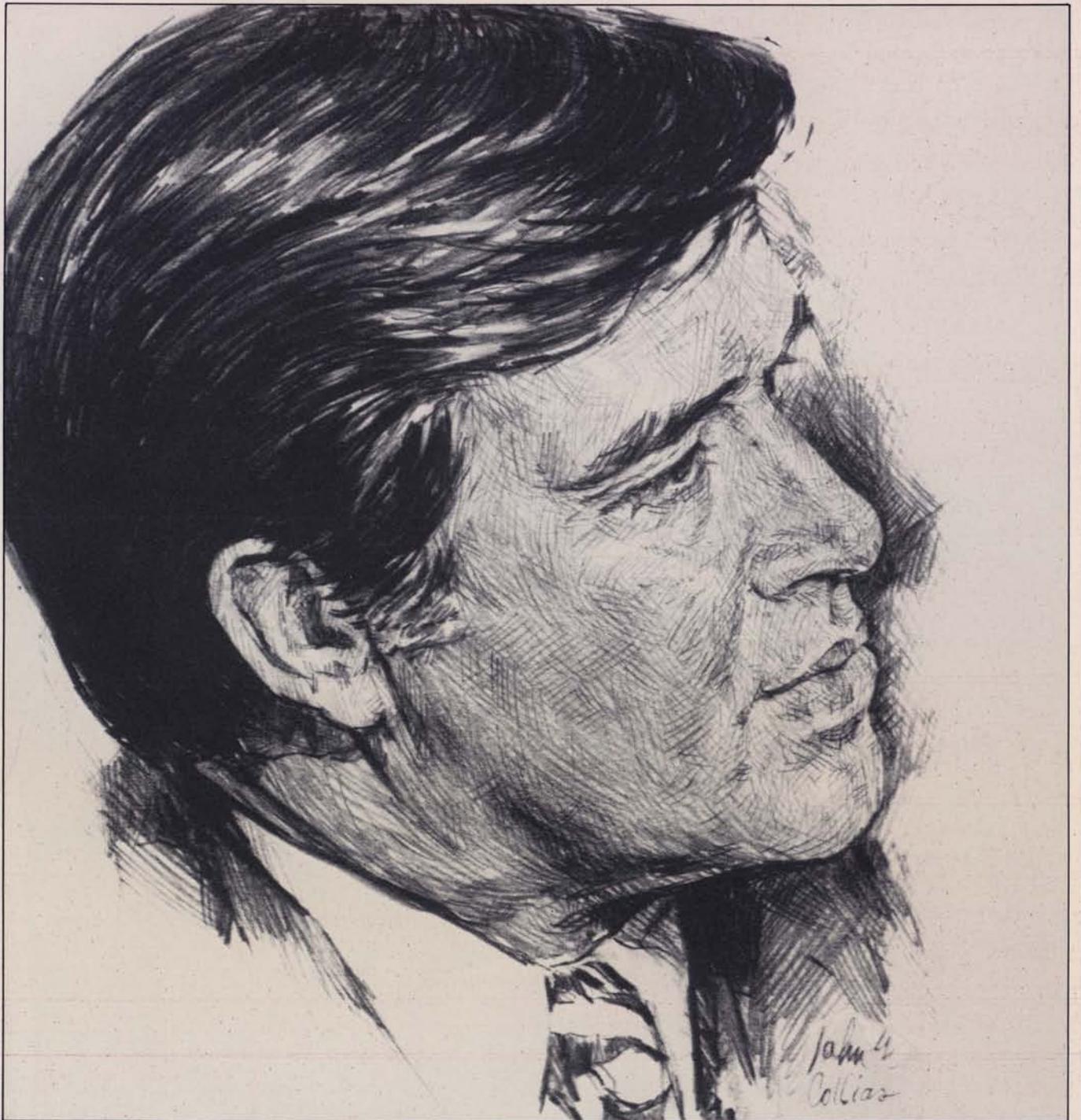


*Stanford*  
**LAWYER**

FALL 1984

VOL. 19, NO. 1



Frank Church (AB '47, JD '50) 1924-1984



# Table of CONTENTS

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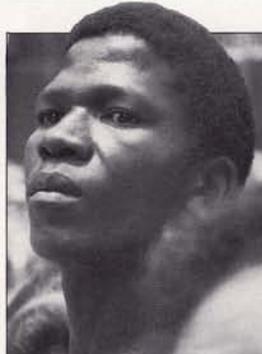
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Page 4



Page 16



Page 24

## **FROM THE DEAN**

- Our Students: Do the Stereotypes Fit? 2  
*John Hart Ely*

## **FEATURE ARTICLES**

- Dividing the Pie: An Economic Inquiry into Law Firm  
 Profit Sharing 4  
*Ronald J. Gilson and Robert H. Mnookin*
- Psychological Realities and Judicial Policy 10  
*David L. Rosenhan*
- South Africa: A Lawyer's Dilemma 16  
*Robert S. Townsend*

## **AT ISSUE**

- Recycling Our Electrical Utilities 22  
*Ralph C. Cavanagh*
- Protection Against Unjust Dismissal 24  
*William B. Gould IV*

## **BOARD OF VISITORS ANNUAL MEETING** 26

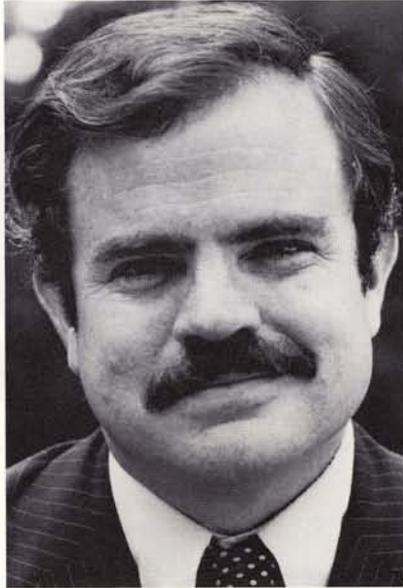
## **SCHOOL NEWS** 41

- Faculty Notes 50

## **ALUMNI/AE NEWS**

- Class Notes 60  
 In Memoriam 86  
     Frank Church 87  
     Ernest W. McFarland 88  
 Alumni/ae Gatherings 90  
 Coming Events Back Cover

## **LAW FUND ANNUAL REPORT** Insert



**John Hart Ely**

**W**hen I am in bookstores—yes, I do still read, occasionally—I like to pull pre-law handbooks off the shelves to see what they are saying about Stanford Law School.

The general impression conveyed, of course, is the right one, that ours is an excellent law school with high quality teaching and extremely high quality students. There are, however, three stereotypes about our students that tend to creep into the discussions, with varying degrees of subtlety. I'd like to discuss them—the extent to which they are true; the extent to which, if true, they are bad; and what, if anything, we are or should be doing to change them.

The first stereotype is that Stanford is an unusually upper middle-class law school—a fancy school for fancy people.

The second is that we have here a population of students who march unreflectively—virtually in lockstep—into large corporate law firms located in large cities.

The third is that the students here don't work very hard.

I must admit that this is not an unrelievedly negative picture—in fact it sounds in some ways rather pleasant! But . . . .

---

#### STEREOTYPE I

---

Of course our student body is drawn largely from the upper middle class. So are the student bodies of all law schools—especially, perhaps, the so-called “elite” law schools.

There is nothing necessarily distressing about this. We take the best qualified people we can get, and it falls out, unsurprisingly, that a high percentage of them do indeed hail from upper middle-class homes. It also falls out, again unsurprisingly, that the brightest students by no means *inevitably* come from such backgrounds, with the result that our class in fact ends up quite diverse both ethnically and socioeconomically.

So I don't have any particular concern about the current makeup of our student body. It would, however, be a great tragedy were our student body to show a significant shift in the direction of becoming *more and more* homogeneously upper middle class. Unfortunately, that is a real possibility.

Tuition here next year, despite our best efforts, will break the \$10,000 barrier. It will therefore cost about \$16,000 a year overall to go here, if you don't live too well. Unless our financial aid program can keep up with these skyrocketing costs, we will, inevitably, end up with a student body that runs the “gamut” from upper middle class to rich.

Why is that so bad? Not because it means we'll have a stupid class: obviously our quality would drop off somewhat, but there are plenty of smart people out there from advantaged backgrounds. Not because I worry about the fate of those thus forced to attend public law schools either: graduates of schools as good as Boalt and Michigan can do very well indeed, thank you. The problem, instead, is with the sort of education we would end up giving those students rich enough to be able to come here—one sheltered from the realities of social and economic diversity, surely not the sort of education appropriate to a profession one of whose moral imperatives is to understand and respond to social injustice.

The short of it is that as of 1984 we need a massive injection of financial aid funds—a good deal of which, as you've heard me say before, we plan to use as loan resources as opposed to outright grants (though in order to keep our students from absolutely drowning by the time they finish seven years of higher education, we will want to impose a reasonable “loan cap” beyond which all aid will take the form of scholarships). I am delighted to

## Our Students: Do the Stereotypes Fit?

be able to announce that Rod Hills ('55) has agreed to head up a special financial aid drive to help us respond to this pressing problem.

As to the first stereotype, then, of course we are substantially an upper middle-class school, but that is an observation that in isolation is not terribly troubling. What *is* terribly troubling is the sort of socially shriveled school we could become without substantial new financial aid funds.

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### STEREOTYPE 2

---

My diagnosis here is similar to my diagnosis of the first stereotype. Yes, most of our graduates do go to work for large law firms that number large corporations prominently among their clients. But so do most of the graduates of all the top law schools in the country, and it frankly isn't all that surprising. These jobs are lucrative and often fascinating, and it's no surprise that people often want them. It's simply a fact of life.

Facts of life aren't necessarily good, however—I can think of a lot of them we would all want to change. Does this one fall in that category? I don't think so. So long as big-firm practice is what our students genuinely want, and so long as they conduct their practices ethically, there is no particular reason for the Law School to try to interfere with their choice.

What *would* be wrong is if the students were right in charging, as many of them do, that Stanford and other top schools essentially leave them no choice *but* to enter large corporate law firms, either because we inculcate in them the notion that that is the only worthy career in the law or, at the very least, do not trouble to acquaint them with the fact that there are other rewarding legal careers. I think this charge is mostly nonsense, but we have taken certain steps to make sure that there is no mistake about it.

Our placement office—nationally respected, incidentally—has long done an aggressive and fine job of informing Stanford students of alternative employment possibilities.

One thing that I think *has* changed is that we do a lot more talking around the School these days than we used to about career alternatives. Certainly *I* say it more often: yes, practice in a large corporate firm is probably what most of you will end up choosing, but those who choose something else need count themselves no less successful. There has probably also been an increase in meetings and programs around here on alternative careers, including an all-day conference last fall with over fifteen outside panelists in a variety of public interest pursuits.

In addition we now have the Montgomery Loans—one of the proudest developments of my deanship—a new

program whereby up to twenty students can now afford to spend a summer doing legal work with a government agency or a charitable organization. While the loans are extended only slightly below market rates, repayment doesn't start until a couple of years after graduation. What's more, if the graduate makes a career of public interest law, the loan will gradually be excused.

Another development that tends substantially to undercut Stereotype 2 is the newly established East Palo Alto Community Law Project. Combining a legal aid clinic with community education components, the Project is integrated with the School so that each term we give a course joining practice in the clinic with theoretical discussion in the classroom.

This project sprang 100 percent from the minds and hearts of our students—a very dedicated, energetic, and capable group. The Director they have hired is a most impressive woman, and if the operation continues to look as good as its beginnings promise, and the potential *educational* value of the enterprise is realized, the School undoubtedly will be moved to pitch in and try to twist the arms of some of you to help ensure that the Project stays in business.

Therefore, while Stereotype 2 also is substantially true, you have to take the “lockstep” out of it. We're making *sure* our students know that they have many choices. And even if they choose to practice in large corporate firms, which of course most of them will continue to do, that will at least have been an informed choice for which they will not be heard to disclaim moral responsibility.

What's more, our students being the kind of people they are, we can be sure that thus exposed, they will continue what is a great Stanford Law School tradition, that of centering one's practice fundamentally in a large law firm but at the same time engaging, intermittently or on an ongoing basis, in various public interest activities. Only one who doesn't understand the profession thinks you have to “choose” between being a corporate lawyer and being a public interest lawyer.

---

### STEREOTYPE 3

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I'm afraid the impression that our students don't work very hard was buttressed by the article in last year's *New York Times Magazine* that pictured some of our students sleeping in the library! (Of course, given the heat of the lights needed to take such pictures, they couldn't *really* have been sleeping, but still . . .) Here too—and I realize

*(Continued on page 52)*

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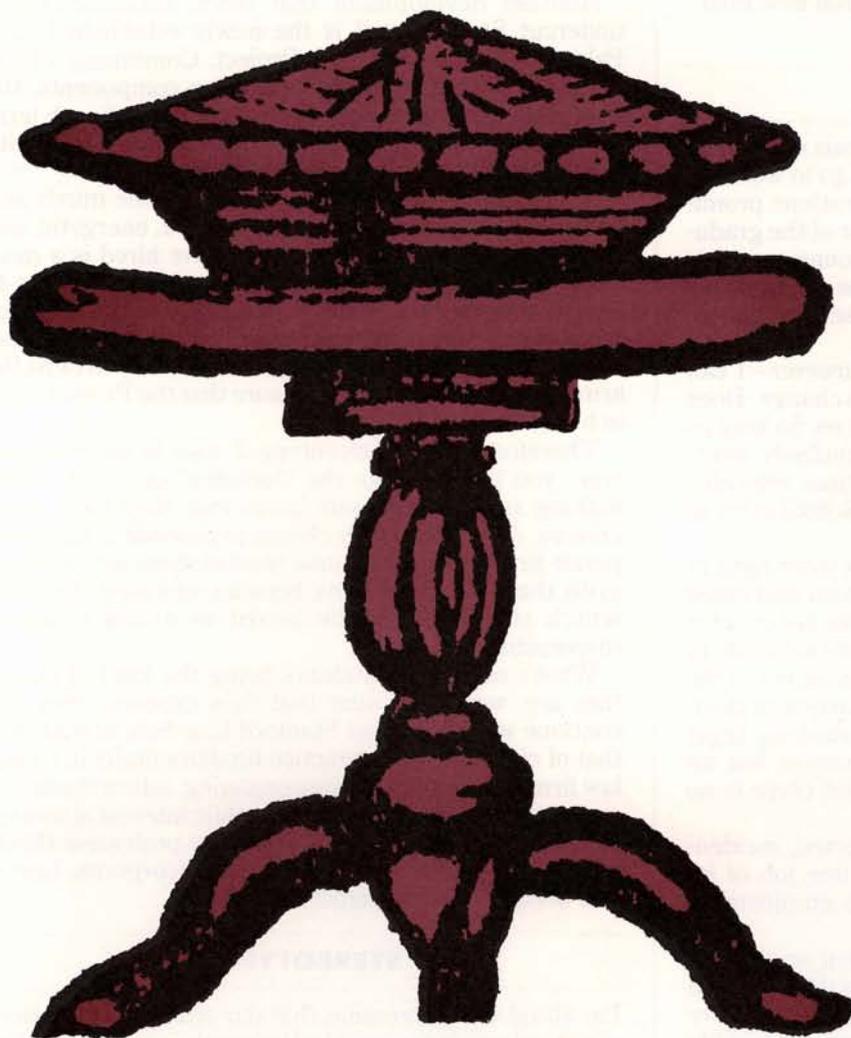
*Dean Ely first discussed these views with members of the Board of Visitors, on May 3, 1984.*

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# DIVIDING

## An Economic

by Ronald J. Gilson  
*Professor of Law*  
and Robert H. Mnookin  
*Professor of Law*



A was an  
Apple pie

**L**arge corporate law firms seem to be in a state of extraordinary flux. Success and failure are both on the rise.

On the up side, big firms appear to supply a large and growing proportion of the legal services consumed by American business enterprises and to hire a significant fraction of the graduating classes of elite American law schools. Moreover, the last twenty years have witnessed a remarkable expansion in both the number of large firms, and in the absolute size of the biggest.

But accompanying this striking success are signs of serious institutional instability. Several previously successful large firms have recently disintegrated, and reports are legion of individual partners leaving one firm to join another, groups of partners splitting off to establish their own firms, and internal squabbles over the division of profits.

Familiar economic theory is of little help in explaining the internal organization of law firms, let alone the current dissatisfaction with previously unquestioned traditions.

What is styled the "theory of the firm" in traditional economic literature is not about organizational structure at all, but rather about how the firm, as an economic unit, be-

# THE PIE

## Inquiry Into Law Firm Profit Sharing

haves depending upon the level of competition in the market for the goods or services the firm produces.

Indeed, the question of the internal organization of law firms—and especially the critical issue of profit division—has not only been neglected by scholars, but also has been veiled in silence.

Large firms have always had to divvy up the firm's profits among partners. But like sex in marriage, dividing the partnership pie was until very recently one of those centrally important but awkward topics that intimates often had difficulty discussing with one another — “gentlemen” certainly did not talk about this issue with outsiders, much less make public comparisons.

In the past, everyone knew that dissatisfaction would occasionally lead lawyers to leave one firm, and sometimes start or join another. But this was rather rare, especially among lawyers in larger, better established firms, which were generally assumed to divide the pie by some sort of seniority-based system where a partner's share was largely determined by how long he had been a partner.

In the popular press at least, yesterday's taboo has become today's fixation. Legal newspapers, consulting firms, and management journals now regularly offer advice on techniques that proponents claim offer the best opportunity for long-term partnership bliss.

Indeed, the *American Lawyer* recently sponsored for representatives of major law firms a closed (and very expensive) group therapy session on

“Allocating Partner Shares [and] Assuring Partner Productivity . . . in Today's New Legal Market.”

There seems to be, among various consultants and pundits, a growing consensus that seniority-based systems are bad, and that a partner's share should depend primarily upon his or her productivity. It is claimed that the traditional method of pie division deadens incentives, and in the long run is inevitably detrimental to the firm's prosperity, stability and survival.

But, if these experts are right, what explains the continued pros-

perity of certain well-known large firms committed to a traditional “lockstep,” seniority-based system? And the instability of certain other firms that try to divide each year's profits by measuring the productivity of individual lawyers?

We have, in an extensive working paper from which this article is excerpted (see box), sought to shed new light on the internal organization of law firms by application of two recently developed theories from the field of economics.

The first—portfolio theory—indicates potential gains from diversifi-



**B**  
Bit it



**C**  
Cut it



cation available to individual lawyers by forming a firm and agreeing to share profits.

The second — agency theory — illuminates problems that may be expected with sharing, temptations of a sort that may make sharing unstable: 1) *shirking*, when a partner does less than his “fair share” of the work; 2) *grabbing*, when a partner stays within the firm but demands more than his previously agreed share of firm profits; and 3) *leaving*, when a lawyer leaves the firm and takes cli-

ents and business with him.

We then focused on the law firm’s method of splitting profits, because it reflects both the extent to which the firm has attempted to capture the gains from diversification and the internal performance incentives for individual lawyers in the firm.

We examined two polar models of pie division: a seniority-based sharing model, in which a partner’s income is a function of how long he or she has been a member of the firm; and a productivity approach, in which each partner’s share is based upon his or her contribution to firm profits.

We concluded that, contrary to conventional wisdom, a sharing model is superior provided that shirking, grabbing, and leaving can be constrained, and we developed the concept of “firm-specific capital” to explain why successful firms committed to sharing can remain stable, notwithstanding the agency risks.

In this extract from our study, we will focus on the underlying economic rationale, as shown through portfolio theory, for income-sharing

within law firms. This provides the framework for an examination of the relative merits of the two polar models of dividing the pie: 1) the traditional seniority-based sharing approach; and 2) the currently touted productivity-based approach.

The result of looking at a problem differently, of course, is that a different pattern appears. As with a kaleidoscope, no single pattern captures the entire reality; however, altering the lens through which the subject is viewed has the potential to illuminate otherwise hidden features.

### Portfolio Theory

The first step in understanding the origin and existence of large law firms is to understand the economic gains available from cooperation among lawyers, without regard, for the moment, to the specific contractual arrangements by which cooperation is achieved. We think significant insights into the source of these gains are available from portfolio theory, a comparatively recent development in financial economics. Portfolio theory is concerned with what factors determine the value of a capital asset—a term that includes, for our purposes, the most critical asset in legal practice: a lawyer’s human capital, i.e. ability to practice law.

The modern development of portfolio theory rests on the insight that rational investors, wishing to minimize risk, will always hold a diversified “portfolio” of assets. This follows from two premises: that investors prefer more return to less, given the same level of risk; and that investors prefer less risk to more, given the same level of return. By combining assets in a portfolio, the investor can reduce risk without reducing return, and a rational investor will then select the portfolio of assets that offers the most desirable combination of risk and return.

At this point, it is necessary to take

## J Joined for it

*“A lawyer’s most important and valuable investment is in his or her own human capital—the ability to practice law.”*

a closer look at the *kind* of risk that is reduced by diversification. The overall risk associated with an asset's return is made up of two components, usually referred to as *systematic* and *unsystematic* risk.

Systematic risk arises from broad changes in economic conditions, such as increases or decreases in the gross national product or a change in inflation rates. These events affect the value of all assets.

Unsystematic risk, by contrast, is related to holding a particular asset. For example, if the capital asset in question is platinum, the risk that changes in defense technology will reduce the demand for platinum is unsystematic.

An investor, according to portfolio theory, can virtually eliminate unsystematic risk by holding a sufficient number of assets in his or her portfolio. The impact of an event on a particular asset will be balanced both by the same event's different impact on other assets in the portfolio, and by the occurrence of other events affecting other assets. There would, therefore, be no effect on the value of the portfolio as a whole.

In other words, a fully diversified portfolio is simply not subject to unsystematic risk. The only risk that remains in a diversified portfolio, then, is systematic risk—the risk of events that alter the value of all assets.

The final point from portfolio theory for our purposes involves the recognition that investors will not be paid to bear risk that can be avoided; as a result, the return on, and therefore the price of, a capital asset depends on how much *systematic* risk is associated with it. If the asset carries a great deal of systematic risk—if it is quite responsive to general economic conditions—an investor will require a higher return, and the asset will warrant a lower price, than an asset that is less sensitive.

Suppose, for example, that there are two bidders for an asset, one who already holds a diversified portfolio

of investments and one who does not. Because the diversified bidder would bear less risk but still receive the same return, the asset would be worth more to him: it would have a higher value and result in a higher bid.

It follows that the value of an asset is set competitively, based on its value to a diversified investor. Consequently, the undiversified investor will receive no return for bearing unsystematic risk.

We believe this fact—that capital assets are worth more when part of a diversified “portfolio”—is crucial to understanding why law firms exist at all and why they take their familiar form.

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### Human Capital

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A lawyer's most important and valuable investment is in his or her human capital—the ability to practice law. How can a lawyer earn the greatest return on this investment? Once it is recognized that the ability to practice law in the future is a capital asset, portfolio theory becomes relevant to understanding how to maximize that asset's value.

Implementing portfolio theory in this setting is not, however, without difficulties. A lawyer's earning power has a special character, unlike that of assets such as stocks and bonds. The problem is that a return can be earned on the lawyer's investment *only* by actually rendering such services. The earnings on human capital are conditional on continued, effective performance by the holder of the asset.

The value maximization problem this presents can be seen by looking at a lawyer's human capital in relation to the two kinds of risk—systematic and unsystematic—defined in portfolio theory.

A lawyer's systematic risk is the extent to which earnings from the practice of law vary with overall economic conditions: how sensitive are his or her earnings to the per-



*Prof. Mnookin's and Prof. Gilson's study was first described at a conference on The Law Firm as a Social Institution, February 24-25, 1984, at Stanford Law School. It has since become available as a working paper of the School's Law and Economics Program,\* and will soon be published—along with other papers from the Law Firm conference—in Vol. 37 of the Stanford Law Review. The present article is a considerable abridgement of the original.*

---

*Prof. Gilson, a 1971 graduate of Yale Law School, spent seven years in private practice with Steinhart, Goldberg, Feigenbaum & Lader of San Francisco, before joining the Stanford faculty in 1979.*

*Prof. Mnookin came to Stanford in 1981 after nine years on the UC-Berkeley faculty. A 1968 Harvard Law School graduate, he spent three years in private practice with the San Francisco firm of Howard, Rice, Nemerovski, Canady, Robertson & Falk.*

*Research for the present study was supported by the Stanford Legal Research Fund, made possible from the estate of Ira S. Lillick, and by gifts from other friends of the School.*

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\*Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits, Stanford Law School, Law and Economics Program, Working Paper 16 (April 1984).

formance of the economy?

Unsystematic risk, in contrast, is the variation in earnings from law practice resulting from the *individual* characteristics of a particular lawyer: for example, how smart, attractive to clients, healthy, and long-lived he or she is.

Portfolio theory teaches that investors do not earn a return for bearing the unsystematic risks associated with a capital asset because that risk can be eliminated by diversification. For that reason, a stockholder in a publicly held company may be unconcerned with the ill health of the company's president, because although this misfortune may have an impact on the performance of that particular company, it would have *no* impact on the return of a diversified portfolio one of whose holdings was the company's stock.

The peculiarity of a lawyer's human capital appears quite starkly when we consider the impact of unsystematic risk on the returns from this asset. A lawyer's ill health has a substantial impact on his earnings precisely because it is extremely difficult to diversify one's human capital.

The inability of a lawyer to diversify away unsystematic risk does not, of course, leave the lawyer entirely at the mercy of fate. Some elements of unsystematic risk, such as death or disability, can be diversified through insurance markets.

But insurance does not exist for other important aspects of the unsystematic risk associated with a lawyer's human capital. Most importantly, the lawyer cannot insure against uncertainty concerning the actual value of his human capital; no insurance policy is available against the risk that a lawyer will be less successful than his or her expectations.

There are also other events that, like disability, may reduce the return from a lawyer's human capital but

*“Large firms have always had to divvy up the firm’s profits among partners. But like sex in marriage, dividing the partnership pie was until recently one of those centrally important but awkward topics that intimates often had difficulty discussing with one another . . .”*

which are essentially uninsurable. Practitioners are familiar with the impact that upheavals in a lawyer's personal life such as divorce, mid-life crisis, or alcoholism can have on productivity and earnings.

In portfolio theory terms, then, the human capital of a lawyer is difficult to diversify, and insurance markets are unlikely to develop with respect to important elements of unsystematic risk bearing on that form of capital. This creates an opportunity for the development of an institution to fill this gap—to enable lawyers to capture the gains from diversifying their human capital. This institution is, of course, the large law firm.

Simply put, the law firm provides participating lawyers with a means of diversifying their human capital by pooling theirs with that of other lawyers and agreeing to share the profits. In this way, unsystematic risk arising from possible future difficulties (disability and/or disability-like personal problems) can be minimized.

Similarly, the risks associated with investing in more specialized human capital—such as becoming a securities or bankruptcy lawyer—can also be minimized by diversification. Because different legal specialties respond differently to economic conditions, a portfolio composed of a number of specialties—available to a law firm but not to an individual lawyer—serves to reduce the investment's risk. When one spe-

cialty is down, another will be up, leaving the combined earnings of the specialties the same.

We think much can be learned about the existence and organization of large law firms from understanding how they serve to allow lawyers to diversify their human capital.

Let us now, from the vantage point of portfolio theory, look at two polar models of law firm profit

division to see how well each facilitates and/or frustrates diversification on the part of member lawyers.

### **Seniority-Based Income Division**

It is not hard to see that the traditional seniority-based model is well designed to capture the gains available from diversification. For our purposes, the pure case would have the following elements:

- each partner's share of profits depends entirely upon seniority, which is based upon assignment to a "class";
- a partner's class depends only upon the year the lawyer was admitted to the partnership and cannot be changed;
- all partners in a single class earn the same income;
- in any given year, the relationship between the incomes of partners in different classes is based upon a ratio that is fixed and known in advance; and
- the members of each class march "lockstep" down a path until after a fixed number of years they would all be "full share" partners.

An individual lawyer, upon being admitted to such a partnership, is quite literally exchanging his human capital for participation in a portfolio of human capital diversified both

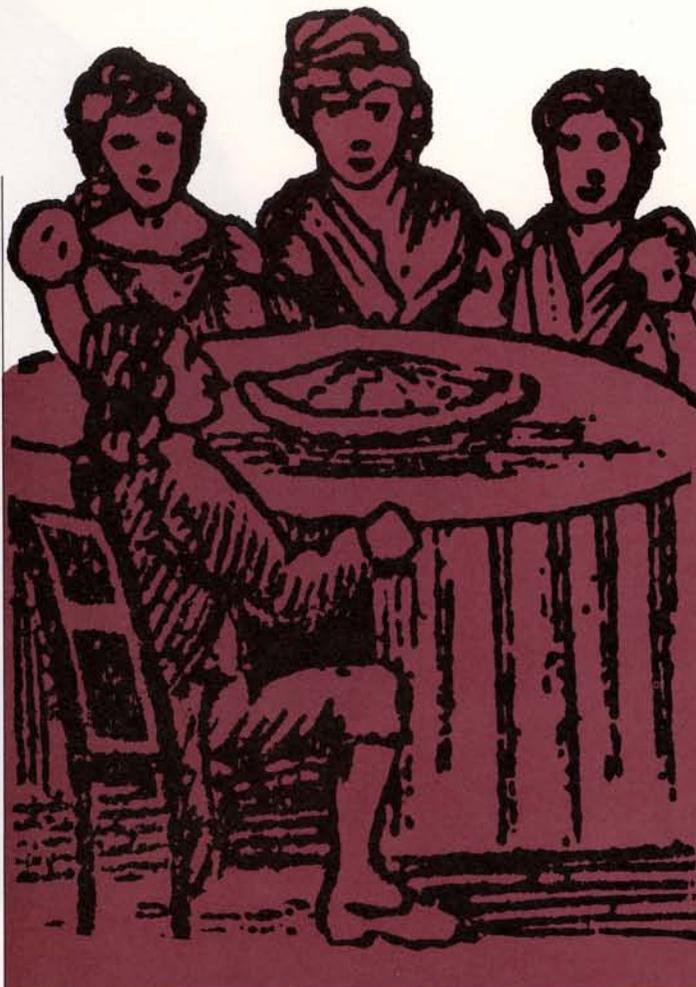
with respect to the personal characteristics of the lawyers and with respect to specialty. Indeed, in a well-established firm it is striking just how well diversified the portfolio is.

An entering partner is in effect "buying into" a mutual fund through which he is able to share not only the future income of his contemporaries, but also the future income of lawyers with differing expertise and experience spread over two or maybe even three generations. In other words, buying into a lock-step traditional firm offers a more diversified portfolio than that available in a partnership made up of lawyers in a single age cohort.

There are, however, the "agency" problems with seniority-based distribution—shirking, grabbing, and leaving—mentioned above.

The last of these, leaving, can sharply reduce the amount of diversification within a firm, as when, in one recent case, a disaffected partner took his entire department with him. Grabbing, which is often a prelude to leaving, obviously diminishes the returns from diversification available to other partners by dividing the pie unevenly and in a manner other than that agreed to at the time of their initial "investment" in joining the firm.

It is shirking, however, that has over the past decade been the main focus of criticism of the seniority-based sharing model and that has provided most of the fuel for arguments in favor of productivity-based divisions of the pie.



## XY & Z ... All wished for a piece in hand

Louis Auchincloss, himself a Wall Street lawyer, rendered the standard criticism in his novel, *The Partners*. A restive junior partner in a firm with seniority-based pie division complains:

"Do you think it is equitable that Hal Gavin should receive a larger share of the firm profits than I, or Burrill Hume? Or Alex West? An ac-

countant friend of mine described our partnership agreement as a mutual fund for the benefit of the retired and disabled."<sup>1</sup>

This same young man, the story goes, later proposed that the firm's system be changed to one "whereby credit for every dollar of the firm's gross income be attributed to the particular partner or partners deemed responsible for earning it."<sup>2</sup> The fictional law firm of which he was a member rejected the proposal. But the approach he proposed—a productivity-based mode of income allocation—is that now being advocated by many experts and consultants.

Is the productivity model truly superior to the seniority-based system? At least with respect to the ability to capture the gains from diversification, we have serious theoretical and practical doubts.

### Productivity-Based Income Division

In order to give lawyers an incentive to be productive—*i.e.*, to avoid the risk of shirking posed by traditional seniority systems—a firm should, the argument goes, divide the pie by productivity, not seniority. In other words, each year a determination would be made of each partner's relative contribution to the firm's productivity, and income divided accordingly.

In the abstract, paying each partner in proportion to his contribution to the firm's profitability sounds like

*(Continued on page 53)*

*"The behavioral sciences have much to offer the judicial system, but not always on the requested terms."*



# Psychological REE Judicial

by David L. Rosenhan  
*Professor of Law and  
Psychology*

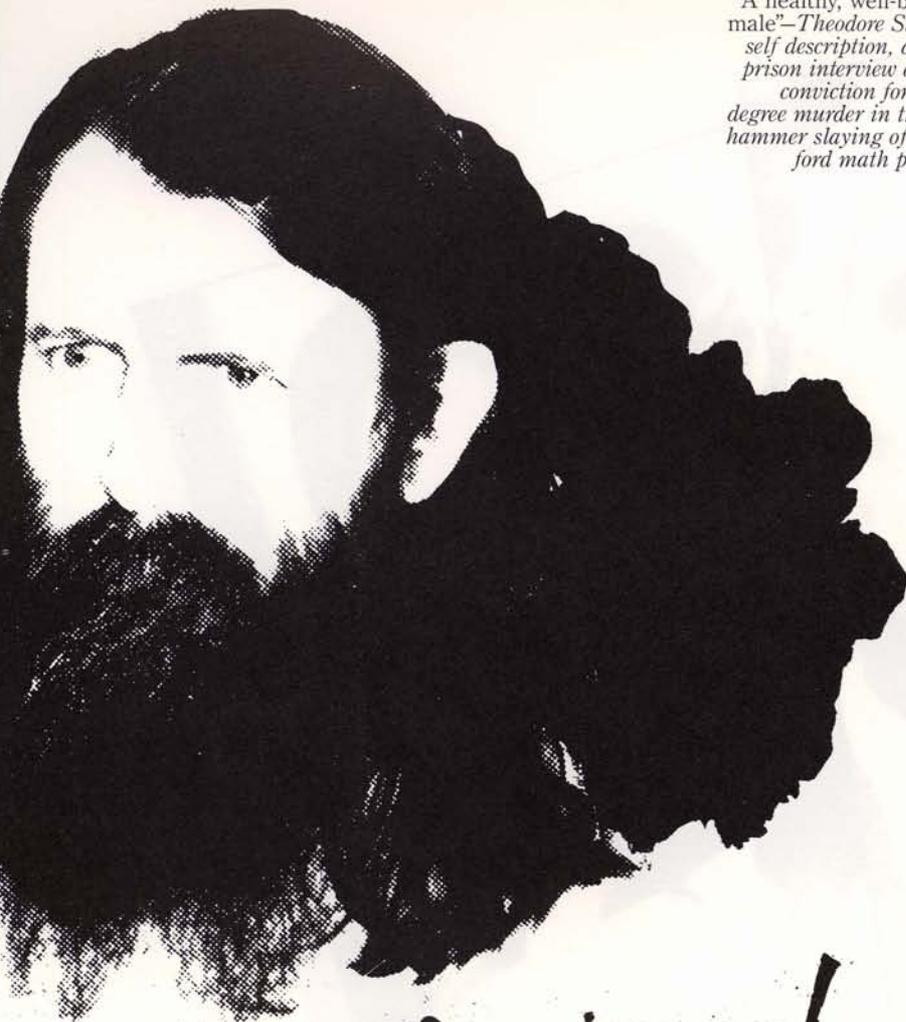
**H**ow can psychologists best integrate psychological knowledge with law and legal requirements?

That overly broad question becomes concrete and interesting under two conditions. First, when psychology has a great deal to offer

but the law asks a bad question. And second, when psychology has nothing at all to offer and the law asks a very good question.

I think of these two dilemmas as concrete manifestations of two nightmares.

In the first, you are surrounded by elegant bicycles, wonderful computers, a brand new set of Rorschach cards, a cyclotron, and a large sieve. Someone approaches. You expect



"A healthy, well-balanced male"—*Theodore Strelski's self description, during a prison interview after his conviction for second-degree murder in the 1978 hammer slaying of a Stanford math professor.*

# ILITIES and Policy

that you will be asked to demonstrate a splendid magic with your fine equipment. Instead, you are asked to build a house. Nothing that you own equips you to do that task. You are entirely unprepared, impotent.

In the second nightmare, there is nothing surrounding you, not a bit of equipment. Someone approaches and asks you to build a house. You are entirely unprepared, impotent.

The insanity defense is a good example of nightmares of the first sort. Psychologists know a great deal about psychological disorder. And what they know about psychological disorder equips them to contribute to the legal determination of insanity, even though the law, as we shall soon see, asks the question badly. The very fact that the law has posed the question poorly, however, has consequences for psychology,

psychiatry, and the law that all parties ought to be positioned to anticipate.

Custody determination is an example of the second sort, where the law asks a perfectly reasonable question that psychologists and psychiatrists are, in the main, totally unprepared to answer. What kind of wisdom, Solomonic or otherwise, protects parents and children under such conditions? Lest you be dismayed that the problems outweigh the solutions, let me say at the outset that there *are* solutions and that, at the very least, there are better ways of doing these things than the ways we have been doing them until now.

## The Insanity Defense

Let us turn first to the legal view of the insanity defense. The foundations of the insanity defense are profoundly moral and philosophical. They are the very same foundations of the criminal law.

A crime, you recall, cannot be committed unless there is a guilty mind. In the absence of such a mind, there can be no guilt and therefore no crime. Among those for whom a guilty mind is held to be impossible are the insane, for whom the following exception is made in the Model Penal Code:

*A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.*

The first part of that test, which deals with the capacity to appreciate the criminality of one's conduct, is called the *knowledge* or the *cognitive* test. The second part, dealing with the ability to conform one's conduct to the requirements of the law, is termed the *volitional* prong of the insanity defense.

## The Hinckley Case

The Model Penal Code's formulation of the insanity defense has been accepted in the Federal Courts and in more than thirty state jurisdictions. Its influence was growing until June 1982, when John Hinckley, who had seriously wounded the President and three other people, was acquitted after a lengthy trial



"No one will emerge from this unscathed"—the judge in *Peter and Roxanne Pulitzer's* bitter 1982 divorce/child custody battle.

wherein he was found not guilty by reason of insanity. Hinckley, it was felt, lacked substantial capacity to "conform his conduct to the requirements of law."

That jury decision, I need not remind you, triggered outrage. The public perception was that Hinckley had "beat the rap," and that the insanity defense had been the single instrument enabling him to do so.

Within the bar, the judiciary, and legislative bodies, feeling ran strong that it was time to restrict the insanity defense and particularly its volitional prong. How could one tell whether someone *could* not or

simply *would* not conform conduct to the requirements of law? The distinction that was early enunciated by Lady Wootton—that it is difficult to distinguish the irresistible impulse from the impulse that was merely not resisted—surfaced again to great applause.

And finally the mental health professions were upset. The Hinckley trial had been the kind of spectacle wherein psychiatrists from the prosecution were contradicted by equally eminent psychiatrists from the defense, seeming to render all psychiatry (and by implication all behavioral science) a useless mockery.

The result of this outrage was nearly instantaneous mobilization and nearly instantaneous change. Nine states either abolished their insanity defense or added along with it a verdict of "guilty, but insane"—a term that is philosophically contradictory. The American Bar Association hastily assembled a Task Force on Nonresponsibility for Crime, gave it an accelerated deadline, and in February 1983 made the following recommendation to each state's house of delegates:

*Resolved, that the American Bar Association approves, in principle, a defense of nonresponsibility for crime which focuses solely on whether the defendant, as a result of mental disease or defects, was able to appreciate the wrongfulness of his or her conduct at the time of the offense charged.*

Observe that this formulation embraces the cognitive, but abandons the volitional prong of the insanity defense. This was not the formulation that had been proposed by the task force. The task force would have retained the Model Penal Code formulation in use for more than twenty years. In reversing its own task force, the American Bar Association was clearly responding to public uproar over the Hinckley case.

The American Psychiatric Association was no less hasty in adopting a reformulated insanity defense:

*A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense.*

*As used in this standard, the terms mental disease or mental retardation include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances.*

Finally, the Committee on Legal

Issues (COLI) of the American Psychological Association, at its meetings on March 4-6, 1983, recommended that the Association endorse in principle the ABA position (although subsequently, the Board of Directors of the APA refused to do so).

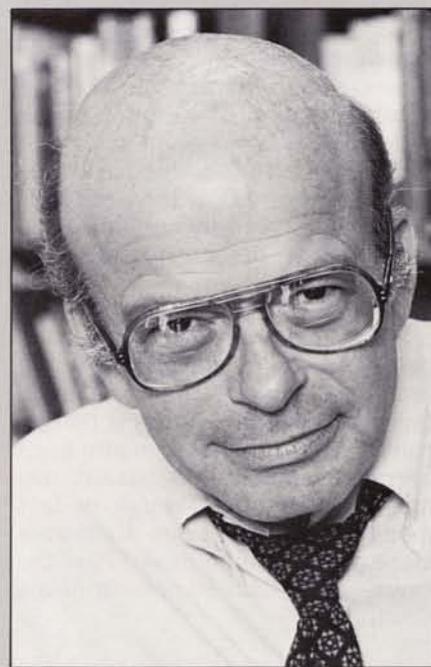
### The Distortions of Vivid Information

The effects of this single case have been remarkable. And they are very reminiscent of a thought experiment in which I invite your participation. I quote the hypothetical in toto:

*Let us suppose that you wished to buy a new car and have decided that on grounds of economy and longevity you want to purchase one of those solid, stalwart, middle class Swedish cars—either a Volvo or a Saab. As a prudent and sensible buyer, you go to Consumer Reports, which informs you that the consensus of their experts is that the Volvo is mechanically superior and the consensus of the readership is that the Volvo has a better repair record. Armed with this information, you decide to go and strike a bargain with the Volvo dealer before the week is out. In the interim, however, you go to a cocktail party where you announce this intention to an acquaintance. He reacts with disbelief and alarm: "A Volvo! You've got to be kidding. My brother-in-law had a Volvo. First, the fancy fuel injection computer thing went out. 250 bucks. Next he started having trouble with the rear end. Had to replace it. Then the transmission and the clutch. Finally sold it in three years for junk."<sup>1</sup>*

The logical result of this information should be to shift the frequency of repair record by an iota or two on a few dimensions, since the "brother-in-law" is just one more datum among thousands already accumulated.

But as you might guess, the result is much more dramatic than that. Such an encounter is likely to induce doubt and, indeed, to alter decisions in the direction of a car that "brother-



*Professor Rosenhan is a psychologist (PhD, Columbia, '58) with a joint appointment at the Law School and the Department of Psychology. Before coming to Stanford in 1970, he was director of research for the Department of Psychiatry of New York City Hospital at Elmhurst.*

*This article is based on his address, August 27, 1983, to the American Psychological Association's Division of Psychology and Law, of which he was then president.*

*The photos of individuals involved in court cases are from the files of the Peninsula Times Tribune.*

in-law" had no experience with. Indeed, subsequent experiments have shown that such concrete and vivid information overwhelms the abstract data summaries upon which rational choices are often made.

I propose that what these researchers term a "vividness effect" is operating powerfully in discussions of the insanity defense. Consider the following data:

In 1978, the last year for which relevant data are available, 1625 people were remanded to treatment facilities because they had been found not guilty of offenses by reason of insanity. That amounts to an average of roughly 30 insanity dismissals per state, though in fact many states had fewer. California alone accounts for almost 170 of the cases—more than 10 percent of the dismissals.

In 1980, there were about 39,000 felony convictions in California and well over a quarter of a million felony arrests. Only 259 defendants, however, were found not guilty by reason of insanity—far less than 1 percent of felony convictions.

Conservatively estimated—there really are no national data on this matter—there are no more than 2 insanity pleas for every 1000 felony trials, and considerably fewer successful insanity pleas.

Overwhelmingly, in trials where an insanity plea has been entered, it is stipulated to by prosecution and defense. Psychological testimony enters the trial by court appointment rather than from the prosecution or the defense. In the majority of cases, there is no "battle of the experts." A single expert, occasionally two, offers the court very similar testimony.

In short we are not talking about a defense that is unduly used. Nor one that, when used, is vastly successful. Rather, the insanity defense is rarely invoked and rarely succeeds. Moreover, when used, professional reputations are rarely blackened.

Finally, and most importantly, nearly always when the insanity defense succeeds, it deserves to succeed. There is reasonable doubt that the defendant was sane.

Nevertheless there are two further

reasons to expect dispute regarding the insanity defense. The first arises from oddities of measurement. The second from adversarial investments.

### Categories and Continuities

With few exceptions, measurement in science is continuous rather than categorical. This is as much the case with psychological measurement as it is with measurement in biology and physics. Most of the significant features of human experience are continuous.

Take depression, for example. Though we often speak of depressives—as if depression is a natural category of clear and known parameters that includes some people and not others—we know that none of us is a stranger to depression. Depression varies in imperceptible steps from none at all to profound and intense. Depression is continuous.

The identical issue arises in regard to insanity. The law treats insanity as if it were a natural category: There are the few insane, and then there are the rest of us. The insane are unable to appreciate the criminality of their behavior, unable to know right from wrong, unable to control their actions. The rest of us can.

But "appreciating," "knowing," and "controlling" are continuous phenomena, upon which law (and language) impose categories. The fact is that few people have full appreciation of the meaning of their behavior, few fully know right from wrong, and few indeed are fully in control of their actions. Most of us are distributed along the continuum. When we say that someone is "unable to appreciate the criminality of his behavior," we are inserting a relatively arbitrary cut-off point into that continuous distribution, and designating those who exceed the cut-off point insane.

Now consider the insanity plea. The very notion of insanity is for most psychologists and psychiatrists an imposed and artificial cate-



"I think there's either enough to guide the jury or confuse the jury"—the presiding judge, after one month of conflicting psychiatric testimony concerning John Hinckley, Jr., found not guilty by reason of insanity in the 1981 shootings of the President and three others.

gory. The assessment of whether a person was able to control his behavior, or able to understand and appreciate its criminality, is, among thoughtful people, a matter of degree, not kind. We are, all of us, more or less in control of our impulses. We are, all of us, more or less appreciative of the criminality and noncriminality of our behavior. When the law imposes a category—insanity—on what is a fundamentally continuous dimension, we ought to expect disagreement not unlike the disagreement that we see regarding grading or illness or a host of other important dimensions.

And that is precisely what we find. Linda Cheng ('83), Thomas Panelli ('83), and I recently examined all the insanity pleas entered in Santa Clara County during a 25-month period. Over the time in question—from October 1980 through November 1982—a total of 6,635 criminal offenses were arraigned.

Of these defendants, 39 pleaded not guilty by reason of insanity, at some point in the criminal proceeding. Of those 39, 16 defendants pleaded successfully. All told, the rate of insanity acquittal in Santa Clara County during this period was less than 1 in 400, a figure that does not differ dramatically from that found in other studies.

We also, in our study, looked at the question of disagreement among mental health professionals asked to evaluate criminal defendants.

The law in California requires the appointment of at least two such experts to investigate the mental status of the defendant and to determine sanity. If our view of the matter is correct—that the state asks clinical scientists to impose categories on matters that they view as continuous—then one should expect some amount of disagreement.

Indeed, that is precisely what we found. Mental health professionals agreed with each other in 33 of 39 determinations. But in 6 determinations—roughly 15 percent of the cases, the doctors split on the question of the defendant's sanity.

### Shifting Cut-Off Scores

It is reassuring that despite the difficulties in diagnosis, the incidence of disagreement among mental health professionals is not very high—not much higher in fact than might be expected had the issue been grades or physical health. Moreover, very little of this disagreement comes to the public's eye. In many of our cases where there was disagreement, the matter never came to trial.

Yet it is undeniable that, especially recently, there have been a number of prominent cases where the disagreements among mental health professionals regarding the sanity of the defendant made headlines.

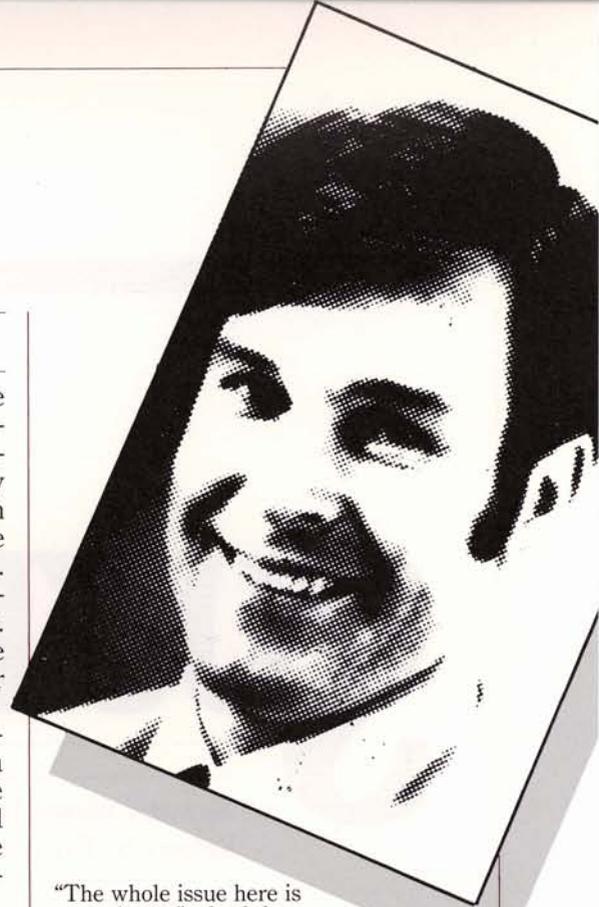
Those disagreements arise, I believe, from the fact that in determining categories, one needs to set cut-off scores. And cut-off scores will be higher or lower depending upon whether one is testifying for the defense or the prosecution.

Experienced practitioners will find that fact too obvious to belabor. Yet it needs to be observed that this is one area in which the judicial system itself creates unavoidable opportunities for disagreement among mental health professionals. No matter what standard is ultimately adopted for the insanity defense, whether it be as narrow as *M'Naughten* or as broad as *Durham*, the very nature of the adversary system will generate disagreement on the matter of the defendant's sanity.

That is because in this matter, as in many others, where one sets the cut-off score depends upon the nature of one's investments. The adversary system in law makes it very difficult for a mental health professional not to be influenced in such a way that cut-off scores are also influenced.

### On Child Custody

Nowhere are the theoretical and empirical shortcomings of psychol-



"The whole issue here is mental state"—the defense attorney for Dan White, who was convicted of voluntary manslaughter in a first-degree murder trial for the 1978 shooting deaths of the mayor of San Francisco and a city supervisor.

ogy so much in evidence as they seem to be when psychology is called upon to decide to whom a child should be awarded in a custody proceeding. Divorce, as many of us know first hand, is a splendid solution for adults—and a disaster for children.

Some of the issues that might trouble us in determining custody are illuminated in a recent paper by Beaber, who asks us to imagine that we have completed a psychological assessment of a family that is being dissolved. The relevant findings from this assessment are that neither of the parents suffers severe psychopathology: Neither is utterly incompetent to parent. Rather, as is more commonly the case, both meet the minimal standards for being a parent. The court requires help to decide which will be the *better* parent.

Now, imagine that you have testified that the mother of this seven-year-old boy is hostile and rejecting,

*(Continued on page 57)*

*A Lawyer's  
Dilemma*

# SOUTH AFRICA

*Text and photos by*  
Robert S. Townsend '84

I spent the 1983 fall term in the Republic of South Africa on an externship with the Legal Resources Centre (LRC), the only public interest law firm in that country. Though I knew in advance that separate and unequal was the law of the land, no amount of homework could really prepare me for the experience of living and practicing in so alien a system.

The form of South African law was familiar enough. Referred to as Dutch-Roman common law, it seems very like ours except for a heavier use of Latin terms and a bifurcation (similar to England's) of practitioners into either courtroom advocates (i.e., barristers) or attorneys (solicitors).

The real difference lay in the openly racial content of the many laws that enforce segregation and subordination of the African majority and, to a lesser but significant degree, of individuals of mixed ancestry ("coloureds") and Asian



ancestry. (The usual collective term for people of non-European stock is "blacks.")

The Legal Resources Centre, which maintains offices in three cities, provides legal assistance to such individuals. In doing so, it works within a system of law that LRC lawyers consider fundamentally flawed. They are keenly aware of their ethical dilemma but endeavor to challenge and reform the law toward a more equitable social structure.

I expected, as a student and foreigner, to play a very limited role. However, it soon became clear that the demand for legal assistance among South African blacks is so great that the LRC can't afford to have someone sitting in the library doing research for others.

In no time I had my own clients with disputes in labor law, commercial law, housing law, and influx control—an area of law peculiar to South Africa, where restricting the presence of Africans in urban and industrial areas designated as white is a high priority.

I hope, by recounting some cases I was involved in, to help you appreciate and understand the work of a public interest lawyer in South Africa.

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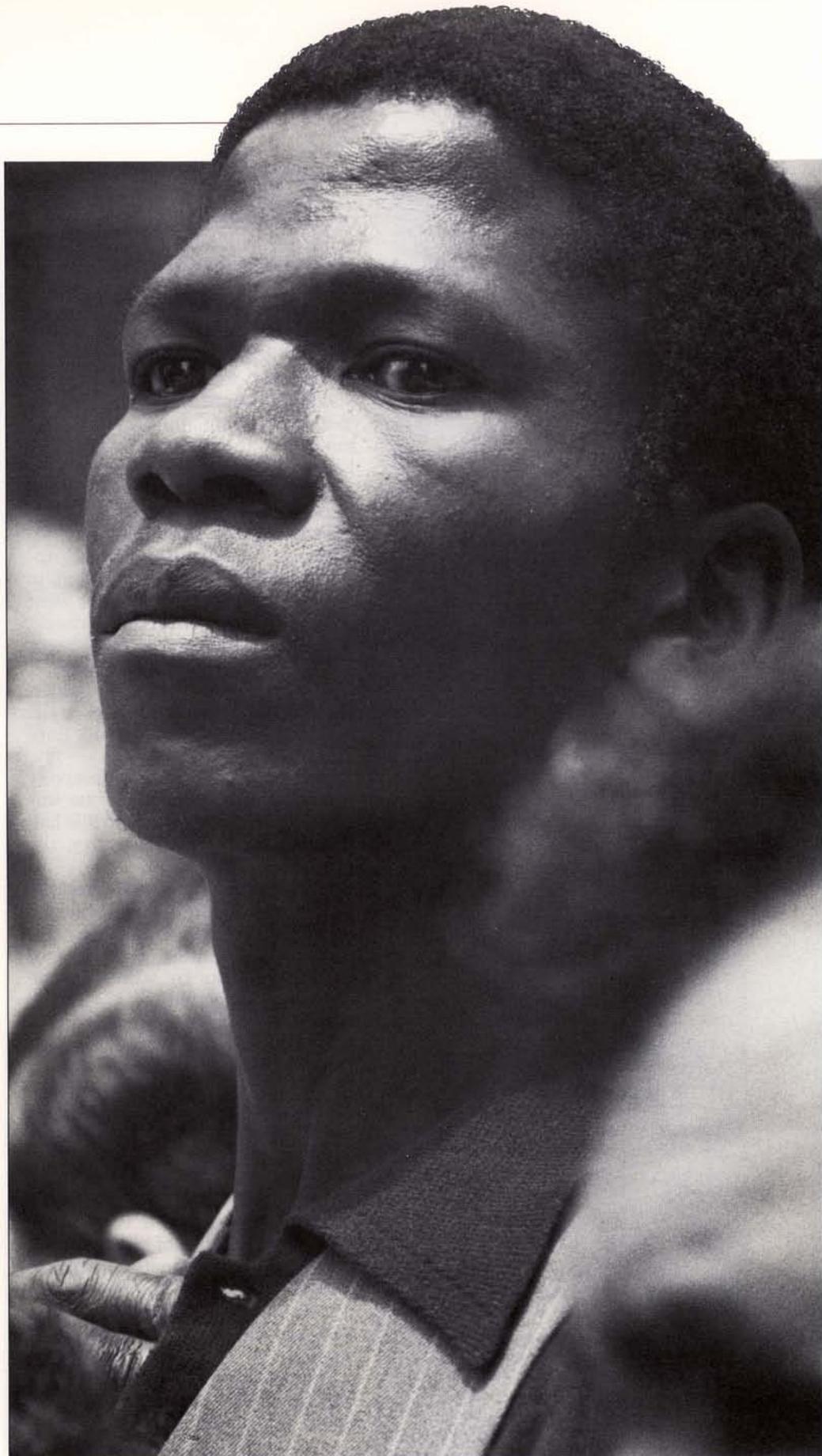
### Mr. Willie

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James Willie is a very shy, unimposing African in his mid-thirties. With the aid of an interpreter I was able to gather his story.

Mr. Willie had been employed by a chemical firm under a renewable annual contract expiring in July 1983. (Such contracts—of which more below—are the rule for Africans without residence rights in white, urban areas.)

Shortly before his contract expired, Mr. Willie negotiated a wage increase equivalent to five cents an hour (from US\$1.25 to \$1.30) with his employer. At the end of his





*Robert Townsend graduated from the School in June 1984 and is now an associate at Morrison & Foerster in San Francisco. His interest in Africa developed during a year spent in Kenya through UC-Berkeley's Education Abroad Program.*

*The photographs, which Townsend took during his 1983 Stanford Law externship, are of onlookers at a bicycle race through the streets of Johannesburg.*

*Townsend would like to thank Dean Hamerton-Kelly of the Stanford Chapel and the Anglo-American Foundation for helping fund his externship. He is also grateful to the members of the Legal Resources Centre for "the professional guidance and consideration they exhibited" during the four months he spent in their offices.*

contract, his employer issued him a "call-in-card" to use in renewing the contract. Mr. Willie duly traveled (as required by law) to his Transkei homeland, presented his card, secured the necessary legal papers for renewal, and reported back for work on July 30, 1983.

Mr. Willie was paid at the new rate for just two weeks before his wage suddenly dropped to \$.86 per hour. When he complained to management, he was told he must accept the lower wage or leave the company. He remained for another month, until Sept. 14, at which time he was dismissed without warning.

Three weeks later he was instructed to return to the plant to collect his leave pay. When he went to the manager's office for his check, James Willie did what all African employees of that company are required to do to speak to the manager: he got on his hands and knees in the doorway and stared at the floor until recognized.

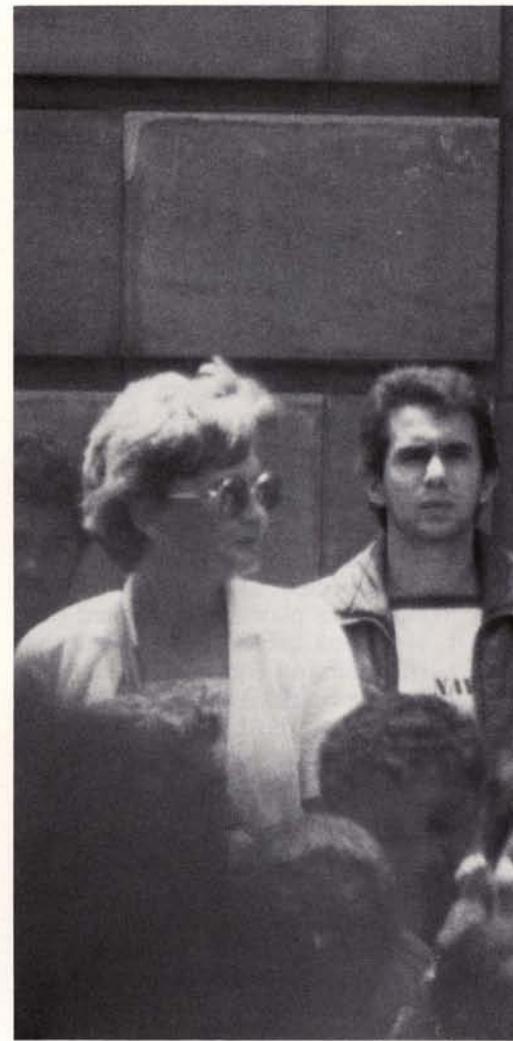
The manager then aggressively approached and asked why he was there. When told that Mr. Willie had come to collect his leave pay, the manager struck him.

Mr. Willie eventually received the pay, but not before being physically and mentally assaulted by the manager. Unfortunately, this type of abuse of blacks by whites in the workplace is common.

There were two legal alternatives available to Mr. Willie. The first—to take the matter to an industrial council on the grounds of an unfair labor practice—was rejected because the relief available is reinstatement by the same employer, which Mr. Willie quite understandably did not desire.

The other, based on the fact that Mr. Willie had had a valid work contract at the time of his dismissal, was to proceed against the firm for breach of contract. We had just settled a similar case against the same company for a sizable amount of money.

Such suits have become a common tool for public interest lawyers in South Africa, where so many Afri-



can employees are hired as migrant laborers on a contract basis. The usual approach is to sue the employer for the balance of wages due under the contract. The damages available depend on factors like mitigation. To date, all such cases have been settled out of court. However, the frequency of this type of action makes it likely that the theory will soon be tested in the courtroom.

In Mr. Willie's case, a demand letter to the company was prepared requesting damages for the breach of contract and for assault. The firm responded aggressively, refusing our demands and assuming a very hostile position.

We have since consulted with Mr. Willie and are proceeding with the contract action. (The assault claim was dropped because of the difficulties of proof.) I anticipate this case will settle sometime in the near future.



### Mr. Mogkaki

Mr. Mogkaki was by South African standards a relatively privileged African, in that he could afford to purchase a used car. (Most Africans must either walk or rely on segregated public transportation.)

He had visited the lot of a used-car dealer in Johannesburg, selected a car, and signed a contract. But when he produced his money, expecting to receive the automobile, the dealer had other plans.

Taking the money, the dealer explained that he would like to keep the car one more day to finish preparation and make it perfect. Mr. Mogkaki agreed and left both the money and the car with the dealer.

When Mr. Mogkaki returned for the car the next day, the dealer claimed that Mr. Mogkaki had taken it the previous day. The same mer-

chant is known to have defrauded several other people, relying on such schemes.

Mr. Mogkaki and his fellow victims may never see their money again. When I left, the LRC was in a race to get judgments before the government succeeded in extraditing the dealer, who is wanted in Germany on several criminal charges.

Although South Africa has legislation providing a degree of consumer protection, this and other LRC cases show that individual merchants are often able to overstep the bounds of the law and take advantage of uneducated, usually black, customers.

Such violations are bound to occur when the common law of contracts is applied in an environment where assumptions of equal bargaining power and freedom of contract are absurd.

### Mr. Sibisi

The only involvement I had with South African criminal law occurred during an inquest over the death—alleged by the police to be suicide—of an African man in police custody.

Mr. Sibisi, a farm worker, had been detained three times in connection with the murder of a white foreman. He complained to his wife after his first two detentions that he had been tortured. He told her that the police had used electric shocks on his genitals and other parts of his body; that they sprayed tear gas up his nose; that they had placed a canvas bag over his head, tightening it around his neck and saturating it with water so he could not breathe; and that they had whipped and beaten him.

Within a week of being released from his second detention, Mr. Sibisi

was again taken to the police station. Two prisoners who had shared his cell testified during the inquest that he also complained to them about being shocked during previous detentions. (Mysteriously, this evidence did not appear in the written statements of these prisoners prepared by the police.)

According to the police account, the two other prisoners were removed from the cell the following morning to work around the jail. Mr. Sibisi was left for later questioning. When the police came for him, they found him dead, hanging by the neck from a rope tied to the bars. The police claimed that he had committed suicide and that the rope must have been smuggled in around his waist.

The magistrate at the inquest decided not to bring charges against any police officer. Although I cannot quarrel with his decision based on the limited evidence we were able to introduce, I couldn't help feeling that something was fundamentally wrong. It seemed clear to me that Mr. Sibisi had either been murdered by the police because he had refused to make a confession, or that he had committed suicide out of fear of being tortured again.

The tragedy was compounded two weeks later when Mr. Sibisi's brother died in the same manner—hanging by the neck from a rope, in the countryside. But perhaps the greatest tragedy is that several months after these deaths, another man (white) was convicted of murdering the foreman.

### Workers in Limbo

Thursday mornings at the LRC are particularly chaotic. I would arrive at 8:00 a.m. to find the waiting room and hallway full of African men waiting for help in obtaining permission from the government to become residents, along with their families, of the urban areas where they are employed.

Residency rights are in fact a privilege carefully restricted under

the Urban Areas Act of 1945. The vast majority of workers do not qualify and therefore must either limit their stays in white areas (which include most urban and industrial areas) to 72 hours or get special permission for temporary residence, which does not include their families.

The Act is part of a body of "influx control laws" that attempt to resolve one of the fundamental dilemmas of South Africa's apartheid system: the desire to exclude Africans from those large areas of the country which are designated as white, while at the same time taking advantage of cheap, African labor.

Most LRC influx law clients are seeking to obtain permanent residence status under the provision requiring that they have worked in the area for one employer for an unbroken period of not less than ten years. Any brief interruption in employment, or a change in employers, is sufficient grounds for denial by the local boards that administer the laws.

The "call-in-card" procedure that Mr. Willie was required to follow is one way the government has attempted to prevent Africans from qualifying. Employers wishing to continue employing an African migrant worker must in effect fire him each year. The worker is then given a "call-in-card" which, when taken to and presented in his official native "homeland," enables him to sign another annual contract. This technique was thought to prevent the worker from meeting the statutory requirement for ten *continuous* years with the same employer.

The LRC successfully challenged this policy in 1983 before the South African Appellate Court in a case involving Mr. Tom Rikhoto, a native worker with an unblemished record—ten consecutive annual contracts with one firm.

Thanks to the Rikhoto victory, the LRC is swamped with men hoping to receive the coveted residence rights, leading the LRC to set aside a whole day each week for these clients.

One of my first jobs was to handle the more "difficult" cases—those that did not fit neatly into the facts of the Rikhoto judgment. It is important to realize that while the Rikhoto case may have opened a door, administration boards are trying to limit its impact by strictly construing the holding.

Most of the men I saw had already applied and been refused. Sometimes I would discover that the board had made an error and that the client was clearly entitled or had merely failed to produce sufficient documentary evidence. In these cases, we would merely provide a letter for the client to take to the board setting out the facts of his case and the reasons he was entitled. The boards were usually cooperative in these circumstances.

However, I was more often confronted with an individual who just missed qualifying because he had been fired a few weeks short of the ten required years, or had once had a brief period of unpaid leave. Any such flaw in the worker's ten-year record could be grounds for denial of residence status. He would then be required to continue as a "migrant" worker—living in a decrepit men's hostel in an African township for 11 months a year and seeing his wife and children only during a brief annual vacation in the "homeland" where they are forced to live.

Out of the perhaps 25 men I tried to help, one face stands out—that of Mr. John Hlongwane. Mr. Hlongwane, a giant of a man, had recently been denied residence rights because of a single exception in his ten-year work record: several years ago he had taken an extra month of leave (unpaid) to build a house for his wife and children in their homeland.

Africans, living under a hostile government, are skilled at hiding their feelings. But when I told Mr. Hlongwane that the price of his single month of home-building would be continued separation from his family, the mask fell away and his anguish was unmistakable.

(Continued on page 58)

*"The Legal Resources Centre . . . works within a system that LRC lawyers consider fundamentally flawed. They are keenly aware of their ethical dilemma but endeavor to challenge and reform the law toward a more equitable social structure. . . .*

*"I tried to avoid the conflict as much as possible by learning which questions to ask and which to avoid. However, difficult situations often arose, and at those times I elected to adhere to the law, however repugnant, out of a desire to avoid tarnishing the reputation of the LRC."*



## Recycling Our Electric Utilities

by Ralph C. Cavanagh  
*Senior Staff Attorney  
Natural Resources Defense  
Council*

**A**s an attorney for the Natural Resources Defense Council, I'm not an obvious candidate for counselor to the afflicted electric utility industry. Indeed, some will view hostility toward that industry as an occupational requirement for environmental activists. I'm reminded that David Brower, a founding father of the modern conservation movement, was once asked to name the best source of electric power, from an environmentalist's point of view. His response was "flashlight batteries." I think, however, that Mr. Brower would join me today in striking a more conciliatory note, as part of a search for constructive responses to some of the most expensive planning and investment mistakes in American history.

Before assessing the predicament of our electric utilities, it is important to note their immense economic and environmental significance. Electricity is now responsible for more than a third of this society's energy consumption, and that fraction has grown in each of the last twelve years. In the decade following 1972, while total U.S. energy use was declining by 5 percent and petroleum use was down 13 percent, energy devoted to electricity production *increased* by 22 percent. Between 1980 and 1982, electricity

accounted for almost half of the energy dedicated to all requirements of our residential, commercial, and industrial sectors. By contrast, petroleum met barely one fifth of those needs.

Utilities have become entrenched as a dominant element of the national economy. Power plant construction alone absorbed on the order of 10 percent of gross private domestic investment over the last decade. Electricity production consumed 85 percent of all coal used within the United States in 1983. In addition, from the standpoint of environmental quality and regulation, utilities are a crucial point of leverage. Whether the issue is acid rain, air quality, disposal of radioactive waste, or prospects for catastrophic climate changes, utilities find themselves at the center of national debate.

But if this sector is now one of the economy's most important, it is also one of the sickest. Since 1972, 147 power plant cancellations have cost the nation in excess of \$14 billion in totally unproductive construction. At least a dozen more unfinished plants, representing more than \$12 billion in sunk costs, are on the brink of termination today. It was a consortium of utilities that recently produced the largest municipal bond

default ever inflicted on the investment community. Records for costliest single power plant cancellation are epic but transient: Washington State's 1982 mark of \$2.3 billion gave way in the first month of 1984 to a still more robust \$2.5 billion collapse in Indiana. Either New York's Shoreham unit or New Hampshire's Seabrook Station may seize the lead later this year, by abandoning the field after expenditures exceeding \$3 billion.

It is natural at this point to ask what on earth has happened to an industry that, until about ten years ago, was a model for sustained growth and low risk. Throughout the postwar era, utilities had been the textbook illustration of a natural monopoly firmly grounded in economies of scale; every new power plant was cheaper and cleaner to operate than the units it supplemented. The primary task of regulators was to determine the timing of rate reductions. Demand escalated majestically at rates of about 7 percent per year.

Beginning in the early 1970s, that reassuring and simple world disintegrated, as economies of scale gave way to an epidemic of cost overruns. Suddenly every new kilowatt-hour cost more—in many cases three to ten times more—than the average for the existing system. A power plant's christening was no longer an occasion for consumer celebrations, but rather a harbinger of large rate increases.

Those increases were exacerbated by the common practice of playing pyramid games with power plant

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**\*An occasional section of comment and opinion. Views herein expressed are not endorsed by the editors or by Stanford Law School. Readers are invited to respond. Contributions on new topics are also welcome.**

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financing. During the ten- to fifteen-year construction period for a large-scale coal or nuclear plant, returns on bonds and stock sold to finance the plant frequently were paid by issuing more bonds and stock; the first installment on the inflated debt came due only after the first kilowatt-hours emerged from the generator. What happened next has been called "rate shock" by the industry—and something rather less printable by the recipients of the bill.

None of this would have mattered nearly as much to utilities if high rates of growth in electricity demand had persisted throughout the transition. They didn't, which will not surprise anyone who believes that demand for a commodity is not altogether unrelated to its price. Notwithstanding all the power plant cancellations I noted a moment ago, the national utility industry today enjoys—or rather, intensely regrets—capacity surpluses that exceed reasonable reserve requirements by a factor of two.

Any pretense of certainty about future consumption has vanished. The most that forecasters in the employ of the federal Department of Energy are willing to venture is that the nation's needs in the year 2000 will probably fall between two points that are separated by about 300,000 megawatts. That assumes a minimum annual growth rate of 2 percent. If you join increasing numbers of analysts in acknowledging the possibility of zero growth in electricity consumption, low and high estimates for the year 2000 are at least 600,000 megawatts apart. That figure far surpasses the highest U.S. peak demand recorded to date. Such uncertainties are awesome—not to say paralyzing—if you are a utility executive contemplating a multi-billion-dollar capital investment in a power plant that will take ten to fifteen years to complete. Mid-course corrections are going to be traumatic in the extreme.

I want to expand a bit on why the forecaster's task is so difficult. It has

much to do with unexploited opportunities for improvements in the efficiency of electricity use. Take a typical all-electric Stanford house, occupied by a typical Stanford law professor. By applying technologies available today, you could cut electricity consumption in that house by at least 70 to 75 percent without changing the lifestyle of its inhabitants. How? By replacing the upright, frost-free American refrigerator with a comparable Toshiba; substituting heat pumps for the obsolete electric water and space heating systems; removing the incandescent bulbs and installing fluorescents that deliver the same illumination for one-fourth the kilowatt-hours; replacing single-pane windows with triple-pane glass; using newly-developed methods to seal all the hidden leaks that the builder plastered over; and by completing other adjustments too numerous to list in full now. Every year brings innovations that expand the options available. For example, a Stanford law student is now involved in marketing a lightweight transparent film that gives two-pane windows the insulation strength of four-pane windows.

The list of conservation options for commercial buildings and industrial plants would be different in composition but not in effect. The cost per kilowatt-hour saved would not always be trivial, but it would be substantially less than a kilowatt-hour from a new coal-fired or nuclear plant. Cumulatively, such efficiency improvements constitute a formidable electricity resource, which can

*(Continued on page 54)*

*Mr. Cavanagh first presented these views at a faculty seminar on March 21, 1984, while serving as a lecturer at the School. A graduate of Yale (BA '74, JD '77), he has been with the Natural Resources Defense Council in San Francisco since 1979. A revised version of this lecture is being published in the Amicus Journal.*

## Protection Against Unjust Dismissal

by William B. Gould IV  
*Charles A. Beardsley*  
*Professor of Law*

Two years ago, in the midst of the crisis between the Polish government and Solidarity, on the eve of the first Congress of Solidarity, Pope John Paul II issued an encyclical which read: "We must emphasize and give prominence to the primacy of man in the production process, the primacy of man over things. Everything contained in the concept of capital in the strict sense is only a collection of things. Man is the subject for work, and independent of the work he does, man alone is a person. This truth has important and decisive consequences, and again, the right to private property is subordinated to the right to common use, to the fact that goods are meant for everyone."

We live in an age and in a country where the concept of employment rights—rights that relate to the ability to provide for oneself and one's family and to the basic human dignity of workers—have lagged far behind the evolution of rights afforded individuals in such areas as access to and protection of property. Nowhere is the contrast more vivid than in the area of the right to job security.

There have been many innovations in the employer-employee relationship in the twentieth century. Until the past few years, rigid adherence to the terminable-at-will doctrine (the notion that an em-



ployee could be dismissed at any time for any reason) was given constitutional status by the Supreme Court, and accepted as a matter of law throughout the United States. It was part of the conventional wisdom among those concerned about industrial relations in the United States. The evolution of trade unions and modern labor legislation and statutes, executive orders, and other instruments prohibiting discrimination on such grounds as race, sex, national origin, and religion, did not fundamentally transform the basic employer-employee relationship, particularly in a nonunion setting, although the impact of employee discrimination laws cannot be gainsaid. While unionized employ-

ees were able to achieve protection through just cause provisions in collective bargaining agreements, and public employees were able to obtain protection through civil service routes, this was not true for the majority of the work force in the United States.

Recent developments, perhaps facilitated by the series of economic crises in the post-World War II period, have improved this situation considerably. A number of doctrines, based on contract and tort theories, enunciated by the Supreme Court of California and by other courts throughout the nation, have under some circumstances protected long-term employees from dismissal. In this respect, we begin

to show a greater degree of compatibility with other industrial countries that have long provided protection to employees against attacks on job security. The International Labor Organization's Termination of Employment Convention affords protection to workers in those countries that are signatories, but the United States is not.

There are also serious problems with the way in which the case law has evolved in California. The case law has attacked existing nonunion procedures, and challenged employers to institute procedures to protect employees, but it is inadequate. The standards, as enunciated by the courts, are vague. Some decisions use the same terms—such as “just cause”—in different senses in the very same opinion. Thus, it is difficult to provide adequate counsel and advice to both employers and employees. It would appear that the theories that have evolved in the courts provide protection only to employees who have been employed by a particular employer for a considerable period of time. Utilization of juries has added to the unwieldiness of legal procedures, and to the unpredictability of the outcome.

Inasmuch as the theories utilized by the courts are often predicated upon common law, which has been hostile to the idea of compelling personal services, there is no provision for reinstatement. One would assume a society concerned with the protection of job security for workers, while recognizing that reinstatement is not always the appropriate remedy, would at least make that remedy available.

Perhaps most important, the procedures seem to provide the most protection to those who are best able to protect themselves, i.e., those who are educated and in managerial, executive, or supervisory positions. This may be the result of a screening-out process among that portion of the bar representing plaintiffs.

I am chairman of a committee established by the California Bar to

make recommendations about what legislation would be appropriate in this area. The statute our committee is working on is designed to supplant existing California case law. An employee would be able to file a claim within a period of time—as yet undetermined—with a commissioner who has the status of a state court judge, whose job would be to mediate and simultaneously engage in discovery. The employer would be obliged to state within a specified period of time what the reasons were for the discharge. It may be desirable to exempt those with long-term written contracts (so as to remove from the statute those powerful enough to protect themselves) and some industries, like sports.

We would give greater deference to management decisions with regard to higher-level employees, because it is more difficult to make determinations at this level.

The statute would also provide remedies—probably including back pay with interest, reinstatement, or payment of earnings lost for a period of up to two years—where reinstatement is not appropriate. Where the employee prevails, attorneys' fees and costs will be paid by the employer.

Many objections have been made to this proposal. It is said that there would be an avalanche of cases and that there are not enough qualified arbitrators to resolve these matters. If there were a shortage of arbitrators, however, I don't believe that even those unions and employers that resort to arbitration would remove the arbitration clauses in their contracts. Those procedures developed in the unionized sector since the 1890s, and particularly since World War II, would continue.

Regarding the concern about an avalanche of cases, it is of interest to note that the Canadians have had an unfair dismissal statute, covering their federal sector, for five years. That statute, in contrast to the one we recommend, provides that the state bear the cost of the proceed-

ings. It is in many ways an invitation to indiscriminate use of the process, yet in the first two years, only 383 complaints were filed, from their approximately 300,000 workers.

There is also concern lest arbitrators, whose daily bread comes from arbitration, be influenced by the fact that they will not see the individual employee again but they will see the big company again, in contrast to the union-employer situation, where the arbitrator will see both sides in the future.

Those who would most benefit from this proposed legislation are not well organized, and thus are unable to express their point of view. Many companies oppose it for obvious reasons, although the effect of the legislation would be to limit their liability, to take away the prospect of punitive damages and compensatory damages. Some companies fear that more of their employees would challenge them in the future, but many companies that have been sued already favor this legislation, because they now see the clear and present danger.

Plaintiffs' counsel are not particularly sympathetic because the proposal limits damages, and they operate under contingency fee arrangements. Possibly those who presumably assert the best interests of the workers are asserting, instead, their own.

One would assume the unions

*(Continued on page 52)*

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*This editorial is based on a statement by Professor Gould at a colloquium of the Center for the Study of Democratic Institutions in Santa Barbara in November 1983. A fuller version, with discussion, appeared in the July/August issue of The Center Magazine.*

*Professor Gould was cochairman of the California Bar Association's Ad Hoc Committee on Termination at Will and Wrongful Discharge. The Committee's report and legislative recommendations were issued February 8, 1984.*

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# Board of VISITORS

## ENTHUSIASM MARKS ANNUAL MEETING DELIBERATIONS

Highpoint of the kickoff lunch (right) was the talk by Professor William Baxter '56 (below). Associate Dean Barbara Dray '72, Visitor Lucinda Lee '71, and panelist Walter Buting of Genentech (below, right) were among the nearly 100 participants in the annual Visitors' meeting. The lively moot court finals were enjoyed by a full house, including Dan Olincy '53 (bottom).



There was an almost celebratory air about this year's Board of Visitors meeting. Bright skies prevailed from the opening luncheon Thursday, May 3 to the final banquet Friday, May 4. But more important was the clear sense that the School, already among the best, was continuing to move forward.

Dean Ely warmly welcomed the nearly one hundred Visitors, spouses, and guests in attendance, noting that several elements of this year's program—panel discussions on alternative methods of dispute resolution, law and technology, School and University financial management, and the School's fundraising priorities—grew out of suggestions by the Executive Committee and Visitors, during last year's meeting.

The Thursday luncheon speaker (whom Dean Ely thanked his "lucky stars" to have back at Stanford) was William F. Baxter, chief from 1981 to 1983 of the Antitrust Division of the U.S. Department of Justice. (Baxter first joined the Stanford faculty in 1956 and is the School's Wm. Benjamin Scott and Luna M. Scott Professor.) His talk, titled "Back Through the Looking Glass," offered a fascinating insider's view of the controversial IBM and AT&T cases.

G. Williams (Bill) Rutherford ('50), chairman of the Board of Visitors, opened the formal Visitors' program after lunch with a brief orientation for new members, observing that "the Board is a University visiting committee with a broad advisory mandate."

Rutherford then paused to pay tribute to his "friend and classmate," Senator Frank Church ('50), who had died less than a month before (see "In Memoriam" section).

After a full and varied afternoon—including Dean Ely's annual "state-of-the-school" report and the multi-media presentation on dispute resolution (both described on subsequent pages)—the Visitors gathered in the School's Forty-

Niner Room for cocktails and a sumptuous buffet supper.

Entertainment was provided by a troupe of student and staff thespians, who performed excerpts from their musical, *A Midsemester Night's Dream*. Billed as "an historically accurate portrait of an ancient Greek law school and law firm," the production owed far more to the talents of third-year students Bill Skrzywniarz, Alex Alben, Greg Karasik, Marcela Davison-Aviles and crew than to the Bard of Avon.

Friday's program began with an exploration by practitioners and professors of emerging issues in law and technology, with curricular implications for the School.

Dean Ely then shared with the Visitors a draft document describing developmental priorities for the School over the next three to five years, and invited comments and suggestions.

Small-group lunches with students—a lively tradition at Board of Visitors meetings—were next on the schedule, followed by a very informative session, "Fund Raising and Financial Management: How the University and the Law School Raise and Manage Money," featuring Law School Associate Deans Barbara G. Dray ('72) and Thomas F. McBride, University Vice-Provost Raymond F. Bacchetti and Vice-President (Development) Henry E. Riggs, and University Trustee George E. McCown, who chairs the Trustee's Subcommittee on Investment Policy and Evaluation.

The formal program ended with a summary and advisory session chaired by Rutherford. Samuel D. Thurman ('39), in his parting words upon retiring from the Board, offered high praise for the School, its leadership, and graduates, but suggested three areas for improvement: increased representation of women on the faculty and Board of Visitors, growth in Law Library holdings, and more frequent contact between faculty and the Board.

Dean Ely, responding to a question from Brooksley E. Born ('64), noted that the School has 4 women out of 37 on the regular faculty—1 a full professor, 1 voted to be, 1 hired as an associate professor, and 1 assistant professor promoted to associate. The number of women on the Board of Visitors has also increased substantially. "This is something we are continuing to give thought to," he said. "We are not satisfied, and we're working on it."

John Van de Kamp ('59), attorney general of California, asked a series of questions—about the School's drop-out rates (answer: very low—only 2 or 3 a year), record in passing the bar (usually the highest rate in the state of California), and performance of minority students (not noticeably less successful in passing the bar than the School's other graduates). Overall, noted Associate Dean Mann, "almost all our students—98 percent or so—pass after the second attempt and some 92 percent do so the first try."

Additional comments by Carol M. Petersen ('66), Charles D. Silverberg ('55), Judge Thomas P. Griesa ('58), David Freeman ('55), and Chairman Rutherford concluded the session—just in time for participants to attend what turned out to be one of the most spirited and witty Moot Court final competitions ever held at Stanford. (See "School News" section for photos and story.)

*Justice Stevens (right), fresh from the Kirkwood Moot Court final competition, was a guest at the Friday banquet, where he was joined (below) by Dean Ely and State Attorney General John Van de Kamp '59.*

The Visitors were joined at the banquet that evening by Moot Court Justices John Paul Stevens of the U.S. Supreme Court, Rose Elizabeth Bird of the California Supreme Court, and Mary M. Schroeder of the Ninth Circuit Court of Appeals.

Justice Stevens, in after-dinner remarks, spoke about Stanford students he has known ("intelligent, interesting, and sensible"), his early days on the Supreme Court (trying to maintain his dignity despite a chair with runaway tendencies), and, on a more serious note, Supreme Court problems in handling the ever-increasing number of petitions ("it is very easy to miss things that should not be missed").

The evening—and with it the Twenty-Sixth Annual Meeting of the Stanford Law School Board of Visitors—ended with a happy comingling, on and around the dance floor, of Visitors, deans, faculty, staff, and students. □



*Board of Visitors*

## DEAN'S REPORT

**John Hart Ely**  
*Richard E. Lang Professor and Dean*



*"We can all be proud," Dean Ely told Board President Williams (Bill) Rutherford '50 and the other Visitors.*

The School is, Dean Ely was pleased to report, "in very good shape."

While he hesitates to say (as some do) that Stanford is the *best* law school in the country, "I think we're at a point where no one can confidently say that any *other* law school is best"—which is all, he noted, that anyone could hope for.

The management team, he said, is "very strong," with Dean Keith Mann continuing to oversee academic affairs, Deans Tom McBride and Margo Smith (his first additions) handling administration and student affairs, and Dean Barbara Dray, whom the School has "happily rerecruited," heading up development and alumni/ae relations. Dray, he added, is ably assisted by Kate Godfrey and Elizabeth Lucchesi.

The faculty, Dean Ely continued, is "person for person the best faculty in the country." Having added three outstanding new members in 1982-83, we are in the enviable position of not really needing anyone new. The main change during this academic year was, he said, the welcome return of Bill Baxter from Washington, D.C.

"The level of scholarship," he observed, "is very high indeed," and as a teaching institution we are "quite special," if not unique, among other top schools.

We continue, Dean Ely said, to attract outstanding students, with the total number of applications this year up 7 percent from the previous year's. He reported a very slight decline in the LSAT scores of admitted students, from a median equivalent of 753 to 748—hardly cause for concern. "We could, had we tried, have admitted a class with a median of 780," he said. "I think in a way it is probably a sign of our growing self-confidence that we didn't do so—that we may perhaps be de-emphasizing numbers in the application process." The scores are still high, he noted to general laughter, perhaps even higher than those of many present in the room.

Dean Ely then discussed the representation of minorities among the School's students. He had been much concerned over the drop from 28 minority entering students in 1981 to 19 in 1982. Happily, the drop appears to have been "a blip." The class entering last fall (1983) has—thanks largely to Margo Smith's recruiting efforts—31 minority members, a healthy population. "I remain concerned," Dean Ely said, "but at least it is no longer an emergency."

He added that the School achieves this level of minority enrollment (around 18 percent of the entering class) by "vigorous recruiting rather than any significant dip in our standards."

Women, he reported, are very well represented in the student body—about 40 percent overall. In fact, the percentage in the entering class may approach 50. "This has happened quite unconsciously," he said. "We just don't look at the gender of people in ruling on admissions files. I think we can put that in the category of a non-problem."

Dean Ely then examined some current stereotypes—not all negative—about the School's students. (This portion of his talk is carried in full beginning on page 2.)

Relationships between the School and its alumni/ae, he said, also seem "excellent." Dean Ely was pleased to announce that 1983 Law Fund annual gifts came to \$853,629—17 percent over the previous year and 5 percent more than the goal set at the beginning of the year. Major gifts, he added, have also been high of late—in fact, for 1982-83, more than \$2 million above the average for the prior seven years.

All in all, he concluded, "the School is feeling good about itself. Its quality has been building for many years, through several deanships, and we can all be proud of what it has become and is becoming." □

*Board of Visitors*

## ALTERNATIVE METHODS OF DISPUTE RESOLUTION: NEGOTIATION AND MEDIATION



**Robert H. Mnookin**  
*Professor of Law*

**P**rofessor Mnookin, chairman of the panel, noted that its subject—research and teaching concerning alternatives to formal adjudication—is one in which the Visitors expressed great interest at last year's meeting.

He emphasized that while alternatives to the courtroom are attracting renewed attention, our legal system has always largely relied on bargaining and negotiation to resolve most disputes. And much of that bargaining takes place “in the

*Professor Robert Mnookin (above) chaired this interdisciplinary presentation. Participants in the session's negotiating “game” (bottom) included Leonade Jones '73, Dave Freeman '55, Ed Luce '48, and Talbot Shelton (AB '37). Conferring en passant were John A. Sutro (AB '26) and Brooksley Born '64 (center).*



shadow of the law”—i.e., where the parties are well aware of the potential risks, costs, and benefits of litigation.

“The search for alternatives to litigation is spurred by a number of considerations, he said: “The desire to save money and time,” “efforts to unclog the courts,” and the feeling that in some types of cases—child custody battles being one example—the traditional adversary approach may make things “worse, not better.”

“We in the legal profession,” Prof. Mnookin observed, “have a responsibility for and interest in furthering research and education in alternative forms of dispute resolution. For changes to occur,” he concluded, “lawyers must be involved.”

There followed a series of presentations on ways in which third parties (other than judges) may facilitate dispute resolution.

### Mediation

**Bea Moulton '69**  
*Lecturer*

**M**s. Moulton, coauthor of *The Lawyering Process: Negotiations* (Foundation Press, 1981) and a lecturer at the School, began her presentation with a videotape of a professional mediator working with a divorcing couple in a conflict over child support.

The highly charged session demonstrated, among other things, that mediation is not necessarily friendly and pleasant. “Conflict is there from the beginning,” Moulton noted, and may in fact be more open than “in the more formalized” setting of the courtroom.

The School uses video techniques

## DISPUTE RESOLUTION *continued*

not only for demonstration but also to record student exercises for review and critique by the student and/or the instructor.

"Students have different impressions of their performances after viewing themselves," Moulton observed. "They learn the disparity between what they intended to convey and what they did indeed convey."

Such clinical exercises help students improve "their interpersonal and mediation skills to provide what the client family needs.

"Most law students," noted Moulton, "are not accustomed to dealing with other people's emotions. Law schools generally teach them to operate on a cognitive level."

*Nearly fifty students took part in small group discussions with Visitors and members of the faculty.*



### Special Masters

**John R. Griffiths '60**

*Crist, Griffiths, Bryant, Schulz, Biorn & Clohan*

Large commercial disputes can be settled "more quickly and cheaply," said Griffiths, a current member of the Board of Visitors who has been serving as a court-appointed special master in Santa Clara County.

Griffiths has so far handled nine "relatively complex civil and commercial litigation cases," of which six have been settled and three are

still being mediated. At least two of the nine cases would probably, he said, have involved trials of a year or more.

The program in Santa Clara County was devised to relieve a civil court backlog. Lawyers are appointed to act as judges pro tem, who in turn appoint special masters, with reimbursement at a market rate of \$150/hour.

Costs, which are split equally between the disputing parties, are considerably less than those incurred in a long court case, Griffiths said.

"The system works and works very, very well," he said, "if the attorneys involved have a say in the selection process."

Griffith finds his new role—which involves "thinking like a mediator rather than a litigator"—very rewarding.

Prof. Mnookin, in introducing the next two speakers, observed that the School seeks not only to show students how mediation works but also to "stimulate research on dispute resolution."

### International Go-Betweens

**Jonathan Greenberg '84**

*Clerk to the Hon. Ben. C. Duniway  
U.S. Court of Appeals, Ninth Circuit*

Greenberg—whose presentation was based on work for Prof. Mnookin's 1983–84 course on alternative methods of dispute settlement—analyzed the critical role played by Algeria during the 1979–80 hostage crisis involving the United States and Iran.

The primary parties in the fourteen-month dispute were, he observed, literally and figuratively not on speaking terms—certainly "an

extreme case of parties unable to resolve differences in direct negotiations."

In fact, Greenberg was told by chief U.S. negotiator Warren Christopher, the gap was so wide that without Algeria's assistance the hostages would probably never have come out alive.

Algeria, which, as an Arab nation friendly to the West enjoyed "credibility" in both Teheran and Washington, played five roles, according to Greenberg's analysis.

These were: **host**, creating a neutral meeting ground; **messenger**, shuttling back and forth between capitals, delivering revised proposals; **policeman**, verifying the agreement, visiting the hostages, and arranging security for their final departure; **promisee**, because the Iranians, unwilling to sign an agreement with the U.S., were instead persuaded to allow the provisions to be formulated as promises to Algeria; and, perhaps most significant, **mediator**, or what Christopher termed "cultural interpreter"—helping each side understand the constraints and mentality of the other.

Greenberg acknowledged that the settlement was also helped along by "extrinsic factors," e.g., Khomeini's consolidation of power, the death of the Shah, and the coming inauguration of a new and perhaps tougher U.S. president.

Nonetheless, he said, the Algerian example "highlights the importance of patient and persistent efforts to reach agreements, even

with the most irrational opponents." Finally, Greenberg said, it can serve as "a model for the kind of creative solutions that are possible even in the most extreme disputes."

## An Analytic Model

Jane F. Becker-Haven

PhD candidate

School of Education

**W**hat does mediation consist of and how can it be described to both professionals and clients or disputants?

Ms. Becker-Haven, a doctoral student in counseling psychology, has been collaborating with Prof. Mnookin in a study of the mediation process, as shown in divorce and child custody mediation.

"The question 'What is it?' needs to be answered before a meaningful response can be made to the question 'Does it work?'" she pointed out.

Becker-Haven then described their "heuristic model," which proposes four basic functions or styles of mediation, with corresponding roles for the mediator.

The **therapeutic function** (mediator as "healer") involves "ad-

ressing the emotions that block conflict resolution." Here, Becker-Haven explained, the mediator proceeds as if "feelings are facts" and seeks to facilitate the "psychic divorce" that will make agreement possible.

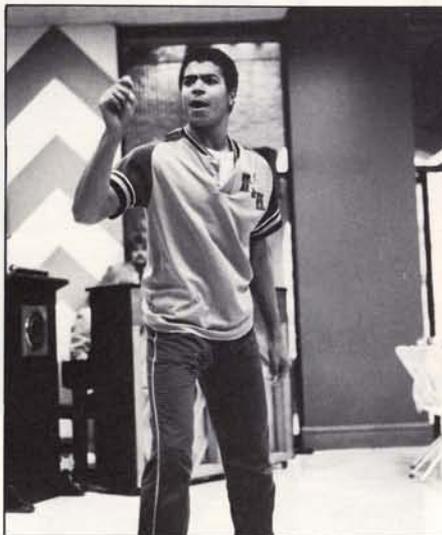
In the **educational function** (mediator as "teacher"), the mediator provides information and perspective on the divorce process and helps couples develop coping skills for what is, most probably, a life crisis with which they have had no previous experience.

The **rational/analytic function** (mediator as "strategist/decision maker") focuses on helping the couple maximize joint "profits" in their parenting agreement. The method is logical and systematic, often including a formal decision matrix.

Within the **normative/evaluative function** (mediator as "judge/inspector"), the mediator makes an independent determination of the "correct" decision, taking into account the welfare of the children—interested but often powerless nonnegotiating parties to the agreement. The mediator then attempts "to push parental preferences into line" with his or her expert opinion.

This analytic model is being used by Becker-Haven, in on-going field research with Professor Mnookin, to discover "procedural patterns"

*Wade McCree '84 (near right) and a cast of tens entertained Thursday night with selections from "A Midsummer Night's Dream" [sic]. The panel next day on University and Law School development and finances, moderated by Associate Dean Barbara Dray '72, featured George McCown (University trustee), Tom McBride (Law School associate dean, administration), Ray Bacchetti (University vice-provost) and Henry Riggs (University vice-president, development).*



## DISPUTE RESOLUTION *continued*

employed by mediators in actual divorce and custody cases.

Such an analysis can be both revealing and surprising, she said. One lawyer, who first described his own mediation roles as primarily rational/analytic (70 percent) and educational (30 percent), discovered that he in fact routinely gained movement at impasses by working in a therapeutic role.

Reference to a conceptual model like that described may, Becker-Haven concluded, "heighten the self-awareness of mediators and help families to select mediators whose style is congruent with their own values and preferences."

### A Negotiation 'Game'

**Jerry Talley, PhD**  
*Consulting Assistant Professor of Sociology*

**T**he final presentation of the panel involved an ingenious simulation game invented by Prof. Talley as a "tool for raising questions about negotiation."

After a change of venue to the Faculty Lounge, the visitors were seated in groups of six—two teams of three each—at eleven tables.

The game, which is played on a kind of checkerboard, invites both competition and cooperation between each pair of teams—the most obvious kind of cooperation being the need to bargain for rights-of-way across squares belonging to the opposing team.

A monetary stake was created by requiring each participant—some 66 visitors and interested staff members—to put up a dollar. Half of the total of \$6 at each table would, Prof. Talley explained, go to

its winning team. And the other half (\$3 from each table) would make up a pot going to the team in the room with the highest score.

There followed twenty minutes of intense exchanges at each table. A sampling, as overheard by our roving reporter: "We'll give you rights if . . ." "What will you give *us*?" "You want it, you've got it." "This is our final offer." "You can't do that!" "We don't split—we go to court." And finally, in despair: "We clearly did not talk enough."

The resulting scores followed a Bell curve. At one end was a single table with 0 points: the opposing teams, unable to negotiate any

agreements, deadlocked; neither made a single scoring move.

In the center of the distribution were several tables racking up winning scores ranging from 1900 to 3900 (some real hardball there).

But the table where the winning team scored a whopping 7900 was the only one to realize that the competition was not so much between teams as among tables. The two teams combined forces to maximize the score of one on the understanding that both would share in the fruits (a total of \$33—which they then donated to the Law Library).

Talley noted in his post game analysis that, as many teams no doubt discovered, competition may arise *within* teams as well as on a group level. Such conflict, he observed, may be over process as well as substance.

Though the game's fit with real life may be imperfect, he concluded, it has proven useful in stimulating students to think about "a balance of competition and cooperation."



*Student Jonathan Greenberg '84 (left) and attorney Guy Blase '58 (below left) were among the negotiation panel's seven speakers. Engaged in conversation below were George Sears '52 and Roy Steyer (JD Yale '46), parent of Jim Steyer '83.*

## Discussion

**G**uy Blase '58 spoke enthusiastically of his experience studying negotiation skills while on sabbatical. A partner in Blase, Valentine & Klein of Palo Alto, he noted that "a demand for good negotiating skills exists in every law firm in the country."

Richard Guggenhime, a former partner now of counsel to Heller, Ehrman, observed that "the most successful agreements are ones that are mutually advantageous. It takes experience, but a fair deal is the best deal."

"If lawyers don't find a better way of settling disputes," he warned, "they're going to lose business, because their clients will—it's a matter of self interest."

Charles Munger, chairman of Blue Chip Stamps and founding partner of Munger, Tolles & Rickershauser, pointed out that "although techniques are very important, you can't ignore the power balance." In the Iranian hostage crisis, for example, "we had several billions of their assets frozen. This may have had more to do with their settling than what the Algerians did."

In concluding, Prof. Mnookin said that his personal goal is "to help train lawyers who when confronted with conflict will realize that there are an array of approaches to resolving it and a variety of ways third parties may help. What we are trying to do is sensitize our students to the alternatives available so they can choose appropriately." □

*Board of Visitors*

## LAW AND TECHNOLOGY: EMERGING ISSUES AND HOW THE LAW SCHOOL SHOULD DEAL WITH THEM



### Emerging Issues: Computer Sciences

**Susan H. Nycum**  
*Gaston Snow & Ely Bartlett  
Palo Alto*

**A**re there legal issues specific to the computer science industry? Nycum—a Silicon Valley attorney who is a former Stanford computer facility director and Law School fellow—suggests that there are.

Certainly the conditions under which the industry has developed are "highly unusual, if not unique."

First, she said, there is the pace of development—the speed at which seminal inventions become widely used products. It is (to use an example cited by IBM) as if you had the Boeing 747 operating commercially just two years after Kitty Hawk.

Another unusual aspect of computer science, she pointed out, is

*Silicon Valley attorney Susan Nycum (left) described unanswered questions in computer law, while Professor Paul Brest (top), chairman of the School's Law and Computers Committee, suggested how such questions could be addressed.*



## LAW AND TECHNOLOGY *continued*

that it grows out of “two converging technologies with different cultures, histories and experience in regulation—that is, computers and telecommunications.

Computer software also appears to be *sui generis*, Nycum observed. “There is nothing like it—no existing analogues or precedents.” What then, she asked, are the property rights? “Is it a form of expression—for which copyright would be the relevant law—or an object—relating to patent law?”

Liability rights are another open question. “Who is responsible for a program? Is anybody? Whom do you sue if something goes wrong?” Injuries can range from loss of time and money to—in an extreme case—the recent killing of a Japanese worker by a robot.

And then there is, Nycum pointed out, the broader policy question: “What is information? A property right? A personal right? Or a national resource?”

“People at Stanford are very lucky,” she observed. “Not only can they talk about these issues in a traditional fashion, but they can also use computers to test theories.”

### Emerging Issues: Biotechnology

**Walter E. Buting, PhD**  
*Chief Patent Counsel*  
*Genentech, Inc.*

**B**uting, who has a doctorate in organic chemistry as well as a law degree, discussed legal issues already or soon to be raised as a result of developments in recombinant DNA technology.

Scientists themselves, he pointed out, first raised the issue of the safety of experiments in 1975 at a widely reported Asilomar conference. This was taken up by lay people, whose fears of “some super Andromeda strain” are, according to Buting, exaggerated if not absurd.

He told of one case where a scientist had succeeded in fusing genetic materials from several strains of bacteria, each able to consume a different hydrocarbon, into a new organism that consumes many hydrocarbons—the hope being that it could prove useful in cleaning up oil spills.

Some opposed work with this new organism out of fear that it could, if it escaped, “literally bring the world to a screeching halt by eating up all

the oil that lubricates our machinery and makes our industrial society viable.”

As a result of such concerns, recombinant DNA research has been prohibited within the borders of certain communities.

Fortunately, Buting said, fears of disaster have since been largely dispelled by the development of guidelines by the National Institutes of Health (NIH), the evident “common sense and caution” used by experimenters, and recent actual experience in the commercial production of at least one genetically engineered product (insulin).

There are, however, some areas in which Congress might act, he said. Can, for example, living things be patented? The Supreme Court, in a case involving the new oil-eating bacterium, decided that it could be considered an “article of manufacture.” The issue of whether it was living or nonliving was not viewed as a controlling factor in determining patentability.

Buting also indicated some unresolved sub-issues. How broad, for example, should patent protection be? And when, where, and how would one deposit an organic patented item for use and access after its patent expires?

“Most fascinating,” he said, are “coming issues, which raise ethical, moral, social, and legal questions.”

It is now possible, he pointed out, to insert genes into a cell or cell culture and have them function. It is therefore not unlikely that one could insert a gene into a whole animal or person.

What if, for example, a baby is discovered to have a defective or absent gene. “We now repair or replace damaged organs,” he said. “May we also repair or replace genes?”

Next, Buting asked, would it be acceptable to replace normal genes with others for eugenic purposes—e.g. IQ or stature? Or a super race of individuals? “And if *we* don’t do it,” he said ominously, “will others?”

“It’s only a short time,” Buting



*Marjorie Evans '72 and Rod Hills '55 (above) were among the many drawn to sunlit Cooley Courtyard between sessions.*



warned, "until we will have to decide whether we will play God."

Legislation, regulation, and litigation are sure to follow, he said, producing new legal issues which Stanford University, as "a cradle of this new technology," has a unique opportunity to address.

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## Challenges for the Business Lawyer

**Robert L. Jones (JD/MBA '79)**  
*Cooley, Godward, Castro,  
Huddleson & Tatum, Palo Alto*

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Jones, a business lawyer in the heart of Silicon Valley, described some of the challenges he finds in working with the young, entrepreneurial, high-technology companies typical of the area.

There is, he said, a frequent need to work out new and novel collaborative arrangements.

"Two companies—one perhaps strong in technology and the other with a product line and management experience—may want to work together," he said. Joint research ventures are also common, as when new medical instrumentation is developed by companies that bring together computer and medical expertise.

Other kinds of collaborations may be desired to shift risk, raise capital, or provide for marketing and distribution of a new product.

The business lawyer, Jones said, "needs to decide what the structure of the relationship should be, define it, and make everyone happy." This requires familiarity with corporate law, partnership law, tax law, intellectual property, and so forth.

Another set of challenges grows

out of what Jones termed "employee questions."

"Barriers to entry into the market revolve at least as much around personnel as around patent and marketing factors," he observed. "I deal a lot with entrepreneurs."

Incentives like stock options can be very important. A company may also wish to allow a talented employee to form a developmental subsidiary, with a promise to buy out the subsidiary if all goes well. Some companies also accommodate employees who want to spin off, on the understanding that the employer gets to be the venture capitalist.

Such arrangements involve "balancing business and legal risk," Jones said, "and business lawyers must be deeply involved. It's a fascinating practice."

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## Committee on Law and Computers

**Paul Brest**  
*Kenneth and Harle Montgomery  
Professor of  
Clinical Legal Education*

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The Law School's Committee on Law and Computers, which Professor Brest chaired, was established by Dean Ely in the spring of 1983 "to consider ways in which the Law School curriculum might deal with computer technology."

Brest was joined on the Committee by Law Professors Thomas Heller and Robert Mnookin, Computer Sciences Professor Bruce Buchanan, Anne Gardner ('58), who has just completed a doctorate in Computer Sciences, and two attorneys with firms serving high-technology clients: Susan Nycum (see above) of Gaston Snow & Ely Bart-

lett, and Paul Saffo ('80) of Cooley, Godward.

Of the Law professors, Brest has expertise in programming, Heller in theory, and Mnookin in financial projections.

The group, Brest reported, identified a variety of issues: 1) technical, e.g., how computers might help lawyers do their jobs; 2) legal, such as questions raised by electronic transfers of funds; 3) policy implications, relating to intellectual property, privacy, government regulation, and the like; and 4) computer-assisted instruction.

The Committee's recommendations, reported to Dean Ely last November, were that the School begin by establishing an elective Law and Computers course—a means, Brest said, of "creating an environment in which a number of people who share active interests in these areas could pursue them."

This seminar, which now appears in the 1984-85 course listing, was preceded in the Spring 1984 term by a planning seminar of students, interested faculty, and "a stream of visitors," including Anne Gardner, who served as an adjunct professor. Two areas for initial work emerged from the planning process:

The first is to develop expert or knowledge-based systems for reference by practicing lawyers. Such systems, which already exist in the medical field, codify the expertise and decision-making process of acknowledged experts in a particular subject area. Some planning seminar participants are now working on an expert system in the estate planning area.

The second and more general focus of the new seminar will be, according to Brest, "an exploration of the social, legal, political, and economic consequences posed by the information revolution." These include the role of venture capital ("not new—but having a whole industry dependent on it is new"), labor problems (different segmentation of workers, international competition and trade), and the rela-

## LAW AND TECHNOLOGY *continued*

tionship, particularly in research enterprises, between industry and university.

"Because of the extraordinary quality of the Stanford Computer Sciences Department, the interests of the Law School faculty, and our geographic location in a center of high-tech computer technology, Stanford Law School is uniquely situated to engage in teaching and research involving law and computers," Brest said. "These modest suggestions constitute a good first step."

### Biotechnology and Law Committee

**John H. Barton**  
*Professor of Law*

**P**rofessor Barton, chairman of the Law School's Biotechnology and Law Committee, noted that it too was established in 1983 at Dean Ely's request. Members, in addition to Barton, are Professors Thomas Grey of the Law School, Robert Schimke of the Department of Biological Sciences, and two practicing attorneys: Steven V. Bomse of Heller, Ehrman, White & McAuliffe, and Thomas Kiley of Genentech, Inc.

The Committee was, said Barton, "very pleasantly surprised" to find that one central area of concern—training lawyers to deal with start-up, high-tech firms—was already

being addressed by Law Professor Ronald Gilson, in a teaching unit of his Business Planning course. This subject matter, the Committee suggests, should be given a more central place in the Law School curriculum.

Other relevant issues are 1) the safety concerns alluded to by Walter Buting, 2) licensing arrangements (for example, of insulin made from recombinant DNA techniques), 3) public vs. private support for research (the patent system having been developed to encourage private research); and finally, 4) how to integrate results of the new technology with our health care system.

Given the as yet "ephemeral" nature of these issues, Barton said, the Committee recommends that at this point no new professorship or course be dedicated exclusively to biotechnology. The School should instead, the Committee says, move in directions that are "related to and suggested by the biotechnology



*Professor John Barton '68 (left) advocated flexibility in the developing law and technology curriculum. Also pictured are Visitor Ellen Corensuet '75 (below, left), and a congenial group (bottom, left to right) consisting of Dean Ely, James Gaither '64, Seth Montgomery '65, and Ted Cranston '64.*



example, but which transcend that example."

The first such direction would be to establish a *rotating* chair in Law and Technology, which would be "open and flexible" in subject matter. The professorship should initially rotate, he said, because of the emergent nature of the field and the fact that there may not currently exist on the faculty of any law school a person qualified permanently to hold such a professorship. It is to be expected that the chair will at first be filled on a year-to-year basis—by practitioners as well as academics, and perhaps occasionally academics from fields other than law—until an appropriate permanent holder can be identified.

The second direction would be to develop a Law and Technology course for law students. This should not be a special interest seminar focused always, say, on biotechnology, but rather one that most students take. "Specific issues can shift," Barton noted, but some problems—such as patent law and the use of scientific witnesses—are likely to endure.

The third Committee recommendation is to publish a scholarly journal—*Stanford Journal of Technology and the Law*—which would be edited by students and supervised by the holder of the new Law and Technology chair.

In general, Barton said, the Committee encourages "an openness to Law School cooperation with work in other departments and scientific disciplines," as well as frequent use of visitors and conferences. The central Law School curricular focus should, however, be upon "the legal system's and future lawyer's adaptation to technology—areas in need of much greater attention than they are now receiving." □

*Board of Visitors*

## DEVELOPMENTAL PRIORITIES FOR 1984–1987

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**John Hart Ely**

*Richard E. Lang Professor and Dean*

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*The Board of Visitors, while not involved in fund raising, is concerned with both the current condition and future directions of the Law School, in which financial resources necessarily play a part. Dean Ely accordingly sought the advice of the Visitors in establishing development priorities for the next three to five years. The basis of discussion was a draft statement of priorities prepared by Dean Ely and Associate Dean Barbara Dray and sent in advance to members of the Board.—ED.*

Dean Ely opened the session with the observation that Stanford Law School's present position of eminence is a matter for pride, but not complacency. "Momentum can be fickle," he said. "It requires constant attention and in particular the support of the Law School's alumni/ae and friends.

"Certain developing problems loom on our horizon," he continued—"problems that without significant help could become crises." Mainly economic in origin, such problems could well affect the School's ability to maintain a diverse student body, attract and hold top-notch faculty, and stay in the forefront of research and teaching.

He then described and invited comments on each of eight areas of need described in the draft statement:

- **Student financial assistance**—"the top fund-raising priority of the Ely deanship"—must, he

said, be increased if the School is to continue admitting applicants on merit without regard to ability to pay. Over the next three to five years, a projected \$3.4 million—\$2.5 million in financial aid endowment and another \$900,000 in expendable loan funds—are being sought.

Roderick M. Hills '55, Walter L. Weisman '59, Charles D. Silverberg '55, and others expressed the view that a student financial aid drive was essential to the ongoing vitality of the School—that we must undertake it. Indeed, Hills was sufficiently persuaded of its importance that he agreed to chair the effort.

- **Additional faculty support** funds are needed, Dean Ely said, if the School is to remain competitive with other leading schools. Housing is unusually expensive here, in addition to which we offer somewhat less funded time off for research. "We intend to push for faculty support very hard," Dean Ely said. "The package has to get better or we risk losing our best and most promising faculty to other competitive law schools which can offer more." Endowed professorships and research funds are both effective forms of faculty support, he said. The School is also exploring the possibility of establishing two or more endowed rotating "distinguished scholar professorships" for our professors who wish to pursue particularly innovative and time-demanding scholarly projects for a term or two.

G. Williams Rutherford '50 and others made various suggestions about how these needs might be met.

- **Law and technology** is an

## DEVELOPMENTAL PRIORITIES *continued*

emerging field in which Stanford is uniquely situated to provide leadership. Two areas—law and biotechnology and law and information science (computers)—are of particular interest. An appropriate first step, Dean Ely said, would be to create a single endowed professorship in Law and Technology, as described by Professor Barton in an earlier session. A second chair might later be sought specifically in law and computer sciences.

J. Dan Olincy '53, Henry Wheeler '50, and others voiced enthusiastic support for the program and urged that it be established as soon as possible.

- **Alternative dispute settlement**—including arbitration—is something that, Dean Ely said, “I used to think was not teachable. You were either a good negotiator or not. But now I think it is. The students can do it, see films and discuss it. We think we can teach litigation so why not negotiation?” The way to strengthen our program here, he said, is probably not a chair or adding to the permanent faculty, but rather through short-term appointments, teaching assistants and lecturers.

- Stanford's **JD/MBA Program**, though probably the best in the country, is, Dean Ely pointed out, “a joint program but not yet a program of joint study.” Funds are needed to plan and develop a more integrated program, including joint courses and seminars, new course materials, a JD/MBA administrator “to deal with day-to-day coordination between the two schools and with the students,” and an improved counseling program.

- The otherwise excellent **Law Library** is, Dean Ely said, only seventeenth in the country in terms of the number of volumes. Costs in general for acquisitions, including an increasing number of law journals, are rising. In addition to this ongoing need, new endowed funds are being sought to strengthen holdings in such areas as Law and

Business, International Business Transactions, and Real Estate Law.

- **A study of the legal profession**—addressing such issues as whether there are too many lawyers and too much litigation—would be a timely undertaking with implications for the “nature and survival of our profession,” Dean Ely said. The School would like, with the help of an interested benefactor, to conduct a two-year study involving practitioners and academics from a variety of disciplines, “not so much to help the School as to address issues of genuine concern to the entire profession.”

James E. S. Baker, Henry Wheeler '50, and other members of the Board strongly urged that such a study be undertaken here.

- **Challenge grants from law firms** to the Stanford Law Fund would, by encouraging other donors to increase their giving, have “a multiplier effect” beyond the actual

amount of the firms' gifts. A firm—one per year—making such a grant would agree to match (dollar-for-dollar up to a maximum of, say, \$100,000) all increases in annual contributions from individual graduates of the School. In this way, Dean Ely said, a firm “sympathetic with the goals of the Law School will be able to make a substantial contribution on a one-time basis.”

Charles T. Munger strongly urged that, in our various fundraising efforts, we repeat the obvious: that the tuition paid even by those without financial aid actually covered only one-half of the cost of their educations. People, he said, “have an obligation to replace for the next generation what they received as members of the previous generation. That basic ethic is a fundamental part of what the Law School stands for.” □



*The Fifties were well represented by Judge William Norris '54 (right), and by incoming Board chairman Charles Silverberg '55 (above, center), and Morton '56 and Marcy Friedman.*



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*Former Dean Charles Meyers enjoyed a light moment with Joseph Bartlett '60.*

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## Rabin Named Mackay Professor

The first holder of the School's new A. Calder Mackay Professorship is Robert L. Rabin, 45, an expert in administrative law, torts, and environmental law.

"Professor Rabin is one of the centerpieces of our faculty," Dean Ely said in a statement to the University trustees—"not only a fine scholar but also a highly regarded teacher."

The Mackay Professorship was established in December 1982 through a bequest by the late A. Calder Mackay, a prominent Los Angeles tax attorney and founding member of the law firm of Mackay, McGregor, Bennion & Higson.

Mackay developed close ties to Stanford first as a parent of Stanford students and then as a volunteer and major donor.

Both his sons—John Calder Mackay (AB '42, JD '49) and Richard N. Mackay (AB '45, JD '49)—were educated at Stanford, and his daughter Leah married Stanford Law graduate F. Lee Coulter (LLB '57, since deceased).

Rabin, whose appointment as Mackay Professor became official March 13, 1984, holds degrees in both law and political science from Northwestern (JD '63, PhD '67).

He is the author of three books: *Cases and Materials on Tort Law and Alternatives* (with Marc A. Franklin, 1983), *Perspectives on Tort*



Robert Rabin

*Law* (2d ed., 1983), and *Perspectives on the Administrative Process* (1979).

Rabin was Senior Environmental Fellow at the Environmental Protection Agency in Washington, DC, in 1979-80. He spent the summer of 1982 at Oxford University as a visiting fellow at the Center for Sociolegal Studies, Wolfson College.

Rabin then became a 1982-83 fellow at the Center for Advanced Study of the Behavioral Sciences at Stanford. It was there that he began work on a book, now almost completed, on the growth of the federal administrative system over the past 100 years.

"I recently became interested in looking at the subjects I teach from a historical viewpoint," he said in a recent interview, noting that he has also written on the evolution of the fault principle in tort law.

The federal regulatory system, he points out, has "grown incredibly" since the establishment in 1887 of the Interstate Commerce Commission (ICC). "Yet", he

says, "little has been published from a historical vantage point on the changing forces that have spurred this growth from one period to the next, or on the evolving attitudes of the judiciary."

His forthcoming book describes the successive waves of regulatory reform (Populist, Progressive, New Deal, post-New Deal, and the recent consumer-environmentalist movement); assesses "how these have changed our political and socioeconomic system," and puts these together with "how the courts have responded."

Rabin is giving a seminar on the subject this year, in addition to teaching a sec-

tion of first-year Torts and the basic course in Environmental Law.

As a teacher, he seeks "to lead students to reflect about the subject matter in a way they wouldn't otherwise, now or later in practice—to add a dimension to their understanding."

Rabin currently heads the Law School's appointments committee. For the past two years, he has also been participating as a University Fellow in a program of discussion and education about University affairs and governance.

Rabin and his wife Yemima, a noted local photographer, have three children and live in Palo Alto. □

## Polinsky Appointed to Crocker Law and Economics Chair

Professor A. Mitchell Polinsky has been appointed first holder of the Josephine Scott Crocker Professorship in Law and Economics.

The Crocker chair—the first Law School professorship specifically dedicated to economics and its implications for the law—was established in March 1978 through a gift to endowment by Mrs. Roy P. Crocker, for whom the chair is named.

Dean Ely, in recommending Polinsky's appointment, noted that "knowledge of economic theory and analysis can be critical to the effectiveness of Stanford Law School graduates in business, government, and private practice.

"This chair, with Professor Polinsky as its first holder, will enable the Law School to remain in the forefront of legal teaching and scholarship in this rapidly developing field." Polinsky, Dean Ely continued, is "a leading contributor to the field of law and economics."

A recent book by Polinsky—*An Introduction to Law and Economics* (1983)—has been adopted at over fifty universities and is the best selling text on the subject.

Polinsky is one of the few economists in the field with formal legal training. He has not only a PhD in economics from the Massachusetts Institute of Technology (1973) but



Mitchell Polinsky, new Crocker Professor of Law and Economics

also a master's in legal studies (MLS) from Yale (1976).

A member of the Stanford Law faculty since 1979, Polinsky heads the School's Law and Economics Program as well as holding a courtesy appointment as a professor in the Department of Economics. Highly regarded as a teacher, Polinsky conducts a popular undergraduate course on law and economics in the Economics Department, as well as teaching introductory and advanced economics courses at the Law School.

He also chairs the Law School's Committee on Research and Interdisciplinary Studies and is in addition a member of the steering committee for the University's Center for Economic Policy Research (CEPR).

Prof. Polinsky was born in St. Louis, Missouri in 1948, and attended Harvard University, where he earned a bachelor's degree (B.A.) magna cum laude with highest honors in economics. While studying for his doctorate in economics at MIT, he was a Woodrow Wilson Foundation Honorary Fellow and a National Science Foundation Graduate Fellow. At Yale Law School, where he obtained his master's degree, he was a Russell Sage Foundation Resident in Law and Social Science.

Polinsky taught in Harvard University's Economics Department from 1973 to 1979, and during his last two years there also held a joint appointment at Harvard Law School.

He has since 1978 been a research associate in the Law and Economics Program of the National Bureau of Economic Research.

Polinsky is a soaring (sailplane) enthusiast. He and his wife, business consultant Joan Roberts Polinsky, have an infant son and live on the Stanford campus.

### Law and Economics

"Too often, laws and regulations are drawn without regard for the economic incentives they create—incentives which may actually undercut the framer's original purpose,"

Crocker Professor Polinsky said in a recent interview.

"The economic issues aren't everything," he continued, "but we certainly shouldn't ignore them either."

The law and economics curriculum at Stanford Law School, he explained, is designed first to train students in microeconomics, that is, the economics of decisions by firms and consumers (as opposed to macroeconomic subjects like inflation).

Step 2, he says, is to "teach students how to apply microeconomics to particular legal problems." Take, for example, punitive damages, which, he pointed out, "in many instances far exceed the amount of compensatory damages." What economic theory would support this?

Polinsky has argued in court that when wrongful but profitable practices are detected only some of the time, purely compensatory damage awards are not an adequate deterrent. "The probability of detection" should be factored in so that the economic cost to wrongdoers of detected violations will more than balance out the gains from undetected ones.

Breach of contract remedies, products liability, and income tax compliance are other areas where economic analysis proves helpful. The idea, he says, is to "look at the incentives of each of the parties in a legal system, try to predict what parties will do under different rules, and see which

### Profs Win Award for Book on Different Cultures

Professor John H. Barton and Sweitzer Professor John Henry Merryman have been honored by the American Society of International Law for *Law in Radically Different Cultures* (West Publ. Co., 1983), which the Society cited as "a work of great distinction."

The award is shared with two additional coauthors, Professor James Lowell Gibbs, Jr., of the Stanford Anthropology Department, and former Stanford Law professor Victor H. Li, who now heads the East-West Center in Hawaii.

The book, which grew out of a course by the same name taught for some years at the Law School, describes and contrasts the ways the legal systems of Egypt, Botswana, China, and the United States (California) deal with such social problems as inheritance, crime, breach of contract, and population controls. □



rules are most likely to encourage socially desirable results."

Under the leadership of Polinsky and a blue-ribbon advisory committee headed by George W. Coombe, Jr. (executive vice-president and general counsel of the Bank of America), the School's Law and Economics Program has already established three components: a year-long research seminar for law students; a series of working papers (eighteen published since 1982); and continuing education seminars for practitioners (four thus far, on such subjects as bankruptcy, employment discrimination, and litigation risk analysis. (Readers interested in further information should call Prof. Polinsky at 415-497-0886, or Administrative Director Barbara Adams at 415-497-2575.)

### The Crocker Family

Members of the Roy P. Crocker family have for many years been great supporters and benefactors of Stanford University and Stanford Law School. The Josephine Scott Crocker Professorship is in fact the third Stanford chair to be endowed by the Crockers.

Mr. Crocker, who died in 1977, was president (1941-59) and then chairman of First Lincoln Financial Corp. A graduate of Cornell (BS'15) and the University of Southern California (JD'24), he had many philanthropic interests, including USC, the Goodwill Industries, and Stanford's Hoover Institution, of which he was an advisory board member.

Mrs. Crocker, who endowed the newest chair, is a 1923 Stanford graduate. The Crockers's twin sons, Donald W. Crocker and Benjamin Scott Crocker, both received Stanford AB degrees in 1956 and law degrees in 1958. A third son, Stephen H. Crocker, received an AM degree in 1966 from the School of Education.

In 1970, Mrs. Crocker endowed the Wm. Benjamin Scott and Luna M. Scott Professorship in Law in memory of her parents. Mr. Scott was a turn-of-the-century pioneer in the oil industry in Southern California. The Scott chair has since 1976 been held by Professor William F. Baxter.

A third chair—the Benjamin Scott Crocker Professorship in Human Biology—was established in 1974 in memory of Mr. and Mrs. Crocker's late son, Ben, who died of cancer at the age of 38. Ben was then chairman of the board of Lincoln Savings and Loan Association in Los Angeles and a Stanford University trustee. The professorship in his name was made possible by gifts from Mr. and Mrs. Crocker and other members of the Crocker family, with matching funds from the Ford Foundation. This chair was first held by Donald Kennedy, now president of the University, and then by Professor Albert Hastorf, who recently served as University vice-president and provost.

The Crocker Garden adjacent to the Law School's student lounge has also been dedicated to Ben's memory. Ben had in 1973 received the Gold Spike Award, the Stanford Annual Fund's highest recognition of volunteer service.

His brother Donald has also been honored on numerous occasions for volunteer service to Stanford and particularly to the Law School. He too received the Gold Spike Award, in 1981. Don has been a member of the Law School Board of Visitors (from 1974 to 1980) and the only person ever to chair the Board for two terms. He currently serves on the School's Advisory Council on Law and Business.

"We at Stanford Law School," Dean Ely said recently, "are deeply grateful not only for the gift of the new Josephine Scott Crocker Professorship, but also for the splendid example of enlightened philanthropy set by this extraordinary family. We are privileged to have them as our friends." □

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## Mendez Granted Tenure

Miguel Angel Mendez, a member of the faculty since 1977, has been granted tenure and named professor of law, effective July 1, 1984.

Mendez's childhood was spent in both Mexico and Texas and he is equally fluent in Spanish and English.

He earned his bachelor's ('65) and law ('68) degrees at George Washington University, where he was elected to the Order of the Coif.

A member of both the Texas and California bars, Mendez has been active in public service and public interest law, first as a clerk in the United States Court of Claims (1968-69), and then as a legislative assistant to Senator Alan Cranston (1969-71), staff attorney in the national office of the Mexican American Legal Defense and Educational Fund (1971-72), deputy director of California Rural Legal Assistance (1972-74), and deputy public defender, Office of the Monterey County Public Defender (1975-76).



*Miguel Mendez*

His academic specialties are Criminal Law and Evidence, where he is known for creative, interdisciplinary scholarship and innovative teaching.

Mendez has been a visiting professor at the University of Santa Clara (1975-77) and the University of California's Boalt Hall (1982), in addition to his seven years as a Stanford associate professor of law.

A leader in the School's clinical education program, he has developed a new course—Evidence: Theory and Practice—which includes exercises similar

*(Continued on page 46)*

## Laurels and Sage Advice for 1984 Graduates

The Class of 1984 received advice and counsel along with their diplomas at the annual Law School awards ceremony Sunday, June 17.

"You are among the privileged few who have substantial choices about how you are going to spend your lives," said



*Rosalind Z. Wiggins '84 and family*

Dean Ely in his charge to the graduates. "Don't put off doing what you really want to do—you are already well into your lives."

Professor Thomas H. Jackson, winner of the 1984 John Bingham Hurlbut Award for Excellence in Teaching, spoke in his Hurlbut address of the work world, urging graduates to fight boredom with intellectual commitment rather than to withdraw (see opposite page).

Jackson was introduced by Gail A. Sonnenschein, president of the Class of 1984, which had given him the award.

A total of 191 graduates—187 J.D. recipients and 4 with master's degrees (M.L.S. and M.S.L.)—were recognized at the ceremony in Kresge Hall following the University's commencement exercises.

The Nathan Abbott Scholar award for the highest cumulative gradepoint average in the Class of 1984 was won by Theodore P. Senger, who had also received the Second Year Honor for the top GPA at the end of 1983.

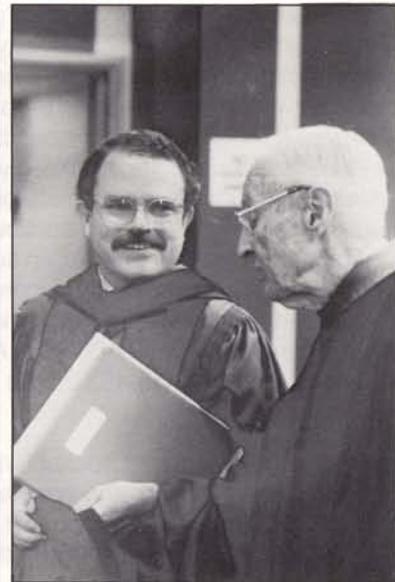
The Urban A. Sontheimer prize for the second highest cumulative GPA was won by Joel G. Samuels, a co-recipient in 1982 of the First Year Honor.

Karen Zacharia was the other recipient of the class's First Year Honor.

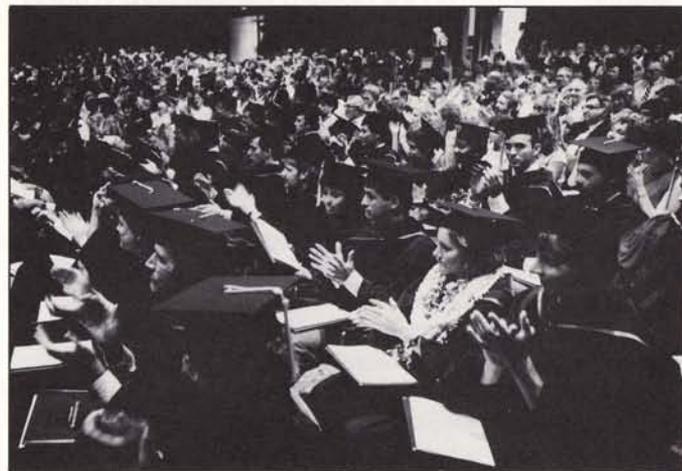
A special Nathan Abbott Scholar award was granted to Walter A. Kamiat, who graduated at mid-year with an overall GPA that would have earned him either the 1983 or 1984 Abbott award. Kamiat, president of the 1982-83 Law Review, is now clerking at the U.S. Supreme Court (see "Class Notes" section).



*J.E. Moffatt Hancock,  
Kirkwood Professor Emeritus*



*Dean Ely and Kirkwood Professor  
Emeritus Lowell Turrentine*



Stanford Law Review honors went to Michael C. Walch (the Board of Editors Award for outstanding editorial contributions), Barbara E. Koh (Irving Hellman, Jr. Special Award for outstanding student note published in the *Review*), Charles C. Van Cott (Hewett Johnson Swanson & Barbee award for the greatest contribution during the second year), and Marilyn F. Drees (for outstanding service during the present year).

Paul G. Cassell, president of the 1983-84 Law Review, won the 1983 Carl Mason Franklin Prize in International Law, as well as a moot court honor (see below). Shelley F. Wall was a co-recipient of the Franklin Prize, in 1984.

Honors in other subjects were won by Nina F. Locker (the Frank Belcher Award in evidence), Palma J. Strand (the 1983 Olaus and Adolph Murie Award in Environmental Law), and

David L. Ainbender (1983 co-recipient of the Faerie Mallory Engle Prize in client counseling).

The award winners from the 1984 Marion Rice Kirkwood Moot Court competition (see page 49) were Timothy C. Hale (best oral advocate), Hale and M. Byron Wilder (best brief and best team), and Paul Cassell and Harsha Murthy (runner-up team).

The R. Hunter Summers trial practice award, which is presented by officers of Serjeants at Law for outstanding performances in trials, went to Julio L. Pietrantonio, Byron Wilder, Jan A. Templeman, Ky B. Hutchens, Kenneth R. Barrett, and Francis A. La Poll. La Poll was also 1983-84

editor-in-chief of the *Stanford Journal of International Law*.

Nine of the above award winners—Senger, Samuels, Zacharia, Kamiat, Cassell, Hale, Wilder, Strand, and Van Cott—were also elected to the Order of the Coif, as were Joanne S. Abelson, Jerry L. Anderson, Susan Abouchar Creighton, Eric D. Fingerhut, Stuart C. Kaperst, Christopher M. Painter, Michael S. Powlen, Geoffrey S. Rehnert, and Marc J. Sobil.

After the announcements of awards and honors, each graduate came on stage to receive their diplomas. Dean Ely spoke for all onlookers—faculty and guests—in saying to the Class of 1984: “We’re proud of you.” □

## Jackson: ‘Work Didn’t Get Its Name for Nothing’

*Professor Thomas Jackson, in his Hurlbut Award address at Commencement, discussed two problems that graduates are likely to encounter in the work world. The first—confusion and even panic—is, like that experienced in early months at law school, soon dispelled. But the second—a sense of ennui similar to that felt toward the end of law school—will, he observed, be more of a challenge. . . .*

Many of you, I suspect, leave law school a bit bored. . . . I hold little hope that we can ever profoundly change the process in a way that will enrapture the majority of you for the duration.

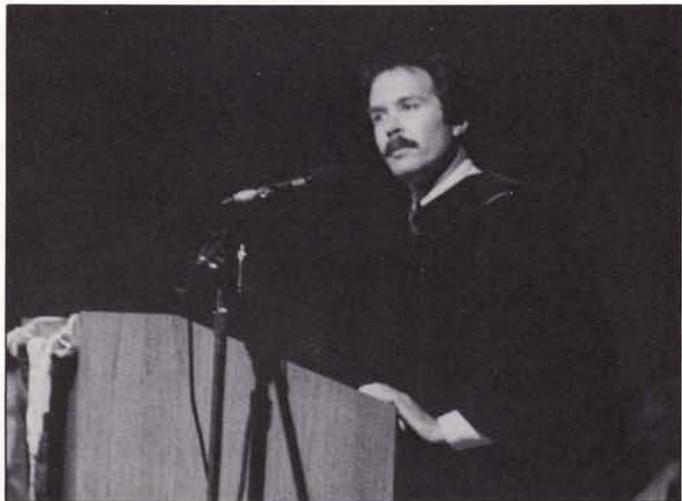
The reason for this is repetition—which is at the core of boredom—an area where law schools have no monopoly. It is, instead, a phenomenon of life, and one you will most surely see, and sooner than you may think, in your professional lives. . . .

Work didn’t get its name for nothing. . . . Much of it is pressured, unglamorous stuff with only momentary flashes of genius required. Once you have done a particular transaction, you will find that the second time through is a lot easier, and the third time through is a bit boring.

Now, don’t misunderstand me. I believe law is better than most areas to work in precisely *because* it is more interesting. But that happy fact may be counterbalanced in your cases by the fact that you are smart enough so that it may take *less* to bore you.

Five years from now, many of you may have switched jobs because you believe there must be somewhere or something where the ratio of fun and interest to work and drudgery is higher. . . . [But] disenchantment won’t come simply because you are in a particular size firm or are engaged in a particular practice.

Twenty years from now, you may reflect the general malaise of many middle-aged lawyers: successful in a number of ways but. . . not really fully engaged—working ridiculous hours but, paradoxically, running on only three intellectual cylinders. . . .



1984 Hurlbut Award winner Thomas Jackson

For some of you, the answer will come in career changes. But for all of you, I would urge you to *try harder*. Try harder, not in the sense of increasing your billable hours but, rather, in the sense of trying to involve yourself intellectually in what you’re doing *when* you work.

Again, don’t misunderstand me. On your 107th bank loan agreement or breaking-and-entering defense, there may be little you can do to relieve the sense of *deja vu*. Ninety percent of what you do, because it requires only the ability to work hard and carefully, applying skills acquired by repetition, may only be elevated so far.

But ten percent in fact *will* involve your intelligence—or *can*, if you let it or, more accurately, seek it.

You have the capacity to do that. Resist the irony of having your considerable intellectual talents be a contributing cause to career boredom. . . . You’re bright enough to glide, but if you do, you’ll be more restless than if you try to stay intellectually engaged. . . .

But you have to do it; no one will do it for you. □

## MELENDEZ (continued)

to actual trial situations.

His goal, he says, is "to give students an appreciation of what it takes to be a trial lawyer—what fact formation and fact marshalling are all about."

His students also spend time, as is traditional, in studying appellate decisions, but from a different perspective—the purpose being, he says, to "try to understand implications of these opinions for the trial lawyer."

By the end of the two-term course, he says, "my students are ready to go into a real courtroom."

Mendez's scholarly work generally involves "a combination of Evidence and some other area."

In a paper now in press

with the *UCLA Law Review*, he examines psychological studies indicating how much information on a person's past behavior influences other people's judgment of that person's more recent behavior.

The findings, Mendez says, indicate that people—such as jurors—may well "jump to unwarranted conclusions based on insufficient evidence"—suggesting that California's Proposition 8, which lifted restrictions on the introduction of character evidence against defendants and witnesses, is unwise.

"Just because a person cheats on income tax doesn't mean he will lie on the stand," Mendez points out. "The only way you can accurately predict how someone will act in a given

situation is if you could observe him in the same situation—a rarity in the real world."

In an earlier paper, published in 1980 in the *Stanford Law Review*, Mendez examined practical difficulties in proving discriminatory motive, as required in Title VII employment discrimination cases. The law, he said, "created a mess" by ignoring evidentiary implications. This paper—one of the *Review's* most widely cited—appears, he says, to have had some influence in the courts.

Mendez's most recent study—soon to be published in the *Stanford Journal of International Law*—compares American common law with European civil law, which has far fewer formal restrictions on the use of

witnesses.

"The civil law system," he says, "shows that it is possible to have a good legal system without so many rules."

Mendez is currently chairman of the School's Legal Research and Writing Committee, faculty sponsor of La Raza Law Students Association, and member for several terms of the Law Admissions Committee. He also serves on the University Panel on Human Subjects in Behavioral Research and the Koret Public Policy Symposium Fund.

In addition, he is this year resident fellow of Yost House, an upperclass house with a residential education program. And, he is much in demand to serve as the Hispanic representative on various committees here and outside the University. □

## 'Til We Meet Again

Third-year students gathered May 9—just one month before graduation—at a School-sponsored dance by the shores of Lagunita.

The just-for-fun party, which was hosted by Dean Ely, featured music by second-year student John Place and his combo.

The Masked Gaucho (Associate Dean Thomas McBride) also put in a surprise appearance, singing the unexpur-

gated version (best appreciated by those conversant in Spanish) of the popular Mexican song, "Cielito Lindo."

Moot Court instructor Nancy Millich provided further diversion with her rewrite, mentioning members of the class, of "Blowin' in the Wind."

But the real stars of the evening were the soon-to-graduate students, who, relishing friendships three years in the making, lingered to dance and talk far into the night. □



## Romano, Simon, and Weisberg Promoted

Three assistant professors—Roberta Romano, William H. Simon, and Robert Weisberg—have been promoted to the rank of associate professor. Though alike in belonging to the 1981 "class" of law faculty, they are each making their mark in a quite different area of law.

### ROBERTA ROMANO

An expert in corporate finance and taxation, Professor Romano graduated from Yale Law School in 1980, where she was note editor of the law review.

She previously earned a B.A. from the University of Rochester (in 1973, with



Prof. Romano

highest honors and membership in Phi Beta Kappa), and an M.A. from the University of Chicago (1975, in History).

Romano came to Stanford after a year clerking for Judge Jon O. Newman of the U.S. Court of Appeals, Second Circuit.

She describes her research focus as "the mod-

eling and testing of theories of the legal system." She is especially interested in integrating public and corporate finance with the teaching of business law.

Romano's publications include articles in the Northwestern and Stanford law reviews and *Tax Notes*. She is presently completing an empirical study on state competition for corporate charters.

### WILLIAM H. SIMON

Prof. Simon's principal subjects are social insurance and public assistance, the lawyering process, and the legal profession.

He was for two years staff attorney for the Legal Services Institute, a practice training center affiliated with Harvard, Northeastern, and the federal Legal Services Corporation.

Simon received his A.B. magna cum laude from Princeton (1969), and his J.D. cum laude (1974) from Harvard Law School.

He then spent three years



Prof. Simon

as an associate with Foley, Hoag & Eliot of Boston, Massachusetts.

Simon's varied experience also includes a year as trade editor with Simon and Schuster in New York, a summer translating a book on Jean Renoir from French to English, another summer as a legal intern with the Environmental Protection Agency in Washington, D.C., and part-time teaching at Harvard and Northeastern law schools.

The legal profession and social welfare are the focus of his research, and he has had articles published in the law reviews of Wisconsin, Stanford, Yale, and Maryland law schools.

### ROBERT WEISBERG

Weisberg, who was president of the Stanford Law Review in 1978-79, is the only alumnus (J.D.'79) among the new associate professors.

His specialties are commercial law and criminal law.

Weisberg holds an A.B. magna cum laude (1966) from City College of New York, and advanced degrees (A.M., 1966; Ph.D.,



Prof. Weisberg '79

1967) from Harvard in English, which he taught for several years.

His honors include election to Phi Beta Kappa and to the Order of the Coif.

After law school, Weisberg clerked for Chief Judge J. Skelly Wright of the U.S. Court of Appeals, D.C. Circuit, and then for Justice Potter Stewart of the U.S. Supreme Court.

His legal writings include articles in the UC-Berkeley, Virginia, and Stanford law reviews, as well as in the *Supreme Court Review* and *Family Law Quarterly*.

Weisberg's research interests are the law of capital punishment and the history of commercial law. □

## Publications of Interest

Two volumes of national importance were recently edited and published by Stanford Law student groups.

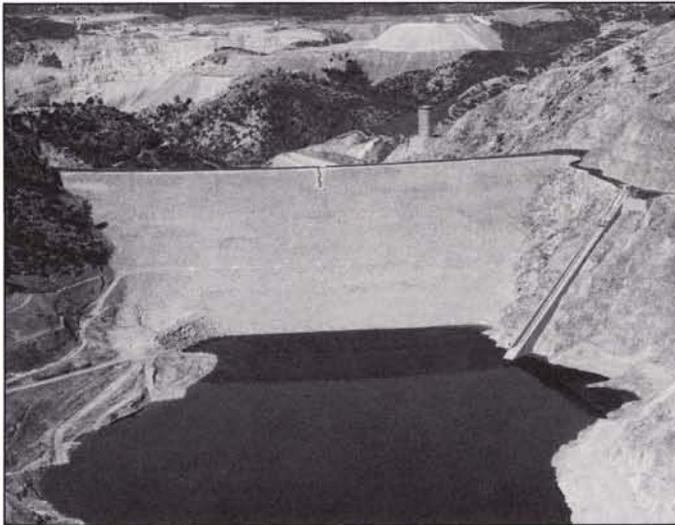
The first—fruit of a four-year effort by members of the Stanford Environmental Law Society—analyzes the controversial Stanislaus River New Melones Project and its role in *California v. United States*—a recent Supreme Court decision on federal and state control over water projects.

Titled *Who Runs the Rivers? Dams and Decisions in the New West*, the 450-page ELS study was researched

and written by Barbara T. (Bebo) Andrews and Marie Sansone (both '81), and edited by Marc E. Jones ('82), Mark Brewer ('81), Tom Hagler ('83), Eric Hvolboll ('82), and Craig Tighe ('81).

"No other area of public policy has seemed to me more dysfunctional and anachronistic than that of water resources," writes Senator Daniel Patrick Moynihan in his foreword to the volume, "and none would seem so needful of new ideas."

Copies are available for \$12.00 @ (plus \$.78 @ sales tax for California residents, and \$.50 postage and handling) from the ELS, Stanford Law School, Stanford, CA 94305; telephone (415) 497-4421.



Stanislaus River, with disputed New Melones Dam

The second—a double issue of the *Stanford Law Review*—deals with the Critical Legal Studies movement, which first took shape at a 1977 conference by that name at the University of Wisconsin.

"The importance of this phenomenon," according to the *Review* editors, "lies not only in the number of persons involved but in the fact that the group appears to offer a set of viewpoints, descriptions, and prescriptions that vary substantially from those embraced by the mainstream legal culture."

Contributors—some insiders and others observers—include Stanford Professors Robert W. Gordon, Thomas C. Heller, Mark G. Kelman, and William H. Simon.

Among the often provocative articles are such novelties as a dialogue, a parody, and even a survey of Palo Alto gas prices. "We enjoyed working on this volume," say the editors. "We also feel, however, that these articles have something serious to say . . . and deserve a careful look."

Single copies can be obtained for \$10.00 from J. Galle, Stanford Law Review, Stanford, CA 94305. □

## Sears '52 Heads 1984-85 Law Fund

George A. Sears, a member of the Class of 1952, has been named president of the Stanford Law Fund for 1984 and 1985.

Sears is a notable San Francisco attorney and partner in Pillsbury, Madison & Sutro, of which he became chairman on January 1.

He has long been an effective volunteer fund raiser for the School and served as Inner Quad chairman for San Francisco from 1979 to 1981. Members of the Class of 1952 will remember George's signal contributions as chairman of their Twenty-fifth Reunion, in 1977.

Sears succeeds Myrl R. Scott ('55), whose two years (1982 and 1983) as Law Fund President were marked by significant real increases in alumni/ae annual giving to the School—an accomplish-

ment reported with great pleasure in the attached *Annual Report of Giving*.

Among Sears's first appointments was Jerome C. Muys ('57), as national chairman of the Law Fund's Inner Quad program. Muys is with the Washington, D.C. office of Holland & Hart.

George E. Stephens, Jr. ('62)—recipient in 1982 of the Stanford Associates Award—is continuing as Quad national chair. Stephens is with Paul, Hastings, Janofsky & Walker of Los Angeles.

Lucinda (Lucy) Lee ('71) has been named to the new post of "Class Agents National Chair," created (according to Law Fund Director Kate Godfrey) in recognition of the "absolutely vital" role played by these alumni/ae volunteers. Lee, who in 1981 chaired the most successful tenth reunion drive the School has ever had, is with the San Francisco firm of Flynn & Steinberg.

Another first is the appointment of a couple—James W. ('59) and Carol Hamilton—to serve as co-chairs of the Law Parents Committee. The Hamiltons are parents of Theodore ('83), and Jim is with Paul, Hastings, Janofsky & Walker in Washington, D.C.

"We have a terrific team," Sears said recently. "I look forward to working with them and our many other volunteers." □



George A. Sears



Moot Court Justices Bird . . .



Stevens . . .



and Schroeder

Winners Tim Hale '84 and Byron Wilder '84

## Stevens of U.S. Supreme Court Oversees Lively Kirkwood Competition

The 1984 Marion Rice Kirkwood moot court final arguments were played out before a distinguished three-judge panel lead by U.S. Supreme Court Justice John Paul Stevens and including California Supreme Court Justice Rose Elizabeth Bird and Judge Mary M. Schroeder of the U.S. Ninth Circuit Court of Appeals.

The case—drawn, Judge Schroeder said, with “exquisite nuances worthy of the Moot Court Hall of Fame”—involved a hypothetical reporter attempting to shield confidential sources for two allegedly libelous newspaper articles.

The first question from the bench came just two sentences into the first oral presentation, beginning a witty and erudite dialogue between judges and students that rendered prepared arguments moot indeed.

The students—Byron Wilder and Timothy Hale on the

one side and Harsha Murthy and Paul Cassell (all '84) on the other—responded effectively, with even a touch of humor. The prolonged applause that followed was, Justice Stevens said, “justly deserved.”

The decision ultimately went to Wilder and Hale, for both best brief and best oral arguments, with Hale as the single best oralist. “All par-



ticipants,” said Justice Bird, “did a very very fine job. I

would welcome you in my court any time.” □

## 1983 Student Wins National ASCAP Competition

This year's national Nathan Burkan Memorial Competition was won by Henry V. (“Hank”) Barry ('83) for work done during his third year at Stanford Law School.

The Burkan Award, which is sponsored by the American Society of Composers, Authors and Publishers (ASCAP), is given annually to a law student writing an outstanding paper on copyright law.

Barry, who earlier placed

first in the School's 1983 Burkan competition, is now a copyright lawyer with the entertainment department of Paul, Weiss, Riffkind, Wharton & Garrison in New York City.

“It fascinates me,” Barry said in a recent telephone interview, “that people create works, such as musical compositions, that are essentially intangible, and that those works, when fixed in a tangible medium of

expression, can become valuable pieces of property.”

Barry first became intrigued with what he calls “the real estate of the mind” while at the University of Michigan, where he worked with the local Song Writers Guild on copyright procedures (earning at the same time his B.A. in economics with highest distinction and membership in Phi Beta Kappa).

At Stanford he was man-

## Faculty Notes

Prof. **William F. Baxter** traveled to Tokyo in May to participate in three days of lectures and discussions on U.S. antitrust, trade, and tax laws applicable to Japanese enterprises doing business in the U.S. The program, which was jointly sponsored by Japanese government agencies and private trade associations, was attended by several hundred Japanese executives and corporate lawyers. July found Baxter in Salzburg, Austria, where he gave a series of lectures and seminars for the predominately European

lawyers attending the annual U.S. Law Seminar.

Prof. **Thomas J. Campbell** made three major presentations this summer: an advanced antitrust seminar for the Practicing Law Institute, in San Francisco in June; a paper at the National Economic Research Associates conference in Aspen, Colorado, in July; and a week-long seminar for federal judges on economics, statistics, and law, at the University of Wisconsin, also in July. In August, during the ABA convention in Chicago, he served as program chairman for the Antitrust Section, as well as hosting the recep-

tion for Stanford Law graduates.

Prof. **Mauro Cappelletti** delivered a series of lectures in April and May at the Universities of Malta and Istanbul. On his return to Florence, Italy (where he was teaching at the European University Institute), he participated in a round-table discussion, organized by the Institute and the University of Florence, on the Draft Treaty on European Union. He has also recently visited Hamburg (in April, to take part in the annual trustees meeting of the Max Planck Institute), Uppsala, Sweden (in June, to serve as general reporter of the conference of the International Association of Legal Science, of which he was president), and Puerto Rico (in August, to deliver lectures at the University of Puerto Rico). Cappelletti is spending 1984-85 in Palo Alto as a fellow at the Center for the Advanced Study in the Behavioral Sciences.

Prof. **Robert C. Ellickson** presented a paper in November 1983 on "Inclusionary Housing Programs: Yet Another Misguided Urban Policy?" at an American Planning Association conference in New York City. And in July 1984, Little, Brown & Co. published his 150-page supplement to *Land-Use Controls*, a casebook he authored with A. Dan Tarlock ('65). Also noteworthy was his third-place finish in April at the San Francisco Open Scrabble Tournament, during which Ellickson defeated four com-

petitors ranked among "the top ten Scrabble players in the United States."

A new text prepared by Prof. **Jack H. Friedenthal** with Michael Singer (a 1981 graduate of the School now teaching at Pennsylvania Law School), has been accepted for publication by the Foundation Press. The volume, which deals with the law of evidence, is unusual in that it contains no court opinions but consists entirely of text and hypotheticals—making it, in Friedenthal's words, "a caseless casebook."

Prof. **Paul Goldstein** also has a new volume—*Real Property*, a casebook published in May 1984 by Foundation Press. In August, he was appointed chairman of the advisory panel for a study—requested by the Judiciary Committees of both the House and Senate and conducted by Congress's Office of Technology Assessment—on *Intellectual Property Rights in an Age of Electronics and Information*.

Prof. **William B. Gould IV** had a new book published in May: *Japan's Reshaping of American Labor Law* (M.I.T. Press). He testified before Congress on June 25 during the Joint Oversight Hearings of the Committee on Education and Labor; in his statement, "Has Federal Labor Law Failed," Gould asserted that the National Labor Relations Act has not been effectively implemented. He has also been active as cochairman of the State Bar of Cali-

## ASCAP AWARD (continued)

aging editor of the *Law Review* and news editor of the student newspaper.

His prize-winning paper was developed under the tutelage of Professor Paul Goldstein, a former national Burkan award winner, whom Barry praises as "the best teacher I ever had—and I have had some great teachers."

Barry also thanks Profes-

sors John Henry Merryman and Roberta Romano for help at "crucial stages in the development of my paper."

Just one year out of Law School, Barry has already had articles published in the *Stanford* and *New York University* law reviews, and another recently accepted by the *European Intellectual Property Review*. □

Burkan Competition winner Hank Barry '83



fornia's Ad Hoc Committee on Wrongful Discharge and Termination at Will, which on February 8 issued a report recommending legislation re nonunion employees (the subject of his "At Issue" piece beginning on page 24 and of recent presentations at a Los Angeles County Labor Law Bar symposium, to the Ontario Ministry of Labor, and to the National Academy of Arbitrators). He has in addition been named to the advisory council of Cornell Law School. And in August, Gould was denied a visa by the government of South Africa. "I'm flattered," he said, "that they consider me a threat."

Prof. **Gerald Gunther** spoke recently at a Brigham Young University symposium celebrating the upcoming Bicentennial (1787-1987) of the U.S. Constitution. He also served on a National Endowment for the Humanities review panel evaluating project applications pertaining to that landmark event. Gunther is a signer of a statement that will appear in the November 1984 California State ballot booklet, in opposition to an initiative seeking a national constitutional convention to propose a balanced budget amendment to the U.S. Constitution. He also described, in a recent issue of *California Lawyer*, the risks of using the convention route to amend the Constitution.

Prof. **John Kaplan**—one of only two law professors so honored this year—has

been elected to the American Academy of Arts and Sciences.

Prof. **Mark Kelman** has had two articles in recent issues of the *Stanford Law Review*: "Time Preference and Tax Equity" (34:4) on the relationship between different theories of the origin of interest, on the fact that one can earn income by saving rather than consuming, and the relative equity of income and consumption taxes; and "Trashing" (35:1-2), on the accusations that Critical Legal Studies scholarship has been unconstructive. (The latter is part of a major *Review Critical Legal Studies Symposium* published earlier this year.)

Professor and Associate Dean **J. Keith Mann** continues to serve as special master in the *U.S. v. Alaska* case, a post to which he was appointed in 1980 by the U.S. Supreme Court. The latest round, which Dean Mann presided over this July at the Law School, involved hearings dealing with issues not resolved in earlier sessions. The dispute is over ownership of submerged lands with oil reserves.

Prof. **John Henry Merryman** was "pleased and honored" to be elected chairman for 1984-85 of the Stanford University Faculty Senate—a policy-making group of top academic administrators plus 55 faculty members elected by their peers. In March, Merryman attended a symposium on Italian legal

scholarship, in Rome, where he spoke on "Il nuovo stile italiano" (The New Italian Style).

**A. Mitchell Polinsky**—recently named first holder of the new Josephine Scott Crocker Professorship of Law and Economics (see page 41)—gave several lectures last spring: on the economics of contract law, to the legal staff of the Bank of America in San Francisco; on the economics of punitive damages, at Georgetown University Law Center; and again on punitive damages, for the University of Pennsylvania's Law School and Economics Department. He also chaired a seminar in April, sponsored by the Law School's Law and Economics Program, on "Employment Discrimination: Law, Economics and Statistics," which Prof. Campbell (see above) taught.

**Robert L. Rabin**, who was named last spring as the first A. Calder Mackay Professor of Law (see page 41), has been appointed to the editorial board of Foundation Press. He presented a paper, "Characterization, Context and the Problem of Economic Loss in American Tort Law," in England in April, at the Colston Symposium of the University of Bristol Law School. An article, "Legitimacy, Discretion and the Concept of Rights," was published during the summer as part of a *Yale Law Journal* symposium on the New Deal. And in September he participated in two symposiums: on Tort

law, at Yale; and on continuing relationships (Administrative law), at the University of Wisconsin.

Prof. **Deborah L. Rhode** addressed a AALS Workshop on Teaching Professional Responsibility, in March, and gave a colloquium in April at the Yale Humanities Center, on "Moral Character as a Professional Credential." She spoke twice in May to Stanford University alumni/ae gatherings: the Stanford Alumni Campus Conference (on the subject of legal ethics), and the Stanford Professional Women's Club in Los Angeles (on "Women and Work"). Rhode also chaired a workshop on sex discrimination, at the Law and Society Conference in June. She expects to have a volume of readings on Professional Ethics, prepared in collaboration with Prof. Geoffrey Hazard of Yale, published this fall. Rhode is currently a visiting professor at Harvard.

Prof. **David L. Rosenhan** is now visiting at the University of Western Australia, in Perth, and at Tel Aviv University, Israel. He is completing a term as past president, Division of Psychology and Law, American Psychological Association; and as member (and past president) of the board of directors of the American Board of Forensic Psychology. An article based on his address last year to the APA begins on page 10. □

## STUDENTS

(Continued from page 3)

I'm beginning to sound a little like a broken record—there probably is a little truth in the stereotype.

That, however, is not necessarily a bad thing. In fact in many ways it is the flip side of all the things that make Stanford such a pleasant place to go to law school. This, therefore, is a rheostat that we want to turn up very cautiously indeed.

We have turned it up a notch or two, though. One thing we've done since my arrival is to cut back quite radically on the number of courses students can take on a 3K (essentially pass/fail) basis. Yes, I too have heard people assert that the amount of work a student does in a course is unaffected by whether he or she is receiving a grade. All of us on the faculty have heard people say that. I'm afraid most of us are not quite convinced.

Was this just the first step in a general process of "toughening things up"? Emphatically not. Were we to get hyperactive on the subject of making our students work harder, we would almost certainly change this quite wonderful school into a place which, like some other law schools, is full of anxiety.

The main burden of making our courses more engaging for our students falls squarely on the faculty. Overall, I believe that the teaching is better here at Stanford than at any of the other elite law schools—because we are able to combine a favorable faculty-student ratio with an ethos that holds teaching to be an important component of the faculty's work. Certainly there's more variety here in teaching technique than I have seen elsewhere, and those students who want it can get a great deal of personal attention.

Nonetheless, we're not doing as good a job as we should in providing truly advanced work. What happens here is what happens at all law schools: for three years students

take broad survey courses, in one subject after another. What we need is some genuine sequencing, some truly advanced work that builds on insights gained in courses taken earlier.

You've heard that before—in fact if you've been around long enough you've heard it for half a century—and nothing much has happened. Is there any reason to suppose it might now, at Stanford? There are a couple. The first is that we fully appreciate and are hard at work on the problem. The second is that the job-seeking profile of the typical law student has changed in ways that may help us solve our curricular problem. The reason our predecessors generally cited for concluding that they were unable to provide truly advanced course work was that students in their third year were so busy looking for jobs that they could not really focus on such courses.

Nowadays students generally *know* in their third year where they're going to work, often for the firm for which they clerked after their second year. (Judges generally also hire their law clerks from among the population of students who have not yet begun their third year of law school.) I frankly don't think that this is a good trend, but it may have a silver lining, in that it may free up the third year for genuinely advanced work. Of course it will be hard to keep up the interest of those who already have their jobs, but it is just possible that that task will prove easier than keeping the attention of those who don't.

So Stereotype 3 also is partly true and always will be: remember that third-year law students are in their twentieth year of school, and they're bound to be getting a little bored. But we can and will do better. Our students are great people, and they deserve it. □

## UNJUST DISMISSAL

(Continued from page 25)

would advocate legislation to benefit working people. But the labor movement is in some instances hostile or ambivalent to the idea of legislation in this area, fearing the loss of one of the main incentives for joining labor organizations—the job security resulting from a negotiated collective bargaining agreement. The British unions have used unfair dismissal legislations as an organizing tool, as have other European unions. It is a sad day when representatives of the labor movement here take such a narrow view of their role in society. This legislation would present a similar opportunity to the U.S. labor movement, to stem its dwindling numbers.

Whether the idea of unfair dismissal legislation's time has come, I do not know. I do not expect to see the California Legislature adopt this kind of legislation in 1984. My hope is that at some point people will look at the document that we have produced and say there is something of use here.

Although in this country we pride ourselves on our political democracy, we have little to pride ourselves on in the area of economic democracy. Meaningful legislation to protect the job security of the American worker would bring us at least one step closer to that still distant goal. □

## DIVIDING THE PIE

(Continued from page 9)

a straightforward proposition, albeit coming at the expense of diversification.

In actual operation, however, it is a very complicated task that is impossible to do with complete accuracy. And the gap between actual productivity and the factors measured by the specific formula adopted takes on particular importance because it creates the potential for a different set of problems: partners are given an incentive to maximize their own income by maximizing the factors measured by the formula, rather than by actual productivity.

To expose these complications, we begin with the simplest case where the firm is not really a partnership at all, but is instead simply a vehicle to share expenses.

### A Pure Expense-Sharing Model

Suppose Mr. Sullivan and Ms. Cromwell rent offices together, hire a secretary and perhaps an associate together, and share the costs of a common library. Each lawyer, however, remains responsible for his or her work and billing, and receives only his or her own gross receipts. In short, only expenses are shared.

Most of these expenses would be rather easy to split. Secretarial time and associate time could be allocated on the basis of work done, although assignment of the library expense might be a bit more arbitrary.

But in all events, the important thing to recognize about this arrangement is that each lawyer, in effect, remains a solo practitioner, albeit one who is trying to achieve some economies of scale. The system perfectly measures each lawyer's marginal product because there is no team production of income.

The absence of income sharing, however, does mean that the arrangement involves no element of diversification of human capital.

### Measuring Productivity by Hours Worked

The next step up in complexity would be for the lawyers to treat all revenues as belonging to the firm, but to divide profits in the same proportion as the product of the number of hours each lawyer works times his or her hourly fee bears to the firm's total revenue. This intermediate step is particularly useful because, depending on the choices made in developing the formula, it can generate a number of really quite different results and thus can be used to illustrate several important points.

The first question is how each lawyer's hourly fee will be determined. Suppose that the lawyers decide to follow the traditional approach and set fees based on years of experience, with a ceiling above which all lawyers charge the same fee.

It should be apparent that the effect of this approach is to reintroduce important aspects of the seniority-based sharing model; so long as all lawyers work the same number of hours, the result is identical. Indeed, we might well describe such an approach as a sharing model, but with an hours component as a check on shirking.

This correspondence between a method of pie division intended to be based on marginal product and one seemingly premised on sharing principles suggests an important relationship. To the degree that the productivity measure is coarse—i.e. counts something less than every factor bearing on productivity—perverse incentives are created. Thus, anything less than a complete measure of productivity results in the productivity approach's equivalent of shirking: strategic behavior intended to emphasize only the productivity factors taken into account in the formula, at the expense of all others.

That the terms of the productivity formula influence how lawyers spend their time has an importance far beyond its impact on their shares of the pie. Just as shirking in a pure

sharing model may result in a reduction in overall firm output, so too may incentives created by the coarseness of a productivity formula. This can be seen by examining the incentives created in our hypothetical with respect to two important factors that the productivity formula does not take into account: efforts at attracting clients and time spent on firm management.

Consider first the matter of attracting clients—hardly an unimportant determinant of a firm's success. Although the simple "hours worked" productivity formula does not explicitly credit this factor, some positive incentive to attract new business exists. In order to have a project on which to work, a lawyer must have clients. Thus, a system that on the surface rewards *only* hours worked necessarily encourages some effort at attracting clients.

The incentive, however, is at best incomplete. A lawyer gets no reward for attracting more clients than he or she can service alone. Indeed, there is a positive disincentive to seeking the assistance of other firm lawyers who may be better equipped to service a client with respect to a particular matter.

A similar problem arises with respect to firm management. Our simple "hours worked" productivity formula gives no credit at all for this activity despite its obvious importance. Yet how one would alter the formula to incorporate firm service is not entirely clear. For example, much firm administration, while perhaps less exciting than trial or transactional work, may also be less demanding and less intrusive on one's personal life. Should credit given for hours spent on administration be complete or only partial?

A simple approach based only on hours billed also draws attention to a general problem in the use of productivity formulas: however coarse or fine, formulas are, at best, imperfect proxies for the characteristic that is at issue but is, in fact, unobservable—actual productivity. Our

simple formula measures only effort, not results.

For example, different lawyers work at different speeds and with different skill. An hour spent by one lawyer may be less productive than an hour spent by another, and it is hardly unreasonable for the more efficient lawyer to object to a system that, in effect, imposes a penalty for efficiency.

The result is that the coarseness of the formula used in a productivity model determines not only the extent of the perverse incentives created, but also determines the extent to which the potential for the same problems which prompted rejection of the sharing model in the first place—shirking, grabbing and leaving—are recreated in the productivity model.

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## Summary

Our examination of the productivity model of income sharing in law firms indicates that it will indeed reduce shirking in a general sense. However, this reduction comes at the expense of diversification. A further disadvantage of the productivity approach is that it in itself can create perverse incentives and thereby reintroduce problems of shirking, grabbing, and leaving.

We believe that what method of income division works best at a particular firm will depend on how successful that firm is in overcoming the agency costs of shirking, grabbing, and leaving that accompany an effort to capture the gains from diversification available in a sharing model.

If agency costs can be constrained effectively, then a sharing model will prove superior, a conclusion consistent with the fact that many successful firms remained committed to this method of income division. In the absence of effective constraints, a productivity approach may be a "second best" solution. The critical issues, then, are how do successful sharing firms constrain shirking,

grabbing, and leaving, and whether their methods can be duplicated by other firms. This analysis, which takes up a substantial portion of our working paper, is too lengthy to explore here.

We can, however, report that there is no universal solution and that the real world is vastly more complex than the world of theory, a point we think is nicely illustrated by the following interesting fact: of the two firms widely considered to be the nation's most profitable, one—Cravath, Swaine & Moore—follows a sharing model, and the other—Skadden, Arps, Slate, Meagher & Flom—follows a productivity-based approach. □

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## Footnotes

1. Houghton Mifflin, 1974, p. 11.
2. *Ibid.*, p. 17.



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## ELECTRICAL UTILITIES

(Continued from page 23)

substitute for new generating units by making additional energy supplies available for incoming households and businesses.

One of the many problems for utility forecasters is that they don't know whether and when millions of individual electricity users will exploit all or part of the potential for increased efficiency. Lest you think all conservation is as difficult or expensive as replacing refrigerators or windows—not that either compares in difficulty or expense with building power plants—I should point out that a substantial fraction of U.S. peak electrical consumption is absorbed by interior lighting for commercial buildings *during the daytime*. Most of that electricity flows into highly inefficient fixtures dedicated to maintaining levels of background illumination that are ten to fifty times what people choose for their own homes. When you're contemplating an inventory of commercial floor-space that should more than double by the year 2010—or a refrigerator stock that will have 80 million new units within two decades—it becomes vital to guess correctly about whether waste-as-usual or cost-minimizing efficiency is going to predominate.

One straightforward forecasting approach is simply to assume that the free market will ferret out all or most efficiency improvements that are less expensive than the marginal kilowatt-hour from new electricity supplies. Unfortunately, while not totally inconceivable, that is highly unlikely. The best available evidence indicates that efficiency doesn't sell unless it produces real annual returns, in reduced electricity costs, on the order of 30 to 200 percent; this is equivalent to a pay-back requirement of six months to three years. Put differently, individuals and businesses are acting—at least for the moment—like much

more demanding investors than utilities. The imbalance invites enormous, speculative supply-side investments in power plants, which could be displaced more cheaply with efficiency investments on the demand side of the electricity equation.

Nonetheless, the federal Department of Energy and two national utility-financed advertising campaigns are now mobilizing behind business-as-usual forecasts of high growth in electricity consumption. These prophets of shortage are calling on the United States to add the equivalent of 438 new large-scale nuclear plants over the next twenty years, at a cost optimistically projected at about one trillion constant 1982 dollars. The estimated bill is kept that low only by excluding all charges associated with operation and retirement of the plants, while simultaneously banishing—with the wave of a computer printout—any additional construction cost overruns.

In proposing to extract the equivalent of \$10,000 to \$20,000 from every American family to build power plants, federal planners are not simply rejecting efficiency improvements that could secure the same services at lower costs. They also are ignoring the prospect of substantial fluctuations in economic trends, which could easily stall predicted demand growth long enough to annihilate investments with the scale and lead times typical of new coal-fired and nuclear power plants.

Industry apologists respond that any surplus coal and nuclear capacity can be used as a substitute for expensive output from oil-fired generators. But a five-year frenzy of that kind of displacement has left oil supplying only about 6 percent of our electricity nationwide; there's not all that much left to displace. Isolated oil-dependent pockets that survive—and California is one of the largest—are besieged *now* with supplicants for the privilege of selling surplus power at sacrifice prices.

Today, for example, utilities from

the following states and territories are courting California with power plants up to 2000 miles away, which all supposedly were built to serve pressing local needs in the host jurisdiction: Utah, Nevada, New Mexico, Arizona, Washington, Colorado, Wyoming, Montana, Oregon, Idaho, North Dakota, British Columbia, and Alberta. It's the best of times to be a Californian, and the worst of times to be contemplating investment in what may turn out to be surplus generating capacity.

That brings me to what I think we must—and will—do to save the utility industry from itself and its friends in the Department of Energy. We can begin by acknowledging that there is an overcapacity crisis throughout the industry, and by effecting an extended moratorium on new power-plant additions. That won't require any dramatic reorientation of policy: the last orders for new nuclear power plants were placed in 1978. Indeed, all 39 nuclear plants ordered since January 1, 1974 either have been cancelled or soon will be. But we cannot avoid painful choices about large-scale plants that are still under construction—more than 100,000 megawatts, or nearly a quarter of current peak demand. In the process, some of our investor-owned utilities will have to weather what amount to bankruptcy proceedings.

At the same time, we're going to have to rein in a number of well-meant incentives for the development of new small-scale generation, which date from the mid- to late 1970s. These technologies unquestionably are the wave of the future—they beat coal and nuclear methods hands down for scale, flexibility and reliability. We can, however, afford to moderate the pace of installations. To cite one example, it is absurd to have 1400 hydropower permits pending in a region—the Pacific Northwest—that is going to be choking on surpluses for at least a decade.

Still more important are efforts to reduce uncertainty about future

electricity needs. A number of regulatory and investment tools are available for that purpose. The core of the enterprise should be stringent, mandatory efficiency standards for buildings and appliances, sweetened by utility payments to help offset the costs of compliance and enforcement. Such standards eliminate the need to speculate about the average consumption of millions of new appliances and buildings in the years ahead; instead, utilities can predict confidently that efficiencies will be fixed at specified levels, set to minimize life-cycle costs to consumers. I'm not visualizing Utopia here—I'm basically describing the path that the Pacific Northwest and California are following today under Republican governors.

In addition to supporting efficiency standards for new electricity uses, utilities should develop the capability to extract large savings from *existing* uses. Many utilities don't need the savings now, but all should have fully tested programs in reserve for the future. One of numerous excellent precedents is Pacific Power & Light's pilot residential-sector program in Hood River County, Oregon, where utility personnel are mounting a community-wide effort to install many of the measures I described earlier, free of charge to the household. This is a massive physics and social psychology experiment, designed to test participation limits, the performance of individual conservation measures, and a utility's capacity to deliver cost-effective energy savings on a crash basis. For purposes of producing kilowatt-hours to sell other customers, electricity saved in existing buildings is indistinguishable from electricity generated at a power plant—and Hood River-style programs reach full power production in two years, not ten to fifteen.

Investments and policies like these can position us to live comfortably for at least two decades within our existing inventory of large-scale coal and nuclear power plants. But to do that, and to cope

with what comes after, we also need to deal with some creakingly obsolete institutions and jurisdictional lines.

In this effort, we confront two major anachronisms—utilities and their state regulators. I'll begin with the states, which recently won a unanimous U.S. Supreme Court endorsement of their traditional sovereign prerogatives to oversee planning and investment decisions by electric utilities. Many of those prerogatives mesh poorly with the inexorable shift toward regional power systems. More than half of U.S. generating capacity feeds into about a dozen tightly coordinated multi-state pools; elsewhere, power pooling and system interconnections are widespread although somewhat less dominant. More than half of U.S. electricity is sold by companies that did not generate it. A network of high voltage transmission lines spans the continental United States and Canada, and sustains transactions between utilities as much as 2,000 miles apart. No utility is an island.

As a result, decisions about developing and transferring power supplies have consequences that reverberate far beyond the confines of the state of origin. Given the way U.S. power pools are actually organized, state boundaries make about as much sense as the African national borders drawn by European colonial powers. We have entered an era in which transmission and resource planning are dominated by regional and national—not state—concerns. But we have yet to shed the regulatory apparatus that evolved in a less integrated and interdependent system. Though the states may fight tenaciously to hang on, the logic of the grid will prevail. We are headed for regional and national regulation of what will probably remain transmission monopolies.

For electric power generation (as opposed to transmission), there is now ample reason to question whether the regulated monopoly

model makes any sense at all, irrespective of the regulator's geographic reach. As I noted earlier, no vestige remains of the economies of scale that traditionally were invoked to justify exclusive generating franchises. Indeed, the franchises themselves are no longer exclusive—federal and state laws now encourage independent development of electricity supplies for sale to utilities. Yet most power plant construction and operation still proceeds within a regulated monopoly context.

A nation increasingly willing to experiment with deregulation in other sectors is not going to overlook utilities indefinitely. Proposals are already surfacing for competitive allocation of five-year power supply contracts to individual distribution systems, on the assumption that private entrepreneurs will assemble to bid in an environment free of both guaranteed returns and regulated prices. Of course, nontrivial problems like the treatment of 500,000 megawatts of largely unamortized utility-owned generating facilities will have to be solved along the way. It is also far from clear that the prospect of short-term supply contracts will tempt hordes of independent producers into a high-risk market with extraordinary capital demands. Once we've stripped away layer upon layer of outmoded regulation and subsidy, we may find that we can't afford the levels of electrical energy reserves and reliability to which we've become accustomed. That prediction is buttressed by the increasingly obvious need to incorporate in electricity rates more of the environmental costs associated with electricity production.

Challenging as these prescriptions sound, I submit that they make more sense and have better prospects than the vision that many utilities and regulators are now pursuing. They apparently believe that we can rescue the existing system by using some combination of promotional pricing, aggressive marketing, and additional federal subsidies to restore high rates of demand

growth. That might allow us to play the pyramid game a little longer, by burning up current surpluses and supplying an apparent rationale for pushing ahead with the coal and nuclear plants still in the construction pipeline. But the ultimate crash would dwarf even what we are facing today.

The best chance for a better result may lie in the emergence of a new and more chastened generation of utility leadership, some elements of which—I dare to hope—may have been educated by all of you. □

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#### CREDITS

**Artwork:** pp. 4-9, *The History of an Apple Pie* (London: William S. Fortey, 1860); 23, 24, Steve Reoutt. We thank artist John Collias of Boise, Idaho, for generously allowing the reproduction on our cover of his drawing (rendered in 1970 with graphite pencil) of Senator Church.

**Photography:** p. 2, Jane Reed; pp. 10-15, courtesy of the Peninsula Times Tribune; 16-21, Robert S. Townsend; 26-39 (Board of Visitors), 44-45 (Commencement), 49 (Moot Court), John Sheretz; 41-42, Ed Souza, *Stanford News and Publications*; 43, Cheryl Ritchie; 46, Michele Foyer; 47, *Stanford News and Publications*; 48 (river), courtesy of *Stanford Environmental Law Society*; 67, Kim Allison; 73, Rick Ridgeway; 80, Albuquerque Journal; 83, U.S. Army; 85, (Kamiat), Roger Watts; 87, Peninsula Times Tribune; 88, U.S. Senate; 89, *McFarland Historic State Park* (Florence, Arizona); 90-91, Jean Dezzarrins and Chuck Painter, *Stanford News and Publications*.

**Calligraphy:** pp. 10, 16, magazine logo, and section titles, Barbara Mendelsohn; 42 (Chinese character for "law"), Harriet Wu.

## PSYCHOLOGY

(Continued from page 15)

and views her son as a symbolic equivalent of her husband, whom she hates and chose to divorce. You predict that she would subject the child to endless rejection experiences and would produce severe damage to his self-esteem. Your best guess as an experienced forensic psychologist is that there would be irreparable damage to this boy. During the cross-examination, the attorney for the other side presents you with the following line of questioning:

*Doctor, imagine if you will, that this rejection by the mother causes the child to have, indeed, very low self-esteem. Soon this child would become extremely insecure and would seek out the approval of other females in his environment. Assume further, doctor, that the child executed that particular psychodynamic by seeking out the approval of all his female teachers, and to a lesser extent, male teachers. Assume, as a result of having this pathological need for correcting the painful derogating self-esteem experience with his mother, that he studied unusually hard and became unusually precocious with regard to certain subject matters. Assume, doctor, just for a moment, that one of those teachers—a biology teacher—was a female who had an unusual similarity to his mother. Assume this teacher had a high standard of conduct and was very critical. Assume further that this child was unusually gifted and he constantly tried to symbolically correct that emotional trauma of his childhood by struggling harder and harder. Assume this child went to medical school. Assume that his neurosis ultimately caused him to feel the need to do something of overwhelming significance for the population of the world. Assume that this child eventually won the Nobel prize for inventing a new antibiotic and that millions of people who would have otherwise died of some medical complication or disease would now survive. Assume as a*

*result of that, that at age 30, he would be wealthy and famous. Assume women on the faculty of medical school, students throughout the school, people who came in contact with him, loved and adored him—giving him that adoration that he never had as a child and giving him a sense of self-esteem and narcissism to more than compensate for the damage done by his mother. Assume that all those things were true, doctor, would you still form the opinion that it is in the best interest of that child not to be with his mother?<sup>2</sup>*

This hypothetical—much overdrawn but very illustrative—raises serious questions about our ability to predict the future and about the role of fortuity in the course of human events. How this boy will grow up and what he will endure in the process depends on many things that seem quite beyond prediction. Clearly the child's welfare will be affected by whether his mother remarries, and if she does, by whom she remarries and by how well he gets along with the child, and by how well the child likes and gets along with him, and by whether the new couple has other children, and by how all of their children are viewed by their parents, and by how the natural father reacts to all of this, and by—one could go on endlessly, but the point is clear.

Although there is not yet one reliable follow-up study of custody decisions and placements (though one promising study by Michael Wald, the late J. Merrill Carlsmith, and Herbert Leiderman is now underway), it is commonplace for us to assume that some monotonic relationship exists between the way we assess a parent-child relationship at the present time and how that relationship will ultimately affect a child. It is fact that no such monotonic relationship exists. Thus does fortuity in human affairs weaken our prophecies and render us, if we have any sense at all, modest in our predictions about human endeavor.

What posture should a social scientist take under these conditions?

Should the professional psychologist withdraw entirely from this field, given that his or her skills at prediction are simply unequal to the task?

I suggest that the proper role for the social scientist confronted with a custody problem is to abjure prophecy, and undertake the kind of counseling that allows parents to arrive at their own best decisions. Such counseling would enable the parents, rather than the courts, to consider the best interests of their children, and how those interests might best be served.

I would also encourage lawyers involved in custody cases to downplay the adversary nature of the proceedings.

### Conclusion

In brief and in summary, the behavioral sciences have much to offer the judicial system, but not always on the requested terms.

The insanity defense turns out to be an area in which we know a great deal. But the terms of the Law's question, and the manner in which it is put, make us seem less knowledgeable than we really are.

With regard to custody disputes, however, the matter is somewhat reversed. The Law poses a decent question, for surely there must be advantages to living with one parent over another. But psychologists, unfortunately, are neither able to predict nor to discern those advantages except in extreme cases. What psychologists can do is enable parents to be discerning themselves in the interest of their children. □

### Footnotes

<sup>1</sup>Richard E. Nisbett *et al.*, "Popular induction: Information is not necessarily informative," in *Cognition and Social Behavior*, edited by John S. Carroll and John W. Payne (Lawrence Erlbaum Assoc., 1976), p. 129.

<sup>2</sup>Beaber, Rex (unpublished mss., 1981).

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## SOUTH AFRICA

(Continued from page 21)

The influx control cases exemplify the strain a public interest lawyer in South Africa faces. Many times I was tempted to overlook the slight flaw in a person's employment record, provide him with a letter stating that the LRC felt he was qualified, and send him back to the administration board in the hope that they by an oversight might grant this person the necessary endorsement.

I tried to avoid the conflict as much as possible by learning which questions to ask and which to avoid. However, difficult situations often arose, and at those times I elected to adhere to the law, however repugnant, out of a desire to avoid tarnishing the reputation of the LRC.

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### Mrs. Maphisa

The LRC usually avoids housing complaints because the laws are so strict that you simply can't win in court.

I had an opportunity to see these difficulties first hand when one of the advocates in the office asked if I would attempt to assist Mrs. Maphisa, an elderly woman who had recently been evicted from her house in Soweto, a black township of Johannesburg.

Mrs. Maphisa had occupied the house for 23 years under a resident's permit issued to her husband. During this time, she and her husband received a lodger's permit to allow a boarder, Florence Kakane, to share the premises.

Mrs. Maphisa's husband had died in July of 1983, and soon after, housing officials attached a notice to her house. Unable to read the document, Mrs. Maphisa and Mrs. Kakane chose to ignore it. The notice was, in fact, an eviction notice. On August 24, the administration board official again visited their residence, removed all their furniture, and locked them out.

The women, both very distressed,

came to our office. I was determined to do what I could to help them.

I called the Administration Board official, and was told that the women had been evicted because Mrs. Maphisa's husband had died. As an unemployed widow, Mrs. Maphisa had no right to remain in an area officially reserved for urban workers. I was stunned.

But when I consulted the regulations, I found that a section of the Urban Areas Act did indeed provide that if the holder of a site or residential permit dies, the permit lapses ipso facto.

Most Soweto residents are aware of this regulation and consequently transfer the permit to someone else in the family when the holder appears to be near death. Mr. and Mrs. Maphisa had failed to do so.

Consequently, she and her lodger were being evicted and, Mrs. Maphisa was, in effect, being forced to leave the city for the remote "homeland" area to which she supposedly belonged.

There was nothing I could do.

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### A Courtroom Scene

People commonly ask whether the court system in South Africa is fair and whether judges are biased. Cases like *Rikhotso* demonstrate that the courts will find against the government when a sufficiently compelling argument is made. However, I encountered a different reality during my stay.

I was assisting two LRC advocates with a labor dispute before the Industrial Court. The dispute was between the Metal and Allied Workers Union and a South African industrial company that had refused to renew the annual contracts of ten black migrant workers, while at the same time asking others to work overtime. This action led to a strike by the black work force and the eventual firing of all black workers at the plant, approximately 140 people.

The president of the Court had, I was told, shown himself hostile to

our position during an earlier, week-long session in September. However, I was surprised, in observing seven days of the second session, at just how biased the proceedings seemed to be.

On the first day, some sixty of the fired blacks attended the proceedings. The President announced, at the end of the day, that henceforth the hearing would be held in a smaller room that would accommodate fewer spectators. The Africans, he said, had created a disturbance.

There had in fact been no disturbance. The truth of the matter, as I saw it, was simply that there were sixty men there and that they were black. Apparently office workers, feeling threatened by their very presence, had complained.

We also encountered problems getting competent translators for our African witnesses. Two translators were tried and rejected because they were inadequate. The third, though an improvement, also made some incorrect translations, which were called to the Court's attention by a black LRC attorney fluent in both languages.

The president responded by stating that something must be wrong with our witness to have required three translators. He said he no longer knew if he could trust the man (our main witness in the case). Another LRC attorney pointed out that the mistake was in the translation, not the witness, and that we had someone competent in both languages who had pointed this out. The president then asserted that the translator and our attorney, both being black, could obviously not be trusted. (Eventually, however, it was agreed that a new translator was needed.)

At another point the president allowed the advocate representing the other side to completely mislead our witness despite vigorous objections. Later, the president became so hopelessly confused and antagonistic toward our witness that our advocate was forced to put a protest of the treatment on record.

The hearing concluded in late March and as of this writing, the Court president has yet to render judgment. The point the LRC is trying to establish regarding refusal to renew migrant labor contracts would be a difficult one to win in any circumstances. In the current atmosphere of a biased court president and a feeling in the country that the Industrial Court is already a workers' court, the LRC is fighting an uphill struggle.

### The Freedom Charter

South Africa lacks a First Amendment, and has, in fact, a law which provides for the banning of publications. I was invited to observe a judicial proceeding involving the prohibition, then being appealed, of a political document.

This work, called "The Land Shall Be Shared Among Those Who Work It," is a slightly modified version of the Freedom Charter—a document of tremendous historic importance in South Africa. A manifesto for non-racial democracy, it was adopted at the Congress of the People in 1955. The contents of Charter are not unlike that of our own Constitution and Bill of Rights, as well as some provisions of the Universal Declaration of Human Rights.

Under the South African Publications Act 42 of 1974, any person can complain to a government Committee of Publications that a particular publication (including movies, books, and newspapers) is "undesirable" according to the Act's criteria—i.e. that the work is prejudicial to the safety of the state, the general welfare, or the peace and order of the nation.

The Committee may, if it agrees, prohibit publication or possession of the publication. Appeal from a decision of a committee is to the Publications Appeal Board (PAB).

"The Land Shall Be Shared . . ." (hereinafter referred to as the Freedom Charter) was banned because it had originally been compiled by the Congress Alliance,

which included the African National Congress (ANC). Though at the time the Charter was adopted the ANC was pursuing a policy of non-violence, it had since adopted violence as a part of its struggle to overthrow the apartheid system.

This circumstance led the Committee to rule that the Charter, though silent on means for achieving its ends, was under the Publications Act an extreme danger to the safety of the state.

The appeal before the PAB on behalf of the Charter was being eloquently argued by an advocate from the Centre for Applied Legal Studies, a progressive research organization. The chairman—a recent appointee with a reputation for being more tolerant than his predecessor—had asked the advocate to appear as a "friend of the court."

The chairman and five Board members first heard arguments from both sides. During the subsequent questioning, some Board members became agitated and asked questions highly critical of the association of the Freedom Charter with the ANC.

To my surprise, the chairman began answering his fellow Board members and defending the Charter. We left the hearing confident that the appeal would, with the President's support, be successful.

The PAB's decision, announced a month later, did in fact overturn the committee's prohibition. South Africans could once again have the Freedom Charter in their homes without fear of being arrested.

### Conclusion

I have tried to provide a feel for the work done by public interest lawyers in South Africa and for the plight of their clients.

All too often such lawyers are faced with situations where they can find no way to help victims of what they feel are glaring injustices.

However, the lawyers and staff of the LRC are at times successful at

working within the system to the benefit of individual blacks. And through carefully selected test cases in labor and influx control, the LRC has had some impact on the way the laws are interpreted and administered.

Some people have criticized the LRC for its attempt to work within the system. It has been argued that the LRC has not been challenged by the government because the LRC's work fosters the government's aims. By providing blacks with access to the courts, the argument runs, the LRC helps support the government's contention that South Africa is a nation governed by the rule of law where all people can have their day in court.

I feel that such criticism—heard mainly from activists outside South Africa—is misplaced. Blacks living in the country seem to regard the LRC as one of the few institutions they can turn to for legal assistance.

The actions of the LRC in attempting, within the system, to help blacks are not likely to mislead world opinion about the inequities written into the laws of South Africa. The LRC's public interest efforts might, however, help to change the system for the better. And that is all that lawyers, acting as lawyers, can hope to do. □

# Alumni/ae GATHERINGS

It has been a lively season for Stanford Law alumni/ae, with several large get-togethers throughout the country, and numerous smaller meetings with students.

The **Orange County Law Society** held a reception March 7 featuring a talk by Dean Ely. Associate Dean Barbara G. Dray ('72) joined him in bringing greetings to Southern California alumni/ae.

The next month Deans Ely and Dray traveled to New York City, for an April 27 reception hosted by the **New York Law Society** in conjunction with the University's "Stanford in New York" event (see photos). It was at this Law gathering, held in the Asia Society's elegant terrace garden, that Dean Ely formally presented Kendyl Monroe ('60) with his Stanford Associates award (announced in our last issue) for twenty years distinguished service. Law Fund Director Kate Godfrey and Alumni/ae Relations Director Elizabeth Lucchesi joined in the applause for Monroe, whose service includes almost ten years as Law Inner Quad chairman for New York.

Jackson Eli Reynolds Professor John Kaplan made a swing eastward in March, at the invitation of three alumni/ae groups: the **Minneapolis Law Society** (March 19); the **New York Law Society** and the Stanford Club of New York (conjointly, on the 26th); and law alums in the **Boston** area (the 28th). His subject? "Why People Hate Lawyers."

**Stanford Women Lawyers** and the **San Francisco Law Society** joined in welcoming Dean Dray, who last December returned to the School as Associate Dean for Development and Alumni/ae Relations. The reception, held April 5, took place at Greens restaurant at Fort Mason in The City.

San Francisco alumni/ae gathered again on September 19, for a luncheon at the Commercial Club, where Dean Ely spoke on "New Ways of Teaching Law for the Late Twentieth Century."

The Dean met earlier in the summer with alumni/ae in The Valley, where on June 4 the **Fresno Law Society** held a reception at the local Hilton.

Members of the **Washington State Law Society** unbuttoned their collars July 13 for what has become a happily

Scenes from the New York City reception on April 27:



The Monroes (Barbara and Kendyl) with Associate Dean Barbara Dray '72



Leonade Jones '73, Peter Cannon '82, and Marsha Simms '77

anticipated annual event—a picnic hosted by Colleen and George Wiloughby ('58) at their home in Bellevue, to welcome new Stanford lawyers and summer associates to the Seattle area.

Professor Thomas Campbell represented the School at the alumni/ae reception during the 1984 **American Bar Association** annual meeting, held in August in Chicago.

The **California State Bar** meeting luncheon, on September 25 in Monterey, featured William Nelson Cromwell Professor Gerald Gunther on the subject of "The Burger Court: An Election-Year Perspective." Dean Ely's

introduction and brief remarks were also much enjoyed.

A special panel for alumni/ae, on the growing phenomenon of lateral career moves, was offered on September 13 in San Francisco by the School's offices of Alumni/ae Relations and Career Services (formerly "Placement"). Called "Demystifying the Lateral Job Market" and moderated by executive searcher and attorney Robert Major (AB '73), the panel also included Paul Breslin ('66) of Archer & McComas, Laura Kerl ('81) of Shartsis, Friese & Ginsburg, Michael Weber ('82) of Orrick, Herrington & Sutcliffe, and Mark Wilson ('76) of



Dean Ely, seeking support for his "Leogryph for Mascot" campaign

William Kroener III '71  
of Washington, D.C.



Board of Visitors member Talbot Shelton  
(AB '37, JD Harvard '40)



Judge Mary Conway Kohler '28 (center), with guests

Synapse Computer Corporation.

Numerous informal get-togethers with students have also been taking place as part of a new "Meet the Alumni/ae" program organized by the Alumni/ae Relations office. More than one hundred alumni/ae have so far met

informally on a one-to-one or small group basis with students holding summer jobs in their cities. Several evening gatherings, including three or four alumni/ae and ten students, have also been arranged in the Bay Area during the school months. Interested

readers may call Elizabeth Lucchesi at (415) 497-2730 for information about participating in these and other Stanford Law alumni/ae events. □

# Vacancy Announcement

## **DIRECTOR OF PLANNED GIVING OFFICE OF DEVELOPMENT STANFORD UNIVERSITY**

The Office of Development currently seeks candidates for the position of Director of Planned Giving. Reporting to the Vice President for Development, the Director of Planned Giving heads Stanford's bequest, trust, and life income gift programs. He or she superintends the work of two Planned Giving Officers who are attorneys, the Manager of Trust Services, and the Manager of Bequest Records. He or she works closely with staff of the Individual Gifts Division to develop and carry out strategies designed to optimize the inflow of bequests, trusts, and life income gifts to Stanford in the context of Stanford's overall fundraising program.

He or she must have an understanding of tax and estate law and will supervise staff who follow through probate all estates in which Stanford is named as a beneficiary, and will be responsible for seeing that they are properly distributed and used in line with the testator's wishes and University policy. The Director supervises the Stanford R-plan, a program of communication with Stanford-related attorneys.

The successful candidate will have a law degree or equivalent experience, and will combine expertise in tax, trust, and bequest matters with proven ability in marketing and sales. Top communication skills, written and verbal, are required, as is the ability to train nonlegal staff in planned gift work. Creativity in soliciting such gifts, both from individuals and groups (classes, alumni of particular schools of the University, and so forth), is essential. Supervisory skills of a high order are required.

While much of the Director's work will be accomplished through others, e. g., fundraising volunteers, the staff of the Planned Giving Division, and the Individual Gifts staff, the Director will often initiate and be personally involved in solicitations, and will be in frequent contact with donors and prospective donors. A high level of confidentiality and discretion is required.

The Director will consistently monitor developments in the field of planned giving, and will recommend to the Vice President for Development additional vehicles for planned giving as opportunities to establish these arise.

Please send resumes to: Deborah Colar  
301 Encina Hall  
Stanford University  
Stanford, CA 94305



