. The practice of resolving them does suggest, however, general acceptance of an adjudicative norm that sincere views about case disposition may be sacrified in order to facilitate the Court's case-deciding function.

2. Formation of majority-opinion coalitions.

Perhaps much more frequently, a majority of the Court will agree on a single disposition but disagree as to the optimal legal rule justifying that disposition. Sincere voting will leave the majority disposition supported by two or more divergent rules, each championed by a minority faction of one to four justices. Such fractured support for the Court's disposition undermines various institutional values.

First, a fractured decision undermines the clarity of the legal rules that will govern future disputes, thereby increasing the unpredictability of the law's application to primary conduct and increasing the costs of future decisionmaking by subsequent courts confronting the same legal issues. Second, it undermines the durability of legal rules, both by weakening the precedential value of the Instant Case, and perhaps also by diminishing public respect for judicial decisions generally. Third, it undermines the expressive function of adjudication, by failing to articulate a singular, coherent justification for the judicial decisions.

In response to these institutional concerns, one or more justices often deviates from her substantively preferred rule in order to accommodate her colleagues sufficiently to form a majority-opinion coalition. Sometimes, the vote-shifting faction's opinion candidly reveals the decision to vote strategically. More frequently, the vote-shifting faction suppresses its sincere views in the published opinions, and the strategic behavior can be detected, if at all, only through careful research of what occurred behind the scenes. For example, as Epstein and Knight note in *The Choices Justices Make*, Justice Powell voted insincerely in *Nixon v. Fitzgerald* 457 U.S. 731 (1982) in order to forge a majority coalition; they quote Powell: "[I]t is evident that a Court opinion is not assured if each of us remains with our first preference votes . . . . As I view the *Nixon* cases as uniquely requiring a Court opinion, I am now prepared to defer to the wishes of you [Chief Justice Burger], Bill Rehnquist, and Sandra" [Sandra Day O'Connor] in order to forge a single opinion of the Court.

It is frequently assumed that, in making these calculations, the majority will converge in a moderate or median position. This may well be quite likely when the justices' ideal points can be lined up nicely in a single-peaked fashion along a single dimension, for instance, from liberal to conservative. Convergence on a center position along the spectrum is not guaranteed, however, depending on the effects of small-group dynamics.

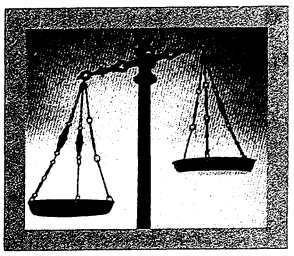
And sometimes the options under discussion cannot easily be aligned along a single dimension. Thus convergence in form does not theoretically imply movement toward a schematically median or substantively moderate position.

3. Formation of supermajority coalitions.

More infrequently, justices coordinate their voting to produce a unanimous opinion. Unanimity establishes a very durable judicial precedent, and it may elicit greater respect from nonjudicial actors, both ensuring short-term compliance with the Instant Case disposition and ensuring long-term respect for the decision's underlying principles. More specifically, coordinated unanimity appears to be strategically deployed to counter perceptible threats to the Court's legal (and sometimes moral) authority.

Even where unanimity is not attainable, justices might also feel some impulse to add another voice to an existing majority coalition. Such "extra" joinders may add to a precedent's durability, which a justice might value even at the cost of a sincere vote.

For each of the types of coalitions described in this section, a justice would weigh the institutional values to be gained against the costs of insincerity in the particular case, which may include institutional costs as well. Form-driven strategic voting appears to be a generally accepted practice on the Court. It is difficult for outsiders to identify each occurrence, however; justices understandably do not candidly announce their decisions to form



insincere coalitions when doing so would undermine their strategic purpose of projecting solidarity.

C. Strategic voting to improve the content of legal rules.

Due to conventional voting protocols, appellate courts offer individual judges fewer opportunities to engage in content-driven strategic voting than are available to members of many other collegial bodies. For example, legislatures often decide issues through a series of votes comparing two options at a time, sometimes called a motion-and-amendment process, such that savvy, sophisticated voting on early choices frequently can manipulate the ultimate path of alternative pairings and hence the substantive outcome. On the Supreme Court, each justice typically registers a single vote to dispose of the entire case, rather than a vote resolving each issue raised by the case. Thus multiple-issue cases do not generally present a justice with an opportunity to misrepresent her views on one or more issues just to dictate the preferred resolution of the case as a whole.

This said, a justice may still have the opportunity to guide the Court's collective output toward her sincere view through various forms of strategic voting behavior. I will focus primarily on two such scenarios, one unilateral and one bilateral.

1. Unilateral strategic voting to influence a discrete legal rule.

Sometimes a justice, by supporting a legal rule with which she disagrees, can unilaterally prevent a collective outcome that she considers even worse. Such a unilateral strategy might be attractive in either of two circumstances, both of which can helpfully be illustrated by focusing on Justice Brennan's behavior in *Craig v. Boren* 429 U.S. 190 (1976).

Under an intentionally simplified version of the case, the relevant legal issue was whether discrimination on the basis of sex should be subject to strict scrutiny (SS), intermediate scrutiny (IS), or rational basis scrutiny (RBS). Suppose the justices' first-rank judgments divided them into three equal-sized factions as follows: Justice Brennan's faction preferred SS; Justice Powell's faction preferred IS; and Justice Rehnquist's faction preferred RBS. Justice Brennan's first-rank judgment can be gleaned from the fact that he recently had advocated SS in *Frontiero v. Richardson* 411 U.S. 677 (1973), though he had failed to convince a majority. But in *Craig*, Brennan circulated a draft opinion for the Court that advocated intermediate scrutiny, a view that ultimately won the day.

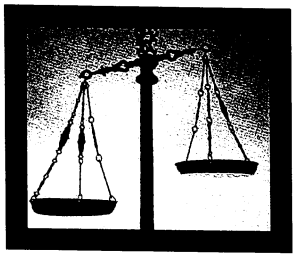
Brennan apparently concluded that it was preferable to vote strategically to establish a durable precedent now for IS, rather than to vote sincerely for SS. There are two different scenarios under which such a strategic maneuver makes sense. The first ("*Craig* I") involves an effort to influence the precedential significance of the decision, assuming that all other justices remain steadfast; and the second ("*Craig* II") involves an effort to influence the collective outcome by encouraging another justice to change her vote.

First, Brennan might have assumed that the Court would remain fractured across the three tests as described above, and that Powell and his faction would join the Brennan faction in invalidating the sex-based classification. If so, Powell's IS test would have established a precedent of sorts under the narrowest-grounds rule. But Brennan might plausibly have feared that an increasingly conservative Court would embrace RBS in a future case, brushing the weak *Craig* precedent for IS aside. Brennan could then try to pretermit this most disfavored possibility by strengthening the *Craig* precedent, through joining Powell's position to forge a majority-opinion coalition invalidating the statute under intermediate scrutiny. This *Craig* I scenario illustrates Brennan's ability to forestall a highly disfavored outcome (a majority-backed precedent for RBS in a future case) by influencing the precedential significance of the Instant Case.

The *Craig* II scenario involves an effort by a strategic-minded justice to induce a colleague to change her articulated position, thus changing the collective outcome in a favorable direction. Such an opportunity may arise whenever the colleague's preference is multidimensional, meaning there are two or more variables that drive her ranking of rules. In such circumstances a justice sometimes can, by strategically repositioning himself, create or destroy multidimensional options and thus influence the colleague's selection from among the available options.

For example, suppose Justice Powell and his faction are concerned with both the substance and form of the collective decision in *Craig*. Powell favors IS, but he also favors construction of a majority-opinion coalition to secure the concomitant institutional benefits. Supose further that Powell's form-driven preference dominates, such that he prefers to forge a majority opinion even at the cost of abandoning IS. If Powell prefers RBS to SS, then he would be inclined to join the Rehnquist faction at RBS to secure the institutional values of a majority-opinion coalition. Brennan could rationally try to forestall this most disfavored possibility by embracing IS rather than SS. This strategic maneuver would induce Powell to stay with IS rather than shift to RBS, by enabling Powell to secure both his preferred substance (IS) and form (joining Brennan in a majority-opinion coaliton). This *Craig* II scenario illustrates Brennan's ability to avert a highly disfavored outcome (a majority-backed precedent for RBS in the Instant Case) by influencing a colleague's vote in this case.

In both scenarios illustrated through *Craig* I and II, Justice Brennan could rationally conclude that the project of best implementing the law according to his intrinsic and relational judgment criteria dictated a strategic choice to eschew his sincere position SS and enshrine his second-ranked rule IS now, thereby averting the present or future possibility of his third-ranked RBS. This archetypal scenario of unilateral strategic behavior can be modeled as follows, applying the "magnitude of perceived error" (MPE) concept developed earlier. According to Justice Brennan's intrinsic and relational judgment criteria, his ranking of the three rules proposed in



Craig is as follows: R1 = SS, R2 = IS, and R3 = RBS. When deciding whether to vote strategically, Brennan should consider both the likelihood of the Court ultimately settling on each option and the MPE represented by the two suboptimal rules, R2 and R3. With respect to the former variable, the more confident Brennan is that unless he forges a majority opinion coalition for IS in the Instant Case a majority will embrace RBS in a near future case (*Craig* I) or even the Instant Case (*Craig* II), the more willing he should be to vote strategically. With respect to the latter variable, the more he views R2 as a minor error and R3 as a major one, the more willing he should be to vote strategically and create a minor error in order to prevent a serious one.

Unilateral strategic maneuvering of these types is likely a common occurrence, even though it typically cannot be detected by others. Justices quite frequently change their views over the course of a decision. Of course, this sometimes reflects a change in sincere views. Sometimes this behavior is driven by the institutional benefits of a majority opinion coalition, but anecdotal evidence suggests that this is not the primary motivation. Most of the time, I think justices care about forging a majority coalition only if it settles on a rule they support — at least support enough. If asked whether they would prefer a majority-opinion coalition to coalesce even if they would be left in dissent or concurrence, I'd bet most often they would say no. If my surmise is correct, then much of the documented position jockeying and concession granting on the Supreme Court reflects strategic behavior designed to improve the content of legal rules.

2. Bilateral vote trading.

Justices will sometimes confront an opportunity to trade votes with one another; each of two justices votes for the other's sincere view on one issue in exchange for the other's support of his sincere view on another. Such an agreement can be either explicit or tacit.

a. Explicit vote trades. Consider the following "vote-trading exemplar" illustrating explicit vote trading across two separate cases. Suppose the Court's docket contains two separate cases, Case Search raising the question whether a particular search violates the Fourth Amendment, and Case Cruel raising the question whether a particular mode of execution violates the Eighth Amendment. The tentative conference vote in Case Search is 5-4 for the criminal defendant, with Justice Wapner in the majority and Justice Judy in the dissent. The tentative conference vote in Case Cruel is 5-4 for the state, with Justice Judy in the majority and Justice Wapner in the dissent. Suppose Wapner is close to indifferent about his apparent victory in Case Search, but is very troubled by his apparent loss in Case Cruel; conversely, suppose Judy is close to indifferent about her apparent victory in case Cruel, but is very troubled by her apparent loss in Case Search. Wapner and Judy then agree to trade votes across the two cases; Wapner switches to vote for the state in Case Search, and Judy switches to vote for the criminal defendant in Case Cruel. From the perspective of each justice, the trade has improved the overall state of the law; each views the trade as creating what he or she considers a minor error but corrects what he or she considers a more major error. Justice Wapner is willing to sacrifice his feasible victory in Case Cruel (the "sacrificed case") for a more meaningful victory in Case Search (the "acquired case"); for Justice Judy, the "sacrificed" and "acquired" cases are reversed.

It is very difficult to identify clear examples of explicit vote trading. My own sense, in accord with that of other scholars, is that explicit vote trading rarely — and perhaps never — takes place.

b. Tacit vote trades. On the other hand, my sense (again in accord with others) is that a form of implicit and informal vote trading is common. Sometimes, a justice — let's use the fictional Judge Wapner — quickly joins a draft opinion circulated by a colleague even through the doctrinal rule articulated does not reflect his sincere position. Wapner nevertheless joins quickly and without criticism, indeed perhaps with praise — because (a) he thinks the error is relatively minor, and (b) he wants to encourage the author to sign onto an opinion in a completely separate but more significant case that Wapner has recently circulated or will circulate soon.

Of course, such tacit back-scratching "agreements" are not formally enforceable. The social norms of cooperation and congeniality prevailing on the Court, however, might strongly encourage a practice of presumptive reciprocity. Thus, while explicit vote trading seems to be shunned in word and deed, a softer form of tacit trading may well be commonplace.

Normative constraints on strategic voting

Form-driven strategic voting appears relatively uncontroversial; content-driven strategic voting engenders much greater controversy. Explicit vote trading is frequently denounced, though generally without clear explanation. The more common but subtle forms of tacit vote trading and *Craig*-like unilateral maneuvering either are ignored or provoke lukewarm concerns. My strong sense is that there is considerable disagreement about the proper line between acceptable and unacceptable strategic behavior and the reason for drawing it.

Litigant-focused constraints

A. Sacrosanct disposition objections.

The primary function of even appellate adjudication is commonly said to be resolving a concrete legal dispute between two or more litigants, with the articulation of legal principles being incidental to that task. Even assuming as I do here that justices identify governing legal rules first and derive dispositions from them, one might believe that once the proper resolution of the dispute is identified, the

putatively victorious litigant becomes "entitled" to that resolution.

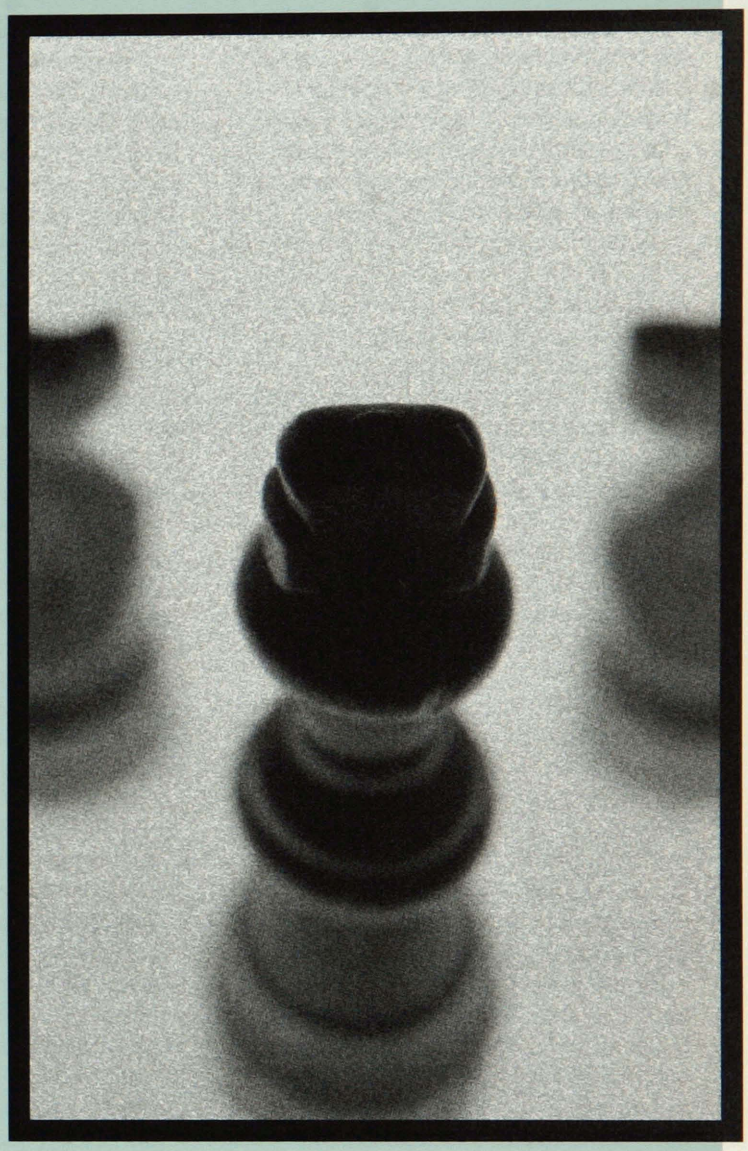
This view underlies what I call the sacrosanct disposition constraint on strategic behavior: a justice may vote strategically for a suboptimal rule only if her insincere vote leads to the same disposition as her sincere vote would have done. Legal rules are fair fodder for strategic play, but sincerely derived case dispositions are sacrosant.

Depending on whether one believes this sacrosanct disposition principle should be unyielding or merely presumptive, a sincere disposition might impose either a "hard" or a "soft" constraint on rule-focused strategizing.

Many people, were they a litigant in Case Search or Cruel, would be quite disturbed if they would have won had a justice voted sincerely, but lost because the justice voted strategically to improve the collective legal rule.

The strength of this underlying intuition, however, can be questioned on its own terms. To begin with, the intuition confronts an interesting temporal question. By hypothesis, strategically improving the legal rule today affects not only who wins the Instant Case but also who will win future cases, changing future winners (under the sincere rule) to future losers and *vice versa*. Why should the entitlement of today's would-be winner under sincere voting trump the entitlement of the future's would-be winner under the strategically secured improved rule?

Moreover, the intuition seemingly presumes that litigants care more about winning than about establishing favorable legal rules. This is not always so. Some litigants expect to be repeat players in similar future cases, and they may be willing to sacrifice a particular victory for a more favorable legal rule over the long run. Some litigants who do not expect repeat play may nevertheless care more about establishing favorable legal principles than about winning the discrete dispute, either because they are representing others in class litigation or because they care about the expressive content of the law.



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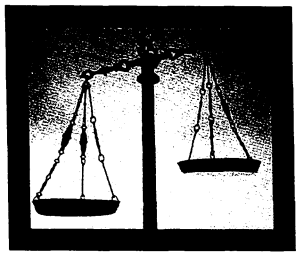


If persuasive on its own terms, the disposition constraint would preclude some other common adjudicatory practices besides vote trading. First, the constraint contravenes some well-accepted norms governing solo decisionmaking that lead justices to support locally suboptimal decisions. Even if Justice Solo's intrinsic judgment criteria incline her to prefer rule R1 leading to disposition D1, she might strategically endorse R2 and D2 either to embrace *stare decisis* and maintain consistency with, or, alternatively, to compensate for, a prior case that she views as wrongly decided. Or, she might decide the Instant Case suboptimally to establish the best long-term precedent for a series of cases. Taken seriously, the disposition constraint would appear to rule out each of these well-accepted adjudicatory practices.

Second, the disposition constraint also rests in tension with some more controversial norms governing solo decisionmaking. As earlier discussed, Alexander Bickel's "passive virtues" sometimes lead justices to deny favorable judgments to would-be winners; concerns about public resistance sometimes lead justices to deny immediate remediation to victorious litigants; concerns about congressional overruling might lead justices to shy away from sincere rules in a manner depriving a would-be winner of a favorable judgment.

Third, the disposition constraint would appear to rule out form-driven maneuvers in certain contexts. When a justice strategically forms a majority-disposition coalition to avoid a three-disposition impasse, by definition she votes for a disposition other than her sincere choice. With respect to strategic voting designed to forge a majority-opinion coalition, sometimes one or more justices might diverge from their sincere disposition in order to do so. The disposition constraint would rule out such form-driven maneuvers.

B. The litigant participation objection.

This objection starts with the premise that adjudication is primarily party-driven, in the sense that the judicial decision is designed to respond to the factual proofs and reasoned arguments advanced by adversarial parties. Concomitantly, the integrity of adjudication also entails a reasoned decisionmaker, one who will respond to and fairly evaluate the reasoned arguments of the parties.

Explicit or tacit vote trading partially undermines the meaningfulness of party participation in the Instant Case by introducing an influential element — the Other Case — that cannot readily be identified in advance. Parties cannot fairly be expected to anticipate, let alone brief, the entire set of other cases that might end up influencing the decision in the Instant Case through a vote trade; that set consists of every other case on the Court's docket.

As a result, decisions influenced by vote trading are arbitrary from the litigants' perspective in the sense that they cannot participate meaningfully, through reasoned argument, in the *critical* judicial determination — the trading justices' comparative evaluation of error magnitudes.

Whether this objection is powerful enough to explain the consensus antipathy toward vote trading, however, turns on the significance one attaches to meaningful party participation through the presentation of reasoned arguments. The more central one views this role on either instrumental or intrinsic grounds, the more troubling vote trading becomes. But the more one believes that party-driven adjudication, while perhaps a good idea, is not normatively essential, then the less troubling vote trading becomes. At the far extreme, if one views parties as helpful but non-crucial judicial assistants, then the justices' resort to decisionmaking means beyond the parties' ken is not that disturbing at all. Recall that even vote trading does not devalue or ignore litigant participation entirely; it just values some non-participatory aspects of reasoning as well.

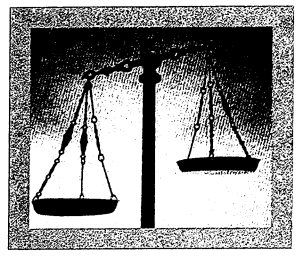
Reasoned justification constraints

This section explores a series of related objections as applied, at least initially, to bilateral trading. Each objection reflects a theme common to many jurisprudential paradigms: when justices declare what the law is en route to deciding cases, we expect them to base that declaration on reasoned argument of a certain form.

A. Adjudication as a justificatory practice.

Many respectable jurisprudential paradigms hold that adjudication is, first and foremost, a justificatory practice. According to this view, the legitimacy of courts' authority turns on the fact that adjudication is a form of justification or reason giving, in a way that other forms of decisionmaking are not. If a judge does not have a reasoned justification for a legal decision, she has no legitimate claim to the exercise of coercive authority over the litigants. As a result, we are rightly hostile to any adjudicatory practice that undermines the process and integrity of justification, even if that practice in some sense "improves" the doctrinal rules ultimately produced. Process, not result, is paramount.

With this process focus in mind, one might challenge explicit and tacit vote trading as depriving the two traded decisions of the type of reasoned justification necessary to judicial legitimacy. After all, there seems to be an element of arbitrariness to the decisionmaking in both involved cases. In the vote-trading exemplar, for example, Justices Wapner and Judy do not take each of Cases Search and Cruel into account when deciding the other one because the result in one case influences their sincere ranking of the available rules in the other. Rather, they take the other case into account only because of the happenstance that, given the particular lineup of all nine justices in both cases, there is an available trade that both believe improves the set of results. If Justice Wapner were asked why he voted the way



he did in Case Search, he could not provide a complete answer without mentioning the role played by Case Cruel. While this reference would partially "explain" his decision, on the surface it would hardly seem to "justify" it, at least in any sense familiar to the judicial enterprise.

But reliance on familiarity here is dangerous, precisely because multimember decisonmaking may enable novel but still legitimate notions of justification. Viewed in isolation, Wapner's decision in Case Search seems unprincipled; he has seemingly "sacrificed" this case for law improvement elsewhere. But why view Case Search in isolation? The mere possibility of bilateral vote trading essentially allows a justice to vote on two issues at once as a packaged deal, an option generally unavailable to judges sitting alone. Consider Justice Wapner's approach to the vote-trading exemplar. Wapner sincerely supports Rule S+ over Rule S- in Case Search and Rule C+ over Rule C- in Case Cruel, but if everyone votes sincerely the Court will endorse Rule S- in Case Search and Rule C- in Case Cruel. Wapner can trade across the two cases with Justice Judy, meaning he can control whether the Court produces rules S+ and C- (by voting sincerely) or rules S- and C+ (by trading). Put differently, Wapner can change the relevant "choice set" from a choice among single rules to a choice among rule combinations.

As illustrated earlier, Wapner can employ the "magnitude of perceived error" rubric to reason from his jurisprudential premises to the conclusion that he prefers package S- and C+ to package S+ and C-. His MPE assessment leads him to view collective outcome S- as a lesser error than collective outcome C-; he is therefore willing to endure the former to forestall the latter. He is not merely appraising the two combinations to see which he prefers in some troubling result-oriented sense. Rather, he is employing the very same process of reasoning that led him to prefer S+ over S- and C+ over C- in the first instance.

To be sure, the comparison of rule packages rather than individual rules is unfamilar. But why would this reasoning process, deemed legitimate when used to favor one rule over another, suddenly become illegitimate when used to prefer one rule package over another? It cannot be problematic just because Wapner finds neither package ideal. This complaint would have too far-reaching consequences, as judges frequently must choose between two or more imperfect options when the optimal option is not feasible to secure. And it cannot be problematic just because there is a sense in which, in evaluating the MPEs associated with S- and C-, Wapner might be comparing "apples and oranges" if the two issues draw upon very different underlying principles. First, it is unclear whether such an apples-and-oranges comparison should be troubling from a theoretical standpoint. But in any event, this complaint would also have too far-reaching consequences, as judges frequently must compare fundamentally different principles in ranking alternatives.

Let us return to the initial claim here, that concern for cabining illegitimate assertions of coercive judicial authority dictates hostility toward any adjudicatory practice that undermines the process and integrity of justification, even if that practice in some sense "improves" the doctrinal rule ultimately produced. It is true that vote trading is generally described in terms of improved results, not proper process. But a justice can provide the same type of justificatory explanation for a trade as for a single-issue ranking: the outcome chosen best satisfied his intrinsic and relational criteria taking relevant MPEs into account. The only difference is that the justice in a vote-trading scenario ranks combinations of rules rather than single rules. This distinction does not appear to make the ranking process any less an exercise in reasoned justification.

One might nonetheless argue that the different ways of conceiving the choice set matters with respect to adjudicatory norms relating to explanation rather than justification. The next two sections consider other norms arguably undermined by vote trading: candor and noncommodificaton of judgments.

B. The candor objection.

Explicit and tacit vote trading would appear to lead a justice to endorse openly a justification different from her true motivation — the MPE calculation. Thus decisionmaking through vote trading violates an oft-proclaimed norm of judicial candor.

This presumption of candor is frequently justified on the ground that it disciplines judicial reasoning. The act of reducing one's true thought processes to written form stimulates critical self-scrutiny, and the act of publication enables peers and the public to evaluate and hold individual justices accountable for their decisions. Vote trading partly avoids these disciplining and constraining effects of transparency, because the driving force behind a justice's decision to trade — his comparative MPE assessment of the two rules involved — is not revealed, let alone publicly explained and justified.

These justifications for candor carry some analytical and rhetorical force, though their tangible effects are highly speculative. This said, deciding just how much force to give to such an objection is difficult. If embraced as a rigid constraint, the obligation of transparency would call into question a number of adjudicatory practices besides vote trading. Some sophisticated behaviors, including many of Alexander Bickel's "passive virtues," involve judicial dissembling. Moreover, many uncontroversial form-driven strategic maneuvers designed to forge coalitions of various sizes entail the suppression of sincere views — indeed, that is the whole point of forming unanimous-opinion coalitions. Finally, content-driven strategic maneuvers such as the unilateral *Craig*

The question is not whether judges act in strategic or sophisticated ways, meaning whether they consider the consequences of their choices in light of the potential behavior of others. The question, rather, is what institutional commitments and conceptions shape and constrain judges' preferences and goals as they interact with colleagues to construct decisions of the Court.

exemplar, while generally thought less controversial than bilateral maneuvers, entail the same misleading acts.

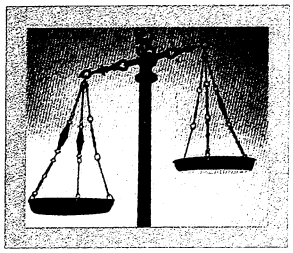
In the end, it is difficult to decide how much weight to give the candor objection to vote trading. In general, the candor constraint is more persuasive when viewed as a presumption than as an absolute. The question with vote trading, as with all of the other forms of judicial reasoning that involve dissembling to some degree or another, is whether the benefits in terms of furthering judicial goals is worth the cost. On this point, reasonable minds might reasonably disagree, and perhaps for many the answer will not turn on the particular type of strategic maneuver but rather the particular issue raised by or the context surrounding the Instant Case.

C. The commodification objection.

This objection posits that adjudicatory processes have expressive as well as functional significance, and argues that bilateral vote trading as a means of rule development undermines the ideal of adjudication as principled reasoning.

Vote trading can be described in crass transactional terms. A justice essentially uses the MPE assessment to ascribe a value to a given legal error, and then decides whether it is worth trading for an unrelated legal correction. Legal rules or judicial votes can be characterized as goods or services to be bartered within a judicial marketplace. Such commodification of rules or their production might alter or deform our shared cultural understanding of adjudication and its role in securing the rule of law, by superimposing on adjudication a preexisting set of cultural norms associated with market activity. Or so many might intuitively fear. Markets and adjudication, the intuition runs, do not mix.

In the abstract, these are serious claims. To my mind, however, the practice of vote trading as I've described it would not seriously threaten such profound alterations of social meaning. We are not talking here about a "literal" market, in which justices exchange a commodity for tangible currency.



In the vote-trading exemplar, justices trade votes based on their reasoned (though divergent) assessments of the rightness of two reasoned (though divergent) assessments of the rightness of two collective outputs. The "currency" of exchange is legal principle, not the traders' own or the litigants' preferences or desires. There is a sense in which two independent products, the rule in the sacrificed case and the rule in the acquired case, are appraised for their relative value. But justices appraise and compare the relative value of competing rules or justificatory positions all the time, without engendering a sense of problematic commodification.

Concededly, social meaning reformulation is not an on-off switch, and commodification can range on a continuum from complete to less-complete forms that "bear some indicia of commodification but are more attenuated," as Margaret Radin wrote in *Contested Commodities* (1996). Thus, even if one agrees that the vote-trading exemplar is a far cry from a prototypical market exchange, she might still be somewhat troubled by indicia of commodification still remaining. I think that analytical argument cannot wholly resolve the dispute.

Judicial lawmaking constraints

The final set of objections revolves around a common intuition: vote trading crosses a conceptual or even constitutional line dividing adjudication and legislation. At one time this intuition might have been captured by the claim that courts "declare" rather than "make" law, and that focus on law-making is an *ultra vires* judicial function. A more sophisticated and modern version would propose that, in a meaningful sense, courts do make law, but do so in a peculiarly judicial manner. Something about vote trading makes it seem as though justices are making law in an inappropriate manner, and therefore, the practice transgresses the proper boundaries of adjudication.

We generally associate vote trading with legislative activity. Some people find judicial vote trading intuitively illegitimate, I believe, because they mentally associate the practice with the more familiar phenomenon of legislative logrolling. Based on this connection, they wrongly assume that the rationale for judicial vote trading would mimic that for legislative vote trading, and they (*rightly*) find the preference-satisfaction rationale underlying legislative logrolling anathema to judicial reasoning. The first assumption is wrong because judicial vote trading can be supported by reference exclusively to legal concepts and principles, and without necessary resort to problematic objects such as preference satisfaction.

Some might object that vote trading feels legislative in nature because it seems to focus on forward-looking law improvement rather than backward-looking law interpretation. "Law improvement" sounds like a legislative task.

This way of characterizing the judicial lawmaking constraint is rhetorically powerful. However, it ignores the significant extent to which well-accepted interpretive practices already contain a forward-looking, improvement-oriented element. As explained earlier, relational judgment criteria require justices to look forward as well as backward, to select a rule that is optimal over a run of related cases even if it might be suboptimal for the Instant Case viewed in isolation. The consistency criterion, for example, requires justices to envision the future cases in which today's rule might apply and to fashion a rule today that traces the optimal trajectory.

A third objection adds the following premise: due to institutional distinctions between courts and legislatures, the goal of competency in lawmaking requires courts to employ a different lawmaking methodology than do legislatures. Legislatures are comparatively well designed to consider and study societal problems comprehensively, and to devise optimal forward-looking solutions thereto. In contrast, courts are not structured to be as proficient at seeing far into the future, or at perceiving and comprehensively considering all of the ramifications and interests affected by proposed doctrinal rules.

Given these observations, the argument continues, we have much more confidence in justices' ability to develop optimal forward-looking rules when the justices focus their attention on fashioning a direct response to the facts and context of the dispute before them, rather than when they engage in a self-conscious project of abstract law improvement.

While the premise of this objection — that courts should remain focused on contextualized decisionmaking — is both analytically and rhetorically powerful, the deduction that vote trading violates this norm demands greater scrutiny. First, each of the two cases involved in a vote trade satisfy the normal requirements for concreteness and adverseness. The trading justices (and the rest), therefore, start from a fact-bound, contextual setting and can reason outward when they construct their initial rankings of, and assess their magnitudes of perceived error for, the proposed rules in each case.

One might characterize the next reasoning step in the vote-trading process — the comparison of MPEs in the two cases — to be somewhat abstracted from the case contexts. When Justice Wapner considers whether the perceived sacrifice in Case Search is more than compensated by the perceived improvement in Case Cruel, he might ponder some seemingly abstract questions like the following: Is it more important for wrongful death sentences to be avoided than for wrongful privacy invasions to be allowed? This question (and others like it) is not tethered to a specific case. And yet, Justice Wapner would certainly be aware of how his answer to this question would ultimately affect his vote and therefore the disposition of these two concrete cases with identifiable parties. In other words, the case-specific consequences of his abstract reasoning would be readily perceptible, at both intellectual and visceral levels. This remains

a far cry from the sort of abstract legislative rulemaking against which the judicial practice is being measured.

Perhaps a slightly different concern animates the comparative competence objection. One might argue that the acceptance of vote trading as a legitimate practice will lead justices to shift the way they approach adjudication in all contexts, involving vote trading or not. The more justices start thinking about adjudication in terms of optimal rulemaking, a mental perspective facilitated by the constant search for potential gains from trade, the more they will become emboldened to make less case-tethered and context-disciplined decisions generally.

This feared transformation is certainly not fanciful; indeed, some might think justices are already prone to the disease of imagining themselves as unconstrained lawmakers and thinking about litigants as inconvenient obstacles. But neither is the transformation inevitable. Surely one can imagine that, even as justices self-consciously engage in vote trading, they also remind themselves of the importance of self-disciplined focus on case contexts, facts, and parties. The question becomes whether, as a prophylactic measure, a norm against vote trading should be articulated and internalized to forestall the risk of a concomitant shift in the justice's self-understood job description. In my view, the prophylactic seems unnecessary, but I recognize this is a subjective and speculative judgment.

Conclusion

As Justice Brennan has noted, "The Court is something of a paradox — it is at once the whole and its constituent parts. The very words 'the Court' mean simultaneously the entity and its members." Appreciation of this paradox is reflected in an exciting explosion of political science scholarship modeling judicial behavior, scholarship that both predicts and tests for various forms of strategic or sophisticated conduct, and also offers new conceptualizations of the relationship between individual judges and their multimember courts. In particular, there is growing recognition that judicial behavior is not shaped merely by ideological attitudes and conceptions of legal reasoning, but also by formal institutional structures and informal role commitments. The question is not whether judges act in strategic or sophisticated ways, meaning whether they consider the consequences of their choices in light of the potential behavior of others. The question, rather, is what institutional commitments and conceptions shape and constrain judges' preferences and goals as they interact with colleagues to construct decisions of the Court.

In particular, as noted in *Supreme Court Decision-Making* (Howard Gillman and Cornell W. Clayton, eds., 1999), "[B]argaining among the justices is not merely a function of preferences plus an awareness of interactive effects; it is also an activity that is constituted by an evolving set of normative institutional perspectives. Because of these sorts of institutional effects the justices internalize an understanding of whether such behavior is to be considered professional, as well as an understanding of what forms of bargaining are acceptable. . . ."

One apparent "rule of the game" of collegial judging is that, while certain forms of output-focused strategic behavior are accepted (even encouraged) and others are quietly tolerated, explicit vote trading is disallowed. In theory, this observable but unwritten code of conduct might reflect a widespread judgment that, in the long term, vote trading is a counterproductive strategy for goal-oriented judges on collegial courts. My strong sense, however, is that judges (and scholars) believe vote trading is wrong, not just unwise. But why?

My conclusion here is that the answer is more complicated than initial intuitions might suggest. While vote trading and other strategic maneuvers can plausibly be viewed as furthering legitimate judicial objectives, I have sketched a number of objections suggesting that vote trading nevertheless constitutes improper judicial behavior. But different objections rest on very distinct foundational assumptions about the nature and purpose of collegial adjudication. Moreover, some (though not all) objections logically entail that certain accepted strategic practices should be equally disapproved as well. Finally, some objections apply to vote trading or other maneuvers only in some contexts but not others, nuances not reflected in current practice. My hope is that this inquiry will stimulate deeper reflection about the "paradox" of collegial adjudication, and perhaps assist judges in developing a more refined understanding of the norms of their profession.

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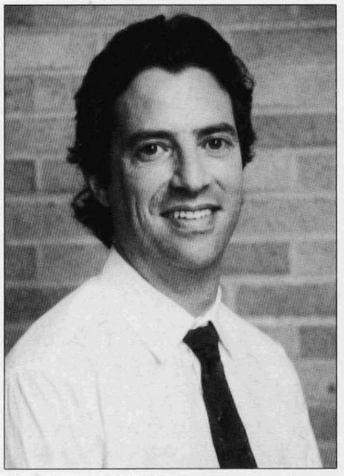
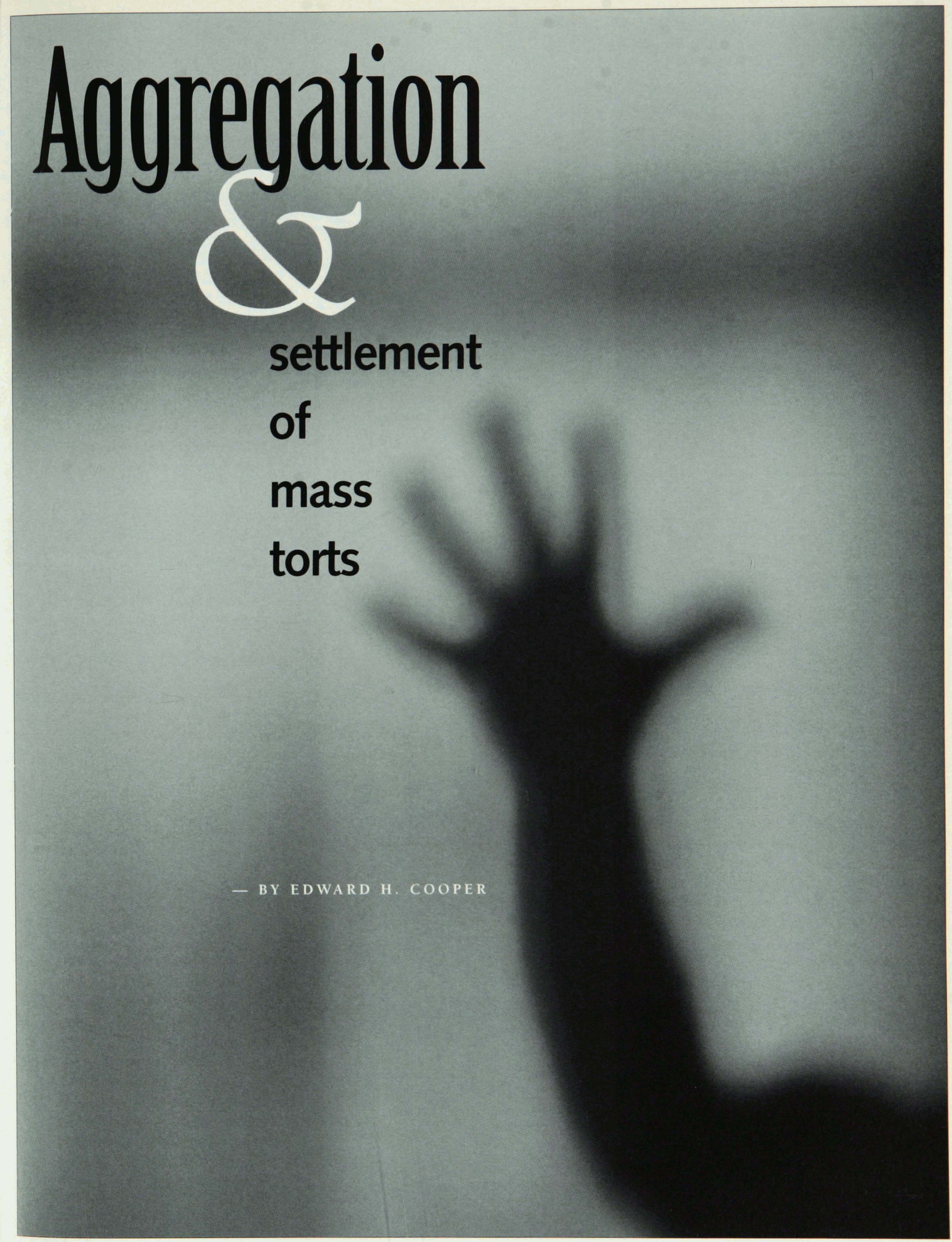


Aggregation & settlement of mass torts



— BY EDWARD H. COOPER

The following essay is the pre-editing draft of the introduction to a paper delivered at a Mass Torts conference held at the University of Pennsylvania Law School in November 1999. The conference grew out of the work of the ad hoc *Mass Torts Working Group that on February 15, 1999, delivered a Report to the Chief Justice of the United States and the Judicial Conference of the United States. The Working Group, chaired by Third Circuit Judge Anthony J. Scirica, '65, included members drawn from several Judicial Conference committees, including the Advisory Committee on the Federal Rules of Civil Procedure, and from the Judicial Panel on Multidistrict Litigation. The Working Group held four public meetings that in all were attended by 81 lawyers, judges, and academics. The models that are discussed in the body of the paper were prepared to stimulate discussion at these meetings and were set out in the Report appendices.*

Little need be said about the models themselves. They do not purport to resolve the dilemmas sketched in the introduction. To the contrary, they are designed to underscore the intransigence of the problems that arise from efforts to resolve substantial personal injury or extensive property damage by a substantially common course of conduct. Asbestos and silicone gel breast implants provide the most familiar models, but there have been many others and are likely to be many more.

The full article appears at 148 University of Pennsylvania Law Review *(June 2000) as "Aggregation and Settlement of Mass Torts." The following excerpt appears here with the permission of the* University of Pennsylvania Law Review. *Complete copies of the article are available from* Law Quadrangle Notes, *the author, via Lexis or Westlaw, or from the* University of Pennsylvania Law Review *by writing: Deborah Showell, Office Manager,* University of Pennsylvania Law Review, *3400 Chestnut Street, Philadelphia, Pennsylvania 19104.*

It is the way of symposia that conveners assign topics that participants use as an excuse to explore topics that interest the participants. I understand my assignment to be discussion of "non-bankruptcy closure" and "settlement." The work of the Judicial Conference Working Group on Mass Torts suggests approaches that might be taken to facilitate closure of mass tort claims by litigation or by settlement. Much of this paper will explore two models prepared to illustrate the challenges that confront any approach to these goals. The first model is the "All Encompassing Model," while the second is a draft of settlement-class provisions for Federal Rule of Civil Procedure 23. Before exploring the models, however, they provide an excuse for considering many of the reasons for doubt provoked by reflecting on the Working Group's experience. These are equal-opportunity doubts. There are powerful reasons to doubt the virtues of individual litigation of individual claims that arise out of a mass tort. These reasons support exploration of mass aggregation and mass settlement. At the same time, there are powerful reasons to doubt the virtues of mass aggregation and mass settlement. These reasons support the argument for making only modest changes or none at all.

In the end, there will be no firm conclusion. Indeed, not even the doubts will be expressed in firm or fully developed terms. The issues go to the core of adversary civil litigation. They go also to the core of tort doctrine for nonintentional wrongs, the multifarious character of state tort law as applied to conduct and injuries that span the nation, the role of federal courts in choosing and applying state law, the practices of representation that have substituted for individualized litigation, and more. Our received traditions in all of these areas are treasured, and properly so, but none of them fares well when subjected to the test of mass-tort litigation. Only drastic remedies will bring much change. Even those who are prepared to accept drastic changes that hold strong promise of great benefit may draw back from predicting the benefits that would justify the costs. We may be better advised to pursue small changes, anticipating only small benefits. All that is offered here is support for the argument that the changes that might achieve true coherence are indeed drastic. In some measure, these doubts carry over even to the modest goal of facilitating the hope for global peace through settlement by revising Civil Rule 23 to address the problems that thwarted two brave attempts to establish massive asbestos settlements.

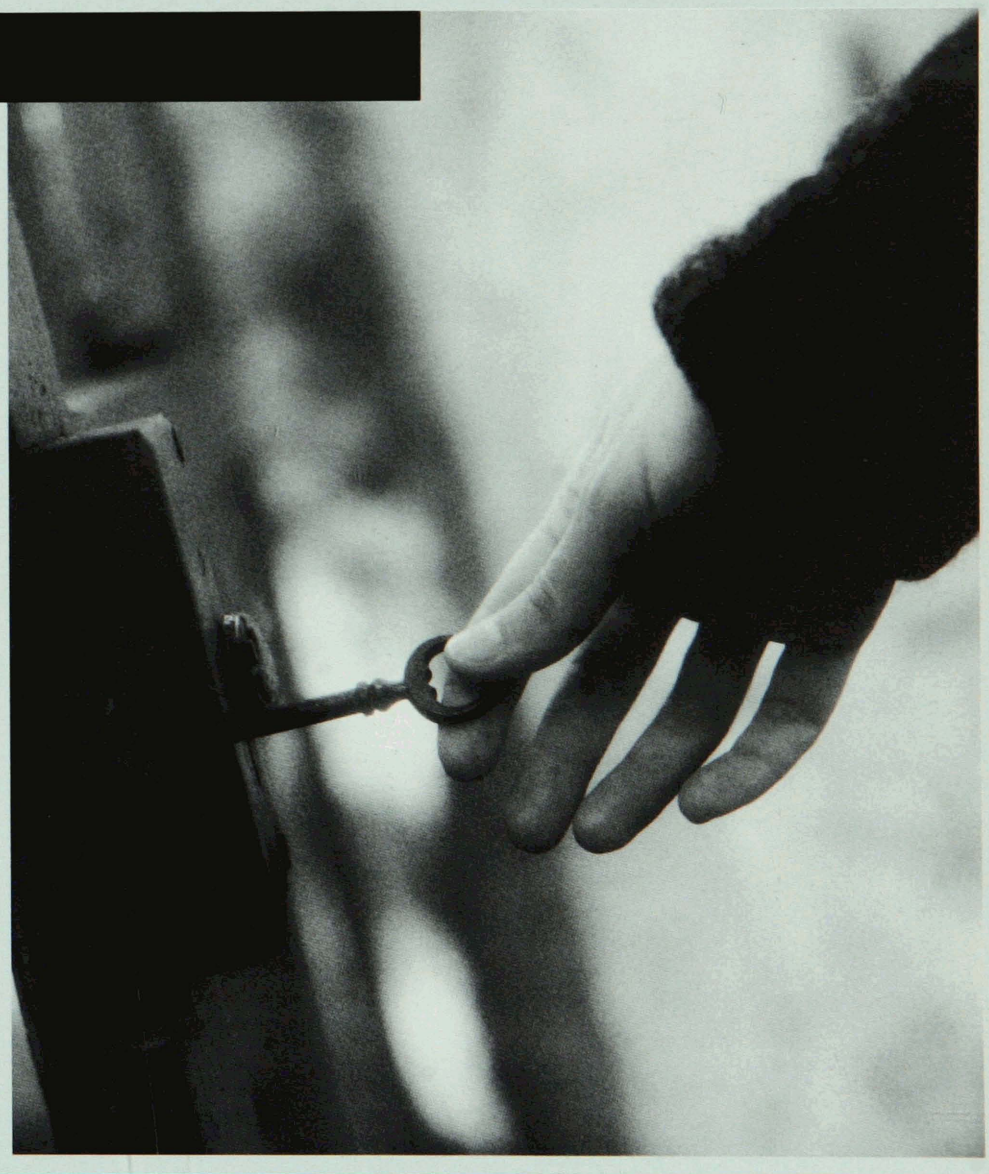
There is a particular reason for setting a high threshold of justification for changes by statute or court rule. Both with and without resort to Civil Rule 23, state and federal courts — prodded by lawyers for plaintiffs and defendants — have proved remarkably inventive in addressing the demands of mass torts. Stratagems accepted as routine today would have been dismissed as unthinkable a scant decade ago. Although there are foundations in court rules and statutes, the process has been very much a common-law process. Often it is observed that each new mass tort presents different problems, requiring different procedural solutions, than any of its predecessors. If that is so, it may be better to leave the judges on the firing lines free to adapt to the new challenges without interference from statutes and rules framed for the last war by the generals in Congress and the tacticians in the rulesmaking committees. There is a risk that lower courts, confronted with overwhelming burdens, may act from expediency rather than principle. But there is a hope that new principles will emerge from their inventive adaptations.

One last prefatory caution is in order. In talking about mass torts, it may seem desirable to offer a definition of the subject. One of the two words, "tort," is easy. The discussion does not involve everything within a broad concept of tort law. We are talking about injuries at the center of traditional tort doctrine: personal injury, and substantial injury to physical property, real or personal. The wrongs defined by modern regulatory legislation — antitrust, securities, and the like — seem different. And even with personal injury, we are seldom dealing with wrongs that are intentional in any but a very refined sense. The second word, "mass," is not so easy. It

would be possible to pick a numerical threshold, and that may be desirable for reform legislation. The number is likely to be rather high. Two hundred fifty actions arising from common facts, or one thousand, may be handled by the collective resources of state and federal courts without significant disruption. The choice of a number, however, must be affected by something more than the impact on the judicial system. It also must take account of the impact on the tort claims. The more drastic the consequences that flow from a mass-tort characterization, the greater the care needed in framing the definition. The broad model described below would have drastic consequences indeed, affecting choice of forum, choice of law, aggregated disposition, and more. Large numbers should be required for this sort of approach. Even for aggregated settlement, many models entail similar consequences in gentler guise. Again, care is warranted.

WE ASK A GREAT DEAL OF TORT THEORY AND JUDICIAL INSTITUTIONS IN TORT LITIGATION. ONE TEST OF AGGREGATING DEVICES IS TO ASK WHETHER, IF WE HAD JUDICIAL RESOURCES FOR THE TASK, IT WOULD BE BETTER TO ENABLE EVERY PLAINTIFF WHO WISHES TO SUE ALONE TO DO SO, AND — IN THE TRADITIONAL MODEL — TO SUE AS MANY TIMES AS THERE ARE DEFENDANTS TO SUE. MANY ARGUMENTS ARE MADE IN FAVOR OF THIS RESULT. THE FORCE OF THESE ARGUMENTS IS AUGMENTED BY THE WEIGHT OF TRADITION. BRIEF REMINDERS OF THE TRADITION SUFFICE TO SET THE SCENE.

I. The Doubts



A. Individual Adjudication of Tort Claims

We ask a great deal of tort theory and judicial institutions in tort litigation. One test of aggregating devices is to ask whether, if we had judicial resources for the task, it would be better to enable every plaintiff who wishes to sue alone to do so, and — in the traditional model — to sue as many times as there are defendants to sue. Many arguments are made in favor of this result. The force of these arguments is augmented by the weight of tradition. Brief reminders of the tradition suffice to set the scene.

Traditionally, the plaintiff begins by choosing a court. The rules of subject-matter jurisdiction, coupled with the reality that most of the central defendants in mass torts are corporations, often give a choice between state and federal courts. Adept framing of the litigation can lock the case into state court. As between state courts, contemporary views of personal jurisdiction and venue often give a substantial range of choice as well. This choice can be exercised to tactical advantage by considering such matters as local aggregation practices (including settlement), jury proclivities and the degree of judicial control, choice-of-law rules, docket congestion, and attorney

QUITE A DIFFERENT CHALLENGE TO THE INDIVIDUAL REPRESENTATION MODEL ASKS WHETHER THERE IS ANY REALITY TO THE IMAGE OF INDIVIDUAL REPRESENTATION. THERE ARE, TO BE SURE, SOME ATTORNEYS AND FIRMS WHO LIMIT THEIR INVOLVEMENT IN MASS TORT LITIGATION TO REPRESENTATION OF A SMALL NUMBER OF CLIENTS, TREATING EACH CASE IN MUCH THE SAME WAY AS THE SAME NUMBER OF UNRELATED CASES WOULD BE TREATED.

convenience. Often, putting aside constraining class-action practices, the individual plaintiff chooses as well when to bring suit, whom to associate as co-plaintiffs, and whom to make defendants. Individual plaintiffs also can make choices whether to push for prompt disposition and early relief, whether to emphasize liability or damages, how to pursue discovery, and — often above all — what terms to accept in settlement.

Apart from the effect of these many and elusive choices on outcome, we celebrate the "process values" that go with individual control. The sense of participation and control are believed to affect the level of satisfaction or dissatisfaction with litigation, and the acceptability of the process. We tend to focus on plaintiffs in praising these values, perhaps in part because we — some of us, at any rate — do not care as much about the process-value experience of corporate defendants, and perhaps in part because we believe that defendants who face many adversaries can achieve a substantial measure of participation and control in aggregated litigation in ways that individual plaintiffs do not.

Frank discussion of the charms of individual litigation adds values that represent escape from the cold rationality of legal rules. As to most issues in mass torts, the burden of persuasion is stated as a preponderance of the evidence. The preponderance of the evidence, however, is an extraordinarily fluid concept that is shaped by many subtle factors. The context of specific parties and injuries may have a powerful impact on the willingness of either judge or jury to accept a given level of uncertainty. This flexible response to fact uncertainty joins with equally flexible response to legal uncertainty. Fault, contributory fault, causation, as well as the fancier frills that may decorate tort theory, all bend to individual factors. Such adaptability seems to some to speak ill of the institutions that administer our law, but to many it represents a triumph of justice over law.

This summary recital of the advantages of individual litigation would read to many observers as a recital of disadvantages. To take one narrow illustration, defendants bewail the opportunities plaintiffs often enjoy to select a court, just as plaintiffs decry the occasional opportunities that

defendants seize to defeat a plaintiff's initial choice. When dealing with individualized events that involve no more than a few people, nonetheless, these protests have not led to any general change or prospect of change.

Dissatisfaction with individual adversary litigation of tort claims takes on a new tone when addressed to mass torts. With essentially unique events, we have few ways to measure the correctness of the judgment. It is relatively easy to take it on faith that most judgments are wise. Mass torts, however, support frequent repetition of the litigation experiment. Frequent repetition invites inconsistent results, both on the merits and in measuring damages. The inconsistencies, moreover, are confused by the efforts of both plaintiffs and defendants to manipulate the results by jockeying to bring to trial the cases that seem most favorable as measured by fact, sympathy, law, and tribunal. The inconsistency and manipulability of results leads to regular debates about "maturity." It is regularly suggested that a mass tort becomes mature only through a substantial number of individual trials. When the results begin to converge, maturity is reached and values are established. Until then, the fear is that a single adjudication cannot reliably resolve all claims. The value of repose justifies acceptance of the first fair trial of an individual claim, but not of many claims.

Quite a different challenge to the individual representation model asks whether there is any reality to the image of individual representation. There are, to be sure, some attorneys and firms who limit their involvement in mass tort litigation to representation of a small number of clients, treating each case in much the same way as the same number of unrelated cases would be treated. Many plaintiffs, however, come to be represented by a small number of specialized firms that represent enormous "inventories" of clients. This broad-scale common representation is seen as another form of aggregation, and a form that operates free of the procedural safeguards that surround formal aggregation. In this view, aggregation is a fact and individualized representation for individualized litigation is largely a myth. The only meaningful questions go to the forms of aggregation.

These doubts about the institutional and procedural capacities of courts commingle with doubts about our abstract tort theories. In part the doubt is whether our institutions and procedure are able to administer our abstract tort theories, either in individualized torts or in mass torts. The administration problems in mass torts, however, also raise substantive questions about the theories themselves.

One of the institutional doubts peculiar to mass torts is the frequently expressed fear that "premature" aggregation will create a mass tort where more sober procedures would show there is none. One version of this fear is that a few plaintiff victories in unusually sympathetic cases brought in particularly favorable forums will stampede many claimants into premature filings, intimidate courts into aggregation, and force capitulation. A more sensible process of repeated trials of typical cases might reveal that there is no mass of victims.

Mass torts do not seem to have much effect on the substantive doubts about the tort theories that define liability-creating conduct. Negligence, product-liability, environment contamination, and like theories are challenged and defended on essentially the same grounds. New point is given, however, to the rules that focus on victims. The point often is made in addressing the "predominance" requirement for certifying a class under Civil Rule 23(b)(3). Questions of causation, plaintiff fault, and damages are treated as unique to each plaintiff, and to predominate over common issues of the defendant's responsibility. But we are driven to ask whether these distinctions really should be made, at least when common injuries are inflicted on thousands, tens of thousands, or even greater numbers of victims. Why, for example, should the "make whole" view of tort law award more money to the victim who had enjoyed the fortune of making more money, and thus has suffered the misfortune of losing a greater stream of future income? How can we possibly presume to distinguish the value of the anguish, pain, suffering, and like intangible injuries of victims who have suffered the same physical impairment? Why should we care that, statistically, smokers are more likely to be injured by asbestos exposure than nonsmokers: if we cannot trace the causal connection with respect to a particular plaintiff, why take account of the statistical probability — unless it is to support a contribution claim on an aggregated basis by asbestos defendants against tobacco manufacturers? As measured by these traditional notions, it is indeed "weird" that a settlement of blood-solids litigation should award $100,000 to each victim without accounting for any of these distinctions; a less tradition-bound view might see the result as profoundly wise.

Substantive doubts about tort doctrine bear on aggregation in another way. Different state-law systems threaten to destroy the commonality that supports aggregation, whether by class action or other device. If we become impatient with these obstacles, it is easier to subordinate state-law differences to achieve the advantages of aggregation.

B. Aggregation

Aggregation has many advantages. It offers promise of "a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a 'mass tort.'" At least after "maturity" has been achieved, there is a single determination for all parties. The single determination avoids the inconsistencies that arise from separate adjudications, achieving the uniformity — like treatment of like claims — that eludes us, at times as to liability and inevitably as to remedies, when we cling to individual litigation. A once-for-all-who-remain adjudication can command litigating resources and judicial attention in a way that may enhance the prospect of fair disposition. Even if the result is no more fair — if, indeed, even uniformity generates as much unfairness as fairness — it may reduce drastically the costs that attend individual litigation.

The costs of aggregation vary with the form. Voluntary small-scale consolidation by permissive joinder or similar devices presents few problems. Aggregation by inventory was noted earlier. Aggregation by consolidation of actual cases actually filed may seem the next more coercive step. The effect of consolidation, however, is little different from class certification if any substantial number of actions is involved.

Opt-in class aggregation offers an alternative that has found little support.

The possible advantages are not inconsiderable. An opt-out class imposes a burden on the unwilling; the burden includes responsibility to read, understand in a sophisticated way, and respond to the opportunity to request exclusion. The level of informed consent represented by a failure to opt out is likely to be as high in body-injury mass torts as anywhere, but still leaves much to be desired. But "high" may not always be high enough. A claimant who has an attorney may not be given sound advice about the opt-out decision, and many claimants — particularly those who have only "future" claims — may not have attorneys at all. An opt-in class, on the other hand, involves only those whose consent is as real as the consent that personal injury victims give to much of anything in the course of litigating their claims. The class can be certified on terms that avoid many of the problems of an opt-out class, including specification of a choice of law, methods for compensating both class counsel and counsel for those who opt in, methods for resolving individual issues, and so on. An opt-in settlement class might have particularly attractive advantages. The class would in effect involve an offer to settle extended to all victims after negotiation by representatives whose negotiation is likely to be respected. The central objection to this procedure seems to be that it would not work. Too few claimants would choose to opt into a litigation class, and too few would choose to accept the offer of settlement by intervening. The pragmatic view is that a settlement offer would be viewed as a new floor, assuredly available to anyone who fails to opt in but supporting more favorable terms for most. Even a litigation class would have the same effect — no one would opt in, expecting that any class victory would establish a similar floor for later settlements.

Broader and more coercive forms of aggregation entrench the disadvantages that must be set against the potential advantages. Most apparent are the loss of individual control and the risk that the efficiently achieved and uniform result will be wrong. Defendants frequently complain that there is no chance of winning on the merits — even a defendant willing to risk the full damages liability that would follow a fair adjudication of liability settles for fear that the sheer mass of self-identified victims will overwhelm reason and force a finding of liability. The rewards of successful broad aggregation, moreover, encourage a race to aggregate first, or at least to bring the first aggregated action to judgment.

Class-action aggregation emphasizes the problem of conflicting interests among plaintiffs. The problem exists in any aggregation, but is highlighted by Rule 23 requirements. A searching inquiry into potential conflicts could easily lead to so many subclasses as to defeat any hope of global settlement or a single trial. Conflicts will exist based on differences in extent and character of injuries, optimal choice of law, comparative responsibility, causation, and other easily identifiable positions. Individual victims, given free choice, likely would differ as well with respect to more elusive choices of litigation tactics, most particularly including settlement. Workable control over a thoroughly consolidated proceeding is likely to be achieved only by resolutely ignoring many of these conflicts. This result can be achieved by pretending that the conflicts do not exist, by asserting the advantages of efficiency and discounting the importance of the conflicts, or by forthrightly concluding that many distinctions drawn by traditional tort rules for individualized litigation do not justify recognition of an "interest" that defeats aggregation. With a choice-of-law question, for example, it can be asserted that all relevant laws are essentially the same; that the differences are too trivial to upset efficient disposition; or that the differences do not justly warrant different treatment — that like treatment should be accorded victims from all states.

A very special problem of conflicting interests arises from the desire to defer aggregation to the point at which a mass tort has matured through the pretrial, trial, and settlement of an informative number of individual actions. The lawyers best equipped to manage the later aggregated litigation are those who brought the dispute to maturity. They are the ones we want. But the anticipation of aggregation may make it difficult to handle the individual actions without regard to, and distortion by, the future proceedings. The steps taken to settle individual-client asbestos claims in preparation for settlement of a broad class claim provide a familiar example.

Repeated aggregation of different mass torts creates risks of a different sort. Depending in part on the means of aggregation, mass torts may come to be dominated by a small number of specialized and well-financed lawyers, litigating before a small number of specialized judges. The results may be similar to the problem of "regulatory capture." All participants know what to expect, and they expect to repeat the strategies that have brought resolution in the past. Tactics may be shaped by the expectation that all players will meet again in future and different mass tort actions. Settlements in particular may reflect received traditions and the expectation of future negotiations.

Effective aggregation, finally, presents severe challenges to received notions of federalism. The challenges are illustrated by the features of the proposed "broad aggregation" model. Most courts are excluded from the action. Choice-of-law traditions are ignored. Common appeal control is asserted even when the aggregation court invokes the assistance of other courts. These challenges will seem daunting to some, but trivial to others.

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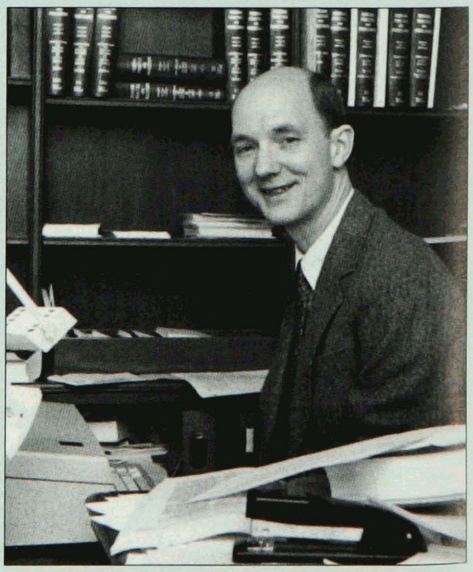

— BY ROBERT L. HOWSE

This essay is excerpted from "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization," a report issued this year by Rights & Democracy, International Center for Human Rights and Democratic Development, in Montreal. A preliminary version was presented at a Rights and Democracy workshop in Seattle last fall. The full report is the product of co-authors Robert Howse, a professor at the Law School, and Makau Mutua, a professor and director of the Human Rights Center at the State University of New York at Buffalo School of Law. Complete copies of the report are available from Law Quadrangle Notes.

Making a home for human rights at the

Institutionally, the GATT developed in isolation, a fact that produced a single-minded free trade perspective. But the actual text of the GATT reflects the recognition of supervening non-trade public values, which were meant to prevail in the event of conflict with the free trade rules in the GATT. GATT Article XX provides that nothing in the GATT "shall be construed to prevent the adoption or enforcement by any contracting party of measures," *inter alia*, "necessary to protect public morals," "necessary to protect human, animal or plant life or health," "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption," "essential to the acquisition of or distribution of products in general or local short supply," and "relating to the products of prison labor."

It is important to note that international human rights was in its infancy when the provisions of GATT Article XX were negotiated. But the GATT drafters certainly included a very broad range of human interests recognized widely at the time as being fundamental or related to very basic human values. Unfortunately, the institutional isolation of the GATT has had a negative impact on the interpretation of Article XX in dispute settlement in the Thai Cigarette and Tuna Dolphin cases, certainly the most important opinions prior to the creation of the WTO. The panels in those cases construed Article XX so restrictively as to almost read it out of the GATT, or to marginalize it. Alarmingly, the notion developed that measures might only be justified under Article XX if no less trade restrictive alternative could be imagined to achieve the policy objectives in question. Since neo-classical economists can almost always find some policy instrument other than trade restriction that could hypothetically, and without regard to real world costs, achieve a given policy objective, this interpretation amounted to making Article XX largely superfluous. In the original design, however, Article XX was designed to be a fundamental building block of the international trade regime.

WTO

The creation of the WTO gives the world a new opportunity to put Article XX in its rightful place in the GATT. Doing so must involve the re-interpretation of Article XX in light of the norms of international human rights law.

The creation of the WTO gives the world a new opportunity to put Article XX in its rightful place in the GATT. Doing so must involve the re-interpretation of Article XX in light of the norms of international human rights law. Contrary to the GATT tradition of isolation and self-containment, it is not a well-established fact in the WTO that its rules and institutions function in the context of the evolving broader framework of international law. Thus, the construction of WTO jurisprudence by its dispute settlement organs must not contradict rules of interpretation set forth in the Vienna Convention on the Law of Treaties. This must include "any rules of international law" relevant to the dispute.

The clearest illustration of this approach to WTO legal interpretation is found in the Turtles case. In that case, the Appellate Body of the WTO examined the meaning of the expression "exhaustible natural resources" in an environmental trade dispute. The Appellate Body adopted an interpretation that included endangered species within the meaning of the expression, which is found in a provision of the GATT that allows members to take trade action otherwise not consistent with GATT obligations where the measures are taken in relation to the conservation of such resources. The Appellate Body referred to the international environmental law as it had evolved since the negotiation of the original GATT text. It concluded that international environmental law had to be used as an appropriate benchmark for the meaning of exhaustible natural resources.

The preamble of the WTO Agreement states a number of objectives of the WTO system that may relate to certain human rights obligations, especially labor rights and elements of social and economic rights. Article XX (a) of the original GATT allows members to take otherwise GATT-inconsistent measures necessary for the protection of "public morals." It can be argued that where trade restrictions may be a necessary mechanism for dealing with gross human rights abuses, there is a possibility of invoking the public moral exception. However, this provision has never been interpreted in dispute

settlement. It is an open question how strictly such measures would have to be justified, given the use of the term "necessary" in the provision. Moreover, concerns persist that such restrictions could be subject to abuse for protectionist purposes.

In the past, the GATT traditionally gave the term "necessary" in other provisions of Article XX a very restrictive reading. However, because of the new approach under the WTO Appellate Body, the meaning of the necessity test would have to be considered in light of relevant rules of international law, including international agreements on human rights. It would also take into account whether that situation was considered as pressing under international human rights law or recognized as such by international human rights institutions. Article XX (b) of the GATT also allows for trade measures that would otherwise be GATT-inconsistent where necessary for the protection of, among other things, human life, or health.

The preamble and human rights in WTO law

The Appellate Body of the WTO has emphasized on several occasions that Article 31 of the Vienna Convention on the Law of Treaties, which states the basic rules of treaty interpretation, is a fundamental reference point for WTO dispute settlement. It provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." An important "context" for treaty interpretation here is the text of the treaty itself, "including its preamble and annexes." The preamble is therefore an important source of "context" in the interpretation of any provision of a treaty text. It is as important as any other provision of the treaty for the purposes of resolving a dispute. The preamble to the Agreement of the WTO, however, has a special status. The Marrakesh Agreement is the framework agreement for the entire WTO system, and the preamble is the most comprehensive statement of the objectives or goals of that system. Thus, it is probative not only with respect to context, but also purpose and object within the meaning of Article 31 of the Vienna Convention.

This explains the heavy reliance by the Appellate Body on the preamble of the Marrakesh Agreement in the Turtles case. In that case, the United States sought to justify trade measures on environmental grounds, in particular the need to protect sea turtles, which it characterized as an endangered species. The Appellate Body held that Article XX of the GATT had to be read in light of the preamble to the Marrakesh Agreement, and especially the commitment to sustainable development as an objective of the multilateral trading system. The phrase "exhaustible natural resources" in Article XX (g) of the GATT, the body said, must be interpreted in light of evolving norms and rules of international environmental law.

Exclusion and transparency within the WTO

Most domestic legal systems, and an increasing number of supranational adjudicative bodies, allow public scrutiny of judicial proceedings. Regrettably, written and oral pleadings in the WTO remain secret unless states party to the dispute consent to openness. This secrecy keeps NGOs, including those dealing with human rights issues, from participating in the dispute settlement process. Such secrecy is notably inconsistent with the norms of transparency required by the WTO itself in domestic legal trade-related proceedings.

It is an encouraging sign, however, that the Appellate Body in the Turtles case recently interpreted WTO law as permitting the submission of *amicus* or intervener briefs in WTO cases. Although there is no explicit provision to that effect, such briefs are not permitted at both the panel and appellate levels of dispute settlement. The WTO legal affairs and Appellate Body secretariats must therefore develop working procedures for the submission of briefs in a timely and effective manner. Pressure will be necessary because neither of these bodies appears eager to make outside interventions a routine practice.

Several issues must be addressed in order to open up the WTO process. A filing system that informs interveners that their briefs will be seen in a timely fashion by panels and the Appellate Body must be instituted. The imbalance of resources must not be allowed to affect the quality and effectiveness of intervener advocacy on behalf of developing countries at the WTO. Consistent with the expansion of legal assistance to governments of developing countries, NGOs from those states must have access to legal assistance for the preparation of their own *amicus* briefs. Organizations with human rights mandates, such as the ILO, the UN Commission on Human Rights, and the World Health Organization must become aware of and gain the competency necessary to take advantage of *amicus* intervention in WTO proceedings with human rights implications.

Amicus submissions, like all pleadings, must be accessible and part of the public record. The entire record, including the briefs, should be posted on the WTO Web site. Finally, the panels and the Appellate Body should be required to evaluate *amicus* briefs for consideration. The usual practice in domestic and international tribunals is to consider such briefs on the basis of leave, or discretion, of the tribunal. But a

WTO panel has a legal duty to make an objective assessment of the facts. This should be understood to mean that the evaluation of briefs for consideration must be based on objective criteria. Such evaluation must consider the relevance of the brief to the dispute and must not be biased or one-sided.

Labor rights

The GATT itself does not create a general right of free access for imports. A member's basic obligation, subject to additional rules in the codes on food safety and on technical barriers, is to provide treatment as favorable to imports as that provided to domestic products. It seems fair to assume that a country that has banned slave labor in domestic production, for instance, could equally ban imports of products from facilities that use slave labor. This would amount to equal treatment of both domestic and imported products, with reference to the requirement that slave labor not be used. Requiring a country to accept imported products produced with slave labor, regardless of the treatment of like domestic products in its law, would in fact amount to demanding more favorable treatment to imports. GATT law does not mandate such a requirement and it is hard to imagine that many countries would agree to it.

In the Tuna/Dolphin cases, which dealt with trade and the environment, two unadopted GATT dispute settlement rulings suggested that equal treatment within the meaning of the National Treatment obligation of the GATT related only to measures based on the physical characteristics of a product. Therefore, regardless of whether domestic products are treated similarly, there would be a per se violation of the GATT provision on import restrictions and prohibitions in the case of measures that distinguished products in their manner of production. This ruling has very questionable legal foundations in the GATT text.

An important "context" for treaty interpretation here is the text of the treaty itself, "including its preamble and annexes." The preamble is therefore an important source of "context" in the interpretation of any provision of a treaty text.

Furthermore, it is also inconsistent with previous rulings adopted by the WTO membership. In particular, it departs from a case in which the National Treatment concept was applied to a scheme in which the products were distinguished based on whether their production entailed the violation of intellectual property rights.

WTO institutions, transparency, and the rule of law

Trade liberalization, even in its narrow conception as a strategy for economic growth and prosperity, depends on the rule of law and transparently impartial and reasonable administrative and judicial procedures in which public officials are accountable. The trade policies of a corrupt, opaque, and arbitrary government that supports lawlessness and corruption in the private sector inevitably lead to a distorted and highly insecure market. In such cases, it matters little even if multilateral trade rules contain provisions that discipline border controls or address overt discrimination. Although GATT Article X contains important transparency provisions, they have rarely been applied or interpreted in dispute settlement.

Despite its long-standing mandate to deal with questions of transparency, the WTO has no institutional expertise in the area. The WTO institutional isolation from human rights institutions, among others, has compounded its inability to address transparency and due process-related provisions in specific agreements of the

WTO. These include dumping, subsidies, procurement, technical barriers, and sanitary and phytosanitary agreements. It is absurd to expect a country that systematically violates basic human rights to faithfully execute and implement the processes that the WTO agreements require. It is necessary to draw on human rights expertise and accept the evaluations of international human rights institutions in order to guide the performance of the WTO in these matters.

Government procurement

Government procurement policies are important in the calculation of human rights. There is a longstanding practice of government procurement conditionalities related to rights or other social objectives in a broad range of countries. Christopher McCrudden, a leading authority on the subject [and an Affiliated Overseas Faculty member of the Law School], has written the following:

"The use of public procurement to put such policies into effect has a long history, most notably in pursuit of racial and gender equality . . . and the Canadian government has introduced preferential award of federal contracts to Aboriginal peoples. The South African government currently uses a system of 'targeted' procurement as part of its policy on social integration. . . . One of the earliest International Labor Organization conventions (No. 94) requires a linkage between certain fair labor standards and government contracts, and this has been widely ratified. In addition, several European countries have various different types of policies for achieving women's equality attached as requirements in the award of public procurement contracts."

The WTO Agreement on Government Procurement (GPA) provides for National and Most Favored Nation (MFN) treatment when foreign suppliers bid for government procurement contracts. It also provides that qualifications that are not essential to ensure the ability to perform the contract may not be imposed on suppliers. While on the face of it the MFN requirement prevents the exclusion of bidders on the grounds that the government of their country of origin violates human rights, Article VIII (b) of the GPA seems to allow the imposition of qualifications based on human rights performance. It appears, however, that the qualifications must be made a condition of the contract itself. That is, they must deal with the practices of the firm in question, and not the government of the country of its origin.

The government procurement policies of Massachusetts in the United States recently gave prominence to procurement disputes. The state's procurement laws require that suppliers have no dealings with Myanmar (Burma). Myanmar's labor rights record has been the subject of censure by a resolution of virtually the entire membership of the ILO. Myanmar is not a party to the GPA, but the European Union was concerned that the Massachusetts stipulation would prevent European companies doing business with Myanmar from bidding on government contracts in Massachusetts. The EU then commenced dispute settlement proceedings against the United States at the WTO. Those proceedings were only suspended when the United States Court of Appeals upheld a lower court judgment that found constitutional defects in the Massachusetts statute. However, the Supreme Court of the United States has

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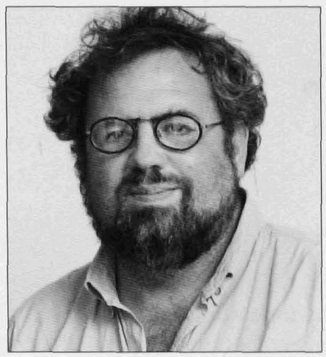
now agreed to hear a final appeal from the appellate court judgment. If the Supreme Court reverses its decision, it is possible that a new WTO action will be commenced against the Massachusetts scheme.

Even if the Massachusetts law violated some provisions of the GPA, it might still have been justified under the exceptions provision of the Agreement, which allows measures that are, *inter alia*, necessary for reasons of public order. This concept, which is based on the idea of *ordre publique* in private international law, relates to the fundamental public policies of a society, and not merely order in the sense of civil peace and public security. McCrudden has suggested that public order should be interpreted to include the emerging international public policy of human rights.

The GPA will surely be subject to review by the membership of the WTO in the coming years. In addition, procurement rules with respect to services are being negotiated. These will provide opportunities to further develop the position that human rights-based procurement conditions are consistent with WTO law. It is anomalous and unjustifiable that WTO regulations should force a country to provide better treatment to foreign bidders than to domestic enterprises, prohibiting it from imposing on the former human rights-based requirements that it routinely imposes on the latter.

WTO



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Professor Howse's research has concerned a wide range of issues in international law, and legal and political philosophy, but his emphasis has been on international trade and related regulatory issues. He is the author, co-author, or editor of five books: Trade and Transitions; Economic Union, Social Justice, and Constitutional Reform; The Regulation of International Trade; Yugoslavia the Former and Future; *and* The World Trading System. *He also is the co-translator of Alexander Kojève's* Outline for a Phenomenology of Right, *and has published many scholarly articles and book chapters on topics as varied as NAFTA, whistleblowing, industrial policy, food inspection, income tax harmonization, and ethnic accommodation. He is currently working with Kalypso Nicolaidis on a book about U.S. and European Union federalism and legitimacy; the project is co-sponsored by the Kennedy School of Government Visions of Governance Project and Notre Europe. He also is working with Brian Langille on a Ford Foundation-sponsored examination of globalization and labor rights.*