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Faculty

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In Detail

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

American Society of Comparative Law honors Eric Stein, '42

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Panel discussions were divided into three categories:

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

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

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

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

At the Supreme Court:

'I never thought it would happen so fast'

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

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

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

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

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

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

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

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

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

At the Supreme Court:

Where first principles really come first

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

By Jeffrey L. Fisher

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

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

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

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

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

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

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

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

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

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

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

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

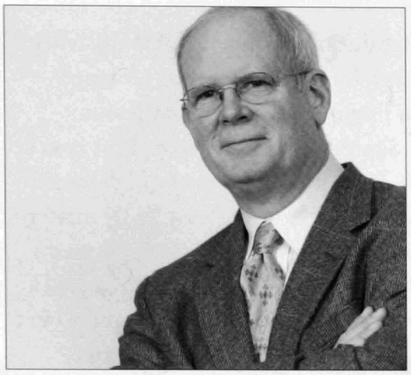
"Jeff made the brave decision to put the emphasis on the broad issue of whether the prevailing doctrine of the confrontation right should be replaced," rather than narrowly focusing on whether that doctrine precluded the use of the challenged statement, according to Friedman.

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

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

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

There will be, he promises, more to come.



Frier honored by Classics Department

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

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

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

Vining targets 'total theory'

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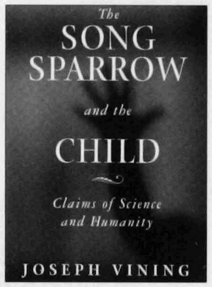
Legal philosopher Joseph Vining, the Harry Burns Hutchins Professor of Law, argues in his newest book, *The Song Sparrow and the Child* (University of Notre Dame Press, 2004), that law and science should join hands in mutual respect. Otherwise, he fears, science-based "total theory" may eclipse the glow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



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

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

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

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

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

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

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

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

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