White Retires After 48 Years

Professor J.J. White, the Robert A. Sullivan Professor of Law, retired at the end of the fall term after 48 years of teaching at the Law School. White, ’62, built a reputation not just as an expert in the field of commercial law, but also as a tough, fair, and often very funny professor.

Online professor guides from former students describe him as “entertaining, curmudgeonly,” and “one of the best professors I’ve had at the Law School.” “He puts you through the wringer each time he calls on you in class,” wrote one alum, but he also “truly cares about you as a student and person,” wrote another.

White’s book Uniform Commercial Code (with Summers and Hillman) is the most widely recognized treatise on the subject. He also is the author of several casebooks on commercial, bankruptcy, and contracts law.

We sat down with him in the office where he has worked for 45 of his years at the Law School and asked him for his thoughts about changes, his teaching style, and mud wrestling.

How did you get to the Michigan Law School?
My grandfather graduated from Michigan in 1908 and I was attracted by its reputation. It helped that I had a Weymouth Kirkland scholarship that paid all of my tuition and a stipend for living expenses. The scholarship, named after a founder of the current Kirkland & Ellis and given by Colonel McCormick of the Chicago Tribune to honor his lawyer, was available to anyone who was a resident of “Chicagoland” and went to school there. Mr. McCormick had an expansive view of Chicagoland; it went from the Missouri River to Lake Huron, so as a resident of Iowa who was going to school at Michigan, I qualified.

What changes have you seen in the Law School in 48 years?
You miss many of the big changes because they occur incrementally. So how are things different? The number of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically. When I came here in 1964, the numbers were minuscule. The other difference of women students has increased dramatically.

I always throw away my notes after each class, and that has been a problem because as you get older, you forget things more easily. But it has helped me to stay fresh and come at the material a little differently each year.

One big change in the students between the time I was in school here and now is, there aren’t any dumb students here anymore. I was in school just after the time when the drill was to admit anyone and then flunk out one third of the class after the first year. Then a handful of students had a hard time getting through school. All of our students now are easily smart enough to do good work in any course. The people at the top are smarter than they were then.

What are the virtues of the Socratic method?
My hope with calling on students during class has always been that the practice will encourage careful preparation and that it will prepare them for probing questions from judges, colleagues, and even clients. Even in a Socratic discourse, you can help a student along by various tricks. What I’ll do is call on a student; if they stumble, I’ll say to the person next to them, “Give her a hand, will you?” and later I try to go back to the first student and give them another chance. I believe that it is better for our students to learn how to deal with hard questions here, where there’s no cost, except a bit of embarrassment, to their being wrong.

How do you compare law practice to teaching?
I practiced law for only a couple of years, and I never regretted coming back here to teach. Not one minute. I loved teaching, and I got to like writing. Hanging out in the lounge with my colleagues is also great fun. [Professors] Frier and Miller continue to try to teach me medieval and ancient history, and that’s enjoyable—because of, or perhaps despite, their personalities.

Tell us some of your memorable interactions with students.

We used to have a talent show in the Lawyers Club Lounge every year, and I was in it a number of times, almost always making an ass out of myself. One time, I was in a mud wrestling contest. I wore an old suit, and it was completely wiped out. One time, I did a dance with four women students; since I can’t dance, I’m sure that was an embarrassment. One time, I did a dance with four women students; since I can’t dance, I’m sure that was an embarrassment. One time, I did a dance with four women students; since I can’t dance, I’m sure that was an embarrassment. One time, I did a dance with four women students; since I can’t dance, I’m sure that was an embarrassment. One time, I did a dance with four women students; since I can’t dance, I’m sure that was an embarrassment. One time, I did a dance with four women students; since I can’t dance, I’m sure that was an embarrassment. One time, I did a dance with four women students; since I can’t dance, I’m sure that was an embarrassment.

I love our students; our students are wonderful. Even when they’re a pain in the ass, they’re wonderful.

See a video interview with Professor White at www.law.umich.edu/quadrangle.
Payton Retires; Was One of First Female Faculty Members

By Katie Vloet

As one of the first two female faculty members hired by the Law School, Sallyanne Payton was in a new position: “I had not been in a place where that ground had not already been broken,” she says.

The year was 1976, and the Law School had some catching up to do. It began with the hiring of Payton and Christina B. Whitman, ’74. But Payton never felt like an outsider, even on a faculty that had for so long been made up only of men.

“The law faculty community was warmly welcoming,” recalls Payton, the William W. Cook Professor of Law, who recently retired.

Payton came to the Law School after earning her law degree at Stanford in 1968, then practicing at Covington and Burling in Washington, D.C., as part of the first cohort of West Coasters who were brought into D.C. firms, she says. It was still a few years before air travel made the boundaries of the country seem closer together, and “East Coasters still thought of Californians as exotics,” Payton says. Covington taught Payton to be a transportation and development lawyer, which gave her the background needed for her next job.

In 1971, Payton went to work for President Nixon as part of the recently formed White House Domestic Council staff. “I wasouted as a Republican when I went to work for the Nixon White House. Many of my friends were shocked,” she says.

Payton’s work focused on presidential projects involving infrastructure investments in the District of Columbia, including rebuilding the riot corridors in D.C., getting the Metro subway system built, and laying the groundwork for home rule for the District. Building on this experience, in 1973 she became chief counsel of the Urban Mass Transportation Administration at the U.S. Department of Transportation. Even now, she considers her work on the National Mass Transportation Assistance Act of 1974 to be among her biggest accomplishments.

In 1975, Payton met future-First Lady Rosalynn Carter, “and I observed that she was probably going to get her husband elected president.” Payton decided it was a good time to think of her next career move, somewhere other than Washington.

Several law schools were interested in her, but she liked Michigan because the state is the “center of thinking about heavy-iron infrastructure, with transportation at the heart of it all.”

She was introduced to things in Michigan that she never was exposed to when living on the coasts: the battle between labor and management, a less adventurous but very industrious spirit, an intense localism. A long-distance bicyclist, she enjoyed exploring hundreds of miles of roads on the weekends, past barns, sheep, and inland lakes. “I began to understand America when I moved to Michigan.”

She taught administrative law, acquired a new specialty in health law, and became “completely fascinated” by legal reasoning and the common law system. She worked with computer science experts at the University through the years to try to figure out how to create reliable computerized representations of legal information in order to democratize access to the laws.

Payton also returned frequently to Washington to consult on projects and serve on boards. In 1993, she was an adviser to the Clinton Health Care Reform Task Force, which led to her election as a fellow of the prestigious National Academy of Public Administration.

Now, she is finding herself even busier in retirement than when she was teaching fulltime. She has undertaken the study of the neuroscience of the Negro spiritual, working with scientists, musicians, and practitioners of integrative medicine to study how and why the Negro spiritual reduces stress.

The idea came from the military’s use of the Emotional Freedom Technique, in which patients with post-traumatic stress disorder tap the acupressure points on their bodies while replacing traumatized thoughts with reassuring thoughts.

At a conference, Payton saw a presentation of the tapping technique, and wondered if it could be used in civilian populations. Then she realized that the basic method of replacing trauma with reassurance is similar to that of old-fashioned Negro spirituals and gospel hymns, which, she says, have historically been used to help people cope with adversity. Instead of simply recalling and rehearsing painful experiences, Payton says, “a spiritual typically moves upward, as in, ‘Sometimes I’m up, sometimes I’m down, but thank the Lord I’m heavenward bound. Glory Hallelujah.’”

“I’m doing a presentation about this at a conference in June, and everyone will enter the room humming, just like in an old-fashioned rural black church,” Payton says. “I don’t know what our research will reveal, but I am intrigued by the idea that the traditional Negro spiritual may have wisdom to offer to cutting-edge neuroscience.”
No point is ever moot when you’re preparing to argue before the United States Supreme Court.

Hence the widespread practice of running through your arguments—mooting—in front of various audiences ahead of the big day in Washington. That’s what happened during a recent afternoon in Ann Arbor as a panel of nine stern-faced Michigan Law professors assembled on the podium at the front of Honigman Auditorium.

Before them stood Michigan Law Professor David Moran, ’91, counsel of record in the double-jeopardy case Evans v. Michigan. “You’re just getting prepared for oral argument, to get you to think of all the possible questions the justices might ask,” said Moran, who cofounded the Law School’s Innocence Clinic. “You want to do enough moots on each case so that you’re never surprised.”

The mooting and all of Moran’s other preparation worked; on February 20, the Court ruled in favor of Lamar Evans, whose case Moran presented in November.

Evans v. Michigan sought to determine whether a defendant can be tried again after the trial judge erroneously holds a particular fact to be an element of the alleged crime, then grants a directed verdict of acquittal because the prosecution failed to prove that fact. Professor Richard Friedman was one of Moran’s co-counsels on the case.

The case originated in Detroit, where two police officers saw a vacant house burning. Then, the officers said, they spotted Evans walking along carrying a can of gasoline. The officers claimed Evans made an incriminating statement after they detained him.

The problems arose after prosecutors chose to charge Evans with “burning other real property,” because the burned house had been vacant at the time of the fire. The defense argued that the charges actually required prosecutors to prove that the building wasn’t a dwelling house, and the judge agreed—then determined that the prosecution had failed to prove that element. With that, she granted Evans’ motion for a directed verdict of acquittal.

Prosecutors appealed, and the Michigan appellate courts decided the trial judge erred. But they also said the double-jeopardy clause didn’t bar a retrial. And it was that question that ended up at the U.S. Supreme Court.

In preparing for oral arguments, Moran had the professoriate of a top-tier law school on hand to ask him the pointed questions. “Chief Justice” (aka Dean) Evan Caminker led the charge, joined by professors Nicholas Bagley, Scott Hershovitz, Joan Larsen, Julian Davis Mortenson, Paul Reingold, Margo Schlanger, Sonja Starr, and Christina B. Whitman, ’74.

The moot was sponsored by the Criminal Law Society and American Constitution Society. A dozen Michigan Law students, who had been taking Moran and Friedman’s seminar on the case, “An Insider’s View to Supreme Court Practice,” mooted him previously; they also attended the arguments in Washington.

In the end, Moran said, the Supreme Court “reaffirmed the principle it had recognized for over a century: an acquittal, whether by a judge or jury, is final and the State cannot put a citizen through the ordeal of a retrial following an acquittal simply by identifying errors in the trial leading to the acquittal.

“To put it simply, it’s the State that puts people on trial, and the Double Jeopardy Clause stands for the proposition that it is the State, not the citizen, who must bear the risk that mistakes are made during that trial.” —JM
Professor Margo Schlanger cites a basic starting point in her paper on the continuing court battle about overcrowding in California’s prisons: “No floor sleepsers.”

Which is to say, if you’re incarcerated in California, you should at least have a place to lay your head.

Both county jails and prisons in California have long operated under that rule. In the jails, sheriffs have shortened misdemeanor sentences and reduced bail for minor offenders in response, reducing crowding. But the state prisons, which house felons, don’t have that authority. So, with the spike in California’s state prison population in recent decades, overcrowding and attendant breakdowns in decent medical and mental-health care rapidly followed.

Lawsuits argued that conditions in the overcrowded system constituted unconstitutionally cruel and unusual punishment, causing hundreds of preventable deaths, and in 2011, the U.S. Supreme Court upheld a district court order requiring the state to limit prison overcrowding to about 137 percent of design capacity by the middle of this year—an order that requires a reduction in prison population of more than 60,000 prisoners from the peak, in 2007.

What has happened since, Schlanger writes, is a fascinating interplay between the political process and the litigation that was designed to force reform. She examines the history of such litigation since the mid-’90s Prison Litigation Reform Act, the litigation history of this particular case, earlier court orders addressing prison and jail overpopulation, and the possibility that solving the crowding problem at the state level might simply push the problem down to the county jail level—making it even more difficult to combat.

“This was the most important prison case in the Supreme Court for at least the past 10 years,” Schlanger says. “It’s a huge case.”

And it’s far from over. The prison system remains under the supervision of the federal court, and the state is required to report at regular intervals its population reduction progress. The current prison population in California is about 120,000, with an additional 8,700 prisoners housed at private facilities out of state. The state hit its first several population benchmarks but has explained to the court that further population reduction would, in its view, violate state law or undermine public safety. The state claims that notwithstanding the court’s earlier contrary view, it can run a constitutional prison system given its current population levels. Governor Jerry Brown has sought a softening of the order, but so far the Court has agreed only to delay, not alter, the final population target.

“So the standoff in this case has ripened,” Schlanger says. “California has challenged the district court to a game of chicken; we’ll see how the court responds.” If the district court denies California’s motion to modify the population order, that denial will go right back to the Supreme Court; unlike in most cases, appeal to the high court is direct.

Schlanger says she intends to keep a close eye on the situation. The paper, “Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics,” is scheduled for publication in 2013 by the Harvard Civil Rights-Civil Liberties Law Review. For the latest version of the paper, visit margoschlanger.net.—JM
Another Busy Year Ahead for Avi-Yonah

Whether he’s pumping out scholarly papers or flying off to all corners of the globe to participate in high-level discussions about international tax, it’s obvious that Professor Reuven Avi-Yonah doesn’t find the work taxing.

“I switched from history to law to make a difference in the real world,” Avi-Yonah says. “I believe tax is an important part of the relationship between citizens and the state that requires constant attention if we want to get it right.”

Avi-Yonah, the Irwin I. Cohn Professor of Law and director of Michigan Law’s International Tax Program, has in the past year written about a wide range of tax issues: capital flight from the United States, the country’s proper role in setting world tax policy, what the Obama administration should do about corporate and international tax reform during its second term, and international tax competition.

In total Avi-Yonah authored or coauthored nine papers during 2012, and won the prestigious Richard Pugh Distinguished International Tax Award. He also helped SJD student Assaf Prussak, who earned his International Tax LLM at Michigan in 2012, write a paper that later captured a top writing award from the U.S. branch of the International Fiscal Association.

In between the papers were a number of conferences, symposia, and other scholarly gatherings, including a noteworthy one in Beijing in December during which every foreign invitee speaking was a Michigan Law graduate. The conference, hosted this year by the China Youth University for Political Science and Peking University, was the latest Chinese iteration of the Sino-U.S. International Tax Forum, a cooperative effort among Michigan Law, Peking University, and Renmin University of China.

His pace isn’t likely to slow this year, either. He’s already scheduled to teach or give lectures in Milan, Vienna, Lisbon, Oxford, London, Montréal, São Paulo, and Tel Aviv.

And that’s not all.

“I have a long article forthcoming in the Tax Law Review on taxation and migration and several short pieces,” he says. “And I have a book to write—an update to my 2007 tax monograph.”

So, clearly, he won’t be bored between plane rides.—JM

Jones Named Thurnau Professor by University

Martha S. Jones—a member of the Law School’s Affiliated LSA Faculty—has been honored as a Thurnau Professor by the University. Colleagues say that Jones—also associate professor of history and associate chair of the Department of Afroamerican and African Studies—is an innovative, collaborative, and visionary teacher whose interdisciplinary research infuses her teaching. One colleague says her teaching “represents the very best of Michigan’s concern for undergraduate learning, for civic engagement, and for rigorous research.”

Jones, who is codirector of the Michigan Law Program in Race, Law & History and the Law in Slavery and Freedom Project, combines a caring, student-centered approach with insistence that students have a responsibility to plunge into primary sources and argue for their interpretation, colleagues say. Pushing beyond conventional classroom boundaries, she creates experiential learning projects that connect primary research with community involvement. Her public exhibits, such as the recent “Proclaiming Emancipation” project that commemorated the 150th anniversary of the Emancipation Proclamation, provide experiences where students discover how vivid the past can be.

Each year, Thurnau professorships recognize and reward a select group of tenured faculty members for their outstanding contributions to undergraduate education. The professorships are named after alumnus Arthur F. Thurnau and supported by the Thurnau Charitable Trust, which was established through his will. Recipients receive $20,000 to support teaching activities, including travel, books, equipment, and graduate student support.
Starr Research Shows Gender Disparities in Federal Criminal Cases

If you’re a criminal defendant, it may help—a lot—to be a woman. At least, that’s what Professor Sonja Starr’s research on federal criminal cases suggests.

Starr’s recent paper, “Estimating Gender Disparities in Federal Criminal Cases,” looks closely at a large dataset of federal cases, and reveals some significant findings. After controlling for the arrest offense, criminal history, and other prior characteristics, “men receive 63 percent longer sentences on average than women do,” and “[w]omen are…twice as likely to avoid incarceration if convicted.” This gender gap is about six times as large as the racial disparity that Starr found in another recent paper, “Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences.”

Other studies have shown gender disparity in criminal cases, but not as pronounced as Starr’s findings. This is because she is looking at “a larger swath of the criminal justice process” in her analysis, she says. The paper states, “Existing studies have typically focused on single stages of the criminal process in isolation”—in particular, the judge’s final sentencing decision. These studies compare actual sentencing outcomes after controlling for the recommended sentence associated with the defendant’s ultimate conviction.

The problem with this, Starr says, is that “the key control variable is itself the result of a host of discretionary decisions made earlier in the justice process”—including prosecutors’ charging and plea-bargaining decisions. Starr’s research incorporates disparities found at those earlier stages, and finds that “more disparity is introduced at each phase of the justice process.”

After estimating the amount of disparity left unexplained by the arrest offense and other control variables, the paper explores “why these gaps exist—and, in particular, whether unobserved differences between men and women might justify them.” Starr explores several potential mitigating factors, such as the “girlfriend theory” (that women “might be viewed as…mere accessories of their male romantic partners”), the role of women as primary caregivers to their children, and the “theory that female defendants receive leniency because they are more cooperative with the government.” Although each of these theories found some support in the data, none appeared capable of explaining anything close to the disparity that Starr found.

Starr emphasizes that it is not possible to “prove” gender discrimination with data like hers, because it is always possible that two seemingly similar cases could differ in ways not captured by the data. Given the size of the apparent gender gap and the richness of the dataset (which allowed many alternative explanations to be explored), however, Starr says that there is “pretty good reason to suspect that disparate treatment may be one of the causes of this gap.”

If men and women are being treated differently by prosecutors and judges, what should be done about it? Starr leaves that question to policymakers, but she does note that the solution “is not necessarily to lock up a lot more women, but perhaps to reconsider the decision-making criteria that are applied to men. About one in every 50 American men is currently behind bars, and we could think about gender disparity as perhaps being a key dimension of that problem.”