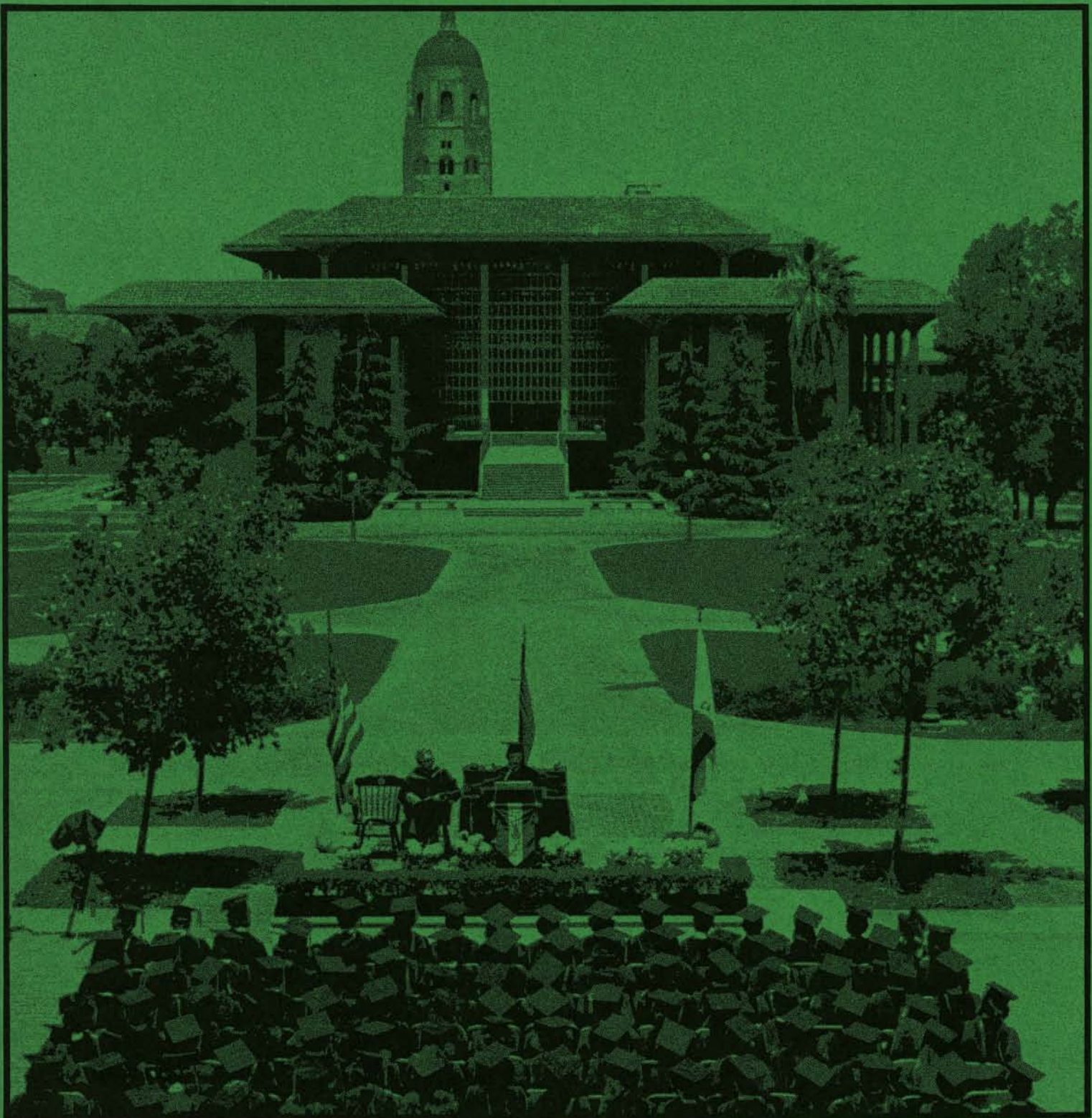


Stanford Lawyer

Spring/Summer 1979
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Attempts to regulate legal education seem to be on the upswing. The would-be regulators include the Chief Justice of the United States and the two committees he instigated: Clare, and its successor, Devitt; the Section on Legal Education and Admissions to the Bar of the American Bar Association; several state supreme courts, including Indiana and South Carolina; the Association of American Law Schools; and now the State Bar of California, which has recently commenced another battle in the Hundred Years War against this state's unaccredited law schools.

Two quite different positions on the issue of regulation have emerged. The first holds that regulation assures quality and thus protects the public. Standards are set by an accrediting agency which enforces them by denying, or threatening to deny, accreditation. This is the prevailing approach today, with the Section on Legal Education and Admissions to the Bar of the A.B.A. being the tribune, backed by the full power of the A.B.A. Denial of accreditation by the A.B.A. is fatal in most states, for graduates of unaccredited schools are ineligible to sit for the bar exam.

The contention that regulation is a guaranty of quality is, in my view, more an act of faith than an established fact. What we do know to be facts are that (1) political pressures in the A.B.A. have at times forced accreditation of inferior law schools, and (2) that there are high costs connected with the regulation of law schools, including an annual report that requires hundreds of man-hours to prepare; an on-site inspection by a team of three or four persons every seven years; and the proliferation of regulations, some quite blatantly self-interested, as the proposed requirement advocated by the Young Lawyers Division of the A.B.A. that law schools maintain placement offices. But perhaps the highest, and the most disturbing, cost is the tendency of the regulations to stifle educational innovation. (I addressed this problem at a hearing held by a panel of the Devitt Committee on April 5 in San Francisco. The text of my testimony begins on page 30).

The second position on the issue of regulation, which might be called the "libertarian model," advocates complete deregulation. Under this approach any institution could call itself a law school

and any person could practice law. University of Chicago economists in a playful, or argumentative, mood can be heard to advocate this position. For the major consumers of legal services, deregulation would have little effect, because they would still acquire the information they need about the quality of a lawyer and his or her legal education. But for the consumer who uses a lawyer only three or four times in a lifetime, the information would probably be hard to come by.

My own feeling is that the answer lies in a middle ground between these two positions—in partial deregulation. Using this approach, accreditation would be abolished, but the bar exam would be retained to protect the public from incompetency. Partial deregulation would necessitate changes in federal law, which now requires accreditation for loans to students, but it would also give law schools the freedom to experiment much more boldly than is currently possible.

It is true that partial deregulation would grant life to the poor-quality law schools that abound in California today and would probably give birth to more in other states. But it is equally true that such schools provide an avenue to the profession for a number of students who would otherwise be excluded. While seventy to eighty percent of the graduates of unaccredited law schools fail the California bar each year, at least twenty to thirty percent pass and are admitted to practice. The unaccredited schools thus serve the function of the open admissions policy that prevailed when I went to law school in 1946: virtually anybody could get in, but forty percent usually flunked out.

In addition to the bar exam, the one regulation that ought to be insisted on in this system of partial deregulation is a consumer protection measure: all schools, including Stanford, should be required to disclose to all students before registration and payment of fees the bar result figures, year by year, for the last ten years.

These views certainly contradict contemporary practices and conventional wisdom, but I believe that regulation feeds on itself, and that if the trend is not soon reversed, law schools in twenty years will find themselves laced in a straightjacket of conformity by a central accrediting authority with broad powers and limited vision.

Dean's Page



In the Name of Justice

Justice is a blindfolded woman. I refer, of course, to the familiar figure of justice. Like many other noted ladies, this one has a past. In many respects it is a dark past. Her age is a mystery. We do know that she is older than she would ever admit, even to her best friends. She was known in ancient Egypt, Greece, and Rome. To Ovid, she was Astrea, the daughter of Jupiter, who ascended the heavens to become a part of Virgo. She sat in Rome, literally. In Roman times she was portrayed seated on a stone, headless, holding the scales in one hand and a sword in the other. She apparently got tired of that and stood up for a seventh century stretch, and she has been standing ever since. After she regained her head, she was depicted as either blind, or optically speaking, rather dazzling, with eyes flashing flames. The blindfold was a modish addition in about 1540. Perhaps the blindfold was added as a fire-prevention device. Anyway, for more than 400 years she has been dressed in Grecian-type robes, tirelessly holding up her scales in one hand and clutching her sword in the other.

Whether in the name of justice, blind or blinding, or in the course of born-

again religious conversion, confession is supposed to be a soul cleanser. I confess that when I agreed to speak, I had only the foggiest idea what I would be talking about. By the time I have concluded my remarks, you may be convinced that my mind has remained in a steady state. The choice of title creates a problem under such circumstances. If one announces a title like "Astonishing Developments in Recombinant DNA," the audience is likely to be edgy or even rebellious when the text turns out to be "The Mating Habits of the Crested Threepwhistle." The way out of this dilemma is the creative ambiguity.

As you know, ambiguities come in a variety of shapes and sizes. The negligent ambiguity is a model very different from the designed ambiguity. Negligent ambiguities, rather like canned olives, are marketed in several sizes: minuscule, standard, and colossal. A negligent ambiguity is minuscule if the dab of imprecision causes a stranger to be fired; the same ambiguity is standard if it causes the draftsman's colleague to be fired; the fate of the draftsman defines colossal.

The creative ambiguity is not a blunder, it is an art form. In this era in which the Freedom of Information Act sup-

just•ice The quality of being righteous; rectitude, impartiality; fairness. The quality of being right or correct. Sound reason; rightfulness; validity. Reward or penalty as deserved; just desserts. The use of authority and power to uphold what is right, just, or lawful. The administration of law; procedure of a law court.

justice

plies a pry bar for opening personnel files, who can improve upon the response of the professor to the request for a letter of recommendation by his student, Grimby—a young man well known to the professor for his unremitting sloth: “Dear Mr. Prospective Employer: You will be fortunate indeed if you can get Mr. Grimby to work for you.”

“In the Name of Justice” is my deservedly modest contribution to the collection. With only slight exertion, the title can be lifted and almost any non-objective work can be tucked beneath it.

The congressional school of design has produced some masters of the ambiguity genre. Even a tyro senator, however, can handle elementary ambiguities. For example, a senator sponsors a bill to permit oil companies to extract and to process oil shale found in national parks. He knows that the proposal will produce outcries from environmentalists. Accordingly, he recites the needs generated by the energy crisis and speaks throbblingly of our solemn obligation to preserve the great heritage of our national parks for the unborn generations of Americans. Now, here comes the elementary ambiguity: “No extraction of oil shale shall be undertaken without

appropriate regard for the preservation of the national parks.”

Some picky senator may inquire whether there might not be a little problem about who will decide how much regard is appropriate and upon what criteria. No senator is worthy of his toga if he can’t figure out how to save his ambiguity and thus his bill.

The sponsor will promptly amend his bill to create the National Agency for Park Preservation and Energy Development, thereafter to be affectionately known to all grant applicants as “NAPPED.” Upon NAPPED is bestowed a handsome appropriation and a suitably engraved delegation of authority to go hence into the world to save those parks and to squeeze that shale. The agency is also given rule-making power by which it will create standards and enforce all of the benevolent purposes that Congress had in mind. The sponsor must be very careful not to be too specific about what purposes Congress had in mind or to spell out any of the standards himself because, if he did, he’d blow his ambiguity. Then, all sorts of his constituents, and, even worse, his campaign contributors, would find out that he really liked oil more than parks or vice versa.

by The Honorable Shirley M. Hufstedler, U.S. Court of Appeals, Ninth Circuit

Justice

"A large part of the grist for our federal court mills is supplied by negligent and designed ambiguities, statutorially and constitutionally created."

With the birth of NAPPED, is our sponsor home free? No, indeed. Some other senator will be peckish enough to ask: "But what happens, perish the thought, if sibling rivalry should break out among NAPPED, NEPA, and ERDA, or (shudder) somebody thinks that NAPPED's regard for oil or parks isn't appropriate enough?"

The answer to those queries is, again, elementary. The sponsor simply writes another amendment to his bill. This one specifically confers jurisdiction on the federal courts to resolve all controversies arising out of the National Park Protection and Energy Development Act.

When someone reminds him that the federal courts are already swamped, he remembers to add his final amendment, "All cases arising under the National Park Protection and Energy Development Act shall be given first calendar priority for trial in the federal district courts and on appeal in the United States Courts of Appeals."

It troubles the good senator not a whit that the Speedy Trial Act has already conferred strict calendar priority on all federal criminal cases and that his fellow senators have earlier given first calendar priority to 29 categories of other civil cases which they particularly fancied—all without any increase for many years in federal judges or judicial personnel to tote the load. The senator's imperviousness to the judicial plight is not simply another illustration of the patient endurance with which most of us can bear the ills of others. It is also a familiar example of the congressional penchant for putting all hot potatoes where politicians think they clearly belong—in the benumbed hands of federal judges who are required to catch them and who do not have to run for office.

The old masters of the creative ambiguity however, are the draftsmen of the Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .

"[N]or shall [any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws. . . ."

The draftsmen painted these glorious ambiguities with "brushes of comets' hair" (to crib from Kipling). Volumes and volumes of constitutional law have been and are still being written to give form and substance to those chimerical phrases: "unreasonable searches," "probable cause," "due process," "just compensation," and "equal protection." I intend no irony in describing the words from the Bill of Rights as "glorious ambiguities." The very elusiveness of their content has made it possible to shape and reshape constitutional doctrine to meet the needs of an evolving, pluralistic, free society. Precision has an honored place in writing a city ordinance, but it is a death warrant for a living constitution.

It is wryly amusing that, during the Nixon era, a prime qualification for Supreme Court candidacy was that the prospective nominee should be a "strict constructionist." The slogan rates an "A" in the Madison Avenue lexicon of ambiguities, on a sudsy par with "99-44/100 percent pure." How does anybody "strictly construe" "due process of law"? What did our founding fathers think of electronic surveillance when they drafted the language securing us from "unreasonable searches"?

A large part of the grist for our federal court mills is supplied by negligent and designed ambiguities, statutorially and constitutionally created. In interpreting legislation, we are, in theory, supposed to ascertain the congressional will and then to carry out that intent in the context of a particular case. Oftentimes this exercise has an Alice-in-Wonderland quality about it. We may be fully aware that the draftsman of the negligent ambiguity never considered the problem that his sloppy workmanship caused. Yet, we must ask ourselves, what would Congress have thought about it if it had thought about it? Applying our powers of retrospective divination, we announce what Congress intended, and we then apply inexorable logic to reach the result that we preordained when we earlier announced our diagnosis of the congressional psyche. Does this mean that we are legislating? Of course, it does.

Anglo-American courts have always made law. Judicial lawmaking in the setting of statutory interpretation is primarily, although not exclusively, of an interstitial kind; we are engaged in filling in the cracks that legislatures have

negligently or deliberately left in statutory schemes. In the context of constitutional law, however, the lawmaking function is quite different. It is unique to the United States, despite some English flutterings in that direction as early as 1610. Whatever may be said about the legitimacy of judicial review—the power of the judiciary to declare legislative acts unconstitutional—that power has been firmly rooted here since *Marbury v. Madison* was decided in 1803. The lawmaking function of courts is either wonderful or wicked depending on whether the commentator agrees or not with the results of the decisions.

Judicial responses to ambiguities generated by others and their ambiguous answers to congressional and constitutional mandates range from the absurd to the sublime. No judge has excelled Mr. Justice Holmes in the upper ranges of these arts. A sample is his famous dissent in *Abrams et al. v. United States*. The Abrams defendants had been convicted for “unlawfully writing and publishing language ‘intended to incite, provoke and encourage resistance to the United States’ ” during World War I, in violation of the Espionage Act of 1918. The defendants were Russian Jews, self-styled revolutionaries who had emigrated to this country. They wrote and distributed some steamy pamphlets intimating that Washington was conspiring with Berlin to crush the Russian Revolution and “calling upon fellow-Russian émigrés, working in ammunition factories, to strike because they were producing weaponry “to murder not only the Germans, but also your dearest best who are in Russia and are fighting for freedom.” In short, the battle was free speech versus national security—a recurring dual, as recent history reminds us. Now Mr. Justice Holmes speaks:

“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent . . . or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foun-

dations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think we should be eternally vigilant against attempts to check the expression of opinions we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law . . . abridging the freedom of speech’.”

The strength of Mr. Justice Holmes was not in the power of his prose style, although he wrote beautifully, but rather in his wisdom in creating breathing room for freedom while simultaneously constructing lines which neither the individual nor the state can cross when locked in combat with each other.

The Constitution bristles with mandatory protections of antagonistic rights: For example, the press has a constitutional right to gather and to publish news. The individual has a constitutional right of privacy to protect from public view the store of information about himself or herself that is essential to preserve the autonomy of one's personality. When these rights collide, neither must be permitted to destroy the other. Constitutional law must be written that permits compromise, whereby each protagonist yields some ground, but no more ground than is necessary to permit a resolution of the controversy, while at the same time doing the least injury to either right—an application of the principle of maximizing the benefits of both. The technique is the creation of an ambiguity, like the clear and present danger test, or the balancing tests that have been more recently devised.

“We have long had the litigating habit, but in recent years, the habit has become an addiction.”

Compromise is a shifty word. It can connote a sellout of virtue. But in its better sense it means an accommodation of conflicting interests. Artistic compromise is an indispensable ingredient of a free, yet ordered, society. To be sure, no one conspicuously wins a compromise, but neither does anyone conspicuously lose. When we are dealing with interests of great importance, we must strive for the rational compromise because in the long run we cannot survive a diet of destruction. There are no real victors in mortal combat, whether the adversaries are private persons, states, or individuals versus the state.

Mr. Justice Holmes was exactly right when he observed that "time has upset many fighting faiths" and that we must always "wager our salvation upon some prophecy based upon imperfect knowledge." Our knowledge changes; our perceptions of truth change. For instance, until very recently, sickness, pain, poverty, and death were thought to be inexorable concomitants of life. They were the harvest of mankind's sin, original or repeated. They were the impositions of the Creator to test the spirit, or to burn away the dross of earthly desire to prepare the soul for reincorporation into the infinite. We had no expectation of an equity of redemption enforceable during our life span.

But in the last hundred years in societies around the world, perceptions have changed. With the injection of hope for earthly rewards that have come from a massive, even if momentary, infusion of food to nourish vast populations; technology that released millions from the absolute necessity of grinding physical labor to wrest subsistence from the land; and expanding knowledge, our prophecies and our perceptions have changed. Sickness, pain, and poverty are no longer seen as sufferings ordained. Instead, they are sufferings that can be cured; they need not be endured. Gradually, health, surcease from pain, and at least mild affluence have come to be regarded as human rights. The conversion of a destiny of misfortune into a right of good fortune has turned misfortune into injustice.

Injustice, thus perceived, foments rebellions and revolutions around the world. In the United States, the same rise in expectations has generated demands, sit-ins, violence, and inevitably lawsuits. No matter how unreasonable may be the expectation, Americans ap-

pear to have unbounded faith that judicial systems can supply a hope chest for every hope, a remedy for every wrong. Even presidents have not been immune from such fantasies. You may recall, for instance, that President Ford seriously proposed that the way out of New York City's financial problems was to declare the City bankrupt and turn it over to the bankruptcy court to administer. (The reaction of the bench, let alone New York, was apoplectic.)

What is the explanation for this unending rush to the courts? There are myriad reasons. Here are a few: Going to court with socio-economic problems as well as private disputes is as old as the republic. We have long had the litigating habit, but in recent years, the habit has become an addiction. Courts are accessible. Who gets admitted to legislative chambers or to the inner offices of the executive branch and how the admission is accomplished is mysterious—although being very rich, or very powerful helps very much. The key to the courtroom door is a complaint. Sophistication is required to know what kind of complaint will open which courtroom, but even a novice can eventually find the right key by trial and error. (I do not mean to imply that hospitality always awaits the litigant who has gained admission to the courtroom.) Courts are visible. A major part of judicial business is conducted in public, and a decision will eventually be made that can be heard or seen or both. Courts are more responsive to the needs of the disadvantaged, the poor, the weak, and the unpopular than are the other branches of government. Courts have been guilty of serious lapses in these situations, but it is fair to say that the judicial track record has been a cut above its governmental counterparts. People have no place else to go. Unfortunately, millions of Americans' encounters with legislatures and bureaucracies have left them folded, stapled, and mutilated—without anyone's listening to their complaints. The courts seem to offer to many the last hope for some kind of hearing. Both the executive and legislative branches have suffered repeated attacks of paralysis. Members of both of these branches of government, fearful of offending opposing constituencies and thus jeopardizing their next election, have failed to reach creative compromises; instead, they have reached stalemates. Lower courts do not have



the luxury of nondecision. We cannot hear cases outside our jurisdiction, but, with trivial exceptions, we must hear and decide all cases and controversies that are brought to us. Courts of last resort, such as the United States Supreme Court, have a large measure of discretion in refusing to hear cases, but again with trivial exceptions, once a hearing has been granted these courts also must decide the controversy.

The accompaniment to all this faith, hope, and charity for courts is distrust, despair, and rage. As usual, many reasons exist for court loathing, some based on fact and others on fancy: Judicial proceedings are costly and slow. Not all judges are kind, brilliant, fair, and handsome. They are human beings, who are not relieved of their frailties when they don a judicial robe.

Some of the rage is due to confusing the cause of ills with the effect of courts upon that sea of troubles. Courts do not cause marital disaffection, poverty, illness, crime, bigotry, bankruptcy, pollution, drought, or earthquakes, or any of our other abiding afflictions. But courts do decide all sorts of controversies that these distresses and disasters breed. The urge to kill the umpire is not confined to baseball fans.

At least a part of the anger directed to the judiciary is a product of our successes. Expectations have been raised that cannot be fulfilled. Sometimes the expectations cannot be achieved because the problems that courts are asked to resolve cannot be "solved" by anyone. We know that we do not "solve" racial hatreds when we compel school integration, any more than we "solve" marital problems when we grant a divorce or dissolution. The evils do not evaporate upon the issuance of a court decree. The decree does no more than to reorder the context in which the ills must be addressed while we await the changes of mind and heart that will be required to bring about racial peace and domestic tranquility.

Ofttimes expectations are based on misunderstandings about what courts can and cannot do. For instance, courts can force a factory to close that is polluting a river, but we cannot appropriate funds to relocate the employees of the factory who have lost their jobs. We can compel an institution or an administrative agency to exercise the discretion legally committed to it, but we cannot dictate how that discretion will be exer-

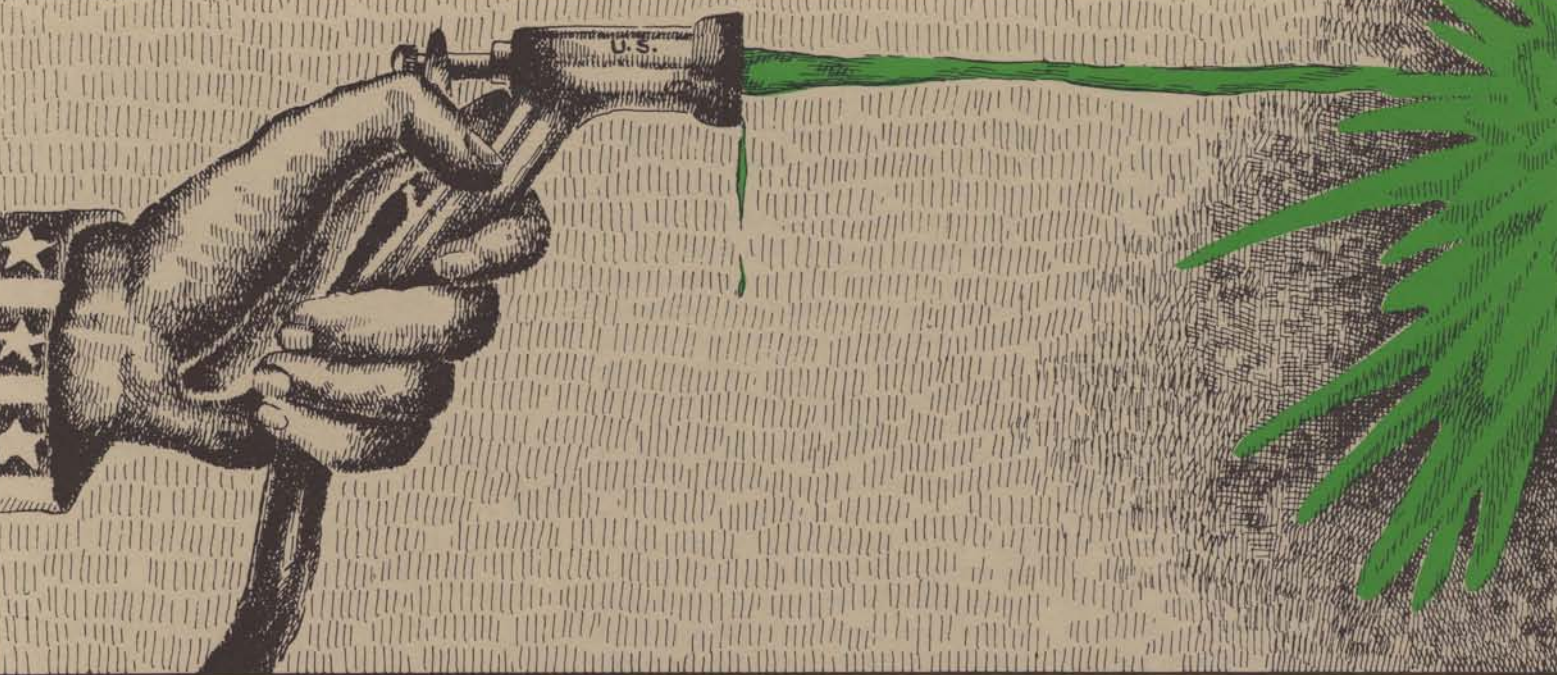
cised. We can stop American tuna fishermen from killing porpoises in violation of federal regulations, but we cannot stop the resulting increased porpoise slaughter by Russian tuna fishermen.

In addition to these jurisdictional limitations, we have other very substantial restrictions upon how we can do our work. In deciding cases, courts are confined to the evidence that is presented to them by the parties, together with information in the public domain that is sufficiently reliable to permit us judicially to notice it. Appellate courts are even more constrained by the record than trial courts because trial courts, under some circumstances on their own motion, can compel the production of evidence to aid them in their decisions. With very modest exceptions, American appellate courts cannot take or order additional evidence to help them decide. If a critical piece of information is missing, appellate courts, at most, can remand the case to trial courts to take further evidence. Judges, who are compelled to decide issues of mind-boggling variety, have extremely limited resources upon which they can draw for help. We have no staffs of experts, and no bureaucracies to tap.

The resource in most critical supply is time. Appellate judges are in no sense unique in this regard. But the pressures on our time have increased over the last decade beyond all reason. The caseload in my court has escalated over 400 percent during the years from 1966 to 1976. At the same time, the active judicial complement has been increased from 9 to 13 judges. The end product of this litigation explosion is not just that we are overworked, it is that the litigants and the public are suffering. Civil litigants with controversies that have not been given statutory priority must now wait years before we can reach their cases. Moreover, in the cases that we are deciding, we do not have enough time to do a thoroughgoing job on each case. That means that more often than we like to admit, we draft negligent, rather than creative ambiguities.

I do not wish to quit on a pessimistic note. I am not a person who believes that the definition of a pessimist is an optimist educated at Stanford. We can and will redesign our litigation valves to regulate the pressures on the judicial systems. We can and will find means to preserve the values and not merely the name of justice.

Judge Hufstedler was the guest speaker at Class Day, held on May 24 for members of the Class of 1979 and hosted by the Board of Governors of the Stanford Associates and the Council of Stanford Law Societies. She is a graduate of the Class of 1949.



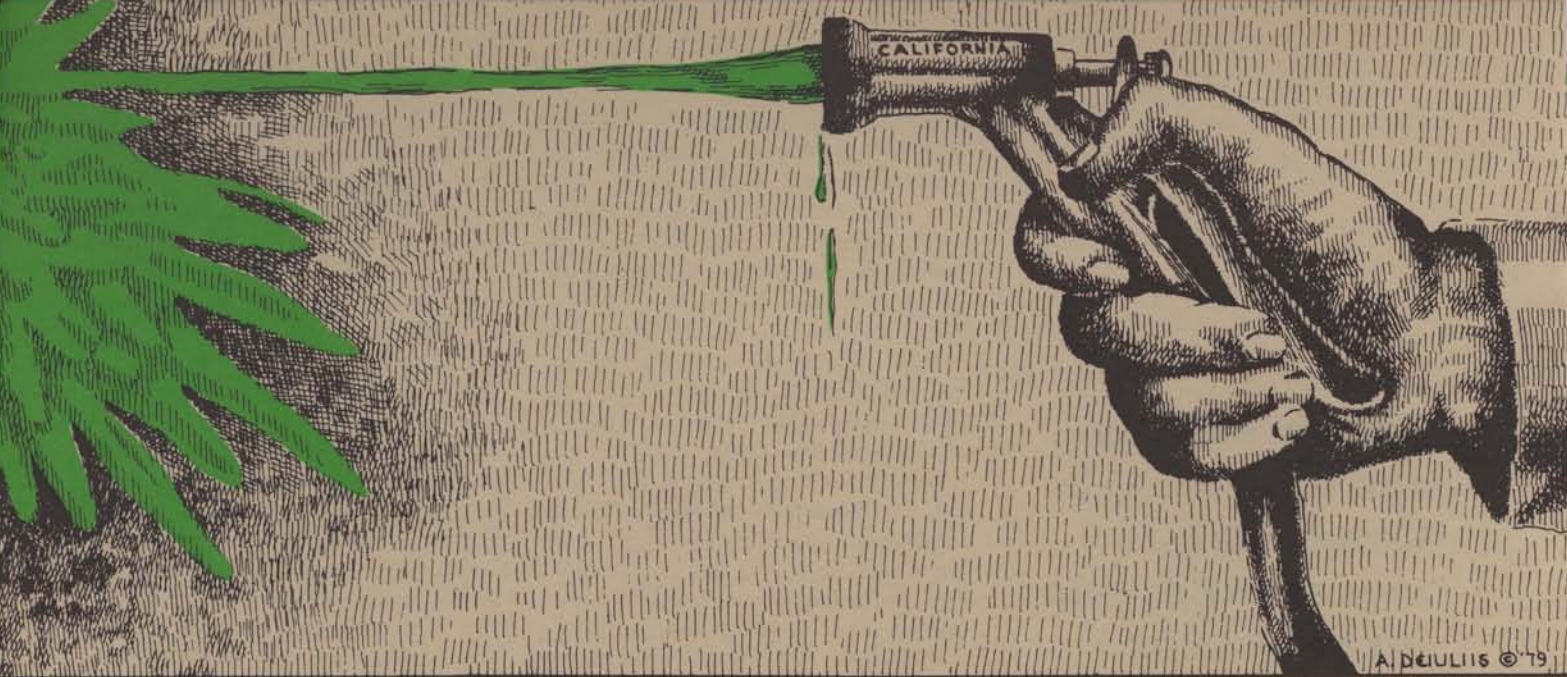
The Battle of the Stanislaus: How the Great Federal/ State Water Fight Was Won

by Roderick E. Walston

The Stanislaus River represents the site of an historic clash between federal and state power. No shots were fired, no blood spilled. Instead the battle was waged with legal arguments in the marbled chambers of the U.S. Supreme Court. The issue was whether the federal government or the states control the water stored behind federal dams in the West. This issue is fundamentally important in the West where most of the developed water supply is stored behind federal dams and is vital to the economic growth of this largely arid region. The battle culminated in a landmark decision that upheld the states' right to control the water, thus marking an historic change in the course of western water law.

The Case

The Stanislaus River begins in the Sierra mountain range in Northern California and flows across the sprawling Central Valley, eventually reaching other rivers which carry its waters to the Pacific Ocean. The upper part of the Stanislaus contains a series of whitewater rapids that have achieved national renown as a recreational area. In 1962 Congress decided to build the New Melones Dam on the upper part of the river. The dam will control floods and provide water to farmers, cities, and industries. When water is stored behind the dam, however, it will inundate the upstream stretch of whitewater, thus destroying a valuable environmental asset. Thus the dam poses the kind of dilemma that increasingly troubles modern man: To



what extent, if at all, should man sacrifice his environmental heritage for his material well being?

Confrontation of the dilemma was forestalled, however, when the U.S. Bureau of Reclamation, which is to operate the dam, applied to California's Water Resources Control Board for the right to store water behind the dam. After a public hearing, the California agency decided that the federal agency should not be allowed to store water fully at the time. Its decision was based on the grounds that the federal agency had not yet developed a specific plan to distribute water to farmers, cities, and industries, and that immediate storage would destroy the upstream stretch of whitewater. No one, the state agency concluded,

should have the right to use California's sparse waters for purposes that have not been identified, at least where the water will destroy an important environmental asset; an environmental trade-off should not be made at least until it is known what kind of economic *quid* will be received for the environmental *quo*. Thus the state agency did not bar the federal agency from forever obtaining water; instead it deferred its right to obtain the water at least until it is known how the water will be used. The Stanislaus thus received a stay of execution, not a pardon.

The United States, objecting even to the stay of execution, brought suit against California.¹ It argued that the federal government has exclusive control of water stored behind its dams, and that California and other western states cannot limit this right; accordingly, the storage limitations imposed by California upon the New Melones Dam are unlawful. This argument was upheld by a federal district judge in Sacramento who granted summary judgment for the United States. It was also upheld on appeal by the Ninth Circuit Court of Appeals in a decision written by Judge Ben. C. Duniway '31. As a last resort, California petitioned the Supreme Court for review.² Over objection of the United States, the Court granted California's petition and set the matter for hearing in March 1978.

The Issues

Most observers thought that California had little chance of winning the case,

1. The conflict between California and the federal government over the New Melones Dam is merely part of a long-standing dispute between these sovereignties over the proper scope and objectives of the federal reclamation program. The federal government, under the Secretary of the Interior, has traditionally sought to use water from federal dams primarily for the purpose of stimulating economic growth by providing water and power to farmers, cities, and industries. In recent years, California has sought to use a substantial portion of the water to protect the environment threatened by the dams by requiring water to be released to protect downstream water quality, fish, and wildlife and by limiting storage of water to protect upstream environmental resources. Thus the suit not only raises fundamental issues of federalism with respect to the control of water in the West; it also raises fundamental issues about the extent to which federal dams should be operated to achieve economic growth at the expense of environmental degradation.

"The precise issue was whether Congress had meant to provide for federal or state control of water in passing the Reclamation Act of 1902."

at least until the Supreme Court decided to review it. As one distinguished law professor heatedly told the author, "The Supreme Court decided that issue long ago." Indeed, the Court had often upheld the federal position. In *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), the Court held that the states cannot override the controversial provision of federal law that limits water from federal dams to lands not exceeding 160 acres. The Court added the comment that nothing in federal law "compels the United States to deliver water on conditions imposed by the state." Later the Court held that the states cannot prevent the federal government from acquiring water by condemnation (*Fresno v. California*, 372 U.S. 627 (1963)). Still later, it held that the states cannot control the distribution of water by the Secretary of the Interior from the federal dams on the Colorado River (*Arizona v. California*, 373 U.S. 546 (1963)). These cases, in their totality, formed a powerful mosaic of federal control. *Stare decisis* was a powerful ally of the United States.

Although *stare decisis* was on one side, history and tradition were on the other. The precise issue was whether Congress had meant to provide for federal or state control of water in passing the Reclamation Act of 1902. The Act, which launched the federal dam-building program, specifically directs the Secretary of the Interior to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. The congressional debates surrounding the Act left little doubt that Congress, although not fully anticipating the clash between state and

federal power, meant to generally provide for state rather than federal control of water. Indeed, at the time that the Act was passed, the western states were traditionally regarded as having primary control of their waters, at least where the federal navigation power was not involved. In its decisions in *Ivanhoe*, *Fresno*, and *Arizona*, the Supreme Court had paid little heed to these historical factors. Indeed, the Warren Court, for better or worse, had often expanded federal power at the expense of state power, even where history and tradition stood in the way. Conversely, the Burger Court has shown a larger respect for our historical and traditional institutions; as part of an emerging "new federalism," it has often given new emphasis to the role of the states in our constitutional system. Thus with *stare decisis* on one side and history on the other, the case presented an interesting study of the dynamics of the judicial process.

Public policy was a coveted ally claimed by both sides. The United States argued that it had made an enormous investment in building dams to stimulate the economy of the West; if the states have absolute control of water, they might—in fits of parochialism—dissipate the stimulant by squandering the investment. Indeed, one commentator likened the states' position to the interposition theory that lay strewn on the battlefields of the Civil War (Goldberg, "Interposition—Wild West Water Style," 17 *Stanford Law Review* 1 (1964)). California argued, on the other hand, that the water will have a dramatic impact on the economy and environment of the state in which the dam is located; to deprive the state of control of the water is to deny it a voice in its own destiny.

California developed a thesis, or more precisely a synthesis, that it argued would protect both federal and state interests, both national and local goals for waters stored in federal dams. Under this approach, the states should have the right to control their water to the extent not inconsistent with specific national goals mandated by Congress. This result, it was argued, would protect vital federal interests by insuring that they cannot be breached by the states; it would protect vital state interests by insuring that the states are otherwise free to develop their own water policies to the extent not in conflict with specific national interests. As a practical matter Congress has not adopted many spe-

2. An amicus brief was filed on California's behalf by Dean Charles Meyers of Stanford Law School, a widely-recognized authority on western water law. The U.S. Solicitor General objected to the filing of the brief on grounds that Meyers was acting in his personal capacity rather than on behalf of a client. The author is not aware of any instance in which an amicus brief has been filed with the Supreme Court under such circumstances. However, the original concept of an amicus, as formulated in early English law, was to allow a lawyer to advise the court merely in his capacity as an "officer of the court." Indeed, one such lawyer in an early English case, waiting for the judge to call his case, was allowed to point out an erroneous legal interpretation expressed by the judge in another case. The Supreme Court, by allowing the Meyers brief to be filed, might have thus revived the original amicus tradition.

cific goals under its dam-building program; instead it has allowed most such goals to be worked out in the administrative process. Thus this approach would allow the states to play a vital, perhaps dominant, role in setting western water policy. One difficulty with the approach is that it requires a case-by-case analysis of specific congressional policies that might be deemed to override state laws. This analysis, however, is made in other cases to determine whether Congress has "preempted" a particular state law. In any event, it was argued, the difficulty seems a small price to pay to give states a voice in matters that vitally affect their economic and environmental interests.

Mootness Averted

Before the case was argued in the Supreme Court, a number of developments threatened to end its life. In 1974, an initiative was placed on the California ballot, Proposition 17, that would have placed the State of California on record as opposing construction of the New Melones Dam. The initiative, if successful, would likely not have had any legal effect; although the state can arguably control the water, it cannot prevent construction of the dam. However, the initiative would have supplanted the storage limitations imposed by California's Water Resources Control Board on the dam; since these storage limitations were the subject of the suit, the suit might have been dismissed as moot if the initiative had passed. But the initiative was narrowly defeated. Much of the anti-initiative sentiment, as voiced by several California newspapers, was that the dam should be built, but should be operated according to the State-imposed storage limitations.

After the initiative's defeat, a bill was introduced in California's Legislature that would have had the same effect as the initiative in preventing construction of the New Melones Dam. However, when the legislators learned that the bill would likely make the pending suit between California and the federal government moot, and would have no legal effect anyway, the bill was defeated.

After the Ninth Circuit rejected California's position, state water officials began to negotiate with the Secretary of the Interior, hoping to secure a pledge by the Secretary to voluntarily comply with the State-imposed storage limitations on the New Melones Dam. If the Secretary had voluntarily complied, the

suit would have probably become moot. The Secretary refused to take this step.

The suit thus overcame many obstacles that threatened to end its existence. It was fully alive when the Chief Justice, shortly after settling in his chair on a chilly day in March 1978, called the case for oral argument.

In the Supreme Court

Oral argument in the Supreme Court is often in the highest legal tradition. Less fettered by the precedents that bind other courts, the Supreme Court has more freedom, which it frequently indulges, to focus on public policy during oral argument. In this sense, the argument in the Stanislaus case was not disappointing. At the outset of the argument, however, many justices focused on policy matters that were extraneous to the issue at hand. Some justices asked whether the federal government has the right to condemn privately held water rights without the payment of compensation, a question left unanswered by the Court's decision in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). Some asked whether the federal government or the states "own" the surplus waters of the western states, a question left unanswered by the Court's decision in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). These questions, although raising provocative issues of federalism, failed to provide much guidance on whether Congress had provided for federal or state control of water in undertaking its dam-building program.³

However, as the argument progressed, the questions became more focused. Frowning, Mr. Justice Stevens asked whether California's view—that the states have the right to control water to the extent not inconsistent with specific congressional policy—might not require a case-by-case analysis of congressional policy; uncomfortably, I assented that this was so. Again frowning, he asked

"Mr. Justice Marshall drew laughter from the galleries by asking the Solicitor General in an elaborate hypothetical question if his view might enable the Secretary of the Interior to sell water to democratic farmers or republican farmers depending upon the political party to which the Secretary belongs."

3. The "ownership" question is irrelevant because, if the United States "owns" the water, the question remains whether Congress turned over regulatory control to the states in the Reclamation Act of 1902. Conversely, if the states "own" the water, the states are still subject to Congress's constitutional powers under the Commerce Clause and Property Clause; these constitutional powers authorize Congress to override state laws in acquiring and using water for commerce and proprietary purposes. See, e.g., *Arizona v. California*, 373 U.S. 546, 597-598 (1963).

the Solicitor General whether, under his view, state laws would be invalid even where there was no conflict with identifiable congressional policy; the Solicitor General appeared uncomfortable in assenting that this was so. In a similar vein, Mr. Justice Powell asked the Solicitor General how the Court could determine the validity of the storage limitations which California had placed on the New Melones Dam if the lower courts had failed to decide how the limitations might affect specific national policies. Mr. Justice Marshall drew laughter from the galleries by asking the Solicitor General in an elaborate hypothetical question if his view might enable the Secretary of the Interior to sell water to democratic farmers or republican farmers, depending on the political party to which the Secretary belongs. Mr. Justice Stewart asked whether California's view might result in inconsistent state laws being applied to the same interstate waters; I argued that this result was unlikely since the western states had divided most interstate waters by negotiations or litigation. Mr. Justice White suggested that Congress, by amendatory legislation, might have vested the Secretary of the Interior with broad discretionary power to carry out the purposes of the federal reclamation program, thus negating its grant of state power under the original program; I insisted that the amendatory laws, if not silent on the matter, supported the opposite result. The Chief Justice rhetorically asked the Solicitor General, with apparent sympathy, whether his view was that the federal government and the states are "partners," but that in the event of conflict the federal government is the "superior partner."⁴ The ar-

gument then ended. Most observers felt that neither side had conclusively won the argument, and that the Court had not revealed its own view on the matter.

The Court's decision was rendered on July 3, 1978, little more than ten months after California filed its petition for review (See *California v. United States*, 438 U.S. 645 (1978)). The decision, authored by Justice William Rehnquist '52, strongly upheld the states' position. The Court ruled that under the Reclamation Act of 1902 Congress had authorized the states to control the acquisition and use of water in federal dams to the extent not inconsistent with "clear congressional directives." The case was remanded to the lower courts for determination whether the storage limitations imposed by California on the New Melones Dam are within this parameter. The Court overruled the parts of its earlier decisions in *Ivanhoe*, *Fresno*, and *Arizona* which had held that the states are powerless to control the water. History and tradition thus prevailed over *stare decisis*.

In a biting dissent joined by Messrs. Justice Brennan and Marshall, Mr. Justice White objected that the "current temporal majority" of the Court had engaged in "revisionary zeal" by overruling the Court's prior decisions. However, the dissenting opinion failed to defend the earlier decisions on their merits, thus inviting the comment that the earlier decisions were not without their revisionary effect. Whether history is being revised often depends on one's perception of history; by focusing on the history of the federal law rather than its own precedents, the majority decision might be defended on the grounds that it followed history once more, rather than revised it once again.

In any case, the Court's decision is far-reaching and historic. It sets western water law in a fundamentally new direction by allowing the states to play an important, perhaps dominant, role in setting water policy. The precise nature of this role is not yet clear, as the courts must determine the kinds of "clear congressional directives" that will be deemed to override state law. However, the Court's broad analysis of state power makes it manifest that, whatever the exact limits, the states' role will be very large. The decision thus results in a new federalism in western water law, one that replaces the federal dominance of the recent past.

Roderick E. Walston received a B.A. in 1958 from Columbia and an LL.B. in 1961 from Stanford, where he was a member of the Stanford Law Review. In 1961-62 he served as law clerk to Judge M. Oliver Koelsch, U.S. Court of Appeals for the Ninth Circuit. The following year he joined the Office of the Attorney General for the State of California, where he is the director of the public resources section in San Francisco. He handles litigation of the environmental agencies grouped under the Resources Agency. Mr. Walston has argued several cases before the United States Supreme Court.

4. The Chief Justice had asked me a similar question in an earlier case, and his question formed the basis of a decision in the earlier case that limited state control of federal activities. In oral argument in *Environmental Protection Agency v. California*, 426 U.S. 200 (1976), the Chief Justice asked me whether it was not true that the states cannot regulate federal activities unless Congress provides such authority by "clear and unambiguous" legislation. The Court's subsequent decision held that the states cannot regulate federal activities without "clear and unambiguous" congressional authorization, and that Congress had not clearly and unambiguously authorized the states to control water pollution by federal agencies under the Federal Water Pollution Control Act. I experienced an uneasy sense of *déjà vu* on hearing a similar question asked in the Stanislaus case.

Some twenty years ago, Mrs. Rosa Parks, an older black woman in Birmingham, Alabama, refused to go to the back of the bus. Her determination and subsequent arrest triggered a civil rights movement that has changed the employment and economic complexion of America.

On April 5, 1977, small groups of disabled persons occupied HEW offices in San Francisco and Washington, D.C., vowing to hold those offices until HEW Secretary Califano signed regulations implementing Section 504 of the Rehabilitation Act of 1973. Weeks later, on April 28, 1977, Secretary Califano signed those regulations.

The 504 sit-ins represented the first aggressive, visible and concerted action on the part of disabled persons to win rights previously denied them. They shattered the image of the quiet and withdrawn disabled person who refuses to expose herself to public view. This successful action also gave a dramatic infusion of energy and a sense of purpose to all disabled Americans. In short, it initiated a new civil rights movement.

This new movement is of vital significance to the 36 million disabled Americans. It is vital to a Stanford Law School graduate who found his blindness, rather than his legal skills, the subject of employment interviews. It is vital to a Sunnyside, California, woman who was denied access to a nightclub because she is in a wheelchair. It is vital to all of us who are able-bodied but who may find ourselves temporarily or permanently disabled by accident, stroke or other physical calamity.

It is also vital because it will stimulate commitment to the enforcement of legislation that addresses the needs of the disabled. Unfortunately, enforcement has long been a problem in this area. The 1968 Architectural Barriers Act (Public Law 90-480) is a case in point. It requires that all facilities built with federal dollars be totally accessible. Notwithstanding its years on the books, it has been virtually ignored since its passage.

It is no wonder, then, that the long-subdued response of the disabled community is one of militancy and immediacy. Political leaders have responded with a plethora of new laws which address the needs of the disabled. This, in turn, has radically increased the expectations of the disabled community for a society that is both hospitable and re-

sponsive to needs of the handicapped.

Such expectations are premature and unfortunate. Resplendent rhetoric of support is fast giving way to a more sober and cautious attitude. In part, this attitude is stimulated by constraints newly imposed by Proposition 13 and its accompanying mentality. It is also stimulated by the increasing volubility of public school and mass transit district administrations who complain that accessibility to the handicapped will consume millions upon millions of non-existent dollars. While the validity of these fears is suspect, as discussed below, their increasing prominence is a cause of grave concern.

What is causing this combination of increasing expectations on the part of the disabled and increasing apprehension in other quarters? Primarily, it is new (or newly discovered) and far-reaching legislation.

New Legislation

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (Public Law 93-112) is often referred to as the "Civil Rights Act of the Handicapped." Best known of the Rehabilitation Act's provisions is Section 504 which provides:

No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving federal financial assistance.

Omnipresent federal funding testifies to the true breadth of this provision. Funding from the Department of HEW,¹ for example, touches almost all public schools and many private schools. It includes most providers of medical care, senior citizen programs, drug and alcohol programs, and many state agencies.

Section 504 Regulations

Because HEW's 504 regulations provide real guidance in this emerging field, some discussion is warranted. Perhaps most significant are the definitions of a "handicapped person," which include anyone who: (1) has a physical or mental impairment which substantially limits one or more of life's major activities (such as caring for oneself, walking, see-

Bringing Legal Services to the Handicapped

by Michael Gilfix

1. HEW was the first federal agency to adopt regulations implementing Section 504. While the HEW regulations will serve as a model to the additional 65 federal agencies, some differences are sure to emerge.

"We must recognize that the problems of the disabled, like the problems of the elderly, are our problems."

ing, hearing, speaking, breathing, working); (2) has a *record* of such an impairment (even though the impairment may no longer exist); or (3) has no substantially limiting impairment, but has been treated or regarded by a recipient of federal funds *as if* he or she had such an impairment (emphasis added).

Included in a list of disabling conditions are emotional or mental illness, drug addiction or alcoholism, visual or hearing impairments and specific learning disabilities.

The regulations provide that handicapped persons must receive services and benefits from HEW recipients on the same basis as those provided to the non-disabled. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. Non-ambulatory clients may not be denied benefits because they are unable to visit a second-story office that is not equipped with an elevator.

The right to employment is also guaranteed, so long as the handicapped person is "qualified," which means that he or she can perform the essential functions of the job in question. For example, an employer may not: refuse to train, hire or promote an applicant because of a handicap; deal with a union-run training and apprenticeship program that discriminates against the handicapped; run social or recreation programs which discriminate on the basis of handicap.

Analogous to other civil rights provisions, employment tests must be job-related and are scrutinized if they screen out qualified handicapped applicants. Thus, an employer cannot refuse to hire a blind applicant for an assembly job merely because the applicant was unable to fill out a written test without assistance. Nor may an employer inquire how severe a handicap is or ask if an individual is handicapped.

Perhaps most significantly, employers must "reasonably accommodate" the known mental or physical limitations of an otherwise-qualified handicapped applicant or employee. This may include shifting non-essential duties to other employees, providing readers for the blind, interpreters for the deaf, or physically modifying or relocating working environments. An employer may be excused from making reasonable accommodations only if it would cause "undue hardship" to the employer's program. Whether "undue hardship" exists will

be determined on a case-by-case basis, taking into consideration the number of employees, the program budget, and the cost of the needed accommodations.

The requirement of equal program accessibility deserves some discussion. Integrated settings are required whenever possible, and alternative facilities can be utilized only when no other alternative exists and when the other facility provides total program accessibility. For example, a university may not have to make all of its classroom buildings accessible, so long as some facilities are accessible and if sufficient classes are relocated so that all required courses and a reasonable selection of electives are offered in accessible facilities.²

Sections 501 and 503 of the Rehabilitation Act

Other significant provisions of the Rehabilitation Act of 1973 are Sections 501 and 503. Section 501 applies the non-discriminatory provisions to federal employees. Section 503 applies to federal contractors. In addition to a prohibition against discrimination, Section 503 includes the affirmative action concept as a condition of obtaining and retaining federal contracts.

Other Federal Legislation

Some of the more salient pieces of federal legislation are the Architectural Barriers Act of 1968, which was referred to above. After years of dormancy, an enforcement mechanism—the Architectural and Transportation Barriers Compliance Board³—has been created and is now implementing that far-reaching piece of legislation.

The Education of All Handicapped Children Act (Public Law 94-142), is as revolutionary as it is overdue. In essence, it requires that all public schools prepare individual work plans for emotionally and physically disabled students and that they provide necessary guidance and accommodation to implement those individual work plans. Parents have a right to involvement and to appeal if they are dissatisfied. Perhaps more than any other legislation, Public Law 94-142 promises to achieve the objective that is

2. Tax payers should note that, under Section 2122 of the Tax Reform Act of 1976, they may be eligible to claim a tax deduction of up to \$25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons.

3. Interestingly, the Board was created by Section 502 of the 1973 Rehabilitative Act.



Drawing by A. DeJullis

"In many communities, accommodating the handicapped has become tantamount to bankruptcy in the minds of administrators."

central to the entire movement: fully integrating the handicapped into the mainstream of society.

It is the public reaction to this act and to Section 504 of the Rehabilitation Act that prompts many advocates to fear that a backlash is beginning before the movement has achieved any level of stability. In many communities, accommodating the handicapped has become tantamount to bankruptcy in the minds of administrators. Notwithstanding the legitimacy or illegitimacy of this view, it is of major concern to disabled individuals who see their movement attacked and eroded just after it has begun.

State Law

In addition to the diversity of federal legislation, states are passing increasing numbers of bills that respond to the needs of the disabled. Perhaps most significant is that legislation which adopts the Section 504 model. That is, many state laws, such as Section 1135 of the California Government Code, include physical or mental disability in the anti-discriminatory provisions that apply to any program or activity that receives any financial assistance from the state. Because this brings in virtually every human services organization that is not receiving federal funds, its significance cannot be overemphasized.

Cost of Compliance

As indicated above, the issue of the cost of complying with these new mandates has been raised in many sectors. While the vast majority of individuals raising this issue are sincerely supportive of the new requirements, they are deterred by the specter of excessive cost in a Proposition 13 world.

Indeed, disabled individuals and advocates have come to expect this response from institutions of higher learning, municipal governments and employers. It is for obvious reasons that a great deal of energy is being channelled into countering this fear of the disabled movement.

To be sure, costs of accommodations cannot insulate an institution from its responsibility to comply with Section 504. This principle was soundly reinforced in *Davis v. Southeastern Community College*, 46 U.S.L.W. 2556, 2557 (4th Cir. 1978).

Moreover, there is some question about the accuracy of the multi-million-dollar speculations regarding the cost of compliance. But there is no doubt that such speculations can raise grave anxieties that can be counter-productive. An

all-too-real example is the library in Tiny Rudd, Iowa, which, fearing that it would have to spend more than its annual book budget to comply with the access requirements of Section 504, refused federal funding.

Clearly, many fears of high costs are unfounded. They are based on a misunderstanding of what the law requires and a lack of knowledge about how barriers can be economically eliminated. For example, a study by the National League of Cities indicates that it costs only one-tenth to one-half of 1 per cent of the cost of a building in the construction phase to be barrier-free. Ramps, for example, cost less than stairs, and are not even necessary when floors are kept on the ground level.

Nor need the cost of modifying existing buildings be prohibitive. The law does not require the removal of every barrier from existing buildings. As indicated above, Section 504 only requires programs to be accessible when the program is viewed as a whole. Every facility need not be totally accessible. Atlantic Christian College, for example, made its campus accessible to an English teacher with cerebral palsy by scheduling all of the man's classes on the same floor as his office. The only cost was the installation of a handrail to assist this individual.

Moreover, it should be pointed out that some social services providers make home visits to handicapped individuals who would otherwise not have access to services because of architectural barriers.

To cite another example, Mainstream, Inc., a Southern California-based consulting firm composed exclusively of disabled consultants, recently saved a West Coast manufacturer \$152,000 by pinpointing only those barriers that would actually impede the handicapped. The corporation's architect thought every barrier had to be removed at a cost of \$160,000. Mainstream's consultants showed them how to make the buildings accessible for \$8,000.

By eliminating architectural barriers we will be making our society accessible. Valuable employees will be attracted to the business sector and will further stimulate our economy. Fewer people will be supported by public benefits. All of us will benefit from more humane working environments.

The Disability Law Center

The paucity of litigation and, hence, non-enforcement of rights of the dis-

abled through the mid and late-1970s reflects the inattention given these issues by the legal profession. The rare exceptions, such as the National Center on Law and the Handicapped, were relatively modest in size and defined their areas of responsibility very narrowly. In fact, it was not until the 1977 White House Conference on Handicapped Individuals that advocates for the disabled from throughout the nation convened and developed coordinated strategies.

Sometime earlier, in late 1976, the concept of a legal services program for the disabled was born at Senior Adults Legal Assistance (SALA). In serving the elderly population, it was becoming clear that a large proportion of clients were turning to SALA because of issues relating to their physical and mental conditions as much as their age. It was then that Assistance in the Law to Physically Handicapped Elders (ALPHE) was born, as was the *Law and Handicapped Newsletter*. In late 1977, the project matured into the Disability Law Center (DLC), when the decision was made to expand services to younger disabled persons.

The development of the DLC has not proven easy in these days of Proposition 13 and budget-tightening inflation. These concerns notwithstanding, it was in the spring of 1978 that fundraising for the DLC began in earnest.

The first four staff members were obtained through a Public Service Employment (PSE) grant from the Comprehensive Employment and Training Act (CETA) Board of Santa Clara County. Initiated in October of 1978 as a one-year project, it is designed to deliver both community education and direct legal service efforts in three areas: employment discrimination, architectural barriers, and public benefits such as Supplemental Security Income (SSI) and Social Security. Notably, this grant enabled the DLC to open its doors in Campbell, California. Serving the 90,000 physically disabled population of Santa Clara County, it is located in the same facility of the Adult Independence Development (AID) Center, which is Santa Clara's "ILP" or Independent Living Project. Almost simultaneously, a grant was obtained from the San Mateo Foundation—a particularly responsive community foundation—for a community education project that is focusing on employers and service providers as well as the disabled.

The next major development occurred in November of 1978, when SALA ob-

tained nine VISTA volunteers for its community organization project. Three of these volunteers were assigned to the DLC, thereby increasing the staff to eight. Phil Sonenschein, a 1978 graduate of the Stanford Law School, is one of those VISTA volunteers.

Most exciting to those of us at the DLC was receiving the first grant of the Stanford Public Interest Law Foundation (SPILF).⁴ Awarded to Debbie Cauble, a 1978 graduate of the Stanford Law School, as the DLC's coordinating attorney, the grant is enabling Ms. Cauble to undertake various organizational and operational tasks. It is fully expected that her efforts will make the Disability Law Center a more efficient, professional and stable legal services program.

With its combination of funding, and notwithstanding its precarious nature, the DLC is providing services in several areas. In addition to direct legal services, it is providing legal and support assistance to community organizations of the disabled, undertaking a variety of community education efforts, and publishing the *Law and Handicapped Newsletter*.

It is our hope that stable sources of funding will be obtained and that the DLC will continue to serve the disabled population of Santa Clara County and will serve as a model to other service programs throughout the nation.

Conclusion

We must recognize that the problems of the disabled, like the problems of the elderly, are *our* problems.

We must use our legal and personal skills to eliminate the barriers of isolation and segregation that have barred millions of disabled Americans from the mainstream of our society.

We must respond to ignorance and fears about the disabled with openness and community education.

We must respond to the wavering commitment to the disabled with tenacity and with a recognition that a free society is an accessible society.

Only then will the human potential of millions of Americans be realized. Only then will the promise of equal opportunity be made a reality.

4. In the opinion of this writer, SPILF is to be acknowledged for its present and future contributions to public interest law. Its existence and efforts are particularly appreciated by those of us in public interest law because of decreased funding opportunities from some of the more traditional sources.

Michael Gilfix ('73) is Director of Senior Adults Legal Assistance (SALA) of Santa Clara County, California. He is also Director of the Disability Law Center, a SALA project. He has taught a seminar at the Law School, is a member of the Executive Committee of the Legal Services Section of the State Bar of California and is the father of 10-month-old Mark Rafael Gerson Gilfix ('02).

In Law School & Over Thirty:



A Look at Stanford's Older Students

An English professor, a commercial pilot, a housewife, an expert in Slavic linguistics, a probation officer, a doctor of physics and founder of an industrial microbiology firm, a public administrator, a tenured associate professor of philosophy, a psychologist, a mathematician and computer specialist, a journalist—these are just a few of the students currently enrolled at Stanford Law School. They represent a growing number of “drop-ins,” individuals over thirty who have left well-established professional careers to come to law school.

Though their numbers are still quite small, the proportion of older students in each class has steadily increased over the past few years. For example, in the third-year class, Class of 1979, there are ten students over thirty, while the first-year class contains fifteen. Each class numbers about 165.

The increase, according to the admissions committee, can be attributed primarily to the fact that more older students are applying to law school these days. People in general seem to be less concerned about job *security* than job *satisfaction* and are more inclined to change careers when they find their jobs no longer challenging or stimulating. For many the study of law offers intellectual excitement combined with the prospect of an interesting and financially rewarding career.

A second reason for the increase at Stanford is the preference for greater diversity within each class, a preference expressed by the current chairman of the admissions committee, Professor William Cohen. Though age alone does not improve an applicant's chance of admission, the current committee's desire to admit candidates who have had intellectually challenging experiences outside of college tends to favor students who have had more opportunity to gain these experiences. But such a factor, Professor Cohen explains, only affects “choices at the margin.” Hundreds of applicants to the School each year possess virtually indistinguishable academic credentials,

and only a fraction of these people can be admitted. It is at this point that diversity factors are taken into consideration.

Moreover, while the older student's ability to add diversity and perspective is desirable, this must be coupled with the same intellectually high standards demonstrated by the more typical 22-year-old admittee. Aware that older students could find the return to a rigorous academic routine a difficult one, the admissions committee carefully examines grades and LSAT scores to be certain that these applicants have the ability and the potential to succeed in law school.

Once admitted to the Law School, older students experience the same problems and frustrations their younger classmates often experience—the trauma of first year, the pressures of interviewing for summer and permanent jobs, the anxieties of deciding what career path to follow, i.e. private practice vs. public interest or government work, small firm vs. large firm, major city vs. small town. And added to these can be other problems more peculiar to the older student. There can be a sense of isolation, of being different from the other students. One older female student recalls a conversation with a younger student, in which he exclaimed, “My gosh, there are people in my dorm who are 28!” But some older students see this problem less as one of years and more as a lack of similar interests, of having things in common to talk about.

Occasionally, interviewing for a job can prove difficult for the older student. Sometimes interviewers are suspicious of the student's motives for leaving a good job to start a new career; they may question the student's feelings about being supervised by attorneys who will be younger. Some older students have even found interviewers concerned about the effect of a middleaged new associate on the firm's retirement structure.

On balance, however, most older students have found law firms generally receptive to hiring them. Often, they say, firms feel older students have something

by Cheryl W. Ritchie

"Mary reminisced about the high school vocation tests she had taken in the '50s and the counselor who told her, 'Too bad you're not a boy; you'd make a great lawyer.'"



extra to offer in terms of professional and social polish, and in being able to establish an immediate rapport with clients.

In addition to the academic pressures, older students may have to contend with special personal problems, not the least of which is attempting to raise small children or teenagers while going to law school. In most cases, the older student has had to uproot his or her family, leaving home and friends behind, to settle in campus housing, where children and parents alike must develop new relationships and restructure the family routine to accommodate the demands of law school.

Why Law School?

Given the sacrifices and problems the older student is likely to encounter, why do these individuals make the decision to come to law school?

Of the dozen students interviewed for this article, the majority cited the need to do something else as their primary motivation. Bob Weisberg '79, president of the *Law Review* for Volume 31, left a tenured position in the English department at Skidmore College to enter law school. For him, law offered an escape from the "financial and emotional depression" he found in liberal arts academia. He saw the study of law as "a mixture of intellectual interests with the possibility of satisfying employment."

Mary G. Swift '80 echoed Weisberg's sentiment, explaining that as a probation officer for Marin County she had gone as far as she could with the job and was "tired of working for a bureaucracy." While considering various possibilities, she read an article in the *Stanford Observer* about Rita Giles, a single mother of two who had decided to go back to school and had been admitted to the Law School. (Rita graduated in 1977.) Mary remembers thinking, "She did it; maybe I can do it, too." While talking about her decision to study law, Mary reminisced about the high school vocation tests she had taken in the '50s and the counsellor who told her, "Too bad you're not a boy; you'd make a great lawyer."

Like Mary, Marjorie Weinzwieg '81 graduated from high school in the days "when women were expected to be teachers, nurses, or social workers." In her hometown of Calgary in Western Canada, there was one female lawyer "who didn't get many clients." After

graduating from Brandeis, Marjorie did graduate work in philosophy at Harvard and Berkeley, where she received her Ph.D. While at Berkeley, she became involved with the civil rights and anti-war movements and her interest in law began to develop. Now a tenured member of the Philosophy Department at Cal State, Fullerton, and mother of two university students, Marjorie is taking a sabbatical to complete her first year of law school. Her situation is further complicated by the fact that her husband is living in Los Angeles, so weekends are spent commuting. Admitting that going to UCLA Law School would have been the most practical thing to do, Marjorie observes, "I wanted to go to the best."

If someone had asked Bill Chapman '79 in 1956 what he planned to do after graduating from Swarthmore, he would have answered, "Teach engineering." But after a brief stint at Columbia, where he did some graduate work that included teaching, Bill was sidetracked into advertising. After six years on Madison Avenue working in radio and television, Bill became executive director of the American Institute of Architects. From there he was recruited by the University of Hawaii, where he held several administrative positions, including vice president for administration. In this post, Bill gained first-hand knowledge of the legislative process and developed an appreciation of "how the law can be an effective problem-solving tool." After seven years at the university, Bill felt he needed some "mind expansion." Law school, he decided, was the place to find it.

For Bill the highlight of his three years at Stanford has been the course in Juvenile Law, a clinical seminar taught by Professor Michael Wald and Adjunct Professor William Keogh. The course has allowed Bill to represent minors in juvenile court and has consequently developed a keen interest in litigation, an interest he will pursue with the San Francisco firm of Pettit & Martin.

For some older students law school is a natural "next step" in careers that intersect with law. Calvin Ward '81 holds a Ph.D. in physics, and after four years of post-doctoral work in molecular biology at UC Berkeley, he, along with four others, founded CETUS, an industrial microbiology firm in Berkeley. In six years the firm grew from the original five founders to 150 employees. At that point, Calvin decided the work "was no longer exciting" and left the company

to do full-time consulting in computers. Calvin's interest in computers led him to think about law, specifically patent law, which he sees as "a good way to stay on top of lots of technologies." A professional student at heart, Calvin is also considering combining courses in economics with his law school work.

Lynda McNeive '80, a graduate of Marymount College, held a variety of interesting jobs before coming to law school. They included high school English and journalism teacher, counsellor in a home for disturbed adolescents, newspaper reporter, continuity writer and legislative reporter for a radio station, freelance editor and writer. Though she enjoyed each of her jobs, she found that none seemed to offer long-term growth and flexibility. Feeling that graduate study might be the answer, she decided to choose a field that used the communications and counselling skills she had already developed. Law was the obvious choice.

With two years of law school behind her, Lynda is looking forward to a career in private practice in the Bay Area. While at Stanford, she has continued to develop her counselling skills through volunteer work at Senior Adults Legal Assistance and as a member of the Client Counseling Society. This summer she will work for a firm in San Jose.

Often the decision to study law is the realization of a long-standing interest in the field. Frank Plewes '80, who holds a Ph.D. in Slavic linguistics from Princeton and speaks six Slavic languages, describes his initial decision to study linguistics as "a toss up between law school and graduate school." Frank has now pursued both interests and hopes to sustain both by finding a job that combines the practice of law with his language skills.

Kristi Cotton Spence '81 has wanted to be a lawyer "for almost as long as I can remember." Though it has taken sixteen years since graduation from college for Kristi to realize her goal, much of that time has been spent working in the area of law that will soon become her career, juvenile law. Kristi received her A.B. from Stanford in 1963. A week after graduation she married; and by 1970 she was the mother of four children, two of whom were adopted.

While she and her husband were going through the adoption process, Kristi became interested in the legal rights of children and the related fields of inter-

national adoption, child welfare, and child advocacy. For the last ten years, she has volunteered her time and energies to serve on a number of boards and committees at both the local and state level to improve adoption services and foster care.

Kristi's decision to go to law school developed from a growing sense that she "could do more as a professional than as a volunteer." Her decision was reinforced when she attended "Creative Alternatives for the Educated Woman," a course offered by the Stanford Alumni Association. Through a number of vocational tests administered during the course, Kristi discovered that her natural talents and interests were in law and politics.

For Kristi the return to school has been a difficult adjustment, which has reinforced for her the value of "making every minute count." To allow time to spend with her children, who range in age from 14 to 8, she rises every morning at 4 a.m. "to get a few hours of studying in." In addition to self-discipline, Kristi credits her ability to combine law school with her family obligations to "a very supportive husband," and a deep awareness of the need that exists in the area of juvenile law and how she might help to fill that need: "I want to know how to use the law for the benefit of children and to explore those areas where their rights have not yet been defined or even recognized."

As the son and grandson of Philadelphia lawyers, Peter Stern '81 comes quite naturally to the study of law, that is, after a few detours along the way. Following graduate work in French history at Princeton, Peter taught in the Western Civilization program at Stanford, and later at the University of Santa Clara. He then left teaching to try his hand at a variety of jobs, including editing and working for the State Department. Though unsure at this point where his law school training will lead, Peter is fully enjoying the intellectual challenge of the first year: "Every aspect of it has been fascinating. It's like being in a candy store and helping yourself to all kinds of goodies." And, to add even further to his enjoyment of the first year, Peter won the Faerie Mallory Engle Prize for outstanding performance in the School's Client Counseling Competition. He shared the first-place prize with his teammate, Thomas Camp '79.

When Waymon Henry '81 first thought

"I want to know how to use the law for the benefit of children and to explore those areas where their rights have not yet been defined or even recognized."



"That first year, I kept thinking I was the biggest mistake the admissions committee had ever made, until I began talking to other people and found that they felt the same way."



about law school, he was a freshman in college. He didn't think about it again until fourteen years later when he graduated from San Jose State with a degree in accounting. During those fourteen years Waymon was involved in a variety of careers, beginning with five years of military service that included stints in Turkey, Spain, Italy, and Vietnam, where he was an interpreter. After finishing his military duty, he went to barber school and subsequently opened four barber-shops in Sunnyvale and San Jose. At the same time, he became interested in flying and obtained a commercial pilot's license, which led to several interesting jobs, including training commercial pilots in Mexico, transporting personnel and testing aircraft for NASA, and firefighting for the U.S. Forest Service.

A Native American, Waymon is actively involved in helping the School recruit Native American applicants. While his plans beyond law school are not yet definite, they do include obtaining a Master's degree in tax from NYU, and possibly a Ph.D. in philosophy.

Michael Singer '80 first articulated his own interest in law when he persuaded a close friend to apply to law school. Educated at Cambridge, Michael decided to become a professor of mathematics. After receiving his Ph.D. from King's College, London, Michael taught at universities in West Germany, Sweden, and Israel. He then came to the United States on a research fellowship from Ohio State. An interval teaching at Cal Tech introduced Michael to the charms of California, and after a year's sabbatical during which he wrote a book on computer organization and machine language, he made the decision to go to law school. When asked how he felt about the study of law, Michael enthusiastically replied, "It's fun. And that's the way it should be; scholarship should be fun." How Michael will use his legal training is not certain, but he is contemplating a career in international law. He is also contemplating writing another book. Since he has already finished a sequel to his computer book, he's considering one he's tentatively titled, *How To Think Like a Lawyer!*

Why Stanford?

In response to the question, "Why did you choose Stanford Law School?" the majority indicated that the small size of the student body and the opportunity for close student/faculty interaction were

the primary reasons. In some instances the student visited the School and observed some first-year classes before making his or her decision. Some of the women were personally contacted by members of the student organization, Women of Stanford Law, who talked informally about life at the School and provided information about child care facilities, housing, etc.

In general, most felt the School could do more to recruit older students once they are admitted, particularly by emphasizing what those interviewed perceive to be Stanford's most distinctive qualities: a superior faculty and a personal educational environment that promotes interaction between students and faculty.

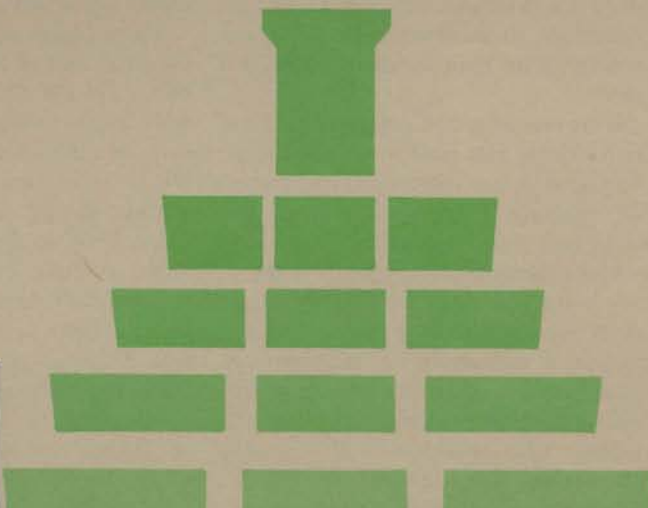
Hard Work But Worth It

For most of the students interviewed for this article, law school has proven to be more difficult and time-consuming than they had expected. Recalling his first months at the School, one student observed, "That first year, I kept thinking I was the biggest mistake the admissions committee had ever made, until I began talking to other people and found that they felt the same way."

Since most older students hold advanced degrees and many have extensive teaching experience, a common reaction to the study of law is one of surprise at how different it is from other academic disciplines. "After teaching for so many years," admitted one student, "I really didn't think going to law school would be that difficult, but I have found that I have had to develop new work habits and worry about exams, so there has been a lot more anxiety than I had anticipated."

Yet, despite the economic and personal sacrifices connected with the return to school, each student interviewed was confident that he or she had made the right decision. As one student explained it, "Sure, sometimes I get discouraged, but when I do, I think to myself, 'Wait a minute, you used to get discouraged then, too.'"

Whatever their reasons for coming to law school it is clear older students contribute a great deal in terms of enthusiasm, motivation, and diversity of experience. And just as their decision to study law has benefitted the Law School, their decision to practice law will doubtless greatly benefit the legal profession and the society it serves.



ON MY TEACHING

I am teaching differently this year. The impetus for change is a feeling which has grown over several years that something was lacking in my own teaching and perhaps in legal education more generally. At different times I have understood the problems to be intellectual or political or methodological or interpersonal. Right now I perceive them as a complex interweaving of all of these, and I'm not ready to untangle the strands. Nonetheless, I do have two notions which capture my concerns and objectives.

The first is that a legal education, besides imparting substantive knowledge and technical skills, should be centrally concerned with how lawyers can use their skills thoughtfully, morally, and humanely. This might be characterized as an education for "professional responsibility," but I don't mean learning the ABA Code. I mean an education that induces us continually to question our own values and those implicit in the legal system and to take personal responsibility for our professional conduct. (I talk about "us" rather than "you" here because I think the issues of professional responsibility are no less relevant to law teachers than to practitioners, and that in the process of helping you to educate yourselves I will also educate myself.)

Second, law school is a place where all of us—students, faculty, teaching fellows, and staff—spend a lot of time, and for this reason alone it should allow for

intrinsically fulfilling experiences and relationships. This is no less true for students, whose stay at the school is designedly transient, than for the rest of us. Three years—let alone the quarter of a lifetime you have been in school—is too long to subordinate the richness of being to a purely instrumental notion of becoming.

To give you a fuller idea of my concerns and how I am responding to them, let me describe my most vivid teaching experience this year—vivid because of its process and content, and also because it was new and I was scared. This was the first meeting of my Civil Procedure class last fall. I asked the students to divide into groups of three or four and introduce themselves. After a while I asked them to form new groups and invited them to share their feelings about being at Stanford. The students expressed feelings that ranged from great excitement to anticipatory boredom, ambivalence, and fear. Some were apprehensive that in learning to "think like lawyers" they would cease being whole persons. As one student put it, she feared that she might "lose her soul." Another feeling was also abroad in the room, although no one mentioned it to me until later in the term: some students were uncomfortable with the exercise—which certainly did not conform to the paradigm of a law school class.

My student's concern that she might lose her soul expresses one of my cen-

FACULTY OPINION

by Paul Brest

tral concerns as well. The modes of legal discourse invite us to put distance between "the law" and our own feelings and ideals—an invitation we are often eager to accept. There is a danger—I know there is because I have succumbed to it—that we become so attracted by the supposed rigor and objectivity of legal analysis that it dominates most aspects of our lives. In that first civil procedure class, several students who foresaw the danger disclosed their strategy for guarding against it. Beginning with law school, they would draw a boundary between their personal and professional lives.

I imagine that this preemptive move usually fails. First, we can't compartmentalize our lives so neatly. We cannot suppress our humanity at the office or in a classroom and just switch it back on when we come home at the end of the day. The way we treat our colleagues, clients, students, teachers, and others—including adversaries—in our "professional" roles affects our whole being. As if by analogue to Gresham's law, Mr. Hyde tends eventually to invade the personality of Dr. Jekyll.

Second, to the extent that we actually succeed in alienating ourselves from our work we cease to treat those we deal with as whole persons and lose sight of the moral dimensions of the work itself. Our feelings about a legal matter are not a substitute for analysis. But our analysis will surely be distorted if we cannot relate the issues it involves to our own values. Only in this way, I think, can we assume personal responsibility for our professional judgments and actions.

My teaching has begun to reflect these concerns. For example, the core of the Civil Procedure course was a simulated litigation problem in which class members handled a case from the initial client interviews through a hearing and negotiated settlement. The exercise was designed both to introduce a system of procedure and to allow the students to gain a base of personal experience for addressing issues of professional responsibility. After completing the six-week simulation, we spent almost two more weeks examining the conflicts that had arisen between the students' personal values and their roles as lawyers. The point was not that our own values are superior or inferior to professional norms, but that if we subject both to scrutiny we may discover where the Code embodies our own ideals and

where it is in tension with them; and this permits us to confront difficult moral choices rather than let them go by default.

In my second term Constitutional Law course I have also tried to integrate legal analysis with our subjective experiences. For example, class discussion of the *Bakke* case was preceded by an exercise in which the students, in groups of three, took turns assuming the roles of a minority applicant seeking preferential admission, a competing nonminority applicant, and a university official whom both attempted to persuade. I and the students who helped plan the exercise did not think that a few minutes of playing a role would significantly change perceptions that have evolved over twenty or more years. We did hope that it might jog us out of familiar mindsets, and it seemed to work to some extent.

I started out talking about the ways in which we distance ourselves from our work and, indeed, from ourselves. Many of us also tend to maintain distance from other participants in the life of the Law School—distance among and between students, faculty, teaching fellows, and staff. This manifests itself in various ways, such as a reluctance to expose our feelings, or even unpopular ideas, out of the fear of being ridiculed or rejected. For example, in Constitutional Law I have often been struck by the near unanimity of the class about social and moral issues that divide the rest of our society, such as affirmative action, the death penalty, and abortion. Who wants to be branded the class racist, sexist, or fascist by sticking his neck out?

A sense of trust and acceptance by others—and the concomitant sense of community—is a good in itself. It also facilitates a full and honest discussion of many of the difficult issues we encounter. It allows us to let down defenses, which is often a precondition for becoming open to ourselves. The introductory meeting of Civil Procedure was one of a number of ways that I tried to encourage the growth of mutual trust in our class. Throughout the term the course was structured to allow students to work cooperatively in different groups and settings. Many of us became more open and accepting than is typical within the Law School—with both edu-

cational and personal rewards.

The problem of distance is related to the allocation of authority and responsibility. Let me get at these issues somewhat indirectly by describing a phenomenon that particularly concerns me. After the first term, quite a few students stop putting energy into the Law School. "Laid back" is the current term for this antiwork ethic, but the phrase does not capture the frustration, anger, and anxiety that often accompanies it. There are lots of accusatory and self-justifying explanations for this endemic condition: So the students are lazy or anti-intellectual or expect law school to be all thrills when there's lots of hard work. Or the faculty doesn't care or is too academic or just plain boring. These partial and hostile visions obscure the truth and the possibility of solutions. To put it more bluntly, they are cop-outs—facile ways for all of us to avoid responsibility for the situation.

Having said this, I don't have a "true vision." I do have ideas about what might be done. I imagine that we would learn and feel better if authority and responsibility were more widely shared within the law school. Some of the authority that we, the faculty, exercise seems functional. And some seems inappropriate and counterproductive. The thoughtless exercise of authority tends to make us unresponsive and to contribute to your frustration and disaffection. It invites you to cede responsibility for choosing what you want the School to be. And it tends to expand the distance, not just between students and faculty, but among the students themselves.

We can begin to deal with these problems if we are explicit about our expectations of ourselves and each other, if we try to understand what underlies the other's different expectations, and if we are open to reconsidering our demands and behavior. To these ends, I started Constitutional Law this term by suggesting that we draft a constitution to govern the course. Although the exercise was attended by some discord (which I will mention below), it resulted in several useful practices. For example, I consult with a different group of students each week to get feedback on the preceding class sessions. We have also given up one class a week to allow students to engage in supervised independent study in small groups. The groups have formed around topics ranging from eminent domain to gay rights, and most students

are devoting at least as much time to these projects as they would to an ordinary class hour. The members of each group have decided to submit a joint paper which will count for one-third of their final grade.

In sum, I think there are compelling reasons mutually to address questions of authority and responsibility and to work toward removing barriers to openness and community within the Law School. Not only are the issues important in themselves, but the very process of mutual inquiry and decision could be a valuable part of an education for professional responsibility. For I imagine that the way in which we address, or avoid, these issues in one situation is how we tend to deal with them in most others. And I fear that a student who passes through law school disengaged from the experience is all the more likely to pass through each stage of her professional career in the same way—postponing the hard issues until she finally puts them out of mind altogether. Law school provides an important opportunity to choose what we shall be in the future by choosing what we are now.

Even if you agree with these aims you may doubt that they are realistic or that they can be achieved through legitimate means.

My experiences so far leave me cautiously optimistic. I have mentioned some of the year's more successful ventures, but I should disclose that almost every success has been mitigated by difficulties. For example, while many students found both the introductory meeting of Civil Procedure and the subsequent examination of personal and professional conflicts to be valuable experiences, others found them threatening or irrelevant. And although the Constitutional Law class constitution produced some good results, the "convention" itself was a disaster. About a third of the class opposed the exercise: Some said that they had previously participated in "experimental education" and found it a waste of time; others objected to their classmates exercising any power over them. We reached a compromise and proceeded. But I did not stay sufficiently aware of the students' anxieties or of my own authority. Moreover, some of the students were insensitive to each other and used their collective power so as to give substance to the opponents' concerns. I had hoped that we would gain some insights into constitutional

law, but I had not thought that we would experience so vividly the central constitutional problem of protecting minority rights in a majoritarian polity. The exercise brought to the surface and perhaps exacerbated negative feelings which we did not deal with productively.

Some of these difficulties resulted from my and my students' unfamiliarity with nontraditional modes of learning. Through trial and error I am discovering what works and what doesn't (and why), and how better to integrate personal values and subjective experiences with theoretical aspects of the curriculum.

There are more troubling problems, however, which implicate the very premises of my teaching. I sometimes wonder whether there isn't an inherent contradiction in trying to pursue some of my objectives in a law school. My recurring doubt is whether, without abusing my authority, I can engage you in a broader vision of what law school and legal education might be. For I offer a compound of discomforts. The distance mandated by conventional roles within the School, as elsewhere, is designed to avoid personal unease; the prospect of "unconventional" behavior produces anxiety. My introduction of subjective approaches to the law violates expectations about legal education, which are further frustrated when we examine our own "professional" relationships within the Law School. Most fundamentally, perhaps, some of our inquiries bring to consciousness suppressed doubts about our choice of a career in law. So, if against a background of rather clear contrary expectations and conventions, someone "accepts" my invitation to participate in these manifold discomforts, you may rightly ask in what sense the acceptance was free.

I have no ready answers. I believe, however, that I may legitimately seek to engage students in the ways I have described without violating their autonomy or the implicit contract between us, even though every step involves discomfort—providing that I stay responsive. The best way for me to stay responsive is to participate myself and to be at least as open as I invite you to be.

It is, of course, easier to recognize the need for safeguards than to implement

them. The size of even our smallest classes makes it difficult to be responsive to each student. More difficult yet is staying aware of my own purposes and exercising authority responsibly. My teaching has been more erratic this year than in some time. But on the whole I have taught better, and I am learning to be more sensitive to my students' needs while also demanding more of my classes than I have before. In short, I feel good about the year's experience—about myself and my students.

Throughout this essay I have suggested that if the experience of being in law school were intrinsically fulfilling the school's educational mission would be served as well. Let me conclude by making this connection more explicit and even stronger. We often talk about ourselves as "professionals" and as "people," as if each of us had a double identity. Sometimes this reflects my own sense of reality. Yet there is a deeper place where I—as teacher, lawyer, scholar, friend, husband, father—come together. To be aware of myself on this level is not easy. It is sometimes painful, because the awareness illuminates contradictions that aren't manifest when I regard myself merely in one role or another. Yet when I am there I sense a wholeness; my experiences and actions have coherence and feel authentic; and my understanding of myself, of you, and of the law is enriched. The other times seem cloudy and impoverished by comparison.

Earlier I said that something was lacking in my own teaching and in legal education more generally: I think it is this integration of the subjective and external aspects of our existence. My sense is that if we can touch and hold onto what is deepest within us, we will discover common ideals and more likely commit ourselves to work toward a just and humane society. This is itself an ideal, and sometimes it seems embarrassingly romantic. Increasingly it feels right to me. I don't want to impose this ideal on you, and I couldn't if I wanted to. But I do want the Law School to be a place where you are free to consider it for yourself and pursue it with me if you will.

This essay addresses the students of Stanford Law School. It appeared in the May 18, 1979 issue of the Stanford Law School Journal, the School newspaper.

Professor Brest has been a member of the faculty since 1969.

THE HAZARDOUS ROAD TOWARD A CONSTITUTIONAL CONVENTION

FACULTY OPINION

by Gerald Gunther

The current drive to call a constitutional convention to propose a balanced budget amendment raises important unresolved questions which have prompted me to do some reading and thinking and talking in recent weeks in the unaccustomed and refreshing realm of constitutional interpretation unguided (and unobscured) by judicial pronouncements.

A discussion of this issue should, I think, begin with the U.S. Constitution itself. Article V states:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . ."

In our nearly 200 years of constitutional existence, we have had only 26 amendments to our remarkably brief Constitution. All of them have been proposed through the first of the two methods provided by Article V: two-thirds of Congress has proposed the amendments, and they have been ratified by three-fourths of the states. The ongoing balanced budget campaign is a threat to use the other method: application by the legislatures of two-thirds of the states for a convention to propose amend-

ments, for ultimate ratification by the states.

The fact that we haven't used the convention route does not make it illegitimate, of course: it is there *in* the Constitution, and it is there to be used when appropriate. But it is an uncertain route because it *hasn't* been tried, because it raises a lot of questions, and because those questions haven't *begun* to be resolved. If 34 state legislatures deliberately and thoughtfully want to take this uncertain course, with adequate awareness and consideration of the risks ahead, so be it. But the ongoing campaign has in fact largely been an exercise in constitutional irresponsibility — constitutional roulette, or brinksmanship if you will, a stumbling toward a constitutional convention which more resembles blindman's buff than serious attention to deliberate revision of our basic law.

When California Governor Brown announced his support of the campaign at the beginning of this year, about two dozen state legislatures had already asked Congress to call a constitutional convention, yet the public was largely unaware that we were already well on the way towards a convention. Most astoundingly, the campaign had gotten that much support with the most remarkable inattention in those state legislatures to what they were really doing. I gather that not a single one of them had even held a committee hearing on the unresolved questions of Article V. Typically, the debates in the state legislatures were brief and perfunctory—essentially up-and-down votes on whether one was for or against a balanced budget. Yet what was adopted, typically,

was a resolution which said that, unless Congress submitted a balanced budget amendment of its own, the state was applying under Article V for a constitutional convention. I think it is fair to say that the questions of what such a convention might do, and especially whether such a convention could and would be limited to the balanced budget issue, were simply ignored.

When Governor Brown joined the campaign in January, the public began to take it more seriously. In February, a committee of the California Assembly became the first state legislative body to hold formal hearings on what this convention process really might look like. California rejected the convention proposal after those hearings. A good many people then assumed that the drive was dead. But it continues: only last week, the lower house of the New Hampshire legislature came on board, and New Hampshire will very probably become the 30th state to ask for a convention. And the issue is pending in several other legislatures now in session. If four more states join the campaign, I suppose everyone will become aware that a truly major constitutional issue confronts us, for Congress will then have to decide whether 34 valid applications are on hand; and if there are, Congress will be under a *duty* to call a convention—a convention for which there are no guidelines regarding what its scope shall be, how the delegates are to be selected, how long it shall meet, and so forth.

One way of looking at the problems the convention route poses is to examine the assurances by the advocates of the balanced budget amendment—assurances that the convention process won't get out of hand. In my view there is no adequate basis for those assurances, and certainly not for the confidence with which they are presented. I believe that the convention route promises uncertainty, controversy, and divisiveness at every turn. With respect to the central constitutional question—whether a constitutional convention could and would be limited to a single subject—I am convinced that there is a serious risk that it would not in fact be so limited.

I perceive three major recurrent themes in those assurances. First, we are promised that a constitutional convention is not likely to come about, since the real aim of this drive is to spur Congress into proposing a balanced budget amendment of its own. That claim seems to me the

simplest to challenge: I take it that if the movement is to be a threat to induce congressional action, it needs to be a credible threat. I take it, too, that one does not adequately answer questions about the lethal nature of a weapon by responding that the weapon will never be used if the other side surrenders. Moreover, one of the very few issues about the convention route on which there is full agreement among constitutional scholars is that, once proper applications for a convention are before Congress, Congress is under a *duty* to call a convention and does not have a legitimate discretion to ignore the applications. In short, a strategy that rests on the threat of a convention must surely take account of the possibility that a convention will actually convene.

Second, we are assured that any constitutional convention would be limited to the subject matter of the state applications. That is, of course, the central constitutional problem, and it raises a number of questions for which there are no authoritative answers. I will touch on just a few of the issues that raise doubt about the possibility of truly limiting a convention.

Let me begin by recalling the various steps spelled out for the convention route in Article V of the Constitution. The first step is "the Application of the Legislatures of two thirds of the several States" for a convention. After proper "Applications" are received, Congress, as the second step, "shall call a Convention for proposing Amendments." (Note that Congress "shall" call a convention, and that, in this context, "shall" surely means "must." And what is "called" is a "Convention for proposing Amendments," in the plural.) Then, as the third step, the convention meets. After the convention reports its proposed amendments to Congress, Congress is called upon to take the fourth step: to choose the "Mode of Ratification"—ratification either by the "Legislatures of three fourths of the several States" or by ratifying conventions in three-fourths of the states. The fifth and final step is the actual consideration of ratification by the states.

Now, with respect to the first step, there are some scholars who believe that the only valid "Application" is one calling for a general, unlimited convention.

A larger number of scholars believe that some limited applications could be considered valid—so long as they are not so narrowly circumscribed as to deprive the convention of a real opportunity to deliberate, to debate alternatives, and to compromise among measures. I do not know of *any* scholar who believes that a very specific application—e.g., to vote up or down on the text of a particular amendment—is the kind of "Application" contemplated by Article V. The typical amendment proposals adopted by the states so far strike me as quite specific; I accordingly think that it is questionable that they are proper "Applications" in the Article V sense.

But the uncertainty about what constitutes a proper "Application" is only a preliminary phase of the problem. The main difficulties lie in what Congress could and would do, and what a constitutional convention could and would do. First, as to Congress, in the second step of the convention route: If Congress adopted the position that only unlimited applications are proper, it could simply ignore the limited ones and the process would stop right there, at least for now. Or, Congress, still acting on the belief that all conventions had to be general ones, might disregard the specification of the subject matter in the applications as surplusage and issue a call for a general convention.

I suspect that Congress would adopt neither one of those alternatives. I think that Congress would first of all turn to the question of whether the applications at hand were valid ones. They are not identical in text. They are not all properly addressed to the proper recipient in Washington, according to some members of Congress. They typically contain conditions—for example, that the applications for a convention are to be considered only if Congress fails to act, and that they are to be viewed only as applications for a convention with limited scope. Some have suggested that the judiciary committees of Congress should hold hearings narrowly limited to the question of the validity of the applications. If those plans materialize, we may see a process in which members of Congress find flaws in most of the applications submitted. I certainly hope that the judiciary committees do not take that route: What could do more to reinforce the feelings of distrust and lack of confidence in Washington that underlie the balanced budget campaign in the first

place than to have Congress strike, one by one, the applications before it, on various technicalities?

I suppose that the most probable action by Congress if 34 applications are adopted (and if Congress doesn't propose an amendment of its own) is this: Congress would attempt to heed the limited concern that stirred the applications and call a convention purported to be confined enough to still the qualms about excessively narrow conventions.

Congress thus might call a convention purported to be limited to the issue of fiscal responsibility—a convention which could, for example, consider the spending amendment supported by Milton Friedman as well as the balanced budget proposal supported by Governor Brown. And if Congress took that route, it would presumably enact (at last) some legislation which would set up the machinery for a convention—legislation similar to that proposed by Senator Sam Ervin a decade ago.

But all that takes us only through the first two steps of the convention route. The uncertainties at those stages are grave enough, but they are as nothing compared to what confronts us at the all-important third stage, the convention itself. Even if Congress were satisfied that the quite specific balanced budget applications constituted valid "Applications," and even if Congress were satisfied that it had the power to confine a convention to the subject matter it defined (both debatable assumptions), that would not resolve the question of what might take place at the convention itself.

The convention delegates would gather after popular elections—elections where the platforms and debates would be outside of congressional control, where some interest groups would probably seek to raise issues other than the budget, and where some successful candidate would no doubt respond to those pressures. Those convention delegates could legitimately speak as representatives of the people, elected after the most recent nationwide elections. And the delegates could make a quite plausible case, on the basis of the historical data and the commentaries, that a convention is entitled to set its own agenda. Convention delegates, noting that they were the first convention we have had in nearly 200 years, could make a respectable argument that the limitations in the "Applications" and the limitations in the congressional "call" were to be taken as

a moral exhortation to the convention delegates, but not as binding restrictions on the convention's discussion. They could argue that they were charged with considering all those constitutional issues perceived as of major concern to the American people who elected them. And, acting on those premises, the convention might well propose a number of amendments—amendments addressing not only fiscal responsibility but also such issues as nuclear power or abortion or women's rights or defense spending or mandatory health insurance or school prayers.

True, if the convention were to report proposals such as those to Congress for submission to the ratification process, the argument would of course be made that the convention had gone beyond the bounds set by Congress. And I have heard it said recently that Congress would easily invalidate the efforts of any such "runaway" convention: all that Congress would have to do would be to "simply ignore" the proposed amendments on issues exceeding the limits. I do not doubt that Congress could make a plausible constitutional case for refusing to submit the convention's "unauthorized" proposals to ratification. But any such congressional veto effort would, I believe, run into substantial constitutional counterarguments and equally substantial political restraints.

Consider the possible context—the legal and political dynamics—in which congressional consideration of a veto of the convention's efforts would arise. The delegates elected to serve at "a Convention for proposing Amendments" (in the words of Article V) could surely make a plausible constitutional argument that they acted with justification, despite the congressional effort to impose a limit. They could make even more powerful arguments that a congressional refusal to submit the proposed amendments to ratification would thwart the opportunity of the people to be heard through the ratification process. In the face of such arguments, might not Congress find it impolitic to refuse to submit the convention's proposals to ratification? Indeed, one of the "safeguards" heralded by advocates of the convention route—the requirement of ratification by three-fourths of the states—could well become the instrument which would quell any congressional inclination to

bury any so-called "unauthorized" proposals by the convention. I suggest, then, that it is not at all inconceivable that Congress—despite its initial belief that it could impose limits in the convention, and despite its effort to impose limits—would find it to be the course of least resistance after a convention had met to submit all of the proposals emanating from a convention of delegates elected by the people to the ratification process, where the people would have another say.

I am not reassured by the argument sometimes heard that if Congress attempted to submit such allegedly "unauthorized" proposals to the ratification process, a lawsuit would stop the effort in its tracks. There is a real question as to whether the courts would consider this an area in which they could intervene: other aspects of the amendment process have been held by the courts to raise nonjusticiable questions. And, even if the courts decided to rule, there is the additional question of whether they would agree with the constitutional challenge. In any event, the prospect of such a lawsuit simply adds to the potential confrontations along the convention road—this, a confrontation between Court and Congress, to go with the possible other confrontations between Congress and the convention, and Congress and the states, and perhaps the Supreme Court and the states.

That brings me to the third reassurance about the low-risk nature of the convention route. We are told that even if the convention were to become a "runaway" convention (as the one in 1787, of course, was) and even if it were to propose amendments going beyond the budget issue, those proposals would never become part of the Constitution because three-fourths of the states would never ratify them.

I think there is a fatal flaw in that argument as well. It assumes that a convention would either limit itself to a narrow subject or "run amok" in the sense of making wild-eyed proposals lacking any substantial support in the country. But that overlooks a large part of the spectrum in between. Can there really be confidence that there are no issues of constitutional dimensions other than a balanced budget that could conceivably elicit the support of the convention delegates, and, ultimately, the requisite support in three-fourths of the states? (I might add that support in three-

fourths of the states may reflect approval of less than half of our population.)

True, it can be argued that one should not worry about a method of producing constitutional amendments if three-fourths of the states are ultimately prepared to ratify. But I am concerned about the *process*—a process in which serious focus on a broad range of possible constitutional amendments does not emerge until quite late in the process, not until some time in the convention and ratification stages. Is it really deliberate, conscientious constitution-making to add potentially major amendments through a process that begins with a narrow, single-issue focus and inattention and ignorance, that does not expand to a broader focus until the campaigns for electing convention delegates are under way, and that does not mushroom into broad constitutional revision until the convention and ratification stages?

I confess that it is a good deal easier to challenge the reassurances of the proponents of the convention route than to arrive at my own understanding of how the process should work. I have examined the relevant materials with care, but neither I nor anyone else can make absolutely confident assertions about what the convention process was intended to look like. My own best judgment is that "Applications" from the states can be limited in subject matter, so long as they are not too specific. I believe, moreover, that Congress can specify the subject for discussion at the convention in its "call." But I also believe that such a specification should be viewed as essentially a moral exhortation to the convention and as largely an informational device, telling the convention delegates what issues prompted the initiation of the convention process. Most important, I do not think that the convention can be effectively limited to that subject, by Congress or by the courts; instead, I think that if a convention chooses to pursue a broader agenda, it has a persuasive claim to have its proposals submitted to ratification.

Now, that understanding can be attacked as making the convention route terribly difficult to use, because single issue applications may mushroom into multi-issue convention proposals. The understanding can be attacked, moreover, as construing the state-initiated amendment route as different from (as well as more difficult than) the traditionally used congressionally-initiated

amendment process. I think those criticisms overlook important historical lessons. It is true that the 1787 convention deliberately gave the states an opportunity to initiate the amendment process. It is not true, however, that the 1787 convention made the state-initiated process parallel or nearly identical to the congressionally-initiated one. The records of the 1787 convention are really quite illuminating on this: the convention did *not* accept a proposal by James Madison to make two-thirds of the states co-equal with Congress in proposing amendments; instead, it limited the states' initiative to one of *applying* for a *convention*, and it inserted the *convention* as the institution that would undertake the actual proposing. That convention step inevitably makes the state-initiated route a different, not a synonymous or even closely parallel alternative.

What I think the Framers had in mind was that the states should have an opportunity to initiate revisions of the Constitution if Congress became wholly unresponsive and tyrannical. But that was viewed as a last resort opportunity, for truly major constitutional crises. The notion of a convention most familiar to the Framers in 1787 was precisely the kind of convention they were then attending in Philadelphia—one that undertook a major overhaul of an unsatisfactory basic document. That does not mean that any convention called under Article V must be as far-reaching as the one in 1787. But I believe that the convention contemplated was one that considered *all* major constitutional issues of concern to the country. True, if the balanced budget were the only major issue of concern today, a single issue balanced budget convention might be entirely feasible. But the actual, unavoidable problem today is that there *are* other constitutional issues of concern; and if they are of concern, in my view the convention may consider them.

Still relying on what data we have about the Framers' intent, I might add that a congressional claim to play a major role in setting the agenda of the convention is especially questionable. If the state-initiated alternative was designed for anything, it was designed to *minimize* the role of Congress. Congress has only two responsibilities under Article V, and I think properly construed

they are extremely narrow responsibilities. First, Congress must call the convention when 34 valid applications are at hand (and it is of course a necessary part of that task to consider the validity of the applications and to set up the machinery for selecting delegates and organizing the convention). Second, Congress has the responsibility for choosing a method of ratification once the convention submits proposals. I think that is *all* that Congress can properly do; and I think that seriously undercuts the claims (based on *McCulloch v. Maryland* and the broad discretionary powers of Congress that we are used to in other circumstances) that Congress has the power to set time limits and require oaths of delegates and govern the scope of the deliberations at the convention.


That is my best judgment about the convention process; but, as I said, it is by no means an authoritative one, no more so than that of anyone else who has made an effort to make sense of Article V. The ultimate reality is that there are many questions, many uncertainties, and no authoritative answers.

Let me conclude with this: If the nation, with open eyes and after more careful attention than we have so far had in most state legislatures, considers a balanced budget amendment so important as to justify the risks of the convention route, that path ought to be taken; but surely it ought not to be taken without the most serious consideration of the foggy, treacherous road ahead. It is a road that promises controversy and confusion and confrontation at every turn. It is a road that may lead to a general convention able to consider a wide range of constitutional controversies. My major concern in all this is simply to argue that as we proceed along this road, we should comprehend the full dimensions of the risks ahead. It is that conviction which leads me to urge that state legislatures not endorse the balanced budget-constitutional convention campaign on the basis of overconfident answers to unanswered and unanswerable questions, or of blithe statements that inadvertently or intentionally blind us to the genuine hazards.

Professor Gunther delivered these remarks at the 21st annual meeting of the Stanford Law School Board of Visitors, held on April 26 and 27 at the School.

Mr. Gunther is William Nelson Cromwell Professor of Law.

ON THE DEVITT COMMITTEE RECOMMENDATIONS



FACULTY OPINION

by Charles J. Meyers

The Devitt Committee has made ten recommendations, but I address myself to three only—numbers 1, 5, and 6—which are the ones that would have the greatest impact on legal education. If the first recommendation is adopted, students who wish to be admitted to the federal bar must have four trial experiences, two of which must be actual trials and two of which may be simulated trials. Recommendation 5 specifically proposes a student practice rule which would allow second- and third-year law students to satisfy part of the requirement by participating in actual cases while in law school; Recommendation 6 would allow law students to satisfy another part of the requirement by participating in simulated trials in law school. The effect of the three recommendations, taken together, would be to increase greatly the demand for trial advocacy instruction in law schools.

I shall direct most of my remarks to the costs that these recommendations would impose on law schools in general and on Stanford Law School in particular. But before doing so, I should like to

make several preliminary observations.

First, I do not deny that bench and bar should be concerned with the quality of trial advocacy; they, therefore, are properly concerned with legal education. Second, I have no doubt that, with adequate resources, law schools could produce better advocates. I would note, however, that the demands on lawyers today, and those demands are ever increasing, go far beyond trial advocacy. A well-trained law graduate should know basic economics and its application to law; should know statistics and quantitative methodology, including some decision theory and optimization modeling; and should, of course, have some familiarity with such proliferating new fields of law as environmental law, federal regulatory law, welfare law, and other subjects too numerous to mention here. Any licensing requirement that emphasizes one area of training over another tends to allocate resources to the required subject area and hence reduces the resources available for other areas of study. I would therefore urge you to consider with great care and particularity the need to impose a licensing re-

quirement on law students in order to remedy the perceived problem of inadequate trial advocacy, when other demands on legal education are growing and resources are static if not declining.

I turn now to the question of costs. I believe that the figures I am about to give you demonstrate a genuine commitment on the part of Stanford Law School to improve the education of our students in trial advocacy. We now have the capacity to give 60 students—about one-third of the graduating class—six semester hours of trial advocacy instruction. Six semester hours would ordinarily permit the students to engage in two trial experiences—either actual trials, usually in juvenile court, or simulated trials. We are working very hard to extend the benefits of that education to more students. For example, in academic year 1969-70 we had one course in trial advocacy. Ten years later, in 1978-79, we have seven. In 1969-70 we devoted about one-third of one professor's time to the subject. We now allocate the equivalent of the full time of nearly four professors to training in trial advocacy. That represents about a twelve-fold increase in the resources allocated to this kind of training. Moreover, I am now seeking to raise \$250,000 to fund a major project, to be headed by Professor Anthony G. Amsterdam, to develop clinical teaching materials for use by teachers not specializing in trial advocacy, so that more students, not only at Stanford but in other law schools, can have the benefit of training in these skills. Stanford Law School has done this of its own volition and with its own funds; we have received no support from such organizations as the Council on Legal Education for Professional Responsibility. And I wish to emphasize that we have proceeded cautiously and experimentally, for we refuse to reduce quality in this portion of our educational program. But innovation with quality will end if the Devitt Committee recommendations are implemented. Our students will demand at least two and probably four trial experiences while still in school. That demand cannot be met at the level of quality that now characterizes our trial advocacy courses. The reason is found in the costs of first-rate trial advocacy instruction.

Our studies show that the average direct cost of trial advocacy instruction at Stanford Law School last fall was about \$7,800 per semester hour. (By di-

rect cost I mean faculty salaries and other direct instructional charges; the cost of administrative support and overhead is not included.) The comparable figure for conventional instruction was about \$5,000. The difference, \$2,800, which represents a 56% increase in costs; is explained by three facts:

(1) Trial advocacy instruction takes more professorial time;

(2) Effective trial advocacy instruction requires limited class enrollment. Conventional classes at Stanford Law School have an average enrollment of 40; trial advocacy classes of 16;

(3) The hardware is expensive; videotape recording costs are \$20 an hour; hour-length tapes cost \$25 each.

If we assume that all Stanford Law School students will desire to qualify for admission to the federal bar upon graduation, that would mean that 165 students per year, on the average, would desire trial advocacy instruction. Let us further assume that the School attempts to satisfy only two of the four trial requirements—the two simulated trial experiences. If we try to give these students the same kind of trial advocacy training that we are now offering, we would divide them into 11 groups of about 15 students each. In general, we find that only one full trial can be conducted in a three-hour course. Thus to accommodate 165 students in two trial experiences, Stanford Law School would have to offer twenty-two courses—or sixty-six semester hours—of trial advocacy instruction. Since we now offer about 24 hours each year, the additional offering would be 42 hours. Multiply 42 semester hours times the hourly cost of trial advocacy instruction—\$7,800—and the additional cost to the School is \$327,600 per year. Part of the new cost could conceivably be absorbed by shifting some faculty resources from conventional teaching to trial advocacy instruction, but law professors are not fungible and in any event we would be most hesitant to take that step because of its debilitating effect on the remainder of the academic program. Obviously the assumptions may vary—perhaps only half our students will want to qualify for the federal bar. The more likely variation is that most of our students will want all four trial experiences while in law school. Certainly Recommendations 5

and 6 encourage them in that desire.

Stanford Law School cannot afford those incremental costs. Nor can other law schools, either public or private. If we should require the 165 students taking the trial advocacy courses to pay the additional costs themselves, the tuition for each of them would increase, using the conservative additional cost figure of \$327,000, by \$2,000 per year. If the cost were spread over the entire student body, the tuition increase would be about \$655 per year.

There being no source of money for these added costs—not from endowments, not from the legislature, not from the bar—not even from the Judicial Conference of the United States—other solutions must be found. The most likely is large classes in which the students sit passively as they observe a videotape of a trial, while an instructor points out what someone else is doing. I'm sure that this kind of instruction won't hurt the students, but we do not regard it as good education at Stanford, and I wonder if it is an appropriate remedy for the problem perceived—assuming there is a problem. Additional instruction in trial advocacy to reach all students—even in large classes—will add incremental costs which I fear will take away from the innovative efforts now underway at Stanford and elsewhere to give the students truly meaningful instruction in trial advocacy. I also fear that trial advocacy instruction will capture a disproportionate share of law school resources, to the detriment of the development of other fields of law equally important to the practitioner and society. It would be unfortunate if we should look back on the Devitt Committee report twenty years from now to discover that implementing its recommendations had weakened the profession overall because lawyers had not been adequately trained to deal with problems other than conducting trials.

Dean Meyers made these remarks to a panel of the Devitt Committee at a hearing held on April 5 in San Francisco. The panel consisted of Judge Charles B. Renfrew, U.S. District Court for the Northern District of California; Judge J. Clifford Wallace, U.S. Court of Appeals, Ninth Circuit; Judge Sherman G. Fine-silver, U.S. District Court for Colorado; and Gordon Gee, Associate Dean, J. Reuben Clark Law School, Brigham Young University.



Unique Courses in International Law Add New Dimensions to the Curriculum

With the support of the Andrew Norman Fund for Innovations in Legal Education, the School has expanded significantly its work in the area of international law, as evidenced by two highly innovative courses, *Law in Radically Different Cultures* and *Arms Control*.

Law in Radically Different Cultures

In the early Seventies, a few faculty members, troubled by the notion that most comparative law courses deal only with legal systems within the Western tradition, began to develop a course that focused on legal systems in "radically different cultures."

The course became a reality last fall when Professors John Barton, Victor Li, and John Henry Merryman of the Law School, and Professor James Gibbs of the Department of Anthropology offered a course entitled, *Law in Radically Different Cultures*.

The central objective of the course was to explore the questions: *What do legal systems look like in radically different cultures? Is it possible to identify legal constants running through such societies? . . . What kinds of social differences are correlated with significant differences in legal systems?*

The course was characterized as a research seminar in which students were invited to join the professors in "thinking through these questions and developing

materials for a new course."

Using American law as the benchmark, the seminar examined the law of the Peoples Republic of China (Eastern law), the Arab Republic of Egypt (religious law), and the Republic of Botswana (traditional law). Four basic issues were chosen for comparative study: an inheritance problem to examine the passing on of status and property rights; a breach of contract problem to look at the handling of promises and contracts; an embezzlement problem to examine the treatment of anti-social or "criminal" behavior; and a family planning decision-making problem to examine the role of legal institutions in effecting social change.

Each of the students in the seminar was assigned to study one problem in one country. Meeting in both culture groups and problem groups, the students researched their particular problem and drafted materials which formed the basis for the new teaching materials for the course.

In the spring, the seminar held a closed working conference to which several experts, including Islamic law specialists, a sociologist specializing in China, and a legal anthropologist specializing in African culture, were invited to review the materials and offer suggestions for improving the course.

Rikki Quintana '80, a participant in the seminar, who also worked as a research assistant during the spring term, praised the course for its interdisciplinary approach, which she felt enabled the students to study the role of a legal system *within* each society, rather than merely as an entity unto itself: "We also found that what constitutes a legal issue differs from culture to culture. Moreover, the course provided a unique opportunity to look at the American legal system from a *foreign* perspective, and thus allowed us to

make a more critical evaluation of it."

This summer the four faculty members, along with a research assistant, will refine the materials further for use in the fall, when the course will be offered again. This time it will be designed for a much larger group of students and will be open to graduate students outside the Law School, as well as upperclass undergraduates.

A casebook for the course is planned for 1981.

Arms Control

Although Professor John Barton has taught a seminar on Arms Control several times, examining the legal institutions that shape and restrict the use of armed force, in the 1978 course description he wrote, "Tentatively, the 1978 seminar will be a group research project focusing either on international arrangements for the nuclear industry or on the role of the United Nations in arms control."

What Professor Barton envisioned for the course, and what actually transpired, represents an important innovation in teaching, one that emphasized a new depth in interaction among students, and between students and experts.

The course brought students face to face with experts from the University, the nuclear industry, and government, as they examined current controls on nuclear materials to determine whether more effective controls could be developed.

"Each student," according to Professor Barton, "became an expert on part of the problem. One student set herself the task of becoming an expert in the buying and selling of fuel for nuclear power purposes.

"A second steeped himself in methods of processing that ore.

"A third devoted himself to the security problems involved."

Out of their investigations evolved a proposal calling for the



establishment of a new international organization, "International Nuclear Fuel Authority (INFA)," to control the allocation of nuclear fuel, waste disposal and reprocessing. The proposal has been set forth in a 96-page book, *Evaluation of an Integrated International Nuclear Fuel Authority*, recently published by the Stanford Institute for Energy Studies.

Calling themselves the Stanford Law School International Nuclear Fuel Cycle Working Group, the twelve student authors point out that the primary objective of INFA would be to reduce the probability of nuclear weapons being used by nations or "subnational entities." To accomplish this end, the organization "would have control over uranium ore supplies, enrichment, fuel fabrication and reprocessing facilities, research and development, transportation, and waste disposal. . . .

"In return for relinquishing national control over fuel cycle activities, members of INFA would obtain assurance of a continuous supply of nuclear fuel for their electrical generating plants.

"Membership would be open to all nations, and sanctions would be applied only upon violations of agreed-upon standards."

The book has been circulated to experts who were involved in the seminar, many of whom are in Washington, and it is the hope of the authors that it will encourage serious discussion and perhaps provide a model for the evaluation of urgently needed reforms within the international nuclear fuel system.

The course represents the first attempt to integrate clinical components into the study of international law. It brought together twelve students with diverse perspectives and gave them the job of finding a common solution to a complicated problem. The students divided the problem into its component parts, thoroughly re-

searched each part, met with experts from the nuclear industry and the non-proliferation field, negotiated points of difference, and prepared and integrated successive drafts to arrive at the final proposal.

Student reaction to the seminar has been very positive. As one participant, Jon Schwartz '79, points out: "The course provided an opportunity for students to work closely together toward a common goal—something traditional law courses can't provide. And the emphasis on writing and editing helped develop our writing skills. Moreover, the course taught us that there are unresolved problems that even professors don't know the answers to!"

For Professor Barton, the seminar was "the course I have most enjoyed teaching." He is hoping to use the basic format of the seminar to teach a second course. Among the topics he is considering are U.S. conventional arms legislation and international commodity arrangements.

Evaluation of an Integrated International Nuclear Fuel Authority is available upon request from Publication Distribution, Stanford Institute for Energy Studies, 500 A, Stanford, CA 94305. The cost is \$4.00, including tax, postage, and handling.

Journal Wins ABA Division Competition

The *Stanford Law School Journal* has won first place in the ninth circuit division of the national law school newspaper competition sponsored by the Law Student Division of the American Bar Association.

The competition is held annually to recognize the outstanding efforts of law school journalists. All law school newspapers that are

sponsored or published by student bar associations or other law school groups of ABA-approved law schools are eligible. There are seventeen eligible law schools in the ninth circuit division, which includes California, Nevada and Hawaii.

Judges for this year's competition included Ron Copperud, Professor of Journalism at USC and faculty advisor to USC's newspaper, *The Daily Trojan*; MaryAnn Galante, news and copy editor for *The Daily Journal*, one of Los Angeles' two legal newspapers; and Matthew St. George, ABA/LSD governor for the ninth circuit.

The *Journal* will now be entered in the national finals to be held in August during the annual meeting of the ABA in Dallas.

Editor-in-chief of the *Journal* for 1978-79 was Jeff Klein '80.

Faculty Increases By Four

Dean Charles J. Meyers has announced four new appointments to the faculty. They are Ronald J. Gilson, a San Francisco attorney; Thomas C. Heller, Associate Professor of Law at the University of Wisconsin; A. Mitchell Polinsky, Assistant Professor of Economics and Law at Harvard Law School; and Deborah L. Rhode, a 1977 graduate of Yale Law School.



Associate Professor Ronald J. Gilson is a graduate of Washington University, St. Louis, (A.B., *summa cum laude*, 1968) and Yale (J.D., 1971), where he was

note and comment editor of the *Yale Law Journal*. Following law school he served as law clerk to the Honorable David L. Bazelon,



Chief Judge, U.S. Court of Appeals, D.C. Circuit. In 1972 he joined the San Francisco firm of Steinhart, Goldberg, Feigenbaum & Ladar, where he specialized in corporate and securities law. He became a partner in the firm in 1978. During 1976 Mr. Gilson was a lecturer at Boalt Hall. In 1977 he was a visiting lecturer at the University of Michigan Law School. He has also been a lecturer for CEB in San Francisco and the Practicing Law Institute in Los Angeles.

During the 1979 spring term, Professor Gilson taught a seminar in the regulation of tender offers at the School. He also will teach corporations, business planning, and securities regulation during 1979-80.



Associate Professor Thomas C. Heller, who visited at the School during the 1978-79 academic year, received an A.B. (1965) from Princeton and an LL.B. (1968) from

Yale. Between 1968 and 1970 he was a fellow at the International Legal Center in Bogota, Columbia. He then returned to Yale as a Fellow in Law and Modernization. In 1971 he joined the law faculty at the University of Wisconsin. He was a visiting professor at the University of Miami Law School and its Center for Law and Economics in 1977-78.

He has been a member of the Institute of Environmental Studies, and a fellow of the Poverty Research Institute at the University of Wisconsin. From September 1976 to September 1977, he served as co-director of the Center for Public Representation, a public interest law firm, in Madison. At present, he is an associate of the Institute for Social and Policy Studies at Yale University.

While Professor Heller's teach-

ing expertise is in taxation, his scholarly interests center on legal theory. He is currently at work on a book, *Reading Easy Cases*, which draws on anthropology and structuralist-linguistic methods to demonstrate that easy cases, to which we refer to make sense of our legal order, do not, in fact, exist.



A. Mitchell Polinsky, who will hold a joint appointment as professor of law and associate professor of economics, received an A.B., *magna cum laude* with

highest honors in economics in 1970 from Harvard; a Ph.D. in economics from MIT in 1973; and an M.S.L. (Master of Studies in Law) from Yale in 1976. Since 1973 he has been an assistant professor of economics at Harvard in the Economics Department; while on leave from 1975 to 1977, he was a Russell Sage Foundation resident in Law and Social Science, spending 1975-76 at Yale Law School and 1976-77 at Harvard Law School. From 1977 until coming to Stanford, he also held a joint appointment as assistant professor of economics and law at Harvard Law School.

He is currently a member of The Urban Institute's Committee on Urban Public Economics and of the executive committee of the International Seminar in Public Economics. He is also a research associate in the Law and Economics Program of the National Bureau of Economic Research, and a principal investigator under a grant awarded by the National Science Foundation.

In the Law School, where he will spend most of his time, Professor Polinsky will offer introductory and advanced courses in law and economics and be a resource for faculty members who

are interested in the applicability of economics to their courses and research. In addition to offering instruction on economic foundations of law in the Economics Department, it is expected that Professor Polinsky will actively promote interest in law and economics by offering seminars and workshops for faculty members and graduate students in subjects of interest to the two disciplines.



Assistant Professor Deborah L. Rhode received a B.A., *summa cum laude* in political science in 1974, and a J.D. in 1977 from Yale, where she was editor of the

Yale Law Journal. In 1977-78 she served as law clerk to Judge Murray Gurfein, U.S. Court of Appeals, Second Circuit; during 1978-79 she was law clerk to Mr. Justice Marshall of the Supreme Court of the United States. Ms. Rhode will teach courses in contracts, the legal profession, and professional responsibility.

Moot Court Finals Held

The final round of the 27th Annual Marion Rice Kirkwood Moot Court Competition was held on April 6 in Kresge Auditorium. Sitting as the United States Supreme Court were Judge Shirley M. Hufstедler '49 and Judge Jo-



Cory Streisinger



Alan Pletter



seph T. Sneed, both of the U.S. Court of Appeals, Ninth Circuit, and Judge Charles B. Renfrew of the U.S. District Court, Northern District of California.

The two teams of finalists argued the case of *California Athletic Association, et al. v. Betty King, et al.*, which dealt with the scope of the prohibition of sex discrimination of Title IX and the Equal Protection Clause when applied to high school athletics.

Top honors went to the team of Alan Pfeffer '80 and Cory Streisinger '80, who was also selected as "Best Advocate." The other finalists were Ronald Beck '80 and Cynthia Lewis '80, who went on to represent the School in the Roger Traynor state competition.

Traynor Competition

Two weeks later, on April 20 and 21, the School hosted the annual Roger Traynor Moot Court Competition, the nation's largest statewide moot court competition. This year twenty-one law schools competed in two days of elimination rounds, with the University of Santa Clara taking first place.

Several Stanford alumni/ae participated as judges in the preliminary, quarter-final and semi-final rounds, including Debra S. Belaga '78, James T. Danaher '58, Marjorie W. Evans '72, Robin D. Faisant '58, F. Kinsey Haffner '74, Gerald Z. Marer '63, John McBride '64, W. Robert Morgan, '48, Archie S. Robinson '63, Paul C. Valentine '61, and Richard J. Wylie '58.

Pamela Prickett '79, president of the Stanford Moot Court Board for 1978-79, coordinated both competitions.

Placement Update

Computerization has finally come to the Placement Office and the anticipated result is increased

efficiency in the student sign-up process, in the assignment of students to interview slots, and in the clerical effort expended by members of the placement staff.

However, the employers should not expect the system to alter in any way their contacts with the students or placement staff. In fact, Gloria Pyszka, director of placement, says, "We hope that the computerization will give us the best of both worlds in continued, personal attention to employer needs and in time savings for ourselves and the students."

This fall, the program will have its first real test when the computer will assign interview slots for all scheduled employers. The total number of interviews is expected to number around 7,000.

The computer will take the names of the employers whom each student wishes to interview, the student's class schedule, and information supplied by the employer. It will then print out two or more end-products, including a listing by employer of all students signed up to interview and a listing for each student for a two-week period of each employer with time and date of interviews, plus a listing of employers for that period who still have available interviewing slots on their schedules.

Last fall, 434 employers visited the School to interview second-year students for summer clerkships and third-year students for permanent positions. Ms. Pyszka estimates that 2,800 student hours were saved in the computerization of part of the process last fall, and even more hours will be saved with the second step of the process computerized for the coming fall.

With the sharp rise in the number of employers visiting the campus (434 in 1978, compared to 265 in 1975), a necessary but troublesome result has been a significant rise in class interrup-

tions and absences by students as they interview with the visiting employers. Several options aimed at offsetting the class/interview conflict are currently under consideration at the School, including the use of Saturdays for interviewing, scheduling interviews earlier and later each day, and starting the interview season before the fall term begins.

"Our goal," according to Ms. Pyszka, "is to develop a system that achieves a balance between the educational and career concerns of the students, while satisfying the needs and concerns of the employers and the faculty as well. Computerization is the first step in reaching that goal."

Book Fund Honors Memory of Professor Stanley Morrison

Peter Morrison '53 has established the Stanley Morrison Memorial Book Fund at the School to honor the memory of his father, a distinguished member of the faculty from 1924 until his death in 1955.

Stanley Morrison graduated from Yale in 1915. Following two years at Harvard Law School, where he was elected an editor of the *Harvard Law Review*, he served as first lieutenant in the field artillery during World War I. He received his degree from Harvard in 1919, and went on to serve as law clerk to Mr. Justice Oliver Wendell Holmes of the Supreme Court of the United States, an experience that instilled in him a lifelong interest in Constitutional Law.

Following three years in private practice in San Francisco, he joined the Stanford law faculty in



1924. Though Professor Morrison's primary interests were in the fields of Taxation, Constitutional Law and Admiralty, he also taught Municipal Corporations, Criminal Law, Public Utilities and International Law. His skill as a teacher was equalled only by his scholarship. Among his most notable works are his article, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 *Stan. L. Rev.* 140, 159 (1949), and his book, *Cases and Materials on Admiralty*.

Dean Charles J. Meyers praised the Fund as "an important addition to the School's library resources, and one that most appropriately acknowledges Stanley Morrison's lasting contributions to legal scholarship."

Memorial gifts from others to the Stanley Morrison Memorial Book Fund will be gratefully received.

Clerkships 1979

United States Supreme Court

Associate Justice William J. Brennan
Fredric C. Woocher '78
Associate Justice Lewis F. Powell
Mary Ellen Richey '77
Associate Justice Byron R. White
Robert V. Percival '78

United States Court of Appeals

District of Columbia:
Judge David L. Bazelon
Jonathan B. Schwartz
Judge J. Skelly Wright
Robert Weisberg

Fifth Circuit:

Judge John M. Wisdom
Robert G. Pugh

Ninth Circuit:

Judge Ben. C. Duniway '31
Lynne B. Parshall
Judge Shirley M. Hufstедler '49
Douglas G. Baird

United States District Court

Arizona:

Judge Walter E. Craig '34
David J. Cantelme

California, Southern District:

Judge William B. Enright
Leonard J. Lewis, Jr.
Judge Howard B. Turrentine
James E. King

District of Columbia:

Judge Barrington D. Parker
Jeffrey B. Maletta
Chief Judge William B. Bryant
Donald J. Koblit

Texas:

Judge William W. Justice
Michael R. Smith

State Courts

Court of Appeals, California:

Judge F. Douglas McDaniel
Nancy N. Potter

Superior Court, Massachusetts:

Jonathan L. Kravetz

Supreme Court, Missouri:

Judge Albert L. Rendlen
Lewis S. Goldblatt

Supreme Court, Oregon:

Judge Hans A. Linde
Joshua D. Kadish

Supreme Court, South Carolina:

Judge Julius B. Ness
Mark McKnight

Supreme Court, Washington:

Judge Robert F. Utter
Randy A. Hertz

Law Firm Establishes Law Review Award

The Dallas firm of Hewett, Johnson, Swanson & Barbee has established the HJSB Law Review Award at the School.

Commencing with the Class of 1980, the award will be made annually to the third-year member of the *Law Review* staff who has made the greatest overall contri-

bution to the *Review* during his or her second year. Selection will be made by the outgoing Board of Editors who will consider "the quantity and quality of each staff member's work, the results obtained, and his or her willingness to assist in accomplishing the many tasks facing *Law Review* leadership." Though financial need may be considered as a secondary factor, the quality of the member's work and the depth of his or her commitment will be paramount.

The recipient will receive an amount equal to one-half of the tuition and fee requirements during his or her third year. A similar amount will be available, at the request of the recipient, in the form of an unsecured loan made by the Law School.

The award, the first of its kind established at Stanford, reflects the strong belief at Hewett Johnson Swanson & Barbee in the importance of the *Law Review*, a belief that is further demonstrated by the fact that several members of the firm were editors of law reviews, including the four founding partners and three members who were officers of the *Stanford Law Review*. It is the firm's hope that the award will "encourage membership on the *Law Review* and will serve as an incentive for excellence in its publication."

First recipient of the award is Bruce A. Machmeier of Minneapolis, who will be managing editor of the *Review* for 1979-80.

Commence- ment 1979

Commencement exercises for the Class of 1979 were held on June 17 at the School.

Dean Charles J. Meyers opened the program with the announcement of the top academic award recipients. Jonathan B. Schwartz of Pacific Palisades was named



Nathan Abbott Scholar for highest cumulative grade point average in the class. Gary M. Cohen of New York City received the Urban A. Sontheimer Honor for second highest cumulative grade point average.

Dean Meyers then revealed those members of the class who were elected to the national law school honor society, Order of the Coif. They include Michael T. Andrew, John D. Arnold, David W. Bagley II, Douglas G. Baird, Thomas R. Camp, Gary M. Cohen, Peter J. Courture, Christopher W. Hornig, Robert L. Jones, James E. King, Teresa M. Lobdell, M. Jeffrey Morris, Kenneth A. Rubin, Jonathan B. Schwartz, Richard B. Van Duyne, Robert Weisberg, and Mitchell H. Zimmerman.

The John Bingham Hurlbut Award for Excellence in Teaching was presented to Assistant Professor David L. Engel, who gave the commencement address. Following the conferral of the degrees, Class President Clarence L. Irving, Jr. gave the class response.

A champagne reception was held in Crocker Garden.

Law Grad Tops at GSB

Graduation was a particularly important event for Robert L. Jones, a graduate of the JD/MBA program. In addition to being elected to the Order of the Coif at the Law School, Mr. Jones was named top student in a class of 236 men and 64 women at the Graduate School of Business. His cumulative academic record at the Business School placed him at the top of a list of 31 students (the top ten percent of the class), who were designated Arjay Miller Scholars.

Top student status also earned Mr. Jones the Henry Ford II Scholar award, which carries a cash prize of \$5,000.

A public management student who concentrated his studies in corporate regulation, finance,

securities, and government administration, Mr. Jones will be joining the San Francisco firm of Cooley, Godward, Castro, Huddleson & Tatum.

Professor Hancock Honored

On May 18, Moffatt Hancock, Marion Rice Kirkwood Professor, Emeritus, received the honorary degree of Doctor of Laws from Dalhousie University Law School in Halifax, Nova Scotia.

The degree, which was conferred during commencement exercises at the school, was awarded in recognition of Professor Hancock's "outstanding work as a student of the law, and his contributions as a teacher to several universities."

Professor Hancock also delivered the law school's commencement address entitled, "English Lawyers in the 17th Century: The Duchess of Norfolk's Divorce," which deals with England's first divorce case.

An expert in conflict of laws and real property, Professor Hancock taught at Dalhousie from 1945 to 1949. In 1946, at the age of 34, he was named Viscount Bennett Professor of Law. He joined the law faculty at the University of Southern California in 1949. Four years later he became a member of the Stanford law faculty. In 1962 he was named Marion Rice Kirkwood Professor of Law. He retired from the Stanford faculty in 1976, when he joined the faculty at Hastings College of the Law.

He is the author of *Torts in the Conflict of Laws* (1942) and numerous papers, including his famous "Conflict Drama and Magic in Early English Law" (1953), entries in the *Encyclopedia Britannica*, and a series of articles dealing with conflict of laws in land

title litigation, for which he received a Guggenheim Fellowship in 1963.

Professor Hancock was joined at the commencement by his wife, Eileen, who is the West Coast representative for the American Foundation for the Blind; his daughter, Catherine, who is an associate professor of law at Tulane University; and his son, Graeme '80, who is an associate managing editor of the *Stanford Law Review*.

Faculty News

Professor **Paul A. Brest** lectured on "The Misconceived Quest for the Original Understanding" at Boston University Law School in February. The topic is part of a larger project Professor Brest is working on in constitutional theory.

Professor **Jack H. Friedenthal** recently completed the manuscript for a second edition of *Sum and Substance of Civil Procedure*, co-authored with Professor Arthur R. Miller of Harvard Law School. He is currently working on a third edition of *Civil Procedure, Cases and Materials* with co-authors, Arthur Miller and John J. Cound, Professor of Law, University of Minnesota.

Lawrence M. Friedman, Marion Rice Kirkwood Professor of Law, acted as moderator for a panel on "Legal History: The Courts in Historical Perspective," held on May 12 in San Francisco, during the annual meeting of the Law and Society Association in San Francisco.

Professor **William B. Gould** addressed an International Conference on Human Rights at the University of Cape Town, South Africa, on January 23.

Gerald Gunther, William Nelson Cromwell Professor of Law, is making a number of public appearances pertaining to the ongoing campaign to call a consti-



tutional convention to compel a balanced federal budget. He is emphasizing the uncertainties and risks of the convention route for amending the Constitution. In connection with the convention, he testified at a California legislative hearing in February; he addressed the Commonwealth Club of California in May; he spoke to a national conference on the Constitution and the Budget in Washington and to a gathering of state legislative leaders in Colorado, also in May; and he spoke and wrote about the subject for television and newspapers.

In April, Professor Gunther and former Solicitor General Archibald Cox were the speakers at the final session of a year-long series of discussions on "The Quest for Equality," at Washington University School of Law, St. Louis. Professor Gunther also delivered the John A. Sibley Lecture in Law at the University of Georgia in May. And, in December, he was a commentator in an American Enterprise Institute Conference on the changing role of the federal judiciary.

After preparing the annual supplement of his constitutional law casebooks early this summer, Professor Gunther will prepare new editions of the books before returning to his biography of Judge Learned Hand.

Assistant Professor **Thomas Jackson** presented a paper entitled "Security Financing and Priorities Among Creditors" (with Assistant Professor Anthony Kronman of the University of Chicago Law School) during the fall at a Law and Economics Workshop at the University of Chicago and, during January, at the meeting of the Contracts and Commercial Law Sections of the Association of American Law Schools. The paper appears in the May issue of the *Yale Law Journal*.

During 1978-79 Professor **J. Myron Jacobstein** is serving as

president of the American Association of Law Libraries, a professional association of nearly 3,000 law libraries throughout the United States and Canada.

John Kaplan, Jackson Eli Reynolds Professor of Law, gave the 14th Cleveland-Marshall Fund Lecture at Cleveland-Marshall College of Law, Cleveland State University, on April 10. The topic of his talk was "Controlling Firearms."

Assistant Professor **Mark G. Kelman** wrote a review of *Criminal Violence, Criminal Justice* by Charles E. Silberman for the February 1979 issue of the *Stanford Law Review*. An article by Professor Kelman on personal deductions and tax jurisprudence is scheduled for publication in the May issue of the *Review*. Professor Kelman is also awaiting publication of an article on the Coase Theorem in the *University of Southern California Law Review*.

Professor **James E. Krier** is currently writing a chapter on "Legal and Institutional Aspects" of ocean disposal of municipal waste, for a book to be published under the auspices of a committee of the National Oceanic and Atmospheric Administration. He is also at work on a series of articles about "Zero-infinity" problems in environmental law, and on a course book on property, which is scheduled for publication by Little-Brown in the summer of 1980.

Victor H. Li, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies, participated in a panel discussion of "U.S.-China Relations: The Impact of Normalization" on February 15 in Palo Alto. The program was sponsored by the Peninsula Chapter of the World Affairs Council.

In January, **John Henry Merryman**, Sweitzer Professor of Law, lectured on "Comparative Law and Social Change" at the law




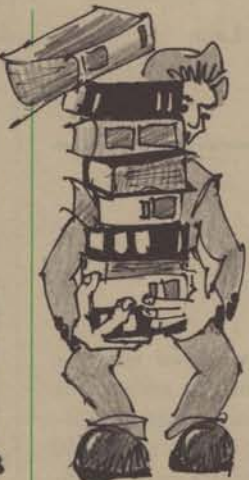

faculties of the European University Institute, Florence; the University of Siena; and the University of Rome. The Spanish translation of Professor Merryman's book, *The Civil Law Tradition*, was recently republished by El Fondo de Cultura Economica in Mexico. His latest book, *Law, Ethics and the Visual Arts*, written with Albert E. Elsen, Walter A. Haas Professor of Art History and Cooperating Professor of Art and the Law at Stanford, has just been published by Matthew Bender and Co. Their innovative course, Art and the Law, which has been offered eight times at the School, has now been adopted by several law schools around the country, including Harvard, UCLA, and Indiana.

Professor **Robert L. Rabin** was recently named chairman of the section on Administrative Law of the Association of American Law Schools, for the 1979-80 academic year. He was also appointed to the Law and Governmental Studies Group at the National Institute of Education, which will be making funding decisions on educational administration research. He has also been appointed to serve on the advisory board of the *Law and Society Review*. Professor Rabin will be spending the 1979-80 academic year at the Environmental Protection Agency, working in the office of Planning and Management. Earlier this year, Professor Rabin gave the closing address at the special program for administrative law judges given by the National Judicial College.

Professor **Kenneth E. Scott** moderated a panel discussion on "The Future of Nuclear Power" on April 18 at the School. The panel, sponsored by the Environmental Law Society, the Energy Information Center, and the Speaker's Bureau, was part of a series of events held at the University in conjunction with "Environment Month."

A Boon to Hiring Committees Everywhere!

As most attorneys know, evaluating summer clerks for the purpose of making an offer of permanent employment can sometimes be a difficult task. At least it used to be. . . . *Stanford Lawyer* is pleased to reveal the first fool-proof guide for assessing a clerk's performance. Our thanks to John J. O'Connor III '53 of the Phoenix firm of Fennemore, Craig, vonAmmon and Udall, for bringing this remarkable innovation to our attention.

					
Performance Factors	Far Exceeds Requirements	Exceeds Requirements	Meets Requirements	Needs Improvement	Fails to Meet Minimum Requirements
Quality	Leaps tall buildings in a single bound	Leaps tall buildings only with a running start	Leaps only short buildings	Crashes into buildings	Needs help in finding buildings
Timeliness	Faster than a speeding bullet	As fast as a speeding bullet	Not quite as fast as a speeding bullet	Barely keeps up with BBs	Wounds himself while attempting to shoot
Initiative	Stronger than a locomotive	As strong as a bull elephant	As strong as a bull	Shoots the bull	Smells like a bull
Adaptability	Walks on water consistently	Walks on water in emergencies	Washes with water	Drinks water	Passes water in emergencies
Communication Skills	Talks with God	Talks with the angels	Talks with himself	Argues with himself	Loses those arguments

Alumni/ae Weekend October 5 & 6, 1979 Make Plans Now To Attend.



Two full days of activities to enlighten and entertain! Among the events specially planned for the Weekend:

- The Annual Alumni/ae Banquet (October 5)
- Stanford/UCLA football game (October 6)
- Seminars and panel discussions by Law School faculty (October 5 & 6)
- Reunions for the Classes of 1929, 1934, 1939, 1949, 1954, 1959, 1964, 1969, 1974 (October 6)

Blocks of rooms will be held until August 20 at the following motels:

Currier Motel

3200 El Camino Real
Palo Alto 94304
Phone: (415) 493-9085

Flamingo Motor Lodge

3398 El Camino Real
Palo Alto 94306
Phone: (415) 493-2411

Holiday Inn

625 El Camino Real
Palo Alto 94301
Phone: (415) 328-2800

Mermaid Inn

727 El Camino Real
Menlo Park 94025
Phone: (415) 323-9481

Rickeys Hyatt House

4219 El Camino Real
Palo Alto 94306
Phone: (415) 493-8000

Tiki Inn

531 Stanford Avenue
Palo Alto 94306
Phone: (415) 327-3550

Be sure to make your reservations before the August 20 deadline. Please identify yourself as a participant in the Law School Alumni/ae Weekend when making your reservations.

Further information will be sent soon.

*Cover: Commencement 1979. Photos by
Joseph E. Leininger, Associate Dean,
and Cheryl W. Ritchie.*

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Stanford Law School
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