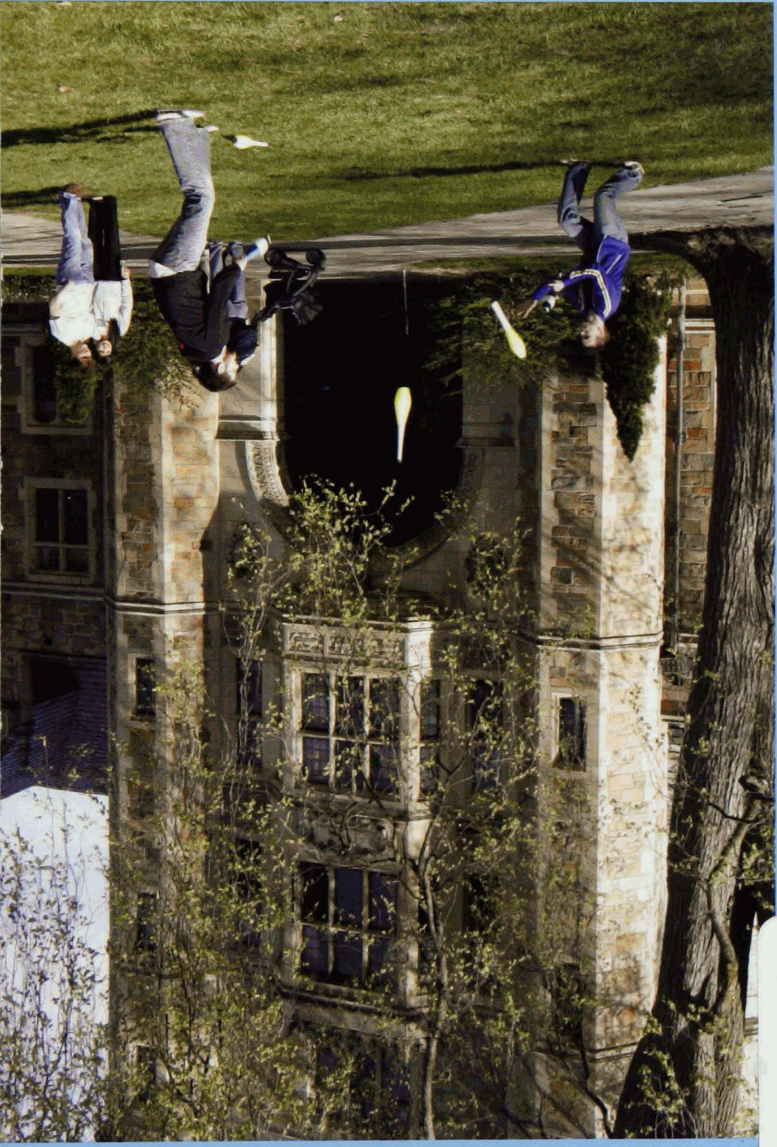


# LAW QUADRANGLE NOTES

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The University of Michigan Law School  
48.1 • Summer 2005

**THE UNIVERSITY OF MICHIGAN  
LAW SCHOOL**

**VOLUME 48, NUMBER 1  
SUMMER 2005**

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**ON THE COVER:** Law students enjoy activities at the annual year-end picnic sponsored by the Law School Student Senate. Photos by Gregory Fox.

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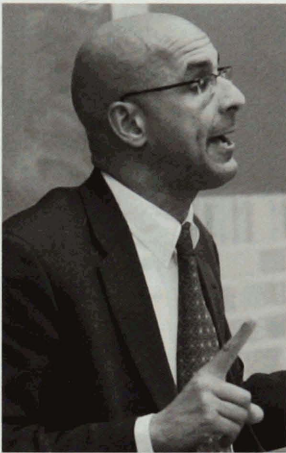
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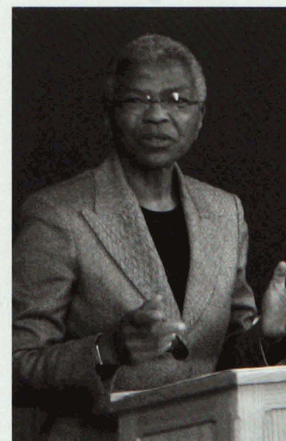
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— Adam C. Pritchard

- **Are the Geneva Conventions out of date?** The so-called war on terrorism has prompted calls for revisions to the 1949 Geneva Conventions on armed conflict and the 1977 Additional Protocols thereto in order to address terrorist-related warfare, but I believe that claims for a major reform of international humanitarian law are premised on a variety of misconceptions of that law.

— Steven R. Ratner

- **Detroit Area Study on Financial Services: What? Why? How?** For most of us, our paychecks directly deposited into our bank accounts, writing a check, or storing our money in an account can be taken for granted. But for most low- and moderate-income households, the picture is quite different.

— Michael S. Barr

- **Representing children: A new national standard.** Recently, a national model of child welfare has emerged through a culmination of federal law and policy and through national standards of lawyer practice. What was once a provincial practice, varying considerably from state to state, has increasingly become a national model of practice.

— Donald N. Duquette and Marvin Ventrell

# MESSAGE

## from Dean Caminker

The following is an excerpt from the Dean's remarks to the graduating class of 2005. (See commencement story on page 24.) A number of requests have been made for copies of the speech, so we have reprinted an edited version here.

Lawyers are routinely blamed for many of society's ills. In fact, the practice dates back to William Shakespeare and a character who famously uttered the phrase: "The first thing we do, let's kill all the lawyers." Now, I don't mean to suggest that this single sentence is the progenitor of all subsequent lawyer-bashing. But it is a phrase that pundits freely repeat today; it's a phrase that has become a part of our cultural vocabulary, often used indiscriminately and thoughtlessly, even if typically in jest.

Certainly there are moments when lawyer-bashing seems justified; for example, Enron and its aftermath certainly shined a spotlight on some lawyers who had lost their way. And I've been known to laugh at a good lawyer joke as much as the next guy. But over the past year I've become increasingly worried that public criticism of lawyers, and especially of judges, has become unjustifiably and dangerously shrill.

Lawyers and judges today are asked to grapple with some of the most fundamental, emotionally charged, and divisive issues imaginable. Issues such as the detention of enemy combatants, the legality of various interrogation methods, and the use of domestic security measures authorized by the U.S. Patriot Act, require lawyers and judges to make decisions balancing national security and individual liberty.

Given the stakes, it is not surprising that these issues engage the passions of politicians, pundits, and laypersons alike. This is a sign of a healthy democracy:

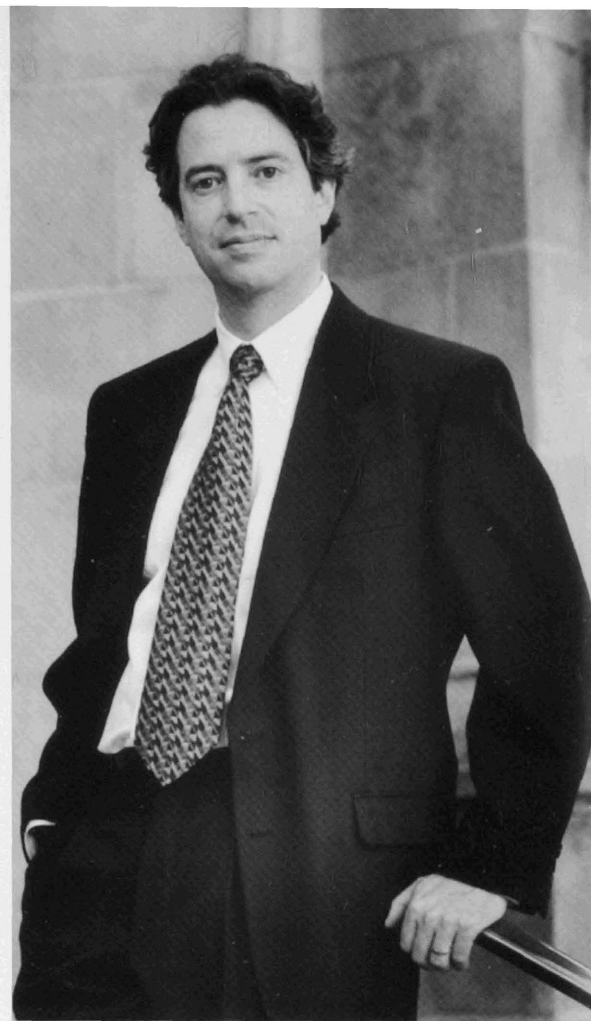
people publicly discussing deep-seated values and emotions, and debating how they ought to be applied to resolve divisive social issues.

But reflective debate is one thing; and knee-jerk reaction is another. Modern-day media tools such as on-line insta-polls create a wave of visceral responses that then become publicized as "popular opinion." Poll results are in turn trumpeted as the "will of the people" by politicians seeking to galvanize political support for their electoral agenda.

Yet in a constitutional democracy, law is not and should not be determined by the passions of the moment or by political demagoguery. Rather, lawyers must argue, and judges must decide, specific cases based both on the concrete facts and on the enduring values imbedded in our Constitution and common law. Judges are supposed to consider precedents and context and nuance, not the raw emotions of the moment.

Of course, lawyers and judges will inevitably have good faith disagreements about what the law and facts dictate in specific cases. It is in the nature of law that there will be room to argue, within boundaries set by a good-faith interpretation of longstanding norms.

But recent proclamations by high-profile political officials and opinion-leaders have, in my view, gone so far as to threaten a healthy separation of powers, if not the rule of law itself. Judges who issue judicial rulings that are disfavored on political grounds are routinely castigated for being "unaccountable" and "out



of touch," rather than praised for having the courage to apply the law even in ways that may prove unpopular. The epithet "judicial activist" is bandied about so frequently that it no longer has any principled meaning. Indeed, now sometimes judges are accused of activism when they refuse to act, if the critic believes action is warranted. "Judicial activism" ought not mean simply "deciding contrary to my personal views."

Criticism of judicial decisions has been a staple of American politics since Chief Justice Marshall penned *Marbury v. Madison* two centuries ago. But it is in my sense that the lack of civility in public discourse is reaching new heights. Overheated and even threatening rhetoric suggests an unprecedented hostility being directed personally at judges themselves just because their rulings depart from the critic's own views. Given the ferocity of recent *ad hominem* attacks, one wonders whether the oft-repeated Shakespearean threat to lawyers has become so engrained in our cultural lexicon that we

have become inured to such blatant challenges to judicial independence and the rule of law.

We would do well today to take a deep breath, step away from the battle lines, and recall the actual context of Shakespeare's famous dictum. It was the rebellious commoner Dick Butcher in *Henry VI* who suggested to his fellow schemers that, after they overthrew the reigning government, they should kill all the lawyers. The revolutionaries believed that the lawyers must be eliminated because they would stand in the way of the rebellion, by steadfastly maintaining their fidelity to and defense of the Rule of Law. Thus Shakespeare was not declaring open season on lawyers. Rather, he was actually extolling their virtues, and highlighting their special training and role in defending the Rule of Law and principles of justice against the raw emotion of the masses.

While perhaps this is a melodramatic way to put the point, the scene captures a central reality of our society: It is the cadre of well-trained lawyers and jurists, committed to a society ruled by law and not men, that forms our strongest bulwark against oppression and injustice.

It is imperative that, even in the face of relentless criticism, lawyers and judges maintain their sense of perspective and mission. They must continue to use their own best, independent judgment to interpret and apply the law in a manner that prioritizes foundational values over raw passion, and to make decisions based on evidence, not anecdote.

Now, this is not to say that passion plays no role at all for lawyers or judges. But the point is that the law has its own integrity, its own character, that tempers raw emotion and guides it towards long-term, clear-minded resolutions of difficult issues — indeed, part of the point of law is to temper the passions of the day.

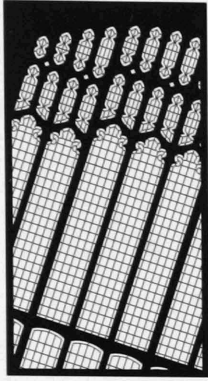
The University of Michigan Law School is proud to do its part in cultivating this penchant for careful, critical and independent legal analysis that properly balances reason and passion — what might be called the public character of a lawyer — in educating the next generation of young lawyers. Indeed, this mission was emblazoned over the entryways of the Quadrangle by William W. Cook. Cook, of course, was the Law School's preeminent benefactor who, paving the way for many thousands of other alumni who have supported this School, originally provided the private funds to build the lovely and grand Quadrangle.

He explained, in language inscribed around the Quad: "American institutions are of more consequence than the wealth or power of the country; and . . . the preservation and development of these institutions have been, are, and will continue to be under the leadership of the legal profession. [Furthermore, the] character of the legal profession depends on the character of the law schools. [And the] character of the law schools forecasts the future of America."

We are very proud of the character of this law school. We expect our graduates to take what they have learned here about the integrity of the law and the ethics of

lawyering, and share these principles with a cynical society. We expect alumni to serve others with integrity, with generosity, with civility, and with an eye towards pursuing justice. Each one of us should be an ambassador of the rule of law, and in our work, personify this "character" of Michigan Law School.

*Evan Caminker*



## A CONVERSATION WITH PROFESSOR EISENBERG

BUILDING ON...

THE  
CAMPAIGN  
FOR THE  
UNIVERSITY  
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LAW SCHOOL

*The Law Quadrangle, the gift of graduate William W. Cook, was built in the 1930s. Only two renovations have been made to the Quadrangle since that time: the underground Allan F. and Alene Smith Library addition and the four stories of library stacks. It now has become necessary to add additional space to accommodate people and their activities in a way that the original buildings cannot. To that end, the Law School is planning for additional facilities and is working with architect Renzo Piano to reflect the historical heritage while simultaneously embracing current and future needs. Planning for the new facilities has been centered in the Law School's Building Committee, chaired by Rebecca S. Eisenberg, the Robert and Barbara Luciano Professor of Law. In the following interview, Eisenberg discusses the need for a new building and considerations that go into planning for it.*

*Professor Eisenberg, Dean Caminker often speaks about the changes in legal education and how Michigan must respond to those changes. He cites specifically what the new building's design will allow. Can you elaborate on this need?*

**Professor Eisenberg:** I think legal education has changed tremendously over the last 25 to 30 years, since the time I went to law school. Students are much more involved in much more of a variety of learning experiences, hands-on learning, clinical education, and seminars. There are more seminars. There are more workshops. There are more activities going on in the buildings of different sorts. It's much less professor-centric. There's much more active learning going on and it calls for different kinds of spaces. And we have beautiful spaces of the old fashioned variety, where the professor is very much the central authority figure in the front of the room. But we have much more poorly adapted spaces for these newer kinds of learning.

*A number of programs are new to legal education since the Quadrangle was completed. How did the building committee think about these changes in the design of the new building?*

**Eisenberg:** As we become more pressed for space, important functions have had to be scattered outside the Law Quad, and that creates a real loss of energy. . . . What we want to do is have a centralized Law Quad where everything happens, where people can come in the morning and stay all day, and leave at the end of the day. That's the way the buildings have been working for the faculty for many years, and I think that with better student space and with better classrooms that meet our current needs, inside the Quad we'll have that kind of energy and concentration and sense of community for the students as well.



Rebecca S. Eisenberg

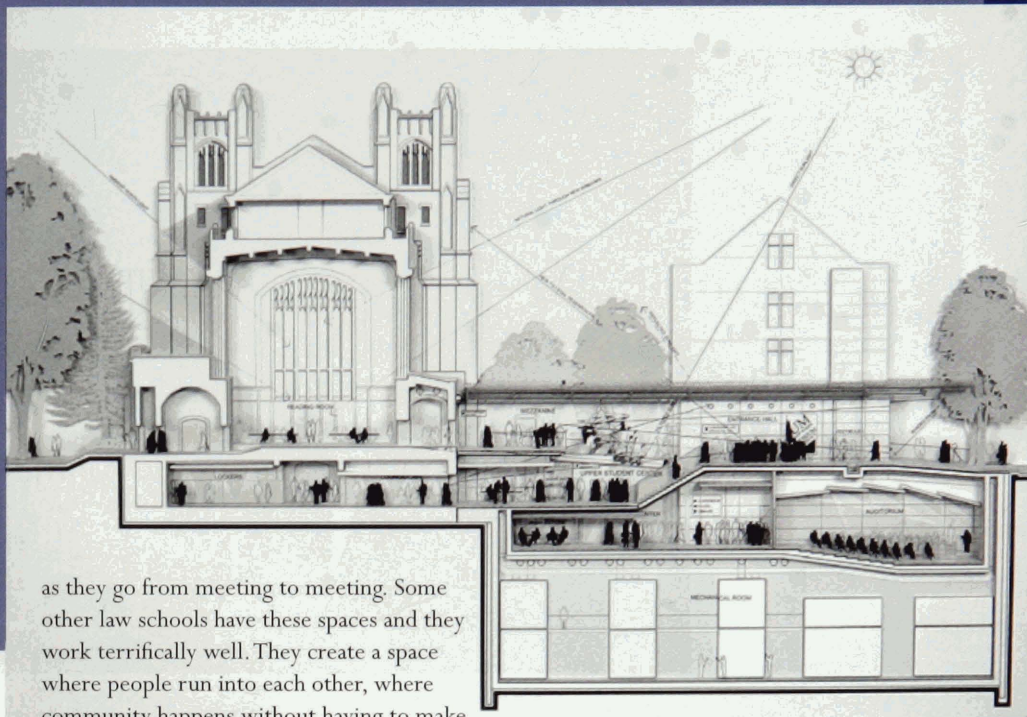
*Can you tell us about the process you used in working with the Renzo Piano Workshop on the design for the new building?*

**Eisenberg:** The design solves many problems that were poorly understood at the beginning of the process. One of the great pleasures of working with Renzo Piano is that he designs his buildings from the inside out. He begins with trying to understand the functions that the buildings perform for us currently, what functions they perform well, what functions they perform badly, and we came to an improved understanding of who we are and what our needs are.

*Can you give us some specific examples of something that evolved from this work?*

**Eisenberg:** As legal education has come to embrace more different kinds of functions, the Law School needs to be more open to the outside world. We have conferences that bring in outside speakers and attendees, we have clinics that bring in clients and outside attorneys, and we need to be more accessible to these people outside our internal community. The current buildings are very difficult for outsiders to navigate. The new building will have a central entrance that will be apparent to all. It will be clear how one space relates to another space. People will know where they come from and where they need to go. Through the orientation of the buildings, it is going to be an important way of opening up the Law School community to a broader world.

Another thing that the expansion will do is provide a lively, vibrant central space, where people meet each other, where people are passing through as they go from one wing to another, as they go class to class,



as they go from meeting to meeting. Some other law schools have these spaces and they work terrifically well. They create a space where people run into each other, where community happens without having to make special plans to meet somebody at Starbucks. I think this is going to be really important for us.

Also, of course, it addresses many of our space needs. We are so compressed in our current space. We have so many needs for more classrooms, more offices, improved student space, space for students to study inside the Quad rather than having to leave during the day to go and study. I think that will really improve the energy and sense of community in the place.

*What research did the building committee conduct in preparation for these discussions with Renzo Piano?*

**Eisenberg:** We visited other law schools as part of our process of designing these buildings and to get a sense of what our peer institutions are doing. And I think it surprised us greatly, because we love our buildings so much, to realize how they stand in comparison in certain important dimensions, particularly in how people — faculty, students, and visitors — experience the buildings. One of the things that many of the law schools have that we don't have is much better student spaces that are convivial, that provide spaces for students to study, to meet each other, to have their lunch, to meet in groups. Students like to study in groups. And as we looked at spaces that other schools had, we realized that we have fallen behind.

*So, this is a really significant project for the School?*

**Eisenberg:** I think this is going to be a transformative project for the Law School that will connect the past and the future and will allow us to be competitive for the best

students, that will allow us to keep up with changes in technology, and to keep up with changes in the character of legal education.

*I'm sure the committee addressed the need to preserve the beauty of the Quadrangle. How do you balance the beauty of the buildings with the need for more functionality?*

**Eisenberg:** One of the things we realized when we began the process of working with Renzo Piano is that the buildings that we love so much and find so beautiful no longer function as well for us as they did in the past. Our needs have evolved. We need different sorts of buildings. And one of the things that is beautiful about this new project is that Renzo has started with function and with understanding what these buildings need to do for us, all the while respecting the beauty of the current buildings. And the new design is going to enhance the beauty of the buildings and make them work better for us. So we are going to love them all the more.

Another very exciting part of this project, to those of us who love the Law Quad, is that this completes the Quad. We have had a city block that in one corner has only been occupied by an underground library, which is a beautiful library on the inside. But to the outside world we are "missing" a corner of our Quad. And one of the really brilliant aspects of this design is that it completes the Cook Quadrangle.

## Building Committee's teaching experience runs deep

Expertise in legal education runs deep among the members of the Law School's Building Committee, which includes eight experienced faculty members among its 16 members. Two of these faculty members also earned their J.D. degrees at the Law School, so their insights and perspectives on legal education come first-hand from both sides of the podium.

Together, these Building Committee members bring more than 100 years of teaching experience to their work to assay how legal education has changed since current Law School facilities were built in the 1930s and 1980s, and how future facilities can continue to meet the dynamic needs of legal education well into the 21st century.

The views that Chair Rebecca Eisenberg, the Robert and Barbara Luciano Professor of Law, expresses in the accompanying interview have been forged through many Building Committee meetings over the past few years and countless informal discussions among members and others. Other faculty members on the committee are:

- Assistant Professor Michael S. Barr
- Professor of Law and Associate Dean for Academic Affairs Steven P. Croley
- Henry M. Butzel Professor of Law Thomas E. Kauper, '60
- Law Library Director and Adjunct Professor Margaret Leary
- Clinical Professor of Law Rochelle E. Lento, Director of the Law School's Detroit-based Legal Assistance for Urban Communities Clinic.
- Harry Burns Hutchins Professor of Law Joseph Vining
- Francis A. Allen Collegiate Professor of Law Christina B. Whitman, '75

Other members of the committee include financial and facilities experts, University of Michigan representatives, and law students.

# BRIEFS

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## Attorney: Punishment for Abu Ghraib abusers reflects democracy in action

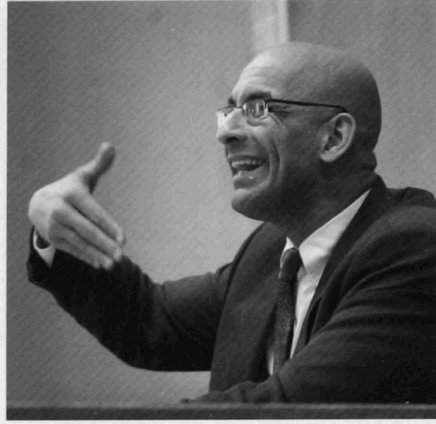
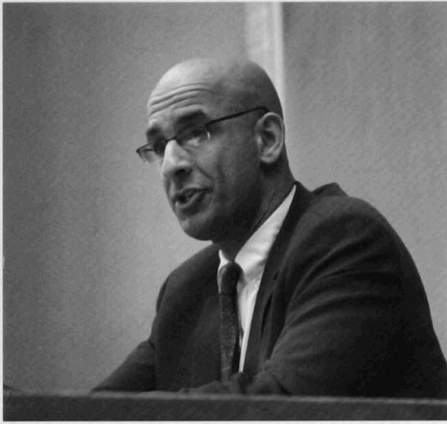
Attorney Shereef H. Akeel sees himself as part of the American system in his representation of an Iraqi-born Shiite Muslim, now a Swedish citizen, who charges he was tortured by Americans in Abu Ghraib Prison in Iraq.

When Akeel took the case in March 2004, stories and photos of prisoner mistreatment at Abu Ghraib had not yet become public. Akeel, of Akeel & Valentine PLC in Birmingham, Michigan, didn't even recognize the prison's name when his client told him he had been tortured there.

Akeel, one of 10 *Michigan Lawyers Weekly* Lawyers of the Year in 2004, discussed his work with the case in a talk at the Law School earlier this year sponsored by more than half a dozen Law School student organizations.

His client, a pro-American Iraqi Shiite who distributed flyers to his countrymen urging cooperation with the American-led coalition during the first Gulf War in 1991, said he was imprisoned and tortured at Abu Ghraib after he returned to Iraq to help with reconstruction following the U.S. invasion in 2003.





This was his second time as an Abu Ghraib inmate. Saddam Hussein imprisoned him there for five years for his anti-government work in the first Gulf War. After release, he left Iraq and became a Swedish citizen. He returned to Iraq after the second Gulf War, bringing his life savings with him. After his second release from Abu Ghraib, he came to Dearborn, Michigan, where many of his relatives had settled.

Akeel, who formerly specialized in insurance and tort work and became known as a civil rights attorney for his work in ethnic profiling cases after 9/11, said he had to search hard to find a legal avenue for challenging the behavior of the hired interrogators his client says abused him.

International and Iraqi tribunals offered no solution, Akeel said. Nor did military tribunals. So he finally turned to U.S. laws, the 1789 Alien Tort Claims Act (ATCA), the 1991 Torture Victims Protection Act that he says "put teeth into" the ATCA, and RICO (the Racketeer Influenced and Corrupt Organizations Act). RICO figures into the case because the alleged torture involves two U.S. companies, CACI International Inc. and Titan Company, which were hired by the U.S. government to provide translation and interrogation services.

Akeel works on the case with the New York City-based Center for

Constitutional Rights and Montgomery, McCracken, Walker & Rhoads of Philadelphia. The case, *Saleh v. Titan Co.*, was filed last fall in federal district court in San Diego. Now a class action suit, the case charges abuse of detainees at Abu Ghraib and other detention centers.

As part of his preparation for the case, Akeel visited Iraq to talk with former prisoners at the country's detention centers. Traveling in disguise and working with several human rights organizations, he spent 15 days listening to former detainees' stories of torture and abuse in Abu Ghraib and more than 20 other detention centers. "We came back from Iraq just devastated," he reported.

"I am sorry about what happened," he found himself telling Iraqis and others. "It was done by Americans. But this is not what America is about. In America, if someone does something wrong, there is a mechanism to punish them. . . . That's democracy."

Sponsors of Akeel's talk included the American Civil Liberties Union, Asian Pacific American Law Students Association, Black Law Students Alliance, Criminal Law Society, International Law Society, Latino Law Students Association, and Student Network for Asylum & Refugee Law.

## No more wires

The tether is gone. The recent installation of a full wireless network in the underground Allan F. and Alene Smith Law Library closes the circle so that a laptop computer user can enjoy wireless connection to the Internet throughout the Law School.

"You can roam from Hutchins to the underground library with your laptop and stay connected to the network, except in the elevator," proudly reported Rosa Peters, the Law School's information technology and computer support services manager. "We have expanded our current wireless network to achieve 100 percent wireless coverage throughout the Law School (Hutchins Hall, the Law Library, and Legal Research)."

Information technology specialists have been expanding wireless connectivity in the above-ground portions of the Law School for some time. Providing wireless connectivity throughout the three floors of the underground library, however, posed special challenges and demanded especially rigorous testing.

"We had to perform the survey twice to make sure we had complete coverage," Peters reported. "This delayed the implementation, but it was worth it because we now have great coverage on all three [below-ground floors]."

Launched last October, "the expansion project involved purchasing, installing, and configuring switches, conduits, cables, and 31 access points to work with our wireless network," Peters explained.



U.S. Senator Carl Levin, left, and Michigan Governor Jennifer Granholm, center, greet participants at the launch of the new Michigan lawyer chapter.

## ACS launches Michigan lawyer chapter

Building on establishment of a student chapter of the American Constitution Society for Law and Policy (ACS) at the Law School two years ago, state and national leaders gathered at the Law School in March to launch a Michigan lawyer chapter of the national organization.

Formed in 1999 as the Madison Society for Law and Policy to counter the successes of the conservative/libertarian Federalist Society for Law and Public Policy, ACS adopted its current name in 2001. Today ACS includes some 6,000 members in more than 120 student chapters and more than a dozen lawyer chapters, but its presence and visibility, both within and outside of government, still lag behind its conservative counterpart, the Federalist Society, founded in 1982.

"Over the past 20 years our nation's legal landscape has been transformed by a conservative legal philosophy," ACS Executive Director Lisa Brown told the

audience of legal practitioners, judges, students, and others. "Our mission is nothing less than to restore liberty, justice, and equality to our nation."

Veteran U.S. Senator Carl Levin (D-Michigan) called ACS the "counterweight to the Federalist Society." Both organizations believe in the U.S. Constitution, he said, but "the difference between us and the Federalist Society is that they believe that the only way to interpret the Constitution is to go back to the meaning of the original text. Well, the Civil War changed the text, and Lincoln's words changed the meaning."

Other speakers included Michigan Governor Jennifer Granholm and Dennis Archer, former two-term mayor of Detroit, former Michigan Supreme Court Justice, past president of the American Bar Association, and current chairman of Dickinson Wright PLLC in Detroit.

Granholm condemned tyranny of the majority, stressing instead that in American democracy majority rule

includes protection of minorities. She criticized the anti-affirmative action resolution expected to go onto Michigan's ballot next year and praised the diversity that the University of Michigan Law School successfully defended in its admissions policies.

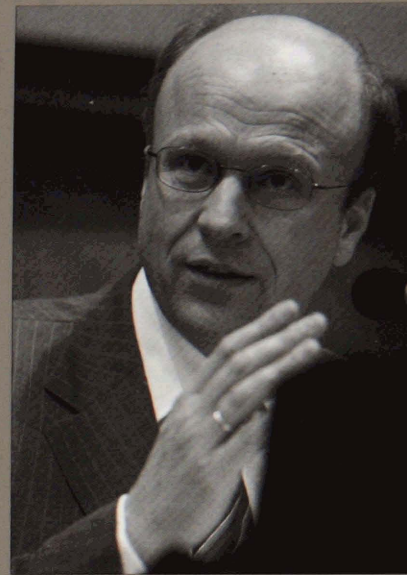
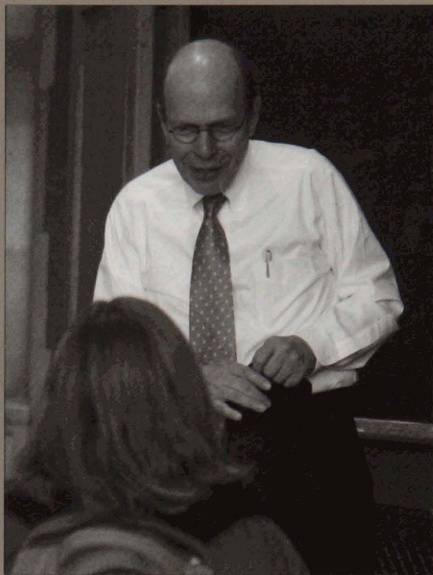
"In this tapestry that is democracy, some of the threads are different from others. . . . It is the non-conforming threads, the different threads, that add richness," she said.

Archer, who also criticized the anticipated ballot initiative, noted that people of color already comprise the majority of the world's population and by mid-century will make up the majority of the U.S. population.

An African American, Archer also said that if the Constitution were interpreted as originally written he would count as only three-fifths of a person and would not be able to vote. Women wouldn't be allowed to vote either, he added, and cited Supreme Court Justice Thurgood Marshall's view that it is the amendments to the U.S. Constitution that should be celebrated, not the document as it originally was written.

The ACS' mission, according to its Web page, is "to ensure that the fundamental principles of human dignity, individual rights and liberties, genuine equality, and access to justice are in their rightful, central place in American law."

The Federalist Society, according to the statement of purpose on its Web page, "is a group of conservatives and libertarians . . . founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."



## May I approach the bench?

### Court in session

Above, the Hon. Bernard A. Friedman of the U.S. District Court for the Eastern District of Michigan chats with students and faculty after sitting in session at the Law School to hear civil motions. Friedman's visit marked the first time in recent memory that a sitting judge has conducted court proceedings in a public forum at the Law School. Law students and other interested persons crowded Honigman Auditorium to view the judicial system in action.

### Two judges from the highest courts

Justices from two of the world's highest overseas courts visited the Law School during a single week in March. Above center, Justice Dorit Beinisch of the Supreme Court of Israel chats with faculty members as part of a luncheon "Conversation with Justice Beinisch." In the afternoon she spoke on "The Role of the Supreme Court in the Fight against Terrorism" as a program in the Law School's International Law Workshop (ILW) speakers series. In an ILW program the next day, Judge Koen Lenaerts of the European Court of Justice, above right, discusses "The Future Role of the European Union in Global Affairs after the Constitution for Europe." During his week-long stay at the Law School as a DeRoy Fellow, Lenaerts also taught classes in federalism and the European legal order.

## Law Library adds major services

The Law Library has been in the forefront of developing a new statewide online legal self-help program that provides easily accessible legal information to any practitioner with access to the Internet.

Library staffers also have facilitated inclusion of the *Michigan Law Review* in a prestigious digital collection of scholarly journals that makes the journals easily accessible to scholars worldwide.

Barbara Garavaglia, head of the library's reference department, worked with other law librarians and attorneys on the Michigan State Bar's Libraries, Legal Research, and Legal Publications Committee to develop the recently launched Michigan Online Legal Self-Help Center ([www.michbar.org/generalinfo/libraries/selfhelp.cfm](http://www.michbar.org/generalinfo/libraries/selfhelp.cfm)). The new online center also is accessible via the Electronic Resources List from the Law

Library's index page ([www.law.umich.edu/library/index.html](http://www.law.umich.edu/library/index.html)).

"Links on the page direct users to general articles on finding legal help; locating Michigan law libraries; researching law; and to other general Michigan law Websites," according to the Michigan State Bar's announcement of the new service. "In addition, pages provide more detailed information and links in the areas of family law, elder law, criminal law, wills and trusts, and landlord-tenant law."

"We should all be very proud of our colleague, Barb Garavaglia, and grateful to others" who have created the new online center, said Library Director Margaret Leary.

In the case of adding the *Michigan Law Review* to the highly regarded digital collection known as JSTOR, the Law Library contributed a complete set of the journal

for the project, according to Leary. The *Michigan Law Review* is one of only five law schools' student-edited law journals asked to be included in JSTOR. The others are from Columbia, Stanford, Virginia, and Yale universities.

JSTOR, which provides both searchable text and PDF images, was established as an independent not-for-profit organization in August 1995. Its mission is to help the scholarly community take advantage of advances in information technologies.

For the *Michigan Law Review*, being in JSTOR means exposure to the entire academic community. Most major colleges and universities subscribe to JSTOR, and scholars in all disciplines will now have the *Michigan Law Review* at their fingertips.



## Climate change from many angles

The issue of greenhouse gases and climate change generates many different responses. In a week-long series of programs during the winter term, experts addressed many of these issues and perspectives, pulling under the microscope the linkage of climate change to legal, scientific, business, and other activities.

The week's programs featured experts from the academic world, business, and government, and focused on a different aspect of the issue each day. Speakers unanimously acknowledged that the earth is warming and climate is changing, but differed in their measurements of how much human civilization is contributing to that change and how to combat it.

As Dan Bodansky put it in the week's first talk, there's "no question" that carbon dioxide and other greenhouse gases are increasing in the earth's atmosphere, that sea levels are rising, and glaciers are retreating. "The question is if we are adding to it."

Generations of explorers died trying to find their way through the ice-blocked Northwest Passage," noted Bodansky, the

Woodruff Professor of International Law at the University of Georgia School of Law and a former climate specialist with the U.S. State Department. When sailors finally got through the passage, it took a year and required the help of icebreakers. But "two years ago, a yacht took two weeks to go through the Northwest Passage."

Speakers also agreed that the United States' refusal to take part in the Kyoto Protocol, which went into effect last February, has scuttled hope for worldwide cooperation in reducing greenhouse gas emissions. Now the need is for "bottom up" activities, different countries doing different things, individual states within the United States legislating emissions reduction, as California has done. "These are baby steps," Bodansky acknowledged. "The question is if we will get there fast enough, but this seems like the way to go."

Carbon dioxide levels today are two to four times what they were in the pre-industrial era some 250 years ago, reported Law School Professor Edward

Left: Dan Bodansky  
Right: Edward A. Parson

A. Parson, who is also a U-M professor of natural resources. “The changes we see now will continue and accelerate through the 21st century,” Parson predicted. Impacts will be harshest nearer the north and south poles and in the tropics. In countries like the United States, the changes will be “disruptive and uncomfortable, but far from catastrophic.” Recent studies have raised the possibility of additional impacts, like the change in ocean currents that warm western Europe and Scandinavia and the west coast of Canada, and rising sea levels brought about by the dissolution of Antarctic ice sheets.

Like Bodansky, Parson posited a vanguard that does not include the United States: “We need everybody or we need every big player involved. We just don’t need them all right now. I think the only serious possibility of moving forward [is that] we need a coalition of the willing. The core could be Europe, with Japan and Canada if they get serious.”

John Bozzella, Ford Motor Company’s vice president of public policy and state governmental affairs, discussed the role that major corporations like Ford can play in coping with climate change. Noting that Ford’s new Escape Hybrid is “the most fuel efficient SUV on the planet,” Bozzella outlined the automaker’s efforts to improve fuel efficiency, expand hybrid engine use, and develop hydrogen-powered vehicles — while continuing to be a profitable and successful company.

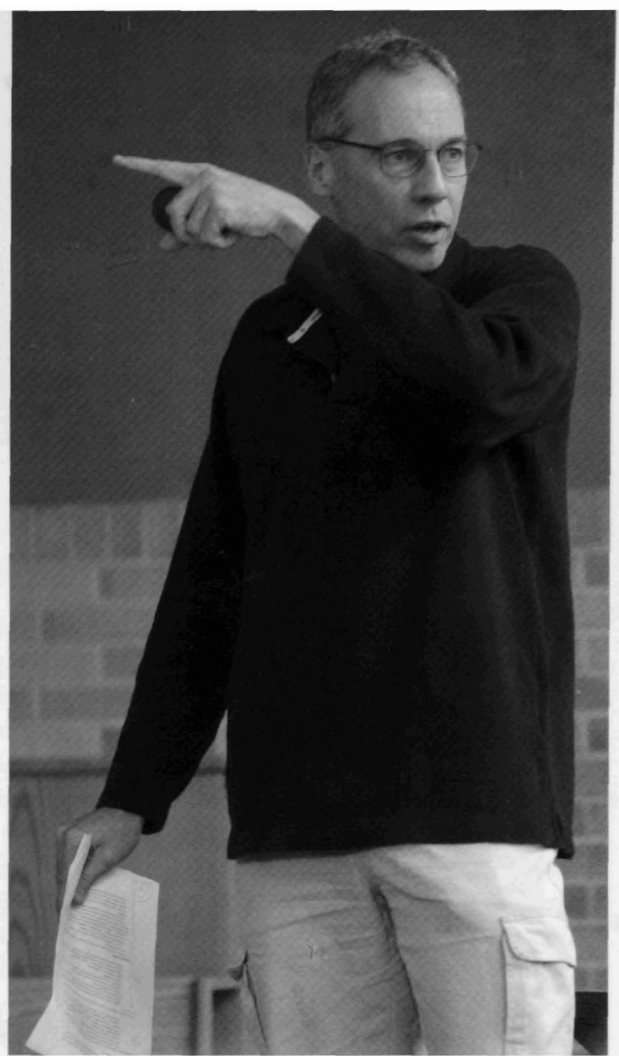
Most greenhouse gases are produced naturally, and transportation accounts

for barely one-fifth of greenhouse gas emissions, according to Bozzella. Nonetheless Ford, and other companies like General Motors, IBM, Weyerhaeuser, Whirlpool and others who make up the pioneers sometimes referred to as the “carbon cartel,” are working hard to reduce greenhouse gas emissions from their manufacturing centers and products.

Reducing greenhouse gases changes markets, explained Andrew J. Hoffman, the Holcim Professor of Sustainable Enterprise and co-director of the Corporate Environmental Management Program at the University of Michigan. But “what business faces in the United States now is uncertainty. Do you install greenhouse gas mitigation equipment or not? That’s a gamble. And that’s what companies don’t like — uncertainty. Some \$700 billion is invested in new equipment each year in the United States. Do they install greenhouse gas equipment or not?”

Eventually, regulation will require such installations, Hoffman predicted. States like California, Oregon, Washington, and throughout New England already are imposing or considering tightening greenhouse gas emission requirements.

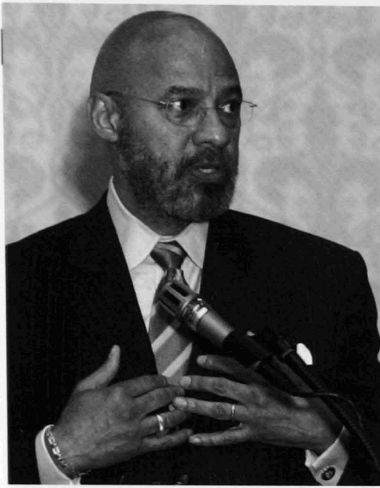
Big business dislikes such a quiltwork of regulation, Hoffman continued. “Rather than having one big gorilla, it’s



like having 50 monkeys on your back,” he explained, so business interests will find themselves responding by seeking a single federal regulation to replace the state-by-state patchwork.

Simon Wynn, assistant New York attorney general, concluded the five-day series with a discussion of the public nuisance action that New York is bringing against five of the largest utility generators in the United States. The idea underlying the action is that emissions from separate power plants, in the absence of federal enforcement or even if each plant meets air quality standards, can jointly constitute a public nuisance or threat to public health.

Bodansky spoke as part of the International Law Workshop speakers series. Other programs in the series were sponsored jointly by the Environmental Law Society and the Ann Arbor office of the National Wildlife Federation.



Keynote Dennis Archer addresses the Butch Carpenter Memorial Scholarship Banquet

## Remembering Alden J. 'Butch' Carpenter

The legacy of Alden J. "Butch" Carpenter is alive, well, and growing. The annual Alden J. "Butch" Carpenter Memorial Scholarship Banquet has become a highlight of the Law School year — the 27th annual banquet was held last March — and the fund supporting the scholarships likely will top \$500,000 this year.

Tragically, Law School student Carpenter died in an auto accident before he graduated. But he already had made his mark as a leader dedicated to using his skills and education to reinvigorate economically depressed communities and improve life for their residents.

On February 21, 1978, the Black Law Students' Alliance (BLSA) unanimously voted to establish the Alden J. "Butch" Carpenter Memorial Fund "to promote the attributes exemplified by his life and to motivate the social commitment demonstrated by his professional objectives." The fund stood at more than \$418,000 earlier this year and is expected to reach \$500,000 soon, according to Assistant Dean of Students Charlotte Johnson, '88.

Today BLSA's annual banquet in Carpenter's honor draws more than 200 attendees. And in an act that renews the promise that Carpenter's tragic death cut short, a high point of each banquet's program is presentation of Butch Carpenter Scholarships to students who share Carpenter's goals. This year's scholarship winners, law students Mitoshi Fujio-White, Nneoma Nwogu, and Anthen T. Perry, shared a total of \$17,500

in scholarship awards.

"I feel my life in so many ways has been a miracle," Nwogu said as she accepted her scholarship. "Thank you for the faith you have put in me that I can carry on and do something."

"Because of the example set by Butch Carpenter and others like him, we as BLSA members have remained true to uplifting our community within the Law School and abroad," according to 2004-05 BLSA Chairperson Shandell S. Magee. "This is evidenced by our sponsorship of food/clothing drives and mentoring efforts geared toward high school and undergraduate students, in addition to various other programs and events."

In another presentation at the banquet, BLSA gave its Faculty of the Year Award to Assistant Professor Laura N. Beny, who

joined the faculty in 2003. In accepting the award, Beny urged listeners to have confidence in their abilities. "Every time you're told you can't do something, let it make you more and more determined to prove the speaker wrong," she said.

The evening's keynote speaker, former American Bar Association President Dennis Archer, stressed the value of affirmative action, especially for women. He also noted that by mid-century people considered minorities today will make up the majority of the country's population.

Archer also has served as a judge on the Michigan Supreme Court and as mayor of Detroit. He currently is chairman of Dickinson Wright PLLC in Detroit.

Butch Carpenter Scholarship winners, from left, Nneoma Nwogu, Anthen T. Perry, and Mitoshi Fujio-White





*Campbell Moot Court Judges:  
Hon. Avern L. Cohen, '49;  
Hon. John M. Walker Jr., '66; and  
Hon. Timothy B. Dyk*

## Campbell Moot Court judges give nod to respondent's team

Student counselors for the respondent made a clean sweep in Campbell Moot Court final arguments last spring, capturing honors as Best Team, Best Oralist, and Best Brief.

The winning team of Patrick Egan and Edwin J. Kilpela Jr., representing the fictitious State of Hutchins in a hypothetical case to clarify the definition of "testimonial" in relation to the Sixth Amendment right to confrontation, won the judges' nods over the team of Joshua Deahl and Michael A. Pearson. Kilpela was declared the competition's Best Oralist.

The competition's hypothetical case of *Downing v. Hutchins* revolved around whether a 911 message seeking assistance could be used as testimony against the defendant. Egan and Kilpela successfully argued that the spouse of the caller, who had been convicted of murdering her, had forfeited his right to having the 911 message considered to be testimonial — and therefore subject to cross examination.

Deahl and Pearson argued that the 911 call was improperly deemed to be evidence and used to convict their client.

Judges for the competition were the Hon. John M. Walker Jr., '66, chief judge of the U.S. Court of Appeals for the Second Circuit, acting as chief justice;

the Hon. Avern L. Cohn, '49, of the U.S. District Court for the Eastern District of Michigan; and the Hon. Timothy B. Dyk, circuit judge of the U.S. Court of Appeals for the Federal Circuit.

All three judges voiced high praise for the competitors' performance.

The hypothetical case used in the finals reflected current efforts throughout the U.S. legal system to clarify the meaning and reach of *Crawford v. Washington*, the 2003-04 case in which the U.S. Supreme Court ruled that the right to confrontation demands that, with limited exceptions, a defendant be able to face and cross examine those who provide testimonial evidence against him. Law School graduate Jeffrey Fisher, '97, of Davis Wright Tremaine LLP in Seattle, successfully argued *Crawford* before the Court. Richard D. Friedman, the Law School's Ralph W. Aigler Professor of Law, assisted Fisher in the case. (See Friedman's "Confrontation after *Crawford*," page 80, in the Winter 2005 issue of *Law Quadrangle Notes*.)

Some 500 people participated in this year's competition, including 130 student competitors, 36 faculty judges, and nearly 250 Law School graduates who adjudicated the preliminary round.



*Edwin J. Kilpela Jr.*



*Patrick Egan*

### Graduates aid NALSA

A group of Law School graduates who were active in the Native American Law Students Association (NALSA) during their student days have continued to assist the student members of the organization with financial support.

Leaders of the Ogichidaa Award Foundation (Ogichidaa is the Odawa word for “warrior” or “person with a big heart”) report that since its establishment in 2001 the organization has distributed more than \$5,000 in awards to NALSA members at the Law School.

The foundation was founded by Allie Greenleaf Maldonado, '00, a member of the Little Traverse Bay Bands of Odawa Indians in Harbor Springs, Michigan. Maldonada said she realized during her days as a law student and NALSA leader how helpful such an organization could be to student leaders.

In addition to Maldonado, the current Ogichidaa Award Foundation Board of Directors includes: Matthew Fletcher, '97; Shannon Howl, '98; Elizabeth Kronk, '03; Melody McCoy, '86; Robyn McCoy Nabwangu, '00; Lynette Noblitt, '99; and Colette Routel, '01.

## Tribes are placing different bets

Some Indian tribes, some with successful gaming casinos, are opposing the efforts of other tribes to establish their own casinos.

That's the picture drawn by Aurene Martin, keynote speaker for Indian Law Day at the Law School last April.

Some tribes have found casinos to be cash cows, explained Martin, a Wisconsin-born Menominee who is a partner in Holland & Knights' federal Indian law practice group in Washington, D.C. For other tribes, casinos provide just enough income to help them get by. But some tribes, like her own Menominee, occupy lands that are too isolated from population centers or for some other

reason have reaped no benefit from their right to establish gaming casinos.

But off-reservation casinos are possible for such “have-not” tribes because the 1988 Indian Gaming Regulatory Act (IGRA) provides exceptions to allow them — through federal recognition of new tribal status and/or reservation boundaries, new land acquisition to satisfy an earlier land claim, new trust land, or for the community good. These “second generation” gaming facilities are the bones of contention.

Martin explained that applicants must overcome a number of high hurdles on the way to congressional or Bureau of Indian Affairs approval of such expansion, including negotiation of what she labeled “the idiosyncrasies of the bureaucracy.” Approval also requires working through the costly preparation and submission of an Environmental Impact Statement and environmental mitigation if necessary, state and local approval, and perhaps quelling the opposition of other tribes.

Any of these obstacles can be insurmountable, and very few expansions have occurred since IGRA's passage 17 years ago, Martin reported. In one Louisiana case, she said, casino supporters have been waiting three years for the governor's office to respond to their proposal.

When this process pits tribe against tribe, and the inter-tribal disagreements go public, everyone loses, according to Martin. “I don't know the answer,” she confessed, but “I think we need to have a discussion. It should be made in inter-tribal and intra-tribal forums, not in public.”



Aurene Martin



Martin's talk kicked off an afternoon of panel discussions of "Off-Reservation Gaming" and "Recent Developments and the Future of Tribal Gaming." Panelists discussing off-reservation gaming included:

- R. Lance Boldrey, of counsel with Dykema Gossett in Ann Arbor;
- Gavin Clarkson, assistant professor in the School of Information with appointments at the Law School and in Native American Studies, University of Michigan;
- Riyaz Kanji, a partner in Kanji & Katzen in Ann Arbor and a former associated member of the University of Michigan Law School faculty; and
- Moderator Bethany Berger, an assistant professor at Wayne State University Law School.

Panelists discussing recent developments and tribal gaming's future included:

- Bill Brooks, general counsel of the Little River Band of Ottawa Indians in Michigan;
- Frank Ettawageshik, chairman of Michigan's Little Traverse Bay Bands of Odawa Indians;
- Matthew Fletcher, '97, an assistant professor at the University of North Dakota Law School;
- Colette Routel, '01, an associate with Faegre & Benson in Minneapolis; and
- Moderator Trent Crable, chairman of the Law School chapter of the Native American Law Students Association (NALSA), which sponsored the program.

## Facing off between security and rights

The U.S.A. Patriot Act presents a classic confrontation between "two equally strong claims," according to sociologist/social philosopher Amitai Etzioni: the need to protect public security and the duty to preserve individual rights.

Both claims are valid, and the trick is to examine all the components of the Patriot Act and determine how best to balance the competing sides, explained Etzioni, director of the Institute for Communitarian Policy Studies at George Washington University. He spoke at the Law School last winter on "How Patriotic is the Patriot Act? Freedom Versus Security in the Age of Terrorism."

Generally, Etzioni said, when people greatly fear for their safety, as they did after the terrorist attacks of 9/11, "they demand that public authorities take whatever actions are needed. . . . [But] as public fear wanes, the concern for rights rises."

Faced with such change, he advised, each section of the Patriot Act should be evaluated separately.

The law's authorization to track people is a matter of law catching up with technology, he said. So is its authorization to trace e-mail through several jurisdictions.

But the post-9/11 shift from crime prosecution to crime prevention "practically all the time means messing with innocent people" and is "on the borderline" of what is permissible — depending on the danger's scope and immediacy. And holding people indefinitely, as authorities have done at Guantanamo Bay Naval Base in Cuba, "is a very distressing policy and there is no need for it."

It's difficult to balance public security and civil rights, Etzioni said. When people feel endangered, they're more willing to weaken their civil rights. When they feel secure, they're unwilling to weaken them. In today's world, he concluded, "There has to be enough public safety so people are not tempted to tamper with the Constitution."

## U.S., South Africa leaders compare notes on affirmative action

*The following story by Kevin Brown of the University's News and Information staff appeared in the April 19 edition of the University Record and appears here with permission. Panel discussions for the conference were held in Honigman Auditorium at the Law School. Dean Evan Caminker moderated the discussion "Evaluating the Results of Affirmative Action in Higher Education"; among the panelists were Wade H. McCree Jr. Collegiate Professor of Law Emeritus David Chambers and Law School graduate Roger Wilkins, '56, the Clarence J. Robinson Professor of History and American Culture at George Mason University. Former Law School faculty member Theodore M. Shaw, president and director counsel of the NAACP Legal Defense and Educational Fund, was a member of the panel discussing "The Case for Affirmative Action in Higher Education."*

**U.S.** and South African higher education and judicial leaders said [in a U-M/Law School conference] that maintaining funding for K-12 education is one of several key challenges both countries face to effectively promote affirmative action in higher education.

Njabulo Ndebele, vice-chancellor of the University of Cape Town, said that while more black families are able to pay for college as economic opportunity has grown post-apartheid, "We may have to do more." Further, he said the AIDS epidemic in his country has decimated the ranks of K-12 teachers.

Ndebele joined a panel discussion Thursday at the Law School, part of a two-day symposium, "Affirmative Action in Higher Education: The United States and South Africa," hosted by U-M.

The event was organized by Marvin Krislov, vice president and general counsel [and adjunct professor at the Law School], and sponsored by the Andrew W. Mellon Foundation, Spencer Foundation, Office of the President, Office of the Provost, Law School, and Office of the Vice President for Communications.

Other panelists were Yvonne Mokgoro, justice of the Constitutional Court of South Africa; William G. Bowen, president of the Andrew W. Mellon Foundation; Michael McPherson, Spencer Foundation president; and U-M President Mary Sue Coleman.

Charlayne Hunter-Gault, CNN Johannesburg bureau chief, opened the symposium earlier in a noon address at Rackham Amphitheatre. She said that for black South African university students after apartheid, "Things have changed but only if you've got money — and that's unacceptable."

Hunter-Gault offered a unique view of changing attitudes on race in South Africa, as one who had experienced discrimination in the United States as an African American student seeking to enter the University of Georgia in 1961.

She and fellow African American student Hamilton Holmes first were denied admission. Hunter-Gault, who worked later as a reporter for *The New York Times*, PBS, and National Public Radio, said the stated grounds for denial were there was no room for her in a dormitory. "I was not socially or morally undesirable, I was black," she said.

The courts ruled that both students must be admitted. Hunter-Gault said family pride allowed her to withstand the racial slurs called out by white students who followed her to classes. "It was that armor that protected me."

When she returned to Georgia to celebrate the 40th anniversary of her admission, former Georgia Gov. Earnest Vandiver, who had tried to block her admission, embraced her and apologized.

After several working trips to South

Africa, Hunter-Gault moved to the Johannesburg area in 1997. She said her fascination with the continent began when she was a girl in Covington, Ga., watching Tarzan movies on Saturdays, and the stylized Africa they depicted. "There was that image of the strong, muscular Tarzan and the villain was always black," she said. But Hunter-Gault's Africa was better captured by poet Countee Cullen in her poem "Heritage."

"What is Africa to me, copper sun and scarlet sea," Hunter-Gault quoted from memory. "It was more than the poet who penned those lines could ever have imagined."

She recalled the ugliness of apartheid-era South Africa, including the story of the woman so badly beaten, that when the victim lifted her shirt to reveal bruising on her chest administered by state security officers, Hunter-Gault collapsed to the floor. "My journey into the apartheid state did take me back," she said.

Hunter-Gault said post-apartheid South Africa still is trying to sort itself out. "The interesting thing about the country right now is this whole issue of debate," she said, adding South Africans love to argue — on talk radio, and in person. "People don't feel afraid to express their opinions and that's a good thing. It doesn't mean that problems have been solved," she said.

Hunter-Gault called AIDS "the new apartheid."

In the panel discussion at the Law School, Mokgoro said the South African constitution allows for race-based affirmative action measures, which the country has begun to implement. Panel members representing the United States echoed the South African panelists, saying inadequate support for K-12 education

similarly hurts students' ability to prepare themselves for college.

Still, William G. Bowen, president of the Andrew W. Mellon Foundation, said that the future of using race as a factor in admissions is bright. He referenced the U.S. Supreme Court decision in 2003, which reversed in part the University's undergraduate admissions policy. The court still allowed for the consideration of race in admissions, as determined in the University's victory in the Law School case. "We have to be more aggressive in closing the achievement gap in the K-12 area," he said.

"We are in a competition for talent globally. For me, it's very much a national competitive issue," said [U-M] President Mary Sue Coleman. "It's a matter of national economic survival. Diversity enhances the educational experience of every student. We think it's all about educational excellence and preparing students."

Coleman and panelists McPherson and Bowen noted that alternatives to affirmative action continue to fail, such as a recent Texas measure to admit the top 10 percent of all graduating high school seniors to the state universities they want to attend.

"Higher education can't be a private good to only those with certain backgrounds," Coleman said. "I think we're going to be at great risk if we don't commit in years ahead to higher education as a public good. I think the country's prosperity depends on it."

The April 15 program featured panel discussions "The Case for Affirmative Action in Higher Education," "Implementation Challenges to Existing Programs," "Evaluating the Results of Affirmative Action in Higher Education," and "The Road Ahead."

## Speakers: Opening textile trade favors China

The shirts on the backs of every second American soon may come from a single country — China — as the result of the sunset of the international agreement that had regulated textile trade for many years, according to a panel of experts who spoke at the Law School last spring.

Completion of the Multi-Fiber Arrangement's (MFA) 10-year phase-out of protective quotas last January for the 144 member countries of the World Trade Organization (WTO) will reduce the number of countries that are major players in international textile trading, the panelists predicted. And China, whose booming industrial base already mass produces textiles and clothing, will move into the vacuum, they said.

"In many ways, when we talk about this issue, we are talking about the rise of China as an industrial power," explained Brad Farnsworth, director of the University of Michigan's Center for International Business Education.

Fellow panelist Scott Nova, director of the Washington, D.C.-based Labor Rights Consortium, noted that WTO predictions call for U.S. textile imports from China to jump from 16 percent to 50 percent within two years of the phase-out. The U.S. imported 941,000 cotton shirts from China in January 2004, he said. In January 2005, the first month without quotas, the figure jumped to 18.2 million, a 1,837 percent increase.

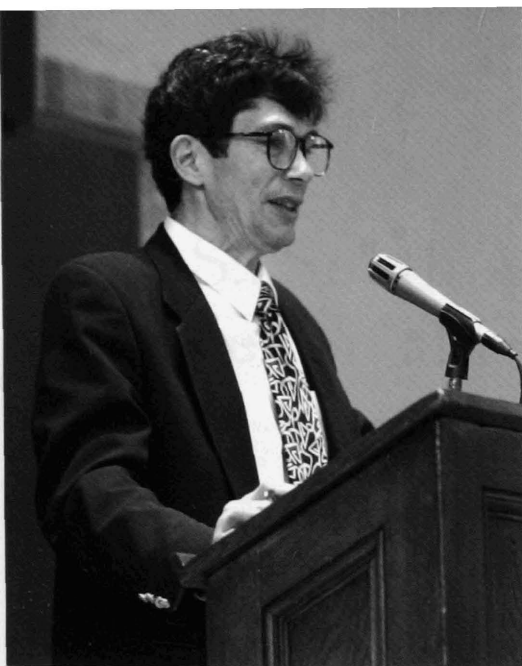
Substandard wages and working conditions are widespread in the world's apparel and textile industries and the MFA phase-out is going to make this worse, Nova predicted. Countries like Bangladesh and Sri Lanka

reap most of their earnings from apparel exports but will be unable to compete with China without the protection of quotas, he said.

It is possible that increased reliance on China for textiles can be used to pressure the country to improve working conditions and allow the formation of unions, he continued. "The fundamental choices [of where to buy from] are made by the brands and retailers, not the countries," Nova said. "Chinese labor conditions are not the worst, but independent unions are illegal. It's worth noting that this is one labor law that is enforced [in China]."

Other panelists included Professor of Law Maureen Irish of the University of Windsor in Ontario and Professor of Corporate Strategy and International Business Linda Y.C. Lim of the U-M Ross School of Business.

The program was sponsored by the Law School chapter of the International Law Society and the U-M President's Committee on Labor Standards and Human Rights. Additional support came from the U-M Ross School of Business, the Center for International Business Education, and the Student Organization for Labor and Economic Equality.



Opening keynote speaker Richard Delgado

## Ideas of class re-enter the critical race theory discussion

The pendulum is swinging back. Critical race theory (CRT) pioneers often criticized scholarly analyses of legal and social questions for overemphasizing class and giving short shrift to the role that race plays in such issues. In challenging the traditional “colorblind” approach to social, cultural, legal, and other studies, CRT’s proponents at first left little room for considerations of class.

But today, many CRT scholars are finding that class and race often inseparably intertwine with each other and factors like income, education, residence, and others as major currents in the flow of society.

Recognizing this shift, leaders of the *Michigan Journal of Race & Law* marked their 10th anniversary this year by presenting a symposium that brought together many of this country’s top scholars to examine where this evolution is taking the field of critical race theory. They presented their symposium, “Going Back to Class? The Reemergence of Class in Critical Race Theory,” in February with sponsorship from the Law School and more than a dozen other supporters.

Guy-Uriel E. Charles, the Russell M. and Elizabeth M. Bennett Professor of Law at the University of Minnesota Law School, delivered the opening talk that launched the symposium’s day-long series of panel discussions, and Gerald Torres, the H.O. Head Centennial Professor in Real Property Law at the University of

Texas at Austin School of Law, delivered the symposium’s closing banquet address.

Panel discussion topics included: “New Directions: The Future of Critical Race Theory”; “Beyond the Law: Interdisciplinary Perspectives on Race and Class”; “Redefining the Movement: Class in Critical Race Theory”; and “Incorporating Class: Race, Class, and Intersectionality”. Nearly 20 scholars from universities throughout the country participated as panelists.

CRT pioneer Richard Delgado delivered the opening conference keynote. The author of 15 books and more than 100 journal articles, Delgado is a law professor and the Derrick Bell Fellow at the University of Pittsburgh School of Law.

The concepts and impacts of race were central to critical race theory when it was being formulated in the 1960s, according to Delgado. Today, however, few critical race theorists any longer can ignore the intersection of race with economics, sociology, political science, and other fields, he said. But the scholar’s question remains: What is the main agency of change? What factor — race, income, education, or something else — is the prime mover in social change?

Many scholars still seek an overriding, single cause or “agency” of change, according to Delgado. But Delgado does not. He related the cool reception he got at a conference last year marking the 50th

anniversary of *Hernandez v. Texas* when he suggested that *Hernandez* was the result of many factors coming together. *Hernandez* is the Mexican American student busing case that many observers consider to be a precursor to the famous *Brown v. Board of Education* school desegregation case.

“I proposed *Hernandez* as a case of ‘interest convergence,’” Delgado explained. “In 1954, the United States was in the early stages of the Cold War and competing for the hearts and minds of the third world. With *Hernandez*, an additional element entered into the equation — the fear of Latin American communism.”

In other words, according to Delgado’s “interest convergence” interpretation, the self-interest of the United States’ non-Latino leadership supported an expansion of the rights of Latinos.

But the shift toward seeing a combination of factors as the drivers for change has not won universal, or even widespread acceptance, according to Delgado. His *Hernandez* thesis, he reported, “got a relatively downbeat reception.”

Speaker Eric Alterman



## Experts examine media ownership, role

Democracy is ill-served by having only a half dozen major media companies control most of the information that Americans receive, according to the keynote speaker who opened a conference at the Law School last spring to examine the impact of increasingly concentrated media ownership.

In 1983, when the term “mediaopoly” was coined, some 50 major media companies controlled most of this country’s information flow, but today there are only six major media companies, reported media critic Eric Alterman, whose commentaries appear in *The Nation* and via MSNBC.com. “You’d have to be naïve to believe that their own interests are consistent with what we consider to be the interests of the republic,” said Alterman, who also is an adjunct professor of journalism at City College of New York.

The small number of these media giants — Bertelsmann, Disney, Vivendi Universal, Viacom, News Corporation, and Time-Warner — results in a lack of vitality in the marketplace of ideas that is the lifeblood of a democracy, Alterman said. “If we only have six companies giving us our information, and if we are limited to the nonsensical shockfest that we see on TV, and increasingly in print, all we get is knowledge handed down to us . . . and as we know, that form of knowledge has been enormously downgraded over the past few decades.”

In addition, information flow can be restricted because of corporate perceptions of repercussions. For example, Alterman explained, Disney’s refusal to let its subsidiary, Miramax, release Michael Moore’s anti-George Bush movie *Fahrenheit 911* because Disney executives feared that release of the film might affect Disney’s development hopes in Florida

shows how distant corporate considerations can limit information flow to the public. In a poll published last January, Alterman reported, one-third of local television news directors admitted to having been pressured by superiors to avoid negative stories about advertisers, and 40 percent of them said they self censor to avoid the issue.

Alterman also debunked as myth the idea of a liberal bias in the media. “Most journalists are liberal on social issues and conservative on economic issues,” he said, but “it’s not reporters who determine what is in the news. It’s the editors, publishers, and owners.”

Alterman was the opening speaker for the symposium “Not from Concentrate? Media Regulation at the Turn of the Millennium,” presented in March by the Law School’s *Journal of Law Reform* and the U-M’s Department of Communication Studies.

The conference focused on television, book, movie, music, and other information companies, especially those like television that are subject to regulation by the Federal Communications Commission (FCC). Participants did not discuss newspapers or the big three newspaper companies — Gannett, the Tribune Company, and the New York Times Company — which control the 10 largest papers in the United States and through them set the national media agenda for public discussion.

Discussion topics and panelists for the symposium included:

### **A Perfect Storm: The Battle over Media Concentration**

With panelists Michael G. Baumann, senior vice president of Economists Inc.; W. Russell Neuman, the U-M’s John Derby Evans Professor of Media Technology; Andrew Jay Schwartzman,

president and CEO of the Media Access Project; and Jonathan Weinberg, professor of law at Wayne State University Law School. The panel was moderated by U-M Assistant Professor of Law Molly Shaffer Van Houweling.

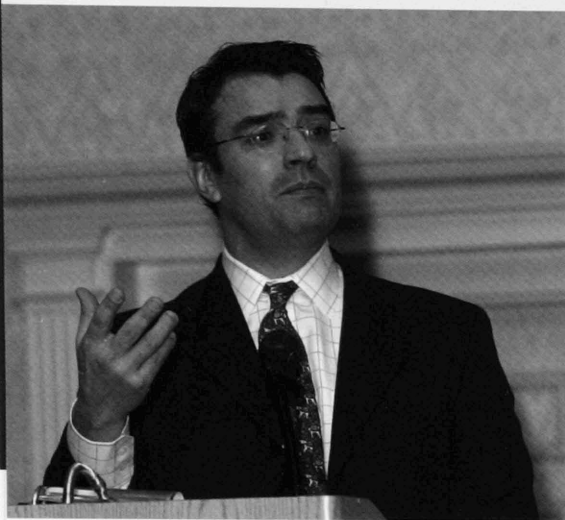
### **Media and Free Speech: The Right Balance for Democracy**

With University of Pennsylvania Law School Professor C. Edwin Baker; Robert Corn-Revere, a partner with Davis Wright Tremaine LLP; Political Science Professor Michael E. Good of California State University at Hayward; and Martin H. Redish, the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law. The Law School’s L. Hart Wright Collegiate Professor of Law James Boyd White moderated the discussion.

### **Media at the Margin**

With St. John’s University School of Law Professor Leonard M. Baynes; Susan Douglas, the Catherine Neafe Kellogg Professor and chair of the U-M Department of Communication Studies; Sonia R. Jarvis, the Lillie and Nathan Ackerman Visiting Distinguished Professor of Equality and Justice in America at the School of Public Affairs, Baruch College, City University of New York; and Pace University School of Law Associate Professor Anthony E. Varona. U-M Law School Assistant Professor Alicia Davis Evans moderated the discussion.

Commissioner Jonathan S. Adelstein of the Federal Communications Commission gave the conference’s closing keynote address.



Banquet speaker James Cavallaro

## Juan Tienda: A thriving legacy of service to others

Law students prepared the rice-and-beans menu for their first Juan Tienda commemorative banquet more than 20 years ago, dinner was served in the Lawyers Club, and the cost was \$2.50 per person. That first simple banquet nonetheless raised \$2,500 for scholarship aid in the name of the dynamic young law student who died before he could begin his third year of legal studies.

From that spartan beginning, the Juan Tienda Scholarship program has grown to provide about \$10,000 in aid each year to students involved in public interest work. The annual Juan Tienda Scholarship Banquet has become a staple of Law School life that now is held in the ballroom of an Ann Arbor hotel to accommodate the 200 and more people who attend. Both programs are run by the Latino Law Students Association with help from LLSA alumni. LLSA last year also launched the Project Comunidad Fellowships to provide financial aid to students doing public interest work during the summer.

The annual banquets have become gala affairs that include post-dinner dancing after a program that features announcement of the Juan Tienda Scholarship winners; presentation of the J.T. Canales Distinguished Alumnus Award, which commemorates an 1896 Latino graduate who went on to an outstanding legal and legislative career and founded the League of United Latin American Citizens; and a talk by a distinguished member of the Latino community.

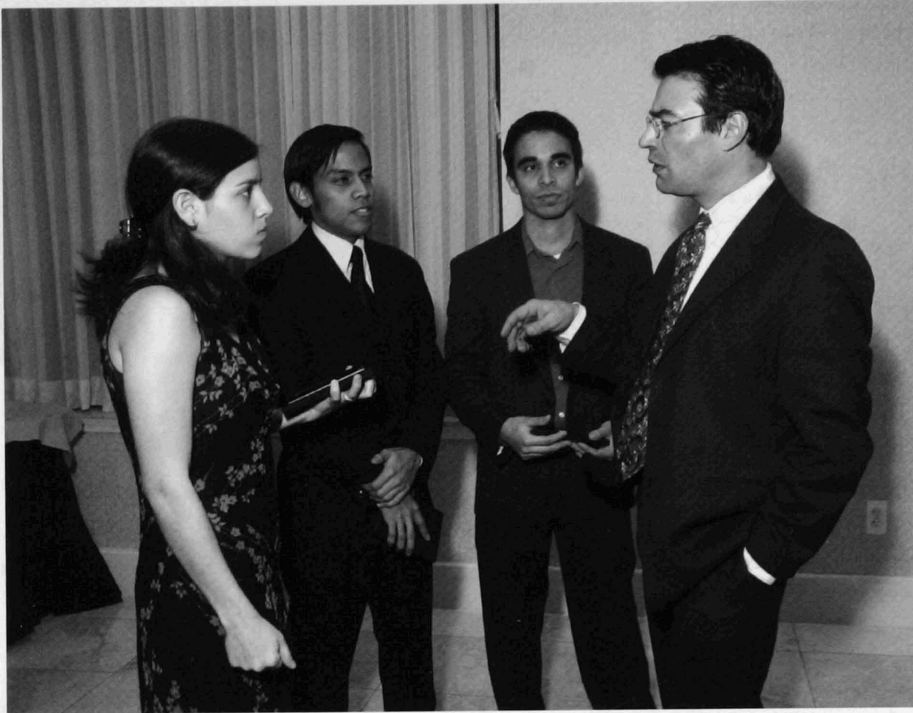
Tienda, who was born in Detroit in 1951, died in an automobile accident in Texas in August 1976, just before beginning his third year of legal studies. He had won the Army Commendation Medal and National Defense Service Medal during a two-year stint with

the U.S. Army and earned a B.S. from Michigan State University before beginning his legal studies in 1974. While at the Law School, he served as president of La Raza, the predecessor to LLSA, established the Michigan Migrant Legal Assistance Project in Hart, Michigan, and organized the Milan Prison Project, which provided Law School visitors to inmates at the Milan Federal Correctional Facility in Milan, Michigan.

Establishment of the Tienda Scholarship was "inspired by the light-hearted spirit and unassuming commitment of a *compañero* whose sudden loss is deeply felt," a close friend, Milwaukee County (Wisconsin) Circuit Court Judge Elsa Lamesas, '78, noted at the time.

"We remember Juan as unambitious, energetic, and genuinely in love with people, his own, anyone in need, the unpretentious, his friends," Lamesas continued. "He was blessed with intelligence, good looks, an easy stride, and a constant smile. His death, at 24, is so hard to reconcile. Finally, we would add that his commitment was exemplified by his work and unfailing optimism, not by rhetoric. Juan touched our lives; may he touch yours in ever-widening circles."

This year, three first-year law students received a total of \$10,000 in Juan Tienda Scholarships. Each of the winners, Deon Falcón, Paul Meta, and Monica Vela, already has done considerable community or public service work. For example, Falcón worked with Community Building Inc., the Center for International Development, and the Fresh Air Fund while studying at Harvard; Meta had served as a mentor for the New York City Board of Education and been politically active in his native Austin, Texas; and Vela had been a mentor and worked on the AIDS Quilt Project in her native Texas.



*James Cavallaro chats with Juan Tienda Scholarship winners Monica Vela, Paul Meta, and Deon Falcón*

Since coming to the Law School, Vela also served as a voter protection volunteer in Detroit on Election Day last November and has been involved in efforts to reduce the abuse of women.

These winners represent “the epitome of what Juan Tienda stood for,” said scholarship committee chairman Marty Castro, ’88, himself a Juan Tienda Scholarship winner while a student. Castro now is a partner with Seyfarth Shaw in Chicago.

Irasema Garza, ’83, director of the Women’s Rights Department in the American Federation of State, County, and Municipal Employees of the AFL-CIO, received this year’s J.T. Canales Distinguished Alumnus Award. A first generation Mexican American, Garza drew laughter with her confession that as a youngster one of her two career dreams was to become quarterback for the Dallas Cowboys, a goal that meant replacing Roger Staubach. Her other, realizable goal, she said with a laugh, was to become a lawyer.

“This country runs because working people work,” she said as she led the room in applause for the evening’s servers and kitchen staff. “You can do

well and do good,” she stressed. “I feel that I have had that privilege.”

Keynote speaker James Cavallaro, clinical director of the Human Rights Program at Harvard Law School, criticized the treatment of U.S. prisoners at Guantanamo Navy Base in Cuba and Abu Ghraib Prison in Iraq as reflective of a growing attitude that “some people are so dangerous that they don’t get human rights.”

“What I see in the United States, and as a consequence throughout the world, is the greatest single crisis facing human rights since the birth of human rights after World War II,” said Cavallaro, who returned to the United States in 2002 after founding and directing the joint office of Human Rights Watch and the Center for Justice and International Law in Brazil. He also is the founder of the Global Justice Center in Brazil, a human rights non-governmental organization (NGO).

“We have the facts,” Cavallaro said. “The question is the policy.”

Cavallaro also cautioned against uncritical praise for Latino advancement. For example, he said, after Latinos were added to the ranks of U.S. border guards

along the U.S.-Mexican border, “many migrants told us that the Latino officers were as cruel as or worse than the white officers.”

“Should Latinos be proud that Alberto Gonzalez is named as the first Latino attorney general?” Cavallaro asked. “I think the question requires us to think about what we are proud of and who represents us.”

He encouraged his audience to think deeply in choosing their role models for the future. Agriculture workers pioneer organizer Cesar Chavez? Juan Tienda? Chilean musician and poet Victor Jara? U.S. Attorney General Alberto Gonzalez?

“These are difficult times,” Cavallaro concluded. “They are times in which we must reflect, reach into ourselves, look to our best traditions, and raise our voices, here, in Latin America, and everywhere.”



*Irasema Garza, ’83, winner of the J.T. Canales Award*

Assistant U.S. Attorney Judith Levy makes a point as fellow panelists Martha S. Jones, a visiting assistant professor of the Law School, and Zanita E. Fenton of Wayne State University Law School listen.



## Speaker series opens with discussion of women on death row

Being a woman on death row is unnervingly lonely and isolated, according to one of the authors of an American Civil Liberties Union (ACLU) report on women who have been convicted of a capital crime and are awaiting execution.

“The most shocking thing we learned . . . was the isolation” of female death row inmates, reported Rachel King, a coauthor of “The Forgotten Population: A Look at Death Row in the United States Through the Experiences of Women,” issued last December.

King outlined some of the report’s findings in a talk at the Law School in March that kicked off a four-part series of mid-day lectures on issues affecting women. The series, which organizers hope to make an annual presentation in conjunction with Women’s Law Month, was sponsored by the Women Law Students Association (WLSA) with support from other law student organizations and Law School offices.

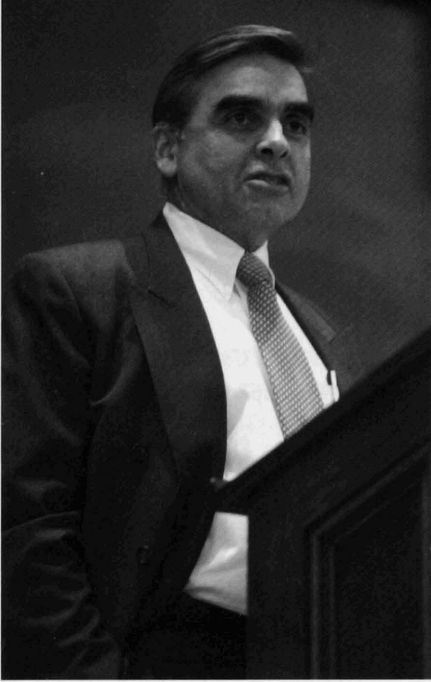
Women account for a tiny fraction of the death row inmates in the United States, and this adds to their isolation, according to King. The 48 women on death row at the end of 2003 made up only 1.4 percent of the total of 3,500 inmates on death row and accounted for less than one-tenth of one percent of the approximately 50,000 women in U.S. prisons. In a small solitary cell and isolated from the general population, a woman on death row might be the only woman in that situation in a prison. In a case that King used as an example, a woman was sequestered so that she also was alone when she left her cell for her recreational time — one hour five days a week. She also lacked television and had no window in her cell.

Women on death row are subject to a demeaning lack of privacy, lack of appropriate health care, or amenities, King said. The numbers of women on death row are simply so small that corrections officials don’t know what to do with them, she explained. One of the report’s recommendations is to integrate female death row inmates into the general female prison population, King explained. Her talk was cosponsored by the Criminal Law Society and the ACLU.

Other programs in the series included:

- “Real Life as a Working Woman: A Panel Discussion on Sexual Harassment, Family Planning, Glass Ceilings, and More.” Panelists included employment lawyers Teresa Killen, ’97, and Jennifer Salvator, ’97. Cosponsored by the Office of Career Services and the Intellectual Property Student Association.
- “Multiple Layers of Identity: Being a Minority, Gay, or Transgender Woman in the Workplace.” With speakers Martha S. Jones, U-M assistant professor of history and visiting assistant professor at the Law School; Assistant Professor Zanita E. Fenton of Wayne State University Law School; and Judith Levy, assistant U.S. attorney for the Eastern District of Michigan. Cosponsored by the Black Law Student Alliance and OutLaws.
- “International Experiences: Women Lawyers Practicing Abroad,” with Virginia B. Gordan, assistant dean for international programs, and a panel of LL.M. candidates with experience practicing abroad. Cosponsored by the International Law Society and the Center for International and Comparative Law.





Kishore Mahubani

Has the United States strengthened or undermined international law?

“From the perspective of a practitioner” — speaker Kishore Mahubani, a veteran of nearly 35 years with Singapore’s foreign service, hesitated ever so slightly — “the answer is both.”

The United States’ positive role in building up international law began with the Allied victory in World War II and, for the most part, continued into the 1990s, according to Mahubani, who spoke at the Law School earlier this year.

But there also is the “more painful part” to the story of the United States in the international arena, Mahubani continued. Whenever the United States has flouted international convention, as it did by rejecting the Law of the Sea Treaty and invading Iraq, it lowers the norm for international behavior and sends mixed signals to other countries, he said.

“In 1945, the United States could have done what all the great powers did when they became powerful,” Mahubani explained. “It could have gone out and colonized the world. [But] it did not. Instead of colonizing the world, it decolonized the world.”

The United States “stayed within its borders,” Mahubani said, and that was “an enormous gift of America to the world.” The United States lent its power and prestige to the establishment of the

## The U.S. and international law: A scorecard

United Nations, an action that helped to create “a normative structure” for trade and other international relations, Mahubani explained.

American military might also has been a gift to the world because it put teeth behind the rules of international relations. And for the most part, Mahubani added, the United States has set a high standard by playing by the rules of international trade and relations, even when, as in some World Trade Organization (WTO) rulings, exercise of the rules has been contrary to apparent U.S. national interest.

But the “more painful part” of the story is that the United States also has weakened the rule of international law, Mahubani continued. Since the passing of Dag Hammarskjöld, who was UN Secretary General from 1953 until his death in 1961, the United States has tried to keep the UN weak. The United States’ actual or threatened use of its Security Council veto “has undermined the principle of treating all countries equally,” Mahubani said, and its “capricious and arbitrary behavior has undermined confidence” in the Security Council.

He also cited on the debit side:

- U.S. influence to prevent the International Monetary Fund from aiding Thailand during its recent financial difficulties.
- Refusal to sign the Law of the Sea Treaty after participating in lengthy negotiations to frame the agreement.
- “Confusing messages” from the United States regarding nuclear proliferation and work of the International Atomic Energy Commission.

- The United States’ invasion of Iraq, which sent mixed signals across the world because the United States sought Security Council approval for the invasion, did not get it, and invaded regardless.
- Indeterminate detention of prisoners at the U.S. Navy Base at Guantanamo Bay, Cuba.

Mahubani visited the Law School as part of a tour to publicize his newest book, *Beyond the Age of Innocence: Rebuilding Trust between America and the World* (Public Affairs, 2005) and drew heavily on the book’s content for his talk. A veteran foreign ministry official for Singapore, Mahubani served as Singapore’s ambassador to the United Nations from 1998 – 2004 and as president of the Security Council in January 2001 and May 2002. He was the permanent secretary of Singapore’s Foreign Ministry from 1993 – 98. He currently serves as the first dean of the Lee Kuan Yew School of Public Policy, which opened in August 2004 at the National University of Singapore. He spoke at the Law School as part of the International Law Workshop (ILW) speakers series.

Among the ILW series’ other speakers were:

- Anne Norton, University of Pennsylvania professor of political science, who discussed “The School of Baghdad: Strauss, the Straussians, and American Empire.”
- Ayelet Shachar, an associate professor at the University of Toronto Faculty of Law, who spoke on “Religion and Gender: A Global Clash?” Shachar’s talk was cosponsored by the University of Michigan’s Center for the Education of Women.

## Commencement recognizes 'THE NEW AMBASSADORS OF THE RULE OF LAW'

Blue skies, temperatures that climbed into the '70s, the gentlest of spring breezes, and the celebrations of more than 300 Law School graduates and their families, friends, and well-wishers combined for an idyllic commencement day May 7.

It was the kind of celebratory day that brought families together — J.D. candidate David Osei's father, Albert, came from France to attend, and LL.M. candidate Stefan Robert Sulzer walked across the stage holding the right hand of his young daughter Cassandra — and brought praise from the day's student speakers for the diversity of people and philosophies that each class incorporates. Law School Student Senate President Bradley D. Wilson noted that among the School's students are a former ski instructor in Switzerland, a former Miami nightclub manager, and a former U.S. interrogator in Afghanistan. Ali Hassam Shah, chosen by his fellow graduates to address them, also cited the rich mix of people and viewpoints that characterizes the Law School, and reported that "this Law School's students are not only very smart people, but also good people."

"We are very proud of the character of this Law School, and in particular, of the young men and women in this graduating

class," Dean Evan Caminker said in his remarks. "We expect you to take what you have learned here about the integrity of the law and the ethics of lawyering, and share these principles with a cynical society. We expect you to serve others with integrity, with generosity, with civility, and with an eye towards pursuing justice. For you are now the ambassadors of the rule of law, as you yourselves assume the leadership of the next generation."

Author/attorney Scott Turow, a partner in the Chicago office of Sonnenschein Nath & Rosenthal and the author of *One L*, *Presumed Innocent*, *The Burden of Proof*, *Pleading Guilty*, *The Laws of Our Fathers*, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty*, and other books that have been translated into some 25 languages, delivered the main commencement address.

Turow detailed his arduous personal quest to combine book writing with legal practice, and noted that "one of the greatest blessings of a law degree is the multitude of choices you have today and will have in the future. Whether to go into law or business or the arts. Teaching or practice. Public sector, or private. In-house or a firm."

Turow's literary successes are well-known, his legal satisfactions perhaps less so. As an assistant U.S. attorney in Chicago from 1978 – 86, he was on the prosecution team that won conviction of Illinois Attorney General William J. Scott for tax fraud. He also was lead counsel in several trials that grew out of Operation Greylord, the federal probe of corruption in Illinois' judiciary. More recently, he served on the Illinois commission appointed to consider reform of the state's capital punishment system.

"I am proud to be a practicing lawyer," Turow told the commencement audience. "I often say I have met more great human beings, people of profound intelligence and moral sensibility — in the law than I think I might have [met] anywhere else." Lawyers' fundamental work is "attempting to make the small part of life that humans can control fairer than it would be without them," he said. "And that is an endeavor that dignifies life and humanity."

"Remember who you were when you decided to go to law school, and who you are today," he advised. "As the years pass, continue to consider the counsel and passions of that person. Remember kindly always what you want now. Remain loyal to yourselves. Write your own stories."





# FACULTY

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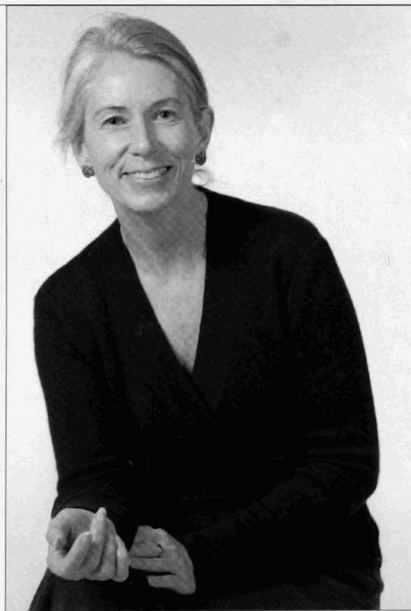
### MacKinnon elected to American Academy of Arts and Sciences

Catharine A. MacKinnon, who pioneered the establishment of legal claims for sexual harassment and the recognition of sexual harassment as a civil rights violation, has been elected to the American Academy of Arts and Sciences, a prestigious society that recognizes individuals who have made significant contributions in scholarly and professional fields.

Founded in 1780, the academy is an international learned society composed of the world's leading scientists, scholars, artists, business people, and public leaders. The academy is headquartered in Cambridge, Massachusetts.

The U.S. Supreme Court has accepted MacKinnon's approaches to equality, pornography, and hate speech. MacKinnon specializes in sex equality issues under international and constitutional law.

Twelve other Law School current and emeritus faculty members previously have been named to the academy. They include Professors Phoebe Ellsworth; Bruce Frier; Richard O. Lempert, '68; Donald Regan; Rebecca Scott; A.W. Brian Simpson; Joseph Vining; and James Boyd White; and Emeritus Professors Francis A. Allen; Robben W. Fleming; Yale Kamisar; and Terry Sandalow.



### Conference celebrates Law School ties with China

Scholars from the Law School and counterparts from China met at Tsinghua Law School in Beijing in May for a special conference on "New Development for Sino-American Commercial Law." The conference celebrated the 10th year of Tsinghua Law School, which shares a scholar exchange program with the U-M Law School.

Participants from the Law School and their presentations included:

- Irwin I. Cohen Professor Reuven Avi-Yonah, who organized the conference and presented the papers "Risk, Rents, and Regressivity: Why the United States Needs Both an Income Tax and a VAT" and "The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility."
- Adjunct Professor Timothy Dickinson, '79, who discussed "Evolving Norms of Anti-Corruption Law in International Commercial Transactions."
- Alicia Davis Evans, whose paper dealt with "Regulation of the Market for Corporate Control in the United States."
- Professor Vikramaditya S. Khanna, who presented a paper on "Significant Changes in U.S. Corporate Law after Sarbanes-Oxley."
- Alene and Allan F. Smith Professor Robert L. Howse, whose presentation was titled "Back from the Dead? Reviving the Idea of a Multilateral Investment Agreement."
- Professor Steven R. Ratner, whose paper discussed "The Expropriation Battles Act II: Regulatory Takings."

Scholars from Canada and Australia also participated. Dean Wang Chenguang of Tsinghua University Law School called the conference "a success" and said the Michigan professors' teaching was "warmly received by not only our students, but also students from Peking University, Renmin University, and China University of Politics and Law."

The exchange of scholars between the Law School and Tsinghua began last year, when Law School Professors Avi-Yonah, Michael S. Barr, and Richard D. Friedman taught a coordinated course in Beijing. In turn, Tsinghua faculty members Tianlong Hu and Liya Rong each visited the Law School as research scholars for half of the 2004-05 academic year; both also participated in the recent conference in Beijing. Howse and Dickinson are the Law School faculty members teaching at Tsinghua this year.

## Scholars honor James Boyd White: 'With this prize ...'

James Boyd White, widely recognized for his deep interdisciplinary thinking on the relationship of law and culture, has been honored by his academic colleagues with the creation of a special award in his name.

At its annual meeting in March, the Association for the Study of Law, Culture, and the Humanities announced the creation of The James Boyd White Prize "to be presented annually for distinguished scholarly achievement." The first James Boyd White Prize will be presented at the society's upcoming annual meeting in March 2006.

The society presented White with a commemorative plaque in conjunction with announcing the new award. The plaque reads:

"With this prize we recognize and honor the originality and excellence of your contribution to the field and acknowledge our indebtedness to you for your commitment to the interdisciplinary study of law, culture, and the humanities."

White is the Law School's L. Hart Wright Collegiate Professor of Law and also is a professor of English and an adjunct professor of classical studies. He chairs the Michigan Society of Fellows and served in 1997–98 as a Phi Beta Kappa Visiting Scholar, a role in which he lectured at many U.S. colleges and universities. A graduate of Amherst College, Harvard Law School, and Harvard Graduate School, where he earned an M.A. in English, White taught at the University of Colorado Law School and the University of Chicago before joining the Law School faculty.

He is the author of numerous books, including *The Legal Imagination* (1973); *Constitutional Criminal Procedure* (with James Scarborough, 1976); *When Words Lose*

*Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984); *Heracles' Bow: Essays in the Rhetoric and Poetics of the Law* (1985); *Justice as Translation: An Essay in Cultural and Legal Criticism* (1990);

*"This Book of Starres": Learning to Read George Herbert* (1994); *Acts of Hope: The Creation of Authority in Literature, Law, and Politics* (1994); *From Expectation to Experience: Essays on Law and Legal Education* (2000); and *The Edge of Meaning* (2001).

James Boyd White



## Certification moves ahead for child welfare specialists

Thanks to Clinical Law Professor Donald N. Duquette, '75, judges and others who want children to get competent legal representation soon will be able to call on lawyers certified as Juvenile Law (Child Welfare) Attorneys.

Duquette, founder of the Law School's highly regarded and much-imitated Child Advocacy Law Clinic, has been working for several years with Marvin Ventrell, executive director of the National Association of Counsel for Children (NACC), to develop a certification procedure for child welfare law specialists modeled after the medical profession's specialty certifications in pediatrics, obstetrics, gynecology, and psychiatry.

Funded by a \$600,000, three-year grant from the U.S. Children's Bureau and with Law School support, Duquette and Ventrell won approval from the American Bar Association last year for NACC to administer certification testing and are now piloting the certification in California, Michigan, and New Mexico. Only experienced, peer-reviewed lawyers who pass a comprehensive examination qualify for the certification, which is for five years and is renewable.

NACC estimates that there are more than 1 million child welfare cases in U.S. courts each year and 50–75,000 lawyers handle these cases on an ongoing basis. However, as Duquette and Ventrell have noted, "there is widespread dissatisfaction with the quality and availability of legal representation in child protection and foster care cases. . . . Virtually every critique of the child protection legal system calls for improved lawyer performance and lawyer training."

Further, the ABA noted in a 2001 followup to its report *America's Children: Still at Risk*, "The legal problems children face are rarely confined to a single isolated

legal forum, and effective legal representation for children must cross traditional boundaries. . . . Lawyers and other participants in the court proceedings involving children need specific cross-categorical training throughout their careers."

"The NACC certification will be a form of 'branding' that will assure the judge or employer of the quality and expertise of that lawyer," Duquette and Ventrell explained for an article in *Children's Legal Rights Journal* in 2003. "As courts and employers of child welfare lawyers acquire more experience with the NACC-certified lawyers, we expect

they will increasingly seek out those lawyers for hiring or court appointment. . . .

"The goal is for the 'branding' of NACC certification to be understood by the courts, employers, and other consumers as equated with 'added value' — credibility and effectiveness quite separate from lawyers not so qualified to claim this specialty status."

*(This summer's publication of Duquette and Ventrell's book Child Welfare Law and Practice is part of the certification implementation process. An excerpt begins on page 78.)*

Donald N. Duquette '75



## West joins boards of two scholarly journals

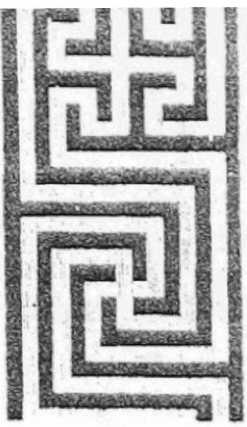
Nippon Life Professor of Law Mark D. West, faculty director of the Law School's Center for International and Comparative Law and head of the University of Michigan's Center for Japanese Studies, has been named to the editorial boards of two scholarly journals, the *Journal of Japanese Law* and the Japanese-language *Ho to Keizaigaku Kenkyu* (*Law and Economics Review*).

The English-language *Journal of Japanese Law*, also known as *Zeitschrift für Japanisches Recht*, has been published since December 2004 in conjunction with the Australian Network for Japanese Law (ANJeL). It began as the journal of the German-Japanese Association of Jurists, formerly published in German and only occasionally in English, was co-published twice yearly with the Max Planck Institute for Foreign and International Criminal Law, and is the only regularly published western language journal on Japanese law.

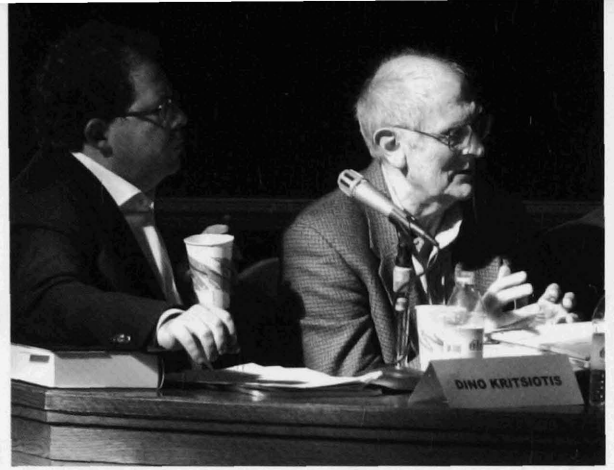
The *Japanese Law and Economics Review* is a new publication and is the journal of the Japan Law and Economics Association. It circulates primarily within Japan to association members.



Nippon Life Professor of Law Mark D. West



## ON THE SUBJECT OF TORTURE



1.

Law, history, social psychology, human reason, and the cultural role of the law — these and other perspectives came to bear when Dino Kritsiotis, the L. Bates Lea Visiting Professor of Law, brought together his “Agora: Reading the Torture Memos” program last spring.

The ancient Greek Agora was the public marketplace in Athens, where commerce and public discussion brought together every variety of perspective that cultural hub of the ancient world had to offer. Kritsiotis found a similarly rich array of expertise when he asked Law School faculty members to be speakers for his program:

**Phoebe C. Ellsworth**, the Frank Murphy Distinguished University Professor of Law and Psychology, who brought her background in social psychology research to the discussion;

Professor of Law **Steven R. Ratner**, a former U.S. government attorney in the executive branch and a scholar of international law and especially its relation to war;

**A.W. Brian Simpson**, the Charles F. and Edith J. Clyne Professor of Law, an historian of human rights law and its place in international law; and

**James Boyd White**, the L. Hart Wright Collegiate Professor of Law, whose interdisciplinary work on what it is to live a life in the law is widely known.

Participants made their remarks in response to a selection of readings that Kritsiotis had collected from published and Web sources. Much of the day’s discussion centered on two August 1, 2002, communications to then-Counsel to the President Alberto R. Gonzales: Assistant Attorney General Jay S. Bybee’s memorandum on standards of conduct for interrogation and Deputy Assistant Attorney General John C. Yoo’s letter “concerning the legality, under international law, of interrogation methods to be used during the current war on terrorism.”

“You have asked for our office’s views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code,” Bybee wrote. “As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture.” The memo concluded with an examination of “possible defenses that would negate any claim that certain interrogation methods violate the statute.”

Yoo wrote that interrogation methods that comply with Section 2340-2340A “would not violate our international obligations under the Torture Convention, because of a specific understanding attached by the United States to its instrument of ratification. We also conclude that actions taken as part of the interrogation of Al Qaeda operatives cannot fall within the jurisdiction of the ICC, although it would be impossible to control the actions of a rogue prosecutor or judge.”

Kritsiotis opened the program by explaining that ancient torture devices like the hanging cage and the rack “are all now a figment of our legal memory,” but “the ingenuity of [inflicting] pain has asserted itself again in ways which we have become acquainted with in the last two years with U.S. treatment of prisoners in Guantanamo and Iraq.” If you define torture as “pain inflicted in the public interest,” he said, the definition means that torture sometimes is allowable and its prohibition is not the only norm to be taken into consideration.

Ellsworth, drawing heavily on findings in the Milgram (1963) and Stanford Prison (1971) experiments, noted that “situational factors explain behavior much better than individual differences.” Indeed, as the Stanford University News Service reported in 1997, the Stanford Prison Experiment “offered the world a videotaped demonstration of how ordinary people (middle class college students) can do things they would have never believed they were capable of doing.”

(In psychologist Stanley Milgram’s experiment at Yale University, scien-





1. Dino Kritsiotis and A.W. Brian Simpson  
 2. Kritsiotis, Simpson, Steven R. Ratner,  
 James Boyd White, and Phoebe C. Ellsworth

2.

tists ordered people to give what they thought were increasingly severe electric shocks to subjects who did not respond adequately to questions. Said Milgram: “Stark authority was pitted against the subjects’ strongest moral imperatives against hurting others, and, with the subjects’ ears ringing with the screams of the victims, authority won more often than not. The extreme willingness of adults to go to almost any lengths on the command of an authority constitutes the chief finding of the study and the fact most urgently demanding explanation.” The Stanford experiment divided its subjects into “prisoners” and “guards,” put them into a simulated prison setting, and ordered the “guards” to maintain control. On the second day of the experiment, the “prisoners” revolted. The “guards” crushed the revolt, and then, as one researcher reported, “steadily increased their coercive aggression tactics, humiliation, and dehumanization of the prisoners. The staff had to frequently remind the guards to refrain from these tactics,” and the worst abuse occurred at night when “guards” thought the staff was not watching. After a latecomer to the experiment “challenged us to examine the madness she observed, that we had created, and had to take responsibility for,” the chief researcher halted the experiment and acknowledged that he had so intellectualized his role as observer that he did not realize how the experiment was dehumanizing “guards,” “prisoners,” and the researchers themselves.)

As to prison abuse at Abu Ghraib, Ellsworth said, guards and interrogators are praised when they get information or

confessions from prisoners and “had every reason to believe this [abusive behavior] was actually approved.”

Ratner, a former attorney advisor at the U.S. State Department and a supporter of the U.S. invasion of Afghanistan after the September 11, 2001, terrorist attacks, said the Justice Department memos take a position that the U.S. obligation under the Torture Convention is only to avoid criminal conduct. The memos have “almost no mention” of cruel, inhuman, and degrading treatment, he said. He also noted that the self-defense position posited in the memos is not available to the United States because it did not reserve that defense when it adopted the Convention Against Torture in 1984.

“You won’t find a state in the world that is willing to say it approves of torture,” noted Simpson, but “a whole lot depends on how you define torture.” And “you must draft the rules very carefully, because in real life people in combat, or who are doing interrogation, tend to go beyond the rules.”

Why does it matter? Opposing torture is “basic,” Simpson answered, like being opposed to murder. It’s part of the legal code that countries ratify, and “it’s better to have a world run by law.” Torture often yields bad rather than good information. And “it corrupts the people who do it.”

White wondered: “Is our law simply a neutral instrument that can be used for any purposes whatever — torture, slavery, genocide? Or does it have some enduring principles of respect for human dignity, for the integrity and value of the human person and personality, that mean that if it is used for such purposes it is

being profoundly abused?” He compared the memo justifying extreme measures to “a badly written brief which simply moves generalities and concepts and definitions around on the page, without ever thinking about the facts of the particular case. . . . Here what the memo does not think about are the practices of cruelty, degradation, and inhumanity that it would read the statue as legitimizing.”

White also used the memos as a springboard to broaden the target of his remarks. The legal theorizing that justified abusive behavior toward prisoners “does not come out of nowhere,” he said. “It is the product of a certain kind of legal education, and we who are law teachers are in some sense responsible for it.”

“Do we require or invite our students to mean what they say?” he asked.

“Are we teaching our students what responsible legal judgment is?” he wondered. “Do we ask them to mean what they say, and stand behind it? Do we teach law in a way that keeps before the students and ourselves those features and elements of its essential character that will resist efforts to convert it into a system of thought and power that would legitimize slavery, or genocide, or torture?”

“ . . . CERTAIN ACTS MAY BE CRUEL, INHUMAN, OR DEGRADING, BUT STILL NOT PRODUCE PAIN AND SUFFERING OF THE REQUISITE INTENSITY TO FALL WITHIN SECTION 2340A’S PROSCRIPTION AGAINST TORTURE.” — Memorandum

## Activities

Professor of Law **Omri Ben-Shahar**, director of the Law School's John M. Olin Center for Law and Economics, was a visiting professor at Harvard Law School during January. A symposium on his article "Contract without Consent" appeared in the 2005 volume of the *University of Pennsylvania Law Review*, and his further work on this topic will appear in a book of the same title to be published next year by Harvard University Press. During this academic year, Ben-Shahar also was a speaker at a conference on international commercial law in Florence, Italy; a conference on default rules at Florida State University; and for the Law and Economics Workshop at the University of Pennsylvania.

**Edward H. Cooper**, the Thomas M. Cooley Professor of Law, continues his work as reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure.

**Phoebe C. Ellsworth**, the Frank Murphy Distinguished University Professor of Law and Psychology, has been named to the editorial board of the *Journal of Social Inquiry* and has a chapter on "Legal Reasoning" in the in-press *Cambridge Handbook of Thinking and Reasoning*. In May, she spoke on "Appraisal Theories of Emotion" at the University of Toronto. Earlier in the winter term, she presented a paper on "Emotions, Culture, and Cognition" for the American Association for the Advancement of Science; participated in a colloquium on "Race and Juries" at Bryn Mawr College; took part in a colloquium on "Cognition, Culture, and Emotion" at Haverford College; and delivered a paper on "The Relationship Between Appraisals and Emotions" at the annual convention of the Society for Social and Personality Psychology in New Orleans.

Ralph W. Aigler Professor of Law **Richard D. Friedman** has been maintaining The Confrontation Blog ([www.confrontationright.blogspot.com](http://www.confrontationright.blogspot.com)), which is active with commentary on developments related to *Crawford v. Washington*.

**Thomas A. Green**, the John P. Dawson Collegiate Professor of Law, delivered the Jerome Hall Lecture at Indiana University Law School in April. His topic was "Conventional Morality and the Rule of Law: Freedom, Responsibility, and the Criminal Trial Jury in American Legal Thought, 1900–1960."

Assistant Professor **David M. Hasen** taught the course "U.S. Corporate Tax: Theory and Policy" in the LL.M. program at the University of Auckland, New Zealand in May. Earlier in the spring, he presented his papers "A Realization-Based Approach to the Taxation of Financial Instruments" at a tax policy seminar at Harvard Law School and "The Illiberality of Human Endowment Taxation" at a tax colloquium at NYU Law School.

The latest book by Professor **James C. Hathaway**, *The Rights of Refugees under International Law*, is to be published in August by Cambridge University Press. During the winter term, Hathaway was a scholar-in-residence at the Immigration Branch of the Department of Labor in New Zealand, where he coordinated policy development workshops and was responsible for providing training to members of the Refugee Status Branch and the Refugee Status Appeals Authority. Last fall he served as Distinguished Visiting Professor in the School of Humanities and Social Sciences at American University in Cairo, where he taught in the Refugee Studies Program. He also gave special lectures to members of the Egyptian judiciary and taught advanced workshops for lawyers and United Nations officials engaged in representation of asylum applicants.

In April, **Robert L. Howse**, the Alene and Allan F. Smith Professor of Law, spoke on "Corporate Procedural Protections: An Economic Analysis" at the University of Minnesota Law School and Vanderbilt Law School, and in February, he discussed "Sarbanes-Oxley and the Organizational Sentencing Guidelines" in a lecture at the U-M's Ross School of Business.

Professor Emeritus **Yale Kamisar** presented his paper "*Dickerson v. United*

*States*: The Case that Disappointed *Miranda's* Critics — And Then Its Supporters" at a conference on Chief Justice William H. Rehnquist at the University of Indiana Law School in April.

**Thomas E. Kauper**, '60, the Henry M. Butzel Professor of Law, last fall served as chairman and principal lecturer at the Antitrust Short Course presented by the Center for International and American Law and lectured on international antitrust before the Academy, a program of the same organization. He also was one of three principal lecturers at the ABA's Antitrust Masters Course and at the Golden State Antitrust Institute in California. The previous spring he gave the Miles Kirkpatrick Lecture at the Georgetown Law Center on the search for standards under Section 2 of the Sherman Act.

Professor of Law **Vikramaditya S. Khanna** earlier this year co-organized four conferences in Bangalore and Hyderabad, India, on the role of foreign investment capital in the Indian venture capital markets; he also made presentations on "Sarbanes-Oxley and the Foreign Firm" at these events. In April, he lectured on "Corporate Procedural Protections: An Economic Analysis" at the University of Minnesota and Vanderbilt University law schools.

Eric Stein Distinguished University Professor of Law and Sociology **Richard O. Lempert**, '68, on leave to serve as Division Director for the Social and Economic Sciences at the National Science Foundation (NSF), visited China in May as part of an NSF social and behavioral science delegation. Earlier this year he also participated in a conference to bring fresh thinking to homeland security issues and in a Syracuse Law School conference on the rule of law held in honor of Richard "Red" Schwartz, a pioneer in the sociology of law and perhaps the first nonlawyer to be dean of an American law school.

Assistant Professor of Law **John A.E. Pottow** spoke on "Greed and Pride in

International Bankruptcy” at the Seventh World Quadrennial Congress of INSOL International (International Association of Restructuring, Insolvency & Bankruptcy Professionals) in March in Sydney, Australia.

Professor of Law **Adam C. Pritchard** last spring spoke on “The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act” at the Institute for Law and Economic Policy Conference and on “The Impact of the Private Securities Litigation Reform Act” at a faculty colloquium at the University of Alabama School of Law. Earlier in the academic year, he spoke on “The Role of Independent Directors in Corporate Groups” at a conference on the corporate governance of group companies presented by the Korea Development Institute, and discussed “The SEC at 70: Time for Retirement?” at a Notre Dame Law School conference on The SEC at 70. (A version of “The SEC at 70: Time for Retirement?” begins on page 54.)

Professor of Law **Steven R. Ratner** earlier this year discussed “Suing Foreign Human Rights Abusers: U.S. and International Practice” as part of a University of Windsor Faculty of Law panel on “Torture, Human Rights, and the Search for Global Justice” and spoke on the question “Are the Laws of War Applicable to the War on Terrorism?” at the Michigan State University Law School’s *Journal of International Law* Symposium on the Relevance of International Criminal Law to the Global War on Terrorism.

**Mathias W. Reimann**, LL.M. ’83, the Hessel E. Yntema Professor of Law, taught a course on comparative product liability law at the Scuola Superiore Santi’Anna in Pisa, Italy, in May and spoke on the Law School’s experience with its pioneering Transnational Law course at the section panel on internationalization of the curriculum at the annual meeting of the Association of American Law Schools in San Francisco in January.

Last fall, in addition to hosting the 2004 annual meeting of the American Society of Comparative Law at the Law School, he spoke on “The Structure of German Legal Education and Its Impact on Styles of Legal Reasoning” at a comparative law colloquium at Harvard Law School; discussed “Comparative Law in the United States Since World War II” at the conference “Towards a New Globalism? Lawyers and Jurists in the 21st Century” at St. Louis University; gave a presentation on “The 2002 Reform of the German Law of Obligations” at the conference “El Código Civil de 1984: Veinte Años de Vigencia — Pasado y Futuro,” at the Universidad Católica del Perú in Lima; and taught a two-week seminar on Advanced Issues of Comparative Law for the Studienstiftung des Deutschen Volkes in Valdaora, Italy.

James E. and Sarah A. Degan Professor Emeritus **Theodore J. St. Antoine**, ’56, spent 12 days in China last winter speaking on the mediation and arbitration of labor disputes to faculty members and graduate students, union and management representatives, and labor arbitrators and government officials in Beijing, Shenzhen, and Hong Kong as part of the third year of a four-year project involving a number of experts from the University of Michigan.

Harry Burns Hutchins Professor of Law **Joseph Vining** lectured on “Authority and Reality” last fall at the Symposium on the “Culture of Law” at the Pope John Paul II Cultural Center in Washington, D.C.

Nippon Life Professor of Law **Mark D. West**, who also is faculty director of the Law School’s Center for International and Comparative Law and director of the U-M’s Center for Japanese Studies, spent two months of this academic year as Invited Research Scholar at Kyoto University in Japan. His article, “The Tragedy of the Condominiums: Legal Responses to Collective Action Problems after the Kobe Earthquake,” co-written with Emily M. (Morris) Park, ’02, then a

student, has won the Hessel Yntema Prize from the American Society of Comparative Law; the article appeared at 53 *American Journal of Comparative Law* 903 (2003). Last January, West presented the Columbia Law School Distinguished Lecture, speaking on “Reputation, Information, and Scandal in Japan and America,” and in February spoke (in Japanese) to some 40 judges at the Osaka (Japan) District Court on the topic “A Comparative Law-and-Society View of Defamation and Scandal.”

L. Hart Wright Collegiate Professor of Law **James Boyd White** is editing the collection *How Should We Talk About Religion?*, to be published next year by Notre Dame Press, and is completing a book titled *Living Speech: Human Dignity in the Empire of Force*, also expected to be published next year. A talk White gave in Brussels has been published in French in the Brussels-based *Revue Interdisciplinaire d’etudes juridiques* as “Quand le langage rencontre la pensee: trois questions.”

## Visiting and Adjunct Faculty

Law Library Director and adjunct faculty member **Margaret Leary** presented a talk about Law School graduate and benefactor William Cook in April at the annual tea for former residents of the Martha Cook Building. Leary also serves as treasurer of the Ann Arbor District Library Board and chairs the board’s finance committee.

Adjunct faculty member **Leonard M. Niehoff Jr.**, ’84, a media law specialist with Butzel Long in Ann Arbor, earlier this year moderated a panel discussion on ethics in journalism for the Michigan Press Association and spoke on the U.S.A. Patriot Act and related post-9/11 developments to the French-American Chamber of Commerce in Detroit. He also successfully represented *pro bono* a defendant who had been sued for defamation because he had expressed concern about the business plans of a group of entrepreneurs.



Bruno Simma

## Simma: Foreigners have right to consular aid

According to Judge Bruno Simma of the International Court of Justice (ICJ), the United States risks backlash from nations large and small if it ignores the requirements of the Vienna Convention on Consular Relations (VCCR), the international agreement that allows foreigners to contact their consular office if they are detained.

“This is an area of law in which countries that differ very greatly in power can reciprocate,” Simma warned during a talk at the Law School early this year. Simma is a member of the Law School’s Affiliated Overseas Faculty and teaches at the School regularly.

More than 120 foreigners from 32 countries are on death row in the United States, Simma reported, and “in the last seven years three countries have sued the United States in the International Court of Justice for breaches of Article 36 [of the VCCR, which the United States ratified in 1969],” according to Simma. The United States has shown an “almost consistent pattern” of ignoring Article 36, he said.

Article 36 says that “consular officers shall have the right to visit a national of the sending state who is in prison, custody, or detention, to converse and correspond with him and to arrange for his legal representation.”

Simma successfully argued *Germany v. United States* (known as the LeGrand case) on behalf of Germany before the ICJ, winning a decision in 2001 that the United States had violated Article 36 by failing to inform two German nationals that they could contact the

*The U.S. has shown  
an “almost consistent pattern” of ignoring Article 36*

German consul when they were arrested. The men were convicted and executed, one after the U.S. Supreme Court denied Germany’s request for a stay of execution.

Simma was elected to a German seat on the ICJ a year after arguing the LeGrand case and recused himself when *Mexico v. United States* brought a similar issue to the court in 2003. In *Mexico v. United States*, often called the Avena case, the ICJ ruled in 2004 that the convictions of 51 Mexican nationals on death row in Texas should be reviewed because they had been denied their Article 36 right to meet with and be assisted by Mexican consular officials. Simma, a longtime adviser to the United Nations and a highly regarded legal educator in Germany and the United States, limited the subject of his Law School talk to these cases and closely related issues. He spoke at the Law School last January as part of the International Law Workshop speakers series.

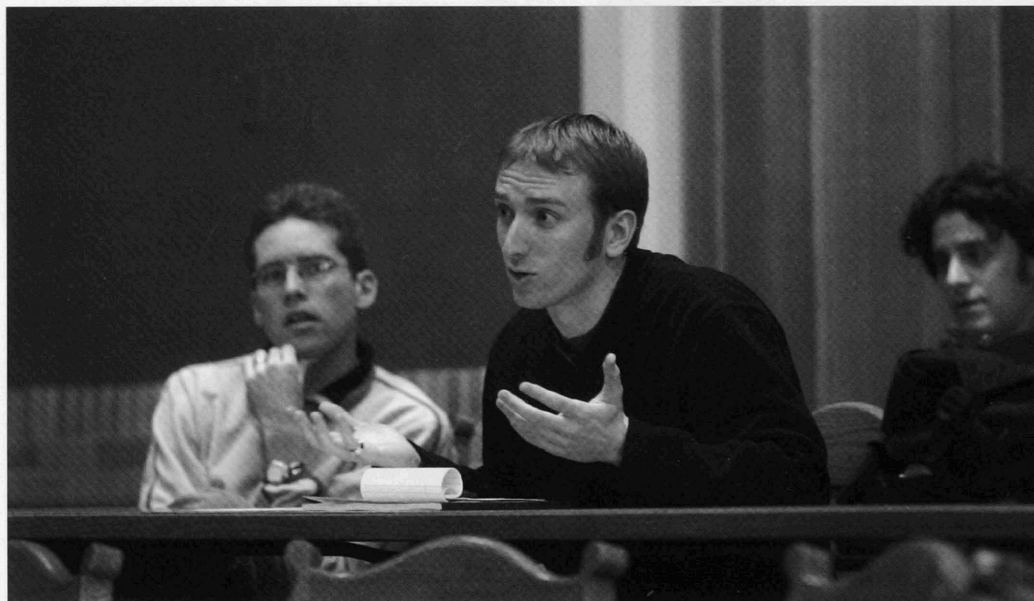
(Ed. Note: Subsequent U.S. actions cast new light on the issue. Last spring, the U.S. Supreme Court withdrew its *cert* to hear *Medellin v. Dretke*, which deals with the issue of consular aid to foreigners. Earlier, on March 9, the U.S. State Department announced that it was withdrawing from the international protocol that gives the ICJ jurisdiction in such cases. The announcement followed a February 28 memorandum in which President Bush ordered reconsideration of the 51 Mexicans’ convictions in compliance with the ICJ ruling. The memorandum was in connection with

a U.S. government brief in *Medellin v. Dretke*, which the U.S. Supreme Court agreed to hear “to determine what effect U.S. courts should give to a recent ruling by the United Nations’ highest tribunal, the International Court of Justice at The Hague (the World Court). In the case of *Medellin* and 50 other Mexican nationals on death row, the World Court recently ordered U.S. courts to reconsider the convictions and death sentences because the defendants were not given their rights under the Vienna Convention on Consular Relations to seek help from their consulate.”)

Much of the difficulty has centered on U.S. courts’ unwillingness to apply ICJ rulings, Simma reported. For example,

in the late 1990s Virginia executed a Paraguayan national after the ICJ had issued an order to stay his execution; the U.S. Supreme Court said the ICJ ruling was not binding and refused to grant *certiorari* in the case.

U.S. courts have declined to view VCCR as a conveyor of individual rights and have used procedural default rules to block consideration of a VCCR claim, as occurred in *Medellin*, according to Simma. He said his research has revealed more than 90 cases in which U.S. courts have “largely failed to draw the right conclusion” in VCCR cases by denying review or setting the bar so high for review that requirements could not be met.



*International Law Workshop programs offer both a formal lecture and the opportunity for audience members, above, to question the speaker.*

## Pottow, Reimann win top teacher award

Faculty members John A.E. Pottow and Mathias W. Reimann, LL.M. '83, have won law students' vote as their favorite professors. In a process that began with student nominations and concluded with a Law School Student Senate vote on the top nominees last spring, Pottow and Reimann won the L. Hart Wright Distinguished Teaching Award.

The annual award, which memorializes a popular longtime member of the Law School faculty, is the only Law School-wide student-initiated award that recognizes a faculty member's standing among current students.

Pottow, an assistant professor of law who joined the Law School faculty in 2003, teaches courses in contracts, bankruptcy, and secured transactions and also advises students on research and externship papers.

A graduate of Harvard Law School

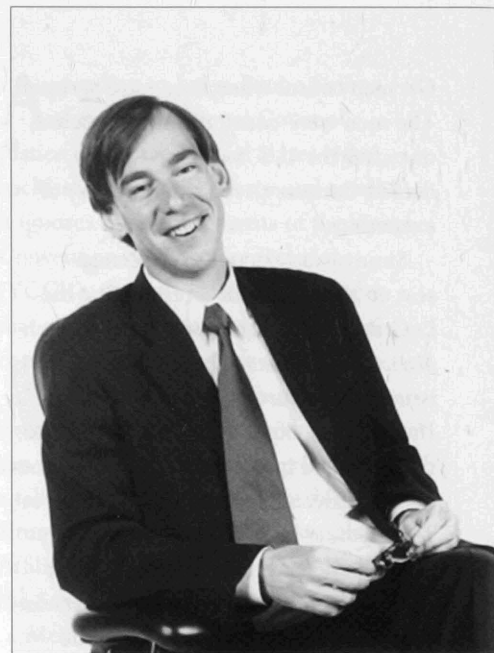
and Harvard College, he clerked on the Supreme Court of Canada and for the U.S. Court of Appeals for the Second Circuit. He is a licensed attorney in Massachusetts and a barrister and solicitor in Ontario.

Pottow's research and teaching center on bankruptcy and commercial law, and he has a particular interest in international bankruptcy. He has written on transnational insolvency theories and procedures and maintains an active interest in procedural matters.

Reimann, the Hessel E. Yntema Professor of Law, earned his basic legal education in Germany and holds a doctorate from the University of Freiburg Law School, where he taught for several years.

A specialist in international and comparative law, Reimann is an editor in chief of the *American Journal of Comparative Law*, the scholarly journal of the

Foreigner's right to consular aid

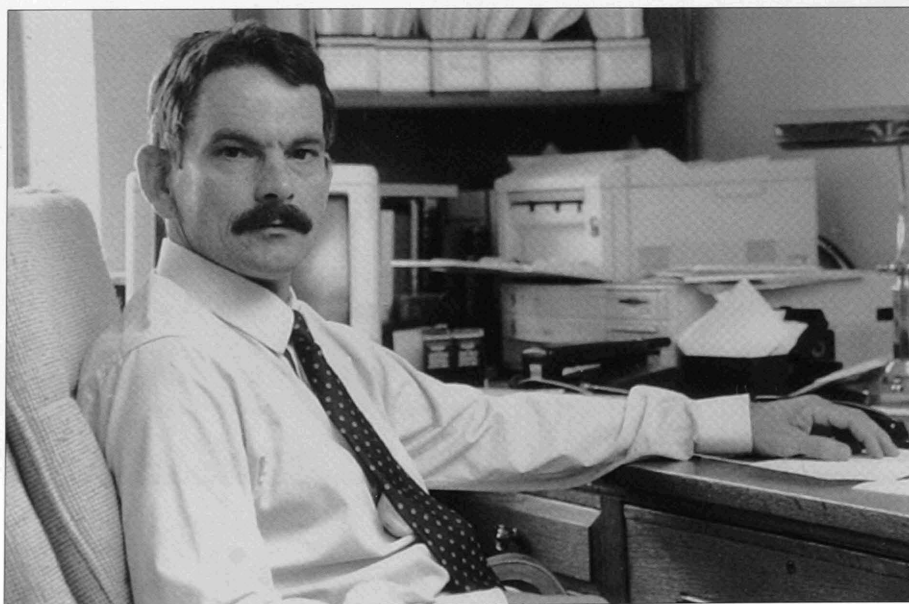


John A.E. Pottow

American Society for Comparative Law (ASCL). In that role, he acted as host for ASCL's annual meeting and conference at the Law School last fall. The gathering drew a larger attendance than in previous years, and participants praised Reimann's decision to reduce the time devoted to formal presentations and increase the role of open discussion throughout the conference program.

Reimann helped design and regularly teaches the Law School's pioneering Transnational Law course, the first of its kind to be required for graduation from a major U.S. law school. Reimann also teaches courses in jurisdiction and advises students working on externship and semester study abroad papers. He publishes widely in English and in German in the United States and abroad on comparative law, private international law, and legal history.

Mathias W. Reimann, LL.M. '83



## Animal rights are advancing

“What is the connection between corporate law and animal law?” Law professor and legal philosopher Joseph Vining, who teaches separate courses on corporate law and on animal law, says the two fields share much more than you may think. “Both animal law and corporate law present a question to us, you and me, whether we can value something other than ourselves,” he explained to a midday audience at the Law School last winter.

A corporation often is depicted “as a system, like a biological system that doesn’t value others other than as competitors, and is not responsible to others for what it does or doesn’t do,” explained Vining, who is the Harry Burns Hutchins Collegiate Professor of Law. “And when you turn to animals, they are often viewed as ‘mobile metabolisms,’ protein sources, or energy sources, with which we have no relationships. We see them as part of a system that we need to maintain for our own survival and maintenance.”

But “neither of these pictures is true,” he reported. Malfeasance and brutal performance in either legal realm is called “dehumanizing,” he said. “In fact, in business, the internally ruthless and absolutely self-regarding organizations fall apart. Enron is the latest example.”

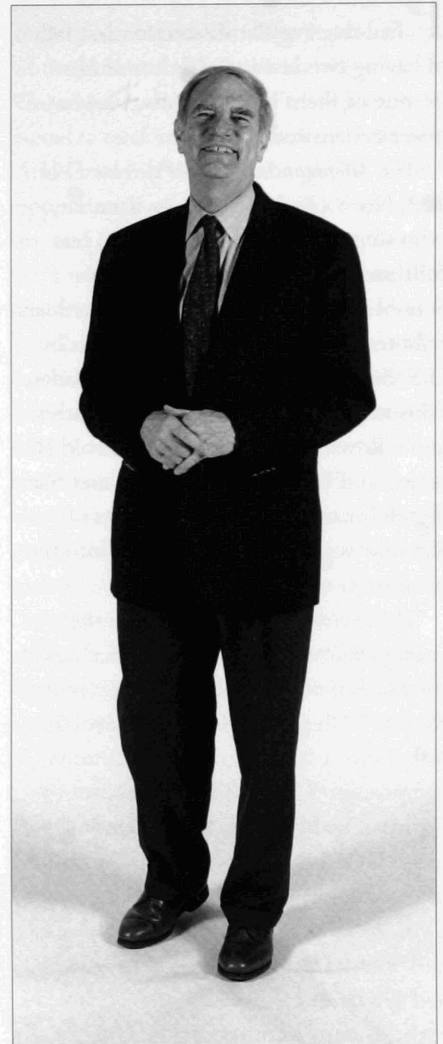
Successful, long-lasting corporations do not act that way, according to Vining. Even if economic gain is their primary goal, questions of human health, employee wellbeing, and other issues all are relevant to the business.

“Animal law,” Vining continued, tells us that animals are the quintessential other, that animals are not mere systems.” The legal status of animals is changing, and increasingly they have legal standing in domestic and international law, he explained.

While 17th century philosopher René Descartes could claim that animals were like clocks and that their screams when cut open were like clock alarms going off, such behavior today would bring a felony conviction and mandatory counseling, Vining said.

As further proof of the advance of animal rights, he noted that Florida has amended its constitution to recognize animals, the Treaty of Rome has declared animals to be sentient beings, and the German constitution was amended two and one-half years ago to give animals their own legal interests. In addition, he said, experimentation on animals has become more and more circumscribed.

Vining’s talk was sponsored by the student chapter of the American Constitution Society.



*Harry Burns Hutchins  
Collegiate Professor of Law  
Joseph Vining*

# TWO LAW JOURNALS HONOR KAMISAR

Professor Emeritus Yale Kamisar had the singular distinction last fall of having two law journals honor him — one of them located at a school he never had visited.

The *Michigan Law Review* devoted Vol. 102, No. 8 (August 2004) to Kamisar, who stepped down from his 40+-year fulltime teaching career at the Law School in 2003. The issue features a dozen tributes to Kamisar, including essays by U.S. Supreme Court Justice Ruth Bader Ginsburg, Kamisar’s longtime co-author and fellow Professor Emeritus Jerold H. Israel, and Eve L. Brensike, ’01, and Marc Spindelman, ’95, former students of Kamisar who have followed him into the profession of teaching law.

The second tribute appears in the young *Ohio State Journal of Criminal Law*, a publication of the Ohio State University’s Moritz College of Law, which devoted Vol. 2 No. 1 last fall to papers from its symposium “Capital Juries,” tributes to Kamisar, and two articles by Kamisar himself, “A Look Back on a Half-Century of Teaching, Writing, and Speaking About Criminal Law and Criminal Procedure,” and “Postscript: Another Look at *Patane* and *Seibert*, the 2004 Miranda ‘Poisoned Fruit’ Cases.” Kamisar said he is especially honored by the Moritz journal’s action because he never has visited or taught at Ohio State.

These *feitschrift* editions are tangible recognitions of Kamisar’s impact on legal scholarship (his casebook on criminal law is in its 10th edition), jurisprudence (the U.S. Supreme Court has cited him in its opinions more than 30 times, more than any other individual), public debate (Kamisar has published more than 100 op-ed essays, many in the *New York Times*, *Washington Post*, and *Los Angeles Times*), as

well as the law students he has helped mold into lawyers.

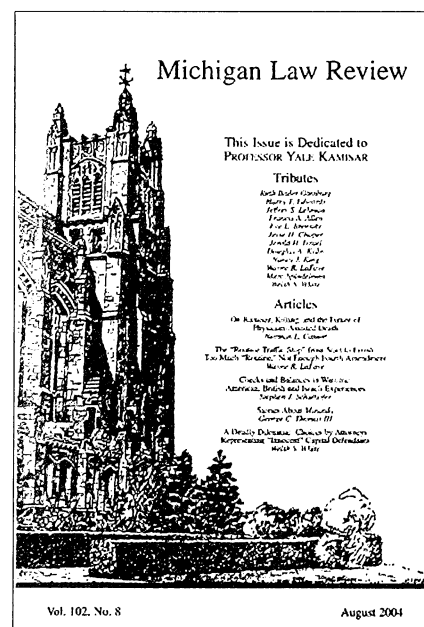
Ginsburg noted that she — “as do judges, law professors, and practitioners across the country” — keeps the latest editions of his casebooks *Modern Criminal Procedure* and *Constitutional Law* conveniently at hand for ready reference.

“Yale might reasonably be called the ‘father’ of the *Miranda* rule,” wrote former Law School Dean Francis A. Allen, the Edson R. Sunderland Professor of Law Emeritus. “Before the decision was handed down his voice was the most effective in pointing to the need for judicial regulation of pretrial interrogation of arrested persons, and he has been the leading defender of the rule in the years that followed.”

To Israel, Kamisar’s co-author and “sounding board” for more than 35 years, Kamisar’s scholarly writings will continue to be read for many years. “As the academic literature on any issue grows, there is a tendency for each generation of commentators to focus primarily on the writings of their contemporaries,” according to Israel. “Yet some writings will be viewed as so ‘rich’ and ‘powerful’ (to use two of Yale’s favorite adjectives) that they will be cited and discussed even though they date back to an earlier generation. In my opinion, Yale Kamisar has produced a portfolio filled with such writings. Indeed, although he has retired from ‘full-time teaching,’ that portfolio is certain to grow, for he has lost none of his enthusiasm for the issues or the debating of those issues.”

Brensike, a former public defender who is a visiting assistant professor at the Law School this year, studied with Kamisar and worked as his research assistant. She applauded his demand that

his students — and he himself — push back the letter of the law to look beneath it. “After only two minutes in Yale Kamisar’s classroom, I realized that it was not a place to learn black letter law; rather, it was a place to question it,” she wrote. “His course was a lesson in advocacy during which he used law and logic to push students to think, analyze, and argue. While some professors wanted us to read the Supreme Court opinions and figure out what the justices were saying, Professor Kamisar wanted us to understand what the justices were not saying: What were the flaws in their logic and what had they forgotten or intentionally left out of their opinions? When the opinions were divided, who was right and who was wrong? Which arguments made sense and which could not survive scrutiny? Professor Kamisar forced us to question the law, to formulate our own opinions about what the law should be, and to argue for our ideas — to back down was a sign of weakness, or intellectual defeat. In Yale





“In Yale Kamisar’s classroom,  
the only thing worse than not defending your opinion  
was failing to have one in the first place.”

Kamisar’s classroom, the only thing worse than not defending your opinion was failing to have one in the first place.”

Spindelman, another Kamisar student who now is assistant professor of law at Ohio State’s Moritz College of Law, notes that “for Yale, the law is not (as it is for some) about abstract institutional arrangements. It is not designed, as some seem to think it should be, to protect the privileged who sit atop existing social hierarchies.”

Spindelman was one of the prime movers in the “Capital Juries” conference and served as guest editor for the resulting Kamisar tribute issue of the *Ohio State Journal of Criminal Law*. He worked with another Kamisar fan, his faculty colleague Joshua Dressler, who is co-managing faculty editor of the journal and has taught as a visiting professor at the U-M Law School.

Like the *Michigan Law Review* issue in Kamisar’s honor, the special issue of the *Ohio State Journal of Criminal Law* contains numerous tribute essays to Kamisar, including a touching, effusive piece by Kamisar’s teaching colleague and anti-soulmate William Ian Miller, the U-M Law School’s Thomas G. Long Professor of Law.

“Yale is larger than life. And so was his damn crim pro casebook,” began Miller, who went on to bemoan the poundage that was the published result of Kamisar’s rigorous and thorough research. Kamisar’s intellectual rigor and passion converted him to the “yea beleaguered suspect, boo cops” side, Miller admitted, “but one night *Dirty Harry* was on the late show and I was up watching. And Harry’s ‘Do you feel lucky punk, well do you?’ struck me as so much more moving than ‘You have a right to remain silent,

etc.’ From then on I was backing Clint. Nevertheless, reading Kamisar never ceased to be a treat even if I had become pro-cop. But poor Yale: imagine a lifetime of work undone by 15 minutes of a Clint Eastwood movie.”

Miller’s respect for Kamisar seems to lift right off the page: “Was ever a man so clearly himself, always himself, and no other person than Yale? He is incapable of even the smallest hypocrisy. . . . We will never see the likes of him again. To borrow the last line of *Charlotte’s Web*: It is not often that someone comes along who is a true friend and a good writer. Yale is both.”

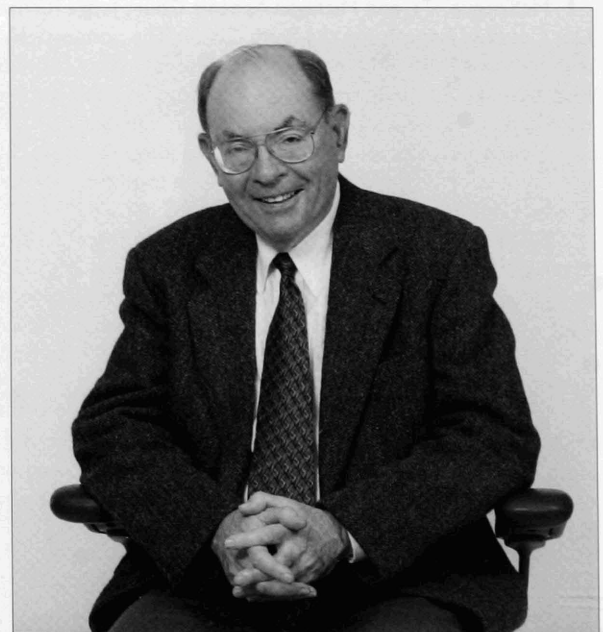
Spindelman correctly noted in his introduction to the issue that “of course, Yale being Yale, we could not venture a collection such as this one without giving him the last word.” We’ll do the same here, retaining Kamisar’s emphases from “A Look Back on a Half-Century of Teaching”:

“Of course a law professor who addresses a problem or a cluster of problems should *start out* with an open mind or, as Judge Hand puts it, ‘an open ear to the cold voice of doubt.’ But after hundreds of hours of reading and thinking about critical issues — such as the search and seizure exclusionary rule; the appropriate balance between police officer and suspect in the interrogation room; the relationships, if any, between the crime rate and court decisions; the death penalty; and (to take some very recent examples) the distinction, if any,

between prisoners of war and ‘unlawful enemy combatants’ and the rights, if any, of the hundreds of people detained in Guantanamo Bay — aren’t law professors *bound to reach some pretty firm conclusions*? And shouldn’t they tell the public, if the opportunity arises, *what* their conclusions are and *how* and *why* they reached them?

“I would put it more strongly. I believe that in the past 100 years the media has proclaimed so many ‘crimes crises,’ and law enforcement officials and politicians have warned us so often that ‘we cannot afford a civil liberties “binge” at this perilous time’ or expressed lack of confidence so many times in the capacities of our established institutions and traditional procedures to cope with the particular ‘emergency’ of the day, that members of the academy who are knowledgeable about these matters have an *obligation* to enter the fray.”

*Yale Kamisar*



## IN DETAIL

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### Senate confirms David McKeague, '71, Richard Griffin, '77 for Sixth Circuit

The U.S. Senate on June 9 unanimously confirmed U.S. District Court Judge David McKeague, '71, and Michigan Appeals Court Judge Richard Griffin, '77, for seats on the U.S. Court of Appeals for the Sixth Circuit. The nominations of the two Law School graduates had won quick approval on a voice vote from the Senate Judiciary Committee in late May after the Senate forged a deal to retain the filibuster in exchange for unlocking the nominations of several Bush administration nominees.

McKeague, of East Lansing, has been a judge on the U.S. District Court for the Western District of Michigan since 1992. Before moving to the bench, he was a shareholder and director of Foster, Swift, Collins & Smith PC in Lansing.

Griffin, of Traverse City, has been on the Michigan Court of Appeals since winning his first election to the post in 1988. He was reelected in 1996 and 2002. He previously had been a partner at Read & Griffin and with Coulter, Cunningham, Davison & Read, and had been an associate with Williams, Coulter, Cunningham, Davison & Read.

President Bush re-nominated both judges last February after initially nominating McKeague in 2001 and Griffin in mid-2002.

The Sixth Circuit Court of Appeals is headquartered in Cincinnati and handles appeals from Michigan, Kentucky, Ohio, and Tennessee. At full strength it has 16 judges, but has not had a full complement of judges for several years. At least one of Michigan's four seats on the court had been open since 1995, another opening occurred in 1999, the third in 2000, and the fourth in 2001.

### Celebrating the WTO

The Law School was well-represented as the series of conferences to commemorate the 10th anniversary of the World Trade Organization's Appellate Body got underway last spring in Italy.

Several Law School graduates joined Alene and Allan F. Smith Professor of Law Robert L. Howse on the program of the first of the commemorative conferences, held in March at Bocconi University in Milan, Italy. Howse and former U.S. Deputy Trade Representative Susan Esserman, '77, co-authored one of four reports presented at the program. Their report discussed "Trade Negotiations and Dispute Settlement: What Balance between Political Governance and Judicialization?"

Other conference participants with ties to the U-M Law School included:

Professor Thomas Cottier, LL.M. '82, of the University of Bern, who served as a discussant for the session "From Initiating Proceedings to Ensuring Implementation: What Needs Improvement?"

Former U-M Research Scholar Claus-Dieter Ehlermann, counsel with Wilmer Cutler Pickering Hale and Dorr in Brussels and a former chairman of the Appellate Body, who chaired the section that featured the Howse-Esserman presentation;

Former U-M Law School visiting scholar Professor Petros Mavroidis of Columbia University in New York City and the University of Neuchatel in Switzerland, who served as a discussant for the session "1995-2004, Ten Years and 63 Cases Later: The Contribution of the Appellate Body to the Development of International Law;" and

Professor Peter L.H. Van den Bossche, LL.M. '86, of the University of Maastricht, who was reporter for the session "1995-2004, Ten Years and 63 Cases Later."

The 2005-06 series of commemorative conferences also includes programs in Sao Paulo, Tokyo, Cairo, Sydney, and New York City.

## Former chair: Civil Rights Commission lacks power but has 'big megaphone'

The U.S. Commission on Civil Rights hasn't got enforcement power, but it offers a bully pulpit for civil rights, longtime member and former chair Mary Frances Berry, '70, told a Law School audience earlier this year.

Berry, named to the commission in 1980 by President Carter, chaired the body from 1993–2004. She left the commission last December. Outspoken and blunt, she could rile even her supporters. When President Reagan tried to fire her from the commission, she sued and won. President Clinton reappointed her in 1999.

The commission, established by President Eisenhower in 1957, can conduct studies, run investigations, and has subpoena powers, Berry told her lunchtime audience at the Law School. "It doesn't give anybody any money," she said, "but it has a big megaphone."

Democratic administrations have been friendlier toward the commission than Republican administrations, Berry said. "And this is ironic, since it was launched by a Republican president — [Dwight D.] Eisenhower."

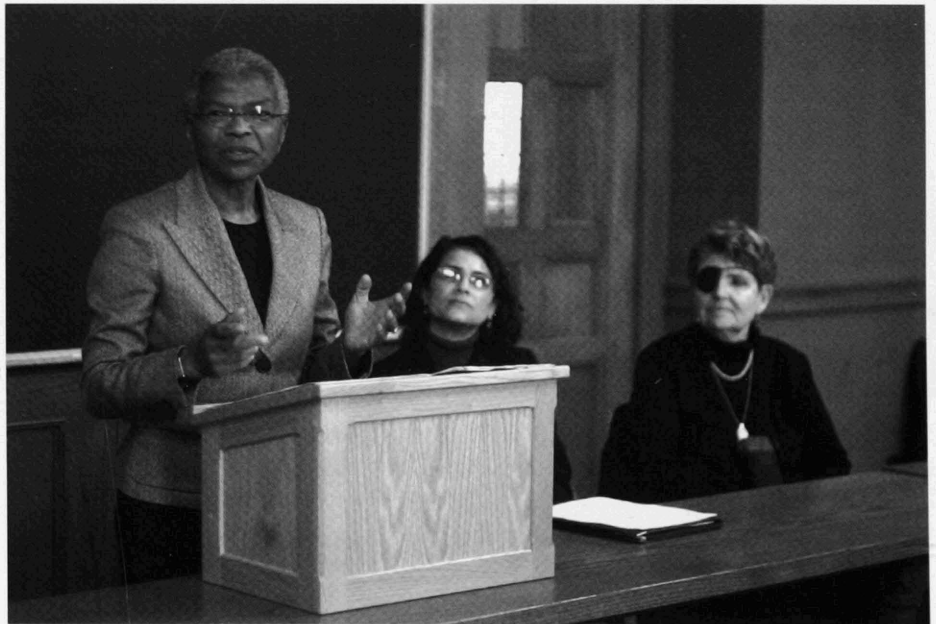
*Former U.S. Civil Rights Commission Chair Mary Frances Berry, '70, describes experiences at the commission. Listening are, far right, Caroll Smith-Rosenberg, who holds the new Mary Frances Berry Collegiate Professorship in History and American Culture, and Law School Visiting Assistant Professor Martha S. Jones, a U-M assistant professor of history.*

Berry, the Geraldine R. Segal Professor of American Social Thought at the University of Pennsylvania, earned both her law and bachelors degrees at the University of Michigan. She spoke at the Law School during her visit to the University for ceremonies associated with the inaugural lecture for the newly established Mary Frances Berry College Professorship in History and American Culture.

Historian Carroll Smith-Rosenberg, who holds the new professorship, was a colleague of Berry at the University of Pennsylvania for many years. Smith-Rosenberg said she chose to name her new professorship after Berry because of Berry's exemplary work as scholar, activist, and public servant. In her lecture, "Dangerous Doubles," Smith-Rosenberg explored the psychological role that images of Native Americans play in the formation of a white American identity.

Berry, the author of more than half a dozen books and many articles and

essays, is well-known in academic as well as civil rights circles. She has been awarded more than 30 honorary degrees, including one from the University of Michigan, and has served as president of the Organization of American Historians. She also has been awarded the NAACP's Roy Wilkins Award, the Rosa Parks Award of the Southern Christian Leadership Conference, and the Ebony Magazine Black Achievement Award. Sienna College Research Institute and the Women's Hall of Fame have listed her as one of "America's Women of the Century" and she is one of 75 women featured in the collection *I Dream A World: Portraits of Black Women Who Changed America*. She currently is completing a book on the history of the more than century-old effort to get reparations paid to ex-slaves.



## Edwards: Diversity's time has come

Acceptance of the diversity of America's people and respect for their differences and backgrounds is the next step in the progress spawned by the civil rights movement, according to the Hon. Harry T. Edwards, '65, of the U.S. Court of Appeals for the District of Columbia Circuit.

Edwards was the speaker for a program at the Law School in January to celebrate Martin Luther King Day and the U-M-wide Martin Luther King Symposium.

Edwards described a cultural progression in which Americans are replacing the goal of assimilation into the mainstream for African Americans, and other minorities, with a sense that the diversity of people who make up the national population is to be valued and respected.

According to Edwards, there always was resistance to the U.S. Supreme Court's 1954 decision in *Brown v. Board of Education*, which outlawed separate, segregated public schools and, by extension, was used to dismantle formal

segregation throughout American society. By the 1980s and 1990s, traditional affirmative action designed to open opportunities to minorities faced legal cutbacks and "the diversity model was beginning to take hold," Edwards explained. "That is the way we started to integrate in this country, I believe. We were not going to assimilate."

The *Grutter* case "was bound to come," he said of the 2003 decision in which the U.S. Supreme Court upheld the Law School's admissions policy that uses race as one of many factors that are weighed in order to ensure diversity among law students. "It was a terribly important decision" because it stressed "inclusiveness [and] mutual understanding," Edwards explained.

Edwards drew much of his talk from his article "The Journey from *Brown v. Board of Education* to *Grutter v. Bollinger*: From Racial Assimilation to Diversity," which appeared in the *Michigan Law Review*, Vol. 102, No. 5 (2004).

Noting the occasion of his talk, Edwards praised King as "one of the great leaders of our time and of our country who helped to make the dream of equality a reality."

King's message that "we are one" was "hard for even the naysayers to resist," Edwards said. "He was a wonderful leader and I am glad we have a day to recognize him."

A jurist and scholar who graduated from Cornell University before enrolling in the University of Michigan Law School, Edwards taught at the Law School 1970-75 and 1977-80, and was the School's first tenured African American faculty member.

... a sense that the diversity of people who make up the national population is to be valued and respected.



The Hon. Harry T. Edwards, '65

## Trade and Industry Minister: Panama is on the ramp to the global highway

**A**lejandro Ferrer, LL.M. '92, S.J.D. '00, Panama's minister for trade and industry, credits the Law School for helping to illuminate his country's road to change.

"Basically, Panama was isolated for many years from the world trade system. . . . We thought we could resist globalization and integration for a long time," he explains. "When I came back to the University of Michigan Law School I realized that globalization and international trade are going to come to Panama. For all that I am very grateful to this University."

Ferrer's Panama is mired in poverty: Nearly one-quarter of the 14 percent of Panamanians who live in poverty are classified as living in "extreme poverty," he said. Poverty in agricultural regions stands at 48 percent, in rural areas at nearly 65 percent, and among indigenous people it is 95 percent. Investment in both agriculture and industry has been declining.

The proposed solution requires tax reform, social reform, initiation of development clusters in areas like ports, tourism, value-added exports, a national energy policy, a new international trade policy, and expansion of the Panama Canal, Ferrer told a Law School audience during a talk here earlier this year.

"We have to change so that Panamanians produce what they can sell," not just what they can eat or wear, he explained. The production of value-added foodstuffs and other products instead of traditional sustenance crops, for example, will lead to higher salaries and better income, he said.

"With these trade policies we are asking people to change the way they have done things all their lives. Like people, societies

resist change" explained Ferrer, who negotiated Panama's entry into the World Trade Organization in 1997 and served as his country's first ambassador to the WTO. The move onto the global highway has legal, economic, political, social, and cultural impacts, he noted.

"Beyond any economic analysis, beyond any number, there are human beings who will be affected by a trade policy," he stressed. "Development doesn't just happen. You have to go out of your way to find development. It implies change."

"We have to make a trade policy that can be a key part of our social policy," he concluded. "We need a mix of economic and social policies, and good government, to make that happen."

Ferrer spoke as part of the Law School's International Law Workshop speakers series.



*Panamanian Minister  
of Trade and Industry,  
Alejandro Ferrer, LL.M. '92, S.J.D. '00*

## Graduate offers look inside the 9/11 Commission

Barbara A. Grewe, '85, who helped investigate U.S. intelligence performance associated with the terrorist attacks on the World Trade Center and Pentagon on September 11, 2001, discussed her role in a talk at the Law School last spring called "Behind the Scenes of the 9/11 Commission: A Staff Attorney's Experience."

Grewe, who is associate general counsel of the Government Accountability Office in Washington, D.C., served on the 9/11 Commission as special investigative counsel for the Department of Justice Office of Inspector General.

She explained that her work with the commission involved investigating and reporting on the FBI's handling of intelligence prior to 9/11. She also directed part of the investigation into information sharing between the FBI and CIA, including missed opportunities to locate the hijackers before 9/11 and earlier warnings about terrorist plans to use airplanes as weapons.

Grewe also met with students to discuss career options during a midday program organized by the Office of Public Service. Although she began her career in corporate law, she said, she soon accepted an offer to work in government service and has found the work "stimulating, challenging, and enjoyable." Seize opportunities that come your way, she advised. If you don't like your choice, try something else.

Grewe returns to the Law School this fall as the featured speaker for the September 16–18 reunion of the classes of 1980, '85, '90, '95, and 2000.

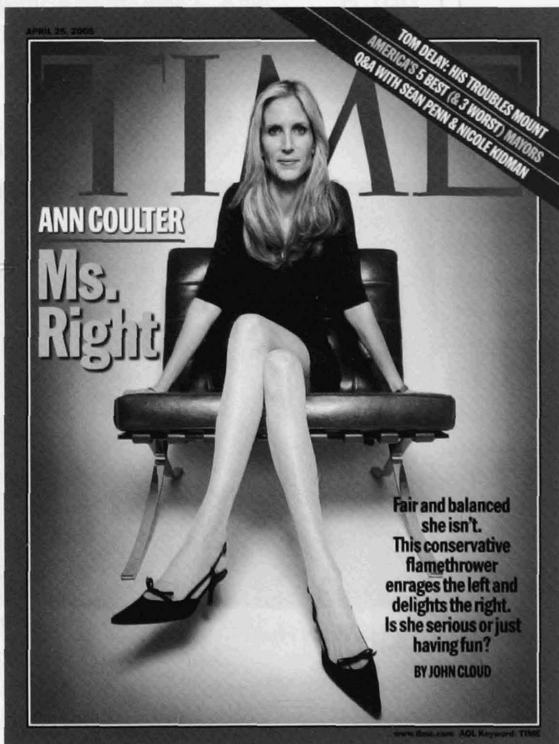
*Barbara A. Grewe, '85, who was an investigator with the 9/11 Commission, describes her experiences in a talk at the Law School.*





## Government Service

Robert Fiske Jr., '55, standing at center, is shown with Dean Evan Caminker, far left, and the Fiske Fellows for 2005. From left are: Adam Kirschner, '05, who is working at the Department of Justice, Federal Programs Branch, Civil Division, in Washington, D.C.; Rosemary Caballero, '04, who is working at the Office of the Public Guardian in Chicago; and Ona Hahs, '05, who is at the Office of the Legal Advisor, U.S. Department of State, in Washington, D.C. The competitively awarded fellowships, made possible through a gift from Fiske, provide debt payments and financial support for graduates who go into government work. (Photo courtesy of Adam Kirschner)



## Out Front

CNN commentator and best-selling author Ann Coulter, '88, was the subject of the cover story in the April 25 issue of Time magazine. In his nine-page profile, writer John Cloud compares Coulter to Clare Boothe Luce, the wife of the Time founder, "who rankled the Roosevelt establishment in the '40s with her take-no-prisoners opposition to the New Deal and communism" and "called Vice President Henry Wallace's liberal approach to postwar foreign policy 'globaloney,' a proto-Coulterism that shocked many in Washington." In the end," Cloud writes, "I'm not sure the public and private Anns are so different. On TV or in person, you can trust that Coulter will speak from her heart. The officialdom of punditry, so full of phonies and dullards, would suffer without her humor and fire."

TIME Magazine © 2005 Time Inc. Reprinted by permission.

## Donors, benefactors share a 'very special' time

The annual scholarship dinner proved to be a very special night at the Law School. Each year, donors who have established scholarships get the opportunity to meet the student recipients. The evening celebrates the generosity of these donors and gives the students a chance to express their thanks to their benefactors.

"I always love this event because it really gives me the chance to realize how important and how satisfying the relationships with this institution can be," said Dean Evan Caminker, referring to the many donors who attend the event year after year. "For the donors here tonight, you can take pride in these talented students who have benefited so much from your generosity. I hope you agree with me, after spending some time talking with them, that the future of our profession is bright."

Following Caminker's introduction, Sam Erman, in his third year in a joint J.D./American Culture Ph.D. program, addressed the donors on behalf of scholarship recipients. Erman spoke eloquently on the importance of his scholarship to his experience at Michigan. In particular, he related how it has let him take chances and get involved with the life of the School in a very meaningful way. He served as editor-in-chief of the *Michigan Law Review* and intends to become a legal teacher and scholar with a focus on legal history after graduation. Erman said his merit scholarship allows him to focus on the legal research he wants to continue after graduation by freeing

him from having to devote tremendous energy to finding well-paid summer work in a law firm to ease his incredible debt load.

Representing the donors, Bill Halliday, '48, directed his remarks to the students in the room. He described how many people had helped him along the way in his career and how important it was for him and his spouse, Lois, to be able and available to help others. True to this idea, the Hallidays established the William and Lois Halliday Scholarship in 1986 to provide scholarships to highly qualified and highly motivated students. Bill Halliday stressed that giving is a learned art and that he expected everyone in the room to find a way to give back and keep giving back to the School.

The Law School has more than 150 scholarship funds created through philanthropy. The dollars raised enable the School to attract talented students from a variety of backgrounds, regardless of their ability to meet the costs of modern legal education.



Dean Evan Caminker thanks donors and praises scholarship recipients as he addresses Scholarship Dinner participants.



Professor Emeritus John Reed and his wife Dorothy, who are scholarship donors, are shown with scholarship recipients Kyle Harding and Sam Li.



Lois Halliday chats with law student Karen Shen.

Sam Erman, who spoke on behalf of scholarship recipients, and scholarship donor Bill Halliday, '48, who spoke on behalf of donors, share a moment before the Scholarship Dinner.





From left, Joe C. Foster Jr., '49; Mark Shaevsky, '59; Robert V. Peterson, '65; Maurice E. Schoenberger, '66; Vincent Buzard, '67

1949

**Joe C. Foster Jr.**, shareholder in the firm of Foster Zack & Lowe PC located in Okemos, Michigan, has been included in *The Best Lawyers in America 2005-2006*.

1950

### 55TH REUNION

*The Class of 1950 reunion will be October 7-9*

**Chair:** Hudson Mead

**Committee:** Charles M. Bayer; James T. Corden; Charles E. Day; Robert P. Griffin; Robert W. Hess; Herbert E. Hoxie; Jerome Kaplan; John L. King; Alan C. McManus; Herbert E. Phillipson

1955

### 50TH REUNION

*The Class of 1955 reunion will be October 7-9*

**Chair:** Robert B. Fiske Jr.

**Fundraising Chair:** Robert I. Donnellan

**Participation Chair:** Frazier Reams Jr.

**Committee:** Richard M. Adams; Robert E. Baker; Lawrence I. Brown; William J. Conlin; Stewart S. Dixon; Robert S. Frey; Daniel L. Martin; Irwin Roth; Robert G. Schuur; John R. Worthington

1959

**Mark Shaevsky**, who is of counsel in the corporate and securities law department of Detroit-based Honigman Miller Schwartz and Cohn LLP, has been named to the 2005-2006 edition of *The Best Lawyers in America*.

1960

### 45TH REUNION

*The Class of 1960 reunion will be October 7-9*

**Fundraising Chair:** Joseph D. Whiteman

**Participation Chair:** Clifford H. Hart

**Participation Committee:** Thomas E. Kauper; H. David Soet; Bert R. Sugar; Kent E. Whittaker

**Larry I. Tate**, senior vice president for franchise sales of Golden Corral Buffet and Grill of Raleigh, North Carolina, has been named to the board of directors of the International Franchise Association, whose membership includes more than 30,000 franchisees and franchisors in more than 100 countries.

1963

**C. Reynolds Keller** has joined Ulmer & Berne LLP's Cleveland, Ohio, office as of counsel in the Product Liability Group. He previously was a partner with Keller & Kehoe

LLP and is the former managing partner at Weston, Hurd, Fallon, Paisley & Howley LLP, also in Cleveland.

1964

**William B. Dunn**, who heads the Real Estate Practice Group in the Detroit office of Clark Hill PLC, has been named to the 2005 *Chambers USA Ranking of America's Leading Business Lawyers*. Inclusion in the book requires extensive peer-review conducted by Chambers and Partners, the London-based publisher of *Chambers Global* and *Chambers UK Leading Lawyers*.

1965

### 40TH REUNION

*The Class of 1960 reunion will be October 7-9*

**Fundraising Committee:** John W. McCullough, Charles F. Niemeth

**Participation Chair:** Eric V. Brown Jr.

**Participation Committee:** Joan V. Churchill; Amos J. Coffman Jr.; Laurence D. Connor; Terrence L. Croft; Wilbert F. Crowley; David M. Ebel; David A. Ebershoff; Richard M. Helzberg; Jon H. Kouba; Paul M. Lurie; Joseph E. McMahon; Lawrence J. Ross

**Robert V. Peterson** has been elected board chair of Presbyterian Villages of Michigan (PVM) Foundation.

Peterson is an attorney with Dickinson Wright PLLC of Bloomfield Hills. He has served as a member of the PVM Board for six years.

1966

**William G. Barris**, founder and senior member of Barris, Sott, Denn & Driker PLLC in Detroit, Michigan, has been named in *The Best Lawyers in America 2005-2006*. He focuses his practice in real estate.

**Maurice E. Schoenberger** of East Lansing, Michigan, has been named in *The Best Lawyers in America 2005-2006*, in its Family Law section. Schoenberger was formerly an East Lansing district court judge.

1967

**Lewis T. Barr**, partner in the Cleveland, Ohio, office of Ulmer & Berne LLP, has been included in *The Best Lawyers in America 2005-2006*.

**Vincent Buzard**, a Rochester partner in the statewide law firm of Harris Beach LLP, has been named president of the New York State Bar Association, the country's largest voluntary state bar association, and took office on June 1, 2005. Buzard has held several leadership positions in the association during the past 20 years, has also been active in the Monroe County Bar Association and in serving the community.



From left, Robert E. Kass, '72; Barbara Rom, '72; Joseph M. Polito, '75; Jerome R. Watson, '76; Bill Bay, '78; Robert L. Kamholz Jr., '78

Cox, Hodgman & Giarmarco PC of Troy, Michigan, has named **Joseph F. Page** as the head of its Business Practice Section. He specializes in health care, general corporate, and business law.

### 1969

**Robert M. Vercruyse**, a director of the Bingham Farms, Michigan, firm of Vercruyse Murray & Calzone, has been selected for inclusion in *The Best Lawyers in America 2005-2006*, Labor and Employment Law section. He has been included in every edition since 1989.

### 1970

#### 35TH REUNION

*The Class of 1970 reunion will be October 7-9*

**Co-Chairs:** Steven B. Chameides and Gregory Lee Curtner  
**Committee:** Leo R. Beus; James R. Bieke; Diane Sharon Dorfman; Bettye S. Elkins; John M. Forelle; Peter L. Gustafson; John R. Laughlin; David Baker Lewis; Simon M. Lorne; George P. MacDonald; Edward T. Moen II; George B. Moseley; Victor F. Ptasznik; Steven G. Schember; David M. Schraver; John C. Unkovic

### 1972

**Saul A. Green**, a principal in the Detroit, Michigan, office of Miller, Canfield, Paddock and Stone PLC, was recently named

by *Corp!* magazine as one of Michigan's Top African American Achievers. He is a member of Miller Canfield's Criminal Defense Group, Litigation and Dispute Resolution Practice Group, and the Business and Finance Group, focusing on minority-owned businesses.

**Robert E. Kass** of Barris, Sott, Denn & Driker PLLC in Detroit, Michigan, has been elected as a Fellow of the American College of Trust and Estate Counsel.

**Barbara Rom** has been named partner-in-charge of the Detroit office of Pepper Hamilton LLP, which is celebrating its 25th anniversary in the city this year. She specializes in workouts, bankruptcy, insolvency matters, and commercial litigation.

**Richard B. Salomon** has been named partner in the New York City office of Wolf, Block, Schorr, and Solis-Cohen LLP in the Real Estate Practice Group. His corporate and securities practice focuses on representing companies led by their principal owners and advising independent directors of REITs and other public companies.

### 1973

**Ronald L. Kahn**, a partner in the Cleveland, Ohio, law firm of Ulmer & Berne LLP, has been included in *The Best Lawyers in America 2005-2006*. He has been named to the publication since 1995.

### 1975

#### 30TH REUNION

*The Class of 1975 reunion will be October 7-9*

**Co-Chairs:** Frederick J. Salek and Joel E. Krischer  
**Fundraising Committee:** I. Scott Bass; Robert A. Katcher; Jeffrey Liss; David H. Paruch; Douglas M. Tisdale; Raymond L. Vandenberg; Lamont M. Walton; James L. Wamsley III  
**Participation Committee:** Susan Low Bloch; Donald D. Duquette; Barbara E. Etkind; Susan Grogan Faller; Steven T. Hoort; Shirley A. Kaigler; George A. Pagano; James J. Rodgers; Zena D. Zumeta

**Charles Bateman**, a shareholder in the Duluth, Minnesota, firm of Downs Reyelts Leighton Bateman & Hylden Ltd., has become a Fellow of the American College of Trial Lawyers.

**Joseph M. Polito**, a partner and past chair of the Environmental Law Department of Detroit-based Honigman Miller Schwartz and Cohn LLP, has been named to *The Best Lawyers in America 2005-2006*. He has been recognized there since 1989.

**Zena Zumeta**, principal of the Mediation Training & Consultation Institute in Ann Arbor, has received the John Haynes Distinguished Mediator Award at the Association of Conflict Resolution Annual Conference.

### 1976

**Alan M. Share** has been appointed as a managing director by The PrivateBank and Trust Company in Chicago, Illinois. He joined The PrivateBank's Lake Forest office to manage commercial and commercial real estate clients in 2002.

**Jerome R. Watson**, a principal in the Detroit, Michigan, office of Miller, Canfield, Paddock and Stone PLC, has been elected to a two-year term as a managing director of the firm. Watson is a member of the firm's Labor and Employment Law Group. For 2002 to 2003, he served as interim general counsel for the Detroit Public Schools.

### 1978

**Bill Bay**, partner with the St. Louis, Missouri, office of Thompson Coburn LLP, has been named Marketing Partner of the Year as part of the 2005 Thompson Elite Excellence in Legal Marketing Awards. Award nominees are submitted by some 400 U.S. and overseas law firms.

Godfrey & Kahn attorney **Robert L. Kamholz Jr.** is included in *The Best Lawyers in America 2005-2006*. Kamholz has appeared in the publication for the last 10 consecutive years.



From left, Michael G. Campbell, '79; Fredric N. Goldberg, '79; Margaret Coughlin LePage, '83; Michael R. Lied, '83; Jeffrey W. Stone, '83; Gregory S. Gallopoulos, '84; Robert Johnston, '84

## 1979

**Michael G. Campbell**, principal in the Grand Rapids office of Miller, Canfield, Paddock and Stone PLC, has been elected to a one-year term as president of the Association for Corporate Growth's Western Michigan Chapter.

**Fredric N. Goldberg**, a member of the law firm of Mika Meyers Beckett & Jones PLC, has been elected chairman of the Cascade Township (Michigan) Planning Commission. Goldberg concentrates his practice in corporate and securities law and also specializes in college and university law.

## 1980

### 25TH REUNION

*The Class of 1980 reunion will be September 16-18*

**Fundraising Chair:** Tillman Lowry Lay

**Fundraising Committee:** Beverly Bartow; T. Christopher Donnelly; Stewart A. Feldman; James D. Holzhauser; Randall Mehrberg; Darrell W. Pierce; Robert E. Spatt; James Stengel

**Participation Chair:** Beatriz M. Olivera

**Participation Committee:** Steven Louis Gillman; Jeffrey R. Liebster; Kenneth B. Roberts; Edward P. Timmins

## 1981

**David B. Calzone**, a director of the Bingham Farms, Michigan, firm of Vercruyse Murray & Calzone, has been selected for inclusion in the 2005-2006 edition of *The Best Lawyers in America*, Labor and Employment Law section. He has been included in every edition since 2001.

**David Grigereit** has joined the Atlanta, Georgia, office of Ogletree, Deakins, Nash, Smoak & Stewart PC as a shareholder. He works with employers to prevent and solve labor and employment problems.

## 1983

**Jack M. Beard** has joined the faculty of the UCLA School of Law, where he will teach courses in the international legal sphere. Beard previously served 14 years as the associate deputy general counsel (international law) in the Office of the General Counsel, Department of Defense, and 12 years as adjunct professor at the Georgetown University Law Center.

**Francis C. Flood** has joined the Farmington Hills, Michigan, office of Foster, Swift, Collins & Smith PC as a shareholder. He was formerly general counsel at North Pointe Insurance Company.

**Van E. Holkeboer** has joined the Chicago office of Chapman and Cutler LLP as a partner in the Corporate Finance Department. He represents private investment funds, banks, and other financial institutions that provide mezzanine financing to middle-market companies. He previously was a partner in the Chicago office of Foley & Lardner.

**Margaret Coughlin LePage**, an attorney with the Portland, Maine-based firm of Pierce Atwood LLP, is listed in *The Best Lawyers in America 2005-2006*. Coughlin LePage is recognized for her work in labor and employment law.

**Michael R. Lied**, an attorney with Howard & Howard Attorneys PC in Bloomfield Hills, Michigan, spoke at the Eighth Annual Employment Law Update & Workshop in Peoria, Illinois, in January and in Chicago in February. Lied's presentation focused on employee background checks.

**Jeffrey W. Stone**, a partner in Hodgson Russ LLP's Real Estate & Finance Practice Group, was a featured speaker at the December New York State Government Finance Officers' Association's western regional holiday seminar in Rochester. He spoke on "Legal Issues Surrounding Advance Refundings."

## 1984

**Christopher N. Wu** has begun a two-year term as chair of the board of directors of the National Association of Counsel for Children (NACC). He also is president of the Northern California Association of Counsel for Children, the NACC affiliate in the San Francisco Bay Area. Wu is supervising attorney with the Judicial Council of California's Center for Families, Children and the Courts..

The Chicago, Illinois, firm of Jenner & Block has appointed **Gregory S. Gallopoulos** as its new managing partner. He has spent his entire career with the firm and for the last several years has been part of its senior management.

**Robert Johnston**, an attorney with Howard & Howard Attorneys PC in Bloomfield Hills, outlined "An Introduction to Qualified Benefit Plans and an Overview of ERISA" in his address to the employee benefits seminar hosted by the Detroit Area Chapter of the International Society of Certified Employee Benefits Specialists earlier this year in Troy, Michigan. Johnson, who specializes in qualified retirement plans, executive compensation, and employee benefit plans, is a frequent lecturer on employee benefit plans.

# CLASS NOTES



From left, Stanley P. Jaskiewicz, '85; Lori McAllister, '86; Mary Beth (Pratt) Gustafsson, '89; Nancy L. Little, '89; Charles Vigil, '89

1985

## 20TH REUNION

*The Class of 1985 reunion will be September 16-18*

**Fundraising Chair:** Kimberly M. Cahill

**Fundraising Committee:** John P. Buckley; Stuart M. Finkelstein; F. Curt Kirschner; William B. Sailer; Robin Walker-Lee

**Participation Co-Chairs:** Jerome F. Elliott and Constance A. Fratianni

**Participation Committee:** Christian F. Binnig; Arnold E. Brier; Carl A. Butler; James R. Lancaster Jr.; Priscilla A. May; Gail Pabarue; Rex A. Sharp

**Leslie J. Ford**, an associate with Barris, Sott, Denn & Driker PLLC in Detroit, Michigan, has been named in *The Best Lawyers in America 2005-2006*. Her practice covers all aspects of business and commercial litigation.

**Stanley P. Jaskiewicz**, member of the Center City, Pennsylvania, firm of Spector Gadon & Rosen PC, has been elected to a three-year term of the YMCA of Philadelphia & Vicinity's Board of Directors. Jaskiewicz is a member of his firm's Business Law Department.

1986

Dykema Gossett PPLC in Detroit, Michigan, has announced that **Lori McAllister**, a member of the Litigation Practice Group in the Lansing office, has been appointed the firm's first general counsel in the firm's newly created Office of General Counsel. The office will handle the many types of legal issues that face a regional law firm.

1987

**Reginald M. Turner Jr.**, a member of the Executive Committee of Clark Hill PLC, and a member of the firm's Detroit office, has been appointed to the Comerica Incorporated Board of Directors. Turner is also president of the National Bar Association and past president of the State Bar of Michigan.

1988

An article co-authored by **Elizabeth Barrowman Gibson**, "Recent Misinterpretations of the Avoidable Consequences Rule: The Duty to Mitigate and Other Fictions," published in the *Harvard Journal of Law and Public Policy* in 1993, has been cited by the California Supreme Court in *State Dept. of Health Services v. Sup. Ct.* Gibson is a partner at Jeffer Mangels Butler & Marmaro LLP in Los Angeles.

**Kevin W. Manning** has been elected as a shareholder in the law firm Foster Zack & Lowe PC in Okemos, Michigan. He specializes in commercial and business litigation, bankruptcy, and alternative dispute resolution.

**John A. Nixon**, a partner in the Philadelphia office of Blank Rome LLP, presented sessions on fiduciary investment and administrative duties under the Employee Retirement Income Security Act (ERISA) and tax compliance under the Internal Revenue Code as a faculty member for the annual American Legal Institute-American Bar Association course of study "Fundamentals in Employee Benefits Law" in San Antonio last March. Nixon's practice focuses on design, implementation, and maintenance of pension, retirement, and welfare benefit programs.

1989

U-M Law School Assistant Dean of Students **David H. Baum** has been chosen chair-elect of the Student Services Section of the Association of American Law Schools and has begun a two-year term on the State Bar of Michigan's District G Character and Fitness Committee. Also active in U-M-wide programs, Baum chaired the University's Special Interest Student Groups Subcommittee of the Student

Organization and Recognition Advisory Committee and currently is serving his second year on the University's Office of Student Conflict Resolution Appeals Board.

American Standard Companies Inc. has named **Mary Beth (Pratt) Gustafsson** as senior vice president, general counsel, and secretary. She joined American Standard as chief corporate counsel in 2001 and prior to that spent five years with Honeywell.

**Nancy L. Little**, shareholder in the firm Foster Zack & Lowe PC, located in Okemos, Michigan, is included in *The Best Lawyers in America 2005-2006*. She is named in the area of Trusts and Estates.

**Charles Vigil**, shareholder and director at Rodey, Dickason, Sloan, Akin & Robb PA in Albuquerque, New Mexico, has been sworn in as the 109th president of the State Bar of New Mexico. He will serve through December 2005.

1990

## 15TH REUNION

*The Class of 1990 reunion will be September 16-18*

**Fundraising Chair:** Paul E. Glotzer

**Fundraising Committee:** Andrew S. Doctoroff; John F.



From left, Lawrence Gadd, '92, Michael Warren, '92; Mark C. Witt, '94; Kristin A. Hermann, '96; Naomi F. Katz, '96; Christopher S. Olson, '98; David L. Skidmore, '98

Klein; Peter P. Murphy; Mark G. Peters

**Participation Committee:**

Jeffrey J. Brown; Harold R. Burroughs; Ronald G. De Waard; Susan M. Guindi; John A. Moore; Tyler M. Paetkau; John T. Panourgias; Kenneth A. Wittenberg

The Los Angeles, California, firm of Mitchell Silberberg & Knupp LLP has made **David Rugendorf** a partner in the firm. Rugendorf practices in the area of immigration law.

1991

**Ernest W. Torain Jr.** has joined the Capital Markets and the Finance and Transactions practice groups at Vedder Price in Chicago. Torain was formerly a partner with KMZ Rosenman.

1992

As a result of the merger between Strobl Cunningham & Sharp PC of Bloomfield Hills, Michigan, and Bingham Farms-based Harnisch & Gadd PC, **Lawrence Gadd** has joined Strobl Cunningham & Sharp as a shareholder of the firm. Gadd joined the Harnisch firm as a partner in 1994 and has extensive litigation experience.

**Pedro A. Ramos** has been appointed as managing director for the City of Philadelphia. Appointed by Mayor John F. Street, Ramos was previously the city solicitor. He is responsible for overseeing, support-

ing, and assisting 13 operating departments.

The Hon. **Michael Warren** has been elected to complete the remainder of the term in which he was appointed to the Sixth Circuit of Michigan (Oakland County). His current term expires on January 1, 2007. Judge Warren serves in the Civil/Criminal Division and previously served in the Family Division of the court.

1994

**Julia L. Ernst** has been named executive director with the Women's Law & Public Policy Fellowship Program at the Georgetown University Law Center. She was previously legislative counsel to U.S. Congresswoman Louise M. Slaughter.

**Alyssa Grikscheit** has joined Goodwin Procter LLP as a partner in the New York office with the firm's Corporate and Private Equity Practices Group. She focuses her practice on representing domestic and foreign clients making investments in the United States and other countries. She previously was with O'Melveny & Myers.

Godfrey & Kahn shareholder **Mark C. Witt** has been selected for inclusion in *The Business Journal's* "40 Under Forty" listing, which features the Milwaukee, Wisconsin, leaders of tomorrow. Witt is a member of the Corporate Practice Group in the Milwaukee office.

1995

10TH REUNION

*The Class of 1995 reunion will be September 16-18*

**Co-Chairs:** Roger A. Hipp and Adam J. Nordin

**Fundraising Committee:**

Vincent Basulto; Robert L. Bronston; Thomas Cunningham; Ana Merico-Stephens; Laurel E. Queeno; Natalie J. Spears

**Participation Committee:**

Anne Auten; Benjamin C. Gilbert Bair; Kristen A. Donoghue; Greg H. Gardella; Darren J. Gold; Jonathan D. Hacker; Lara Fetsco Phillip; Roopal Shah; Denise Ann C. Tomlinson; Christopher H. Wilson

**Matthew Latimer** has been named chief speechwriter to Secretary of Defense Donald H. Rumsfeld. He previously served as a top aide to Senator Jon Kyl (R-Arizona).

1996

**Kristin A. Hermann** of the Detroit, Michigan, office of Miller, Canfield, Paddock and Stone PLC has been elected a principal. She is a member of the Financial Institutions and Transactions Group.

**Naomi F. Katz**, a member of the Chicago, Illinois, office of Holland & Knight LLP, has been elected to partnership. She practices in the Litigation Section in the areas of labor and employment law.

1997

**Todd H. Lebowitz**, a member of the Employment and Labor Group in the Cleveland, Ohio, office of Baker & Hostetler LLP, has been elected partner. He concentrates his practice in the area of employment litigation.

1998

**Christopher S. Olson** has joined Kickham Hanley PC in Royal Oak, Michigan, as an associate in the firm's Litigation Group. Olson was previously an associate in the Bloomfield Hills office of Dykema Gossett PLLC. He has practiced in the U.S. Supreme Court and the U.S. Court of Appeals for the Federal and Sixth Circuits among others.

Warner Norcross & Judd LLP attorney **David L. Skidmore** has authored the "Wills" section for the second edition of the *Michigan Law and Practical Encyclopedia*, published by LexisNexis. Skidmore practices in the Grand Rapids office.

2000

5TH REUNION

*The Class of 2000 reunion will be September 16-18*

**Co-Chairs:** Christopher G. Evers; Chitta Mallik; and Nora FitzGerald Meldrum

**Fundraising Committee:**

Beej Das; Corey R. Harris; Bill G. Jenks; Iham Kim; Michael L. Simes; Leslie Hinds St.-Surin; Corin R. Swift; Liv N. Tabari

## | CLASS NOTES



*From left, Kevin Landmesser, '00; Ingrid Sprangle, '00; Bree Popp Woodruff, '00; Jason Killips, '04; Sara Klettke MacWilliams, '04*

**Participation Committee:** Rahmah A. Abdulaleem; Adam M. Becker; Rachel E. Croskery-Roberts; Shelly Lynn Fox; Carolyn J. Frantz; Alexandra T. MacKay; Aimee S. Mangan; Michael S. Ponder; Caroline Sadlowski; Lauren E. Schmidt; Hartmut Schneider; Leah Sellers

**Kevin Landmesser** has been appointed an associate in the Charlotte, North Carolina, office of Helms Mulliss & Wicker, where he practices in the finance practice area. He previously was a member/licensed contractor with Landmesser Development Company LLC in Plainwell, Michigan, and practiced with Winston & Strawn in Chicago.

**Marc K. Salach** has joined the Bloomfield Hills, Michigan, law firm of Dawda, Mann, Mulcahy & Sadler PLC as an associate. He concentrates his practice in areas of corporate, real estate, and tax.

**Ingrid Sprangle** has joined the Austin, Texas, office of Jackson Walker LLP as an associate in the Litigation Section. She practices commercial litigation and handles federal and state court complex, class action, intellectual property, unfair competition, contract, employment, real estate, construction, and product defect cases.

**Bree Popp Woodruff**, an associate in the Lansing office of Miller, Canfield, Paddock, and Stone PLC, has been elected to a two-year term as a member of the Alumni Steering Committee of the Michigan Political Leadership Program, a Michigan State University-based program that recruits and trains public policy leaders of the future. Woodruff, who practices in Miller Canfield's Public Law Group, represents the 2004 class on the committee.

### 2004

**Jason Killips** has joined Howard & Howard's Bloomfield Hills, Michigan, office. He concentrates his practice in commercial and intellectual property litigation.

**Sara G. Lachman** has joined the downtown Grand Rapids, Michigan, office of Miller, Johnson, Snell & Cumiskey PLC as a litigation associate.

**Sara Klettke MacWilliams** has joined the Bloomfield Hills, Michigan, office of Howard & Howard. She focuses her practice in litigation, corporate, and immigration law.

# IN MEMORIAM

'15	Adolfo A. Scheerer		'50	Frederick E. McMahon Jr.	2/2/2005
'16	James F. Tallman		'51	Robert Harry Jones	6/9/2004
	Fermin S. Torralba			Floyd H. Lawson Jr.	2/13/2005
'17	Merwin Haven			Kaj G. Sandart (LL.M.)	12/1/2004
	Herbert Will Lamb		'52	Frederick R. Keydel	2/26/2005
'21	Feng Chu Liu (LL.M.)			Earl Langdon Neal	2/13/2005
'33	Jacob Brown	3/1/2005		David F. Ulmer	3/13/2005
'34	Bruce Shorts	3/8/2005	'53	Robert S. Ernstein	2/17/2005
'35	Joseph N. Crowley	3/20/2005	'55	Ara Berberian	2/21/2005
'36	Alton H. Rowland	2/17/2005	'56	John J. Brittain	3/25/2005
'37	John P. Mead	1/11/2005		Charles R. Stiles	2/19/2005
'38	Rita Singer Brandeis	1/10/2005	'57	Thomas S. Erickson	1/22/2005
	William Jay Hover	11/19/2004	'61	George R. Cronin Jr.	1/23/2005
'39	Lewis E. Berry Jr.	1/31/2005		James J. Schiller	2/22/2005
	Robert M. Eckelberger Jr.	1/15/2005	'65	Daniel B. Hess	11/28/2004
	Paul C. Keeton	3/24/2005	'66	Thomas A. Brown	4/28/2004
	Robert E. Sipes	1/7/2005	'67	James J. Podell	1/29/2005
	John H. Uhl	2/8/2005		Hans J. Puttfarken (M.C.L.)	2/23/2005
'40	John H. Pickering	3/19/2005	'69	W. Timothy Baetz	1/16/2005
	Leonard W. Swett	1/6/2005	'71	Donald P. LaRocque	3/30/2005
'41	Herman John Lipp	2/15/2005	'72	Ronald W. Gerdes	2/15/2005
	Elizabeth Durfee Oberst	3/29/2005		James E. Heiser	2/23/2005
'42	Willard D. Hoot	2/4/2005	'82	Glen M. Bis	2/13/2005
'43	Frederick H. Hoffman Jr.	2/18/2005			
'46	Eve B. Bassham	12/4/2004			
	George W. Roush	1/11/2005			
'48	Theodore C. Rammelkamp	2/14/2005			
	Winston W. Wolvington	1/14/2005			
'49	Reid D. Ferrall	3/26/2005			
	E. V. Greenwood	4/5/2005			
	Edward E. Hiatt	3/27/2005			
	Stuart L. Main	1/14/2005			
	Bernard L. Trott	2/23/2005			
	Beryle Walters	12/27/2004			



# The SEC at 70: Time for retirement?

By Adam C. Pritchard

*The following essay is based on a talk delivered at Notre Dame Law School last September at a conference marking the 70th anniversary of the establishment of the Securities and Exchange Commission. The complete version of Professor Pritchard's article appears at 80 Notre Dame Law Review 1073 (2005) in the Notre Dame Law Review's "The SEC at 70" symposium issue. For more information about this 430-page, nine-article symposium issue, please e-mail [ndlrev@nd.edu](mailto:ndlrev@nd.edu). Reprinted with permission © Notre Dame Law Review, University of Notre Dame. Law Quadrangle Notes is responsible for any errors that may occur in reprinting or editing this article.*

As one grows older, birthdays gradually shift from being celebratory events to more reflective occasions. One's 40th birthday is commemorated rather differently from one's 21st, which is, in turn, celebrated quite differently from one's first. After a certain point, the individual birthdays become less important and it is the milestone years to which we pay particular attention. Sadly for entities like the Securities and Exchange Commission, it is only the milestone years (the ones ending in five or zero, for some reason), that draw any attention at all. No one held a conference to celebrate the SEC's 67th anniversary. Clearly the SEC is not getting its fair share of chocolate cake.

Eventually the birthdays come to be recognitions of the fact that you are still around. Survival, not moving ahead in life, becomes the notable fact. And so it is with the SEC. It has now been 70 years since Congress created the SEC in the Securities Exchange Act of 1934. We are still short of the gold standard for human survival — 100 years — but 70 is not bad. The SEC today looks poised to outlast even the longest human life span. It has largely moved beyond the tasks that dominated much of its early agenda — the taming of the New York Stock Exchange, the reform of corporate bankruptcies and public utilities — and ensconced itself firmly as the arbiter of corporate disclosure and the primary enforcer of anti-fraud rules relating to the purchase and sale of securities. And the perceived importance of those latter-day functions, and thus, the SEC's prospects for survival, have only increased of late, reinforced by the *fin de siècle* accounting scandals and corporate abuses. The list is by now familiar — Enron, WorldCom, Tyco, Adelphia, Global Crossing, etc., etc. — and that drumbeat of scandal has made the SEC once again the fair-haired boy of the Congress and the White House. The SEC was given a raft of new enforcement tools by Congress in the Sarbanes-Oxley Act as politicians fell over themselves to get tough on corporate crime in the wake of the collapse of the tech bubble. The SEC — most anxious not to disappoint — has responded to this groundswell of support with a flurry of rulemaking aimed





at accountants, analysts and audit committees, just to cover the “A”s. I have not run across any rules directed toward the “Z”s, but I am sure that is only because the agency has not gotten that far yet. So the SEC clearly shows no interest in slowing down and taking it easy as it reaches its advanced years. A more telling sign of continued vitality at the SEC is that the customary complaints about how the agency does not have nearly enough resources to adequately do its job of protecting the integrity of our financial markets have given way to an extraordinary situation in which the agency finds itself unable to spend all of the money allocated to it by Congress (which was in turn, more than the White House asked for). This is a most unusual problem for a bureaucracy to have. In sum, business is booming at the SEC.

How odd then, the suggestion of my title that it might be time for the SEC’s retirement. Retirement can be made mandatory for persons in “high policymaking position[s]” after the age of 65, and the SEC certainly qualifies as a policymaker. But no one is pushing the SEC toward retirement. Well, almost no one — I am not the first to suggest that the time has come to put the SEC out to pasture. Jon Macey suggested 10 years ago at a commemoration of the bureau’s 60th anniversary that the SEC had become “obsolete” and that it was time to kill it off. The efficiency of the financial markets, Macey argued, has increased “as technology had developed and as market professionals who compete to find mispriced securities have emerged in huge numbers.” Moreover, “the opportunities for manipulation and fraud are probably fewer now than at any time in history” and “rules against fraud existed long before there was an SEC.” Finally, the development of portfolio theory and capital asset pricing models had eliminated diversifiable risks from the investment process. Macey’s conclusion: “Market forces and exogenous technological changes . . . have obviated any public interest justification for the SEC that may have existed.”

Macey’s argument was a non-starter then. The conventional wisdom held that “the SEC is one important reason why the securities industry is in so much better shape than other financial service industries, and why U.S. securities markets are the best securities markets in the world.” The causal connection between the existence of the SEC and the strength of the U.S. capital markets was difficult to pinpoint, but the conventional wisdom did not question its existence. And that conventional

wisdom concerning the essential role of the SEC in protecting the integrity of the financial markets has only been strengthened by the aforementioned accounting scandals although the certainty that the U.S. markets are the best in the world may have been shaken a bit.

Am I simply tilting at the same windmills as Macey? I think not. Whereas Macey seemed intent on affirmatively killing off the SEC and its essential functions, my proposal is (I think), considerably more modest. To return to the metaphor of my title, I think retirement would suffice; capital punishment of the kind proposed by Macey is a bit extreme. By retirement, I mean the abolition of the SEC and the transfer of its essential functions to the executive branch. Specifically, I propose transferring the SEC’s regulatory function to the Treasury Department and its enforcement function to the Justice Department, while leaving largely intact the enforcement functions of the state securities authorities and the self-regulatory organizations such as the National Association of Securities Dealers (NASD), the New York Stock Exchange (NYSE), and the Public Company Accounting Oversight Board (PCAOB).

Old wine in new bottles? Again, I think not. Separating the SEC’s regulatory function from its enforcement function promises to improve the effectiveness and efficiency of both. My main point goes to accountability. Although it is traditionally argued that placing administrative responsibilities within the executive branch rather than an independent agency is desirable because it increases accountability, I think that the shift of authority I propose might diminish accountability, at least of a certain sort. The accountability that I believe should be diminished is the SEC’s accountability to Congress. Because the SEC is an “independent” agency, the President’s influence over the agency is limited to the ability to nominate commissioners, and even that power is subject to the Senate’s confirmation authority. The SEC’s status as an “independent” agency leaves it vulnerable to the political whims of key legislators. That vulnerability fuels the cyclical pattern of neglect and hysterical overreaction that typifies securities regulation emanating from both the SEC and Congress. Moving securities regulation to the executive branch might help insulate the field from this destructive pattern. In addition, congressional oversight does little to help overcome the SEC’s susceptibility to groupthink and confirmation bias. Moreover, moving securi-



ties regulation to the executive branch might open up the field to more diverse perspectives. More executive branch involvement might also encourage securities regulators to move beyond their fixation with promulgating new disclosure requirements. Finally, disrupting the close connection between the SEC and Congress might disrupt — at the margin — the disproportionate influence that interest groups exert over securities regulation. I should begin with a caution: I do not mean to overstate my case. The SEC should certainly not be singled out as an underperformer among regulatory agencies. It enjoys the reputation as being one of the more competent of the administrative agencies and that reputation is, in my view, largely warranted. My point is a more modest one: Institutions matter in regulatory policy. In the field of securities regulation at least, the investing public is not well served by vesting authority in an independent agency. I do not believe that securities regulation in the United States has been a failure, but that does not mean that we are incapable of doing better. We might do better by placing the responsibility for the development of securities regulation and the enforcement of those rules in the executive branch.

Where has the SEC fallen short? The list should be a familiar one for most observers of securities law; I do not offer it as original. Nor is it intended to be comprehensive; others will have their own favorite examples of SEC failure. My purpose here is merely to show that the SEC's interaction with Congress plays an important role in explaining a range of familiar shortcomings.

### Regulatory overreaction

The single most powerful influence on regulatory policy is the urge to protect defrauded investors in the wake of the bull market. To be sure, some investors are defrauded as a bull market is climbing ever higher, but the rising tide tends to obscure the shenanigans as everyone focuses on the profits that they are piling up on paper. Congressmen (at least some of them) recognize in the abstract that encouraging liquid securities markets will facilitate capital formation, and thus, economic growth. Regulation may be necessary to secure that liquidity. That interest, however, is not high on the list of legislative priorities during bull markets when investors' primary focus is counting their gains and chasing the next "sure thing." During these periods, Congress is happy to leave the day-to-day regulating to the SEC, which is, after all, the expert agency.

Bear markets, however, inevitably follow bull markets. Corporate mismanagement and corruption can be obscured by rising stock prices in a bull market, but the dirty laundry has a way of surfacing in bear markets. The bad news flushes out

dissatisfied investors who clamor for government intervention. Politicians who happily ignored ever-climbing stock markets become profoundly interested in disclosure policy when the financial news migrates from the business page of the newspaper to the front page. The accounting scandal *du jour* provides an opportunity to fulminate, hold a series of show trials called "legislative hearings" to rake some greedy businessmen over the coals, and then enact legislation to protect "investor confidence." Indeed, that is the genesis of the Exchange Act, which garnered much of its legislative momentum from the legislative proceedings orchestrated by Franklin Roosevelt's henchman, Ferdinand Pecora. The recent spectacle of politicians falling all over themselves to outdo each other in "getting tough on corporate crime" is only the latest chapter of political overreaction to the fallout of corruption revealed by a bear market. How quickly the winds shifted in Washington when Enron and WorldCom collapsed under the weight of their "creative" accounting. Congress and the SEC, previously inert, have responded to public outrage over corporate shenanigans by proposing a laundry list of new laws and regulations to crack down on corporate abuses. For example, after stymieing regulation of auditor independence during the bull market, Congress quickly shifted course on the question with the Sarbanes-Oxley Act imposing an array of restrictions on services by accounting firms to their auditor clients.

There may be more than political opportunism at work here. The availability heuristic is also in play, as both the SEC and Congress focus too narrowly on recent and immediately available information. Regulators may also be too quick to see a pattern in a series of events that are in fact random. For example, a handful of salient accounting scandals may be construed as a corporate governance crisis. In the face of a crisis, regulatory approaches seem to make sense when they previously had no support whatsoever. Immediately prior to the Enron scandal, CEO certification of financial statements was nowhere to be found on the SEC list of policy initiatives. It was hardly news that CEOs sometimes fudge the numbers, occasionally on a grand scale. Nonetheless, CEO certification — like other aspects of the Sarbanes-Oxley Act — would not have been adopted without the external pressure to react to a supposed crisis. Similarly, before the Enron scandal broke, Capitol Hill had no interest in safeguarding the role that analysts play as gatekeepers in the securities markets. After the scandal, legislators were buying for regulatory reform, some of them — perhaps — even sincerely. It seems unlikely that this shift on the part of lawmakers could represent a rational response to new information. More likely, it is a symptom of the availability heuristic at work. Also at work is the hindsight bias, as SEC regulators and their congressional overlords place too much weight



## THE SEC AT 70: TIME FOR RETIREMENT?

on the probability of past events that actually occurred relative to those that did not. Enron was “obviously” a disaster waiting to happen — how odd that so few recognized it before disaster struck.

And of course these biases interact in perverse ways with the aforementioned political imperative to respond to the latest headlines. Opportunistic politicians may take advantage of the biases of the electorate, playing up recent instances of fraud to gain electoral support. Analyst independence only became a priority when the New York state attorney general revealed incriminating internal e-mails from Merrill Lynch. Only after Enron and WorldCom moved accounting from the business page to the front page was auditor independence a compelling need. The SEC did nothing to discourage the notion that the small number of companies implicated in these scandals reflected a broader pattern, a statistically very dubious proposition (following the “law” of small numbers). Notwithstanding this dubious empirical foundation, once this story took hold alternative explanations were pushed aside. Just as curious as the (over)-reaction to the “analyst affair” was the lack of reform effort prior to the scandal. The airing of the investment bank’s dirty laundry provided no new information on the conflicts of interest that plague that business model. The SEC — and indeed, most investors — have long known that analyst ratings are skewed toward optimism and that auditors often provide non-auditing services to their clients.

Worse yet, some of the abuses that Congress has lately seen fit to regulate can be traced back, not to a lack of regulation, but rather, laxity in enforcement. During the bull market, Congress had more important uses for the taxes generated from securities transactions than policing the securities markets. An understaffed Securities and Exchange Commission long ago gave up periodic review of company filings because it had other priorities. Accounting fraud ranked low on the enforcement agenda, trailing the vendetta against insider traders and the pursuit of teenagers engaged in Internet stock scams. Only in the late 1990s did the SEC make financial reporting a priority. Once financials were put under the microscope, the agency claimed itself to be shocked to find that chief financial officers were playing fast and loose with the numbers. Once the SEC started looking at the books, the number of restatements skyrocketed and we had a “deluge of restatements” on our hands (at least in the light of the particularly salient accounting scandals making the front pages).

The “deluge” now seems to have abated somewhat, but the passage of the Sarbanes-Oxley Act has been followed up by an orgy of rulemaking that shows no signs of subsiding anytime soon. The SEC, seeing a window of opportunity, looks for areas

in which to expand its sphere of influence while the public still worries over the specter of massive fraud. The regulation of hedge funds looks to be the next territory to conquer.

Congress, however, shows certain signs of restlessness. As the echoes of those accounting shenanigans begin to fade, various members of Congress have been making threatening noises on the question of the proper accounting treatment of options. The loss to public corporations of beefed-up internal controls is called into question. Scandal-driven reform followed by political neglect has been a recurring pattern in the securities markets. Although scandals may be needed to focus dispersed lawmakers’ collective will, they often result in overreaction, particularly if political entrepreneurs succeed in framing the issue in a way that resonates with the electorate.

That dynamic means that demands for financial market regulation will arise in times of crisis, particularly if that crisis spills over into the real economy. Crisis, however, does not create the ideal environment for developing balanced, cost-effective policy interventions. Politicians will want to “do something,” even if the proposed something may prove to be costly, ineffective, or counterproductive. SEC Commissioners and division heads will be called to the carpet by legislators looking to hold someone accountable for the market decline. Commissioners and staffers tend not to enjoy such encounters. Not being paid very well (relative to their alternative employment opportunities), they expect to at least lead a quiet life, which leads them to a strong preference for conservatism in regulation. From the bureaucrat’s perspective, the optimal number of regulatory failures is zero. If a rule makes an incremental contribution to the avoidance of a future crisis, government regulators may be quick to see the rule’s wisdom, discounting its costs. Those costs will be born by investors generally, in the form of small reductions in their investment returns and disclosure documents that bury important information in a sea of minutia. Those costs are sufficiently diffuse that they are unlikely to generate a groundswell for regulatory reform. Thus, the cumulative effect of regulation in response to crisis is a ratchet effect pushing toward greater, more intrusive regulation and greater dead-weight costs for investors.

It may take multiple crises to push government regulations to the point where they become a serious drag on the financial markets, but having reached that point, it becomes very difficult to turn the ship of state toward less regulation. Staffers at the SEC have more important tasks to worry about than figuring out which regulations can be discarded — when is the last time anyone at the SEC sat down looking for items to cut from Regulation S-K? Do investors in today’s environment really need a discussion of the impact of inflation on a company’s operations?



Worse yet, once in place, legislation and regulations often take on a life of their own. It took Congress over six decades to get around to repealing the Glass-Steagall Act, for example, enacted in response to the crisis of the Great Depression. Legislators may accept the wisdom of prior legislation uncritically, operating under a confirmation bias. Interest groups that benefit from the regulatory apparatus will fight hard to preserve their prerogatives. Deregulation requires a mammoth (and unusual) mustering of political will. Without any recent information of equal salience — nonscandals tend not to generate newspaper headlines — no impetus will develop to remove the protective legislation.

One could argue that this regulatory approach makes sense — put out fires and “don’t fix what ain’t broke.” It may be costly to experiment with new regulations (or less regulation) without the threat of a perceived and immediate loss to investors. But this generalization cannot always be true. Sometimes rationalizing regulation, such as loosening up restrictions on forward-looking disclosure, may benefit both issuers and investors. The continued bias toward reactive reform to the securities laws represents a very dubious presumption in favor of the status quo. That presumption can only be overcome, it seems, by a spate of headlines. This political cycling between policies of benign neglect and hysterical overreaction suggests that the SEC, far from serving as a shelter against the vagaries of the political winds, acts more like a weathervane, swinging wildly with the change in the political atmosphere.

### “Groupthink” and confirmation bias

I turn now from the SEC’s susceptibility to external stimuli to its internal thought processes. Few observers would suggest that there is a great deal of diversity of thought at the SEC. The SEC is known for its strong organizational culture. Often praised as hard-working and dedicated, the mission of “investor protection” is taken to heart by virtually all SEC staffers. As former SEC Chairman Arthur Levitt put it: “Investor protection is our legal mandate. Investor protection is our moral responsibility. Investor protection is my top personal priority.” This ethos is no doubt reinforced by self-selection among those seeking SEC employment. The people who pursue careers as regulators and enforcement officials may be individuals with heightened senses of justice and fairness. This is not entirely a bad thing. Such traits may lead regulators to work hard for relatively low pay. Such a culture helps maintain morale and focuses SEC staffers on the task of regulating the capital markets.

Despite these benefits, the strong investor protection culture within the SEC may also lead to “groupthink.” Groupthink occurs when individuals come to identify with the organization and

accept its mission uncritically due to their perceived membership in the group. Although an individual may assess a particular decision critically, members of a group defer to the consensus. Groupthink will also tend to reduce the range of hypotheses that an organization considers when faced with a problem. Homogeneous groups like the self-selected SEC staffers are particularly susceptible to the confirmation bias and are perhaps more likely to engage in self-serving inferences (to the extent that all the staffers have a homogeneous interest). Once the SEC has committed to a policy initiative through a rulemaking proposal — thereby tentatively committing to the “group” — feedback on the proposal may get less weight than it would have if the information had been solicited before the SEC fixated upon a specific proposal.

Groupthink may also manifest itself in the SEC’s single-minded focus on investor protection. When a decision can be placed on a normative scale, such as more or less investor protection, group decision dynamics will push the group toward a polar end of the scale. At the SEC, the systematic tendency will be to settle on outcomes that promise more investor protection. Many investors may be able to protect themselves, but the SEC usually focuses on the stereotypical “widows and orphans” in crafting protections. The SEC’s recent initiative to regulate hedge funds, the investment haven of the ultra-rich, springs to mind. If hedge funds are not safe for widows and orphans, the SEC must bring them to heel. Only political pressure is likely to deter the SEC from seeking the most restrictive alternative.

The SEC’s focus on “widows and orphans” also helps explain its consistently siding with the plaintiffs’ bar. The plaintiffs’ bar, of course, styles itself as the “investors’ advocate” even more strongly than does the SEC. Private class-action litigation has been an important impetus toward ever more expansive interpretations of the anti-fraud rules. With a few minor exceptions (sometimes driven by fear of congressional retribution), the SEC has sided with the plaintiffs’ bar in the courts. As a somewhat exasperated Justice Powell noted, the “SEC usually favors all  $\pi$ . I can’t recall a case in which this was not so.” The SEC has promoted this expansion despite the readily apparent weaknesses in the arguments for investor compensation.

Congress is of two minds on this issue. Legislators are opposed to “frivolous litigation,” but they strongly favor compensating their constituents for corporate fraud, even going so far as to give up some money that would otherwise go the U.S. Treasury. Being of two minds is the profit maximizing strategy for members of Congress, as it allows them to extract contributions from the deep pockets on both sides of the issue.

The SEC’s single-minded focus on investor protection may



also fuel its aversion to clear rules. Regulated entities and their lawyers vastly prefer determinate rules, which allow them to structure their business dealings in predictable ways. The SEC, however, likes to afford itself leeway, promulgating mind-numbingly detailed and correspondingly impenetrable rules, but preserving discretion to pursue those who would manipulate those rules for some deceptive purpose. Too much clarity in the rules is deemed to provide a “roadmap to fraud.” And, of course, the SEC has a very expansive notion of what constitutes fraud, one seldom bounded by common law understandings of the term. Those regulated may find the outer limits of the rules only when they are facing an enforcement action and the SEC is demanding a settlement. Congress is responsible for the broad rulemaking delegations that have facilitated this aversion to clear rules and it has done nothing to rein in the SEC’s open-ended interpretations of statutes.

Does congressional oversight ameliorate this tendency toward the groupthink of “investor protection”? Not likely; instead, congressional review tends to push the SEC to skew deliberation over rule proposals to make those rules easier to justify to committee chairs and their staffs. If rules are proposed to satisfy political demands, legislative oversight will induce greater justification for those rules, but it is unlikely to generate more thoughtful consideration on the part of regulators. Because the SEC staff will be aware of the preferences of important members of congressional committees, the staff will tailor regulatory rules to conform to those preferences.

The confirmation bias can be seen in the path dependence in the SEC’s regulations. As originally enacted in the 1933 and 1934 Acts, the securities laws provided separate disclosure standards for companies making public offerings and those whose securities simply trade on the secondary markets. For several decades thereafter, commentators recognized the need to unify disclosure standards. Disclosures have the same relevance to investors whether they are purchasing in a public offering or on the secondary market. The SEC did not seriously consider revamping the scheme until the 1960s, ultimately adopting the present integrated disclosure system. Even that, however, falls short of a full-fledged scheme of company disclosure. Congress is nowhere to be found on this issue. Redundant disclosure is imposing a small but steady drag on the economy, but there is no political hay to be made in reducing that drag. And it certainly does not rise to the level of a scandal.

### Fixation with disclosure

The SEC is not known for regulatory creativity, often attempting to tackle difficult problems of corporate governance

with measures invariably derived from some variant of disclosure. Bribes being paid to foreign government officials? Disclose them! CEOs being paid obscene sums? Disclose it! Disclosure traditionally has been justified as a means of exposing potentially problematic activities. Justice Louis Brandeis’ oft-quoted phrase that “sunlight . . . is the best disinfectant” provides a succinct summary of the philosophy behind disclosure. Once investors (and others) can see such activities clearly, then market participants are less likely to engage in opportunistic behavior in the first place. Managers considering a self-dealing transaction, for example, may choose not to do so if related-party transactions must be disclosed. In addition to ferreting out agency costs, disclosure may assist rational investors in allocating their investment dollars, leading to better use of capital and more accurate securities prices. So disclosure has much to recommend it as a policy lever in securities regulation.

But disclosure is far from a panacea. Bounded search at the SEC may blind regulators to possible alternatives to disclosure regulation. In the wake of the Enron and WorldCom scandals, the SEC proposed requiring corporate chief executive officers to certify corporate financial statements annually. Congress, anxious to be seen “doing something,” followed this proposal with legislation enacting the CEO certification requirement into law. What this added to the existing disclosure received by investors is unclear, but the *in terrorem* threat posed to CEOs and CFOs is quite clear. Huge sums are now being devoted to ensuring that this “disclosure” is accurate. If it is not, the executives fear, a flurry of lawsuits will follow, for which they face very real exposure to personal liability (or, a more remote prospect, an SEC enforcement action or, still more remote, criminal prosecution). Simply having adequate disclosures is no longer enough; company executives need to disclose about disclosure. And the informational value to investors of this certification has to be considered quite dubious. Given these difficulties with disclosure as a regulatory tool, the SEC’s continued reliance on disclosure suggests an unduly narrow search within the SEC.

Disclosure is the tool of choice largely because that is what Congress has given the SEC. The SEC’s regulatory strategy reflects the broad grants of authority to the agency to mandate corporate disclosures under the 1933 and 1934 Acts. Alternatives to disclosure generally would require the SEC to seek statutory authorization from Congress. To get that authority, however, would almost certainly require the SEC to make an empirical showing to justify the need for a new regulatory tool. The Sarbanes-Oxley Act provides the SEC with a handful of additional tools, but disclosure remains the central theme. Even though it relies on disclosure as the cure-all for the maladies of securities markets, the SEC



has done surprisingly little to investigate the impact that disclosure has on those markets. The agency instead prefers to remain above the grubbiness of empirical data, preferring to ground its policy prescriptions in “investor confidence.” The SEC avoids any meaningful definition of investor confidence, thereby avoiding the possibility of empirical contradiction. But it also avoids making a persuasive case to Congress for more creative tools to use against corporate malfeasance. Congress is unlikely to be creative in this arena on its own, given its generally reactive approach to securities regulation.

### Regulatory capture

Why do Congress and the SEC lay such heavy burdens on disclosure as the regulatory workhorse? The answer to that question takes us to our last shortcoming, regulatory capture. The SEC tirelessly promotes the myth that individual investors can be successful in choosing their own stocks, if only they devote sufficient energy to the voluminous disclosures made available to them as a result of the wise regulations promulgated by the SEC. Congress happily endorses the populist notion that every Joe or Jane Investor can compete with the big boys in picking stocks. Call it the myth of investor autonomy. Moreover, well informed shareholders will hold directors to account, and those directors will in turn keep greedy managers in check. Call this one the myth of investor sovereignty. The empirical evidence contradicting both of these notions is overwhelming.

Why do Congress and the SEC perpetuate these myths? Because the financial services industry requires these myths for its very existence. If investors were to switch *en masse* to index funds and other forms of passive investment, the Wall Street-industrial complex would crumble. The SEC would lose its reason for being. And members of Congress fortunate enough to serve on the Senate Banking Committee and the House Financial Services Committee would lose the steady stream of contributions that help them maintain their tenure in office. So the myths of investor autonomy and investor sovereignty must be maintained.

It would be a mistake to overstate the regulatory capture story. Industry players fare well in the battle over the content of securities regulation when they are enjoying the frothy rise of a bull market. They are no match, however, for the populist appeal of protecting defrauded small investors during a bear market, as discussed above. Overall, there is little evidence to show that the SEC’s status as an independent agency has freed it from the influence of industry capture. As an agency with a specialized mission, it should come as no surprise that the subjects of that regulatory attention have an interest in influencing the agency.

This would come as no surprise to the Congress that created the SEC — enhancing the susceptibility of the regulators to capture was an important goal behind the creation of the SEC. Enforcement of the securities law was originally entrusted to the Federal Trade Commission, which proved less vulnerable to the influence of the securities industry than the broker-dealer community desired. The SEC was created as part of the ‘34 Act as a more industry specific regulator that would be more amenable to the financial services industry.

Although that wish may have frustrated in the short run, in the long run, the narrower focus of the SEC relative to the FTC has made it more vulnerable to capture. The securities industry has spent considerable lobbying resources to influence the appointment of commissioners and, of even greater significance, chairmen. Moreover, the financial services industry has considerable influence over the information that the SEC receives as it undertakes its rulemaking responsibilities. The result has been a system of securities regulation that largely benefits the big players in the securities industry. The SEC’s protection of fixed commissions in the brokerage industry from the debilitating effects of competition for nearly half a century is by now a hackneyed example. And the SEC has dragged its heels in implementing the National Market System that Congress intended to replace the old cartel system. The agency continues to struggle to find a place for proprietary trading systems as the NYSE and NASDAQ resist this incursion into their comfortable sinecures. It has also been argued that other aspects of the SEC’s regulatory agenda benefit primarily the brokerage industry, including much of the detailed disclosure required of public companies, as well as the contours of insider trading law.

Industry influence has been reinforced by the narrow focus of the relevant oversight committees in Congress, the Senate Banking Committee and the House Financial Services Committee. As Elena Kagan explains, “When Congress acts in [the sphere of administration], it does so through committees and subcommittees highly unrepresentative of the larger institution (let alone the nation) and significantly associated with particularized interests.” As of the writing of this article, 9 of the 51 members of the House subcommittee for securities came from New York, New Jersey or Connecticut, and 3 out of the 15 members of the Senate Subcommittee came from these same three states. This concentration of legislators from the New York metropolitan area is evidence of the fact that “the one thing the shadow executive system of the congressional standing committees can guarantee us is that the most affected regional interests will try to kidnap the federal law execution processes that most affect them.” The remaining legislators on these subcommittees, coming from states



lacking in constituents directly interested in this sector of the economy, may be less acutely interested in the welfare of Wall Street. Nonetheless, service on one of these subcommittees is a cash cow for these legislators, guaranteed to produce a steady stream of campaign contributions. Wall Street makes huge investments in influencing the contours of its regulatory environment.

The financial services industry is not the only affected party that gives special attention to these legislative oversight committees. The accounting firms and the high-tech sector are also intensely interested. This influence was felt during the 1990s on the questions of expensing stock options and auditor independence; the SEC backed down in both cases in the face of congressional opposition. For example, corporations poured millions of dollars into the campaign war chests of strategically placed congressmen to head off the Financial Accounting Standards Board's efforts to require that options grants be accounted for as an expense. Congress then bullied the supposedly independent FASB into submission; the SEC aided and abetted the effort.

The consequences of this interested oversight is that the SEC regulates in the shadow of potential retaliation from Congress. Legislators on the relevant committees have powerful tools to bring the agency to heel. If the agency strays too far from the dominant view on those subcommittees, it risks legislative overruling and worse yet, budget cuts. The bottom line: "Independent" agencies such as the SEC are not independent of politics; they are highly dependent upon the industries that they are charged with regulating. That dependency is mediated through Congress, which uses its mediating role to extract financial support from the financial services industry, accounting firms and public companies. Good work if you can get it.

### The executive branch as securities regulator

My proposal is quite simple. The SEC's rulemaking authority should be turned over to the Treasury Department, to be overseen by the same regulators who oversee other aspects of financial regulation. The SEC's enforcement authority should be turned over to the Justice Department and combined with that agency's existing fraud section. Civil and criminal enforcement would be consolidated within the same department.

A few administrative details would need to be worked out. The adjudications currently processed by the SEC's administrative law judges (ALJs) could be turned over to ALJs located in Treasury, or better still, be conducted in federal district court. The SEC's supervisory authority over the SROs would also go to Treasury; SROs that failed to fulfill their enforcement obligations could be referred to Justice. The SEC's power to review sanctions

imposed by the SROs could be handed over to the district courts. The states could continue to play a role in enforcing the federal statutes and regulations devised by Treasury.

Note that I am not suggesting firing the SEC staff — the staff members could be divvied up appropriately between the two departments without creating undue confusion. Five commissioners, however, would be looking for work. I address below the justifications for the minor blip in unemployment caused by this sweeping transfer of regulatory authority.

### Regulatory overreaction

Could transferring regulatory authority to the executive branch dampen the rapid swings from regulatory inertia to regulatory hysteria? We have witnessed a series of largely garden-variety frauds over the past few years. Companies were making up earnings. Analysts were recommending stocks that they thought were crap. Mutual funds were providing sweetheart deals to big investors in the form of guaranteed profits through late trading. The response of the SEC and Congress to the revelation that "There is fraud in our financial markets!" has been a deluge of new statutes and regulations. Those subject to all these new rules publicly welcome them and privately pass the costs along to investors. To be sure, some of the wrongdoers are now facing enforcement actions and criminal prosecution. And the companies, broker-dealers and mutual funds implicated in the sleaze have taken a serious hit in the market, which enforces its judgments much more swiftly and surely than the government ever could. But sending the bad guys to jail and hammering the stock price of their employers is never enough. We must punish the wrongdoers and make sure this never happens again. I have no quarrel with punishing the wrongdoers, but I fear that the SEC and Congress will typically be fighting the last war as they continually expand the Code of Federal Regulations and the United States Code in their quest to end fraud. The fraudsters, I'm afraid, will always be with us.

Would transferring accountability from the SEC to the executive branch help matters? Accountability (or the lack thereof) favors the status quo in this context. Although the President remains ultimately accountable for policy choices affecting the securities markets in my model, the transfer of authority envisioned in my proposal would divide accountability between the Departments of Treasury and Justice. Unlike the commissioners of the SEC, who are responsible for both rule-making and enforcement, the Secretary of the Treasury and the Attorney General would each exercise only a portion of the regulatory authority currently wielded by the SEC. Unlike the ultimate accountability borne by the President, these political



actors would be accountable only for the regulatory authority within their respective jurisdictions. This means that each will be pointing the finger at the other in the event of regulatory “failure.” Was the scandal of the week the result of insufficiently stringent rules or a consequence of lax enforcement?

One does not ordinarily consider finger-pointing of this sort a useful mechanism for encouraging effective regulation. In this context, however, separating enforcement and rulemaking allows for a healthy bit of indirection and delay. The SEC has no one else to blame when it is dragged before Congress — Congress has certainly not been grudging in affording it rulemaking authority, even if it frequently has been rather tight-fisted with dollars for enforcement. But Justice and Treasury could blame each other. “The rules prohibiting this fraud are unclear, so we can’t go after the bad guys” can be met by “This behavior clearly violates our anti-fraud rules. Prosecutors should come down hard on these fraudsters.” This is the sort of mutual recrimination that Washington uses all the time to deflect calls for change. It is sometimes disparagingly characterized as “gridlock,” but it has an important stabilizing influence, unless one thinks that every social ill calls out for a vigorous government response. The President would be accountable for the trade-off between rulemaking and enforcement. Congress is likely to think twice before it calls him before a subcommittee for a lecturing on regulatory priorities and the critical need to protect widows and orphans. Simply put, the President is too busy for that. By contrast, commissioners of the SEC, most assuredly, are not.

If Congress wanted to make its influence felt, it would have to go through the tedious and time-consuming process of drafting legislation, finding a majority coalition to vote for it, and persuading the President to sign the resulting bill into law. The marginal cost of this effort is substantially greater than bullying the SEC. Perhaps Congress, too, would then find better things to do.

### Task diversity and perspective diversity

The Secretary of the Treasury has a lot of irons in the fire. According to the department’s Website, “The mission of the Department of the Treasury is to promote the conditions for prosperity and stability in the United States and encourage prosperity and stability in the rest of the world.” That’s a big job. More concretely, the Treasury is responsible for:

- Managing federal finances;
- Collecting taxes, duties and monies paid to and due to the United States and paying all bills of the United States;
- Producing postage stamps, currency and coinage;

- Managing government accounts and the public debt;
- Supervising national banks and thrift institutions;
- Advising on domestic and international financial, monetary, economic, trade, and tax policy;
- Enforcing federal finance and tax laws;
- Investigating and prosecuting tax evaders, counterfeiters, and forgers.

This diversity of tasks encourages a diversity of perspectives among the top officials at the Treasury. Although all of the senior staff are likely to have expertise in one or more of these areas, it is unlikely that any one of these areas will predominate. Consequently, when it comes time to decide important policy matters, the Secretary will be getting advice from people with a broad range of backgrounds. For the Secretary and the rest of the Treasury staff, it is hard to have a single-minded focus on saving widows and orphans from the vipers of Wall Street when you have so many tasks that require your attention. Investor protection would continue to be an important goal for a Treasury Department charged with regulating the securities markets, but so would capital formation, diversification of the outlets for financial services to consumers, and cooperation with foreign regulators.

To be sure, under my proposal, many members of the Treasury staff will specialize in the regulation of the securities markets, but their proposals will face the scrutiny of superiors not suffused in the culture of investor protection. And promotion within the department is unlikely to be a lock-step progression — a person who shows talent in the field of banking or tax might be tapped for an important role in regulating the securities markets. Going higher up the chain, Republicans and Democrats would switch places in the politically-appointed slots as power shifted in the White House. The result would be less homogeneity, broader search and more critical thinking generally.

So too, with the Justice Department. The Attorney General has at least as broad a range of concerns as the Secretary of the Treasury — locking up terrorists, fighting the war on drugs, prosecuting environmental polluters, etc. Going down to the trenches, the FBI special agent who shows talent in making a case against Medicare fraudsters may well have talent for unraveling the machinations of accounting fraudsters. Fraud is fraud, and the expertise of the SEC staff can easily be oversold. The Justice Department has many lawyers and investigators who are proficient at prosecuting securities fraud (e.g., the fraud unit of the U.S. Attorney’s office in the Southern District of New York). There would be many more such professionals if the Justice Department took over civil enforcement of the securities laws along with the criminal authority that it already exercises. But





expertise must be balanced against diversity of perspective, and it is hard to imagine any state of the world in which the SEC would surpass Justice on diversity.

More importantly, the lawyers at Justice are more likely to view the regulations promulgated by Treasury with a critical eye. Although both departments are nominally components of the executive branch, they have distinct histories and cultures. Lawyers at Justice are much less likely to buy in to the work of Treasury than SEC enforcement attorneys are to buy in to the work of the Divisions of Market Regulation or Corporate Finance. The lawyers in the executive branch are on the same side, but not the same team. Justice is unlikely to suffer from confirmation bias in reviewing the proposals of Treasury; it is not their work, after all. The division between the two departments also matters for those discussions of enforcement policy in slightly shabby conference rooms at Justice or the Treasury. Clear rules may be a “roadmap to fraud,” but it is much easier to show violations of them in court. The skepticism with which the Solicitor General’s office has treated some of the SEC’s more cockamamie theories affords a concrete example.

Lawyers at the Justice Department are also more likely to be skeptical of the need for class action litigation and investor compensation. The SEC’s support for the plaintiffs’ bar helps the agency with the more populist element in Congress, but the Justice Department knows that deterrence is really the critical element in minimizing the social costs of fraud. Fraudsters need to go to jail and pay hefty fines; what happens to the money afterward is, at best, a sideshow.

### Fixation with disclosure

Can a transfer of authority to the executive branch stimulate more creative thinking about regulatory responses to malfeasance by corporate officers and financial services professionals? Recall my argument that the Congress and the SEC focus almost exclusively on disclosure because it reinforces the myths of investor autonomy and sovereignty, a very lucrative myth as far as the financial services sector is concerned.

Would the Treasury and the President be equally enamored of this myth of the empowered investor? To be sure, the financial services industry is a major contributor to presidential as well as congressional campaigns, so disclosure has continued appeal. But the lines of accountability for ultimate policy choices would be clarified somewhat with a transfer of authority to the executive branch. A risk-averse President who wanted to avoid a political backlash from the next bull market would strongly favor a well-diversified electorate. The real stories of pain in a market decline are from the poor souls who are under-diversified. Politicians, of

course, are notoriously wary of blaming even foolhardy victims for their plight (think of the Enron employees), despite the inexpensive self-help that they could have adopted. “This all could have been avoided with a bit more disclosure!” Or a bit of diversification. It is doubtful that a politician in the White House would be willing to blame the victim any more than Congress and the SEC. Policy will continue to focus on throwing the books at the wrongdoers.

But will the President follow condemnation of the bad guys with a slew of new disclosure requirements to address last year’s fraud? The President has the advantage of being able to rely on the strong rhetorical message sent by actual criminal prosecutions. The SEC’s civil enforcement powers look rather tame by comparison to hard time. Congress has only the ability to write additional rules. Congress can, of course, ratchet the jail time up another couple notches, but most maximum penalties in the securities area are already well past the point of diminishing marginal deterrence and, worse yet, obviously so. No one is impressed anymore by another five to ten potential years of jail time for white-collar criminals after the first ten to twenty. Martha Stewart’s six months in prison will be quite sufficient to deter her from lying to the government in the future. Neither Congress nor the SEC has the satisfying power of throwing the fraudsters in jail. Used aggressively, the authority to prosecute could satiate the public clamor to do something without imposing an additional burden of disclosure costs on all the business that did not break the law and should not be punished. This may not satisfy the hue and cry for government intervention in extreme cases, but a few well-placed “perp walks” can help deflect the demand for additional disclosure requirements.

### Regulatory capture

Would a transfer of authority to the executive branch make a significant dent in the extent of regulatory capture? Of the four concerns identified here, this one carries the least weight; it would be insufficient standing alone to justify transferring regulatory authority to the executive branch. The principal effect of such a transfer on the usual pattern of “Inside-the-Beltway” rent seeking would be to simply shift some of the power to extract rents — regulated industries from members of Congress would have a bit less, and the President would have a bit more. The financial services industry already tries to curry favor with the President in order to influence the choice of commissioners and to be able to call upon the President’s aid in the lawmaking process (either to instigate, or veto, legislation). Giving the President authority over rulemaking would enhance the President’s attractiveness as recipient of lobbying largesse. By contrast, lobbying to influence



the Justice Department's enforcement agenda would be very tricky business; not many White House staffers would enjoy waking up to read in the *Washington Post* about influence peddling related to Justice Department fraud prosecutions. On balance, I think the overall shift would be to make members of Congress less attractive and the President more attractive, but rent seeking, like fraud, will always be with us.

Despite these caveats, I think that my proposal would achieve some limited success in diffusing the effect of lobbying expenditures. Members of the House and Senate subcommittees for securities that do not have a substantial number of constituents in the financial services industry have little to constrain them from offering their votes and influence to the highest interested bidder. The voters back home in Wyoming will have little interest in their representative's vote on reforming the market structure for buying and selling securities. In that vacuum of electoral interest, campaign contributions (which can be used to pay for the television ads to reach all those voters spread so thinly across the state) can be very persuasive indeed.

The President, by contrast, has many constituencies to which he must answer and is unlikely to be able to give decisive weight to any one interest group. Simply put, it costs more to buy a President than a legislator, even a well-placed one. Moreover, it is harder for lobbyists to gain access to the President, given the demands on his time. To be sure, the White House staff and Treasury Department officials are likely to be more responsive, but they too will have diverse constituencies to which they need to attend on the President's behalf. Congressional committee members will still have a role to play in influencing policy, but they carry substantially less of a threat in a conflict with the executive branch than they do with the SEC. The President, as a roughly co-equal actor in the legislative and budgetary processes, can fight back if a department's budget is threatened; the SEC has to grin and take it. A transfer to the executive branch will not eliminate concerns over regulatory capture, but it might slow down by a step or two the interest groups attempting to capture regulatory policy.

More importantly, the accountability for tailoring regulation to suit interest groups would be clear. Under the current regime, Congress can bully the SEC into caving in when faced with interest group pressure and no member of Congress will face any serious threat of reprisal (as with Congress' derailing of expensing for options). There is safety in numbers. If the President overrules rules proposed by the Treasury staff, the responsibility will be clear. If new rules are warranted, the President who nixes them would face a considerably more substantial risk of political embarrassment than would an individual congressman.

## Conclusion

As the SEC marks its 70th anniversary, the survival of securities regulation, and the federal government's role in that regulation, are no longer in doubt (if they ever were). Federal securities regulation is here to stay; proposals to do away with it are unlikely to garner much support anytime soon.

I have made a more modest proposal: transferring that authority over securities regulation to the executive branch. The main impetus behind my call for reform is that the SEC is "independent" in name only. The agency's dependence on Congress has some unfortunate consequences for the path of regulatory policy in the field of securities. Specifically, far from dampening the boom and bust cycle in securities regulation, the SEC — under the watchful eye of Congress — has fueled the cyclical swings in regulatory policy as a means of gaining additional authority and budgetary support. Congress and the SEC have fed off each institution's cognitive biases. Most destructively for investor welfare, both institutions have perpetuated the twin myths of investor autonomy and investor sovereignty. Finally, vesting regulatory authority in the SEC has facilitated agency capture and enhanced the ability of members of Congress to extract rents from the securities industry, the accounting profession, and others affected by securities regulation.

I have argued that the executive branch might be somewhat less subject to these maladies if we were to vest authority over securities regulation in the Treasury and Justice Departments. I am far from claiming that regulatory "perfection" (whatever that would mean) would follow if my proposal were implemented. More modest improvements, however, might come about. Transferring authority might dampen the regulatory over-reaction that follows in the wake of bear markets. The Treasury and Justice Departments would almost certainly bring greater diversity of perspective to addressing the problems of corporate governance and the securities markets. Those departments might view more skeptically the claim that disclosure solves everything. And my proposal might reduce the extent of agency capture at the margin (but only at the margin).

Is my proposal to transfer regulatory authority over the securities markets to the executive branch as far-fetched as Jonathan Macey's call to end federal securities regulation altogether? It might appear so at first blush. The SEC is busier than ever, better funded than ever, and has more support generally in Congress than it has enjoyed any time in recent memory. Moreover, there are powerful constituencies that have come to rely on the SEC for their professional livelihood. Corporate lawyers, for example, would strenuously resist the abolition of the SEC. I am a natural-

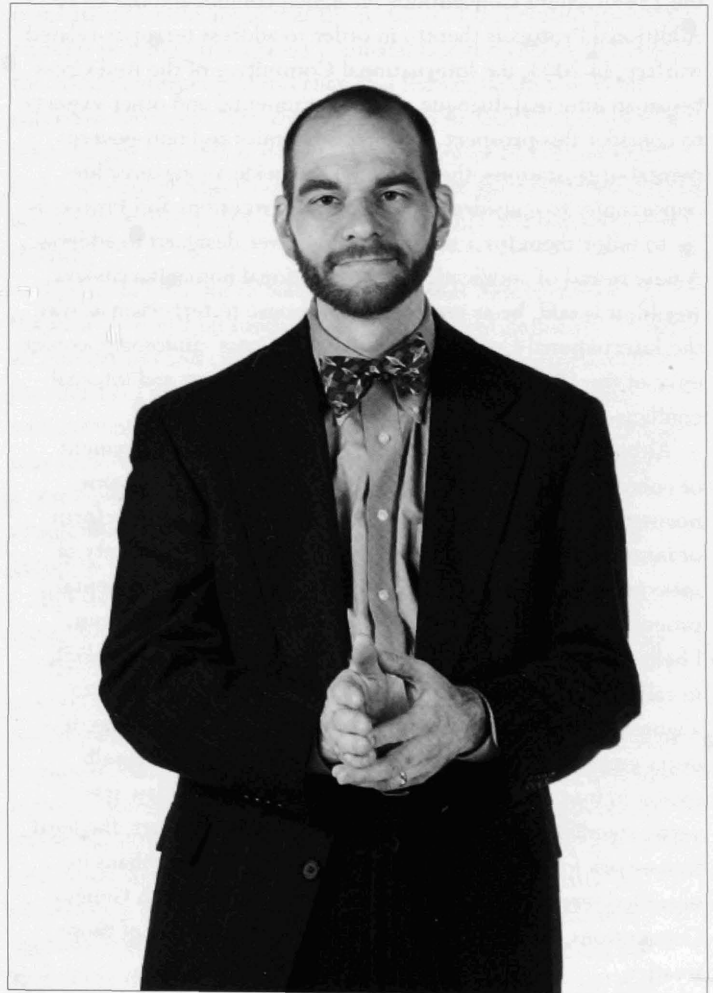


## THE SEC AT 70: TIME FOR RETIREMENT?

born pessimist, so I freely concede that my proposal is unlikely to be adopted anytime soon.

The one constant in securities regulation is that the political fortunes of the SEC generally ebb and flow with the cycles of the market. The correlation is inverse, however, so the SEC rides high when the Dow Jones Industrial Average rides low. But within that broader correlation there is some variance in the support for the SEC. When the market is first hitting the downward trend in its cycle, support for the SEC may dip along with the major indices. In one of those future dips — who can predict when it will come — may arise the opportunity for the sort of administrative reform proposed here. To be sure, the relevant committees in Congress will cling tenaciously to their “independent” agency, but sometimes the political imperative to “do something” can overcome even entrenched institutional self-interest. It would be a poor bet to try to handicap a retirement date for the SEC, but it might be almost as speculative to count on the agency’s staying on the job forever.

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# Are the Geneva Conventions out of date?

By Steven R. Ratner

*The following essay is a revised version of one that originally appeared at The Crimes of War Website ([www.crimesofwar.org](http://www.crimesofwar.org)) as part of a debate on "Rethinking the Geneva Conventions."*

The so-called war on terrorism engaged in by the United States and other states has prompted calls for revisions to the 1949 Geneva Conventions on armed conflict and the 1977 Additional Protocols thereto in order to address terrorist-related warfare. In 2003, the International Committee of the Red Cross began an informal dialogue with governmental and other experts to consider this prospect. To some academics and non-governmental organizations, the discussions provide a long-overdue opportunity to consider updating the Conventions and Protocols — to tailor them for a war they were never designed to address. A new round of codification of international humanitarian law would, it is said, be as important a response to terrorism as was the International Committee of the Red Cross' diplomatic conference of the 1970s a response to anti-colonial wars and internal conflicts.

Although governments should ensure that the employment of coercion against terrorists is regulated according to some normative framework, I believe that claims for a major reform of international humanitarian law are premised on a variety of misconceptions of that law. As a result, any intergovernmental process is not likely to lead to any significant new norms nor, I believe, should it. I will suggest four misconceptions implicit in calls for major reform and their implications for efforts to augment the Conventions and Protocols. Before beginning, it bears emphasis that the abuses by U.S. forces at Abu Ghraib prison in Iraq did not happen because international law sets vague standards regarding the relevant conduct; in fact, the legal framework for treatment of prisoners-of-war and civilians in occupied territory is clear under the Third and Fourth Geneva Conventions, as are the acts that constitute violations of those treaties.

## **Misconception 1: International humanitarian law has a major gap regarding the war on terror.**

A common assumption in favor of updating the law of war is that the existing corpus of international humanitarian law is ill-equipped to address uses of force by and against terrorist groups. Although the laws of war provide detailed rules for interstate conflicts, conflicts between states and liberation movements, and conflicts between states and well organized insurgencies, some claim that they do not provide guidance to those fighting in wars between states and terrorist movements. It is, of course, undeniable that the Conventions and Protocols only cover what they cover. If one side in the conflict does not meet the definitions provided in Common Article 2 of the Geneva Conventions (namely, a state party to the Conventions), Article 1(4) of Protocol I (a state party or a national liberation movement), and Article 1 of Protocol II (a state party or an organized insurgent group in a civil war), the Conventions and Protocols *qua* treaties simply do not govern the conflict.

But international humanitarian law has a sizeable "place-holder" for all other conflicts — one that Protocol I explicitly recognizes: "the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." These terms are no mere rhetoric. At a minimum, their content includes: (a) the principle of distinction, i.e., that soldiers must distinguish between other combatants and civilians, and that combatants must neither deliberately target nor indiscriminately or disproportionately harm civilians; (b) the status of *hors de combat*, under which combatants not taking part in hostilities shall be treated humanely; and (c) limitations on methods of combat to those that do not cause "unnecessary suffering." These basic notions are admittedly vague around the margins. But states have recognized such obligations in all

conflicts. Thus, while at first denying, and later limiting, the application of the Geneva Conventions to its operations against Afghanistan and Al Qaeda, the United States and its allies have repeatedly stated their acceptance of basic principles of humanitarian law.

Indeed, the full scope of customary international humanitarian law is far more detailed than these basic principles. If asked, most states would point to numerous provisions of the 1907 Hague Regulations and the Geneva Conventions and Protocols as still binding in this conflict, even though it does not meet the definition of armed conflict in those instruments. For instance, the ban on killing someone in the course of a *bona fide* surrender, as well as the possibility to shoot those engaging in perfidy by faking surrender (with some gray areas as to how the *bona fides* of the surrender is determined), would seem well accepted.

This is not to suggest that every scenario in the “war on terrorism” is addressed by customary international law. That, after all, is why states draft treaties. Ambiguities over the definition of combatant, the meaning of hostilities (and the end of them), and other problems will remain beyond the scope of existing customary international law simply because customary law has not had time to develop regarding certain aspects of these new conflicts. The question, however, is whether those ambiguities can and should be resolved through a new round of codification or whether other methods are open to decision makers.

The burden needs to be on those calling for revision to demonstrate exactly what needs to be improved. Are they asserting that, under current law, combatants are underprotected, as when members of terrorist groups are taken prisoner and not granted POW status; or that they are overprotected, as when the U.S. military targets and kills an Al Qaeda leader in Yemen and claims this action is a legitimate engagement in an armed conflict? Are civilians currently underprotected, as when they are killed in collapsing buildings; or are they said to be overprotected, because many members of terrorist cells, e.g., those organizing or financing activities, never wear uniforms or ever show arms? Even now, while the U.S. administration denies the applicability of the POW provisions of Geneva Convention III to Taliban detainees (almost certainly unjustified under that Convention) or Al Qaeda detainees (more convincing under extant law), the ICRC is able to monitor their conditions at a number of detention facilities.

More likely, the harms arise from the prospect that states, such as the United States, may be claiming the right to kill terrorists (as the U.S. government defines them) anywhere or detain them indefinitely. This is a significant expansion of the notion of armed


conflict, and eats away at much of the traditional way of addressing transnational crime, e.g., through extradition and trial. But if that is the case, those inside and outside of governments should focus on those narrow issues, rather than assume that international humanitarian law has little to say about such conflicts.

### **Misconception 2: *Jus in bello* can and should be divorced from *jus ad bellum*.**

One of the hallmarks of international humanitarian law since the nineteenth century has been the need to protect victims of armed conflict regardless of its cause or the blameworthiness of the sides under the law governing recourse to force (*jus ad bellum*). Today, the Conventions and Protocols apply equally to entities acting unlawfully — in violation of the UN Charter’s ban on the use of force — and those acting lawfully — notably in self-defense or under UN authority. Without such a clear distinction, combatants would argue that the justness of their cause allows for all sorts of indignities against combatants and civilians, defeating the whole enterprise of international humanitarian law. With regard to terrorism, the argument would be that the question of who is right and who is wrong in the decisions by certain states and non-state groups to use violence against each other should not detract from the need to regulate that conflict in a humanitarian manner.

The *jus in bello/jus ad bellum* distinction is thus premised on the idea — based on fundamental principles of humanity — that all combatants and civilians deserve protections regardless of the merits of their side. In addition, international actors may well have other reasons for granting both sides protection. They may understand the difficulty of knowing (or at least reaching a consensus among states) in certain conflicts which side has violated *jus ad bellum* by initiating the war; in these cases, it is better to grant both sides protection.

But the reality is not as obvious as this distinction suggests. First, the inclusion of wars of liberation in Protocol I’s coverage stemmed from the sense among many (but by no means all) governments that certain struggles against colonial or alien domination were legitimate; and even Protocol II’s protections recognize that insurgent groups might be engaging in a legitimate activity. Second, even for wars that are illegal, i.e., aggression under the UN Charter, states seem to have found these not so obnoxious to merit denying even the offenders humanitarian protections. States quietly accept that wars still happen; that aggression still occurs; and that they might, after all, even be aggressors themselves one day. They are not willing to say that the aggressor is so evil — that his goal is so beyond the pale of



civilized conduct — that he forfeits all protections for his troops and his civilians.

But what happens when we have non-state actors whose goal is simply to kill innocent people and terrorize a population? While not all groups labeled as terrorist by states have this goal — many use attacks on civilians as a means to gain control of specific territory (e.g., the IRA or Palestinian groups) — there seems to be no such goal for Al Qaeda. It has no leaders in waiting to take over the United States or the United Kingdom. It claims to want those states to change their foreign policies on various issues, but there is also evidence that it is simply the way of life practiced in these states that it finds a threat. In these situations, can and should governments make the leap of faith that such conflict against organized states deserves regulation by detailed protections of international humanitarian law? When the goal of a group is so beyond acceptable conduct that it finds no defenders among governments, extending the protections of international humanitarian law to such conflicts serves a legitimating function. Equally significant, key governments likely have the same fear, and are unlikely to engage in a process that they will regard as tarnishing international humanitarian law.

**Misconception 3: The non-reciprocal nature of international humanitarian law demands protection even for those entities that insist on violating it.**

Another mantra of humanitarian law is that, unlike much international law, the targets of its norms deserve protection even if they themselves violate them. Thus, traditional norms of treaty interpretation that permit a state to suspend its obligations in the event of a material breach by the other side do not apply in many key situations. At a minimum, reprisals — i.e., otherwise unlawful acts taken in response to prior unlawful acts — against POWs, civilians, and wounded, sick, and shipwrecked combatants are explicitly prohibited by Geneva Convention III (article 13), Geneva Convention IV (article 33), and Protocol I (articles 20 and 51(6)). Some might call for the abolition of all reprisals based on the underlying purposes of humanitarian law. Another form of non-reciprocity appears in Protocol I's requirement (article 44(2)) that combatants do not lose their status even if they violate most norms of humanitarian law in the course of their operations. Under this non-reciprocity model, the violations of international humanitarian law by various terrorist groups should not be an excuse for denying them certain protections.

But non-reciprocity is not and should not be all-encompassing. First, current humanitarian law does not preclude reprisals during combat against combatants that might violate international

humanitarian law. Second, even the bans on reprisals in Protocol I have their detractors, such as the United Kingdom, which issued a reservation to that treaty allowing for the possibility of measured reprisals against civilians if the opposing party itself engaged in serious, deliberate attacks on civilians. Lastly, the granting of protections in Protocol I was, in fact, part of a reciprocal bargain, not simply extending protections to guerrilla groups as a gesture of goodwill, but creating obligations for those movements as well. Thus Protocol I denies combatant status to guerrilla groups that do not follow certain requirements regarding open carrying of arms.

The nature of terrorist organizations — whose *modus operandi* emphasizes targeting of civilians — pushes the need for non-reciprocity even further. One side is determined from the outset to carry out a struggle regardless of even the most fundamental principles of humanity. If these acts are not simply an aberration but its principal way of operation, why should its members be afforded anything more than treatment consistent with those basic notions of humanity? (Some will suggest that they do not even deserve that treatment, of course.) States will not and should not tolerate a legal regime whereby only one set of combatants benefits from the protections of international humanitarian law.

This solution is not a recipe for a free-for-all in the war against terrorism. International law is not a blank slate merely if the Geneva Conventions do not formally apply. As noted, basic principles of humanity still apply and are accepted, at least officially, by governments. They would mean, for example, that terrorists cannot be tortured upon capture and that their families cannot be targeted. Yet to suggest that the international humanitarian law's non-reciprocal approach to protections requires granting them a vast array of other protections, such as the combatant's privilege (against prosecution) or POW status, is unwarranted.

At the same time, I recognize that extending POW status to those who formally do not legally merit it can serve a prophylactic function by creating additional pressures on their keepers to treat them with respect. Despite administration promises to treat detainees humanely, it is now apparent that the February 2002 Presidential decision to deny POW status to *all* those detained at Guantanamo Bay sent a tacit signal to some military lawyers, interrogators, and administrators of U.S. detention facilities worldwide that a lesser degree of respect for detainee rights was now acceptable. Once the familiar framework of the Geneva Conventions was removed, some actors within the government perceived a legal vacuum, with the result that the promised humane treatment often did not materialize.

### Misconception 4: The paradigms of combat and combatants are out of date.

One argument made for the revision of the Conventions and Protocols is that they reflect an outdated notion of what constitute armed conflict and those participating in it. Thus, Al Qaeda's actions against the United States — whether against civilians or military personnel, whether within the United States or abroad — are a form of armed conflict; and the U.S. actions in fighting, capturing, and killing Al Qaeda forces — whether in Afghanistan, Pakistan, Yemen, or elsewhere — are equally armed conflict. The argument is not that customary law does not offer some protections, but that the Conventions and Protocols, which on their face govern only three sets of conflicts (state vs. state, state vs. national liberation movement, and state vs. organized insurgency), need to respond to the changing nature of armed conflict.

This apparent need for updating seems bolstered by the very use of the war paradigm by states engaging with Al Qaeda. Thus, the United States and its allies have used the rhetoric of armed conflict to respond to the attacks of September 11. U.S. officials refer to their operations as the “war” on terrorism; and the United States has invoked its rights under *jus ad bellum* — UN Charter Article 51's right of self-defense to an armed attack — in acting against Afghanistan and Al Qaeda targets and personnel around the world (a position I find justifiable at least with respect to the operations in Afghanistan). The U.S. government relies on this characterization to avoid treating Al Qaeda as simply a criminal organization that can be targeted only through traditional law enforcement activities, e.g., police investigations, extradition requests, and civilian trials with full due process. Advocates for change say that the administration is trying to have it both ways — asserting various rights under *jus ad bellum* while denying the applicability of key aspects of *jus in bello*.

It seems unquestionable that the United States and others are engaged in an armed conflict with Al Qaeda. But the subsidiary concepts of combat operations and combatants that permeate Hague and Geneva Law are not and should not be infinitely elastic. Part of the core of international humanitarian law is the creation of physical and temporal space in which it is perfectly legal for certain categories of people to kill each other: that space is combat and those people are combatants. The combatant's privilege means that combatants (at least in international conflicts) may not be punished for lawful combat operations, though, of course, they can be punished for war crimes. The notions of armed conflict, combat, and combatant have changed since the days of the Hague Conventions; today, the problems of determining whether the unconventional nature of some armed forces'

garb (like the Taliban) serves to deny them combatant status are well known.


Yet, even with the expansion of the notion of armed conflict to cover acts by national liberation movements in Protocol I, there remain the ideas of the military engagement and the military attack. For instance, under Protocol I, if a fighter does not carry his arms openly during the engagements as well as during the deployment before an attack while visible to the adversary, he is not a lawful combatant (entitled, for example, to POW status). This compromise (though opposed by the United States) preserves the idea of combat operations and the special nature of the combatant, who must distinguish himself from the civilian population in combat and the time leading up to it. The ban on perfidy also reinforces this idea.

To expand the laws of wars to apply to any situation where an organization (or conceivably an individual) initiates force is to blur the distinction between cases where the law allows individuals to kill each other and those where the law prohibits it. Under such a view, every attack on a military installation, even if undertaken without any separation from the civilian population (indeed, this is the *modus operandi* of many terrorist operatives) is *per se* a combat operation and those who carry it out combatants. The result is to turn every act of violence into an act of war, and all those who commit it into lawful combatants who enjoy the combatant's privilege. It infinitely expands the protected zone in time and space. Where does one draw the line between Al Qaeda attacks and those of the mafia or simply an insane person? For the combatant's privilege to remain, as it should, a hallmark of international humanitarian law, it must be confined to a highly limited set of circumstances. States will not and should not agree to extend it to any individual or group that chooses to attack a military target.

### Priorities for normative development

Of course, as noted, the United States government conceives of the struggle against Al Qaeda as a war, and it wants to expand the geographical zone of legitimate combat significantly — to cover, for instance, the killing by remotely piloted vehicle of a suspected Al Qaeda leader in Yemen. The executive branch also wants to expand the notion of combat temporally. It refuses to talk about an end to the hostilities, partly to justify the indefinite detention without trial of Al Qaeda and Taliban personnel.

These two expansions of the notions of armed conflict, combat, and combatant — geographical and temporal — are the most vexing questions for international humanitarian law today. On



the geographical plane, it is hard to accept the U.S. position that treats Al Qaeda operatives around the world as legitimate targets for wartime killing while rejecting the idea that Al Qaeda operatives are acting as lawful combatants when they kill U.S. soldiers anywhere in the world. The government squares the circle by relying on the notion of the “illegal combatant,” something that international humanitarian law already accepts in terms of spies, mercenaries, and guerrillas who do not meet the special requirements of carrying arms openly. This allows a state to kill them but afford them fewer benefits when captured. But is there no limit to how and where someone becomes such an illegal combatant?

The simplest solution is to say that the armed conflict paradigm does not apply at all — that Al Qaeda’s members are criminals and that the United States should use law enforcement techniques to try and punish them, just like European states are rounding up suspected members of Al Qaeda cells. Human rights law, which governs peacetime law enforcement, still recognizes significant discretion for police acting in genuine self-defense, while protecting criminals from arbitrary killing by the state. The question is whether this attitude will suffice in a world where Al Qaeda can gain access to weapons of mass destruction. If states treat the campaign against Al Qaeda as an armed conflict, then they need to do so in a way that does not entail a wholesale change in the notion of combat. The conflict with Al Qaeda needs to have boundaries beyond which the special privileges that the law of war gives to combatants do not apply.

As for the temporal question, namely the administration’s willingness to tolerate indefinite detention of Al Qaeda fighters, it is surely unsustainable in the long term, as U.S. courts are now recognizing. (As noted, its position on the Taliban seems to be a misreading of the Conventions.) Humanitarian and human rights law mandate that individuals — whether lawful combatants, civilians, or others — not be held indefinitely without trial. But rather than recognizing some form of combatant status for Al Qaeda and then trying to determine at what point hostilities cease (so that they would have to be released), another possibility is available. They should enjoy protections consistent at a minimum with basic principles of humanity. Beyond that, states should apply the list of minimal protections found in Article 75 of Protocol I to any captured suspected terrorist. This list currently applies to anyone in the control of a party to an interstate conflict who does not enjoy better treatment under other parts of the Convention and Protocol. These include the basic human right to a trial for suspected crimes.

In summary, as a predictive matter, it seems exceedingly unlikely that states will agree to a significant revision or augmentation of the laws of war to address the sorts of unconventional threats posed by transnational groups such as Al Qaeda. To date, only a very small part of those activities that some states refer to as terrorism — guerrilla warfare as part of a legitimate war of national liberation — has come under the protection of international humanitarian treaties. The remainder of unconventional activity is still subject to baseline principles of humanity, and states see little reason to grant more. Protocol I was expanded to cover liberation movements because a group of states — those in the developing world — insisted upon such protections. Al Qaeda and other groups have no such vocal constituency, however, as much as some states may support them *sub silencio*. If, for some reason, enough states were to find the absence of treaty law in the war on terrorism an unacceptable gap, a Protocol III is likely to be far more limited than Protocol II turned out to be. Indeed, I suspect it will do nothing beyond recognizing the most basic principles of humanity.

As a normative matter, any codification that goes beyond the obvious principles of humanity is at best premature. The legitimization function accomplished through codification sends a signal to these unconventional fighters that their tactics are acceptable — that they are lawful combatants, even if they consider their great victories to be crashing a plane into a commercial building or incapacitating a major city via germ or chemical weapons. The immediate threat to public order around the world from groups whose mission is to create civilian casualties — who themselves reject the most basic principles of the law of war — argues against enveloping their activities in a set of detailed law of war norms. Any such process will do little to protect the victims of such acts, as those people are already illegitimate targets under international criminal law, humanitarian law, and human rights law. So it seems to benefit only one side in the conflict. Whatever protections those fighting colonialism may have deserved, Al Qaeda and its allies fall into a completely different category.

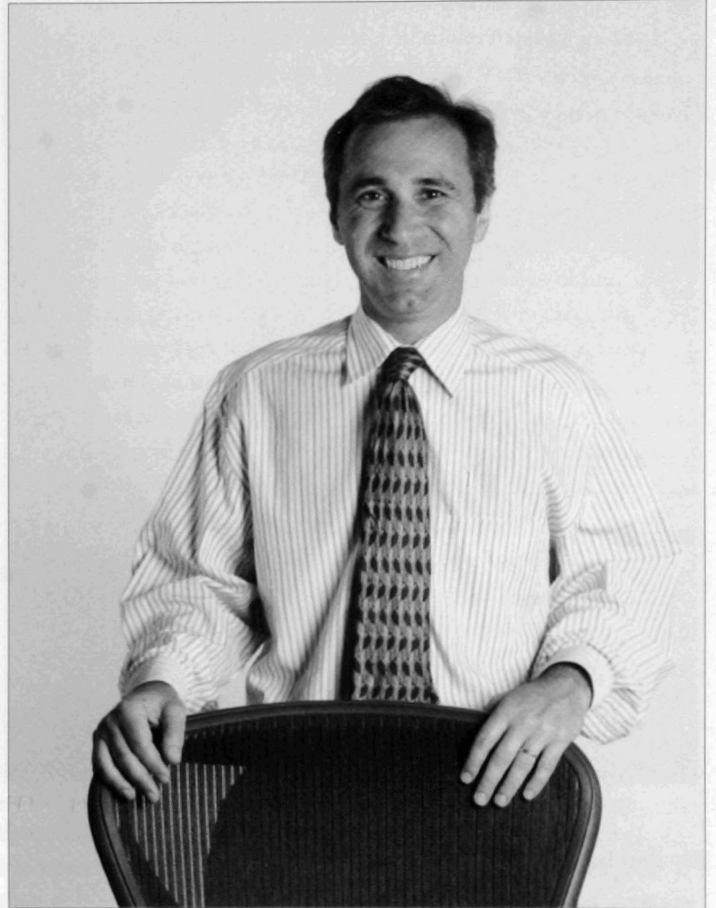
Surely, governments need to figure out some limits to armed conflict as a geographic and temporal matter, and academic and governmental discussion of such issues can help elaborate whether the existing norms work or need some further elaboration. But beyond that, as long as those fighting terrorism respect the basic principles of humanity in that struggle, international humanitarian law ought to live with something close to the *status quo*.



Prior to joining the Law School in 2004, Professor **Steven R. Ratner** was the Albert Sidney Bursleson Professor in Law at the University of Texas School of Law at Austin. He holds a J.D. from Yale; an M.A. (diplôme) from the Institut Universitaire de Hautes Etudes Internationales (Geneva), and an A.B. from Princeton. Before joining the Texas faculty in 1993, he was an attorney-adviser in the Office of the Legal Adviser at the U.S. State Department for six years.

Ratner's research has focused on challenges facing new governments and international institutions after the Cold War, including ethnic conflict, territorial borders, implementation of peace agreements, and accountability for human rights violations. He has written and spoken extensively on the law of war, and is also interested in the intersection of international law and moral philosophy and other theoretical issues. In 1998–1999, he served as a member of the UN Secretary-General's three-person Group of Experts for Cambodia. Among his publications are three books: *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War* (St. Martin's, 1995); *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford, 1997 and 2001) (co-author); and *International Law: Norms, Actors, Process* (Aspen, 2002) (co-author). A member of the board of editors of the *American Journal of International Law*, Ratner was a Fulbright Scholar at The Hague during 1998–99, where he worked in and studied the office of the OSCE High Commissioner on National Minorities.

At the Law School, he teaches *Transnational Law, Advanced Transnational Law, International Investment, Human Rights, and the Law of War*.





## Detroit Area Study on Financial Services: What? Why? How?

For most of us, getting our paychecks directly deposited into our bank accounts, writing a check, or storing our money in an account can be taken for granted. We often struggle to save for longer-term goals, our children's education, or retirement, but most of us, most of the time, do not worry whether our savings or insurance will be enough to get us through an illness, or even loss of a job.

For most low- and moderate-income households, the picture is quite different. High cost financial services, barriers to saving, the lack of insurance, and credit constraints may contribute to poverty and other socio-economic problems. Low-income individuals often lack access to financial services from banks and thrifts, and turn to alternative financial service providers such as check cashers, payday lenders, and money transmitters.<sup>1</sup> Low-income households may also face high costs for these kinds of services, and some may find it more difficult to save and plan financially for the future. Living paycheck to paycheck may leave them vulnerable to emergencies that may endanger their financial stability, given the lack of insurance for key life events, and the lack of longer-term savings may undermine their ability to invest in human capital, purchase a home, and build assets. High cost financial services may reduce the value of government income transfer programs such as the Earned Income Tax Credit.

Despite these differences, all of us rely on financial services in our daily lives. Yet economists often have a difficult time figuring out why we all behave the way we do. Many of us save less than we should, borrow more than we ought, and get ourselves entangled in financial transactions that make little sense to an outside observer. Recent research in behavioral economics has challenged many of the central assumptions of economic theory regarding household financial decision making.

I have begun an empirical project to study these issues with an in-depth household survey in the Detroit metropolitan area. This essay introduces the study, explores competing theoretical frameworks that motivate the inquiry, describes the survey methodology, and provides an update on the status of the project.

### By Michael S. Barr

*The following article is based on a talk given by Assistant Professor of Law Michael S. Barr to the University of Texas Law School-Harvard Law School Joint Conference on Commercial Law Realities in Austin, Texas, in April. Barr was selected by the University of Michigan's Institute for Social Research, Survey Research Center to be the faculty investigator for the Detroit Area Study, which the University has conducted for more than 50 years. Barr is using the study to explore the financial services needs of low- and moderate-income households, building on his groundbreaking analysis in his article "Banking the Poor," published by the Yale Journal on Regulation. Barr raised a total of nearly \$800,000 from the Ford Foundation, the MacArthur Foundation, the Fannie Mae Foundation, the Casey Foundation, and the Mott Foundation, as well as University sources, for the study. Barr is beginning field work this summer.*

## The Detroit Area Study

I was selected by the University of Michigan's Institute for Social Research, Survey Research Center (SRC) to be the faculty investigator for the Detroit Area Study (DAS) for 2005. The DAS has been conducted under the auspices of SRC for more than 50 years. I will survey low-, moderate-, and middle-income households from the Detroit metropolitan area about (1) how and why they use a wide array of financial services, as well as the costs and benefits of such services; and (2) how they would respond to new types of cost-effective financial products tailored to their needs. In addition, I have geocoded all financial services firms in the three-county area, including more than 1,300 check cashers, pawn shops, payday lenders, and tax preparation firms, and more than 350 banks, thrifts, and credit unions. I will be using mail and telephone surveys to gather information about the prices and products offered by this wide range of firms.

Broadly speaking, my research aim is to develop a comprehensive understanding of the financial services behaviors of low- and moderate-income households and the financial services constraints that they face. My goal is both to inform the theoretical debates on key questions regarding household financial decision-making and to contribute to the development of policies to expand access to financial services.

## Theoretical inquiry

The study can help to inform theoretical debates among traditional economic models, behavioral economics, and social network theories regarding low- and moderate-income households. In this short space, I briefly set out competing theories, and explore implications of these theories in five key areas: saving, credit, transactional services, insurance, and household preference formation. I suggest for each area the kind of questions that the study may contribute to answering.

Basic assumptions about how people behave shape our understanding of economics and our views about the role of law. Traditional economic models of rational choice view decisions as made by optimizing rational agents with perfect foresight. Research in psychology and behavioral economics provides alternative explanations for decision-making, such as the importance of default rules, framing, and heuristics.<sup>2</sup> Behavioral economists focus on the limits of our rationality. By contrast, the public debate is largely consumed by "culture of poverty" theories of social deviance, laziness, imprudence, and impatience as descriptions for the behavior of the poor.

These differing frameworks affect how one views a wide range of phenomena, such as savings behavior, risk-taking in investment, and insurance. The behavioral economic insight, for example,

regarding default rules, can be used not only to understand individual choice, but also, perhaps, to design institutions to influence individual decision-making.<sup>3</sup> That is, our understanding of how individuals make decisions can have profound implications for differing approaches to the role of law in such areas as consumer protection, disclosure, bankruptcy, and national savings policy.

Little empirical work has attempted to translate these theories into the world inhabited by low-income households in the United States. Bertrand argues that "the poor may exhibit the same basic weaknesses and biases as do people from other walks of life, except that in poverty, with its narrow margins for error, the same behaviors often manifest themselves in more pronounced ways and can lead to worse outcomes."<sup>4</sup> By contrast, Duflo suggests that the stress of poverty "almost certainly affects the way people think and decide" and that "[w]hat is needed is a theory of how poverty influences decision-making, not only by affecting the constraints, but by changing the decision-making process itself."<sup>5</sup> These theories can and should be informed by empirical studies that provide information on household financial behavior and attitudes, and the constraints that such households face.

One important area for analysis of these differing frames involves savings. The dominant rational choice model is the "life cycle" theory, which suggests that savings are used to smooth consumption over one's life.<sup>6</sup> An extension of the rational choice model posits that precautionary motives also influence saving; that is, rational individuals with full foresight save as a form of insurance in the face of uncertainty.<sup>7</sup> Behavioral models suggest that, although these rational choice theories may be useful at the aggregate level, individual choices regarding saving are profoundly affected by psychology: mental accounting, starting points, endowment effects, and other frames. For example, groundbreaking empirical research by Richard Thaler at the University of Chicago has demonstrated the importance of framing, starting points, and default rules in determining whether and how much individuals will save in employer-sponsored retirement plans.<sup>8</sup>

Little empirical research is directed at savings among low- and moderate-income households in the United States. How and why do low-income households save? Which households are able to save? A "culture of poverty" theory would suggest that low-income households that do not save have different preferences, or values (thrift, prudence, work ethic) from other households. A behavioral theory would suggest that access to different forms of financial institutions or the opportunity for direct deposit at work might affect saving by affecting individual choices through institutional channels. That is, having a bank account, or using direct deposit at work, may contribute to



saving apart from rational choice models of saving. A demonstration project involving “Individual Development Accounts” for low- and moderate-income households suggests that institutional structure affects savings.<sup>9</sup> The life cycle theory predicts higher savings-to-income ratios than data suggest that the poor exhibit, but failures in measuring how low-income people save may be at fault. Moreover, under plausible assumptions regarding the hard budget constraints of poverty, a rational choice theory would explain that low-income households do not save because they are poor; there are simply insufficient funds to set aside each month after necessities. Put another way, no current savings could be the rational choice in smoothing consumption over one’s life. Other rational choice models predict lower savings because social safety net programs reduce the need to save as a precautionary measure against income shocks.<sup>10</sup>

Yet the rational choice model is confronted with a puzzle: Lots of households that should save don’t, and evidence from other studies suggests that some low-income households do save. Why do these households save and how are they able to do so? Do families save out of a precautionary motive, to build human capital through education, to save for retirement, or for other goals? What is the effect of saving on the ability of households to weather hardships, such as job loss or injury? How are households able to save? What is the role of “mental accounting,” in which different sources of income are used for different functions? Are tax refunds, including from the Earned Income Tax Credit, an important form of saving, and do households view tax refunds as a time to commit to future saving? Answers to these questions can inform debates over pension law reform and Social Security, as well as private sector initiatives to encourage savings.

A second important area involves credit. Liquidity constraints can affect consumption, savings, work incentives, insurance, and time horizons for financial decision-making. Yet little empirical work has been done until recently on the credit constraints facing low-income households.<sup>11</sup> What kind of liquidity constraints do low- and moderate-income households face? What are the causes and consequences of such constraints? To what extent do the choices among different credit channels used by households, for example, banks, payday lenders, pawnshops, and refund anticipation lenders, reflect credit constraints, different preferences (for example, convenience), or other factors? Why do such households borrow? For example, do households take out refund anticipation loans because they are impatient, need to pay off their bills, or have to pay the tax preparer? What are consumer attitudes towards credit, the consequences of delinquency, and bankruptcy and to what extent are differing attitudes, if any, reflected in

behavior? To what extent do consumers understand credit terms, such as minimum payment terms on credit cards? Answers to these questions could lead to better disclosures and could inform the debate over bankruptcy reform.

A third important area involves transactional services. One theory suggests that use of check cashers is simply a rational response to those with preferences for convenience and impatience. A behavioral economics approach focuses on the role of social networks in a neighborhood in conditioning individual choice. Economic network theory suggests instead a focus on conflicting payments systems: Employers pay by check while landlords and other businesses in low-income communities accept cash. An institutional focus combines these insights to suggest looking at the structure of banking to explore these transaction costs.

Welfare economics largely treats income as if it were cash (or a fully liquid intangible) for purposes of determining utility. What happens to the model if the transaction costs of converting income into useable form are high relative to income? As a normative matter, as I argued in “Banking the Poor,” the costs of converting income into cash may be grounds for a non-income form of redistribution of financial services. But these theories require knowing the size and direction of some key parameters. For example, does proximity to different types of financial services affect financial services usage patterns, preferences, and needs? Do price and product offerings explain such matters? Are other factors, such as hassle, habit, or employment patterns what is really at work? Does access to a bank account affect saving and credit?

Fourth, low- and moderate-income households face risks to their health, income, employment, household structure, and the like. To what extent are such households insured against such risks? Measures of insurance include formal insurance mechanisms, such as unemployment, disability, and health insurance, as well as informal mechanisms and credit, such as borrowing from friends and family, or self-insuring through savings, holding durables, or other means. Empirical research can contribute to our understanding of the extent to which low-income households are under-insured, and can begin to tease out the links among insurance, savings, and credit as substitutes in providing a cushion against hardship for low- and moderate-income households. To what extent can financial hardships be understood as insurance failures?

Fifth, empirical research can contribute to a better understanding of household preference parameters,<sup>12</sup> such as risk tolerance and future-orientedness, and their influence on decision making with regard to savings, insurance, credit, and the like. To

what extent does heterogeneity of preferences explain behavior? Alternatively, to what extent are household preferences and behaviors shaped by how available choices are framed for them? How predictive are economic measures of risk tolerance? What is the relationship between risk tolerance and income? Are low-income households more risk tolerant because they have little to lose, or more risk averse because they have no cushion to fall back on? Does risk aversion contribute to lower levels of borrowing and lower returns to capital? Are low-income households more impatient than others as measured by time preference and inter-temporal rates of substitution?<sup>13</sup> Do households save more because of an underlying propensity to plan or because of the savings choices they are offered? Is the lack of self-control an important factor explaining saving and borrowing decisions or are such matters driven by hard budget constraints? Understanding heterogeneity in preferences can lead to better modeling of economic behavior under both rational choice and behavioral models.

Lastly, in addition to these theoretical contributions, empirical research can contribute to policy debates and private-sector decision making regarding product offerings. For example, this research will provide guidance to federal government policy makers about the savings needs of low- and moderate-income households as Congress and the executive branch are considering Social Security and tax changes that will affect savings policy across the income spectrum. Low- and moderate-income households likely present quite different challenges — and opportunities — to policy makers than other households. The research will also contribute to other efforts, both private sector and governmental, to expand access to financial services. For example, one product from the research will be a market model enabling financial institutions to measure possible take-up rates among low- and moderate-income urban households for different forms of cost-effective financial products. Thus, the research is also designed to assist efforts to increase the financial services opportunities of low- and moderate-income households.

## Methodology

The project contains four main components:

- The household survey measures financial services usage patterns, attitudes and preferences, demographics, income, wealth, and employment characteristics.
- The conjoint portion of the study uses choice-based methodology to measure household financial services preferences.
- The non-bank financial institutions survey captures information about the price and product offerings of check cashers, grocery and other stores that cash checks, as well as payday lenders, pawnbrokers, and tax preparation firms.

- The bank telephone survey captures price and product information on bank accounts offered by area depository institutions.

Together, these four instruments will provide a comprehensive picture of low- and moderate-income financial services demand and supply in the Detroit area.

## Household survey

We will conduct computer-assisted, personal interviews with households in the Detroit metropolitan area, which includes Wayne, Oakland, and Macomb counties. Each interview, to be conducted by SRC field staff, will last approximately 60 minutes. In-person interviews enable interviewers to reach low- and moderate-income households more systematically than telephone interviews, and permit interviewers to ask sensitive questions about financial services that households may be reluctant to answer by phone. The target sample for the DAS is a stratified random sample of 1,000 completed household interviews. I have divided census tracts into three strata: Low-income (at or below 60 percent of area median); Moderate-income (61-80 percent of area median); and Middle-income (81-120 percent of area median). The 1,000 interviews will include 600 in the low income stratum, 300 in the moderate income stratum, and 100 in the middle income stratum. For all three strata combined, we expect to need a total starting sample of 1,859 listed households in order to obtain 1,000 completed interviews. SRC field staff have listed the sample from 150 segments of the Detroit metropolitan area. The sampling frame for the first-stage selection is a frame of all census blocks in the area. The sampling frame for the second-stage selection of households is a listing of all housing units in the selected segments. Households will be randomly selected from these segments, and a randomly selected adult in the household will participate in the survey. The data collected will generalize to a random sample of households and individuals.

## Conjoint analysis

I developed the conjoint methodology with Ed Bachelder of Dove Associates using CBC software from Sawtooth Technologies. The conjoint approach analyzes respondent preferences for different types of payment-card technologies that can be used for income receipt. It is difficult to measure preferences from observed behavior, because behavior derives from the intersection of preferences and constraints. Using hypothetical products permits direct measurement of preferences.

The conjoint methodology uses a repeated measures technique. Each respondent will be shown a series of 12 cards. Each card contains columns with three product options — a debit card, a payroll card, and prepaid debit card — and a choice of “none of



the above.” The product offerings are realistic composite products based on my research regarding existing product offerings and discussions with financial institutions and vendors about plausible variations. Nine rows contain product attributes, tested at different levels, for each product, such as fees, deposit features, bill payment, savings features, credit background checks, and consumer protection. Product features are constructed with an orthogonal design that will permit assessment of the importance of different features to the respondent’s choice of product. Using multinomial logistical regression models, one can estimate the importance of each product feature (e.g., price, savings plan) in the consumer’s choice of products, as well as “take rates” for hypothetical products, although such data will be analyzed as measuring consumer preference, rather than actual behavior. Three versions of the conjoint, with a common “holdout” card, will be randomly administered to control for the possibility of design order bias. By combining conjoint analysis with demographic, behavioral, and preference information from the household survey, we will be able to control for factors, such as race, age, and gender, that may be correlated with preferences.

### **Non-bank financial institution mail survey**

I developed a list of 1,365 non-bank financial institutions in the three-county area relying on a variety of sources. Institutions that cash a certain number of checks are subject to federal reporting requirements as money service businesses, including money transmitters, grocery stores, check cashers, payday lenders, and liquor or convenience stores. This dataset was supplemented by Web-based telephone listings for these types of firms, as well as with listings for tax preparation firms and pawnbrokers. I developed a pen and paper mail survey, which is being sent out to such institutions on their key prices and products of interest. We will use geographic proximity analysis, and price and product analysis to examine constraints facing low- and moderate-income households derived from the location of financial institutions and the cost and availability of useful products, as well as how such constraints affect preferences and behavior.

### **Bank telephone survey**

All 380 branches and headquarters of all banks, thrifts, and credit unions in the three-county area have been geocoded and listed using datasets from the FDIC, the National Credit Union Administration, and Michigan regulatory agencies. Depositories in the Detroit area will be contacted by telephone to determine price offerings on key banking products of interest. These data will also be checked against web listed prices.

### **Project status**

I have formed an advisory board that includes James Carr (Fannie Mae Foundation), John Caskey (Swarthmore), Phoebe Ellsworth (University of Michigan Law School), Reynolds Farley (Institute for Social Research), Jeane Hogarth (Federal Reserve Board), Rochelle Lento (University of Michigan Law School), Sherrie Rhine (Federal Reserve Board), Bob Shoeni (Institute for Social Research), and Michael Stegman (University of North Carolina, Chapel Hill). I am also consulting widely with other experts in the field.

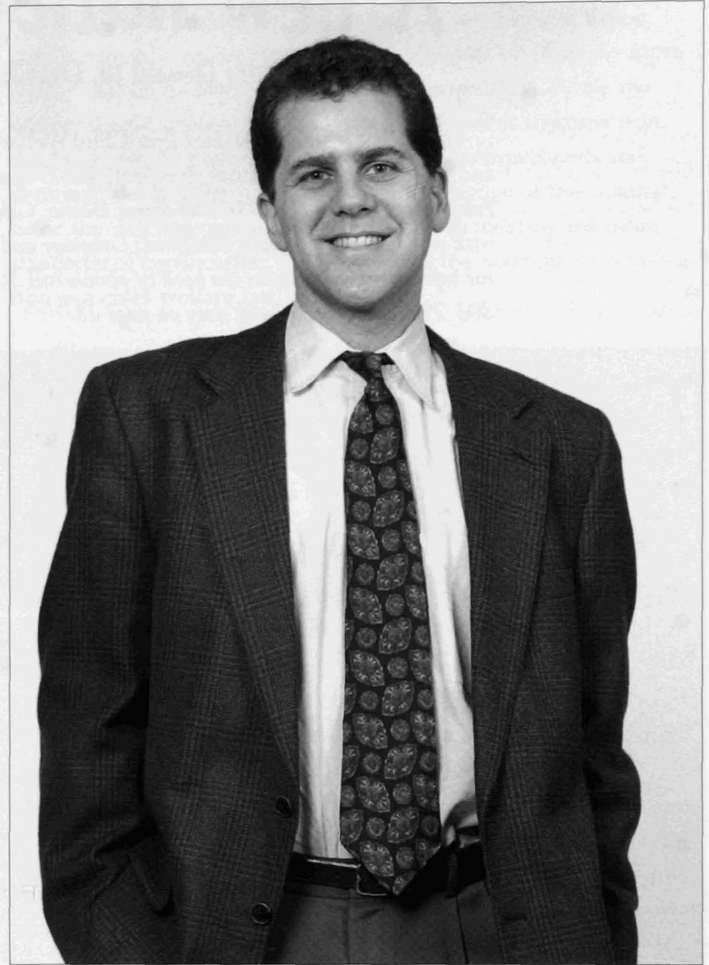
To carry out the survey, I raised a total of nearly \$800,000 from the Ford Foundation, the MacArthur Foundation, the Fannie Mae Foundation, the Casey Foundation, the Mott Foundation, the Provost’s Office, the Office of the Vice President for Research, the Center on Local, State and Urban Policy, and the National Poverty Center.

During fall 2004 and winter 2005, I developed the sampling plan, as well as the household survey and the conjoint analysis that will be administered to households, and, separately, a mail survey that will be sent to area financial service providers to determine key supply data. The survey instruments have gone through numerous drafts, and have been vetted by my advisory board, outside academic experts and practitioners, and an ISR survey methodology team expert in cognitive and interpretive problems. The instruments have been pretested by law school students and SRC field staff. We undertook cognitive interviews, in which core questions are discussed with households demographically similar to the sample to get a better understanding for respondent comprehension and decision making. We also conducted a pretest on a representative sample of low- and moderate-income households. After pre-testing and survey modifications, we will be in the field for interviewing during the summer.

### **Conclusion**

Studying the financial decision making of low- and moderate-income households can help to illuminate a world that is often hidden in plain sight. How many of us walk by the signs for “Checks Cashed Here,” “Money Orders for Sale,” and “Payday Loans: Get Cash Quick” without thinking about the implications of those signs for the daily lives of lower-income households? By exploring these issues in the Detroit Area Study, I hope to reveal this reality, and to shed light on fundamental questions regarding how people behave that are at the core of current legal debates based on advances in behavioral psychology and economics.

Assistant Professor of Law **Michael S. Barr**, who joined the faculty in fall 2001, teaches *Financial Institutions, Jurisdiction and Choice of Law, and Transnational Law*. He served as chair and now is on the executive committee of the Section on Financial Institutions of the Association of American Law Schools. Barr earned his B.A., *summa cum laude*, with Honors in History, from Yale University, an M. Phil. in International Relations from Magdalen College, Oxford, as a Rhodes Scholar, and his J.D. from Yale Law School. Barr served as a judicial clerk for Justice David H. Souter of the Supreme Court of the United States, and for Judge Pierre N. Leval, then of the Southern District of New York. His wide experience includes serving as: special adviser and counselor on the Policy Planning Staff of the U.S. State Department; Treasury Secretary Robert E. Rubin's special assistant; deputy assistant secretary of the Treasury; and special adviser to the President. Barr is a nonresident senior fellow at the Brookings Institution and a member of the bars of New York and the District of Columbia.



#### Endnotes

- <sup>1</sup>See generally Michael S. Barr, "Banking the Poor," 21 *Yale Journal on Regulation* 121 (2004).
- <sup>2</sup>See, e.g., Daniel Kahneman and Amos Tversky, *Choices, Values, and Frames* (2000).
- <sup>3</sup>See, e.g., Cass R. Sunstein and Richard Thaler, "Libertarian Paternalism is Not an Oxymoron," 70 *University of Chicago Law Review* 1159 (2003); Richard Thaler & Cass Sunstein, "Libertarian Paternalism," 93 *American Economic Review* 175 (2003); Colin Camerer, et al., "Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism'," 151 *University of Pennsylvania Law Review* 1211 (2003); Michael Sherraden and Michael S. Barr, "Institutions and Inclusion in Savings Policy," in Nicolas Retsinas and Eric Belsky, eds., *Building Assets, Building Credit: Creating Wealth in Low-Income Communities* (2005).
- <sup>4</sup>Marianne Bertrand, Sendhil Mullainathan, and Eldar Shafir, "A Behavioral-Economics View of Poverty," 94 *American Economic Review* 419 (2004).
- <sup>5</sup>Esther Duflo, "Poor but rational?," in A. Banerjee et al., eds., *What Have We Learnt About Poverty?* (2004).
- <sup>6</sup>F. Modigliani and R. Brumberg, "Utility Analysis and Aggregate Consumption Functions: An Interpretation of Cross-Section Data," in K. Kurihara, ed., *Post-Keynesian Economics* (1954); Milton Friedman, "A theory of consumption function," NBER (1957).
- <sup>7</sup>Christopher D. Carroll, "The Buffer-Stock Theory of Saving: Some Macroeconomic Evidence," *Brookings Papers on Economic Activity*, No. 2 (1992).
- <sup>8</sup>See Richard H. Thaler and Shlomo Benartzi, "Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving," 112 *Journal of Political Economy* (2004); James J. Choi, et al., "Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance," in James M. Poterba, ed., 16 *Tax Policy and the Economy* 67 (2002); Brigitte C. Madrian and Dennis F. Shea, "The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior," 116 *Quarterly Journal of Economics* 1149 (2001).
- <sup>9</sup>See Sherraden and Barr, *supra*.
- <sup>10</sup>James P. Ziliak, "Income Transfers and Assets of the Poor," 85 *Review of Economics & Statistics* 63 (2003).
- <sup>11</sup>See Barr, "Banking the Poor," *supra*; Michael S. Barr, "Credit Where it Counts: The Community Reinvestment Act and Its Critics," 80 *New York University Law Review* (2005).
- <sup>12</sup>See, e.g., Robert B. Barsky, F. Thomas Juster, Miles S. Kimball, and Matthew Shapiro, "Preference Parameters and Behavioral Heterogeneity: An Experimental Approach in the Health and Retirement Study," *Quarterly Journal of Economics* 537 (May 1997).
- <sup>13</sup>See, e.g., Emily Lawrence, "Poverty and the Rate of Time Preference: Evidence from Panel Data," 99 *Journal of Political Economy* 54 (1991).

# Representing children: A new national standard

By Donald N. Duquette and Marvin Ventrell

*The following essay is adapted from Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases, published this summer by Bradford Publishing Company (1743 Wazee Street, Denver, Colorado 80202; www.bradfordpublishing.com). It appears here with permission of Bradford Publishing Company and the National Association of Counsel for Children (NACC). For information or to order the book by phone, call 303.292.2590 or 800.446.2831, or fax inquiries to 303.298.5014. See related story on page 28.*

This book is intended to serve as a resource for agency, parent, and children's attorneys who are preparing for the NACC [National Association of Counsel for Children] child welfare law certification exam. But it is more than an exam study guide. The NACC believes that the material in this book represents the body of knowledge that defines child welfare law as a specialized field of legal practice. We believe this publication can serve as a general reference for the child welfare law practitioner and as a guide to develop and deliver much needed training for child welfare lawyers throughout the country.

This book and national certification standards would not have been possible, even a few years ago. Historically, child welfare law and practice have varied significantly from state to state. Recently, however, a national model of child welfare law has emerged through a culmination of federal law and policy and through national standards of lawyer practice. From the Child Abuse Prevention and Treatment Act through the Adoption and Safe Families Act, there is now considerable federal statutory direction in this field with which states must comply in order to secure significant amounts of federal funding for child protection and child welfare services. Additionally, national standards of practice now exist for both children's and agency attorneys, and parent attorney standards are in the drafting stage. The Child and Family Service Review process conducted by the federal government has resulted in Program Improvement Plans for states across the country that further define performance standards for attorneys and call for training and education consistent with the emerging national model. While child welfare law technically remains state law, it is heavily influenced by federal policy. What was once a provincial practice, varying considerably from state to state, has increasingly become a national model of practice.

The benefit of these developments is an increasing uniformity of the legal representation of children, parents, and state agencies. Now, for the first time, it is possible to produce a meaningful national practice book and to award specialty certification based

on a mastery of the knowledge and skills presented here. Since its inception in 1977, the National Association of Counsel for Children (NACC) has worked to build an effective legal workforce for the legal representation of children, families, and agencies in child welfare cases. The child advocacy movement of the 1970s gave rise to previously unknown numbers of abuse, neglect, and dependency cases, and visionaries saw the need for an organization that could train attorneys to appear in these cases. The NACC was founded to fill that need. Yet this territory, particularly the representation of very young children, was uncharted, and the work required more than providing practice tips. It required the definition and creation of a new legal discipline. From the beginning, the NACC has worked not only to provide training and technical assistance to attorneys in the field, but also to establish the practice of child welfare law as a distinct legal specialty that would produce the highest quality legal service.

Certification of lawyers as specialists in child welfare law is an important step in the evolution of this area of practice. In the same way that pediatric medicine grew from obscurity to a recognized medical specialty, the NACC has sought to grow the practice of child welfare law. Whether called juvenile law, children's law, or even pediatric law, we are, as a profession, now poised to achieve the status of a legitimate and respected field of legal practice. In the same way that physicians are board certified in pediatrics, or other attorneys are board certified specialists in certain areas of law, this publication serves as the framework for certification in child welfare law. This has come about because of the dedication of numerous local, regional, and national organizations, and the dedication of thousands of lawyers who saw the value of this work in the service of children and families in our society. They worked tirelessly, without adequate compensation or recognition, and we stand on their shoulders now, as we take the next step — certification of attorneys as child welfare law specialists.

The NACC considered the concept of child welfare law certi-

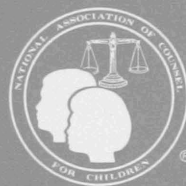


fication for many years. For the longest time, we believed that the field was not ready for this step. Initially, we did not wish to discourage any lawyer who may have been interested in the field. We wanted the field to be accessible to as many committed people as possible. Even though we identified certain requisite competencies for practice, at the early stages we were careful not to make the conditions for entry into the field too burdensome. We thought it more important to nurture the field to maturity. At the same time, our clients, and the children these legal proceedings should ultimately serve, deserve the best we can offer. There comes a time when it is appropriate to advance and improve the competencies, even though raising expectations may make it more difficult to do child welfare work and may discourage some lawyers. It is a tricky balance.

In 2000, therefore, as the field reached a certain level of maturity, the NACC launched its Child Welfare Law Certification Program designed to improve the practice of law for children by offering lawyers who wish to distinguish themselves as elite practitioners the opportunity to become branded as child welfare law specialists. We are moved by the comment of a young lawyer working at the NACC, who said in response to the argument that we should not make it too difficult to do this work: "I don't want to be part of a practice that just anyone can do." And not just anyone can do this work well. Child welfare law is complex and demanding and requires a strong work ethic, high intelligence, extensive training, and empathy for our clients. Certification is a means to cultivate those qualities. By becoming a certified child welfare specialist, lawyers identify themselves as competent for the task.

In 2002, the NACC was awarded a three-year grant from the U.S. Department of Health and Human Services Children's Bureau to create the nation's first child welfare law certification program. The grant called on the NACC to create a program infrastructure, acquire designation from the American Bar Association as an authorized certifying body, develop certification standards, draft a certification exam, prepare certification preparation material, pilot the program in selected states, evaluate the results, and present a plan for national dissemination. In February 2004, after careful review, the American Bar Association accredited the NACC to certify lawyers in the newly defined specialty of child welfare law.

This book is something more than a primer and less than a comprehensive treatise; it covers enough areas in adequate depth for the lawyer to develop a specialist's competence. While the editors do not pretend that everything one needs to know is in this book, we do believe that if an attorney comprehends and demonstrates mastery of the theory and practice of this manual, he or she will have presented, together with meeting the other standards of certification, *indicia* of expertise warranting certification as a child welfare law specialist.

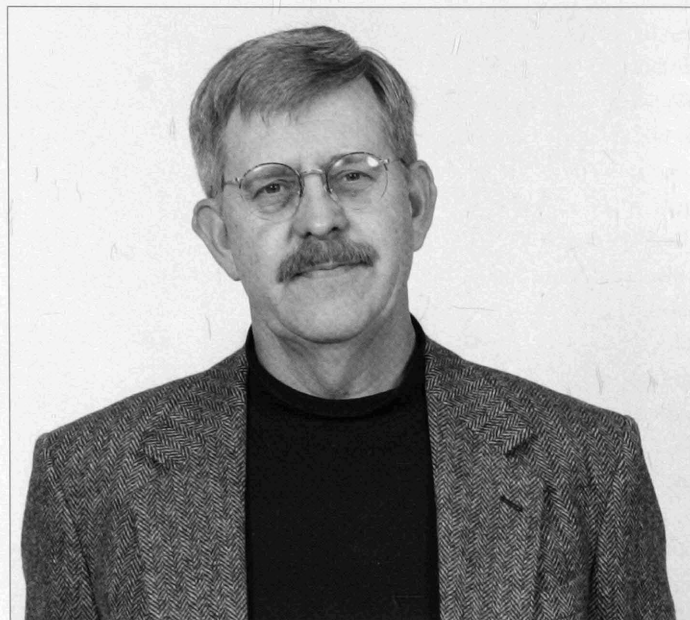


## Child Welfare Law and Practice

Representing Children,  
Parents, and State Agencies in  
Abuse, Neglect, and Dependency Cases

Marvin Ventrell & Donald N. Duquette  
*General Editors*

**Donald N. Duquette**, '75, is Clinical Professor of Law and Director of the Child Advocacy Law Clinic at the University of Michigan Law School, where he has taught since 1976. In 1997–98, Duquette spent a sabbatical year in Washington, D.C., at the U.S. Children's Bureau, where he drafted *Permanency for Children: Guidelines for Public Policy and State Legislation*, as part of President Clinton's Adoption 2002 Initiative on Adoption and Foster Care. He has written and taught extensively on interdisciplinary approaches to child welfare law and has published more than 40 articles and book chapters on the subjects of child protection, foster care, and child advocacy. Duquette has received many awards, including the National Association of Counsel for Children's Outstanding Legal Advocacy Award, the Adoption Activist Award from the National Association of Counsel for Children (NACC), and the Gerald G. Hicks Child Welfare Leadership Award from the Michigan Federation of Private Child and Family Agencies. He serves as NACC treasurer and is a member of NACC's Board of Directors. Duquette is a graduate of Michigan State University and was a social worker specializing in child protection and foster care prior to earning his J.D. at U-M. Before joining the Law School's clinical law faculty, he served as an assistant professor of pediatrics and human development at Michigan State University. His research and teaching interests are clinical law and interdisciplinary approaches to child welfare law and policy. Duquette also manages the Law School's Bergstrom Child Welfare Law Summer Fellowship Program and in winter 2004 started the Law School's first mediation clinic.



President and Chief Executive Officer **Marvin Ventrell** has led the National Association of Counsel for Children (NACC) since January 1994. From 1985 to 1994 he was in private practice, where he represented hundreds of children in both delinquency and dependency cases. He is the recipient of the ABA National Child Advocacy Award and the Kempe Award. He is a member of the Colorado and Montana Bar Associations, a Fellow of the Colorado Bar Foundation, and has served as a juvenile law consultant to numerous organizations, including the U.S. Department of Health and Human Services, the National Council of Juvenile and Family Court Judges, the American Bar Association, and the Kempe Children's Center. He serves on the editorial staff of the Children's Legal Rights Journal and as reviewer for Child Abuse & Neglect, the International Journal. He is editor of the NACC's Guardian and annual Children's Law Manual. He is a trial skills trainer for the National Institute of Trial Advocacy and a lecturer in child welfare and juvenile justice trainings. He is the author of numerous articles and book chapters regarding children and the law. He co-authored the ABA (NACC Revised) Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases and the NACC Recommendations for Representation of Children in Abuse and Neglect Cases.



# EVENTS

**August 4 - 9** American Bar Association  
Annual Meeting, Chicago



**September 16 - 18** Reunion of the classes of  
1980, '85, '90, '95, and 2000

**September 22** State Bar of Michigan Reception  
Lansing



**October 7 - 9** Reunion of the classes of  
1950, '55, '60, '65, '70, and '75

**October 14 - 15** Michigan Difference Weekend



**November 11 - 12** Committee of Visitors

**2006**

**January 4 - 8** Association of American Law Schools  
Annual Meeting  
New Orleans



*John Nannes, '73, and Emeritus Law Professor John Jackson, '59, stand together for a "photo op."*



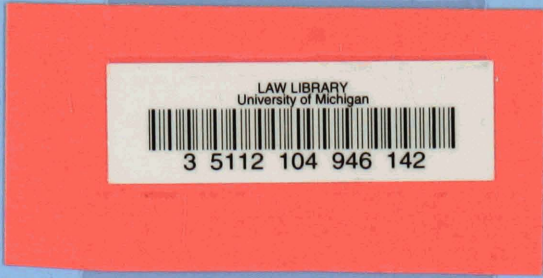
*Michigan Law Professor Rebecca Eisenberg explains the building expansion plans to Nubar Tashjian, '53.*

## On the road

In a series of regional events around the country, Dean Caminker introduced alumni to the most significant fundraising campaign in the School's history. The events were hosted by alumni leaders and unveiled plans for the renovation and addition to the Law Quadrangle, identified the need for additional support for faculty and students, and talked about a renewed focus on annual giving through the Law School Fund. The events have brought great energy to the Law School's extended community and reconnected alumni in New York, Washington, D.C., San Francisco, Chicago, and most recently Los Angeles. (See related story on page 4.)

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

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# LAW QUADRANGLE NOTES

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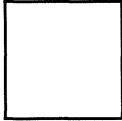
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