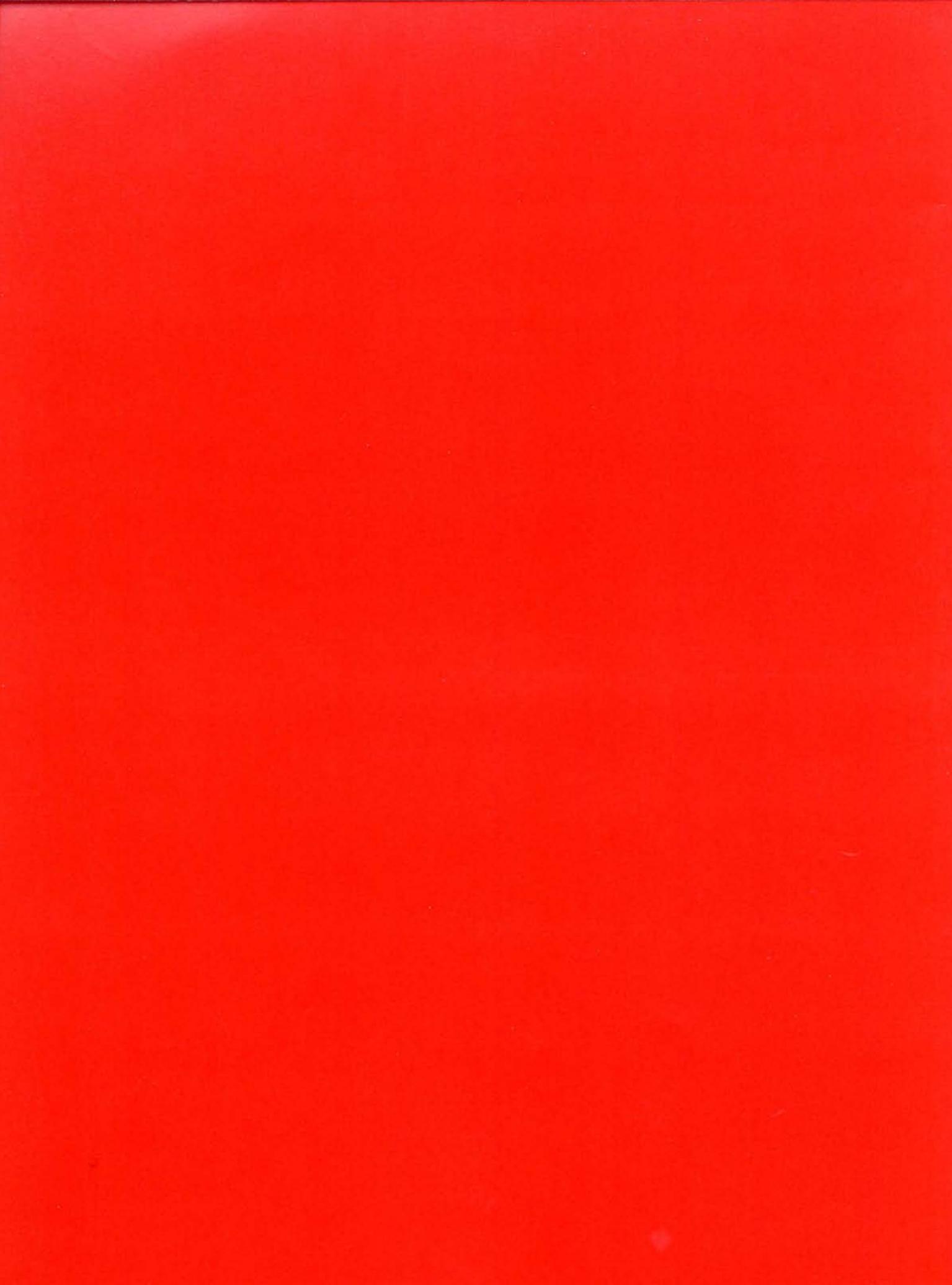


Stanford **LAWYER**

SPRING 1988 VOL. 22, No. 2



Law and Business / Children / Critical Legal Studies / Black Grads / 1987 Annual Report



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FROM THE DEAN

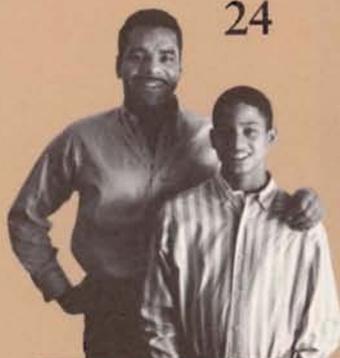
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Ethnic Diversity

A unique opportunity to improve minority representation at Stanford and other schools of law.

By Paul Brest

24



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FEATURE ARTICLES

4

What's Next for Business Law

A hard look at how Law and Business is usually taught—along with a plan for reform at Stanford.

By Ronald J. Gilson and Thomas J. Campbell

10

Who Speaks for the Child?

Not always the parent, according to a leading expert in Children and the Law.

An interview with Michael S. Wald

18

Assume Nothing!

A noted "crit" challenges the foundations of traditional legal thought.

By Mark G. Kelman

24

Speaking Their Minds

Black grads talk about life, law, and the Law School.

By Mary E. Erickson

18



DEPARTMENTS

33

Alumni/ae Weekend 1987

38

School News

48

Class Notes

90

In Memoriam

96

Alumni/ae Gatherings

99

Letters

*After
Page 100*

Annual Report
of Giving

*Back
Cover*

Coming Events

From the **DEAN**



CAROLYN CADDIS

*Paul Brest
Richard E. Lang Professor and Dean*

Ethnic Diversity

DURING the past two decades, the number of minority and women faculty and students at the Law School has grown markedly. This increased diversity has proved extraordinarily valuable to our educational mission. At the same time, we have learned that the effort must be continually renewed, nurtured, and supported.

In 1988 we have a unique opportunity both to assist minority individuals who want to become lawyers and to make a special contribution to the diversity of the national pool of law teachers.

Let me first tell you about the Spaeth Fund and the challenge that Miles Rubin has given us to support financial aid for minority students, and then talk about the School's new graduate program for aspiring law teachers — a program of modest size for which we have immodest hopes and expectations.

FINANCIAL AID

In 1972, Miles L. Rubin '52 and Victor H. Palmieri '54 established the Carl B. Spaeth Fund to meet the growing need for financial assistance to minority students. This Fund, as augmented over the years by new gifts from its founders and other graduates, has been a crucial source of aid to students who could not otherwise afford a Stanford Law education. Of the 512 JD candidates currently enrolled at Stanford, 27 percent are identified as members of minority groups: 12 percent are Latino, 8 percent Black, 4 percent Asian, and 3 percent Native American.

These numbers are encouraging, but our ability to maintain minority enrollments is precarious. Each year, competition among law schools for individuals in the pool of qualified applicants is intense, and the amount of financial aid often determines whether a student can afford to go to the school of his or her choice.

The Spaeth Fund has made it possible for many minority students to accept Stanford's offer. It is, however, smaller than we would like and expendable in nature. Our goal for this year is to bring the Fund to a new level and put it on a more stable footing by creating an endowment.

To encourage the School in this effort, Miles Rubin has issued a generous challenge to us. *Miles has pledged to match, dollar for dollar, any contribution made to the Carl B. Spaeth Fund during this calendar year.* If you can help us take advantage of this extraordinary offer, the Fund will be endowed in perpetuity.

The Spaeth Fund will continue to provide funds to needy JD candidates, with a preference for those from under-represented groups. A portion of the Fund will also be available, with the same preference, for fellowships in the School's new graduate program for aspiring law teachers.

GRADUATE PROGRAM FOR ASPIRING LAW TEACHERS

This innovative doctoral program is designed to respond to several problems shared by law schools throughout the United States: the inadequate number of minorities on our faculties, the shortage of people of color going into the legal academy, and the general concern that the quality of teaching in American law schools is not keeping pace with the quality of scholarship. Actually, on the first point, Stanford — with close to 10 percent minority representation on its own faculty — is

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and increase
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representation
at Stanford
and
elsewhere.*

in better shape than most law schools. But a recent count of all ABA-approved law schools indicated that 34 percent had not a single full-time minority faculty member, and 31 percent had only one. Over all, only 5 percent of the regular faculty members at accredited law schools are members of minority groups.

Our new graduate program is small: For the foreseeable future, we will have only a couple of students entering each year. But it is designed to create a group of scholars who have some formal training in both legal research and teaching before they enter the profession; to increase the pool of minority individuals who seek careers in law teaching; and to enhance their chances for academic employment by giving them the opportunity to produce a significant scholarly work before they enter the job market. Representing a renaissance of our existing doctorate degree program (JSD), the program includes a special seminar in legal education, and intensive supervised research leading to publication of one or more articles.

The program will begin this fall. Our first two JSD candidates are both women, a Black and a Latina, and both superbly qualified to benefit from and contribute to the new program. Pilot funds are being provided from the School's general funds and a grant from the Irvine Foundation. For future funding, however, we must look to your generosity as well.

WHY 1988?

Miles Rubin's challenge applies only to gifts received during the 1988 calendar year. We are therefore making an extraordinary appeal to alumni/ae and friends of the Law School to contribute to the Spaeth Fund this year. To this end, Sallyanne Payton '68 — the School's first Black graduate and a tenured professor at the University of Michigan Law School — has enthusiastically agreed to head a 1988 Task Force for the Spaeth Fund.

This spring, the School held two events to benefit the Spaeth Fund. In April, law students staffed a phone appeal to alumni/ae, and in May, the Black Law Students Association held a reception to honor Professor Charles Lawrence and to raise money for the Fund. The reception was attended by over 100 students, faculty, and staff.

You will doubtless be hearing soon from Sallyanne or another member of the Task Force. I hope that each of you will respond, as best you can, to this important appeal. □





WHAT'S NEXT FOR

L *Business* A W

The School's Law and Business Program is expanding and changing. Plans include a new emphasis on private ordering.

STANFORD Law School has embarked on a program to change dramatically the way that business lawyers are educated. Several elements are already in place; others are now being established; still others are in the exploratory phase. Here, however, is a comprehensive overview of the Law and Business Program at Stanford Law School as currently envisioned.¹

From the perspective of professional training, the Law and Business Program is designed to produce exceptionally qualified business lawyers, capable of analyzing business problems and thus anticipating the need for legal advice. From the perspective of public policy, the Program will focus on the theory and practice of private ordering — how individuals and firms arrange their business relationships in a relatively free market economy. Of course, all

by Professors Ronald J. Gilson
and Thomas J. Campbell
Co-chairs, Law and Business Program



business takes place within a legal framework. Only by starting with the private ordering of business relationships, however, can policymakers learn whether and in what manner government intervention might improve private ordering or remedy any undesirable consequences that private ordering may cause.

This is no small task. Legal education's traditional approach to business law has been to focus on the pathologies of failed ventures and on the government regulation of business transactions, rather than on the more fundamental question of how individuals and firms go about arranging their own business relations. If we are to produce well-trained business lawyers and policymakers, the traditional orientation must be turned on its head. And this will require studying the components of private ordering that legal analysis does not now explain. Thus, our program, by necessity, has a research as well as a curricular component.

Also, because both the curriculum and research are concerned with how real economic actors order their relationships, the Program must foster interaction between members of the Law School community and lawyers and business people. The Program will therefore include a seminar for practicing lawyers in which academic developments can be shared with and evaluated by the practicing business bar. At the same time, the Program may offer a lecture series in which business executives and entrepreneurs share their experience and perceptions with faculty and students.

The following pages describe in greater detail the conceptual underpinnings of the Stanford Law and Business Program, its various components, and the special advantages Stanford brings to the task of revitalizing the study of law and business. The goal of the Program is to provide an education that, in three years of intensive work, will offer much of the benefit of the current four-year JD/MBA program to students for whom an extended business school education is unnecessary.

THE SCOPE OF THE UNDERTAKING

Business law has always been the stepchild of American legal education. How many of today's business lawyers would claim that law school prepared them for most of what they do in the practice of law?

To understand what Stanford Law School seeks to accomplish, and the magnitude of its task, one must ask why legal education has traditionally been oblivious to the primary

function of business lawyers: helping their clients arrange their relationships in the large segment of our economy where the terms of trade are dictated primarily by markets and where regulation plays a relatively minor, background role.

The issue is illuminated by reviewing the limited alternatives traditionally available to someone charged with designing a business law curriculum. The traditional approach is to teach the doctrines of corporations, securities, and tax law. However, the doctrinal courses tend to be obsessed with effects of regulation to the exclusion of the parties' own business goals. For example, law schools have usually taught tax law as if the tax planning decision depended only on the size of the tax bill. This misses critical dimensions of what should be the planning process. Efforts solely to minimize taxes may, to the extent that they require altering business practices and organizational forms, negatively affect internal incentives and impose transaction costs in magnitudes that can swamp tax savings. Understanding these second-order effects of tax planning requires an underlying understanding of the non-tax characteristics of organizational and transactional structure.

Another approach would be to teach practice skills: for example, how to draft documents and negotiate business agreements. But, although "clinical" education can certainly play a role in teaching transaction-oriented aspects of business law, law professors have no special comparative advantage in teaching the day-to-day mechanics of law practice; law firms are likely to do a far better job of this than any law school.

The alternative to teaching practice is teaching theory. This approach to business law education has confronted a serious problem, however. Bluntly put, there has been no theory to teach. By and large, academics lacked any theory that explained the structure of private business relationships. Teachers of business law thus fell back on the same materials that continue to dominate litigation-oriented law school courses: appellate court decisions reflecting the strikingly abnormal circumstance when a breakdown in a business arrangement has led to litigation. The mismatch of traditional business law education and business law practice was inevitable: Each was interested in a different phenomenon.

Stanford's Program in Law and Business plans to offer a curriculum that focuses on the ways in which economic actors structure their private business relationships. On the practical

The program will have three major components: curriculum, research, and a seminar for practitioners.



*“It is a
testimonial
to the
private bar
that its best
business
lawyers
have learned
to do
something
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schools still
do not teach
effectively.”*





THE BETTMANN ARCHIVE

*“An innovative curriculum
and significant faculty research
go hand in hand.”*

side, we shall borrow from the Business School and adapt practical business courses for use within the Law School. On the theoretical side, we shall draw on two areas of economics — finance theory and transaction cost economics — to understand how business people actually do, and can optimally, order their relationships.

The study of private ordering, in turn, promises to improve faculty and student understanding of the complex interactions between government regulation and private behavior and hence our understanding of when regulations are appropriate and how they can be effectively designed and implemented.

Someone who thinks of lawyers as deal breakers, not makers, might ask why law schools should train professionals to facilitate private ordering. Why not instead leave this to business schools, where the profession is not burdened by the obsession with regulation and litigation carried by law schools and lawyers?

The answers seem obvious. As a practical matter, today's business lawyers are called upon to perform many tasks that require business knowledge rather than litigative and other technical legal skills. Moreover, much private ordering in the United States takes place in the shadow of regulatory regimes.

For example, the selection of the optimal form of organization for a business venture is affected not only by the allocation of risk, return, and decision authority among participants, but also by the need to balance these concerns against the most advantageous tax or other regulatory treatment for the venture.

Similarly, the application of many regulations depends on the formal legal structure of organizations and transactions: for example, the Internal Revenue Code, as well as state corporation and federal antitrust laws, treat partnerships in a significantly different way from corporations.

The unavoidable interplay of private and public ordering in a mixed economy creates a need for professionals familiar with alternative transactional and organizational forms and skilled in translating the chosen form into appropriate documents.

In sum, training lawyers in the practice of business decision making creates a unique synergy between private and public ordering skills that mirrors the real environment in which business is actually transacted. Because legal training already develops skill in dealing with regulatory structures, law schools have a dramatic advantage in training professionals with this combination of skills.

THE STANFORD PROGRAM

The Law and Business Program at Stanford will have three major components: curriculum, research, and a seminar for practitioners. We also plan a lecture series through which business leaders can make available their experience with real-world problems.

Restructuring the curriculum. There are four central problems with the traditional business law curriculum. We have already mentioned the first, and most important: By and large, traditional courses are about the wrong thing.

The problem is illustrated by the content of the typical introductory Business Associations course—historically the entry-level course of a business curriculum at Stanford and elsewhere. The course and standard casebooks are a hodgepodge. They combine coverage of both publicly traded corporations and more private enterprises such as partnerships and closely held corporations, despite their conceptual and practical distinctiveness. The most significant feature of public corporations is a public market for the corporation's securities; yet traditional materials omit any consideration of how the capital market dictates the optimal design of the public corporation's structure, such as the choice of voting rules, managerial incentives, and the like.

Traditional materials concerning private enterprises share this artificial simplicity. Close corporations, partnerships, and proprietorships are commonly presented as distinct areas of interest rather than as organizational alternatives, the choice among which depends on the trade-offs between internal rules governing decision authority and profit sharing and external considerations such as limited liability and, especially, tax considerations.

The coverage of the traditional Securities Regulation course presents the same problem of teaching the wrong thing. This course typically is limited to the registration process and exemptive provisions of the Securities Act of 1933 and the liability provisions of that Act and of the Securities Exchange Act of 1934, thus focusing almost exclusively on one small part of the capital market—the offering of new securities to United States residents. Entirely ignored is the structure of the capital market itself. No attention is paid to financial intermediaries—such as mutual funds, pension funds, or insurance companies—which have come to represent a substantial proportion of capital available to American business. Through these alternatives, investment banks have devised an

array of new financial instruments that have dramatically increased the range of financial strategies available to those seeking funds and the range of investments available to those with funds to invest. Such developments in private ordering have left some traditional regulatory regimes, like the Securities Act of 1933, with a peripheral impact.

A modern curriculum should begin, then, with the result-oriented question—What do the parties want to accomplish?—rather than the narrow focus of an existing regulatory regime. Only then can we effectively train lawyers to facilitate their clients' goals. Only then will our graduates be able to anticipate legal problems rather than react to problems after they have arisen. And only then can policymakers meaningfully evaluate the operation of existing regulatory schemes and, where appropriate, design effective regulations. The traditional business law curriculum fails to accomplish these goals. It is a testimonial to the private bar that its best business lawyers have learned to do something that law schools still do not teach effectively.

The second problem with the traditional business law curriculum is that it does not provide the skills essential to the study of business decision making. Three areas are particularly important: accounting, finance and microeconomics, and decision theory and strategy.

Accounting is the language in which economic actors assess the consequences of private ordering. Many law schools offer a watered-down accounting course—often titled "Accounting for Lawyers"—which operates on the implicit assumption that business lawyers can function without real literacy in the language of private ordering. In fact, business lawyers require the same skills in financial accounting as non-accountant business executives.

Business lawyers also require serious training in finance and microeconomics. Developments in finance—especially asset and option pricing theory—provide a powerful conceptual framework for specifying how individuals can maximize the value of their assets. Microeconomics—especially transaction cost economics, competition theory, and the economics of distribution—provide a framework for understanding and alleviating the non-regulatory barriers that impede asset-value maximization.

Finally, decision theory and strategy provide techniques for engaging in business decision

Research is
needed on private ordering—
how individuals
and organizations arrange
their own
business relationships in a
relatively
free market
economy.

(Continued on page 44)





Reported cases of abuse and neglect are up six-fold since 1970. Prof. Michael Wald discusses this and other issues concerning children.

WHO SPEAKS FOR THE CHILD?

H

ow far do parental rights go? When and how should the legal system intervene on a child's behalf? And, more broadly, what role should society play in preparing the younger generation for tomorrow's world? Michael Wald — at 46 a senior scholar in the relatively young specialty of Children and the Law — has thought deeply about such questions.

Wald joined the faculty in 1967 fresh from Yale, where he earned an MA in Political Science as well as an LLB. An innovative teacher of criminal, family, and juvenile law, he was named a Stanford full professor in 1976. From 1984 to 1987 he served as director of the Stanford Center for the Study of Youth Development.



Michael Wald

Illustrations and lettering by Emily Schroeder, age 9, of Berkeley, California.

Best known for his work with the ABA's landmark Juvenile Justice Standards Project (1972-77), Wald drafted the model legislation for state intervention on behalf of abused and neglected children.¹ In 1984 the American Psychological Association presented him with its Distinguished Child Advocacy Award.

*This interview, which took place on December 21, 1987, marks the completion of Professor Wald's twentieth year of teaching at Stanford and the publication of his book, *Protecting Abused and Neglected Children*.² The questions were put by Constance Hellyer.*



How did you get interested in law as it applies to children?

Anna Freud, one of the world's leading child psychoanalysts, visited at Yale when I was a student. Through my course work with her, and with professors Joseph Goldstein and Jay Katz, I was exposed to a number of disturbing questions about the impact of the legal system on children. I became fascinated and decided to concentrate on Family Law.

Did you have any children of your own then?

Yes. My wife and I were in law school together, and our daughter was born during our second year. We've since had a son.

Is Children and the Law a recognized specialty?

It is now, but it certainly didn't exist then. A number of people taught Family Law and as part of that would teach issues dealing with adoption and child custody. But when I started at Stanford, I was one of just a handful of people around the country concentrating primarily on children's issues.

What makes children's law distinctive? Is it that the child has separate status as a client rather than as just part of the family?

In part, but not just as a client. Children's law focuses on the question: Who shall decide what is best for a child—the child, a parent, or the state, acting through judges, social workers, or other state officials?

The idea that children, because of their relatively helpless and dependent condition, warrant special protection from society goes back at least to the 1800s, when the first child abuse laws were passed. Since the late 1960s, a number of other problems have become legal issues, such as consent for medical procedures; age-based restrictions on speech, drinking, and sexual freedom; child pornography; juvenile court procedures and penalties; and treatment of runaways and so-called "status offenders." Whether children have rights to autonomy as well as protection is also a major focus of children's law.

Is there a danger of becoming adversarial—of pitting child against parent?

Some issues do put children in an adversarial position with their parents. Abuse and neglect

*Unfortunately,
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children...*



are obvious examples. Another is when a runaway child objects—often with good reason—to returning home. Or when a child doesn't want to visit a noncustodial parent. Also the abortion issue—when teenagers are afraid to tell their parents. Children's interests are not always the same as parents' interests.

Some practicing lawyers may emphasize the adversarial aspects. My own focus is more on how to incorporate the needs of children and respect them as independent human beings, while recognizing that, for the most part, children are best off with caring parents.

Basic attachment has to be reckoned with.

Yes—when positive attachment is present. Unfortunately, many parents seem to be less invested in and less committed to children today. In a broad sense, parent-child bonds may actually be weaker than in the past.

That's scary.

It is scary.

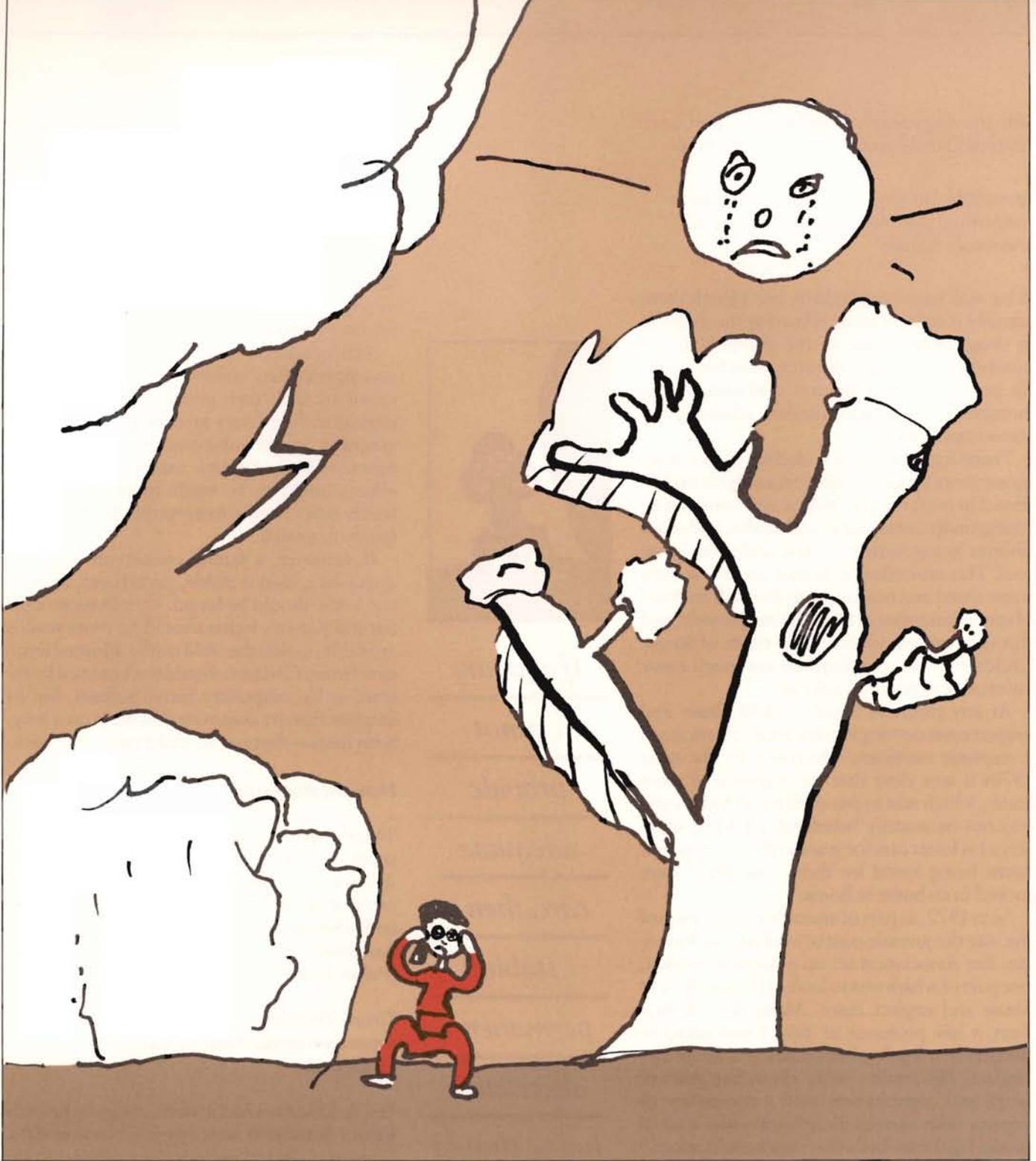
What do you attribute that to—"the new narcissism"?

There are many factors. Perhaps the most significant, and one that hasn't been focused on much, is widespread drug use. This is seriously affecting the quality of parenting in lots of families—not only those identified as child abuse and neglect cases, but also in many others where there just is poor child care and limited commitment because of underlying drug and alcohol problems.

There may also be an increase in the percentage of parents who are concerned more with self-fulfillment than with childrearing. While it is certainly possible to have a successful career and also be a successful parent, there is evidence that children are receiving less parental guidance and attention than in, say, the 1950s and '60s.

I've heard that divorced fathers are on average much better off financially than their children, who often live in relative poverty with the mothers.

Divorce has hurt children to a substantial degree. However, many children today are economically better off than they would have been in the past, because of the simple fact that most families have fewer children. Each child can claim a bigger share of the pie.



What you have, then, is a much greater division between the well-off and the not-so-well-off. In an intact, two-parent family with one or two children, a lot of economic resources are available, while in single-parent families, resources are much more scarce.

Let's talk about your research. What was the ABA Juvenile Justice Standards Project all about?

Beginning in the 1960s, people began to recognize that child abuse was a significant problem in society. Many children were being injured, some pretty severely, by their parents. In other situations, children were being left without adequate food or care.

Increasingly, these cases were coming into the juvenile court system. The number of child abuse and neglect cases nationwide grew from 100,000 in 1960 to 300,000 in 1970. And it's

still growing: nearly 2 million children were referred to child protective services in 1986.

Incredible. Do you think that child abuse is really more prevalent now, or that it was previously hidden?

A lot may have been hidden, but I think there actually is more — some related to the increase in drug abuse, some to the increase in the number of poor single parents, who have trouble providing adequate care, and some to the increase in step-parent families, where sexual abuse is more likely.

There has also been a decline in the non-government protective systems available to children. Up until the late '40s, it was common to have grandparents, aunts and uncles, and older siblings living nearby — often under the same roof. This undoubtedly helped prevent at least some abuse and neglect, both through the kind of surveillance that caring relatives provide, and through backup parenting in times of stress. Children in isolated families are much more vulnerable to parental failings.

At any rate, the flood of child abuse and neglect cases coming into the legal system made a response necessary. Moreover, by the early 1970s it was clear that the response of most states, which was to put children in foster care, was not necessarily beneficial. Children often stayed in foster care for years with no permanent home being found for them, and many were moved from home to home.

So in 1972, as part of an entire reevaluation of the way the juvenile courts worked, the American Bar Association set up a national project, one part of which was to look at the handling of abuse and neglect cases. Along with Robert Burt, a law professor at Yale, I was asked to develop new legal policies relating to abuse and neglect. The result — after about five years of work and consultation with a committee of experts from various disciplines — was a set of model legal standards that states could adopt.³

What did you recommend?

The major thrust of the proposals was to define more clearly those harms to children that justify state intervention. Most state statutes at that time described abuse and neglect in very vague terms, so that people (social workers, lawyers, judges, and so forth) had no consistent criteria to go on. Intervention was sometimes based on middle-class moral standards. Children could be removed from their homes because their parents, even though living together for a long



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time, were not married; or because their house wasn't kept clean enough. We found a wide range of situations where intervention appeared inappropriate. Also, because the law spoke just in terms of "unfit" or "unsuitable" homes, without defining these terms, nobody knew just what they should be trying to change. We therefore specified the type of harms — such as physical injury and sexual abuse — that justify intervention.

The standards were also premised on the assumption that children develop best when raised by their own parents, and that unless parents really are very inadequate, foster care is generally a poor substitute. We therefore recommended that when intervention occurs, efforts ought to be made to work with the family unit in order to keep the children in the family if possible.

If, however, a family cannot provide adequate care, then a stable, permanent, alternative home should be found. Termination of the natural parent's rights should be more readily available, so that the child can be adopted into a new family. Children should not be raised by the state or by temporary foster parents, but by families that are committed to them on a long-term basis — that see the children as their own.

Have the standards had an impact?

There's been a major shift in the law. Several states — California, Iowa, New York, Alaska, Arizona, and North Carolina — have adopted most or all of the proposals. Many were also embodied at the national level in the Adoption Assistance and Child Welfare Act of 1980 (Public Law 96-272).

Great. This new study that you've done on foster care versus home care seems to follow up on that.

Yes. A difficulty I had in developing the Juvenile Justice Standards was a serious lack of data. There was clinical evidence of problems in the foster care system, but no studies comparing the costs and benefits of alternative ways of dealing with abused children. Were we right in assuming that children are better left at home than put in foster care? Was foster care as bad as some of the literature said? Answers weren't available. So the standards we then proposed had to carry the caveat that, although they were based on the best available knowledge, plus certain value judgments in favor of parental care, more research was clearly needed.

In 1977 California adopted legislation (which I helped draft) creating an experiment

that kept certain children at home with special support services in two counties, while comparable children in other counties were placed as usual in foster care. The legislation also encouraged adoption of children who could not be returned home.

The evaluation planned by the state focused mainly on statistics, for example: Were more children kept at home in the experimental counties? I thought it was important also to examine the actual impact on children. Were the home or the foster children better off in terms of physical and emotional health? School performance? Social development? Relations with their families?

I undertook the study with Herb Leiderman from the Psychiatry Department and Merrill Carlsmith from the Psychology Department.⁴ Our plan was to compare the two groups of children over a two-year period following court intervention. It is relatively rare in the legal world that we ever do experimentation to see if a proposed change makes things better or worse.

How does a lawyer pick up the skills for that kind of research — survey design, statistical analysis, and so forth?

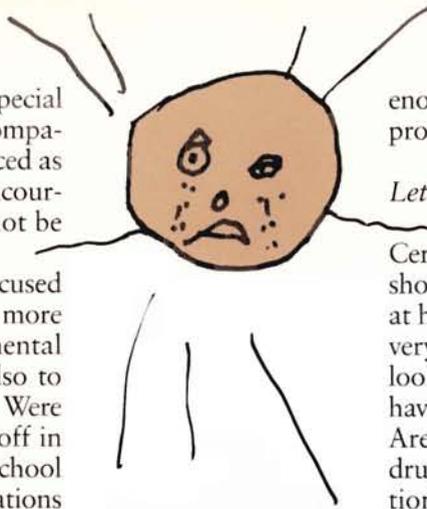
I had some training in my graduate work in Political Science. But I think to do it well, you need interdisciplinary groups. Carlsmith was an expert in research methodology, and Leiderman brought from psychiatry a set of clinical insights and ideas about the project.

My contribution as a lawyer was to define a problem of concern to the legal system, provide some guidance on which kinds of information would be relevant, and then, in collaboration with people with research expertise, design a project that gets at that information.

What did you find out?

First, that this kind of research is very difficult. It took us two years just to develop the study design. And even though ours was one of the most extensive and best-financed studies of this sort ever done, our sample still was not large enough to enable us to answer many questions. Unlike medical and natural science projects, social science research rarely is funded at a level adequate to provide “answers.”

We did find, however, that children do not do as badly as feared in foster care. A lot of the laws that I had developed were based to some degree on concerns about the quality of foster care. More recent research, including ours, has indicated that even given the inadequacy of the foster care system, when the home is bad



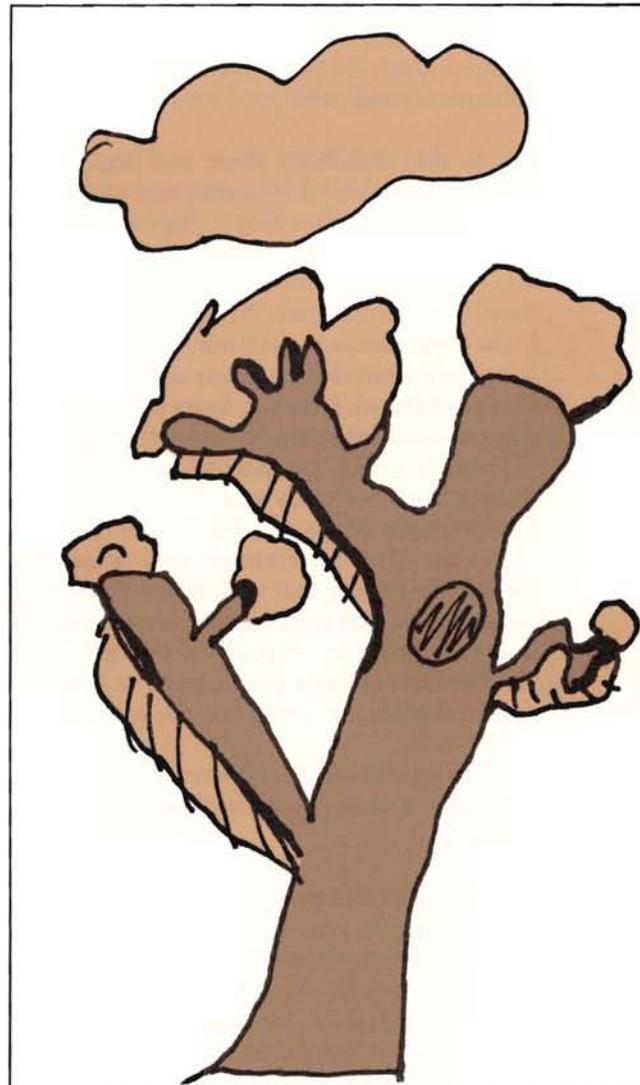
enough, foster care will be better — that it will provide at least some degree of stability.

Let's hope, freedom from hurt.

Certainly — physical and emotional. I think we should not just assume that children can be left at home. They should remain only if there are very, very good services, and if we continue to look at the child's development. Instead, we have tended to look at the parents' behavior: Are they hitting the child? Are they doing drugs? We don't look at whether the intervention is aiding the child's academic, social, or emotional development — that should be our primary focus.

Some counties said that they would prefer home care if only they had adequate family support services. What would those be?

*I think that
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criminality.*



They range from homemakers who come into a family and work with the parents, to specialized day care that includes support services for the parents and help for children with developmental problems, to drug and alcohol counseling, mental health counseling, plus assistance in finding jobs and housing. Many children go into foster care because of inadequate housing.

Is there a significant cost difference between home care with support services vs. foster care?

Home care has often been sold as a saving, but I think that really good home care is nearly as expensive as good foster care.

With so many women working at outside jobs, it must be hard to find foster care homes.

Absolutely. That's a huge problem. The availability of foster homes is seriously depleted. Plus, we don't pay foster parents enough for what is a very difficult job.

Do child custody decisions have legal repercussions down the line — such as juvenile delinquency and other problems with the law?

I think that childhood abuse and neglect is a major factor in later delinquency and adult criminality. It is also clear that a disproportionate number of people who exhibit criminal behavior — particularly serious, violent behavior — have been in foster care. Whether that's related to the foster care or to the family conditions that led up to it is not clear; in many cases, both may have contributed. However, foster care undoubtedly minimized the harm to some other children.

From a policy perspective, an important finding from our study was that probably the best predictor of what a child would look like two years after intervention was what they looked like the day that we first saw them: that neither home care with services, nor foster care, had that great an impact on our group of children, all of whom were already at least five years old when they came into the system.

Perhaps by that age, the children's basic emotional development had already been damaged.

I think that's often the case. Many children are resilient, and the system can come in and be very helpful. But others have suffered a great deal of harm. Any serious abuse and neglect has probably been going on for some time, and it is sometimes too late for us to make much of a difference.



*A society's
ability to
function
economically
depends
upon the
human
capital
investment
that is made
in children.*

So although we obviously have to respond to child abuse and neglect of school-age children, the major focus of our resources ought to be on early prevention.

We need to provide visiting home nurses and support systems for families and for single mothers, prenatally and postnatally. And we should have neighborhood support systems available to every family, including drop-in centers and early child-care centers like Head Start, where the teachers also reach out to the families.

Have you represented children in court?

I have over the years been involved in legal representation, but I do much more legislative drafting than litigation.

For a number of years, however, I taught a course here in which the students represented adolescents charged with delinquency in San Mateo County. Along with other people who worked with me in the course — Bill Keogh and Thelton Henderson, who is now a federal judge — I supervised the students and went to court with them.

That must have been one of the first really clinical, hands-on courses here. Are you involved at all in the East Palo Alto Community Law Project?

Yes. I work with David Neely, a Project attorney, on issues related to children.

One of their concerns is the large number of kids that get suspended from school, most frequently for being truant. It's a problematic response to say, "You haven't been coming, and therefore you can't come." Dealing with truancy is not easy, but I'm skeptical that suspension is the best way of doing it.

Is there anything else unusual about your teaching?

Almost all of my courses are interdisciplinary in nature. There are always people from other fields — child psychiatry residents, pediatricians, and graduate students from education, psychology, sociology, and other departments — in my classes.

For a number of years I've taught a course (Child Custody) jointly with Eleanor Maccoby of the Psychology Department. It exposes law students to people from other disciplines that they would work with if they deal with children.

I've also encouraged students in other departments to focus on research that the legal system needs in answering policy questions.

Have any studies come out of that?

Three Ph.D. dissertations have been especially important. One by Ann Stanton, on what happened to children whose mothers were jailed, led to some policy changes in California, such as a greater effort to provide alternative sentences. Another, by Susan Meehan, on children involved in custody disputes and how they feel about being interviewed and going to court, has made judges more sensitive in that area. A third, by Kathy Lewis, helped policymakers understand the capacity of adolescents to think about the consequences of actions like having an abortion.

What issue do you plan to tackle next?

I've just begun research on a book that asks the question: How does a society that wants to provide equal opportunity for children organize itself? Can you still give a great deal of discretion to parents to raise their children differently? Can you accept the high degree of inequality that we have among families? And so it gets to the question: In a society committed to equal opportunity, what should be the relative roles of the state and the family in rearing children?

Sometimes parents with eccentric ideas seem to produce interesting kids — like those home-educated brothers who got into Harvard. On the other hand, you wonder what opportunities children will have whose parents insist on their learning creationism instead of modern biology. How does one draw the line?

There is an essential conflict between our society's commitment to diversity — our concern that the government not try to shape all individuals — and our desire to have some degree of equality of opportunity.

My tentative notion is that diversity is very important, and that we don't have the knowledge to rear children communally and shouldn't try. Even if all of the children in the United States were raised in big communes, there would be differences among communes, so you'd still get different outcomes.

What you want is to make sure — through the public education system and through the definition of the minimal kinds of things that parents must provide — that all children get a level of support that makes it likely that they will have a reasonable opportunity for a productive life, satisfactory personal relationships, a sense of self worth, and a chance to move into some kind of work that gives them fulfillment.

Should the Amish have been allowed to keep their children out of high school?

I think not. I would give the Amish considerable leeway to expose their children to Amish ways of life and belief, but parents shouldn't be able to totally foreclose exposure to other avenues of development just because they want to perpetuate their own way of life.

I'm working on a different definition of a parent's role, but don't know what I'm going to say at this point.

This is a Social Darwinist or devil's advocate question: Why should society and the legal system care, anyway? Children belong to parents, and if some parents blow it, too bad — there are plenty of other kids. Why should we try to ensure that every individual child is well treated and has opportunities to develop?

For me it comes down to the core level that if human beings don't have a sense of commitment to other human beings and their well-being, then there is no quality to being human — nothing that distinguishes us from any other species. Moreover, Social Darwinists don't seem to recognize that the most successful societies are those that invested in the welfare of the community. No society has worked by pure individualism or each for his or her own.

In modern terms, a society's ability to function economically — its material wealth — depends upon the human capital investment that is made in children. We are in a world in which production turns largely on the education level and thinking capacities of the work force, rather than on physical labor. Our business community seems to be recognizing this: that if the United States allows a large number of children to drop out of high school or graduate unable to read — it is going to have difficulty competing economically with societies making bigger investments in their children and their children's education.

I think also that a society that doesn't invest in its children produces adults who will be threats to society. So there's a public safety interest as well.

In conclusion, what do you see as the most pressing problems involving children and the law?

Ensuring the adequacy of parental care — especially related to drug and alcohol abuse. And guaranteeing a truly adequate level of economic support for the well-being of each child. □

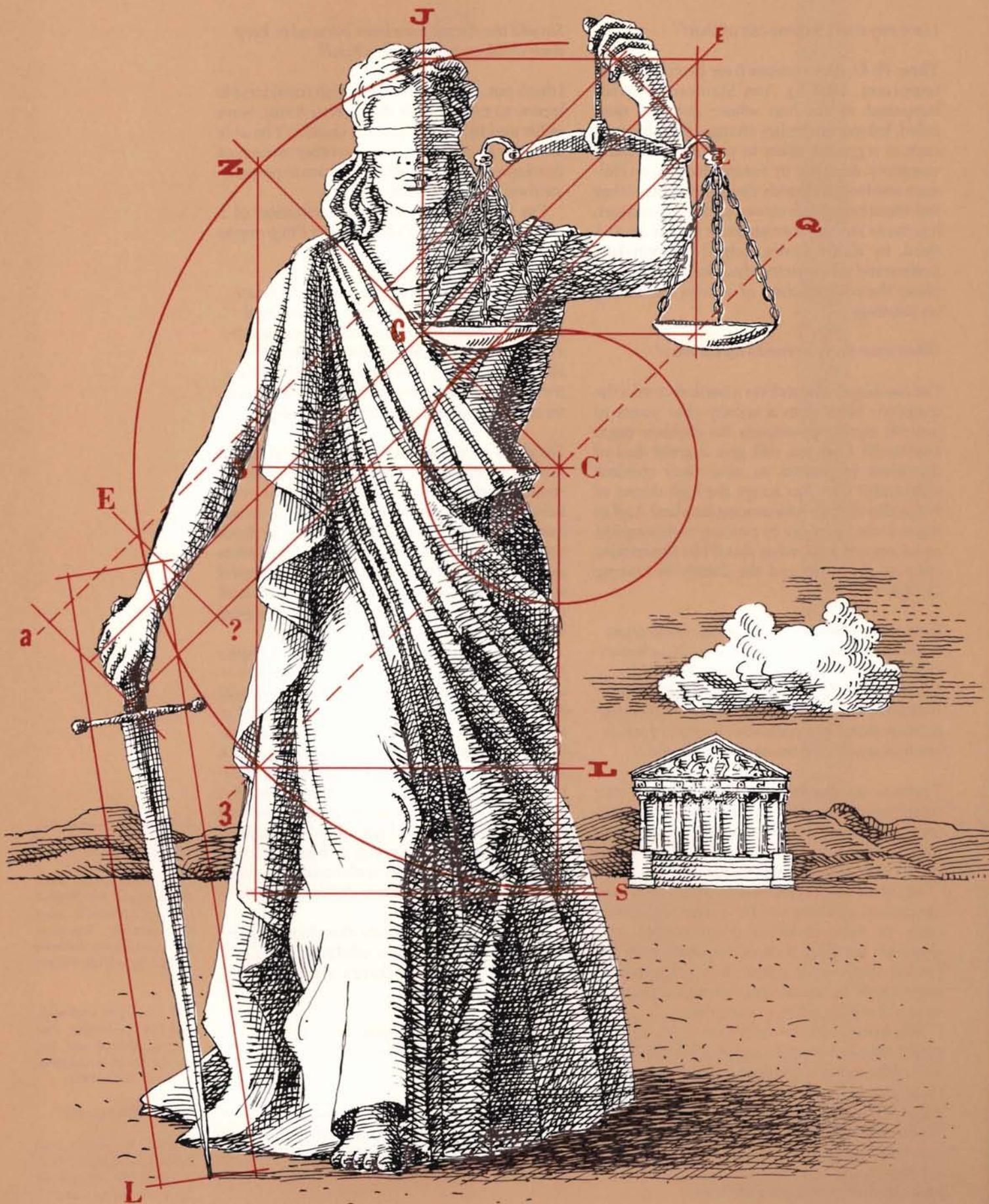
Footnotes

¹ M. Wald and R. Burt, *Child Abuse and Neglect (Model Standards plus Commentary)*, American Bar Association Juvenile Justice Standards Project (1977).

² M. Wald, J.M. Carlsmith, and P.H. Leiderman, *Protecting Abused and Neglected Children* (Stanford University Press, 1988).

³ Wald and Burt, *supra* 1.

⁴ Wald, Carlsmith, and Leiderman, *supra* 2. (Prof. Carlsmith did not live to see completion of the study.)



ASSUME NOTHING!

TWO movements in the past decade have significantly changed the way that the law is taught at Stanford and a number of other law schools (particularly schools generally thought of as leaders). One movement, which comes broadly from the political right, is Law and Economics; the other, associated more with the left, is Critical Legal Studies.

Though very different in perspective, both movements challenge traditional ways of thinking about the law. Together they are making the study of law a more complex, questioning, and pluralistic enterprise. A short-run consequence may be that students need to develop a high tolerance for ambiguity. On a deeper level, however, the developments I describe represent what I believe to be a more realistic view of law and its role in society than was taught in former years.

Before I describe these movements and their relationship to traditional approaches, let me offer two caveats.

by Mark Kelman *Professor of Law*

**Traditional legal theory is
being challenged from right and left.
A noted "crit" explains why.**

The first is that, given the brevity of this format, my characterizations will inevitably be somewhat oversimplified and exaggerated. The other is that I speak from the perspective of a Critical Legal Studies scholar.

That said, let me begin at the beginning—with the approach to legal education that predominated before the advent of the Law and Economics and CLS movements.

Critics sense that lawyers serve generally as apologists for the existing social order—that one role of the legal regime is to present the distribution of powers, privileges, and rights as essentially neutral.

THE TRADITIONAL APPROACH

Here, in skeletal form, is a heuristic view of legal education as I experienced it at Harvard in the early 1970s and as most readers from Stanford and other schools will also have experienced it during the same and earlier periods.

We would look, particularly in the first year of law school, at a series of controversies that on the face involved very basic questions about relations between people and between the citizen and the state.

These would include questions in contract law, like the degree to which people have affirmative obligations to disclose to their contracting partners information that could make the contract disadvantageous for the partners. Or questions about the degree to which someone was entitled to retain the benefits he gained from someone else while the two were attempting to negotiate a formal relationship, though no formal contract was ever

ultimately made, especially if he implied (in some sense) that if the other party gave him something else of value, a contract was sure to result. We'd look, in courses like criminal law, at issues about the degree to which the state ought to punish someone before she had consummated a harm—trying to draw a line between nonpunishable preparation (thinking about a crime) and attempting a crime (when

reached under the covering rule—that there was a high degree of social consensus on what was fair and rational. Moreover (though this aspect of the first procedural view was both more hidden and perhaps ultimately even more problematic), there was a fair degree of consensus about the level of generality the covering rule ought to have—the degree to which it is possible or appropriate to think about moral, political, or legal issues without taking into account the detailed particulars of social situations.

The second procedural implication—and a key to understanding the changes in legal education—is that the legal method (this rhetorical method of imposing covering rules and testing them against tricky hypotheticals) could resolve difficult social problems in a fashion that was distinct from other sorts of resolutions. “Legal reasoning” was thought to be radically distinct from the assertion of purely political preferences. It was also thought to be distinct from efforts at empirical study of issues, that is, studies of controversies where people agree on certain ends but then battle over how best to implement them. The traditional notion was instead that this uniquely lawyer’s technique of rhetoric would give people a clue to the resolution of social conflicts.

There were substantive correlates to that procedural belief as well. One was that underlying the rules lawyers had worked out through this rhetorical technique was a proper set of rules that ought to govern the relationship between “private” individuals and between individuals and the state, i.e., that we had essentially settled on a fundamentally just and uncontroversial regime. The presumed uncontroversiality and neutrality of the distribution of powers and perquisites in social life was derived from the presumed fact that these were all governed by the legal rules which themselves had been derived through this objective rhetorical process.

The other substantive correlate was in a sense a result of the structure of law school, especially the choice of the core first-year subjects, which essentially involved only relationships between “private” individuals: the traditional

you’ve done something but simply failed to complete it due to extrinsic circumstances).

We approached such questions by looking at a lot of cases or fact situations and trying to imagine what a good covering rule would look like. The idea was to come up with a rule at a fairly high level of generality that didn’t lead to obviously wrongheaded or silly results when pressed to cover cases (real or hypothetical) that seemed included under the covering rule.

That was the basic rhetorical technique that we were taught—the basic process of thinking like a lawyer: generating covering rules and hoping that the covering rules wouldn’t lead to absurd results in particular cases.

Implicit in this vision of legal education were a number of procedural and substantive notions. One of the procedural implications was that everybody in the classroom (and, presumably, people in society more generally) would be able to reach consensus about when an absurd result had been

common law subjects of contracts (policing “voluntary” promises to others), torts (duties that people have not to harm others), criminal law (involving essentially the same duties, though *enforcement* is now public, not private), and property relationships (the law of individual entitlements). The resulting message was that the organization of society could best be understood in terms of the proper resolution of relationships between particular people, and that was all that you would need to understand. The ideal nature of political inquiry was simply to make sure that one had properly set boundaries between particular people—what they could do in the process of negotiating with one another, what kinds of harm they could inflict upon a stranger, and so forth.

So, that was the law school that I went to and that I think dominated the postwar era into the 1970s—despite the presence of some extraordinary intellectually powerful dissenters, particularly those associated with the Law and Society movement.

In a sense, the basic procedural claim that one could expect, through a unique legal method, to resolve fundamental issues about relationships between persons is on the face of it rather astonishing. It’s amazing that law students even began to swallow—let alone actually embraced—the claim. It was particularly difficult to swallow in the Vietnam war era, when I was going to law school. The claim that society could overcome what seemed to be extremely deep fissures through a certain type of technical dialogue, and that the disjunctions that appeared so rampant in political life generally would disappear through better, more careful rhetoric, didn’t seem very plausible. It didn’t seem likely that people who weren’t getting along about any other political issues would begin to get along if they just generalized their aims properly so that they could then agree on the absurdities of the covering rules they had initially chosen.

In fact, I think a lot of what was happening when this vision of legal education fell apart was a function of political, ethnic, and gender fissures in America, though in the heavily white male law schools of the early ’70s,

racial and gender divisions were often less visible than traditional ideological ones. Essentially, the centrist political consensus in American politics, which had also dominated American law schools, was breaking apart from both the left and the right in the late ’60s and early ’70s. That is to say, there was both the growing left fringe in American politics and, especially in the ’70s, a growing conservative fringe.

What the law schools faced, then, was a group of students of my generation who didn’t buy the assumption that technical, legal, rhetorical thinking would resolve issues like: “What do you owe other people who are less capable of taking care of themselves than you?” or, “To what degree is it appropriate for the state to intervene against people who pose some danger of violating criminal prohibitions but have not clearly shown that they do?” A lot of what you see happening in American legal education today grows out of a skepticism that such fundamental political conflicts can be papered over with technique.

The Law and Economics movement and Critical Legal Studies movement represent differing responses by a new generation of legal scholars to the perceived inadequacies of this traditional approach.

LAW AND ECONOMICS

In the terms that I’ve been using, the Law and Economics movement—along with the Critical Legal Studies movement—considered it unlikely that there would be any unique, legal form of argumentation that could promise to resolve the politically charged issues in social life. In fact, both movements are essentially very hostile to the idea that lawyers know anything particularly unique. The thought was that basically what lawyers were doing was probably a bad version of fumbling towards other sorts of knowledge, and that it would be better to make those other forms of knowledge fairly explicit.

But—and here the Law and Economics people are very different from the Critical Legal Studies people—legal economists admire traditional educational style and also share the

traditionalists’ supposition that uncontroversial legal rules could ultimately be derived. They don’t think such rules can be derived by the same method that my teachers had thought, but they share the same vision of classroom procedure: the goal of both scholarship and classroom dialogue is to derive uncontroversial principles. Legal economists also drew the same substantive implication that the centrist rhetoricians did, which is that the fundamental arrangements in American social life can be justified in a fairly neutral way.

The legal economists do this, broadly speaking, in two ways. First, instead of relying on the traditional socratic-method dialogue to *reveal* shared values, they start by *positing* a first principle that is assumed to be fundamental. The case method practitioners’ way of dealing with the problem of grounding one’s values was to adopt a theoretical posture of value skepticism and relativism, which was buttressed by never being very explicit about what your values are. At the same time, the traditional law teacher typically thought values actually were broadly shared, and students would see that by noticing that *everybody* found certain sorts of general rules ridiculous when pressed to deal with particular examples. Legal economists didn’t accept this rhetorical approach, but instead tried to *define* a particular value that institutions should seek, define it in some detail, and argue that this value was really one we all could agree on.

This value was, of course, one variety or another of economic efficiency or wealth maximization. There are various technical formulations of what this means, but essentially, the value is to try to make “the pie” as large as possible.

The second thing legal economists did was to suggest that there was a good deal of consensus on the appropriate *legal* norms, even if people might otherwise disagree on “abstract” fundamental ends. In essence, the economist said, “I’ll concede to my political opponents *any* set of plausible ends they might have, and focus instead on what amounts to empirical implementation studies and try to argue that

regardless of our ends, we must inevitably agree that only a narrow range of institutions serves *any* plausible end." People may not easily agree on what they seek, but if you can persuade them that the things that they think they're seeking are unattainable in the fashions that they would like, there still might ultimately be consensus over practical policy.

So a fairly typical legal economics strategy in the classroom would be to say: "Okay, if some group of students—for whatever reasons, which are too difficult to gain consensus over, so I'll just concede them—favors tenants against landlords or believes that we would obtain more optimal levels of safety if we did not rely on consumers to purchase automobiles or aspirin bottles with only those safety features that they value enough to pay for voluntarily, I'll show that the techniques that these students think are legally appropriate to those goals won't actually serve their ends."

On a landlord/tenant issue, for example, the legal economist might argue that if one adopts rent control or

a nonwaivable warranty of habitability for apartments, tenants will not actually be helped; or that if the government mandates crash-proof windshields or safety-cap aspirin bottles, consumers will counteract the effects of the regulation through offsetting, risky behavior.

In sum, Law and Economics is like the traditional approach in believing that consensus could ultimately be reached, but different in the procedure for doing so. Procedurally, the legal economists 1) define the end—efficiency—that they seek rather than believing that ends should never be explicitly stated, and 2) work from either an *empirical* vantage point or from what they assert to be descriptively accurate generalizations about actual behavior rather than a more purely rhetorical vantage point.

A good deal of the teaching at Stanford Law School is heavily influenced by legal economics. There are very few courses that are taught here now—whether by people who would describe themselves as adherents of legal economics or by those less centrally concerned about the economists' agenda—that don't have a heavy dose of this sort of material. In fact, I would say that although this school is probably less nationally known for legal economics than the University of Chicago, Stanford's contributions to the movement in fact rank as high as any other school's in the country.

CRITICAL LEGAL STUDIES

The CLS people took a different path, both critiquing the traditional approach and then developing a secondary critique of Law and Economics, which was in their view yet a new sort of "formalism," or effort to de-politicize legal disputes.

In the first instance, I think what the Critical Legal Studies people did—looking at the claims of traditional lawyers that hard cases could be resolved through rhetorical technique—was to develop a different way of looking at cases. The best brief description I can give is that it is somewhat influenced by the way in which a cultural anthropologist would approach a distinct culture. We treated

ourselves as anthropologists of the legal culture, as well as lawyers.

What we were looking for was *structure* in legal argument. It was our presupposition that instead of clarifying and resolving things, legal arguments often simply obfuscate and obscure certain recurring political tensions. We were trying to identify the underlying tensions that are really at stake in these cases but that tend to be overlooked when one engages in the rhetorical process that our teachers generally used. Ultimately, we showed that, behind all the variations in argument from case to case that appeared so central in the traditional case method, is a rather short list of fundamental political tensions that have dominated Anglo-American legal discourse since Hobbes and Locke.

Rules vs. standards. One is the tension between establishing legal regulations in the form of fairly abstract general rules, rather than through purposive ad hoc standards. A simple illustration of that is the rule that citizens who have passed their eighteenth birthday can vote—easily administered, because it is simple to determine who is eighteen and who is not. The standard, however, would be that politically mature and sophisticated people can vote—harder to administer, but directly meeting the purpose that enacting a rule that those eighteen can vote should hopefully serve, which is to allow only politically sophisticated and mature people to participate.

Our legal system forever is engaged in a battle between the rule and standard form. A lot of what Critical Legal Studies people did was to try to demonstrate the recurrence and repression of that tension in legal dialogue—that is, how often it was there on the surface, how often it was under the surface, and how it was made to appear to go away even when it was still there. Our claim was that one could not, looking at an actual area of legal controversy, find an "optimally" rule-like or standard-like solution, but rather that, in every case, quite *formally* distinct legal solutions would each appear quite compelling.

Intentionalism vs. determinism. A second tension that we have identified is between two distinct forms of



Mark Kelman is a leading member of the intellectual movement that is the subject of his new book: A Guide to Critical Legal Studies. Published late last year by Harvard University Press, the work has been widely hailed as a landmark in its field.

Kelman, who is 36, joined the Stanford faculty in 1977, one year after graduating magna cum laude from Harvard Law School. His teaching areas—in which he has also published searching analyses—are legal theory, criminal law, legal economics, taxation, and property.

The present article is based on a talk he gave in July 1987 to a group of Stanford University donors.

description of human conduct—intentionalist descriptions and determinist descriptions. That tension is probably best known and most obvious when one is thinking about criminal blame: questions about whether we treat people as self-determining or as determined by forces around them—how much self-control and autonomy they have. We looked at that both in the way in which it came out on the surface and in ways in which it came out that people really didn't see.

For example, let's take a case where somebody who died in 1900 left an estate to what was then an all-boys school, saying in the will, "I want to leave this for the education of young men." Somebody in 1985 tries to reconstruct the will, because the school now has girls in it and wants to use the scholarship money for students of both sexes. The question that lawyers have tended to ask in such circumstances is what the testator *would* have wanted, were he alive now. (That's a problem not only in the reconstruction of wills, but also obviously of legislative and constitutional intention.)

The problem that this intentionalist/determinist analysis tries to reveal is that reconstruction of a historical figure's intention in a counterfactual hypothetical sense ("What would this person have wanted?") is not compatible with the supposition that people have individuating, intentionalistic beliefs and personalities. If you claim that what the testator would have wanted today is different from what he then said he wanted, you may well be assuming that he's just an average guy who believes what everyone else around him believed in 1900, so he probably would believe what everyone else believes now. People then didn't think girls should be educated; now they do—so that's what he would believe.

The "that's what he would believe" step may be compatible in some ways with our ideas of individualism and personality, but it is deeply incompatible with others. We are in a sense saying: "He didn't make himself up; he was a creature of his environment." The availability of both of those discourses is what makes cases like that so problematic for courts. They shift

The Law and Economics movement and Critical Legal Studies movement represent differing responses by a new generation of legal scholars to the perceived inadequacies of [the] traditional approach.

back and forth between the discourses relatively unaware of them.

Subjective vs. objective values. The third set of tensions that we identify as quite prevalent in the law is the conflict between the idea of moral values as objective or at least agreed upon, versus the idea of values as subjective, relative, and individual—perhaps as ungrounded and arbitrary as a taste for chocolate rather than vanilla ice cream. Maybe people just believe different things.

Obviously, the kind of legal system that treats values as individualistic can hardly be committed to the idea that there can be fairly objective values. A lot of legal debates bounce back and forth between the idea that the state's role is in essence simply to facilitate the working-out of a lot of diverse, individual life plans, and the idea that the state should establish and often support certain entitlements which in a variety of ways actually make particular commitments as to what the good is. We really don't treat the batterer's desire to hit as equally legitimate with others' desires not to be hit, but we seem frequently wedded to a conversational style in which such judgments of relative legitimacy cannot be articulated.

Value skepticism is the basic starting point in most debates about free speech or the fairness of contractual terms (the good is too unknown to suppress opinions about it; the fairness

of a contract is measurable only by the particular preferences and appetites of the contracting parties). It is surely the case that we *supplement* value-skeptical arguments in the free speech area by reference to "objective claims" about human nature (e.g., people will develop themselves better if their beliefs are tested; politics will become more just as a result of open debate) or in the contract area by reference to human needs (e.g., even if it would be better to overturn particular contracts, the resulting uncertainty would jeopardize the satisfaction of many valid wants). Nonetheless, the skeptical views remain basic and deeply held; the supplemental arguments are far less secure.

The first strategy of Critical Legal Studies scholars was, then, to say: "All of the little, rhetorical moves that lawyers were making in these particular cases can probably be structuralized and summarized—not viewed as lots of boats each on its own bottom." In all likelihood, they reflect some fairly fundamental, recurring political dilemmas, and if you step back and generalize, you would understand much more about the dialogue of the particular cases than if you treated each one as an effort to unfold the truth of a particular situation. Instead, what you would probably see is that

(Continued on page 46)

Sallyanne Payton '68

"They were knocking themselves out to be nice... although they frequently revealed a good deal of ignorance."



SPEAKING THEIR MINDS

**BLACK GRADS
TALK OF CHALLENGE
AND SUCCESS,
BURDENS AND
REWARDS**

BY MARY E. ERICKSON (2L)

IT never crossed my mind that I'd be the first Black student at Stanford Law School," recalls Sallyanne Payton '68, who entered in 1965 after four years as a Stanford undergraduate. Accustomed to being in a largely white environment, she says, "I didn't view this as a big deal, and it turned out not to be."

For Stanford Law School, however, it would be a very big deal. The Dean and the faculty, with a consciousness born of the civil rights movement, had come to realize that a learning environment with only one race deprived all races of a true education.

In the twenty years since, over 350 minority students have earned Stanford law degrees: 178 Latinos, 129 Blacks, 14 Native Americans, and at least 40 Asians. Today Stanford graduates of color can be found throughout corporate America; in government, industry, entertainment, and public interest law; in investment banking and communications; and on law school faculties.

The School's seriousness about attracting minority students was for many years personified in Thelton Henderson, a Black 1962 Boalt Hall graduate hired in 1968 as an assistant dean and first administrator of the minority admissions program.

Henderson, who was previously with the Legal Aid Clinic in East Palo Alto, describes his reaction on hearing that Stanford Law School was about to graduate its first Black student. "I was staggered by the statistic — astounded. I thought it was abominable. I ran out of adjectives."

Payton, who is now a law professor at the University of Michigan, offers a demographic explanation for the racial imbalance at Stanford in the 1960s. "I was in the first wave of students from Black families who had moved West during and immediately after World War II. Stanford as an institution didn't have many opportunities to have Black students until

Betty Meshack '82

those people started producing children of college age. So it's not really an administrative embarrassment that I was the Law School's first Black student."

Henderson set out as assistant dean to make certain that in the future Stanford Law School would have a multiracial student body. The passion he brought to that undertaking, combined with Stanford's continuing commitment and reputation for openness, boosted the Law School's minority student representation to a level that now approaches that of the population at large.

Henderson, who has since become a federal district court judge in the Northern District of California, remained at Stanford for eight years because, he says, "I wanted to perpetuate the numbers, to institutionalize the program."

He was followed in the role of minority recruiter and assistant dean by Victoria Sainz Diaz '75, LaDoris Cordell '74, Margo Smith '75, and in 1987-88 by Peggy Russell '84 (acting). Sally Dickson, a Rutgers law graduate and former assistant dean at Golden Gate Law School in San Francisco, became the sixth person of color to take up the challenge when on July 1 she assumed the post of Stanford Law School's Assistant Dean for Student Affairs (see page 39).

Looking at the twenty-year growth in minority enrollment, Henderson says, "I knew it would snowball. The biggest recruiting technique is to have students say, 'Come on in — the water's fine.'" And the water basically was fine, according to a sampling of Black graduates interviewed this spring.

BREAKING THE MOLD

WHEN I arrived in 1965, what I call 'the integration project' was in full swing," says path-breaker Sallyanne Payton. "Goodwill was in the air."

Her job search was conducted in the same atmosphere. "They were knocking themselves out to be nice. I can't remember a single occasion on which anyone made any remarks to me that were other than what they thought of as kindly — although they frequently revealed a good deal of ignorance.

LISA ROMERIN



I
*have
problems with
the term
'minority'
because it
diminishes
a person...
I made an effort
to integrate
myself."*

Remember, Black people and white people were just getting to know one another. We Black people understood that for a while there we had a burden of special education."

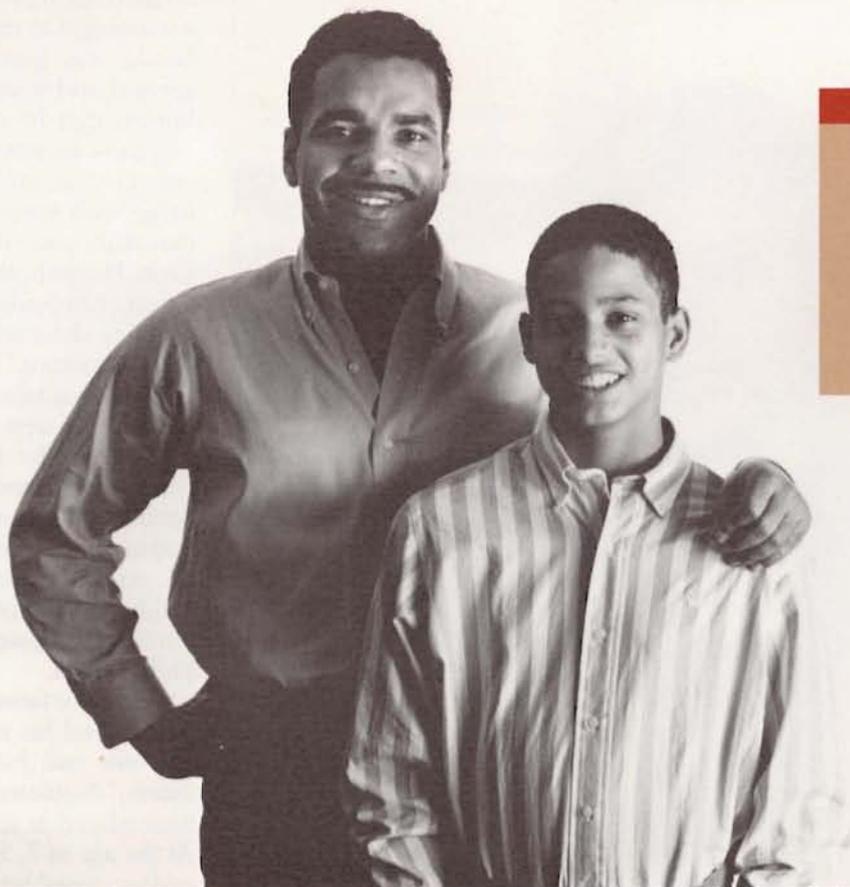
Payton recognizes that her career path — to Covington & Burling for three years, the Nixon White House for four years, and then into teaching administrative law and regulated industries — might not have been what some people expected. "One of the burdens one labors under when one is Black is that one is expected by whites to be a race leader," she says. "Many white people think they know what Black people are supposed to be doing. White people are therefore not altogether pleased when we turn out to be as interested as they are in matters that don't have to do with race."

About the special pressures of being part of what is nationally a minuscule minority of women and people of color on a law school faculty, she says, "The burdens are not what I would have anticipated. But because Michigan is in the throes of a massive self-examination on the subject of race relations, I don't think I should comment further."

A BROAD CONSTITUENCY

ADRIEN Wing '82, who recently became the first Black woman law professor at the University of Iowa, does comment. "I am inundated by minority students and women students who need job advice and a shoulder to cry on," she says. "It is an extreme burden that the average white male professor has no concept of. They'll say, 'Just close your door'—which is easy for them, because they don't see themselves as having any constituency broader than themselves. I have to be super-woman and super-Black."

But Wing knows how crucial role models and mentors can be. Hers included LaDoris Cordell and Professor William Gould of Stanford, Paul Robeson, and, just recently, skater Debi Thomas. However, Wing balks at the idea of being considered a role model herself. "I'm only 31 years old. How can I be a role model? But I'm aware that what I do is being scrutinized, not only by peers but by stu-



Ron Noble '82

"I've been a Big Brother for four years, and sometimes I think my Little Brother is a role model for me."

dents who are looking for someone to tell them, "You can combine all these things: lawyer, political activist, mother, wife."

And that is what Wing is doing. She moved to Iowa after five years at law firms in New York City (Curtis, Mallett and Rabinowitz, Boudin) because her husband, Enrico Melson, a family practitioner with the U.S. Public Health Service, was assigned to that state. One thing she appreciates about teaching is the opportunity to spend more time with her four-year-old son. "Now I see him at 5:30 every afternoon," she says. "He's thriving, and I really love teaching. I'm glad I made the change from practice."

Wing, whose credentials include an M.A. from UCLA in African studies, is teaching contracts, law in radically different cultures, and, next year, courses on race discrimination and apartheid. Her scholarly work — one article published and another in the hopper on the Foreign Sovereign Immunities Act — demonstrates her belief that "it's important to have

mainstream academic interests." But she's also doing an article dealing with preventive detention in the U.S. and South Africa and another on legal treatment of AIDS in Third World countries. "I'm hoping to make some original contributions in those areas that can be of use to activists, not just the ivory tower," she says.

Wing's off-campus activities include heading international affairs for the National Conference of Black Lawyers. "I speak all over the world, meeting people from Jesse Jackson to the head of SWAPO [South-West Africa People's Organization]." She is also currently working on Jackson's 1988 presidential campaign — an extension, she says, "of my interest in both domestic and international issues."

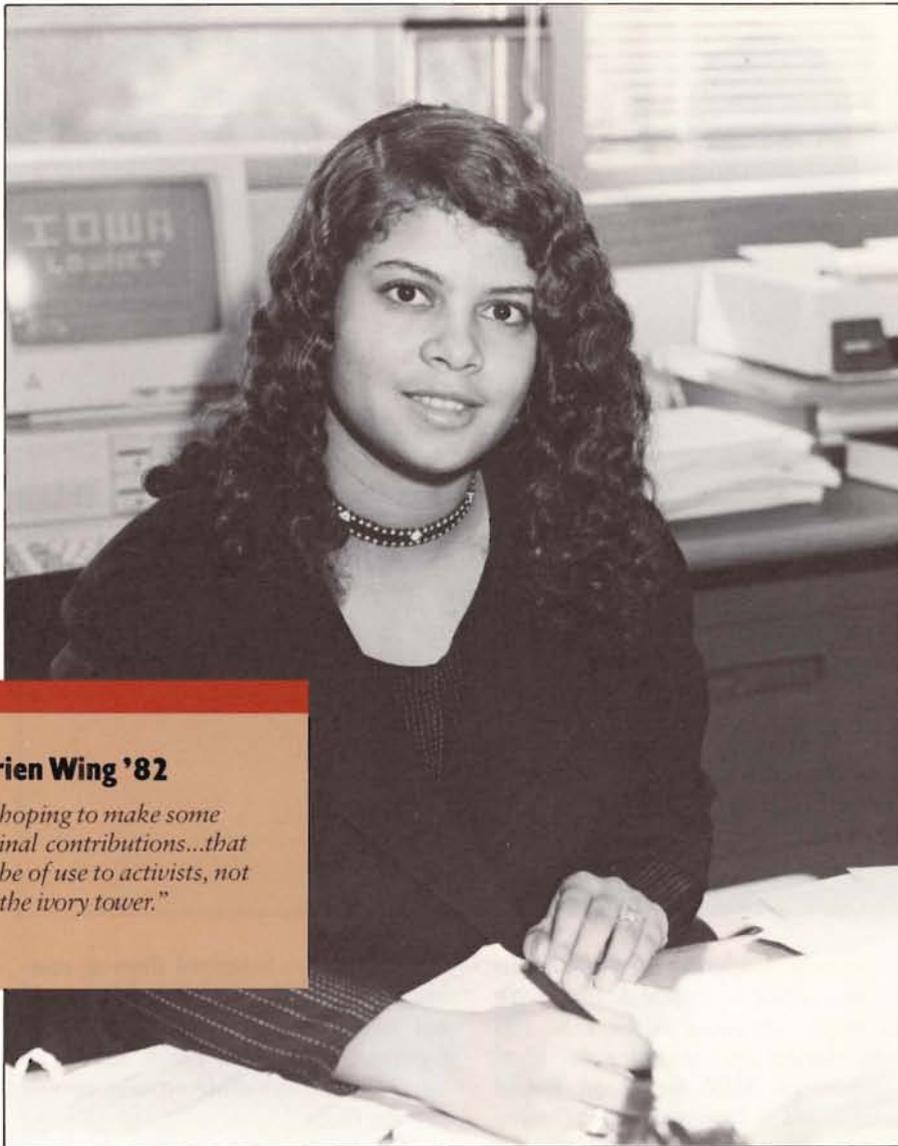
MENTORS AND BROTHERS

THE federal courthouse in Philadelphia has been home for Ron Noble '82, who clerked there for two years before becoming an assistant U.S. attorney. Noble

remembers his Stanford days as relatively free from race-related stress. "I am mixed — my mother's a white German, my dad's a Black American — so I'm comfortable around people of both races."

The first-year hunt for summer employment presented some problems, however. "We were told, 'Use your contacts, your parents' friends,'" he says. "Although it's not exclusively a Black issue, it *was* incredibly insensitive to a large number of Black students here. My dad's a janitor with a seventh-grade education. How am I going to use his contacts?"¹ Later, though, "after I made Law Review, I got an offer at every place I interviewed."

Noble, like Wing, feels a certain pressure to "super-succeed." Even in the City of Brotherly Love, he says, "I overhear bigoted comments about Black lawyers, about myself as a Black lawyer. I think that when you're part of a group with a negative stereotype, you feel that any time you do anything consistent with the stereotype, you hurt your group as a whole. If I were



Adrien Wing '82

"I'm hoping to make some original contributions...that can be of use to activists, not just the ivory tower."

to do something wrong, they'd say it was because that's what Blacks are like. If I do something right, they say it's because I'm special, I'm different. My doing something well won't necessarily reflect well on all Black people."

Noble's record as a prosecutor includes convictions in every case he has taken to trial, the most sensational perhaps being a clump of eighty convictions in the high-profile "Yuppie Conspiracy," a \$50-million-a-year cocaine ring headed by a dentist, Dr. Larry Lavin. Lavin, according to Noble, "applied market segmentation and product differentiation business principles — whatever quantity and quality his customers wanted — to the distribution of cocaine in thirteen states and Canada." The case, which

implicated lawyers, doctors, stockbrokers, and athletes, is the subject of an upcoming *60 Minutes* segment.

"The crimes I prosecute are rarely whodunit crimes where you worry about prosecuting the wrong person," Noble says. "They're crimes of deception or corruption, or you're actually listening to the crimes as they occur. You have discretion in deciding what charges to bring, what sentence to recommend, and negotiating with defense counsel who may be unprepared, and it's up to you to make sure the facts don't come out too distorted for the defendant. The concept of 'pursuing justice' is too heavy for me — I just try to be fair."

Noble's role models overlap with Wing's: "LaDoris Cordell, who made

certain that the transition to law school went okay. On the academic side, Bill Gould was great. He was well respected, and he wasn't afraid to let it be known that he identified with us as Blacks — he was there for us." For his post-graduation years, however, the judge with whom Noble clerked for two years and now plays tennis — A. Leon Higginbotham, Jr., of the U.S. Court of Appeals for the Third Circuit — "has definitely assumed the role of supermentor."²

Noble has taken the concept of role modeling a step further. "I've been a Big Brother for four years," he says, "and sometimes I think my Little Brother is a role model for me." Noble and his match, Frazier Hamilton, now 14, are what Noble calls "the poster children" (see photo) for this year's publicity campaign for Big Brothers of Philadelphia.

"Frazier's father died when he was young, and his mother couldn't care for him and his four brothers and sisters," Noble explains. "The children were placed in separate foster homes. At the age of 8, Frazier called an aunt and promised her he'd take care of the younger children — be like a father to them — if they could all come stay with her. She agreed, and has since adopted all five."

Frazier's new mother, according to Noble, "thinks it's important that his Big Brother be Black — important to show that there's a man who cares, and that there are Blacks who care as well.

"It's the best thing I've ever done with my life," Noble concludes. "If I don't accomplish one more thing, I'll be satisfied."³

GOING TO TRIAL

STANFORD lawyers on the defense side include Noble's classmate Betty Meshack '82, a deputy public defender for Los Angeles County, and James Robertson '70, an associate professor at Howard University School of Law who both teaches and practices criminal law.

Robertson was born in Nashville, the son of a rug installer and a nurse's aide. "From as far back as I can remember," he says, "my education was the number-one priority in the house-

Leroy Bobbitt '69

“**Y**ou

*feel you're
carrying the race
on your
shoulders,
so to speak—
but I always felt
I had broad
shoulders.”*

hold.” He came to Stanford Law School after serving in the military, working as a court reporter, and completing college at Santa Clara University. After law school, he spent four years in New York at Donovan Leisure and then Skadden, Arps, before joining the Howard faculty in 1974.

Robertson's criminal law practice consists of defending what he calls “higher-echelon drug cases, not persons who are charged with street sales. I turn a lot of these cases into classroom exercises. My students try out all the evidentiary questions that come up. I think my practice enhances my ability to teach my courses.”

Robertson says he has found “nothing negative” associated with being one of few Blacks, whether in law school, firms, or his present criminal practice. “Race is not something that has played a significant part in my experience,” he says. “You can be consumed by myopically focusing on race and imagining that as a result of your race, you have all these special obligations.”

Robertson acknowledges that “there *are* situations when a client may use my race to their advantage.” For example, he says, “A white corporation has hired me to act as its lawyer because they're going before a Black jury. I know that to some extent I'm being exploited, but you've got to be a good lawyer first.”

When Betty Meshack arrived at Stanford Law School twelve years later, she was one of fourteen Black law students. A deciding factor in her coming was, she recalls, that she would be “the Law School's first student from a historically Black college [Spelman College in Atlanta].

“The Black schools were an unknown to the admissions committee, and they seemed unsure whether I could do the work,” she says. “So I came with an attitude about the school. And I came knowing I had turned down Harvard, so I wasn't intimidated.”

The sources of her confidence, Meshack says, were her upbringing and her undergraduate education. “I was a product of the Sixties. I inherited from my father — a minister and a mailman — a certain missionary zeal, and from my mother — a social worker

who would go to court with her clients and take me with her — a desire to help people. And what I got from Spelman could not be taken away from me.”

“I was not prepared to play the game of being a minority,” Meshack says, adding parenthetically: “I have problems with the term ‘minority’ because it diminishes a person.” At Stanford, “I went out of my way not to operate as a minority. I hung out with, for lack of a better word, ‘majority’ students. I made an effort to integrate myself.”

The manifestations of racism she observed among law students were relatively insignificant, she says. “You would hear stupid things coming out of the mouths” of one small group of students, “but it was just a matter of considering the source.”

Meshack did, however, find the job search humiliating. “Even though I was a member of the Law Review, I was not accepted for myself,” she says. This was, she thinks, “because I did not fit into their stereotype of what a lawyer looked like, or because I had gone to a Black college—some interviewers actually told me that.”⁴

After graduation, she did research for a year with Stanford Law Professor Mauro Cappelletti in Florence, Italy; worked briefly with a union-side labor law firm in Los Angeles; and joined the public defender's office in late 1984. “There are opportunity costs associated with being a P.D., as opposed to being in private practice,” Meshack says. “I'm not making as much money as my classmates. On the other hand, I'm not working Sundays. Still, the job never leaves you; you're always thinking about your clients.”

She is often asked, “How can you defend a guilty person?” — a question she finds “irrelevant. It's for the jury to determine guilt or innocence,” she says. “My duty is to find the best outcome that will prevent the system from hurting my client too much and prevent my client from hurting other people.”

The fact that Meshack is Black has at times taken on a satisfying irony. “I've been assigned white South African clients, who *freaked* when they saw me. I kind of freaked too! They had to take me anyway,” she says. “They didn't have a choice.”



LISA POMERIN

I
*could
not imagine
practicing law
without doing
pro bono work.
Right now
I'm involved
in writing a
habeas corpus
petition for a
death row
inmate."*



HARLEE H. LITTLE, JR.

THE CORPORATE WORLD

BLACKS from Stanford have also found their way into the ranks of the top corporate law firms. Leroy Bobbitt '69 of Loeb & Loeb in Los Angeles is one example. "I came here as a corporate lawyer," he says, "and had an interest in becoming involved in the entertainment area because I thought I'd run into more Blacks. Frankly, I haven't seen many anywhere — in entertainment or in law. But I like my work; I'd have long since left if I didn't. I like the intellectual challenge, the wheeling and dealing, the show biz part, and the corporate part. I know what I'm doing, and I'm comfortable."

Loeb & Loeb is worlds away from Jackson, Mississippi, where Bobbitt was born, and from the small town in Michigan where he grew up. "I didn't know a single college-educated Black," he says. "My parents were laborers, but they were very determined that I should go to college." And he did, graduating from Michigan State University, then on to Stanford Law School.

"When I got to Stanford," Bobbitt recalls, "there were three of us, so, yeah, I felt conspicuous. But you get used to it — it's not as if it was the first time in my life I felt conspicuous for being Black." Nor the last. "In my firm of 175 lawyers in L.A. and New York, there's one Black partner, and that's me."

Though Bobbitt first got interested in being a lawyer from watching Perry Mason television shows, he says, "I haven't tried a case in my life. I got going in the corporate direction because I determined that Blacks needed to get into business in order to increase our involvement in the economic structure of this country." A post-law school year spent as a Reginald Heber Smith fellow with East Palo Alto Legal Aid "convinced me that the business world was more important." He went to Paul, Weiss, Rifkind for three-plus years before joining Loeb & Loeb in 1974.

As for role models, Bobbitt says: "This will sound strange, but aside from Perry Mason, I don't have any, I never did, and I don't believe in them. My own feeling is that the only aspiration you should have is to be the best

you can be and believe in yourself. You have to really be comfortable with who you are, and you have to convey that to your client and to the other side of the table."

Any pressure Bobbitt feels to succeed has been mainly internal, arising partially from the debt he feels he owes his parents. "A lot of sacrifice went into my getting to where I am, and I couldn't let them down," he says. "And there's still a sense of being judged by the color of your skin instead of your own ability. My father always told me that was part of the game. You feel you're carrying the race on your shoulders, so to speak — but I always felt I had broad shoulders."

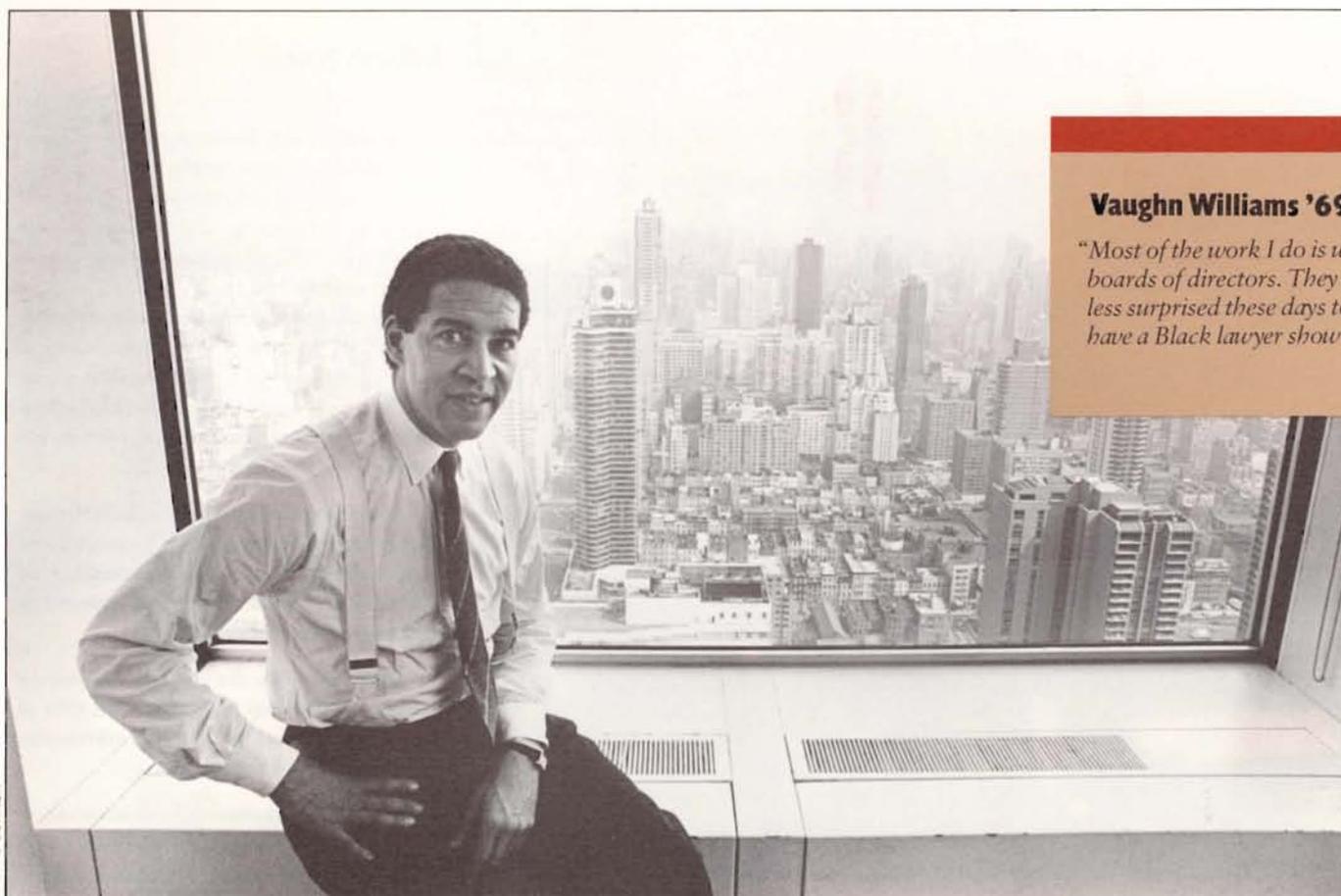
Vaughn Williams '69 also chose corporate law — at Skadden, Arps in New York. Becoming a lawyer did not, for him, require so great a leap of the imagination. A graduate of Harvard, he is the son of a federal judge and has a brother who is also a lawyer.

"Many of my parents' friends were lawyers who had been active in the civil rights movement," Williams says. "Thurgood Marshall would frequently stay with us — he was definitely one of my role models. Another friend of my father's was Third Circuit U.S. Court of Appeals Judge William Hastie [the first Black federal judge]. So I went to law school with the idea very clearly in mind that Black people could become lawyers."

Williams is in a tiny minority of Blacks at his firm. "Though I don't have a sense of bias in recruiting, hiring, or treatment of lawyers," he says, "I don't understand why there aren't more Blacks."

Clients, he says, are getting used to the idea and the reality of Black lawyers. "Most of the work I do is with boards of directors. They are less surprised these days to have a Black lawyer show up. They tend to be worldly enough people so that if they have negative feelings, they would only show in a subtle way. But I do feel an obligation to speak up quickly and let them know I know what's going on — that I'm not just someone whose role is to fill a quota."

In law school, being one of just two Blacks may have had its upside, speculates Williams, who was president of



Vaughn Williams '69

"Most of the work I do is with boards of directors. They are less surprised these days to have a Black lawyer show up."

Law Review. "A lot of faculty members knew of me, and it was easier to create friendships. In that sense it was a very hospitable environment. I wasn't aware of any negative incidents."

He did, however, experience "pressure from some of my law school friends to go into a civil rights-related career. I was disappointed that they didn't know me well enough not to impose a specific expectation on me." Williams went on to clerk for Judge Carl McGowan on the D.C. Circuit Court of Appeals, to practice at Wilmer, Cutler & Pickering for four years, and to spend a year as general counsel to the Ford Administration's Council on Wage and Price Control before joining Skadden, Arps, where he is a partner.

"I'm really happy doing what I am doing," Williams says. "I do securities and corporate law litigation in the merger and acquisitions area. I also do some pro bono work, but it's not necessarily related to the Black com-

munity. I'm on the board at Lincoln Center, and one constituency there is the Black community, so I try to represent that specific point of view. But the part of New York I really know is the professional world, which is predominantly not Black."

POSSIBILITIES

JUDE Kearney '84, the most recent graduate interviewed for this article, is the fifteenth of seventeen children of a poor, Black farm couple from Arkansas. Sixteen of the seventeen are college educated. Eight are lawyers, and a ninth is now at Yale Law School.

Kearney, an associate at Jones, Day, Reavis & Pogue in Washington, D.C., is hard pressed to account for this family phenomenon. "What's clear is that my parents understood the significance of education better than anyone I've known. My dad used to tell us stories about all the things he'd wished

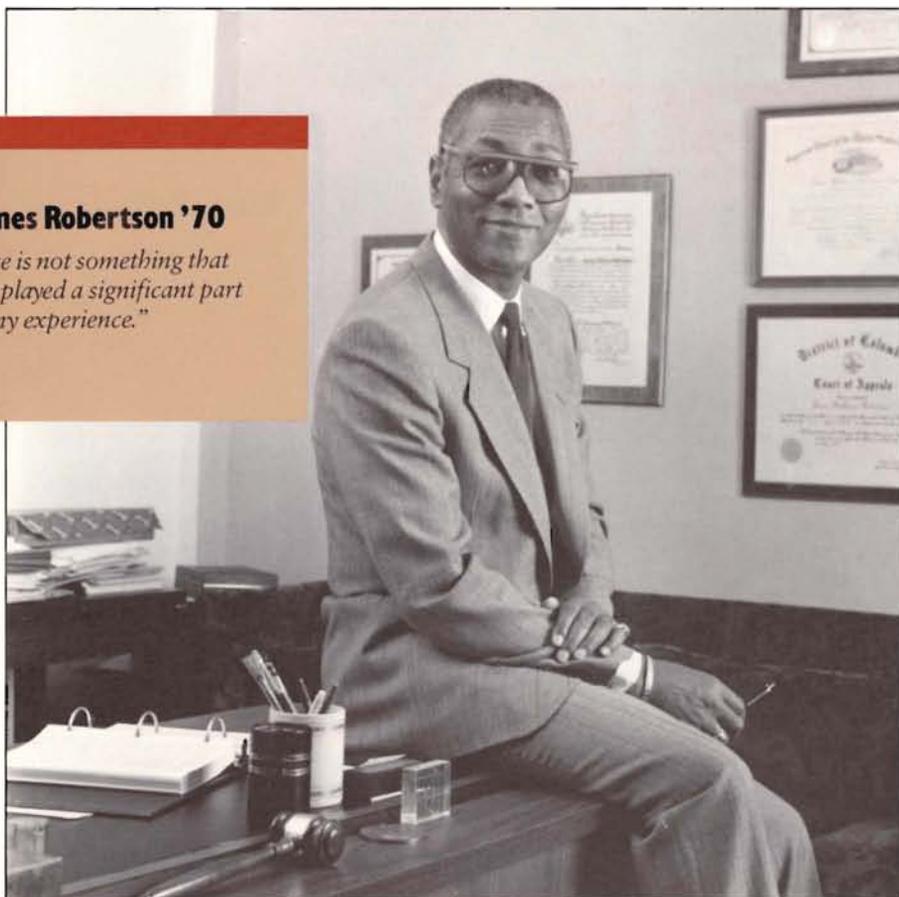
he could have done. We just grew up thinking that college was in the cards for us. The only other thing that was pushed was that we are as good as anyone around. That was unusual in the South — some Black parents were afraid to instill that kind of confidence in their children."

Kearney has found heroes and role models in many fields. "When I was growing up, I thought my dad had the perfect temperament. Muhammad Ali and Stevie Wonder have been inspirations in ways that are clearly not related to what I do. And while I'm not sure that I would be a Jesse Jackson-type of politician, I definitely like the fact that he is willing to do what he's doing."

A similar willingness propelled Kearney into Harvard as an undergraduate and then to Stanford to study law. One of twelve Blacks in his class, he says, "I had a great time. And I'll be the first to admit that my circumstances are very attractive to law firms: the combination of coming from the

James Robertson '70

"Race is not something that has played a significant part in my experience."



HARLEE H. LITTLE, JR.

poor South, going to top schools, and getting fellowships to travel."

Kearney went first to Skadden, Arps in New York, moving on after a year and a half to Jones, Day. "What I've been doing here — general corporate litigation — is the right combination of challenge and fun." And, he says, "I could not imagine practicing law without doing pro bono work. Right now I'm involved in writing a habeas corpus petition for a death row inmate in Texas through the ABA's post-conviction death penalty project."

Kearney envisions eventually returning to Arkansas to "pursue my public service interest. Though I won't be able to revisit the 1960s, I'm sure there will be injustices and imbalances that will still require some attention." There is a family precedent — a sister who just bought a Black weekly newspaper with a civil rights tradition in Little Rock. "I have always," Kearney says, "liked strong Black people who aren't afraid to speak their minds and aren't afraid to take chances." □



SUZANNE ROBINSON

Mary Erickson has a master's degree in journalism from the University of Minnesota and seven years' experience as a newspaper reporter. For the five years before entering law school, she produced documentaries on social and political issues for National Public Radio affiliates in Kansas and Missouri. Now a second-year student, she spent the past summer working at the Southern Poverty Law Center in Montgomery, Alabama.

Editor's Notes

1 Placement office assistance to first-year students wishing summer employment includes a four-day employer interviewing program, job counseling and seminars, and extensive resource materials. In 1987, all students seeking summer employment found positions.

Almost all graduating students also find employment. Of the 33 minority students graduating in 1987, 32 have informed the School of their current job choices. These are: law firms (24), judicial clerkships (3), public interest law (3), other corporate law (1), and further education (1).

2 Judge Higginbotham was the School's Herman Phleger Visiting Professor in 1987. An article drawn from his Phleger lecture, "The Bicentennial of the Constitution: A Racial Perspective," appeared in the previous issue (Fall 1987).

3 Noble has, since this writing, accepted an assistant professorship beginning in Fall 1988 at New York University Law School. He will continue to see his Little Brother frequently.

4 The School's placement office works to ensure that the job hunt process is fair and open for all students, and that employers fulfill their responsibilities. All employers using the office are bound by a written "Policy on Non-Discrimination," which imposes sanctions for violations, including barring the employer from interviewing at the Law School. The statement also indicates types of interview questions considered inappropriate, as well as the School's procedure for following up any student complaints. Copies are available from Career Services, Stanford Law School, Stanford, CA 94305-8610.

The School has also coproduced a video for employers—"A Fair Shake: Lawful and Effective Interviewing"—which has been made widely available through the National Association for Law Placement, 440 First St., N.W., Suite 302, Washington, D.C. 20001.

To Our Readers

This is one in a series of occasional articles about Stanford Law graduates from population groups once rare in the law school classroom. Earlier articles include "In Law School and Over Thirty: A Look at Stanford's Older Students," by Cheryl W. Ritchie (Spring/Summer 1979), and "The Venturesome Women of Stanford Law, 1920-1945," by Leelane E. Hines '59 (Fall 1986). Next: Latino graduates.

Alumni/ae WEEKEND 1987

*Highlights included class reunions,
a dialogue with the new Dean,
victory on the gridiron, and honors
for a distinguished graduate.*



THE annual all-alumni/ae gathering took place this year on a bright Saturday, the 24th of October. Participants included large numbers of graduates who had celebrated class reunions the evening before.

It was a weekend with something for everyone. For sports fans there was a lively discussion of the free agent issue with an expert panel of eight co-chaired by Professors Bill Gould and Jack Friedenthal, and, later at the stadium, a satisfying 13-10 win by the resurgent Cardinal over visiting Oregon.

For the nostalgic there were (in addition to class reunions) fond recollections of the School by Shirley Mount Hufstедler '49 following the presentation to her of the 1987 Alumni/ae Award of Merit (see pages 36-37).

For the education-minded there was a thoughtful State of the School report by Dean Paul Brest, followed by a chance to explore with Professors Robert Weisberg '79 and John Kaplan a number of issues revealed in the participatory "Admissions Game."

And, for the fun-loving, there was a canopied, pre-game luncheon at Angell Field and an evening banquet with live dance music. In the words of one alumnus: "I wouldn't have missed this for the world."

Alumni/ae Weekend 1988 will take place October 14-15, with special reunions for classes graduating in years ending in -3 and -8. Further information will gladly be given by Kate Godfrey or Jane Goldstein of the Alumni/ae Relations staff, at (415) 723-2730. □

PHOTOS BY VAL FLESCH, JOHN SMERETZ AND ROBERT A. ISAACS



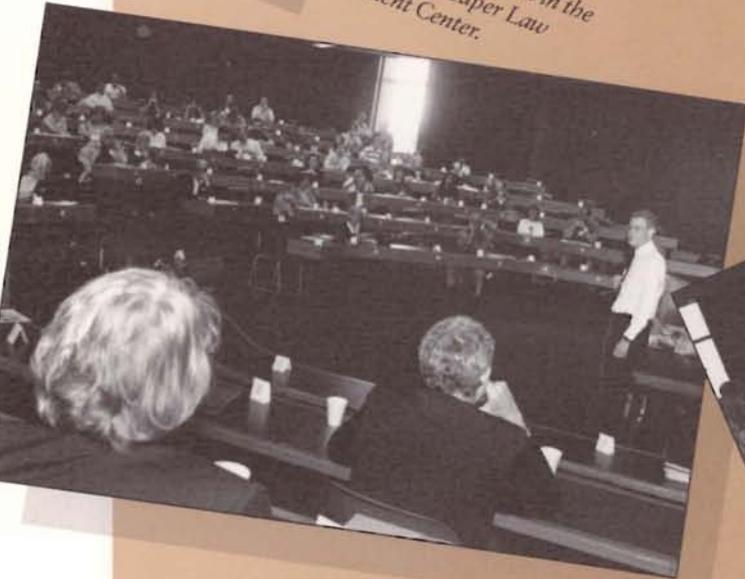
The Class of 1967 reunion at Paul Kreutz's Palo Alto home drew Stephen Tennis, James Galbraith, Douglas Ragen, and some 80 other graduates, spouses, and friends.



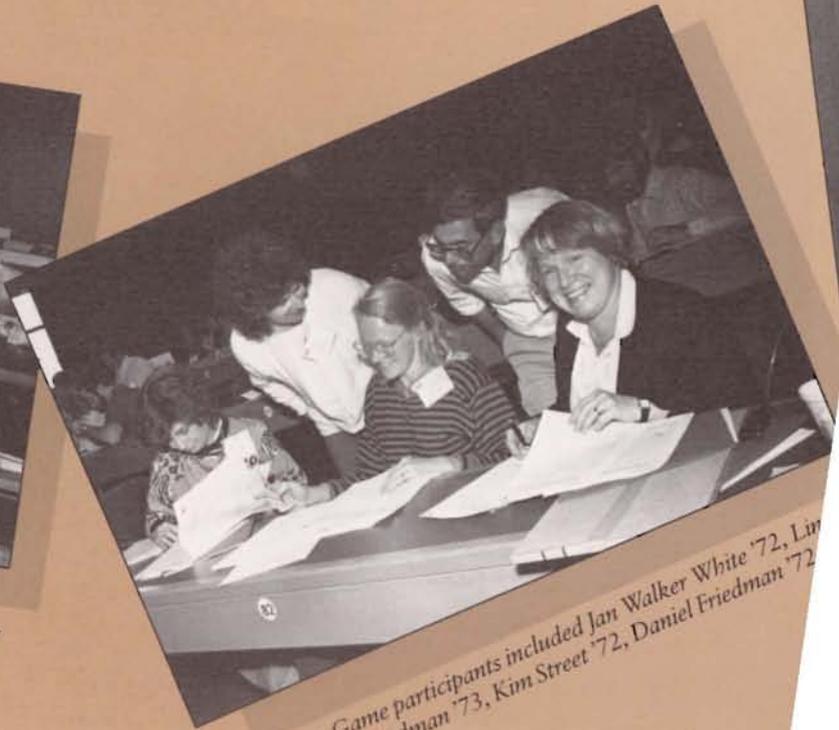
Inner Quad donors were treated to breakfast in the new Mark Taper Law Student Center.



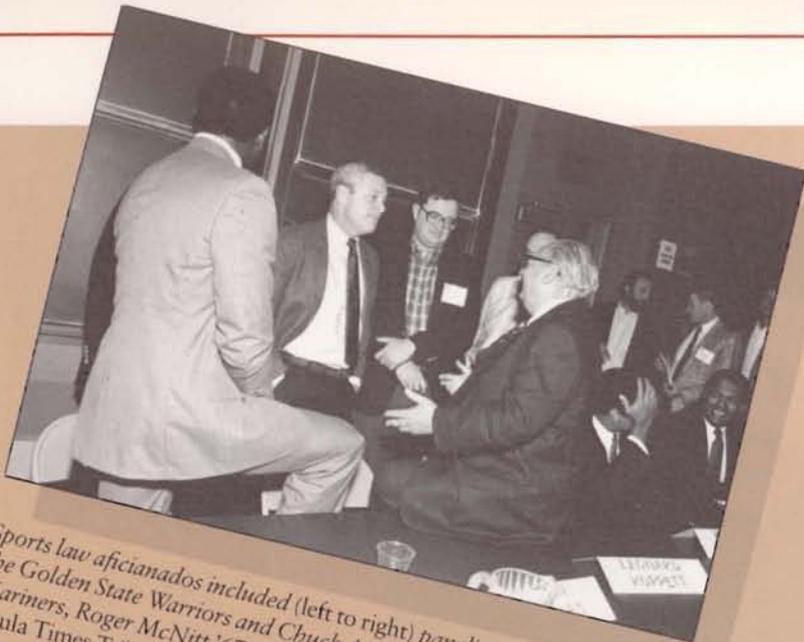
Judge Patrick Morris and Robert Carmody, Jr., were among the many members of the Class of 1962 to attend their thirty-fifth year reunion at the Woodside home of Mark Gates.



Dean Brest concluded his first annual State of the School report with the words, "I look forward to working with you in coming years."



Admissions Game participants included Jan Walker White '72, Lin Sommenschein Friedman '73, Kim Street '72, Daniel Friedman '72, Heidi Duerbeck '72.



Sports law aficionados included (left to right) panelists Alvin Attles of the Golden State Warriors and Chuck Armstrong '67 of the Seattle Mariners, Roger McNitt '67, and panelists Leonard Koppett of the Peninsula Times Tribune, Kenneth Shropshire (AB'77) of the Wharton School legal studies faculty, and Larry Whiteside of the Boston Globe. Professors William Gould and Jack Friedenthal organized the panel, which also featured former NFL Players Association officer Robert Moore '83.

Shirley Hufstedler '49 received a bronze medal from Dean Brest and a standing ovation from the banquet guests at the presentation of the 1987 Award of Merit.



Prof. Robert Weisberg discussed the delicate art of choosing among thousands of qualified applicants for admission.



1972 graduates Susan and Jim Ware welcomed their classmates—plus Professor John Kaplan (right)—to a reunion at the Ware home in Mountain View.



Law School alumnae converged on Angell Field for a pre-game luncheon. Most took advantage of the tented shade, but Bill Kroener '71 and friends opted for sun.



“We’ve seen
a transformation
in recent
years.”

On Reflection: Shirley Mount Hufstedler

Recipient, 1987 Alumni/ae Award of Merit

“A mind in service to something more important than itself”—this apt tribute to Hon. Shirley Mount Hufstedler ’49 was one of many cited by Dean Paul Brest in presenting her with the School’s third Alumni/ae Award of Merit. The award ceremony took place October 24, 1987 during the annual Alumni/ae Weekend banquet (see preceding pages).

Mrs. Hufstedler—the simple designation she prefers—has served with honor variously as a founding member of Stanford Law Review, a county, state, and federal judge (Ninth Circuit Court of Appeals, 1968–79),

the nation’s first Secretary of Education (1979–81), private attorney (since 1981 with Hufstedler, Miller, Carlson & Beardsley of Los Angeles), and member of the board of national corporations, foundations, and universities.

Throughout, she has been an eloquent spokesperson and advocate for women’s rights, children’s welfare, education, and such constitutional values as the right of privacy. Here are the thoughts she shared with fellow Stanford Law graduates and friends after receiving the Award.

“**T**HERE is no honor as great as being honored by the home folks, and I thank you.

It is hard to believe that so many years have passed since we were students here. How can we now be members of the senior Bar? I am reminded of a couplet by Ogden Nash: ‘I just dropped in for two short beers, and there went [37] years.’

The Way We Were

In 1946, when I first came to Stanford, the Law School had just one classroom of its own. Other classes met in scattered rooms shared with other departments on the Quad.

The reading room of the law library seemed bathed in a perpetual twilight—difficult, no doubt, for human eyes, but apparently just right for the owl that flew in one day and lighted on a volume of *Corpus Juris*. The librarians were thoroughly perplexed. It took a student to think of using a wastebasket and broom to remove the errant bird.

The Dean then was Marion Rice Kirkwood. He looked like God would if he taught law.

George Osborne was the resident terror. In five minutes of intense cross-examination, he could reduce a combat veteran to a lump of quivering jelly. The first-year class was welded together for life with George Osborne terror stories. It took some of us years to realize that beneath that granitic exterior beat a marshmallow heart.

John Hurlbut was simply wonderful—a darling man. If publish or perish had then been the name of the game, he would never have made it; he didn’t publish a thing. Instead, he ‘published’ law students. Hurlbut was always in motion, and his repertoire of gestures was unrivaled. He used a lectern as Fred Astaire used a cane.

In our second year, Carl Spaeth entered our world as the new Dean. He was a Rhodes Scholar, graduate of Yale, had served with the State Department, and was an expert in Latin American affairs. Best of all, he brought his wife, Sheila. Together they made the School a home away from home for a generation of terrified law students.

Dean Spaeth thought it appropriate for Stanford to have a law review. In 1948, Vol. 1, No. 1 of the *Stanford Law Review* was born. Many of the students on its masthead have since become very well known. They used the training they received to do some remarkable things all over the world.

Then there were Samuel Morrison and Lowell Turrentine. Morrison’s knowledge of Constitutional Law was absolutely encyclopedic, though his knowledge of students was absolutely zero. Turrentine looked like the original absentminded professor. He taught Wills. Few students imagined that this seemingly frail and gentle man had once been a member of the great

daredevil air squadron of World War I, the Lafayette Esquadrielle.

The New World of Law

A lawyer who, Rip Van Winkle-like, fell sleep in 1910 and awakened in 1960 would not have been in much confusion. The legal world had changed little in those fifty years. There were new discovery rules, to be sure. But in 1960 the profession was still segregated by gender, race, religion, and ethnicity. The tools of the trade—typewriters, carbon paper, telephones, and so forth—were also much the same. Firms with more than twenty lawyers were considered big. Clients were almost uniformly well off. Law firms were local, regional, and statewide, as were most American businesses. Those few that were multinational had generally been so for some time.

But if this 1910 lawyer awoke in 1985, he (for it almost certainly would have been a he) would be seriously disoriented. We’ve seen a transformation in recent years. Before, the only women in law firms were secretaries. Today, it is unthinkable to have a firm that is labeled ‘no women’ or ‘gentiles only.’

Wonderful things have also happened in the world. Europe and Asia are reborn, thanks in part to our country’s generosity through the Marshall Plan and other programs. International trade is vastly expanded. Today even a small business must understand the international market.

Our Rip Van Winkle would not recognize the world in which we practice today. The changes even for those of us who have not been sleeping are startling: huge, 200-plus firms; word processors; a computer-linked, global economy; affirmative action in the workplace; and so on.

There is one thing, however, that I hope will never change—a sense of social obligation among members of the legal profession.

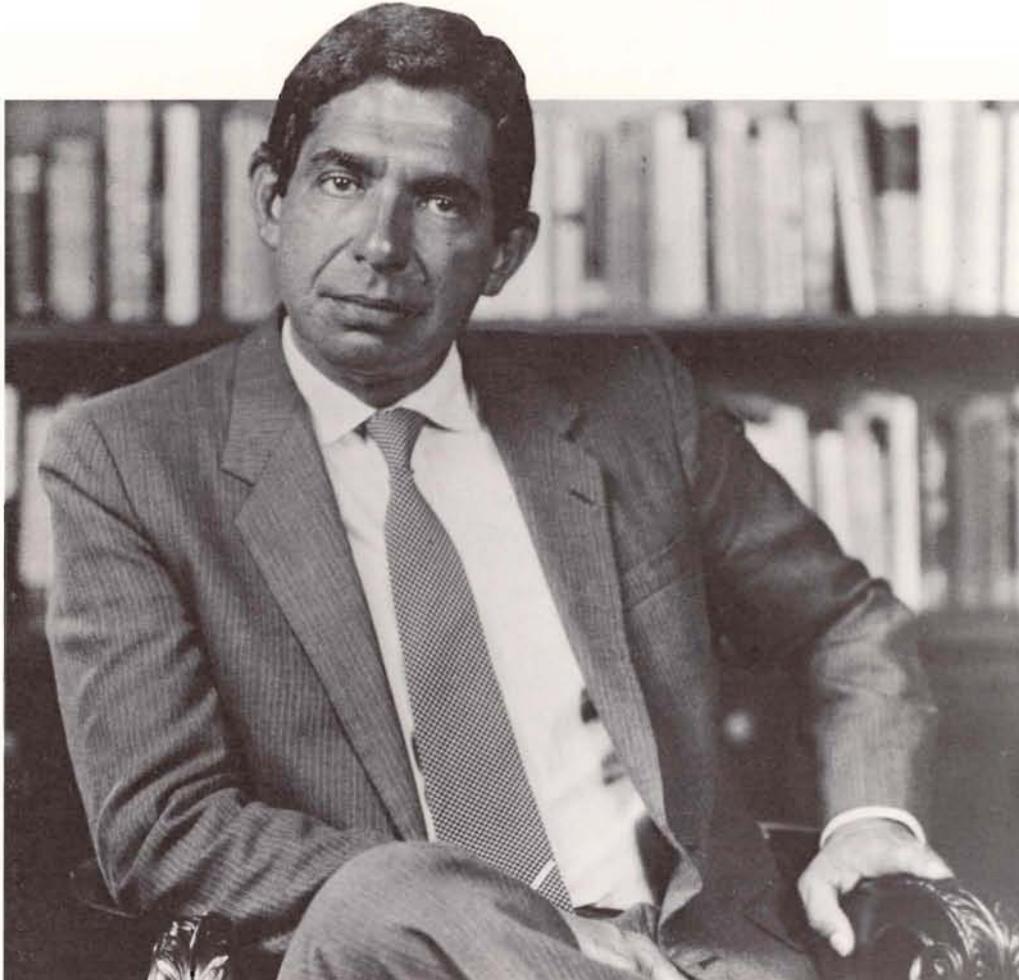
Privilege and Responsibility

Those of us who had the privilege of going to Stanford Law School have a particular responsibility to the profession and to society—an obligation to perform public service. There are many ways to do so and many causes worthy of our efforts. You can give of yourself to make a difference wherever you think you can do the most.

I would like, though, to ask you to consider seriously the interests of children. The sad fact is that if we don’t give nourishment to the mind or body before the age of six, we might as well forget it. We as a nation are not doing very well by our next generation.

In closing, let me say that it gives me great pleasure to be among the people who mean the most to me. Thank you for sharing this wonderful evening. □

School NEWS



Arias Awarded 1988 Ralston Prize in International Law

President Oscar Arias Sanchez of Costa Rica has been named winner of the School's 1988 Jackson H. Ralston Prize in International Law. He is expected to visit Stanford during the 1988-89 academic year to receive the prize and present a public lecture.

"We are honored to be associated with President Arias and the ideals for which he stands," said Dean Brest, citing the Costa Rican's commitment to peace by negotiation and to the democratic freedoms. "The future depends upon those who persevere in hope where others despair."

Arias, who won the Nobel Peace Prize last year, has led the search for an indigenous solution to the problems of Central America. This effort resulted in the signing, on August 7 in Guatemala City, of a pathbreaking peace plan by the presidents of five countries (Nicaragua, El Salvador, Honduras, and Guatemala, in addition to Costa Rica). Still being implemented, the plan calls for cease-fires in the region's three guerilla conflicts, amnesties, and democratic reforms, as well as an end to outside aid to rebels.

Arias, who is 47, became president of Costa Rica in May 1986 after an election in which he won 53 percent of the vote. He was previously a minister of national economic and political planning and a member of the national legislature.

He holds degrees in law and economics from the University of Costa Rica, where he is a professor, and has studied in England at the University of Essex and the London School of Economics. He is the author of several books on politics and economic development in Latin America.

The Ralston Prize was established at Stanford Law School by Opal V. Ralston in honor of her late husband, international lawyer Jackson H. Ralston. The prize recognizes original and distinguished contributions to the development of the rule of law in international relations and the establishment of peace and justice.

Winners are recommended by the Dean of the Law School to a selection panel composed of the president of Stanford, the chief justice of the California Supreme Court, and the secretary general of the United Nations. Prime Minister Olof Palme of Sweden (1977), Ambassador Tommy T. B. Koh of Singapore (1985), and President Jimmy Carter (1987) are the previous recipients. □

Student Award Created in Dispute Resolution

The School has initiated an annual University-wide award for student research on alternative ways of settling disputes. Believed to be the only one of its kind in the nation, the new award honors the late Richard S. Goldsmith '36, former chief magistrate of the U.S. District Court for Northern California.

"Lawsuits, strikes, and other forms of confrontation are often the most costly and least effective way of handling differences between parties," said Dean Brest, who announced the establishment of the award. "We hope, through this and related efforts, to encourage exploration of more constructive methods."

The Goldsmith Award committee is chaired by Robert H. Mnookin, the School's Adelbert H. Sweet Professor and coarbitrator of the pathbreaking settlement last year of the IBM-Fujitsu dispute. Serving with him on the committee are Chief Judge Robert F. Peckham '45, of the Northern California District Court, and Paul F. Goldsmith, a San Francisco attorney and son of the late chief magistrate.

"Dispute resolution shall be broadly conceived," said Prof. Mnookin. "The student research may concern disputes of any sort, between individuals, organizations, or nations. Relevant procedures of resolution include not simply



judicial or adjudicatory procedures, but also such alternatives as mediation, arbitration, and negotiation."

The first Richard S. Goldsmith Awards will be given as \$1000 prizes for

research papers relevant to dispute resolution. In future the award may alternatively support research leading to a paper.

(Continued on next page)

Sally Dickson Appointed New Dean for Student Affairs

Sally M. Dickson of San Francisco became Assistant Dean for Student Affairs on July 1. She has held the same post at Golden Gate University School of Law in San Francisco since 1985.

A graduate of City University of New York and of Rutgers University law school, Dickson has more than ten years' experience in legal administration and teaching. From 1977 to 1982 she served as academic dean of the New College of California School of Law in San Francisco.

She joined Golden Gate in 1982 as director of the academic assistance program, becoming assistant dean in 1985. During 1984-85, she also directed Santa Clara University Law School's academic support

program for minority first-year students.

Dickson has taught, in addition to her administrative responsibilities, at both the New College and Golden Gate. Her teaching fields are criminal law and procedure and administrative law. Since 1975 she has also been teaching evening courses on law and business at the City College of San Francisco.

Dickson will, as Stanford Law School's assistant dean of student affairs, provide both career and personal counseling. In addition, she will seek to increase the diversity of the student body, particularly through recruitment of additional qualified minority students.

"I plan to be extremely accessible to students," she

said in a recent interview. "I want them to feel I am concerned for their welfare, both as students and as individuals."

Dickson, who is currently a resident of San Leandro, has two school-age children.

Her predecessor at Stanford, Margo D. Smith '75, left in August 1987 to become an assistant district attorney in San Jose. Margaret M. (Peggy) Russell '84, who has been serving as acting assistant dean for the past year, enters the School's JSD program this fall. □



VISUAL ART SERVICES

Franklin Art Collection Displayed

Some 44 artworks collected by Professor and Mrs. Marc Franklin have been on exhibit at the De Young Museum in San Francisco's Golden Gate Park. Titled "Forms and Forces: Dynamics of African Figurative Sculpture," the show ran from May 4 to July 10.

How did Franklin—an expert in libel law and the School's Frederick I. Richman Professor of Law—and his wife, Ruth—a freelance magazine editor—come to amass what a De Young curator describes as "a collection of great diversity and quality"?

Entirely by accident, explains Prof. Franklin. The couple first saw an example of what was then called "primitive art" (an Oceanic fern figure) almost thirty years ago while living in New York. Intrigued, they audited some art courses, were introduced to African works, and became, Franklin says, "hooked by the strong aesthetics."

After two years of looking at classroom slides, they began visiting galleries. "We wanted to hold the objects and turn them around—see how they felt and what they looked like from the back," says Franklin. Their first purchase—a modest statuette—was made in 1961 with no idea of starting a collection. But gradually others followed, until today they have over 200 figures, masks, and objects of everyday use.

The Franklins do not, however, simply acquire objects—they research them. "African art is far more than art," says Prof. Franklin. "Each object was made for an explicit social or spiritual purpose. Finding out what that was helps us understand its distinct heritage."

The resulting collection is stunning evidence that even in the international art market, amateurs of limited means can—with sufficient persistence and selectivity—build art collections of significance. For Marc and Ruth Franklin, however, the chief reward is the "continuous sense of discovery that comes from living with and studying objects of such presence and power." □



M. H. DEYOUNG MEMORIAL MUSEUM

Student Award

(Continued)

Chief Magistrate Goldsmith was known as "a great settlement judge" for his effectiveness in persuading disputants to negotiate rather than engage in courtroom battles. The National Conference of United States Magistrates honored him posthumously in 1987 with its first Founders Award.

Goldsmith was born and raised in San Francisco and educated at Stanford (AB '33, LLB '36). Except for military service during World War II, he spent vir-

tually all his working life in association with the U.S. District Court for Northern California, beginning as a clerk for Judge Michael J. Roche. He served for eighteen years (1946-64) as clerk to George B. Harris, chief judge of the court. In 1964 he was appointed U.S. Commissioner for San Francisco. He became one of the original U.S. magistrates when the position was created by statute in 1971.

Goldsmith and his wife, the former Carolyn Bender,

died together in a 1984 automobile accident at the ages of 72 and 65, respectively. They were survived by five children, and a sister and brother.

The Richard S. Goldsmith Award is being funded by gifts from family, friends, and colleagues. Matching funds are being provided by the AMAX Foundation of American Metal Climax. □

Faculty Notes

Barbara Babcock delivered the University of Arizona law school's ninth annual Marks Memorial Lecture, February 23. Her subject: "Clara Shortridge Foltz, 1849-1934, and the California Constitution." The pioneering attorney was also the topic of presentations by Babcock at the National Association of Women Judges' annual meeting in Seattle, the New Views of Women series at San Diego State University (both in October), and a Stanford-in-L.A. alumni meeting in March.

John Barton traveled to Montevideo, Uruguay, in November to speak on genetic diversity issues at a meeting of the Latin American Seed Industry Federation. He taught a seminar, International Business Transactions, at Harvard Law School during its short winter quarter in January 1988.

Thomas Campbell has an article—"Predation and Competition in Antitrust: The Case of Nonfungible Goods"—in the 1987 *Columbia Law Review* (87:1625). His current activities include serving with Ronald Gilson as co-chair of Stanford Law School's developing Law and Business Program (see page 4).

Mauro Cappelletti has been reelected to the board of the International Association of Legal Science, and participated in its annual conference, October 1987 in Munich. Last fall he also attended a conference in Trieste of the Italian association of proceduralists. His recent publications include a

book on judicial responsibility (*Giudici irresponsabili*, Milan, 1988) and, with Bryant Garth '75 of Indiana, the introductory chapter ("Policies, Trends and Ideas in Civil Procedure") of the procedure volume in the *International Encyclopedia of Comparative Law* (Tübingen, 1988).

Currently in residence at Stanford, he continues to direct the international research project, "European Legal Integration in Light of the American Federal Experience," from which a fifth volume has just been published.

William Cohen has written "A Look Back at *Cohen v. California*" for a special issue of the *UCLA Law Review* honoring the late Prof. Melville Nimmer.

Law Librarian **Lance Dickson** recently served on an ABA accreditation inspection team to the Inter-American University School of Law in Puerto Rico. On the publication front, he and coeditor Win-Shin Chiang have just issued two five-year cumulations (1978-82 and 1983-87) of their annual *Legal Bibliography Index*.

Robert Ellickson was a panelist in September for the Association of American Law Schools' Workshop on Property, in Chicago. He spoke during the winter at a Federal Bar Council meeting in Maui, Hawaii, and at faculty workshops sponsored by the University of Chicago, Yale, and Stanford. This fall he will become a member of the faculty of Yale Law School, from which he graduated in 1966.

John Ely spent the Spring 1988 term as a visiting professor at New York Law School. On April 15 he moderated an all-day symposium on Equality and the Constitution.

Daniel Farber, a visitor this year from the University of Minnesota, has been named to that school's Henry J. Fletcher Professorship in Law. A recent article by him, "Brilliance Revisited," was published in the *Minnesota Law Review*. Another, "Practical Reason and the First Amendment," appeared in the *UCLA Law Review*.

An exhibit of African sculptures collected by **Marc Franklin** and his wife, Ruth, has been running at the De Young Museum in San Francisco (see page 40).

Jack Friedenthal, George E. Osborne Professor of Law, has announced his early retirement from Stanford, effective this spring. His professional career started here in 1958, and over the years he has performed many other duties as well. During the past fifteen years he has been President of the Board of Directors of the Stanford Book Store; for the past seven, the Faculty Athletic Representative for the University; and for the last three, a member and president of the University's Advisory Board. He was Associate Dean for Academic Affairs at the Law School from 1985 to 1987. Professor Friedenthal has accepted the deanship of the George Washington University National Law Center in Washington, D.C. Though we will all miss him and his wife, the

Faculty Notes

(Continued)

former Jo Anne Marder '60, they take with them our very best wishes.

Ronald Gilson delivered the Rome Lecture at the University of Maryland Law School in April. "Organizing Human Capital: The Economic Structure of Law Firms" was his topic. A recent article by him, "Drafting an Effective Greenmail Prohibition," appeared in the March *Columbia Law Review*. He is also co-author (with **Myron Scholes** and GBS Prof. Mark Wolfson) of an article—"Taxation and the Dynamics of Corporate Control: The Uncertain Case for Tax Motivated Acquisitions"—published in *Knights, Raiders, and Targets: The Impact of the Hostile Takeover*, a 1988 Oxford University Press volume edited by J. Coffee (a visiting professor in 1986-87), L. Lowenstein, and S. Rose-Ackerman. Gilson is in addition serving with Thomas Campbell as cochair of the School's Law and Business Program (see page 4).

Paul Goldstein was called to Washington, D.C., in February to testify on U.S. adherence to the Berne Copyright Convention, at hearings of the House Subcommittee on Courts, Civil Liberties, and Administration of Justice. Later in New York, he was a Herman Finkelstein Lecturer at Benjamin Cardozo School of Law, speaking on "Reflections on Copyright." Goldstein has been selected, along with two other former first-place winners of the National Nathan Burkan Copyright Prize, to judge the 1988 competition.

William Gould spoke to the Foreign Relations Committee of the congressional Black Caucus in September concerning labor unions in South Africa, the subject also of talks in October at Valparaiso University Law School. In December he gave speeches on "Labor and the Constitution," sponsored by the Labor Archives and Research Center and San Francisco State University's Living Constitution Program; and "Judicial Review of Labor Arbitration Awards," at the George Meany Center in Maryland. Gould in addition toured Great Britain and Spain in January presenting lectures as an Ampart Professor for the United States Information Agency. And in April he spoke at Claremont McKenna College, the University of Wyoming (under Phi Beta Kappa auspices), and at the University of Texas, Austin, where his topic for the Herman Sweatt Symposium on Civil Rights was "The Supreme Court and Job Discrimination: The Affirmative Action Decisions."

Gould's recent publications include "Stemming the Wrongful Discharge Tide: A Case for Arbitration" in the *Employee Relations Law Journal* (Winter 1987/88) and a newspaper article about his beloved Boston Red Sox. He is presently sponsoring an informal seminar for law students on Sports and Law in which several major figures in professional sports have participated. His plans for a book on the future of industrial relations have been furthered by a fellowship grant from the Canadian Studies Program.

Thomas Grey presented a lecture last September for a Bicentennial symposium at Brigham Young University. His subject: "The Original Understanding and the Unwritten Constitution."

Gerald Gunther was "far and away the most mentioned candidate" for the Supreme Court in a *New York Law Journal* survey last October of 50 prominent federal judges, government officials, law professors, and private practitioners. Respondents were asked to name—"ideology aside"—individuals who are "especially qualified." Esteem for the School's Cromwell Professor (whose publications include the nation's pre-eminent constitutional law casebook) was voiced even by conservatives perceiving him as liberal. A typical comment: "Judicious, non-doctrinaire, and exuding a sense of fairness."

Gunther topped another list—as author of the most-cited modern law review article: "A Model for a Newer Equal Protection," *Harvard Law Review*, 86:1 (1972). Citation counts by Fred R. Shapiro of Yale Law School placed the article first both currently (1979-) and over the past forty years (1947-).

Tributes written by Gunther to two persons for whom he has special regard have recently been published. The first, to **J. Myron Jacobstein** on the occasion of his retirement as Law Librarian, appeared in the November 1987 *Stanford Law Review*. The second, to Justice Lewis F. Powell, Jr., on his retirement from the U.S. Supreme Court, was in the December *Harvard Law Review*.

John Kaplan presented the annual Sibley Lecture at the University of Georgia. His topic for the March 2 address was "The Problem of Surrogate Motherhood."

Mark Kelman has an article, "The Necessary Myth of Objective Causation Judgments in Liberal Political Theory," in the *Chicago-Kent Law Review*, 63:579 (1987). Another article, "On Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement," appeared in the *Virginia Law Review*, 74:2 (1988). He participated in a Law and Economics panel on causation at the annual meeting in January of the Association of American Law Schools.

Kelman's biggest news, however, is the publication in November of his book, *A Guide to Critical Legal Studies*, by Harvard University Press. He is also author of the brief introduction to "crit" theory beginning on page 18 of this magazine.

Miguel Mendez is, in addition to his Law School teaching, presenting an undergraduate course in criminal law and procedure. He is also giving a dorm seminar on uniquely American criminal rules.

Sweitzer Professor Emeritus **John Merryman** gave the keynote address, "Why We Care About Cultural Property," at a conference of the World Monuments Fund, October 16 in New York City. As chair of the Visual Arts Division of the ABA's Forum Committee on the Entertainment and Sports Industries, he re-

visited New York in November to conduct a conference at the Museum of Modern Art titled "The Art World and the Law: 1987." In December in Washington, D.C., he testified on the Visual Artists' Rights Bill (S.1619) before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary. (His position: "Partial support and partial opposition.")

The second edition of Merryman's two-volume book with Art Professor Albert Elsen, *Law, Ethics and the Visual Arts*, was published in June by the University of Pennsylvania Press.

Robert Mnookin is pleased to announce the funding, by the William and Flora Hewlett Foundation, of a Research Center on Conflict and Negotiation at Stanford, with Mnookin as a principal investigator. (Details on this late-breaking development will appear in the next issue.)

As the recently named Adelbert H. Sweet Professor, Mnookin presented an inaugural lecture for the chair on October 30 at the Law School. "Dividing Family Assets: 'Til Death or Divorce Do Us Part" was the title. He has since delivered a paper on the law and economics of bargaining, at a University of Virginia conference.

A. Mitchell Polinsky was recently appointed to the editorial board of the *International Review of Law and Economics*. An article by him, "Optimal Liability when the Injurer's Information about the Victim's Loss Is Imperfect," ap-

peared in the December 1987 issue. Polinsky has also written (with Prof. Daniel Rubinfeld of Berkeley) an article published in the January 1988 *Journal of Legal Studies*, entitled "The Welfare Implications of Costly Litigation for the Level of Liability."

Robert Rabin has for the past year been a visiting professor at Harvard Law School. He traveled to Indiana in November to present Valparaiso University's Monsanto Lecture on Tort Law. Tort reform was also the subject of a faculty workshop he presented in March at the University of Maryland Law School.

Deborah Rhode presented a paper—"Politics of Paradigms: Gender Difference, Gender Disadvantage and Gender Dominance"—at the Women and the Constitution conference sponsored this February in Atlanta by four former First Ladies. In March she delivered an endowed lecture, "Occupational Equality," at Duke Law School. And in April, she gave the Baker-McKenzie Foundation Lecture at Loyola University School of Law, on "Moral Character: The Personal and the Political."

Rhode is the principal researcher on a recent grant from the Russell Sage Foundation for an interdisciplinary conference and book on adolescent pregnancy, sponsored by the Institute for Research on Women and Gender at Stanford. She has also been appointed cochair of the newly created California State Bar Attorney-Client Commission. The Commission is charged with making recommendations related to governance of

lawyer-client agreements and grievances.

Byron Sher was one of fifteen California state legislators to get a perfect score for the 1987 year from the League of Conservation Voters. His most notable legislative accomplishment during the past session was the passage of a bottle-recycling bill. Almost as much attention, however, has been paid to his support of the campaign by a local Campfire troop to gain for the homely banana slug the status of State Mollusk.

Lowell Turrentine, Marion Rice Kirkwood Professor Emeritus, was married January 26 to Gazelle E. Janzen. The wedding took place at Channing House in Palo Alto, where both reside. The new Mrs. Turrentine is the widow of Henry F. Janzen, a former Pennsylvania State University professor and Stanford Press employee. Professor Turrentine, who has been twice widowed, retired in 1961 after 33 years on the Stanford Law faculty.

Other personal news: The School has experienced something of a baby boom, with five new arrivals to faculty members since November. The professors (all second-time fathers) are Mark Kelman, Gerald Lopez, A. Mitchell Polinsky, William Simon, and Barton H. (Buzz) Thompson, Jr. '76.

■

Former professor (1977-85) **Thomas Jackson** has been named Dean of the University of Virginia Law School. □

LAW AND BUSINESS

(Continued from page 9)

making. The fundamental reality is that decisions are made under conditions of uncertainty. All participants in a transaction have the opportunity to alter their behavior in response to actions taken by other parties—a process studied in business schools but ignored or taken for granted in law schools.

The value of these skills to the study of private ordering points to the third problem that confronts the traditional business law curriculum: the diversity of student backgrounds. At one extreme our students include accountants, economists, and, increasingly, students with significant experience in business. At the other extreme, many students have no business experience and little undergraduate training outside of the humanities; these students approach business law unfamiliar with even the terminology. Such disparities of experience and educational background present particular problems in the business curriculum, since accounting and economics provide the very language in which the inquiry takes place.

Leading MBA programs ensure that students with diverse backgrounds come to share a common set of needed skills by requiring mastery of a “core” curriculum before the students begin advanced work. The Law School has recognized the value of this approach through its development of the four-year JD/MBA program. However, this program cannot accommodate all students interested in studying business law, nor is it appropriate to require an additional year of study for most such students. Rather, the goal of the Law and Business Program is to provide a core business curriculum *within* the Law School, so that all students pursuing a business law curriculum will have been introduced to the set of skills necessary to the sophisticated study of the subject.

The final problem with the traditional business law curriculum flows directly from the first three. Historically, the business law curriculum has not been sequenced. Second- and third-year courses have considered dif-

ferent substantive areas of business law, but without an increase in the sophistication of the inquiry, whether in terms of practice or theory. To improve business law training, the core skills must be provided early, beginning in the second semester of the first year and completed no later than the end of the second year, so that by the third year of law school the student is equipped for sophisticated study, research, and practical training.

The solution to these several problems, simply put, is to internalize the JD/MBA. Stanford Law School, building on an already strong foundation (see below), is on its way to doing so.

Research agenda. It is a commonplace that an innovative curriculum and significant faculty research go hand in hand. That synergistic relationship is especially critical with respect to the Stanford Law and Business Program. Developing a theory and practice of private ordering and a corresponding theory and practice of regulation is at the cutting edge of legal and economic research. Thus, accomplishing our curricular goals also requires pursuing a substantial research agenda.

Although the Law and Business Program draws heavily on work done in law and economics, the goal of developing a theory of private ordering is a far broader enterprise than the microeconomic analysis of particular judicial doctrines or laws which has characterized much of the Law and Economics scholarship in recent years. While illuminating, its emphasis on public ordering—its focus on rules rather than on what people do—is inadequate for the task of developing a theory and practice of private ordering.

The Law and Business Program contemplates the use of theory not merely to criticize legal doctrine, but also to facilitate practice—a partnership between scholars and practitioners that holds real promise for improving business law education.

Practitioner participation. A regular seminar with practitioners will be an integral part of the partnership of theory and practice on which the Law and Business Program is premised. In such a seminar, practicing lawyers and Law School faculty would examine developments in business law practice coming out of the Program.

The practitioners' seminar will have two goals. First, we hope to increase the speed with which the Law and Business Program affects the practice of law. In the past, academic innovations found their way into practice by one of two means. Either law students carried the innovations into practice with them and, in time, the number of former students in practice reached a critical mass (a trickle-up approach); or else practitioners discovered the innovations directly through academic publications (as happened with economics in antitrust). The Stanford practitioners' seminar should accelerate this process by creating a direct link between the Law School and lawyers already in practice.

Second, the seminar is intended to provide a vehicle through which the Program can receive feedback from practitioners. The partnership of theory and practice, of the Law School and the practicing lawyer, requires a means by which we can learn whether the Law and Business Program is “getting it right.” The direct interaction of faculty and advanced students with an audience of sophisticated practitioners would provide the Program with an important source of information and discipline.

The proposed lecture series would complement the practitioner seminar, serving as another means of bringing to the Law School the benefit of knowledge acquired in the field. Open to students, faculty, and legal practitioners alike, this series would present prominent members of the business community in discussions on problems of business structure, environment, and practice. An appreciation of how industry participants understand these aspects of their business would provide the detailed knowledge of an activity necessary for Program participants to extend the boundaries of present theory and evidence.

A STRONG FOUNDATION

Stanford Law School is in a unique position to develop the nation's first comprehensive integrated program in Law and Business. In 1966, the School established the nation's first JD/MBA program. The appointment in 1982 of Myron Scholes, among the world's most prominent financial economists, marked the first recognition by a law school of the important link between finance and business law.

The link was further emphasized by the creation in 1984 of a first-year course in financial economics designed to serve as the entry-level business law course for students intending to pursue an emphasis in this area. The process of sequencing courses has already begun, with most second-year business law courses presuming finance or economics, and third-year seminars premised on the second-year courses.

In this effort, the Law School draws on a number of important resources. The interests of the School's well-established John M. Olin Program in Law and Economics clearly complement those of the Law and Business Program. For example, the Law and Economics Working Paper Series reaches an audience of some 600 academic and practicing lawyers and economists. A substantial number of the papers have concerned business law, and it is expected that Law and Business Program research of common interest would continue to be distributed as series papers.

In developing synergy between the study of private ordering and the study of regulation, Stanford builds on exceptional faculty strength in the regulatory area. For example, in labor law, Professors William Gould of the Law School and Robert Flanagan of the Business School have taught an advanced course in the economics of labor relations. In antitrust, Stanford students have an opportunity unique in the country to study under the father of modern antitrust theory and enforcement: Professor William Baxter, formerly head of the Justice Department's Antitrust Division. The advanced antitrust course taught by one of the authors (Campbell) covers particular problems of a practitioner (i.e.

standing, damage theories), as well as the more important theoretical points in modern economic theory (e.g., predation, oligopoly).

Another example is in the field of international trade, where Professor John Barton presents the basics of the GATT and U.S. trade law and economics in International Business Transactions, and offers a seminar for advanced students in the law and economics of technology transfer. Similar basic regulatory law courses and sequenced seminars exist in tax, intellectual property, and securities regulation.

Stanford also has unusual strength in alternative dispute resolution—an area in which private and public ordering intersect. Professor Robert Mnookin, who currently acts as an arbitrator of the IBM-Fujitsu dispute—one of the most important commercial arbitrations in history—teaches courses on negotiation and mediation. Mnookin, together with Nobel laureate economist Kenneth Arrow, cognitive psychologist Amos Tversky, and strategic theorist Robert Wilson, also teaches an interdisciplinary course in decision theory.

The Law and Business Program would in addition draw on the resources of the Stanford Graduate School of Business. In recent years, there have been numerous joint teaching and research efforts between Law School and Business School faculty. One important goal of the Law and Business Program is to deepen this relationship to the benefit of both schools. This will be especially true in course development, where the Program's eventual goal is to provide a "core" business law curriculum within the Law School.

Finally and most important, the Program draws on a remarkable law school faculty. Unusual in its diversity, the group reflects a range of viewpoints and approaches to the study of law and of the relation of law and society. At the same time there is broad interest in the interaction of law and business and the complementary area of Law and Economics. This combination has fostered an ongoing constructive dialogue rare in legal education.

Stanford Law School thus enjoys an intellectual atmosphere extraordi-

narily well suited to our purpose: redefining the intellectual and pedagogical premises on which the study of law and business is based, and making these premises actual in a revolutionized curriculum for business lawyers of the future. □

1 The authors gratefully acknowledge the continuing assistance and guidance of the members of the Law and Business Advisory Committee. All practitioners of note, they are George W. Coombe, Jr., of the Bank of America; Robert A. Keller III ('58) of Coca-Cola Co.; Charles J. Meyers of Gibson, Dunn & Crutcher; Donald Mitchell of Boise Cascade; Charles B. Renfrew of Chevron; and Kenneth Roberts of Exxon.

Professors Gilson and Campbell are co-directors of the Law and Business Program. Gilson received his law degree from Yale and was a partner in a San Francisco corporate law firm prior to joining the Stanford faculty in 1979. His research has focused on corporate law and finance, with special emphasis on corporate acquisitions. His writings include The Law and Finance of Corporate Acquisitions, published last year by The Foundation Press.

Professor Campbell received his law degree from Harvard and his PhD in Economics from the University of Chicago. Prior to joining the Stanford faculty in 1983, he was director of the Bureau of Competition at the Federal Trade Commission. He has written widely concerning the law and economics of antitrust and labor law.

ASSUME NOTHING

(Continued from page 23)

each one is an unfolding of one of the major, ongoing, political conflicts in the culture.

CRITIQUING LAW AND ECONOMICS

The Critical Legal Studies scholars, in their critique of Law and Economics, challenged the notion that the value that economists posited as uniformly acceptable—the value of wealth maximization and efficiency—is in fact acceptable or even coherent. This is a fairly tricky, technical argument to make briefly, but let's try with an example.

Imagine that we're trying to come up with an efficient solution to a typical problem of assigning an entitlement: whether kidney dialysis machines ought to be assigned as they would be in a private property regime—to whomever bids the most money for them—or whether people should be entitled to the machines according to need (perhaps as determined by a medical committee).

The standard economists' definition of when one entitlement is more efficient than another is to say that entitlement X is more efficient than Y if when you shift from Y to X the winners from the shift would be able to compensate those who lost from the shift so that they'd be indifferent to the new rule or prefer it. That is to say, nobody would really lose, because if they were able to get compensation they'd be just as well off as they were in the state that we're thinking of changing. So nobody would be hurt and somebody would be helped—at least hypothetically. (In most efficiency tests you don't have to actually pay the compensation.)

In the dialysis case, the problem is that if we recognize the presence of third-party moralists—people not in need of dialysis but who care, for any reason, about the distribution of the dialysis machines—either entitlement probably looks efficient in the economic sense I've described. The amount the moralists would be willing to pay to get the kidney dialysis machines into the hands of the poor

would probably be limited—both in the sense that the moralists' wealth is limited by their earnings, and in the sense that they may feel a limited duty to actively help other people. On the other hand, if you assign those same moralists the right to keep the dialysis machines in the hands of poor but needier people, the richer people probably won't be able to bribe them out of that—both because the moralists would now have a tremendous increase in illiquid wealth by being granted the entitlement to stop the transfer, and in the sense that the moralists may think that they would be actively killing somebody if they sold off the right.

The point is that we cannot avoid sharp political controversy by invoking the efficiency norm. *Either* entitlement scheme looks efficient if it's the one we start off putting in place. But the debate over which should be put in place is the very politicized debate that the legal economists hoped to avoid.

In empirical analyses of Law and Economics, the people in Critical Legal Studies have been employing traditional economic approaches to question whether the particular studies by legal economists—the kind of regulation-denigrating studies that one of my colleagues calls the “futilitarian” tradition of Law and Economics—were in fact persuasive and actually demonstrated what they were supposed to have demonstrated. Here our work was not particularly distinct, conceptually or methodologically, from that of more conservative economists. We just came to different conclusions.

DELUSION AND COLLUSION

Having shown (or at least convinced ourselves that we had shown) that neither the traditional legal rhetorical strategies nor the legal economic strategy promise an escape from conflict and politics in law, the critics still had to deal with at least two obvious questions.

One was to figure out how lawyers had convinced themselves that they had created a distinct, less political form of inquiry. Law has, after all, been a stable system; a lot of perfectly bright people had been engaged in

these rhetorical processes for a long time. So some of us tried to figure out how this came to be. And, second, we must figure out *why* it was done—what purpose it served at a social level; what the point was.

In looking at the “how” aspect, Critical Legal Studies people drew heavily on the approaches of literary criticism. They looked at techniques of reading texts—treating legal arguments as text—to figure out what internal sense they make and how they can be externally unravelled or deconstructed. Our goal was to identify a whole laundry list of techniques by which lawyers persuaded themselves that what they said made sense without regard to the underlying political conflicts.

An example would be *Regina v. Cunningham*, a famous case mentioned in the bulk of criminal law books now on the market. The case involves a guy who stole coins from a gas meter in the basement of a London flat. During the theft (a crime for which he's clearly guilty) some gas escaped and poisoned a neighbor. The culprit was charged with the poisoning as well as thievery.

At the political level, the tension is that on the one hand we have a certain commitment to the idea that each particular crime a person commits ought to be judged by itself, isolated legally from his other acts. In this case, the culprit should not be judged more harshly as a poisoner because he happened also to be a thief. Fighting against this, however, is a secondary principle, which is a feeling that we should learn as much as we can about a person, and try to judge him or her in accordance with everything we know.

Now my claim about the case would be that you can actually get to either result you want— isolate the crimes or combine the crimes—through unconscious manipulation of the legal materials in a way that lawyers frequently do but are essentially unaware of doing. Let me demonstrate briefly.

The second crime—poisoning—can probably be committed, in legal jargon, either recklessly or negligently. For our purposes, it is enough to say that an actor will be judged reckless if he is subjectively aware of an undue risk that someone in his situation

ought not to take. An actor would be judged negligent if he is not aware of the risk, but should have known better and not taken it anyway.

Here's how the interpretive problem comes about. What is the situation the actor is in? Should he be interpreted as being in the situation of someone dealing with gas meters or someone stealing from gas meters? If you treat him as somebody who is stealing from gas meters, you would then ask: "Did an actor in his situation take an *unreasonable* risk?" Almost any risk that he took is unreasonable, given that the legitimate gains of the activity are non-existent. That implies in some way that you can hook him for reckless poisoning or negligent poisoning without overcoming this supposed principle that we judge each crime separately.

On the other hand, you may want to flip that around by saying: "Was he as *careful* as a typical person in that situation?" Well, it depends. Was he as careful as a typical thief? He may well have been: thieves, being fearful of discovery, tend to be in a rush. So if your focus was on care, looking at the situation in that narrower frame would tend to exculpate him.

The point of the example is that lawyers can take an act and frame it in terms of an act of which it is an in-

stance, or in terms of more particular acts which it more particularly represents, and fool themselves into thinking that something follows quite easily from their analysis of the case. How? By hiding from themselves their initial interpretive step: whether to treat the person as doing only precisely what he did or as doing something of which it is an instance.

The final area of inquiry is the least developed part of Critical Legal Studies. There is a sense among critics (and this is probably the way in which it is most closely connected to politics of the left) that at a very general level lawyers serve as apologists for the existing social order. The apologetic role of the legal regime is to present the distribution of powers, privileges, and rights in society as essentially neutral.

This is a very important and central issue, but one which Critical Legal Studies scholars have yet to address adequately. The bulk of our work so far has been devoted to the structural description and unmasking of ways in which tensions are hidden. Most of us have done very little to prove any particular macro-sociological point. I think that partly has to do with our training as lawyers rather than as, say, sociologists. But it may also be out of a suspicion that very high levels of

social theorizing tend to be fairly unilluminating, compared to more detailed studies of the ways in which very particular social institutions function. Still, I suspect the failure to present a fairly general descriptive theory of the role of law or a general normative theory of what a properly reformed legal system might look like contributes to a sense of frustration with our work, especially among fundamentally sympathetic, progressive students seeking direction as they enter or reenter the work force, intent on a socially transformative vocation. □

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Alumni/ae GATHERINGS



New York: The decanal reception in Manhattan drew (above, left to right) Robert Lewis '84, John Faulkner '84, and Sean Maloney '87, among others. Judge Tom Griesa '58 (right) was a featured guest.



Graduates in cities across the nation turned out in large numbers for events offering opportunities to meet Paul Brest, the School's new Dean, and to catch up on Law School developments. Brest was often accompanied on these travels by his wife, Iris, who is an attorney in Stanford's Office of the General Counsel.

Almost forty **Chicago** alumni/ae braved the winter's first snowstorm November 10 to attend a reception featuring the new Dean. Also on hand were Associate Dean (Development) John Gilliland, Law Fund Director Elizabeth Lucchesi, and Alumni/ae Relations Director Cathryn Schember. Jay Canel '55,

who had helped arrange the Monroe Club venue, provided an eloquent introduction to the Dean's remarks.

Two days later, on November 12, the Dean visited New York City for a reception held at the offices of Davis Polk & Wardwell. (Thanks be to Bill Kroener '71 for making available a room with a view of the midtown skyline.) Judge Tom Griesa '58 introduced Brest, who in turn gave a brief State of the School talk and fielded questions. Over forty-five graduates attended the event, as did School representatives Gilliland, Lucchesi, and Schember.

A November 18 gathering in **San Francisco** drew over one hundred Bay Area graduates to the Mandarin

Orange County: John B. Hurlbut, Jr. '64 and his wife, Susie, visited with Associate Dean John Gilliland (*top, left to right*) at the Costa Mesa event. Dean Brest (*center, right*) welcomed the chance to talk with R. Sam Barnes '49 (*left*) and numerous other graduates, including (*bottom, left to right*) Frank Mallory '47, Carl Mitchell '62, and Jim Hamilton '59.



LISA POMEREN



Oriental Hotel. After a warm introduction by San Francisco Law Society president Don Querio '72, Dean Brest discussed new directions for the School's curriculum.

Orange County alumni/ae met March 30 at the Center Club in Costa Mesa to welcome Brest and hear of his plans for the School. Kudos to Larry Boyd '77 for helping with arrangements and to Frank Mallory '47 for introducing the Dean.

Other recent events included a reception January 9 during the American Association of Law Schools meeting, held this year in Miami Beach. Some thirty academics stopped by the Fontainebleau Hilton for conversation and news of Stanford.

The Stanford Law Society of Southern California's annual luncheon honoring graduates recently admitted to the California Bar took place January 19. Close to seventy-five alumni/ae enjoyed lunch at the Dragon Restaurant and a talk, "Digging Up the Legal Past," by Lawrence Friedman, the Marion Rice Kirkwood Professor of Law. Society President Pam Ridley '79 and Terrence Hughes '84 deserve mention for organizing this successful event. □



San Francisco: Beatrice Laws '52 (*top, center*) and her husband, Robert (*left*), were snapped with Allan Fink '52 during this Bay Area gathering. John Salmano-witz '78, Donald Kelley '73 (*center, left*), and master-of-ceremonies Don Querio '72 (*center, right*) are also shown. Other guests of note included Professor Emeritus Samuel Thurman '39 and his wife, Enid, (*bottom, left*) and Godfrey Munter, Jr. '54 and his wife, Helen.



LETTERS

MEN'S CLUBS



The fact that Professor Deborah L. Rhode is probably a frustrated old maid is not the point. The point is that the University and the Law School would condone, teach, and publish such

warped ideas as contained in her "Private Clubs and Public Values" (Fall 1987). In spite of Professor Rhode, I will always believe that restrooms should be segregated.

Paul W. McComish (AB '35)
St. Helena, California

Professor Rhode responds, "Res ipsa loquitur."

Single-sex private clubs have for so long been acceptable to both men and women that the burden of proof should fall on those now claiming that men's clubs are objectionable. However, Prof. Rhode offers no evidence that their exclusion from such clubs disadvantages women, let alone so significantly as to justify her recommendation that not only men's clubs, but, for public policy reasons, women's clubs, too, should be stripped of their tax exemptions and state-granted licenses.

For example, she cites a 1975 study showing that one-third of men find jobs through private contacts as "evidence" that their exclusion impairs women's career opportunities. Obviously, "private contacts" can't be equated with "private clubs," and it seems improbable, to say the least, that many unemployed males are to be found in private clubs. Further-

more, the only men—or women—who can aspire to membership in the more elite (and expensive) clubs that are the real targets of women's rights advocates are those who have already "made it" and can easily reach other deal-makers by phone. Many such clubs, in fact, have rules forbidding transaction of business on the premises because their high-powered members are seeking respite from pressure.

Not surprisingly, she offers no substantiation for the assertion that the exclusion of women carries the same sort of stigma as the exclusion of racial minorities. The very different connotations attached to racial and sexual segregation are illustrated by the fact that racially separate public restrooms have been legally prohibited while no sensible public official would dream of mandating uni-sex bathrooms. The sexes are fully integrated in most public and private activities, including professional societies; at every social level, men and women freely, and persistently, choose some separate groups and activities. Many women's colleges are of course highly prestigious and continue to educate a disproportionate share of the women who go on to earn doctorates.

Men's clubs are of little or no interest to the overwhelming majority of women: the average professional is too busy juggling career and family, and the poorer women, who are likely to be single heads of households, are preoccupied with feeding and housing their families. I suspect that the critics are mainly the upper-status women who have made careers out of the crusade for "gender equality," and have long since run out of salient issues to justify either crusade or careers. Others, no doubt, are motivated by the status-envy to which neither sex

is immune. Their success in persuading such cities as San Francisco to legislate against men's clubs should be evidence, if any were needed, that women are far from powerless.

Few politicians, journalists, or academics dare to defend them publicly, but I don't know anyone whose "basic values" are offended by single-sex clubs, including the more exclusive. However, I'm not merely affronted, but outraged, when a privileged minority feels entitled to dictate the private associations of others, and is empowered to enforce its preferences.

Mary M. Ash '71
Palo Alto

CAPITAL PUNISHMENT



Racial bigotry is a sorry aberration reminding us continuously of human imperfection. Unfortunately, however, it will go away no faster for all the efforts of those who manage

to find discrimination in every nook and cranny, whether it is there or not.

One example is the attempt by Professor Robert Weisberg ("Race, Death, and the Supreme Court," Fall 1987) to interpret *McCleskey v. Kemp* as "symptomatic of a more widespread moral malaise" due to the Court's "indifference to systemic discrimination," primarily because of a statistical study showing that more murderers of white victims are executed than murderers of black victims. Putting aside the Professor's

interpretation of the opinion itself, one should take a good look at another aspect of his article, namely, the oblique use of statistics typical in recent years of opponents of capital punishment.

Lawrence W. Johnson, writing in *National Review* (Nov. 15, 1985), points to the statistics showing that between 1976 and 1985, disproportionately more whites were executed than blacks. "In the face of such overwhelming evidence," writes Johnson, "some of those who oppose the death penalty on the grounds that it discriminated against blacks have taken a new track. They now claim that the death penalty is discriminatory because the murderer of a white stands a greater chance of being executed than the murderer of a black." This is exactly what was attempted in the *McCleskey* case.

The trouble with this argument is that a very significant aspect of the statistical data base seems to get overlooked, or at least underplayed. As Mr. Johnson puts it, "Most murders are committed within one's own race. In 1983, 94 percent of

black murder victims were killed by blacks, while 88 percent of the whites murdered were slain by whites. Not only are interracial murders uncommon, but such as do occur are far more likely to entail blacks killing whites than the reverse: In 1983, 245 blacks were killed by whites, while 592 whites were killed by blacks. —It is almost certainly true that more murderers of white people are being executed, because more whites are being executed,

Mr. Johnson goes on to say, "The history of death-penalty statutes and cases since 1972 encourages the courts to bend over backward to make sure they are not executing a disproportionate number of blacks. So they end up executing a disproportionate number of whites and murderers of whites. This is a reason not to abolish the death penalty, but to straighten out some of the post-1972 confusion and restore to Justice her blindfold."

An objective reading of *McCleskey* might indicate to many that the Court there also leaned over backward to give *McCleskey* a fair shake.

Unavoidably, however, the Court was probably influenced by the District Court's finding the statistical study "flawed," regardless of the procedural posturing in order to reach constitutional issues.

Since the way we feel about each other must ultimately arise from our hearts, and souls, perhaps it is in that direction we should guide our efforts in seeking the truth, rather than to our minds, with ambiguous statistics.

W. Edward Chynoweth '63
Sanger, California

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Readers are encouraged to join the dialogue. Space constraints may limit the number and length of letters published, but all will be read with great interest. Please address letters to:

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1988	August 8	Stanford Law alumni/ae reception American Bar Association annual meeting <i>In Toronto, Ontario</i>
	September 26	Stanford Law alumni/ae luncheon California State Bar annual meeting <i>In Monterey, California</i>
	October 14-15	Alumni/ae Weekend 1988 With reunions for the classes with years ending in -3 and -8. <i>At Stanford</i>

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