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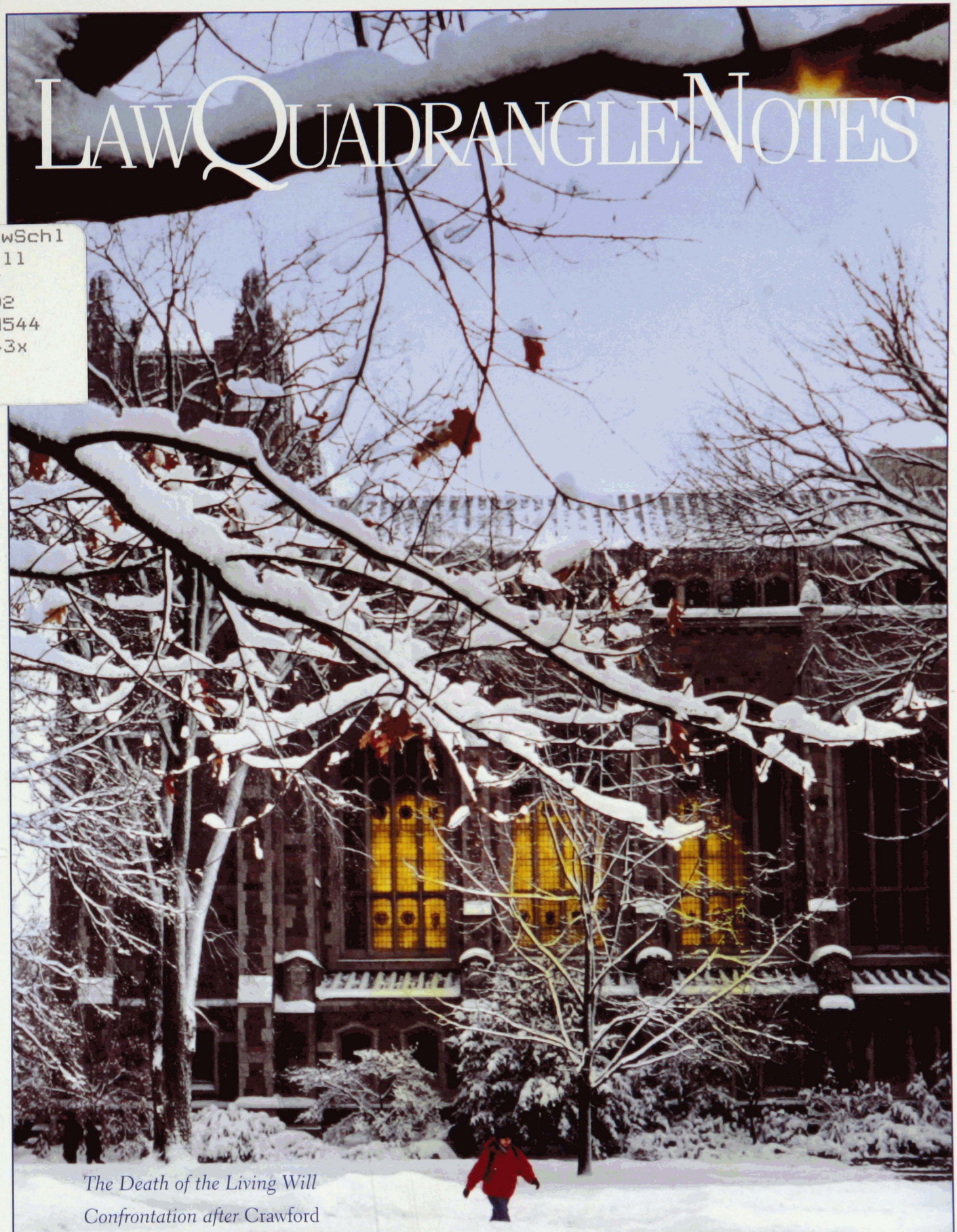

The Death of the Living Will

Confrontation after Crawford

Earl Warren: Law Enforcement Leads to Defendants' Rights

The University of Michigan Law School
47.3 • Winter 2005

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

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WINTER 2005

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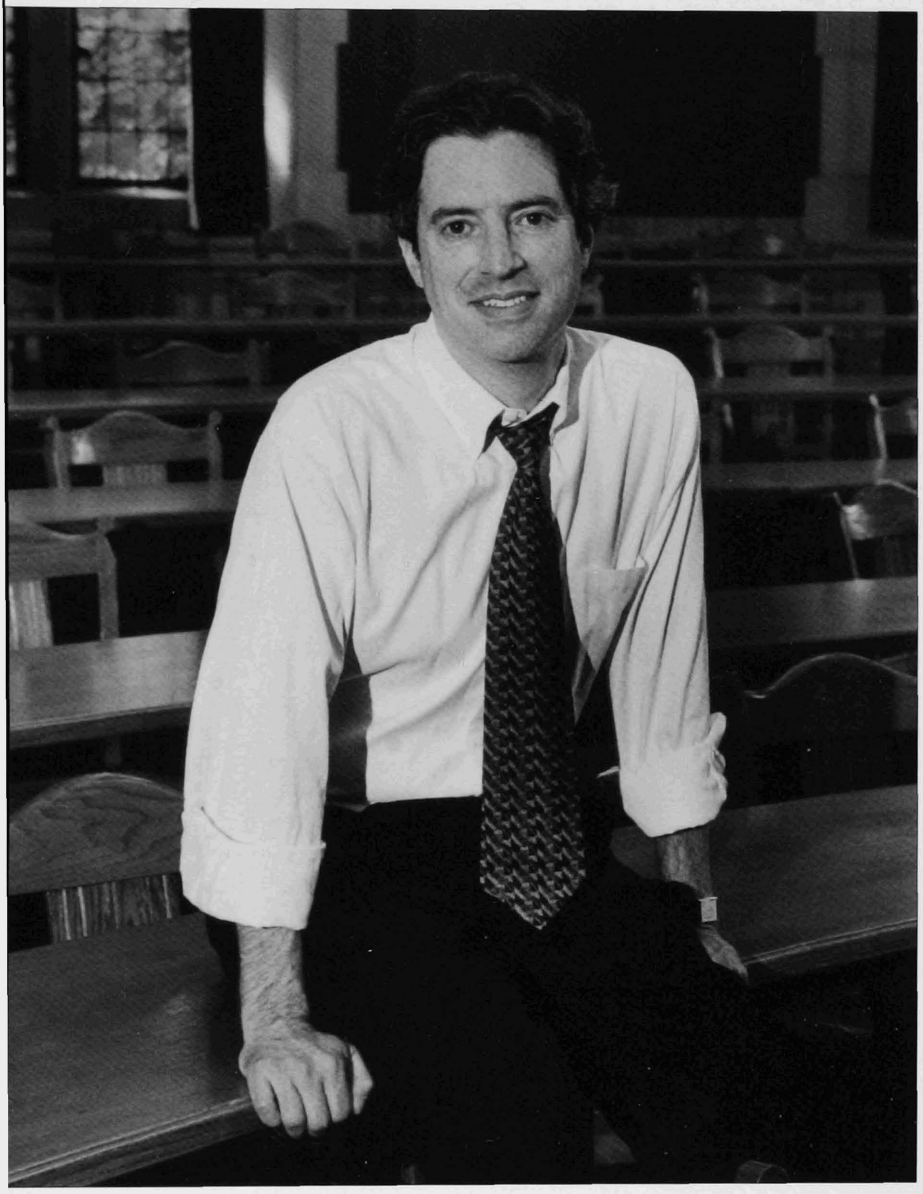
Message
from Dean Caminker



Supreme Court Justice Antonin Scalia's recent visit to the Law School afforded a great opportunity to witness, in action, the combination of intellectual vibrancy and social cohesion that characterizes the University of Michigan Law School. While the spotlight was on the Justice's formal teaching and presentations, his presence illuminated the many informal spaces outside the classroom where this collegiality of our community really thrives.

Our students decided to prepare themselves for the Justice's visit by designing extracurricular opportunities to educate themselves about his jurisprudence. During the week before Justice Scalia arrived, student organizations gathered faculty (both ours and those from other schools) to discuss the Justice's views of criminal law, separation of powers, voting rights, and affirmative action. They titled the series "Scaliapalooza" — clearly a play on "lollapalooza," literally meaning "an event of tremendous importance," but perhaps the pop culture reference to an alternative music concert tour was intended, given the festive flavor of the gatherings. The collaborative energy in these faculty-student interchanges was infectious, and the Law School came alive with passionate debate on all sides of the issues. The students' homework paid off; they were primed and ready to engage with the Justice in the classroom and at his public address at Rackham during the following week.

Our faculty interacted with the Justice in much the same way, with spirited but collegial dialogue in dining halls and hallways. In just one example, Professor Rich Friedman, whose scholarly view of the Sixth Amendment Confrontation Clause was recently adopted by Justice Scalia writing for the Court (in a case argued by Jeff Fisher '97), found the opportunity informally to engage the Justice about the case. Together they probed how best to address an important question left open — concerning the meaning of "testimony" triggering the right of confrontation, with Rich actually doing almost all of the talking (his loquaciousness being justified, he claimed, by his desire to make sure the Justice wouldn't say anything requiring his recusal from the next case). Several other faculty joined in the discussion, and the dialogue was energetic, stimulating, and productive, notwithstanding the variety of views represented.

Of course, none of this is new for us; day after day we collaboratively explore the law in informal and *ad hoc* ways, as well as through classroom teaching. A host of dynamic visitors offer insights on contemporary issues of the day, sparking a hallway conversation among students here and inspiring some volunteer efforts there. Our top-notch faculty share their scholarly work with students and help them marry theory with practice. And student-organized workshops and other events generate exciting discussions that greatly enhance the learning in the core curriculum. The legal education provided here is a synthesis of formal and informal, practical and theoretical — only some of which can be clearly defined in an admissions catalog or statistical rankings.

To be sure, such outside-the-classroom learning is present at all top-tier schools, and I'm sure many of our peers can boast of a similar intellectual energy. In fact, all top schools acknowledge this informal learning is imperative in today's legal education. But I'll argue that even among the best schools, the cohesive and collegial nature of our community stands out. This is in part because our location — on a world-class university campus in the "small town" of Ann Arbor — allows this type of community to flourish. First, we have a very focused group of faculty and students. Law schools in urban centers often struggle with distractions, as many professors and students are routinely pulled away from the school by the allure of law firm practice or other endeavors. In contrast, our location encourages us to find our intellectual stimulus within our own community. Indeed, I believe Michigan Law attracts students and faculty who appreciate that central focus, further reinforcing this notion of a strong, engaged community. Finally, the majesty of the Cook Quadrangle, an unsurpassed architectural gem, inspires the dialogue and debate that takes place within.

And it often inspires those who are just passing through. As we said our farewells, Justice Scalia said that our students were noticeably more engaged than those he had met elsewhere during visits to other prominent law schools, and they were far more civil as well. And after remarking on the vibrant but collegial culture we have nurtured at the Law School, he added that perhaps his own Court could profit from aspiring to the same.

Briefs

In Detail

Law School launches new public service fellows program

Dean Evan Caminker has established an initiative to support Law School students who wish to work in public service careers.

Called the Dean's Public Service Fellows Program, the new initiative is made possible through the generosity of a Law School graduate and will financially assist students who do public service work during the summer between their second and third years of legal education as part of preparation for careers in public service.

"The Law School's tradition is one of shaping our students to become future leaders, whether that is in public service, private law practice, or the business world," Caminker said. "This new initiative continues that tradition by supporting our students as they pursue work in public service."

"Enabling the Law School's students to pursue their dreams of public service benefits everyone," remarked the donor for the program, a Law School graduate who wishes to remain anonymous. "Our students are of the highest quality, just what public service needs. I believe in the value of giving back, and that coupled with my personal desire to help students pursue their dreams of public service, are the reasons I contributed to this fellowship program."

Each year the program will support up to 20 second-year law students. Fellows receive a $5,000 cash award.

At deadline time, winners of the first group of fellowships included: Sarah Bookbinder; Lucas Caldwell-McMillan; Jonathan Caver; Emma Cheuse; Toni Gantz; Nadine Gartner; Jennifer Klem; Mariana (Molly) Kovel; Amrita Mallik; Ryan McFarland; Cherokee D.M. Melton; Kerene Moore; Maureen R. Pettibone; Matthew Rojas; Melissa Martin Salinas; Jay Surdukowski; and Mona M. Youssef.

"Launching the Dean's Public Service Fellowship Program is consistent with the value we at Michigan place on developing lawyers who incorporate public service into their practice," noted MaryAnn Sarosi, '87, director of the Law School's Office of Public Service, which coordinates the new program. "We want our graduates to understand the value of 'giving back,' whether they are in private practice or in public service."

Law School welcomes new Office of Public Service director

MaryAnn Sarosi, '87, founder of a much-imitated legal services provider in Chicago and former director of Michigan's award-winning Access to Justice Program, has brought her experience and commitment to the Law School as the new director of the Office of Public Service.

Sarosi began her new duties last fall, replacing Robert Precht, a former public defender in New York who had headed the Office of Public Service since it was established in 1995. Under Precht's leadership, the Office of Public Service became an integral part of Law School life that sponsored lectures, counseled students, and helped students locate and apply for financial support for public interest work. Fifteen students won prestigious Skadden Fellowships for public service work during the past decade, and others won Echoing Green and other public interest fellowships.

In 2001, a gift from former Special Prosecutor Robert B. Fiske, '55, boosted the School's public service profile by establishing the Robert B. Fiske Jr. Fellowship for Public Service, which supports graduates who go into government work. The same year the Law School gained national recognition for its public service program by winning the prestigious Judy M. Weightman Memorial Public Interest School of the Year Award; the American Bar Association's Law Student Division presents the award each year to the law school whose public service programs, including clinics, outreach, and other efforts, it considers to be the best in the country.

Rob, as Precht was known to all who worked with him, encouraged students to look beyond income to careers that interested them and offered them personal satisfaction.

"Rob always very helpfully reminded us to follow our passion when considering our professional direction," recalled Noah Leavitt, '02, advocacy and policy director for the Jewish Council on Urban Affairs in Chicago. Leavitt was active in public service work when he was a law student and was instrumental in preparing the successful nomination of the Law School for the Judith Weightman Award.

"As a result of Rob's efforts, our School is now 'on the map' as one at which interested students are offered a developed path towards serving the public, broadly defined," commented Dean Evan Caminker. "We expect that MaryAnn will build successfully on these efforts in the coming years."

To Sarosi, serving the public is part of every lawyer's responsibility. "As many have said before me, law is first a profession and only second a business," she explained. "As such, lawyers are bestowed with the rights of practicing law and the responsibilities as well. Part of the responsibility includes serving the public.

"Whether you serve the public good as a public service lawyer, or you incorporate it into your private practice, lawyers should do some service for the public good. The Office of Public Service will be supporting those students that want to pursue public interest or government careers, but equally importantly, we will support the students that go into private practice because we want them to fulfill the professional responsibility of serving the public good."

In her first months on the job, Sarosi said she already has seen the difficulty students face in graduating and going directly into public interest work. "Many public interest organizations hire attorneys with a few years of experience," she explained. "It would be great to provide one- or two-year fellowships for new Michigan grads to get experience practicing in nongovernmental organizations. That would give our graduates a leg up in the highly competitive public interest world."

A graduate of both the University of Michigan and the Law School, Sarosi founded and served as executive director of the Coordinated Advice and Referral Program for Legal Services in Chicago. In her five years with that legal services program, she built the organization into one that became a model for providing urban multi-program low-income legal services.

Returning to Michigan in 1997, Sarosi served as the director of the State Bar of Michigan's Access to Justice Program. In 1998, the American Bar Association awarded the Access to Justice Program its Harrison Tweed Award for outstanding leadership and commitment to providing low-income people with access to justice.

For three years before coming to the Law School, Sarosi ran an independent consulting practice supporting legal services programs, nonprofit agencies, courts, and other law-related entities. Last summer she assisted the Law School's Associate Dean for Clinical Affairs Bridget McCormack and Clinical Assistant Professor Anne Schroth with planning the School's new Pediatric Advocacy Clinic.

"The search committee has been impressed with all of MaryAnn Sarosi's gifts, including her energy and enthusiasm, her organizational skills, and her proven commitment to public interest work," reported Clinical Professor of Law Paul Reingold, who chaired the search committee. "We are especially pleased with MaryAnn's ability to connect one-on-one with students who want or need counseling on how to pursue their dreams related to public service."

"A vibrant Office of Public Service is important to the Law School as an expression of the value we place on public service," explained Law School Dean Evan Caminker. "It is also important to our students, many of whom desire to use their legal education and training here to make a difference in our society and the world. MaryAnn's commitment to the ideals of public service, her prior experience in various public service venues, and her understanding of and contacts with the legal services community will enhance our students' capacity to serve the public interest in a variety of ways."

Sarosi is a native of Michigan, one of six children of immigrant parents — her father was born in Hungary and her mother was born in Germany. Five of her siblings did undergraduate work at the University of Michigan, and four went to graduate or professional school at the U-M. "My poor parents had a stretch where, for 17 years, there was at least one Sarosi here," she laughed. "It makes it that much more satisfying to now be working at the University."

"Growing up in southwest Detroit, an ethnically diverse, working class area, gave me a perspective that has helped me in my legal aid career," she explained. "Indeed, it was growing up there and having parents that lived in Nazi Germany that led me to understand the value of a truly just, democratic society. I felt that I could tap my experiences to work toward such a society."

Decentralize environmental regulation, speaker urges

Federally based environmental regulation often does a disservice to the American people because state and local regulation could do a better job more tailored to solving a problem, according to an environmental specialist who spoke at the Law School this academic year.

The wave of federal environmental regulation that began in the 1970s grew out of a misperception that state laws had failed, according to the speaker, Jonathan H. Adler, associate professor and associate director of the Center for Business Law and Regulation at Case Western Reserve Law School in Cleveland, Ohio. Federal laws apply standards that cannot cope with the varieties of conditions that exist in different parts of the country, said Adler, whose talk was sponsored by the Law School student chapter of the Federalist Society for Public Policy Studies.

As a result of this centralization, he said, "we have a problem of one size fits all that means one size fits nobody." In reality, he noted, state-based regulation was working much better than many Americans thought. For example, prior to passage of the Clean Water Act in 1972 and subsequent federal wetland protection, the loss of wetlands had slowed considerably — dropping from 800,000 acres in 1904 to 458,000 acres in 1954-74, and 290,000 acres in the years 1974-82. Only 79,000 acres of wetlands were lost in 1979, he said.

Federal regulation has a role and should focus on its strengths, like utilizing efficiencies of scientific research and dealing with interstate spillovers of environmental problems, he said. In contrast, he explained, decentralizing appropriate environmental regulation would foster innovation, satisfy local preferences and priorities, ensure better accountability on the part of regulators, and create economies of scale because more targeted solutions could be applied to local or regional problems.

Predicting the end of juvenile execution

Victor Streib has been battling against the death penalty for juveniles most of his professional life, both as an attorney representing juvenile clients and as a law professor. So you could hear the relief in his voice as he predicted during a talk at the Law School last fall that "the death penalty for juveniles is now in its last days."

Streib, professor at Ohio Northern University's Pettit College of Law and a nationally known expert on the juvenile death penalty, made his prediction during a talk at the Law School eight days after the U.S. Supreme Court heard oral arguments in *Roper v. Simmons*, a Missouri case that most observers were expecting to end the constitutional debate over juvenile execution as cruel and unusual punishment.

Speaking in a program sponsored by three Law School student organizations (the student chapter of the ACLU, Criminal Law Society, and Law School Democrats), Streib portrayed *Roper* as the last step in a long evolution that has been taking place both inside and outside of the nation's courtrooms. "This issue is too important to leave to lawyers," he explained at one point during his talk.

The number of juvenile executions has been dropping in the United States for decades, and the last occurred in 2002, Streib reported, and other changes also portend an end to juvenile execution: The number of juveniles sentenced to death has been falling (although the number of juveniles sentenced to life imprisonment without parole has been rising); recent scientific research on brain development has reinforced the traditional perception that juveniles, especially juvenile boys, are not fully developed in their capacities to exercise judgment and control impulses; "evolving social standards" of what constitutes cruel and unusual punishment increasingly reject the practice of executing juveniles; the U.S. Supreme Court's 1989 decision that the minimum age for capital punishment is 16 has been weakened by the Court's decision in *Atkins v. Virginia* in 2002 that a mentally retarded offender cannot be executed; and the United States is the last nation in the world to retain legal capital punishment for juveniles.

Roper involves the case of Christopher Simmons, who murdered Shirley Cook in 1993 when he was 17 years old. In 2002, the Missouri Supreme Court overturned Simmons' death penalty and ordered life imprisonment. The U.S. Supreme Court took the case on two grounds:

- The Missouri court's departure from the holding of *Stanford v. Kentucky*, the 1989 case in which the U.S. Supreme Court upheld a minimum age of 16 for execution.
- The question of the death penalty as "cruel and unusual punishment" for a person who was 17 at the time he committed his crime.

Streib said the abolition of capital punishment could be delayed if the Court restricts itself to the first issue. As he told *Legal Times* shortly before *Roper* was argued, "The Missouri Supreme Court, in deciding this case below, essentially

rejected the controlling U.S. Supreme Court case law on the juvenile death penalty and instead declared a new, evolved federal constitutional principle. The U.S. Supreme Court, therefore, is also looking at whether a state supreme court should be doing this. It is certainly possible, although unlikely, that *Roper v. Simmons* will be decided on this 'other issue' and never get to the juvenile death penalty issue directly."

"In oral arguments, the Court gave no attention to this issue, which I think is a big one," Streib told his Law School audience. Even if the Court decides *Roper* on this issue instead of the question of juvenile execution as cruel and unusual punishment, the end of capital punishment is near, according to Streib. "It is not a question of if," he said. "It is a question of when and how."

(**Ed. Note**: *On March 1, the U.S. Supreme Court ruled 5-4 that capital punishment is illegal when the defendant was a minor at the time of the crime.*)

Judges: Road to the bench getting too political

The law itself is a product of politics. So is the road to becoming a judge, but turning judicial elections into heavily financed partisan races hurts the judicial system and the U.S. democracy itself, three Michigan Appeals Court judges explained during a program at the Law School last fall.

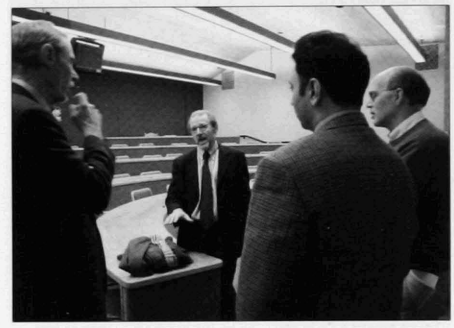
In contrast to the appointment of federal judges, some 38 states, including Michigan, elect their judges and "more and more politicalization" is creeping into the process, reported Judge Janet Neff, who first was elected to the Michigan Court of Appeals in 1988. She added that Michigan is the only state where Supreme Court nominees are put forward by political parties but run as nonpartisan.

Judges are the referees of the law, according to Neff, and "we want referees who are fair and impartial, who call them as they see them, not as their supporters want them to call them. . . . When you question the impartiality of the referee, it's hard to have confidence in the result."

"It is a political process . . . and money is playing more and more a part," Neff continued. At least one recent Michigan Supreme Court race raised up to $1 million, "and the money is coming from people and organizations that are interested in outcomes. That's not what judges are supposed to be interested in."

Neff and her co-panelists, Appeals Court Judges Jessica R. Cooper and Stephen Borello (who was appointed in 2003 by Gov. Jennifer Granholm to fill a vacancy), agreed that the appointment of judges is fraught with politics. They said a version of the Missouri System, in which the state bar association recommends judicial candidates, offers the best method to minimize the impact of fundraising and special interests on the selection of judges.

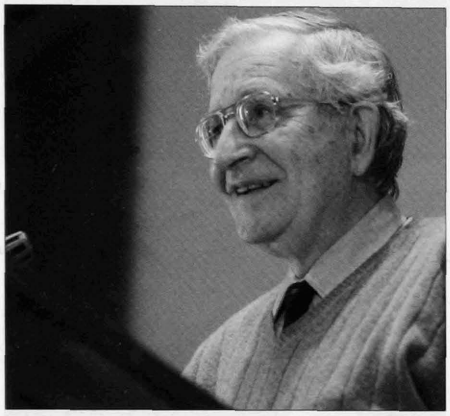
The panelists are members of the American Constitution Society, whose Law School student chapter sponsored the program.



John M. Olin Lecture in Law and Economics: Asset protection a new development

Henry Hansmann, top, president of the American Law and Economics Association, explains to a Law School audience that entity shielding, or corporate asset protection, is a relatively new development in the long history of economic organizations. In the second photo, Hansmann chats after his lecture with Law School faculty members James E. Krier, Vikramaditya Khanna, and Richard D. Friedman. Hansmann, the August E. Lines Professor of Law at Yale Law School, delivered the annual John M. Olin Lecture at the Law School last fall; the annual lecture is presented by the School's John M. Olin Center for Law and Economics. Hansmann's lecture was titled "Legal Entities, Asset Partitioning, and the Evolution of Organizations."

Academic Freedom Lecture
Noam Chomsky parses 'illegal,' 'legitimate'



Introduced by University of Michigan Provost Paul N. Courant as "an academic and public intellectual [who is] deeply committed to speaking the truth," MIT Professor of Linguistics and Philosophy Noam Chomsky drew overflow crowds when he delivered the 14th annual University of Michigan Senate's Davis, Markert, Nickerson Lecture on Academic and Intellectual Freedom at the Law School last October.

Drawn by Chomsky's renown, listeners stood elbow-to-elbow in Honigman Auditorium in Hutchins Hall, filled three overflow classrooms that showed live audio/video feeds of Chomsky's talk, and crowded into knots of people who struggled to listen from just outside the doorways into each of the four rooms. Still other listeners stood outdoors to hear the hour-long program through Honigman Auditorium's opened windows.

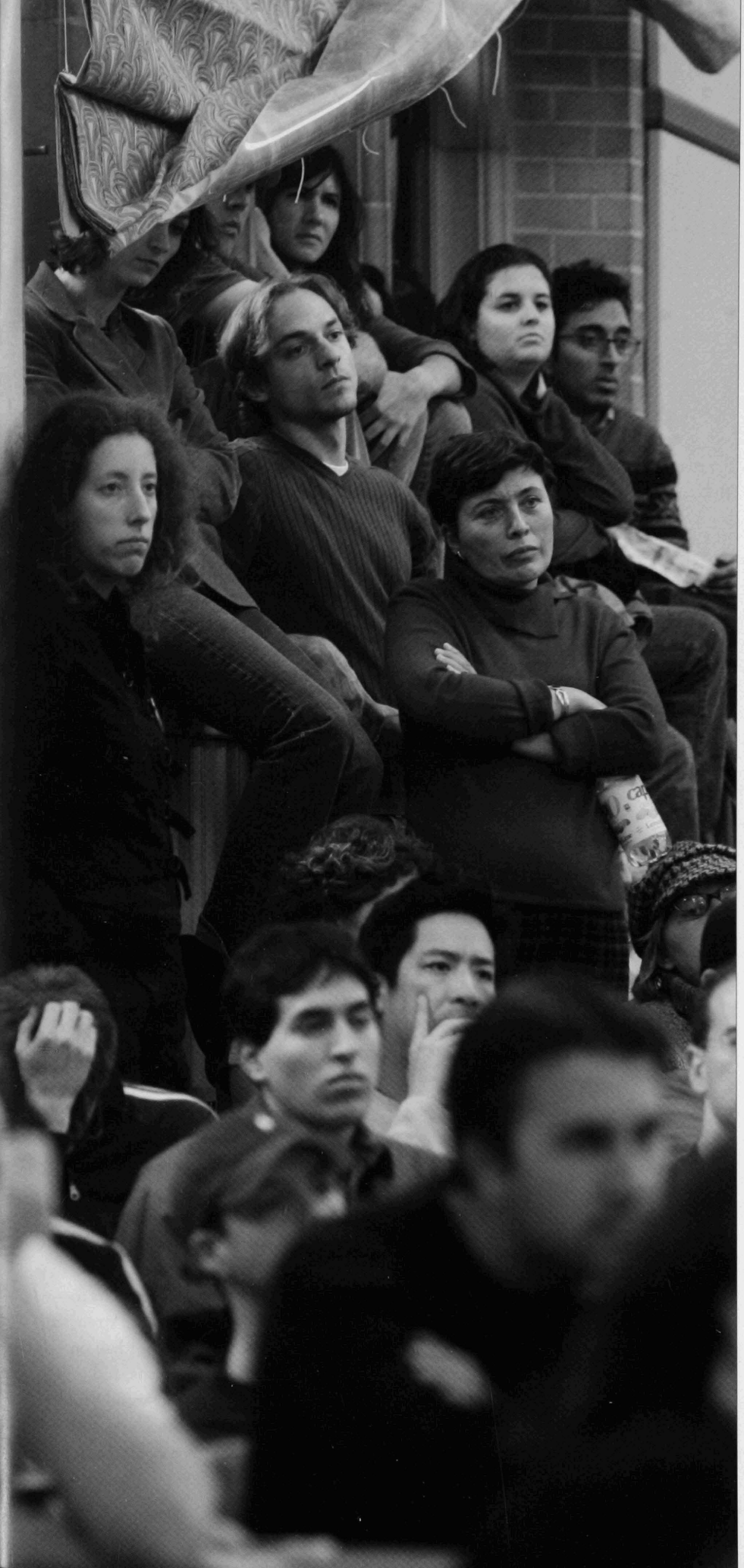
Citing deep research into American history, European history and news coverage, and current U.S. events, Chomsky used his talk, "Illegal but Legitimate: A Dubious Doctrine for the Times," to criticize the unilateral use of force in international relations except in the most dire of circumstances. Preemptive attack is a violation of the peace, the worst crime possible under international law, he said.

We in the United States enjoy more freedoms than people anywhere else in the world, he said. But freedom confers opportunity, and opportunity in turn confers the responsibility to use freedom wisely, honestly, and humanely. Yet since its earliest days — he used John Quincy Adams' justification for Andrew Jackson's incursion into Spanish Florida to chase Seminole Indians as an early example — the United States has justified its use of force as a means to what its leaders consider noble ends.

Chomsky cited the United Nations charter as proof that the horrors of World War II and the threat of human doom wrought by the advent of the atomic bomb brought the world to widespread agreement that war no longer should be used as a means of settling disputes. "The efforts to end the curse of war led to the consensus among people that guides state action after World War II," he said. But that consensus nearly disappeared during the 1990s and is "virtually ignored" today. He said that is why NATO bombed Kosovo when parties were near agreement on a pact that could have made the bombing unnecessary.

What's happened today is that the right to launch and wage war is used by the nations powerful enough to do so, he said. "No one accepts the right of anticipatory self-defense, except the powerful states . . . . We conclude that the principal of universality has exceptions" that apply to the United States because it has the power to make those exceptions stick.

The U.S. attack on Afghanistan after 9/11 is "an outstanding contemporary illustration that the resort to force can be illegal but legitimate," Chomsky said.



"The justice of that attack is considered so transparent that the matter has barely been discussed," he said, but an international Gallup poll that went unreported in the United States found very little support for the invasion.

"Few questions are more important today than the propriety of the use of force," he concluded. "There may be legitimate reasons [to use force], but the historical record should give us pause."

The annual Academic and Intellectual Freedom lecture is presented in honor of three U-M faculty members — H. Chandler Davis, the late Clement L. Markert, and the late Mark Nickerson — whose teaching positions at the University were suspended after they refused to cooperate with a communist-hunting congressional committee during the 1950s.

The Law School has been a consistent supporter of the annual university senate-sponsored lectures, which began in 1990. Four members of the Law School family have been among the series' 14 lecturers: Lee C. Bollinger, then-dean of the Law School (and now president of Columbia University), in 1992; the Hon. Avern Cohn, '49, of the U.S. District Court for the Eastern District of Michigan, in 1996; Pulitzer Prize winner Roger Wood Wilkins, '56, the Clarence J. Robinson Professor of History and American Culture at George Mason University, in 1997; and Catharine A. MacKinnon, the Law School's Elizabeth A. Long Professor of Law, in 2002. In addition, Cornell University President Jeffrey S. Lehman, '81, a former dean of the Law School, recently has joined the lecture series' advisory board.

Michigan's Prop 2: What does it mean?

The passage of Proposal 2 in Michigan last year — and similar measures in a dozen other states to restrict marriage to a union of one man and one woman — has set the stage for clarifications that will determine what the measures mean and how broadly they apply, according to a Michigan attorney who expects to be part of that elucidation.

"This is the first time the [Michigan] constitution says a certain group of people is not entitled to a right," Jay Kaplan, an attorney with the American Civil Liberties Union of Michigan's Lesbian, Gay, Bisexual, and Transgendered Legal Project, explained of Michigan's Proposal 2. Kaplan spoke at the invitation of Law School students last fall shortly before the new Michigan constitutional amendment took effect December 17.

Kaplan focused his talk on efforts to clarify the reach and impact of the new constitutional amendment and did not mention the overwhelming difficulty of repealing such a just-adopted constitutional change. Does the amendment apply only to same-sex marriage, for example, or does it also forbid other kinds of unions between same sex partners? Kaplan asked. Does the amendment forbid the extension of health and other benefits to same-sex partners?

Most observers expect clarification of the meaning of the amendment to take some time and perhaps reach the Michigan Supreme Court. Indeed, two weeks before the amendment was to take effect the state of Michigan announced that, in agreement with state workers' labor unions, it was tabling plans to offer domestic partner benefits until the meaning of the amendment is clarified by the courts.

Fifty-two percent of Michigan voters approved the proposal, which amends the state constitution to include the phrase: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."

Opponents of the amendment, like Kaplan, fear that it endangers the domestic partners health coverage and other benefits that many businesses, all state universities, and many municipalities offer employees.

"We do not have any court interpretation saying how far it goes," Kaplan said of the amendment. "There are a lot of things we don't know [about the impact of the amendment] and a lot of people are worried," he explained.

Most of the marriage-defining amendments passed in other states were like Michigan's and "went beyond simply marriage," Kaplan continued. In Louisiana, that extension is being challenged because Pelican State law limits ballot initiatives to a single subject, but Michigan has no such restriction.

In Michigan, Kaplan explained, amendment clarification groups could seek a declaratory judgment from a state court on what the amendment means. In federal courts, he continued, clarification forces might raise an equal protection argument if an employer decides to stop offering benefits to same sex couples. "We wouldn't argue marriage," he said. "We would argue that you're taking away a benefit that you offer to others." He added that there could be a breach of contract issue if the amendment is used to deny benefits that have been guaranteed by a contract.

If the amendment is interpreted to deny domestic partner benefits, it might also be used to deny health and other benefits to the children of domestic partner unions, according to Kaplan. "I don't think that most Michigan voters want to take health care away from children," he said.

Kaplan's talk, "Proposal 2, Where to From Here?", was sponsored by the Law School student chapter of the American Civil Liberties Union with co-sponsorship from the Law School student groups the OutLaws and the American Constitution Society for Law and Policy.

Law Library among nation's best

National Jurist magazine has ranked the University of Michigan Law Library fourth out of a total of 183 law school libraries in the nation. Only the law libraries at the University of Iowa, Indiana University-Bloomington, and Yale Law School ranked ahead of the University of Michigan's.

According to the *National Jurist* Web site, criteria used for the comparison included: the number of volumes, number of titles and serial subscriptions, ratio of library study capacity and professional librarians to student enrollment, and the number of hours per week that the library is open. Data for the comparison was taken from the most recent American Bar Association report, which is updated each year.

"This survey is remarkable for its focus (50 percent of the score) on the strength of the collection, and the other half on accessibility: seating, librarians, and hours open. Therefore, our wonderful collection — worldwide in scope, and historical in depth — is weighted as it

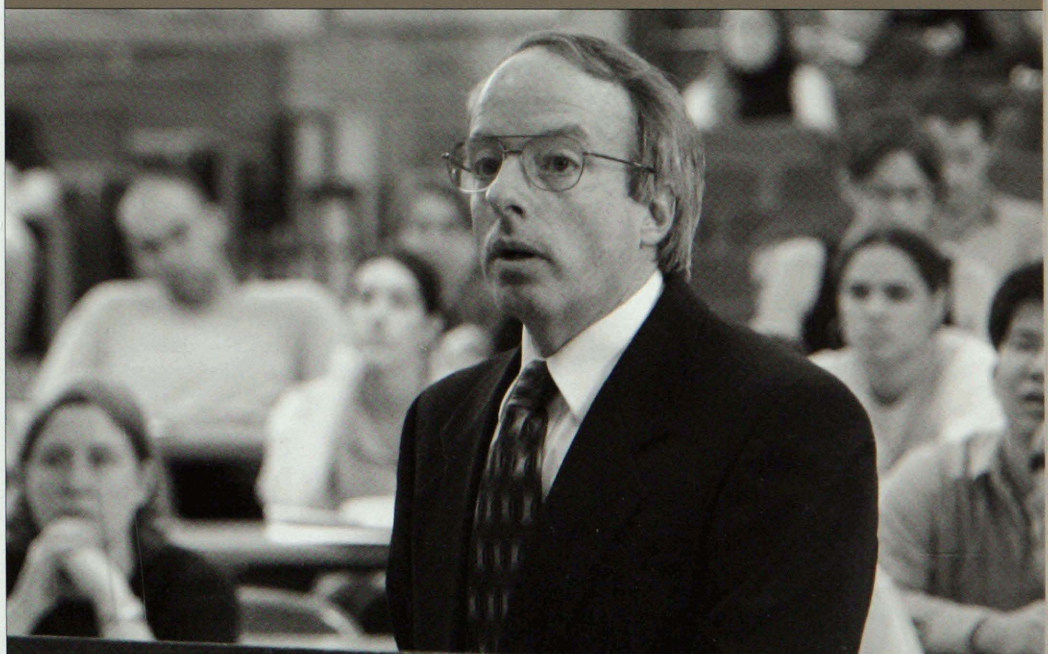
should be," said Margaret Leary, director of the U-M Law Library. "If the assessment went into more depth (examining the amount of foreign, comparative, and international law, for example), Michigan would easily remain among the top four or five collections.

"Other ways in which Michigan's collection stands out include that none of our collection is in remote storage (Harvard, Yale, and Columbia all make extensive use of remote storage), and that we have an active preservation program. We are generous in providing online resources, but cautious about substituting digital for paper.

"Similarly," Leary noted, "our generous number of seats works to our advantage, as it should. The survey doesn't address the nature of the seating, but our students benefit from variety and choice: the classic, open table seating in the glorious Reading Room; or the international style of the Allan and Alene Smith Addition, with its mix of carrels, tables, upholstered lounge seating, and stools along the light well."

The survey does not address what is probably the most important question about any library: how well does it meet the needs of those who depend on it? she explained. "This is not only difficult to measure, but nearly impossible to use as the basis for comparative rankings."

Practicing for the High Court — Visiting professor David Moran, below, a fulltime member of the faculty at Wayne State University Law School in Detroit, presents a mock trial of *Kowalski v. Tedrow* at the Law School prior to his oral argument of the case before the U.S. Supreme Court on October 4, 2004. Moran was arguing to strike down a 1999 Michigan law that denies indigent defendants the right to an appointed attorney for appeal of a case in which the defendant entered a plea of guilty or *nolo contendere* at trial. Moran opened the mock trial to the Law School community so that students could see the presentation. From left, Law School faculty members serving as judges included: Clinical Professor of Law Paul Reingold; Thomas and Mabel Long Professor of Law Samuel R. Gross; Francis A. Allen Collegiate Professor of Law Christina B. Whitman, '74; Clinical Assistant Professor of Law Kimberly Thomas; and Associate Dean for Clinical Affairs/Clinical Professor of Law Bridget M. McCormack. The Court let the law stand by ruling the attorneys Moran represented, who claimed the law could restrict their income-earning ability, did not have standing.



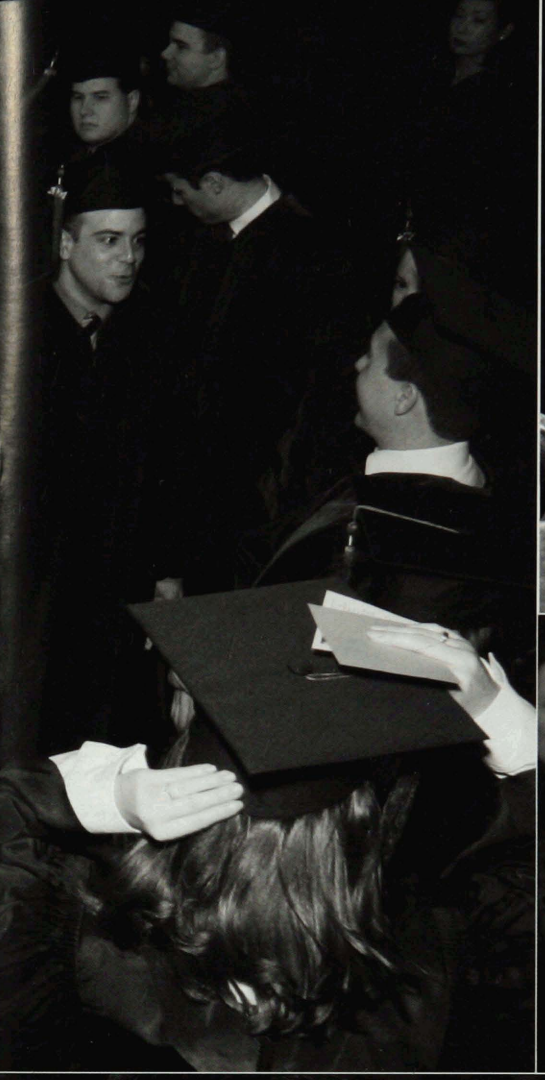
December's Senior Day

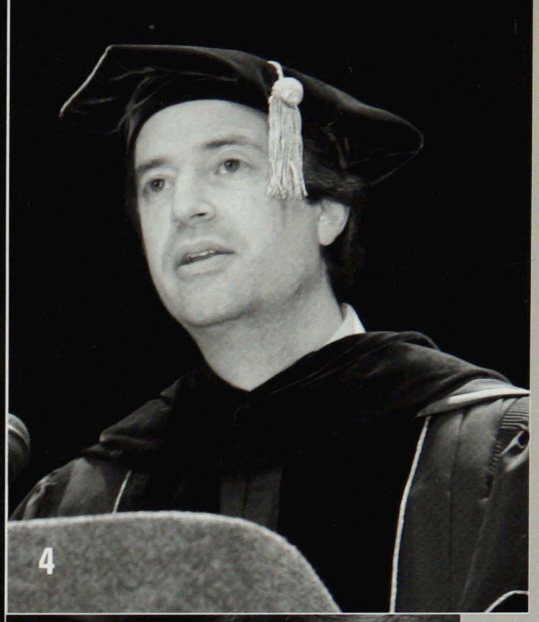
Commencement comes twice a year for the Law School — in December for summer starters, and in May for those who began their legal education in the fall term. Last December, the names of 68 graduates were on the printed program; applause, cheers, and camera flashes from their supporters accompanied them as they walked across the stage of the Michigan Theater. Speaker for the day was Thomas M. Cooley Professor of Law Edward H. Cooper, who noted that graduates may follow "many avenues to success [and] satisfaction." Here, we share images from this day of celebration.

1.
Final name card checks and mortarboard adjustments are part of preparation as graduates descend the steps from their gathering place on the mezzanine to march into the main auditorium.

2.
Spouses Aaron Ostrovsky and Andrea Delgadillo Ostrovsky and Marissa Bono reflect the excitement and joy of graduation.

3.
Graduate Jean Soh receives a congratulatory handshake from Dean Evan Caminker.





4.
Quoting both William Shakespeare and Law School benefactor William W. Cook, Dean Evan Caminker tells graduates they have the opportunity, through their actions, to define their profession and craft. "I hope," he said, "you will find some way to make a difference in our society."

5.
Graduate Michelle Foster and Assistant Dean for International Programs Virginia Gordan.

6.
Dad Jack Lahav congratulates daughter Ilana Cutler.

7.
Teneille R. Brown, elected by her fellow graduates to address them at commencement, notes that "Michigan students are different, more balanced and down to earth, than their counterparts" at other schools.

8.
At the post-commencement reception in the Lawyers Club, graduates Holli K. Froemming and Teneille Brown, who sent classmates e-mail poems during the school year under the alias of Marshall Runne, cannot resist sharing a farewell message, set to the rhythm of a familiar holiday carol:

"Oh little town in Michigan,
Our journey's end draws nigh
And to the rooms of Hutchins Hall
New students have arrived.
. . .

"Oh little town in Michigan,
Yes, our time here is through.
We'll miss you much, please keep in touch.
This goes for all of you."

Bishop Lecturer

Mary Robinson:

We live in difficult, hopeful times

The Global View

U.S. administrations "consistently reject" the Universal Declaration on Human Rights' guarantees of rights to education, adequate housing, and other social and cultural needs, even though former First Lady Eleanor Roosevelt was instrumental in getting the declaration approved more than 50 years ago, the former United Nations High Commissioner for Human Rights and first woman president of Ireland told an overflow audience at the Law School last fall.

"If the United States would take seriously economic, social, and cultural rights, it would be the greatest boost to the human rights agenda worldwide . . . because then we could all share the same human rights agenda," Mary Robinson told an audience crowded into the Law School's Honigman Auditorium. Some 120 additional people watched her talk via a live feed into a nearby classroom.

Robinson, founder/leader of Realizing Rights: The Ethical Globalization Initiative (EGI) and a professor at Columbia University, was president of Ireland from 1990-97 and served as UN High Commissioner for Human Rights from 1997-2002. She visited the Law School to deliver the 2004 William W. Bishop Jr. Lecture in International Law, the most recent installment of a lecture series named in honor of a longtime Law School faculty member and leader in the study of international law.

Dean Evan Caminker welcomed Robinson as "a true visionary of both theory and practice" and noted that she was the first Irish president ever to visit the Queen of England at Buckingham Palace.

In his introduction of Robinson, Judge Bruno Simma of the International Court of Justice explained that for many years human rights have been marginalized and discussion of them has been fraught with ideology. Simma also noted that despite the World Conference on Human Rights declaration in 1993 that all human rights are universal, interdependent, and interrelated, the international Covenant on Civil and Political Rights has received much more attention than its counterpart Convention on Economic, Social, and Cultural Rights. "I think one of the reasons for this neglect is that debate about the nature of these rights is still confused," said Simma, who is a member of the Law School's Affiliated Overseas Faculty.

"I think the time for the ideologically charged debate is over," Simma continued. "One of Mary Robinson's great, great contributions was that she got the debate closer to what I would call the moment of truth."

Issues like the tension between security and civil liberties, empowering women, combating HIV/AIDS, and other problems cannot be sidestepped because of a claimed inadequacy of resources, according to Robinson. There is "a failure to confront them as problems of injustice," she said.

The Universal Declaration of Human Rights guarantees a person's right to a standard of living "adequate for the wellbeing of himself and his family," she explained. Most countries have endorsed this "broad international agenda" but the United States still has not offered its full support.

Hundreds of millions of people across the globe face "the comprehensive insecurity of the powerless," she said — like food shortages or the threat of being killed or robbed. "For women," she added, "gender is its own insecurity."

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Judge Bruno Simma of the International Court of Justice and a member of the Law School's Affiliated Overseas Faculty, introduces Robinson.

The Global View

International perspective marks many Law School programs

When former Irish President Mary Robinson delivered the William W. Bishop Jr. Lecture in International Law last fall, her talk reflected the Law School community's interest in international issues as well as the School's traditionally rich and diverse exploration of international and comparative law.

"There's tremendous energy" at the Law School for international issues and their legal ramifications, in the enthusiastic words of Assistant Dean for International Programs Virginia Gordan, whose office coordinates activities associated with the School's international students and international/comparative law study programs.

Gordan also is chief administrator for the Law School's Center for International and Comparative Law, and works with Professors Michael Barr, Daniel Halberstam, Robert Howse, and Steven R. Ratner to present the International Law Workshop (ILW), a year-long, nearly weekly series of talks that explores the most searing issues in the hotbed of international law. This year's ILW lecturers focused on topics ranging from detention in the war on terrorism and reconsideration of the legitimacy of the World Bank and International Monetary Fund to the near-glacial progress of human rights in the jurisprudence of the International Court of Justice.

Gordan and her ILW partners have been pleased with the depth and variety of international law programs presented this year. They're also pleased with the student, faculty, and University community response to them. Several programs have drawn standing-room-only audiences.

Here are some of the international/comparative law highlights that marked the first part of this academic year:

- Robinson, who was the first woman president of Ireland from 1990-97 and served as UN High Commissioner for Human Rights from 1997-2002, used the commemorative Bishop Lecture in October to plea for greater recognition of economic, social, and cultural rights across the globe. (See story on page 14.)
- Philosopher/linguistics scholar Noam Chomsky discussed the illegality, but legitimacy, of first-strike war-making when he delivered the 14th annual Davis, Markert, Nickerson Lecture on Academic and Intellectual Freedom at the Law School. (See story on page 8.)
- Scholars from across the country probed the intersection of comparative law and human rights when the American Society for Comparative Law held its annual meeting at the Law School in October. A high point of the meeting, organized by Hessel

Panelists probe the issue of "U.S. Detentions During the 'War on Terrorism': International Law and American Justice" during a program of the International Law Workshop. From left are: visiting professor Sarah H. Cleveland of the University of Texas at Austin School of Law; Federal Public Defender Frank W. Dunham Jr.; attorney John A. Drennan, '95, of the criminal appellate section of the U.S. Department of Justice; and Law School Professor Steven R. Ratner.

E. Yntema Professor of Law Mathias Reimann, LL.M. '83, was the society's presentation of a lifetime achievement award to comparative law pioneer Eric Stein, '42, the Czech-born scholar of European unification who is the Law School's Hessel E. Yntema Professor of Law Emeritus. (See story on page 32.)

- And there was an especially rich lineup of ILW lecturers. Judge Bruno Simma of the International Court of Justice (ICJ), an Affiliated Overseas Faculty member at the Law School, was part of the schedule; he detailed the slow, steady growth of human rights concepts in ICJ jurisprudence in his talk "When the Old Law Meets the New: The International Court of Justice and Human Rights." Law School Assistant Professor Laura Beny, an expert on the Sudan, filled the lecture hall for her ILW talk "The Sudan: A Case of Genocide?" Speaker Ngaire Woods, director of the Global Economic Governance Program at Oxford University in England, discussed "Do We Need the IMF and World Bank?" Other fall term ILW speakers included Mary Ellen O'Connell, the William B. Saxbe Designated Professor of Law, Moritz College of Law, The Ohio State University, who spoke on "Torture, Looting, and Other Crimes of Occupation"; and Pascale Fournier, Boulton Fellow at McGill University Faculty of Law in Canada, whose talk was titled "Negotiating Islam Across Borders: Can the Subaltern Muslim Woman Speak?"

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The Global View

Winter term speakers offer rich insights

At deadline time, the winter term's early schedule of speakers on international topics promised to continue the high interest and thought-provoking discussions that marked the fall term. On Wednesday, March 23, Judge Beinisch of the Israeli Supreme Court will visit the Law School as a DeRoy Fellow and deliver a public lecture.

The International Law Workshop (ILW) also is offering a full lineup of speakers. ILW's winter schedule and topics still were being finalized, but the program already included prominent public officials, highly regarded scholars, and cutting edge topics. The lineup includes:

- Ana Palacio, minister of foreign affairs of Spain.
- Anne Norton, University of Pennsylvania professor of political science.
- Ayelet Scachar, associate professor at the Faculty of Law, University of Toronto.
- Alejandro Ferrer, LL.M. '92, minister of trade and industry of Panama.
- Kishore Mahbubani, dean of the Lee Kuan Yew School of Public Policy at the National University of Singapore, former Singapore ambassador to the UN, former president of the UN Security Council, and former permanent secretary of the Ministry of Foreign Affairs of Singapore.
- Dan Bodansky, Woodruff Professor of International Law at the School of Law, University of Georgia, and climate change coordinator for the U.S. State Department 1999-2001.
- Judge Koen Lenaerts of the European Court of Justice.
- Bill Alford, Henry L. Stimson Professor of Law, vice dean for the graduate program and international legal studies, and director of East Asian legal studies, Harvard Law School.

Assistant Dean for International Programs Virginia Gordan, left, and Dean Evan Caminker accompany Robinson as she arrives to deliver the Bishop Lecture.

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"The underlying cause of insecurity is the absence of the capacity to influence change at the personal or the community level," Robinson explained. "People need the means to hold their government accountable."

"Freedom from want is an empty phrase today," she continued. Some 30,000 children die each day from disease. Forty-six nations grew poorer while already wealthy countries grew richer during the 1990s. "There are two very different kinds of countries: the beneficiaries of the free movement of capital, and those [that are] left behind."

As UN High Commissioner for Human Rights, Robinson said, she believed that civil/political rights no longer should hold priority over economic/social/cultural rights. "I was concerned that the time had come to treat the two sets of rights equally," she explained. Among her initiatives, she:

- Secured new UN mandates on education, food, and other issues.
- Worked to develop human rights guidelines for poverty indicators, a move designed to affect how the World Bank and other funding providers make their decisions to offer aid.
- Increased the UN's in-country teams working on development.

Still, Robinson said, human rights workers face a number of criticisms and issues. For example:

- They often overstate the role of law and fail to recognize cultural traits. "This is changing, and many human rights organizations recognize the need to go beyond simply 'naming and shaming.'"
- Human rights law efforts often cannot cope with the shift of power centers among government, business, and international organizations like the International Monetary Fund. "In many developing countries people believe that powerful nations make the decisions. This is a major challenge for human rights advocates."
- Trade issues complicate the human rights agenda.
- Some economists charge that human rights advocates appeal to high principle but often are unable to make practical decisions. For example, Robinson said, sometimes they refuse to acknowledge the constraints brought about by a scarcity of funds or other resources.

"The challenge is to redouble our efforts to move the broad human rights agenda forward," Robinson concluded. "I do believe we live in difficult, but hopeful, times."

William W. Bishop Jr., for whom the lecture is named, graduated from the Law School in 1931. He was assistant legal adviser in the U.S. State Department from 1939-47, joined the Law School faculty in 1948, co-directed the School's International Legal Studies program from 1958-76, and took emeritus status in 1977. He died in 1987. His daughter, Dr. Elizabeth Bishop, an Ann Arbor psychologist, attended Robinson's lecture.

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Breaking from its usual format of a single speaker and single respondent, ILW last fall also presented a four-member panel discussion of "U.S. Detentions During the 'War on Terrorism': International Law and American Justice." Using a panel that combined scholars and practitioners, the program featured Law School Professor Steven R. Ratner; visiting professor Sarah H. Cleveland of the University of Texas at Austin School of Law; John A. Drennan, '95, an attorney with the criminal appellate section of the U.S. Department of Justice; and Federal Public Defender Frank W. Dunham Jr. of Alexandria, Virginia, who argued for the petitioner in *Hamdi v. Rumseld* (124 S. Ct. 981 [2004]). The Court ruled in *Hamdi* that an American citizen held in the United States as an enemy combatant must be given an opportunity to contest the factual basis for his detention. The Court's action had the effect of freeing Hamdi, who was captured in Afghanistan and had been held in a military brig in Charleston, South Carolina.

ILW is "a speakers series" designed to spark student and faculty interest in international issues whether or not they are already knowledgeable in the field, according to Gordan. You needn't be a specialist in the lecture topic area, or even a lawyer, to appreciate and learn from the programs.

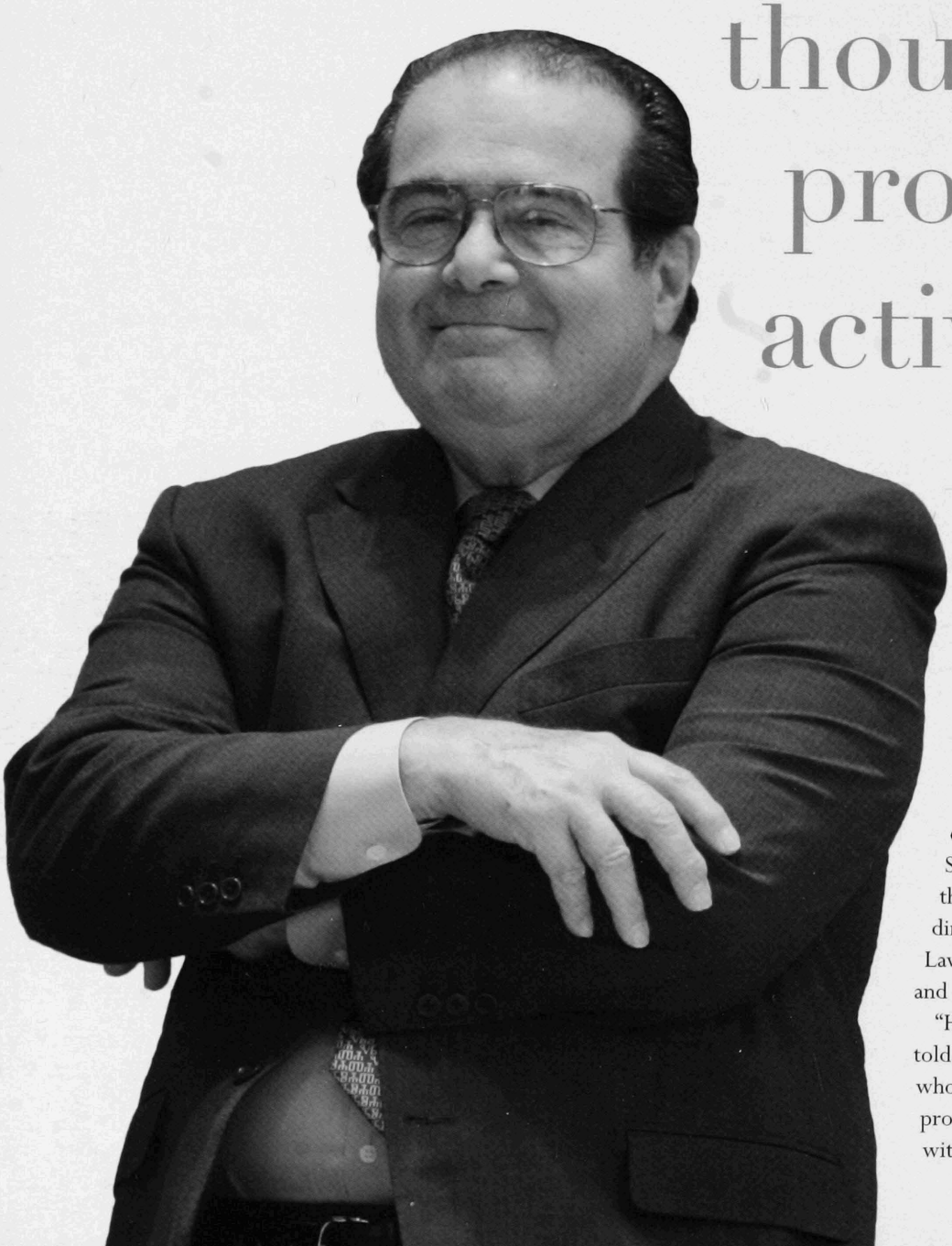
Toward that end, Gordan meets each spring with editors of the Law School's *Michigan Journal of International Law* and officers of the International Law Society to get suggestions for speakers. She and her faculty colleagues, Barr, Halberstam, Howse, and Ratner, also mine their own expertise and contacts to identify speakers for the series.

In a way, ILW is an umbrella series that reaches out and embraces much of the international law-centered activity that takes place here at the Law School. Permanent faculty members, visiting professors, scholars who are visiting elsewhere within the University, and special lecturers and guests brought in for a specific occasion, all these and more have been incorporated into the ILW series at one time or another.

To best prepare students for the world of practice they will be entering, the Law School recognizes the importance of students gaining an understanding of international law and foreign legal systems, Gordan explained. Internationally oriented programs like those sponsored by her office, Law School student groups, and other University of Michigan organizations are significant components of the preparation for such practice.

To best prepare students for the world of practice they will be entering, the Law School recognizes the importance of students gaining an understanding of international law and foreign legal systems.

Scalia visit a whirlwind of thought-provoking activity



U.S. Supreme Court Justice Antonin Scalia's visit to the Law School in November as a Helen R. DeRoy Fellow provided an opportunity to hear from and question a jurist of the highest court in the land.

Scalia's two-day agenda was a whirlwind of activity: He delivered the DeRoy Lecture, taught classes in administrative law and constitutional law, attended a Legal Theory Workshop, and conducted a special question-answer session for Law School students. One evening, Scalia dined at Inglis House with Law School supporters and University officials; the second evening of his visit he attended a dinner in his honor at the Lawyers Club with Law School faculty members and their spouses and guests.

"He isn't combative like what you've been told," reported Professor Emeritus Yale Kamisar, whose legal interpretations and criminal procedure scholarship often have been at odds with Scalia's legal philosophy.

"He's entirely different face to face than he is as an opinion writer," Kamisar explained. "When he takes pen in hand, he sometimes slashes his colleagues in his opinion, but he is just a remarkably charming guy when you talk with him and when you ask him questions about his opinions."

"The old professor still is very much a part of his personality," Kamisar added, referring to Scalia's professorships at the University of Virginia and University of Chicago law schools and visiting faculty turns at Georgetown and Stanford. "He loves to mix it up. As he said, he's trying to influence the next generation."

Clinical Professor of Law Donald N. Duquette agreed, and said Scalia's lecture and discussions during his visit were "in the best tradition of public discourse. . . . We had a polite and reasonable discussion among people who disagree strongly on certain issues. But we agreed on the importance of having the free and open discussion. Justice Scalia represented a very conservative view in this fairly liberal setting, and we at this 'super-duper law school' listened. We also had a chance to challenge his ideas — respectfully, of course."

Scalia only occasionally showed flashes of his famous testiness. After his public lecture, for example, when a questioner asked about the correctness of the Supreme Court's role in deciding the 2000 presidential election, Scalia prefaced his answer with "I'm tempted to say that that was four years and an election ago. Learn to live with it." Scalia then recounted the Court's 7-2 decision to hear the case, and noted that the issue really was whether to decide immediately at the Supreme Court level or remand the case for further proceedings in the Florida Supreme Court.

Named to the Court in 1986 by President Reagan, Scalia is known as a conservative justice, and many students and faculty do not share his legal philosophy. Nonetheless, they found it exciting and thought-provoking to hear him articulate his positions. As a teacher, he earned high grades.

"Justice Scalia's presence dominated the campus chatter for the week," reported law student Matt Nolan, president of the student chapter of the Federalist Society and executive editor of *Res Gestae*, the Law School's student newspaper. "While he may have gained few converts for his originalist philosophy, he at a minimum planted the seeds of discussion in many minds where they were not fermenting before."

For Sarah Rykowski, a member of the executive board of the Criminal Law Society, Scalia's visit offered a

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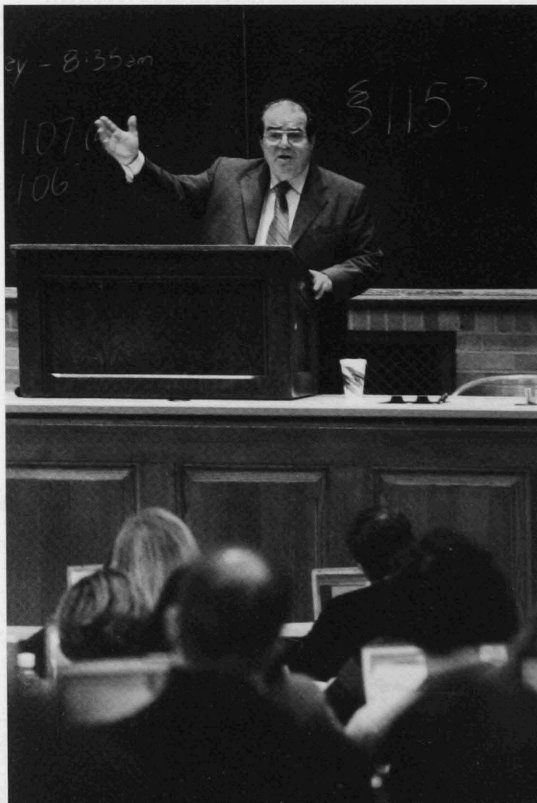
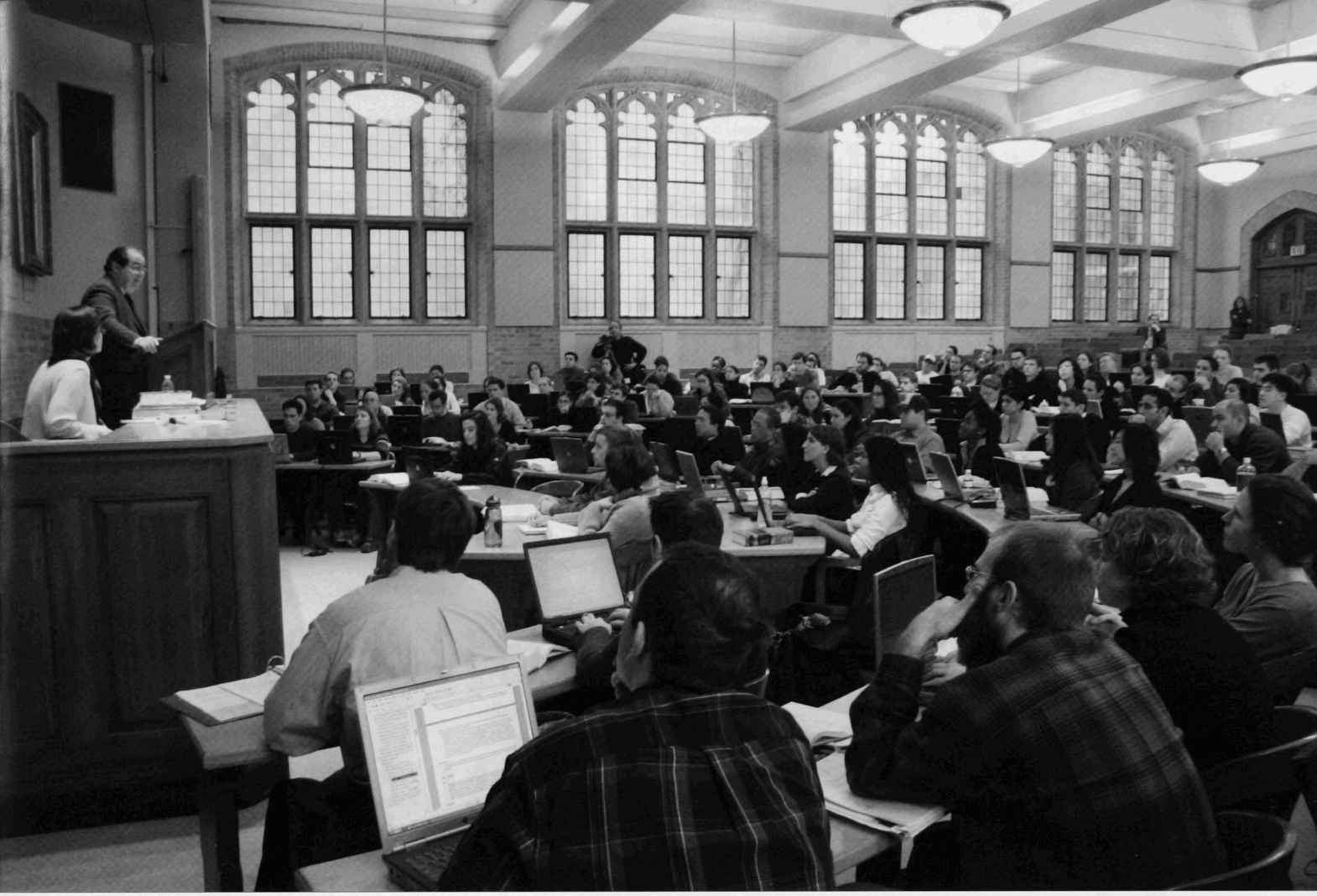
Justice Antonin Scalia's views permeate the subject of administrative law, says Professor Nina Mendelson, shown above at left with Scalia as he prepares to teach her Administrative Law class. Below, the justice, a former law professor, proves to be an energetic and engaging teacher.



The Hon. Antonin Scalia
Associate Justice
U.S. Supreme Court

- Born in Trenton, New Jersey.
- Undergraduate studies at Georgetown University and the University of Fribourg in Switzerland (A.B.); earned LL.B. at Harvard Law School, where he was note editor of the *Harvard Law Review* and a Sheldon Fellow.
- Admitted to the Ohio Bar (1962) and the Virginia Bar (1970). Practiced with Jones, Day, Cockley, and Reavis in Cleveland, Ohio (1961-67).
- Professor of law, University of Virginia (1967-74); scholar in residence at the American Enterprise Institute (1977); visiting professor of law at Georgetown University (1977); professor of law, University of Chicago (1977-82); visiting professor of law, Stanford University (1980-81).
- General counsel, Office of Telecommunications Policy, Executive Office of the President (1971-72); chairman of the Administrative Conference of the United States (1972-74); assistant attorney general, Office of Legal Counsel, U.S. Department of Justice (1974-77).
- Nominated by President Ronald Reagan to the U.S. Court of Appeals for the District of Columbia Circuit and took oath of office August 17, 1982.
- Nominated by President Ronald Reagan as Associate Justice of the U.S. Supreme Court and took oath of office on September 26, 1986.
- Other experience includes: editor of *Regulation Magazine* (1979-82); chairman of the American Bar Association (ABA) Section of Administrative Law (1981-82); chairman of the ABA Conference of Section Chairmen (1982-83); board of visitors at J. Reuben Clark School, Brigham Young University (1978-81).

Professor Daniel Halberstam, top left, listens as Supreme Court Justice Antonin Scalia addresses a combined session of Halberstam's Criminal Law classes. Above, Scalia, seated at right, listens as Ralph W. Aigler Professor of Law Richard D. Friedman addresses the Law School's Legal Theory Workshop. At right, Scalia displays deep pleasure at the activities associated with his visit. At far right above, law students, screens aloft and laptops at the ready, cram Hutchins Hall's Honigman Auditorium to be taught by the Supreme Court justice whose written opinions are a significant part of their legal education.



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close up view of the judge in action. "I had the chance to attend the question and answer session with Justice Scalia," Rykowski said. "I was really impressed with the turnout, the quality of students' questions, and the quality of his answers. Hearing him speak gave me a new appreciation of him as a person willing to stand up for what he believes in, regardless of what other people think.

"Because the Court is currently dealing with several important issues in criminal law, and may itself experience change, the opportunity to hear Justice Scalia speak about the Court and the role the nine justices play in our legal system and governance was a once-in-a-lifetime experience."

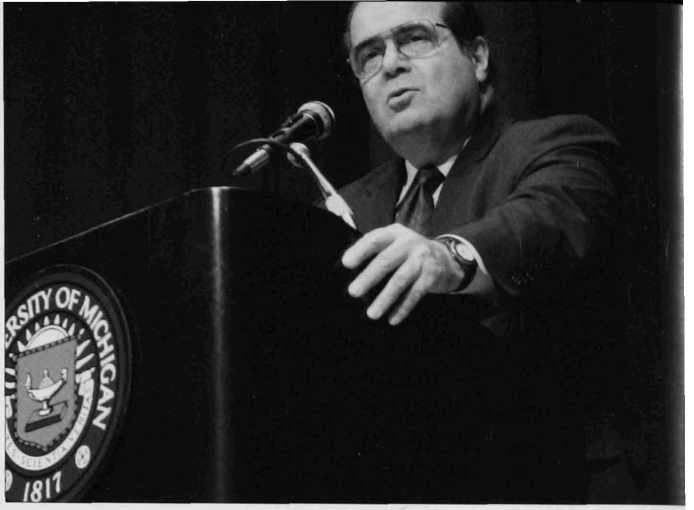
"I was delighted to have Justice Scalia speak in Administrative Law," reported Professor of Law Nina Mendelson, who regularly teaches the class. "One simply cannot study this subject without engaging the justice's views at every turn, whether in opinions for the Court, in dissent, or in scholarly writings.

"He spoke on standing jurisprudence, particularly the well-known case of *Lujan v. Defenders of Wildlife*, for which he authored the Court's opinion. The students had a wonderful opportunity — which they took full advantage of — to engage the justice in a lively debate on his views of the standing doctrine."

"Whenever law students meet a justice of the United States Supreme Court they bristle with excitement," explained Professor of Law Daniel Halberstam, who combined two sections of his Constitutional Law class for Scalia to teach.

"For better or for worse, we generally spend an enormous amount of class time analyzing and discussing Supreme Court decisions over the course of the semester," Halberstam continued. "To have one of the Court's most influential, provocative, and challenging jurists come teach a two-hour session, and to be able to engage with him rather freely on matters of real constitutional substance, was both highly energizing and pedagogically useful."

"Bringing a Supreme Court Justice to the Law School adds life to the classroom," added Shandell S. Magee, chairperson of the Black Law Students Alliance. "Since we, as students, read so many judicial opinions and philosophies, it's great that the Law School provides an opportunity for us to get a glimpse of their actual personalities."



Scalia delivers the DeRoy Lecture:

U.S. Constitution is a legal document, not a living thing

Most husbands are glad when their spouse hums a tune while preparing breakfast. Not U.S. Supreme Court Associate Justice Antonin Scalia. At least not this time.

This particular breakfast was being prepared the morning after the Supreme Court had announced its decision that burning the American flag is an accepted expression of the free speech guaranteed by the First Amendment to the U.S. Constitution.

Justice Scalia was in the majority this time. The act of burning the American flag in protest disgusts him, but he was convinced that the original meaning of the amendment protected such expression.

"My wife is a very conservative person," Scalia explained. And as she's preparing breakfast, she's humming "It's a Grand Old Flag."

"I didn't need that," he joked.

U.S. Supreme Court Justice Antonin Scalia related this story near the end of the Helen R. DeRoy Lecture that he presented to an overflow audience of more than 1,300 at the University of Michigan's Rackham Auditorium in November. He delivered the talk as part of his two-day visit to the Law School as a DeRoy Fellow. During his visit, he also taught classes, met with faculty and students, and attended a Legal Theory Workshop presentation.

Laying aside personal values, as he did in the flag-burning case, is one of the most difficult things a jurist can do while interpreting the Constitution, Scalia revealed. Yet do it he must if he is to honestly determine the original meaning of the document, and that is what a judge should do. Applying the flexible yardstick of a "living" Constitution eventually will destroy the document itself, he said.

"Originalism" used to be the orthodox way of interpreting the Constitution, Scalia said. But "in the last 40 years, since the Warren Court, there's a new phrase: 'We have a living Constitution'" that changes meaning to fit changing times. Placing himself squarely among the "small but hardy minority of us who believe in the philosophy called originalism," Scalia said that the courts should not be the arbiters of social issues like abortion, same sex marriage, and the death penalty.

"Why you would want to leave these enormously important social questions to nine lawyers, I don't understand," he explained.

The Supreme Court is within a vote or two of repealing the death penalty because it is has come to be seen as "cruel and unusual punishment," he noted, but there is nothing in the Constitution that outlaws it. In fact, when the Constitution and Bill of Rights were ratified, death was the usual penalty for a felony and none of the new states repealed their death penalty statutes. Thus, according to Scalia, the Eighth Amendment's prohibition against "cruel and unusual punishment" did not originally mean to outlaw the death penalty.

If the Constitution is to change, it should be amended by the people, not be reinterpreted by the courts, he explained. "The Constitution is a legal document," he said, and no one prepares a legal document with the idea that its meaning will change over time.

That doesn't mean the Constitution is immutable, Scalia explained. "The [originalist] system of my Constitution is very flexible. If you want the death penalty, persuade your fellow citizens it's a good idea." The right to an abortion or physician-assisted suicide is not part of the original meaning of the Constitution, he said. If you want to legalize physician-assisted suicide, don't ask the courts to stretch the Constitution to embrace it. "Adopt it the way the people of Oregon did it. Pass a law and you have it."

Scalia noted that originalism inherently is neither liberal nor conservative. Those on the right as well as the left side of the political spectrum are happy to embrace the concept of a living Constitution if it meets their political and legal leanings. Originalism also can lead to the restoration of rights as well as the taking away of rights.

Recently, Scalia noted, the Court restored the original meaning of the Constitution's confrontation clause by reversing a 25-year-old interpretation that allowed hearsay evidence to be used against a defendant without cross examination if the court deems it to have "the indicia of reliability" about it. (See related stories, pages 34 and 35.)

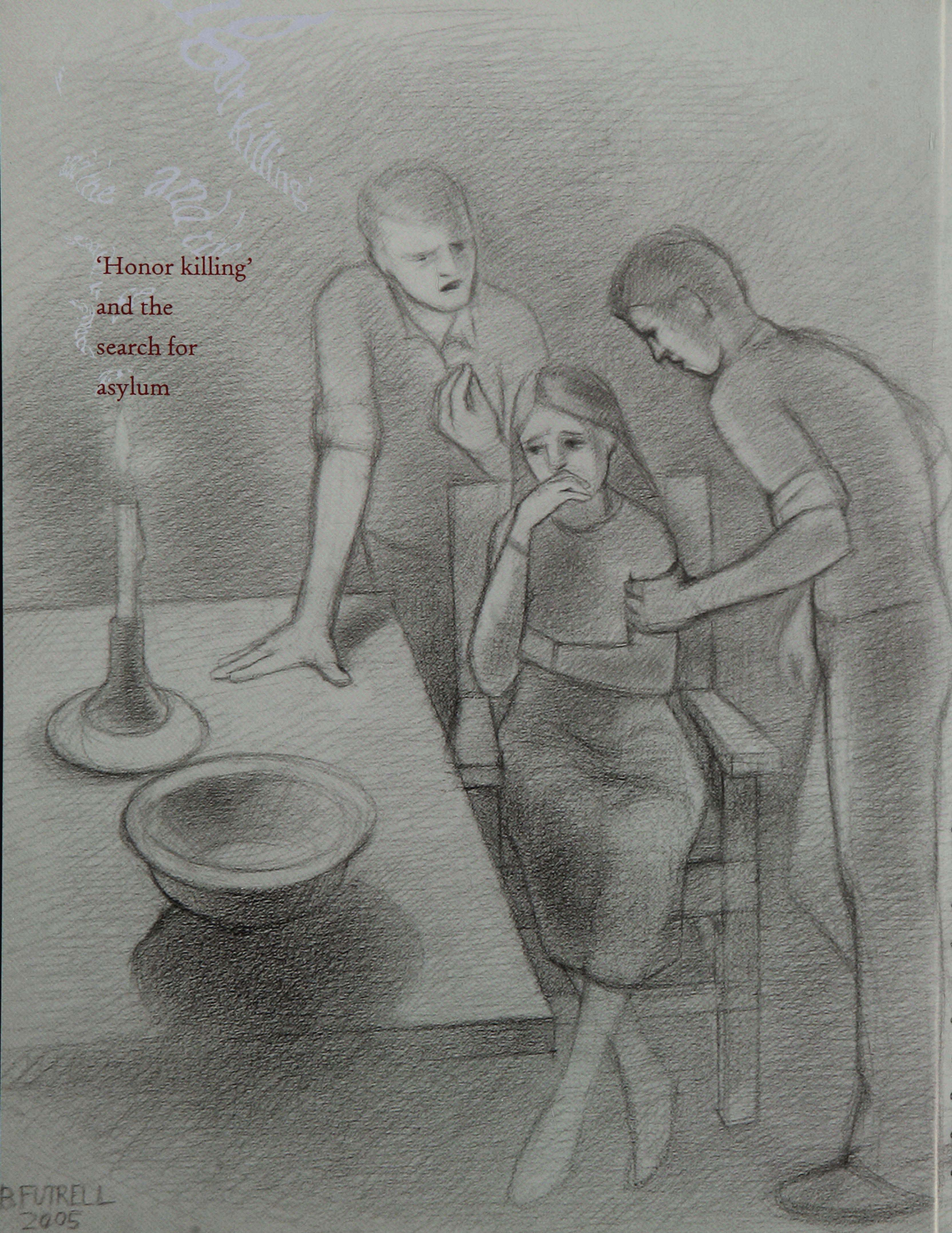
However, after four decades of jurisprudence based on a "living Constitution," questions regarding the death penalty and abortion "are off the democratic table because the Court has spoken," he said.

One result of the adoption of the idea of a living, evolving Constitution is that interest groups look for judicial nominees who will interpret the Constitution in ways to their liking, Scalia said. "And that's where we are now."

To Scalia, that's an ominous place to be. "To turn the whole thing over to the majority is to destroy the Constitution," he said. "[But] how do we get back to where we need to be? I don't know. It's hard, very hard to convert people who believe in a living Constitution."

Below, Dean Evan Caminker listens as Supreme Court Justice Antonin Scalia delivers the Helen R. DeRoy Lecture to an overflow audience at the University of Michigan's Rackham Auditorium.

'Honor killing' and the search for asylum



'Honor killing' and the search for asylum

As the woman uncoiled her story to her Law School audience last fall, it quickly became clear that she would not be alive but for the near-decade of legal work on her behalf by the Law School's clinical program.

Let's call her Samira, as ABC News did when it interviewed the young woman for *20/20*. Samira is Jordanian, and nearly became a victim of the "honor killing" code that is part of the culture in her homeland as well as many other nations. Samira became marked for death at the hands of her extended family because she dishonored them by falling in love, becoming pregnant, and marrying.

"Honor crimes are acts of violence, usually murder, committed by male family members against female family members who are perceived to have brought dishonor upon the family," according to Human Rights Watch. "A woman can be targeted by her family for a variety of reasons including refusing to enter into an arranged marriage, being the victim of a sexual assault, seeking a divorce — even from an abusive husband — or committing adultery. The mere perception that a woman has acted in a manner to bring 'dishonor' to the family is sufficient to trigger an attack."

In Jordan, as in most countries where honor killing is part of the culture, the practice is more common than reported. It is considered a mitigating circumstance in the case of a murder conviction, and a convicted honor killer seldom serves more than six to twelve months in prison. In the case of potential victims, they can seek safety with the authorities, who put them in protective custody in prison for a brief time. Citing only public news stories, Human Rights Watch reported that four Jordanian women were honor killing victims during the first four months of 2004, and authorities were holding some 40 women in prison in protective custody.

The practice of honor killing is widespread. More open immigration and increased international travel have taken it into countries like Great Britain, where it is not part of the mainstream culture. "Reports submitted to the United Nations Commission on Human Rights show that honor killings have occurred in Bangladesh, Great Britain, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan, Pakistan, Morocco, Sweden, Turkey, and Uganda," *National Geographic* reported in 2002. "In countries not submitting reports to the UN, the practice was condoned under the rule of the fundamentalist Taliban government in Afghanistan, and has been reported in Iraq and Iran."

Honor killing is not associated with any specific religion. Samira is Roman Catholic, and grew up attending Catholic schools in Jordan. To her family members, part of Jordan's small Christian minority, marriage to her Muslim lover did not erase the dishonor they felt she had done them, and her relatives set out to kill her. She and her husband fled to Syria, but her uncles and cousins tracked them down. "Until today, I don't know how they found us in Syria. It was pretty shocking," she explained in her talk at the Law School last fall, sponsored by S.N.A.R.L. (Student Network for Asylum and Refugee Law).

The couple fled back to Jordan, where Samira spent months moving from hiding place to hiding place as her family members got close. It became apparent that the couple could not hide in Jordan, but Samira's husband could not leave the country because he was in the military. Exhausted, Samira gave in to her mother's offer of help to go to the United States in return for divorcing her husband. (Her mother made the proposal, it turns out, in order to protect her own husband from revenge if his relatives killed or harmed Samira's husband.)

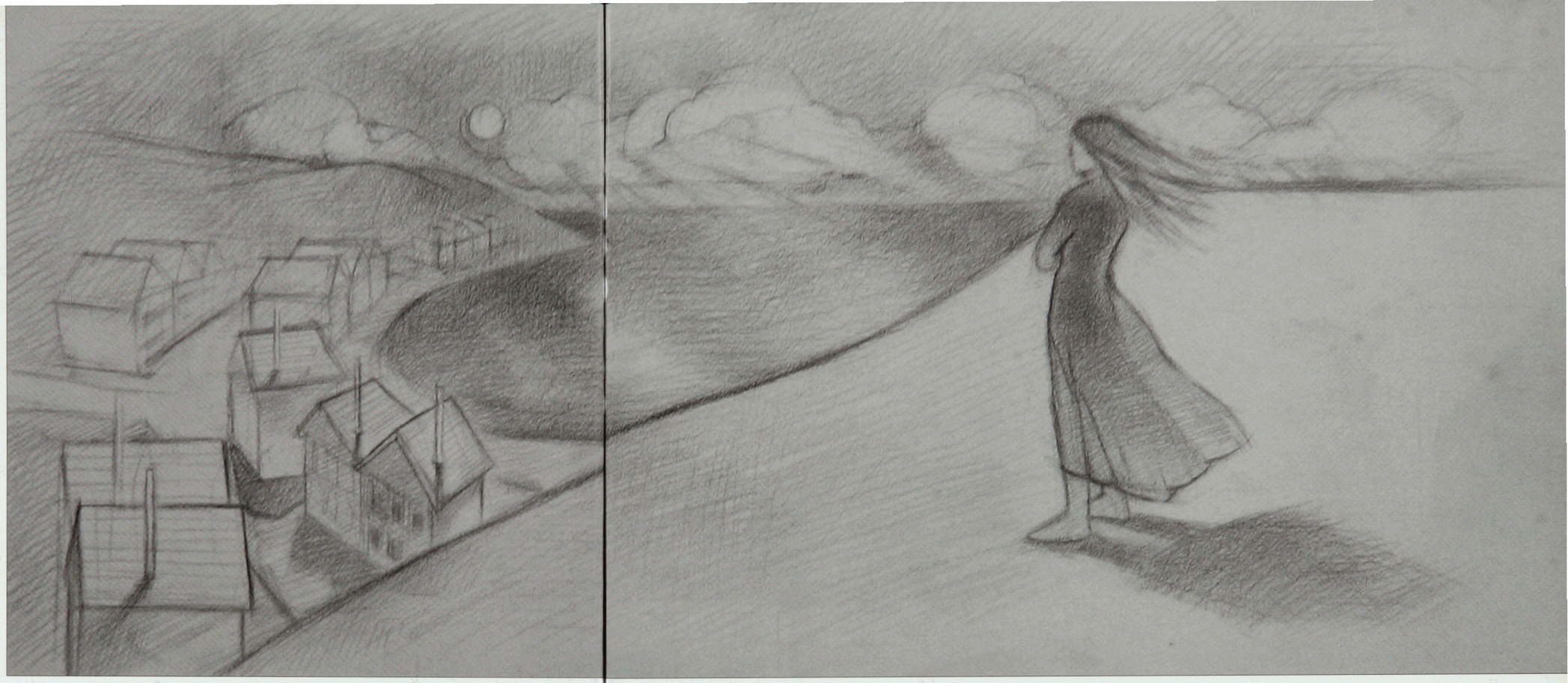
"It was a very difficult decision for me to make at the time, but I didn't feel I had many options," Samira recalled. With her mother's help, she came to the United States, then moved to Canada, where her daughter was born and initially given up to a Canadian couple for adoption. Denied asylum in Canada, Samira tried the United States, where the immigration officer "didn't believe me" when she described her plight. "He laughed at me," she reported

She entered the United States in 1991 as a nonimmigrant visitor; by 1993 she had overstayed her authorization and the then-Immigration and Naturalization Service (INS) began moving to expel her.

Even so far from her vengeance-seeking family, there was no sanctuary. Samira's father sent her older brother to kill her. When he failed, and decided to stay instead of return to Jordan, her father sent another brother on the same mission. Her father also tracked her down and telephoned to her hiding place in Detroit. As late as 2002, nearly a dozen years after she fled from home, Samira's father still swore he would kill her to avenge her dishonor of the family.

Samira sought the assistance of the Law School's then student-run Asylum & Refugee Law Project. The Law School clinic came into the case in the mid-1990s, taking over from the student-run project. Under the supervision of Clinical Professor of Law Nicholas J. Rine and Adjunct Clinical Assistant Professor of Law Kathleen Q. Hegarty, an associate with Marshal E. Hyman & Associates P.C. in Troy, Michigan, clinic students found a technicality — a critical document lacked Samira's signature —and helped her get her daughter back. They also helped find safe houses where Samira's vengeance-seeking family could not locate her, and negotiated with INS on her behalf. Those negotiations became "very adversarial and very nasty," according to Rine.

Samira's student lawyers faced a complex task, according to Barbara Miltner, '02, who worked on the case with fellow student lawyer Tracey Glover, '02, throughout their third year.



"In the law, a refugee is a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion," explained Miltner, who currently teaches at the University of Dundee in Scotland and plans next fall to begin work on her LL.M. in international and European Law at the University of Aberdeen. "With Samira's case, it was clear that her facts would allow us to assert legal arguments that she had a well-founded fear of persecution for reasons of 1) religion and 2) political opinion (which is not limited to strict notions of political ideas). However, the phenomenon of honor killings and the situation as it played out in Samira's case also clearly fell squarely within the 'particular social group' category."

The trick was to define Samira's "particular group" so that it was neither too broad nor too restrictive to meet the demands of asylum law, Miltner recalled. "Ultimately, we defined her group as 'Jordanian women perceived to have transgressed family, tribal, or community norms of sexual morality.' We limited it to Jordan because we had solid evidence documenting the practice in Jordan, in ways that might perhaps be unique to Jordan. (Sadly, honor killing is not a particularly rare phenomenon; it is limited neither by geography, religion, race, or culture.) We added the 'perceived' element because many victims of honor killings never actually engage in the activity that triggers the crime. . . . Finally, the part about 'family, tribal, or community norms' was also an attempt to define the social group broadly enough to encompass all possible sources of sexual norms that form the basis for honor killings."

The student lawyers set to their preparation with dedication, drafting the brief, compiling supporting documentation, gathering evidence, doing interviews, preparing affidavits, and readying themselves for oral argument. "The hardest part was trying to focus on those tasks without focusing too much on the stakes," explained Miltner. "Everybody knew that deportation would be a death warrant for Samira and her daughter. It was difficult to feel confident about working in such a case as a student, knowing that the case had such incredible consequences."

Throughout, their client was frank and helpful, and Miltner and Glover finally argued Samira's case in Immigration Court on April 1, 2002. "We never realized how deeply she had repressed everything until the hearing, when she really just fell apart," Miltner said. "That was a difficult task, where the courtroom process keeps marching along, regardless of the emotional state of the respondent. It was a very difficult experience, watching someone overcome with emotions, and realizing that the best way to serve her was to stay alert and focused on the process."

Then they waited.

The immigration judge issued his opinion nearly a year later, on October 30: "The Court finds that the respondent has not suffered harm from her family thus far, and thus has not established past persecution. She has demonstrated, however, the length to which her family will go to cleanse the family honor. He [her father] made it very clear to the executive director of an immigrant assistance agency that 'One hundred years could pass and I will kill her.' As recently as the Saturday before her Immigration Court hearing, the respondent testified, her mother had warned her that her father's views had not softened. The Court therefore finds that the respondent has established a well-founded fear of persecution on the basis of her membership in the particular social group discussed herein, if she returns to Jordan. Accordingly, the Court will grant the respondent's application for asylum."

It was a groundbreaking decision, and "we were so pleased with this outcome that we posted a copy with the UC [University of California] Hastings Center for Gender and Refugee Studies as a resource to lawyers researching attempted honor killings as a possible social group ground for asylum," Miltner said.

Rine has high praise for Samira's student lawyers. "They prepared, filed, and tried the case in Immigration Court — and won," he said. He also noted that gripping as it was personally and emotionally, Samira's case also neatly met the educational aims of the clinic.

"In several ways, this case was a prototype of what we try to give students with a clinical experience," he explained. "Not every clinical experience includes all of these elements, but this case did:

"First, there was an opportunity to grapple with a set of very complicated communications problems: 1) with a client from a radically different social and cultural background, needing to find a way to empathize and understand her well enough to give her good representation; 2) with a refractory and difficult forum; and 3) with a hostile and obstructive opposition.

"Next, there was an opportunity to actually do the 'sexy' part of trial work — the in-court dramatics — in a case that actually carried quite a lot of drama, but also an opportunity to slog through and see the complexity and effectiveness of thorough preparation.

"Also, there was an opportunity to have a small impact on moving American law very slightly in a progressive direction."

"There also was an important secondary purpose, an opportunity to learn the satisfactions of service to a helpless client, largely dependent on the efforts of her lawyers," he continued. "Finally, for me, it was a real pleasure to work with smart, conscientious student/lawyers as colleagues on the many problems we had to deal with in the case. I think — I hope — that they shared that same satisfaction of a collaborative accomplishment."

As for a very grateful Samira, "I've applied for my green card," she told her Law School audience last fall. "I consider myself successful. My daughter is with me, she's 13 now, and I can't wait to become a [U.S.] citizen."

Faculty

In Detail

A new look at correcting errors in wills and other donative transfers

Although Lawrence Waggoner, '63, the Lewis M. Simes Professor of Law, isn't a legislator or a judge, he teaches mostly law that he's had a hand in writing. He's been given the opportunity to have a direct influence on the law through his reportorial work with the American Law Institute and the Uniform Law Conference.

One of the features of his work as reporter for the *Restatement (Third) of Property (Wills and Other Donative Transfers)* and for the Uniform Probate Code is the way errors in the execution or the content of wills are treated. In an essay prepared by Waggoner and John H. Langbein, the associate reporter for the *Restatement* and a member of the drafting committee for the Uniform Probate Code, the authors note that "courts have traditionally applied a rule of strict compliance and held the will invalid when some innocuous blunder occurred in complying with the Wills Act formalities, such as when one attesting witness went to the washroom before the other had finished signing. Likewise, the courts have traditionally applied a no-reformation rule in cases of mistaken terms, for example, when the typist dropped a paragraph from the will or the drafter misrendered names or other attributes of a devise; the court would not correct the will no matter how conclusively the mistake was shown."

They write, however, that there is a "fledgling movement to excuse harmless execution errors and to reform mistaken terms in wills" that has received reinforcement in the *Restatement* and the Uniform Probate Code, both of which seek to safeguard against weak or fraudulent claims by imposing an exceptionally high standard of proof (clear and convincing evidence). The *Restatement* and

the Uniform Probate Code reverse the strict-compliance rule, allowing the court to uphold a defectively executed will if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will. The *Restatement* reverses the no-reformation rule, authorizing courts to reform mistaken terms in a will if the mistake is shown by clear and convincing evidence. The *Restatement*'s reformation rule is also incorporated into the new Uniform Trust Code, and a proposal to incorporate it into the Uniform Probate Code is on the drawing board.

According to Waggoner and Langbein, the two cases that best illustrate the new harmless-error and reformation doctrines are *Estate of Hall*, 51 P.3d 1134 (Montana 2002), and *Estate of Herceg*, 193 Misc.2d 201, 747 N.Y.S.2d 901 (Sur. Ct. 2002).

In *Estate of Hall*, spouses Jim and Betty Hall had visited their attorney's office to discuss a new draft will, made and agreed to several changes, and then left under the impression that the signed draft would serve as the will until the final version was prepared and executed.

At the end of their meeting, Jim asked the attorney if the draft (as revised) could stand as a will until the final version could be prepared. The attorney, apparently in ignorance of the statutory requirement of two attesting witnesses, advised them that the draft would be valid if Jim and Betty executed the draft and he notarized it. Betty testified that no one else was in the office at the time to serve as an attesting witness. Jim and Betty proceeded to sign the will and the attorney notarized it without anyone else present. When they returned home, Jim told Betty to tear up his earlier will, which she did.

Jim died before the final version could be prepared and properly executed. The probate court upheld the draft under Montana's enactment of the Uniform Probate Code's harmless-error statute. On appeal, the Supreme Court of Montana affirmed, saying that the uncontradicted testimony that Jim's intent for the joint will "to stand as a will until [the attorney] provided one in a cleaner, more final form" was sufficient to support the trial court's judgment admitting the will to probate.

In *Estate of Herceg*, the residuary clause of the will of Eugenia Herceg stated: "All the rest, residue and remainder of the property which I may own at the time of my death, real and personal, and wheresoever the same may be situate."

The drafting attorney filed an affidavit stating that the current will was a redraft of a previous will, and in redrafting that previous will using computer software, "some lines from the residuary clause were accidentally deleted." The previous will, which was admitted into evidence, identified the residuary legatee as the testator's nephew or, if he failed to survive, the nephew's wife.

The court noted that the traditional rule that the court cannot supply missing names to correct a mistake conflicts with the primary objective of ascertaining the intention of the testator. Quoting liberally from the *Restatement*, the court concluded that "it seems logical to this court to choose the path of considering all available evidence as recommended by the *Restatement* in order to achieve the dominant purpose of carrying out the intention of the testator. . . . [W]hat makes sense is to construe the will to add the missing provision by inserting the names of the residuary beneficiaries from the prior will."

Waggoner and Langbein point out that both *Hall* and *Herceg* involved attorney error. They argue that the new remedies for mistake (the harmless-error rule, reformation) are to be preferred over exposure to malpractice liability because of "the simple truth that preventing loss is better than compensating loss."

Although questions of execution errors and mistaken terms are traditionally the province of state law and state courts, the authors note that the new intent-serving rules have a role to play under federal law. The unusually broad preemption provision of the federal Employee Retirement Income Security Act (ERISA) preempts relevant state law even when ERISA is completely silent on the question. "The scholarly literature," they report, "suggests that the federal courts should look to the *Restatement* as a source of federal common law" in adjudicating mistaken beneficiary designations in ERISA-covered plans.

[A copy of the Waggoner-Langbein essay can be obtained by sending an e-mail request to Professor Waggoner: waggoner@umich.edu.]

American Society of Comparative Law honors Eric Stein, '42

The American Society of Comparative Law (ASCL) has honored Eric Stein, '42, the Law School's Hessel E. Yntema Professor of Law Emeritus and a pioneer in the study of European law, with a Lifetime Achievement Award.

ASCL President David Clark noted that "we are celebrating some of the legends of comparative law." Stein, however, modestly claimed in his acceptance remarks that he merely "backed into" comparative law, indeed that he doesn't even fit the mold of a comparativist.

Stein need not try to fit molds. He's been creating them for more than half a century: He was a leader among scholars who first recognized the potential for eventual European union of the nascent European Coal and Steel Community, and his books, journal articles, and lectures have carved a niche in the academic field of comparative law.

Stein is "the founding father of European Community law," Matthias Reimann, LL.M. '83, said in his announcement of Stein as one of the society's three lifetime achievement award recipients. "Eric has maintained the highest standards, and his work shows great craftsmanship, care, and depth," said Reimann, the Law School's Hessel E. Yntema Professor of Law.

Stein and Reimann share more than the title of their named professorships. Reimann said he often has sought Stein's advice on scholarly questions and found him to be a fair and rigorous critic and a good friend.

"I suggested that I do not fit the traditional image of a comparative lawyer," Stein noted in his acceptance remarks. "Nor can I claim membership in the exclusive group of European refugee scholars who came to this country with an established reputation and helped to create the comparative law discipline here. In fact, I backed into the comparative law field from a base in international law and international organization.

"First, I started teaching international law from my colleague Bill Bishop's [long-time U-M Law School faculty member and international law scholar

Professor Emeritus Eric Stein, '42, left and at right, delivers remarks after receiving his award.

William W. Bishop Jr.] innovative casebook that paid attention to international law in national courts: That proved an immensely fertile area for a comparison of the different idiosyncratic styles in which different states give effect to their international obligations in their distinct national legal orders."

More than 30 years later, Stein still was comparing: "In the early '90s, I was a member of an international expert group advising the Czechs and Slovaks on drafting a new federal constitution — a highly contested and ultimately aborted enterprise. I was responsible for the articles dealing with foreign affairs — including again the issue of the effects of international law on internal law and the opening of the constitution to the outside world. Here again comparisons with Western federal constitutions were at the core of a fascinating debate. I tried to recapture the story in a book on the Czech-Slovak split." (*Czecho/Slovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup*, was published in English in 1997 and reprinted in Czech in 2000.)

The ASCL's presentation of a Lifetime Achievement Award was the most recent of several similar awards given to Stein over the past few years. In 2001, in ceremonies in Prague, Czech Republic President Vaclav Havel personally presented the Czech-born Stein with the Medal of Merit First Degree for his "outstanding scientific achievement." The trip to Prague also provided Stein and his wife, Virginia, the opportunity to travel to his birth city of Holice, which made him an honorary citizen. Stein fled Czechoslovakia in 1940 in the face of the Nazi advance. Most of his family members, he learned later, died in the Holocaust.

Last year, Stein was included in the exclusive International Biographic Center's *Living Legends* book and was nominated as an International Educator of the Year. Last summer, he was the subject of a major article in *Jungle Law* magazine, which celebrated him at 91 as "the oldest active law professor in the country" and noted that "the number of his former students who are already retired could staff a large law firm." This year he is to be recognized at the biennial meeting of the European Union Studies Association for his extraordinary contribution to European Union studies.

The ASCL presentation was part of the society's annual meeting at the Law School last fall. Focusing on "Comparative Law and Human Rights," the meeting timed its opening to include presentation of the William W. Bishop Jr. Lecture in International Law by Mary Robinson, former president of Ireland and former UN High Commissioner for Human Rights. (See story on page 14.) The meeting also included two days of discussions on comparative law and human rights.

The discussion panel participants included scholars, activists, and others, and the panels were designed to encourage interchange on "comparative law and human rights rather than comparative human rights," Reimann explained in his remarks opening the meeting. Reimann is an editor in chief of ASCL's *American Journal of Comparative Law* and acted as host for the meeting.

"This is sort of a conference without papers" designed to encourage conversation and exploration of "the relationship and learning opportunities between these two disciplines," Reimann said. Afterward, participants agreed that the combination of shortened formal presentations and extended opportunities for discussion and comparison had produced especially lively and thought-provoking sessions.

Panel discussions were divided into three categories:

1. A plenary session on "Western Human Rights: Tensions within the Club," which included discussions of "The European System: Gay Rights" and "The Transatlantic Dimension: The Death Penalty."

2. "Western Human Rights and Non-Western Resistance," made up of roundtable discussions on "Islamic Law: Women's Rights," "Asian Systems: Counterpoint to Human Rights?", "African Traditions: Female Circumcisions," and "Third World Claims: Economic, Social, and Cultural Rights."

3. Roundtables on "Human Rights in Domestic Legal Orders," with sessions on "South Africa: Constitution Building" and "Israel: Constitutional Evolution and the Boundaries of Comparative Jurisprudence."

There also was a session on scholarly works in process and a concluding discussion.

At the Supreme Court:

'I never thought it would happen so fast'

Professor Richard D. Friedman and graduate Jeffrey L. Fisher, '97, collaborated on Crawford v. Washington, *which Fisher successfully argued before the U. S. Supreme Court. For Friedman, the case affirmed a position he had been advocating for some time. For Fisher, who also argued a second case before the court the same term, the experiences re-affirmed what he had learned at the Court as a clerk.*

If you're a professor like Richard D. Friedman — he is the Law School's Ralph W. Aigler Professor of Law — you wage your campaign to change the law using the tools of academic articles, book chapters, and, when you have the opportunity, court briefs. And you hope someone notices.

Last year, the U.S. Supreme Court noticed, ruling in *Crawford v. Washington* that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

"I never thought it would happen so fast," Friedman excitedly says of the restoration of the Confrontation Clause to its original, simple elegance. A scholar like himself often can devote an entire career to championing a change in the law, he explains. For him, it happened in about a decade.

The *Crawford* decision reestablishes what the U.S. Constitution, and generations of English law before it, demands, according to Friedman. U.S. Supreme Court Justice Antonin Scalia cited Friedman in the Court's majority opinion as among the "members of this Court and academics [who] have suggested that we revise our doctrine to reflect more accurately the original understanding of the [Confrontation] Clause."

Crawford reversed more than a quarter century of jurisprudence that had diluted the Confrontation Clause to allow the admission of hearsay, or un-cross examined evidence if it has an adequate "indicia of reliability" (*Ohio v. Roberts*, 448 U.S. 56, [1980]). In other words, any out of court statement, no matter how accusatory, that a court determined to be reliable could be used against a defendant without the defendant being able to cross examine and confront the source of the evidence.

Friedman dipped into the hearsay maelstrom as far back as the 1980s, when he decided to write the sections on hearsay for the project he was editing, *The New Wigmore: A Treatise on Evidence*. By the 1990s his misgivings about hearsay were translating into advocating for restoration of the confrontation right.

That evolution accelerated when he was studying at Oxford in the mid-1990s. As he pored over the ancient volumes in the law library there, his research reaffirmed how deeply the right to confront a witness is embedded in the English system of law that the United States inherited.

"I found myself being sucked into the historical origins of the right, and I realized that a fundamental value of our criminal justice system had become badly obscured," he explained. "Confrontation is a procedural right, not just a matter of what evidence gets admitted and how to look at it, but more importantly the procedures by which a witness gives testimony.

At the Supreme Court:

Where first principles really come first

Jeffrey L. Fisher, '97, recently named Runner up Lawyer of the Year by the National Law Journal, *clerked at the U.S. Supreme Court with Justice John Paul Stevens in 1998-99 and now is an attorney with Davis Wright Tremaine LLP in Seattle. During the Court's 2003-04 term, Fisher successfully argued two cases before the Court,* Crawford v. Washington, *which concerned the defendant's right to confront those who testify against him, and* Blakely v. Washington, *which dealt with the role of judge and jury in sentencing. Here, Fisher reflects on his path from law school to his clerkship at the Court, and then back to the Court as a practicing lawyer.*

By Jeffrey L. Fisher

One of the great luxuries of law school is the ability to debate every question. No legal premise or court decision is sacrosanct. Every case in the casebooks has forceful contentions on both sides and could be decided either way. Every decision is held up to scrutiny as if it could be overruled by the end of class if a student makes a good enough argument.

When we enter practice, however, we discover that it doesn't exactly work that way. Litigators spend most of their time either operating under binding precedent or at least arguing that a court must reach a certain result because a higher court decision dictates that outcome. We operate in an edifice that, if not fully decorated, is at least framed out and plastered.

But during the year I had the privilege to clerk for Justice Stevens, I learned what might seem an obvious lesson: The Supreme Court is the highest court there is, so precedent rarely dictates any outcome there. It does not really matter how many lower courts have operated under a certain assumption or reached a certain conclusion. If the Supreme Court has not considered the issue, it is an open issue, and the justices will decide it according to their own tools of constitutional or statutory interpretation.

But even then — and here's where this lesson was not so obvious, at least to me — the Supreme Court's own prior decisions hardly ever foreordain the outcome of a case. Sitting on the sidelines, as clerks do, and listening over the course of a term to Supreme Court justices at oral arguments, one quickly realizes that they rarely feel hemmed in by suggestions or trends in the Court's prior decisions. Even when the Supreme Court has squarely decided an issue, justices who dissented still may be unwilling to accept that result in the next case.

Consequently, advocates in the Court are far better off trying to persuade the justices with first principles than with an argument that they have incrementally more precedent on their side. I observed that the most successful advocates offered compelling visions of the basic schematics of the law, instead of — or at least in addition to — arguments that lower courts of appeals misapplied the holding of a prior case.

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"In the old Continental courts, witnesses gave their testimony behind closed doors, out of the presence of the parties. But in the common law system, a prosecution witness gives testimony openly in the face of the defendant. The English fought hard to establish this right, and it was a critical part of the system of criminal procedure that traveled to America."

Before going to England he had been writing articles with titles like "Improving the Procedure for Resolving Hearsay Issues" (*Cardozo Law Review*, 1991) and "Toward a Partial Economic, Game-Theoretic Analysis of Hearsay" (*Minnesota Law Review*, 1992).

After his research in England, he began producing articles like "Thoughts from Across the Water on Hearsay and Confrontation" (*Criminal Law Review*, 1998) and "Confrontation: The Search for Basic Principles" (*Georgetown Law Journal*, 1998). Scalia cited the latter article in his *Crawford* opinion.

Friedman's campaign on behalf of confrontation got a boost in 1998, when Margaret A. Berger, a well-known evidence scholar, invited him to join on an American Civil Liberties Union brief in *Lilly v.Virginia*, in which a defendant challenged admissibility of a statement from an accomplice. In ruling that Lilly's confrontation right had been violated, the Supreme Court did not alter the prevailing framework, but Justice Breyer wrote a concurring opinion that expressed sympathy for the ACLU brief and prompted Friedman to contribute

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continued from Friedman on page 35

"*Lilly v. Virginia*: Glimmers of Hope for the Confrontation Clause?" to the online journal *International Commentary on Evidence*.

Friedman continued to confront the issue of confrontation, writing articles like "The Conundrum of Children, Confrontation, and Hearsay" "(*Law and Contemporary Problems*, 2002), "Dial-In Testimony" (with Associate Dean for Clinical Affairs Bridget McCormack, *University of Pennsylvania Law Review*, 2002), "Remote Testimony (*Michigan Journal of Law Reform*, 2002), and the chapter "No Link: The Jury and the Origins of Confrontation Right and the Hearsay Rule," in *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law* (2002).

In 2003, Seattle-based attorney Jeffrey Fisher, '97, who had become familiar with Friedman's work on confrontation, sent Friedman his petition seeking Supreme Court review of *Crawford v. Washington*. The case involved admission of a statement a defendant's wife made to police without giving the defendant the opportunity to cross-examine. When the Court decided to take the case, Friedman authored an *amicus* brief, and he arranged for Fisher, an attorney with Davis Wright Tremaine, to moot the case at the Law School the week before he argued it in November 2003. At Fisher's request, Friedman sat as second chair at the argument.

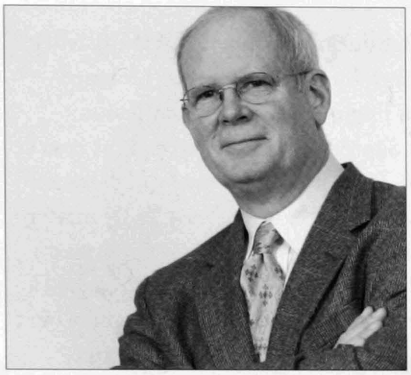
"Jeff made the brave decision to put the emphasis on the broad issue of whether the prevailing doctrine of the confrontation right should be replaced," rather than narrowly focusing on whether that doctrine precluded the use of the challenged statement, according to Friedman.

The Court's decision came in March 2004: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. . . . Where testimonial statements are at issue, the only idicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation."

But the Court threw out a caveat, too: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."

So Friedman isn't finished yet with confrontation. Defining "testimonial" demands considerable legal exploration, he says, and he's jumping into that exploration with the same tools he used earlier. He's already written "Adjusting to *Crawford*: High Court Decision Restores Confrontation Clause Protection" (*Criminology Journal*, 2004), "The *Crawford* Transformation" (*Section on Evidence Newsletter*, 2004) and "The Confrontation Clause Re-Rooted and Transformed" (*Cato Supreme Court Review*, 2004). (An edited excerpt from the latter article begins on page 80.) And he has started The Confrontation Blog, www.confrontationright.blogspot.com.

There will be, he promises, more to come.



Frier honored by Classics Department

Roman law specialist Bruce Frier, the Henry King Ransom Professor of Law, now holds a second named professorship, in the University's Department of Classical Studies, part of the College of Literature, Science, and the Arts.

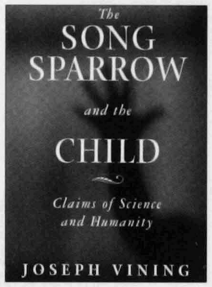
Frier, one of several Law School faculty members who hold joint academic appointments within the University, has been named the Frank O. Copley Collegiate Professor of Classics and Roman Law.

The appointment allowed Frier to name his professorship, and Frier chose Copley, a professor of Latin who taught at the U-M from 1934 until 1977. Copley died in 1993. The Copley Prize is awarded annually in recognition of outstanding achievement in Latin.

Vining targets 'total theory'

continued from Fisher on page 35

Legal philosopher Joseph Vining, the Harry Burns Hutchins Professor of Law, argues in his newest book, *The Song Sparrow and the Child* (University of Notre Dame Press, 2004), that law and science should join hands in mutual respect. Otherwise, he fears, science-based "total theory" may eclipse the glow of human concern for the individual and obscure the unifying links of the chain of life.



The physical book itself reinforces Vining's holistic approach to his subject. It is printed entirely on post-consumer recycled paper processed without chlorine, part of the effort of the Green Press Initiative, a consortium of more than 30 U.S. publishers that have agreed to maximize their use of post-consumer recycled paper and to phase out their use of paper with ancient forest fiber content.

As his subtitle "Claims of Science and Humanity" hints, Vining decries the overextension of scientific understanding into "total theory," and notes that human experimentation in the German and Manchurian death camps of the 20th century showed how easily the line that protects people can be crossed. Throughout the book, he writes, "we will be asking how any total vision of the world can claim the true allegiance of human beings living and thinking together in it."

"This book is also about belief — or not — in spirit," he continues. "The child learns to speak. The song sparrow comes to sing a beautiful song, special not just to its kind but to its individual throat and tongue. They are often compared, the development of individual song in the song sparrow and language in the child. Experiments that could be gruesome and called atrocity in a human context are performed on the young song sparrow. What is it that holds us back from performing the same experiment on the child — or letting it be done?"

Spirit and the legal sensibility we all share is the answer, though that is too simple a way to put it, as Vining makes clear in his discussion of the interplay of scientific system and individual uniqueness. The law is the place where the "system" and the "individual" meet, he writes, where "scientists and those who do not devote their lives to science must meet . . . to trace the line of action and suffering and decide where the sparrow is to be put, and the child."

Harold Shapiro, former president of the University of Michigan and Princeton University, and chairman of President Clinton's National Bioethics Advisory Commission, called *The Song Sparrow and the Child* "an erudite and poetic discourse on the dangers of those attitudes that assign all power, possibilities, and responsibilities to humankind or conceive of humankind as the ultimate creator." George Levine of Rutgers University said the book "is an amazingly learned, unpretentiously cultured meditation on a moral, spiritual, and cultural problem."

Vining's previous books include *Legal Identity*, *The Authoritative and the Authoritarian*, and *From Newton's Sleep*. He holds a B.A. in zoology from Yale University, an M.A. in history from Cambridge University, and a J.D. from Harvard University.

Although this unique aspect of Supreme Court procedure might appear to edge toward chaos, I came to believe it is a great institutional strength. Our culture is constantly evolving, and if the law is to remain stable and adaptable, there must be at least one group of decision makers with the willingness and ability persistently to re-evaluate even the most accepted legal principles.

Having embraced this reality as a clerk, it became quite liberating and exciting as a practicing attorney. Last year, it helped me persuade the justices to adopt a new approach to the Confrontation Clause, abandoning a framework the Court had employed — and many justices in the majority in my case had followed — for over two decades. It also helped me convince the justices to examine erosion of the right to trial by jury under modern sentencing guidelines systems, even though the broad consensus in the lower courts was that no such problem existed.

In short, the Supreme Court frees lawyers to argue the way we did in law school — for the right result, not just the one that precedent allows. It allows us to consider every problem afresh. I am grateful for the opportunity to understand and to employ that lesson.

Alumni

In Detail

A snapshot of this year's entering class

The class of 2007 continues the tradition of excellence associated with U-M Law School students. First-year students come from 127 different undergraduate schools and about two-thirds of these students are entering the Law School a year or more after completing their bachelors' degrees. The median age of this year's class has increased to 24 from last year's 23.

Here's a by-the-numbers snapshot of the class, as provided by the Law School Admissions Office:

- Total number of students: 381
- States represented: 41
- Michigan residents: 25 percent
- Non Michigan residents: 75 percent
- Male: 54 percent
- Female: 46 percent
- Minority: 27 percent
  - Asian American-11.5 percent
  - Black/African American-6.8 percent
  - Hispanic-6.0 percent
  - Native American-2.3 percent
- Median GPA: 3.62
- Median LSAT: 167 (96th percentile)
- Undergraduate institutions represented: 127
- Foreign countries represented: 9

New assistant dean:
Law School's history and promise are exciting

Todd Baily, who was named assistant dean for development and alumni relations last fall, is finding himself excited, energized, and challenged by his work at the Law School.

After 12 years in the University of Michigan's Office of Development, and four years as a major fundraiser for the Mayo Clinic in Rochester, Minnesota, Baily brings to the Law School a blend of solid experience and undiminished enthusiasm. "I like being around youth and energy and unrealized potential," he explained of his return to higher education.

"I have a strong passion for higher education and quality institutions, and in my view there is no better public education institution than the University of Michigan Law School. Having been away, I have a new perspective on the University."

"And," he added, "this is very much a return home for me and my family. Ann Arbor is a wonderful community in which to live."

Baily noted his experience with the University's central development office will help Law School and University-wide fundraising efforts support each other and draw from one another's strengths. The Law School benefits from being part of a large, highly regarded research university, he explained, and the University benefits from having a top-ranked Law School as one of its components.

During his interviews last summer and his first few months on the job here, Baily reported that he's been impressed by the quality and commitment of the Law School's students, faculty, administrators, staff, and volunteers. He added that he is especially taken with the long-range vision for the School put forward by Dean Evan H. Caminker and Campaign Steering Committee Chairman Bruce Bickner, '68. For him, Baily said, becoming part of the Law School's fundraising and alumni efforts is "a great opportunity to grow a program that will serve the needs of this School for many years to come."

Last fall's alumni reunions gave Baily an opportunity to meet many Law School graduates and he said he's excited about meeting more members of the worldwide Law School community. "I very much look forward to meeting and working with the alumni and friends of the Law School who care deeply about and value what Michigan Law School has done for them and their families."

Baily came to the Law School from the Mayo Clinic in Rochester, Minnesota, where he served as associate chair for philanthropic support at the Mayo Foundation. In that position, he was responsible for all fundraising programming for the world-famous clinic, which has operations in Jacksonville, Florida, Scottsdale, Arizona, and Rochester.

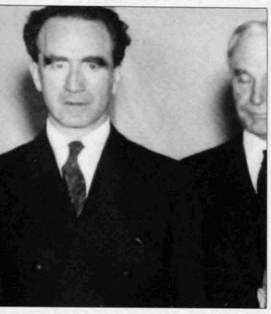
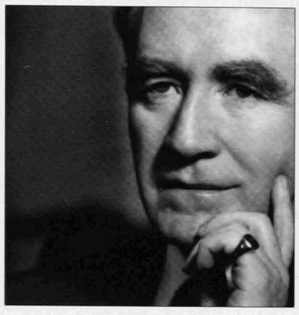
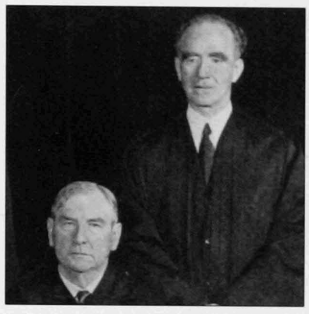
Prior to Mayo, Baily worked for the University of Michigan Office of Development from 1988 to 2000, and was director of principal gifts at the time he went to the Minnesota-based clinic. Baily began his fundraising career at Vanderbilt University in Nashville, Tennessee.

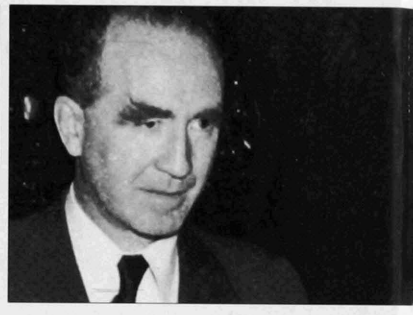
Law School Dean Evan H. Caminker said he's happy to have Baily on board. "Private philanthropic support of the Law School is essential to its ongoing success, given both its ambitious plans for providing legal education of unsurpassed quality and also the steadily declining state support for public schools," Caminker explained. "Todd Baily has the skill, experience, and energy to help secure the financial resources necessary for the School to remain one of the truly outstanding law schools in the world."

Law Library Director Margaret Leary, who chaired the search committee, noted that "Todd Baily brings extraordinary experience and professional qualifications to the Law School. Twelve years right here at Michigan — and then four at the Mayo Foundation, with increasingly broad responsibilities, while he continued to maintain contact with many individual donors — mean that he can quickly get up to speed."

Leary added that Baily's "management style, and his plans to mentor and grow the staff, build a strong base in the Law School Fund, conduct a successful Campaign, and integrate his unit into the Law School match what the search committee sought."

Remembering U.S. Supreme Court Justice Frank Murphy, '14



Two members of the Law School class of 1940 who clerked for Frank Murphy, '14, the only Law School graduate to date to become a U.S. Supreme Court justice, reflect on his impact. Washington, D.C.-based attorney John H. Pickering remembers Murphy with the gift of the Frank Murphy Seminar Room, and Professor Eugene Gressman recalls how fate seemed to ordain the clerkship that launched his career as Supreme Court scholar and litigator.

Ed. Note: John H. Pickering, '40, died as this issue of *Law Quadrangle Notes* was printing. In an e-mail to the Law School community, Dean Evan Caminker expressed "profound sadness" at Pickering's death, and noted that "John was truly a leader of both the D.C. and national bars, whose enormous accomplishments as a lawyer were recently recognized when the *American Lawyer* bestowed upon him one of its inaugural Lifetime Achievement in the Law awards last year (his list of individual honors and accomplishments, including his work as a leading Supreme Court advocate, literally fills a page). I had the pleasure of working closely with John first when I was a young lawyer at then-Wilmer, Cutler & Pickering (we wrote a Supreme Court *amicus* brief together), and then again more recently during the *Grutter* litigation, and finally as an Honorary Chair of our Campaign Steering Committee. Through the years I have seen John in many contexts, public and private, and inevitably his two great passions in life would work their way into his every conversation: his unwavering commitment to the advancement of social justice, and his exuberant appreciation for our Law School and the outstanding education he received here, both about the law and about life. He will be sorely missed as an important member of our alumni family."

John Pickering's stellar career was highlighted on page 68 in Fall 2004, vol. 47.2, *Law Quadrangle Notes*. This article can also be accessed on the School's Web site at www.law.umich.edu/NewsandInfo/LQN/fall2004/Pickering.htm.

Remembering Frank Murphy | John H. Pickering, '40:

Murphy 'a great influence on my career'

John H. Pickering, '40, a founding partner of Wilmer, Cutler, Pickering, Hale, and Dorr LLP, is quick to acknowledge that U.S. Supreme Court Justice and fellow Law School graduate Frank Murphy, '14, "had a great influence on my career."

Although Pickering cut his lawyer's teeth right after graduation at Cravath, de Gersdorff, Swaine & Wood in New York, it was as clerk to Murphy that he distilled the philosophical blend of legal practice and public service that has propelled his career for 60 years.

And a stellar career it is: involvement in now-textbook Supreme Court cases like *Youngstown Sheet & Tube Co. v. Sawyer* (1952), challenging President Truman's takeover of U.S. steel mills; *Powell v. McCormack* (1969), dealing with federal government checks and balances; and *Vacco v. Quill* and *Washington v. Glucksberg*, 1997 cases involving physician-assisted suicide. Last year *The American Lawyer* added to Pickering's long list of honors by presenting him with one of its first 12 Lifetime Achievement in the Law Awards recognizing attorneys that editor Aric Press described as "lawyers with sterling records in practice who also played important roles as citizens." (A report on the awards and Pickering's career appeared in the Fall 2004 issue of *Law Quadrangle Notes*.)

Pickering, Murphy's clerk for two Court terms, is one of three graduates of the Law School's class of 1940 who clerked for the justice. Murphy's other

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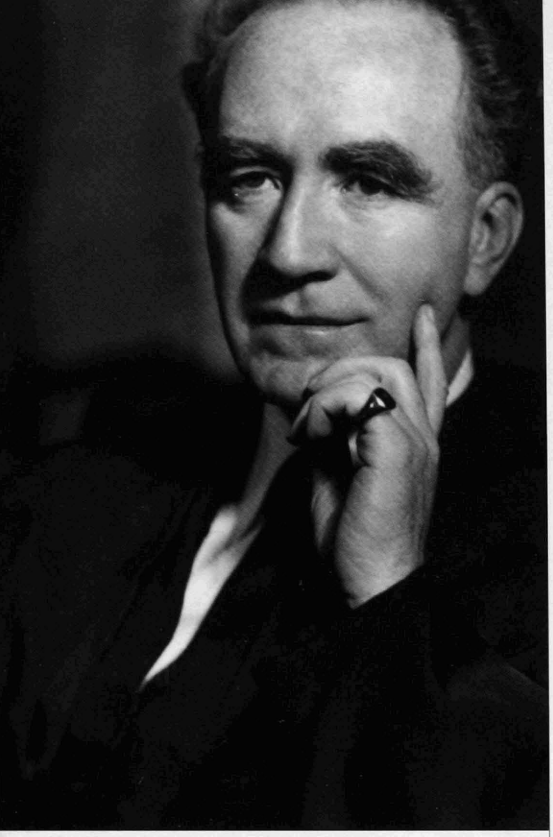
At the settlement of the Chrysler strike on April 6, 1937, then-Michigan Governor Frank Murphy, seated at center, presides as labor leader John L. Lewis, seated left, and Walter Chrysler, seated right, shake hands.

Photos accompanying these stories are from the Frank Murphy Collection at the University of Michigan's Bentley Historical Library and appear here with permission. Photos are from the library's Image Bank and Box 95 of the collection.



Supreme Court Justice Frank Murphy

Frank Murphy, 1890 – 1949

- 1890: Born William Francis Murphy, April 13, Harbor Beach, Michigan.
- 1914: Graduated from University of Michigan Law School.
- 1917–19: U.S. Army office, World War I, service in Europe.
- 1919: Law studies at Lincoln's Inn, London, and Trinity College, Dublin.
- 1920–23: First Assistant U.S. District Attorney, Eastern District of Michigan.
- 1922–27: Law instructor, University of Detroit.
- 1923–30: Recorders Court Judge, Detroit.
- 1930–33: Mayor of Detroit.
- 1933–36: Governor-General, Philippine Islands. After the islands achieved commonwealth status, he became U.S. High Commissioner.
- 1937–38: Governor of Michigan.
- 1939–40: Attorney General of the United States.
- 1940–49: U.S. Supreme Court Justice.
- 1949: Died July 19, Detroit. Buried in Rock Falls Cemetery, Harbor Beach, Michigan.

To commemorate Murphy,

Pickering is making a $1 million gift to the Law School to establish the Justice Frank Murphy Seminar Room in the School's new addition. "I am making this gift in memory of United States Supreme Court Justice Frank Murphy, Law School Class of 1914, who advanced many worthy issues of public interest in his outstanding career of public service in the state of Michigan and the nation," Pickering explains. "I hope that the activities in this seminar room will include learning that advances the public interest and other themes championed by Justice Murphy."

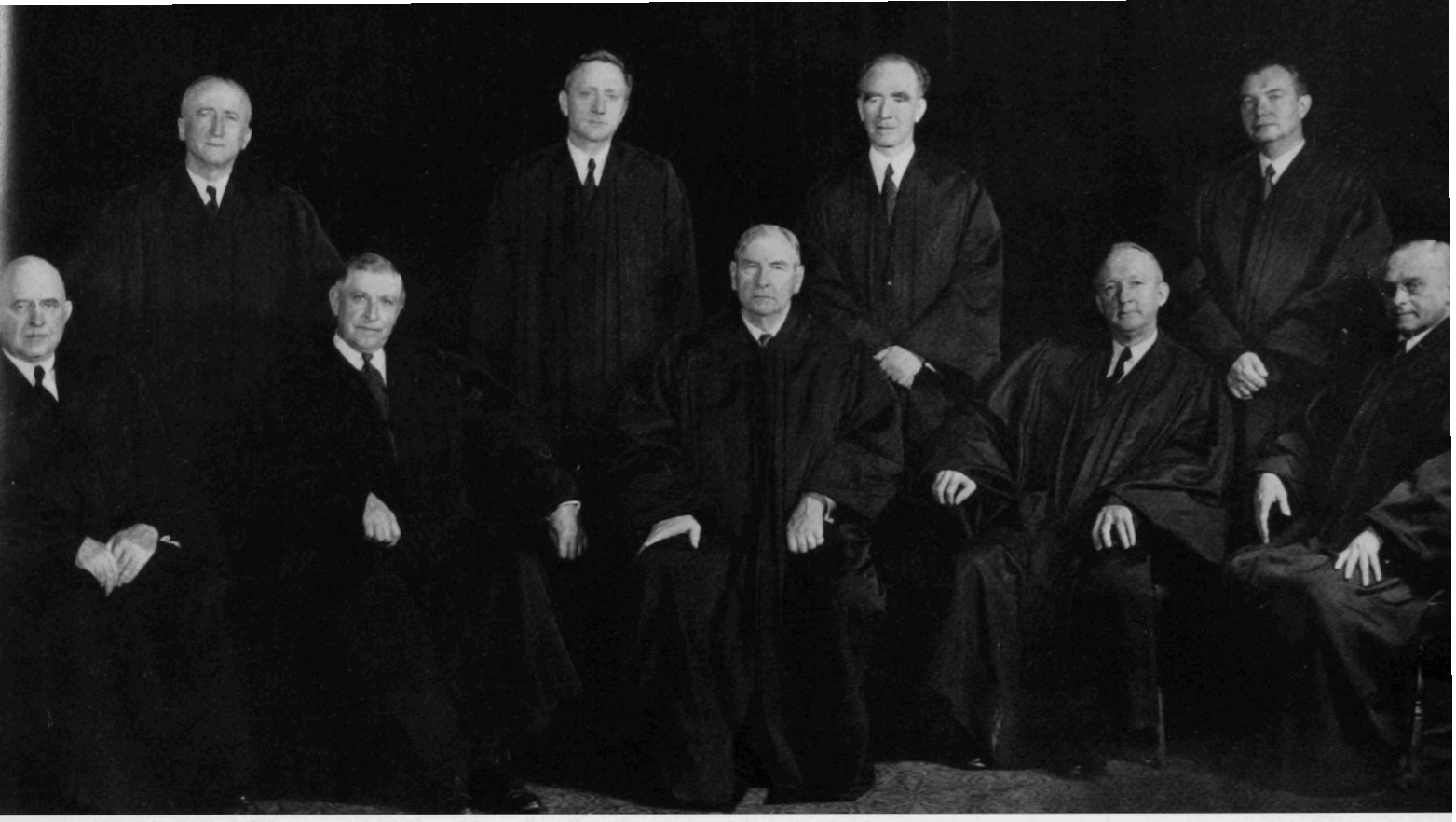
The room will include a plaque engraved with the following:

Justice Frank Murphy Seminar Room

Given in honor of the late Justice Frank Murphy, LLB 1914

Mayor of Detroit, U.S. High Commissioner in the Philippine Islands, Governor of Michigan, Attorney General of the United States, and Associate Justice of the United States Supreme Court

By his former Law Clerk, John H. Pickering, AB 1938, JD 1940



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clerks from the class were the late John Adams, '40, who clerked during the Court's 1941 term, and Supreme Court scholar and professor emeritus Eugene Gressman, '40, who succeeded Pickering and served for five terms. (See Gressman's essay on his experience on page 45.)

Pickering says he had aligned himself with "the law and order people" as a law student but learned a different perspective from Murphy. "There wasn't a lot of 'yeast' in the Law School at that time," he told a Law School interviewer recently. "We were all there during the Great Depression with some sacrifice and no great social impetus. This was the time of the Flint Sit-Down Strikes in 1936–37 when Murphy was governor of Michigan.

"Governor Murphy resisted sending in the troops and worked out a compromise between the unions and management. His handling of the situation was eventually universally praised, but at that time I was probably with the law and order people who criticized Murphy's refusal to use force to break the strike. However, my years with Murphy changed my attitude."

Was there a case that to Pickering exemplifies Justice Murphy's attitude?

"When I showed up to clerk, Justice Murphy said, 'There's one thing I want you to keep an eye out for. Last year I was persuaded to join the majority in the case of *Minersville v. Gobitis* that required school children to pledge allegiance and salute the flag. A group of Jehovah's Witness children were expelled because they refused to do that.' Justice Murphy wanted to correct that decision. . . . Eventually in 1943 a second case came along, *West Virginia v. Barnette*, that again raised the flag salute issue and gave the Supreme Court the chance to reverse the *Minersville* case, which the Court did.

"Prior to *Barnette*, Justice Murphy had been joined by Justices [Hugo] Black and [William] Douglas in a dissenting opinion in the case of *Jones v. Opelika* (1942), which involved the right of the Jehovah's Witnesses to distribute handbills. All three justices had voted against the Jehovah's Witnesses in *Gobitis*. In their dissenting *Opelika* opinion, they said they

Supreme Court Justice Frank W. Murphy, '14, is standing third from left in this photo of the Court in fall 1941. Seated, from left, are Justices Stanley Forman Reed, Owen J. Roberts, Chief Justice Harlan Fiske Stone, Hugo Lafayette Black, and Felix Franfurter. Standing, from left, are Justices James F. Byrnes, William Orville Douglas, Murphy, and Robert H. Jackson.

U.S. High Commissioner Frank Murphy is standing at left, next to Secretary of State Cordell Hull, as President Franklin D. Roosevelt, seated at center, approves the Philippine constitution on March 23, 1935.

were wrong in *Gobitis* and intimated a desire to correct their error. They did so in *Barnette*."

Murphy was a civil liberties champion throughout his career, a philosophy he reflected whether writing with the Court's majority or in dissent. In *Thornhill v. Alabama* (1940), for example, he clarified labor's right to strike and held that peaceful picketing is an exercise of freedom of speech. His dissent in *Korematsu v. United States* (1944), in which the Court upheld the U.S. government's wartime internment of Japanese-Americans, has been widely quoted:

"Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution."

John Adams, Eugene Gressman, and John Pickering as they appear in the composite photograph of the Law School's graduating class of 1940.

Remembering Frank Murphy: Eugene Gressman, '40

The three Supreme Court law clerks from the Michigan Law class of 1940

By Eugene Gressman, '40

Fate No. 1, defined as an event over which I had no control or anticipation, all began on January 4, 1940. On that day President Roosevelt announced that he was nominating Frank Murphy, then the Attorney General of the United States, to the post of Associate Justice of the Supreme Court of the United States. By January 15 his nomination had been confirmed by unanimous voice vote of the Senate. Frank Murphy thus became the first and only Michigan graduate (both B.A. and LL.B.) ever to sit on the Supreme Court.

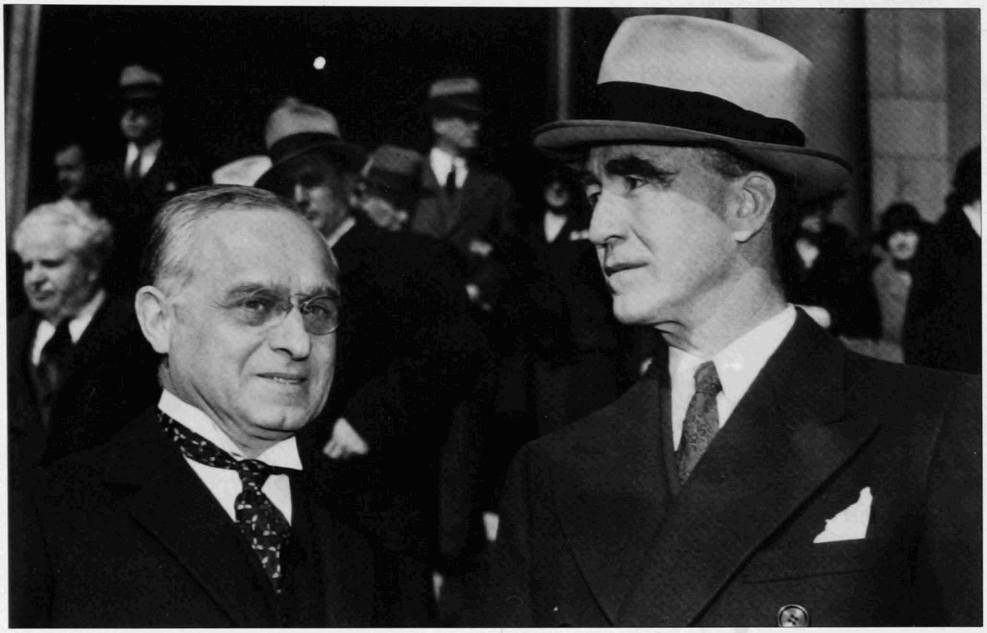
Now it was up to me to try to take advantage of this Fate No. 1. My first thought was to suggest to the then-Dean Stason that he should try to get Justice Murphy to agree to select his law clerks from the most recent Michigan law graduates. At that time an Associate Justice was entitled to have but one law clerk per term. The Dean then discussed this matter with the new justice, who readily agreed to confine his law clerk selections to Michigan law graduates. But because Murphy's appointment came in the midst of the 1939–1940 term of the Court, he was almost forced to accept Justice Frankfurter's suggestion that he select a recent and available Harvard law graduate to serve as Murphy's law clerk for the remaining five or six months of that term.

In the meantime the Dean compiled a short list of those third-year law students he felt would make good law clerks.

As I remember, my friend John Adams topped the list. John Pickering, another good friend of mine, was No. 2. And I think I was somewhere near the bottom of the list, perhaps at No. 6 or 7.

It came as no surprise that Justice Murphy picked the first name on the list, John Adams, to be his first Michigan law clerk. But that left me without any job prospects and not knowing what area of law I wanted to be involved with.

Fate No. 2 then stepped in. It declared that I should not accept the Dean's suggestion that I pursue a job at a fine corporate law firm in Toledo, Ohio. Fate told me to say, "But I don't want to go to Toledo." Having become an ardent New Dealer as my political faith, I said that I wanted to go to Washington, D.C., and seek a job with a federal department or agency. I did just that despite the dean's disapproval. And without any help or recommendation from the Michigan Law



Top, Supreme Court Justice Felix Frankfurter, left, and Murphy at the funeral of Supreme Court Justice Louis Brandeis in 1939. Above, His Excellency Governor General Frank Murphy, center, is shown with his party at the town fiesta of Macabebe in The Philippines in this circa 1933 photo.

School, I spent nearly four months in Washington before finding a job at the Securities and Exchange Commission. That job, as a part of Fate No. 2, was to be of inestimable value in dealing with administrative law cases when I did reach my Supreme Court clerkship.

Fate No. 3 proved to be a more general proposition that affected not only those on the Michigan list of potential Supreme Court law clerks but all other young males in the nation. That Fate took the unfathomable form of World War II and the accompanying draft of all able-bodied males — including, of course, all those on the Michigan list of those graduates who were thought to be worthy of becoming a Supreme Court law clerk.

As a matter of fact, it was Fate No. 3 that limited John Adams to one term as Justice Murphy's law clerk; his military obligations forced his exit. And it was Fate No. 3 that eventually limited John Pickering to two terms as John Adams' successor; he too left because of military obligations.

As for me, Fate No. 3 dictated that I too be called to prepare for military duty by taking the obligatory physical exam. But I was rejected for physical reasons. Indeed, that Fate also dictated that all others on that Michigan list of 1940 be called by the wartime draft. Nor did that Fate stop at that point. The military draft, at a time when America was fully involved in World War II, denuded the Michigan Law School of all students who might have become eligible to serve as a Supreme Court law clerk. Even many of the faculty, too old to serve as soldiers or sailors, left their teaching assignments for more lucrative outside legal jobs.

In fact, Fate No. 3 left me at the bottom of the barrel of those thought

capable of serving as a Supreme Court law clerk. There was literally no competition for Justice Murphy's law clerkship once it was known that I had unintentionally been rejected by the military. And so, with the recommendations of both John Adams and John Pickering, Justice Murphy chose me to be his third law clerk from the 1940 Michigan law class.

Finally, Fate No. 4 dictated that the three law clerks from that 1940 list will be remembered for the following:

1. Michigan's 1940 Law School class set a never-equaled record, for no other law school ever produced three Supreme Court law clerks from the same class to serve the same Justice.

2. My own service as law clerk to Justice Murphy for five terms, 1943-1948, has never been equaled or exceeded since the Supreme Court Building opened in 1935, which for the first time in history provided office space not only for each justice and a secretary but also for one or two law clerks. Since then, when the number of law clerks possible each term has risen to four, the number of law clerk offices has increased, often located in spaces relatively remote from the justice they serve.

3. The work performed by the three law clerks from the 1940 Michigan class was quite different from the work performed by today's law clerks. All we had to work with was one typewriter, two sheets of paper with a carbon in between, the briefs or petitions of the parties to any given case, and then whatever original research in the library we felt necessary. In short, we never even heard of Lexis or Westlaw or any other research tool. The work was hard and I often spent half or more of the night completing my assignments.

4. But hard though the work was, I have never regretted one minute of it. It has affected and inspired all the subsequent legal events in my life. Soon after I left my clerkship in 1948, I was asked to help write what became the leading practitioner's guide to practice before the Court, entitled *Supreme Court Practice*, now in its 8th edition. I developed my own rather extensive practice before the Court, filing many hundreds of petitions and briefs and engaging in 13 oral arguments before the Court. My Supreme Court experience was instrumental in becoming a law school professor, while at the same time continuing to practice before the Court. So I am indeed happy with the Four Fates that composed and guided my professional life.

Eugene Gressman *is a professor emeritus at the University of North Carolina School of Law. He is well-known as a national authority on practice and procedure before the United States Supreme Court. He coauthored the leading lawyers' guide to such practice and procedure entitled* Supreme Court Practice. *This authoritative guide is now in its eighth edition (2002). His expertise on this subject began in 1943, when he became a law clerk to Supreme Court Justice Frank Murphy, a 1914 graduate of the University of Michigan Law School. His five-year tenure in that clerkship (1943 to 1948) is the longest in the modern history of Supreme Court clerkships. He has also written articles and pamphlets on such practice and procedure, as well as on other federal constitutional and statutory issues. In addition, he has coauthored one constitutional law textbook, and authored part of a treatise on federal jurisdiction. As a private practitioner, he has filed hundreds of* certiorari *petitions in the Supreme Court and has orally argued before the Court on 13 occasions. His most noteworthy argument was in* INS v. Chadha, *462 U. S. 919 (1983). In that case, he represented the United States House of Representatives in its effort to sustain the constitutionality of the so-called one house veto procedure.*

Professor Gressman earned both his B.A. (1938) and J.D. (1940) degree (both with honors) from the University of Michigan; he also served as an editor of the Michigan Law Review. *In 1994, he received an Hon. LL.D degree from Seton Hall University, whose law school each year holds the Eugene Gressman Moot Court Competition. As professor, he has taught courses in constitutional law, federal jurisdiction, professional responsibility, and seminars in Supreme Court practice. He has taught some or all of these courses at North Carolina, Seton Hall, Fordham, Michigan, Ohio State, Indiana at Indianapolis, Catholic, and George Washington University law schools. In 1987, he received the Frederick B. McCall award for Teaching Excellence at the North Carolina School of Law. Born in 1917, he still is active writing or advising others in writing Supreme Court petitions and briefs, as well as composing his own articles and speeches on a variety of Supreme Court matters. He will also be active in helping prepare a ninth edition of* Supreme Court Practice.

One Summer, Two Friends

A Lifetime of Giving Back

The following story by Rebecca Freligh and photos are reprinted with permission from the Winter 2005 issue of *Leaders & Best*, produced by the University of Michigan's Office of Development.

There is no doubt Tom Van Dyke thought the world of Amalya Kearse.

As colleagues at the Law School, he admired her mind. She had that magical combination of book smarts and common sense. Still, when Van Dyke asked what she wanted to do after their law school studies, and Kearse replied, "Work for a Wall Street firm," he couldn't help but wonder: Was it possible?

In 1962, black women did not become Wall Street lawyers. Then along came Amalya Kearse, and the legal world learned what Tom Van Dyke knew from his own experience: Amalya Kearse was brilliant.

"She had a lot of good common sense as well as a great analytical mind, and she was never pretentious about her abilities," Van Dyke says. "That's very rare."

Today, Judge Amalya L. Kearse, '62, is one of the country's most respected jurists as a member of the powerful 2nd U.S. Circuit Court of Appeals, and Thomas W. Van Dyke, '63, is paying homage to her as a friend and mentor by establishing a scholarship that promotes the diversity and intellectual vitality of the Law School. He has had significant interest in civil rights causes for the past 40 years, and doesn't hesitate to say Kearse has always been his inspiration.

~

It was the summer before his second year of law school that Van Dyke felt his eyes opening, and they've been watchful ever since.

The catalyst was Kearse, who came from Wellesley College to Michigan to pursue her lifelong dream of becoming a lawyer.

When it came to racial issues, Van Dyke says he had "little or no consciousness. I grew up in Kansas City, and the schools I went to were all segregated. It wasn't that I heard prejudice around me, but I knew no peers of color."

Then he met Kearse. A native of Vauxhall, New Jersey, she had dreamed since childhood of becoming a litigator, an almost unheard-of specialty for women. A year apart in school, Kearse and Van Dyke first met as summer research assistants to Professor Samuel D. Estep. Through the prism of their relationship as colleagues and friends, Van Dyke learned his first lessons in what would become a lifelong education in diversity.

In the early 1960s, women and minorities were scarce in law schools across the country; at Michigan, Kearse was the only African American of eight women in her class of about 350, while in Van Dyke's class of the same size there were six women, all white.

"We'd go to have a Coke together at the Michigan Union, and people would stare," he says. "It was 1961, and we were a white male and a black female."

They never discussed racism or sexism, and Van Dyke knew Kearse was a first-rate student. Still, he was skeptical when she talked of working on Wall Street.

As the summer went on, Van Dyke's respect for Kearse grew immeasurably. Indeed, she became a role model. "I admired her approach to so many things," he says.

Van Dyke's classmate Lawrence W. Waggoner met Kearse when she was an editor of the *Michigan Law Review* and he was a second-year staffer.

"As soon as you met her, you knew she was a person to be trusted," says Waggoner, '63, today the Lewis M. Simes Professor of Law. (See story on Waggoner on page 30.) "She was much looked up

to. She didn't have a hint of a chip on her shoulder. She didn't have anything to prove; she was the genuine article."

Wall Street also took notice.

Upon graduation, Kearse was hired as a litigator by the firm of Hughes Hubbard & Reed, a triumph in a day when New York firms were bastions of white male privilege.

She recalls her job search: "One gentleman told me they had no women lawyers, and they had only just hired women secretaries. Another firm said they had four women already."

In 1969, Kearse became a partner at Hughes Hubbard and the first African American to be elected to partnership of a major Wall Street firm. Hughes Hubbard managing partner Orville Schell told *The New York Times* at the time: "She became a partner here not because she is a woman, not because she is black, but because she is so damned good — no question about it."

After his own graduation, Van Dyke went to work in Washington, D.C., where he grew in his sensitivity to prejudice, influenced by friends' experiences and by society at large. He says he will never forget the marches and vigils he saw unfold in support of what would become the Civil Rights Act of 1964.

With his wife, Sharon, Van Dyke returned to his hometown of Kansas City, Missouri, where today he is a partner with the law firm of Bryan Cave. He has since been involved with promoting diversity on several fronts: in his firm, through numerous civic organizations, and as chair of the Kansas City's Human Relations Commission, a mayoral appointment.

"It's been my passion," says Van Dyke. And Kearse lit the spark. "When I thought about what she had to go through, that's what kicked it off."

The Van Dykes are giving $500,000 to establish their Law School scholarship in Kearse's honor, citing her "contributions to the vitality and diversity of intellectual engagement at the Law School during Tom Van Dyke's law studies and her subsequent contributions to the Law School."

Kearse's groundbreaking path continued past Hughes Hubbard. In 1979, President Jimmy Carter appointed her to the 2nd U.S. Circuit Court of Appeals in Manhattan, the first woman to be named to that prestigious judicial body. She was only the second African American named to that bench, the first being Thurgood Marshall.

Within six months, Kearse was mentioned as a possible choice to be the first woman justice on the U.S. Supreme Court, and her name has appeared on short lists for the high court ever since.

While leaving Hughes Hubbard meant a sizeable pay cut, Kearse says she was attracted to the judiciary and to public service. "I enjoyed research and writing, and I thought the bench, especially the appellate bench, was a good fit for the work I liked best," she says.

The most significant 2nd Circuit case of her tenure, in her view, has been *United States v. Yonkers Board of Education*, a decades-long school desegregation case deemed by some to be the most significant of its kind after *Brown v. Board of Education*.

Kearse names her parents as her role models, along with another lifelong hero, Jackie Robinson. Robert F. Kearse worked as Vauxhall's postmaster, his dream of a legal career derailed by the Depression. Myra Smith Kearse, a physician, was the only woman in her medical class of 1925. The judge is proud to note that a park in Vauxhall is named after her father and a multi-service center after her mother.

Longtime U-M law professor John W. Reed lauds Kearse's "stellar career on the bench" and recalls her as a superb student. But Reed, the Thomas M. Cooley Professor Emeritus of Law, remembers her best as "a Renaissance woman" with multiple interests, including sports and bridge. Kearse is a world-class bridge player who has written and translated books on the game.

The facts are simply indisputable. "She did everything, and she did everything well," says Reed, an expert on courtroom evidence.

Tom Van Dyke has no objection.

The Van Dyke File

Name: Tom Van Dyke

U-M ties: J.D., 1963; member of the Law School Committee of Visitors

Memorable U-M experience: Being part of the "Brown-Bag Club," five married male law students who ate their sack lunches together daily. More than four decades later, the men, along with their wives, remain friends, get together regularly, and even take vacations as a group.

Favorite spot on campus: The Pretzel Bell

On supporting U-M: "I was fortunate enough to have a full tuition scholarship all three years. I want to do for others what I received."

The Kearse File

Name: Judge Amalya L. Kearse

U-M ties: J.D., 1962

Memorable U-M experience: "I have a very fond memory of the entire experience from beginning to end."

Favorite spot on campus: "The office" (where she worked for John W. Reed, now Thomas M. Cooley Professor of Law Emeritus, and did much of her studying)

Thompson, '72, leads nation's women judges

The Hon. Sandra Thompson, '72, of the Los Angeles Superior Court has been elected president of the National Association of Women Judges (NAWJ). The association announced Thompson's acceptance in conjunction with the swearing-in of its 2004-05 board of directors at its 26th annual conference in Indianapolis last fall.

Among those applauding the announcement was U.S. Supreme Court Associate Justice Sandra Day O'Connor, a founding member of NAWJ. "I am very pleased that Judge Thompson has been elected and has agreed to serve this wonderful organization," O'Connor said.

A life member of NAWJ, Thompson was appointed to the South Bay Municipal Court by California Gov. George Deukmejian in 1984. She was elected in 1988, 1994, and 2000, and was elevated by unification with the Los Angeles Superior Court in January 2000. She presides over misdemeanor criminal matters.

Thompson earned her bachelor's degree at the University of Southern California. She is a former member of the board of directors of the National Center for State Courts and is the former chairperson of the Los Angeles County Municipal Court Judges Association. She also is a member of the California Judges Association, National Bar Association, California Women Lawyers Association, Black Women Lawyers Association of Los Angeles, and Langston Bar Association.

NAWJ works to ensure fairness and gender equality in American courts and equal access to justice for vulnerable populations. It also offers professional and personal support to help judges achieve their full potential.

U-M Law School graduates have been active with NAWJ since it was formed in 1979. Among its founding members are the Hon. Cornelia Kennedy, '47, of the U.S. Court of Appeals for the Sixth Circuit, and the Hon. Amalya Kearse, '62, of the U.S. Court of Appeals for the Second Circuit. (See article concerning Kearse on page 48.)

Beverly Burns, '79, heads Michigan Women's Foundation board

Beverly Hall Burns, '79, a principal and deputy CEO of Miller, Canfield, Paddock and Stone PLC in Detroit, has been elected chair of the Michigan Women's Foundation's (MWF) board of directors and is leading the foundation through its "Facing Change Campaign."

Burns was elected to the two-year post last fall. The "Facing Change Campaign" aims to build up the 19-year-old foundation's endowment and annual giving program.

MWF promotes women's economic self-sufficiency by developing emerging women leaders and providing financial and technical assistance to nonprofit organizations. MWF is the only Michigan-wide foundation that focuses solely on women and girls.

Burns' practice centers on labor law issues and she represents private and public employers in National Labor Relations Board and state employment relations matters. She also works on employment discrimination and labor-related issues and is a member of Miller Canfield's Automotive Group.

In 1997, *Crain's Detroit Business* named Burns "One of Detroit's Most Influential Women." She also was a finalist in *Crain's* "2003 Executive Woman of the Year" search.

Burns joined Miller, Canfield, Paddock, and Stone in 1979. She left the firm in 1981-82 when she taught at Glassboro State College in New Jersey and was a fellow in the Wharton School's Industrial Research Center at the University of Pennsylvania. She returned to Miller Canfield in 1983.

Last fall, Burns also was elected to a two-year term as president of the board of directors of Michigan State University's College of Arts and Letters Alumni Association. The association funds grants to faculty and students and sponsors alumni events throughout the year. Burns earned her B.A., with honors, from Michigan State University.

Starr Commonwealth honors Judge Eugene Arthur Moore, '60

The Starr Commonwealth Board of Trustees last fall named the Hon. Eugene Arthur Moore, '60, chief judge of the Oakland County [Michigan] Probate Court, recipient of the organization's Child Advocacy Award. Moore accepted the award at Starr Commonwealth's 91st anniversary Founder's Day Ceremony in October.

Moore has served on Oakland County's Probate Court since 1966 and has been active in local, state, and national justice organizations. He was president of the National Council of Juvenile and Family Court Judges from 1980-91. In 1996, the National Council as well as the Michigan Probate Judges Association honored him for "meritorious service to juvenile courts in America."

Moore is "a remarkable force in juvenile justice in America," according to Clinical Professor of Law Donald N.

Duquette, director of the Law School's Child Advocacy Clinic. "He and I have served on many boards and commissions over the years and his wisdom and perspective are always in demand. His opinion in the Nathaniel Abraham case [January 13, 2000] was widely praised as a fair and just resolution for that young man, but also a fair reminder of the rehabilitative ideal that underlies America's juvenile justice system."

Abraham, who was tried as an adult under a 1997 Michigan law, was convicted at age 13 of second degree murder. He was 11 at the time of the incident. Under the law, Moore could sentence Abraham as an adult, a juvenile, or give a blended sentence.

"This court orders that Nathaniel Jamar Abraham be placed within the Juvenile Justice System and committed to F.I.A. (Michigan Family Independence Agency) for placement at Boys Training School," Moore decided. "The court shall continue to supervise the progress of Nathaniel Abraham and will conduct six month reviews of his progress. It is further ordered that Nathaniel may not be transferred from Boys Training School without a Court Order after a hearing, with notice to the prosecutor and defense. This sentence shall be effective until Nathaniel reaches age 21 when this court loses jurisdiction. This shall be a treatment program involving individual and group therapy for he and his family and shall include positive role models with positive rewards for proper behavior."

"When I taught Children and the Legal System in fall 2003, I invited Judge Moore to speak to my class about the Nathaniel Abraham case and the present and future of juvenile justice," Duquette added. "He was a terrific influence on the class."

The annual Starr Commonwealth award honors those who have made a lifetime commitment to programs, policies, or services that benefit young people. Previous winners have included Muhammad Ali; Wendy's founder and CEO Dave Thomas; Neal Shine, publisher of the *Detroit Free Press*; and Michigan Governor Jennifer Granholm.

Moore's colleague Elizabeth Pezzetti, chief judge *pro tempore* of the Oakland County Probate Court, praised Moore as "a man who can be respected and emulated by the entire bench for his devotion to children. Through his historic commitment to doing what is right for children, he has always extended himself far beyond routine judicial parameters."

Starr Commonwealth is headquartered at Albion, Michigan, and operates facilities in Michigan and Ohio.

Handschu, '66, heads Academy of Matrimonial Lawyers

Barbara Ellen Handschu, '66, a leading family law practitioner in New York City, has been elected president of the American Academy of Matrimonial Lawyers. Handschu said her goal for the academy is to provide parents with better tools to work with their children after the parents divorce.

A columnist on family law issues for *The National Law Journal*, Hanschu serves as special counsel to Mayerson Stutman in New York City. She restricts her practice to trial and appellate family law issues and is a nationally recognized expert on custody.

The American Academy of Matrimonial Lawyers is composed of the nation's top 1,600 divorce and family law attorneys.

Law School grads among NAPABA's 'Best Lawyers Under 40'

Two Law School graduates, Victor I. King, '89, and Christina Chung, '96, have been named among the National Asian Pacific American Bar Association's "Best Lawyers Under 40."

Eighteen young lawyers were honored by NAPABA, which announced the 2004 awards last fall. The award recognizes "talented individuals within the Asian Pacific American legal community under the age of 40 who have achieved prominence and distinction in their fields of endeavor — be it the practice of law, academia, business, civic and charitable affairs, the judiciary, or politics — and have demonstrated a strong commitment to civic or community affairs."

King is university counsel for California State University in Los Angeles and president of the board of trustees of the Glendale [California] Community College District in Glendale/La Crescenta. He was elected to the board in 1997 and re-elected in 2001. He also serves as a director of the Center for Asian Americans United for Self Empowerment in Pasadena.

Chung is project director at the Asian Pacific American Legal Center (APALC) in Los Angeles, where she has spearheaded lawsuits challenging sweatshop abuses in major clothing companies and won significant settlements for Asian and Latino immigrant workers. Under her leadership, APALC filed a civil rights complaint against the county welfare department charging discrimination against people whose English was limited and won $1.7 million in back benefits for low-income clients.

Susan Eklund, '73, serves as U-M dean of students

Susan Eklund, '73, who is well known to the Law School community through her service as assistant dean for student affairs and associate dean, has been named University of Michigan interim dean of students through June next year.

Eklund, who earned both her bachelor's and law degrees at the University of Michigan, was named to the interim post last summer and her interim appointment was extended in November. A search committee is expected to recommend a permanent dean of students by spring 2006.

University of Michigan Vice President E. Royster Harper cited Eklund's depth of experience in announcing Eklund's appointment. Eklund was the Law School's assistant dean for student affairs for 8 years and served as associate dean for 15 years. At the Law School, she was responsible for overseeing admissions, financial aid, registration, academic advising, student standards, discipline and professional responsibility certification, career planning and placement, services for students with disabilities, and student programs.

She retired last April after serving five years as director of user services for Michigan Administrative Information Services and M-Pathways.

"With nearly 30 years of solid student affairs and leadership experience, Ms. Eklund is a seasoned professional who can assist the Office of the Dean of Students in maintaining its mission: To ensure that students accomplish their educational and personal goals within the context of the broader academic purpose of the University," according to Harper.

"Her proficiencies and insight will play an important role in planning, guiding, management, and accountability for the dean of students' area during this intervening period. We are truly appreciative of the fact that she has come out of retirement briefly to assist us at this time while we launch a comprehensive national search for a permanent dean of students."

Saunders: Children deserve special protection

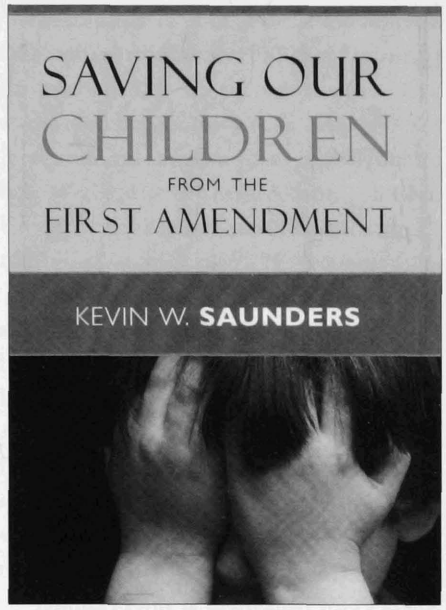
"Reasonableness" is a critical measure for Kevin W. Saunders, '84, and is the cornerstone of the argument for restriction that he lays out in his most recent book, *Saving Our Children from the First Amendment* (New York University Press, 2003).

Saunders, a professor at Michigan State University College of Law, applauds current restrictions that prohibit distribution of sexual material to children and argues that the prohibition also should embrace violent, vulgar, or profane materials and music that contains hate speech.

"The word 'reasonable' is important here," Saunders writes. "If the dual approach argued for here is to have any meaning, that meaning is that restrictions when children are involved need not meet the strict scrutiny tests required for most restrictions involving adults."

Saunders recognizes the value of free speech in a democratic society like this one, and stresses that restrictions applied to children must be explicit and very clear that they do not apply to adults.

But he considers children to be a special category for protection. "The thesis of this work is that the First



Amendment should function differently for children and for adults," he writes in the introduction. Making his case through chapters like "The Most Important Freedom," "The Costs of Free Expression," "Children and Other Constitutional Rights," "Obscenity," "Violence," "Hate Speech," "Advertising," and others, he concludes 255 pages later that "reasonable restrictions on the access of children to negative media influences should be recognized as constitutional."

Saunders also is the author of *Violence as Obscenity: Limiting the Media's First Amendment Protection* (Duke University Press, 1996).

'Rocky' Dhir, '99, and his 'win/win/win situation'

Abhay "Rocky" Dhir, '99, with Career Services attorney-counselor Carolyn Spencer, who was Dhir's Legal Practice teacher when he attended the Law School.

Abhay "Rocky" Dhir, '99, knew what kind of foundation he would need when he decided to launch his legal research firm: He would use the training he received in the Law School's Legal Practice Program as the model for training his own researchers.

Legal Practice, launched in 1996 as a two-semester requirement for all first-year law students, teaches students the skills of legal research, writing, and analysis in assignments ranging from interoffice memos to dispositive motions as well as briefs, letters, advocacy communications, and the many other sorts of communications that are part of practicing law. The course also includes training in oral and written advocacy.

The program is taught by fulltime clinical faculty and takes the place of the Case Club system taught by third-year law students that had been used for generations of law students. Dhir knew how he had benefited from the Legal Practice Program and knew that he could use it as a launch pad for fashioning his own training program.

To discuss how best to proceed, he returned to the Law School to meet with Grace Tonner, director of the Legal Practice Program and his Legal Practice teacher, Carolyn Spencer. (Since teaching Dhir's class, Spencer has become an attorney-counselor in the Office of Career Services and no longer teaches in the Legal Practice Program.)

"It was a pleasure to see one of my former students return to the Law School to seek our advice," Spencer said. "As both Rocky's Legal Practice professor and Career Services counselor, I'm proud to have helped Rocky achieve his goals."

By the year 2000, Dhir was ready to begin assembling the pieces that would become Atlas Legal Research the next year. That meant traveling to India, where he planned to recruit and train his researchers. Dhir was born in India, but left to come to the United States when he was two.

Dhir saw many good reasons for using India-based researchers. Obviously, they would be less costly to hire than domestic researchers. But also:

- Educated Indians speak English.
- India's legal system is rooted in English common law, like the U.S. legal system.
- India's legal documents are written in English, and legal researchers are fluent in the language and accustomed to working in it.
- Finally, it's daytime in India when it's nighttime in the United States — so Atlas' Indian researchers can provide "overnight" service to their American clients.

"How did I train them?" Dhir asks. "I took what I had learned in Legal Practice, and bravely went over there [to India] and did the same thing." He opened Atlas in 2001 and says it meets needs throughout the legal profession. For example:

- For solo practitioners, "the best part is that our solo attorney clients save on the tremendous overhead costs that come with hiring full-time associate attorneys." Solo practitioners also can use Atlas to cut down the time they spend in research and document writing.
- For small and mid-sized law offices, there is no need to be understaffed when work loads increase because they can turn to Atlas' researchers as the need arises.
- For large law firms, "Atlas' services enable large firms to grow at sustainable rates that will survive even rough recessions." Large firms don't have to over-hire when business booms and then lay off when it contracts.

Atlas Research wasn't an overnight goal for Dhir. He always had been interested in business and in running his own business. He knew, as he told a Law School audience last fall, that practicing law is "a great option, but not your only option."

Like many Law School graduates, he clerked for a judge — in Dhir's case for the chief judge of the Northern District of Texas. Also like many Law School graduates, he was offered a position with a major law firm — but Dhir turned down the offer.

"It was a very tough decision," he explained, but "I wanted the freedom of charting my own course." He liked the idea of being independent, and was willing to live spartanly while he worked toward that dream.

So he did what few law school graduates do: He returned home to Dallas and moved back in with his parents. No shortcoming here, he explained. "I come from a culture where it's not a disgrace to live at home."

"I had this business idea," he continued, "and I didn't want to get comfortable, and used to a salary, and then not be able to do it.

"And I didn't want anybody to do it first."

So he launched Atlas and his own solo practice firm. Now, he finds, lawyers and firms that hire Atlas also often are taking him on as co-counsel in their cases.

As Dhir says, it's a "win/win/win situation."

Special alumni speakers enliven reunions

Each graduating class elects one of its members to deliver a talk at its commencement ceremonies — and graduates enjoyed a version of this tradition last fall when an outstanding member of each reunion group delivered a featured talk as part of the reunion weekend's activities.

Mary Snapp, '84, corporate vice president and a deputy general counsel of Microsoft Corporation, was featured speaker for the reunion weekend in September, which brought back to the Law School members of the classes of 1979, '84, '89, '94, and '99. Larry D. Thompson, '74, former deputy U.S. attorney general and now senior vice president/general counsel of PepsiCo, was the special speaker for the reunion weekend in October for members of the classes of 1949, '54, '59, '64, '69, and '74.

At both gatherings, Dean Evan H. Caminker outlined the "State of the Law School," discussing current activities, initiatives, and future plans, and answered graduates' questions.

Mary Snapp, '84, corporate vice president and a general counsel at Microsoft, tallies the rapid changes that technology has brought over the last two decades during her talk to Law School graduates at their reunion in September. Snapp oversees Microsoft's compliance with federal court orders stemming from the Justice Department's suit against the corporation.

Mary Snapp, '84
Corporate Vice President, Deputy Counsel Law and Corporate Affairs Department
Microsoft Corporation

Mary Snapp, who joined Microsoft 17 years ago, narrated Power Point screens of then-and-now that traced how much has changed since she and her classmates were law students — and how quickly those changes have occurred:

- Jimmy Carter, then Ronald Reagan were president. *Cheers* and *Hill Street Blues* were in their original runs and drawing hordes of television viewers.
- By 1994 *Friends* was the popular television show, and George Herbert Walker Bush was president. Then Bill Clinton and George W. Bush moved into the Oval Office. *Sex in the City* became a television staple.
- Former Playboy Playmate turned feminist Gloria Steinem was an inspiration to Snapp and other young women who aspired toward careers. Recently, Snapp noted, she was talking with two women at Microsoft who told her "they were inspired by the technology itself."

The adoption of technology has accelerated, with PCs, cell phones, and DVDs rising to dominance in very short periods of time, Snapp recounted. Seventeen years ago, when she joined Microsoft, e-mail was "very rudimentary" and did not allow you to correct your message, she related. Today, e-mail is a major form of communication within and among business mates and individuals around the world — and it's easy to correct your message if you catch your mistake before you hit "Send."

Similarly, cell phones, once considered curiosities, now often have replaced land line telephones — and today's versions can take digital photos and handle e-mail as well. Computer-based games have become big business, and the burgeoning development and popularity of hi-tech games continues to raise new legal issues, especially in the field of intellectual property.

Information dispersion has exploded in unimagined ways, Snapp recounted. AOL began in 1990, MSN and MSNBC in 1995. "I don't know about you, but I rarely watch television [news] anymore," she reported. "But I check online several times a day."

Our daily language, too, has incorporated the technology-spawned, jargonized language that Snapp jokingly calls "Geek Grock." It's common practice to say "fire up" your computer or "launch" a product. Music, video, Napster (both generations), all have become part of the "broad cultural movement" that has been occurring over the past decade and leading many people to believe that whatever is on the Internet should be available free to everyone. The law has been racing to catch up to and control free distribution via the Web, and today "music companies have found a way to license the music and make it available online."

Other issues have arisen, too:

- The electronic junk mail known as spam has become a daily hazard of opening your e-mail, despite the best of filters: Today it is estimated that "well over 50 percent of e-mail that goes over the system is spam," according to Snapp.
- Privacy issues and online profiling continue to elude easy solutions in the virtual world.
- Security issues from "literal dumpster diving" to "phishing," plus invasions by viruses and worms, continue to challenge the security of modern data gathering, storage, management, and transmission.
- Contracts are taking on new meanings. For example, what does it mean to accept a contract in the online world?

Such changes have become pervasive parts of our way of life, but actually have occurred over a very small number of years, according to Snapp. And for the future, we only can expect that rapid change will continue to characterize our lifestyle.

Former U.S. Deputy Attorney General Larry D. Thompson, '74, delivers a reunion talk in which he discusses Justice Department response to the September 11, 2001, terrorist attacks and the role of lawyers in U.S. society. A week after speaking at the Law School in October, Thompson became senior vice president and general counsel for PepsiCo.

Larry D. Thompson, '74
Former Deputy Attorney General
U.S. Justice Department

Larry D. Thompson, who became senior vice president and general counsel of PepsiCo at the beginning of this year, delivered a wide-ranging talk that touched on issues of security versus civil liberties in the post-9/11 world, the effort he led to increase diversity within the U.S. Justice Department, and the role of lawyers in American corporations and society.

The search for a successful post-9/11 balance between keeping Americans safe and protecting their constitutional liberties will continue for a long time, he predicted. "This is going to be an ongoing, dynamic process. We're going to struggle as a society in finding the balance of security and our civil liberties."

Part of that balancing act took place in 2004 when the U.S. Supreme Court ruled that detainees at Guantanamo Bay Naval Base in Cuba should have access to the courts to determine why they are held. Because of that restriction's effect on battling terrorism, "we may need to have a national security court," Thompson said. This is because the "best way to get information is to get it during detention. The Supreme Court has put limits on this. We may need another mechanism. . . . The best way to get intelligence is through detention and interrogation during detention."

Thompson also addressed:

• Affirmative action

The decision that the Supreme Court reached in the 2003 case challenging Law School admissions policies "in a strange sort of way is acceptable to the government" even though President Bush opposed the University of Michigan program. By the time the Law School case was underway, the Justice Department already had realized that it needed to increase diversity among its own attorneys. As the Law School case made its way through the courts, Thompson was heading the department's first-time-ever effort to diversify its ranks. "We implemented a diversity effort. . . . A diversity program is very important, and I am very proud of what we did at the Department of Justice," Thompson said.

• The impact of 9/11

The terrorist attacks of September 11, 2001, launched a new era in which U.S. citizens for the first time must live with a threat of "mass murder," according to Thompson. The terrorist threat is "stateless and shadowy" and demands that protection shift from responding to an event to preventing it. Most of those charged with terror-related activities, like the cell of six people in the Buffalo, New York, suburb of Lackawana, have been tried within the regular criminal justice system, as they should be, not by military courts or tribunals. When irregularities have surfaced, like they did in a case in Detroit, the suspect properly has been acquitted.

• Detention

"We do not have a concept of preventive detention in this country, and I am not advocating that we adopt preventive detention. But we [federal authorities] did use the material witness statutes — an independent judge can detain [a material witness] — and that's something I think has been a success."

The FBI interviewed some 7,000 people after 9/11, about 1,000 of whom were illegal aliens. Afterward, thinking that these aliens already had been identified, Thompson authorized the FBI to proceed with investigation of the immigration status of these 1,000 aliens. Looking back on that decision, he said, it might have been handled differently.

• Lawyers and their role in society

Corporate scandals, like those involving Enron, occurred in part because "lawyers were afraid to give independent professional advice. . . . They were blinded by the money they were making."

Lawyers must reemphasize their role as neutral, professional advisers, Thompson said. "There's nothing wrong with good, hard-nosed, fair criticism," he explained. "When you look at our profession, we're trained to be critical, to analyze. . . . We need to question, to be critical, and our profession is going to play a leading role in this process, obviously."

Dean Caminker: Current success and future promise mark 'State of the Law School'

With an outstanding entering class, five new faculty members, the launch of a capital campaign to fund expansion of the Law Quad, and new curricular initiatives, the Law School continues to be in the forefront of legal education and is headed into a brighter than ever future.

That's the picture that Dean Evan H. Caminker drew in his "State of the Law School" talks to graduates who returned to the Law School for reunions last fall.

- The "heart and soul" of the Law School is its outstanding students, and this year's 381-strong entering class continues that tradition, Caminker reported. This year's first-year students rank in the 96-97th percentile in Law School Aptitude Test scores. And this is the third consecutive year that the entering class has broken the preceding record for the highest combination score of LSAT and undergraduate Grade Point Average.

  The class also is "quite diverse" in many ways. Nearly sixteen percent entered Law School after working in a different career, about 15 percent have at least one parent who never earned a college degree, and 12 percent already hold another advanced degree. Forty-six percent are women, 7 percent are African American, 6 percent are Latino, and 2 percent are Native American.
- Five new faculty members joined the Law School this academic year: Corporate law expert Alicia Davis Evans; Vikramaditya S. Khanna, a scholar of both U.S. and Indian corporate and securities laws; business law specialist, Certified Public Accountant, and real estate broker Roshunda Price, '93, who is working with the Law School's Legal Assistance for Urban Communities Clinic in Detroit; public international law specialist Steven R. Ratner, who has a special expertise in nations, like those of eastern Europe, that are making the transition from one legal/economic system to another; and Kimberly Thomas, who is teaching in the general civil/criminal clinic. (A story on these new faculty members, with their photos and biographies, appeared on pages 30-33 in the Fall 2004 issue of *Law Quadrangle Notes*.)
- State financial support for the Law School continues to dwindle, and this year accounts for only about 3.15 percent of the Law School's budget. As a consequence, private donations are a major factor in Law School finances. The School's traditional Law School Fund annual giving program is more critical than ever, and, in addition, the School has launched "an important capital campaign to fund expansion of the Law Quad." The only expansions to the 75-year-old Law Quad have been construction of the aluminum-faced section of the Legal Research Building in the 1950s and the underground Allan F. and Alene Smith Library that opened in the 1980s. "We need more space" and "we need a new kind of space," Caminker explained: The number of faculty has grown, as has the number of courses the Law School offers. But class sizes have shrunk as teaching styles have shifted from large lectures to smaller discussion-centered classes and seminars. (A more complete discussion of this appears in Caminker's Dean's Message in the Fall 2004 issue of *Law Quadrangle Notes*.)
- New curricular initiatives include a plan to expand the reach of the Legal Practice Program, a required first-year skills course, into the realms of business and transactional law in upper-level courses. Last fall, the Law School launched a new Pediatric Advocacy Clinic, which combines expertise from the Law School, Medical School, and Mott Children's Hospital. The Law School also is launching a new initiative to expand students' opportunities to participate in public service work. (See story on page 4.)

Reunion Giving

The recognitions on these pages reflect all class giving during each class' reunion counting period, which began July 1, 2003, and ended two weeks after each class' reunion celebration. Total Class Giving demonstrates the generosity of the class during this time period. Photos show activities at the reunions.

Class of 1954

50th Reunion

Co-Chairs: Lawrence L. Bullen and Myron M. Sheinfeld
Committee: Robert B. Aikens; Stephen A. Bromberg; Paul B. Campbell; Granger Cook Jr.; Roderick K. Daane; Robert B. Dornhaffer; Benton E. Gates Jr.; Norman N. Gottlieb; Hugh G. Harness; Carl A. Hasselwander; Leonard Kravets; James S. Patrick; Herbert S. Ruben; John F. Shantz; Theodore J. St. Antoine; William K. Van't Hof; Stanley R. Weinberger; Marvin Oscar Young; Richard W. Young

Class Participation...47%
LSF Gifts and Pledges...$102,500
Total Class Giving...$311,000

Donors to Law School Fund

$10,000 TO $24,999
Lawrence L. Bullen
Myron M. Sheinfeld
Theodore J. St. Antoine

$5,000 TO $9,999
Carl A. Hasselwander
William G. Hyland

$2,500 TO $4,999
Chris T. Christ
Clyne W. Durst Jr.
Shigeru Ebihara

$1,000 TO $2,499
Karl E. Braunschneider
Paul B. Campbell
Milo G. Coerper
Roderick K. Daane
Robert B. Dornhaffer
Norman N. Gottlieb
John S. Hager
Hugh G. Harness
James L. Howlett
Robert J. Kilgore
Warren F. Krapohl
Alvin P. Lipnik
Donn B. Miller
Justin T. Rogers Jr.
Bradford Stone
Malcolm J. Sutherland
Donald M. Wilkinson Jr.
Robert T. Winston
Arthur M. Wisehart
Richard W. Young

$1 TO $999
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Nola Allen
Gaylord L. Baker
George B. Berridge
Robert H. Bloom
William S. Bonds
Stephen A. Bromberg
Larry J. Burke
Robert W. Cary
Raymond M. Champion Jr.
Charles H. Cleminshaw
Howard A. Cole
Julius Denenberg
Jerry A. Donley
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Clyne W. Durst Jr.
Richard A. Entenmann
John S. Fallon
James T. Frost
Jack F. Gardner Sr.
Roger K. Garfink
Henry W. Gleiss
Herbert A. Goldsmith Jr.
James A. Hildebrand
Alan R. Hunt
Constantine D. Kasson
John B. King
Lawrence A. King
Leonard Kravets
John H. Leddy
George M. Mack
Joseph R. Matsen
Patrick H. McCauley
Maclyn T. Parker
Raymond J. Payne
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Jerome V. Sluggett
Ann W. Trombadore
William K. Van't Hof
John K. VonLackum
Stanley R. Weinberger
John M. Wilson
Marvin O. Young
Allen Zenmol

Donors to Endowments, Capital Projects, and Other Restricted Funds

$100,000 AND ABOVE
Robert B. Aikens
John E. Riecker

$1 TO $999
Jerome S. Fanger

Planned Gifts
Richard W. Young

Class of 1959

45th Reunion

Committee: Gerald L. Bader Jr.; Stanley N. Bergman; Charles F. Clippert; John H. Jackson; James P. Kennedy; Jerome B. Libin; J. Lee Murphy; Hilary F. Snell; Frank K. Zinn

Class Participation...35%
LSF Gifts and Pledges...$183,252
Total Class Giving...$363,333

Donors to Law School Fund

$25,000 TO $49,999
Louis Perlmutter

$10,000 TO $24,999
Stanley N. Bergman
John H. Jackson
Jerome B. Libin
Denis T. Rice
John E. Schippel

$5,000 TO $9,999
Donald A. Hines
Frank D. Jacobs
Leroy Michael Jr.
Leonard B. Schwartz
Wendell A. Smith
John P. Williams
Frank K. Zinn

$2,500 TO $4,999
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Robert M. Brucken
James T. Funaki
Stanley Hirt
Edwin C. Landis Jr.
J. Lee Murphy
Joel D. Tauber

$1,000 TO $2,499
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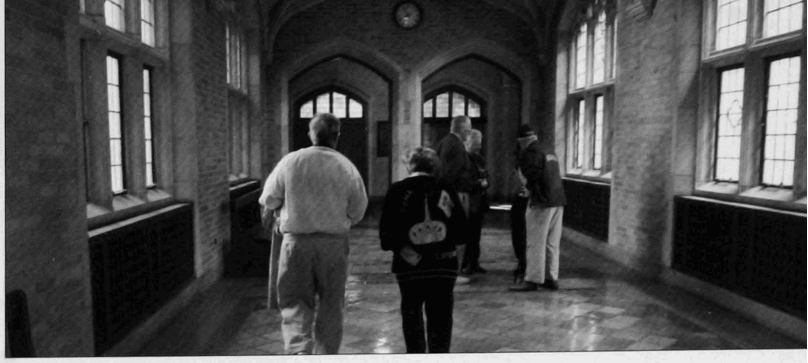
James L. Burton
Guido J. Casari Jr.
Thomas A. Dieterich
Wallace M. Handler
George Q. Hardwick
Arnold Henson
Barry Hirsch
E. Campion Kersten
William R. Norris
Ronald J. St. Onge
John M. Swinford
George S. Tulloch

$1 TO $999
Harry M. Asch
Stanton H. Berlin
Homer S. Bradley Jr.
James W. Brehl
Richard C. Brunn
G. Sidney Buchanan
Edward D. Bureau Jr.
Donald W. Carlin



Samuel B. K. Chang
David C. Coey
Lynn W. Fromberg
Malcolm H. Fromberg
Bradley M. Glass
Robert H. Gorske
Albert E. Grinton
James J. Hall
David I. Harfeld
Wolfgang Hoppe
John T. Jeandrevin
Marten R. Jenkins
Alvin S. Kaufer
James P. Kennedy
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Lawrence J. La Brie
Paul M. Ladas
Wayne Leengran
Lawrence E. Levine
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Peter S. Lucyshyn
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Wilbur J. Markstrom
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Alan F. Meckstroth
Robert F. Mitchell
William H. Morman
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John Butler Schwemm
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George C. Stewart
Edward B. Stulberg
Robert P. Volpe
Marilyn M. Wanger

Donors to Endowments, Capital Projects, and Other Restricted Funds

$100,000 AND ABOVE
Frederick P. Furth

$50,000 TO $99,999
Frank K. Zinn (In memory of Frank T. Zinn '29)

$25,000 TO $49,999
John D. Boyles

$5,000 TO $9,999
John P. Williams

Class of 1964

40TH REUNION

Co-Chairs: Michael V. Marston and Thomas E. Palmer
Committee: James R. Borthwick; Timothy K. Carroll; James L. Copeland; Irwin J. Dinn; Daniel R. Elliott Jr.; Leon E. Irish; Justice G. Johnson Jr.; James L. Krambeck; John E. Mogk; Stephen W. Roberts; Richard A. Rossman; Neal Schachtel; Lloyd A. Semple; Marvin S. Shwedel; James M. Wilsman; Stephen M. Wittenberg; James D. Zirin

Class Participation...32%
LSF Gifts and Pledges...$127,303
Total Class Giving...$128,803

Donors to Law School Fund

$10,000 TO $24,999
Melinda M. Morris
Thomas E. Palmer
E. David Rollert
James D. Zirin

$5,000 TO $9,999
H. Lee Blumberg
Irwin J. Dinn
Michael V. Marston
Philip McWeeny
Lawrence G. Meyer
Peter S. Sheldon

$2,500 TO $4,999
William B. Dunn
William T. Hutton
Justice G. Johnson Jr.

$1,000 TO $2,499
Robert J. Battista
Dennis P. Bedell
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James R. Borthwick
James L. Copeland
Alan D. Croll
Ronald K. Dalby
Daniel R. Elliott Jr.
John W. Erickson
Fred J. Fechheimer
Robert L. Freedman
J. Portis Hicks
S. Olof Karlstrom
William J. Madden Jr.
Donald L. Martin
John E. Mogk
Donald A. Pierce Jr.
Kurt E. Richter
Stephen W. Roberts
Richard A. Rossman
Neal Schachtel
Cheever Tyler
Robert G. Waddell
Kenneth P. Walz
John P. Williams

$1 TO $999
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Marvin J. Brenner
E. Alan Brumberger
Timothy K. Carroll
Alan G. Choate
John J. Connaughton
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Robert M. Kroenert
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Timothy W. Mast
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Walter A. Urick
Daniel W. Vittum Jr.
J. Michael Warren
David G. Williams
Stephen M. Wittenberg

Donors to Endowments, Capital Projects, and Other Restricted Funds

$1,000 TO $2,499
Irwin J. Dinn

$1 TO $999
Daniel R. Elliot Jr.
S. Olof Karlstrom
Robert G. Waddell

Class of 1969

35TH REUNION

Co-Chairs: Peter P. Garam; Robert E. Gooding Jr.; and Stanley S. Stroup
Committee: Ben J. Abrohams; John T. Blakely; Stephen C. Brown; Marilynn J. Cason; Spencer T. Denison; John E. Dewane; Darrel J. Grinstead; Frederick Lambert; John F. Lynch; Joseph L. McEntee Jr.; James P. Murphy; Allen J. Philbrick; Donald E. Shelton (Honorary); Ronald L. Walter; Steven Y. Winnick

Class Participation...31%
LSF Gifts and Pledges...$222,300
Total Class Giving...$354,300

Donors to Law School Fund

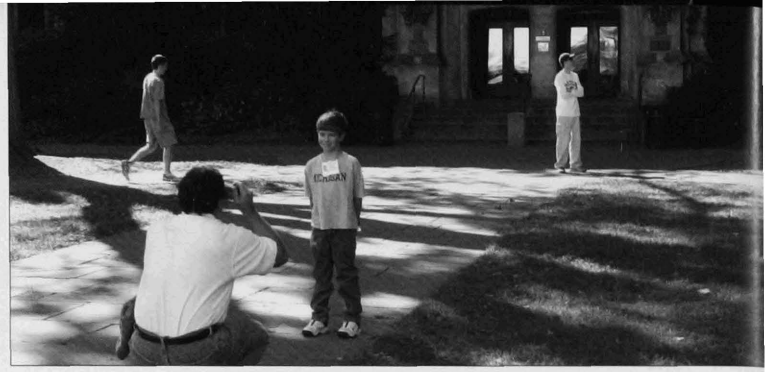
$25,000 TO $49,999
Peter P. Garam
Robert J. Kheel
Arnold M. Nemirow
Stanley S. Stroup

$10,000 TO $24,999
Marilynn J. Cason
Robert E. Gooding Jr.

$5,000 TO $9,999
Joseph L. McEntee Jr.
Thomas M. O'Leary

$2,500 TO $4,999
Lori Klein Adamek
David L. Haron
Jim D. Korshoj
Robert J. Millstone
B. Lance Sauerteig
Roger C. Siske
David E. Weiss Jr.

$1,000 TO $2,499



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Spencer T. Denison
Harold E. Fischer Jr.
Charles L. Gagnebin III
Stephen P. Kikoler
Chan Jin Kim
Richard M. Kohn
Van H. Leichliter
Gary M. Macek
Rickard F. Pfizenmayer
Steven Y. Winnick
Lawrence E. Young

$1 TO $999
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Ben J. Abrohams
Stephen W. Andrew
Ben Barnow
William A. Childress
Joel E. Cooper
E. Duane Cubitt
John P. Davis
Paul R. Dimond
Donald R. Epstein
Robert D. Evans
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Simcha Shapiro
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Michael R. Smolenski
Ken R. Springer
Stephen J. Spurr
Michael B. Staebler
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Anthony C. VanWestrum
Philip L. Weinstein
Edward M. Welch Jr.

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$25,000 TO $49,999
Robert J. Kheel

$2,500 TO $4,999
Ben J. Abrohams

$1,000 TO $2,499
Robert M. Vercruysse

$1 TO $999
David L. Haron
Michael L. Stefani

Class of 1974

30TH Reunion

Chair: Richard J. Gray
Committee: Gail L. Achterman; Stephen R. Drew; Allen E. Giles; Forrest A. Hainline III; Gene H. Hansen; Thomas F. Koernke; P. Kenneth Kohnstamm; Richard G. Moon; Clarence L. Pozza; Bart J. Schenone; Langley R. Shook; Barbara S. Steiner; Larry D. Thompson

Class Participation...30%
LSF Gifts and Pledges...$181,700
Total Class Giving...$289,000

Donors to Law School Fund

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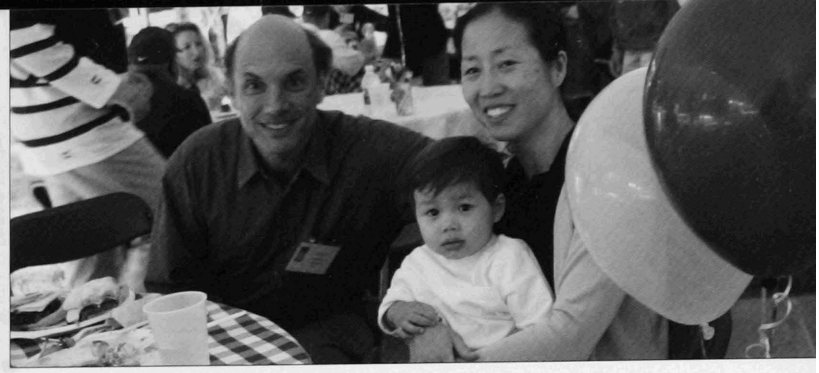
James B. Griswold
Michael H. Morris
Larry D. Thompson
Dana L. Trier

$5,000 TO $9,999
Thomas L. Harnsberger
Jeffrey L. Howard
Larry D. Hunter
Stuart M. Lockman
Richard A. Riggs
Bart J. Schenone
Langley R. Shook

$2,500 TO $4,999
Robert A. Armitage
Estelle C. Busch
Lloyd A. Fox
Allen E. Giles
Bruce F. Howell
Anita H. Jenkins
Robert A. Nelson
David C. Patterson
Marcia L. Proctor
Daniel E. Reidy
Larry J. Salustro

$1,000 TO $2,499
Emerson J. Addison Jr.
Jerome A. Atkinson
Arnold P. Borish
Philip A. Brown
R. Michael Gadbaw
Frank J. Greco
Gene H. Hansen
Louis A. Highmark Jr.
Patrick J. Hindert
H. Wendell Johnson
Jeffrey D. Keiner
Bernard S. Kent
Renate Klass
Matthew J. Mason
William F. Mills Jr.
Richard G. Moon
Louis P. Rochkind
Michael Touff
Patricia D. White

$1 TO $999
Gail L. Achterman
David B. Anderson
W. David Arnold
Richard F. Babcock Jr.
John R. Barker
Darryl S. Bell
John C. Bigler
Michael B. Brough
Bodo Buechner
Robert W. Buechner
Eileen Cairns
Robert O. Chessman
Norma Ann Dawson
Gary R. Diesing
Joseph F. DiMento
Bruce D. Dugstad
Michael D. Eagen
S. Jack Fenigstein
Raymond F. Fix
Steven F. Friedell
Glen B. Gronseth
Forrest A. Hainline III
Susan K. Hartt
Susan L. Hauser
Alan B. Hoffman
Michael A. Holmes
William S. Jordan III
Thomas W. Kennish
Stephen T. Kochis
Thomas F. Koernke
P. Kenneth Kohnstamm
Renard J. Kolasa
Jeffrey D. Komarow
Spencer LeRoy III
Gordon R. Lewis
Daniel W. McGill
Stephen J. Meyer
Shirley Moscow Michaelson
Alan S. Miller
Arthur R. Miller
Kraig E. Noble
Irving Paul
John W. Pestle
Richard A. Polk
Thomas G. Power
Clarence L. Pozza Jr.
John P. Racine Jr.
Louis C. Roberts
John M. Rogers
Gary A. Rowe
Michael D. Rubin



James A. Samborn
Daniel M. Schember
Darryl L. Snider
Barbara S. Steiner
David G. Strom
Curtis C. Swanson
Bruce T. Wallace
James D. Wangelin
James M. Warden
Thomas W. Weeks
Christina B. Whitman
L. Michael Wicks
Frederick C. Williams
Thomas S. Wiswall
Larry M. Wolfson
Craig A. Wolson
Kenwood C. Youmans

Donors to Endowments, Capital Projects, and Other Restricted Funds

$100,000 AND ABOVE
Anita H. Jenkins

$5,000 TO $9,999
Michele Coleman Mayes

$1 TO $999
Sara S. Beale
Carl V. Bryson
Alan L. Kaufman
Stuart M. Lockman
Laurence C. Nolan
Larry D. Thompson

Class of 1979

25TH REUNION

Fundraising Chair: John K. Hoyns
Fundraising Committee: Richard E. Cassard; John V. Lonsberg; Jack Molenkamp; John M. Quitmeyer
Participation Chair: Donald R. Parshall Jr.
Participation Committee: Mary Kathryn Austin; Bruce D. Celebrezze; Ethan J. Falk; Beverly K. Goulet; Kevin S. Hendrick; David Bernard Kern; Charles C. Lane; Bradford L. Livingston; John V. Lonsberg; Barbara Schlain Polsky

Class Participation...35%
LSF Gifts and Pledges...$402,700
Total Class Giving...$433,200

Donors to Law School Fund

$50,000 TO $99,999
Stuart D. Freedman
John K. Hoyns

$25,000 TO $49,999
Barrie L. Loeks

$10,000 TO $24,999
Thomas A. Connop
Timothy L. Dickinson
Beverly K. Goulet
Kevin S. Hendrick
Bradford L. Livingston
John V. Lonsberg
Jack A. Molenkamp
Duane D. Morse
John M. Quitmeyer

$5,000 TO $9,999
Jeffrey C. Beinlich
Norman H. Beitner
Bruce D. Celebrezze
Carla Elizabeth Craig
Robert J. Diehl Jr.
David B. Kern
Robert B. Knauss
Marguerite Munson Lentz
Rick A. Pacynski
Barbara Schlain Polsky
Burt P. Rosen
Arn H. Tellem

$2,500 TO $4,999
Richard E. Cassard
Ethan J. Falk
James P. Shaughnessy
Martha Browning Sosman
Mark Allen Sterling
Jeffrey E. Susskind
Peter J. Wiedenbeck
Lee B. Zeugin

$1,000 TO $2,499
Maria B. Abrahamsen
Mary Kathryn Austin
Jeffrey H. Goodman
Jeffrey K. Helder
Frieda P. Jacobs
William D. Klein
David L. Miller
Debra Fochtman Minott
Pamela Ann Mull
David Narefsky
Theodore R. Opperwall
Michael J. Rufkahr
David J. Schwartz

$1 TO $999
Peter Adler
John W. Amberg
Jacintha Kraft Balch
Patricia K. Bare
Mark V. Beasley
Robert B. Bettendorf
Frederick R. Bimber
Hildy Bowbeer
Brenda E. Braceful
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Timothy L. Grosch
Don H. Hainbach
Sheila Cowles Haughey
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Mark A. Kantor
Howard J. Kirschbaum
Charles C. Lane
Richard B. Learman
James Lehrburger
Terry Lewis
Charles R. Lowery Jr.
Michael McEvoy
Edwin F.M. Meysmans
Barbara Rogalle Miller
Stephen R. Miller
Gary E. Mitchell
Kim S. Mitchell
Susan E. Morrison
Julie Page Neerken
Kiichi Nishino
Michael J. O'Rourke Jr.
David R. Pahl
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Michael B. Peisner
Gary J. Peters
Steven F. Pflaum
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Charles H. Polzin
Jean Jones Porter
Ronald C. Porter
Michael J. Quinley
Lawrence E. Rissman
Clyde J. Robinson
Fred A. Rodriguez
N. Rosie Rosenbaum
Frank J. Ruswick Jr.
Brad S. Rutledge
Michael J. Sauer
James K. Say
Christian Schmid
William A. Schochet
Christopher M. Scotti
Geoffrey L. Silverman
James H. Simon
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Richard A. Stevens
G. Steven Stidham
Jeffrey A. Supowit
Charles J. TenBrink
David L. Tripp
Thomas H. Van Dis
Thomas P. Van Dusen
John S. Vento
Christian M. Verbeeck
Seth J. Weinberger
Jeffrey I. Weiss
Steven D. Weyhing
Ford H. Wheatley IV
Robert A. Wynbrandt

Donors to Endowments, Capital Projects, and Other Restricted Funds

$50,000 TO $99,999
Stuart D. Freedman

$25,000 TO $49,999
Arn H. Tellem

$1 TO $999
Norman H. Beitner
Travis G. Clemens Jr.
Debra S. Neveu

Class of 1984

20TH REUNION

Co-Chairs: Meg Waite Clayton and Stephen G. Tomlinson
Committee: Marjorie Sybul Adams; Sandra A. Bulger; Gregory D. Hopp; Susan M. McGee; Grant Whitney Parsons; Robert J. Portman; Rex L. Sessions;

Michael R. Shpiece; Russell O. Stewart; David K. Tillman; Kurtis T. Wilder (Honorary)

Class Participation...27%
LSF Gifts and Pledges...$230,000
Total Class Giving...$480,100

Donors to Law School Fund

$100,000 AND ABOVE
Mary E. Snapp

$10,000 TO $49,999
James A. Davidson
Daniel M. Sandberg
Stephen G. Tomlinson

$5,000 TO $9,999
Scott C. Dew
Jennifer L. Duchene
David J. Schlanger
Russell O. Stewart

$2,500 TO $4,999
Marjorie Sybul Adams
Terrence E. Burns
Stuart Hershman
Charles E. Jarrett
Steven M. Kaufmann
Stephen M. Merkel
Kathryn Montgomery Moran
Grant W. Parsons
Gary A. Rosen
Paul B. Savoldelli
Elizabeth B. Yntema

$1,000 TO $2,499
Kirk A. Davenport
Michael J. Erickson
Thomas J. Frederick
Rolando Hidalgo
Juli Wilson Marshall
Susan M. McGee
Steven C. Poling
Robert J. Portman
Jacob C. Reinbolt
Megan Scott-Kakures
Michael J. Seats
Rex L. Sessions
Deborah A. Somerville
Philip S. VanDer Weele
Barry M. Wolf
John F. Zabriskie

$1 TO $999
Michael T. Ambroso
Janine M. Avner
Darby A. Bayliss
Douglas S. Bland
Thomas J. Blessing
Daniel Raphael Bronson
Sandra A. Bulger
John B. Bulgozdy
Thomas J. Clemens
Sue O. Conway
Ann M. Cooper
Carey A. Dewitt
Thomas E. Dixon
Martine R. Dunn
Jill Martin Eichner
Stephen T. Erb
David B. Fenkell
Gregory Stratis Gallopoulos
Kyle A. Gray
Randall A. Hack
Jeffrey T. Harbison
Helen R. Haynes
Bradley D. Heinz
Michael H. Hoffheimer
William H. Holmes
Leonard W. Horton III
William F. Howard
Robert M. Jackson
Kim P. Jones
Lori W. Ketcham
Christopher Klimko
David W. Koch
Kay Adele Kornman
David A. Kotzian
Steven L. Kroll
James W. Langham
George Lavdas
Thomas R. Lucchesi
David L. Marshall
Kurt Micklow
Martha D. Moses
Elizabeth A. Morris
Paul J. Novack
Mark D. Pollack
John V. Polomsky II
Richard L. Pomeroy
Marc S. Rockower
Kevin W. Saunders
Anthony J. Shaheen
Roger M. Sherr
David D. Shoup
Michael R. Shpiece
Adrien L. Silas
Lawrence A. Silvestri
Rochelle P. Slater
Joan P. Snyder
Elaine K. Soble
Andrea B. Sperling
Robert C. Stoddart
Clare Teresa Tully
Lynn C. Tyler
Julie A. Waddell
James P. Weygandt
Mary Beth M. Wong
Kurt G. Yost
Sheri Ann Young

Donors to Endowments, Capital Projects, and Other Restricted Funds

$100,000 AND ABOVE
Mary E. Snapp

$1 TO $999
Derek L. Cottier
Gregoria Vega-Byrnes

Class of 1989

15th Reunion

Co-Chairs: Stephen W. Kelley; Rebecca J. McDade; and Michael M. Parham
Committee: Earl J. Barnes II; David H. Baum; Charles A. Browning; J. Danielle Carr; Steven R. Englund; Lydia Barry Kelley; Brandon D. Lawniczak; Rebecca S. Redosh-Eisner; Paul G. Thompson; J. Douglas Toma; Bruce G. Tuchman; Linda S. Warshavsky

Class Participation...18%
LSF Gifts and Pledges...$78,445
Total Class Giving...$81,005

Donors to Law School Fund

$10,000 TO $24,999
J. May Liang
Bruce G. Tuchman

$5,000 TO $9,999
Earl J. Barnes II
Elizabeth Jolliffe Basten
Lydia Barry Kelley
Stephen W. Kelley
Michael M. Parham

$2,500 TO $4,999
Steven R. Englund
Donald J. Kula
Rebecca J. McDade

$1,000 TO $2,499
Charles A. Browning
Karen M. Hassevoort
Daniel R. Laurence
Brandon D. Lawniczak
David N. Lutz
Andreas P. Reindl
Paul G. Thompson
Jack M. Williams

$1 TO $999
Hyun Bang
David H. Baum
Matthew E. Berke
Thomas A. Brusstar
Anne E. Campbell
J. Danielle Carr
Martin B. Carroll
Michael J. Carroll
Bruce M. Chanen
Steven F. Cherry
Scott D. Cohen
Jeffrey K. Compton
Timothy J. Connors
Sandra Miller Cotter
Catherine J. Courtney
Holly B. Fechner
Albert E. Fowerbaugh Jr.
Michael S. Gadd
Brian K. Gearinger
Lisa S. Gelb
Grant P. Gilezan
Robert P. Hanson
Moira Dages Hathcock
David L. Jenny
Stephen M. Jung
Denise Michael Kaplan
Donald M. Kerwin
Michael L. Kidney
Steven C. Lee
Elizabeth E. Lewis
John F. Mahoney
Creighton R. Meland Jr.
Kathryn A. Mrkonich Wilson
Kathie Zieve Norman
Thomas J. Piatak
Todd W. Rahmes
Anne E. Read
Timothy S. Reiniger
Mark L. Rickard
Steven J. Rindsig
Robert A. Romanoff
James E. Schaafsma
Daniel J. Sheridan
Samuel W. Silver
Mark J. Snyder
Jane A. Stautz
Robert P. Stefanski
John P. Stimson
Anne Findlay Vail
Kristin Mary Vanden Berg
Sara E. von Bernthal
Kay E. Wilde
Ruth E. Zimmerman

Donors to Endowments, Capital Projects, and Other Restricted Funds

$2,500 TO $4,999
Daniel R. Laurence

$1 TO $999
David H. Baum
Marcella David

Class of 1994

10TH REUNION

Co-Chairs: Ann-Marie Anderson and Cheryl A. Hipp
Committee: James P. Allen Sr.; Otto Beatty III; Julie A. Beck; Janene A. Collins; Julia L. Ernst; Michael R. Etzioni; Armando Irizarry; Dennis R. Kiker; Liam B. Lavery; Monica P. Navarro; Gregory J. Ritts; Elizabeth M. Rosenfeld; Andrew M. Winograd; Heather Martinez Zona

Class Participation...20%
LSF Gifts and Pledges...$61,125
Total Class Giving...$61,325

Donors to Law School Fund

$10,000 TO $24,999
Gordon E. Devens

$5,000 TO $9,999
Heather K. Gerken

$2,500 TO $4,999
Cheryl A. Hipp
Andrew M. Winograd

$1,000 TO $2,499
Otto Beatty III
Jon Ed Brown
Bradley L. Cohn
Michael R. Etzioni
Daniel M. Feeney
Sean W. Gallagher
Wendy A. Hallgren
Rick Hsu
Armando Irizarry
Dennis R. Kiker
Monica P. Navarro
Leslie Collins Overton
Elaine Murphy Rice
Timothy O. White Jr.
Margaret C. Wilson
Robert G. Wilson

$1 TO $999
Jae H. Ahn
Aaron S. Ahola
Cara A. Ahola
Jeffrey M. Alperin
Ann-Marie Anderson
Jennifer B. Anderson
Erika K. Appelt
Jeffrey D. Appelt
Steven M. Baumer
Jothi Beljan
Matthew F. Bergmann
Joshua G. Berman
Jennifer L. Blickenstaff
Matthew A. Block
Dean Bochner
Valerie K. Brennan
Linda L. Bunge
Leslie F. Chang
Janene A. Collins
Katherine J. Drakos
Garrett Duarte
Julia L. Ernst
Christopher R. Falk
Linda K. Finkel
Noah A. Finkel
Matthew J. Fischer
Robert M. Fogler
Benson K. Friedman
Tamilla F. Ghodsi
Joseph K. Grekin
John P. Hensien
Teresa Holderer
D. Duane Hurtt
Veena K. Jain
Brian J. Kelly
Rachel H. Klayman
Kacy Kleinhans
Bradley D. Kohn
Jeffrey A. Koppy
Nate Kowalski
Ann M. Kraemer
Lauren G. Krasnow
Lance S. Lankford
Liam B. Lavery
Matthew A. Levin
Christopher P. Mazzoli
Kunio Namekata
Max J. Newman
Mona J. Patel
Laura B. Redstone
Gregory J. Ritts
Elizabeth M. Rosenfeld
Michael S. Russell
Valerie L. Russell
Daniel S. Ruzumna
Diane I. Smason
Gregory H. Teufel
Pia N. Thompson
Daniel S. Varner
Donica Varner
Susan M. Wagner-Fleming
Alan G. Waldbaum
Michael W. Waldron
Michael L. Weissman
Barbara J. Wells
David B. Williams
Phoebe G. Winder
David C. Wood

Donors to Endowments, Capital Projects, and Other Restricted Funds

$1 TO $999
D. Duane Hurtt
Daniel S. Varner
Donica Varner

Class of 1999

5TH REUNION

Co-Chairs: Gregory W. Cooksey, Jenny L. Floyd, and David R. Grand
Committee: Rocky Dhir; Mei-Ling Huang; David C. Kirk; Camille C. Logan; Megan Mack; Emily K. Paster; Elliot M. Regenstein; Joel H. Samuels; Joshua S. Spector (Friend of Committee)

Class Participation...16%
LSF Gifts and Pledges...$18,610
Total Class Giving...$18,630

Dedicated in memory of Rosemary B. Quigley, Class of 1999

Donors to Law School Fund

$2,500 TO $4,999
Gregory W. Cooksey
David R. Grand
David C. Kirk

$1,000 TO $2,499
Kyle M. DeYoung
Jenny L. Floyd
Katharine R. Saunders

$500 TO $999
John C. Gonzalez
Matthew I. Hall
Brian H. Meldrum
Kendra D. Miller
Christina M. Parker

$1 TO $499
William B. Berndt
Jason K. Bowler
Lacey Calhoun Sikora
Madison L. Cashman
Kerri J. Chase
Adam B. Cox
Benjamin H. DeBerry
Michael G. Dickler
William L. Emerson
Jon R. Fetterolf
Matthew R. Fowler
Charlotte J. Gibson Zavos
George E. Gurrola
Kathleen R. Gurrola
Brian C. Horne
Maaike S. Hudson
Andrew R. Isidore
Richard A. Kline
J. Chris Larson
Paula R. Latovick
Timothy Leiman
Wendy Marantz Levine
Camille C. Logan
Margaret H. Mack
Evan K. Makela
Michael J. McLaughlin
Elizabeth W. Milnikel
Nada M. Payne
Alicia A. Perla
Gina M. Petro
Marc L. Robinson
Hideya Sadanaga
Joel H. Samuels
William R. Sherman
Aaron C. Singer
David E. Smith
Randy L. Socol
Matthew S. Sosin
Joshua S. Spector
Brian M. Steinhardt
Bizunesh K. Talbot
David D. Tawil
Steven K. Taylor

Donors to Endowments, Capital Projects, and Other Restricted Funds

$1 TO $499
Anna K. Strasburg-Davis

From left, Sandor M. Gelman,'63; Allyn D. Kantor,'64; Paul R. Dimond,'69; Barbara Rom,'72; Clarence L. Pozza Jr.,'74; Philip Ahrens III,'75; John R. Cook,'75; Peter D. Holmes,'75; Larry J. Saylor,'75.

1954

John Riecker and his wife Ranny were honored in September at the dedication of the John and Margaret Ann Riecker Board Room at the Mackinac Center Building in Midland, Michigan. Ranny Riecker served as a founding member of the center's board, and both of the Rieckers currently serve on the center's Mid-Michigan Board of Advisors.

1955

50th Reunion

The Class of 1955 reunion will be October 7-9

1956

Judith Weinshall Liberman, LL.M., who has been an artist for many years, has a solo exhibition of her artworks titled "From the Ashes" at the Temple Tifereth Israel in Cleveland, Ohio. Among her featured works are pieces from her Holocaust Wall Hangings and her Biblical History Wall Hangings series.

1960

45th Reunion

The Class of 1960 reunion will be October 7-9

Barbara (Burger) Burt and her husband **Philip, '61**, have made a major contribution to the Indiana Bar Association IOLTA fund. The gift is the largest single outright gift to the bar foundation in its history.

1961

J. Philip Burt and his wife **Barbara, '60**, have made a major contribution to the Indiana Bar Association IOLTA fund. The gift helps make up a program budget shortfall and will help fund the state's *pro bono* efforts.

Warren E. Eagle of Katz, Friedman, Eagle, Eisenstein & Johnson PC in Chicago, Illinois, has received the Professional Achievement Award from the Chicago-Kent College of Law.

1962

The Hon. **Amalya L. Kearse**, U.S. Court of Appeals for the Second Circuit, New York, has been inducted into the American Contract Bridge League's Hall of Fame. (See story on Kearse, page 48.)

1963

The Board of Directors of the Oakland County Bar Association has appointed **Sandor M. Gelman** as delegate to the American Bar Association. Gelman is sole shareholder of the Troy, Michigan, law office of Sandor M. Gelman PC.

1964

William B. Dunn, member of the Detroit, Michigan, office of Clark Hill PLC, has been named in the *Chambers USA: America's Leading Lawyers for Business* – 2004 edition. Dunn received the highest rating in the Real Estate category.

Allyn D. Kantor, principal in Miller, Canfield, Paddock, and Stone PLC's Ann Arbor office, is included in the Alternative Dispute Resolution and Business Litigation sections of *The Best Lawyers in America*®, 2005-2006.

1965

40th Reunion

The Class of 1965 reunion will be October 7-9

Former Congressman **Richard Gephardt** is starting the Richard A. Gephardt Institute for Public Service at Washington University in St. Louis, Missouri. The new institute is modeled after other political institutes such as the Robert J. Dole Institute of Politics at the University of Kansas and the Leon and Sylvia Panetta Institute for Public Policy in California.

1967

Philip A. Nicely, partner in the Indianapolis, Indiana, firm of Bose McKinney & Evans LLP, is named in *The Best Lawyers in America*®, 2005-2006.

1968

Robert M. Vercruysse of Vercruysse Murray & Calzone PC in Bingham Farms, Michigan, served as a speaker in a panel discussion for the American Employment Law Council's 12th Annual Meeting. The session was titled "Execs Gone Wild: Sarbanes-Oxley and the Investigation of Alleged Senior-Level Corporate Misconduct."

1969

Paul R. Dimond, senior counsel in the Ann Arbor and Washington, D.C., offices of Miller, Canfield, Paddock and Stone PLC, is included in the Corporate, M & A, and Securities Law section of *The Best Lawyers in America*®, 2005-2006.

Stephen J. Spurr, Professor of Economics at Wayne State University in Detroit, Michigan, has written a textbook, *Economic Foundations of Law*, available as of January this year.

1970

35th Reunion

The Class of 1970 reunion will be October 7-9

Steven G. Schember, a partner in the Tampa, Florida, firm of Shumaker, Loop & Kendrick LLP, has been named to the U.S. Coast Guard Academy Athletic Hall of Fame. Schember was a 1967 graduate of the Academy.

David M. Schraver of Rochester has been named a vice president of the New York State Bar Association, representing the Seventh Judicial District. He is managing partner of the Rochester office of Nixon Peabody LLP.

1971

John E. Klein has been named executive vice chancellor for administration at Washington University in St. Louis, Missouri. Prior to joining the university, Klein served as chairman of Bunge North America, a major agribusiness company.

Kenneth M. Mogill has become a Fellow of the American College of Trial Lawyers. Mogill is a partner in the firm of Mogill, Posner & Cohen in Lake Orion, Michigan.

1972

William F. Martson Jr., with Tonkon Torp law firm in Portland, Oregon, has been included in the *Chambers USA: America's Leading Lawyers for Business* – 2004 edition.

Michael D. Mulcahy, founding member of the Bloomfield Hills, Michigan, firm of Dawda, Mann, Mulcahy & Sadler PLC, is listed in *Chambers USA: America's Leading Lawyers for Business* – 2004 edition. Mulcahy is cited for his expert knowledge of the business side of real estate transactions.

Theodore Nowacki, partner in the Indianapolis, Indiana, firm of Bose McKinney & Evans LLP, is listed in *The Best Lawyers in America*®, 2005-2006.

Michigan Governor Jennifer Granholm has appointed **Barbara Rom**, a partner in the Detroit office of Pepper Hamilton LLP, to serve on the Michigan Gaming Control Board for a term that runs through the end of 2007.

1973

Stephen E. Selander, senior counsel with the Detroit, Michigan, office of Warner Norcross & Judd LLP, received an Outstanding Achievement Award presented by the Automotive Industry Action Group. He was honored for his volunteer efforts with the organization.

Joseph S. Voboril, with Tonkon Torp law firm in Portland, Oregon, has been included in the *Chambers USA: America's Leading Lawyers for Business* – 2004 edition.

James L. Wernstrom, shareholder in the firm of Law Weathers & Richardson in Grand Rapids, Michigan, has become a fellow of the American College of Trial Lawyers.

1974

David W. Clark has been named a national "Legal Reform Champion" by the American Tort Reform Association for his reform efforts in Mississippi. Clark is a partner in the Jackson, Mississippi, office of Bradley Arant Rose & White LLP.

Frank J. Greco has been appointed Chief Commissioner of the Michigan Supreme Court. He has been a member of the Michigan Supreme Court Commissioners' Office since 1978. The Commissioners' Office is the permanent legal staff of the court.

Miller, Canfield, Paddock and Stone PLC principal **Clarence L. Pozza Jr.** is ranked as one of Michigan's top attorneys in *Chambers USA: America's Leading Lawyers for Business* – 2004 edition. Pozza is resident in the firm's Detroit office.

1975

30th Reunion

The Class of 1975 reunion will be October 7-9

Philip Ahrens III, of the Portland, Maine, office of Pierce Atwood LLP, is listed in *The Best Lawyers in America*® 2005-2006. He has been listed each year since 1995.

John R. Cook, of the Kalamazoo office of Miller, Canfield, Paddock, and Stone PLC, is included in the "Corporate, M&A, and Securities Law" section of *The Best Lawyers in America*® 2005-2006. Cook is a principal and a managing director of Miller Canfield and also is co-leader of the firm's West Michigan Business Practice Group.

Connye Y. Harper, associate general counsel of the International Union, UAW, in Detroit, Michigan, has been inducted into the College of Labor and Employment Lawyers.

Peter D. Holmes, who heads the Environmental Practice at Clark Hill's Detroit and Birmingham offices, has been elected chairperson-elect of the Environmental Law Section of the State Bar of Michigan.

Larry J. Saylor is included in the Antitrust Law section of *The Best Lawyers in America*®, 2005-2006. He is a senior principal in the Detroit, Michigan, office of Miller, Canfield, Paddock, and Stone PLC and serves as deputy leader for the Litigation and Dispute Resolution Practice Group.

1976

Paul Griffin has joined Thelen Reid & Priest as a partner in its Antitrust Practice. He was previously with Pillsbury Winthrop, where he served as head of the Antitrust Group and chair of the Consumer Law Litigation and Counseling Team.

In June, **George A. Lehner** rejoined the Washington, D.C., office of Pepper Hamilton LLP as a partner. He had spent the last two years serving as deputy assistant legal adviser for international claims and investment disputes at the U.S. Department of State. While with the State Department, he earned the Superior Honor Award for his work on the oral proceedings at the International Court of Justice in the Oil Platforms Case.

Patrick E. Mears, who practices in the Grand Rapids, Michigan, office of Barnes & Thornburg LLP, is listed in the 2005-2006 edition of *The Best Lawyers in America*® in the Bankruptcy and Creditor-Debtor Rights Law section.

From left, Timothy D. Sochocki,'78; Douglas A. Zingale,'78; Jane E. Garfinkel,'79; Amanda Van Dusen,'79; G.A. Finch,'80; Patricia Lee Refo,'83; Christopher B. Gilbert,'93.

1978

Timothy D. Sochocki, a principal and resident director of the Ann Arbor office of Miller, Canfield, Paddock, and Stone PLC, spoke at the National Association of Bond Lawyers 29th Annual Bond Attorneys' Workshop in Chicago, Illinois.

Douglas A. Zingale, a shareholder in the Boston, Massachusetts, office of Greenberg Traurig LLP, is included in *The Best Lawyers in America*®, 2005-2006. He is included in the Corporate, M & A, and Securities law sections.

1979

Mark A. Filippell of Cleveland, Ohio, has co-founded a new investment banking firm, Western Reserve Partners LLC. Filippell was previously associated with McDonald Investments Inc.

Jane E. Garfinkel, partner in the Cincinnati, Ohio, office of Thompson Hine's Health Care Practice Group, has been selected for inclusion in *The Best Lawyers in America*®, 2005-2006.

Barbara S. Polsky has rejoined the firm of Manatt, Phelps & Phillips LLP, Los Angeles, California, as a partner. Polsky began her career at Manatt and has also served as executive vice president and general counsel of City National Corporation, City National Bank, and Aames Financial Corporation.

Amanda Van Dusen, of Miller Canfield, Paddock, and Stone PLC in Detroit, is listed in the Financial Institutions and Transactions Law section and the Public Finance Law section of *The Best Lawyers in America*®, 2005-2006, a referral guide. A principal and one of five managing directors of her firm, she serves as co-leader of the Schools specialty group and deputy leader of the Public Law Group.

1980

25th Reunion

The Class of 1980 reunion will be September 16-18

G.A. Finch, co-managing shareholder in the Chicago, Illinois, firm of Querrey & Harrow, has been named to Leading Lawyers Network in the area of real estate law and governmental, municipal, and administrative law.

Jeffrey M. McHugh, a principal in the Detroit, Michigan, office of Miller, Canfield, Paddock, and Stone PLC, has been elected to a three-year term on the Board of Directors of the American College of Bond Counsel.

1981

Natalia Delgado has become general counsel of Huron Consulting Group Inc. in Chicago, Illinois.

Karl Fink has been elected to managing partner of Fitch, Even, Tabin & Flannery's Chicago, Illinois, office. The firm specializes in intellectual property.

Detroit, Michigan-based law firm Honigman Miller Schwartz and Cohn LLP announced that **Stewart L. Mandell** has joined the firm as a partner in the Real Estate Tax Appeals practice area. Mandell was previously chair of the Tax Department at the Detroit office of Dykema Gossett.

Ken Salazar, a two-term attorney general, has been elected to the U.S. Senate from Colorado.

Jeffrey S. Stein has been promoted to vice president of The Garden City Group Inc.'s Business Reorganization Division. Stein joined the firm, which is located in Melville, New York, in 2003. Prior to that, he was a partner in the Bankruptcy Department of the New York law firm of Hahn & Hessen LLP.

1982

Mark T. Boonstra, principal in the Ann Arbor, Michigan, office of Miller, Canfield, Paddock, and Stone PLC, has been named a deputy chair of the firm's Litigation and Dispute Resolution Group representing the Detroit, Ann Arbor, Troy, and Monroe areas.

Matthew J. Kiefer, a partner in the Boston, Massachusetts-based firm of Goulston & Storrs, has been elected president of the Board of Directors of Historic Boston. He also teaches a course in historic preservation at the Harvard Graduate School of Design.

Stuart A. Streichler has been a visiting Fulbright lecturer in the Graduate School of Law and the Graduate School of International Cultural Studies at Tohoku University in Sendai, Japan, for the 2004-05 academic year.

Rebecca K. Troth has been named legal director of the National Law Center on Homelessness & Poverty in Washington, D.C. She started with the organization as a senior staff attorney working on housing issues. The organization is involved in litigation, policy-making, and public education on a nationwide basis.

1983

James J. Greenberger has joined the Chicago, Illinois, firm of Sachnoff & Weaver's Private Equity and Venture Capital Practice Group as an equity partner. He was previously head of the Private Equity Practice Group at Schwartz Cooper Greenberger & Krauss Chtd., also in Chicago.

Denise J. Lewis, a senior partner in the Real Estate Department of Detroit-based law firm Honigman Miller Schwartz and Cohn LLP, has been elected to the American College of Real Estate Lawyers (ACREL). Lewis is the first woman attorney and first minority attorney in Michigan elected to membership in the organization.

Patricia Lee Refo has been named chair of the American Jury Project by incoming American Bar Association President Robert J. Grey Jr. The project is an initiative to produce a single set of modern jury standards the ABA can propose as a model. Refo is a partner in the Phoenix, Arizona, office of Snell & Wilmer LLP.

1985

20th Reunion

The Class of 1985 reunion will be September 16-18

U.S. Air Force Colonel **Paul E. Pirog** has been appointed as the new permanent professor and head of the Department of Law at the U.S. Air Force Academy, Colorado.

1986

Steven M. LaKind has been promoted to executive managing director with Studley, a national commercial real estate firm specializing in tenant representation. LaKind joined Studley in 1995.

1988

David Copley Forman, an attorney with the Tonkon Torp LLP firm in Portland, Oregon, has been recognized by the *Portland Business Journal* as one of the 40 most influential community and business leaders in Portland under the age of 40.

1989

Robert D. LoPrete has joined Sachnoff & Weaver Ltd., Chicago, Illinois, as a partner in the firm's Estate and Wealth Planning Group. Prior to that, he was a partner at Vedder Price, also in Chicago, as a member in its Tax and Estate Planning Group.

Creighton R. Meland Jr.'s student law review note, "Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo?", 86 *Michigan Law Review* 1787 (1988) was cited by the U.S. Supreme Court in *Central Laborers' Pension Fund v. Heinz*. Meland is a partner in the Chicago, Illinois, office of Baker & McKenzie LLP.

Donald P. Moore, a shareholder of Fowler White Burnett PA, one of Florida's largest law firms, has joined the board of directors of Zi Corporation.

David A. Westrup, a member of the Litigation and Risk Management Practice Group at von Briesen & Roper in Milwaukee, Wisconsin, has been appointed a member of the Task Force on Asbestos within the Tort Trial and Insurance Practice Section of the American Bar Association. He has also been appointed a member of the Emerging Issues Committee within the same section of the ABA.

1990

15th Reunion

The Class of 1990 reunion will be September 16-18

Christine M. Castellano has been named associate general international counsel for Corn Products International Inc. She is responsible for managing the legal matters of the company's operations and affiliates in Latin America, Asia, and Africa.

Robert Goldberg is a founding partner of Hale & Goldberg LLP in Lihu'e, Hawaii, focusing on civil litigation. Previously, he served as an assistant attorney general in the Northern Mariana Islands.

William Hoffman has joined Kaye Scholer LLP as a partner in the Product Liability Group. Hoffman is based in Washington, D.C. He was previously a partner at Arnold & Porter LLP, also in Washington.

Karl Weber, managing partner of Plunkett & Cooney's northern Michigan office, has been selected as chairman of the Northern Michigan University Board of Trustees for 2005.

1992

Dr. **Alejandro Ferrer**, LL.M., has been selected as the Minister of Trade and Industry by the recently elected President of Panama, Martin Torrijos. Dr. Ferrer has also been appointed as the president's representative in the free trade agreement negotiations between Panama and the United States.

Brion Fox, Ph.D., has completed a Robert Wood Johnson Foundation Developing Leadership in Reducing Substance Abuse Fellowship. The fellowship is designed to mentor the next generation of leaders in substance abuse education, advocacy, service delivery, policy research, and policy development. Fox, a resident of Madison, is an associate scientist at the University of Wisconsin Comprehensive Cancer Center.

1993

Attorney **Christopher B. Gilbert** has been named as a Texas Rising Star for 2004, an honor that includes the top 2.5 percent of Texas attorneys. Gilbert serves in the Schools & Education Group of Bracewell & Patterson LLP's Houston office.

Gregory P. Magarian, who joined the faculty at Villanova University School of Law in Villanova, Pennsylvania, in 1999, has been granted tenure and promoted to Professor of Law.

Kathryn R.L. Rand has been named associate dean for academic affairs at the University of North Dakota School of Law. Rand also serves as the co-director of the Institute for the Study of Tribal Gaming Law and Policy and is an associate professor, teaching and writing in the areas of constitutional law, civil rights, and Indian gaming law.

1995

10th Reunion

The Class of 1995 reunion will be September 16-18

Andrew Altschul has opened his own law practice, Altschul Law Office PC in Portland, Oregon. He provides employment law services for both employees and employers in California, Oregon, and Washington.

From left, Laurie Callahan Endsley,'95; Robert J. Wierenga,'95; Bree (Popp) Woodruff,'01; Marcy L. Rosen,'04.

Andrew P. Boucher has joined the Worcester, Massachusetts, office of Bowditch & Dewey LLP as an associate in the Business and Finance Practice. Prior to this, Boucher was an associate at Kirkpatrick & Lockhart LLP in Boston.

Laurie Callahan Endsley has been appointed chief of staff for the Office of the CEO of PricewaterhouseCoopers (PwC). Endsley has spent the past seven years in Russia, most recently as PwC Russia's chief operating officer and general counsel. She is now located in New York but also works out of London and Amsterdam.

Walter J. Lanier, founder and principal of Lanier Law Offices Ltd. in Milwaukee, Wisconsin, has been appointed to chair the Milwaukee County Pension Board. Lanier was also named one of the city's up and coming future leaders in *Milwaukee Magazine*.

Melainie K. Mansfield has been named partner in the Milbank, Tweed, Hadley & McCloy LLP's Global Securities Group in the firm's Palo Alto, California, office.

Securities litigation specialist **Rachel Meny** has been elected a partner with Keker & Van Nest LLP in San Francisco. She and her husband also recently celebrated the birth of a second son, whom they have named Brady.

Robert J. Wierenga has joined the Ann Arbor office of Miller, Canfield, Paddock, and Stone PLC as senior counsel in the Litigation and Dispute Resolution Group. He was previously an associate in the London, England, office of Sullivan & Cromwell LLP.

1996

Marisa T. Brown has joined the Kalamazoo office of Miller, Canfield, Paddock, and Stone PLC as an associate in the Real Estate Group. She previously was an associate at Cooper, White & Cooper in San Francisco.

Scott Delacourt has been named deputy chief of the FCC's Wireless Telecommunications Bureau in Washington, D.C. He oversees the broadband, and spectrum and competition policy divisions.

1997

Associate Professor **Guy-Uriel Charles** has been awarded tenure at the University of Minnesota Law School. He is also a Faculty Affiliate, Center for the Study of Political Psychology, University of Minnesota.

Chad A. Readler, a member of the Litigation Group with Jones Day in Columbus, Ohio, has been appointed chair of the board of trustees of Crittenton Community School, which is affiliated with Directions for Youth and Families, a nonprofit agency that serves challenged children and families in central Ohio. Crittenton Community School enrolls at-risk students in the 6th, 7th, and 8th grades.

Hardy Vieux has joined Robins, Kaplan, Miller & Ciresi as an associate with a focus in health care litigation. Previously, he worked as a criminal appellate defense counsel for the U.S. Navy Judge Advocate General's Corps.

1999

J. Robert Scott, international design and manufacturing company, has announced the appointment of **Andrew Frumovitz** as chief executive officer. Frumovitz has served as the company's general manager and general counsel since March 2004. He and his family reside in Venice, California.

2000

5th Reunion

The Class of 2000 reunion will be September 16-18

2001

Bree (Popp) Woodruff has joined the Lansing, Michigan, office of Miller, Canfield, Paddock, and Stone PLC as an associate in the Public Law Group. Prior to joining the firm, Woodruff was a law clerk to Michigan Supreme Court Justice Michael F. Cavanagh.

2002

Kirsten Matoy Carlson is a visiting associate professor this academic year at the University of Minnesota Law School. She is teaching Civil Procedure I and II and a seminar in Race and the American Law.

2004

Emily Korstange has joined Briggs and Morgan PA in Minneapolis, Minnesota, as an associate. She is a member of the Trade Regulation section.

Andrew Malone has joined the Tax Practice Group of Godfrey & Kahn SC in the Milwaukee, Wisconsin, office.

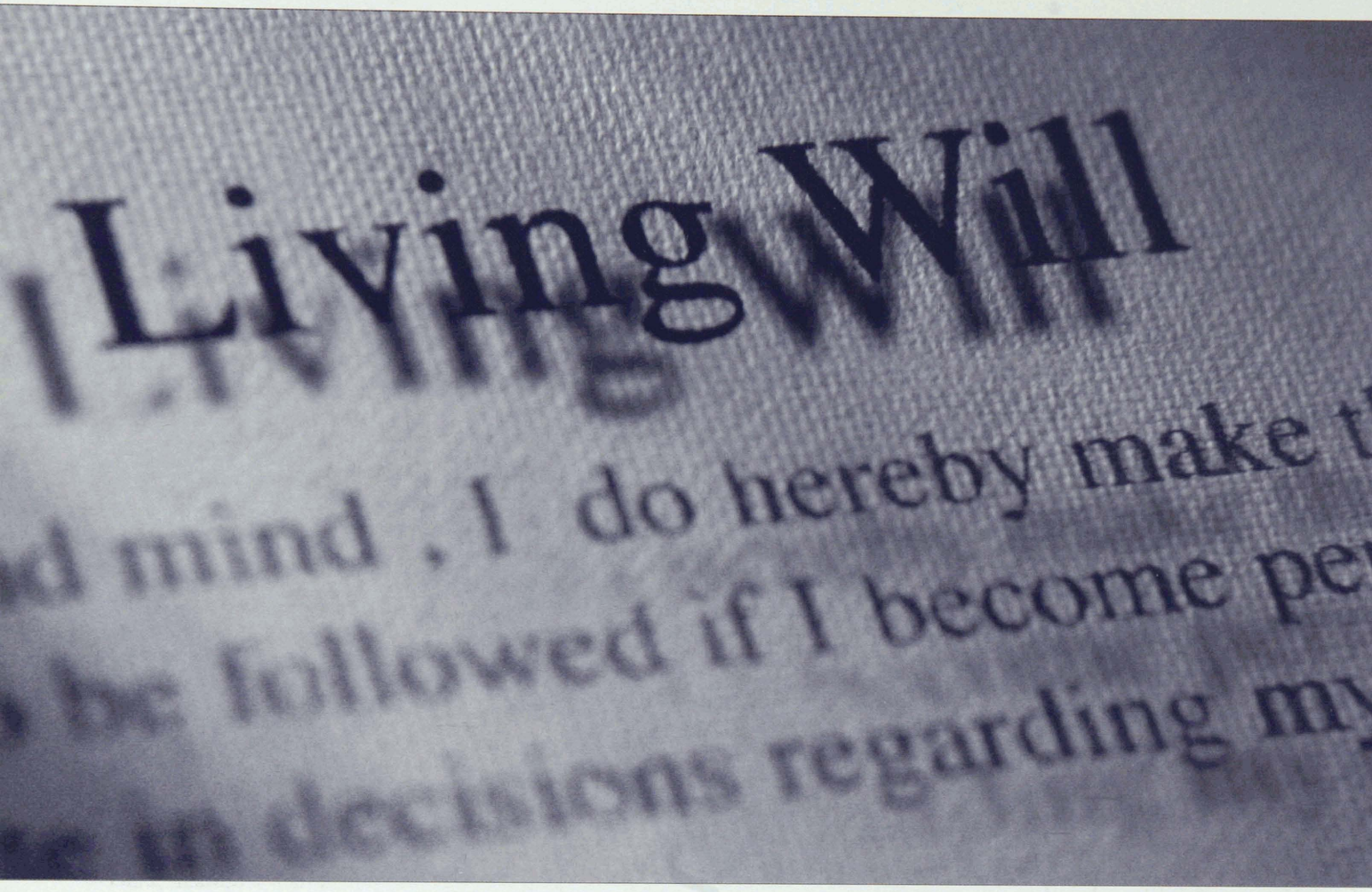
Marcy L. Rosen has joined the Detroit, Michigan, office of Miller, Canfield, Paddock, and Stone PLC as an associate in the Litigation and Dispute Resolution Group.

Grant W. Williams has joined the Troy, Michigan, office of Miller, Canfield, Paddock, and Stone PLC as an associate in the Real Estate Group.

Tiffany L. Wohlfeil has joined the Litigation Practice Group in the Milwaukee, Wisconsin, office of Godfrey & Kahn SC.

In Memoriam

'13	James LeGro	
'14	William J. Millar	
'32	F. Norman Higgs	9/12/2004
'34	Steg J. Lignell	7/19/2004
	Mary Louise Ramsey (S.J.D.)	5/27/2004
	Maurice Silverman	7/20/2004
'35	Clifford H. Domke	8/22/2004
	Thomas L. Lott	6/15/2004
'36	Robert Q. Archibald	9/6/2004
	Joseph A. LaCava	8/8/2004
'37	Walter N. Bieneman	9/8/2004
	Jacob L. Keidan	9/16/2004
	Wallace B. Kemp	9/29/2004
	Donald H. Larmee	8/20/2004
	William J. McFate	9/20/2004
'39	Douglas Hall	10/24/2004
	Walter Martin	7/11/2004
	Edward C. Schoede	7/30/2004
'40	Robert B. Dunn	8/21/2004
	Roy E. Frazier Jr.	10/13/2004
	H. James Gram	10/15/2004
'41	Earl R. Gilman	9/5/2004
	James T. Warns	9/11/2004
'42	Woodrow A. Yared	11/7/2004
'47	Charles B. English	5/25/2004
	William E. Sykes	8/13/2004
'48	Richard V. Bruns	6/3/2004
	Clark R. Cooper	9/14/2004
	John G. Gent	10/22/2004
	William H. Henning	5/26/2004
	Richard O. Horn	11/15/2004
	Charles S. Miller	8/31/2004
'49	William R. McTaggart	8/27/2004
	William J. Pierce	7/6/2004
	Dale F. Ruedig Jr.	8/20/2004
	John Henry Spelman	10/13/2004
'50	J. Gerald Wetzel	6/29/2004
'51	Mark H. Bauer	9/6/2004
	James R.B. Hovey	11/3/2004
	Malcolm R. McKinnon	8/1/2004
'52	Don Philip Bonfa	7/3/2004
'53	James G. Degnan	9/16/2004
	James Granitsas	9/12/2004
	Thomas J. Owens	9/16/2004
	Carrington Shields-Oppenheim (LL.M.)	10/1/2004
'54	Catalino T. Macaraig Jr. (LL.M.)	11/17/2003
	James S. Patrick	9/23/2004
	Ralph I. Selby	11/15/2004
	Joseph Van Buskirk	6/13/2004
'55	James Leslie Colman	10/23/2004
	William G. Myers	7/23/2004
	Stanley S. Schwartz	8/16/2004
'56	William J. Cowlin	10/23/2004
	Charles L. Young	11/3/2004
'57	Robert T. Achor	1/26/2004
	George Kircos	7/26/2004
	Roger Law	8/29/2004
'58	Eugene C. Penzien	10/10/2004
	Harry W. Theuerkauf	8/19/2004
'59	Marion A. Youngers	8/12/2004
'60	Bruce M. Stiglitz	7/14/2004
'63	Robert E. Kleeb	7/6/2004
'64	Brian Mark Gray	7/1/2004
'67	George A. Bilque Jr.	7/31/2004
'68	William D. Hoops	9/5/2004
	Frederick C. Moore	10/11/2004
'70	William V. Kokko	11/25/2004
'73	Kenneth H. Bernstein	8/28/2004
'75	Scott Ewbank	11/6/2004
	Mark L. Lasser	10/7/2004
'78	Charles Kevin McCabe	10/11/2004
'83	Bebe A. Fairchild	10/4/2004
'90	Peter A.W. Ndenga	10/1/2004
'99	Rosemary B. Quigley	9/6/2004



The death of the living will

The following article is based on "Enough: The Failure of the Living Will," which appeared in the March-April 2004 Hastings Center Report.

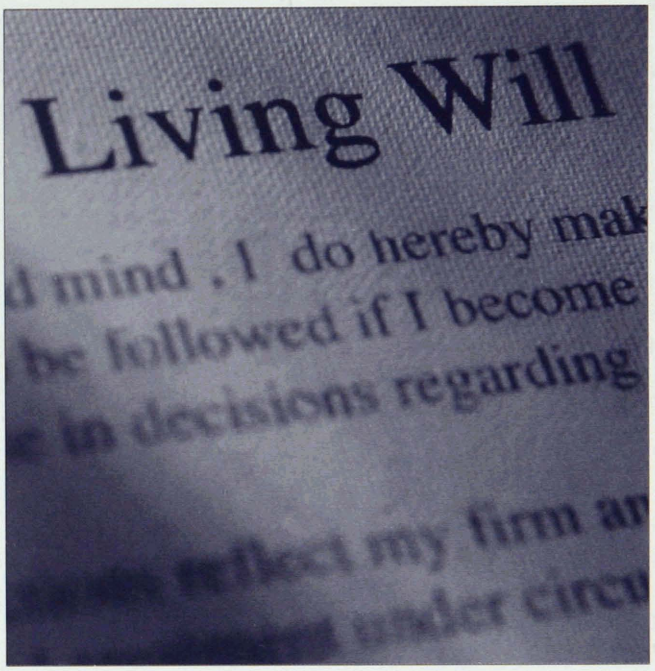
By Carl E. Schneider and Angela Fagerlin

Enough. The living will has failed, and it is time to say so.

We should have known it would fail: A notable but neglected psychological literature always provided arresting reasons to expect the policy of living wills to misfire. Given their alluring potential, perhaps they were worth trying. But a crescendoing empirical literature and persistent clinical disappointments reveal that the rewards of the campaign to promote living wills do not justify its costs.

Nor can any degree of tinkering ever make the living will an effective instrument of social policy. As the evidence of failure has mounted, living wills have lost some of their friends. We offer systematic support for their change of heart. But living wills are still widely and confidently urged on patients, and they retain the allegiance of many bioethicists, doctors, nurses, social workers, and patients. For these loyal advocates, we offer systematic proof that such persistence in error is but the triumph of dogma over inquiry and hope over experience.

A note about the scope of our contentions: First, we reject only living wills, not durable powers of attorney. Second, there are excellent reasons to be skeptical of living wills on principle. For example, perhaps former selves should not be able to bind latter selves in the ways living wills contemplate. And many people do and perhaps should reject the view of patients, their families, and their communities that informs living wills. But we accept for the sake of argument that living wills desirably serve a strong version of patients' autonomy. We contend, nevertheless, that living wills do not and cannot achieve that goal.



And a stipulation: We do not propose the elimination of living wills. We can imagine recommending them to patients whose medical situation is plain, whose crisis is imminent, whose preferences are specific, strong, and delineable, and who have special reasons to prescribe their care. We argue on the level of public policy: In an attempt to extend patients' exercise of autonomy beyond their span of competence, resources have been lavished to make living wills routine and even universal. This policy has not produced results that recompense its costs, and it should therefore be renounced.

Living wills are a bioethical idea that has passed from controversy to conventional wisdom, from the counsel of academic journals to the commands of law books, from professors' proposal to professional practice. Advance directives generally are embodied in federal policy by the Patient Self-Determination Act (PSDA), which requires medical institutions to give patients information about their state's advance directives. In turn, the law of every state provides for advance directives, almost all states provide for living wills, and most states "have at least two statutes, one establishing a living will type directive, the other establishing a proxy or durable power of attorney for health care." Not only are all these statutes very much in effect, but new legislative activity is constant. Senators Rockefeller, Collins, and Specter have introduced bills to "strengthen" the PSDA and living wills, and state legislatures continue to amend living will statutes and to enact new ones.

Courts and administrative agencies too have become advocates of living wills. The Veterans Administration has proposed a rule to encourage the use of advance directives, including living wills. Where legislatures have not granted living wills legal status, some courts have done so as a matter of common law, and where legislatures have granted them legal status, courts have cooperated with eager enthusiasm. Living wills have assumed special importance in states which prohibit terminating treatment in the absence of strong evidence of the patient's wishes. One supreme court summarized a common theme: "[A] written directive would provide the most concrete evidence of the patient's decisions, and we strongly urge all persons to create such a directive."

The grandees of law and medicine also give their benediction to the living will. The AMA's Council on Ethical and Judicial Affairs proclaims: "Physicians should encourage their patients to document their treatment preferences or to appoint a health care proxy with whom they can discuss their values regarding health care and treatment." The elite National Conference of Commissioners on Uniform State Laws continues to promulgate the Uniform Health-Care Decisions Act, a prestigious model statute that has been put into law in a still-growing number of states. Medical journals regularly admonish doctors and nurses to see that patients have advance directives, including living wills. Bar journals regularly admonish lawyers that their clients — all their clients — need advance directives, including living wills. Researchers demonstrate their conviction that living wills are important by the persistence of their studies of patients' attitudes toward living wills and ways of inveigling patients to sign them.

Not only do legislatures, courts, administrative agencies, and professional associations promote the living will, but other groups unite with them. The Web abounds in sites advocating the living will to patients. The Web site for our university's hospital plugs advance directives and suggests that it "is probably better to have written instructions because then everyone can read them and understand your wishes."

Our own experience in presenting this paper is that its thesis provokes some bioethicists to disbelief and indignation. It is as

though they simply cannot bear to believe that living wills might not work. How can anything so intuitively right be proved so infuriatingly wrong? And indeed, bioethicists continue to investigate ways the living will might be extended (to deal with problems of the mentally ill and of minors, for example) and developed for other countries.

Although some sophisticated observers have long doubted the wisdom of living wills, proponents have tended to respond in one of three ways, all of which preserve an important role for living wills. First, proponents have supposed that the principal problem with living wills is that people just won't sign them. These proponents have persevered in the struggle to find ways of getting more people to sign up.

Second, proponents have reasserted the usefulness of the living wills. For example, Norman Cantor, distinguished advocate of living wills, acknowledges that "(s)ome commentators doubt the utility or efficacy of advance directives," (by which he means the living will), but he concludes that "these objections don't obviate the importance of advance directives." Other proponents are daunted by the criticisms of living wills but offer new justifications for them. Linda Emanual, another eminent exponent of living wills, writes that "living wills can help doctors and patients talk about dying" and can thereby "open the door to a positive, caring approach to death."

Third, some proponents concede the weaknesses of the living will and the advantages of the durable power of attorney and then propose a durable power of attorney that incorporates a living will. That is, the forms they propose for establishing a durable power of attorney invite their authors to provide the kinds of instructions formerly confined to living wills.

None of these responses fully grapples with the whole range of difficulties that confound the policy promoting living wills. In fairness, this is partly because the case against that policy has been made piecemeal and not in a full-fledged and full-throated analysis of the empirical literature on living wills.

In sum, the law has embraced the principle of living wills and cheerfully continues to this moment to expound and expand that principle. Doctors, nurses, hospitals, and lawyers are daily urged to convince their patients and clients to adopt living wills, and patients hear their virtues from many other sources besides. Some advocates of living wills have shifted the grounds for their support of living wills, but they persist in believing that they are useful. The time has come to investigate those policies and those hopes systematically. That is what this article attempts. We ask an obvious but unasked question: What would it take for a regime of living wills to function as their advocates hope? First, people must have living wills. Second, they must decide what treatment they would want if incompetent. Third, they must accurately and lucidly state that preference. Fourth, their living wills must be available to people making decisions for a patient. Fifth, those people must grasp and heed the living will's instructions. These conditions are unmet and largely unmeetable.

Do people have living wills?

At the level of principle, living wills have triumphed among the public as among the princes of medicine. People widely say they want a living will, and living wills have so much become conventional medical wisdom "that involvement in the process is being portrayed as a duty to physicians and others." Despite this, and despite decades of urging, most Americans lack them. While most of us who need one have a property will, roughly 18 percent have living wills. The chronically or terminally ill are likelier to prepare living wills than the healthy, but even they do so fitfully. In one study of dialysis patients, for instance, only 35 percent had a living will, even though all of them thought living wills a "good idea."

Why do people flout the conventional wisdom? The flouters advance many explanations: They don't know enough about living wills, they think living wills hard to execute, they procrastinate, they hesitate to broach the topic to their doctors (as their doctors likewise hesitate). Some patients doubt they need a living will. Some think living wills are for the elderly or infirm and count themselves in neither group. Others suspect that living wills do not change the treatment people receive; 91 percent of the veterans in one study shared that suspicion. Many patients are content or even anxious to delegate decisions to their families, often because they care less what decisions are made than that they are made by people they trust. Some patients find living wills incompatible with their cultural traditions. Thus in the large SUPPORT and HELP studies, most patients preferred to leave final resuscitation decisions to their family and physician instead of having their own preferences expressly followed (70.8 percent in HELP and 78.0 percent in SUPPORT). "This result is so striking that it is worth restating: Not even a third of the HELP patients and hardly more than a fifth of the SUPPORT patients "would want their own preferences followed."

If people lacked living wills only because of ignorance, living wills might proliferate with education. But studies seem not to "support the speculations found in the literature that the low level of advance directives use is due primarily to a lack of information and encouragement from health care professionals and

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family members." Rather, there is considerable evidence "that the elderly's action of delaying execution of advance directives and deferring to others is a deliberate, if not an explicit, refusal to participate in the advance directives process."

The federal government has sought to propagate living wills through the Patient Self-Determination Act (PSDA), which essentially requires medical institutions to inform patients about advance directives. However, "empirical studies demonstrate that: the PSDA has generally failed to foster a significant increase in advance directives use; it is being implemented by medical institutions and their personnel in a passive manner; and the involvement of physicians in its implementation is lacking." One commentator even thinks "the PSDA's legal requirements have become a ceiling instead of a floor." In short, people have reasons, often substantial and estimable reasons, for eschewing living wills, reasons unlikely to be overcome by persuasion. Indeed, persuasion seems quickly to find its limits. Numerous studies indicate that without considerable intervention, approximately 20 percent of us complete living wills, but programs to propagate wills have mixed results. Some have achieved significant if still limited increases in the completion of living wills, while others have quite failed to do so. Thus we must ask: If after so much propaganda so few of us have living wills, do we really want them, or are we just saying what we think we ought to think and what investigators want to hear?

Do people know what they will want?

Suppose, counterfactually, that people executed living wills. For those documents to work, people would have to predict their preferences accurately. This is an ambitious demand. Even patients making contemporary decisions about contemporary illnesses are regularly daunted by the decisions' difficulty. They are human. We humans falter in gathering information, misunderstand and ignore what we gather, lack well-considered preferences to guide decisions, and rush headlong to choice. How much harder, then, is it to conjure up preferences for an unspecifiable future confronted with unidentifiable maladies with unpredictable treatments?

For example, people often misapprehend crucial background facts about their medical choices. Oregon has made medical policy in fresh and controversial ways, has recently had two referenda on assisted suicide, and alone has legalized it. Presumably, then, its citizens are especially knowledgeable. But only 46 percent of them knew that patients may legally withdraw life-sustaining treatment. Even experience is a poor teacher: "Personal experience with illness . . . and authoring an advance directive . . . were not significantly associated with better knowledge about options."

Nor do people reliably know enough about illnesses and treatments to make prospective life-or-death decisions about them. To take one example from many, people grossly overestimate the effectiveness of CPR and in fact hardly know what it is. For such information, people must rely on doctors. But doctors convey that information wretchedly even to competent patients making contemporaneous decisions. Living wills can be executed without even consulting a doctor, and when doctors are consulted, the conversations are ordinarily short, vague, and tendentious. In the Tulsky study, for example, doctors only described either "dire scenarios . . . in which few people, terminally ill or otherwise, would want treatment" or "situations in which patients could recover with proper treatment."

Let us put the point differently. The conventional — legal and ethical — wisdom insists that candidates for even a flu shot give "informed consent." And that wisdom has increasingly raised the standards for disclosure. If we applied those standards to the information patients have before making the astonishing catalog of momentous choices living wills can embody, the conventional wisdom would be left shivering with indignation.

Not only do people regularly know too little when they sign a living will, but often (again, we're human) they analyze their choices only superficially before placing them in the time capsule. An ocean of evidence affirms that answers are shaped by the way questions are asked. Preferences about treatments are influenced by factors like whether success or failure rates are used, the level of detail employed, and whether long or short-term consequences are explained first. Thus in one study, elderly subjects opted for the intervention 12 percent of the time when it was presented negatively, 18 percent of the time when it was phrased as in an advance directive already in use, and 30 percent of the time when it was phrased positively. Seventy-seven percent of the subjects changed their minds at least once when given the same case scenario but a different description of the intervention."

If patients have trouble with contemporaneous decisions, how much more trouble must they have with prospective ones. For such decisions to be "true," patients' preferences must be reasonably stable. Surprisingly often, they are not. A famous study of 18 women in a "natural childbirth" class found preferences about anesthesia and avoiding pain relatively stable before childbirth, but at "the beginning of active labor (4-5 cm dilation) there was a shift in the preference toward avoiding labor pains. . . . During the transition phase of labor (8-10cm) the values remained relatively stable, but then . . . the mothers' preferences shifted again

at postpartum toward avoiding the use of anesthesia during the delivery of her next child." And not only are preferences surprisingly labile, but people have trouble recognizing that their views have changed. This makes it less likely they will amend their living wills as their opinions develop and more likely that their living wills will treasonously misrepresent their wishes. Instability matters. The healthy may incautiously prefer death to disability. Once stricken, competent patients can test and reject that preference. They often do. Thus Wilfrid Sheed "quickly learned (that) cancer, even more than polio, has a disarming way of bargaining downward, beginning with your whole estate and then letting you keep the game warden's cottage or badminton court; and by the time it has tried to frighten you to death and threatened to take away your very existence, you'd be amazed at how little you're willing to settle for."

At least 16 studies have investigated the stability of people's preferences for life sustaining treatment. A meta-analysis of 11 of these studies found that the stability of patients' preferences was 71 percent (the range was 57 percent to 89 percent). Although stability depended on numerous factors (including the illness, the treatment, and demographic variables), the bottom line is that, over periods as short as two years, almost one-third of preferences for life-sustaining medical treatment changed. More particularly, illness and hospitalization change people's preferences for life-sustaining treatments. In a prospective study, the desire for life sustaining treatment declined significantly after hospitalization but returned almost to its original level three to six months later. Another study concluded that the "will to live is highly unstable among terminally ill cancer patients." The authors thought their findings "perhaps not surprising, given that only 10-14 percent of individuals who survive a suicide attempt commit suicide during the next 10 years, which suggests that a desire to die is inherently changeable."

The consistent finding that interest in life-sustaining treatment shifts over time and across contexts coincides tellingly with research charting people's struggles to predict their own tastes, behavior, and emotions even over short periods and under familiar circumstances. People mispredict what poster they will like, how much they will buy at the grocery store, how sublimely they will enjoy an ice cream, and how they will adjust to tenure decisions. And people "miswant" for numerous reasons. They imagine a different event from the one that actually occurs, nurture inaccurate theories about what gives them pleasure, forget they might outwit misery, concentrate on salient negative events and ignore offsetting happier ones, and misgauge the effect of physiological sensations like pain. Given this rich stew of research on people's missteps in predicting their tastes generally, we should expect misapprehensions about end-of-life preferences. Indeed, those preferences should be especially volatile, since people lack experience deciding to die.

Can people articulate what they want?

Suppose, arguendo, that patients regularly made sound choices about future treatments and write living wills. Can they articulate their choices accurately? This question is crucially unrealistic, of course, because the assumption is false. People have trouble reaching well-considered decisions, and you cannot state clearly on paper what is muddled in your mind. And indeed people do, for instance, issue mutually inconsistent instructions in living wills.

But assume this difficulty away and the problem of articulation persists. In one sense, the best way to divine patients' preferences is to have them write their own living wills to give surrogates the patient's gloriously unmediated voice. This is not a practical policy. Too many people are functionally illiterate, and most of the literate cannot express themselves clearly in writing. It's hard, even for the expert writer. Furthermore, most people know too little about their choices to cover all the relevant subjects. Hence living wills are generally forms that demand little writing. But the forms have failed. For example, "several studies suggest that even those patients who have completed AD forms . . . may not fully understand the function of the form or its language." Living wills routinely baffle patients with their "syntactic complexity, concept density, abstractness, organization, coherence, sequence of ideas, page format, length of line of print, length of paragraph, punctuation, illustrations, color, and reader interest." Unfortunately, most advance directive forms . . . often have neither a reasonable scope nor depth. They do not ask all the right questions and they do not ask those questions in a manner that elicits clear responses. Doctors and lawyers who believe their clients are all above average should ask them what their living will says. One of us [Schneider] has tried the experiment. The modal answer is, in its entirety: "It says I don't want to be a vegetable."

No doubt the forms could be improved, but not enough to matter. The world abounds in dreadfully drafted forms because writing complex instructions for the future is crushingly difficult. Statutes read horribly because their authors are struggling to (1) work out exactly what rule they want, (2) imagine all the

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circumstances in which it might apply, and (3) find language to specify all those but only those circumstances. Each task is ultimately impossible, which is why statutes explicitly or implicitly confide their enforcers with some discretion and why courts must interpret — rewrite? — statutes. However, these skills and resources are not available to physicians or surrogates.

One might retort that property wills work and that living wills are not that far removed from property wills. But wills work as well as they do to distribute property because their scope is — compared with living wills — narrow and routinized. Most people have little property to distribute and few plausible heirs. As property accumulates and ambitions swell, problems proliferate. Many of them are resolvable because experts — lawyers — exclusively draft and interpret wills. Lawyers have been experimenting for centuries with testamentary language in a process which has produced standard formulas with predictable meanings and standard ways of distributing property into which testators are channeled. Finally, if testators didn't say it clearly enough in the right words and following the right procedures, courts coolly ignore their wishes and substitute default rules.

The lamentable history of the living will demonstrates just how recalcitrant these problems are. There have been, essentially, three generations of living wills. At first, they stated fatuously general desires in absurdly general terms. As the vacuity of over generality became clear, advocates of living wills did the obvious: Were living wills too general? Make them specific. Were they "one size fits all"? Make them elaborate questionnaires. Were they uncritically signed? "Require" probing discussions between doctor and patient. However, the demand for specificity forced patients to address more questions than they could comprehend. So, generalities were insufficiently specific and insufficiently considered. Specifics were insufficiently general and perhaps still insufficiently considered. What was a doctor — or lawyer— to do? Behold the "values history," a disquisition on the patient's supposed overarching beliefs from which to infer answers to specific questions. That patients can be induced to trek through these interminable and imponderable documents is unproved and unlikely. That useful conclusions can be drawn from the platitudes they evoke is false. As Justice Holmes knew, "General propositions do not decide concrete cases."

The lessons of this story are that drafting instructions is harder than proponents of living wills seem to believe and that when you move toward one blessing in structuring these documents, you walk away from another. The failure to devise workable forms is not a failure of effort or intelligence. It is a consequence of attempting the impossible.

Where is the living will?

Suppose that, *mirabile dictu*, people executed living wills, knew what they will want, and could say it. That will not matter unless the living will reaches the people responsible for the incompetent patient. Often, it does not. This should be no surprise, for long can be the road from the drafteer's chair to the ICU bed.

First, the living will may be signed years before it is used, and its existence and location may vanish in the mists of time. Roughly half of all living wills are drawn up by lawyers and must somehow reach the hospital, and 62 percent of patients do not give their living will to their physician. On admission to the hospital, patients can be too assailed and anxious to recall and mention their advance directives. Admission clerks can be harried, neglectful, and loath to ask patients awkward questions.

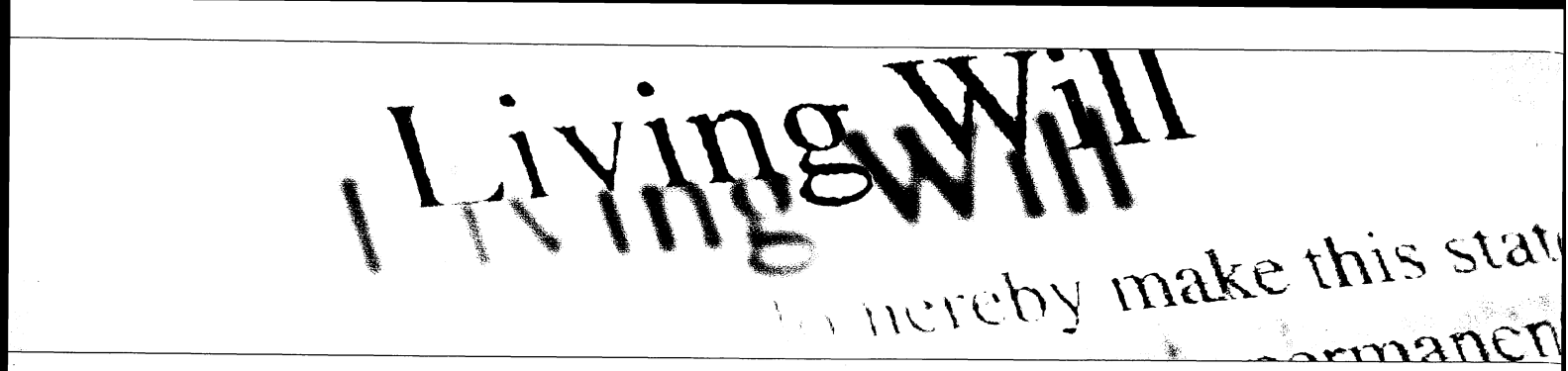
Thus when a team of researchers reviewed the charts of 182 patients who had completed a living will before being hospitalized, they found that only 26 percent of the charts accurately recorded information about those directives, and only 16 percent of the charts contained the form. And in another study only 35 percent of the nursing home patients who were transferred to the hospital had their living wills with them.

Will proxies read it accurately?

Suppose, *per impossibile*, that patients wrote living wills, correctly anticipated their preferences, articulated their desires lucidly, and conveyed their document to its interpreters. How acutely will the interpreters analyze their instructions? Living wills are not self-executing: Someone must decide whether the patient is incompetent, whether a medical situation described in the living will has arisen, and what the living will then commands.

Usually, the patient's intimates will be central among a living will's interpreters. We might hope that intimates already know the patient's mind, so that only modest demands need be made on their interpreting skills. But many studies have asked such surrogates to predict what treatment the patient would choose. Across these studies, approximately 70 percent of the predictions were correct — not inspiring success for life and death decisions.

Do living wills help? We know of only one study that addresses that question. In a randomized trial, researchers asked elderly patients to complete a disease- and treatment-based or a value-based living will. A control group of elderly patients completed no living will. The surrogates were generally spouses or children who had known the patient for decades. Surrogates who were not able to consult their loved one's living will predicted patients'



preferences about 70 percent of the time. Strikingly, surrogates who consulted the living will did no better than surrogates denied it. Nor were surrogates more successful when they discussed living wills with patients just before their prediction.

What is more, a similar study found that primary-care physicians' predictions were similarly unimproved by providing them with patients' advance directives. On the other hand, emergency room doctors (complete strangers) given a living will more accurately predicted patients' preferences than ER doctors without one.

Do living wills alter patient care?

Our survey of the mounting empirical evidence shows that none of the five requisites to making living wills successful social policy is met now or is likely to be. The program has failed, and indeed is impossible.

That impossibility is confirmed by studies of how living wills are implemented which show that living wills seem not to affect patients' treatments. For instance, one study concluded that living wills "do not influence the level of medical care overall. This finding was manifested in the quantitatively equal use of diagnostic testing, operations, and invasive hemodynamic monitoring among patients with and without advance directives. Hospital and ICU lengths of stay, as well as healthcare costs, were also similar for patients with and without advance directive statements." Another study found that in 30 of 39 cases in which a patient was incompetent and the living will was in the patient's medical record, the surrogate decisionmaker was not the person the patient had appointed. In yet a third study, a quarter of the patients received care that was inconsistent with their living will.

But all this is normal. Harry Truman rightly predicted that his successor would "sit here, and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike — it won't be a bit like the Army. He'll find it very frustrating." (Of course, the Army isn't like the Army either, as Captain Truman surely knew.) Indeed, the whole law of bioethics often seems a whited sepulchre for slaughtered hopes, for its policies have repeatedly fallen woefully short of their purposes. Informed consent is a "fairytale." Programs to increase organ donation have persistently disappointed. Laws regulating DNR orders are hardly better. Legal definitions of brain death are misunderstood by astonishing numbers of doctors and nurses. And so on.

But why don't living wills affect care? Joan Teno and colleagues saw no evidence "that a physician unilaterally decided to ignore or disregard an AD." Rather, there was "a complex interaction of . . . three themes." First (as we have emphasized), "the contents of ADs were vague and difficult to apply to current clinical situations." The imprecision of living wills not only stymies interpreters, it exacerbates their natural tendency to read documents in light of their own preferences. Thus "(e)ven with the therapy-specific AD accompanied by designation of a proxy and prior patient-physician discussion, the proportion of physicians who were willing to withhold therapies was quite variable: cardiopulmonary resuscitation, 100 percent; administration of artificial nutrition and hydration, 82 percent; administration of antibiotics, 80 percent; simple tests, 70 percent; and administration of pain medication, 13 percent."

Second, the Teno team found that "patients were not seen as 'absolutely, hopelessly ill,' and thus, it was never considered the time to invoke the AD." Living wills typically operate when patients become terminally ill, but neither doctors nor families lightly conclude patients are dying, especially when that means ending treatment. And understandably. For instance, "on the day before death, the median prognosis for patients with heart failure is still a 50 percent chance to live six more months because patients with heart failure typically die quickly from an unpredictable complication like arrhythmia or infection." So by the time doctors and families finally conclude the patient is dying, the patient's condition is already so dire that treatment looks pointless quite apart from any living will. "In all cases in which life-sustaining treatment was withheld or withdrawn, this decision was made after a trial of life-sustaining treatment and at a time when the patient was seen as 'absolutely, hopelessly ill' or 'actively dying.' Until patients crossed this threshold, ADs were not seen as applicable." Thus "it is not surprising that our previous research has shown that those with ADs did not differ in timing of DNR orders or patterns of resource utilization from those without ADs."

Third, "family members or the surrogate designated in a [durable power of attorney] were not available, were ineffectual, or were overwhelmed with their own concerns and did not effectively advocate for the patient." Family members are crucial surrogates because they should be: patients commonly want them to be; they commonly want to be; they specially cherish the patient's interests. Doctors ordinarily assume families know the patient's situation and preferences and may not relish responsibility for life-and-death decisions, and doctors intent on avoiding litigation may realize that the only plausible plaintiffs are families. The

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family, however, may not direct attention to the advance directive and may not insist on its enforcement. In fact, surrogates may be guided by either their own treatment preferences or an urgent desire to keep their beloved alive.

In sum, not only are we awash in evidence that the prerequisites for a successful living wills policy are unachievable, but there is direct evidence that living wills regularly fail to have their intended effect. That failure is confirmed by the numerous convincing explanations for it. And if living wills do not affect treatment, they do not work.

Do living wills have beneficial side effects?

Even if living wills do not effectively promote patients' autonomy, they might have other benefits that justify their costs. There are three promising candidates.

First, living wills might stimulate conversation between doctor and patient about terminal treatment. However, at least one study finds little association between patients' reports of executing an advance directive and their reports of such conversations. Nor do these conversations, when they occur, appear satisfactory. James Tulsky and colleagues asked experienced clinicians with relationships with patients who were over 65 or seriously ill to "discuss advance directives in whatever way you think is appropriate" with them. Although the doctors knew they were being taped, the conversations were impressively short and one-sided: The median discussion "lasted 5.6 minutes (range, 0.9 to 15.0 minutes). Physicians spoke for a median of 3.9 minutes (range, 0.6 to 10.9 minutes), and patients spoke for the remaining 7 minutes (range, 0.3 to 9.6 minutes). . . . Usually, the conversation ended without any specific follow-up plan." The "(p)atients' personal values, goals for care, and reasons for treatment preferences were discussed in 71 percent of cases and were explicitly elicited by 34 percent of physicians." But doctors commonly "did not explore the reasons for patient's preferences and merely determined whether they wanted specific interventions."

Nor were the conversations conspicuously informative: "Physicians used vague language to describe scenarios, asking what patients would want if they became 'very, very sick' or 'had something that was very serious.' . ." Further, "[v]arious qualitative terms were used loosely to describe outcome probabilities." In addition, these brief conversations considered almost exclusively the two ends of the continuum — the most hopeless and the most hopeful cases. Conversations tended to ignore "the more common, less clear-cut predicaments surrounding end-of-life care." True, the patients all thought "their physicians 'did a good job talking about the issues,'" but this only suggests that patients did not understand how little they were told.

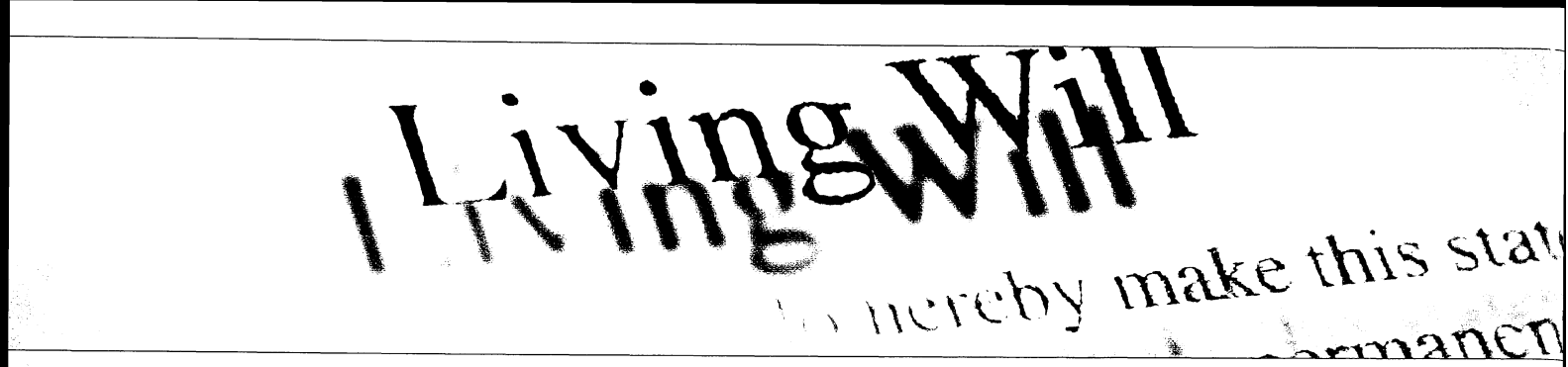
The second candidate for beneficial side effect arises from evidence that living wills may comfort patients and surrogates. People with a living will apparently gain confidence that their surrogates will understand their preferences and will implement them comfortably, and the surrogates concur. Improved satisfaction with decisions was also a rare positive effect of the SUPPORT study (which devoted enormous resources to improving end of life decisions and care but made dismayingly little difference). In another study, living wills reduced the stress and unhappiness of family members who had recently withdrawn life support from a relative. But even if living wills make patients and surrogates more confident and comfortable, those qualities are apparently unrelated to the accuracy of surrogates' decisions. Thus we are left with the irony that one of the best arguments for a tool for enhancing people's autonomy is that it deceives them into confidence.

Third, because living wills generally constrain treatment, they might reduce the onerous costs of terminal illness. Although several studies associated living wills with small decreases in those costs, several studies have reached the opposite conclusion. The old Scotch verdict, "not proven," seems apt.

The costs

There is no free living will, and the better (or at least more thorough and careful) the living will, the more it costs. Living wills consume a patient's time and energy. When doctors or lawyers help, costs soar. On a broader view, Jeremy Sugarman and colleagues estimated that the Patient Self-Determination Act imposed on all hospitals a start-up cost of $101,569,922 and imposed on one hospital (Johns Hopkins) initial costs of $114,528. These figures omit the expenses, paid even as we write and you read, of administering the program. And this money has bought only *pro forma* compliance.

These are real costs incurred when over 40 million people lack health insurance and when we are spending more of our gross domestic product on health care than comparable countries without buying commensurately better health. If programs to promote and provide living wills showed signs of achieving the goals cherished for them, we would have to decide whether their valuable but incalculable rewards exceeded their diffuse but daunting costs. However, since those programs have failed, their costs plainly outweigh their benefits.



What is to be done?

Living wills attempt what undertakers like to call "pre-need planning," and on inspection they are as otiose as the mortuary version. Critically, empiricists cannot show that advance directives affect care. This is damning, but were it our only evidence, perhaps we might not be weary in well doing: for in due season we might reap, if we faint not. However, our survey of the evidence suggests that living wills fail not for want of effort, or education, or intelligence, or good will, but because of stubborn traits of human psychology and persistent features of social organization.

Thus when we reviewed the five conditions for a successful program of living wills, we encountered evidence that not one condition has been achieved or, we think, can be. First, despite the millions of dollars lavished on propaganda, most people do not have living wills. And they often have considered and considerable reasons for their choice. Second, people who sign living wills have generally not thought through its instructions in a way we should want for life-and-death decisions. Nor can we expect people to make thoughtful and stable decisions about so complex a question so far in the future. Third, drafters of living wills have failed to offer people the means to articulate their preferences accurately. And the fault lies primarily not with the drafters; it lies with the inherent impossibility of living wills' task. Fourth, living wills too often do not reach the people actually making decisions for incompetent patients. This is the most remediable of the five problems, but it is remediable only with unsustainable effort and unjustifiable expense. Fifth, living wills seem not to increase the accuracy with which surrogates identify patients' preferences. And the reasons we surveyed when we explained why living wills do not affect patients' care suggest that these problems are insurmountable.

The cost-benefit analysis here is simple: If living wills lack detectable benefits, they cannot justify any cost, much less the considerable costs they now exact. Any attempt to increase their incidence and their availability to surrogates must be expensive. And the evidence suggests that broader use of living wills can actually disserve rather than promote patients' autonomy: If, as we have argued, patients sign living wills without adequate reflection, lack necessary information, and have fluctuating preferences anyway, then living wills will not lead surrogates to make the choices patients would have wanted. Thus, as Pope suggests, the "PSDA, rather than promoting autonomy has 'done a disservice to most real patients and their families and caregivers.' It has promoted the execution of uninformed and under-informed advance directives, and has undermined, not protected, self-determination."

If living wills have failed, we must say so. We must say so to patients. If we believe our declamations about truth-telling, we should frankly warn patients how faint is the chance that living wills can have their intended effect. More broadly, we should abjure programs intended to cajole everyone into signing living wills. We should also repeal the PSDA, which was passed with arrant and arrogant indifference to its effectiveness and its costs and which today imposes accumulating paperwork and administrative expense for paltry rewards.

Of course we recognize the problems presented by the decisions that must be made for incompetent patients, and our counsel is not wholly negative. Patients anxious to control future medical decisions should be told about durable powers of attorney. These surely do not guarantee patients that their wishes will blossom into fact, but nothing does. What matters is that powers of attorney have advantages over living wills. First, the choices that powers of attorney demand of patients are relatively few, familiar, and simple. Second, a regime of powers of attorney requires little change from current practice, in which family members ordinarily act informally for incompetent patients. Third, powers of attorney probably improve decisions for patients, since surrogates know more at the time of the decision than patients can know in advance. Fourth, powers of attorney are cheap; they require only a simple form easily filled out with little advice. Fifth, powers of attorney can be supplemented by legislation (already in force in some states) akin to statutes of intestacy. These statutes specify who is to act for incompetent patients who have not specified a surrogate. In short, durable powers of attorney are — as these things go — simple, direct, modest, straightforward, and thrifty.

In social policy as in medicine, plausible notions can turn out to be bad ideas. Bad ideas should be renounced. Bloodletting once seemed plausible, but when it demonstrably failed, the course of wisdom was to abandon it, not to insist on its virtues and to scrounge for alternative justifications for it. Living wills were praised and peddled before they were fully developed, much less studied. They have now failed repeated tests of practice. It is time to say, "enough."

The death of the living will

Carl E. Schneider and Angela Fagerlin

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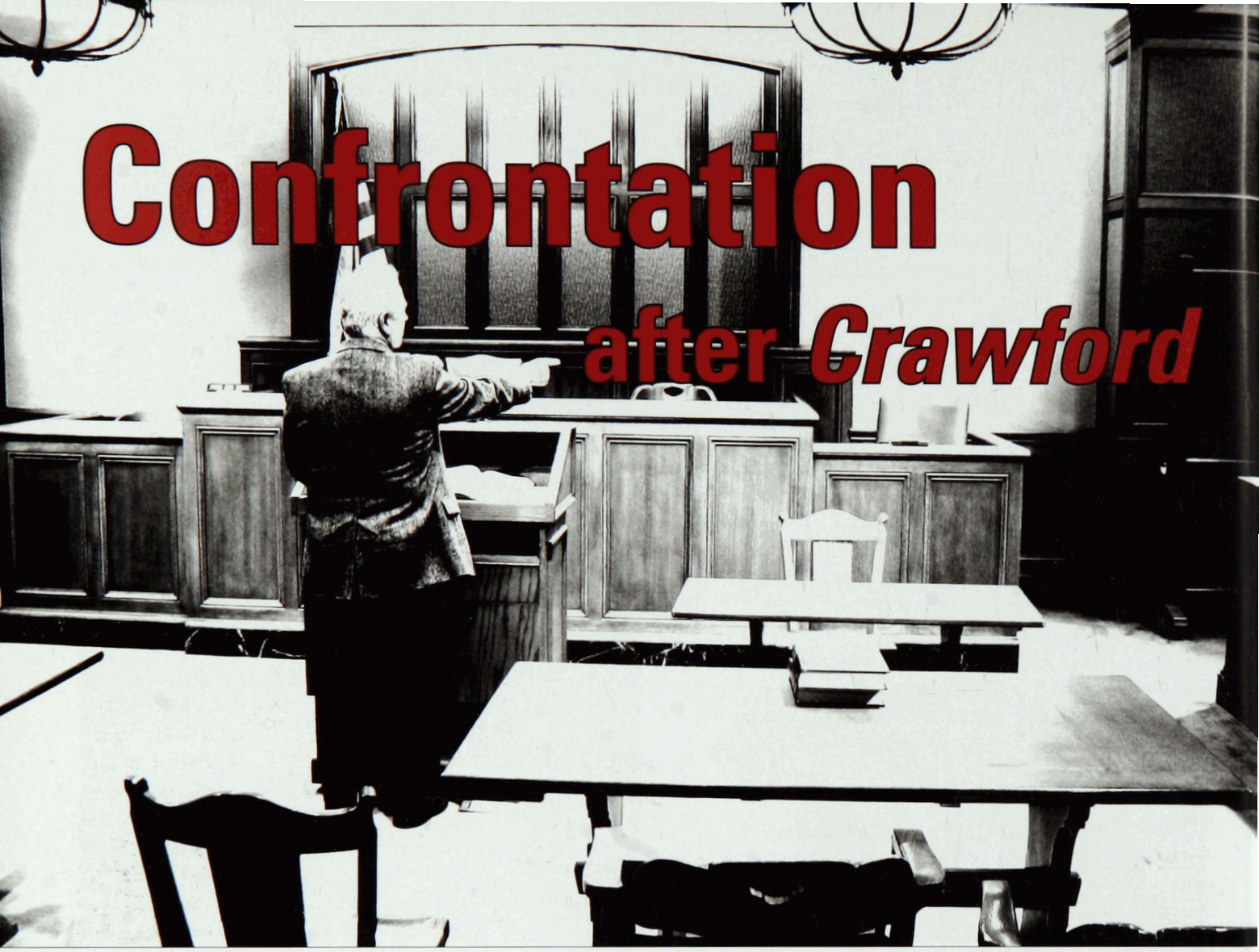
Confrontation after *Crawford*



The following edited excerpt, drawn from "The Confrontation Clause Re-Rooted and Transformed," 2003-04 Cato Supreme Court Review *439 (2004), by Law School Professor Richard D. Friedman, discusses the impact, effects, and questions generated by the U.S. Supreme Court's ruling in* Crawford v. Washington *last year that a defendant is entitled to confront and cross-examine any testimonial statement presented against him. In* Crawford, *the defendant, charged with attacking another man with a knife, contested the trial court's admission of a tape-recorded statement his wife made to police without giving him the opportunity to cross-examine. The trial court admitted the statement, and the appeals court upheld the conviction.*

When Crawford *was argued before the U.S. Supreme Court in November 2003, the guiding principle for two decades had been that "the U.S. Supreme Court has tolerated admission of out-of-court statements against the accused, without cross-examination, if the statements are deemed 'reliable' or 'trustworthy,'" according to Friedman. But in* Crawford, *"the Supreme Court did a sharp about-face, holding that a 'testimonial' statement cannot be admitted against an accused, no matter how reliable a court may deem it to be, unless the accused has had an adequate opportunity to cross-examine the witness who made the statement."*

"Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law — as does Roberts *[*Roberts v. Ohio, *448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether," Justice Antonin Scalia wrote for the Court in* Crawford. *"Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"*

*"*Crawford *is not only a vindication of the rights of the accused, but a victory for fidelity to constitutional text and intent," Friedman writes in the article from which this excerpt is taken. "And yet the decision leaves many open questions, and all lawyers involved in the criminal justice process will have to adjust to the new regime that it creates."*

By Richard D. Friedman

Crawford reflects a paradigm shift in the doctrine of the Confrontation Clause. Nonetheless, *Crawford* and *amici* went to some pains to assure the Supreme Court that adoption of the testimonial approach would alter the results in few, if any, of the Court's own precedents. A considerable number of decisions in the lower courts, however, would come out differently under *Crawford*. To set the groundwork for understanding how *Crawford* alters the doctrinal landscape and the important issues that are likely to arise, it will first help to examine several respects in which *Crawford* does not change the law.

First, under *Crawford*, as before, a statement does not raise a confrontation issue unless it is offered to prove the truth of a matter that it asserts. This is the rule of *Tennessee v. Street* [471 U.S. 409, 414 (1985)], which *Crawford* explicitly reaffirms. In *Street* itself, for example, the defendant contended that the police coerced him to make a statement similar to that of an accomplice's confession. The Court ruled unanimously that the prosecution therefore could introduce the accomplice's confession to demonstrate not that it was true but that it was substantially different from the defendant's. That result would be unchanged under *Crawford*. There may be questions as to how far a prosecutor may take this "not for the truth" argument. For example, if the prosecutor argues that the statement is being offered as support for the opinion of an expert witness, in some cases that might be considered too thin a veneer. Nonetheless, the basic doctrine remains in place.

Second, many statements that were admissible under *Roberts* will still be admissible under *Crawford*, though the grounds of decision will be different. The question is not, as some analysts have posed it, whether *Crawford* preserves given hearsay exceptions. The rule against hearsay and the Confrontation Clause are separate sources of law — and *Crawford* stops the tendency to meld them. The question for Confrontation Clause purposes in each case is whether the given statement is testimonial. The fact that a statement fits within a hearsay exception does not alter its status with respect to that question.

But one can say that most statements that fit within certain hearsay exceptions are not testimonial. For example, under *Roberts*, business records and conspirator statements were deemed reliable because they fell within "firmly rooted" hearsay exemptions. Under *Crawford*, almost all such statements will be considered non-testimonial, and therefore the Confrontation Clause will impose little, if any, obstacle to their admissibility.

Third, the rule of *California v. Green* [399 U.S. 149 (1970)] also is preserved. As the *Crawford* Court summarized the rule, "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."

In my view, the rule is a dubious one. It fails to take into account the serious impairment of the ability to cross-examine that arises when a witness' prior statement is admitted and the witness does not re-assert its substance, effectively walking away from it. But the Court has shown no inclination to modify the rule. Indeed, it was reinforced by Justice Scalia himself in *United States v. Owens* [484 U.S. 554 (1988)], a case involving a witness whose severe head injuries destroyed much of his memory — and it now becomes more important than ever for prosecutors. If a witness makes a statement favorable to a prosecutor, but the prosecutor is afraid that the witness will not stand by the statement at trial, the prosecutor should not argue that the statement is "reliable." Rather, the prosecutor should bring the witness to trial, or otherwise ensure that the defendant has had an adequate opportunity for cross. If the witness reaffirms the substance of the prior statement, all is well and good for the prosecutor. If she testifies at variance from the statement, then the Confrontation Clause does not bar admissibility of the statement.

Fourth, in applying *Roberts*, the Court developed a body of case law concerning what constitutes proof of unavailability (assuming the given statement can be introduced only if the declarant is unavailable), and that case law — including part of *Roberts* itself — is left untouched, for better or worse. At argument in *Crawford*, the chief justice asked what impact the testimonial approach would have on *Mancusi v. Stubbs* [408 U.S. 204 (1972)], a key case in this line and one in which he wrote the majority opinion. The proper answer is simple: None at all.

Fifth, *Crawford* explicitly preserves the principle that the accused should be deemed to have forfeited the confrontation right if the accused's own misconduct prevented him from having an adequate opportunity to cross-examine the witness. The right may be forfeited, for example, if the accused murdered or intimidated the witness. The forfeiture principle may take on greater importance under *Crawford*, as explained below.

Sixth, the rule of *Maryland v. Craig* [497 U.S. 836 (1990)] is unchanged, at least for now. In that case, the Court held that, upon a particularized showing that a child witness would be traumatized by testifying in the presence of the accused, the child may testify in another room, with the judge and counsel present but the jury and the accused connected electronically. *Crawford* addresses the question of when confrontation is required; *Craig* addresses the question of what procedures confrontation requires. The two cases can coexist peacefully, and nothing in *Crawford* suggests that *Craig* is placed in doubt. And yet, Justice Scalia dissented bitterly in *Craig*. The categorical nature of his opinion in *Crawford* squares better with his *Craig* dissent than with Justice O'Connor's looser majority opinion in *Craig*, and presumably he would welcome the opportunity to overrule *Craig*. Whether he would have the votes is an open question.

Finally, *Crawford* leaves intact the final succor of prosecutors, the rule that a violation of the confrontation right may be harmless and therefore not require reversal.

Changes and open questions

That *Crawford* leaves much of the *status quo ante* unchanged does not gainsay that it changes a great deal, and not just the conceptual framework of the Confrontation Clause. Here I will address respects in which *Crawford* does change the law, questions that it leaves open, and adjustments to existing law that might be adopted in its wake.

A. The basic change

Most fundamentally, of course, *Crawford* ends the prosecutorial use of testimonial statements made to police in circumstances where the accused cannot confront his accuser. That means that when a prosecutor attempts to introduce a testimonial statement made by a person who is not a witness at trial, the prosecutor will not be able to argue that the statement should be admitted because it is reliable. Unless the accused either has had the opportunity to cross-examine the declarant, or has forfeited the right to confront her, the statement cannot be admitted.

Thus, to take an obvious example, some courts have been willing to admit grand jury testimony given by a witness who is not available at trial, persuading themselves that various factors — including the fact that the testimony was given under oath — are in the aggregate sufficiently strong "particularized guarantees of trustworthiness" to excuse the absence of an opportunity for cross-examination. *Crawford* means that this practice must stop. Similarly, station-house statements, of the type involved in *Crawford* itself, and statements made in plea hearings may not be introduced by the prosecution unless either the witness testifies at trial or she is unavailable and the accused has had an opportunity to cross-examine her. Courts have already begun to apply cases consistently with these principles. In one Detroit murder case pending on appeal when *Crawford* was decided, the prosecutor has since confessed error, because the conviction depended in part on statements made to a polygraph examiner by a friend of the accused. Consider also *United States v. Saner* [313 F. Supp. 2d 896 (S.D. Ind. 2004)], a post-*Crawford* decision in which the accused, a bookstore manager, objected to admission of a statement by a competitor, made to a Justice Department lawyer and paralegal, that the two managers had fixed prices. The Court held, properly, that because the accused had not had a chance to cross-examine the competitor, who asserted the Fifth Amendment privilege at trial, *Crawford* precluded admissibility of the competitor's statement.

B. The meaning of "testimonial"

The most significant question that arises, of course, is how far the category of "testimonial" statements extends.

1. Standards

The *Crawford* Court did not have difficulty in concluding that Sylvia's [the defendant's spouse's] statement was testimonial: "Statements taken by police officers in the course of interrogations," as Sylvia's was, are "testimonial under even a narrow standard." As the Court elaborated:

"Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."

So much for the core. The boundaries of the category will have to be marked out by future cases. The Court quoted three standards without choosing among them:

- "*Ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially";
- "Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and
- "Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

I believe the third of these is the most useful and accurate. It captures the animating idea behind the Confrontation Clause — the prevention of a system in which witnesses can offer their testimony in private without cross-examination. In some cases, under this view, a statement should be considered testimonial even though it was not made to a government official.

It is by no means certain that this standard will ultimately prevail. Some language in *Crawford* emphasizes the role of government officers in creating testimony. For example, having used the term "interrogation," the Court takes care to note that Sylvia's statement, "knowingly given in response to structured police questioning, qualifies under any conceivable definition"; at another point, it noted that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." This emphasis on government involvement might suggest that the Court will stick closely to a minimalist definition of testimonial statements.

That would be a mistake, however. I do not believe that participation by government officials in creation of the statement — either receipt of it as its initial audience or active procurement of it through interrogation — is the essence of what makes a statement testimonial.

The confrontation right was recognized in older systems in which there was no public prosecutor, and victims or their families prosecuted crimes themselves. The idea behind the confrontation right is that the judicial system cannot try an accused with the aid of testimony by a witness whom the accused has not had a chance to confront. The prosecutor plays no essential role in the violation.

Thus, if just before trial a person shoved a written statement under the courthouse door, asserting that the accused did in fact commit the crime, that would plainly be testimonial even though no government official played a role in preparing the statement. One ground for hope in this respect is that *Crawford* itself noted that one of the statements involved in the notorious *Raleigh* case was a letter.

In some cases a problem that nearly is the reverse arises — an investigative official may be seeking to procure evidence, but the declarant may not understand this. I believe that in the usual case the investigator's anticipation should not alter characterization of the statement. If the declarant does not recognize she is creating evidence that may be used in a criminal proceeding, then the nature of what she is doing in making the statement is not testimonial.

Thus, a conversation between criminal confederates, with no anticipation of a leak to the authorities, is not ordinarily testimonial, and if in fact the authorities are surreptitiously recording the conversation, that should not change the result. On the other hand, investigators probably should not be allowed to disguise their intent gratuitously — that is, for the purpose of defeating the confrontation right. Accordingly, even apart from a standard like the third one quoted above, perhaps a statement should be considered testimonial in what might be called an "invited statement" context in which the statement fits a description such as this:

Before the statement is made, (1) a recipient of the statement anticipates evidentiary use of the statement, but does not inform the declarant of this anticipation, and (2) the prosecution does not demonstrate that disclosure of anticipation of evidentiary use would have substantially diminished the probability that the declarant would have made the statement.

The idea behind the second prong of such a test would be that if disclosing the recipient's investigatory activity would not inhibit the declarant from making the statement, then the disclosure probably ought to be made; on the other hand, if the disclosure would likely prevent the statement from being made, then the investigator has sufficient reason for declining to make a disclosure. This rule seems to me to have some merit, but it may be too complicated to be applied satisfactorily.

2. Special cases

Many cases will arise, in a wide variety of circumstances, in which it is a close question whether a statement should be deemed testimonial. I will address here two of the most important recurring types of cases.

a. When are 911 calls testimonial?

Consider first the example of statements made in calls to 911 operators. In recent years, courts have often admitted these statements — most characteristically, by complainants in domestic violence cases — even though the caller has not testified in court. Under *Crawford*, this practice would not be allowed if the statement is deemed "testimonial." The extent to which these calls are "testimonial," however, is an open question.

The court in one post-*Crawford* case [*People v. Moscat*, 777 N.Y.S. 2d 875 (N.Y. Crim. Ct. 2004)], in justifying its decision that statements in 911 calls should not be deemed testimonial, declared:

"Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a 'witness' in future legal proceedings; she is usually trying simply to save her own life."

This generalization fits some cases, but not all. In some cases, the caller does not perceive that she is any longer in immediate danger, and the primary purpose of the call is simply to initiate investigative and prosecutorial machinery. Indeed, often the call occurs a considerable time after the particular episode has closed, and often the caller gives a good deal of information that is not necessary for immediate intervention. In a broader set of cases, the caller's motives are mixed but she is fully aware that what she says has potential evidentiary value.

Consider, for example, *State v. Davis* [64 P.3d 661 (Wash. Ct. App. 2003)], now on review in the Washington Supreme Court (the same court from which *Crawford* came). The complainant called 911 and, in response to questions by the operator, disclosed that the defendant had beaten her with his fists and then run out the door, further disclosed that she had a protection order against him, and explained the reasons why he had been in her house. The complainant did not testify at trial, and the 911 tape was played to the jury. In closing argument, the prosecutor said, "[A]lthough she is not here today to talk to you[,] she left something better. She left you her testimony on the day that this happened . . . . [T]his shows that the defendant, Adrian Davis, was at her home and assaulted her."

Then the prosecutor played the 911 tape again. Here, the statement has strong claim to be considered testimonial. Davis and cases like it suggest that the 911-call scenario should not be dismissed by broad generalizations about the "typical" case. Rather, a case-by-case assessment is necessary. Indeed, even if a 911 call is nothing but an urgent plea for protection, the court should closely scrutinize it. I will repeat here the analysis that Bridget McCormack [Law School Associate Dean for Clinical Affairs] and I have given:

"To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the truth of what they assert . . . . To the extent that the contents of the call are significant only as the caller's report of what has happened, such a report usually should be considered testimonial."

b. When are statements by children "testimonial"?

Another type of case that frequently will test the limits of the term "testimonial" involves statements by children, typically alleging some kind of abuse. Suppose, for example, a young child tells a police officer that an adult has physically or sexually abused her. If an adult made such a statement, it would clearly be testimonial. But can a different result occur in the case of a very young child?

At some point, the statement of a very young child may perhaps be considered more like the bark of a bloodhound than like the testimony of an adult human; that is, the child may be reacting to and communicating about what occurred, with no sense of the consequences that her communication may have. Arguably, fidelity to the text and policies of the Confrontation Clause suggests that some degree of understanding of the consequences of the statement is necessary before a declarant may be considered a "witness." If that is true, the better rule would probably be that a person is not a witness unless she understands that the statement, if accepted, is likely to lead to adverse consequences for the person accused. Under this view, a child could be a witness even if she had no real understanding of the legal

system; it would be enough to know that telling a police officer about a bad thing that a person did would likely cause that person to be punished.

In deciding whether a child is capable of acting as a "witness," the moral as well as cognitive development of the child may well be material. My colleague [U-M Law School Professor] Sherman Clark has argued that part of what drives the confrontation right is not simply the formal categorization of a person as a "witness," but also the moral sense of the obligation of an accuser to confront the accused. If he is right — and I believe there is a good deal of force to the argument — then the important question is not only whether the child understands the punitive consequences of the statement, but also "the level of obligation and responsibility we are willing to put on the shoulders of children."

Even assuming a given child is capable of making a testimonial statement, the fact that the declarant is a child can complicate the question of whether the particular statement should be deemed testimonial. As I suggested earlier, when an adult makes a statement accusing a person of a crime, the statement should be considered testimonial, even though the statement is made to a private individual, if the declarant understands that the listener will pass the information on to the authorities. But consider children's statements to intermediaries — for instance, a child's statement to his mother. This situation may be materially different from that of the adult witness, because even a child sufficiently mature to be capable of being considered a witness may have no understanding that the third party will pass the statement on to the authorities.

There are different ways to approach this problem. One view is that the statement is not testimonial if a child in the position of the declarant would not understand that the information would reach the authorities. A second view is that if the child, without understanding the particulars, expects the mother to visit adverse consequences upon the assailant, then the child should be deemed to be testifying within his or her ability to do so. And a third view is that differentiating by maturity is simply inappropriate and unadministrable, so the perspective of a reasonable adult should govern determination of whether a statement is deemed testimonial.

Furthermore, the supplemental standard I have suggested as a possibility in "invited statement" contexts may be appropriate in certain cases involving statements by children. Under that standard, the statement should be deemed testimonial (1) if the investigative nature of the conversation is withheld from the child but (2) it does not appear that the nondisclosure was necessary to procure the statement. Again, the idea is that the investigator should not be allowed to withhold the purposes of her inquiries gratuitously in an effort to defeat the confrontation right — but the complexity of this inquiry gives me some qualms whether this standard should be applied.

Plainly, this is an extraordinarily complex and difficult area, and pending further guidance from the Court it will remain very uncertain.

3. What constitutes an "opportunity for cross-examination"?

Under *Crawford*, the confrontation right presumptively is violated if a statement is considered "testimonial" but the witness does not testify at trial. By contrast, the confrontation right is not violated where the witness is unavailable and the accused has had a prior opportunity for cross-examination. In the wake of *Crawford*, a wise prosecutor, aware of the possibility that a key witness may be unavailable, will often take the witness's deposition early in the investigation. *Crawford* therefore raises an important question about what constitutes an adequate "prior opportunity for cross-examination."

For example, suppose a laboratory report is a critical piece of evidence. In most circumstances, the lab report should be considered testimonial, because the report is prepared in anticipation of its introduction at trial. Therefore, the lab technician who made the report should testify at trial if she is available to do so. If she becomes unavailable through no fault of the accused (by accidental death, for example), and the accused has not had an opportunity to cross-examine her, then the report should not be considered admissible.

But if the prosecution takes her deposition — that is, a pretrial examination, subject to oath and cross-examination — and the technician later becomes unavailable, the prosecutor may use the deposition if the deposition presented an adequate opportunity for cross-examination.

Because *Crawford* increases the prosecutor's incentive to take a deposition, we can expect pressure to amend the rules of criminal procedure in jurisdictions, including at the federal level, in which depositions are not now readily available, and perhaps even to allow depositions before charges have been brought. If a deposition is taken very early, obviously there will often be a question whether it gave the accused an adequate opportunity to cross-examine. Did counsel have enough time to prepare? Did counsel know what issues to press, and have the information at hand that would enable her to do so effectively? The better approach would not be to assume that early opportunities are inadequate per se; in many cases, counsel will have little difficulty, even with limited preparation and even before matters have proceeded very far, determining what questions to ask. Rather, if the defendant had an opportunity to cross-examine the witness at deposition but the witness is unavailable at trial, the confrontation right should not require exclusion unless the defense shows some particular reason to believe the opportunity was inadequate.

One more change in prosecutorial practice may well follow from *Crawford*. Suppose a prosecutor announces an intention to use a witness' statement and invites the defense to demand a deposition of the witness if it wants to be assured of cross-examining the witness. If the defendant does not make the demand, the witness is unavailable at trial, and the prosecution offers the statement, would this procedure suffice to protect adequately the "opportunity for confrontation"? Perhaps, by not making the demand though being warned of the possible consequences, the defendant would be deemed to have waived the confrontation right. Or perhaps the procedure would be consid-

ered a violation of the accused's passive right to do nothing and "be confronted with" the witnesses against him. We may never know for sure unless the procedure is tried.

4. What constitutes "forfeiture"?

The idea that the accused cannot claim the confrontation right if the accused's own misconduct prevents the witness from testifying at trial is a very old one. *Crawford* explicitly reaffirms it, and justifiably so.

Forfeiture often raises difficult issues. If a witness is murdered shortly before she was scheduled to testify against the accused, what showing of the accused's involvement does the prosecution have to make? Is it enough that the accused acquiesced in the wrongdoing? And how is participation or acquiescence to be determined; is the mere fact that the accused benefited from the murder enough to raise a presumption that the accused acquiesced in it?

One issue on which *Crawford* gives little or no guidance may be expected to become particularly pressing now. Suppose the wrongful act that allegedly rendered the witness unavailable is the same act with which he is charged. May the act nevertheless cause a forfeiture of the confrontation right? For example, suppose the accusation is of child sexual abuse and the prosecution argues that the abuse itself has intimidated the child from testifying in court (though she previously made a statement describing it). Or suppose the accusation is of murder, the prosecution contending that the accused struck a fatal blow and that the victim made a statement identifying the accused and then died?

The first reaction of many observers is that in such situations forfeiture would be bizarre. And yet, for reasons I will summarize briefly, I believe that in some circumstances it is appropriate. In post-*Crawford* cases, two state supreme courts [Colorado and Kansas] have agreed.

The objection most frequently made to applying forfeiture doctrine in situations of this sort is that it is bootstrapping: The accused is held to have forfeited the confrontation right on the ground that he or she committed the very act on which the trial centers — an act that he or she is accused of committing, but denies committing and is presumed not to have committed. On closer analysis, I do not believe the objection carries weight. The situation is analogous to the one that often arises when a defendant is accused of conspiracy and the prosecution argues that the hearsay rule poses no bar to admission of a statement made by a conspirator in support of the conspiracy. In each of these cases, the same factual issue — the defendant's participation in the conspiracy in the one case, and his commission of the wrongful act that rendered the witness unavailable in the other — may arise as a threshold matter for evidentiary purposes and when determining guilt, but so what? The issue will likely be decided for the two different purposes by different fact-finders — the judge deciding threshold evidentiary matters and the jury determining guilt — and on different factual bases.

Another objection is that presumably the crime was not committed for the purpose of rendering the witness unavailable. But again I respond with a shrug. The point of forfeiture doctrine is that the accused has acted wrongfully in a way that is incompatible with maintenance of the right. Suppose that an informer makes a statement to the police describing a drug kingpin's illegal activities. But the informer stays undercover and, before the kingpin knows anything about the statement, the two get into a fight over a card game. The kingpin goes to a closet, pulls out a gun, and murders the informer. If the kingpin is tried on drug charges and the prosecution wants to introduce the informer's statement, the kingpin should not succeed in arguing, "But I haven't had a chance to cross-examine him." The appropriate response is, "And whose fault is that? You murdered him."

As interpreted in this way, forfeiture doctrine can solve one of the puzzles of the confrontation right. The *Crawford* Court accurately noted that the "dying declaration" exception is the only exception commonly applicable to testimonial statements that had been well established at the time of the Sixth Amendment's adoption in 1791. The Court then said, with apparently studied ambiguity, "If this exception must be accepted on historical grounds, it is *sui generis*." It seems highly unlikely that the Court would generally exclude statements that fit within the dying declaration exception, thus achieving a remarkably unappealing evidentiary result that courts have avoided for several hundred years.

On the other hand, admitting these statements on the ground suggested by the Court raises problems of its own. It obscures the clarity of the principle adopted by *Crawford*, that if a statement is testimonial it cannot be introduced against the accused unless he had an opportunity to cross-examine the witness. And it does so on very weak grounds, for (as noted above) the rationale generally cited for the dying declaration exception is absurd. A far better resolution would be to recognize that, however the admissibility of dying declarations usually has been defended, it really is best understood as a reflection of the principle that a defendant who renders a witness unavailable by wrongful means cannot complain about her absence at trial. That principle also explains, incidentally, why (1) the hearsay exception for dying declarations is limited to those that describe the cause of death, and (2) the declaration will not be admitted unless death appeared imminent at the time the declaration was made.

C. *Crawford*'s impact on non-testimonial statements

If a statement is deemed not to be testimonial, what is the impact of the Confrontation Clause? *Crawford* does not resolve the matter. The theory of the opinion suggests, and the Court explicitly preserves the possibility of, "an approach that exempted such statements from Confrontation Clause scrutiny altogether." But, in an apparent compromise, the Court also indicated that *Roberts*, or some standard even more flexible, might also be applied in this context. Numerous post-*Crawford* courts, having determined the statements at issue were not testimonial, have gone through the *Roberts* analysis and — not surprisingly — determined that the statements were admissible. It is easy enough to see why a court disposed to admit a statement would follow this approach: If instead the court held that the Confrontation Clause did not

apply at all to non-testimonial statements, it might leave itself vulnerable to reversal if a higher court held that *Roberts* continues to apply to such a statement. So it is prudent to run through the *Roberts* analysis, which a court can always find is satisfied if it wants to (that being one of the problems with *Roberts*.) No terrible harm is done, perhaps, but the process is wasteful, because courts will continue to run through it with predictable results. Until a prosecutor is brave enough to press the point, it is doubtful that there will be a clear test in the Supreme Court on the proposition that outside the context of testimonial statements, the Confrontation Clause has no force.

Conclusion

Plainly, *Crawford* leaves open many very important questions. In particular, the impact of the opinion may be very different depending on whether the Supreme Court adopts a broad or narrow understanding of the term "testimonial." But what is most important is that the jurisprudence of the Confrontation Clause, after a long detour, has been set on the proper course. This means that the discourse can be rational and candid. Rather than manipulating unanswerable questions as to whether a given statement is sufficiently "reliable" to warrant admission, the courts will be asking whether admission violates the time-honored and constitutionally protected right of a criminal defendant to insist witnesses against him testify subject to cross-examination.

Even in the pages of this journal, I am willing to confess that I am not a strict originalist in constitutional interpretation. I believe that there are some questions of constitutional law that cannot be answered most usefully by asking what the public meaning was of the constitutional text at the time it was adopted, or what the intention of the Framers was. But in this context, all indications are in alignment. The historical background shows that the meaning of the text and the intention of the Framers are quite clear, and the unequivocal procedural rule on which they insisted continues to resonate today as one of the central aspects of our system of criminal procedure. The *Crawford* Court properly said, "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." The Constitution does not always speak in terms of categorical guarantees, but when it does, as in the case of the Confrontation Clause, it should be heeded. Give credit to the Court for disenthralling itself from a doctrine that had grown familiar but had no basis in the Constitution and was utterly unsatisfactory, and for recognizing the essence of the confrontation right.

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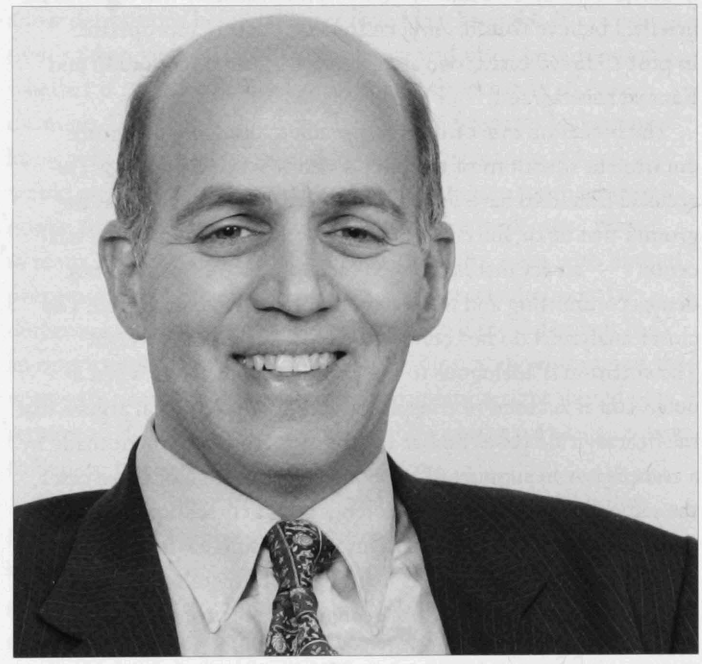
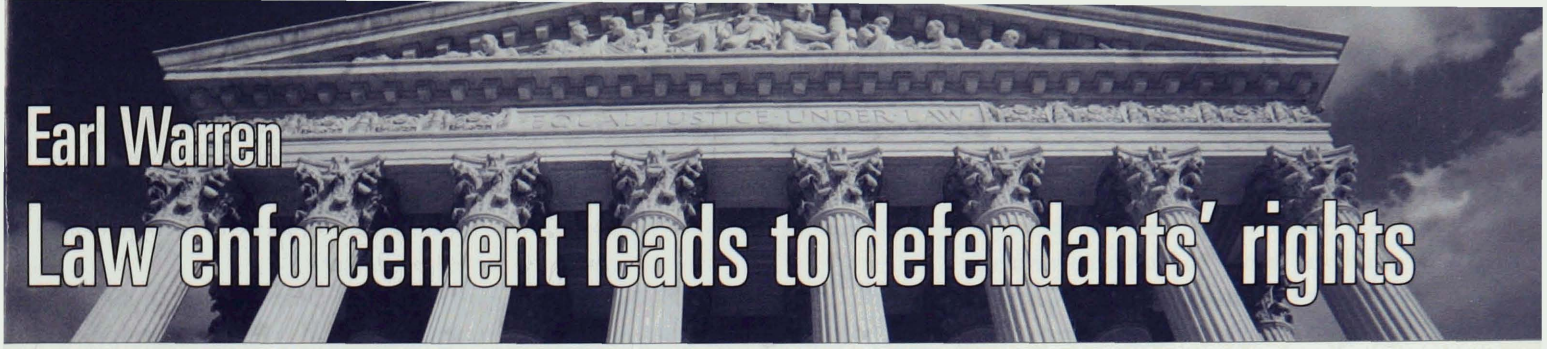




Earl Warren
Law enforcement leads to defendants' rights

The following is a condensed version of a talk Yale Kamisar, Clarence Darrow Distinguished University Professor Emeritus of Law at the University of Michigan, and now a member of the University of San Diego law faculty, gave last year at a two-day conference on "Earl Warren and the Warren Court: A Fifty Year Retrospect," held at the University of California (Berkeley).

A paper based on Kamisar's talk, along with other papers that grew out of the conference on Warren, will be published by the Institute of Governmental Studies at UC Berkeley under the editorship of Harry N. Scheiber, director of the Earl Warren Legal Institute at UC-Berkeley. An article based on Kamisar's talk also will appear in a forthcoming issue of the Ohio State Journal of Criminal Law, *part of a symposium on "The Warren Court Criminal Justice Revolution: Reflections a Generation Later," edited by Professor George C. Thomas III of Rutgers University Law School (Newark).*

By Yale Kamisar

Before becoming governor of California, Earl Warren spent 22 years in law enforcement: five as a deputy district attorney (1920-25); thirteen as head of the Alameda County district attorney's office (1925-38); and four as state attorney general (1939-42). My thesis is that Warren's many years in law enforcement significantly affected his work as Chief Justice of the United States. Among the cases I think support my thesis are the following:

• ***Hoffa v. United States*** (1966): This Supreme Court case affirmed the conviction of Jimmy Hoffa for trying to bribe members of a jury during the so-called Test Fleet trial. The government had relied heavily on the testimony of an "informer," a union official named Edward Partin.

Chief Justice Warren was the lone dissenter. He pointed out that Partin had been languishing in jail, under indictment for such state and federal crimes as kidnapping, manslaughter, and embezzlement, when he contacted federal authorities and told them he would be willing to become an informer against Hoffa, who was about to be tried in the Test Fleet case. Warren noted, too, that in the years since Partin volunteered to be an informer against Hoffa, he had not been prosecuted for any of the serious crimes for which he had been jailed.

Warren argued that "the affront to the quality and fairness of federal law enforcement which this case presents" was sufficient for the Court to overturn Hoffa's conviction in the exercise of its supervisory powers over federal criminal justice. No conviction should be allowed to stand, insisted Warren, when based heavily on the testimony of a person with Partin's background and incentives to lie. "And that is exactly the quicksand upon which these convictions rest."

In Warren's very first case as a deputy district attorney he assisted a senior prosecutor in the trial of a union official for "criminal syndicalism." Warren felt uneasy about the use of the three informers in the case; all three had unsavory backgrounds. Years later, Warren called the three informers "repulsive." He thought that convictions based on the testimony of such persons were likely to result in miscarriages of justice.

• ***Mapp v. Ohio*** (1961): Dolly Mapp had been convicted of possessing obscene materials. At first, everybody thought the issue presented was not whether *Wolf v. Colorado* (1949) (the case that permitted state courts to admit illegally seized evidence) should be overruled, but whether the Ohio obscenity-possession law was unconstitutionally vague. The vote in conference was to overturn Miss Mapp's conviction on First Amendment grounds.

After the conference, however, four justices (including Warren) changed their minds and decided to overrule *Wolf* if they could get a "fifth vote." The best bet was Justice Hugo Black. Warren was one of the justices who visited Black in his chambers and helped persuade him to come aboard.

Ironically, in 1942 then State Attorney General Warren and his staff had convinced the California Supreme Court to reaffirm its position that illegally seized evidence could be used in a criminal prosecution. However, shortly after he became Chief Justice of the United States, the California Supreme Court, in a famous case called *People v. Cahan* (1955), had overruled that precedent and adopted the exclusionary rule. By 1955, it had become apparent to Roger Traynor, author of the *Cahan* opinion, that "without fear of criminal punishment or other discipline," California police "casually regard illegal searches and seizures as nothing more than the performance of their ordinary duties for which the city employs and pays them."

As district attorney and state attorney general, Warren had kept in close touch with the California police. Warren must have known that Traynor's criticism of the police was well-founded. Moreover, Warren knew Traynor personally and on the basis of his own dealings with Traynor, greatly respected him. (When Warren had been state attorney general, then-Professor Traynor had been brought into Warren's office to organize a new tax division and to take charge of all tax litigation.)

If Justice Traynor's scholarly, yet powerful, opinion in the *Cahan* case was not sufficient reason to vote for imposing the

exclusionary rule on the states as a matter of federal constitutional law, the kind of criticism the *Cahan* decision had been receiving from California law enforcement officials probably was. The critics had reacted to *Cahan* as if the guarantee against unreasonable search and seizure had just been written.

• ***Gideon v. Wainwright*** (1963): Warren had long been a strong proponent of an indigent defendant's right to appointed counsel. When the Alameda County Charter was written in 1927, it was District Attorney Warren who had insisted that it provide for a public defender. Because the newly appointed public defender had no investigators on his staff, whenever the defender thought one of his clients was innocent, Warren would share all the facts in his files with him. Warren felt so strongly about the right to counsel that he took an active role in founding the Bay Area Legal Aid Society in order to provide lawyers in civil cases for those who could not afford them.

Prior to *Gideon*, the rule that governed state criminal prosecutions was the *Betts* rule (named after the 1942 case) or the "special circumstances" rule. Under this rule, an indigent person charged with a serious non-capital case (even armed robbery or arson) was not entitled to the appointment of counsel under the federal constitution absent "special circumstances," e.g., he was illiterate or mentally disabled or the case was unusually complicated.

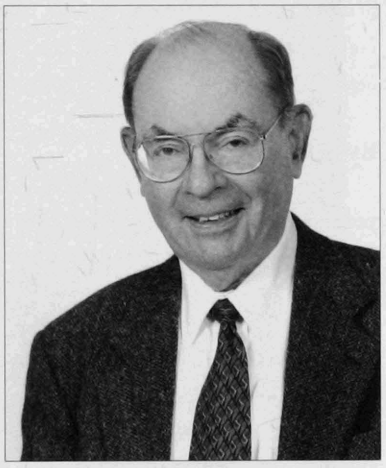
According to one of his biographers, Warren had instructed his clerks to look for a right-to-counsel case that would serve as a vehicle for abolishing the *Betts* "special circumstances" rule. When the Court found the case — Clarence Gideon's penciled *in forma pauperis* petition — Warren must have been sorely tempted to assign the case to himself. But Justice Black had written a powerful dissent 20 years earlier in *Betts*, the case *Gideon* was to overrule. So the Chief Justice let Black convert his old dissent into the opinion of the Court.

• ***Miranda v. Arizona*** (1966): In the course of throwing out a coerced confession in *Spano v. NewYork* (1959), Chief Justice Warren observed that "the abhorrence of the use of involuntary confessions" turns in part on "the deep-rooted feeling that the police must obey the law while enforcing the law." According to his former deputies, District Attorney Warren used to say exactly the same thing to them all the time. His long-time chief investigator recalled that his boss often told him: "Be fair to everyone, even if they are breaking the law. Intelligence and proper handling can get confessions quicker than force."

District Attorney Warren's office had one of the highest conviction rates in the state, yet none of the convictions he or his deputies obtained were ever reversed on appeal. Warren's deputy district attorneys were so hard-working and so determined to avoid any trickiness or unfairness in dealing with suspects or defendants that they earned a reputation around the courthouse as the "Boy Scouts."

J. Frank Coakley, a former Warren deputy district attorney, and Warren's successor as head of the Alameda County district attorney in office, has suggested that the seeds of Warren's *Miranda* opinion may have been his own understanding of the decisive imbalance between a prepared, indefatigable interrogator and an isolated suspect. Warren's own experience as a prosecutor and an interrogator may have made him keenly aware of the opportunities for coercion in the custodial setting.

As district attorney of Alameda County, the third largest county in the state, Warren was constantly trying to "professionalize" the police as well as his own deputies. After many unsuccessful attempts, he finally persuaded several California colleges to offer criminology courses and other police training programs. As Chief Justice, Warren was confident that professional police could satisfy the demanding standards the Supreme Court was requiring. Despite his critics' claims that he and his colleagues were "handcuffing the police," Warren viewed the Court's rulings, such as *Miranda*, as enlightening the police and encouraging them to work harder and to prepare their cases more thoroughly. As G. Edward White, one of Warren's biographers (and one of his former law clerks as well) put it, Warren believed that he and his colleagues were not hampering law enforcement but "ennobling" it.



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