

Law School
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THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

VOLUME 43 • NUMBER 3
FALL/WINTER 2000

LAW QUADRANGLE NOTES

Law Quadrangle notes

DNA Evidence: Viewing Science Through the Prism of the Law

Congress' Arrogance

Arbitration and Judicial Review

U P C O M I N G E V E N T S

- October 7 Commemoration of the 10th anniversary of the Academic Freedom Lecture Fund
- October 13-15 Reunion of the classes of 1950, '55, '60, '65, and '70
- October 16 International Law Workshop (ILW) — "Fuji, Coups, and the Rule of Law," Rodger Haines, Queen's Counsel and lecturer, Faculty of Law, Auckland University
- October 19-21 Committee of Visitors
- October 23 ILW — "Constructing the Fifth Branch: Constitutional Change and International Government," Professor Chantal Thomas, Fordham University School of Law
- October 26 Sperling Seminar with Denis T. Rice, '59, director of Howard, Rice, Nemerovski, Canady in San Francisco (by invitation)
- November 3-4 Symposium — Directions for Reform: The Americans with Disabilities Act
- November 6 ILW — "Forgiveness, Apology, and Conflicts of the Past: The South African Truth Commission and Beyond," Professor Annalise Acorn, Faculty of Law, University of Alberta
- November 9 Dean's Forum with Susan L. Oakes, '84, officer and director of Ireland, Stapleton, Pryor & Pascoe, Denver (by invitation)
- November 13 ILW — "Developing International Human Rights Responsibilities for Business," Professor David Weissbrodt, University of Minnesota Law School
- November 17-18 Symposium — *Miranda* after *Dickerson*: The Future of Confession Law
- December 16 Senior Day
- January 3-7, 2001 Association of American Law Schools Annual Meeting, San Francisco
- January 15 Martin Luther King Jr. Day Observance
- January 26 Symposium — Factory Farming in the 21st Century: Are the Financial Benefits Worth the Environmental and Social Costs?
- March 7-9 Symposium — Law, Policy, and the Convergence of Telecommunications and Computing Technologies
- March 22 Symposium — Native American Law Day
- March 23-26 Colloquium on Challenges in International Refugee Law (by invitation)
- March 24 Butch Carpenter Dinner

(Continued on inside back cover)

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On the Cover:

Law students with laptops, like these two students in the John Potter Cook Room of the Law Quadrangle, bring the most modern technology to legal education while acquiring a sense of legal traditions and the knowledge to further the frontiers of the law.

PHOTO BY PHILIP T. DATILLO

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POSTMASTER, send address changes to:
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Ann Arbor, MI 48109-1215

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LAW QUADRANGLE NOTES

2 DEAN'S MESSAGE

3 LINKING THE STONES

- A special section that introduces faculty members — in their own words — whose multidisciplinary expertise enriches Law School life and is reflected in joint academic appointments in the Law School and elsewhere within the University of Michigan. With comment by recent graduates from the Law School's joint degree programs.

26 BRIEFS

- Law School plays prominent role in U-M Press' *Law 2000* catalog
- Olin Center for Law and Economics quickly becomes part of Law School life
- New eye on the world

38 FACULTY

- Vining marks 'time' at Cambridge
- Herzog named Edson R. Sunderland Professor of Law
- Heller/Krier article voted among year's best

72 ALUMNI

- Law School's European graduates gather at Heidelberg
- Robert A. Fisher, '49, receives U-M Distinguished Alumni Service Award
- Hometown organizations honor Bullen, '54

83 FEATURE

- **SURPRISE ENCOUNTER SHEDS LIGHT ON HUMAN RIGHTS DEBATE**
A.W. Brian Simpson, the Charles F. and Edith J. Clyne Professor of Law, loves few things more than rummaging through national archives, British or American. Poring through both leads him to a surprise encounter that's worth writing about — and he does.

ARTICLES

87 DNA EVIDENCE: VIEWING SCIENCE THROUGH THE PRISM OF THE LAW

Scientific needs for certainty are very different from evidentiary needs of the law — as witness this discussion of the role of DNA evidence in the courtroom.
— Richard Donnelly and Richard D. Friedman

96 CONGRESS' ARROGANCE

The anti-Miranda § 3501 of the Omnibus Crime Control and Safe Streets Act of 1968 was the result of congressional hearings that excluded voices of opposition.
— Yale Kamisar

102 ARBITRATION AND JUDICIAL REVIEW

"Reading" a disputed contract is *sine qua non* for an arbitrator, and a great deal of care must accompany that reading, including the knowledge that the arbitration decision must be crafted in the shadow of potential judicial review.
— Theodore J. St. Antoine, '54

In my last message, I suggested that great lawyers are optimistic. To be sure, I conceded that this suggestion may be surprising. After all, Voltaire's memorable character Dr. Pangloss has lent optimism a bad name, and many lay people are more likely to associate lawyers with cynicism than with optimism.

Yet I think of the very best lawyers as optimists. Not complacent Panglosses. But, rather, pragmatic activists who are inspired by a faith that their actions as attorneys are not pointless. They are people who believe in their own efficacy.

Any experienced lawyer has a deep repository of war stories in which the wrong thing happened. A correct legal argument was rejected by a trial judge or an appellate court. An honest and accurate witness was disbelieved by a jury. An innocent person was charged, prosecuted, convicted, and sentenced.

Given such experiences, why do lawyers persist? Perhaps the simplest account would be that they believe errors are more or less random and will balance out in the long run. (In metastasized form, this view might become a belief that the judicial process produces results that are entirely unrelated to the merits of the underlying dispute, but that extreme of cynicism is not necessary to explain the willingness to persist.)

There is something unsatisfying, however, about this "errors cancel out" view of things. For one thing, it is not clear why errors should cancel out. Why shouldn't errors on one side overwhelm any errors on the other side, as a result of systemic biases? Why shouldn't structural flaws of one kind or another lead to the conclusion that the judicial system is simply incapable of reaching a just result, at least in certain classes of cases?



For another thing, the notion that errors will even out in the long run cannot explain the commitments that lawyers sometimes make to a single case. I think, for example, of the work of Brian O'Neill, '74, as the lead attorney for the plaintiffs in the *Exxon-Valdez* litigation. The tanker ran aground in March

1989, it was five and one half years until the jury returned its verdict, and it was another six years until the Supreme Court denied *certiorari*. As described in the book *Cleaning Up*, O'Neill uprooted his life and moved to Alaska for several years in order to direct the litigation. His law firm partners back in Minneapolis borrowed tens of millions of dollars for the expenses of litigation, many of them offering their homes to secure the borrowing.

It is hard to explain behavior such as this with the idea that bad luck in one lawsuit will be offset by good luck in the next one. To me it seems more natural to conclude that a more fundamental optimism was at work here. The lawyers in question believed in their hearts that, in the end, the legal system would work. If they did their jobs as well as they could, if they were skillful advocates on behalf of their clients, their clients' interests would be vindicated. Because of that belief, they were willing to make heroic sacrifices to continue the litigation.

The best lawyers I have known share that quality. They recognize the imperfections of our legal system. They understand that biases and errors, both human and structural, can lead to miscarriages of justice. But at the end of the day, they believe such outcomes are the exception. With an optimistic faith that, in any given case, the most likely outcome is also the correct one, they choose to go forward and play their role in the process to the very best of their abilities.

BY NANCY CANTOR • Provost, University of Michigan

The hallmarks of a great research university, and indeed of this institution, are the richness of its intellectual fabric and the eagerness of its faculty to tap the full wealth of resources as they push the boundaries of their respective disciplines in pursuit of new and deeper understandings. Physical boundaries and distances have become less defining because of technological advances in this increasingly complex and multi-faceted world. So, too, intellectual boundaries must become more permeable and less rigidly constructed. We have come to understand that only by viewing issues through multiple perspectives can we hope to fully understand them and arrive at solutions to the challenges of our times. Today, often the most original, cutting-edge advances in knowledge emerge from academic work that takes place at the intersections of the disciplines.

Nowhere is the vitality and richness of interdisciplinary work more apparent than at the University of Michigan Law School. Remarkable for the intellectual depth and breadth of its extraordinary faculty, the Law School has for several decades been at the forefront among its peers in the pursuit of interdisciplinary scholarship. The work of the faculty as scholars and as teachers probes legal issues from a variety of perspectives, reminding us that contemporary scholarship, as well as a modern education, requires a willingness to cross boundaries, share sensibilities, and examine the world from multiple angles and through many lenses.

Is there something about law as a course of study that makes it a particularly fertile ground for interdisciplinary work? Perhaps it is the fact that law extends its reach into all aspects of society, addressing questions of human relations, fairness, and justice that almost by definition have no easily knowable answer. The legal method, then, must be one of triangulation — moving theoretically and empirically closer and closer to an acceptable understanding. As such, legal understandings recognize the complexity of human behavior, the role that context plays in shaping what we do and think in everyday life, and, therefore the necessity to look at evidence and events from many angles and to come to terms with the possibility that multiple plausible answers may reasonably emerge. Just as the renditions of witnesses sometimes bring to light alternative portrayals of events, and looking at the past helps in understanding the present, so, too, does an interdisciplinary approach stretch scholarly understandings. Of course, with this added detail often come new questions (instead of clear answers), but then that is the mindful exercise to which we are all committed.

This issue of *Law Quadrangle Notes* explores the connections between law and 11 other disciplines through a series of essays by Law School faculty members, all of whom hold appointments in both the Law School and another of our schools and colleges: Omri Ben-Shahar (Law and Economics), Phoebe C. Ellsworth (Law and Psychology), Bruce W. Frier (Law and Classics), Thomas A. Green (Law and History), Don Herzog (Law and Political Science), Jeffrey S. Lehman (Law and Public Policy), Richard A. Lempert (Law and Sociology), Donald H. Regan (Law and Philosophy), Carl Schneider (Law and Medicine), James Boyd White (Law and English Language and Literature), and Christina B. Whitman (Law and Women's Studies). These faculty members were asked to respond to two questions:

- What issue or issues in law does your multidisciplinary expertise help you to examine?
- How do your multiple disciplines add to the discussion?

Their responses to these questions offer a fascinating array of insights into the world of interdisciplinary inquiry. The effectiveness of an accepted remedy is called into question when it is considered from the perspective of an economist; the unintended consequences of a court ruling come to light when it is examined in light of contemporary feminist scholarship; commonly held assumptions are put to the test of data by scholars trained in a social science as well as in law. Easy challenges? Certainly not. Yet the results of these inquiries unquestionably raise the discourse to a new level, leading as they do to a more comprehensive, if less comfortable, understanding.

In law, as in other disciplines, our students also benefit greatly from an interdisciplinary approach. The astonishing range of joint degree programs available to law students — the J.D. and an M.B.A., the J.D. and an M.S. in Natural Resources, the J.D. and a Master of Arts in Japanese Studies, to mention just a few — attest to the opportunities afforded students to explore the world and their understandings of the law from a broader perspective. With what success? In a series of brief interviews, recent graduates of one of the Law School's 12 joint degree programs discuss how their interdisciplinary training informs and enriches their professional lives.

This issue presents the University at its best!



NANCY CANTOR

**University of Michigan Provost
and Executive Vice President
for Academic Affairs**

Professor of Psychology

**Senior Research Scientist, Research
Center for Group Dynamics, Institute
for Social Research**

Ph.D., Stanford University (Psychology)

A.B., Sarah Lawrence College

By Omri Ben-Shahar • Assistant Professor of Law and Economics

Law and economics is a methodology that helps answer three types of questions:

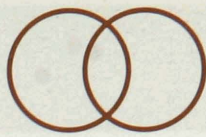
- What effect do legal rules have on individuals' behavior?
- How should legal rules be designed to increase human well-being?
- How does the design of legal institutions affect the content of legal rules?

In the area of private law, where law and economics has its main contribution, the focus is on the ability of legal rules to create incentives for private parties to behave in conformity with social goals. How should liability rules in tort law be designed to promote incentives for care and reasonable safety? What remedies for breach of contract provide private transactors with sufficient regard for the interest of their contracting partners? What bundle of ownership rights is necessary to induce creation of new property by individuals? How do trial procedures and settlement patterns affect the value of substantive rights?

Economic theory derives most of its analytical prowess from the assumption that individual decision-makers conduct their affairs in a rational manner, namely, that they are consistent in their pursuit of their subjective goals and interests. A variety of economic methods have been imported into law to sharpen our understanding of the effects that legal rules have on rational actors. The clearer understanding of the incentives of individuals and the pattern by which they will react to social regulation is important for the evaluation of rules and their ability to promote any desirable set of policy concerns. The economist is, in a way, a skepticist who is concerned with the limits of implementation: how far can legal rules affect private behavior and what are the bounds of society's power to control individuals?

Exploiting such tools, my own research has demonstrated various patterns of behavior that are likely to arise under specific legal rules. For example, in a recent paper with Professor Lisa Bernstein of the University of Chicago ("The Secrecy Interest in Contract Law," 109 *Yale Law Journal* 1885), economic analysis was utilized to challenge the wisdom of prominent contract and commercial law doctrines. Consider a party who wishes to sue for remedy for breach of contract. Under current law, this party is required to disclose information about its business operations that is necessary to assess its losses from breach and its actions to reduce the loss. If this aggrieved party has, for any one of numerous reasons, a secrecy interest in these operations, it might be reluctant to sue and undergo the costly scrutiny of its business and the discovery of its private information. This party might, in fact, prefer to entirely forego the compensatory remedy in order to protect its secrecy interest. Recognizing this incentive to protect information suggests that various remedial provisions in the law are ill-suited to provide the relief for which they are intended. Thus, economic analysis demonstrates that the traditional goal of contractual remedies — to make the aggrieved party "whole" — may be better served by remedies such as specific performance and summarily enforced liquidated damages that do not demand proof of actual loss and do not permit the defendant a broad scope of discovery.

The economic analysis is employed here, as in many other places, not to prescribe a social policy, but to better understand the fitness of a particular legal doctrine to achieve its stated goals. In this or in other areas of law, the normative implications of the economic analysis may be embraced, or rejected on the basis of other, non-utilitarian concerns. Either way, the analysis highlights the cost and the feasibility of choosing any social course of action.



OMRI BEN-SHAHAR

LL.M., S.J.D., and Ph.D, Harvard University

B.A. and LL.B., Hebrew University

By Phoebe C. Ellsworth • Kirkland and Ellis Professor of Law; Robert B. Zajonc Professor of Psychology

I am an empiricist; I believe that when courts and legislatures address empirical questions about human behavior, their decisions should be informed by empirical research. Courts and legislatures are faced with such questions every day. Do juries really understand the facts and the law? When parents divorce, what kind of custody arrangement is least harmful to the children? Why do people favor or oppose the death penalty? How can we tell when we can trust the testimony of a young child? For that matter, how can we tell whether an adult's testimony is accurate?

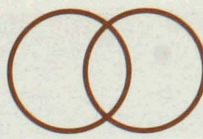
Legal analysts and decision-makers have traditionally addressed questions like these with rational analysis, intuition, and common sense. What my training in psychology gives me is a set of systematic techniques for ruling out some answers and confirming others, for *testing* my rational analyses, intuitions, and common sense. For example, in my research on juries I have brought in groups of 12 jury-eligible citizens, shown them a videotaped trial, and then let them deliberate and try to reach a verdict, just like real juries. Their deliberations are videotaped, and afterwards I ask them questions to find out how well they remembered and understood the facts of the case and the judge's instructions on the law. My research, and that of other psychologists who study juries, shows that juries come to an accurate understanding of the facts. During deliberation they correct each other's mistakes, and by the end of this process their understanding of the facts is more complete and accurate than it was at the beginning. However, this is not true for their understanding of the law. The jurors want to get the law right, they try to get it right, but they fail, and group deliberation doesn't help.

A critic might argue that these results are untrustworthy, because these were just mock jurors, not real ones, so maybe they didn't take their task very seriously. One of the beauties of systematic research is that the scientist's toolkit contains many methods, and so it is possible to do a second study to compensate for the weaknesses of the first. So I interviewed real jurors after they had decided real cases, and asked them questions about the legal instructions they had been given. They were just as confused as the mock jurors.

During the 1990s the jury system was widely criticized, and a number of reforms were proposed. Systematic empirical research is extremely useful (of course I would say it is essential) in discovering which of the problems are real and which of the proposed reforms are effective.

The opportunities for applying empirical methods to legal questions are endless. I have done research on factors that affect the accuracy of eyewitness testimony, on the reasons for people's attitudes toward the death penalty, and on the fairness and the quality of decision making of juries in real cases. The differences between my expertise and that of my lawyer colleagues make collaboration especially valuable. When two well-trained people with very different approaches to defining and answering questions work together on a project, the experience is much more challenging but also much more exciting than it is when the two people think alike to begin with. It can be frustrating, sometimes even exasperating, but it is always exciting, and in general I think that multidisciplinary collaboration results in answers that are both deeper and more comprehensive.

An empirical approach has one other attribute that is rare in traditional legal analysis, and that is the possibility that the results will show that your ideas were just plain wrong. For instance, in one study I set out to test the hypothesis that witnesses make many more false identifications when they are only shown the suspect by himself than when they have to pick him from a full lineup. Everybody "knew" this, including the Supreme Court, but in fact there wasn't any research on the question. My plan was to fill this small gap. Much to my surprise, witnesses made just as many mistakes — or more — with the full lineup. This unexpected finding led me to new ideas and new research paths that I would not have been able to conceive if I had not been an empiricist.



PHOEBE C. ELLSWORTH

Ph.D., Stanford University

A.B., Harvard College

The University of Michigan in Ann Arbor includes 19 schools and colleges on four campuses, with more than 4,200 faculty and nearly 38,000 students. The breadth and excellence of the institution give rise to highly regarded graduate programs that often attract law students. The pursuit of a joint degree is an excellent way for a student with multiple interests to complete two graduate programs in a shortened time. Students feel energized by the opportunities and enriched by the different academic perspectives and social atmospheres of two graduate programs. Currently, Law School students can choose from the following 12 formally established joint degree programs:

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J.D./M.B.A.

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J.D./M.H.S.A.

Law and Public Health
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Law and Public Policy
J.D./M.P.P.

Law and Information
J.D./M.S.I.

Law and Natural Resources
J.D./M.S.

Law and Social Work
J.D./M.S.W.

Law and World Politics
J.D./A.M.

Law and Japanese Studies
J.D./M.A.

Law and Russian &
East European Studies
J.D./M.A.

Law and Modern Middle Eastern &
North African Studies
J.D./A.M.

JOINT DEGREE PROGRAMS

By Bruce W. Frier • Henry King Ransom Professor of Law; Professor of Classics

“What issue or issues in law does your multidisciplinary expertise help you to examine? How do your multiple disciplines add to the discussion?”

My main field of interest is Roman legal history, and I have a split appointment between Classical Studies and the Law School. The reason why I find this arrangement so attractive is that it assists me in bringing to bear on Roman law the particular insights and methods associated with modern American law.

Roman legal history is a very old academic field, in continuous existence since approximately 1070 C.E.; and it has profoundly influenced the subsequent development of the Western legal tradition in continental Europe. This tradition has been predominantly analytical, and accordingly it has laid little stress on the complex intersection between law and society within the historical Roman world. One of my ambitions, still only partially realized but coming to fruition also in the work of my students, is to “reawaken” the field by examining Roman law through emphatically new methods. My hope is to create a fresh, more clearly historical approach to these time-honored legal materials.

The faculty at Michigan does not speak with one voice, obviously; indeed, from my perspective, one of its great assets is its extraordinary pluralism, with representatives of almost every major American legal movement during the last half-century. Of particular help to me are our various proponents of law and economics (an approach that is only slowly becoming known outside the United States), of “law and society” in its various manifestations, and of law and literature. In a series of books and articles on various aspects of Roman law, I have often made good use of conversations that I have had with my colleagues on these and other matters. However, to the extent that the social sciences are implicated in much of my work, it is also true that I have been able to draw extensively on the extraordinary resources that this university offers elsewhere.

It is not easy to summarize my work, which is usually aimed at scholars rather than at a general audience. However, on the most general level, my two books on Roman law explore the issue of how the introduction of systematic legal thinking altered the social system of ancient Rome, above all in two ways:

- First, by facilitating modes of legal change that can respond to smaller social pressures without the clumsy apparatus of the legislative process, an alteration that increases the social salience of law within society;

- Second, by offering, or seeming to offer, the promise of relatively long-term social stability and predictability, an alteration that increases a society’s capacity to envisage and effect an evolution toward greater social complexity.

Other articles of mine have dealt with a large diversity of social themes:

- The extent to which the Roman jurists had accurate knowledge about their social environment;

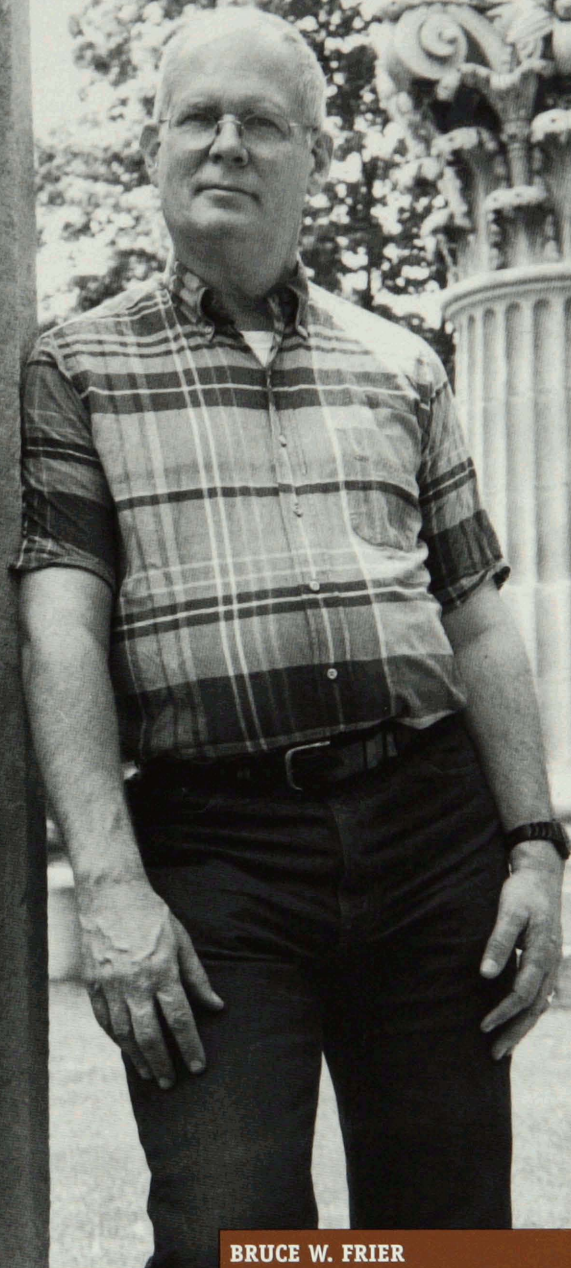
- The extent to which social pressures can actually be said to have brought change in Roman law;

- The influence of economic efficiency in shaping legal institutions that are otherwise difficult to explain through ordinary dogmatic principles;

- The role of language and of linguistic understandings in the shaping of legal rules; and so on.

Although these articles are directly concerned only with Roman law, they raise, I hope, larger questions about our understanding of law as a phenomenon within pre-modern and even modern societies.

Virtually none of this work would have been possible if I had not found, within the University of Michigan and more especially within its Law School, a place where I could think freely about the broader legal issues that concern me, but where I could also draw upon the enormous expertise of my colleagues.



BRUCE W. FRIER

Ph.D., Princeton University

B.A., Trinity College

JEANNINE BELL, '99

Associate Professor of Law, Indiana University Law School, Bloomington

Adjunct Faculty, Political Science, Indiana University, Bloomington

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Ph.D. (Political Science), University of Michigan

B.A. (Government), Harvard College

"I accepted my current job in large part due to my interactions during law school with joint program faculty. I considered offers that were in law and in political science, and I received career advice from joint degree faculty members. While in the job market, it made sense to seek their counsel since during law school I had received mentoring from joint degree faculty, who told me about their lives and having joint appointments.

"I think that my experiences at the Law School as a person doing interdisciplinary work were greatly helped by the faculty, especially Tom Green, who has an appointment in history, and Phoebe Ellsworth, who has an appointment in psychology, and Rick Lempert, a member of my Ph.D. dissertation committee, who met with me throughout law school and understood what it meant to be pursuing a joint degree. They were great mentors, who helped me in the job market and helped me through the process of making the decision to choose law.

"The real strength of the program lies in the faculty who have joint degrees, and the interest they take in students who pursue joint degrees. It's important to note that many faculty have Ph.D.s but do not have joint academic appointments. I think that Michigan is a very rich interdisciplinary environment, largely fostered by the faculty members who have joint degrees."

By Thomas A Green • John Philip Dawson Collegiate Professor of Law; Professor of History

I am primarily an historian, and in my three decades at Michigan I have mainly taught English and American legal history to law students, undergraduates, and history students. With respect to my basic approach, I teach all of these legal history courses pretty much the same way: as broadly-based history courses. The main difference between my non-law and law courses in legal history (beyond the fact that I frequently cover different themes or periods) is that in the former none of the students knows much about law and in the latter only some of the students have a background in history. This produces markedly different teaching experiences — and learning experiences — in which the students are being stretched in quite different ways. Although much of what I bring to non-law students is often intrinsically difficult for them to grasp, most of what I bring to law students is not intrinsically difficult for them but requires them to resist the temptation to think about legal history mainly in terms of legal doctrinal and institutional matters. Indeed, one of the questions current historians of law commonly ask is, why have legal elites typically conceived of the history of law from “inside” the law? If law students can get sufficiently outside of the law to understand all that the question implies, they are well on the way.

My main scholarly interest is the history of criminal justice in England and America from medieval times to the present. The particular themes that dominate in my scholarship tend to appear with some (my students would say obsessive) frequency in my teaching. They are certainly among the issues that my “multidisciplinary expertise” has led (and perhaps even “helped”) me to examine. Specifically, I have long been interested in two ideas regarding human freedom: political liberty and free will. Of the two, free will has been my main concern; my interest in it has often centered on its relationship to ideas and practices associated with political liberty. To give an illustration: one aspect of my long-standing interest in the history of the criminal trial jury involves the community-based attitudes that, via the jury, have sometimes served either to constrain or to expand state power over individuals. Among those attitudes has been, at times, the belief (or intuition) that particular offenders did not possess the freedom — here, meaning personal agency — that the formal law assumed (or was taken to assume) was required for criminal conviction (or a certain level of punishment). At other times, formal legal rules that defined the absence — or relative absence — of freedom, and, hence of *mens rea*, have seemed too broad and have resulted in successful appeals to jurors to interpret the law narrowly and thus to perform their “duty” of making those “truly responsible” for harm pay for their wrongdoing. These divergent social perspectives regarding criminal responsibility have co-existed in local communities and have been given effect on an *ad hoc* basis, a process that has resulted in institutional and doctrinal development of differing kinds — some reflecting resistance to the influence of “non-legal” ideas, some reflecting acquiescence in, or actual acceptance of those ideas. Yet another closely related example: one of my main interests in Anglo-American legal thought centers precisely on the role of ideas about freedom in the history of attempts to justify, criticize, or simply to explain the use of jury trial. I have often employed analysis of that subject as lead-in to consideration of thinking, past and present, of jurists and non-jurists, about many other legal doctrinal and institutional problems regarding the relationship between human free will and political liberty.

As an historian, I am more concerned with the history and present status of the phenomena I have briefly encapsulated than with matters of “policy.” I am not especially confident that an historical perspective suggests how best to resolve present legal problems regarding free will either to make the law more coherent or to reform it in order to make life in an organized society more coherent, satisfying, fair, or in any other way just. Not that I regard those ends as unworthy; rather, my interest in the free will problem is related to my belief that it defies resolution. The history of doctrinal, institutional, social, and academic practice and debate regarding the free will issue — especially in relation to



THOMAS A. GREEN

J.D., Harvard Law School

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A.B., Columbia University

political liberty — is always enlightening. It is also intriguing, amusing, depressing, or tragic depending on one's mood of the moment. It is, for better or worse, a part of history and, in my view, a large part.

Thus, my study and teaching of history bear importantly on my study and teaching of law, for many and fairly obvious reasons. For many years I taught Property and, not surprisingly, I often focused on the idea of individual initiative (or "labor") that, in part, underlies (justifies) the idea of entitlement. This commonly accepted justification often rests, at least implicitly, on the notion of human free will. Though the same result can be reached on a purely utilitarian analysis, and that analysis is sometimes invoked, the actual application of doctrine has mainly been guided by slowly-evolving freedom-based ideas that are integral to our social and political culture and our group and personal psychology. When, in teaching a particular aspect of property law, I moved from doctrinal analysis, *per se*, to discussion of historical context, I tended to focus on one or another strand of the history of social or political thought since the late 17th century. I sought in doing so to demonstrate the degree to which the law is, in one of its guises, an aspect of intellectual history, and to trace briefly the evolution of those ideas and interests that have served to contain the deterministic side of modern thought and have underwritten law's claim — through emphasis on human free will — to relative separation from sheer historical contingency. I should add (or confess) that, although I was originally trained as a medievalist, I spent relatively little time in class on the origins and early development of estates and future interests; no doubt my students suffered from too little focus on the relationship between ideas about free will and the doctrine of springing uses. But one can't do everything.

You might be wondering — if you are still reading this — why I taught Property rather than Criminal Law, since the latter corresponds directly to my field of research and writing. I have hitherto avoided teaching Criminal Law precisely for the reason I write about its history, that is, because it raises (for me at least) the free will issue in an especially fundamental and compelling, but totally perplexing way. I have no solution to the deepest problems that strong doubts about the reality of human free will pose for criminal law, in theory or in practice, and little taste for replicating the linguistic and philosophical gymnastics of the many criminal law scholars who have struggled in good faith both to face the issue and yet avoid the conclusion that the law (and life) is very possibly meaningless. At current rates, such a conclusion might well seem unsatisfying to many students. As it happens, I shall begin teaching Criminal Law next term. I am not sure what determined me to make that twilight-of-career choice (not the dean, by the way) or exactly how I am going to approach the course. If you are curious about how it went, feel "free" to write me next summer.

By Don Herzog • Edson R. Sunderland Professor of Law; Professor of Political Science

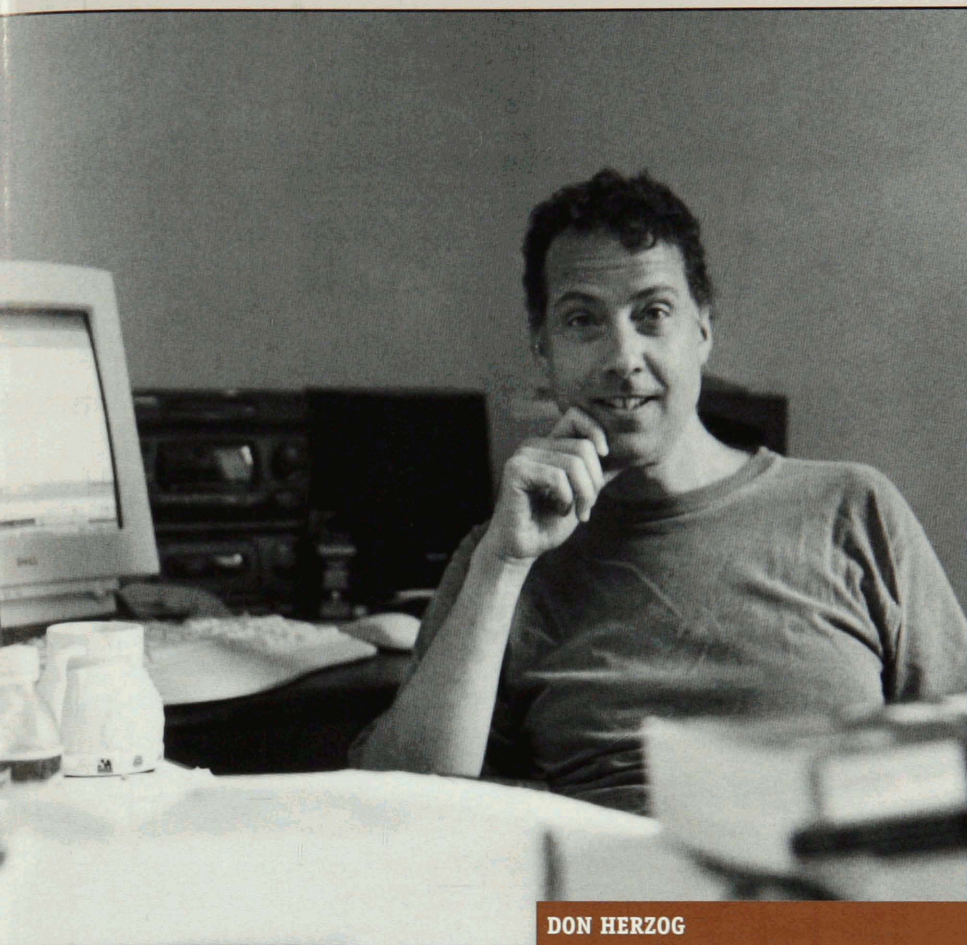
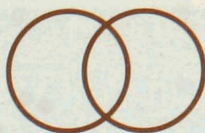
I'm a political theorist. My specialty is Anglo-American theory, from the 16th century to today. (Or, if you prefer, I'm a dilettante with poor foreign language skills.) I've had ongoing interests in liberalism and its critics, in democratic theory, in pragmatism, and for many years now in constitutionalism and legal theory. (I cut my teeth in graduate school trying to persuade Ronald Dworkin that his objections to H.L.A. Hart depended on misconstruing Hart's position. I didn't succeed, but I still think I'm right.)

At the Law School, I've been teaching First Amendment. Does a grasp of liberal democratic theory help me — and my students — get a grip on free speech, free exercise, and establishment? I confess I'm skeptical. True, the courts sometimes nod to highly stylized accounts of censorship of the press in early modern Europe, or religious oppression in England and the settling of the colonies. It would be easy enough to make fun of this lawyer's office history, threadbare from a scholarly point of view. But I'm not sure what the point would be, unless one had a decidedly eccentric account of originalism.

Surely the theory gives us no traction on the wonderfully detailed hard questions the law routinely has to resolve. The theory is too abstract, fluffy, even flaccid. The Court has had to decide, for instance, whether the University of Virginia may withhold funding from a religious student publication while funding nonreligious student publications. Or whether the University of Wisconsin may compel its students to contribute to a student activities fund that in turn funds student groups to which some students have pronounced political objections. I know of nothing in Mill, in Rawls, or anywhere in political theory that really helps out here. And you don't need any heavy artillery from theory to understand the basic contours of the problems, either. Not that "doctrine" and "theory" are antithetical categories or enterprises. They're mutually supportive, I think. But the theory required has to be closer to the ground than the stuff political theorists routinely traffic in, worked up out of the cases, in a way appealing to my pragmatist sensibilities.

Political theory has lots more to say, though, about ongoing debates about the law. Not because the traditional canon is wiser or more incisive about the very issues that today's law professors and politicians wrestle with, though now and again that's true. But because it gives a richer context for grasping what's at stake in the debates. In a seminar on constitutional interpretation, I rounded up the usual suspects: Bickel, Ely, Dworkin, Sunstein, Posner, Amar, and so on. I didn't subject my students to potted lectures on Hobbes, Bentham, and Austin, or the American constitutional convention, but I tried to show what these disputes are finally about, what deeper problems are structuring the terrain in ways these recent authors grasp only tenuously. In a seminar on liberalism and its critics, I do work the students through some canonical texts by Locke, Montesquieu, and Mill. Turning then to recent legal writing, they're in a position themselves to assess my routine suspicion that liberal-bashing on the left and right depends heavily on accounts of liberalism one might charitably call caricatures.

I've begun working on torts, which I hope to be ready to teach in 2002. My immediate instinct is that nothing in political theory about responsibility and liability is going to supply any traction on concrete legal dilemmas. But the more abstract debate about whether (or to what extent) tort law does (or should) promote economic efficiency, or whether it's up to something else, immediately resonates with centuries-old debates about markets and commodification, about utilitarianism and rights theory, and the like. So I hope my background in theory will give me a useful context, or a perch from which to survey and illuminate the legal terrain.



DON HERZOG

A.M., Ph.D., Harvard University

A.B., Cornell University

CHRISTOPHER GRUNEWALD, '99

**Assistant Corporation Counsel,
City of Chicago**

J.D., University of Michigan
Law School

M.S. (Natural Resources Policy),
University of Michigan

B.A. (Science Technology/
Environmental Policy), University
of California-San Diego

"After I got my bachelor's degree I interned at a small naval base in San Diego and worked in their environmental department. Coming off a couple of years of working experience, primarily in environmental compliance, I'd seen a spectrum of things and I wanted to build on that, but I wasn't sure that I was going to go into environmental consulting. And I definitely wanted to go to law school. The joint degree program at the University of Michigan was a big draw for me. At the time I saw it as doing separate things but getting them done in a short amount of time.

"I'd say it was good for me to be able to try out both. I was able, by going back to school once, to try on two totally different hats. By the third year I was starting to come back to thinking about being a lawyer. I found that I didn't want to do the policy side of things, and I was actually more satisfied doing legal work.

"It's been good to have been exposed to many things in school."

By Jeffrey S. Lehman, '81 • Dean and Professor of Law; Professor of Public Policy

Sometimes when I tell people that I hold a joint appointment in law and in public policy, I am asked, “What’s the difference between the two?” It’s a very good question. After all, public policy is ordinarily executed through the instruments of law, and the primary function of law is to express and implement public policy.

To me, the most important differences between the two disciplines concern the questions that researchers ask.

In law, the central questions most often involve issues of authority. What is the *status quo* in the absence of “legal” intervention? Which organs of government have the authority to intervene and change the *status quo*? And when those governmental organs decide whether to intervene, what sources of law should they take into account? What authoritative texts? What kinds of “evidence” about the world? What overarching values and principles?

In policy analysis, the central questions often involve empirical issues. Assuming one has the power and authority to make a policy decision, what should be the most important factual predicates for that decision? What do we know about those factual predicates? How might we learn more about them? What tools from the worlds of economics and statistics can we use to conduct the inquiry?

The differences in approach can leave people in each discipline talking past the other. The policy analyst can be baffled when a legal scholar argues that an appellate court should refuse to consider evidence that was not first presented to the trier of fact. The legal scholar can be baffled when a policy analyst argues for the investment of millions of dollars to conduct a study that will almost certainly confirm facts that “everyone already knows.”

During my time in teaching, however, I have found that — at least when things go well — the two disciplines can be mutually reinforcing, allowing us to see a more complete picture of a problem than either might have been able to paint on its own. Let me offer three examples: an article published in a law review, a chapter published in a policy book, and the classroom.

After I joined the faculty, my first law review article analyzed the Michigan Education Trust, a program created by the State of Michigan to allow parents to “prepay” their children’s college tuition while they were still very young. The article argued that the designers of the program had made overly aggressive assumptions about the tax laws, and that the consequence was that the program could engage in significant redistribution of wealth within the state. Some parts of the article were traditional exercises in doctrinal analysis of the federal tax laws. Other parts of the article, however, departed from the traditional law review style and used data from the Census Bureau and the Treasury Department to develop an empirical model of the program’s distributional impact. Each part contributed to a complete understanding of the program.

Several years later, the editors of a book on antipoverty policy asked me to write a chapter on the subject of urban policy. In traditional policy analytic style, much of the chapter reviewed and analyzed various studies of different experiments in urban policy. The second part of the chapter, however, drew heavily on my legal training. It developed the idea that urban policy should be considered in the context of a general societal aspiration: that each citizen have opportunities for geographic and social mobility through employment. It was helpful to think about how the rationale for laws against discrimination in housing and employment, and our experience with those laws, help to frame our understanding of programs such as “empowerment zones.”

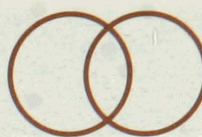


JEFFREY S. LEHMAN, '81

J.D., University of Michigan Law School

M.P.P., University of Michigan

A.B., Cornell University



In my classes on tax law, my public policy training has added in small ways to a course that is, for the most part, a traditional introductory tax course. But interdisciplinarity is the hallmark of an experimental course that I teach jointly with another faculty member from the Ford School of Public Policy, to a class that enrolls students from both disciplines. The class considers the origins and consequences of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 — the welfare reform statute adopted by Congress at the end of the first Clinton administration. The course readings draw on a broad range of sources, from legislative materials and Supreme Court decisions to empirical studies of welfare recipients, in an effort to give students a well-rounded understanding of the law's impact.

I have no doubt that academic training in any discipline helps to shape one's perspective on the world. Training in two disciplines can help to ensure that one approaches every problem from at least two perspectives. And it is probably the lawyer in me that tells me it is good to nurture the habit of approaching problems from multiple perspectives in whatever ways we can.

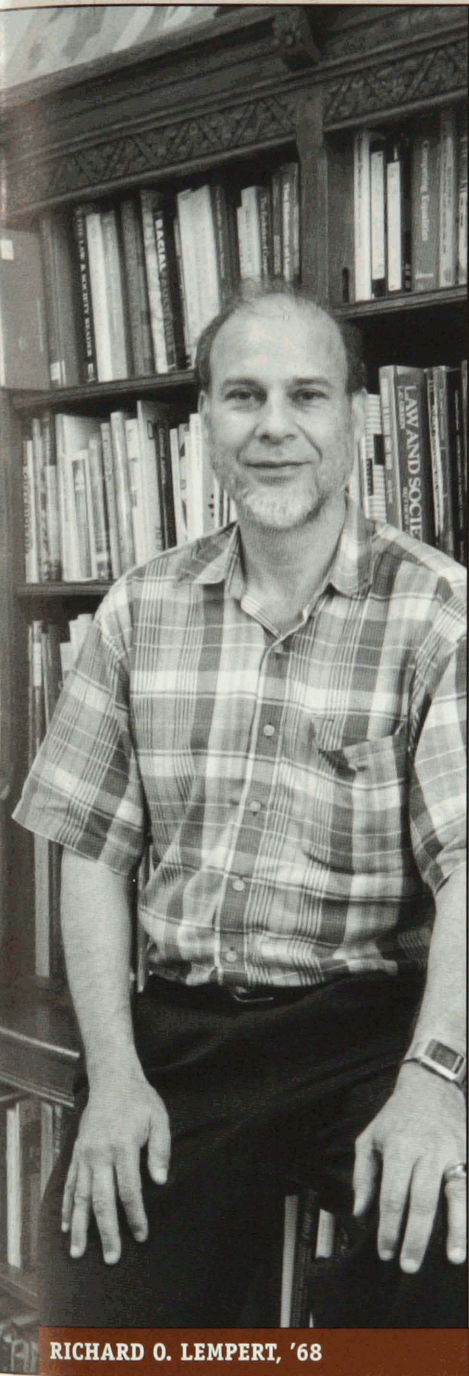
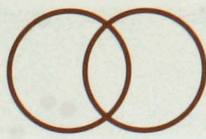
By Richard O. Lempert, '68 • Francis A. Allen Collegiate Professor of Law; Professor of Sociology

My extra legal training in sociology informs almost everything I write about, no matter what the topic. My first major article, for example, was a criticism of two cases in which the U.S. Supreme Court had approved of reductions in the size of state criminal and federal civil juries from 12 to 6 persons. A lawyerly criticism of these cases might have begun by looking at the framers' understanding of how juries should be constituted, and, if the framers had conceived of juries as having 12 members, would have chided the court for ignoring the framers' intent. I did look historically and was delighted to come up with evidence supporting my hunch about the framers' intent, such as a statement by Virginia's Governor Randolph, speaking at his state's ratifying convention, "There is no suspicion that less than 12 jurors will be thought sufficient." But I did not stop there.

The Court had rested its decision largely on the proposition that there was "no discernable difference" between the decisions of 6- and 12-person juries and had cited several social science studies in support of this proposition. My methodological training in sociology allowed me to recognize not only serious methodological weaknesses that meant that none of the cited studies offered more than feeble support for the Court's position, but also to point out that because many tried cases were not close on the facts, even well-designed studies were unlikely to spot verdict differences that might well occur. Then, again taking a lawyer's perspective, I argued that those cases where jury size might well make a difference were likely to be cases of special significance to the legal system because they were likely to be cases where the presence of minority viewpoints on juries were particularly important to fair, well-reasoned decisions. Finally, I turned to social-psychological studies of small groups, some of which I had encountered as a graduate student, and to statistical models to show that for the kinds of problems jurors worked on, larger groups were likely to perform better than smaller ones. My article, together with the work of several social psychologists who wrote on the problem of jury size, seemed to play a role in stemming what, at the time, seemed to be a stampede toward small juries, and was later cited several times by the Supreme Court when it refused to countenance criminal juries of fewer than six persons.

Another example of how my work blends legal analysis with social science is an article I wrote called "Desert and Deterrence: An Evaluation of Moral Bases of the Case for Capital Punishment." The first part of the article, which deals with "desert," is lawyer stuff. Although the arguments it considers are more philosophical than legal, the philosophical issues are ones that legal scholarship has long pondered and that many law students are exposed to in first-year criminal law courses. The second part of the article, which concerns deterrence, is social science. In it, I reviewed every empirical discussion of the deterrent effects of capital punishment that I could find, and I closely critiqued what was, when I wrote, regarded as the strongest empirical evidence that capital punishment deterred. My critique, together with several other social science critiques that I drew on, shows the fundamental flaws in the study, and allowed me to criticize the Supreme Court majority in *Fireman v. Georgia* for citing this study for the proposition that the social science evidence on capital punishment and deterrence was sufficiently divided that the matter need not figure in judicial analysis.

As a final example, I have written twice on issues relating to affirmative action. The first article, apart from its brevity, is in many ways ordinary legal scholarship. It takes off from a case, *United Steel Workers v. Weber*, and analyzes language of the majority and the dissent to show that the majority's reasoning is better justified. But



RICHARD O. LEMPert, '68

J.D., University of Michigan Law School

Ph.D., University of Michigan

A.B., Oberlin College

even here, I was influenced by social science scholarship, this time on how language acquires social meaning. More recently, working with two colleagues, David Chambers and Terry Adams, '72, I have been examining how Michigan's minority graduates, many of whom have benefited from special consideration at the admissions stage, fare, relative to Michigan's white graduates after they enter law practice. (The report, "Michigan Minority Graduates in Practice: The River Runs Through Law School," appears in the June 2000 issue of *Law and Social Inquiry*. A briefer discussion appears in the Summer 1999 issue of *Law Quadrangle Notes* under the title "Doing Well & Doing Good.") This study is pure social science, as we were committed to meeting rigorous social science standards for empirical research and used social science methods, such as O.L.S. and logistic regression, in analyzing our data. But we believe that our major findings bear importantly on the legal debate. Our results reveal that Michigan's minority graduates appear to be as successful as its white graduates in their post-law school careers. They also indicate that LSAT scores and college grades, credentials that opponents of affirmative action take to be strong evidence of merit, tell us virtually nothing about the capacity of competing white and minority applicants to succeed in the practice of law, although as admissions credentials they favor the admission of whites to the exclusion of most minority applicants. To put this another way, if we were talking about hiring decisions rather than law school admissions, and if the performance criterion was practice success rather than law school grades, it would probably be illegal for Michigan, under *Grills v. Duke Power* to favor a white over a minority applicant because the former had the higher LSAT score and undergraduate grades. Seen in this perspective, using racial diversity as a criterion of law school admissions, as permitted by *Bakke*, serves not only to advance educational values, but also to alleviate the ultimately unjustified racial impact of criteria that do not predict to practice success.

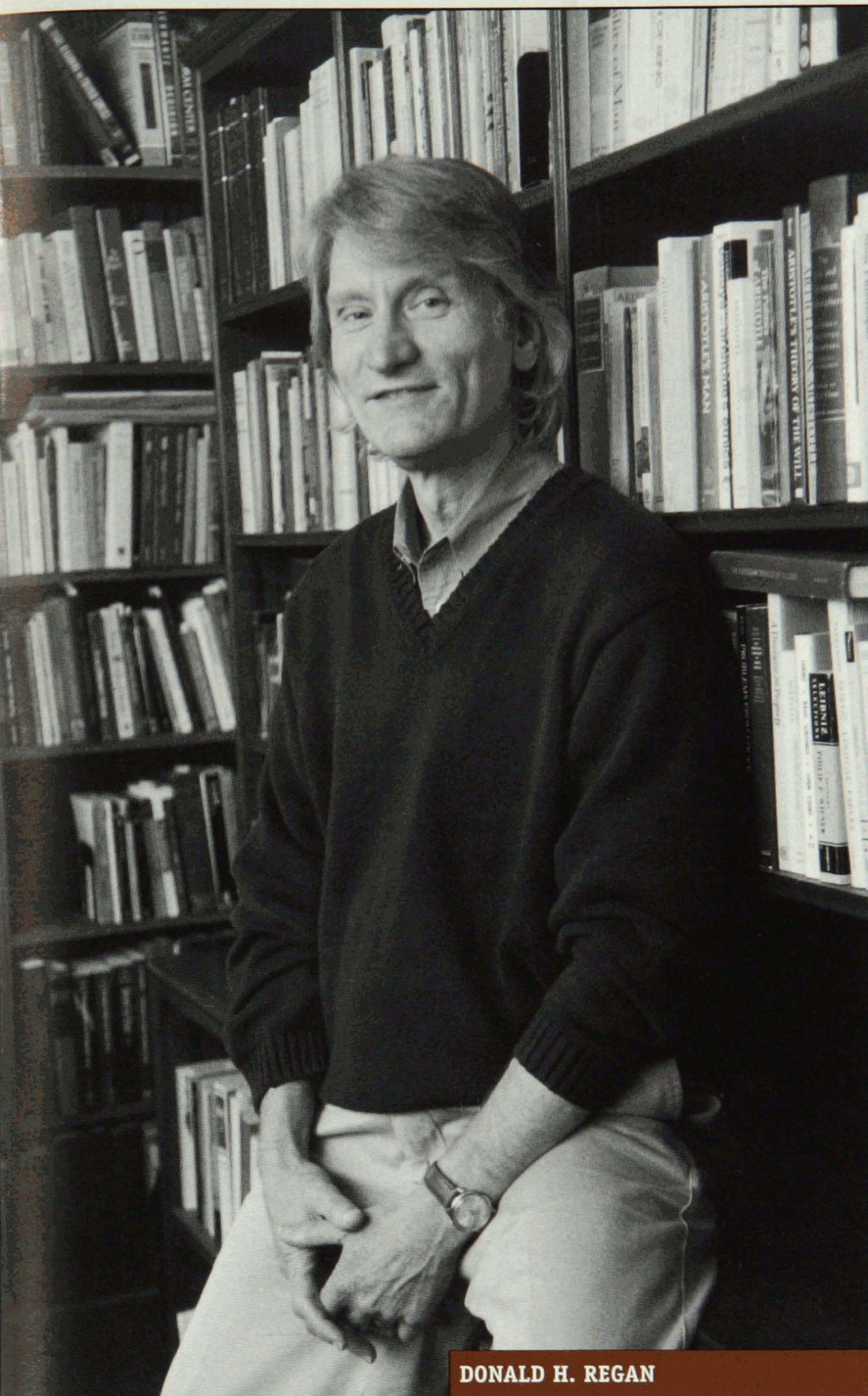
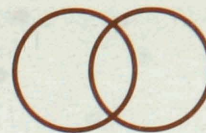
I know on some law faculties there are people with a dual commitment to law and a social science who report frustration because they are neither fish nor fowl, by which they mean they feel marginal to both their disciplines. I tell them that at Michigan things are different. From the start, when Michigan agreed to appoint me part-time and provided summer money so that I could complete my sociology and dissertation research, I have felt both supported by the Law School and respected by my colleagues here. The same is true of the Sociology Department, which I joined with tenured status in 1985 and recently chaired. I have never felt caught between law and sociology, or sensed that I was less well thought of in one field because of my interest in the other. I think an important reason why I have felt respected for my work in both fields is that at the University of Michigan Law School I am not special. I have many colleagues who are as interdisciplinary as I am, and are seen as making valuable contributions to the Law School precisely for this reason. I have other colleagues who don't have any interdisciplinary background, but who nonetheless do sophisticated work across disciplinary boundaries. For people like us, I do not believe there is a better law school than Michigan.

By Donald H. Regan • William W. Bishop Jr. Collegiate Professor of Law; Professor of Philosophy

I have been asked for an essay of 500-1,000 words on the question “What issue or issues in law does your multidisciplinary expertise help you to examine? How do your multiple disciplines add to the discussion?” I don’t have 500-1,000 words to say about that. Indeed, I don’t have anything at all to say about it. My non-law appointment is in philosophy. I don’t teach what is standardly thought of as the philosophy of law. Nor am I one of those constitutional lawyers who regard constitutional law as merely political philosophy under another name. Indeed, I often describe myself as having multiple academic personalities — not, I hope, a “disorder.” Sometimes I am a lawyer doing constitutional law or trade law; sometimes I am a philosopher doing moral and political philosophy. And I like it that way. Of course, I am at all times me, with the mental habits and inclinations I have developed over 55 years of training and work in a variety of disciplines. My constitutional law students sometimes complain that my course is too “philosophical.” But so far as I can tell, all they really mean is that I like arguments to be made as explicitly and precisely as possible, and that I seem to care more about this than most of their other teachers. Since they know I am a philosopher, they attribute this predilection to my philosophy background. Perhaps they are right — although I myself should not like to suggest that philosophers have a monopoly on concern for clear thought.

Ironically, the non-law training that seems to me to have the most immediate and obvious impact on my legal work is the graduate degree in economics I did after law school. There are a few basic concepts pioneered by economists — the prisoners’ dilemma, Pareto optimality, externalities, and so on — that ought to be in every educated person’s conceptual tool kit, and that certainly ought to be in every lawyer’s. I have never been tempted to add on the personality of an academic economist, but having done the early stages of their professional training probably makes me more at ease with some of their basic concepts and less likely to be intimidated by overreaching claims than most non-economists. Indeed, I would happily claim to have a better working grasp on the meaning and importance of “efficiency,” that talisman of the law-and-economics set, than many law-and-economists do.

In my case, which may be unusual, the importance of my non-law training and commitments is not in specific contributions they make to my work in law. Rather, it is in their contributions to my being me. For better or worse.



DONALD H. REGAN

LL.B., University of Virginia

Ph.D., University of Michigan

B. Philosophy, Oxford University

A.B., Harvard College

JOHN C.C. HUGHES, '99

**Associate, Mayer, Brown & Platt,
Washington, D.C.**

J.D., University of Michigan
Law School

M.A.E. (Masters of Applied
Economics), University of
Michigan

Joint Degree: B.A. (Economics)
and B.A. (Philosophy),
Pepperdine University

"After graduating from Pepperdine, I was an analyst doing transfer pricing analysis, a particular aspect of international tax that is heavily influenced by economics and economic analysis. Working around tax lawyers, and having an interest in law in general, I went on to law school.

"I pursued the economics largely for my own edification because I enjoyed economics and enjoyed studying economics, but also because economics is just really an insightful approach for understanding human behavior. Economics really can contribute a great deal to understanding the motivations that lie behind the parties in a case. There's a great deal of overlap, theoretically certainly, but also practically, between law and economics.

"It became clear to me that I had an interest in tax law, especially international tax. So I was able to parlay my experience with transfer pricing into a career as a tax lawyer. My economics background has very much helped me in the kind of price transfer analysis that I do now."

By Carl E. Schneider, '79 • Chauncey E. Stillman Professor of Ethics, Morality, and the Practice of Law;
Professor of Internal Medicine

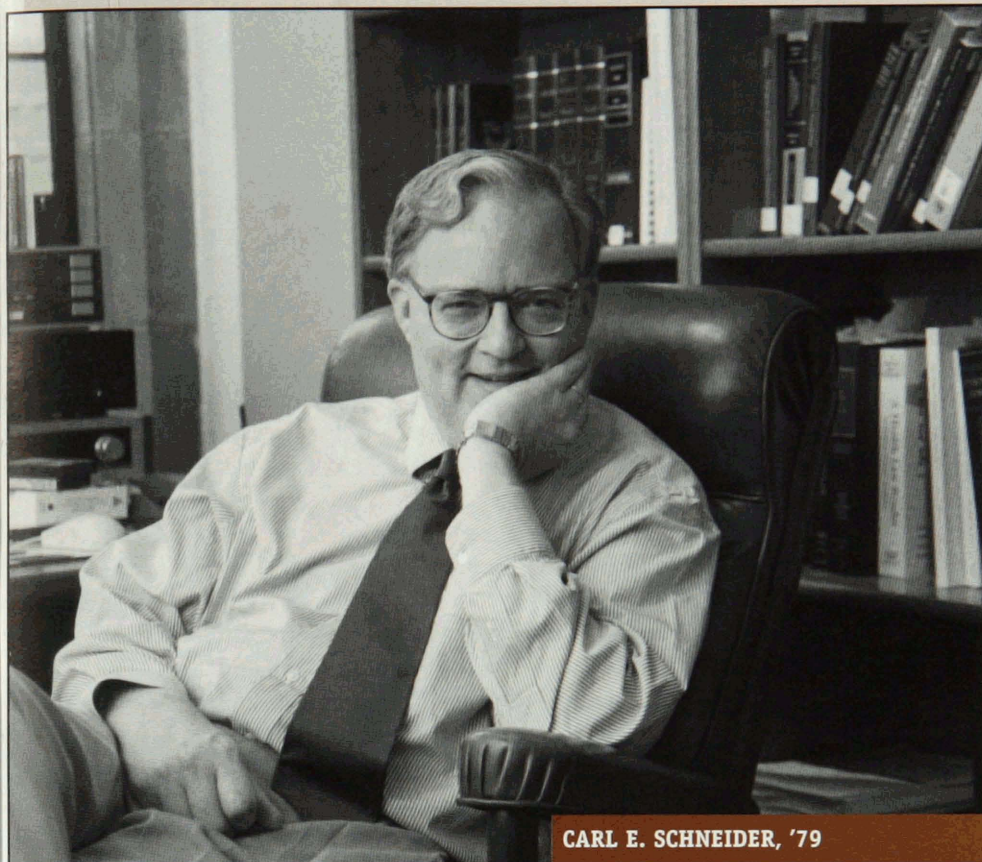
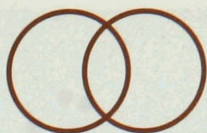
Law professors commonly live their lives thinking about the theories and doctrines that should animate the law. Being appointed to a medical faculty puts the law professor in the unaccustomed position of being surrounded by the people the law seeks to regulate, people who are not always charmed by the law's wiles or even its wisdom. This is salutary. My medical colleagues are frankly and even fiercely skeptical of the law's theories and passionately interested in how law actually works in practice. And, unlike most law professors, they are willing to try to find out what the law means in real life by systematic, empirical investigation. This is inspiring. My scholarship is a different — and richer — thing for it. It compels me to ask better questions and challenges me to find better answers.

Let me, as my medical colleagues like to say, cut to the chase by describing a project that illustrates what I am saying. Perhaps the legal centerpiece of bioethics is the doctrine of informed consent. When I proposed to write about it, my medical friends asked me what made me think I knew anything about how it worked. I asked them what they could do to help me find out. They said, whatever I wanted. I began by spending a month observing in an intensive care unit. I watched as the attending physician and his residents struggled to understand what "informed consent" meant in the case of a man who came into the unit "severely obtunded" and "experiencing fulminant hepatic failure." That is, his liver had suddenly stopped working, and he was virtually unconscious. He was accompanied by his wife, who was at least inebriated. She demanded that he be treated aggressively. Soon thereafter, another wife showed up. She announced he was a Jehovah's Witness, and she denounced the proposed treatment because it involved blood transfusions. Pressed, she conceded that he wasn't exactly a Jehovah's Witness yet, but she insisted he was about to become one. So what's a doctor to do?

I moved on to a kidney dialysis unit. I was welcomed with the most astonishing generosity. I started off interviewing doctors, nurses, social workers, dieticians, patients, and patients' family members. I soon found myself observing every aspect of the unit's sad and stirring work. I sat in on an interview in which a gentleman was told that his kidneys were failing. He was asked please to choose which kind of dialysis he would prefer. He listened politely and announced that he really didn't care as long as he could still go bowling. Bowling? Yes. Certainly. Bowling. Wouldn't he like to hear his options? Could he go bowling with any of the methods? Oh yes. Then he would really be content with whatever method you medical types preferred. Now could we talk about something more interesting? So what's a doctor to do?

Then I rounded at a hospital. Mr. Allworthy was an elderly gentleman of a sweet and commendable nature. He had multiple embolisms and an aortic aneurysm. Either could be quickly fatal. The treatment for one bid fair to exacerbate the other. Dr. Knightly and his flock had for several days been administering tests to get a better sense of the problem and the solution. We entered Mr. Allworthy's room and said good morning. He said good morning and praised the hospital's fine breakfast. (I said he had a sweet nature.) Dr. Knightly lucidly reviewed Mr. Allworthy's complicated situation. Mr. Allworthy listened tolerantly. Dr. Knightly asked if Mr. Allworthy had any questions. Why no. Did Mr. Allworthy approve of the treatment plan? Why yes, whatever you fellows want to do. Did Mr. Allworthy understand what his problem was? Why yes, I have thick blood. So what's a doctor to do?

I then discovered that it has become a cultural disgrace for an upper-middle-class American to become seriously ill and not write a book about the experience. There are literally hundreds of these memoirs of illness. They are a fountain of information



CARL E. SCHNEIDER, '79

about what it is like to be sick, about what it means to be a patient, about what the ill want. I read as many of these as I could get my hands on, although I could endure only a few at a time, so dark were their stories.

When I returned to the law of informed consent, all these experiences were a lamp unto my feet, and a light unto my path. They were a testimony to the implacable complexity law confronts. They were a river of insights and illustrations. Perhaps most of all, they were a lesson in the way law affects lives. I believe — I hope — that they give a vividness and liveliness to the book they inspired (*The Practice of Autonomy: Patients, Doctors, and Medical Decisions*) it could have attained in no other way. I know they have convinced me never to undertake another substantial project that does not centrally ask how the logic of the law confronts the experience of life.

J.D., University of Michigan Law School

B.A., Harvard College

KAREN PHILLIPS, '99

Associate, Thelen Reid & Priest, San Francisco

J.D., University of Michigan Law School

M.B.A., University of Michigan Business School

B.A. (Biological Sciences), University of Chicago

"My interest in pursuing the J.D./M.B.A. grew out of my interest in pursuing a career in management. I served as director of a not-for-profit volunteer community service organization in Los Angeles after college and realized that management was my passion. I also worked as a paralegal and realized very quickly that the skills that I was developing through my work in the law — like time management/project prioritization, oral/written communication, and client service — would be invaluable in my management career. More importantly, I felt they were skills best learned in a legal environment.

"Pursuing a J.D./M.B.A. has worked wonderfully for me. It has afforded me opportunities as a summer associate that were not available to others. I have been given assignments with greater responsibility, that provide me with a larger role in the transactions of which I am a part, and offer greater client contact. The bad news is that coupled with that increased responsibility is an expectation that I perform at a higher level and at a faster pace.

"I remain willing to face the challenges and reap the rewards that my joint degree has afforded me. Besides, as my mother reminds me, if all of this fails to work out, I still have time to go to medical school."

By James Boyd White •

L. Hart Wright Collegiate Professor of Law; Professor of English Language and Literature; Adjunct Professor of Classical Studies

It is a major tendency of legal studies in our time to focus upon questions of general social policy, with argument centered on which theory or methodology ought to determine such matters. My own attention has been differently focused, on the nature and quality of legal thought itself, and of legal expression. It is to these matters that the work I do with the humanities — literature, classics, philosophy, and translation — mainly speaks.

One way to put this is to say that I am in the first instance interested in law from the point of view of the person engaging in it, as practitioner, judge, or teacher. And whether we are aware of it or not, we are all faced with the question: What does it mean to use this language and this set of institutions to address a problem that has arisen in the real world? What does it mean, that is, to think and speak as a lawyer? How can this be done well, or badly, and with what intellectual, ethical, and practical consequences?

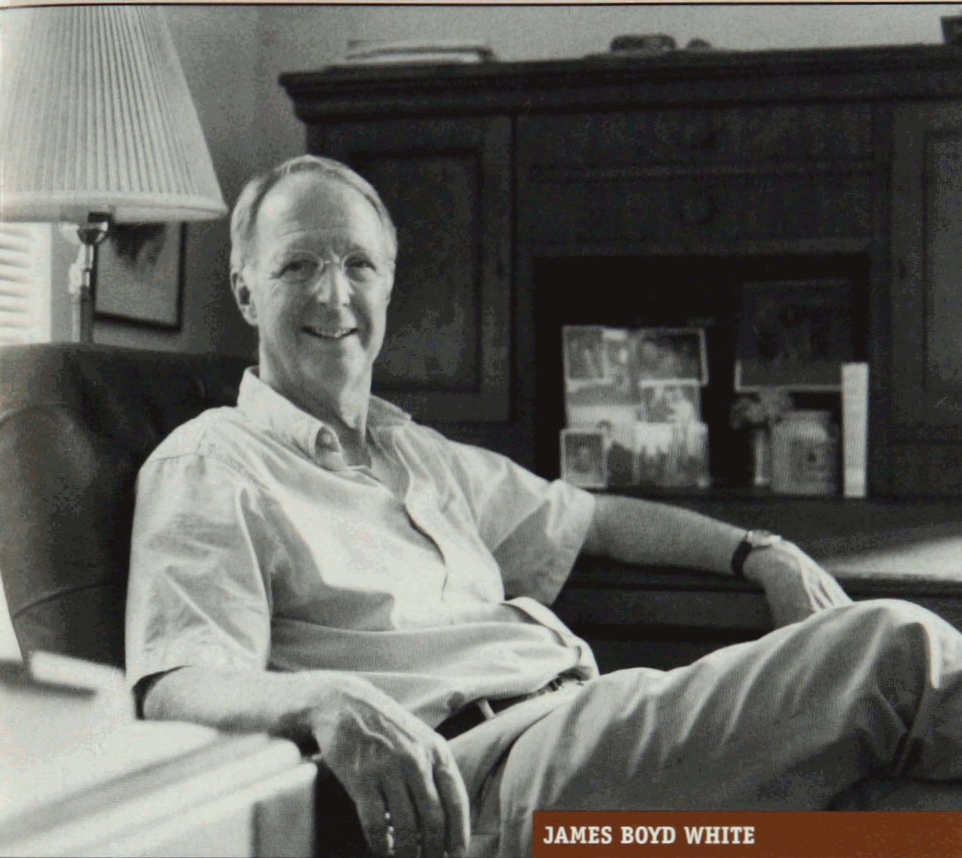
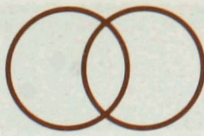
This set of questions, in one sense innocent enough, quickly leads to others, of deep difficulty. The lawyer uses legal language; this is how she thinks; indeed, it helps shape her mind and imagination; how then is she to make it the object of her own critical attention, how is she to judge it as a system of thought and expression? What is she to do about the points at which she finds it wanting: How, and with what confidence, can she become a maker, or remaker, of her language? This line of thought may involve her in thinking more generally about the relation between language — any language — and the experience it purports to describe or regulate; about the proper relations among languages, say those of law and some other field of expertise and learning, such as psychology or economics; and about the ethical and political significance of particular intellectual and rhetorical practices (such as legal argument itself).

On such questions as these I believe it is useful to bring to bear the best work we can find, in whatever field, both as a way of discovering instances by which we might measure work in the law, our own and that of others, and as a way of providing a place outside the law from which the language and practices of the law might be examined. I cannot in two paragraphs explain how I do this, but I can at least say that it is with hopes such as these that I turn, say, to Plato and Thucydides, Emily Dickinson and Robert Frost, Edmund Burke and Jane Austen, all of whom make their language the object of critical and creative thought, all of whom concern themselves with the ethical or political meaning of particular acts of expression.

The study of literature and the other humanities is helpful in large part because it trains us to focus our attention in certain ways:

- On the meaning of what is said by particular speakers in particular contexts;
- On the way in which a language or set of generic conventions — like those governing the form of the sonnet or the novel, the judicial opinion or legislation — commits us to one way of imagining the world or another, making certain claims of significance possible, others impossible;
- And on the way in which the use of language is an inherently ethical and political activity, as we define both ourselves and those we speak about in what we say.

To learn to think about these things well, if we could manage it, would not dictate particular legal rules or result in particular cases, but it would greatly improve the quality with which the law is made and practiced, and in this sense be of the largest social significance.



JAMES BOYD WHITE

LL.B., Harvard Law School

A.M., Harvard Graduate School

A.B., Amherst College

HIDEAKI SANO, '00

Associate, Honigman Miller
Schwartz & Cohn, Detroit

J.D., University of Michigan
Law School

M.S. (Aquatic Ecology),
University of Michigan

A.B. (Human Biology),
Stanford University

"I have no doubt that the skills that I have gained in my scientific discipline will make me a better lawyer. In my mind there's quite a parallel between what you do in the two fields. There's a conceptual link between the two. Scientists approach problems, conduct research, and structure arguments very much like lawyers. At the same time, I have also learned to think about problems and issues very differently than most lawyers. I have two ways of thinking about things, not just one.

"My scientific background is not only useful in terms of an approach to the law, but it's also something that comes up as a substantive matter in cases. There is, for example, a great deal of science and scientific work in litigation. My scientific background will help me to combine the skills of a lawyer with an understanding of the substance and minutia of a case."

By Christina B. Whitman, '74 • Associate Dean for Academic Affairs and Professor of Law;
Professor of Women's Studies

Women's Studies, like law, is deeply interdisciplinary. Its central methodology is simply to ask the feminist question: "What is the significance of this for women?" The answer is inevitably complex because women live varied lives. Any disciplinary tool that helps us understand this complexity is welcomed. Law serves as both a tool of analysis and a subject of interrogation. Asking about women does not lead to simple answers. It complicates the legal project of determining rights and responsibilities.

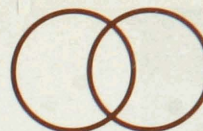
Any lawyer can identify the most obvious achievements of asking "the woman question" of law. One example is the Nineteenth Amendment, a feminist achievement. Another, more recent, is the disappearance of explicitly gender-based job segregation. In other areas asking about the impact of a legal rule on women's lives has revealed aspects of the problem that had been overlooked but seem obvious once described. We have come to understand how critical a woman's control over her reproductive life is to her ability to live on terms of equality with men. We have become skeptical about relying upon the preferences of women to justify confining them to low-paying, low-status positions. We now see coercion in sexual situations that would have been thought to be consensual a generation ago. We no longer look at pornography as merely the exuberant speech of a rebellious male spirit; we notice the woman who is depicted, too, and her silence.

Women's Studies draws on interpretive disciplines that uncover gender bias in doctrines and descriptions that previously seemed neutral. For example, an historical survey of the tort law of emotional injuries reveals its origins in 19th century cases that describe a husband's stake in marriage as material and a wife's as purely emotional. Emotional injury claims were initially more easily recognized when they were brought by women, but they still are disfavored in a way that may be due to their association with "the weaker sex."

Often, asking about women reveals how limited the tools of law are when addressing deep inequalities. Thoughtful feminism, like thoughtful economics, reveals the unintended consequences of using law to achieve social change. Even when a violation of the law seems clear, it can be difficult to find a remedy that furthers the interest of all women. Take, for example, the litigation involving state military colleges that led to a U. S. Supreme Court decision in *United States v. Virginia*. The use of state funds to support institutions of higher education that are completely closed to women made this a clear case of gender discrimination. Most of the Supreme Court agreed, but the justices, and feminists, disagreed on the appropriate solution. Unlike the justices, feminists ask which remedy would best improve the status of women.

The Court ordered the Virginia Military Academy to admit women. The hard question, which feminists debate and the Court left unanswered, is over the terms of that admission. The Court took an equal-access approach, reminiscent of the early 1970's jurisprudence associated with the opinion's author, Justice Ginsburg. It opened the doors of the academies "on behalf of ...women" who could succeed in an environment that rewarded aggressive behavior and upper-body strength. In the absence of a comparable state institution geared to leadership training for women, a state must permit women to enroll in the male academy. This formal equality solution insists only that women be permitted to participate if they can meet male standards. Women who fail to conform to the male model can be excluded.

To other feminists, however, gender discrimination at VMI was not merely a question of exclusionary admissions policies. What troubled them is state support for a deeply stereotypical view of male-female behavior. If the goal of anti-discrimination law is equality of citizenship, this argument goes, institutions based on gender stereotypes should be closed, or the stereotypical behavior should be eliminated in favor of citizen-soldier training that assumes many students will be women.



ROSEMARY QUIGLEY, '00

**Clerk for the Hon. Kermit Lipez,
U.S. Court of Appeals for the
First Circuit**

J.D., University of Michigan
Law School

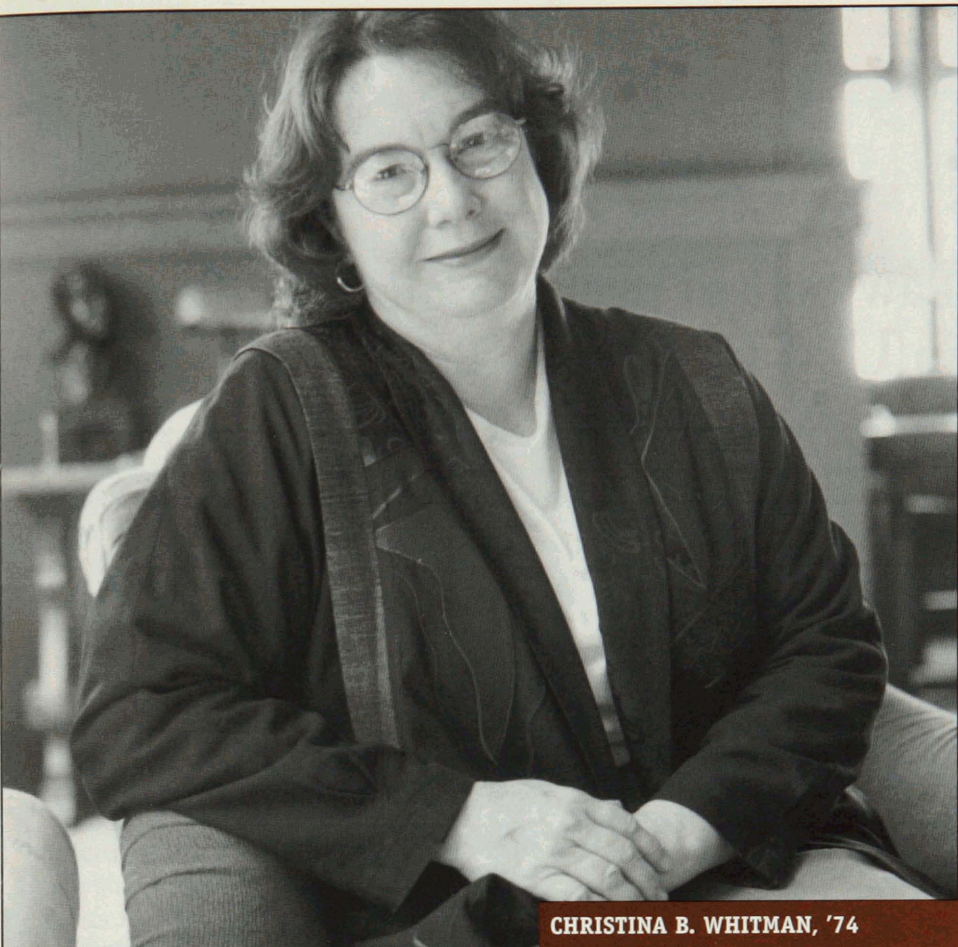
M.P.H. (Health Management and
Policy), University of Michigan

A.B. (English Literature),
Harvard College

"Before I went back to school I was a research associate in medical ethics at the American Medical Association, so I knew at that time that I wanted to do healthcare law and wanted to deal with aspects of patient care, genetics, and clinical research issues. So to gain credibility in the healthcare world, I thought it was important to have a healthcare-oriented degree in addition to my law degree. I wanted to have the skills to weigh in on the legal issues.

"One of the things I like about the fact that I've straddled healthcare and law is that I can speak with patients and put them at ease about the law, whereas people usually get anxious when they deal with a lawyer. I can get them to see that lawyers may be helpful. At the School of Public Health, there were always people waiting for me to play the lawyer, and I like to do so by bringing in information to provide people with different perspectives, and actually help them understand where positions are coming from.

"Healthcare is becoming highly regulated, access issues are becoming more important, and those issues often involve people with the law. Hopefully, I can help them."



CHRISTINA B. WHITMAN, '74

In a response that has become a refrain throughout feminist jurisprudence, still other feminists responded that closing or redesigning VMI for this reason would itself perpetuate a stereotypical view of women as unsuited for military life. The more radical solution, these women argue, is consistent with the Court's formal approach: Admit women on exactly the same standards as men and subject them to exactly the same requirements. Subject them to adversative education and barracks life. Shave their heads. Make no accommodation. The disappearance of women into bodies made anonymous by uniforms and baldness, and women's success under these conditions, would pose the deepest challenge to our assumptions about gender. From this perspective, law should be used to eliminate not only gender-based lines but the very existence of gender categories.

The first of the feminist solutions would open the public world to more women. The second would make the world safer for unconventional women. Either choice would leave some women vulnerable, yet lawyers, unlike theorists, cannot avoid choosing.

J.D., University of Michigan Law School

B.A. and M.A., University of Michigan

- 26 Law School plays prominent role in U-M Press' *Law 2000* catalog
- 28 Olin Center for Law and Economics quickly becomes part of Law School life
- 29 Law and Economics Workshop schedule
- 29 Golden Diploma goes to Bolgár
- 30 A new eye on the world
- 30 White's first novel: *Second Families*
- 30 Working to improve children's welfare
- 32 Training for death penalty bouts
- 34 Conferences offer opportunity for deeper look at issues
- 36 *Todai* exchange joins kindred spirits
- 37 EC issues claim growing share of Dutch Council's time

Law School plays prominent role in U-M Press' *Law 2000* catalog

Books by and about faculty members and about the Law School itself make up a prominent share of the newly released *Law 2000* catalog from the University of Michigan Press.

U-M Press' stable of authors is impressive in many areas, among them law. The recent issue of the *Law 2000* catalog confirms the significant role of the University of Michigan Law School in the fields of legal thought and legal scholarship as well as the unlimited variety that a life in the law offers.

For example, the 16-page catalog lists both a book by L. Hart Wright Collegiate Professor of Law James Boyd White, *From Expectation to Experience: Essays on Law and Legal Education* (1999), as well as a book about White, Jeanne Gaakeer's *Hope Springs Eternal: An Introduction to the Work of James Boyd White* (1998). The latter was published in The Netherlands by the University of Amsterdam Press, whose products the University of Michigan Press distributes in the United States.

Eric Stein, '42, Hessel E. Yntema Professor of Law Emeritus and a pioneer in the field of comparative law, has two books in the catalog: *Czecho/Slovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (1997), which draws in part on his personal acquaintance with Czech President Vaclav Havel as well as his work as advisor in formation of the Czech constitution, and *Thoughts from a Bridge: A Retrospective of Writings on the New Europe and American Federalism* (2000), which brings together and adds to essays that Stein has written over the past 30 years.

Carl E. Schneider, '79, Chauncey Stillman Professor of Ethics, Morality, and the Practice of Law, appears as editor and contributor to *Law at the End of Life: The Supreme Court and Assisted Suicide* (2000). The book collects papers delivered by a variety of experts at a

conference on assisted suicide/end of life questions that was held at the Law School in late 1997. Schneider's chapter is "Making Biomedical Policy Through Constitutional Adjudication: The Example of Physician-Assisted Suicide." Among the other contributors is Assistant Professor Peter J. Hammer, '89, who wrote the chapter "Assisted Suicide and the Challenge of Individually Determined Collective Rationality."

Other books listed in *Law 2000* incorporate contributions from Law School faculty members. Among the contributors are Thomas G. Long Professor William I. Miller, whose work appears in *Law in the Domains of Culture* (1998), edited by Austin Sarat and Thomas R. Kearns; Miller's chapter is "Clint Eastwood and Equity: The Virtues of Revenge and the Shortcomings of Law in Popular Culture."


Joseph Vining, the Harry Burns Hutchins Collegiate Professor of Law, contributes "Fuller and Language" to *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (1999), edited by Willem J. Witteveen and Wibren van der Burg. This book is also published by the University of Amsterdam Press and distributed in the United States by the University of Michigan Press.

There are two books on the architecture of the Law School, Kathryn Horste's *The Michigan Law Quadrangle: Architecture and Origins* (1997), and Ilene H. Forsyth's *The Uses of Art: Medieval Metaphor in the Michigan Law Quadrangle* (1993).

Two other books in the catalog also reflect connections to the Law School:

- *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (1999), in which author Joseph L. Sax, who taught at the Law School from 1966-86, turns his attention from land and water conservation to the protection of cultural resources. Sax, who now teaches at Boalt Hall, the law school of the University of California-Berkeley, discussed the topic in the William W. Cook Lectures on American Institutions — “Who Owns History?” — that he delivered at the Law School in November 1997.
- Virginia G. Drachman spent considerable time doing research at the Law School and lectured here on her findings while she was preparing *Women Lawyers and the Origins of Professional Community in America: The Letters of the Equity Club, 1886-1890* (1993). The Equity Club was founded at the Law School in the late 19th century by a group of women law school graduates.


Further information on the *Law 2000* catalog and offerings is available from the University of Michigan Press, 839 Greene Street, Ann Arbor, Michigan 48106-1104, telephone 734.764.4392, or go to www.press.umich.edu/ for the online catalog.



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Olin Center for Law and Economics quickly becomes part of Law School life

The Law School's new John M. Olin Center for Law and Economics hit the ground running as the academic year began this fall. Under the directorship of Assistant Professor Omri Ben-Shahar, the new center officially opened August 1, and quickly became part of the life of the Law School during this fall term.

"The center supports faculty and student research, issues discussion papers, and offers workshops and fellowships in law and economics," reads the "Welcome" page of the center's multi-layer Web site, which can be reached through the Law School homepage (www.law.umich.edu). Links attach the "Welcome" section to pages on center staff, faculty associated with the center, courses, workshops, fellowships, conferences, and discussion papers.

Seventeen faculty members are listed as close associates of the center: 13 from the Law School, two from the Department of Economics, and two from the School of Business Administration. Law School professors include: Reuven Avi-Yonah; Ben-Shahar; Steven P. Croley; Merritt Fox, who also is director of the Law School's Center for International and Comparative Law; Peter Hammer, '89, who also directs the Law School's Cambodian Law and Development Program; Michael Heller; Robert Howse; James Krier; Kyle Logue; Ronald Mann; Adam Pritchard; A.W. Brian Simpson; and Mark West, who heads the Law School's Japanese law program.

Others associated with the center include Klaas van't Veld and Michelle

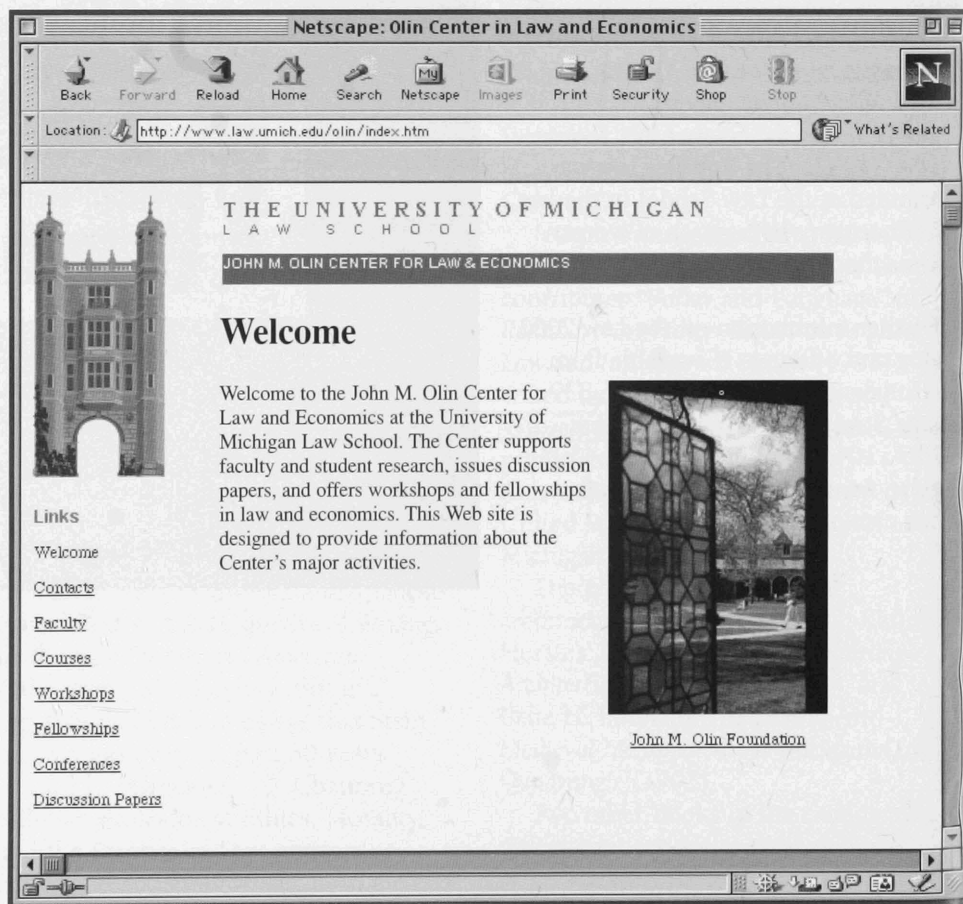
White of the Department of Economics and Scott Masten and Francine Lafontaine of the School of Business Administration. Masten currently is a visiting professor at the Law School.

The center's role is to "provide opportunities for scholars — faculty and students alike — to study and explore the way legal rules affect behavior," according to Ben-Shahar. And the program bears him out. At deadline time, which arrived well before the center had finalized its program for academic year 2000-2001:

- Seven courses already were aligned as part of the center's program: Economic Analysis of Law; Contract Design and Interpretation; Corporate Finance; Mergers and Acquisitions; Boundaries of the Market; Payment Systems and Secured Credit; and Law and

Economics Workshop (a series of weekly talks by visiting and U-M experts on law/economics subjects; see adjoining schedule).

- Olin Fellows for the academic year were about to be announced. Up to 10 fellowships are to be awarded, with each recipient to work under supervision of a faculty adviser and write a law and economics paper in addition to pursuing regular academic work.
- The program schedule for the fall term Law and Economics Workshop was finalized. "The workshop provides faculty, students, and Olin Fellows an opportunity to discuss ongoing research in economic analysis of law," according to the center. At each weekly meeting of the workshop, an invited speaker from the University of Michigan or another



The welcome page of the Web site for the John M. Olin Center for Law and Economics (www.law.umich.edu/olin/index.htm) is easily reached through the Centers & Programs link of the Law School's home page (www.law.umich.edu).

law school presents a work-in-progress for discussion. Among the speakers invited to present their work are Daniel Shaviro of New York University, Paul Mahoney of the University of Virginia, and Jennifer Arlen of the University of Southern California. (See adjoining schedule for the lineup of Law and Economics Workshop speakers for the remainder of the fall term.)

- A conference on the role of judges in corporate and securities law is scheduled for April 20-21, 2001. (See description on page 35.)
- More than 25 new papers and articles written by University of Michigan faculty members in 1999-2000 are now available in both electronic and printed versions for comment.

Additional programs and activities continue to be arranged. As an area that has captured growing attention in the past generation, many aspects of law and economics learning are now offered at the Law School. "Modern legal education is interdisciplinary," Dean Jeffrey S. Lehman, '81, has noted, "and without question the other academic discipline that has had the greatest influence on legal scholarship is the field of economics."

The launch of the center is supported by a two-year grant from the John M. Olin Foundation.

LAW AND ECONOMICS WORKSHOP SCHEDULE

The Law and Economics Workshop, part of the program of the John M. Olin Center for Law and Economics, offers weekly programs in which scholars make available works-in-progress for discussion by faculty and enrolled students. Workshop programs began in September. Here is the schedule for the remainder of the fall term:

| | |
|--------------------|--|
| October 5 | David Dana, Northwestern University School of Law |
| October 12 | Paul Mahoney, University of Virginia School of Law |
| October 19 | Victor Goldberg, Columbia University School of Law |
| October 26 | Jill Fisch, Fordham University School of Law |
| November 2 | Stephen Choi, University of California at Berkeley School of Law (Boalt Hall) |
| November 9 | Edward Iacobucci, University of Toronto Faculty of Law |
| November 16 | Merritt Fox, University of Michigan Law School |
| November 30 | Kathryn Spier, Kellogg School of Graduate Management, Northwestern University |
| December 7 | Daniel Shaviro, New York University School of Law |

Golden Diploma goes to Bolgár

Vera Bolgár, who is retired from the Law School, has been awarded the Golden Diploma from The Eötvös Lóránd University of Sciences in Budapest, where she holds the distinction of being the first woman to earn a law degree. She completed her legal studies there in 1949.

The Golden Diploma was presented to Bolgár "in recognition of her valuable contributions in the field of Legal Science over the past 50 years." Bolgár traveled to Budapest to receive the award.

Bolgár joined the University of Michigan Law School in 1949, was instrumental in the development of the *Michigan Journal of International Law*, and has remained active since her retirement in 1979.

"I've had quite a few publications since I retired," she said.

Bolgár's most recent publication appeared in June in the *Encyclopedia of Eastern Europe: From the Congress of Vienna to the Fall of Communism*, edited by Richard Frucht (Garland Publishing Inc., New York and London, 2000). Her entry, "Law and Codification," traces the development of legal codes from Roman to modern times.

A new eye on the world

Recognizing that future lawyers will deal with international questions in nearly all aspects of their work, faculty members have approved the requirement that every Law School student complete a new course designed to "provide an introduction to the international dimensions of law."

Called Transnational Law, the new course "will include the foundations of public as well as private international law with a particular view to the professional needs of current and future lawyers, both in government and in private practice," according to the proposal the faculty approved. The proposal came to the faculty from the steering committee of the Center for International and Comparative Law and the Law School's Curriculum Committee.

The new course will be offered as a first-year elective in winter 2001 and will become a graduation requirement during the 2001-2002 academic year. The Law School is the first top American law school to require such a course.

Transnational Law, designed as an introductory course, "can be taken as a first-year elective or during the second or third year," the faculty said. "Obviously, students who want to take advanced international courses will be strongly advised to take it earlier rather than later."

Making the course mandatory "conveys the important message that the international dimensions of law have become so pervasive that their study is not an option but a necessity," according to the Curriculum Committee.

In the area of public international law, the new course will address:

- Institutions and their role (international, regional NGOs, and trade regimes such as WTO and NAFTA);
- Sources of public international law, especially the making, force, implementation, and interpretation of treaties;
- Fundamental principles; and
- Domestic force of international law.

In the area of private international law, the course will address:

- International civil jurisdiction principles and their relationship to international commercial arbitration;
- Foreign and international law in domestic courts;
- Trans-boundary effects of judgments; and
- The most important conventions affecting private disputes.

White's first novel: *Second Families*

Mary F. White, former head of the Law School's Legal Writing Program, has published her first novel, called *Second Families*.

White's novel was published this year by Citron Press of London. Centering on a Chicago area family, it deals with the difficulties that accompany blending a family and how the teacher/wife/stepmother, daughter/stepdaughter/student, father/husband, and mother/former spouse redefine their roles and themselves.

And, yes, one of the main characters is a lawyer.

Working to improve children's welfare

Carol Boyd often begins her programs on women drug users by showing an advertisement for cigarettes. "Nicotine is the most addictive drug," Boyd, a professor of nursing and women's studies and director of the University of Michigan's Substance Abuse Research Center, tells listeners.

"I'm here to tell you," Boyd continues, "that she's not much different from the woman who smokes crack cocaine, except that she uses a legal drug."

Across the room, Boyd's listeners are paying rapt attention. These Bergstrom Fellows are here at the Law School for intensive classroom and hands-on preparation before heading out for summer internships with child advocacy agencies across the country. Four are Law School students; the other 13 come from law schools across the United States. What they share is a commitment to using the law to improve the welfare of children.

The annual spring training that precedes the Child Welfare Law Summer Fellowship is supported by the Bergstrom Endowment. The Endowment and the Holden Foundation also fund a number of summer fellowships.

For three days, while many other people are preparing for the long Memorial Day weekend, the summer fellows undergo a rigorous preparation for their internships. The May 25-27 program included sessions on "Child Protection and Foster Care Legal Process," "Child Sexual Abuse/Interviewing the Child," "Drug Abuse and Parenting," and an "Introduction to Child Development."

In addition, participants prepare and take part in a mock court case and meet with clients who provide them with a consumer's perspective on the child welfare system. Their dinner speaker this year was the Hon. Nancy C. Francis, '73, a Washtenaw County Family Court judge, who spoke on "Child Advocacy — A View From the Bench."

Teaching faculty for the program included Clinical Professor Donald N. Duquette and Clinical Assistant Professor Melissa Breger, '94. Attorney Naomi Woloshin organizes the annual training.

Women react more quickly and more severely to drug abuse, and it often takes a woman a decade to free herself of drug dependency, Carol Boyd, director of the University of Michigan's Substance Abuse Research Center, tells summer child welfare fellows during their training in May. Boyd was one of several speakers for the intensive, three-day training session.

Four Law School students were among the 17 Bergstrom Fellows who spent three days of intensive preparation at the Law School in May before beginning their Child Welfare Law Summer Internships. From left are Beth Koivunen, Melissa Cordner, Peter Tamm, and Bethany Steffke.



Dean Jeffrey S. Lehman, '81, welcomed the fellows; other speakers included James Henry, of the School of Social Work at Western Michigan University; child psychologist Pamela S. Ludolph; Frank Vandervort, director of the Child Welfare Law Resource Center at the Law School; and Boyd.

Boyd focused her remarks on female drug users, noting several differences between men and women who use drugs:

- Women get sicker more quickly from drug abuse. Differences in hormonal balances and physical size may account for much of this.
- Women drug users show a higher rate of depression.
- "It's a sad fact that many women are initiated into drugs by fathers or uncles, often in the process of being abused. Two-thirds to three-fourths of drug-addicted women have a history of sexual abuse."



Don't expect quick cures, she warned the fellows, who in their child advocacy careers often will have to deal with drug-dependent or drug-addicted mothers. "It takes about 10 years for a person to recover from drug use, and in that time she will enter treatment three or four times."

The four summer fellows from the Law School included: Beth Koivunen, who followed her training with an internship at the University of Michigan Child Advocacy

Law Clinic; Melissa Cordner, who did her summer internship with the Children's Advocacy Project of the Chicago Lawyers' Committee for Civil Rights Under Law; Peter Tamm, who worked during the summer with the Child Welfare Law Resource Center at the Law School and with the Michigan ACLU; and Bethany Steffke, who joined Koivunen to intern at the Child Advocacy Law Clinic.

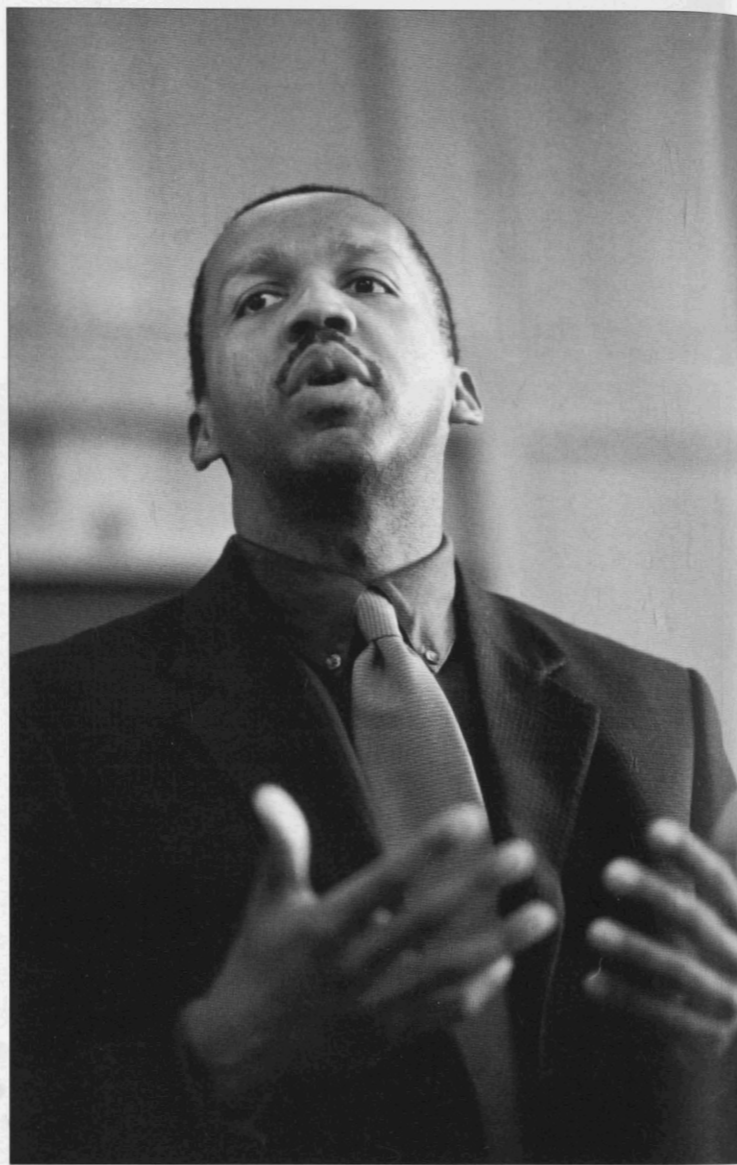
Training for death penalty bouts

It takes a special brand of lawyer to take on, much less specialize in, death penalty cases. There is the sense of aloneness that can accompany defending a suspect who has few or no other allies. There may be the threadbare finances that accompany such cases, especially if the attorney is appointed by the court. And of course there is the ultimate life-and-death measure of the lawyer's performance.

Bryan Stevenson, director of the Alabama-based Equal Justice Initiative, puts it another way: Capital defense is a "pretty extraordinary" area of the law that requires "extraordinary effort." With five lawyers, an annual budget of less than \$500,000, and more than 100 death penalty cases, "We are privileged to do more than anybody thinks possible."

Stevenson was one of three keynote speakers for the Clarence Darrow Death Penalty Defense College presented at the Law School last spring. Sponsored by the Law School, the American Bar Association, and the National Association of Criminal Defense Lawyers, the college brought together attorneys from throughout the United States who are working on death penalty cases to strategize their cases with each other and experts in the field. Confidentiality was strictly enforced, so most sessions were held behind closed doors. But

Many defendants in capital cases feel isolated and friendless, and defending them is "ultimately about hope," Bryan Stevenson, director of the Alabama-based Equal Justice Initiative, tells participants in the Clarence Darrow Death Penalty Defense College, held at the Law School last spring.



Trying a capital case is a "battle," Visiting Assistant Clinical Professor and College Director Andrea Lyon explains in her closing talk to the Clarence Darrow Death Penalty Defense College. "There are lots of different ways to fight the battle, but you have to understand that you're in it, and in it every minute."



Yale Kamisar, right, Clarence Darrow Distinguished University Professor of Law, chats with keynote speaker Michael Tigar after Tigar's address to the Clarence Darrow Death Penalty Defense College, held at the Law School last spring.



Stories have great power because juries remember them, Michael Tigar explains during his talk to the Clarence Darrow Death Penalty Defense College. Tigar drew parallels with the biblical story of Joseph in his successful defense of Terry Nichols against a possible death penalty in the trial for his involvement in the bombing of the Murrah Federal Building in Oklahoma City.

"overblown rhetoric" in such cases, and defense attorneys need to be talking to juries "about what they're supposed to do, require them to think about and articulate that prison is a punishment, that whatever the crime [was] the punishment is not automatic."

"Why was Clarence Darrow so good?" Tigar asked, referring to the fiery attorney whose name identified the Death Penalty Defense College. "Because he had a sense of history, [that] no matter what he [the accused] has done, we are all a part of the human family."

Tigar noted that he had referred to the biblical story of Joseph in his defense of Nichols, noting how Joseph forgave his brothers, who sold him into slavery. There's great power in stories, Tigar said. "Stories work. We know that juries remember stories. In our tradition we get the story — and then the lesson. We get the story — and then the revelation. We get the story and then we're ready for the rule — and learn something about ourselves."

The closing keynote, Visiting Assistant Clinical Professor and College Director Andrea Lyon, outlined "the politics of trying a death case."

"I think it's a lot easier for people to kill the problem than to solve it," she said. "It's hard to solve the problem. You can't solve it in a sound bite. . . ."

"Inject complexity, inject uncertainty. Show how hard a case it is, and let the jury see that it's okay not to have a simple answer."

Another Death Penalty College is being planned for spring 2001 at the Law School.

Information on the college is available through the Centers & Programs link on the Law School home page (www.law.umich.edu).

the public sessions offered wide windows into the stresses of this kind of practice.

Capital crimes defense is high stress work, Stevenson advised. "Understand that death penalty litigation always has got to be a client-centered thing. Get to know your client, get to understand him in order to present who your client is. You must get your client to trust you."

"In my experience, it is about hope," he added. "You're not just talking about facts. . . . You're ultimately talking about hope."

Michael Tigar, the second of the college's three keynoters, successfully defended Terry Nichols against the death penalty in the Oklahoma City federal building bombing case. Prosecutors often employ

Conferences offer opportunity for deeper look at issues

Mini-conferences are part of the way of life at the Law School — small discussion groups, informal hallway debates, social activities that include earnest talks about legal issues like informed consent, intellectual property, takings, or any of the many other subjects that are part of a legal education.

Formal conferences serve a similar, but expanded purpose by bringing together experts to explore and concentrate on specific issues like suspect warnings, the impact of the Americans with Disabilities Act, or the pervasive expansion of technology against the bulwarks of privacy and individual rights. As occurs each academic year, several conferences are scheduled during this 2000-2001 year, on a variety of subjects that bring a legal perspective to bear on topics ranging from current events to images in the crystal ball.

Here is the lineup of conferences scheduled during this academic year:

- **Directions for Reform: The Americans with Disabilities Act (ADA)**, November 3-4. "Why the ADA?" ask conference organizers, who are associated with the sponsoring *University of Michigan Journal of Law Reform*. "This year is the 10th anniversary of the passage of the ADA, the most comprehensive disability rights statute [ever enacted]. The ADA has been under attack, however, by those who think that its high economic costs to employers and institutions have been a disincentive to breaking down the barriers to employment, transportation, public accommodations, and public services for individuals with disabilities." They add: "In addition to the controversy surrounding the effectiveness of the ADA, the ADA has also created a tremendous amount of litigation, especially during the last two years. Although the statute has been on the books since 1990, the Supreme Court remained silent on the Act until 1997. The Supreme Court decided eight ADA cases in its 1997 and 1998 terms. The Court's interest has renewed public attention to the problem of discrimination against persons with disabilities and has led scholars to question the effectiveness and viability of the ADA." The conference, sponsors say, is designed to provide "a special opportunity for students, faculty, and administrators throughout the University to attend a program addressing a multidisciplinary issue in a realistic, interdisciplinary, reform-oriented manner."
- **Miranda after Dickerson: The Future of Confession Law**, November 17-18. Say the organizers: "In the 1966 landmark decision of *Miranda v. Arizona*, the Supreme Court held that police must take some steps to protect a suspect's Fifth Amendment rights against self-incrimination before initiating questioning. The case produced the now famous 'Miranda warnings.' In 2000, the Court ruled in *Dickerson v. United States* that *Miranda* was a constitutional decision that Congress could not displace by passing a statute that required merely that confessions be voluntary. After *Dickerson*, questions abound regarding the case's impact on confessions law and *Miranda* jurisprudence." Among participants will be Paul Cassell of the University of Utah, leading and longtime proponent of overturning *Miranda*, and Clarence Darrow Distinguished University Professor Yale Kamisar, a leading proponent of maintaining the *Miranda* protections. (See page 96 for an excerpt of Kamisar's article on the congressional hearings that preceded passage of the law that sought to overturn *Miranda*.)
- **Factory Farming in the 21st Century: Are the Financial Benefits Worth the Environmental and Social Costs?** January 26, 2001, presented by the University of Michigan Environmental Law Society. Animal Feeding Operations (AFOs) are a growing part of the food production industry and raise issues of environmental and human health and the treatment of animals. "The University of Michigan Environmental Law Society believes that now is an opportune time to bring all sides of this issue together to address the numerous concerns involved, and to discuss solutions to what has become a truly national problem," conference organizers say in the program proposal. The conference will bring together industry representatives, farmers, governmental agency members, environmentalists, property rights and animal rights activists, and foreign observers.
- **Law, Policy, and the Convergence of Telecommunications and Computing Technologies**, March 7-9, 2001. Sponsored by the Law School, College of Engineering, School of Information, School of Public Policy, Business School, and the *Michigan Telecommunications and Technology Law Review*, with support from The Park Foundation. "The end of the 20th century saw the convergence of telecommunications and computing technologies, as the Internet, wireless communications, and a high-bandwidth cable infrastructure transformed all aspects of economic and social life," note conference organizers. "This transformation called into question a broad array of legal norms and policy solutions, within individual nation-states and globally. . . . This conference will bring together a group of leaders from the legal, policy, technical, and business domains to explore these questions and speculate about our shared future." Some of the issues being considered at deadline time for discussion at the conference were: "No

Walls: Personal Privacy in a Connected World"; "One World: Who Taxes? Who Regulates?"; "Internet and Stock Trading: Financial Markets, Services and Transactions, and Direct Trading"; "Content: How Much of My Idea Should I Own?"; "Human Relationships: Is This Bringing Us Together or Driving Us Apart?"; and "Fraud: Can You Trust the Information You Get?" Conference proceedings will be published by the *Michigan Telecommunications and Technology Law Review*.

- **American Indian Law Day**, March 22, 2001. Sponsored by the Native American Law Students Association, this one-day conference examines an issue affecting Native American legal life and coincides with the opening of the annual Ann Arbor PowWow, Dance for Mother Earth. Program details were not available at deadline time.

- **Change, Continuity, and Context: Japanese Law in the 21st Century**, April 5-7, 2001. Sponsored by the Japan Foundation, the University of Michigan's Center for Japanese Studies, and the Law School endowments from Sumitomo Bank Ltd. and Nippon Life Insurance, the conference will include presentations by Japanese comparative law scholars and major U.S. scholars of Japanese law, as well as sociologists, political scientists, and historians.

- **Judging Business: The Role of Judicial Decisionmaking in Corporate and Securities Law**. To be held April 20-21, 2001, under sponsorship of the John M. Olin Center for Law and Economics. "Judging Business," as organizers call the conference in verbal shorthand, will focus on the role that judges play as human agents in the development of corporate and securities law. The papers presented will examine how the ideology, experience, psychology,

and cognitive limitations of judges affect judicial decisionmaking in business cases. Papers will be presented by Chancellor William Chandler of the Delaware Chancery Court; Steve Bainbridge and Mitu Gulati of UCLA; Hilary Sale, of the University of Iowa; Robert Thompson of Vanderbilt University; and Adam Pritchard of the Law School. Confirmed commentators at deadline time included William Allen, director of New York University's Center for Law and Business; William Eskridge of Yale University; Donald Langevoort of Georgetown University; Joel Seligman of Washington University; and Edward Rock of the University of Pennsylvania. Federal judges also have been invited to

bring their judicial perspective to the discussion.

- In addition, the *Michigan Journal of Race & Law* is presenting the speaker series **Race and Democracy in the New Millennium**. The series includes programs this fall and in January, February, and March 2001. Activities include individual speakers, panel discussions, and a debate. Organizers say the series is designed to "explore various issues concerning the roles and rights of racial minorities in U.S. political life" and "will bring together students, scholars, practitioners, and activists to explore the ways in which race, law, and the political process intersect."



Framed —

We all know the attractiveness of the Law Quadrangle, but we're not the only ones to recognize the artistic value of the English-style stone buildings that make up our Law School. Visitors to the Art Fairs in Ann Arbor in July found framed black-and-white photographs of Law Quad buildings on display at the booth of photographer Patrick Whalen of Wesley Chapel, Florida. Another artist, Cynthia Davis, of Ann Arbor, displayed small artistically altered Polaroid prints of the Law Quad.

Today exchange joins kindred spirits

Count on the Law School to prove Kipling wrong: East met West this past academic year, and the twain got on famously.

"It's about a week early for a real evaluation," Mark D. West, who directs the Law School's Japanese law program, reported as the winter term was winding down, "but I think that it's fair to say that the University of Tokyo (*Today*) faculty exchange has been phenomenal this year."

The year had been a busy one for West, as well as for others involved in the four Japanese law courses offered at the Law

really involved in Japan so far, or going to be in the future, would come to join and it must be a very small, quiet, and subtle seminar," he said. "My prediction has turned out completely wrong. Although two students dropped out at the first meeting, seven students are very active, acute, and good in my seminar.

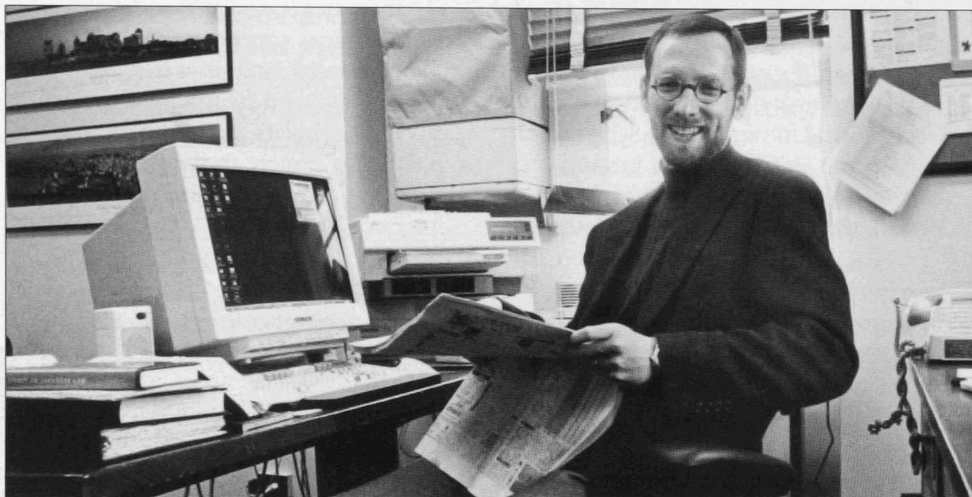
"I first thought I should give introductory remarks to explain in English what a particular Japanese legal document, such as a Japanese Supreme Court judgment, meant. [But] no, it was not necessary at all. They even could not wait for the end of my English explanation. They just began arguing with each other in Japanese on the legal issues."

"I am impressed with the students' ability and eagerness to learn foreign matters through foreign language," he said. "They are a great asset to your Law School. Am I proud of them? Of course."

The excitement reached beyond the classroom. A real highlight of the exchange is the faculty interaction, West said. "Professor Yozo Yokota and Professor Robert Howse each discovered that he is not the only person in the world attempting to link international trade with human rights." Yokota and Howse met again in Tokyo in the spring.

Professor Ronald Mann and Professor Osamu Morita, a law and economics specialist from the University of Tokyo, were in tune with each other from the instant they met. "Five minutes after Mann came in to tell me how fascinating Morita is, Morita came in to tell me that he had finally met his academic counterpart in the United States — Ronald Mann."

In the other half of the Japanese connection, West and five other Law School faculty members taught and spoke in Japan during the summer: Professors Don Herzog and Matthias Reimann, LL.M. '83, taught at the University of Tokyo; Schneider lectured and interviewed in Kyoto and Tokyo; Richard O. Lempert, '68, delivered a number of lectures; Howse attended a conference; and West taught a full course in Japanese on comparative corporate law at Kyoto University. In September, Mann began a two-month stay in Japan as Visiting Scholar from Abroad at the Institute for Monetary and Economic Studies of the Bank of Japan.



Mark D. West

School. West brought in short-term visiting professors from the University of Tokyo to co-teach a seminar in Japanese Law with him. He feels that the team-teaching approach, using a Westerner who had lived, studied, and taught in Japan, and a Japanese national, provides students with the kind of multi-national perspective that such a course demands. Carl Schneider, '79, the Chauncey Stillman Professor for Ethics, Morality, and the Practice of Law, also used the team-teaching approach to teach Comparative Family Law, which he and Visiting Professor Shinichiro Hayakawa created.

Visiting Professor Takahashi Maruta taught two courses, Individual Rights in Japan, and Japanese Legal Documents. As Professor Maruta told many members of the Law School in a group e-mail, the latter course was the first seminar in the Law School to let students read, argue, and write solely in Japanese. "At first I imagined that maybe a couple of students who were

EC issues claim growing share of Dutch council's time

If you need a measure of the impact of the European Community on domestic legal issues in Europe, ask Richard H. Lauwaars, a member of the Council of State of The Netherlands.

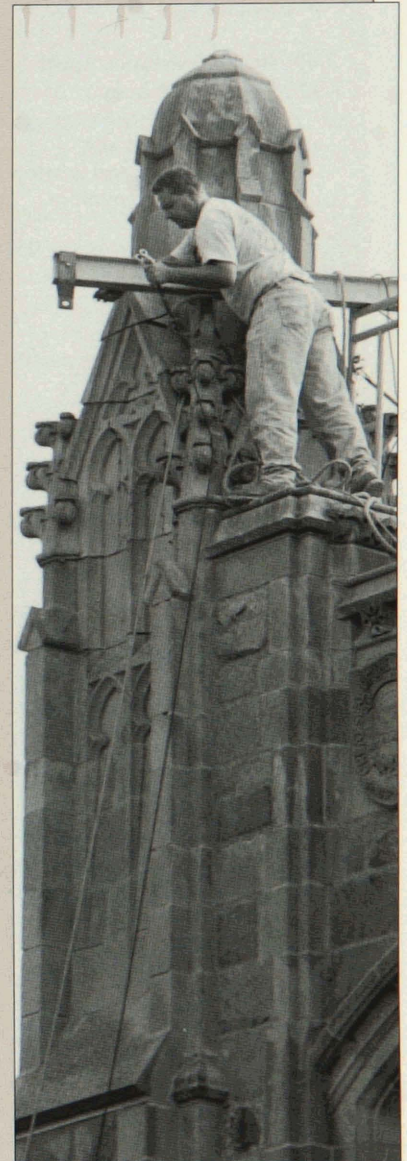
In 1994, when he joined the council, about five percent of the cases that came before the council involved issues associated with the European Community, Lauwaars said. Now, up to half of the 600 cases the council handles each year fall into that category.

"I can say it still is growing," said Lauwaars, who has taught at the Law School as a visiting professor and stopped by last summer during a vacation trip through the United States. "We average 600 cases a year, and in 250 to 300 Community law plays a role. Sometimes it's in the background, in other cases it is predominant."

For example, European Community law often plays a major role in cases involving agriculture, technical standards, food legislation, and transport, he said. Last year, the common Community foreign policy was extended to include national defense and now there is discussion of a common European defense policy.

The Council of State has two main functions: (1) to advise the government on the legality of all pending legislation, and (2) to serve as the country's highest court of administrative law. Council opinions on pending legislation are not binding, "but the government has to write a reply," Lauwaars said. His own special task, he explained, is to manage reports on pending legislation that involve European Community law. "I am the representative for the European Union," he said of his role among the council's 26 members.

Looming in the future is the probability that the council also will become Holland's appeals court for asylum cases, an added responsibility that Lauwaars said would significantly increase its workload.



Torts and Tuckpoint —

The Law School is justly famous for its architecture, and many a future lawyer has learned to read and write briefs within its sandstone walls. But even stonework requires maintenance, and workers from Ohio Restoration of Sylvania, Ohio, spent most of the summer tuckpointing, mortaring, and otherwise repairing the walls, towers, and other features of the Law School's buildings. Seeing the Law Quadrangle through their eyes offers a perspective that students and faculty members seldom get. The repair work was based on the study report "The Building Envelope Investigation," prepared by Simpson, Gumpertz and Heger of Arlington, Massachusetts.

- 38 Vining marks 'time' at Cambridge
- 39 Herzog named Edson R. Sunderland Professor of Law
- 39 Alain Boureau visits to share expertise on Middle Ages
- 40 Heller/Krier article voted among year's best
- 40 Gueyser, Weber join Detroit-based Legal Services for Urban Communities Clinic
- 41 *A Modern Approach to Evidence*
- 41 Massive new treatise assays criminal procedure
- 42 Activities
- 43 MacKinnon wins case against Karadzic
- 44 Three faculty join Legal Practice Program
- 45 Visitors add depth to Law School offerings
- 51 Faculty publications — 1997-2000

Vining marks 'time' at Cambridge

Professor Joseph Vining was among the speakers for a special millennial presentation of the Tanner Lectures on Human Values at Cambridge University during the summer.

"This millennium year, the trustees of the Tanner Foundation decided to have at Cambridge a millennium celebration and symposium on the subject of 'time' over a three-day period, involving 10 lecturers from the United States and five from

Britain representing various disciplines, rather than the usual single lecturer," said Vining, the Harry Burns Hutchins Collegiate Professor of Law.

The series was "a fascinating interdisciplinary effort," he reported.

Stephen Jay Gould of Harvard University opened the series on June 30 with a talk on "Large and Small Scales of Time." Pulitzer and Nobel Prize-winning author and Princeton University professor Toni Morrison concluded the series on July 2 with a talk on "The Loss of Lost Time."

"Between them were three groups of lectures," said Vining, "the first, by historians of science, anthropologists, and an historian of religion, addressing calendars and calendrical existence; the second, by physicists, biologists, an astrophysicist, and myself, addressing the scientific measurement of time; and the third, by composers and historians of music, on time in music.

"Each of my books has wrestled in some way with the problem of time in legal thought, and with various aspects of the reality of time not captured in our sense of it as a sequence of units — what is sometimes called 'real time.' My talk on 'Unmeasured Time' was placed at the end of the second group to provide a transition from discussion of the scientific measurement of time to discussion of the musical performance of time."

William E. Bolcom, the Ross Lee Finney Distinguished University Professor of Music at the University of Michigan School of Music, also spoke in the series. Bolcom discussed "Musical Time vs. Real Time."

The Tanner Lectures on Human Values rotate among seven American and two British universities — Michigan, Stanford, California, Utah, Yale, Harvard, Princeton, Oxford, and Cambridge. The lectures are sponsored "to advance and reflect upon the scholarly and scientific learning relating to human values. This intention embraces the entire range of values pertinent to the human condition, interest, behavior, and aspiration."



Joseph Vining

Herzog named Edson R. Sunderland Professor of Law



Donald J. Herzog

Donald J. Herzog, who holds professorships in both the Law School and the Department of Political Science, has been named the Edson R. Sunderland Professor of Law. The University of Michigan Board of Regents approved the appointment this summer.

A member of the Law School faculty since 1991, Herzog began teaching at the University of Michigan in the Political Science Department in 1983. He earned his A.B. *summa cum laude* from Cornell University and M.A. and Ph.D. degrees from the Harvard University Department of Government. He also has been associated with the Institute for Advanced Study in Princeton, New Jersey. During the 1995-96 academic year he and fellow Law School professor William I. Miller were fellows at the University of Michigan Humanities Institute.

A leading scholar of democratic theory, Herzog is the author of *Without Foundations: Justification in Political Theory*; *Happy Slaves: A Critique of Consent Theory*; and *Poisoning the Minds of the Lower Orders*. The last book, published in 1998, won an honorable mention award from the Professional/Scholarly Publishing Division of the Association of American Publishers.

The Edson R. Sunderland professorship was established at the Law School in 1967. Sunderland, who taught at the Law School from 1901-44, was one of the leading procedural scholars in the Anglo-American legal world.

Previous holders of the chair include Francis A. Allen and Terrance Sandelow. Both professors also served as deans of the Law School.

Alain Boureau visits to share expertise on Middle Ages

Alain Boureau, a distinguished scholar of the history of the Middle Ages who is based in France, is spending part of fall term with faculty and students as the Thomas E. Sunderland Fellow and Visiting Professor of Law.

Boureau began his visit in September and remains through mid-October. He did his undergraduate studies at the University of Lyon and earned his doctorate in history from the École des Hautes Études en Sciences Sociales in Paris. He currently is director d'études des Hautes Études en Sciences Sociales and director of its Centre de Recherches Historiques.

One of the world's foremost scholars of the history of the Middle Ages, Boureau is the author of numerous books and articles. He has taught at Johns Hopkins University, the University of California at Berkeley, and the University of Michigan. His presence at the Law School "will provide a special opportunity for scholarly exchange on the medieval roots of the law," Dean Jeffrey S. Lehman, '81, and Provost Nancy Cantor told University of Michigan regents in recommending Boureau for the fellowship/visiting professorship. "He is a distinguished addition to a fine Law School tradition."

The Sunderland Fellowship in Law was established 15 years ago, according to the Law School's recommendation to the regents, "to bring to the Law School scholars in a wide range of disciplines other than law to work with the members of the Law School faculty and other faculties throughout the University."

Past fellows have included psychologists such as Lee D. Ross, philosophers such as Judith Jarvis Thomas, historians like Gordon S. Wood and Eugene D. Genovese, and economists like Roger E. Noll and Donald N. McClosely.

Heller/Krier article voted among year's best

The legal arena of takings is familiar territory for Professor James E. Krier, and when he joined forces with Professor Michael A. Heller to re-assess the field their collaboration drew widespread attention.

So widespread that their article on the subject in *Harvard Law Review*, "Deterrence and Distribution in the Law of Takings," has been chosen by *Land Use and Environment Law Review* for reprint as one of the best articles on land use published in the past year. The original article appeared in 112 *Harvard Law Review* 997-1025. An excerpt appeared as "Uncoupling the Law of Takings" in the Spring 2000 issue of *Law Quadrangle Notes*.

"The law of takings couples together matters that should be treated independently," the authors begin. They proceed to devise a four-part approach to takings:

- Ordinary regulation;
 - Taking/no compensation;
 - No taking/compensation; and
 - Ordinary taking.
- "Supreme Court decisions over the last

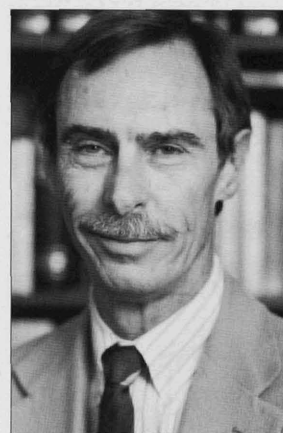
three-quarters of a century have turned the words of the Takings Clause into a secret code that only a momentary majority of the Court is able to understand," the authors say. "The justices faithfully moor their opinions to the particular terms of the Fifth Amendment, but only by stretching the text beyond recognition.

"A better approach is to consider the purposes of the Takings Clause, efficiency and justice, and go anew from there. Such a method reveals that in some cases there are good reasons to require payment by the government when it regulates property, but not to insist upon compensation to each aggrieved property owner. In other cases, the opposite is true — compensation to individuals makes sense, but payment by the responsible government agency does not. Uncoupling efficiency and justice would invigorate the law of takings."

This is the third time that Krier, the Earl Warren DeLano Professor of Law, has won this honor from *Land Use and Environment Law Review*.



Michael A. Heller



James E. Krier

Gueyser, Weber join Detroit-based Assistance for Urban Communities Clinic

Two faculty members have joined the Law School's Legal Assistance for Urban Communities Clinic in Detroit:

- Teresa N. Gueyser, who has worked extensively in Detroit legal circles, brings that expertise to the clinic as a clinical assistant professor; and
- Matthew D. Weber, who has taught at the University of Wisconsin Law School, joins the clinic as a visiting assistant clinical professor who will work with students in many of the projects the clinic undertakes.

The Legal Assistance for Urban Communities Clinic helps community-based groups develop projects and get assistance for housing programs and related activities. Gueyser's experience is proving especially helpful in guiding students through their contacts and negotiations with city agencies and officials.

Gueyser came to the clinic from a post as chief assistant corporation counsel to the

manager of the Real Property/Environmental Division of the City of Detroit Law Department, where she oversaw legal services delivery to city agencies in all aspects of real property acquisition and disposition; she had held the post since 1997.

Prior to that, she served as general counsel to the City of Detroit Housing Commission, and earlier, as senior assistant corporation counsel, she drafted and negotiated contracts for legal services, housing consultants, environmental services, and other construction-related subjects for the City of Detroit.

Before joining the city staff in 1995, Gueyser practiced with Lewis, White & Clay P.C. in Detroit, where she concentrated on public corporation law and quasi-governmental authorities.

Gueyser is a graduate of the University of Iowa School of Law and Indiana University.

Weber earned his B.A. at the University of Michigan and then went on to earn an

M.A. at the University of Wisconsin La Follette Institute of Public Affairs and his J.D., *cum laude*, from the University of Wisconsin Law School, where he also has taught a course in conflict of laws.

Before joining the Detroit-based Law School clinic, he was a research attorney in the family division of Wayne County Circuit Court, where he worked with judges from across Michigan to revise court rules that govern the family division; he also worked with outside counsel to prepare pleadings and briefs in civil actions.

Weber has served as a judicial clerk for the Hon. John C. Shabaz, chief judge of the U.S. District Court for the Western District of Wisconsin, clerked for the Government Operation and Administrative Law Division of the Wisconsin Department of Justice, and served as coordinator of the Northern Michigan Environmental Action Council.

He is a member of the state bars of Michigan and Wisconsin.

A Modern Approach to Evidence

Evidence is both “eminently practical and highly intellectual,” explain authors of a massive new textbook on the subject.

Law School professors Richard O. Lempert, '68, and Samuel R. Gross, with James S. Liebman of Columbia Law School, devote 1,420 pages to giving law students the material they need to mine the depths of the subject of evidence. The narrative and problem-oriented nature of their book, *A Modern Approach to Evidence: Text, Problems, Transcripts, and Cases*, 3rd edition (West, 2000), are designed to encourage policy analysis and concentration on the principles behind rules of evidence.

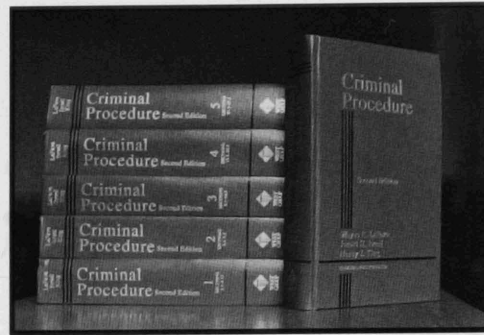
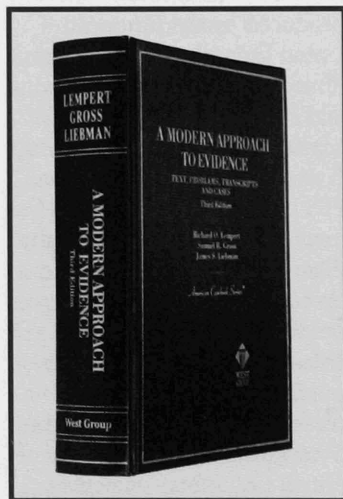
“There are rules to be learned and concepts to be pondered,” the authors write. “The rules of evidence may be examined from historical, logical, and psychological perspectives. They may also be examined as tools that lawyers use to win cases. Ethical issues are close to the surface in this course and are important to an understanding of what it is to be a lawyer. Underlying everything is the often unexplored relationship between rules of evidence and the quality of justice that a legal system delivers.”

The 3rd edition contains a new section on the terminology of evidence law and the process of making a record, and a new chapter on taking evidence. Authors of the 1977 and 1983 editions expected the field of evidence to return to the stability it had exhibited prior to adoption of the Federal Rules of Evidence in 1975.

“That has not happened,” note the authors of this new edition. “The Supreme Court has taken a special interest in clarifying this federal code, Congress has been politically inspired to overturn age-old principles, and, perhaps most important, an Advisory Committee on the Federal Rules of Evidence was created in 1993 and seems determined to prove its value by undertaking the Sisyphean task of bringing the rules closer to perfection.”

As a result, the authors say, the new 3rd edition is mostly rewritten “and having learned to expect more rapid change in the law of evidence — we are committed to maintaining its currency with more frequent revisions.”

Lempert, the Francis A. Allen Collegiate Professor of Law, teamed with Stephen A. Saltzberg to write the first two editions. This time, his co-authors include Gross, the Thomas G. and Mabel Long Professor of Law, and Liebman, Simon H. Rifkin Professor of Law at Columbia Law School.



Massive new treatise assays criminal procedure

It's been 15 years since Jerold H. Israel and long-time co-author Wayne R. LaFare thoroughly surveyed the landscape of criminal procedure — and (with the help of a third co-author, Nancy King) the result of their return is a new treatise that doubles the size of its three-volume predecessor.

“In large part, this growth represents an effort on our part to take note of changes that have occurred in the interim,” Israel, Alene and Allan F. Smith Professor of Law Emeritus, and his co-authors say in the preface to their newly published 2nd edition of *Criminal Procedure* (West Group, 1999). The treatise also is available electronically on Westlaw under the CRIMPROC sign-on.

The six-volume treatise again teams Israel, who also is Ed Rood Eminent Scholar in Trial Advocacy and Procedure at the University of Florida College of Law, with LaFare, the David C. Baum Professor of Law Emeritus and Center for Advanced Study Professor Emeritus at the University of Illinois. This time they are joined by new co-author Nancy J. King, '87, professor of law and associate dean at Vanderbilt University School of Law. King “has brought great skill and enthusiasm to the project, and we have benefited

greatly from her many significant contributions to the enterprise,” her co-authors say.

The massive new treatise brings readers up to date since the first edition appeared in 1984. “During that period, the U.S. Supreme Court has decided a few hundred cases that, collectively, have changed further the character of our state and federal criminal justice systems,” Israel, King, and LaFare note. “We have given particularly close attention to those cases, but have also made an effort to reflect changes, both subtle and dramatic, that have been brought about by legislative activity or by shifting trends in lower court cases.

“Beyond this, the increase in size in the treatise represents an effort by the authors to improve generally upon what we were able to accomplish in the first edition. And thus, even as to subject matter where the governing principles have undergone little or no change, we have attempted to improve the coverage by presenting a more highly developed textual analysis and/or more extensive footnote documentation in the form of relevant court decisions, statutes, rules of court, law review articles, and books.”

The expanded work cites more than 17,000 cases and more than 3,000 statutory or court rule provisions.

Activities

Professor **Evan H. Caminker** is on leave to serve as deputy assistant attorney general in the Office of Legal Counsel, U.S. Department of Justice, until January 2001.

Wade H. McCree Jr. Collegiate Professor of Law **David L. Chambers** chairs the Association of American Law Schools' (AALS) Commission on *Pro Bono* and Public Service Opportunities and is co-chair of AALS' Task Force on Diversity in Admissions. He completes his term on AALS' executive committee this year. During the winter term he presented an AALS workshop on "Empirical Research on the Legal Profession" at the University of Vermont Law School, and spoke on "Customary Marriage Rules in Post-Apartheid South Africa" on two occasions, at a Social Science Research Council conference in Phoenix and for the Family Workshop Group of the Institute for Social Research at the University of Michigan.

Clinical Assistant Professor **Kenneth D. Chestek** presented a seminar program for the Virginia Association of Assessment Officers in July.

Edward H. Cooper, the Thomas M. Cooley Professor of Law, has been appointed an adviser to the American Law Institute's International Jurisdiction and Judgments Project. He also delivered a paper on "Closure in Mass Torts" at a conference at the University of Pennsylvania Law School and served as Civil Rules Advisory Committee

emissary to the U.S. Judicial Conference Federal-State Jurisdiction Committee.

Rebecca S. Eisenberg, the Robert and Barbara Luciano Professor of Law, appeared on PBS' *NewsHour with Jim Lehrer* in July in a program focused on the human genome mapping project.

Assistant Professor **Daniel Halberstam** in April presented a paper on "Haider and the Limits of European Integration" at the conference on Jörg Haider's Freedom Party in Austria called "Austria Black and Blue," held at the University of Michigan's Center for European Studies. The same month he provided summary remarks at the conference "Privacy in the System of Free Expression," held at Northwestern University's Center for the Advanced Study of Freedom of Expression.

Professor **James C. Hathaway** was involved with two film projects during the winter term. He was on-camera host for a set of refugee law videos produced by the European Union for asylum adjudicators, filmed in Athens in February, and he completed his work as adviser for the film *Well-Founded Fear*, which aired on PBS in May. He was actively involved in the debate over the Elian Gonzalez case, and had op-ed pieces on the issue published in the *Chicago Tribune* and *Los Angeles Times*. In March, he spoke at a conference on illegal migration from China at the University of British Columbia, Vancouver; in April he gave the paper "Can Refugee Law Survive the End of the Cold War?" at the Annual Meeting of the

American Society of International Law in Washington, D.C.; and in May he presented lectures and training courses at the International Secretariat of Amnesty International in London and the Refugee Studies Center of Oxford University.

Thomas E. Kauper, '60, the Henry M. Butzel Professor of Law, spoke on merger control in the United States and European Union in his Bernstein Memorial Lecture at the U.S. Department of Justice in May. He also recently participated in a workshop on joint venture guidelines with the Federal Trade Commission and presented a talk on the Microsoft antitrust issue to the Economic Dinner Group at Ann Arbor. He chairs the Public Service Committee of the ABA's Antitrust Section and the *Amicus* Committee of the ABA's Antitrust Section, and is a member of the ABA Antitrust and International Law Section's Antitrust and International Trade Task Force and the Task Force on Concentration Effects. During the winter he was Distinguished Visiting Professor at the Toledo Law School, where he also presented two programs to the faculty on Microsoft. He lectured at the Golden State Antitrust Institute in San Francisco and was chair and principal lecturer for the Antitrust Short Course presented by the Southwestern Legal Foundation in Dallas.

Earl Warren Delano Professor of Law **James E. Krier** served as commentator on papers by young law professors as part of the

Stanford/Yale Junior Faculty Forum at Yale Law School in May.

Francis A. Allen Collegiate Professor of Law **Richard O. Lempert**, '68, this summer participated in an international five-day conference in Tokyo, Osaka, and Kyoto; his remarks at the conference were quoted in the *Japan Times* and on Japanese radio and he appeared on a Japanese television program about the conference. He also gave a talk on legal education at Kwansai Gakuin University in Japan and spoke to the Osaka Bar Association on the subject of the civil jury.

Professor **Kyle D. Logue** chaired the University of Michigan's *Ad Hoc* Advisory Committee on Tobacco Investments that studied the issue of divestiture of University-held tobacco stocks and wrote the report that recommended that the "[Board of] Regents adopt a policy of divestment with respect to tobacco-company securities." The eight-member committee was formed in September 1999 and made its report in March. In June, the Board of Regents adopted the committee's recommendation "to sell all of the University's currently owned shares of stock (and not to purchase any new shares) in companies that, either themselves or through their subsidiaries, manufacture significant quantities of cigarettes or other tobacco products."

Assistant Professor **Adam C. Pritchard** presented papers last spring at the University of Virginia School of Law's Law and Finance Conference, the annual meeting of the American Law and Economics Association, the Law School's Law and Economics Workshop, the Center for Corporate Law at the University of Cincinnati College of Law, and the F. Hodge O'Neal Corporate and Securities Law Symposium at Washington University School of Law.

During the spring, Professor Emeritus **John Reed** gave talks to the International Society of Barristers Convention at Carlsbad, California; the Judicial Conference of the Eighth Judicial District of Ohio at Cleveland; the Bench-Bar Conference of the Memphis Bar Association in Destin, Florida; and the Kentucky Bar Association Convention at Covington. He also serves as a member of the Michigan Supreme Court's Rules of Evidence Committee.

Professor **Mathias W. Reimann**, LL.M. '83, has been appointed general reporter on "Worldwide Trends in Product Liability Law" for the World Congress of Comparative Law, to be held at Brisbane, Australia, in 2002. He also has been elected a member of the executive committee of the Association of American Law Schools' Section on Conflict of Laws. In June, he was a speaker for the conference on "The Americanization of European Law," held in Paris under sponsorship of the French

Ministry of Finance and Economics. In April he participated in an American Bar Association program on international curriculum, and in March was a speaker for the conference on "Rethinking the Masters of Comparative Law," held at Northwestern School of Law.

Clinical Assistant Professor **Grace Tonner**, director of the Law School's Legal Practice Program, participated in three programs at the Association of Legal Writing Directors Conference in Boston in July: "Student Recruitment and Institutional Advancement," "Hiring, Promotion, and Firing of Contract Law Faculty: Process and Practice," and "Taking Risks: The Next Stage for Your Program and Your Career." In January, she discussed "Looking Forward, Looking Back: 20 Years of Legal Writing," as the Legal Writing Section Luncheon Speaker for the annual meeting of the Association of American Law Schools at Washington, D.C.

MacKinnon wins case against Karadzic

Using a legal argument championed by Professor Catharine A. MacKinnon, a federal jury in New York has ordered fugitive Bosnian Serb leader Radovan Karadzic to pay \$745 million to women who accused him of being responsible for killings, rapes, kidnappings, torture, and other atrocities during the "ethnic cleansing" that was part of the war in their homeland during the early 1990s.

In an unusual move, jurors asked to shake the hands of the women and their attorneys after the verdict was read. One juror called the women "wonderful and dignified ladies who deserve justice for the indignity they suffered."

The eight-day trial took place in the U.S. District Court in Manhattan. MacKinnon, the Elizabeth A. Long Professor of Law, filed the original action in 1993 and led the trial team that argued the case in Manhattan in August. The civil suit was filed by a dozen women survivors of rapes and beatings in the former Yugoslavia and three organizations that assist Bosnian and Croatian war victims. None of the plaintiffs is a U.S. citizen.

Many observers consider the verdict symbolic because Karadzic is not subject to U.S. law, but MacKinnon took issue with those who say none of the damages will be collected. The plaintiffs' lawyers said they would try to seize "substantial assets" held by Karadzic. "It seemed as though they would get away with everything up until now," MacKinnon told *The Washington Post*.

Three faculty join Legal Practice Program

Every student at the Law School takes two terms of Legal Practice, a full-year regimen of legal vocabulary building; learning to write in the different ways that a legal career requires, from letters to clients to briefs to courts; and courtroom simulation.

Legal Practice professors get to know their students well and often work with them one-on-one as the future lawyers develop their skills. Three new faculty members have joined the program this year: Edward R. Becker, Margaret A. Cernak, '89, and Kenneth D. Chestek.

Becker, who graduated *summa cum laude* from the University of Illinois College of Law, previously taught at Thomas M. Cooley Law School in Lansing. While teaching there, he also maintained a solo practice, serving as independent legal contractor for two real estate developers. Earlier, he had been an associate with Dickinson Wright P.L.L.C. in Lansing. At Dickinson Wright, he represented Ameritech Michigan in federal and state courts and before the Michigan Public Service Commission. He also worked in general commercial litigation and corporate defense, insurance rehabilitation, and administrative law.

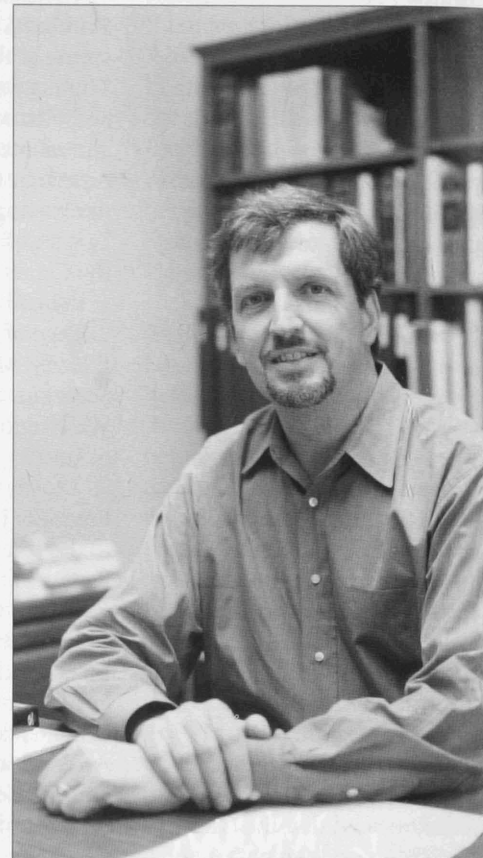
In law school, Becker was articles editor and associate editor for the *University of Illinois Law Review*, a Harno Fellow, and a member of the Order of the Coif. He earned his B.A. in political science from the University of Michigan.

Cernak, who graduated from the Law School *cum laude*, earned her B.A. with high honors and distinction at the University of Michigan. She won the Virginia L. Voss Memorial Award for her senior thesis, "Patterns, Paradoxes, and Possibilities: The Voices of Robert Hayden."

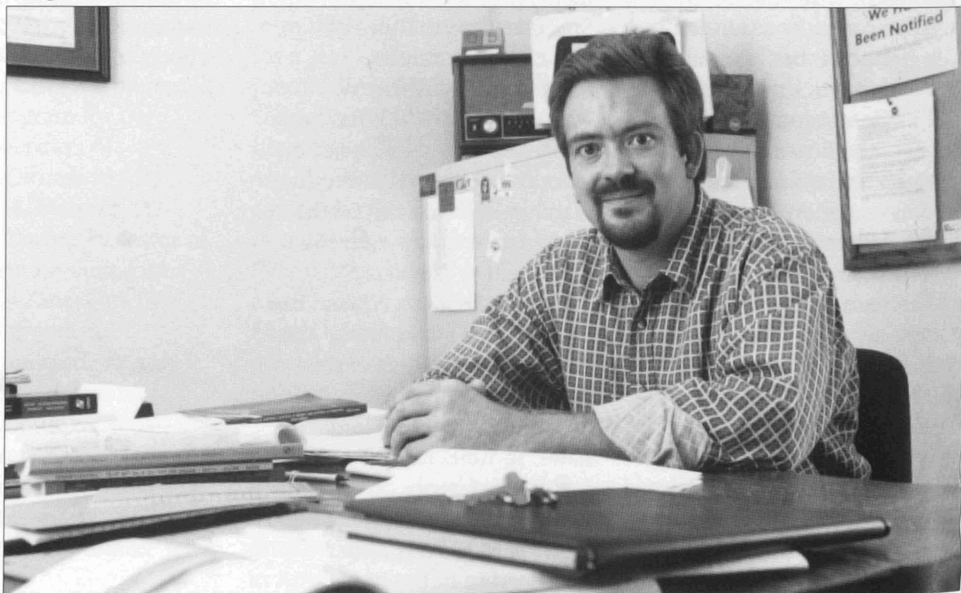
While a student at the Law School, Cernak was a quarter-finalist in the Campbell Moot Court Competition and an afternoon round winner in the ABA Negotiation Competition. She also won the



Margaret A. Cernak, '89



Kenneth D. Chestek



Edward R. Becker

Visitors add depth

University of Michigan Law School Book Award for excellence in legal writing and oral advocacy.

Before joining the Law School faculty, Cernak was a research attorney with Denise L. Mitcham & Associates in Southfield. She also has practiced as a commercial litigation associate with Dykema Gossett in Detroit.

Chestek, who has taught at Gannon University and served as Erie County solicitor, Erie County, Pennsylvania, earned his law degree *cum laude* from the University of Pittsburgh School of Law. At Pittsburgh, he was editor-in-chief of the *University of Pittsburgh Law Review*, a member of the Order of the Coif, and winner of the Scribes Award for the best-written article by a third-year *Law Review* member. He earned his B.A. in English from Pennsylvania State University.

As Erie County solicitor, Chestek supervised four assistant solicitors and provided general legal advice and litigation representation for the county. He was named Outstanding Solicitor for 1995 by the County Commissioners' Association of Pennsylvania.

Chestek has been a partner with two law firms in Erie, Pennsylvania, Agresti & Agresti, and Kingston, Kubinski, Negri & Schonhaler. He also has been managing attorney for the Erie branch office of Philadelphia-based Marshall, Dennehey, Warner, Coleman & Goggin.

His writings have appeared in the *University of Pittsburgh Law Review*, the *International Association of Assessing Officers' Assessment Journal*, and bar association and trade publications. He is principal author of *WordPerfect for Windows 6 in the Law Office* (Que Corporation, 1996) and *WordPerfect for Windows Power Macros* (Que Corporation, 1992).

to Law School offerings

Visiting and adjunct faculty members each year lend new approaches and new perspectives that further enrich the curriculum. Visiting and adjunct faculty members are experts in their fields, and many are widely known among practitioners as well as in the academe. Here are the visitors and adjunct faculty who are teaching at the Law School during this fall term and during the entire 2000-2001 academic year. The list for winter term visitors will appear in the spring issue of *Law Quadrangle Notes*.

Fall 2000:

Annalise Acorn is an associate professor of law at the University of Alberta, Canada, and holds a B.C.L. from Oxford University and an LL.B. and B.A. from the University of Alberta. After law school, she clerked for the Alberta Court of Appeals. Her main areas of scholarly interest are legal theory, women and the law, and restorative justice, and she currently is working with Professor Robert Howse on a collection of essays on law teaching and emotion. Acorn has served as president of the Canadian Association of Law Teachers, has been special counsel on domestic violence matters to the Alberta Law Reform Commission, is a member of the editorial board of the *University of Alberta Press*, and is faculty advisor to the *Alberta Law Review*. She has lectured and published widely, and organized and participated in the Interdisciplinary Colloquium on Justice and Repair at the Canadian Congress of the Humanities

and Social Sciences last spring in Edmonton. At the Law School, she is lecturing, taking part in a variety of discussions and other programs, and assisting in the teaching of several classes.

Elizabeth S. Anderson is teaching Race, Gender, and Affirmative Action. She is professor of philosophy and women's studies at the University of Michigan. Anderson has a B.A. from Swarthmore College and a Ph.D. from Harvard University. Her areas of specialization are ethics, social and political philosophy, philosophy of the social sciences, feminist theory, and epistemology. She is the author of *Value in Ethics and in Economics*.

Howard J. Bromberg is teaching (with Clinical Assistant Professor Phil Frost, assistant director of the Legal Practice Program) Research and Analysis in American Law. Bromberg received his J.S.M. from Stanford Law School and is pursuing a Ph.D. in the history of American law and civilization from Stanford. He holds a J.D., *cum laude*, from Harvard Law School and a B.A., *magna cum laude*, from Harvard College. He has been a legal history research fellow at Stanford Law School, was an assistant district attorney in the Appellate Bureau of the Office of the District Attorney of New York County, and served as

Continued on page 46

visiting faculty

legislative counsel to the office of U.S. Representative Tom Petri. Bromberg is a faculty member and director of the Legal Research, Writing & Advocacy Program of Ave Maria School of Law in Ann Arbor and formerly was a clinical assistant professor teaching in the University of Michigan Law School's Legal Practice Program.

Andrew P. Buchsbaum, staff attorney with the National Wildlife Federation's Great Lakes Natural Resource Center and manager of the center's Water Quality Project, is teaching Federal Litigation: Environmental Case Study. He has worked as program director for the Public Interest Research Group in Michigan and as director and coordinating attorney for the Midwest office of the National Environmental Law Center.

Kathleen Clark, a professor of law at Washington University in St. Louis, is teaching Secrecy and Whistle Blowing and a seminar in national security law. She teaches and writes about political and legal ethics, secrecy and whistleblowing, public corruption, and campaign finance law. She majored in physics and philosophy at Yale College, studied Russian in the former Soviet Union, and studied Spanish in Guatemala. After graduating from Yale Law School, Clark served as a law clerk to Judge Harold H.

Greene, U.S. District Court for the District of Columbia, and then served as counsel to the U.S. Senate Judiciary Committee, where she worked on issues of white collar crime. Clark taught at Cornell Law School in the fall of 1999.

Robert N. Clinton, Wiley B. Rutledge Professor of Law at the University of Iowa College of Law and an affiliated faculty member of the American Indian and Native Studies Program of that university's College of Liberal Arts, is teaching Federal Indian Law. He earned his B.A. at the University of Michigan in 1968 and his J.D. at the University of Chicago Law School in 1971. Professor Clinton joined the faculty at Iowa in 1973 and specializes in federal Indian law and Native American history, constitutional law, federal courts, civil procedure, and copyrights. He is the co-author of *Handbook of Native American Law* and *The American Indian: Readings, Notes and Cases*, two of the primary works on the legal treatment of Native Americans. He also has written numerous articles on Native American law and constitutional law issues. In addition, Professor Clinton serves as the chief justice of the Winnebago Supreme Court and as an associate justice of the Cheyenne River Sioux Tribal Court of Appeals.

Michael Coester, Professor of Civil Law and Labor Law at the University of Munich, is a visiting scholar during the early weeks of the fall term. Coester's research interests include family law, contract law, consumer protection law, labor law, and private international law. He is co-editor of a journal on German and European family law. Coester has written

books on labor law and family law, large sections in the leading commentaries on German civil law, and over 100 articles.

Dagmar Coester-Waltjen, Professor of Law at the University of Munich, is a visiting scholar early in the fall term. Coester-Waltjen has more than 100 publications, focusing on such subjects as the legal problems of artificial reproduction, the protection of pregnant women and young mothers under the laws of the European Community, and the international law of contracts and civil procedure. She has produced a manual on international procedure law and has worked on law reform issues such as the abolition of illegitimacy as a legal category.

Hanoch Dagan taught at the Law School during the summer session and is now teaching two courses, American Legal Theory and Property Theory. He earned his law degree from Tel Aviv University, where he now is a professor, and holds a J.S.D. in law from Yale Law School. Dagan has practiced law in Israel, and his recent book, *Unjust Enrichment: A Study of Private Law and Public Values*, is included in the Cambridge University Press series of studies in international and comparative law. He is the author of numerous articles on private law theory, takings law, distributive justice, and property theory.

Joshua Dressler is teaching two courses, Criminal Law and Criminal Law Defenses. Dressler is a professor of law at McGeorge School of Law at the

University of the Pacific. He received his B.A. and J.D. degrees from U.C.L.A. After completing his education, a judicial clerkship, and a brief period in private practice, Professor Dressler turned to law teaching and scholarship. He was a tenured member of the law faculty first at Hamline University and then at Wayne State University prior to his current position at McGeorge School of Law. Professor Dressler has been a visiting professor at law schools at the University of California, Berkeley; U.C.L.A.; University of California, Davis; University of Iowa; and University of British Columbia. The author of widely recognized and respected treatises and casebooks in the fields of criminal law and criminal procedure, and nearly 30 scholarly articles published in the United States and England on matters of moral philosophy and criminal responsibility, he is editor-in-chief of the four-volume revised edition of the new *Encyclopedia of Crime and Justice*. As a result of his expertise in the field, Professor Dressler served as an advisor to the Oklahoma City bombing case and has provided advice to an Australian legal commission seeking to reform that country's homicide laws and procedures.

Roderick M. Glogower is teaching Jewish Law. Rabbi Glogower received his rabbinic ordination (with honors) in Jerusalem in 1974. He is a *cum laude* graduate of Loyola University in Chicago and holds master's degrees in Jewish philosophy from Yeshiva University and Brandeis University. Rabbi Glogower is the Rabbinic Advisor for the B'nai B'rith Hillel Foundation at

the University of Michigan, and is a highly regarded teacher of Jewish law and rabbinic texts in the Ann Arbor and Detroit areas. The course in Jewish Law evolved from a seminar that had been offered at the Law School for a number of years.

Roger Haines is co-teaching the seminar in Comparative Asylum Law with Professor James C. Hathaway. Haines, who earned his bachelors and law degrees at Auckland University, New Zealand, has been practicing refugee law since 1983 and was appointed Queen's Counsel in May 1999. He also practices in the areas of administrative, immigration, citizenship, customs, and extradition law. He has presented many papers at conferences around the world, and serves as deputy chairperson of the New Zealand Refugee Status Appeals Authority, to which he was appointed when it was formed in 1991. Haines trains all new members of the Refugee Status Appeals Authority, is responsible for the authority's ongoing training program, and has been involved in training officers of the Refugee Status Branch of the New Zealand Immigration Service. He publishes a Web database on New Zealand refugee law known as RefNZ (www.refugee.org.nz), which contains a wealth of information on New Zealand refugee jurisprudence, including headnotes of all Refugee Status Appeals Authority decisions and the texts of the leading decisions.

Kathleen Q. Hegarty, an associate with Marshal E. Hyman & Associates P.C. in

Troy who specialized in actions before the Immigration Court and Board of Immigration Appeals and the Immigration and Naturalization Service, is teaching with Clinical Assistant Professor Bridget McCormack in the Asylum and Refugee Law Clinic. Hegarty earned her J.D. and B.A. at the University of Notre Dame. During law school, she participated in the Concannon Program of International Law in London, England, and received a grant from the International Center for Civil and Human Rights; as an undergraduate she was a Notre Dame Scholar, Aileen S. Andrew Scholar, and member of the varsity swimming team. Hegarty has been a clerk with the Immigration Court in Boston and Catholic Legal Immigration Network Inc. in New York City. She is proficient in Spanish and has a knowledge of Russian.

William R. Jentes, '56, is teaching the seminar Complex Litigation. He is a senior partner with Kirkland & Ellis in Chicago and also has lectured at the University of Chicago Law School and for the American, Federal, Texas, Illinois, and Chicago bar associations. He also is active with and chairs the Chicago Symphony.

Karl E. Lutz, '75, is teaching Law as a Business. A retired partner of Kirkland & Ellis in Chicago, he continues to serve the firm as of counsel. At Kirkland & Ellis, Lutz practiced corporate law, and specialized in private equity, venture capital, leveraged buyouts, mergers and acquisitions, debt and equity financing, and board representations. He has lectured often at professional schools and served as general

counsel of a medical diagnostics company.

Scott E. Masten is teaching Contract Design and Interpretation. He is professor in business and law and professor of business economics and public policy at the University of Michigan Business School. Masten joined the faculty at the Business School in 1984, following two years on the economics faculty at the University of Virginia. He received his Ph.D. in economics from the University of Pennsylvania and his A.B. from Dartmouth College. Masten's research focuses on issues at the intersection of law, economics, and organization, and he is a leading scholar in the area of transaction cost economics, publishing numerous articles relating to contracting, vertical integration, and antitrust. Professor Masten is working on a book titled *The Organization and Governance of Higher Education*. Since joining the University of Michigan, he has taught the core MBA Applied Microeconomics course and the MBA electives The Structure of Business Transactions and Contracting and Nonprofit and Cooperative Enterprise. He also teaches a doctoral seminar on the Economics of Institutions and Organization and has taught Economic Analysis of Law at the University of Michigan Law School. Professor Masten is an editor of *Economic Inquiry* and serves as associate editor or editorial board member of at least five other journals. He is a founding board member of the International Society for New

Institutional Economics and chairs the University of Michigan's Committee on the Economic Status of the Faculty.

Christopher McCrudden, one of the Law School's Affiliated Overseas Faculty, is teaching Comparative Human Rights Law and the seminar Globalization and Labor Rights. He is professor of human rights and reader in law at Oxford University and a fellow of Lincoln College, Oxford. He is the United Kingdom's representative on the European Commission's advisory group of lawyers on women's equality issues, and is specialist advisor to the House of Commons' Northern Ireland Affairs Committee.

Jeffrey H. Miro, '67, is teaching the seminar Federal Income Tax Relating to Real Estate. He is chairman of Miro, Wiener & Kramer in Bloomfield Hills, Michigan.

William M. Richman is teaching the course Jurisdiction and Choice of Law. He is Distinguished University Professor at the University of Toledo College of Law. Professor Richman graduated *summa cum laude* from the University of Pennsylvania, did graduate work in philosophy as a Woodrow Wilson Fellow at Johns Hopkins University, and received his law degree from the University of Maryland School of Law. After serving as clerk to the Hon. Joseph H. Young, U.S. District Judge for the District of Maryland, Richman joined the faculty at the University of Toledo College of Law, where he has

Continued on page 48

visiting faculty

taught civil procedure, conflict of laws, and evidence for 25 years. He has served as a visiting professor at the University of Michigan Law School and the University of Maryland. Richman is co-author of *Conflict of Laws: Cases Materials and Problems* (1990), *Understanding Conflict of Laws* (2nd ed. 1992), and *Jurisdiction in Civil Actions* (3rd ed. 1998). He also has written numerous law review articles on jurisdiction, choice of law, and the bureaucratization of appellate justice. A member of *Phi Beta Kappa*, Order of the Coif, and the American Law Institute, he has received awards for teaching and research and has served as chair of the Association of American Law Schools' Section on Conflict of Laws.

Jay H. Tidmarsh is teaching Civil Procedure and Advanced Civil Procedure. He is visiting from Notre Dame Law School, where he has taught since 1989. He earned his A.B. from Notre Dame and his J.D. from Harvard. He practiced law with the Torts Division of the U.S. Department of Justice and was counsel in a number of environmental tort cases including the Agent Orange and Love Canal litigations. The author or co-author of three recent books on complex civil litigation, his scholarly interests include civil procedure, federal courts, and torts. He has served as reporter to the Advisory Group on the Civil Justice Reform Act for the Northern District of Indiana and reporter to the Advisory Committee on Local Rules of Procedure for

the Northern District of Indiana. Tidmarsh is a member of the American Law Institute and serves as chair-elect of the Section on Civil Procedure of the Association of American Law Schools.

Peter Van Hoek, an assistant defender in the State Appellate Defender Office in Detroit, is co-teaching Criminal Appellate Practice with Valerie R. Newman (see below). A University of Michigan graduate, he earned his J.D. at Wayne State University Law School. After law school, he did separate clerkships with the Hon. George Bashara and the Hon. Dorothy C. Riley, both of the Michigan Court of Appeals. He previously has taught at the University of Michigan Law School and Wayne State University Law School and practiced with Stark & Gordon P.C. in Royal Oak, Michigan. He is a member of the board of directors of the Criminal Defense Attorneys of Michigan. He has written for *Wayne Law Review* and the Institute for Continuing Legal Education and is a contributing author to the *Defender Trial Book*.

The 2000-2001 Academic Year:

Karima Bennoune, '94, earned her B.A. with honors from Brown University and then earned joint degrees — her J.D., *cum laude*, at the University of Michigan Law School and her M.A. in Middle Eastern and North African Studies at the University of Michigan Rackham Graduate School. She also obtained a Graduate Certificate in Women's Studies during the same time period. During her career, Bennoune has worked with a range of non-governmental human rights

organizations. Most recently, she served as legal adviser for Amnesty International in London, England, where her responsibilities included work on torture, women's human rights, and human rights in armed conflict. She also represented the organization in UN conferences for the drafting of new human rights instruments. In 1995, Bennoune was a delegate of the Center for Women's Global Leadership to the Beijing women's conference. Her writings have focused on public international law, human rights, and women's legal issues. Previously, she has taught in the University of Michigan Women's Studies Program and at the London campus of Pepperdine University School of Law. This fall she is a visiting scholar with the Law School's Center for International and Comparative Law and during the winter term will teach the seminar International Protection of Human Rights.

John E. Bos, '64, is teaching Estate and Gift Tax during the fall term and the seminar Estate Planning during the winter term. His series of articles on Medicaid appeared in the *Michigan Probate & Estate Planning Journal* and he has written on living wills and durable power of attorney. He is a partner at Bernick, Omer & Radner P.C. in Lansing, where he specializes in estate planning, elder law, and business planning.

Alyson M. Cole is teaching a seminar on identity politics during the fall term and a seminar during the winter

term. A graduate of Smith College and the University of California at Berkeley, she has taught at Mills College and Berkeley and won teaching prizes at Berkeley. She was a Fulbright Scholar and recipient of the Odegaard and Rozace awards from the UC-Berkeley political science department. Her scholarly interests center on European and American political thought, feminist theory, gender and racial politics, and public law.

Laurence D. Connor, '65, is teaching the seminar Mediating Legal Disputes during the fall term and the course Alternative Dispute Resolution in the winter term. He is a senior litigation partner at Dykema Gossett in Detroit, where his practice focuses on complex business and tort litigation, trials, appeals, and alternative dispute resolution.

Neil S. Kagan teaches the Environmental Law Clinic in the fall and winter terms. He is Midwest wolf coordinator and project attorney for the National Wildlife Federation's Water Quality Project. A graduate of Pennsylvania State University and the University of Oregon School of Law, he also earned a certificate in Environmental and Natural Resources Law at Oregon. He has worked in Oregon as a solo practitioner and as staff attorney/lobbyist with 1000 Friends of Oregon, a land use watchdog group. Kagan has served as the sole or lead attorney in many environmental cases seeking protection of forests, wetlands, rivers, and other natural resources in Oregon.

Joan L. Larsen is teaching Criminal Procedure during the fall term and Introduction to Constitutional Law during the winter term. After graduating from Northwestern University School of Law, she clerked for Judge David B. Sentelle of the U.S. Court of Appeals for the District of Columbia and then for Justice Antonin Scalia of the U.S. Supreme Court. She has practiced with Sidley & Austin and previously has taught at Northwestern University School of Law.

Roberta J. Morris, who earned her J.D. from Harvard Law School and her Ph.D. in physics from Columbia University, has practiced with White & Case and at Fish & Naeve, a patent law firm, and served as assistant general counsel for Mt. Sinai Medical Center in New York. She is teaching the seminar Advanced Patent Law in the fall term and a seminar on the Internet during the winter term.

Cyril Moscow, '57, is teaching Business Planning for Closely Held Corporations this fall and Business Planning for Publicly Held Corporations during the winter term. He is the co-author of textbooks on Michigan corporate and securities regulation, and is a partner with Honigman, Miller, Schwartz & Cohn in Detroit. His practice focuses on corporate and securities law.

Valerie R. Newman, who teaches Criminal Appellate Practice (with Peter Van Hoek during the fall term, see above), is a graduate of Wayne State

University Law School and the University of Michigan. She is an assistant defender in the State Appellate Defender Office in Detroit and has worked as clerk and attorney with Reosti, James & Sirlin P.C. in Detroit. Her professional activities include work with programs of the Michigan State Bar, the Women Lawyers Association of Michigan, the Citizens Alliance on Prisons and Public Safety, the Michigan Abortion and Reproductive Rights Action League, and the National Lawyers Guild. She chaired the guild's national convention in Detroit in 1998.

David A. Santacroce, the former senior staff attorney for the Sugar Law Center for Economic and Social Justice in Detroit, is teaching in the Michigan Clinical Law Program. He holds an LL.M. from Columbia University School of Law, where he was named a Harlan Fiske Stone Scholar; a J.D., *cum laude*, from Pace University School of Law, where he was managing editor of *Pace Law Review*; and a B.A. from Connecticut College. At the Sugar Law Center he managed a national programmatic worker's rights campaign under the Worker Adjustment and Retraining Notification Act in trial and appellate courts throughout the United States, and has published and spoken widely on the topic. He also was responsible for the center's Cities Reinvestment Project, which monitors corporations' accountability for tax subsidies. In addition, Santacroce is a founding member, director, officer and general counsel to

Equal Justice America, a national, nonprofit corporation that, under his direction, recently opened a disability law clinic, and which for the past seven years has provided grants to law students who volunteer to work with organizations providing civil legal services to the indigent.

Bruno E. Simma is a member of the Law School's Affiliated Overseas Faculty. In the fall term he is teaching International Law and in the winter term he is teaching a workshop on topics before the International Law Commission and a course on modern international lawmaking. He is professor of International Law and European Community Law and director of the Institute of International Law at the University of Munich. Simma is a member of the UN International Law Commission. From 1987 to 1992, he was on the faculty of the University of Michigan Law School. Simma is serving as co-agent and counsel in various cases before the International Court of Justice and is an expert for conflict-prevention activities of the UN Secretary General. He serves as a member of the Court of Arbitration in Sports of the International Olympic Committee and was a member of the UN Committee on Economic, Social and Cultural Rights.

J. Taylor Teasdale, formerly a corporate attorney with Lewis & Munday P.C. in Detroit, earned his LL.M. at the London School of Economics and his J.D. from Detroit College of Law. He also has studied at the University of Windsor Law School. A member of the Michigan and Ontario bars, he works with the Detroit-based Legal Assistance for Urban Communities Clinic, concentrating on projects associated with the clinic's Fannie Mae Foundation grants.

Frank E. Vandervort, program manager for the Michigan Child Welfare Law Resource Center at the Law School, is teaching trial practice in the Child Advocacy Law Clinic. He holds a J.D. from Wayne State University Law School, where he served on the Curriculum Committee, and a B.A. from Michigan State University. He has served as executive director of the Children's Law Center at Grand Rapids and as deputy defender with the Legal Aid and Defender Association of Detroit. He also has served as a mediator with the Washtenaw County Permanency Planning Mediation Project.

FACULTY



Dissecting cases —

"You're her lawyer. What do you do next?" Assistant Clinical Professor Bridget McCormack, above left, asks midday listeners as she takes law students through the steps of complaint, arraignment, evidence gathering, and trial. McCormack, Assistant Clinical Professor Melissa Breger, left, and Legal Practice Program Assistant Director Philip Frost, above, presented discussions of, respectively, the processes involved in a criminal, family, and civil law case during separate lunchtime programs at the Law School in June and July. Such "brown bag" programs are staples of Law School life; weather willing, they often move outdoors during the summer months. The analyses of actual cases are "designed to create a complement to things you're beginning to learn in class," Assistant Dean of Students David Baum, '89, explained in his introduction to the talks. "I think the classroom and the clinical program complement each other perfectly."



The value of knowledge lies in the sharing of it — in the classroom, in the community, and in the meetings of intellectually engaged minds in discussion, symposia, and through the ancient but never-improved-upon medium of writing. University of Michigan Law School faculty members produce a stunning amount and quality of writing that helps extend the boundaries of our knowledge and enliven our thinking. Taken together, publications from Law School faculty members reflect both the insatiable curiosity and boundless intellectual energy of our teachers as well as the infinite variety of subjects that may be illuminated through a study of law.



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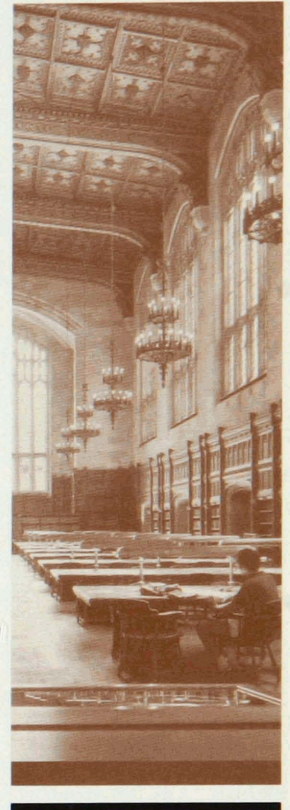
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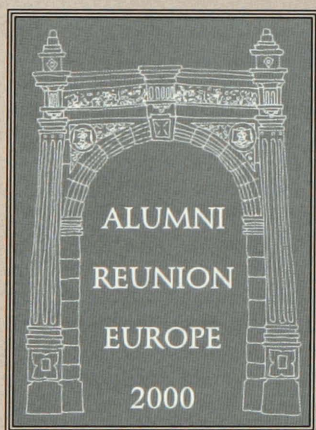
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- 72 Law School's European graduates gather at Heidelberg
- 74 Robert A. Fisher, '49, receives U-M Distinguished Alumni Service Award
- 74 Hometown organizations honor Bullen, '54
- 75 Harold Ford Jr., '96, Keynotes Democrats' Convention
- 75 New professorship honors professional, civic leader Irwin I. Cohn, '17
- 75 Sally Katzen, '67, named deputy director at OMB
- 76 Clerkships sharpen professional focus
- 79 Class notes
- 82 In memoriam



Law School's European graduates gather at Heidelberg



PHOTOS BY FOTO ATELIER BORCHARD

Alumni Reunion Europe 2000, held in Heidelberg, Germany, in June, left participants with warm memories. Here in this city whose namesake castle is lighted a warm red on the nighttime horizon, about 150 European-based graduates of the Law School spent three days with many faculty members and other representatives of the Law School.

This was the Law School's third reunion for European graduates, a once-every-five-years occasion when time and distance fade before the ties that bind these graduates to their alma mater. Alumni Reunion Europe 2000 more than lived up to its promise of giving graduates the opportunity to "renew old friendships and establish new ones" and take part in "intellectually stimulating panel discussions on important topics of the day, arranged to leave plenty of time for participation by our distinguished audience of alumni."

Headquarters for the reunion was the Max Planck Institut for Comparative Public Law and International Law in Heidelberg, whose facilities were graciously made available by Director Jochen A. Frowein, M.C.L.'58. Formal talks and discussions included "The Individual and the Institution: Participation and Legitimacy in the European Union"; "Does Comparative Law Still Make Sense?"; "Lessons from Kosovo"; a special breakfast program on "The Path of European Scholarship on Supranational and International Institutions" for graduates involved in or interested in teaching; and "New Jurisdictional Issues in a Globalizing World: Perspectives from Different Areas of Economic Regulation."

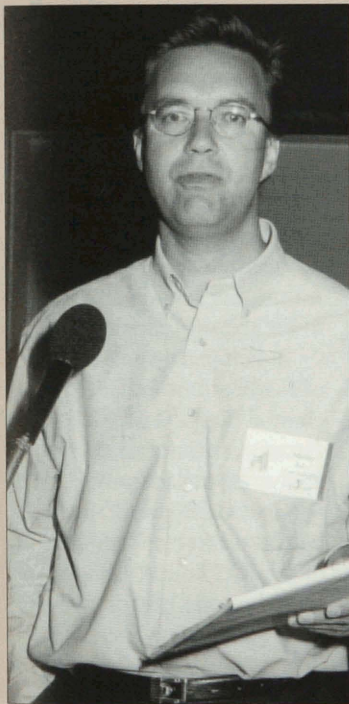
Law School members on the program included: Dean Jeffrey S. Lehman, '81, and Assistant Dean for International Programs Virginia Gordan; and Professors Reuven S. Avi-Yonah; Merritt B. Fox, who also is director of the Law School's Center for International and Comparative Law; Daniel H. Halberstam; Robert L. Howse; Thomas E. Kauper, '60; Ronald J. Mann; Mathias W. Reimann, LL.M. '83; and A.W. Brian Simpson.

In addition to the formal program, there was time for good talk, good cheer, and good times.



LEFT: Animated discussion was at the heart of Alumni Reunion Europe 2000, here carried on by former Law School Research Scholar Jacques J.J. Bourgeois and former Visiting Professor Michel Waelbroeck, both of Belgium. Waelbroeck returns to the Law School this winter as a visiting professor.

BELOW: Even serious panel discussions — like this one on “Lessons from Kosovo” — have space for lighter moments, shared here by Jochen A. Frowein, M.C.L. '58, director of the Max Planck Institut, and A.W. Brian Simpson, the Charles F. and Edith J. Clyne Professor of Law. At far left is Affiliated Overseas Faculty member Bruno E. Simma, professor and director of the Institute of International Law at the University of Munich.



ABOVE LEFT: Alumni Reunion Europe 2000 was a place to confirm ties between Europe and the Law School, often in impromptu conversations like this one. Here, Marc Larcher, M.C.L. '74 (center), of France, and his friend talk with, clockwise, Jacques J.J. Bourgeois, of Belgium; Professor Thomas Kauper, '60; Assistant Professor Daniel Halberstam (back to camera); and Professor Merritt Fox, director of the Law School's Center for International and Comparative Law. Above, Markku J.R. Suks, LL.M., '89, S.J.D. '92, questions a panelist after one of the formal discussions



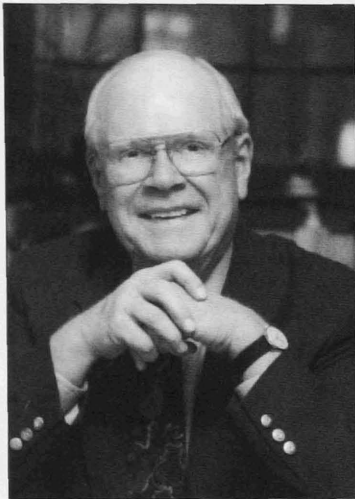
Barbara Weitz, LL.M. '83, of Germany, and Tatyana Kulyabina, LL.M. '96, of Russia, share a moment with the camera.

CENTER: Participants enjoy the reunion gala dinner at the Hotel Europaischer Hof in Heidelberg.



Dean Jeffrey S. Lehman, '81, reflects the enjoyment of Alumni Reunion Europe 2000 as he addresses participants at the Reunion Gala dinner.

Robert A. Fisher, '49, receives U-M Distinguished Alumni Service Award



Robert A. Fisher, '49

Robert A. Fisher, '49, longtime teacher at Thomas M. Cooley Law School in Lansing and stalwart of his Law School class reunions, has been chosen to receive the Alumni Association of the University of Michigan's Distinguished Alumni Service Award.

Presentation of the award is part of a ceremony preceding the Alumni Association's annual fall board of directors dinner in October. The award, established in 1947 and the highest honor voted by the Alumni Association, honors graduates who have distinguished themselves "by reason of services performed on behalf of the University of Michigan, or in connection with its organized alumni activities." Three to nine awards are presented annually.

Fisher, of East Lansing, has been class agent and reunion chairman for each of his class

reunions, which are held every five years. He coordinated reunion fundraising for the 50th reunion last year, and raised pledges and gifts of \$333,000 from the 223 living members of his class.

At that reunion, the class presented Fisher with a blue lapis lazuli globe inscribed "Presented to Bob Fisher, the soul of our 1949 Law Class by his grateful classmates, on the occasion of our 50th reunion."

Fisher has "ceaselessly served his class and the Law School" since his graduation, maintained connections among classmates, and often been described as "the glue that holds the class together," according to Dean Jeffrey S. Lehman, '81.

Classmate John E. Leggat, of Lowell, Massachusetts, called Fisher "an extraordinary example of a Michigan Law School alumnus."

"I have attended Deerfield Academy, Dartmouth College, Marine Corps Officers School, as well as the Law School, and in each of my classes there have been two or three persons who have been catalysts for bringing the class together for mini-reunions, reunions, and, in the case of the schools, raising money," Leggat wrote in support of Fisher's nomination for the award. "However, none have devoted as much time and effort as Bob Fisher."

Classmates often use the word "Fisherize" to praise his organizational skills, Leggat noted of Fisher.

Eight other Law School graduates have received the award over the past 10 years: Robert V. Peterson, '65, in 1997; Paul W. Brown, '61, and James L. Waters, '70, in 1996; James W. Baker and John L. Denniston, both '51, in 1992; Murray J. Feiwell, '63, and Thomas C. Roach, '53, in 1991; and Lawrence B. Lindemer, '48, in 1990.

Hometown organizations honor Bullen, '54

Lawrence L. Bullen, '54, always has held Jackson, Michigan, in an affectionate bearhug — practicing law, serving on the boards of healthcare and musical organizations, and a charitable foundation — and last spring the city returned that heartfelt embrace.

In April, the Jackson Symphony Orchestra (JSO) awarded Bullen its first-ever Golden Baton Award as part of the orchestra's 50th anniversary celebration. The next month, the Great Sauk Trail Council of the Boy Scouts of America presented him with its Distinguished Citizen Award. Even the Jackson Fire Department got into the act with a plaque to Bullen "in grateful appreciation for your many years of unflagging dedication and devoted service to the community."

Bullen began practice in Jackson in 1954 in the legal department of then-Consumers Power — hired by A.H. Aymond, who later received the Sauk Trail Council's first Distinguished Citizen Award. Bullen left for military service, and returned in 1956 to join Rosenberg & Painter, later Bullen, Moilanen, Klassen & Swan P.C., of which he became president. Last year he formed Lawrence L. Bullen P.C. and now is "of counsel" to Marcoux, Allen, Abbott, Schomer & Bower P.C.

He has taught business law at Jackson Junior College and was a member of the committee to establish Jackson Community College. The college returned the favor in 1998, presenting Bullen with its Distinguished Service Award, the school's counterpart to an honorary degree.

Bullen has been a member of the board of Foote Hospital, chaired the Jackson Hospital Finance Authority, and served as charter president of Family Service & Children's Aid. He has been director and treasurer of the JCC Foundation and served on the boards of the Beth Moser Mental Health Clinic, Hospice of Jackson, YMCA Trust Fund, and the Jackson Symphony Orchestra Association. He has served since 1996 as trustee of the Weatherwax Foundation, which funds local and regional charitable and educational projects.

A JSO Association board member since 1979, Bullen "has distinguished himself as a tireless worker lending significant time, effort, and financial support to the orchestra," according to the JSO.

Harold Ford Jr., '96, keynotes Democrats' convention

U.S. Congressman Harold Ford Jr., '96, delivered the keynote address at the Democratic National Convention in Los Angeles in August. The Tennessee congressman, who campaigned for his first term while completing his final year of legal studies, urged Americans to look beyond simply the near future.

"America and Democratic delegates, the choice before us — a choice that in many ways weighs heavier on my generations than any other — is not what kind of America we will have in the next four years, but what kind of America will we have in the next 40?"

Ford, who is from Memphis, was 26 and the youngest person ever elected to Congress when he won his first term in 1996. He recalled that race on CNN's *Larry King Live* shortly after his keynote address:

"I was actually a law student at the University of Michigan at the time. I traveled home every Wednesday through Sunday for about 20 weeks campaigning. I announced for Congress a month before graduation. I went on to graduate and — Go Blue. I always have to squeeze that in — and the voters of the district, the 9th district, were kind enough to send me to Congress and give me a chance."

New professorship honors professional, civic leader Irwin I. Cohn, '17

A new endowed professorship at the Law School honors Irwin I. Cohn, '17, a prominent Detroit attorney who worked tirelessly to benefit his fellow man and his community.

After law school, Cohn became a solo practitioner specializing in bankruptcy law. He quickly established himself as the "dean of the bankruptcy bar," and as a model of lawyer character. "No one who came to him for assistance did he ever turn away," remarked his son, U.S. District Court Judge Avern Cohn, '49, of the Eastern District of Michigan. "He was a devoted son of Detroit and a devoted citizen of Detroit."

Irwin Cohn was known as a civic leader. He was a member of the Detroit City Planning Commission, president of the Urban League of Detroit, and the longtime secretary of Sinai Hospital. He was also a founder and president of Hillel Foundation at the University of Michigan, president of United Hebrew Schools, president of the Lubavitch Foundation of Michigan, and the campaign chairman of the Allied Jewish Campaign. In 1961 he received the Jewish Welfare Federation's

Fred Butzel Award, and in 1972 he received the Jewish Theological Seminary of America's Distinguished Service Award.

In 1961, Irwin Cohn joined the firm of Honigman, Miller, Schwartz & Cohn, an association he maintained until his death in 1984.

Over the years, the family of Irwin Cohn has made a number of charitable gifts in his honor. They established the

Cohn Memorial Fund with the Michigan State Bar Foundation to award scholarships to attend the Summer Institute on Law Related Education at Michigan State University. And Judge Cohn has made a series of gifts to the Law School, culminating in the establishment of the professorship. Judge Cohn explains, "My father passed on to me a love of the University, a love of the law, and a sense of public duty and philanthropy."

Sally Katzen, '67, named deputy director at OMB

President Clinton, acting during Congress' August recess, appointed Sally Katzen, '67, as deputy director for management at the Office of Management and Budget (OMB). Katzen, counselor to the director of the OMB at the time of the appointment, delivered the commencement address at the Law School graduation last May.

Katzen has previously served in the Clinton administration as the administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget, and as deputy assistant to the president for Economic Policy and deputy director of the National Economic Council. She also served in various positions during the Carter administration.

Prior to joining the Clinton administration, Katzen was a partner in the Washington, D.C., law firm of Wilmer,



Sally Katzen, '67, shown here delivering the Law School commencement address last May, has been appointed deputy director for management at the Office of Management and Budget. OMB is part of the Executive Office of the President.

Continued on page 76

Continued from page 75

Cutler, and Pickering, specializing in regulatory and legislative issues. She also has worked extensively in the field of administrative law, both in her law practice and in professional activities.

Katzen was born and raised in Pittsburgh, Pennsylvania, and graduated *magna cum laude* from Smith College and the University of Michigan Law School, where she was editor-in-chief of the *Michigan Law Review*. Following graduation from law school, she clerked for Judge J. Shelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit.

OMB evaluates and formulates management procedures and program objectives within federal departments and agencies. The deputy director for management oversees the Office of Information and Regulatory Affairs, the Office of Federal Procurement Policy, and the Office of Federal Financial Management. In addition, the position has overall responsibility for management practices and procedures throughout the federal government. Under the U.S. Constitution, Katzen's recess appointment allows her to serve until the end of the next Senate session in 2001 unless a new president removes her before that.

Clerkships sharpen professional focus

Each year many graduates accept clerkships with judges of federal and state courts throughout the country. Drawn by the opportunity to work closely with a judge and to see firsthand how a court works, these graduates report that the experience of clerking adds significantly to their preparation for practice.

Clerkship experiences are different: a clerkship in a trial court offers the opportunity to see judges and attorneys in action in the courtroom; while appellate courts concentrate on a thorough understanding of issues raised on appeal and the research and writing necessary to come to a conclusion about them.

Some graduates find their experiences so satisfying that they accept a second clerkship.

The Law School is interested in knowing how many of its graduates accept clerkships, but it has no means of tracking this information and must rely on the graduates themselves to report their activities.

Here are the graduates who begin their clerkships this year. All are Class of 2000 unless otherwise indicated:

David Aman, '99

The Hon. Stanley Marcus
U.S. Court of Appeals for the Eleventh Circuit

Carolyn Barth, '99

The Hon. Ronald M. Gould
U.S. Court of Appeals for the Ninth Circuit

Jose Bartolomei, '99

The Hon. Henry T. Wingate
U.S. District Court for the Southern District of Mississippi

Jason Bent

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

Mark Beougher

The Hon. J. Richardson Johnson
Michigan Circuit Court for the Ninth Judicial Circuit

Christopher Burke

The Hon. Kenneth F. Ripple
U.S. Court of Appeals for the Seventh Circuit

Abigail Carter

The Hon. James Robertson
U.S. District Court for the District of Columbia

Jennifer Chin

The Hon. Martin Jenkins
U.S. District Court for the Northern District of California

Sara Clash

The Hon. Anita Brody
U.S. District Court for the Eastern District of Pennsylvania

Jenny Cooper

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

Laura Sagolla Croley

The Hon. D. Lowell Jensen
U.S. District Court for the Northern District of California

Charlotte Crosen, '94

The Hon. Marianne O. Battani
U.S. District Court for the Eastern District of Michigan

Abhijit Das

The Hon. Benson E. Legg
U.S. District Court for the District of Maryland

Katherine Dawson

The Hon. Arthur L. Alarcon
U.S. Court of Appeals for the Ninth Circuit

Matthew Drexler

The Hon. Thomas S. Ellis III
U.S. District Court for the Eastern District of Virginia

Adam Epstein, '98

The Hon. Richard A. Enslin
U.S. District Court for the Western District of Michigan

Christopher Evers

The Hon. James S. Gwin
U.S. District Court for the Northern District of Ohio

Lea Filippi
The Hon. Alexander O. Bryner
Alaska Supreme Court

Alyson Foster
The Hon. Sidney R. Thomas
U.S. Court of Appeals for the
Ninth Circuit

Carolyn Frantz
The Hon. David S. Tatel
U.S. Court of Appeals for the
District of Columbia

Sarah Geraghty, '99
The Hon. James Zagel
U.S. District Court for the
Northern District of Illinois

Tracy Gonos, '97
The Hon. Robert E. Cowen
U.S. Court of Appeals for the
Third Circuit

Sean Grimsley
The Hon. Harry T. Edwards
U.S. Court of Appeals for the
District of Columbia Circuit

Dina Grinshpun
The Hon. Randall Rader
U.S. Court of Appeals for the
Federal Circuit

Jeffrey Gutkin
The Hon. Samuel Conti
U.S. District Court for the
Northern District of California

Harris Hartman
The Honorable Nora M. Manella
U.S. District Court for the
Central District of California

William Hen, '99
The Hon. Richard F.
Suhrheinrich
U.S. Court of Appeals for the
Sixth Circuit

Rachel Hong
The Hon. Barbara Jacobs
Rothstein
U.S. District Court for the
Western District of Washington

Monika Jeetu
The Hon. George Proctor
U.S. Bankruptcy Court for the
Middle District of Florida

Derek Johnson
The Hon. Michael Bender
Colorado Supreme Court

Kenneth Kalousek
The Hon. John Feikens
U.S. District Court for the
Eastern District of Michigan

Charles Keckler, '99
The Hon. Danny J. Boggs
U.S. Court of Appeals for the
Sixth Circuit

Patricia Kim
The Hon. Stanley S. Brotman
U.S. District Court for the
District of New Jersey

Shannon Kimball
The Hon. Pasco Bowman II
U.S. Court of Appeals for the
Eighth Circuit

Rachel Lessem
The Hon. John Feikens
U.S. District Court for the
Eastern District of Michigan

Christopher Liro
The Hon. William Bryson
U.S. Court of Appeals for the
Federal Circuit

Karen Lorenz
The Hon. Mary T. Mullarkey
Colorado Supreme Court

Susan Loveland
The Hon. R. Guy Cole Jr.
U.S. Court of Appeals for the
Sixth Circuit

Aimee Mangan
The Hon. Paul D. Borman
U.S. District Court for the
Eastern District of Michigan

William Martin
The Hon. James F. Holderman Jr.
U.S. District Court for the
Northern District of Illinois

Crystal Monahan
The Hon. Pamela Harwood
Michigan Circuit Court, Third
Judicial Circuit

David O'Brien
The Hon. Richard P. Matsch
U.S. District Court for the
District of Colorado

Erin O'Connor
The Hon. James L. Ryan
U.S. Court of Appeals for the
Sixth Circuit

Eric Olson
The Hon. John G. Heyburn II
U.S. District Court for the
Western District of Kentucky

Rachel Preiser
The Hon. Robert Chatigny
U.S. District Court for the
District of Connecticut

Rosemary Quigley
The Hon. Kermit Lipez
U.S. Court of Appeals for the
First Circuit

Matthew Roskoski
The Hon. Patrick Higginbotham
U.S. Court of Appeals for the
Fifth Circuit

Caroline Sadlowski
The Hon. Harold A. Ackerman
U.S. District Court for the
District of New Jersey

Lauren Schmidt, '99
The Hon. Bruce Black
U.S. District Court for the
District of New Mexico

Amy Scott
The Hon. Cornelia G. Kennedy
U.S. Court of Appeals for the
Sixth Circuit

Matthew Scott, '99
The Hon. Irma S. Raker
Maryland Court of Appeals

Darcy Shearer
The Hon. Alan C. Kay
U.S. District Court for the
District of Hawaii

Laurie Stegman
The Hon. Stanley S. Brotman
U.S. District Court for the
District of New Jersey

Megan Sugiyama
The Hon. Marianne Battani
U.S. District Court for the
Eastern District of Michigan

Bizunesh Talbot, '99
The Hon. Emmett Sullivan
U.S. District Court for the
District of Columbia

Randi Vickers
The Hon. Robert Eastaugh
Alaska Supreme Court

David Young
The Hon. Thomas S. Zilly
U.S. District Court for the
Western District of Washington

Laura Zachman
The Hon. William B. Chandler III
Court of Chancery of the State
of Delaware

Matthew Zinn, '98
The Hon. John M. Walker Jr.
U.S. Court of Appeals for the
Second Circuit

Continued on page 78

ALUMNI

Continued from page 77

These graduates are beginning their second clerkships:

Rick Bierschbach, '97
The Hon. Sandra Day O'Connor
U.S. Supreme Court

Michael Edson, '93
The Hon. Ronald M. Gould
U.S. Court of Appeals for the
Ninth Circuit

Matthew Findley, '99
The Hon. Andrew J. Kleinfeld
U.S. Court of Appeals for the
Ninth Circuit

Matthew Hall, '99
The Hon. Marsha S. Berzon
U.S. Court of Appeals for the
Ninth Circuit

Sarah Loomis, '97
Staff Attorney's Office
U.S. Court of Appeals for the
Seventh Circuit

Angela Onwuachi, '97
The Hon. Karen Nelson Moore
U.S. Court of Appeals for the
Sixth Circuit

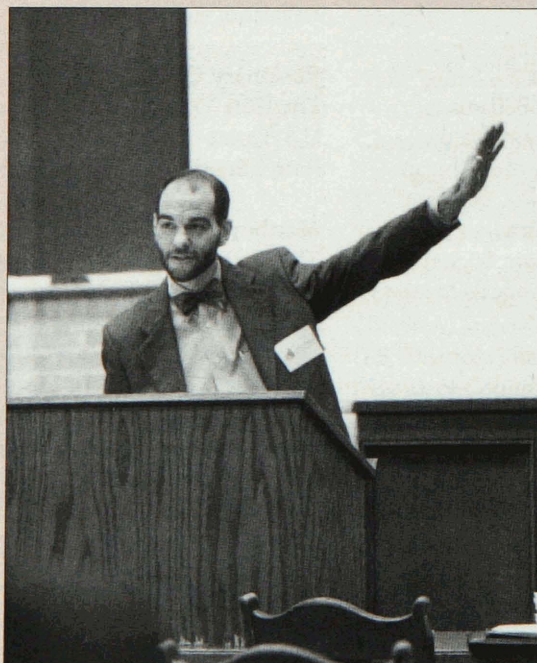
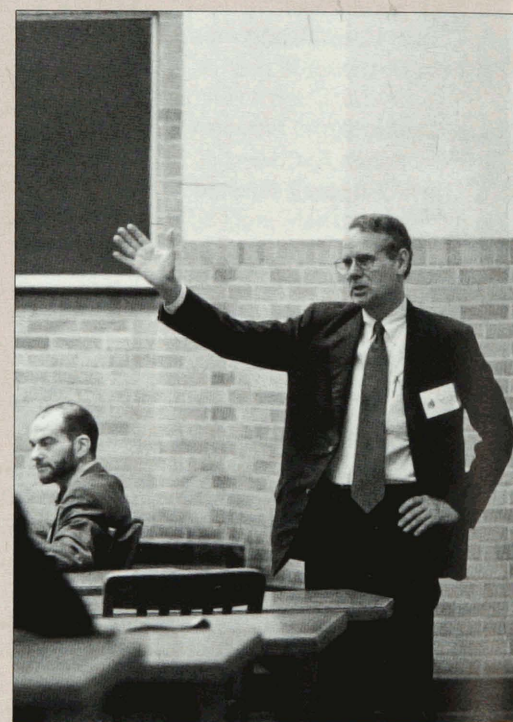
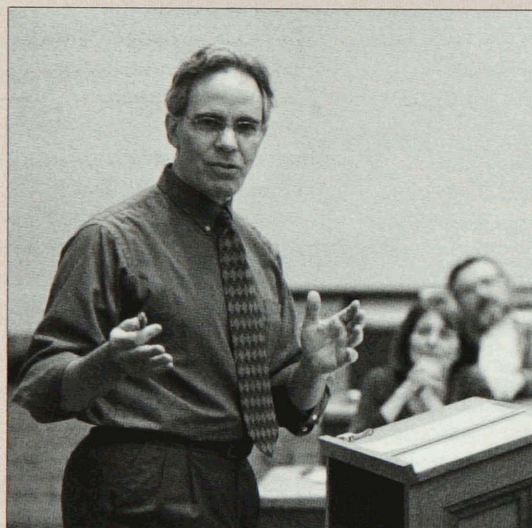
Emily Paster, '99
The Hon. Diana Gribbon Motz
U.S. Court of Appeals for the
Fourth Circuit

Kevin Pimentel, '99
Staff Attorney's Office
U.S. Court of Appeals for the
Ninth Circuit

Tyler Robinson, '98
The Hon. Ferdinand F Fernandez
U.S. Court of Appeals for the
Ninth Circuit

Amar Sarwal, '99
The Hon. Robert H. Krupansky
U.S. Court of Appeals for the
Sixth Circuit

Jessica Silbey, '99
The Hon. Levin H. Campbell
U.S. Court of Appeals for the
First Circuit



Back to the Classroom —

Spring commencement was only a few days past when 100 earlier graduates returned to the Law School for the annual Alumni Spring Seminar in May. Participants re-traced their student steps at the Law School, attended lectures designed for practicing attorneys, and took part in discussion. Top and above left, Kirkland and Ellis Professor Phoebe Ellsworth and Samuel Gross, the Thomas G. and Mabel Long Professor of Law, discuss "Trial Advocacy." Above and left, Merritt Fox, the Louis and Myrtle Moskowitz Research Professor of Business and Law, and Assistant Professor of Law Adam Pritchard present a program on "Corporate Governance."

50TH REUNION

The Class of 1950 reunion will be October 13-15

45TH REUNION

The Class of 1955 reunion will be October 13-15

40TH REUNION

The Class of 1960 reunion will be October 13-15

Arbitration Association. He is an active mediator and arbitrator and speaks and writes widely on these subjects. His most recent arbitration article, "Limitations on the Ability to Obtain Discovery in International Arbitration from Non-Parties Located in the United States," appeared in the July issue of the *International Arbitration Journal*.

1966

James P. Hoffa, president of the Teamsters Union, was commencement speaker and received an honorary degree from Detroit College of Law at Michigan State University in June. Hoffa's son, David, was among the graduates. Hoffa encouraged lawyers to help protect American workers' jobs. "I urge each and every one of you to work on the side of working men and women," he told the graduation audience.

Terence Murphy, a member of the Law School's Committee of Visitors, reports that Murphy Ellis Weber (formerly Murphy & Weber), has grown by 50 percent — from two partners to three. An international law boutique with a client base of large U.S. and European multinational enterprises and leading U.S. trade associations, and with associated offices in Helsinki and Frankfurt, the firm filed an *amicus curiae* brief for the U.S. high-tech industry in the landmark Massachusetts Burma Sanctions case awaiting judgment in the U.S. Supreme Court. Murphy said the firm was "the smallest firm in the United States to be rated 'preeminent' by Martindale-Hubbell.

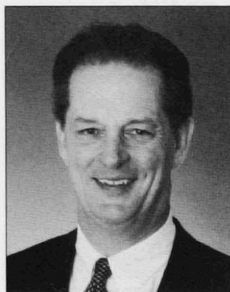
1967



Jeffrey G. Heuer has been elected to a second consecutive three-year term as managing partner of Detroit-based Jaffe, Raitt, Heuer & Weiss. He specializes in complex business litigation involving corporate, partnership, securities, real estate, and construction issues.

John A. Sebert, dean of the University of Baltimore School of Law, has been named the American Bar Association's Consultant-Designate on Legal Education. He also chairs the Committee on Communication Skills and is a member of the Accreditation Committee.

1968



Robert A. Maxwell has joined the Bloomfield Hills, Michigan, office of Howard & Howard Attorneys P.C. He specializes in healthcare, commercial, and employment law. He resides in Bloomfield Hills with his wife, Lynn.



1969

In the spring 2000 issue of *Law Quadrangle Notes*, **Robert M. Meisner's** activities were incorrectly listed under the 1966 section of Class Notes. Meisner continues to present seminars and courses on condominium operation throughout the United States.

30TH REUNION

The Class of 1970 reunion will be October 13-15

1970

Steven G. Schember was elected to a one-year term as vice president of the Outback Bowl at the Bowl's annual meeting in May. The Outback Bowl is a New Year's Day football game matching teams from the Big Ten and Southeast Conference. He is a senior litigation attorney with the Tampa, Florida, office of Shumaker, Loop & Kendrick L.L.P.

1971

Ralph G. Wellington was inducted into fellowship in the International Academy of Trial Lawyers at the organization's annual meeting in March.

1961

Congressman **John Edward Porter** of Illinois, a member of Congress since 1980, will leave office at the end of this year. He plans to work in the private sector.

1964

James G. Knollmiller has been certified by the Arizona State Bar as an estate and trust specialist and as a tax specialist. He is one of only seven Arizona attorneys with both certifications. A partner in Brown, Arenofsky, and Squire of Mesa, Arizona, he focuses on estate planning, business planning, and tax.

35TH REUNION

The Class of 1965 reunion will be October 13-15

1965

Paul M. Lurie, senior partner in the Construction Law Group at Schiff Hardin & Waite in Chicago, has been named to the newly formed Construction Mediation Panel of the American

CLASS notes

Fellows are nominated based upon their skill and recognized ability in trial and appellate practice, for their character and uncompromised integrity, and for providing services that promote the best interest of the legal profession and highest standards and techniques of advocacy. Wellington is chairman of the Philadelphia law firm Schnader Harrison and a member of its Litigation Department.

1972

Charles A. Duerr Jr. has been named the 12th president of the Michigan Association of School Boards' Council of School Attorneys, an organization founded to advance the quality of public education in the state of Michigan. A principal in the Ann Arbor office of Miller, Canfield, Paddock and Stone P.L.C., Duerr practices education law (including labor, tenure, general school law, employment discrimination, open meetings and freedom of information), civil rights, and constitutional law.

Stuart A. Schloss Jr. has joined the Cincinnati office of Ulmer & Berne L.L.P. as a partner. He concentrates on business law and on succession, estate, tax, and retirement planning.

1974

Larry J. Salustro, vice president of Wisconsin Energy, has also been elected senior vice president and general counsel. He retains his responsibilities as vice president for legal, regulatory, and governmental affairs for Wisconsin Electric, a subsidiary of Wisconsin Energy. He joined Wisconsin Electric in 1997.

Patricia Kane Williams has become a partner in the Cherry Hill, New Jersey, office of Duane, Morris & Heckscher L.L.P. She was previously a shareholder with Archer & Greiner P.C. in Haddonfield, N.J.

1975

Jeffrey K. Haynes has joined the law firm Beier Howlett P.C. in Bloomfield Hills, Michigan.

Brent D. Rector has co-authored the book *Occupational Safety & Health: A Guide for Michigan Employers* (Michigan Chamber of Commerce), written to help employers understand and comply with Michigan occupational safety and health laws and procedures. Rector is a member of the Grand Rapids law firm Miller, Johnson, Snell & Cummiskey P.L.C.

1976

Greg Rappleye has won The Brittingham Prize in Poetry, having been selected from more than 900 entries, and his book, *A Path Between Houses*, will be published by the University of Wisconsin Press this year. The award is given annually by the University of Wisconsin for a full-length collection of poetry by an American author. Rappleye's work has recently been published or is forthcoming in *The Southern Review*, *Mississippi Review*, *Quarterly West*, *Prairie Schooner*, *Puerto del Sol*, *New Poems from the Third Coast: Contemporary Michigan Poetry*, and *The Pushcart Prize XXV: Best of the Small Presses*. He lives near Grand Haven, Michigan, with his wife, Marcia Kennedy.

1977

Michael A. Marrero has joined the Cincinnati office of Ulmer & Berne L.L.P. as a partner. His areas of focus include the formation of business entities, business planning, shareholder and investor relations, divestitures, and acquisitions and mergers, as well as telecommunications law, intellectual property, advertising, and administrative law.

1978

Arthur R. Block has been named senior vice president and general counsel with Comcast Corporation in Philadelphia. The firm is involved in the development, management, and operation of broadband cable networks and in the provision of electronic commerce and programming content. With Comcast since 1989, Block previously served as the firm's senior vice president and senior deputy general counsel, supervising the provision of merger and acquisition legal services.

The Hon. **Maurice Portley**, presiding judge of the Mesa County Juvenile Court in Arizona, was named the 1999 "Man of the Year" by Wells Fargo, the *Arizona Republic*, and Valley Leadership. Portley is active in many organizations, among them the Arizona Commission on Judicial Conduct, Arizona Town Hall, A Stepping Stone Foundation, Valley Leadership, Boy Scouts of America, the Great Arizona Puppet Theater, and the National Council of Juvenile and Family Court Judges.

1979

Kevin M. McCarthy spoke to the ADR Committee of the American Bar Association on "Dealing with the Inadvertent Disclosure of Privileged or Confidential

Documents" at a meeting in Puerto Vallarta, Mexico; to the U.S.-Japan Institute in Detroit on "U.S. Labor Law"; and at the American Bar Association's annual meeting in New York on "Ethical Issues in the Mediation of Employment Cases." McCarthy is a principal and deputy resident director in the Kalamazoo, Michigan, office of the law firm Miller, Canfield, Paddock and Stone P.L.C.

Theodore J. Vogel has been named vice president and tax counsel for DTE Energy Company of Detroit, where he will direct the tax aspects of the company's businesses and develop tax strategies supporting DTE's growth plans. He also will lead the tax aspects of the DTE Energy and MCN Energy Group merger. Vogel previously worked at CMS Energy and Consumers Energy for 21 years as vice president for taxes and tax counsel.

1981

Richard S. Hoffman has become senior vice president for special projects with Marriott International, where he is responsible for new business initiatives related to the Internet and e-commerce, as well as other projects. He previously was a partner with the Washington, D.C., firm of Williams and Connolly L.L.P., where he specialized in complex commercial litigation for media and real estate clients and served as lead counsel to Marriott International on major litigation matters.

Richard S. Kolodny is president of The Portfolio Group, an attorney search firm in Los Angeles. He previously was general counsel of Roll International Corp.

1982

David L. Hartsell has returned to the Chicago law firm Ross & Hardies as a partner. He will continue his practice in business litigation and professional liability. He was previously a partner with Kilpatrick Stockton in Atlanta.

David S. Inglis has joined Flashline.com Inc. as executive vice president and chief financial officer. Flashline.com, located in Cleveland, provides products and services to the software component industry. Inglis previously was with Cleveland-based Benesch, Friedlander, Coplan & Aronoff L.L.P., where he chaired the Corporate and Securities Practice Group and served on the firm's executive committee.

Patrick J. Lamb has joined the Chicago litigation boutique Butler Ruben Saltarelli & Boyd as a partner. He continues to concentrate in business disputes and product liability.

Charlie Shumaker of Shumaker Steckbauer Weinhart & Sragow L.L.P. in Los Angeles and **Rick Scarola** of Scarola Reavis & Parent in New York are pleased to announce the merger of their firms as of April 1, 2000. The new firm has 20 lawyers. Its practice includes corporate and securities law, real estate law, intellectual property law, entertainment law, and commercial litigation in all courts. The firm's Los Angeles and New York offices will continue to practice under the names by which they were known before the merger.

1983

Clifford Douglas, of Ann Arbor, is one of the major characters drawn on by Dan Zegart in his book *Civil Warriors, The Legal*

Siege on the Tobacco Industry, published this year by Random House. The book tracks the legal battle led by Ron Motley, a product liability lawyer. Douglas' role in bringing the industry's darkest secrets to light is also examined.

Frederick M. Snow has been elected to partnership in the Chicago-based law firm Chapman and Cutler, where he practices in the Public Finance Group. His focus is on private activity bond financings, including acting as bond counsel, underwriter's counsel, and bank counsel with respect to manufacturing facilities, airport facilities, hospital and long-term care facilities, and educational facilities. He also has represented lessors involved in municipal lease transactions.

1984

Martiné (Marty) R. Dunn has joined Ulmer & Berne L.L.P. as a partner. He has been named partner-in-charge of the firm's Cincinnati office, where he focuses on real estate and business law and on loan transactions.

1985

Arnie Brier has accepted the position of vice president for real estate with Tellaire Corporation in Dallas. He and several Law School graduates have invested in the start-up fixed wireless telecommunications company. Brier is responsible for all real estate related matters and for ensuring the company's access to building rooftops. He and his wife, Jill Feldman, have two children, Zoe and Ethan.

Summer at the End of the World, the autobiographical novel by **Kirsten Kingdon**, executive director of Parents, Families and Friends of Lesbians and Gays (PFLAG) has been published by Banta & Pool.

1986

Dr. John Friedl has been named dean of the University of South Alabama College of Arts and Sciences. He was previously with Wayne State University, where he held the positions of director for the Center for Legal Studies, director of graduate studies, professor of anthropology, and professor of law.

1987

Christine E. Brummer has become a vice president with Arbor Investment Group in Bloomfield Hills, Michigan. She previously practiced with Price Waterhouse and clerked for the Hon. **John Feikens**, '41.

Former Law School research scholar **Wan Exiang** has been approved by the Chinese National People's Congress as a grand justice and as vice president of the Supreme Court of China. He attributes his success to the education he received at UM Law School and plans to continue his professorship at Wuhan University Law School during his service to the court "so we can still carry on exchange activities in the future."

1989

Elizabeth E. Lewis has left the partnership of Baker & McKenzie in Chicago to become general counsel of Corona Optical Systems Inc., a high-tech startup company in Lombard, Illinois.



Michael A. Primrose has joined Benesch, Friedlander, Coplan & Aronoff L.L.P., Cleveland, as an associate in the Corporate and Securities Practice Group. He focuses his practice on representation of entrepreneurs, privately held mid-market growth companies, family controlled businesses, partnerships, proprietorships, and venture capitalists in all stages of their formation, business, and growth.

1990

Elizabeth Beach Bryant has become a principal in Zalk & Bryant, Minneapolis, where she practices in the Family Law Department. She was previously a shareholder with Fredrikson & Byron P.A., where she was a member of the Family Law Department for 10 years.

1991

Keith R. Barnett was elected a senior partner at the Boston law firm Hale and Dorr L.L.P. He has significant experience in all aspects of commercial real estate, including development, lending, leasing, acquisitions, and sales. He and his wife, Amy, reside in Boston.

Lisa J. Bernt has accepted a position as commission counsel at the Massachusetts Commission Against Discrimination in Boston.

CLASS notes

1992



Amy M. Brooks has been elected partner at the Detroit-based law firm Honigman Miller Schwartz & Cohn in the Real Estate Department. Her responsibilities include representing clients in the acquisition, development, sale, financing, and leasing of shopping centers, regional malls, office buildings, apartment buildings, and industrial facilities. She resides in West Bloomfield.

Patrick Romain has become director and senior counsel in the Corporate Law Department at Merrill Lynch & Co. Inc., New York, where he is responsible for technology and intellectual property matters. He was formerly vice president and senior counsel in the Corporate Law Department at Merrill Lynch.

1993

Karen Libertiny Ludden has joined Garan Lucow Miller P.C. as an associate in the Troy, Michigan, office, where she specializes in insurance defense litigation.

1994

Margo Wolf O'Donnell has joined the Chicago office of Jenkens & Gilchrist in the Litigation Practice Group as an associate.

Heather Gerken has joined the faculty of Harvard Law School, where she is teaching Civil Procedure and Election Law this year.

1996

Travis Richardson was appointed chairman of the Chicago Bar Association's Coordinating Council on Minority Affairs and chairman of the Cook County Bar Association's (CCBA) Judicial Evaluation Committee. He is also a member of the CCBA Board of Directors and recently received a Meritorious Service Award for his tenure as the CCBA chief of staff. Richardson is an associate at the Chicago law firm Arnstein & Lehr.

Michael J. Thomas was listed incorrectly as a 1997 graduate in the Summer issue. He graduated in 1996. *Law Quadrangle Notes* regrets the error.

1997

Ole Horsfeldt, LL.M., was elected as a partner in Bech-Bruun & Trolle, Copenhagen, Denmark. His practice focuses on e-commerce, computer law, and mergers and acquisitions within the information technology industry.

Timothy K. Howard has moved to Washington, D.C., and become an associate at Steptoe & Johnson LLP in the Litigation Department. He formerly was with Dorsey & Whitney LLP in Minneapolis.

Rebecca G. Pontikes has joined Berluti & McLaughlin, Boston, as an associate. She concentrates in employment litigation, but is also doing some business litigation and personal injury work.

1998

Dariush G. Adli has joined Fish & Richardson as an associate in the San Diego office. A member of the Litigation Group, he handles patent, trademark, and trade secrets litigation in federal and state courts. He was previously a member of the Complex Litigation Group at Pillsbury Madison & Sutro, San Diego.

1999

C. Todd Inniss of Detroit and **Paula A. Osborne** of Southfield have joined the Detroit office of Dykema Gossett P.L.L.C. as associates. Inniss is a member of the Litigation Practice Group, focusing on general litigation with an emphasis on real estate law. Osborne focuses on general bankruptcy and creditor's rights law matters in the Bankruptcy Practice Group.



IN memoriam

| | | |
|-----|---------------------------------------|--------------------|
| '30 | Saul Bernstein | March 13, 2000 |
| '31 | Albert W. Dimmers | July 31, 1999 |
| | Florence K. Weinberg | March 3, 2000 |
| '36 | Albert F. Donohue | November 22, 1999 |
| '37 | Austin A. Webb | September 14, 1999 |
| '38 | Benjamin K. Harris | April 10, 2000 |
| | Hugh B. Kuder Jr. (LL.M. '40) | April 17, 2000 |
| '40 | Austin Peck | May 11, 2000 |
| '41 | Gene C. Hopkins | December 28, 1999 |
| '42 | Robert W. Dilley | July 14, 1998 |
| | Margaret Curry Rorke | April 26, 2000 |
| '46 | Leo William Leary (LL.M., S.J.D. '53) | June 19, 1999 |
| '49 | Gordon E. Gable | April 18, 2000 |
| | Henry S. Kowalczyk | March 8, 2000 |
| | Ralph Norvell Jr. | April 29, 2000 |
| '50 | Marilynn S. Alexander | March 2, 2000 |
| | Robert M. Brake | March 1, 2000 |
| '51 | William E. Longthorne | March 18, 2000 |
| | David Allan McQuade | June 8, 2000 |
| | George John Slykhouse | May 16, 2000 |
| '52 | Charles E. Starbuck | January 30, 2000 |
| '53 | James P. Dickerson | July 10, 2000 |
| | Mortimer H. Hartwell Jr. | May 5, 2000 |
| | John L. Lodwick | May 25, 2000 |
| '56 | Patrick J. Foley | June 14, 2000 |
| | William C. Williams | April 25, 2000 |
| '58 | Hugh B. Anderson | July 20, 2000 |
| '60 | Morton M. Zedd | April 24, 2000 |
| '62 | Murray Ian Litmans | May 22, 2000 |
| | John D. Miller | May 5, 2000 |
| '65 | John H. Seidel | July 13, 1999 |
| '66 | George G. Newman | April 20, 2000 |
| | John T. Schmidt | May 29, 2000 |
| '69 | David McCrory | March 28, 1999 |
| '86 | Josephine Tsao | April 26, 2000 |

— BY A.W. BRIAN SIMPSON
Charles F. and Edith J. Cline Professor of Law

Surprise encounter

sheds light on human rights debate

Soon after the United Nations was established, its Human Rights Commission, under Eleanor Roosevelt, set about drafting an international bill of human rights. This soon divided into two different instruments. One was designed as a declaration or manifesto on human rights, a statement of ideas; this became the Universal Declaration on Human Rights, which was adopted by the General Assembly on December 10, 1948.

The other was to be a covenant on human rights. This was to be a multilateral treaty; unlike the Universal Declaration, it would actually impose obligations in international law on whichever states ratified it. Drafting the declaration took two years, drafting the covenant took nearly 20, and what was settled in 1966 was two covenants, not just one.

I have been working on a book dealing primarily with the negotiations in the Council of Europe, which produced the European Convention on Human Rights. This was signed in 1950; a protocol signed in 1952 dealt with some rights, which had been left out of the basic covenant of 1950. The United Nations negotiations were closely connected, so far as Britain was concerned, with the European negotiations. Indeed, Britain tried and largely succeeded in producing for Europe the sort of covenant it had been trying to promote, without much success, in the United Nations. So I have been working through not only the archives of the British Foreign Office, but also those of the United Nations and the U.S. State Department.

The British Foreign Office archives for this period are now nearly all open and available to researchers in the British Public Record Office near Kew Gardens in London. When I was working there some months ago, I was reading a file that contained a minute of a meeting that took place in the Foreign Office on February 24, 1950. It was written by one Martin Le Quesne, a British diplomat who today lives in retirement in Jersey. At this time he was our man on human rights. It began:

"Miss Willis of the American Embassy brought a Mr. Stein, a lawyer from the Department of Justice in Washington, to see Mr. Vincent Evans and myself yesterday about Article 2 of the Covenant of Human Rights."

Evans I knew — he later became a judge of the European Court of Human Rights, and had given me help in my research. But who was Stein? For a moment I did not grasp what was happening; suddenly realization dawned, and, to the intense irritation of other researchers, not to mention disapproving archivists, I call out aloud:

"That's Eric!"

It was indeed. I had met my colleague, Professor Emeritus Eric Stein, '42, lurking in the British archives. One does not often meet a colleague in this curious way.

Continued on page 85

DECLASSIFIED
Authority NND 862915
By [signature] NARA Date 6/11/99

DEPARTMENT OF STATE
INCOMING TELEGRAM
RESTRICTED

UNITED NATIONS
AFFAIRS
ACTION COPY

1950 MAR 2 AM 8 40

UNEP
MESSAGE CENTER

Action: UNA
Info:
P
EUR
L
OLI
CIA
IE
UNESCO
DCR

OFFICE OF UNITED NATIONS ECONOMIC
AND SOCIAL AFFAIRS
Reply not necessary
MAR 2 1950

CORRECTED COPY
3/1/50, 2:30 p.m.
CORRECTIONS UNDERSCORED
Control 11203
Rec'd February 24, 1950
11:27 p.m.

FROM: London
TO: Secretary of State
NO: 1076, February 24, 6 p.m.
FROM STEIN FOR SANDIFER AND SIMSARIAN.

Willis and Stein saw Lequesne and Evans, Ass
Legal Adviser, (latter substituting for Be
abance) on Human Rights covenant (DEPTEL 81
February 2).

Stein restated Department's arguments on
5 and 9 on basis Department memo, copy
given to Foreign Office.

While raising number of questions re
Article 2, both Lequesne and Ellis ap
by US arguments although unable give
possible modification UK position.
their belief US would enact necess
to implement covenant but feared
ble states might sign and then fa
legislation. This appears perha
British thinking.

Our arguments on Articles 5 and
pression. Foreign Office app
covenant must spell out some
reasonable exceptions. For
absence of categories would
and confer excessive law-m
with enforcement. They w
40 exceptions of drafting

Details by pouch.
CSB:BCW

DC/E Correction Desk
PERMANENT RECORD COPY: TH

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3/25/50

US 17314/17
8 MAR 1950

Article 2 of the Covenant on Human Rights

Miss Willis of the American Embassy brought a
Washington, to see Mr. Vincent Evans and myself yesterday
about Article 2 of the Covenant of Human Rights.

American position
U.K. position
U.K. arguments

As at present drafted, this Article will make it
possible for States to accede to the Covenant without having
previously brought their law into the accordance with it. It
merely commits them to taking the necessary measures to
bring their law into accordance with it "within a reasonable
time". We are taking the line that this ought not to be
allowed and that States ought to be prepared to bring their
laws into accordance with the Covenant before they accede
to it. We have taken this line for two reasons:-
(1) This is the normal practice with regard
to international agreements.
(2) To admit the arrangement supported by the
United States would be to detract greatly
from the effectiveness of the Covenant.
It is impossible to say what "a reasonable
time" is and it would therefore be possible
for States to accede to the Covenant who had
no intention whatever of actually giving
effect to it.

American arguments

3. Mr. Stein argued most earnestly that the arrangement
which we desire would embarrass the United States greatly.
He said that it would be quite impossible for the Administration
to go to Congress and ask it to pass the required legislation
(which will in some respects presumably resemble Mr. Truman's
Civil Rights Programme) in order to enable it to accede to
the Covenant. This would be unfortunate as the American
public was enthusiastic that the United States should be
among the first to accede to the Covenant. On the other
hand, if the arrangement which they desire were adopted, the
President would be able to go to Congress and argue that by
virtue of the United States accession to the Covenant they
were under an obligation to pass the necessary legislation to
give effect to it. He therefore asked us to consider whether
we would not withdraw our proposal.
(1) It was pointed out to Mr. Stein:-
That in presenting the Covenant to the Senate
for ratification it would presumably be
necessary, even if it contained the arrangement
required by the United States, to give some
indication of the legislation which would
subsequently be necessary to give effect to it.
(11) That if the American public was so enthusiastic
for the Covenant it was strange that Congress
should be untouched by this enthusiasm.

At the time, the British and the Americans were locked in mortal combat over the United Nations Covenant; they were able to agree on very little.

Negotiations in the Human Rights Commission were difficult for various reasons — one was the aggressive behavior of the Soviet representatives, particularly one Pavlov, nephew of “dogs” Pavlov, who never missed an opportunity to rail against the iniquities of the West. One might have expected, however, that the British and the Americans, both of whom claim to have invented human rights, as of course do the French, would have been able to see eye to eye.

But this was not so.

The British wanted the covenant to contain a provision whereby a state, which acceded, had to bring its laws into conformity before accession. The Americans objected, and wanted the covenant merely to require conformity within a reasonable time, with reports of progress. The British argued that this would enable a state to sign up whilst having no intention of ever bringing its law into line. It took years, they pointed out, for the United States to conform to the Convention on Migratory Birds, which at this time were not thought to have any rights, however kindly disposed one was to them; how much worse if humans, who did have rights, were involved.

The Americans, through the State Department, thought that it would be quite impossible for the U.S. executive to secure the passage of the necessary laws before ratification. Indeed, if the provision the British wanted was included, the Senate might well refuse to provide the advice and consent required by the Constitution before the president could ratify the convention. Lurking behind the disagreement were sensitivities over the use of the treaty-making power to trench on “states’ rights,” together with the existence in some of the southern states of legal

provisions quite certain to fall afoul of any covenant that was likely to emerge from the United Nations. The meeting recorded in the minute was mainly designed to produce a compromise on this thorny issue, over which both sides had dug in their toes.

Another ongoing disagreement, also discussed at the same and other meetings, arose over limitations to rights. The British wanted these to be spelled out very specifically for each right; the State Department favored a general limitations clause, which would apply to all rights. The British argued that such a general clause would weaken the convention; indeed, it would enable naughty states — in particular the demonized Soviets — to sign up to the convention, acquire brownie points as protectors of human rights, and then continue to oppress their subjects more or less as much as they liked. The U.S. position was that it was impossible to spell out all limitations in advance; the problem should be handled by the use of general language. Any other solution would immensely complicate the process of drafting, and be impractical. If conformity before accession were insisted upon as well, the limitations would have to conform in detail with the law of all states that acceded, a fanciful notion. The British were unimpressed. Given the will, the job could be done.

More radically, the British officials adopted a somewhat holier than thou attitude, taking the line that the State Department was being hypocritical. All it wanted was a covenant so vacuous as to be acceptable to the Senate and one that would make no practical difference to life in the United States, or indeed anywhere else. The sort of covenant the Senate would accept would hardly be worth the paper it was written on. State Department officials were, however, not just being hypocritical; they were naturally affected by the political realities of the situation. They did not want to engage in negotiating a covenant that they could not hope to sell to the Senate.

There were at this time other disputes that divided the British and the Americans. The British wanted a special provision allowing, but not requiring, extension of

the covenant to colonies; the Americans wanted a special provision to deal with the tricky relationship between the federal authorities and the states. Here one could be horse traded for the other, but conformity before accession was not viewed as tradable.

After the meeting with Stein, senior officials in the Foreign Office — William Strang, the official head; Eric Beckett, the legal adviser; and Gladyn Jebb, whose daughter Stella I rather fancied as a student at Oxford, albeit with no success — met to consider whether it was prudent to squabble with the United States on this issue. The decision was not to change position. Beckett, an international lawyer of considerable ability, was adamant on this, flexibility not being his strong point.

Later, I was working in the U.S. National Archives on the records of the State Department. These are, for this period, much less voluminous than are the British archives, and less complete; the finding aids provided are pretty bad. I was therefore both surprised and delighted to locate an account of the selfsame meeting, telegraphed from the U.S. Embassy in London to the State Department. For a second time I met Eric in the archives.

But there was a problem. Whereas the British account gives the impression that the British won the argument, the American account strongly gives the contrary impression. Thus, the British account sets out what reads like a crushing response to the argument that the U.S. public was enthusiastic in its support of the covenant, and that the British should assist the administration in its attempts to secure the necessary legislation by not insisting on strict conformity on accession: That if the American public was so enthusiastic for the covenant, it was strange that Congress should be untouched by this enthusiasm.

Continued on page 86

Continued from page 85

Game set and match to the Foreign Office. The American telegram, however, states that:

“... both Lequesne and Ellis [really Evans] appeared impressed by U.S. arguments though unable give immediate answer possible modification UK position.”

Perhaps Henry Ford was right after all, and all history really is bunk. Be that as it may, the Americans ultimately won the battle in the United Nations, for the covenants of 1966 do not require states to bring their law into conformity before accession. And, as it turned out, the United States took until 1992 to ratify the United Nations Covenant on Civil and Political Rights, and then only did so with a package of reservations and understandings that had the practical effect of depriving ratification of any domestic impact. Given the politics, this was the best that could be done. So the problems to which Stein called attention in 1950 were all too real.

As for the British, they stuck to their view in the European negotiations until shortly before signature, but then began to run into problems not unlike those that had motivated the State Department. Some European countries could not conform to the convention without amending their constitutions; the Norwegian constitution provided, for example, that “Jesuits shall not be tolerated.”

This hardly conformed to the provision on religious liberty. So, late in the day, the British delegate changed position on the issue, and supported a provision that allowed ratification with reservations; this was to cover non-conforming laws. Britain itself ratified the convention without reservations, but slyly adopted, without publicizing this, a policy of substantial compliance only. In due course, however, recognition under the European Convention of a right of individual petition, and the jurisdiction of the European Court of Human Rights, has produced a situation in which non-conforming laws can be effectively challenged, and many British legal provisions have had to be changed in order to bring domestic law into line.

At the time of this writing, the convention is being largely incorporated into British domestic law, and there have been some expressions of alarm in legal circles, similar to those that have caused problems in the United States. One Scottish Judge, Lord McLuskey, has recently described the convention in such hostile terms — “a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers” — that he can no longer sit in any case that might involve human rights, which promises to provide him with a life of unbounded leisure in his remaining years on the bench. There is, everywhere, a tendency to think of human rights as being primarily for export only.

PHOTO BY SUSANA BYERS



Professors Stein, left, and Simpson don't spend all their time in the archives. Here they help the Law School host a gala dinner for members of The European Court of Justice and the U.S. Supreme Court in Washington, D.C., in April.

Professor Eric Stein adds:

“I had completely forgotten the London meeting until Brian, the premiere archive sleuth, refreshed my memory. Actually, my regular assignment in the State Department concerned political and security affairs of the United Nations — I had nothing to do with the human rights project, which in my office was considered rather ‘intangible’ and ‘elusive.’”

“While stopping in London, on the way to the International Court of Justice at The Hague (I believe), I received instruction from Washington to see the Foreign Office and present the line of argument described so vividly by Brian. I did so, and thought I did my best, considering my limited knowledge of the issues. I thought, as I recall it, that my presentation made some impression on the British, and I included a paragraph to that effect in my cable to Washington.”

“Yet, Brian reports, I pretty much lost the battle, but in the end the United States won the war.”

The following article is adapted from "DNA Database Searches and the Legal Consumption of Scientific Evidence," 97.4 *Michigan Law Review* 931-984 (1999), and appears here with permission of the Michigan Law Review Association.

DNA AS EVIDENCE:

— BY PETER DONNELLY AND
RICHARD D. FRIEDMAN

VIEWING
SCIENCE
THROUGH
THE PRISM
OF THE
LAW

DNA evidence has transformed the proof of identity in criminal litigation, but it has also introduced daunting problems of statistical analysis into the process. In this article, we analyze a problem related to DNA evidence that is likely to be of great and increasing significance in the near future. This is the problem of whether, and how, to present evidence that the suspect has been identified through a DNA database search. In our view, the two well-known reports on DNA evidence issued by the National Research Council (NRC) have been badly mistaken in their analysis of this problem. The mistakes are significant because the reports have carried great authority with American courts; moreover, the DNA Advisory Board of the FBI has endorsed the second report on this issue. We will also offer some reflections on the habits of mind, of both lawyers and statisticians, that may have led to this result. Part of the problem is a prevailing legal attitude of deference to the scientific establishment. This attitude underlies pending amendments to the Federal Rules of Evidence and pervades the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.* and its sequels, *General Electric Co. v. Joiner* and *Kumho Tire Co. v. Carmichael*, as well as their precursor, *Frye v. United States*. We will suggest a far less deferential approach.

First, we summarize the nature of DNA evidence and explain the database search problem. We contrast two types of cases. In both, a sample containing DNA has been left, assertedly by the defendant, at the scene of the crime or some other material location. And in both, the defendant's DNA matches that of the crime sample. But the two cases are different in at least one critical respect. In the first case, what we will call the "confirmation case," other evidence has made the defendant a suspect and so warranted testing his DNA. In the other, what we will call the "trawl case," the DNA match itself made the defendant a suspect, and the match was discovered only by searching through a database of previously



obtained DNA samples. The confirmation case has been the model for most uses of DNA evidence up to now. But the recent creation of a national database containing profiles of past offenders means that the trawl case will become increasingly important over the coming years.

Next, we discuss the NRC's analyses of the question of whether and how the DNA evidence should be presented in the trawl case, and we present our own contrasting analysis. The first NRC report (NRC I), in 1992, opposed admission of the evidence altogether. NRC I proposed that a match discovered after a database search should provide the basis for performing further tests on a new sample taken from the suspect identified by the match, but that the evidence of the initial match should not be presented to the jury. The second NRC report (NRC II), issued four years later in 1996, takes a substantially more generous view, but still calls for a testifying expert to drastically understate the value of the evidence.

In our view, the caution reflected in the NRC reports and in the analyses of those who have taken a similar perspective on the problem is unwarranted. The fact that the DNA match was found only after a search, possibly of many thousands of samples, does not diminish the value of the evidence. On the contrary, the fact that other potential suspects have been eliminated as possible sources of the crime sample slightly raises the value of the evidence. No downward adjustment in the force of the evidence is appropriate. (Indeed, the confirmation case and the trawl case are really poles of a continuum, and analysis of the two cases is fundamentally the same.) It may well be that the *total* weight of the evidence is less in the trawl case than in the confirmation case; there may be less inculpatory evidence in the trawl case, and the identification of the defendant in that case may taint any later-developed evidence by suggestiveness. But this is an entirely different matter, and one that can be left to the ordinary process of argument to the jury; it does not require any rules restricting the force ascribed to the DNA evidence or the manner in which that evidence is presented.

Readers not interested in the issues surrounding DNA database searches may skip to the final portion of this article (which begins on page 92). There we argue that the difficulty manifested by the NRC reports has arisen in part from the tendency of statisticians to export to the legal context methods that were developed to assist scientific inquiries and that appear more suitable in that context than in adjudication. But part of the problem also arises from the tendency of courts to defer to the scientific establishment with respect to matters of scientific evidence. We suggest that the solution lies less in a "gatekeeping" role of the type prescribed by *Frye*, as well as by *Daubert*, *Joiner*, and *Kumho*, designed to keep out disreputable expert evidence, and more in the role of aggressive consumer. When courts allow experts to present evidence in court, it is to perform a service for the legal system. The courts should try to ensure that the experts are doing so in a way designed to serve the needs of that system and are not bound by the experts' own professional habits.

DNA evidence and the database search problem

To understand the database search problem, it is necessary to understand some aspects of DNA evidence — but, mercifully, only some of the less technical ones.

DNA is a remarkably complex type of molecule that is sometimes said to contain the genetic blueprint of life. DNA is contained in the nucleus of virtually all cells of every living organism. Within a given organism, the DNA is effectively the same from cell to cell. The entirety of an individual organism's DNA is referred to as its genome. In humans, the genome consists of two collections, one inherited from each parent, of about three billion building blocks, called *bases*. Human DNA is extremely similar across individuals. This shared genetic material is what makes us human and distinguishes us from other life forms. At a multitude of sites in the genome, however, there are variations from one human to another; typically, two unre-

lated individuals will differ at about one site in 1,000. These variations are what make humans genetically different from each other. Except for identical twins, no two humans have DNA that is identical throughout the whole genome.

The consistency of DNA throughout a given person's body, and the uniqueness of a given person's DNA, are what make DNA evidence so valuable for identification purposes. In determining whether the DNA from two separate samples comes from the same person, it is not possible given the current state of science to compare them over the whole genome. Current testing techniques use several *markers*. Each marker targets a particular place, or *locus*, on the genome. For DNA profiling techniques, loci are chosen that display considerable variability among individuals. In most current methods, this variability is manifested by differences in the length, measured by the number of bases or the number of times a given sequence repeats, between pre-specified locations. This procedure will yield two measurements for each sample for each locus, one for the father's side and one for the mother's side.

If the pair of measurements from one sample at a given locus is the same as the pair of measurements from another sample at that locus, the profiles are said to match at that locus; otherwise, they are said not to match at that locus. If the two profiles match at *each* of the loci examined, the profiles are said to match. If the profiles fail to match at one or more loci, then the profiles do not match, and it is virtually certain — putting aside, as we do throughout this article, the possibility of laboratory error — that the samples do not come from the same person.

Our concern here is with the case in which the profiles do match. A match does *not* mean that the two samples must absolutely have come from the same source; all that can be said is that, so far as the test was able to determine, the two samples were identical, but it is possible for more than one person to have the same profile as indicated by a test even of several loci. At any given locus, the percentage of people having DNA fragments of a given length is

small but not infinitesimal. DNA tests gain their power from the conjunction of matches at each of several loci; it is extremely rare for two samples taken from unrelated individuals to show such congruence over many loci.

But just how rare? That question must be addressed if the strength of the DNA match is to be assessed. Databases of DNA samples from various populations have been collected, and from these it is possible to estimate how common any given fragment length is at a given locus. It is typically assumed that the measurements yielded by each of the markers used in forensic DNA profiling are independent of one another. This assumption enables a forensic scientist to multiply probabilities. This multiplication can yield very low estimates of the probability that a given innocent person from the demographic group described by the database would have a DNA profile matching the profile common to both of these samples. Figures in the range of one in millions down to one in many billions are typical of profiling systems now in use.

So far so good; there are complexities and controversies in the process we have described, but they are not our concern here, and for the most part this process is by now rather well-accepted. Our concern is with the process by which the matching samples came to be tested, and the implications that this has for the value of the evidence and the manner in which it should be presented.

DNA can be used to test for identity in various contexts in litigation, but we will focus on the most important setting. A crime has been committed and a person, assertedly the perpetrator, has left a sample of fluid or tissue containing testable DNA at the scene of the crime or at some other scene associated with the crime. This sample is often known as the "crime sample." The police know that if they find a person whose DNA matches that of the crime sample they may have found the perpetrator. Now we will consider two scenarios by which the police might find a match. In each scenario, we will call the person whose profile matches the crime sample "Matcher."

The Confirmation Case. In the first scenario, what we will call the confirmation case, there is a substantial amount of evidence pointing to Matcher before his DNA is even tested. This evidence might include testimony by a victim of the crime or some other eyewitness identifying Matcher as the perpetrator. It might also include a trail of blood or other circumstantial evidence leading, literally or figuratively, from the crime to Matcher. In any event, the police, believing that they may have their man, secure a DNA test of Matcher. Sure enough, the "suspect sample," as it is often known, matches the crime sample.

Just how this evidence should be presented is a difficult question. One method that is widely used, and that at least for present purposes we regard as satisfactory, states the *match probability*. This is the probability that, if nothing were known about a person other than that he was a member of some defined population, his DNA profile would match that of the crime sample. This probability quantifies the rareness of an "innocent" or "chance" match.

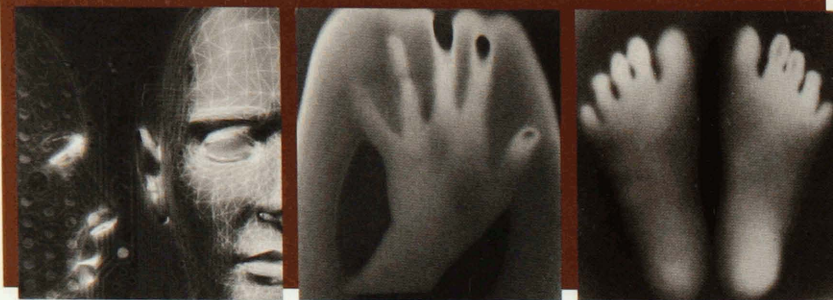
The Trawl Case. In the second scenario — what we are calling the "trawl case" — apart from the crime sample, the police do not at first have evidence that narrows their search to one suspect, or even to a few. This might, for instance, be a rape case in which the rapist was a stranger to the victim and was not apprehended immediately after the crime. But the police do have the crime sample. And they also have a database containing profiles of DNA samples taken from a large number of people, one of whom *might* be the perpetrator. Sure enough, the database search yields one profile, and only one, that matches the crime sample. The police then try to find further evidence incriminating the source of that profile, Matcher, and perhaps they find it. Perhaps, for example, when Matcher is brought before the victim, she identifies him as the perpetrator.

The trawl case will take on increasing importance in coming years. Development has been fast in England and Wales, where since 1995 DNA profiles have been taken routinely from, along others, all persons charged with a "recordable offence." As of

July 2000, nearly 80,000 crime samples had been matched to profiles in this database and more than 11,000 matches had been made between samples from different crimes. In the United States, development of a national database has been much more complex. In part because of the encouragement, including financial incentives, offered by the DNA Identification Act of 1994, all 50 states now require designated sets of convicted offenders to provide DNA samples for analysis. The state databases operate in accordance with national quality assurance standards and software designed by the FBI and participate in the Combined DNA Information System (CODIS) maintained by the FBI. Since October 1998, the FBI has been able to compare the profile of a DNA sample from a crime scene with all the profiles in the system. Thus, CODIS now operates in effect as a national database. As of April 2000, laboratories reported analyzing more than 360,000 offender profiles for entry into CODIS, with nearly 400,000 more waiting to be analyzed. As of the same time, CODIS had been responsible for over 600 "hits," assisting in more than 1,100 investigations. These numbers will almost certainly increase dramatically within the next few years.

Over time, one can imagine databases even broader than the current ones; fingerprints are now routinely taken from arrestees as well as convicts, and from many persons not suspected of crime, and it is plausible to suppose that the same will occur with respect to DNA samples. Indeed, the manager of the English database — which operates under fewer administrative and constitutional constraints than its counterpart in the United States — has said he expects that eventually it will include a third of all English men between the ages of 16 and 30.

And now we can perceive what we have called the database search problem. In the confirmation case, the fact that Matcher's sample, the only one tested, matched the crime sample is clearly powerful evidence that Matcher was the source of the crime sample. But in the trawl case, many samples were tested, without a finger already pointing to any particular suspect. How does this



factor affect the strength of the evidence of a DNA match? How, if at all, should that evidence be presented in court? We now turn to that problem.

Analyzing the database search problem

The NRC Reports. In NRC I, a Committee on DNA Technology in Forensic Science specially appointed by the NRC said: “The distinction between finding a match between an evidence sample and a suspect sample and finding a match between an evidence sample and one of many entries in a DNA profile database is important. The chance of finding a match in the second case is considerably higher, because one does not start with a single hypothesis to test (i.e., that the evidence was left by a particular suspect), but instead fishes through the databank, trying out many hypotheses.”

Thus, the committee pointed out, “[I]f a pattern has a frequency of 1 in 10,000, there would still be a considerable probability (about 10 percent) of seeing it by chance in a databank of 1,000 people.” The report recommended a cautious solution: A match between an “evidence sample” — what we are calling the crime sample — and a profile in a database “should be used only as the basis for further testing using markers at additional loci.” That is, evidence of the initial match should be deemed “probable cause” for securing a blood sample from the person so identified, and comparing it with the evidence sample using markers that were not used in the initial test. What is more, if the second test indicates that the two samples match, “only the statistical frequency associated with the additional loci should be presented at trial (to prevent the selection bias that is inherent in searching a databank).”

NRC II offered an analysis of the database search problem that was quite similar to that of NRC I, but recommended a substantially more lenient solution. (Actually, as we explain in our longer *Michigan Law Review* article, NRC II offered two somewhat different analyses; we concentrate here

on the analysis to which NRC II gave primacy.) According to NRC II, an “important difference,” a difference of a “logical” nature, between the confirmation case and the trawl case is illustrated by this simple set of statistical facts:

“[I]f we toss 20 reputedly unbiased coins once each, there is roughly one chance in a million that all 20 will show heads. According to standard statistical logic, the occurrence of this highly unlikely event would be regarded as evidence discrediting the hypothesis that the coins are unbiased. But if we repeat this experiment of 20 tosses a large enough number of times, there will be a high probability that all 20 coins will show heads in at least one experiment. In that case, an event of 20 heads would not be unusual and would not in itself be judged as evidence that the coins are biased.”

Further, contended the report, “[t]he initial identification of a suspect through a search of a DNA database is analogous to performing the coin-toss experiment many times: A match by chance alone is more likely the larger the number of profiles examined.”

Essential to NRC II, therefore, is the perception that the more profiles examined, the less probative the evidence. And NRC II recommends how this supposedly diminished probative value ought to be communicated to the jury. As we have indicated above, an expert may testify as to the probability that a sample taken from an arbitrarily chosen member of the relevant population would match the crime sample. In determining that probability, NRC II provides, the expert should take the probability that she would use if only one sample were compared to the crime sample, as in the confirmation case, and then multiply that probability by the number of profiles in the searched database. If there are hundreds of thousands or even millions of profiles in the database, this adjustment may make what appeared to be an implausible chance of a coincidental match — because the probability was so low — seem to be far more substantial. The DNA Advisory Board of the

FBI has endorsed this approach.

Thus, though the NRC reports differ in their ultimate recommendations, their analyses of the database search problem are very similar. We believe that these analyses, and those of scholars who have supported the NRC approach, are clearly wrong. We cannot show here all the anomalies of the NRC approach that we discuss in our longer article. But we will say enough to show that the NRC approach asks the wrong question, and that it fails to recognize the full import of evidence of identification based on a database search.

Our View. The proper view of the situation reflects a rather simple intuition. The value of a DNA match is attributable to the rarity of the profile. If the DNA of a particular person matches the crime sample, that evidence strongly supports the proposition that *that person* was the source of the crime sample; that is, the evidence makes that proposition appear far more probable than it did before the match was known. That other samples have been tested and found not to match does not weaken the probative value of the match, with respect to *this particular proposition*, which is the one of interest at the time of trial. On the contrary, this result somewhat strengthens the probative value of the match, because it eliminates some other persons as potential sources. How probable it appears that the particular person is the source depends not only on the DNA evidence but also on the other evidence in the case. If there is no other evidence pointing to him, then the proposition will not appear as likely as if there were such evidence — not because the DNA evidence is any less valuable, but because the prior probability of the proposition is so low. And evidence found after the DNA match is determined might be subject to a ground of skepticism — the possibility of suggestiveness created by the match itself — not applicable to evidence found beforehand. Thus, the probability that the defendant is the source of the crime sample may well appear less in the trawl case than in the confirmation case, but this is not because the DNA evidence itself is any weaker in the trawl case.

Both NRC I and NRC II emphasized that, as the number of profiles tested increases, so too does the probability of finding a match with the crime sample. That is indisputably true. One can even say that the larger a database is the more likely it is that the database will yield at least one false positive result — a profile that matches the crime scene sample but that does not come from the source of that sample. But the conclusion that the NRC reports draw is that the larger a database is (up to a point) the less valuable is evidence that a database trawl yielded a single match. Here the NRC and its supporters go wrong.

The proposition that the DNA evidence is offered to prove is not the broad one that the source of the crime sample is a person represented in the database. Rather, it is that *one particular person — the defendant in the case at hand — is the source of that sample*. And the evidence bearing on this proposition is not simply that there was one match within the database. Rather, it is that *the DNA of that particular person — alone of all those tested — matches the crime sample*.

Now consider in addition the fact that other samples have in fact been tested and found not to match the crime sample. With respect to the precise proposition at issue — that *Matcher is the source of the crime sample* — this fact can only *enhance*, not *diminish*, the probative value of the DNA evidence. One reason for this is that the additional information that a significant number of persons have been tested and found not to match the crime sample can only make the profile of that sample appear rarer than it did absent that information. Potentially more important, a number of people other than the defendant who previously appeared to be possible sources of the crime sample have now been eliminated, thus making each of the remaining possibilities somewhat more probable. Assuming, as is usually the case, that the size of the database is very small in comparison to the suspect population, this effect will be negligible, but as the size of the database increases in comparison to that population,

the effect becomes dominant. If the database includes the entire suspect population, then the existence of only one match points the finger without doubt (assuming accurate testing) at the person so identified. This fact alone, that the all-inclusive database makes the existence of one match essentially conclusive evidence, shows that the NRC analysis, which treats the DNA evidence as less valuable the more profiles are in the database, must be mistaken.

The point may be made even clearer by considering an analogy that draws the NRC's hypothetical involving repeated coin flips closer to the reality of DNA testing. Suppose one coin known to be biased, but otherwise indistinguishable from all those in a piggybank, is thrown into the bank. A tester picks from the bank at random a handful of coins and flips each of them 20 times. Each lands heads up approximately 10 times except for one coin that shows heads on all 20 flips. These results are powerful, though not conclusive, evidence that this one coin is the biased coin that was thrown into the bank. Just how powerful the evidence is depends on how common biased coins are believed to be in the bank. But two points seem utterly clear: The evidence that the one 20-heads-up coin is the biased one thrown into the bank is made stronger, not less strong, by the fact that other coins were tried and appeared to be unbiased, and the more other coins that are tested, the stronger the evidence is.

Thus, the DNA evidence itself is *more*, not *less* probative the more profiles have been searched. Nevertheless, given the same DNA match, the *entire body of evidence* may well be stronger in a typical confirmation case than in a trawl case, which involves many searches. There at least two reasons why this is so.

First, by definition, in the confirmation case there is enough evidence independent of the DNA evidence to cast strong suspicion on the eventual defendant. By definition, that is not true before the database search in the trawl case, and it may not be true even after. And it may well be that, even after the trawl identifies the defendant as having DNA matching that of the crime sample, there is little or no other evidence

tending to suggest that he is the perpetrator of the crime. Assuming that this is true, and that the database searched in the trawl case was not very large in proportion to the suspect population, the entire body of evidence will plainly be stronger in the confirmation case than in the trawl case. Of course, it may still be strong enough in the trawl case to warrant conviction.

Second, even if the evidence in the two cases, the non-DNA evidence as well as the DNA evidence, is comparable, it may appear to have greater weight in the confirmation case than in the trawl case. Suppose that in the confirmation case the police compile a powerful case against *Matcher*, based on circumstantial evidence and eyewitness identification, and only at the end of their investigation conduct the DNA test. And suppose that in the trawl case the police, having identified *Matcher* as a suspect only through a database search, focus their inquiries with such success that they are able to compile the same circumstantial and eyewitness identification evidence. In such a case, it may be plausible that the subsequently discovered evidence was tainted by suggestiveness, given that the DNA match motivated the police, and possibly witnesses as well, to confirm the suggestion that the perpetrator had been found.

These possibilities mean that the confirmation and trawl cases will not necessarily look the same, even assuming that the DNA evidence in the two is of a match with the same profile. But these are factors that a jury, aided by the arguments of counsel, can easily take into account. It is not hard, for example, for a defense attorney to argue, "Except for this DNA evidence, the prosecution does not have a shred of evidence against my client. And the prosecutor's own expert acknowledged that there could well be several other people in the world with the same DNA." Similarly, defense counsel could argue, "The police and the eyewitnesses were hungry to find the perpetrator. After they got this DNA match, naturally they constructed a case to fit the hypothesis of my client's guilt." No technical expertise is necessary to make these arguments, and



no adjustment in presentation of the DNA evidence is required.

The two factors discussed above may account in part for the intuitive sense of some observers — including the NRC committees — that the probative value of a DNA match is weakened by the fact that it is found after a database search. But in fact, as we have argued, it is not that the DNA evidence is weakened; rather, it is possible that the *other* evidence in the case tends to be weaker if, and to some extent because, identification from a database trawl has led to it.

The aspiration to objectivity

We believe there are also deeper reasons for the NRC errors, and for the willingness of legal players to adopt those errors. We believe that some habits of statisticians and scientists make them prone to errors of this sort, and that a judicial tendency towards deference diminishes the ability of courts to make good use of scientific and statistical evidence.

Science aspires to objectivity, to the demonstration of propositions that are not dependent on the subjective views of the observer. Accordingly, it is highly dependent on experiments in which given sets of conditions are observed many times. By counting or measuring different consequences in different conditions, a scientist can hope to draw conclusions on the associations between conditions and consequences.

Accordingly, classical statistics grew up to facilitate objective inferences from data. Classical statisticians try to avoid subjective judgments, seeking instead to determine what conclusions can be drawn solely on the basis of frequency of observation. The Bayesian approach — updating the odds assigned to a given proposition in light of evidence subsequently received — is thus unacceptable to classical statisticians because it depends on the subjective assignment of odds in the absence of objectively measurable data. Instead, the classical statistician, having selected a hypothesis to be tested but without having assigned any

probability to that proposition, observes whether the results of an experiment are of a highly unusual nature assuming the truth of that proposition. If they are, then the statistician concludes that the hypothesis can be rejected. Under this approach, great caution must be exercised in testing more than one hypothesis simultaneously, because the more observations are made the more likely it becomes that some will be unusual even though nothing remarkable happened.

The NRC approach clearly reflects this classical method. NRC I emphasized that with a database trawl “one does not start with a single hypothesis to test (i.e., that the evidence was left by a particular suspect), but instead fishes through the databank, trying out many hypotheses.” Thus, no conclusion could be drawn from the fact of a match produced by the trawl; instead, the match “should be used only as the basis for further testing using markers at additional loci.” In other words, the initial match yielded by the search identifies the hypothesis to be tested, and nothing more. Though NRC II did not recommend the same solution, its analysis of the problem was very similar. Recall NRC II’s discussion of an experiment in which 20 coins are tossed in the air repeatedly and eventually they come up all heads. Applying the lessons of “standard statistical logic,” NRC II said that this experiment proves nothing, because given enough trials it is unsurprising that some of them will have unusual results. And this analogy, NRC II maintained, was on point for the database search problem, because the more profiles searched — the more hypotheses tested — the greater the chance of finding one that matches the crime sample purely by coincidence.

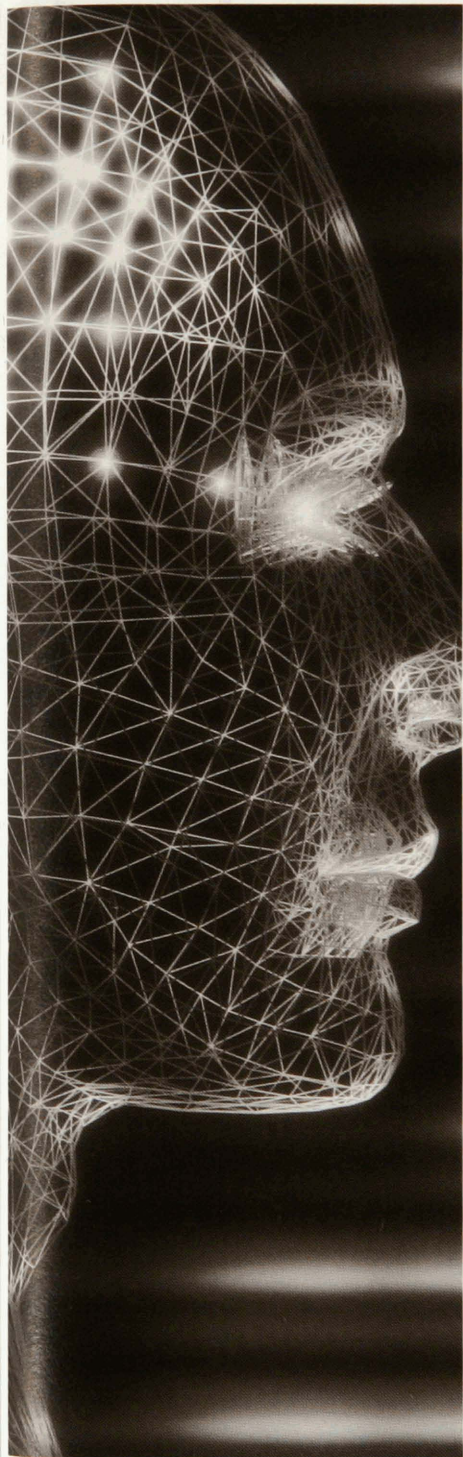
The NRC seems not to have recognized how different the enterprise of law is from the scientific enterprise for which the classical statistical model was developed. The problem facing an investigator or a juror is not to determine a general law of the uni-

verse. Rather, the investigator must try to determine who committed a given crime on a given occasion; the juror’s job is even narrower, seeking to determine whether a given person, on whom its attention has been focused, committed the crime. Subjective assessment, in light of all the information legitimately before them, is essential in allowing both the investigator and the juror to perform their jobs properly. Sufficiently strong evidence may reasonably lead to the conclusion that a given person (whether or not previously identified as a particular source of suspicion) is the perpetrator even though the prior probability of that proposition seemed very low. Once the case is presented to the jury, the jury cannot decide that it lacks the information to draw a conclusion, or that it wants to perform an experiment to ascertain the facts. It must make its best assessment of the facts on the basis of the information within its purview.

Thus, where the evidence tends to show that the person who left a particular DNA sample at a particular place is probably the perpetrator, it becomes of importance to the jury whether the defendant is the source of that sample. The jury should compare how likely the DNA evidence would arise if the defendant were the source to how likely it would arise if he were not the source. And the jury should combine these assessments with its subjective assessments of all the other evidence in the case to assess the probability of guilt.

We have, we think, shown why statisticians are prone in a trawl case to provide the adjudicative system with the answer to the wrong question. But why does the legal system appear to be ready to accept that advice? The answer, we believe, lies in a longstanding tendency of the adjudicative system to defer to the scientific establishment.

Courts have long been afraid that juries will fall prey to “junk science.” Thus, they have demanded that an expert witness’ opinion be in accordance with a theory that has achieved some threshold level of reputability. For most of the 20th century, the dominant statement of this idea was the



one in *Frye v. United States*, 293 F. D.C. Cir. 1923, that the underlying “scientific principle or discovery . . . from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”

Some states still adhere to the *Frye* test. But many jurisdictions have justifiably come to the conclusion that its demand for “general acceptance” by the relevant scientific community as a pre-condition to admissibility is too stringent. Federal Rule of Evidence 702, which has been adopted in many states, supports this view. The Rule provides:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

In 1993, in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, the U.S. Supreme Court held unanimously that the “austere standard” of *Frye* is incompatible not only with the language of Rule 702 but also with the liberal nature of the Rules in general. A majority of the Court went beyond this ruling, however, and attempted to articulate the “gatekeeping role” that the judge must play when “[f]aced with a proffer of expert scientific testimony.”

Justice Blackmun’s opinion for the majority expressly limited this discussion to evidence based on scientific knowledge, as opposed to “technical, or other specialized knowledge,” because that was the nature of the expertise offered in *Daubert* itself. Justice Blackmun put great emphasis on Rule 702’s use of the term “scientific . . . knowledge” and operated from the premise that, to qualify as scientific knowledge, “an inference or assertion must be derived by the scientific method.” Thus, he attempted to articulate indicia of the scientific method, and he laid out four criteria that should often enter into determining “the scientific validity” of the principles underlying the evidence. These may be referred to as (1)

testing, (2) peer review and publication, (3) error rates and standards, and — partially resurrecting *Frye* just a few pages after its apparent death — (4) general acceptance.

Our concern here is not so much with the much-debated questions of whether *Daubert* reflects good philosophy of science, or even whether it reflects good evidentiary policy. Rather, the point of significance here is that, though *Daubert* reflects a loosening of the demands purportedly applied under *Frye*, it still reflects a notable attitude of deference to the scientific establishment. (And this is an attitude that will be entrenched by pending amendments to Rule 702, which barring unforeseen intervention by Congress will become effective December 1 of this year and will explicitly require the court to determine whether expert testimony is “the product of reliable principles and methods . . . applied . . . reliably to the facts of the case.”) This attitude is apparent in several respects. Most obviously, perhaps, is the continued use of “general acceptance” as a criterion — albeit no longer the exclusive one — for determining admissibility.

Further, the other criteria constitute an adoption of currently prevalent scientific methods; the emphasis on peer review and publication also relies heavily on the attitudes of, and decisions made by, the scientific establishment. Perhaps most fundamentally, the entire inquiry seems gratuitous. Under the language of Rule 702, nothing seems to depend on whether the knowledge on which the opinion is based is “scientific” or not. “[S]cientific” and “technical” are clearly listed merely as illustrations of “specialized knowledge”; the key question seems to be whether the opinion is based on “specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.”

The bite of *Daubert*’s insistence on scientific methods was demonstrated in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). There, the plaintiff attempted to show that exposure to PCBs, a class of chemicals,



could promote cancer. He presented the results of four studies, each of which failed on its own to provide strong support for this conclusion. One of his experts, a toxicologist named David Teitelbaum, testified — somewhat ungrammatically, but comprehensibly enough — at a deposition:

[A]s a toxicologist when I look at a study, I am going to require that that study meet the general criteria for methodology and statistical analysis, but that when all of that data is collected and you ask me as a patient, 'Doctor, have I got a risk of getting cancer from this?' That those studies don't answer the question, that I have to put them all together in my mind and look at them in relation to everything I know about the substance and everything I know about the exposure and come to a conclusion. I think when I say, 'To a reasonable medical probability as a medical toxicologist, this substance was a contributing cause . . . to his cancer,' that that is a valid conclusion based on the totality of the evidence presented to me. And I think that that is an appropriate thing for a toxicologist to do, and it has been the basis of diagnosis for several hundred years, anyway."

Justice Stevens agreed with Dr. Teitelbaum that "[i]t is not intrinsically 'unscientific' for experienced professionals to arrive at a conclusion by weighing all available scientific evidence — this is not the sort of 'junk science' with which *Daubert* was concerned." But Justice Stevens stood alone. The rest of the Court upheld the trial court's decision that expert opinions like this one did not rise above "subjective belief or unsupported speculation." A trial court, concluded the majority, could validly decide to exclude "evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

The fear of junk science — the concern that juries will be overwhelmed by chicanery masquerading as science — has thus exerted a powerful effect on the American courts. And perhaps a fear of their own inadequacy to separate the wheat from the chaff has left them to rely greatly on the attitudes and methods of the scientific establishment. We do not mean to deny that a "gatekeeping role" for the courts is necessary; we assume that some evidence offered under the guise of science is of so little value, and sufficient prejudicial potential, that exclusion is warranted. But we believe that deference to the scientific establishment in an attempt to fend off junk science may create another problem — failure to recognize the extent to which, as we have suggested, the methods ordinarily used by scientists do not match up with the needs of the legal system.

The *Joiner* majority's castigation of the toxicologist's opinion as "subjective belief" reflects this failure. Adjudication, we have argued, depends on subjective assessments of factual issues, and courts are fooling themselves if they pretend otherwise. Sometimes, scientists can present to the jury generalized propositions of the type that they try to demonstrate in their ordinary, non-forensic work. But adjudication usually depends on the particulars of the case at hand.

Often this means that the law needs to decide non-recurrent matters for which, because it is impossible to run a controlled experiment or even to gather data across like cases, the scientific method will be useless. And yet, in such cases scientifically based information may be useful in trying to determine the facts. The subjective belief of an expert who has had extensive experience in dealing with problems of a roughly similar nature may be particularly useful in bridging the gap between those principles

and the available evidence. This is often the case, for example, in cases in which an engineer offers an explanation for an accident that is similar in some respects to other accidents but unique in some respects. Even if the expert's opinion is not well grounded on scientific principles, her observations and judgment, based on extensive experience, may be useful. For this reason, we find the Court's decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), somewhat curious. The expert testimony offered there — that of an expert on tire failure — was clearly not scientific. But the Court held that the trial judge had not abused his discretion in applying the *Daubert* criteria. To the extent that judges apply those criteria in determining the admissibility of evidence that does not even purport to be scientific, *Kumho* will represent a further, and misguided, incursion by science into the realm of law. Fortunately, and appropriately, the Court emphasized that the *Daubert* criteria are not mandatory on the trial court — even with respect to purportedly scientific evidence.

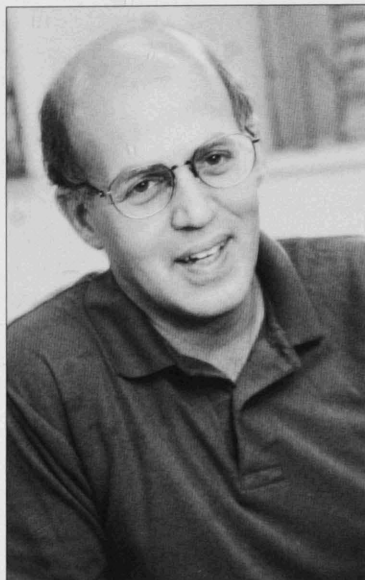
Even if the matter on which an expert wishes to offer an opinion is a recurrent one, so that science can in time yield an answer with confidence, science may not be ready to do so before the legal system needs guidance. Unlike scientific inquiry, Justice Blackmun pointed out in *Daubert*, law "must resolve disputes finally and quickly"; evidentiary rules are "designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." But the Court seems to have failed to realize the implications of that perspective. It does not weigh in favor of excluding scientific evidence, or of deferring to the scientific establishment, but rather in favor of recognizing that the law must satisfy its own needs for scientific advice, even if doing so does not square with the usual methods of scientists.

In any case, if a scientist is doing more than reciting general principles without an attempt to relate them to the facts of the case, the law's treatment of scientific evidence must take into account the adjudicative context in which the evidence is offered. That context differs significantly

from the one in which scientists are used to working -- most notably, with respect to evidence of a DNA database search, in that the jury's job is at base a subjective one and in that the bringing of the case tends to define the propositions at issue.

Our perspective may perhaps be crystallized by comparing it to that of Anders Stockmarr, one of the statisticians who has written in support of the NRC approach to the DNA database search problem. "The decision problem of the court," he has written, "should take the implications of statistical hypotheses for data description into account, and not the other way around." In our view, this is precisely wrong. The legal system is a consumer of the information offered by expert witnesses. It may be that the service needed by the legal system requires scientists to operate in ways at variance with their usual operating methods. The law should not be a passive consumer of scientifically based information, taking what scientists have to offer "off the rack." Rather, it should be an aggressive consumer, asking its suppliers to provide what it needs.

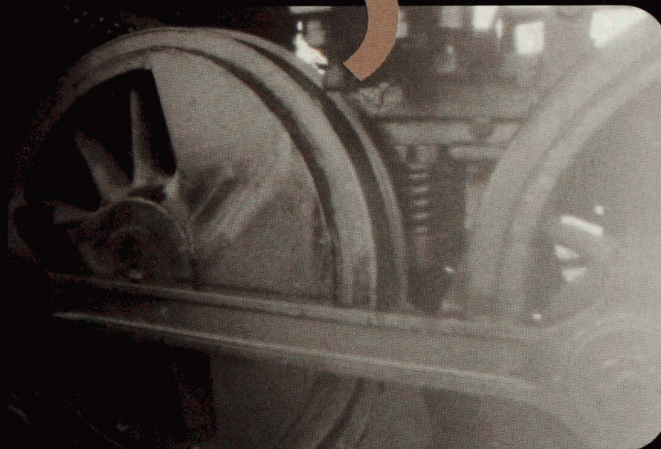
This perspective, which has sometimes been apparent in debates concerning psychiatric testimony, may be helpful across the range of expert testimony. What the law needs is not necessarily information processed in the usual ways of science, but rather information that will be helpful to the jurors in making their best subjective assessment of the particular issues at stake in the case at hand. Of course, like any consumer, the law can only ask the supplier to provide what the supplier can. But in the implicit negotiation between law and science, the law has one advantage that most consumers do not have: It sets the rules. The courts should recognize that what they need from science is not the usual output of the scientific community, but rather a special product more tailored to adjudicative needs. Then they may better play the role of aggressive consumer, and so better secure information that will be of help to the trier of fact.



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Congress' Arrogance



— BY YALE KAMISAR

Does Dickerson v. U.S., reaffirming Miranda and striking down § 3501 (the federal statute purporting to “overrule” Miranda), demonstrate judicial arrogance? Or does the legislative history of § 3501 demonstrate the arrogance of Congress?

Shortly after Dickerson v. U.S. reaffirmed Miranda and invalidated § 3501, a number of Supreme Court watchers criticized the Court for its “judicial arrogance” in peremptorily rejecting Congress’ test for the admissibility of confessions. The test, pointed out the critics, had been adopted by Congress after extensive hearings and debate about Miranda’s adverse impact on law enforcement.

The Dickerson Court did not discuss the legislative history of § 3501 at all. However, in an article published six weeks before the decision in Dickerson, “Can (Did) Congress ‘Overrule’ Miranda?” 85 Cornell Law Review 8833 (2000), Professor Yale Kamisar discussed the legislative history of § 3501 at length. He concluded, in effect, that Congress — not the Supreme Court — should be awarded the prize for arrogance. According to Kamisar, proponents of § 3501 were determined to “overrule” Miranda by simple legislation; they hoped to bypass the prescribed process for amending the Constitution and to persuade the Court to retreat from Miranda. Extracts from the article appear here with permission of Cornell Law Review. (Experts representing the many sides of the issue will gather at the Law School in November to ponder “Confession Law After Dickerson.” See story on page 34.)

As Professor Otis Stephens noted in “The Supreme Court and Confessions of Guilt” (1973), his book-length study of the Supreme Court and confessions: “In the aftermath of *Miranda v. Arizona*, an array of Supreme Court critics, in and out of Congress, insisted on linking the new interrogation requirements with what they described as an unparalleled national crisis in crime control and law enforcement.” In newspaper editorials, as well as in legislative halls, *Miranda* was charged with wreaking havoc and the Warren Court accused of “coddling criminals,” handcuffing police, and otherwise undermining “law and order” at the very time when police faced their most perilous and overwhelming challenge.”

Section 3501 and other provisions of Title II of the Omnibus Crime Control and Safe Streets Act of 1968 were written and debated against this general background. As Fred Graham, then the Supreme Court correspondent for the *New York Times*, observed, “[w]hen Title II burst from the relative obscurity of the Senate Judiciary Committee onto the Senate floor in April of 1968 it was immediately seen as a bald congressional attempt to rap the Supreme Court’s knuckles over crime. Its provisions read like a catalogue of familiar grievances against the Warren Court:

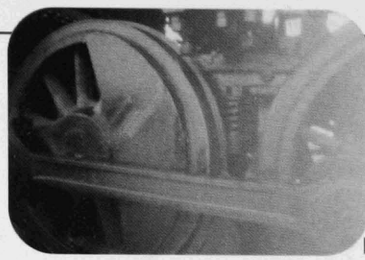
“First, it purported to reverse *Miranda* . . . [in] federal trials. . . . Second, it included the similar effort to overrule *United States v. Wade*, a 1967 case that established the right to counsel at pretrial lineups. . . . These two sections applied only to federal courts, but it was assumed that state legislatures would pass similar laws if these were to get by the

Supreme Court. Third, it overturned *Mallory*. . . . Fourth, it abolished the jurisdiction of the federal courts to review state convictions in *habeas corpus* proceedings. Fifth, it stripped away the jurisdiction of the Supreme Court and all other [federal] courts to overturn a state court’s finding that a confession was voluntary or a . . . trial court’s holding that an eye-witness identification was admissible.

“Nothing quite so irregular had ever been aimed at the Supreme Court by Congress before. It was essentially an attempt to use a statute to reverse a string of Supreme Court decisions, most of which had been interpretations of the Constitution. . . . The supporters of Title II made little effort to disguise their intent to blackjack the Court into changing its course. In private, Senator McClellan called it ‘my petition for a rehearing’ on *Miranda* [As the Senate Judiciary Committee] explained, ‘the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that the legislation would be upheld.’

“Those were the sentiments of a committee that was dominated by Southern senators who had been nursing hurt feelings over the school desegregation decision of 1954 and who wanted to take it out on the Supreme Court over crime.”

Graham characterized Title II as “a piece of dubious statesmanship designed more to chastise the Supreme Court than to improve the law.” Another close observer of the debate over Title II, Professor Robert Burt, put it more strongly: “Title II was, to an important degree, a gesture of defiance at a Court that protected criminals and Communists, and attacked traditional religious, political, and social institutions.”



During the debates on Title II, Senator John McClellan told his colleagues that “the tone is set at the top” and that “the Supreme Court has set a low tone in law enforcement.” As already noted, Senator McClellan chaired the Senate subcommittee hearings on Title II and drafted some of the Crime Bill provisions. He also managed the Judiciary Committee’s bill. Moreover, McClellan dominated both the subcommittee hearings and the debates on the Senate floor. One might say that as far as the congressional battle over Title II was concerned, Senator McClellan “set the tone at the top,” and he set it very low indeed. The depth of his anger at the Court and the intensity of his emotion-charged language is evident in many of his statements, as the following examples demonstrate:

- [The] tone is set at the top. The Supreme Court has set a low tone in law enforcement, and we are reaping the whirlwind today. Look at [the crime graph] chart. Look at it and weep for your country. Crime spiraling upward and upward and upward. Apparently nobody is willing to put on the brakes. I say to my colleagues today that the Senate has the opportunity — and the hour of decision is fast approaching. . . .
- [If] this confessions provision is defeated, the law-breaker will be the beneficiary, and he will be further encouraged and reassured that he can continue a life of crime and depredations profitably with impunity and without punishment. . . . [If Title II is defeated] every gangster and overlord of the underworld; . . . every murderer, rapist, robber . . . will have cause to rejoice and celebrate.

Whereas, if it is defeated, the safety of decent people will be placed in greater jeopardy and every innocent, law-abiding . . . citizen in this land will have cause to weep and despair.

- Today, why should a policeman go out and risk his life to catch a known murderer or criminal who is armed with a gun, when the Supreme Court will find some small technicality . . . to find a way to turn that murderer or criminal loose and then, [in its decisions], attack the officer who risked his life and reflect

upon his integrity, by inferring that we cannot trust a policeman to do right. . . . That is their attitude.

- Under the Court’s logic in the *Miranda* case, the day may come when a parent cannot ask his child about any harm the child has committed upon his mother without the parent giving him a warning that anything the child says may be used against him. Should fathers and mothers be required [to give the *Miranda* warnings] before they ask a child about an act that may be criminal. . . . [?]
- [T]he spiraling rate of crime that now plagues our nation and endangers our internal security will continue unabated — even worsen — so long as this rigid and arbitrary prohibition against the admission into evidence of voluntary confessions by criminals is imposed on the processes of justice. As chosen representatives of our people we have a duty to do something about it.”
- It was not the Constitution that changed. It was five members of the Court [in *Miranda*] who undertook to change the Constitution. . . .

This is nothing less than an usurpation by the Court of the power to amend the Constitution. That power is not reposed in the Court by the Constitution.

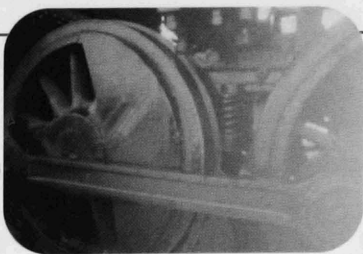
It is that usurpation of power and its exercise that we are truly trying to correct.

I wholeheartedly agree that [changes in the Constitution should be made by constitutional amendment]. We are here protesting and trying to rectify 5-4 Court decisions which have had the effect of amending the Constitution — a power the Supreme Court does not have under the Constitution.

Throughout the subcommittee hearings and the debates on the Senate floor, Senator Sam Ervin proved to be McClellan’s chief lieutenant. He, too, had drafted some of the provisions contained in the Judiciary Committee’s Crime Bill. As we have seen, at first Ervin had balked at attempting to overturn *Miranda* by legislation. But then Ervin threw himself into the battle with considerable gusto:

- If you believe that the people of the United States should be ruled by a judicial oligarchy composed of five Supreme Court justices rather than by the Constitution of the United States, you ought to vote against Title II. If you believe that self-confessed murderers, rapists, robbers, arsonists, burglars, and thieves ought to go unpunished, you ought to vote against Title II. . . . But if you believe as the senator from North Carolina believes, that enough has been done for those who murder and rape and rob, and that something ought to be done for those who do not wish to be murdered or raped or robbed, then you should vote for Title II.
- When the Supreme Court takes the words of the Constitution and attributes to them a meaning which allows self-confessed murderers and rapists and arsonists . . . to go free of justice, then I think it is time for us to do something because we are the only power on earth which can do anything to protect American people against decisions like this, decisions which constitute a usurpation of power denied to the majority of the Supreme Court by the very instrument they profess to interpret.
- All I can say is that the majority of the Supreme Court, in the *Miranda* case, . . . evidently wedded themselves to the strange theory that no man should be allowed to confess his guilt, even though the Bible says, even though psychiatrists assert, and even though those interested in the rehabilitation of prisoners declare than an honest ‘confession is good for the soul.’ Hence, they invented rules in the *Miranda* case to keep people from confessing their crimes and sins. The wisest of men could not have devised more efficacious rules to accomplish this object had he pondered the question a thousand years.

As the Senate debate on the Crime Bill intensified, Republican Presidential Candidate Richard M. Nixon issued his position paper on crime, “Toward Freedom from Fear.” This paper demonstrated that when it came to using the Court as a scapegoat for the crime and violence that beset the nation, Mr. Nixon yielded neither to Senate McClellan nor Senator Ervin nor



any other Democratic politician. Nixon urged Congress to pass the bill overturning *Escobedo* and *Miranda* and restoring the voluntariness test as a way to “redress the imbalance” caused by these decisions — a way to offset the blow suffered by “the peace forces in our society.”

Said Nixon in “Toward Freedom from Fear”: “In the last seven years while the population of this country was rising some 10 percent, crime in the United States rose a staggering 88 percent. . . .

“[A] contributing cause of this staggering increase is that street crime is a more lucrative and less risky occupation than it has ever been in the past. Only one of eight major crimes committed now results in arrest, prosecution, conviction, and punishment — and a 12 percent chance of punishment is not adequate to deter a man bent on a career in crime. Among the contributing factors to the small figure are the decisions of a majority of one of the U.S. Supreme Court.

[The “only one-in-eight crimes results in conviction” statistic is especially jolting — but highly misleading, as I noted in “How to Use, Abuse — and Fight Back With — Crime Statistics,” 25 *Oklahoma Law Review* 251-52 (1972). Even if the conviction rate (the percentage of those held for prosecution who are found guilty) were 100 percent, only one reported crime in six would result in a conviction, because only one reported crime in six leads to a criminal prosecution. The great bulk of reported crimes never lead to an arrest.]

“The *Miranda* and *Escobedo* decisions of the high court have had the effect of seriously ham stringing [sic] the peace forces in our society and strengthening the criminal forces.

“From the point of view of the peace forces, the cumulative effect [of] these decisions has been to very nearly rule out the ‘confession’ as an effective and major tool in prosecution and law enforcement. . . .

“From the point of view of the criminal forces, the cumulative impact of these decisions has been to set free patently guilty individuals on the basis of legal technicalities.

“The tragic lesson of guilty men walking free from hundreds of courtrooms across the country has not been lost on the criminal community. . . .

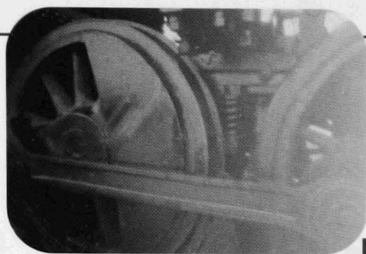
“The balance must be shifted back toward the peace forces in our society and a requisite step is to redress the imbalance created by these specific decisions. I would thus urge Congress to enact proposed legislation that — dealing with both *Miranda* and *Escobedo* — would leave it to the judge and the jury to determine both the voluntariness and the validity of any confession. . . .

“[I] think [the Warren Court’s criminal procedure decisions] point up a genuine need — a need for future presidents to include in their appointments to the United States Supreme Court men who are thoroughly experienced and versed in the criminal laws of the land.”

Senator Karl Mundt, who asked and obtained unanimous consent to print Nixon’s position paper in the *Congressional Record*, noted that “[m]uch of what the former Vice President discusses in his position paper is before us in the form of” the Crime Bill. So Senator McClellan would have had his colleagues believe. One close observer of the Senate debate opined that “McClellan’s most eminent supporter turned out to be Richard Nixon.”

During the debate on the Senate floor, Senators Ervin and McClellan repeatedly referred to the transcript of the McClellan subcommittee hearings for overwhelming evidence of the heavy blow the Warren Court’s confession rulings had dealt law enforcement and the strong need to right the situation by overturning the rulings. Unfortunately, when it came to open-mindedness and fair play, Senator McClellan’s subcommittee hearings left a great deal to be desired. As one close student of Title II pointed out, “the familiar claims of a direct connection between the enlargement of procedural requirements and a rising crime rate were repeated by a parade of district attorneys, police chiefs, and other representatives of what might be

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called the 'law enforcement lobby.'" Senator McClellan himself noted (with evident pride) that the record of his subcommittee hearings "contains letters from 122 chiefs of police in 37 states."

When Senator Joseph Tydings, who led the opposition to Title II in the Senate, charged that not a single constitutional law professor or criminal law professor had been given an opportunity to testify before Senator McClellan's subcommittee on the wisdom or constitutionality of this proposal, McClellan did not deny it. He responded simply that every member of the Senate had been invited to testify and that a person from Tydings' own state has also testified (the president of the Maryland District Attorneys Association).

The conspicuous absence of any law professors at the subcommittee hearings (or any defense lawyers or public defenders for that matter) could hardly be attributed to a lack of interest by those in academia. When asked by Senator Tydings to state their views on the desirability of § 3501 and other anti-Court provisions and on the power of Congress to enact them, 212 law professors (including 24 law school deans) from 43 law schools had responded. Most attacked the constitutionality of the anti-*Miranda* provision; not a single one defended it.

Almost all of the law enforcement officials who appeared before the Senate subcommittee talked about both the need for and the constitutionality of Title II, thus telling McClellan, Ervin, and their allies what they wanted, and expected, to hear. But the testimony of the most eminent witness to appear before the subcommittee, J. Edward Lumbard, chief judge of the U.S. Court of Appeals for the Second Circuit and chairman of the ABA special Committee on Minimum Standards for Criminal Justice, probably surprised and disappointed proponents of Title II.

A year earlier, Judge Lumbard had voiced his unhappiness with the approach the Supreme Court had taken in *Escobedo*. And during his appearance before the subcommittee he made it clear he was not enamored of *Miranda*. At one point he agreed that the self-incrimination clause would seem to have no bearing whatever on the admissibility of a confession that

satisfied the traditional pre-*Miranda* voluntariness test (calling this his "own personal view"). At another point, he agreed that there is "no better evidence" of a person's guilt than his own voluntary confession. Nevertheless, Judge Lumbard balked at overturning *Miranda* by legislation.

He told the subcommittee that if Congress were unhappy with *Miranda* because it unduly hampered police efforts to apprehend criminals "the only way to correct the situation would be by amendment to the Constitution . . . we must apply the Constitution and the law as the Supreme Court has interpreted them." When asked specifically whether the much-quoted language in *Miranda* "encourag[ing] Congress and the States to consider their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our law" "opens the door for legislation [such as Title II] which would permit our avoiding the constitutional amendment process," Judge Lumbard answered, "No; I don't think it permits you to do that." He added that Congress could not enact legislation that failed to do everything the Court said had to be done "[u]nless you can find some suitable substitute for the requirements laid down by the Supreme Court."

At this point, Senator McClellan made it plain that he was only interested in abolishing *Miranda*, not in finding a "suitable substitute" for it. He also left little doubt that he was well aware that abolishing *Miranda* by legislation would be a risky venture. Consider the following exchange:

Senator McClellan: ". . . If they [a majority of the justices] base the *Miranda* decision strictly on constitutional issues, I don't understand how you could write a statute that did not do everything the Court has said must be done. And if you do that, you destroy everything that you seek to attain anyhow."

Judge Lumbard: "Unless you can find some suitable substitute for the requirements laid down by the Supreme Court. . . ."

Senator McClellan: "They [a majority of the justices] wouldn't accept it as suitable unless it accomplished the destruction that their decision does. They say it is based on the Constitution. I don't know how you can do it. They say you have got to do these things. Well, how can you do less if the Constitution requires that this be done?"

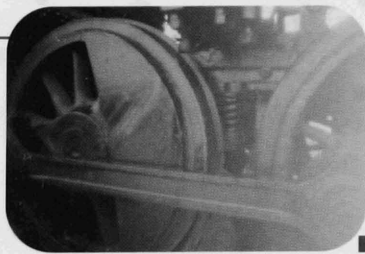
In the Senate Committee on the Judiciary's report recommending that Title II be enacted into law, the committee maintained that "[t]he Supreme Court itself suggests" that Congress is free to overturn *Miranda* by statute and that Congress should accept this invitation because it "is better able to cope with the problem of confessions than is the Court." With one exception, the committee relied only on law enforcement officials and several U.S. senators who had testified before the subcommittee. The one exception was Judge Lumbard, even though, as we have seen, he appeared to have said just the opposite of what the committee wished to hear. How did this remarkable turn of events come about?

The Judiciary Committee report took Judge Lumbard's testimony out of context. The report quotes the judge as follows:

"In my opinion, it is most important the Congress should take some action in the important areas I have discussed. The legislative process permits a wide variety of views to be screened and testimony can be taken from those who know the facts and those who bear the responsibility for law enforcement.

"The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decisions in particular cases where the facts are limited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases."

This testimony sounds as if Judge Lumbard was cheering on the Congress in its efforts to abolish *Miranda* by legislation, but only because the Judiciary Committee omitted both what the judge had told the subcommittee earlier and what he was to tell it later. Judge Lumbard had pointed out earlier that the *Miranda* Court had not dealt with certain situations, such as what rules,



if any, should apply when the police are questioning someone not in custody, e.g., interviewing a person in his own home with other family members present. He told Congress it should "feel free to state a policy and lay down appropriate rules regarding the admission of evidence" in these situations. These were "the important areas" Judge Lumbard was talking about in the portion of his testimony quoted by the Judiciary Committee (areas for which the *Miranda* opinion had not provided definite answers) when he testified he thought it "most important that the Congress should take some action in the important areas I have discussed."

If there were any doubts about what Judge Lumbard meant in the testimony quoted by the Committee Report, he resolved them later when responding to a question from Senator Hugh Scott:

"No; I don't think [the language encouraging the Congress to establish other procedures which are equally effective in apprising suspects of their rights] permits you to do that [overturn *Miranda* without invoking the constitutional amendment process], but there certainly is a wide area which obviously the Court had not covered in its opinion in the *Miranda* cases, not only the matter of questioning before a person is in custody, but then the manner in which the defendant or suspect is handled while he is in custody, the way in which the warning is given, the record that is made, the presence of other people . . . these are obviously the next questions that are going to be raised in contested cases.

"I think that this whole area is open to the Congress and . . . it would be most helpful and most important that Congress should attempt to deal with these areas, and lay down the rules and the standards so far as federal cases are concerned."

The Judiciary Committee report was also less than honest in its treatment of the testimony of another federal judge who appeared at the subcommittee hearings:

Judge Alexander Holtzoff, a federal district judge for the District of Columbia. The committee assured the full Senate that Judge Holtzoff "sees no constitutional bar to congressional abrogation of the *Mallory* rule," quoting from his testimony. But when it discussed Congress' freedom to enact legislation overturning *Escobedo* and *Miranda*, the committee omitted any reference to Judge Holtzoff's testimony, no doubt because this time he told the subcommittee that there was a constitutional bar to congressional action:

"Of course, the *Escobedo* and the *Miranda* cases are in a different class [than *Mallory*] in one important respect. They are based on the Constitution. They hold that the Constitution requires these warnings. Therefore, it would take a constitutional amendment, unless the Supreme Court overrules itself, whereas, the *Mallory* rule being purely a procedural rule, can be changed by legislation."

Those asked to testify at the Senate subcommittee hearings on the Crime Bill were those whose testimony was expected to advance the cause of the subcommittee's chairman, Senator John McClellan. As the Senate Judiciary Committee Report's treatment of testimony of Judges Holtzoff and Lumbard well illustrates, on those rare occasions when a witness said something that disappointed Senator McClellan, that testimony was misrepresented, or simply ignored.

The legislative history of § 3501 makes it hard to take seriously any argument that courts should defer to Congress' superior fact-finding capacity. On this occasion at least, the much vaunted superior fact-finding capacity of Congress was little in evidence. The legislative history of § 3501 also greatly impairs, if it does not destroy, other arguments that proponents of the provision have made — that § 3501 takes into account the *Miranda* warnings or recognizes the central holding of *Miranda* or represents a "blend" of the old voluntariness test and the new *Miranda* decision. The last thing congressional proponents of § 3501 wanted to do was to pay respect to *Miranda*. They were determined to bury *Miranda*, not to recognize it.

Yale Kamisar, a graduate of New York University and Columbia Law School, has written extensively on criminal law, the administration of criminal justice, and the "politics of crime." He is author of *Police Interrogation and Confessions: Essays in Law and Policy* and co-author of *Criminal Justice in Our Time* and *The Supreme Court: Trends and Developments* (five annual volumes). He wrote the chapter on constitutional criminal procedure for *The Burger Court: The Counter-Revolution that Wasn't*; *The Burger Years*; and *The Warren Court: A Retrospective*. He is also co-author of two widely used casebooks: *Modern Criminal Procedure: Cases, Comments & Questions*, all nine editions, and *Constitutional Law: Cases, Comments & Questions*, all eight editions. In addition, he has written many articles on euthanasia and assisted suicide. Professor Kamisar taught at the University of Minnesota Law School from 1957-64 and joined the University of Michigan law faculty in 1965. He is currently the Clarence Darrow Distinguished University Professor of Law.







The following essay was delivered as the
Presidential Address at the 53rd Annual
Meeting of the National Academy of
Arbitrators in San Francisco in June 2000.

Arbitration & Judicial Review

— BY THEODORE J. ST. ANTOINE, '54

A quarter century ago, in a presentation at the Academy's annual meeting, I used the phrase "contract reader" to characterize the role an arbitrator plays in construing a collective bargaining agreement. That two-word phrase may be the only thing I ever said before this body that has been remembered. Unfortunately, it is almost invariably misunderstood. Time and again members have reproached me: "What's the big deal about contract reading, anyway? Isn't it just the same as contract interpretation?" Or, more substantively scathing: "Do you really think, Ted, that all you have to do to interpret a labor agreement is to *read* it?!"



Those two masters of contract interpretation, Arthur Corbin and Carlton Snow, know that context is nearly everything in extracting meaning from a set of words. When I spoke of the “contract reader” years ago, it was in the context of a paper dealing with judicial review of an arbitrator’s award. The process of contract interpretation as such was not my concern. I had a simple, but I like to think important point to make. When a court has before it an arbitrator’s award applying a collective bargaining agreement, it is just as if the employer and the union had signed a stipulation stating: “What the arbitrator says this contract means is exactly what we meant it to say. That is what we intended by agreeing the award would be ‘final and binding.’” In this sense, an “erroneous interpretation” of the contract by the arbitrator is a contradiction in terms.

Now, my Law School colleague Yale Kamisar, who has had more of his books and articles cited by the U.S. Supreme Court than any other contemporary scholar, advises us legal scribblers that it is not enough to have a sound idea. “To make a lasting impression,” says Yale, “you must couch your ideas in memorable language.” So, way back in 1977, I tried my best to come up with a catchy phrase to convey my notion about the relationship between arbitrators and the contracts they are asked to interpret. What could be more apt than to get a court to think of the arbitrator as simply picking up the parties’ agreement and “reading it off” as easily and straightforwardly as A-B-C? Yale didn’t tell us, however, that sometimes you can succeed too well. The audience may remember your catchy phrase — and entirely forget your point!

Today, I am going to take two quite different tacks. First, I shall update the thesis I thought I was communicating to you nearly 25 years ago. The emphasis will be on what may be the hottest issue in judicial review, namely, when may a court set aside an arbitral award on the grounds it violates public policy. Second, in response to your overwhelming demand, I’d like to talk a little about what

many of you thought I was trying to say all along, namely, how should an arbitrator go about “reading,” or interpreting, a contract.



Judicial review of arbitration awards

The story begins, of course, with David Feller’s great triumph in the Steelworkers Trilogy (*Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 [1960]; *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 [1960]; and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 [1960]). There, the Supreme Court made arbitration the linchpin in the federal scheme for the implementation of collective bargaining agreements. More specifically, for our purposes, the Court in one of the three cases, *Enterprise Wheel*, imposed tight constraints on judicial review of arbitral awards. So long as the award is not the product of fraud or corruption, does not exceed the arbitrator’s authority under the parties’ submission, and “draws its essence” from the labor contract, a court is to enforce the award without any attempt to “review the merits.” Despite these strictures, the itch of the judiciary to right seeming wrongs has compelled the Court to revisit the subject, most notably in *Paperworkers v. Misco Inc.*, 484 U.S. 29 (1987).

Misco presented the public policy question in dramatic fashion. The Fifth Circuit had refused to enforce an arbitrator’s reinstatement of an employee whose job was operating a dangerous paper-cutting machine, and whose car had been found to contain marijuana while in the company parking lot. The Supreme Court reversed, declaring that “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” The Court naturally recognized the

general common law doctrine that no contract in contravention of law or public policy will be enforced. But it cautioned that “a court’s refusal to enforce an arbitrator’s *interpretation* of [labor] contracts is limited to situations where the contract as interpreted would violate ‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”

Many lower courts have still not got the message. Judges have been so offended by the reinstatement of deviant postal workers, sexual harassers, and alcoholic airline pilots that they have disregarded the directives of *Enterprise* and *Misco*. Unfortunately and unaccountably, the Supreme Court has not seen fit to step in and insist that its dictates be followed. Thus, the First and Fifth Circuits have taken it upon themselves to find an award at odds with their notions of public policy, even though the action ordered, such as a reinstatement, would not have violated any positive law or established public policy if it had been taken by the employer on its own initiative. The Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits have been far more faithful to the *Misco* mandate. The Second, Third, Eighth, and Eleventh Circuits have vacillated on the issue, but the most recent decisions seem more in line with *Misco*.

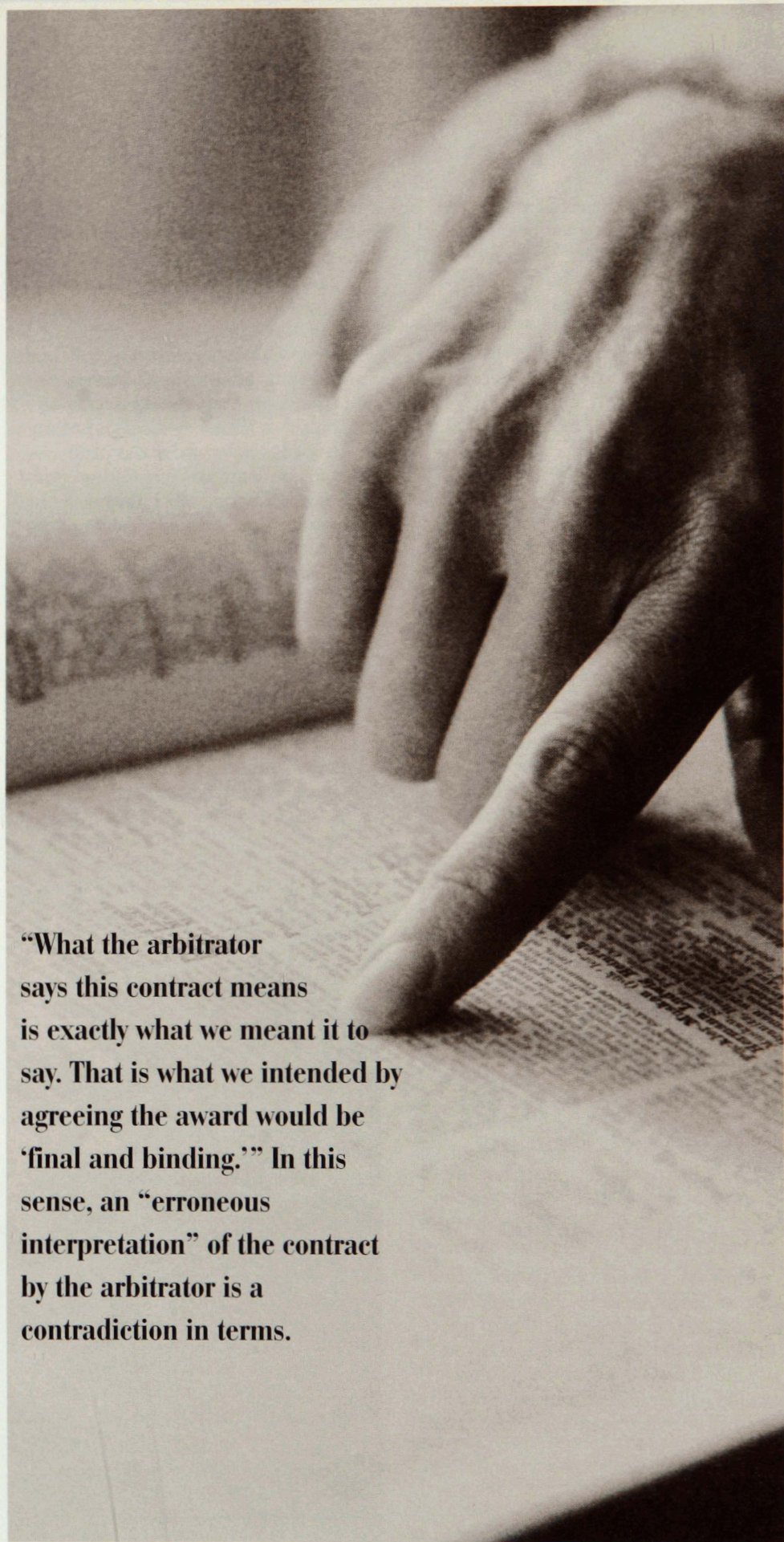
Because I consider it one of the easier issues in arbitration, however much misunderstood by a number of courts, I shall deal brusquely with the rejection of otherwise legitimate awards on the basis of a nebulous public policy. That usually comes down to the highly subjective feelings of particular judges. For me, three estimable critics have correctly assessed the problem and arrived at the right solution. In various formulations, Judge Frank Easterbrook and Professors Charles Craver and David Feller have concluded that if the employer (or the employer in conjunction with the union) has the lawful authority to take unilaterally the

action directed by the arbitrator, such as reinstatement of a wrongdoing employee, the arbitral award should be upheld against public policy claims. If the airline would not have violated the regulations of the Federal Aviation Administration by putting the rehabilitated, re-licensed alcoholic pilot back in the cockpit, the arbitrator's award to that effect is valid and enforceable.

That approach is entirely in keeping with the underlying notion that the arbitrator is the parties' surrogate, their designated spokesperson in reading and applying the contract. What the parties are entitled to say or do on their own, the arbitrator is entitled to say or order. That simple principle seems so self-evident, and so implicit in the Supreme Court's rulings to date, that it should become the accepted norm in the future. This would merely confirm arbitration as the "final and binding" dispute resolution procedure that the parties' contracts almost invariably denominate it.

We may shortly have further enlightenment from the Supreme Court on this long-running debate. In March 2000 *certiorari* was granted in *Eastern Associated Coal Corp. v. Mine Workers*. This was another instance of marijuana ingestion by a worker in a hazardous occupation, here, a mobile equipment operator. In sustaining the arbitrator's reinstatement, the lower courts acknowledged that Department of Transportation (DOT) regulations expressed a "well defined and dominant public policy" against drug use by "those in safety-sensitive positions." But the court of appeals went on to say: "[T]here is no such policy against the reinstatement of employees who have used illegal drugs in the past."

In short, the key is whether the remedial action ordered by the arbitrator, not the triggering conduct of the employee, is contrary to public policy. Of course, the drug-taking *employee* acted contrary to public policy. But the award-issuing *arbitrator* did not and his decision should stand. Indeed, recognizing the possibility of the rehabilitation of



“What the arbitrator says this contract means is exactly what we meant it to say. That is what we intended by agreeing the award would be ‘final and binding.’” In this sense, an “erroneous interpretation” of the contract by the arbitrator is a contradiction in terms.



wrongdoers is a hallmark of a humane and caring society. Despite the ominous implications of a grant of *certiorari* when the court of appeals did not even deign to publish its opinion, that is the way the Supreme Court should rule in this case.

In addition to overturning awards on public policy grounds, judges will not uphold an arbitrator's decision if it stretches beyond some line of rationality. Courts that proclaim their allegiance to the *Enterprise* and *Misco* principles will balk at enforcing an award they find has "no rational basis" because, for example, it ignores the "plain meaning" of the contract. Regrettably, I cannot say that vacating an arbitral award on grounds of irrationality is contrary to the contract reader thesis. In the parties' final and binding arbitration agreement, they presumably took it for granted not only that arbitrators would be untainted by fraud or corruption, but also that they would not be insane and their decisions not totally without reason. In any event, it is probably impossible to keep courts from intervening, on one theory or another, when an arbitration award is deemed so distorted as to reflect utter irrationality, if not temporary insanity. One can only hope that the careful, artful crafting of arbitral opinions will keep this judicial exception to the finality doctrine to the barest minimum.



Contract "reading" as contract interpretation

From what I have said, judges should have an easy time enforcing most arbitral awards. Instead, they make it hard on themselves. If they would just take our word for what a contract means, they would have far fewer problems. We are the ones with the tough job. How should

arbitrators go about divining the parties' "intent" when the reality is they never contemplated the particular issue that has now arisen? What do we do when a "plain meaning" conflicts with bargaining history or established practice?

Two splendid articles by our colleagues Carlton Snow and Richard Mittenenthal — do I dare apply that over-used term "definitive" to them? — have said nearly all that needs to be said about plain meaning and past practice. Carlton is, for him, uncharacteristically blunt: "Arbitrators' continued invocation of the plain meaning rule is anomalous in light of the trend to reject the rule by the courts, the U.C.C. [Uniform Commercial Code], the Restatement [of Contracts], and treatise writers." Dick was prepared to declare, almost 40 years ago, that past practice "may be used to clarify what is ambiguous, to give substance to what is general, and perhaps even to modify or amend what is seemingly unambiguous." The rest of my remarks will mostly be embroidery upon the lessons of these masters.

Despite the teachings of Snow and Mittenenthal, numerous arbitrators of high repute have accepted or at least paid lip service to the plain meaning rule and its benighted first cousin, the parol evidence rule. In most cases this may cause little harm, at least as to the result. After all, we properly begin our interpretation of a collective bargaining agreement with the language of the contract, and often we can end there. But one of the great modern state supreme court justices, Roger Traynor of California, put his finger on the problem when he said:

"A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained."

Put differently, if fidelity to the parties' intent (or their putative intent about a problem they never anticipated) is the touchstone of sound contract interpretation, the *a priori* rejection of any

evidence reasonably probative of that intent cannot be justified. In collective bargaining, what I would call "contextual interpretation" is likely to be grounded in evidence concerning negotiating history and past practice.

In recent decisions, arbitrators have frequently been prepared to look behind what might appear the plain meaning of the written instrument to discern intent from bargaining history and other parol evidence. Of course, arbitrators sometimes play it safe by finding an ambiguity in the language as written, which makes their resort to extrinsic evidence quite conventional. But the arbitrators' ambiguity is often the parties' clear and unambiguous provision, sustaining the latter's respective opposing positions.

Logically, there seems no reason not to take a final step. If the parties, for reasons sufficient unto themselves — for example, concealing trade secrets from an employer's competitors — decided to cloak certain provisions of the collective agreement in a private code, an arbitrator should entertain evidence to that effect, however clear and unambiguous the language might otherwise appear. Professor Corbin is in accord. Needless to say, in any case where one party alleges and the other denies the use of such a private code, the arbitrator is going to be skeptical that ordinary English has been thus stood on its head, and demand pretty convincing proof of the claim.

That brings us to consider the most practical argument in favor of the plain meaning rule — the time and cost of trying to prove that what seems on its face clear and unambiguous is not. Yet here, as in so many other instances, I believe the solution has to be the sound discretion of the arbitrator. I would not reject out of hand an offer to prove that the apparently clear and unambiguous was in fact intended to mean something totally different. But I would refuse proffered evidence that merely reflected one party's internal, uncommunicated understandings of contract terms, and I would give short shrift to testimony or exhibits that were

“Defensive” treatment of external law and public policy

Let me append a few words about the treatment of arbitration cases presenting issues of public policy or external law generally. Once a great debate raged within the Academy over what an arbitrator should do when confronted with a conflict between the terms of a collective bargaining agreement and the requirements of external law. I still believe that, theoretically, in the very rare case where there is an irreconcilable clash between the contract and law (or “dominant public policy”), and the parties have not authorized the arbitrator, expressly or impliedly, to take external law into account, the arbitrator should follow the contract and ignore the law. That is the parties’ commission and the limit of the arbitrator’s authority.

Nonetheless, as a practical matter, external law and public policy are now daily grist for the arbitration mills. This is especially true of civil rights statutes and the vital protections they provide against discrimination in employment on the grounds of race, sex, religion, age, disability, and the like. In the collective bargaining context, arbitrators are constantly applying anti-discrimination clauses covering such categories. An arbitral award in these situations, where statutory rights are implicated, is of course not entitled to the same final and binding effect that is customary in pure contract arbitrations. But under the now-famous footnote 21 in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), an arbitration decision in discrimination cases may be admitted in any subsequent court proceedings, and accorded “great weight” if certain conditions are met. Those include contractual provisions that “conform substantially with [the applicable statute],” “procedural fairness,” “adequacy of the record,” and the “special competence of particular arbitrators.”

All of us, advocates and arbitrators alike, have a professional responsibility to ensure compliance with these Supreme Court standards in mixed contractual-statutory arbitrations. Employers, unions, and employees should not have to spend time and money wastefully. To the extent

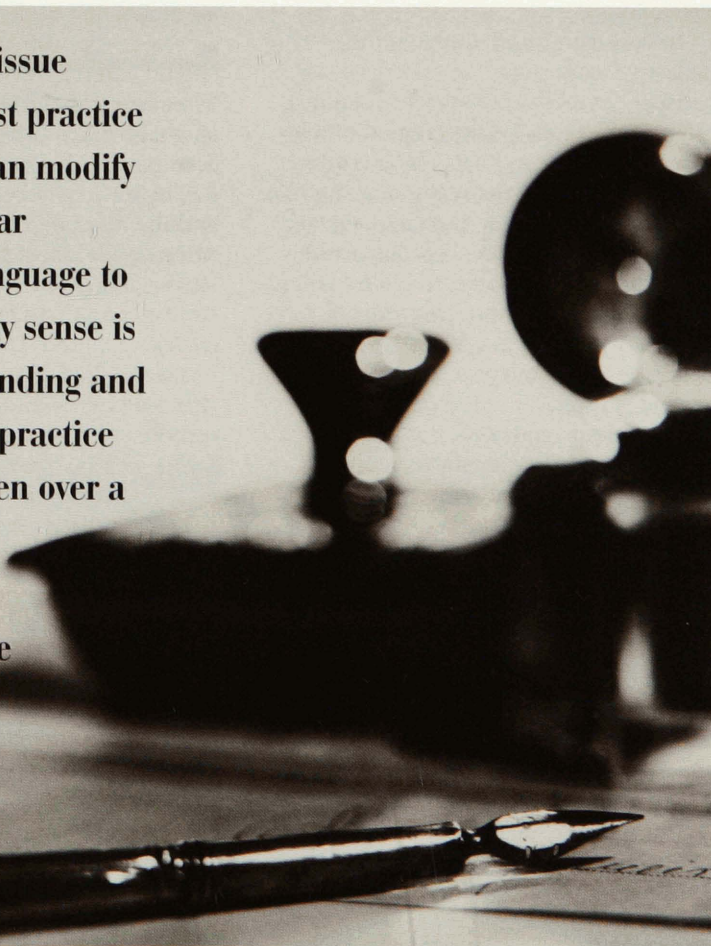
hazardous. But in my view two fundamental principles are apposite. First, any contract, including a collective bargaining agreement, is subject to amendment by the parties to it. Second, for a practice to become sufficiently well established to be binding on the parties, it must meet the usual criteria of (1) clarity, (2) consistency, (3) longevity, and (4) mutual acceptability. Mutual acceptability is especially crucial if the practice is claimed to have superseded a clear, express contract provision to the contrary. If all the conditions are properly met, however, the practice should prevail. The parties are in control of their agreement and, absent statutory or contractual restrictions, they can fashion it or amend it just as well by deeds as by words. Arbitrators are simply following the parties’ lead in acting accordingly.

vague and not directly on target. The language finally chosen by the parties to embody their agreement is entitled to that much respect.

Today’s major issue concerning past practice is whether it can modify or override clear contractual language to the contrary. My sense is that a long-standing and well-accepted practice may prevail even over a “clear” and “express” provision in the agreement. There is also substantial authority, however, that past practice cannot trump an unambiguous contract term. Employers have responded to the encroachments of past practice by seeking various types of “zipper” clauses designed to make the final written agreement the exclusive source of employee rights. Arbitrators are divided on the efficacy of this approach.

All these past practice cases are highly fact-specific. Generalizations are

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15



Conclusion

the law allows, arbitral awards ought to constitute a final disposition of the discrimination claims. In practice, much will depend on the losing party's assessment of its chance of securing a more favorable result in the courts. To promote finality, advocates in preparing their arguments and arbitrators in making their decisions must keep the *Gardner-Denver* factors in mind. I am going to take "procedural fairness" for granted. The others require deliberate attention. The anti-discrimination provisions of the contract may closely track the corresponding statute, but there are now extensive judicial glosses on all this legislation. The advocates should educate the arbitrator on the nuances of their particular case. In turn, the arbitrators should demonstrate their awareness of the applicable law and pertinent court interpretations. That will also serve to establish their "special competence." This could often require more than the two or three pages often specified for expedited arbitrations.

Thus, in all the steps of a discrimination case, right through to the writing of any briefs and the decision, the advocates and the arbitrator should act "defensively." They ought to envisage a federal judge looking over their shoulder, scrutinizing their every move and testing it against the *Gardner-Denver* criteria. That should be enough to sharpen up everybody's skill at contract (or statute) reading!

An analogous approach should be followed in the "public policy" cases. If a sexual harasser or a drug offender in a safety-sensitive job is involved, the advocates and in particular the arbitrator ought not turn a blind eye to the policy implications. Judicial review is a distinct possibility. The arbitrator would enhance the likelihood of the award's being sustained by forthrightly confronting the policy issues and explaining convincingly why the result reached is compatible with the public good. This is a long way from the almost totally autonomous, private domain of labor arbitration we once knew, but I think it accurately reflects the demands of the new age in which we find ourselves.

In interpreting and enforcing a labor agreement, the roles of arbitrators and courts are very different. The arbitrator is the parties' formally designated contract reader. Absent such abnormal circumstances as fraud, corruption, or an exceeding of authority, the arbitrator's award should be accepted by a reviewing court as if it were the parties' own stipulated and definitive interpretation of the agreement. The award of course is subject to the same kind of challenge on the grounds of illegality or violation of public policy as would have been the contract itself, had it come to the court directly without the intervention of arbitration. But that should also be the limit of judicial review. If the parties themselves could lawfully have done what the arbitrator has ordered, the award should be affirmed and enforced.

In construing and applying the collective agreement, the arbitrator will naturally employ a variety of traditional interpretive tools. I have focused on two controversial areas. First, I would reject the broad reach of the plain meaning rule. Regardless of whether contract language appears clear and unambiguous on its face, I would admit all credible evidence, within the constraints of procedural feasibility at a hearing, which goes to show the actual intent of the parties. Second, in spite of seemingly clear, unambiguous contract terms, I would accept proofs of well-established, mutually accepted practices that indicate a modification or amendment of those provisions. In so doing, I am most emphatically not trying to elevate the arbitrator over the parties. My aim is to be faithful to the parties' manifest intent in the deepest, truest sense.

Finally, as a person who treasures both tradition and autonomy, I can understand and sympathize with all those who lament the passing of a time when unions, employers, and arbitrators inhabited a self-made world of labor relations, for the most part untouched by public law and regulation. That day is gone. Yet we

arbitrators have always operated within certain confines, namely, the parties' own contractual and bargaining frameworks. The difference is that the parties generally had no resort from our "final and binding" pronouncements, except to dismiss us from their panels. Today a federal judge can bring us up short with a one-line order.

We can adapt to this new order either grudgingly or gracefully. My hope is that we meet it as a challenge to the best that is within us. I am confident no member of this Academy lacks the capacity to handle most of the applicable statutes and other law and policy. Take, for example, the concept of "discrimination" under federal law. It is subtle and elusive. But it is not the Internal Revenue Code. We have been dealing with "discrimination" under union-employer contracts for decades. We can deal with it under public law, too. Thus, we should not flinch from having to change some of our customary ways. Change, after all, is the law of growth and survival, and we ignore that truth at our peril.

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