By John Masson

Gordon Hired as First Director of Zell Entrepreneurship and Law Program

As Michigan Law’s unique new program in entrepreneurship and law ramps up, newly appointed director Professor Erik Gordon wants his students to gain three main things: knowledge, a skill set, and—most important—a mindset.

An entrepreneur himself, he comes to his new full-time position leading the Law School’s recently established Zell Entrepreneurship and Law (ZEAL) Program from Michigan’s highly regarded Ross School of Business. There, he was a clinical professor and associate director of the Zell Lurie Institute.

The ZEAL Program was established last year with a $5 million seed gift from Sam Zell, AB ’63, JD ’66, HLLD ’05, the Chicago-based entrepreneur who earned undergraduate and law degrees at Michigan. The program has established a clinic that offers free legal advice to the growing number of student entrepreneurs across U-M’s Ann Arbor campus.

It also will create new Law School coursework to train students to better serve both startup and existing large-scale entrepreneurial businesses.

The dual approach—in combination with the wide variety of entrepreneurial opportunities across campus and U-M’s top schools of business, engineering, and medicine—makes the program unique.

“Erik’s background as an entrepreneur, a teacher, and a lawyer make him an extremely strong choice to guide the ZEAL Program,” says Michigan Law Dean Evan Caminker. “His experience through all three facets of his career will provide valuable perspective as we shape course offerings and guide the program into the future.”

In addition to directing the ZEAL Program, Gordon also joins the ranks of the Law School’s professors from practice. As such, he has some definite ideas about how to make lawyers more helpful to entrepreneurial businesses.

“Many entrepreneurs find lawyers to at best be costly nuisances that you try to avoid,” he says. “At Michigan Law, we’re going to turn out graduates that entrepreneurs seek out as partners to help them build their businesses, as well as graduates who start their own companies.”

That’s where the knowledge, skill set, and mindset triad comes into play.

“We need to develop graduates who understand and appreciate risk the way entrepreneurs do, rather than fear risk the way lawyers do,” he says. “If we accomplish that alone, our graduates are going to be shining stars in the world of business.”

With that in mind, Gordon plans (naturally) an entrepreneurial approach to the task. “We’re going to try things and adjust, as necessary,” he says.

The first order of business is to expose law students, early during their law school experience, to what he calls “true, hard-core entrepreneurship.”

“We have to get them early, while they are still learning what law school can be about,” he says. “We want to nourish the entrepreneurial cells in their brains and get them to grow. We want them to see risk, and say to themselves, ‘What’s the opportunity here?’ An entrepreneur looks at a situation and says, ‘This is scaring away nine out of 10 people. Well, good. The field is less crowded for me.’”
Primus Joins Lead Authors in Contributing to Modern Criminal Procedure

By Lori Atherton

It wasn’t long ago that Eve Brensike Primus, ’01, was a student copiously studying from Modern Criminal Procedure. Now, she’s a Michigan Law professor who not only uses the casebook in class, but coauthored the latest edition.

Primus contributed two chapters on the right to counsel and pre-trial witness identification that were previously written by Yale Kamisar, the Clarence Darrow Distinguished University Professor of Law Emeritus, who has been a lead author of Modern Criminal Procedure since its first edition in 1965. Kamisar asked Primus to take over as his successor on the chapters, with the understanding that she would assume the writing of more chapters over time.

“Yale was my criminal law professor,” Primus says, “and I did research for him on the book when I was a student. He made it clear to me when I joined the faculty that this day was coming after I got tenure. It’s an exciting project, and I’m honored that he asked me to be involved with it.”

Largely considered for decades to be the leading criminal procedure casebook in American legal education, Modern Criminal Procedure covers all of the units taught in a criminal procedure class. Because criminal procedure is often divided into two courses at many law schools, including Michigan, the content in the large-volume Modern Criminal Procedure is divided into two smaller casebooks: Basic Criminal Procedure and Advanced Criminal Procedure.

All three casebooks, which are published approximately every three years, are in their 13th edition. A separate casebook, Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text, is published yearly and contains excerpts from the most recent Supreme Court cases related to criminal procedure. Primus wrote about recent Supreme Court developments in pre-trial eyewitness identifications for the Criminal Procedure and the Constitution casebook.

Primus was drawn to the project because of the opportunity to collaborate with Kamisar, as well as coauthor Jerold Israel, the Alene and Allan F. Smith Professor of Law Emeritus. She also welcomed the chance to shape her students’ thinking.

“People don’t often think about how casebooks will shape the minds of law students and affect how they approach a given subject,” she says. “The way in which you organize and order a chapter is the way in which students will internalize the material that they are being taught. This is a unique opportunity and one that I really value.”

Also valuable and important, Primus says, is the dedication of the authors to providing a balanced perspective of the cases that they write about. “One of the things that I think is important for a casebook to do,” she says, “is to push students to think critically about the cases that they are reading. Because this book includes dissenting opinions as well as majority opinions, students learn that there is more than one way to think about an issue.”

Although the newest editions of the Criminal Procedure series were recently published in late June, Primus and her coauthors aren’t resting on their laurels. They’re working with publisher Thomson/West to create a teacher’s manual for the casebook series, as well as a website that would enable other professors to contribute feedback and relevant articles that could be cited in the books.

“It’s just another way of ensuring we stay on top of everything,” Primus says, “and that we’re responding to what the users want to see in the casebook.”
FACULTY NEWS

Scarnecchia: Teaching at Law School is a “Privilege”

By Lori Atherton

Suellen Scarnecchia, ’81, remembers that she was discouraged from taking a clinic as a law student because she was told it wouldn’t look good on her resume. “Which is now, of course, the opposite of what we normally advise students,” she said.

Scarnecchia believes strongly in the importance of clinical education, and she is bringing that passion back to the Law School after 10 years. Starting this fall, she is a clinical professor of law in the Human Trafficking Clinic, where she works with her former student and the current clinic director Bridgette Carr, ’02.

“There’s nothing like leaving and coming back to remind you of what a privilege it is to go to law school here and to teach our students,” Scarnecchia says.

Scarnecchia previously served as a clinical professor of law from 1993 to 2002, and as associate dean for clinical affairs from 1996 to 2002. From 2008 to 2012, she was vice president and general counsel of U-M.

“Coming to the clinic from a more senior position and being more senior myself, it’s a lot of fun for me,” she says. “I’m excited about the opportunity to teach and mentor at this very different stage of my career. Having been out in the field, I can bring to students a wider view of how I might help them to become good lawyers.”

That view includes sharing insights from her work as a litigator. Following law school, Scarnecchia joined McCroskey, Feldman, Cochrane & Brock, P.C., a small employment law firm based in Muskegon, Michigan. As one of three lawyers working in the firm’s Battle Creek office, she handled cases from the initial interview through trial and appeal, becoming a partner in 1987.

“A lot of my peers went to large firms, where it took longer to be able to try cases,” Scarnecchia says. “I was able to try cases in federal and state court, so it gave me litigation experience that was extremely valuable.”

Seeking work-life balance and a return to Ann Arbor after the birth of her son, Scarnecchia applied for a job as a clinical assistant professor in Michigan Law’s Child Advocacy Law Clinic (CALC) in 1987 through an unorthodox means: by responding to an ad in the Michigan Bar Journal. “No clinical professor would ever find their job that way today,” she laughs. “I did none of the clinical preparation that people do now, because clinical teaching really wasn’t a developed career path at that point.”

Scarnecchia worked with Clinical Professor Don Duquette, ’75, CALC’s founder and director, on child protection cases. One of Scarnecchia’s notable cases was the high-profile 1993 “Baby Jessica” custody case, in which the supreme courts of Michigan and Iowa ruled that young Jessica, as she was named by her adoptive parents, be returned to her biological parents. Scarnecchia, who represented the adoptive parents, says it was an important case because it helped states to define clearer adoption laws and better ways of resolving adoption issues.

“I loved our practice in the Child Advocacy Clinic,” Scarnecchia says. “It wasn’t until later that I realized what a terrific combination of cases we had because students represented children, parents, and the state in different Michigan counties. We were teaching our students to have a critical view of their own clients’ cases and the opposing parties’ cases, and it was a great way to teach.”

Scarnecchia’s interest in the Southwest drew her to the University of New Mexico School of Law, where she became professor of law and dean in 2003. Though she had the distinction of being the first woman dean of the law school, “I didn’t feel like it was that big a deal,” she says. “Women were making inroads into deanships, so it wasn’t shocking to me that they hired a woman. But it was interesting to hear how alumni and students reacted. They would say how happy they were that I was there and how much it meant to them to have a woman in a leadership position, so I liked that alumni and students could feel that progress was being made by my being in that role.”

In 2008, Scarnecchia returned to Ann Arbor to be closer to family and assumed the role of U-M’s vice president and general counsel. She remarked that her younger self would be surprised at her career evolution, because as a student, she was interested in representing individual clients and had no desire to be in academic leadership. The unexpected career path provided her with a lesson that she will pass along to her students.

“I was very motivated to do something that I thought was worthwhile to society,” she says. “The academic management piece came along later. I do a lot of talking to students about not trying to predict in a hard and fast way while they are in law school what their career is going to be like, because there are so many different paths they can take, and they don’t really know yet what doors will open and what will excite them.”
The majority opinion in a 2012 case upholding the constitutionality of the Voting Rights Act (VRA) relied heavily on a study led by Professor Ellen Katz.

At issue in *Shelby County v. Holder*, decided in the U.S. Court of Appeals for the District of Columbia Circuit, was whether Section 5 of the VRA remains constitutional. That section requires jurisdictions with historically low levels of voter registration and participation to obtain federal approval, known as preclearance, before implementing any change to their voting procedures. Congress first enacted Section 5 in 1965 to address massive African American disenfranchisement in the Jim Crow South and has reauthorized the statute repeatedly in the years since, most recently in 2006.

*Shelby County*, Alabama, is one of several jurisdictions to challenge Congress’s power to reauthorize Section 5. The argument is that current conditions no longer justify requiring covered jurisdictions to obtain federal approval before changing their election practices. After the Supreme Court sidestepped that challenge three years ago in a case from Texas, Shelby County took up the constitutional claim. A federal trial court rejected the county’s argument last year, and a divided appellate court affirmed this spring. In his majority opinion, Judge David Tatel wrote that Congress “drew reasonable conclusions from the extensive evidence it gathered” when renewing the law and that “we owe much deference to the considered judgment of the people’s elected representatives.”


“An amazing group of Michigan students came together to work with me on the study,” Katz says. “Smart, creative, conscientious, unbelievably hardworking, these students worked on every stage of the project, from defining its scope, presenting the findings, and evaluating their implications.” Several of the students involved have gone on to work in voting-related issues at the Department of Justice, civil rights organizations, and private firms.

Unlike Section 5, Section 2 of the VRA applies nationwide. It states that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [on account of statutorily designated language minority status].” Section 2 informs the ruling on Section 5 because, in the words of Katz’s study, the record of Section 2 cases “helps illuminate the extent to which meaningful minority participation in elections has been a reality in recent times.”

The Katz study found that, four decades after the initial enactment of the VRA, “racial discrimination in voting is far from over. Federal judges adjudicating Section 2 cases over the last 23 years have documented an extensive record of conduct by state and local officials that they have deemed racially discriminatory and intentionally so.”

Judge Tatel’s opinion in *Shelby County* found that the study provided critical support for Congress’s conclusion that the VRA continued to provide important protection for minority voters in covered jurisdictions. Stating that the Katz study provided the “most concrete evidence” comparing jurisdictions subject to the statute and those that are not, Judge Tatel emphasized the study’s finding that minority plaintiffs from covered jurisdictions have been more likely to succeed and have, in fact, succeeded more often in Section 2 litigation than did plaintiffs elsewhere.

Katz anticipates that the Shelby County case will be taken up by the Supreme Court this fall. In 2009, the high court bypassed a similar challenge in *Northwest Austin Municipal Utility District Number One v. Holder*, while expressing considerable skepticism about the continued need for the VRA’s regional provisions.

“Judge Tatel’s *Shelby County* opinion responds that that skepticism and carefully explains why the VRA’s regional provisions are still needed,” says Katz. “Whether the Supreme Court will agree remains to be seen.”—KV
Gabriel (Gabe) Mendlow has been hired by the Law School to teach criminal law, criminal procedure, and legal philosophy. During the 2012–2013 academic year, he will work full time in Detroit as a special assistant United States attorney in the General Crimes Unit of the U.S. Attorney's Office for the Eastern District of Michigan. In the winter term, he will teach a Law School seminar called Moral Issues in Criminal Law, which will take a philosophical approach to such topics as the justification of punishment and the scope and limits of the criminal law.

Before joining the Law School faculty, Mendlow served as law clerk to Justice Richard N. Palmer of the Connecticut Supreme Court and as postdoctoral associate and law and philosophy fellow at Yale Law School and the Yale Philosophy Department. There, he taught philosophy graduate seminars on the nature and justification of criminal punishment and on action and moral responsibility.

Mendlow holds a JD from Yale Law School, where he won the Felix S. Cohen Prize for the best essay on legal philosophy. He also holds a PhD in philosophy from Princeton University, where he was awarded a Jacob K. Javits Fellowship by the United States Department of Education. He earned an AB in social studies from Harvard College, magna cum laude with highest honors in field. Prof. Mendlow is admitted to practice law in Connecticut. He and his wife have two children.—LA
Affordable Care Act Opinion Cites Caminker Paper

A scholarly paper authored by Michigan Law Dean Evan Caminker was cited in the U.S. Supreme Court opinion, authored by Justice Ruth Bader Ginsburg, in the Affordable Care Act case that was decided in June.

The paper, “State Sovereignty and Subordinacy,” was published in the Columbia Law Review in 1995. Justice Ginsburg cited it while discussing the considerable amount of autonomy the states retain in administering Medicaid. She argued that far from disempowering state agencies and bringing them into strict federal orbit, Medicaid is designed to promote “cooperative federalism.”

Caminker’s work argues that cooperative federalism can preserve “a significant role for state discretion in achieving specified federal goals, where the alternative is complete federal preemption of any state regulatory role.”

“Absent from the nationalized model, of course, is the state-level policy discretion and experimentation that is Medicaid’s hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance,” Justice Ginsburg wrote in the opinion.

Bagenstos Testifies Before Senate Committee In Support of ENDA

By Lori Atherton

When the U.S. Senate Committee on Health, Education, Labor and Pensions hosted a committee hearing regarding the Employment Non-Discrimination Act (ENDA), Professor Samuel Bagenstos was one of several experts who provided testimony in support of the proposed legislation. If passed, ENDA would prohibit employment discrimination on the basis of sexual orientation or gender identity.

“ENDA is an exceptionally important bill and one that is much needed,” Bagenstos said during the June hearing, the first one on ENDA since 2009. “It will be the logical next step in our nation’s commitment to eradicating workplace discrimination.”

An expert in civil rights and employment discrimination law, and the former no. 2 official in the Department of Justice’s Civil Rights Division, Bagenstos made three essential points during his testimony: “Discrimination against lesbian, gay, bisexual, and transgender (LGBT) individuals is a serious problem; the current legal regime is inadequate to respond to that problem; and ENDA is an appropriately tailored remedy for that problem.”

LGBT individuals face tough choices in the workplace, Bagenstos said, including being forced to give up job opportunities in their chosen field because of discrimination, or having to hide their sexual orientation or gender identity in order to keep their jobs, “at great psychological cost and [with] fear of discovery.”

Bagenstos said current laws addressing discrimination against LGBT persons are inadequate; only 16 states and Washington, D.C., prohibit workplace discrimination based on sexual orientation or gender identity. Another five states prohibit workplace discrimination based on sexual orientation but do not include any prohibition on gender identity discrimination.

“The enforcement procedures and remedies for those statutes vary,” he said. “They do not provide the clear and strong set of remedies—crucially including access to federal courts—that Congress has developed for workplace discrimination over the past five decades. And LGBT workers outside of those states enjoy no clear state statutory protection against discrimination at all.”

He added: “In responding to these problems, ENDA would do nothing more than extend to sexual orientation and gender identity discrimination the same basic legal structure that has applied to other forms of employment discrimination for nearly 50 years.”
Radin’s Book Tackles Boilerplate

In her forthcoming book, *Boilerplate*, Margaret Jane Radin—the Henry King Ransom Professor of Law—points out that people don’t have any real choice about tacitly agreeing to a sheaf of forms before completing even the most benign transaction. She also is not a fan of the reams of suffocating fine print that users encounter online, where most of us simply resign ourselves and click “I Agree” rather than plow through page after page of incomprehensible verbiage.

The problem with firms’ growing use of boilerplate, Radin says, is that the practice forces us to sign away basic legal rights of our democracy and its commitment to the rule of law—such as jury trials, or choice of jurisdiction, or the ability to take part in a class action. The result, she concludes, is an erosion of the core rights of citizens that threatens the democratic order. She calls upon consumer groups to push back against mass-market boilerplate rights deletions and calls upon judges and regulatory authorities to keep mass-market boilerplate rights deletions in check.

*Boilerplate*, due out in November and published by Princeton University Press, stems from the shock Radin felt several years ago when she began encountering multi-page End User Licensing Agreements (EULAs) that pop up automatically when new software is being installed.

“These things that came with the software called themselves contracts, and I thought, ‘How can you even enforce these? They were using things that nobody reads to take away rights,’” Radin says. “It started with the EULAs, which come onto your screen automatically, and you have to click through them just to be able to use what you’ve bought.”—JM
Logue Argues Some Regulation Could be Outsourced to Insurance Companies


“In many (though obviously not all) situations, private insurers, because of their inherent informational comparative advantage, should be expected to do the job of regulation better than public regulators and courts,” the paper says.

Indeed, the authors write, the law should at times mandate insurance coverage, “in order to harness the regulatory capacity of insurers,” with mandatory liability insurance serving as a substitute, for instance, for much of food safety regulation. “Such mandatory insurance would be equivalent to making insurers the licensing agents for certain types of risky activities.”

That does not take government out of the process entirely, however. The law should, the paper says, monitor the “integrity of insurers’ decisions as regulators, anytime competition does not provide sufficient discipline.”—KV

Hakimi Argues for New Legal Framework on Targeting and Security Detention

A recent paper by Professor Monica Hakimi proposes a new legal framework for assessing when states may target or detain (without criminal process) suspected terrorists or other nonstate actors.

The paper, published in June in the Michigan Law Review, examines what Hakimi considers the flawed method for answering that question in international law—namely, having to classify the situation into one of four regulatory “domains”: law enforcement, emergency, armed conflict for civilians, or armed conflict for combatants.

A new, functional approach, Hakimi says, would use three substantive principles to guide nations in determining whether targeting or preventively detaining a suspected terrorist is justified: liberty-security, mitigation, and mistake.—JM
Community Notification Laws May Lead to More Child Porn, Prescott Writes

Child pornography crimes differ from other sex offenses, so child pornographers should not be subjected to the same community notification as traditional sex offenders, writes Professor J.J. Prescott in the recent Federal Sentencing Reporter article “Child Pornography and Community Notification: How an Attempt to Reduce Crime Can Achieve the Opposite.”

Applying one-size-fits-all community notification requirements—more commonly known as public sex offender registries—to child pornographers isn’t a good idea and may actually increase crime rather than inhibit it, he says.

“One of the takeaways from this article is that we ought to be very careful about who counts as a sex offender for purposes of notification laws,” says Prescott, who researches and writes about sex offender registration and notification laws. “On its own terms, notification seems out of place in this context. Most child pornographers are possessors; they have never attacked children. But the real concern is that making the identity of convicted child porn possessors public may have the unintended consequence of making it easier for child porn networks to form.” —LA

Medicare Design Flaws Mandate Reform, Bagley Says

“Structural infirmities” will stunt the effectiveness of a set of important Medicare reforms included in the Affordable Care Act, Professor Nicholas Bagley says in his new draft paper, “Bedside Bureaucrats: Why Medicare Reform Hasn’t Worked,” set to be published in early 2013 in the Georgetown Law Journal.

“The article is really focused on charting exactly how some of the design choices made at the inception of the program have undermined reform efforts over time,” Bagley said. “Those same design choices are very likely to hamper the Medicare reforms embedded in the Affordable Care Act. … This is Organizational Theory 101. Medicare can’t long continue on its current course. Reform will become a budgetary necessity.”

The challenge, Bagley writes, is to create an administrative structure that forces the private “army of physicians” that implement Medicare at the bedside to account for competing demands on taxpayer dollars. With that in mind, Bagley argues, Medicare must be refashioned around private organizations with the incentives, leverage, and legitimacy to shape physician practice patterns “in a cost-conscious and clinically sensitive manner.” Political resistance to this kind of reform, he predicts, will be intense.—JM
Difference Between Medieval Islam and Christendom Focus of Hudson Research Grant

John Hudson, a William W. Cook Global Law Professor who also teaches at St. Andrews University in Scotland, is among the recipients of a $4 million European Union grant designed for collaboratively studying some of the differences between medieval Islam and medieval Christendom, then examining lessons relevant to the modern world.

“If you look at the world in 700, if there’s a place that looks like it will become highly bureaucratized and institutional, with considerable political continuity, it’s the Islamic world, not Christendom,” says Hudson, one of four academics who will coordinate the program. “Of course, the outcome is the reverse, which obviously kicks us into a discussion of the modern world.”

What makes the topic even more interesting, Hudson says, is that the entire Mediterranean world shared the common classical legacy, particularly of the Romans—yet the areas dominated by Christianity nevertheless developed in ways significantly different from those areas dominated by Islam. The topics under examination include English Common Law, Continental Civil Law, and Islamic Law.—JM

Moran Contributes to Paper on Shaken Baby Syndrome

David Moran, ’91, cofounder of the Michigan Innocence Clinic, uses his educational background in physics, theoretical physics, and mathematics to help explain a statistical issue at the root of the shaken baby debate.

Moran became involved with the paper, which appears in the Houston Journal of Health Law and Policy, after the clinic’s 2010 exoneration of Julie Baumer, who had been wrongfully convicted in a shaken baby case. He writes that a basic statistical blunder helped create the misperception that any child with certain symptoms must, ipso facto, have been abusively shaken by a caretaker. His portion of the paper explains a statistics concept known as Bayes’ Theorem. It’s a mistake so common it has its own grimly ironic nickname: the Prosecutor’s Fallacy.

Suppose that an airport machine that checks for explosives hidden in checked bags is 99 percent accurate in detecting explosives. This means that the machine will sound an alarm 99 times if 100 bags with explosives are fed through the machine, and will sound an alarm only once if 100 bags without explosives are fed through the machine. In other words, bags containing explosives are 99 times as likely to make the alarm sound as bags not containing explosives. If the alarm sounds, how likely is it that the bag contains explosives? Not likely at all. If one million bags are checked by machine, one of which contains explosives (a number that is almost certainly too high), there would be approximately 10,000 false alarms for every true alarm.

Similarly, if significantly more children suffer a particular injury from natural or accidental causes than suffer the same injury as a result of abuse, then it’s clearly wrong to extrapolate, from the set that was abused, that that particular injury is a clear sign of abuse.

The article, coauthored with law professor Keith Findley of the University of Wisconsin, pediatric radiologist Patrick Barnes from Stanford University, and neuropathologist Waney Squire from Oxford University, argues that many infant injuries diagnosed as caused by shaken baby syndrome or other abusive head trauma were in fact caused by accidental trauma or natural causes, such as stroke.—JM