
Stanford Lawyer

Winter/Spring 1979-1980 Volume 15, No. 1



Stanford Lawyer

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Dean's Page



Our centerfold this month may not double sales, but it does contain some interesting figures: annual gifts (those we can count on year in and year out) to the 1979 Law Fund amounted to \$657,474, an increase of \$153,283 over the total for 1978.¹ This represents an increase of 30.4% and, allowing for inflation at 13%, real growth of 17.4%—an all-time high in both gross and adjusted terms.

These results are, naturally, quite gratifying. And they would not have come to pass without enormous effort by the scores of Law Fund volunteers who took time out from their practices to make the personal calls that are indispensable to successful fundraising. We could not be more grateful to them all and to three people especially: Jim Hutter, 1979 Law Fund President, who put it all together and made it an unparalleled success; Del Fuller, 1979 Inner Quad National Chairman, whose unremitting efforts established the Inner Quad Program as the backbone of the Law Fund; and Dan Olincy, 1979 Quad National Chairman, who did a smashing job of increasing both dollars and donors. I hope each and every volunteer will accept our thanks and take real pride in a job well done.

While the dollar totals are impressive in both absolute numbers and in percentage increases over previous years, we have failed to convince a large number of our graduates to participate at all. Harvard Law School obtains contributions from 44.6% of the graduates solicited; our percentage is only 31.5. It is clear that those who do give believe strongly in what we are doing. Our task is to convince the others that our programs are worth their support.

Just what *are* we doing: In this space I cannot hope to tell you very much, but I would emphasize the effort we make

to improve writing ability, to develop lawyer skills and judgment and to modernize the curriculum, all to the end of turning our students into better lawyers. I should also mention the resources we devote to aiding the work of the faculty through support of research and scholarly writing.

To make these generalities a bit more specific, let me indicate some of the major cost centers that will receive support from the Annual Fund in the 1980-81 budget: \$292,000 for faculty salaries (including summer research) and other instructional needs; \$60,000 for the Law Library; \$124,000 for student financial aid; and \$29,000 for student services. The Fund also helps defray some of the costs of alumni relations and development activities and provides reserves to meet emerging needs, which may range from hiring a Lecturer-in-Law at the last minute to replacing a broken-down typewriter in the Dean's Office, and anywhere else for that matter. If anything is left over at the end of the year, we add it to the Law School's permanent endowment.

The importance of endowment cannot be exaggerated, for it provides the security that permits us to make long-term commitments, such as the hiring of an additional tenured professor. Fortunately, the endowment is growing, not only by transfers from the Law Fund but also by major gifts: for example, in 1979 the Law School received gifts to establish three new and substantial endowment funds which support three professorships, the Ernest W. McFarland Professorship in Law, the Kenneth and Harle Montgomery Professorship in Clinical Legal Education and the George E. Osborne Professorship in Law. Still, there is more to be done, and high on the agenda is a program in law and business which will entail the creation of at least one additional professorship, the holder of which will be expected to improve the present JD/MBA program and develop what I call a "mini-major" in business law within the three-year JD curriculum.

1979 was a fine year for the School, and its results give promise that 1980 will be even better. To you, our alumni and friends who have contributed so generously to the success of the 1979 Fund Year, we offer our profound thanks.

1. Footnote, alas: Total gifts to the Law Fund in calendar year 1978 were \$504,191. However, until calendar year 1979, gifts were reported for fiscal years beginning September 1 and ending August 31. Annual gifts in our last fiscal year, 1977-78, amounted to \$517,345, as indicated in the 1977-89 *Annual Report of Giving*. In shifting to a calendar year, we had a hiatus from September 1 through December 31, 1978, during which we mounted our "Fall 1978 Campaign" and raised \$355,965, as indicated in our *Report of Giving* for that period.

The United States Energy Picture

by Howard R. Williams

"[I]f we don't make our own energy policy, Sheik Yamini is pleased to make it for us."

Editorial, *New York Times*, June 4, 1979

This is an abridged edition of a paper presented at the Energy Law Seminar ("Cambridge II") organized by the Committee on Energy and Natural Resources, Section on Business Law, International Bar Association, and conducted at Churchill College, Cambridge, England, September 29-October 4, 1979. It is reprinted here with the permission of the International Bar Association.

Mr. Williams is Stella W. and Ira S. Lillick Professor of Law.

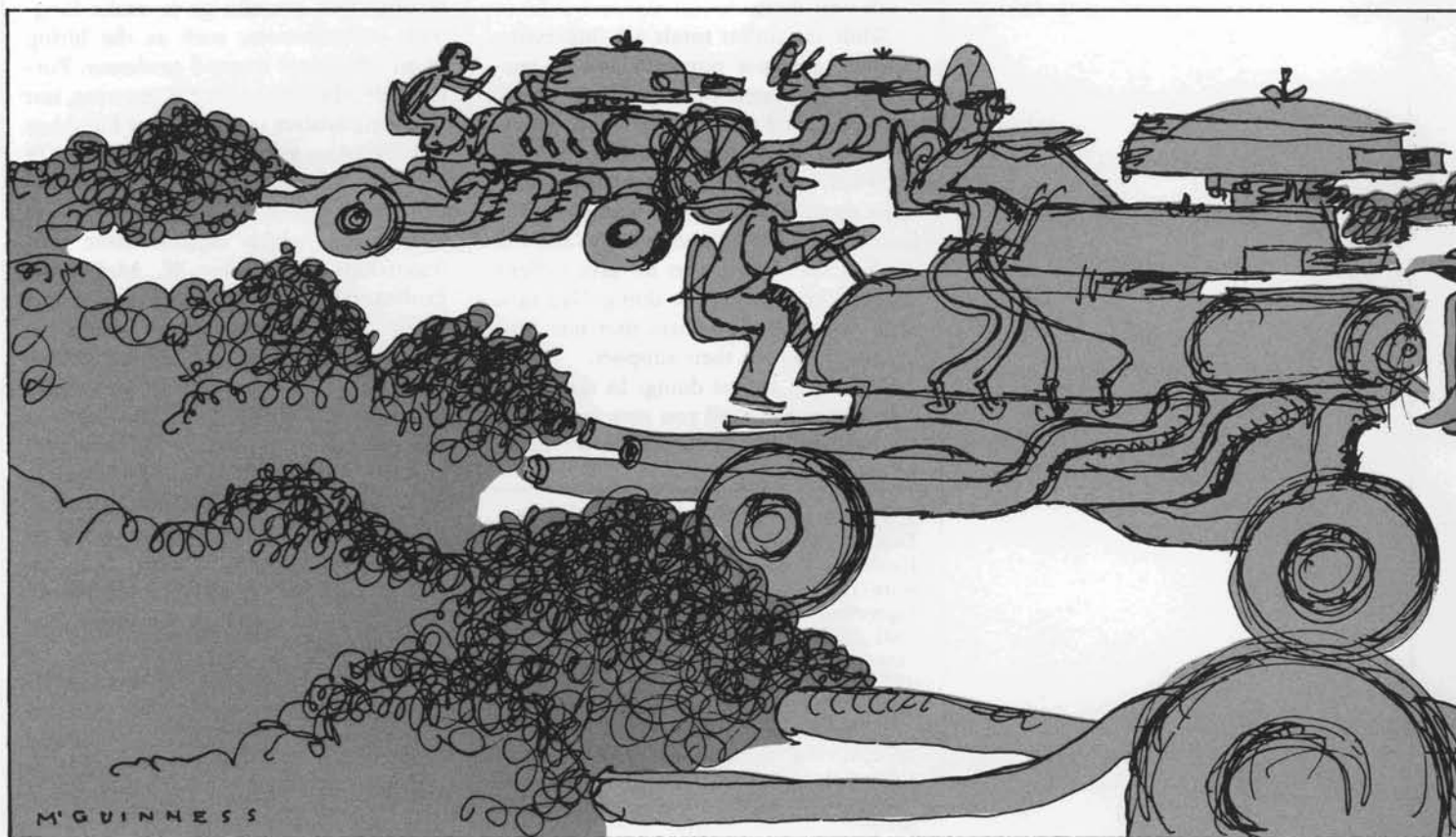
Entering the 1970s as the world's most lavish energy consumers, the people of the United States had life-style expectations implicitly assuming ever-increasing energy consumption.

The wage earner or professional expected to live in a single family home far removed from the shop or office, moving between these two foci of his life as the solitary occupant of a massive four-wheeled vehicle propelled by a powerful internal combustion engine. In building new urban, suburban and exurban motorways, the possibility of rail mass transit occupying the grass median strip separating the multi-lane divided highways was ignored. Existing rail commuter facilities were permitted to fall into disrepair and obsolescence. Upwardly mobile minority groups in the population, increasingly intent on obtaining economic, political and social equality with other segments of the population, followed the population migra-

tion from the central city. The automobile became a necessity. A national self-confidence, perhaps tinged with arrogance, provided assurance that energy requirements could be satisfied during our lifetime.

With the benefit of 20-20 hindsight, we can now see that the pattern of spend-thrift consumption of energy by the United States is due in large part to legal rules and government policies causing energy to be under-priced.

One need only consider the simple supply and demand curves utilized by economists to describe market operations to understand how this underpricing occurred. Assuming some elasticity for both supply and demand (in other words, neither curve is a perpendicular line), the supply curve slopes upward to the right (viz., supply increases with an increase in price) and the demand curve slopes downward to the right (viz., demand increases with a decrease in price).



Anything that causes price to be lower than the market clearing price determined by the intersection of these curves will increase demand and consumption and will reduce supply.

In the United States we have a system of private, as opposed to sovereign, ownership of minerals. This scheme of private ownership, when coupled with the judicially developed doctrine of the Rule of Capture (under which a landowner is entitled to "capture" minerals by a well drilled on his own land, even though by reason of pressure differential, such minerals may have "migrated" from beneath the land of another surface owner) resulted in what is known as the "problem of the commons" or the "common pool problem." Each landowner entitled to drill into the common pool was led to maximize his production in order to avoid having the hydrocarbons extracted by another landowner entitled to drill into the common pool. In determining

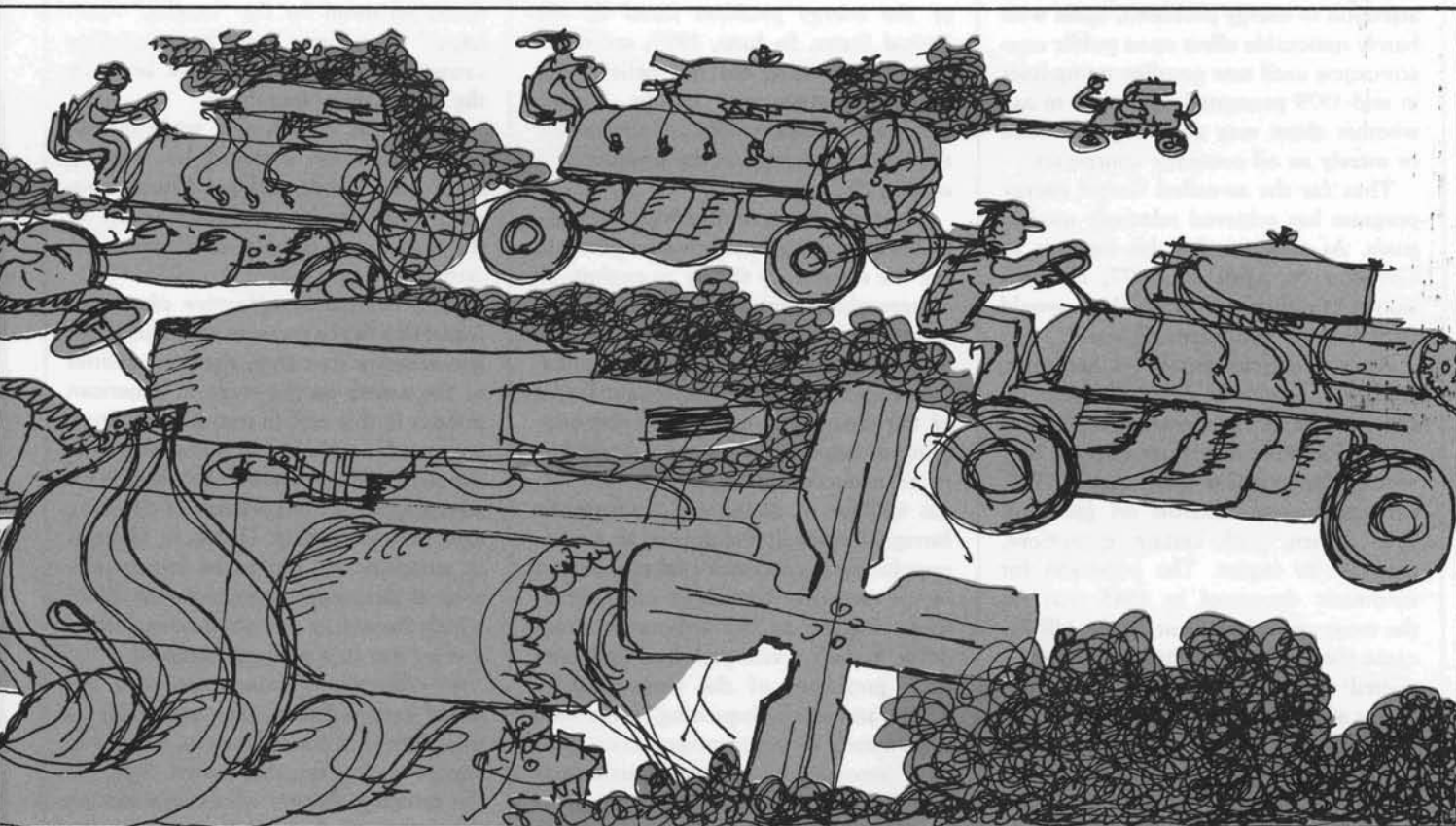
how much to produce in a given time period, the producer ignored the opportunity cost of the future profit foregone by the present production. Overproduction was the result of the tendency of competitors to engage in exploiting an exhaustible resource, in which no one had adequately defined and protectable rights. The supply curve was moved to the right, and energy was underpriced.

Government subsidies to the oil industry also had the effect of moving the supply curve to the right. The most significant of these subsidies was the percentage depletion allowance. Less significant, but nonetheless important, was the expensing of intangibles deduction—which still continues—and the special advantageous tax consequences accruing from careful employment of carved-out and reserved oil payments prior to tax reforms of the late 1960s.

Government intervention was not consistent. As a result of the rightward

movement of the supply curve, and of major new discoveries, oil prices fell drastically. The response was market demand prorationing by the major producing states—a cartel of producing states which served as a model for the latter day OPEC cartel. Yet another cause of profligate consumption of energy by the American public was the regulation of wellhead sales of natural gas by the Federal Power Commission and its successor, the Federal Energy Regulatory Commission. Price fixing of gas sales below the market clearing price had the inevitable consequences of increasing demand for this scarce, valuable, exhaustible resource, and of decreasing the incentive for exploration and production.

From the time of the Nixon administration, the United States has engaged in a frantic scheme of regulating of prices of domestic crude oil and of petroleum products, a scheme designed "to prevent



The United States Energy Picture

the high OPEC prices for crude oil and the concomitant high world prices for products from setting domestic prices." The consequences of the policy have been that energy costs have been held down by regulation, thus having an anti-conservation effect, and that incentives for domestic exploration and development of oil resources and for research and development of alternative energy resources have been diminished.

Prior to the 1970s, the general public in the United States, and the national political parties, saw no need for a national energy policy. In April, 1973, some months before the so-called Yom Kippur war with its embargo and price escalations, President Nixon spoke of the need for an energy program, but the results were scarcely noticeable. The concern provoked in the fall of that year by the queues at the gasoline pumps evaporated with the queues. Subsequently, Presidents Ford and Carter sought to call attention to energy problems, again with barely noticeable effect upon public consciousness until new gasoline pump lines in mid-1979 prompted the public to ask whether there was an energy problem or merely an oil company conspiracy.

Thus far the so-called Carter energy program has achieved relatively modest goals. As announced in his message to Congress on April 20, 1977, he envisioned "a difficult effort which . . . would be the moral equivalent of war."

After a lengthy period of gestation, Congress produced five bills that included some of the elements of his program. The most important of these bills was the Natural Gas Policy Act of 1978, extending price controls on gas until 1985, when, with certain exceptions, they are to expire. The provision for automatic decontrol in 1985 may be the most critical element of the bill because the burden of affirmative action is shifted: previously controls *continued unless* action were taken; under the new law, controls *expire unless* action is taken. Those of us who believe that federal regulation of wellhead prices has created a shortage by restricting supply

and increasing demand can now have modest hope that the misguided policy may expire early in its fourth decade.

The provision for planned expiration of price controls was not without cost: price controls were extended to sales previously not covered and an extremely complex schedule of prices was established by regulation. The new national price established by the legislature was lower than the commodity value of natural gas, but was nevertheless sufficient to occasion the release to the market of a substantial quantity previously withheld from sale—such a quantity as to create what was known as a "bubble," which in turn led our regulators to encourage consumption of gas rather than oil, a course of action which may have been penny-wise but pound-foolish.

It may be useful to enumerate four obstacles to the development of a rational energy policy for the United States.

(1) *Failure to understand the nature of the energy problem faced by the United States.* In June, 1979, seven out of ten Americans did not believe that the oil shortage was serious. Today, many Americans remain convinced that the alleged shortage is the product of a conspiracy.

Unhappy events of the 1960s and early 1970s have contributed to a readiness to use the conspiracy theory to explain all disagreeable events. In those years we suffered a succession of calamities: the assassinations of a president, a presidential candidate, and the charismatic leader of the civil rights movement; the crippling of another presidential candidate in an unsuccessful attempt on his life; the spilling of blood and treasure on foreign terrain in the course of an unpopular war; revelations of misconduct in the executive branch of our government, leading to the resignation from office first of a vice-president and later of a president, of the United States. These, and other disquieting events have contributed to a conspiracy consciousness among our people, particularly among the youthful. Hence queues at the gasoline pump can be explained as

the result of a conspiracy by———. [I leave it to my reader to complete the sentence with his own choice from the lengthy list of potential conspirators: the Seven Sisters; the Department of Energy; the oil company lobby; the OPEC nations; Islam; Communism; . . .]

(2) *Fear of the consequences of nuclear development.* This fear has been whipped into a frenzy by a strange bevy of leaders, many with qualifications limited to some combination of charismatic personality, aspiration for attention or political favor, and a strong mysticism, almost religious in nature. Carrying placards with simple slogans, these leaders have formed a new parade. Placard bearers (whatever their political, social or economic persuasion) soon discover that placards must be small enough to be carried, the paint bright enough to attract attention, and the print large enough for legibility from a distance. There just isn't room for more than the bold accusations; no room for the "maybe," "perhaps," "sometimes," or "but see." One cannot be a placard bearer if beset by the deadly sin of humility.

The gurus of this new wave of placard bearers are a mixed lot, ranging from Jane Fonda and her Prince Consort, Tom Hayden, a placard bearer of the sixties, to equally shrill academicians.

(3) *Absence of effective executive leadership in the government.* This problem arises in part from the personalities of the actors on the stage of American politics in this era; in part it arises from structural problems. In some instances the parliamentary system seems to have advantages over our scheme of choosing executive leadership. However, changes in structure are not to be anticipated, even if desirable; sometimes the plant which thrives in one environment does not survive in a new environment.

(4) *Absence of consensus on a national energy policy.* The most serious impediment to formulation of a national energy policy for the United States is the startling absence of a consensus on the nature of the problem, and on the

"A substantial segment of the population appears convinced that the energy problems of the United States are the result of a profit-maximizing conspiracy of the oil companies. . . ."

policy to be pursued. As a result, at least six energy policy models have found substantial support.

One model, which we may describe as the *conservation model*, has been enunciated by a number of commentators. Proponents suggest that adequate conservation (which perforce must be coerced) will largely solve our energy problem. By the combination of a "no growth" or "restricted growth" policy, with a requirement that energy prices reflect full unsubsidized costs, demand for energy will be reduced. Not surprisingly, this model is opposed by groups in the population (minority groups in particular) seeking to obtain more of the benefits of the affluent society.

A second model enjoying substantial political and emotional support, the *consumer protection model*, is largely responsible for the long period of regulation of wellhead sales of natural gas. The resulting inevitable shortage of natural gas at the regulated price led to a migration of industry to producing states, where gas could be obtained as fuel or as a raw material at an unregulated price. The reduced supply of regulated gas in interstate commerce led to increased government regulation in the form of curtailment rules.

The third model, the "*break up OPEC*" model, emerged from the slow development of some public awareness of an energy problem at a time when OPEC strength became increasingly manifest. The shortage of oil was attributed to the conduct of an oligopolistic cartel of producing nations possessing power to exact a monopoly price for this valuable product, and the perceived solution was the destruction of OPEC. There has been some disagreement among the proponents of this solution regarding the means to achieve the end. Although it has enjoyed some support, the "final solution" method, that is, the use of military force, has been rejected summarily by the overwhelming majority of citizens of the developed nations. Efforts to create a cartel of consuming nations have not met with suc-

cess as yet, although the efforts continue.

A substantial segment of the population appears convinced that the energy problems of the United States are the result of a profit-maximizing conspiracy of the oil companies and hence find a solution in vertical and horizontal divestiture: the "*break up the Oil Companies*" model. Despite the substantial emotional support for this model in the halls of Congress, there is no significant evidence of which I am aware supporting the position taken by these latter-day Luddites.

Suspicion of private oil companies has led to support for the *Federal Oil and Gas Company model*. Not all are convinced that the state can operate as efficiently as private enterprise, but whether or not that is the case, there is certainly no reason to believe that the supply of energy will be increased, or demand reduced, merely by a shift from private to public exploration and development of mineral resources.

Finally, the *supply and demand model* supported by the oil industry relies on the market for adjustments of supply and demand. It is argued that elimination of price controls and the complex and expensive regulatory scheme constructed in recent years will reduce both energy consumption and reliance on imported oil, and will increase both domestic exploration for oil and research and development of new energy sources.

It is difficult to be sanguine about the prospects for the adoption of this model. One need merely think of the response during the spring of this year to the reduced supply and increased cost of diesel fuel and gasoline. Public protests were many and loud; the political response was a demand for more, rather than less, regulation.

Clearly, the impact of a market solution to the energy problem will differ greatly from region to region, industry to industry, and person to person. Ingenuity will be required to alleviate undue burdens borne by one or another group or region. Since disadvantaged portions of society are particularly af-

ected by increases in the cost of gasoline or fuel oil, there are recurring efforts to restrict price increases to protect the disadvantaged from these problems. Direct aid programs for the disadvantaged would be a far more efficient method than price regulation, which would carry an anti-conservation impact. Such a direct aid program for gasoline or fuel oil during a period of adjustment, might involve issuance of transferable coupons redeemable at face value for the purchase of these products, the coupons passing through the bank clearing system as charges against the United States Treasury.

Elements of a National Energy Program for the U.S.

It would be unduly rash of me to predict the time required for the attainment of a consensus and the development of a rational national energy policy. I shall risk, however, the enumeration of some of the ingredients of such a policy:

(1) State and federal regulation of the suppliers of energy should be drastically curbed. There is little evidence that the regulatory bureaucracy possesses the skill of the marketplace in adjusting supply and demand.

(2) The price of liquid and gaseous hydrocarbons should be controlled by the market rather than by government fiat. This will serve the ends of conservation of energy and the encouragement of development of new supplies. Short-term payments to persons acutely affected by price increases may be required, but any provision of this kind should be authorized only for a brief period, rather than for an indefinite time.

(3) The development of new energy sources and the expansion of those in an early stage of development should be encouraged by judicious employment of tax credits for development expenses, public monies for research and development, and guaranteed purchase of specified quantities of products resulting from private research and development.

(4) International cooperation among the consuming national states in dealing

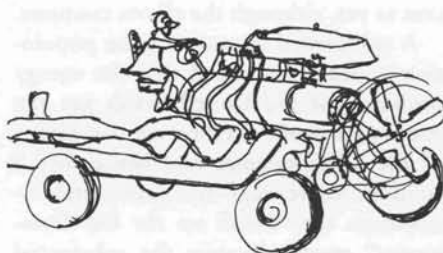
The United States Energy Picture

with the OPEC producers' cartel should be an objective of our energy policy. In dealing with a producers' cartel, it makes no sense for consumers to compete against one another in spot markets, thereby driving prices to even higher levels. Thus, action by the United States in establishing a \$5 per barrel entitlement for imported heating oil, without informing other consuming nations of the plan, was misguided and contraproductive in that it stimulated reactions in the spot market to escalate prices even further.

(5) To alleviate major dislocations which may be caused by abrupt changes in supply (e.g., such as those incident to the Iranian revolution of 1979), a contingency rationing program should be formulated. Such a program should involve freely marketable coupons, good only for a specified amount of fuel and period of time.

(6) Finally, and fundamentally, a maximum effort to curb wasteful expenditures of energy is urgently required. As has been indicated, the market will play an important role in this conservation effort if permitted to do so. Doubtless, the market will require supplementation by government intervention in a number of areas: building codes, automobile efficiency standards, subsidized mass transit, and the like.

Earlier in this paper I noted that it would be rash to predict the time required for the attainment of a consensus and the development of a national energy policy. Since that was written, Senator Edward M. Kennedy of Massachusetts—who may or may not move from his present office to one at the other end of Pennsylvania Avenue in early 1981—stated some segments of his view of an energy policy: retained price controls; search for new sources of oil, domestic and foreign; aggressive development of alternative energy sources, principally coal and solar, but for the present excluding nuclear; increased competition in the energy industry by reduction of the excessive market power of the major oil companies, especially their domina-



tion of alternative energy sources; appropriate governmental assistance to those suffering hardship by reason of rising oil prices; rejection (or at least non-support) of oil import quotas. Obviously, the marketplace plays a most modest part in the Kennedy energy program.

A consensus appears remote.

ADDENDUM (Aug. 1, 1979)

In mid-July, the President of the United States emerged from Camp David to preach another of his sermons on Sunday, the 15th, and to deliver yet another Southern populist political speech to the National Association of Counties meeting in Kansas City on Monday, July 16.

The bulk of the Sunday sermon dealt with the "crisis of confidence" striking "at the very heart and soul and spirit of our national will," with growing disrespect for church, state and other national institutions, and with the isolation of Washington from the mainstream of our national life.

The second portion of the speech was spent on our "intolerable dependence on foreign oil" and with six "points" or steps to be taken:

1. We shall never use more foreign oil than we did in 1977.
2. The President will set import quotas.
3. An Energy Security Corporation is to be established to develop alternative sources of fuel, the effort to be financed by the windfall profits tax.
4. Utility companies will be required to reduce their consumption of oil by 50% and shift to other fuels, especially coal.

5. An Energy Mobilization Board will be created to cut red tape impeding the achievement of our goals.

6. A bold conservation program will be imposed, public transportation will be strengthened, and increased aid will be provided to enable the poor to cope with rising energy prices.

In his peroration the President promised leadership of our fight and called for a common commitment "to a rebirth of the American spirit."

The less inspirational Monday address was only modestly more explicit. The essence of the President's proposals was revealed in his exhortation that:

"The first thing we've got to do is to face facts. There is simply not enough oil available in the world to meet all the demands of all the people in all the nations on earth."

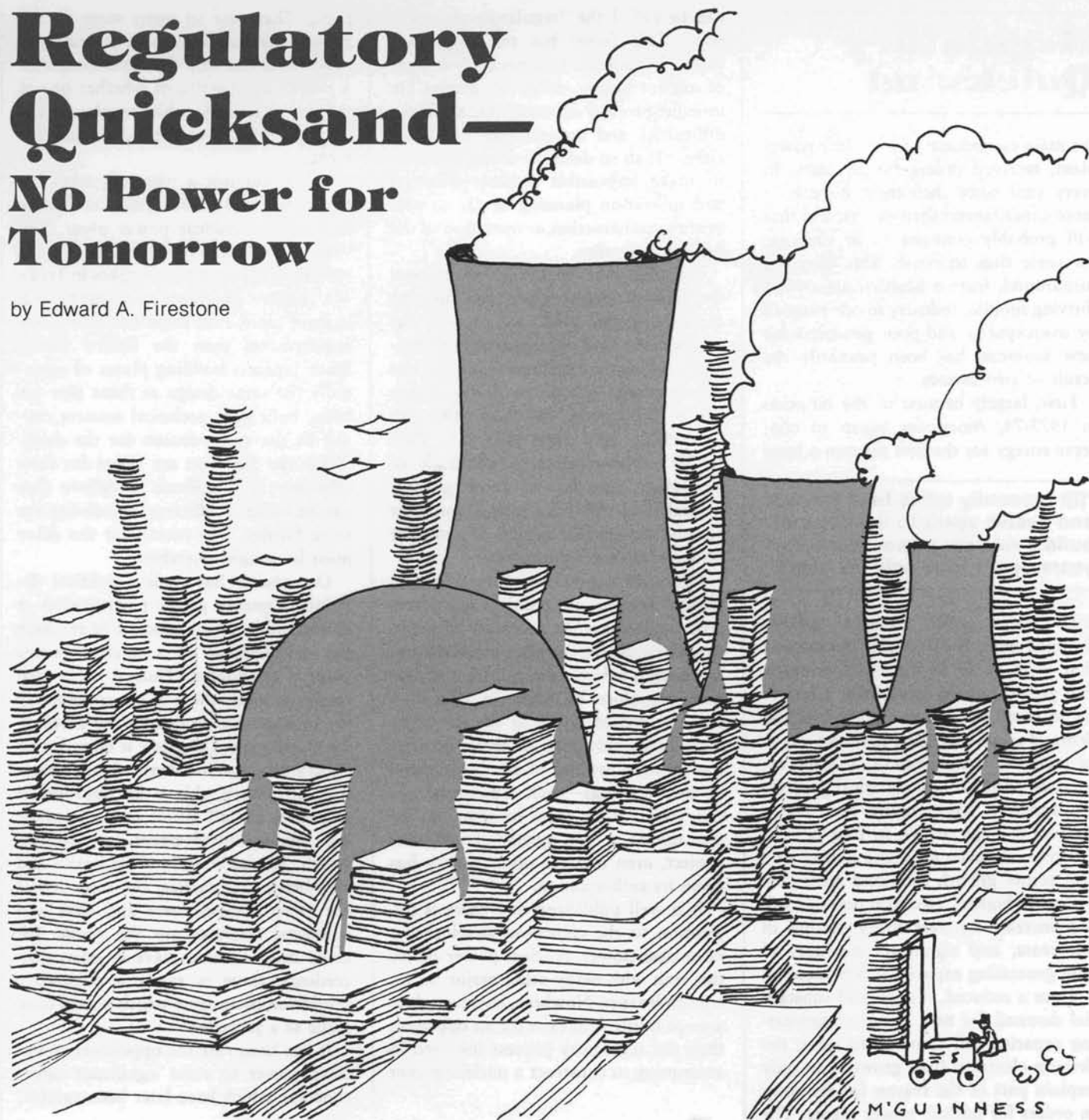
The President used the word "demand" as meaning the amount that might be consumed if price were irrelevant, rather than as meaning the amount consumed at a given price. By his nontechnical definition of "demand" the President signalled his non-market "solution" to the "energy problem": restriction of "demand" by government allocation of energy and increasing "supply" by tax-funded enterprises.

The Sunday sermon called for an outpouring of good spirit and good intentions. A political speech, such as that delivered on Monday, required an enemy who could be blamed for our problems, and such a culprit was identified early in the speech: the oil companies. The giant new Energy Security Corporation, to be charged with developing new energy sources, was not to be "just another Federal agency"; by Presidential edict, it will not suffer from the vices or problems of other governmental agencies. If the states fail to cooperate with the federal government, power will be taken from the states and exercised from Washington.

Two days later, the price of gold broke the \$300 barrier. This was probably not a coincidence.

Regulatory Quicksand— No Power for Tomorrow

by Edward A. Firestone



4:00 a.m., March 28, 1979. To many that date marks a distinct boundary between the past and future of nuclear power. It was at that time that the accident began at Unit 2 of the Three Mile Island nuclear power station near Middletown, Pennsylvania.

It is probably safe to say that due to the discussion of nuclear power and the Three Mile Island accident in the media, the public believes that the accident has directly caused the country to pause in the development of nuclear power. Up until the accident, nuclear power was

discussed, fought, but generally accepted as one way to provide energy for the country's future. Now, however, the public perceives that a moratorium has been declared. This pause in the development of nuclear power, it is believed, will permit us to reflect on the risks of this endeavor and provide time for a thorough review of the agency in charge of the public's safety—the Nuclear Regulatory Commission (NRC).

It is true that the NRC is being carefully and exhaustively examined—the President, the Congress, and the NRC

itself have investigations either underway or complete. However, the fundamental premise, that there has been a pause in the development of nuclear power which can be directly attributed to the Three Mile Island accident, is erroneous. New orders for nuclear power stations in this country essentially ceased after 1974. There have been only thirteen orders for domestic nuclear units in the past six years, and each has since been either cancelled or deferred.

For comparison, in 1974 alone, suppliers of nuclear steam supply systems,

Regulatory Quicksand

the main component of a nuclear power plant, received orders for 28 units. In every year since then there have been more cancellations than orders, and that will probably continue to be the case for some time to come. This dramatic turnaround, from a healthy, apparently thriving supplier industry to one plagued by overcapacity and poor prospects for new business, has been primarily the result of two factors.

First, largely because of the oil crisis in 1973-74, Americans began to conserve energy for the first time on a large

"[I]t presently takes between ten and twelve years to license and build a nuclear power plant. Ten years ago it took only six years."

scale. As a result, electrical growth dropped quite dramatically. Projections that were made in the early seventies that growth would continue at a rate of six to seven percent per year, doubling demand every ten years, have proven to be incorrect. Load growth, and the associated need for new electrical generating capacity, has actually been much less: an average of two to four percent per year. But even assuming a three percent future growth rate (and most estimates are higher), electrical demand still will increase by over thirty percent in ten years, and significant amounts of new generating capacity will be needed.

Since a reduced, though still substantial demand for new electrical generating capacity will continue to exist, the drop in electrical load growth can only explain part of the reason for the drop in orders for nuclear power plants. The second factor behind the drop in orders

can be called the "regulatory disincentive." This factor has two important facets. Despite the economic advantages of nuclear power, utility companies are unwilling to buy an energy facility if the difficulties and uncertainties are likely either (1) to so delay its construction as to make impossible sensible financial and utilization planning or (2) to prevent the construction or operation of the facility altogether.

Congress has generally pre-empted the field of nuclear plant regulation by authorizing the NRC to regulate the construction and operation of, and generally the waste emissions from, nuclear power plants (*Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972)). Nevertheless, a multitude of regulatory agencies at every governmental level still have jurisdiction over various non-nuclear aspects of a nuclear power plant's development.

Often, the various members of the regulatory agencies are political appointees who do not have the necessary expertise to understand the complex technical topics brought before them. Substantial time must therefore be spent in education prior to consideration of the actual issues. Frequently each of these agencies has its own reviews of the project and its own hearings—each a potential pitfall. And success must be absolute, for one failure at one agency can kill the project, even if every other agency has given its authorization.

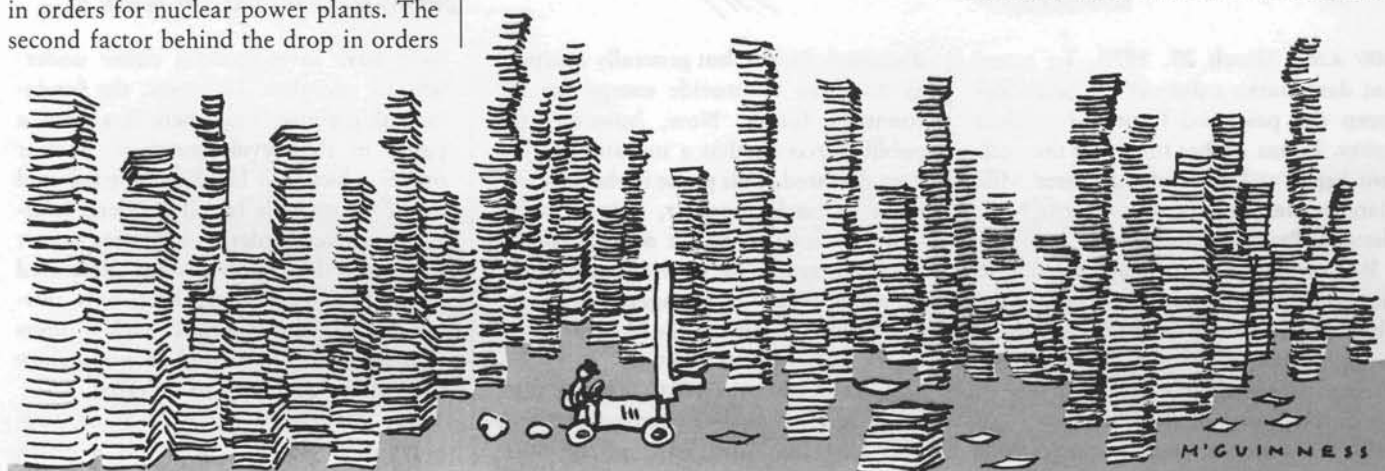
It is well publicized that there is opposition to the continued development of nuclear power. Nuclear power shares this trait with many other major industrial endeavors. Nowhere, however, does a more fertile field exist for an opponent than the regulatory process involved in attempting to construct a nuclear power

plant. There are so many steps in the process that small numbers of dedicated adversaries can stop the development of a facility irrespective of whether or not that result reflects public opinion or the declared policies of the federal government.

In this country it presently takes between ten and twelve years to license and build a nuclear power plant. Ten years ago it took only six years. That is still the amount of time it takes in Japan—a country which has as stringent and, in some cases, even more stringent safety requirements than the United States. Since Japan is building plants of essentially the same design as those that are being built here, technical matters cannot be the entire reason for the delay. While the Japanese are noted for their efficiency, it is difficult to believe they can be twice as efficient at building the same facility. The reason for the delay must be sought elsewhere.

Our society has made a political decision to permit public participation at almost every agency proceeding at which the development of a nuclear power plant is considered. Thus at every step in the process, there is an opportunity for an opponent to contest the development and extend the time it takes for an agency to grant or deny an authorization. In theory, this is an appropriate means to air all issues and encourage the public's involvement in decisions which can significantly affect health and well-being. In practice, the same issues are often litigated over and over and contested hearings are the norm. Because most agencies have *de novo* proceedings, there is rarely a dispositive resolution of an issue which would have value as a precedent.

It has been rare for opponents of nuclear power to raise significant safety concerns which have later been success-



fully upheld by regulators. Opponents insist this is because they have insufficient funds "to counteract the prevarications, deceptions and guile" of the nuclear establishment which is spending many millions of dollars defending its case. Public funding of opponents is often proposed as the only way to assure protection of the public interest. Even without such public funding, and though unsuccessful in their substantive claims, opponents, by opposing nuclear power at every opportunity in the regulatory process, have made the process itself their greatest ally. Every contested issue at every contested hearing takes time. There are enormous costs for every day of delay in a one to two billion dollar project. Accepting a many-year delay in a project is simply economically unpalatable to a utility, whether publicly or privately owned. No prudent business person would pursue a new nuclear power plant in this environment, and none has since 1974.

As was mentioned earlier, utilities are also unwilling to pursue an energy source if regulatory difficulties may cause a project to be abandoned after much time, money, and effort have been expended.

A prominent example of the difficulties faced by a utility interested in developing a nuclear facility is the saga of the now defunct Sundesert Nuclear Plant. The failure to receive one agency's blessing led to the abandonment of the project.

In 1972, San Diego Gas and Electric (SDG&E) determined that new electrical generating capacity would be needed in the early 1980s to meet growing electrical demands in the areas it served. Almost three years were spent doing, among other things, site examinations and evaluations. Since electrical generating facilities need cooling water, large supplies of water had to be found. Land use, seismicity, and demography were studied to help define a location most acceptable for a large energy-producing facility, and in October, 1974, a site near Blythe, California was selected as the preferred location.

In December, 1974, SDG&E received approval of its water supply contracts for the project. In July, 1975, a contract for two 974-megawatt reactors, to be completed in 1985 and 1987, was formally granted to Westinghouse Electric Corporation. Early in that same year something even more important to the project happened. The State Energy Resources Conservation and Development Commission (Energy Commission) was created by the Legislature (Warren-Alquist State Energy Resources Conservation and Development Act, AB 1575, Cal. Pub. Res. Code §§ 2500 *et seq.*) with the power to certify (approve) power plant sites and facilities. Shortly thereafter, SDG&E began the process of preparing its Notice of Intention (NOI) to seek certification for the Sundesert Nuclear Project which would be filed with the Energy Commission.

Early 1976 brought developments that would eventually sink the project, though this was not obvious at the time. A drive was underway in California to pass Proposition 15—an anti-nuclear initiative. Though defeated at the polls by a two-to-one margin, the effort to pass the Proposition galvanized the Legislature to enact, one week before the election in June, amendments to the Warren-Alquist Act (Cal. Pub. Res. Code §§ 25524.1, 25524.2 and 25524.3). These required certain findings by the Energy Commission related to the reprocessing of nuclear fuel, the disposition of high-level radioactive waste and the evaluation of the feasibility of placing nuclear reactors underground, before a new nuclear power plant could be approved by the Energy Commission.

Also in June, 1976, a completed NOI was filed with the Energy Commission and in July, SDG&E was notified that the NOI had been accepted for consideration. Public hearings were held on the NOI in late 1976, and in April of 1977 the Energy Commission issued its preliminary report on the NOI which

found that SDG&E needed more electrical capacity and that neither oil, coal nor advanced technologies were desirable alternatives to Sundesert. The report also stated, however, that more work was required. Further hearings on the NOI were held by the Energy Commission in June of 1977.

But even more important to the project, at the same time as the NOI was being viewed favorably, the Energy Commission was also evaluating the State's new nuclear plant approval laws.

In July, 1977, it issued a preliminary report which concluded that the current status of high-level radioactive waste disposal technology was *not* adequate to satisfy the requirements of the new law.

SDG&E management, concerned that this finding might jeopardize the Sundesert project, but still confident that the Energy Commission was continuing to look favorably at the project (based on the preliminary report on the NOI), attempted to obtain a legislative exemption from the nuclear plant approval laws. AB 1852 (Cal. Pub. Res. Code § 25524.25), enacted in September, 1977, was the result. Basically, it required the Energy Commission to recommend to the Legislature whether, after considering energy need and practical alternative energy sources, Sundesert should be exempted from the requirements of the nuclear laws.

In November, 1977, three years after a site for Sundesert was selected, the final report of the Energy Commission on the NOI proceedings was issued and, in December the Energy Commission, by a vote of 4 to 1, approved the NOI for the Sundesert project. The approval was subject to extensive conditions, one of which was to approve the site for two nuclear power units but only authorizing one unit to be built.

The shock to SDG&E management came the following January. After holding hearings pursuant to AB 1852, the Energy Commission issued its findings on the exemption of Sundesert. Completely reversing its position, the Energy Commission determined that practical alternative technologies were available to meet the needs of the area, and recommended that no exemption to the nuclear plant approval laws be enacted for Sundesert.

In response, SDG&E management suspended all work on the project except that which was related to the federal



Regulatory Quicksand

licensing process or to the State approval process. It also heavily lobbied for passage by the Legislature of SB 1015, a bill designed to exempt Sundesert from the nettlesome portions of the nuclear plant approval laws. That bill died in the Assembly in February. Finally, because of continuing financial uncertainty, the California Public Utilities Commission issued an order which limited SDG&E investment in the project to stockholder funding and disallowed the use of revenue from customers. This effectively denied authorization to continue the in-

"Attempts to license nuclear power plants have come to resemble the challenges made against a certain type of benign power generation facility: Don Quixote's windmills."

vestment of funds in the project, and on May 3, 1978, the Board of Directors of SDG&E suspended all work on the project except those steps necessary to reserve the site and water supply for future use in meeting the electrical needs of the area. The site still can be used for a non-nuclear power plant, but it is extremely unlikely that a nuclear unit will ever be built there.

About \$104 million was spent on the still-born project. Approvals had or were to be obtained from fifteen Federal Agencies, such as the Federal Aviation Administration and the Bureau of Outdoor Recreation, the Advisory Council on Historic Preservation and the Bureau of Indian Affairs. Fourteen regional authorizations had to be obtained and thirteen State agencies had to give their approval. Even though the NRC found the site suitable for a nuclear power plant, a single State agency denied development.

The denouement to this tale was written in 1979 by Judge Enright, when he held, in *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 472 F. Supp. 191 (S.D. Cal. 1979), that the portion of the nuclear plant approval law which provided that no nuclear power

plant could be certified by the Energy Commission until it determined that there was adequate technology for the disposal of high-level radioactive waste, had been pre-empted by the federal government. Thus, an agency acting without legal authority created the pitfall which killed the project.

The problems faced by SDG&E are typical of, though not identical to, those faced by other utilities in this country which have tried to construct and operate nuclear power plants. The record thus is clear. Regulatory and political difficulties are so great and the financial risks they entail are so substantial that no utility is willing to attempt to overcome them. Attempts to license nuclear power plants have come to resemble the challenges made against a certain type of benign power generation facility: Don Quixote's windmills.

Obviously there is no single simple solution to the problems raised in this example. And it is important to keep in mind that the nuclear power option is indeed just that, an option. Other means of producing and conserving large amounts of electrical energy can be used and already exist today. They, too, however, have their significant costs.

Coal has its own tremendous environmental and health costs: strip-mining, air pollution and black lung disease. Using foreign oil to produce power has a dramatic effect on this country's balance of trade and its political position in the world. Other sources—wave, solar, wind, biomass, fusion—simply are not yet technologically feasible for generating electricity at large, centrally located power plants, no matter how attractive they seem or how much they are desired. Conservation must continue, but difficulties will be faced when quality of life is significantly affected and when the sacrifices it entails are no longer perceived to be voluntary or acceptable.

The Three Mile Island accident did not directly produce a moratorium in

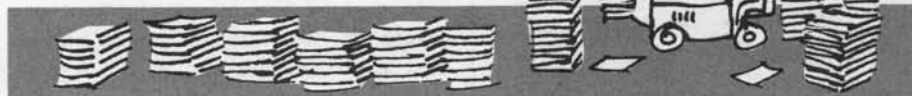
the development of nuclear power: a moratorium had already existed for five years. But Three Mile Island may have had a more important far-reaching effect—by focusing public attention on nuclear power, the risks and benefits of this form of power production can now be properly evaluated. While many may continue to debate the technical aspects of nuclear power, the question is not really a technical one, but truly a political one. Political decisions should be made openly and intentionally; a *de facto* elimination of the nuclear option through the operation of the present regulatory system cannot be tolerated because the demise of nuclear power may not be what the public desires.

If nuclear power is an unacceptable option, the decision should be made clearly, precisely, and unequivocally. If it is acceptable, the present regulatory structure must be overhauled and the federal government must take substantial and measurable actions to support and sustain the decision. There is no question that the decision must be made at the federal level. If nuclear power is rejected, the essential resources which this country has wasted on its development can be reapplied to areas perceived to be more profitable and beneficial. If it is accepted, the "regulatory disincentive" must be swept cleanly away, and a clear national policy promulgated. This policy must allow major and substantial concerns to be addressed but not permit the policies or procedures of state or local agencies to interfere with the stated objective.

Unfortunately, this discussion of the problems created by the "regulatory disincentive" probably has wider application than just the field of nuclear power. It is likely that every major industrial project currently under consideration in this country faces similar difficulties.

The Three Mile Island accident produced many lessons to be learned. These will be disseminated within the nuclear industry. The lessons which can be learned from the last ten years of the nuclear industry's experience with regulatory agencies must be similarly disseminated to all decision-makers involved in major industrial developments.

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Three Mile Island and the Kemeny Commission: Regulating the Regulators

by Jeff Klein

4:00 a.m., March 28, 1979. For most of the Pennsylvania citizens living along the Susquehanna River, it was a moment that sleep let slip by unnoticed. For William Zewe, shift supervisor at Three Mile Island, and his colleagues manning the controls, it was the beginning of a nightmarish scenario that they were neither trained nor prepared for: a nuclear power plant out of control.

It has been called the worst commercial nuclear accident in this nation's history. It began with a loud clatter of alarms when feedwater pumps malfunctioned. It ended only after local residents had been terrorized and confused by reports of pending evacuations, dangerous radiation releases and a possible nuclear explosion. The repercussions of the accident at TMI have yet to end.

Although there were apparently no serious physical injuries near the plant, there were injuries—deep psychological scars still worn by the residents in the neighboring communities.

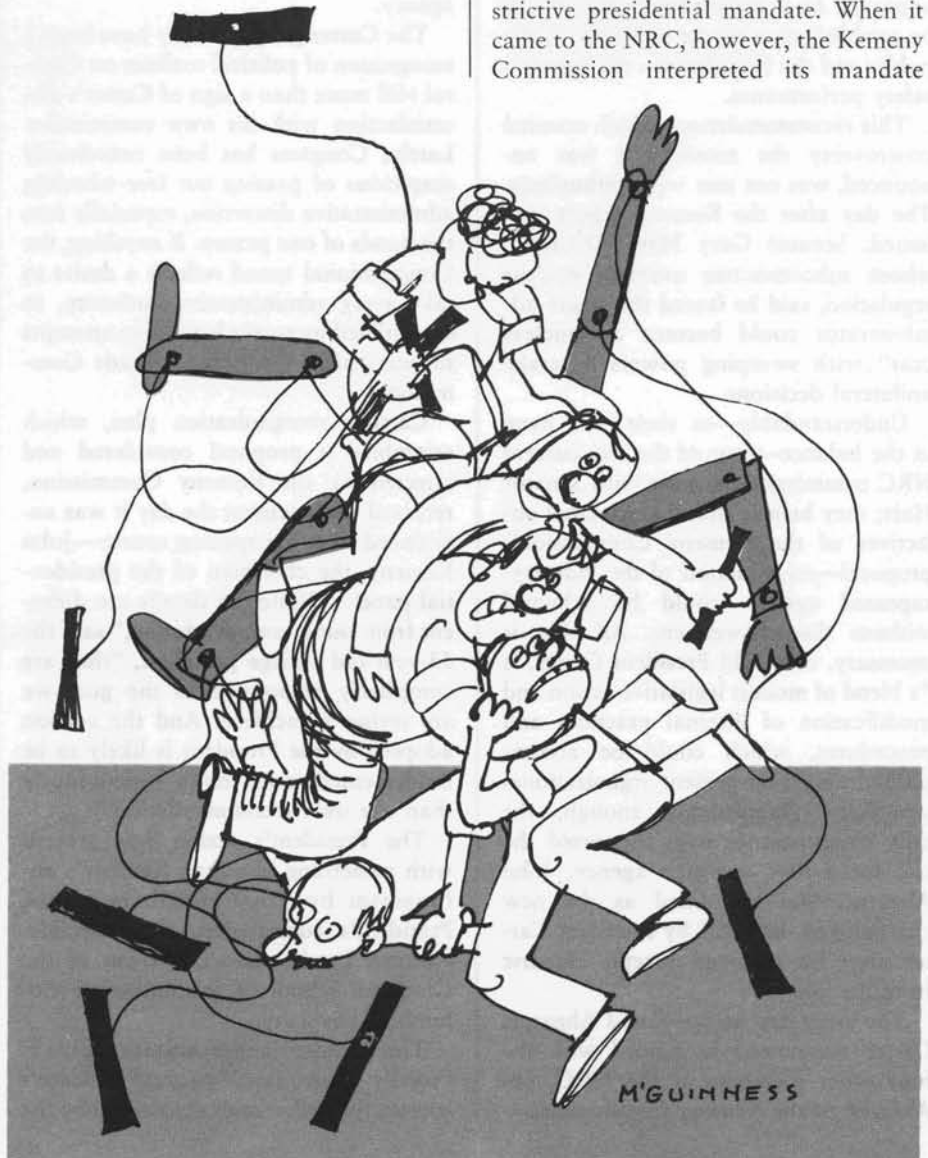
The most traumatic injury was to the nuclear industry and the government regulators of that industry. First, the accident itself, and then, this fall, the report of the President's Commission on the Accident at Three Mile Island, shattered the public image behind which they had been hiding for 20 years, the image that nuclear power is safe, absolutely safe.

In its final report to the President, the 12-member Kemeny Commission, named after its chairman, John Kemeny,

president of Dartmouth College, presented a powerful indictment of the Nuclear Regulatory Commission and the nuclear industry. Nevertheless, it was a tempered version that did not go as far as some of the commissioners, and most of the commission staff would have liked.

The report consisted of findings and recommendations in separate subjects,

including the Nuclear Regulatory Commission, the utility and its suppliers, operator training, public health and safety, emergency response, and the public's right to information. Of the 44 detailed final recommendations proposed by the Kemeny Commission, those that have received the most attention relate to the Nuclear Regulatory Commission. In the other areas, the report concentrated on the specifics of the Three Mile Island accident, largely because of a restrictive presidential mandate. When it came to the NRC, however, the Kemeny Commission interpreted its mandate



"The Nuclear Regulatory Commission . . . resembles a limp, headless marionette, with its arms and legs kicking in all directions and five puppeteers fighting over its tangled strings."

Three Mile Island

broadly and investigated the agency more generally.

The Nuclear Regulatory Commission does not work, according to the report. It resembles a limp, headless marionette, with its arms and legs kicking in all directions and five puppeteers fighting over its tangled strings. The Kemeny Commission recommended untangling these strings by abolishing the five-member Nuclear Regulatory Commission and replacing it with an executive agency headed by a single administrator appointed by the President with Senate approval. An oversight committee would be established to report regularly to the public and the President on the agency's safety performance.

This recommendation, which aroused controversy the moment it was announced, was not met with enthusiasm. The day after the Kemeny report was issued, Senator Gary Hart (D-Colo.), whose subcommittee oversees nuclear regulation, said he feared the single administrator could become a "nuclear czar" with sweeping powers to make unilateral decisions.

Understandably—as their jobs hang in the balance—four of the five current NRC commissioners agree with Senator Hart; they believe that the principal objectives of the Kemeny Commission's proposal—rejuvenation of the industry-captured agency—could be achieved without disembowelment. All that is necessary, they told President Carter, is "a blend of modest legislative action and modification of internal practices and procedures, which could be accomplished within the present organizational structure." Interestingly enough, the only commissioner who supported the call for a new one-man agency, John Ahearne, was appointed as the new chairman of the NRC by President Carter after he removed Joseph Hendrie from the job.

The same day he appointed Ahearne, Carter announced he agreed with the four other members of the NRC, not Ahearne or the Kemeny Commission.

Although he said he agreed fully with the "spirit and intent" of the proposal for a new executive agency, the President decided instead to tinker once again with the old independent commission, which had already seen several legislative revisions since its creation in 1974. His reorganization plan would enhance the executive and managerial powers of the NRC chairman, but leave the agency headed by a multi-member board. A small committee of experts would also be appointed to report on the progress of safety improvements in the redesigned agency.

The Carter proposal may have been a recognition of political realities on Capitol Hill more than a sign of Carter's dissatisfaction with his own commission. Lately, Congress has been notoriously suspicious of passing out free-wheeling administrative discretion, especially into the hands of one person. If anything, the Congressional mood reflects a desire to take away administrative authority, as exemplified by recent legislative attempts to emasculate the Federal Trade Commission.

Carter's reorganization plan, which resembled a proposal considered and rejected by the Kemeny Commission, received endorsement the day it was announced from a surprising source—John Kemeny, the chairman of the presidential panel. "While the details are different from our recommendation," said the 53-year-old college president, "they are completely responsive to the goal we are trying to achieve. And the version adopted by the President is likely to be implemented much more expeditiously than our own recommendation."

The President's action was greeted with something less than Kemeny's enthusiasm by other members of the President's commission, most notably, Carolyn Lewis, Associate Dean of the Graduate School of Journalism at Columbia University.

The President's reorganization plan is "totally inadequate," because it doesn't correct the deficiencies discovered by the

Kemeny Report, she said. "We found how deep the rot is inside the old NRC and said you have to change the personnel and structure in order to deal with safety issues. Now the President says we'll fiddle with it, but won't change it. As long as things stay basically the same, it will mean business as usual."

During their deliberations the presidential commissioners had all agreed that the present NRC was not working well, a conclusion documented in an extended staff report by the commission's office of chief counsel. The NRC's downfall is poor management, the report said, due in part to an unworkable statutory mandate. The Executive Director of Operations, the nominal administrator directly below the commission, is effectively powerless and largely ignored, since the three main divisions under his authority have direct access to the commission, a bypass route guaranteed by statute.

The commissioners themselves spend an inordinate amount of time reviewing export licenses, leaving power plant licensing to an independent staff and hearing boards that are prevented from communicating directly with the NRC by restrictive *ex parte* rules, and informal practices. With a constantly shifting majority on the NRC Commission and a staff reluctant to alienate individual commissioners, it is not surprising that the Kemeny Report could conclude "the NRC is unable to fulfill its responsibility for providing an acceptable level of safety for nuclear power plants."

The Kemeny Commission found that the NRC focused its energies too heavily on licensing plants, and in the process neglected its equally important policing responsibility. The inspection and enforcement office was the NRC's forgotten stepchild, under-staffed, poorly financed and heavily dependent on testing by the industry it was designed to regulate. Although utilities were required to supply reports describing unusual events at their plants, the NRC lacked a formal mechanism to systematically re-

"One of the most significant recommendations offered by the Kemeny Commission was its proposal that new nuclear power plants not be licensed until state and local agencies establish approved emergency plans for an expanded area surrounding the plant."

view them and relied instead on individual inspectors to remember events that might indicate generic problems.

The problems at the NRC were pinpointed by the Kemeny Commission's staff of lawyers, a staff which incidentally was not fully manned until mid-way through the six-month investigation; a tardiness caused by the misguided belief early in the investigation that lawyers were unnecessary, that the technical staff could supply all the relevant answers. Once the legal staff was operational, spotting the problems at the mismanaged bureaucracy was a relatively painless—though exhausting—process.

There was some tension between the legal and technical staffs. The lawyers were all new to the nuclear power business and were willing to be highly critical. Because of the scarcity of technical talent, on the other hand, most of the nuclear scientists and engineers on the staff, other than a few from NASA, had spent their lives working with the NRC or the industry, and were less willing to criticize their former bosses.

One day, Stanley Gorinson, the chief counsel, learned that this incestuousness had spread into his own bedroom. The legal staff had a long list of individuals to be deposed, including one Beverly Washburn, the NRC's project manager on the Three Mile Island licensing application. Washburn was not high on the deposition list, and probably would have been skipped except for one thing: he was working for the Kemeny Commission. The lawyers, at first shocked when informed of this conflict of interest, then bemused, were finally composed enough to walk across the hall and depose the NRC engineer, who promised not to investigate his own prior actions.

Such irregularities aside, the legal staff of the Kemeny Commission easily found fault with the NRC but the commission members had a much tougher time trying to develop concrete suggestions for overhauling the agency. President Carter's proposal to retain the multi-mem-

ber commission and revitalize the NRC chairman's managerial position had been considered by the Kemeny Commission but it was ultimately rejected—though it was included in an early draft of the panel's recommendations.

Because the members of the presidential panel had little experience or knowledge of administrative agencies, they were at first reluctant to recommend major change, preferring instead lofty platitudes for excellence. They were afraid to get into the nuts and bolts of administrative law that a major overhaul would require. The early drafts of their recommendations reflected this reluctance.

Enter Bruce Babbitt and Arizona State law professor Harold Bruff. Babbitt, the governor of Arizona and chairman of the commission's subcommittee on the NRC, and Bruff, a consultant Babbitt had brought to the commission, were gradually convinced that major reform was necessary to revitalize what Babbitt called the misguided "headless" agency. Part of their resolve grew out of an informal seminar Bruff had arranged between commission members and leading experts in administrative law and public policy.

After the meeting, Bruff harshly criticized the early recommendations, some of which he said retreated to "fuzzy exhortations." Bruff, Babbitt and other members of the NRC subcommittee argued persuasively that regulation by committee was ineffective when safety was the predominant goal. The five-member commission might be valuable in adjudicative proceedings, but it could not perform the job of a tough cop, walking the nuclear precinct. The commission structure diffused responsibility and accountability, leaving too many vital enforcement jobs undone. The argument was compelling.

The Kemeny Commission unanimously endorsed the recommendation to replace the five-member NRC with a single administrator. Early this year an NRC-sponsored study reached the same con-

clusion: the old agency, the headless tangled marionette, must go. This will understandably add well-deserved pressure on Carter to reconsider his less drastic reorganization plan.

Other less controversial recommendations of the Kemeny Report have fared fairly well in the bureaucratic market; many are being implemented by the present NRC which is making a last-ditch effort to prove that it is tough enough to ride roughshod over the nuclear industry. Soon after the report was issued, the NRC announced its own moratorium on construction permit applications to give itself time to evaluate and implement the panel's recommendations. But some observers insist that this latest effort was nothing more than an attempt to defuse Congressional proposals for longer moratoriums, such as the three-year suspension proposed by Rep. Morris K. Udall (D-Ariz.).

One of the most significant recommendations offered by the Kemeny Commission was its proposal that new nuclear power plants not be licensed until state and local agencies establish approved emergency plans for an expanded area surrounding the plant. This recommendation had previously been proposed by a Congressional subcommittee, and the General Accounting Office. But the attention that the Kemeny Commission focused on this issue apparently had some impact.

Recently the Nuclear Regulatory Commission released the draft of a new regulation implementing this recommendation. In fact, the NRC went beyond the recommendation by setting a deadline under which currently operating reactors would lose their licenses if state and local emergency plans were not approved. Presently there are 25 states with operating plants, only 12 of which have plans that have received NRC concurrence. If accepted, this regulation would give a virtual state veto on new plants.

The NRC also plans to implement another of the Kemeny Commission's recommendations by expanding the area

"Although both nuclear critics and advocates have found fault with some aspects of the Kemeny Report, and used other parts to buttress their own conclusions, it is widely conceded that the report is a tough, damning and readable document."

around plants that must be included in local emergency plans. During the accident at Three Mile Island, serious consideration was given to a 20-mile wide evacuation. But the NRC regulations only required plans for 2.2 miles around that plant. Now the NRC will require emergency plans for a zone of approximately 10 miles around each power plant and some additional planning for a 50-mile zone.

Although both nuclear critics and advocates have found fault with some aspects of the Kemeny Report, and used other parts to buttress their own conclusions, it is widely conceded that the report is a tough, damning and readable document. This is in part a tribute to the consensus-building ability of its chairman, John Kemeny. Unanimity was achieved on 36 of the 44 recommendations. But unanimity usually means compromise and the report reflects this fact, in part explaining its mixed reception. In many respects, the Kemeny Report was written by committee, word by agonizing word.

Writing by committee is difficult, but this is especially true when the committee is as diverse as this one—in some ways, the commission represented a microcosm of American life. There were three nuclear proponents—a nuclear engineer, an industrialist and a union leader—and three earnest critics—a journalist, a conservationist and a nuclear physicist. The remaining six members were spread across the middle spectrum, understandably ruled by the watchword "caution." This cross-section of opinion and background made consensus all the more difficult, and all the more essential, according to Kemeny, if the report was to have its strongest impact.

Kemeny's consensus gathering broke down once, at a most critical time, during the discussion of the most symbolic of all the recommendations—the moratorium proposals. Three temporary delays in construction permits were introduced—one which hinged upon Pres-

idential and Congressional response, one which would terminate after a new remote siting policy was implemented, and one for two years. None of the proposals were adopted, although eight of the 12 commissioners voted for at least one of the three. Two of the proposals received six votes, a majority of those voting on the issue, but one shy of the seven vote absolute majority required for adoption.

The moratorium forces on the commission believed that they had secured the winning vote when Harry McPherson, a respected Washington lawyer serving on the commission, joined the moratorium vote tied to a remote siting policy. To the surprise of most of the other members, John Kemeny, who voted for the other two moratorium proposals, abstained on this vote, leaving the moratorium barely out of reach once again.

The procedural requirement for seven votes was introduced by Chairman Kemeny and approved by unanimous consent the morning of the moratorium votes. It was one of many procedural rules attached to the day's agenda, briefly skimmed by most of the commissioners, barely noticed by others. Later at least one of the commissioners privately complained that the rule had been purposely used to ward off the moratorium.

The reaction to the commission's failure to pass a moratorium was swift and strong. One congressman said it "tragically flawed" the report. Some reporters focused their attention on the internal dissent, rather than the substance of the rest of the report.

A construction permit moratorium is little more than a symbol to both critics and proponents alike. Only one utility applied for a construction permit last year, while there are 91 plants in some stage of construction with permit firmly in hand, only an operating license standing in the way as the last bureaucratic hurdle before going "on line." Whether these plants should be allowed to operate presents the far tougher issue of the

future of nuclear power, an issue which the Kemeny Commission was not established nor willing to resolve.

Although a construction permit moratorium would have meant little substantively, it was valuable as a symbol. In all likelihood, the difference between a construction permit moratorium and a moratorium on operating licenses might have been lost in the headlines proclaiming a victory for the nuclear opponents. The commission's failure to pass the construction permit moratorium, on the other hand, was readily picked up by the nuclear industry and effectively turned into a widely read and misleading advertising message that the industry should "proceed with caution."

Neither symbol accurately reflects the consensus of the commission, but there was an overwhelming sentiment for fundamental and dramatic changes in the nuclear business and virtually no support for a continuation of business as usual with a little caution thrown in.

The legacy of the Kemeny Report is probably not in its internal machinations or its moratorium votes. Its strong recommendations, including the abolishment of the NRC, are now left to the political process, where it should be remembered what happened to the 12 public-spirited individuals who served on the commission, scurrying to Washington, D.C. for hours of testimony and reams of reports. These 12 people came together from all walks of life for six months to investigate Three Mile Island and came away unanimously convinced that all is not well in the nuclear business, that unless dramatic changes are quickly made, the patient may soon be—and for some, should be—beyond help.

Jeff Klein, a third-year student, spent the fall semester on an externship, serving as an aide to Three Mile Island Commission member Governor Bruce Babbitt. Mr. Klein also has a Master's degree in journalism from Columbia University.

Old Economics and New Environmental Controls

by James E. Krier and Robert B. Bell

This article is based on a current research project of Mr. Krier, a member of the law faculty, and Mr. Bell, a third-year student in the Law School. The authors gratefully acknowledge support from the Environmental Quality Laboratory of the California Institute of Technology.

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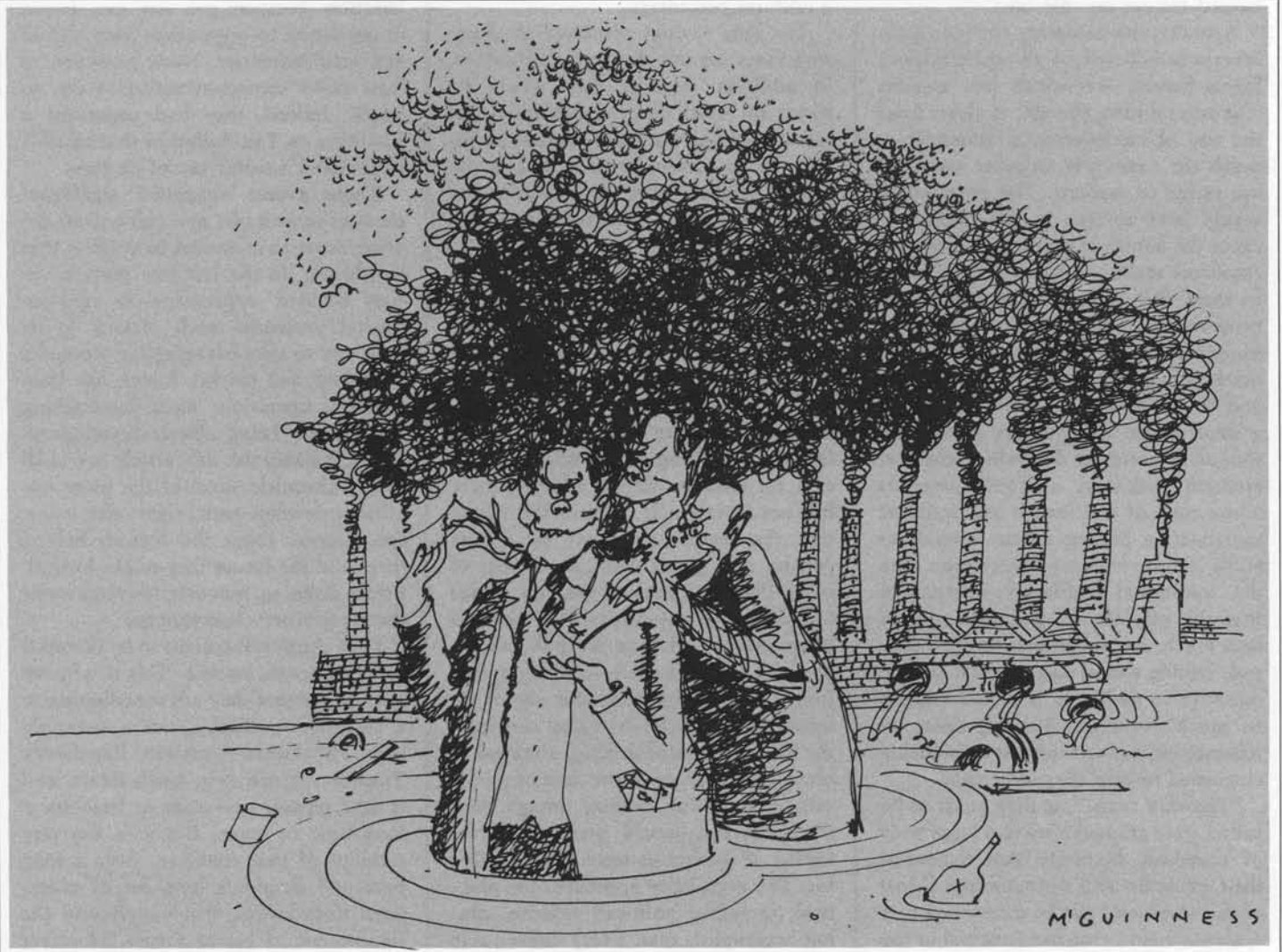
A cynic might argue, pretty persuasively, that the first several hundred years of American policy were devoted to spending insufficient amounts on environmental quality, and most of the last decade to spending as much as possible—sometimes, perhaps, more. The future

looks at least a little brighter. Recent developments in the United States suggest a new interest in saving money and the environment at the same time. Partly this observation arises from a realistic relaxation of many of the heady environmental goals established in 1970 and the years after—goals like making Los Angeles air as clean as that in Yosemite by the mid-1970s, or eliminating the discharge of all water pollutants by the mid-1980s. The trend toward reasoned relaxation is an important development, but it is not our concern here. Rather we shall discuss the new techniques be-

ing used or seriously studied by policymakers as means to achieve any given environmental quality goal. These techniques have at least two things in common: each is based, one way or another, on economic principles that have been around for a long time; together, they contribute to a creeping revolution in the realm of environmental controls.

I

Economists have argued for many years that government should rely more fully on market forces to control pollution and similar environmental problems. Though one could probably push



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the inquiry back further, observations made in the 1920s by the British economist A. C. Pigou are a good starting point. Pigou reasoned that pollution in undue amounts occurs because polluters are not forced to take into account the costs (the "social costs") their activities impose on others. His solution was to levy a tax or a charge—call it an emission fee—on each unit of pollution in an amount equal to the damage it caused. The fee would create incentives inducing polluters to control to an optimal level—to a level, that is, where further control would cost more than the social costs it avoided. The social costs would be charged to polluters via the emission fee; each polluter would control only to the point where the cost of abating the next, marginal unit of pollution would exceed the fee on that unit.

Actually, this summary of Pigou's observations is based on an oral tradition; Pigou himself was much less specific. The central idea, though, is clear: price the use of environmental resources in much the same way as other resources are priced in markets. The government would have to step in, of course, because the nature of many environmental resources makes it difficult to establish in them the virtually exclusive private property rights that form the underpinnings for relatively smooth operation of markets in resources and goods like iron and cows, guns and butter. But this is a small point. All property rights, and thus all markets, are dependent on a government backdrop, a social consensus about rules of entitlement and transfer; moreover, a pricing system would involve less government intervention than the traditional regulatory alternatives whereby officials tell pollution sources how much, and sometimes how, to control. Pricing would leave a great deal of initiative to polluters. It would rely, as so much economic thinking does, on self-interest, but self-interest presumably channeled toward the public good.

"Pigovian taxes," as they came to be called, gave gradual birth to a large body of economic literature that examined their strengths and shortcomings. Most of the latter need not be mentioned here—they are either too fundamental or too technical, or both, and all but a few of them, to be discussed later, probably

have no practical importance for our purposes. As to strengths, a chief one is that emission fees would induce different degrees of control by various pollution sources. Under the constraint of the fee, sources for which control is relatively cheap would control more than sources for which control is costlier. As a result, emission fees could achieve any given level of control at least cost to society. This contrasts sharply with the typical regulatory approach, which tends to require equal amounts of cleanup and to entail higher costs than necessary as a result. A classic study of the Delaware River Basin, for example, showed that a fee system would yield the desired level of water quality at about half the cost of a regulatory program mandating that polluters reduce their discharges by a uniform percentage.

The cost savings promised by Pigovian taxes are not their only advantage. In addition, because they would be levied on every unit of pollution, the taxes would give sources continuous incentives to control further, and to develop efficient new technologies by which to do so. The regulatory approach, in contrast, stimulates sources to control only to the legally required degree, not beyond it. Finally, and implicit in the foregoing, the decentralized nature of the tax system would encourage a range of constructive responses that is virtually impossible to accomplish by regulatory means. Present regulations controlling motor vehicle pollution, for instance, impact what we drive but not how much (save to the extent that the regulations exact an energy penalty that grows with the number of miles driven). Emission fees on motor vehicle pollutants—assessed on the basis of grams of pollutant per mile, multiplied by miles traveled—could not only induce the development and use of effective technologies but also constrain the total amount of driving, a matter of central importance in the case of motor vehicle pollution. Notice, though, that the constraint would permit the rich variety of driving patterns that is called for. The regulatory approach, for practical (including political) reasons, cannot accomplish that. Every conceivable regulatory alternative is simply . . . inconceivable!

II

Despite their apparent advantages, emission fees attracted little attention outside economic circles until quite recently. Significantly, and this is a point to which we shall return, concrete governmental interest began at just about the time the "environmental crisis" closed the 1960s and opened the 1970s with a vigorous commitment to pollution control. In 1969, for example, Senator Proxmire submitted legislation for an effluent tax to control water pollution. The proposal met with widespread objection, especially from environmentalists. The next year the Nixon administration proposed a tax on lead additives used in gasoline, and two years later a tax on sulfur emissions from industrial sources. Neither of the administration measures got very far, thanks in particular to opposition from the oil and lead industries. Now, however, at least *some* environmentalists were on board. Indeed, they had organized a Coalition to Tax Pollution that in 1971 formulated a sulfur tax of its own.

These events suggested significant changes in attitude, and subsequent developments have tended to confirm that conclusion. In the last few years a variety of new approaches to environmental problems, each seeking in its own way to take advantage of economic incentives and market forces, has been put into operation; more far-reaching reforms are being closely investigated. In the balance of this article we shall briefly chronicle some of the more important developments, then offer a few speculations about the reasons behind them and the future they might foretell. Before doing so, however, we must make three prefatory observations.

First, the developments to be sketched are, in a sense, modest. This is why we said earlier that they are contributing to a creeping revolution, not a sweeping one. The Great American Regulatory Tradition is still very much intact, and it shall remain so—more or less—for a long time to come. But it is the very stability of that tradition, over a long time and despite a long list of objections from critics, that underscores the significance of recent events. However haltingly, the tradition appears to be giving way.

Second, and related to the foregoing, the new environmental controls are not pure systems but mixtures—six parts regulation and one part economic incentives. Whether this is simply a transitional phenomenon, or, rather, indicates that pure incentive systems are an ideal that cannot be put into reliable everyday operation, remains to be seen. Our own hunch, shared by a number of others, is that pure (or at least quite pure) systems of incentives will eventually prove to be best suited to some environmental problems, relatively pure regulatory programs to others, and a whole range of combinations to still others. In one way or another, then, mixed approaches will likely come to be the norm.

Our third point is again related to the foregoing, but it requires a bit more elaboration. Pigovian taxes are not the only economic approach to pollution control; government subsidies, for example, are a clear alternative, and have in fact been used for a long time, though seldom in pure form, with regard not only to environmental problems but other areas of concern as well. Subsidies can be seen as the mirror image of emission fees. They say we'll pay you if you don't do a certain thing (like pollute), while fees say you must pay us if you do. Both serve as an inducement to undertake some socially desired activity.

Subsidies and fees share a number of obvious similarities—decentralization, continuous incentives, and so on. There are also dissimilarities, of course, perhaps the most noticeable being the opposite directions in which they distribute wealth. This difference between the two approaches has important implications that we haven't the time to take up here. Nor are we in a position to pursue another interesting point: the popularity of subsidies appears to be waning just at the time that interest in other economic approaches is waxing—at least in the case of environmental problems. These other approaches, much more closely related to Pigovian taxes than is the subsidy technique, share many of the advantages of Pigou's model but also avoid some shortcomings. We have already outlined the strengths of Pigovian taxes. Now it is time to consider some of the operational problems and see how alter-

native techniques can deal with them.

How does a government wishing to employ Pigovian taxes set the correct levy? Ideally, of course, the tax should be set at an amount equal to the marginal social cost imposed by each unit of pollution, but given a host of difficulties—damages that vary as a function of individual preferences, nonlinearities, and synergistic effects, for instance—an even roughly accurate calculation seems, for all practical purposes, to be impossible. Professor William Baxter proposed several years ago that one could deal with this problem by charging on the basis of average rather than marginal cost; part of that cost—harm to persons—would be computed through the political process. A number of economists have advanced a somewhat similar approach, of which Professor Baxter was not unmindful, and for better or worse it is the dominant model of emission fees being considered today. Under this approach (and as in the typical regulatory program), the political process would be used to set a desired level of environmental quality—of ambient air or water quality, for example; then the fees necessary to achieve that level would be calculated by technicians.

Understand that this process, though simpler than setting pure Pigovian taxes, would not be easy; in fact it would be fraught with difficulties. To cope with this, some experts suggest an iterative process whereby charges are established on a best-guess basis, then revised if they prove to be short, or wide, of the mark. The suggestion, though appealing, might well prove politically troublesome. Sources which made capital investments based on one fee schedule would be understandably unhappy with government plans to change fees, especially to raise them, and environmentalists would view a reduction in fees as retrogressive. In any event, even an accurate schedule, once arrived at, would not be stable. Fees would have to be adjusted with changes in general price levels (as they would have to be under the pure Pigovian approach) and changes in the number, nature, and perhaps location of sources (as they might have to be under the Pigovian system). These necessary adjustments could well prove little less difficult than were the initial calcula-

tions. Moreover, fees—Pigovian or otherwise—might create insufficient incentives for sources, like public utilities, that are thought by some to be insufficiently concerned with minimizing costs.

There are other difficulties with fee systems of any sort, but those mentioned are sufficient for our purposes. The short of the matter is that Pigovian taxes, however sound in principle, would be very problematic in practice, and variations on the Pigovian theme, while they respond to some shortcomings, leave others untouched and also introduce new concerns.

For reasons like these, perhaps, there is growing enthusiasm for yet another approach—marketable rights—popularized by a Canadian economist in 1968. Simply put, the government would begin by identifying the desired ambient environmental goal—just as it does in a regulatory program or would under some variants of emission fees. The government would then divide the total pollution load implied by the ambient goal into a number of rights to pollute that could be bought and sold by polluters and others. Because pollution control is costly, and because sources could not pollute without rights, the rights would command a positive price. Sources that could control at relatively low cost would control more, and purchase fewer rights, than sources with higher control costs. The rights would generate all the sorts of incentives created by emission fees; indeed, it seems accurate to say that the rights approach and the emission-fee approach are identical in principle.

The rights approach, though, has several practical advantages: It is easier to infer, from any given ambient goal, an appropriate number of rights than it is to infer an appropriate charge; the number of rights would not have to be altered with changes in price levels and pollution sources; the rights system would constrain even those enterprises thought to be unconcerned with cost minimization. This is not to say, of course, that marketable rights would be trouble free—political pressures could still force the government to issue “too few” or “too many” rights, for example, and markets might prove expensive to organize and operate. Nevertheless, mar-

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ketable rights are sufficiently promising that they have come to be a leading contender among economic approaches to environmental control.

III

Let us now briefly sample some of the new environmental controls, most of them takeoffs from, rather than copies of, one or another of the alternatives discussed above. We can categorize the new controls by the increasing degree to which they alter the traditional regulatory pattern. Given limitations of space, our objective is only to describe, not evaluate.

1. The most modest example of recent developments is the noncompliance penalty provided by amendments to the federal Clean Air Act in 1977. The penalty provisions are modest because they leave the overlying regulatory program entirely intact—they are a means of enforcement only. Still, they represent a decidedly economic approach to enforcement that, like each of the developments to be discussed here, is new in terms of concrete use or interest but old in terms of basic economic principles. Indeed, noncompliance penalties probably have the longest lineage of all, dating back, one could argue, to Bentham.

Under the noncompliance-penalty approach, a source in violation of emission regulations is subject not only to the ordinary sanctions (e.g., a fine for each day of violation) but also to a penalty, computed from the date of detection to the date of compliance, equal to all amounts the source has saved by not complying. The penalty is designed to discourage the dilatory tactics used by polluters threatened with traditional, judicially imposed sanctions. Delay has been a problem because courts are vulnerable to legal maneuvering and have proved reluctant to impose large fines. As a result, violators can, by staving off the day of judgment, end up paying less than the control costs they have avoided in the meantime. The noncompliance penalty copes with these problems by relying on quick, administratively imposed assessments, and by making those assessments equal to savings, thus reducing opportunities for delay and making them unprofitable in any event. The approach was originally designed for Connecticut, and is reported to have cut

both administrative costs and noncompliance significantly.

2. A slightly greater departure from traditional regulation is illustrated by the "bubble" policy of the U. S. Environmental Protection Agency. At present the EPA is using the bubble in connection with federal air pollution control legislation, but its application may be broadened in the future.

The bubble policy alters the typical regulatory approach in a manner that brings into operation some of the economizing incentives of emission fees or marketable rights. Ordinarily, emission regulations specify the maximum amount of pollution permitted from each outlet, if you will, in a source—each of six smokestacks in a manufacturing plant, for example. This is an inefficient approach simply because it is often the case that a source could achieve the required *aggregate* amount of control at lower cost by, say, reducing emissions from three stacks more, and from the other three less, than the regulations require.

The bubble policy lets just such economizing measures take place. An imaginary bubble is placed over each plant, and a single emission limitation is set for all the equipment within the bubble. There is, to be sure, "undercontrol" as to some outlets within the bubble, but it is offset by "overcontrol" as to others. The source has incentives to find the cheapest mix of controls that achieves the aggregate limitation specified. The EPA, to ensure that the bubble policy will not result in increased pollution, restricts its application to discharges of the same pollutant from each outlet. A source cannot reduce emissions of a conventional pollutant from one outlet in order to relax controls on a toxic substance from another.

The bubble policy was stimulated by the high costs of complying with environmental regulations. Douglas Costle, who had been head of the Connecticut Department of Environmental Protection during development of its noncompliance penalty, was considering the bubble approach in his new position as administrator of the EPA. In the course of Costle's deliberations, President Carter appointed a steel industry task force that recommended evaluation of envi-

ronmental regulations to see if their goals could be achieved at lower cost. The task force recommendations, along with White House and steel industry pressure, led to adoption of the bubble policy in 1978. The savings it can yield are impressive. An electric utility in Florida claims it reduced by \$20 million the costs of controlling sulfur oxide emissions. Dupont is developing a proposal to apply the bubble approach to a chemical plant in New Jersey. The firm anticipates 89 percent removal of hydrocarbon emissions at a cost of \$5 million; traditional controls would cost \$20 million and accomplish only 84 percent removal.

3. Our third example—nonconformance penalties—is similar in both name and technique to the noncompliance penalties discussed earlier. It comes here because it represents a much more substantial inroad on regulation.

As background, it is important to understand that Congress has for years, especially since 1970, been playing high-stakes poker with motor vehicle manufacturers—and losing. The game has gone like this: Very demanding vehicle emission control requirements are established, damn their feasibility. The industry asserts that it cannot comply within the mandated deadline. Congress responds by saying meet the requirements or face going out of business. The industry says fine, we'll go out of business. Congress extends the deadline. This is a simplification, but not a gross one; extensions of vehicle emission controls have become almost laughably commonplace. The stakes are such that Congress has lacked the will to call the industry's bluff, if that's what it is.

Some economists have suggested a new approach to the game: allow vehicles to be sold, but only upon payment of a charge for those that do not meet standards. Congress adopted the suggestion, on a limited basis, in 1977. Nonconforming heavy-duty vehicles may be marketed if the manufacturer pays a nonconformance penalty. Factors to be taken into account in calculating the penalty include the pollutant, vehicle category, and amount of emissions over the standard in question. Penalties are to be increased periodically "in order to create incentives for the development of

production vehicles or engines which achieve the required degree of emission reduction"; they are to be set so as to "remove any competitive disadvantages to manufacturers whose engines or vehicles" comply with standards.

The nonconformance penalty hardly represents a pure emission-fee approach to motor vehicle pollution. Very dirty vehicles may not be marketed, and those that achieve standards pay no charge at all. Moreover, the penalty is not designed to vary with the number of miles driven, and thus fails to create incentives to reduce total miles traveled. Finally, as mentioned above, the penalty is of limited application. Nevertheless, it is much closer to a pure emission fee than is the noncompliance penalty (note, for example, that it sanctions varying degrees of control, while the noncompliance penalty does not). And it is as close, by a long shot, as Congress has come to putting emission fees into effect.

4. Just as our third example was related to the first, that to be considered here is related to the second. The bubble policy, recall, permits a source to trade off control at one outlet within a source for control at another; the offset policy permits tradeoffs between sources—between one firm and another. And just as nonconformance penalties resemble emission fees, the offset policy resembles marketable rights. Both reflect about equal degrees of departure from regulatory norms.

Under the federal Clean Air Act, all regions of the country are required to achieve a stringent set of uniform air quality standards. A chief implication of this requirement turned out to be that areas in violation of standards—and there are many of these so-called non-attainment areas—could not permit new industrial growth because it would aggravate existing violations. A virtual cessation of development in most of the major metropolitan areas of the United States is not, of course, particularly palatable from just about any perspective, and the offset policy developed as a result. It was first formulated administratively (and probably extra-legally) by the EPA, then endorsed by Congress in 1977.

The offset policy, putting a number of complications to the side, permits construction in nonattainment areas if the

new source's emissions are controlled to the lowest achievable rate *and* if emissions of the same pollutants from existing sources in the area are reduced so as to offset, on a more than one-for-one basis, the amounts emitted by the new source. (Offsets larger than one-for-one are required in order to achieve net air quality improvements.) To date most offsets have been internal: a firm that wants to build a new source reduces pollution from other of its facilities within the region. In a number of instances, however, offsets have resulted from deals of various sorts. For example, when Volkswagen decided in 1977 to construct an assembly plant in Pennsylvania, the state agreed to reduce hydrocarbon emissions from its road-surfacing operations in order to make room for pollution from the auto plant. In the same year the Oklahoma Chamber of Commerce persuaded oil companies in the vicinity of Oklahoma City to reduce hydrocarbon emissions from their storage tanks so that General Motors could build a new factory. In a highly publicized case in Los Angeles, Standard Oil of Ohio (SOHIO) came close to paying \$90 million to control pollution from a power plant, a glass manufacturing facility, and three dry cleaning plants in order to offset emissions from a proposed oil tanker port. The deal fell through last spring, thanks to the heavy weight of enormous amounts of red tape.

There is a fairly good chance that the offset policy will eventually stimulate more fluid markets in pollution rights; we have already seen advertisements offering so many tons of hydrocarbon emission capacity at such-and-such a price per ton. Like the more pure marketable rights program discussed earlier, offsets have the effect of inducing the greatest degrees of control by sources with the lowest control costs. The constructive incentives of the system have been enhanced recently by changes which permit "banking." Sources may acquire or create offsets at one point in time and save them for sale or their own use in the future. (This strengthens research and development incentives; it also discourages premature construction of new facilities and unduly long retention of old ones.) For purposes of banking, special clearinghouses will keep off-

set records and will also seek to bring together potential buyers and sellers. A clearinghouse is already operating in Louisville; one is expected to open in San Francisco this year; others are in the works in Boston, Buffalo, Chicago, and Philadelphia.

The offset policy completes our list of examples. The four measures discussed are probably the most concrete of recent developments, but they do not exhaust the field of activity. The EPA, for example, has contracted for research on the use of marketable rights for air pollution and as an approach to chlorofluorocarbon control; it has also granted funds to study the feasibility of emission fees. We are confident that our investigations will uncover a number of similar projects, and other operating programs as well—especially at the state level.

IV

Accounting for the new interest in economic approaches to environmental problems is not easy. Institutional change is a complicated and obscure process, and about the best one can do is theorize. At present we have only some very tentative ideas about a number of factors that might be at work. Before listing them, we should note that the move toward markets is not confined to environmental problems; deregulation occupies a broader place than that in relations between government and the economy today. It could be that developments regarding the environment are but reflections of a more general change in the methods of government intervention, and the job then would be to account for the larger trend. While that is a more ambitious undertaking than we have in mind, it probably is the case that a number of common factors are involved. Beyond this, however, each particular area—whether it be the environment or land use or water allocation or the transportation industry—no doubt introduces its own peculiar considerations. Here we want to concentrate on the environment, though some of our observations have obviously broader implications.

1. A factor of central importance in the environmental area has been the high costs imposed by the new era of demanding controls that began about 1970. While traditional regulation has always

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involved allocative waste (because it tends, among other reasons, to ignore the fact that different sources face different control costs), the amounts of waste were modest precisely because the regulations did not demand a great deal. Moreover, the traditional regulatory method has relatively low administrative costs, and savings here could outweigh allocative losses.

High degrees of control exacerbate the waste of crude regulations. They stimulate sources, suddenly facing very large compliance costs, to lobby for cutbacks, or to demand at least the provision of methods that permit the sources to get to the same point at lower cost—the same bang for fewer bucks. Environmentalists, not unaware of the high costs of the new era, have related concerns. By advocating economizing measures, they can dilute industry demands for cutbacks. Beyond this, high costs reduce the chances of achieving further (and still more costly) improvements. Economizing measures can yield a greater bang for the same bucks. Control agencies like the EPA, then, find themselves confronted by an oddly united constituency. The agencies, moreover, are independently worried about high costs, which can threaten the mission to go forward, or at least to hold the line. Yet a revamping of the regulatory approach, while it could perhaps avoid allocative waste, would among other things entail very high administrative expense—an especial concern during inflationary times.

2. Considerations like the foregoing might help to account for the development of the bubble and offset policies, and suggest why those policies followed on the heels of the demanding new environmental controls that began in 1970. A related observation points in the same general direction. High control costs can be eased, among other means, through the introduction of new, more effective technologies. Yet, as mentioned earlier, regulation creates relatively weak incentives for research and development; economic approaches promise to do a better job. Their advantages in this regard have had a good deal to do with formulation of most of the examples discussed above, and played a particularly important role in adoption of nonconformance penalties. Economists suggested the penalties

precisely to break the stalemate that had developed between Congress and the auto industry, and it will be interesting to see whether the experiment succeeds. If it does, we might expect to see more enthusiasm for a broader program of motor vehicle emission fees. Among other things, such a program could induce reductions in vehicle-miles-traveled, something not accomplished by nonconformance penalties. The reductions would represent a second means to cope with high control costs—nontechnological controls.

3. The nonconformance penalty stands out among our examples in that, so far as we can tell, it was devised by Congress; the others, whether in use or under study, were developed by the EPA or by similar integrated agencies at the state level. The appearance of these agencies, again since 1970, may have a good deal to do with the new environmental controls. Given a central agency, industrial and environmental interest groups can concentrate what would otherwise be diffuse lobbying efforts; they can also hassle one agency with lawsuits more effectively than they could an array of agencies. The EPA's short history tends to suggest that the threat of recurring litigation can encourage an agency to work with, rather than against, those seeking its attention. Finally, and quite different from the foregoing, it is not implausible to think that an integrated environmental agency will be more sensitive to the high costs of a total program of environmental controls than would be a multitude of agencies—each concerned with only a single environmental medium, each focused on only part of the picture, each in a position to tell critics that the real problem is with those folks in that *other* building.

4. Agencies like the EPA employ lots of young lawyers, and not only to bring lawsuits; lawyers are intimately involved, as are economists and others, in program design. The young lawyers trained since 1970, however, have generally had a lot more exposure to economics than their predecessors. If they are not sympathetic, they are at least relatively sophisticated, and shibboleths—for example, that marketable rights are “a license to pollute”—tend to leave them unimpressed. They want what

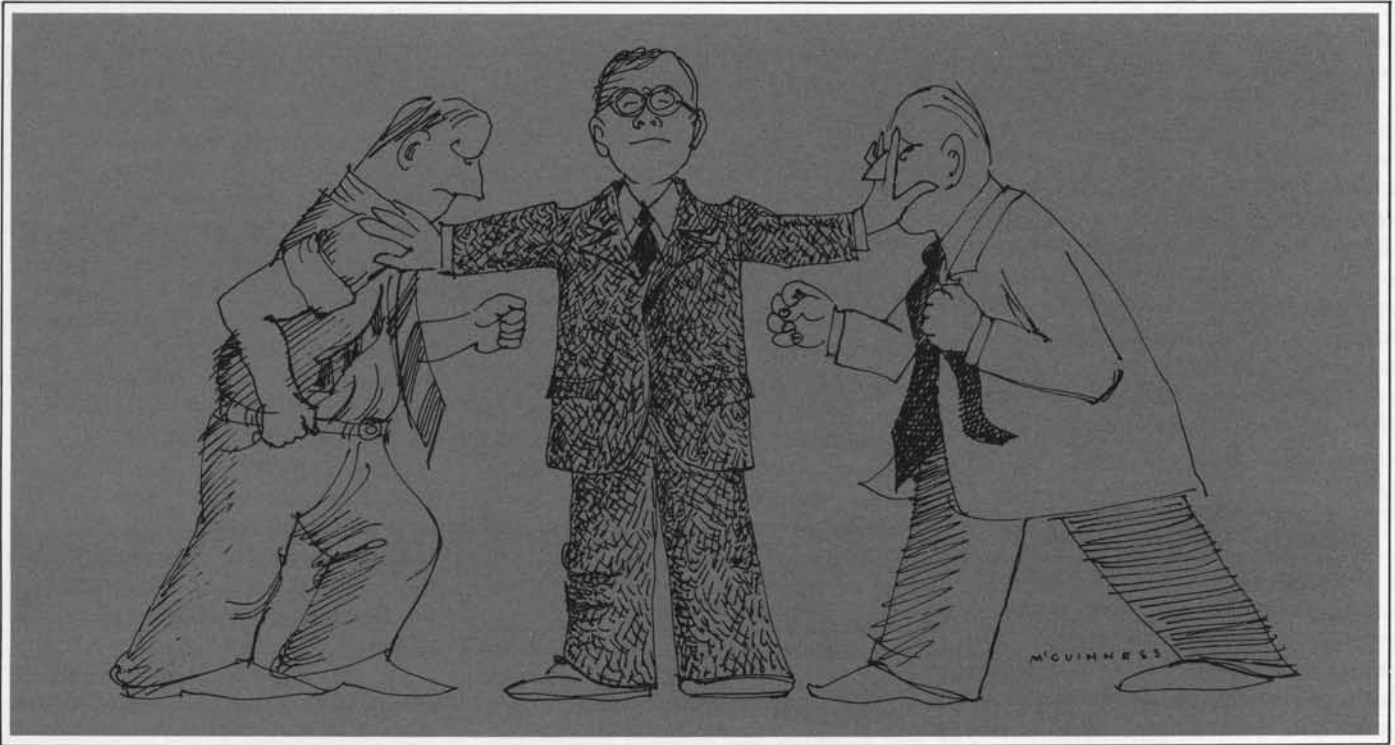
works. The presence of a few people like this can have a pronounced effect on an agency's mindset. A good example is William Drayton, a visiting professor at Stanford Law School in 1975-76. Drayton, as it happens, was trained before 1970 but otherwise exemplifies the type we have in mind. While hardly an apologist for economists (he believes, for example, that pure emission fees are pure bunk), he does recognize the virtues of practical economic approaches. Drayton was instrumental in designing Connecticut's noncompliance penalty, and later—as assistant administrator of the EPA's Office of Planning and Management—in bringing that approach, the bubble, and other reforms into the EPA's program.

5. Just as lawyers are learning more economics, so economists are becoming more practical. Over the last ten years, much of their effort regarding environmental controls has turned away from academic exercises and toward the design of realistic programs capable of real-world application. One can point to any number of these now; they were almost unheard of prior to 1970.

6. Finally, political resistance to economic methods of environmental control is breaking down. Regulatory techniques are running up against their own limitations; alternative approaches (implemented by the EPA without bothering Congress) are proving to be workable, effective, and worthwhile; and industrial and environmental interest groups, for a long time the main opponents of the sorts of reforms discussed here, have now become proponents. But to make these points is simply to restate the speculations outlined above. The fact is that, for whatever reasons, significant changes in direction appear to be underway. Given the inertia of our political system, if nothing else, they will probably continue for about as long as they have taken to start. And there is something else—a set of circumstances, likely to be with us for some time, that encourages alterations in the traditional modes of regulation. Old economic principles will hardly be reflected in every environmental control implemented in the future, but mixed systems will, we believe, come more and more to represent the norm.

Environmental Mediation: An Alternative to the Courtroom

by Nan Stockholm



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Ms. Stockholm wishes to express her appreciation to the Ford Foundation for a grant enabling research on the legal and institutional aspects of environmental mediation. The larger Ford Foundation study from which this article is drawn will be available this summer. Readers interested in obtaining copies should write: The Environmental Law Society, Stanford Law School.

What do the Snoqualmie River in Washington, the Bachman's Warbler in South Carolina, and a surplus tract of land in Rhode Island owned by the Department of Defense have in common? Quite a bit more than one might suspect. All were the cause of lively environmental debates—controversies which might have languished in the courts and administrative agencies for years. Instead, all were settled out of court through the process of mediation.

Environmental Mediation has been the featured topic of recent articles in *Fortune*, the *Christian Science Monitor*, *Audubon*, and the *Bulletin of the Atomic Scientist*.¹ There are many reasons for this new interest in resolving environmental disputes out of court.

The Challenge of Environmental Cases

The race to rectify historic patterns of resource mismanagement has placed unprecedented demands on legal institutions in this country. A flurry of state and federal legislation, most of it passed within the last ten years, has added significantly to the already overburdened courts' load. New laws usually foster

increased litigation, especially when terms are ill-defined, or when issues, such as standing are in question, and environmental laws have been no exception.

In tackling this flood of environmental cases, courts have had special difficulty with concepts which were poorly explained by legislators, such as "best available technology," or "prevention of significant deterioration," terms used in the Clean Air Act. In other instances, the complex nature of environmental problems and technology threatened to overwhelm judges who struggled valiantly to review administrative decisions without "legislating" themselves.

The action-forcing provision of the National Environmental Policy Act (NEPA) section 102(2)(C) probably best illustrates the complex decisions which courts must review. In order to satisfy the requirements of that section and the implementing regulations, an Environmental Impact Statement (EIS) must be a "detailed statement" which covers such items as "unavoidable adverse environmental effects, alternatives to the proposed action, mitigation measures,

1. Abrams and Berry, *Mediation: A Better Alternative to Science Courts*, *Bulletin of the Atomic Scientist* (April 1977); Alexander, *Coal and the Environmentalists: A Try for Detente*, *Fortune* (February 13, 1978); Cattani, *New Methods for Solving Disputes*, *Christian Science Monitor* (January 16-18, 1979); Fanning, *Earthlog*, *Audubon* (January 1979); Thatcher, *Justice in America: Making It Work*, *Christian Science Monitor* (November 27, 28, 29, 30, December 1, 1978).

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long-term vs. short-term impacts, cumulative impacts, secondary impacts, and impacts on wildlife, cultural and historic resources." Each of these items involves difficult trade-offs between environmental quality and other social needs, such as jobs, housing, and economic efficiency.

When one further considers that data pertinent to making these trade-offs may be unavailable or conflicting, and informed by differing values and risk preferences, the challenges of environmental dispute resolution are apparent. It is not surprising that special courts to handle environmental and scientific cases have been proposed. Most observers like Professor Abraham Sofaer, an expert in science and environmental litigation, agree that an "environmental court" would create more problems than it would solve.²

Trends Away From Litigation

Although the courts' caseloads are increasing annually, the recent interest in environmental mediation is part of a recognizable trend to resolve certain kinds of disputes outside the courtroom. Americans have always been known to be litigious, but they more frequently are turning to community dispute settlement centers, neighborhood justice centers, and mediation to resolve a variety of matters ranging from divorce to theft to fraud.³ The motivating factors behind this movement include the delays and expense of litigation and the realization that courts are not always the best forum to resolve conflicts. Says Raymond Shonholtz, director of the Community Board Program, a dispute resolution center in San Francisco:

"The courts are not overused, they are misused. Many of the cases that are in court could be easily and more inexpensively resolved through other means. Few cases, in fact, warrant the expensive adjudicatory, adversary model that law courts use. It makes little sense to have a \$45,000-a-year judge dismissing cases, yet one-third of almost every urban case load is dismissed."⁴

2. See, e.g., Sofaer, *The Science Court: Unscientific and Unsound*, 9 *Env'tl L.* 1 (1978); see also Levethal, *Environmental Decision-making and the Role of the Courts*, 122 *U. Pa. L. Rev.* 509 (1974).
3. See Cattani, *supra* note 1.

The statistics speak for themselves. At the start of 1975, the most recent year for which data is available, in 81 State Appellate Courts with 781 judges assigned to them, an estimated 56,619 cases were pending, 118,566 new cases were filed, and 108,043 cases were disposed of.⁴ Nationally, the average time between filing a civil case and coming to trial was 13 months.⁵ In 1975 in California alone at the Superior Court level, 70,000 cases were filed, of which less than 5% came to trial.⁶ These delays

"The courts are not overused, they are misused."

coupled with the high cost of attorneys' fees lead many parties to forego litigation, to reach an accommodation out of court, or to settle under the auspices of a magistrate or judge. Some local court rules, such as the federal district court of the western district of Washington, provide for mandatory mediation in some types of civil disputes.

Regulation Backlash

In addition to the movement towards alternatives to litigation, impetus for environmental mediation comes from the economic and political climate surrounding environmental regulations. In many aspects of air and water pollution control, industries have cleaned up 75 to 95 percent of the pollutants, so that now companies face steeply rising costs in order to achieve decreasing marginal benefits from controls. In such a situation, the only alternative to litigation might be for a company to close down. Although it may be argued that this is the correct result of regulation, more and more people seem to realize that "there is no such thing as a free lunch," in Dr. Barry Commoner's words, and that extra expenditures for pollution control must be carefully weighed against their impact on inflation and unemployment. Thus, even though Congress has explicitly given the Environmental Protection Agency the power to shut down non-complying industries, both the EPA

and the courts have been reluctant to order such severe remedies, as shown by the recent extension of the Clean Air Act deadlines.

On the one hand industry representatives complain that they are overregulated and underappreciated for their contributions to society. At a meeting of the Business Roundtable with President Carter, spokesmen said in their briefing, "... We view the achievement goals as being directly dependent upon our ability to maintain a sound economy through energy development. Regrettably in our experience with environmental regulation, we have increasingly encountered needless delays and uncertainties. As a consequence, the rate of our domestic energy development has been seriously impeded. Because our nation's economy is so energy-intensive, the economic costs to the country of further delays are overwhelming."⁷

An economist estimates, "For fiscal year 1979, the sum of the administrative costs of federal regulation (paid by the taxpayer) and the compliance costs (generally passed on to the consumer in the form of higher prices) may top 100 billion."⁸

On the other hand, some environmental leaders view the backlash against regulations in general and environmental regulations in particular as an excuse to weaken beneficial laws. Asserts Richard E. Ayres of the National Resources Defense Council, "The fight against inflation... has become a pretext for a different kind of campaign—a campaign to distort and nullify the structure of federal laws laboriously constructed to prevent and repair damage to public health and the natural environment."⁹

It may appear that these conflicting viewpoints are irreconcilable, but when one examines more closely the general needs of parties to environmental disputes, one begins to see that there is room for compromise in certain kinds of conflicts, and that this compromise often may be more likely to result from mediation or an allied form of dispute resolution as opposed to litigation.

Dissatisfaction with the adversary process and administrative solutions to en-

3. Raymond Shonholtz quoted in Thatcher, *supra* note 1.
4. National Center for State Courts, *State Court Caseload Statistics Annual Report* (Final Draft June 1978) (Table 1).
5. *Id.*
6. Superior Court J. Dieden quoted in McCabe, *San Francisco Chronicle* (May 31, 1979).

7. Business Roundtable, *Briefing for Meeting with the President*, 1 (June 15, 1978).
8. Murray Weidenbaum, quoted in materials for National Journal Conference on Regulation (May 21, 1979, Washington, D.C.).
9. Richard Ayres quoted in *id.*

vironmental conflicts has recently put former adversaries on the same side of many issues. This was illustrated well in a meeting held by the Council on Environmental Quality (CEQ) to discuss improvements in the regulations for preparing Environmental Impact Statements (EIS's). The new CEQ Regulations¹⁰ attempt to eliminate unnecessary description in EIS's, and to stress facts rather than conclusions. At the meeting, after a Sierra Club spokesperson had catalogued the improvements the Club wanted in the new regulations, an industry representative stood up and said, "I'd like to adopt the statement of the Sierra Club in full."¹¹ This indicates how much closer environmentalists and the corporate community are coming in efforts to solve environmental problems, for this incident probably would not have occurred five years ago.

According to corporate leaders, the biggest problems with environmental regulations are uncertainty and delay. Says a counsel for a major railroad, Choices that a corporation like this has to make involve huge commitments of money. The economic implications of these decisions are foremost in the minds of the company's leaders, because the company's stock will be discounted. I think that I speak for most industries when I say that it's important that regulations be given to companies in a clear and concise manner so that we can plan around them. If one plant is going to be riskier than another by reason of meeting environmental standards, then we need to calculate that risk along with its chances for success and profit. I think a good example of the problem might be the Storm King Project which practically bankrupted an eastern utility.¹²

Both business people and environmentalists have felt frustrated by the adversary process for several reasons. Since the court system is designed to reach decisions under a prescribed set of procedural rules, the issues which the

"[S]ome environmental leaders view the backlash against regulations in general and environmental regulations in particular as an excuse to weaken beneficial laws."

pleadings isolate end up being legal ones. Thus the resolution of a controversy in environmental cases may turn on procedural issues, such as whether an environmental impact statement (EIS) was filed on time and in a complete fashion, instead of substantive ones, such as whether two smaller dams would be preferable and as effective as one large one. Says a business lawyer, "The current adversary system obfuscates issues; for example, in a nuclear debate, all the lawsuit must be over is procedural issues which the groups bring up in order to cause delay. The underlying controversy centers on substantive matters. And it's true that both sides, and especially groups at either extreme, use the traditional process for their own ends."¹³

Another problem with litigation is what Milton Wessel, an experienced litigator in socio-scientific disputes, terms the "adversarial technique," which centers not on finding the most reasonable or equitable solution, but on winning at any cost.¹⁴ Another lawyer calls this the "adversarial pathology." In this approach, lawyer and client, spurred on by one another, lose sight of compromise in their all-out effort to win. Every tool of the trade is employed to "zealously" represent a client, including endless delays, procedural maneuvers during discovery, and undue posturing for benefit of judge and jury.

The net result of this approach, which unfortunately observers point to as the norm, is that parties and issues become polarized. Despite the fact that many courts now require pre-trial conferences and settlement attempts, practicing lawyers say that in a judge's chambers they are hesitant to concede anything, lest they disappoint their client, or give the judge the impression that they are will-

13. *Id.*

14. Visiting Professor Milton Wessel, course on Socio-scientific Dispute Resolution, Stanford Law School (Fall 1978). For an alternative to the adversarial approach, see Wessel, *The Procedural Rule of Reason* (National Academy of Sciences Paper, 1975) and *The Rule of Reason* (1976).

ing to settle for less than all the relief prayed.¹⁵ There is persuasive evidence that pre-trial conferences accomplish very little in terms of saving trial time or resolving the underlying controversy.¹⁶

On the environmentalists' part, although they have made impressive gains in the courts as a "minority" litigant during the last ten years, some environmental groups are feeling the pinch of disappearing public interest law funds. Others are disillusioned by legal victories which are hollow, because they succeed only in delaying projects, not in improving or eliminating them, even after years of costly litigation. This realization harkens back to the fact that delays won by environmentalists are often based on procedural technicalities, instead of the underlying, critical, substantive issues. Furthermore, even when environmental groups "win" in court (e.g., over the snail darter case based on the Endangered Species Act), the political costs may outweigh the victory, if the public views such a resolution as unreasonable.

A significant number, perhaps even the majority of corporate and "public interest" attorneys, still believe that their job is to use the legal process to their side's advantage, and they seize any trial tactic, including delay, to do so. Some environmental attorneys do not foresee changing this adversarial role, and therefore resist alternatives to litigation such as mediation. Says John Adams, executive director of the Natural Resources Defense Council, "... groups like NRDC will continue to function as before, and the use of mediation will not affect them. The role of NRDC is to be an adversary. With groups like NRDC, private and government decisions are always subject to challenge."¹⁷

Charles Halpern, director of the Institute for Public Interest Representation at Georgetown University Law Center, phrases it this way, "The courts have been an extremely democratic and effective vehicle for some minorities (like

10. Council on Environmental Quality Regulations on NEPA, 40 C.F.R. §§ 1500 et. seq. (1979).

11. Nicholas Yost, Statement at Environmental Law Institute Conference on the Environmental Impact Statement Process (1978).

12. Interview with Nan Stockholm in conjunction with Ford Foundation research project on environmental mediation. All interviews are on file with author, Stanford Law School, Stanford, CA 94305.

15. *Supra*, note 12.

16. The National Center for State Courts after an extensive study of trial courts in the U.S. recently concluded, "Neither processing time nor judicial productivity is improved by an extensive settlement program." The study went on to state that courts which emphasized pre-trial settlements took longer to dispose of cases than those which did not. National Center for State Courts, *Justice Delayed* (1978).

17. *Supra* note 12.

Environmental Mediation

environmentalists) to assert their rights. Many groups will be hesitant to give up any of that power."¹⁸

Other attorneys in private practice or business are skeptical about the adaptability of mediation to complex environmental disputes, and are worried about the primary role of the mediator. One lawyer comments, "Without the built-in safeguards of a trial or administrative proceeding, the fairness of mediation depends upon the skill and ethics of the mediator." Another attorney expresses his concern that a group of consultants, eager to mediate, had "stirred up" a controversy involving his clients where none had previously existed.

"Mediation will never replace litigation."

Government officials, some of whom are attorneys, have mixed reactions about mediation. In agencies like EPA and others with administrative powers, often an official has substantial discretion under a law and regulations to make a decision (e.g., issue a permit, certify a chemical as safe, issue a cease-and-desist order). In this sense, an agency official acts already as a kind of broker or mediator among varied interests. Frequently there remains a need, however, for the agency official to legitimize his decision in the political context. Many officials feel that despite requirements in many laws and programs for "public participation," these requirements are empty gestures. Says a former regional administrator for the Environmental Protection Agency, "I think that public participation under NEPA and similar statutes is one of the worst things the agency does. It's a sham."¹⁹

This administrator and other observers believe that most public reactions to proposed regulations, programs, or agency decisions come too late in the decision-making process to have any force. Another problem is that public input may be too vague and general to be constructive, because the public lacks the information to evaluate options.

Mediation has the potential for involving representatives from environmental groups, industry, labor, and the general public early in the agency de-

cision process, and for giving these potential adversaries an opportunity to resolve or at least to identify some of their differences before the conflict reaches the courtroom. Just where mediation can fit into the regulatory process, and how courts should view successful or unsuccessful attempts at mediation are important questions. One must not exaggerate the shortcomings of the trial process, or administrative procedures which are designed to preserve due process rights and public scrutiny of government decisions. Some environmental cases are not amenable to out-of-court settlement, mediation, or anything else other than a lawsuit. Litigation, in certain situations, effectively finds and narrows facts, assigns fault, and provides a decisive end to societal conflict. The ultimate threat of litigation may be necessary even to bring parties to the mediation table. However, in environmental disputes litigation may not be the best method in terms of finding lasting solutions in the most timely and economic manner for affected parties. It is therefore useful to look at some examples which define mediation and indicate its potential for other kinds of disputes.

Defining Mediation and Other Conflict Resolution Techniques

It is difficult to define mediation precisely, because the term as used today connotes a range of intervention techniques: voluntary, non-binding negotiations with a neutral third party; consensus building around a program or proposal; conflict avoidance; and development of a common data base for decision-making. This loose usage results in great confusion, especially on the part of those not well acquainted with the process, which includes lawyers as well as non-lawyers. The most common misconception is that mediation is the same as arbitration commonly practiced in labor disputes. Mediation of any sort when properly defined is *non-binding and voluntary*, as opposed to arbitration which usually is imposed upon parties under terms of a contract or by judicial order, and which is binding upon the negotiating parties.

The conventional definition of mediation is employed by the earliest center for environmental conflict resolution, the Office of Environmental Mediation (OEM) in Seattle, Washington.

"Mediation is a voluntary process in which those involved in a dispute jointly

explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution."²⁰

OEM adds five more criteria to the definition: (1) mediation employs third party intervenor(s) who work from an impartial base; (2) mediation is a decision-making process; (3) mediation requires some balance of power among parties; (4) mediation is appropriate where an impasse has been reached; and (5) mediation will result in compromises being made. The deceptively simple definition of mediation and these five equally understandable criteria underplay the important characteristics which set mediation apart from traditional litigation, and which have been useful already in settling a number of protracted and bitter disputes.

These disputes include a fourteen-year-old dispute in Washington state over flood control on the Snoqualmie River; a twenty-year-old controversy over extension of Interstate 90 in Seattle; proposed timbering plans originally planned by the U.S. Forest Service in North Carolina which would have threatened the Bachman's Warbler, an endangered species; a conflict over a major shopping mall in Maryland; disagreements over the New Jersey Coastal Zone Management Plan; designation of wilderness areas under the U.S. Forest Service's RARE II Program; and the debate over the sale and use of surplus government land in Rhode Island.²¹

Among the range of conflict avoidance and resolution techniques employed in environmental disputes, one can discern three major categories:

1. Mediation as defined by the Office of Environmental Mediation
2. Consensus Building/Conflict Avoidance
3. Policy Discussions

The characteristics of mediation under the OEM definition include use of the third party neutral mediator, volun-

20. Cormick, *Environmental Mediation: Defining the Process Through Experience*, (Office of Environmental Mediation, Seattle, Washington, 1977).

21. A bibliography of mediated disputes and mediation centers is available from the Stanford Environmental Law Society, Stanford Law School, Stanford, CA 94305.

18. *Id.*
19. *Id.*

"[M]ediation will be most useful as a supplementary technique to resolve issues where there is considerable administrative discretion and room for accommodation."

tary negotiations, non-binding, multi-lateral agreements (as opposed to two-sided agreements typical of labor/management negotiations) and the presence of issues which are defined clearly enough to create an impasse. An example of this sort would be the Snoqualmie Dam or Rhode Island lands disputes. Consensus building or conflict avoidance, on the other hand, typically involves broader policy issues, and occurs earlier in time, before parties have solidified objections and become irreconcilably opposed. An example of consensus building or conflict avoidance might be the efforts to select wilderness lands under the Forest Service's RARE II Program. In that case, mediators were used to bring together people with diverse yet legitimate interests in disposition of lands, such as ranchers, environmentalists, and federal, state, and local officials.

Policy discussions are arguably not mediation at all, since usually no formal third party intervenors are present, but they deserve discussion along with environmental mediation because several significant, ongoing policy discussions have begun recently on environmental topics. These include the National Coal Policy Project, sponsored by Georgetown University's Center for Strategic and International Studies; the Toxic Substances Panel, sponsored by the Conservation Foundation, U.S. Environmental Protection Agency, and other foundations; and the Dispute Resolution Conference which focused on pesticide issues, sponsored by the American Farm Bureau Research Foundation. All these policy discussions involve representatives from diverse backgrounds who apparently are making continuous efforts to go beyond facile accusations and simplistic solutions which so often characterize environmental debates. The products of policy discussions like these are most often reports which catalogue agreed-upon data, specific recommendations for legislation or its implementation, and areas of disagreement among participants. Often the reports are surprisingly specific. The challenge remains, of course, to determine whether recent

efforts like these will influence governmental policy, but initial signs are encouraging.

Legal Obstacles to Use of Mediation

When reviewing these and other efforts at resolving environmental disputes, one cannot help but be struck by the diverse reactions of the legal and non-legal communities. Mediators, many of whom have experience in labor negotiations, tend to advocate keeping lawyers out of environmental mediation at all costs! "Lawyers just complicate matters," is an oft-heard comment. Many mediators and proponents of the mediation process tend to be oblivious to the important legal issues which environmental mediation raises. "It's voluntary," says one mediator, "so how can that cause any legal problems?" Another mediator added, "The memoranda of understanding"²² state on their face that they are not binding so there should be no contract problems."

As anyone familiar with law realizes, unfortunately matters are not that simple. A few moments' reflection by a lawyer will identify a host of obvious and subtle issues which environmental mediation raises. Some of these were also raised in the early stages of labor arbitration and mediation; others are unique to environmental disputes. These include lack of legal precedent, identification of parties-in-interest, contractual and enforcement problems, questions of evidence and privilege should mediation efforts fail and litigation ensue, the proper role of government officials in mediation, and judicial review of mediation in general. Potential statutory conflicts which must be addressed include the Administrative Procedure Act, the Freedom of Information Act, the Federal Advisory Committee Act, Federal and State "Sunshine Laws," and others.

22. Memoranda of understanding are the agreements which parties to a mediation sign. These documents usually state that they are voluntary and non-binding, and that breach of any part of the agreement relieves other parties of their obligations. These memoranda may include suggestions for legislation or implementation of the agreement, and/or "sanctions" for non-performance. Despite the comment of the mediator, a lawyer would be hard pressed to argue that the memorandum was not a contract, or that quasi-contract damages would not be appropriate were there to be reliance by other parties.

Fundamental issues of fairness and efficiency need extensive examination. Will mediation preserve parties' rights to representation and due process? Will mediation conflict with administrative agency prerogative and authority? Will mediation provide solutions more quickly and with less expense than traditional mechanisms? Will mediation offer the predictability which many parties seem to require in environmental disputes and regulations?

As is apparent from the example of labor arbitration, which was much opposed and criticized in its early stages, many of these objections can be met through enlightened judicial review and if necessary, through legislative action. Apparent legal conflicts should not stifle experimentation with a process which has already demonstrated its promise in a variety of conflicts. But advocates of mediation will do well not to ignore lawyers' concerns over these issues.

Mediation will never replace litigation. Mediation is not appropriate for many kinds of environmental disputes, notably those where parties are so polarized that no compromise is possible. (Nuclear power debates may be an example of a dispute not suited to mediation.) It seems that mediation will be most useful as a supplementary technique to resolve issues where there is considerable administrative discretion and room for accommodation. Land use disputes over location of industry, landfill sites, and wilderness areas may be prime candidates for mediation. Siting of facilities like dams, highways, and power lines may be other examples of mediatable controversies. Government officials have suggested that mediation might be useful in resolving federal-state debates over issues like State Implementation Plans required under the Clean Air Act, or over issues addressed in an Environmental Impact Statement.

All these possibilities deserve attention, for mediation does provide important advantages over traditional lawsuits and administrative procedures. Just as in any process, there are dangers of abuses of the process by unethical participants or unethical or unskilled mediators. But the demonstrated successes of the process demand continued attention. As one journalist has noted, "Mediation may be a refreshing example of applied good sense."²³

23. Tom Alexander, *supra* note 1.

Stanford Lawyers Abroad

There are currently 95 alumni living outside of the United States. What prompted their moves abroad? What advantages and drawbacks do they find in living in foreign countries? What advice would they offer others who are contemplating similar moves?

We put these questions to 10 of our 95 émigrés. Their answers follow.

David A. Lush '49



"Thank you, John Hurlbut"

I am an engineer who never engineered and a lawyer who never lawyered. A member of the California and Iowa bars, I never returned to either.

But enough of what I am not. What I am is a venture capitalist who spent 1978 and 1979 as president of FUSALP, France's leading high-fashion skiwear company, with six factories in the Alps.

Go back to the beginning. In college, I was already contemplating the big corporations, so I majored in "general" engineering, a forerunner to today's undergraduate business schools. The Navy had other ideas and "suggested" I switch to a technical major—mechanical. During a year as gunnery officer on a carrier in the Western Pacific, I sent off applications to law schools and was accepted by Stanford and Harvard. The toss of the coin came up sunshine.

An undistinguished member of the illustrious Class of 1949, I ranged three summers in Yosemite, dove submarines in the Reserve with classmates, Charlie

Cole and Winslow Christian, got to Moot Court finals, roamed Europe, and staggered through the Bar exam the second time.

After two and a half years counter-spying for J. E. Hoover, I became a contract analyst for Curtiss-Wright. (John Hurlbut's course in Contracts had application here.) The aging and conservative management of ITT decided at this time—1956—that the pillars of its predominately overseas business were language, law, technique, and finance. I went directly into their executive department, while boning up on French and doing some balance sheet analysis at the NYU Business School at night.

A move to Paris found me helping an ITT subsidiary manage some NATO contracts (thanks again, John Hurlbut) and setting up a new subsidiary. I then became secretary of ITT's European Management Committee, and, with the introduction of Harold S. Geneen into the sleepy old conglomerate, began managing new ventures for the snappy new conglomerate: Belgium, England, back to France, being shot out of a cannon every three or four years to start businesses I had first heard about the weekend before—everything from electronic instruments and cosmetics to flea powder for dogs.

By 1972 my wife, Debe, and I had anchored our kids to a watermill in the lake-and-ski country in the French Alps and I had decided to take my ITT pension to become a venture capitalist, doing for small companies what I'd learned to do in the big ones.

Though I have never practiced law, it is clear that law has been the single most important tool I've used in analyzing these small companies. At times marketing or engineering takes precedence, but by and large it is an understanding of law that is most helpful when one forms

a venture group, buys a blocking minority, negotiates options or changes the statutes.

Suffice it to say that after twenty-four years of general management, I am still indebted to Bill Owens, George Osborne, Marion Kirkwood, Lowell Turrentine, Carl Spaeth, and most particularly, the Silver Fox and the Reasonable Man.

LaForest E. Phillips, Jr. '57



"Interpreting not only a language but a legal system"

The development of my career has been very much a mixture of chance and design. Following graduation in 1957, I spent a year at the Comparative Law Institute of the University of Lyons, thanks to a Fulbright grant. While this year of post-graduate study abroad was unplanned, it was a major factor in my subsequent decision to join a firm that was active in international legal transactions.

After a brief military service interlude, I joined the San Francisco firm of Graham, James & Rolph in 1959. By the end of 1961 I was working in their Tokyo office, and in 1964 transferred to their Rome office. During my three years in Italy I was involved in setting up a Milan office for the firm. At the end of 1967 I left the Graham firm to join two American lawyers, Samuel Pizar and Elwood Rickless, who were practicing in Paris as partners in the Beverly Hills firm of Kaplan, Livingston, Goodwin,

Boynton M. Rawlings '61



"Diverse cultural opportunities more than compensate"

Berkowitz & Selvin. The Kaplan relationship terminated in 1972, but Pizar and I remained in partnership until early 1977, when two French lawyers and I split off and organized our own firm, Phillips & Giraud.

For me, the most challenging aspect of practicing law abroad is that our everyday activity involves interpreting not only a language but a legal system—trying to make someone from one legal system understand how to function effectively in a different system. Most translations involve parties from two or more countries (not only Americans and Europeans—and Dutch and Italians are very different—but Japanese, Chinese, Arabs, and Africans), which makes my role as lawyer a critical one in terms of achieving "a meeting of the minds." This is also true for obtaining government approvals or structuring projects in order to conform to local law and practice. In short, the legal problems are perhaps much the same as those I would be working with in the States; however, I am always dealing with that additional element represented by the lack of common background of the parties facing one another.

I find living abroad interesting and challenging, but at the same time frustrating. It is interesting and challenging because it is less possible to take things for granted and the learning process never stops. The frustration comes from the inability to participate actively in political or community affairs, being too far away to participate effectively in the United States while remaining a foreigner for many purposes locally.

For anyone considering a career abroad, I would recommend first a year or two of practice in the United States, because one has to be a nuts and bolts lawyer in one's own legal system before it is really possible to function effectively in another. Language skills are also important, as is a capacity (on a family-wide level) to adjust, which can't really be judged unless one has already experienced life abroad.

The development of my career abroad can be traced to the year following graduation in 1961 when I attended the Institute of Comparative Law and Economics of the University of Strasbourg. During this time I became acquainted with Professor Homer C. Angelo, a former professor of International Law at Stanford. After receiving my diploma, I returned to the United States to join the San Francisco firm of Broad, Busterud and Khourie, where I specialized in corporate and civil practice. In 1965 Professor Angelo invited me to join him in his practice in Brussels, which was a general corporate practice, including common market reporting, antitrust, subsidiary and branch operations, and litigation.

The following year I moved to Paris to become associated with, and eventually became a partner at, the Law Offices of S. G. Archibald (one of France's largest law firms), continuing a general corporate practice with emphasis on international business transactions, including acquisitions, contract negotiations, licensing, and tax planning. I was admitted in Paris as a *conseil juridique* in 1973. In 1974 I left Archibald to open the European office of the Los Angeles and Washington, D.C.-based firm of Troy, Malin & Pottinger.

My practice in Paris is substantially different from that of a U.S. firm primarily because it is concerned on a daily basis with foreign exchange controls, investment regulations, E.E.C., antitrust, commercial contract, labor law, and other similar provisions related to American investments outside the United States. Moreover, the practice is essentially bilingual, requiring both written and verbal fluency in French and English. The great variety of matters that

are dealt with and the manner with which they are handled under the civil law system make the practice a continually fascinating one.

As for the advantages and disadvantages of living and working abroad, there is an efficiency about legal practice in the United States that simply does not exist in France. On the other hand, the French manner of life, local customs, and availability of diverse cultural opportunities in many ways provide an appealing and attractive day-to-day experience that more than compensates.

Philip C. Wilcox, Jr. '61



"A continuing adventure"

After graduating from the Law School in 1961, I spent two years teaching high school in Sierra Leone, West Africa. I then returned to the States to join a large Denver firm, where I specialized in tax and probate work. But alas, the lure of living abroad was too great and after three years in Denver I took the Foreign Service exam and joined the State Department.

Since that time I have served in various capacities, including Embassy Press Attaché in Vientiane, Laos; Special Assistant to the Under Secretary for Management at State; Political Officer in the U.S. Embassy in Jakarta, Indonesia; and for the last two years as head of the Economic Commercial Section of the

U.S. Embassy in Dacca, Bangladesh. In between tours, I have learned French and Indonesian and have completed the equivalent of a B.A. in economics.

This past summer I returned with my family to Washington, where I will spend a year in senior training at the National War College.

I have found my legal education and experience in law practice extraordinarily useful in almost everything I have done in the Foreign Service. The range of skills learned in law school and developed in practice are invaluable, indeed essential, to our business of diplomatic representation and negotiation, political and economic analysis, and reporting and policy formulation. To others who are interested in Foreign Service careers, I would strongly recommend law school, followed by a few years in practice.

For me the appeal of a career in the Foreign Service is the endless variety—a new assignment every two to four years in a different country or in a different State Department bureau, where officers spend about one-third of their careers. There are, of course, some drawbacks to this itinerant way of life. Most of the nations where the United States maintains diplomatic missions are poor and backwards and often hot and unhealthy. There are not always American schools available, so a heavier burden is placed on parents to educate their children. Moreover, some Foreign Service children who spend many years abroad develop identity problems. (One solution to this dilemma is to intersperse foreign assignments with frequent assignments in Washington.) The absence in many countries of job opportunities for accompanying spouses is another serious problem for Foreign Service families.

Yet, despite these drawbacks, the continuing education one gets in this profession is, in my opinion, unequalled in any other. One is never in a rut, and life is a continuing adventure.

Michael Ledgerwood '64



"The benefits of international living outweigh the burdens"

I am in this group of contributors under slightly false pretenses. Since moving to Paris in 1969, I have become a closet lawyer, while in real life I am a mild-mannered international investment banker.

My move to Europe was by design. I always intended to make it my permanent home, and it was with that in mind that I became an in-house corporate attorney upon graduation. When I could not find interesting legal work abroad, I changed professions. As others can speak more authoritatively about practicing law, I thought I would share some thoughts and observations about living and making one's career abroad.

The first problem with working abroad is that there aren't very many jobs for American expatriates, and there are fewer each year. More Europeans are graduating from U.S. law schools and then coming back home to work. This is exacerbated by the fact that very few law firms or corporations hire American lawyers over here; most are sent from the U.S. and, in the case of most law firms, recalled after two or three years (presumably to prevent one from going out on one's own and taking clients away from the firm).

Those few firms prepared to hire abroad always want "experienced" international lawyers, which presents an-

other problem. Whereas law school prepares one admirably for practicing law in California or South Dakota, virtually all so-called "international law" courses relate to public international law, which has no application whatever to what most international lawyers really do with their time. One learns by osmosis, by working on transnational transactions and bringing to bear on them the usual lawyer-like skills acquired over three years.

Once one is working abroad, one's practice will usually exclude major areas of the law, which perforce must be handled by local counsel: domestic relations, most real property transactions, much of local taxation, trusts and estates. One will almost never see the inside of a courtroom; in most countries one is not allowed to appear at the bar. There is virtually no parallel to the growing U.S. public law firm, little opportunity to serve minorities, and certainly no upward movement to the bench.

Except in a few cities—Paris, London, Brussels come to mind—where there are large numbers of American lawyers, there is no active bar association, nor are there any formal continuing education programs such as CEB in California. What's more, if one is sent abroad by a corporation or a large law firm, there is a major possibility that prolonged residence abroad will interrupt or block upward mobility in the firm.

Lastly, business and legal practice are quite different abroad and can take a lot of getting used to. The slowness of negotiations and decisionmaking, the lack of negotiating power delegated to foreign lawyers, the difficulties of negotiating in another language or through translators, can be exceedingly frustrating.

One's personal life is not necessarily a picnic either. The tax situation for an American living abroad is terrible: one is taxed by the country of residence, by the U.S. government, and sometimes also by the state where one used to live. Since

most foreign countries have large-scale tax avoidance on incomes, the indirect taxes are very high. In France, for example, there is a 33% luxury tax on a new car, plus duty if it's a foreign-made car.

The cost of living in most large cities is quite high, helped by a sales tax, which in France is 18% on most goods but 25% to 33% on items like phonograph records and cameras. The effect of high prices is multiplied if one is paid in dollars. When I came to Paris, the exchange rate was 5.55 francs for each dollar. Now the rate is 4 francs, and the devaluation of the dollar against the Swiss franc and the deutschmark is even more dramatic.

Living abroad can be even more of a problem for one's family. European cities do not have many residential areas comparable to those that surround San Francisco, Los Angeles or New York. And certain desirable areas can become foreign ghettos, which can create an unfortunate sense of isolation from the country in which one is living. The mentality of Europeans, I find, is less open than that of Americans, making it difficult to form friendships. Language barriers increase this difficulty.

Since most foreign societies are male dominated, wives often find few job opportunities. What's more, unemployment problems within the host country usually make getting a work permit very difficult.

Schooling for children can pose real problems. Even if local schools are excellent, it is hard to put children in them for longer than the very early grades for fear that they will miss too much while learning the language. Also, one may wish to preserve some continuity with the American system, looking toward the day when the family returns or when the children wish to go to an American university, and to maintain in the children a sense of being Americans, a sense of America and its qualities and history. On the other hand, many American schools abroad offer only a mediocre education, cost a lot and are located a

long way from the home, thus depriving the children of the natural neighborhood playmates.

Lastly, there is the increasing problem of international terrorism, anti-American feeling and the threat of kidnapping. It was not long ago that Beirut and Tehran were for Americans among the most desirable places in the world in which to live and work.

Why, then, do we stay over here? And why does "international law" still have a certain glamour attached to it?

I suppose it's because the benefits of international living outweigh the burdens. Plainly put, international law, business and finance are exciting, varied and stimulating, and living abroad can be, too.

By virtue of one's exclusion from most purely local legal matters, one must become more of a generalist than a specialist since most transactions involve one or more foreign parties, one has constant contact with other legal systems, other ways of transacting business, people whose cultures are often quite different. Building a chemical plant in Algeria, for example, creates certain legal and business problems that would not arise in building the same plant in California. An international lawyer must help his client understand those problems, then solve them. To build an identical plant in Yugoslavia creates yet a whole new set of problems. I find these problems very challenging and stimulating.

International finance is another exciting area for lawyers. Since the free transferability of money and the Eurocurrency pools mean that one operates very often in a regulatory vacuum, finding adequate security merchandise for lenders and negotiating effective documentation requires imagination and judgment.

By nature, most "international" transactions are large in terms of the money involved, which increases the risks to the parties. Consequently, there is considerable pressure on the lawyers to get it right, but there is also considerable

satisfaction in engineering a successful transaction.

There are also compensating values in one's personal life. The pace of life abroad is generally slower than it is in the U.S., which makes life for us hedonists very pleasant.

Then there is the cultural diversity. While major cities in Europe are geographically close to each other, they remain quite different, making them fun to experience and observe.

For my family integration into the French way of life has not been a problem. My children speak English and French interchangeably, and we expect them to be fluent in a third language by the time they are 18. In a shrinking world we think language fluency will give them more options in life.

France has been my home for over ten years now and, short of some major catastrophe, I do not expect that I will return to live in the U.S. Besides, I suffer from the one problem common to all of us who are away from the States so long: Although I have good international skills, no law firm in California would hire me.

Peter P. Miller '68



"Conforming one's manner of practice to the exigencies of the local environment"

I have been practicing law continuously since my graduation twelve years ago. For eight of those years I have

worked abroad in various legal capacities.

From the first my career decisions have been influenced by my desire to practice in an international context. Following graduation I joined the New York firm of Sullivan and Cromwell, which has long had a thriving international practice and an active Paris office. Though no assurance was given that I would be sent abroad, when I had been at the firm three years an opening in Paris became available and I was offered the position. For the next two years I worked primarily in the corporate and securities area, representing U.S. companies with interests in Europe, governmental and industrial borrowers, underwriting firms in Eurodollar offerings, and Japanese lending banks.

When I returned to the United States in 1973 I had little hope of receiving additional foreign postings. I then heard that the legal department of the International Division of Mobil Oil Corporation was looking for a lawyer to send to London to work on North Sea matters. Thus, I returned to Europe in 1974, this time as a counsel for Mobil Producing Northwest Europe Inc. For the next year and a half I assisted in advising on legal matters affecting all aspects of the operations of Mobil's various exploration and producing affiliates in the North Sea area. In 1976 I was named General Counsel of Mobil Exploration Norway Inc., located in Stavanger, which is developing the largest oil fields thus far discovered in the North Sea. I remained in Norway until the spring of 1979 when I moved to Jakarta, Indonesia, to assume my current position as Vice President and General Counsel of Mobil Oil Indonesia Inc. Here we are assisting Pertamina to develop the giant Arun natural gas field.

By its very nature, practice in an international context calls for expertise in certain areas of law which may only occasionally be of concern to Stateside practitioners. One's client company, the company's employees, and the compa-

nies and persons with whom one contracts or otherwise does business may all hail from different jurisdictions. Even the site of a petroleum development, such as the Statfjord and Murchison Oil Fields, may transcend national boundaries. In these circumstances one deals almost on a daily basis with such subjects as conflicts of laws, the extra-territorial application of tort, antitrust, securities and other laws, multijurisdictional taxation and the avoidance of double taxation, maritime laws and conventions, the Foreign Corrupt Practices Act and similar manifestations of Xenophobia, the use of arbitration or other mechanisms for the resolution of international disputes, and the enforcement of foreign judgments.

But perhaps the single most important difference one encounters when practicing abroad is the necessity to conform one's manner of practice to the exigen-

cies of the local environment. Abroad, one encounters new cultures, new languages, new legal systems, and very often new attitudes about lawyers and their proper role. Being an effective advisor and advocate for one's client under these circumstances requires an eagerness to learn, an ability to adapt, a willingness to consider new alternatives and solutions, and a judicious humility, since being right is not necessarily dispositive.

Practice abroad does have its disadvantages, most important of which are the infrequency with which one has occasion to see family and friends at home and the loss of contact with one's own culture. Yet, for those of us addicted to being at least part-time expatriates, it is difficult to turn down new assignments that promise ever-greater responsibilities and unusual opportunities for culture shock.

William C. Hodge '70



"More the plumbers of society than the architects of change"

One of my strengths as a law student was that I was never afraid to give a hopeless answer to a hypothetical question, especially a convoluted constitutional question. There are many possible

explanations for my fearlessness in this regard, ranging from worthy to pejorative, but suffice it to say that Professor Gunther was hard put to conceal his surprise when I told him that not only had I become a law teacher, but indeed, a constitutional law teacher.

Perhaps not so surprisingly, however, I managed to avoid the federal headaches and constitutional complexities of the American system by joining the law faculty of the University of Auckland, in Auckland, New Zealand, where the constitution approximates the absolute simplicity of the British model.

My interest in New Zealand was kindled during my third year of Law School by my association with some Kiwi teaching fellows who were at the School, and by Professor Sher, who had spent a year as a Fulbright Scholar at Victoria University in Wellington. So, when an offer came in 1972 from the University of Auckland, which included expense-paid stops in Fiji, Samoa, and Tahiti, I was off.

Confrontation with New Zealand's substantive law would cause little culture shock to the American practitioner or law teacher. First-year courses are dedicated to legal principles much the same in common law countries the world over. New Zealand statutes employ terms of art and the judiciary exercise canons of statutory interpretation similar to those found in the United States.

Major differences, however, are conspicuous in three areas. First, New Zealand has abolished the tort action for personal injury by accident. As a consequence, 97% of the insurance dollar is used to compensate and rehabilitate the injured, with the remaining 3% going for the decisionmaking, administrative process. Some legislative tinkering with this new scheme (now six years old) may be necessary, but I've been there and it works.

The second major difference is that New Zealand is not master of its own appellate house. The most authoritative pronouncements on English common law, valid in New Zealand, are still made in the English House of Lords. And New Zealand appellants, both civil and criminal, can make argument of last resort before the alter ego of the House of Lords, the Privy Council, in London. Since 1947 New Zealand has had the power to cut these colonial apron strings but chooses not to.

The third and most important difference—at least to one who teaches a course in Constitutional Law—is that New Zealand has no constitution. There is no Bill of Rights, no judicial review, no state or provincial subunits, no independent head of state, a unicameral Parliament, and in general the most streamlined democracy in the western world. There is, in short, only one constitutional principle in New Zealand, to wit: "A statute passed by Parliament in the proper manner and form is the highest law of the land, and no court, and no person, and no other institution can do anything but interpret that law."¹

As for the practice of law, the bar is

bifurcated. Clients see solicitors and solicitors "brief" barristers who give opinions and if necessary appear bewigged and begowned in the trial and appellate courts. A barrister cannot hang out a shingle until he or she has served as an employed solicitor for three years. Especially capable barristers may be named "Queen's Counsel" (QC), which means that they "take silk" (wear a silk gown) and quadruple their fees.

Bread and butter solicitors' practice is conveyancing: that is, preparation of documents necessary to transfer land, most frequently a 40-perch residential section. Solicitors also step outside a strictly legal role and routinely provide mortgage assistance as if they were a financial institution. Bridging finance and second mortgage money may be made available to clients from solicitors' trust funds. These funds comprise moneys placed in trust with the firm by other clients. A firm's conveyancing business may be enhanced by real estate agents' awareness of its trust fund liquidity. In appearance, and perhaps in reality, such practice is a basic conflict of interest, since the solicitor is representing a mortgagor and a mortgagee in the same transaction. Any remarks to that effect, however, are usually met with a heated rejoinder about American contingency fee practice, which is unknown in New Zealand.

Lawyer advertising is unheard of and viewed as unprofessional. Pending cases may not be discussed in the press because of a powerful contempt of court tradition (and the absence of the First

¹This fact may prompt some readers to wonder how I can justify a salary for teaching one principle all year. Well, in fact, there is a technique for evading the rigours of parliamentary sovereignty and that is what I explore in my course. Unfortunately, the substance of what I teach would require more space than is allotted here, but if the Editor receives sufficient expressions of interest from readers I could be persuaded to contribute a separate article on the subject.

Amendment). Moreover, lawyers are not found at the center of pressure groups and are seldom elected to the legislature. In short, lawyers in New Zealand are considered more the plumbers of society than the architects of social change.

It should also be noted that American citizens cannot engage in the practice of law in New Zealand. Justice remains a royal prerogative, the courts remain the Queen's courts, and only those owing allegiance to the Queen can assist, as officers of the court, in the search of justice. Put another way, the statute that creates the law practitioners' trade union monopoly expressly excludes aliens.

The statute, however, does not include American lawyers who are interested in teaching in New Zealand. Indeed, the country's four law schools—Auckland, Victoria, Canterbury and Otago—would welcome applications from Stanford law grads. You won't get wealthy, but you will live comfortably in a beautiful part of the world.

James H. McGee '70



"An unexpected international opportunity"

I considered an international practice very carefully in my third year of law school but rejected the alternatives that were then available. At that time private international practice seemed to pose only two alternatives: either a long-term

commitment to New York with a prospect of one or two relatively short stints overseas, or an immediate, permanent overseas post. My wife and I were not keen to live in New York, and I was concerned that going overseas immediately would deny me a conventional grounding in the law and lead as a practical matter to a state of permanent expatriation.

I chose instead to look for a topflight U.S. law firm in an area where I felt we could happily live.

After seven rewarding years with O'Melveny & Myers in Los Angeles, an international opportunity unexpectedly presented itself. Some of my close friends, former O'Melveny lawyers, had formed with others a small international firm and approached me about joining their London office. The offer pleased my English wife who was eager to return home, and it gave me the opportunity to go overseas while retaining the prospect of an eventual return to California.

The new firm built a substantial practice in offices in London and Jeddah, concentrating on financial transactions relating to the Middle East. Late in 1979 the Los Angeles home office disbanded as the partners there moved on to other opportunities while we overseas searched for a new base for our practice. That search concluded happily on February 1st of this year when we joined Morrison & Foerster.

Our present practice involves spending a considerable amount of time in Saudi Arabia and Egypt, as well as on the Continent. The work itself is fascinating and one continually refers to the precedents and techniques accumulated back home in trying to modify intelligently American financing structures to serve in very different legal and economic contexts from those in which they evolved.

My advice to those who wish to live and work abroad is to take very special care to cap their law school training with a period of disciplined apprentice-

ship in a large firm, even if doing so requires them to defer their move abroad.

Elise Becket Smith '71



"On balance, a good life"

Those of you in the Class of 1971 who recall me knitting and needlepointing my way through every international law seminar the School had to offer will be relieved to learn that all that work has borne fruit. I am managing director of NeedleArt House Limited, a Johnson Wax subsidiary in Basingstoke, England, which sells both wholesale and retail needlework products. NeedleArt House is a small company with all the flexibility and freedom that are the delights of a small business, but at the same time the high standards and professional resources of a big multinational are there to challenge and encourage. I am finding great satisfaction in a job that requires effort not only in administration and marketing but also in design and even writing.

Whether I wound up in England by chance or design is really a matter of interpretation. It would depend on whether one would view my marriage to an Englishman design or chance. I would call it chance before the event and design afterwards.

When I first arrived in London I went boldly to the Middle Temple asking how much "credit" they would give me for a Stanford Law degree. The infidels did not seem to care that I had digested *Regina v. Dudley & Stevens*, if I may use that phrasing, and would have shortened my British studies not one nanosecond. I decided instead to continue the work I had begun in the States in opposition to the then firmly established Greek junta, which led to some months helping Lady Fleming write a book about her experiences when arrested and jailed by the junta. I then spent about a year working for Amnesty International on material for a book about torture, which was published during their "Year To Abolish Torture." That project included work on laws of evidence; constitutional provisions relating to torture; various aspects of criminal law and procedure; political and economic structure; and international law. The work ranged from discussions of an individual country, with some attempt to describe why torture was used and how the administrative powers either got away with it (as in the case of Greece) or tried to confront it (as in the case of the United Kingdom), to the international organizations and agreements that could be called on to censure and alter the behavior of member states. It was, in short, a fascinating collision of political reality with moral outrage.

After the birth of our son in 1974, I naturally wished to turn from such gruesome preoccupations, so I worked for six months for a Conservative MP, trying to inform him about the United Nations—the important issues plaguing it and what measures for improving it he might consider supporting. But, alas, the Libraries of the Royal Institute of International Affairs and the House of Commons lost the undoubted honor of my patronage when our second child appeared in 1975.

Although there are tremendous frustrations built into the English way of life—resistance to change, predilection

to strike, acceptance of limited opportunities in many areas (including job advancement, education, and health care)—the civilized pace almost makes up for them. On the plus side, the English are less prone to fads and I don't have to change my vocabulary once a week to keep up with the latest trend in introspection. On my occasional trips to the United States I find myself appalled at the demands made on women (by women) to fulfill themselves in all areas of human endeavor simultaneously. It is rather refreshing on this side of the Atlantic to find women who do not try to have children, professions, glittering social lives, spotless houses and win the county tennis tournament all at once and all without help. England is backing gradually into equal rights, and I am hopeful that we will achieve some progress without lurches into extremism.

It is, on balance, a good life, and I love it here.

Fernando Inzunza '78



"Vigor and patience"

During my third year of law school, when I was interviewing for a position in which I could advise clients about business in Latin America, it did not occur to me that a U.S. law firm would

be interested in temporarily sending me to a Latin American city. For this reason the offer of Baker & McKenzie, which has over 450 attorneys in 27 cities worldwide, to place me in an established training program at the Caracas office was unexpected, and understandably so.* The number of recent U.S. law school graduates who work in Latin American law firms is not very significant. (According to the 1978 Martindale-Hubbell Law Directory there are six persons under the age of 35 with first professional degrees from U.S. law schools and 21 such persons with advanced degrees.)

Since I have not been admitted to practice in Venezuela, I cannot assume the role of an attorney. My status is that of an advisor on matters of finance and economics. Nevertheless, I have a variety of foreign trade assignments which would be interesting and appropriate for a first-year associate in a U.S. law firm. These involve investments in companies, the creation of joint ventures, technology contracts, foreign loans, sale and lease agreements, government approvals regarding these matters, and Venezuelan tax consequences. Currently, for example, I am preparing everything necessary to organize and gain government approval for a joint venture involving a California-based clothing manufacturer.

My M.B.A. skills are useful in assisting a Venezuelan economist with economic feasibility studies that are required for companies in formation or those exempted from the divestiture requirements of the Andean Pact. Short-term research issues give me an opportunity to learn certain areas of civil law and Venezuelan legislation: How is a foreign bank affected by the order of payment in liquidation of a Venezuelan bankruptcy? What is the Venezuelan tax treatment of interest income from a foreign loan whose proceeds are used for the purchase of a ship? Must a government concession to a foreign-owned subsidiary for the production of an auto-

mobile component be approved by the Venezuelan Congress?

Although most of my writing is in English, my written Spanish has improved because I translate opinions and contracts about three or four hours per week. As compared to my colleagues in the Chicago office, I have more client contact and a greater orientation to the business transactions themselves. They in turn have more opportunities to write memoranda on interesting, difficult issues of a strategic nature, and naturally they deal with more than one Latin American country.

In twenty years Venezuela has undergone tremendous social change and rapid economic development. Given this socioeconomic transformation, it is not surprising that the Doonesburyism, "still a few bugs in the system," is applicable to *Caragueno* life: electricity, telephone service, water, grocery stocks, prices, recreational facilities, traffic and cultural events. With a mix of vigor and patience, however, one can adapt quite nicely. Besides, every day is spring in Caracas.

Beyond a familiarity with the language and culture, a person who is considering a legal position in Latin America should demonstrate an ability to work hard with other attorneys and to accept criticism. What is really important to me is that I like my work. Courses in school that concerned Latin America or international business were useful to gauge my interest in the field and may have improved my marketability. Just as meaningful to me was my part-time work for Thomas H. Castro, a Washington-based consultant from whom I learned about Mexican business transactions and government regulation thereof.

**Since this article was written, Mr. Inzunza has become associated with the Multi-National Division of Union Bank in Los Angeles.*

School Is New Home for Calder "Beastie"

On November 2, Cooley Courtyard became the new, permanent home for the Alexander Calder stabile, *Le Faucon* (The Falcon). A gift of Mr. and Mrs. Richard E. Lang of Seattle, Washington, the 3-ton metal sculpture stands 12 feet high and measures 20 feet long by 10 feet wide.

Le Faucon was created in 1963 in an iron works in Tours, France, six miles from Calder's studio in Saché. It is one of a series of "beasties" Calder began making in the mid-1920s. Reputed to have been among the artist's favorite works, it stood in front of his studio from the time of its completion until after Calder's death in 1976.

The sculpture was one of several considered by the Langs and the University Subcommittee on Outdoor Art. It was chosen, according to committee mem-

ber, Professor Albert Elsen of the Art Department, because it provides a strong contrast to the Law School buildings and "encourages both multiple viewing and plural interpretations."

"Seen from different angles, the sculpture can be imagined as a different kind of animal. From the back it resembles a dragon. Calder always made it clear he could not foresee all the ways people would read his art. He enjoyed the interpretations of others."

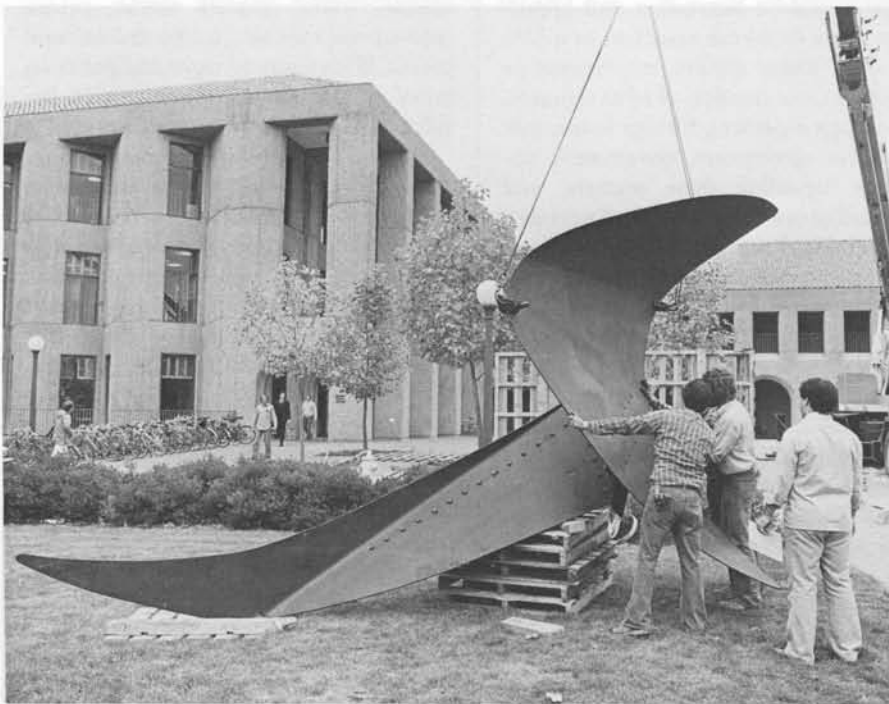
Expressing his own enthusiasm for the work, Dean Charles J. Meyers said, "It is a spectacularly beautiful work which fits the site to perfection. It will make the Law School a central point of interest for thousands of campus visitors."

Dedication ceremony

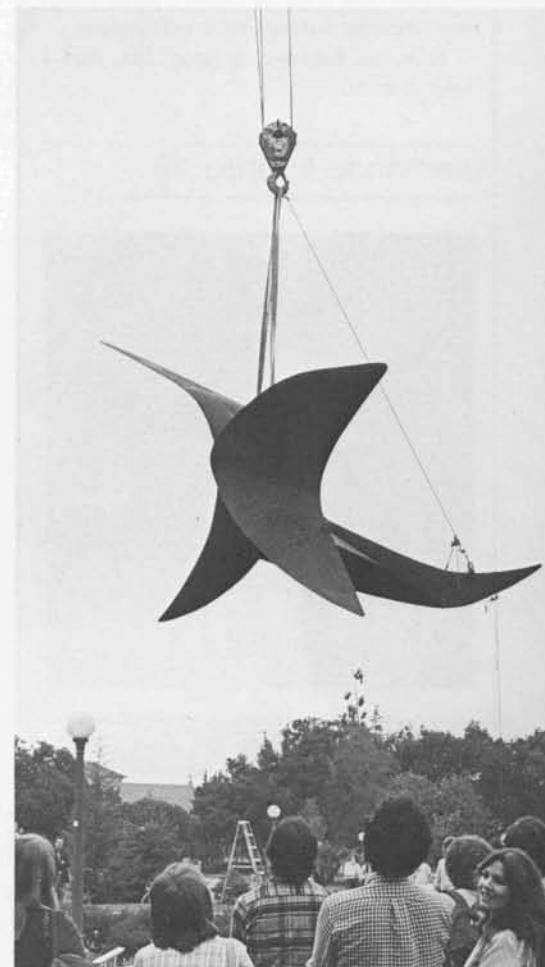
Le Faucon was dedicated on November 17, during a brief ceremony in Cooley Courtyard. Speaking on behalf of his wife and himself, Richard E. Lang described the sculpture as "one of the finest things Calder ever did." He expressed the hope that many others would have the opportunity to enjoy and appreciate the work in future years.

Dr. Peter Bing, president of the Stanford Board of Trustees, said exposure to art of this caliber provides a humanizing influence for professional school students at the University.

Margaret Calder Hayes of Berkeley said, "It's quite wonderful to have your little brother turn out to be such a distinguished artist." She called *Le Faucon*



The arrival and installation of *Le Faucon* was a memorable event for those fortunate enough to have witnessed it. Having arrived in four pieces, the sculpture was carefully assembled a few hundred feet from its new resting place. Then, with the help of a crane, the bird rose several hundred feet in the air, swooped over the trees bordering the edge of the Law School and alighted on its appointed perch in the center of Cooley Courtyard. A perfect four-point landing brought applause from the awestruck crowd.



"one of my very favorite sculptures."

Professor Albert Elsen, Walter A. Haas Professor of Art History and Cooperating Professor of Art and the Law, described Calder as "this country's most complete artist" who "built a serious art upon visual wit."

He added, "*Le Faucon* is a memorable member of Calder's private bestiary in which he dissolved distinctions between fact and fairy tale, engineering and zoology, just as this sculpture poised above the Saché Valley blurred differences between art and life.

"Literally and figuratively, Calder took sculpture off its pedestal so that his 'beasties' would touch and be touched.

"The sight of *Le Faucon* against the architecture of Crown Quadrangle inspires contrasts between not only the regular and irregular, the calculated and spontaneous, but also those who live by rules and free spirits: what for many

seem to be the contrasts between law and art, lawyers and artists.

"Law and art are not enemy faculties, but complementary disciplines. The law requires imagination in the service of reason. Art such as Calder's puts reason in the service of imagination.

"Perched at the entrance of the Stanford Law School, *Le Faucon* is a more eloquent reminder than the words of any jurist about one of the law's great functions: the protection of creativity in our society."

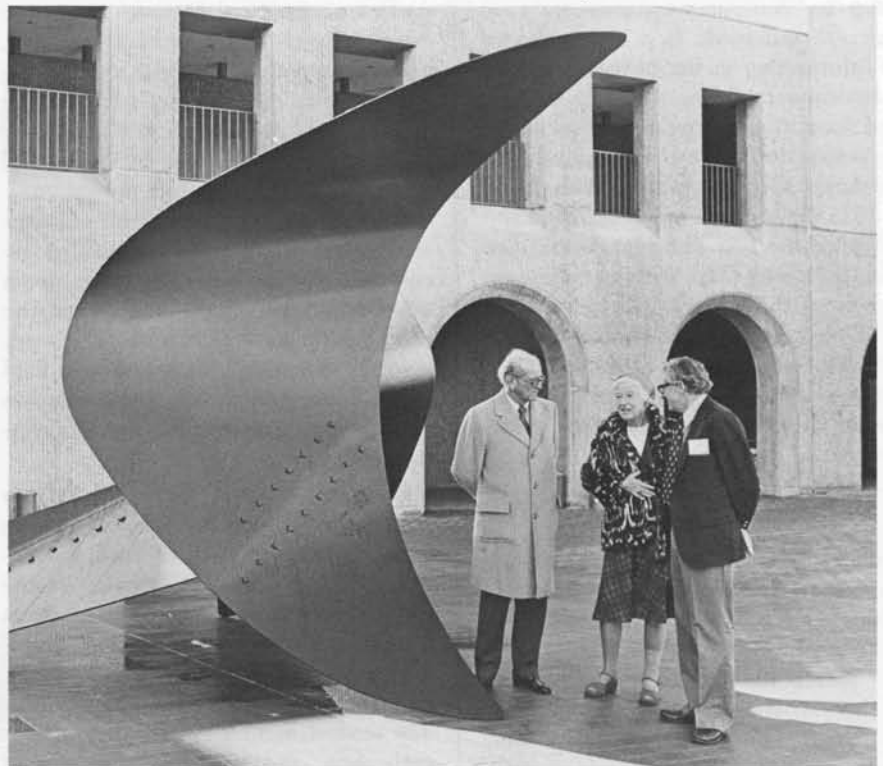
Professor Elsen praised Mr. and Mrs. Lang as "distinguished patrons" who "recognize exceptional quality, have a sharp sense of timing, and do not waver in their decisiveness because of apprehension over public acceptance."

The Langs' generosity is well known to the University and the Law School in

particular. In addition to establishing the Lang Book Fund and endowing the Lang Room, the faculty meeting room in the former Law School building, Richard Lang provided funds for the establishment of a dean's chair at the Law School, a historic first for the University. In 1975, to commemorate the completion of the new Law School buildings, he commissioned Robert Motherwell to execute a work of art, which now hangs in the foyer of the main entrance.

Mr. Lang graduated from Stanford with an A.B. in 1927 and a J.D. in 1929. Both Mr. and Mrs. Lang are well known collectors of modern art and are major benefactors of the Seattle Art Museum.

Richard E. Lang, Margaret Calder Hayes and Dean Charles J. Meyers at the dedication of *Le Faucon*.



Environmental Law Society Enters Second Decade

by Nan Stockholm with Andrew J. Morrow, Jr. and Jan Neuman

Ten years ago, when only biologists knew what the word "ecology" meant, some students at Stanford Law School formed the first environmental law society in the country.* Today, after ten years of innovative environmental research and publishing, the ELS receives inquiries daily from sources such as a scientific institute in Rome, the U.S. Council on Environmental Quality, the Library of the Supreme Court of Canada, and the Governor's Office of Planning and Research in Sacramento. ELS alumni are found in positions as diverse as the Department of Natural Resources in Alaska; Pillsbury, Madison and Sutro in San Francisco; the Center for Law in the Public Interest in Los Angeles; and the Justice Department in Washington, D.C.

The Founders

The founding students named the group the "National Environmental Law Society," and made it a clearinghouse for information in the burgeoning field of environmental law. The ELS encouraged formation of environmental societies across the country, and published a newsletter to communicate with them. By 1971 the students had researched and published the first ELS Handbook: *San Jose: Sprawling City*. With financial support from the John D. Rockefeller III Fund, several students studied growth and land use problems in San Jose, California, and described legal tools for planning in language comprehensible to laypersons.

The Handbook Series

Since then, the ELS has published more than twenty-five handbooks on subjects as diverse as interstate pollution, minimum bottle deposit legislation, historic preservation, weather modification, geothermal energy, the National Environmental Policy Act, federal forest lands, and preservation of deserts. Pub-

*Coincidentally, the student who organized the first national Earth Day was a Stanford student, Denis Hayes.



Meeting of 1979-80 ELS officers

lications nearing completion include studies of the New Melones Dam and Army Corps of Engineers' policies, growth control through the local initiative process, van-pooling, solar energy and property rights, the Lake Tahoe Regional Commission, and environmental dispute resolution through mediation.

Each handbook is the result of original research and writing by Stanford law students. Occasionally, students from other departments with special expertise form part of a research team. The work involves extensive library research, field trips to case study areas, and interviews with government officials and environmental lawyers.

Ongoing support from the Alamo Foundation, along with small grants from foundations such as Ford, Rockefeller, Hancock and Gerbode, enable ELS to pay a modest stipend to students for summer research and to cover printing costs. Sales provide partial reimbursement for the cost of the handbooks. The readers include citizen groups; federal, state, and local officials; private and public interest attorneys; and individual citizens interested in particular topics.

Students gain experience by partici-

pating in every phase of the publication process—from presenting a research proposal to ELS officers to soliciting foundation support to marketing the book once it is completed. Although the stipends offered by ELS for summer research do not compete with salaries provided by most private firms, many students are eager to design their own research and to publish original material. The result is high-quality publications that receive enthusiastic responses from their readers. For example, the U.S. Supreme Court has cited ELS books in its opinions; the Urban Land Institute recently included an ELS Handbook in its four-volume compendium, *Management and Control of Growth*; and Senator Alan Cranston was so impressed by the desert study, *The Fragile Balance*, that he wrote the foreword to the volume.

The Environmental Law Annual

Of special concern to ELS students is the continued decrease in foundation funds for environmental and public interest groups in general, as well as the practical necessity many students face of obtaining more lucrative summer employment. As a result, current ELS officers have explored different means of

research and production. One successful alternative is the Environmental Law Annual. Now in its second year of publication, the Annual features student articles written for academic credit during the school year or during externships with organizations like the Natural Resources Defense Council.

The first Annual, *Energy Production: Selected Legal Issues*, examines federal regulation of water pollution from mines, aspects of the Clean Air Act Amendments, transportation of radioactive materials, and power plant siting. The second Annual, entitled *Coastal Futures: Legal Issues Affecting Development of the California Coast*, focuses on implementation of federal coastal zone legislation in California.

A student Board of Editors oversees production of these annuals, from research through editing to marketing. The goal is to provide students with an intensive editing and writing experience which produces handbooks and annuals of high professional caliber. Outside experts are asked to review student work when appropriate. For example, Lanie Linker and her colleagues at the Natural Resources Defense Council were invaluable as advisors on the Coastal Annual. Similarly, Gail and Denis Hayes, who now head the Solar Research Institute in Golden, Colorado, assisted the student author of a forthcoming book on solar energy and property rights.

1980 Symposium on Land Use

In order to generate papers for the third edition of the Annual, as well as to bring together students and distinguished speakers to discuss current issues in land use, ELS is planning a symposium to be held at Stanford in the fall of

1980. ELS President Nan Stockholm '81, along with a committee of students, Law Professors Jim Krier and Paul Goldstein, and Business School Professor John McMahan are working to arrange a timely, interdisciplinary program of interest to lawyers, planners, and government officials. Panels will treat various issues in depth, such as the impact of the proposed Energy Mobilization Board on federal/state land use regulation, or the conflicts between urban revitalization and suburban development.

Consulting and Part-Time Work

Another goal of the current ELS administration is to solicit more contract work for students, which brings in revenue to the Society. Many ELS students have specialized backgrounds, including graduate degrees in natural resources management, environmental engineering, and biology; as well as work experience in Congress, the U.S. Environmental Protection Agency, state agencies, and with groups such as the Environmental Defense Fund and Sierra Club. A significant number have worked in the private sector, as well as for oil companies, consulting firms, and utilities.

This past year three members of ELS were subcontractors to a consulting firm which prepared an environmental impact statement for the Truckee-Carson water projects in Nevada. This spring two students are researching growth control through local initiatives for the Governor's Office of Research and Planning in Sacramento, while others will be working for a law firm handling NEPA suits over uranium mining in the Southwest. Another ELS member is updating the handbook on *Historic Preservation*, prepared for the National Trust on Historic Preservation.

Under Law School policy, students may perform legal research for an organization in one of several ways. They may receive a salary, in which case the work is usually done over the summer. They may leave the Law School for one semester on an "externship" with an approved agency, for which they receive fourteen credit hours and pay full tuition. Or they may arrange for units of directed research with a faculty member who believes that a part-time project has educational merit.

Although the Stanford externship program offers remarkable positions, ranging from the Environmental Defense Fund in Berkeley to the Domestic Policy

Council at the White House, many students feel that they cannot afford to pay full tuition, provide for their own living expenses, and forego academic courses. Therefore, several ELS students have taken leaves of absence for one semester or for a year, so that they can gain practical experience and receive a salary. Students who have chosen this option have worked for RESOLVE (an environmental dispute resolution group in Palo Alto), the Ford Foundation (under a grant from the environmental division), and environmental agencies in Washington, D.C.

In the words of one such student, "Having a chance to apply my legal education to problems that I care about made all the difference to me. I consider my semester spent off campus to be an integral part of my training as a lawyer."

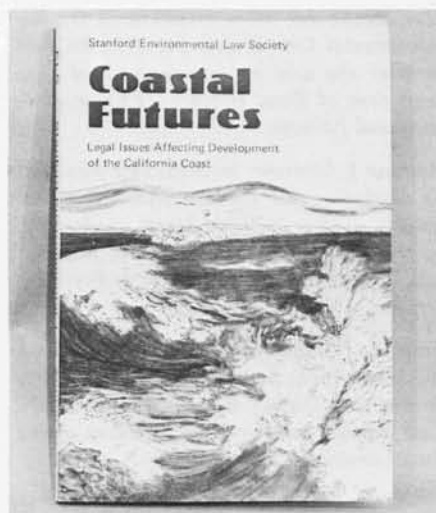
A recurring problem with part-time work during the school year is that many environmental and public interest organizations cannot afford to pay law students. Although many students are willing to perform legal research on a volunteer basis, they are understandably hesitant to take time away from their main studies. One solution proposed by ELS officers is for the faculty to establish a "mini-externship" which would provide one or two units of credit for an approved volunteer position which requires substantive research and writing.

The demand for such legal research is overwhelming. During the fall semester ELS received requests for specific research from the Oceanic Society, People for Open Space, RESOLVE, California Tomorrow, the Sierra Club, Sempervirens Fund, the Audubon Society, and others.

Education and Service to the University

In addition to consulting and research, education of the Law School and campus communities through debates, films, and brown bag seminars is an important goal of the ELS.

Last spring the ELS co-sponsored a spirited debate on nuclear energy which featured Dr. Edward Teller, a nuclear physicist; Bertram Wolfe of General Electric; Jim Harding of Friends of the Earth; and Peter Faulkner, a nuclear systems analyst. This past fall students shared sandwiches and conversations with James Joyce, Western Public Affairs Representative for Shell Oil Com-



Environmental Law Society

pany, and with two attorneys from the Department of Energy in Washington, D.C. A panel on land trusts, which featured representatives from the Nature Conservancy and Northern California Land Trust was especially popular. This spring, plans include a panel on the use of experts and problems of risk assessment in environmental litigation. Since the Stanford community provides a rich array of panelists, the ELS draws from sources like the Business and Engineering Schools, the Energy Institute, and the Programs in Human Biology and Values and Technology and Society for its interdisciplinary discussions.

In addition to panels, documentary films shown by the ELS are open to the campus at large. "The Politics of Poison," which discussed pesticides, and "Paul Jacobs and the Nuclear Gang," which told the story of an investigative reporter researching nuclear power safety, were aired by the ELS this last fall.

Since there is great interest on the part of undergraduates as well as law students in environmental law and policy, the ELS has compiled a directory of environmental courses offered at Stanford, and has held panels with the Placement Center on careers in natural resources law. A recent panel featured representatives from Pacific Gas and Electric, the Natural Resources Defense Council, the California Coastal Commission, and an ELS student who had worked for the federal Environmental Protection Agency and Congress.

As part of its placement work, the ELS has uncovered less traditional sources of employment for Stanford J.D.s, such as engineering and consulting firms. In January, the ELS received a grant from the American Bar Association to prepare and print a pamphlet on "environmental careers." ELS members also advise a number of undergraduates who are interested in environmental law.

ELS cooperates with other campus groups like SWOPSI (Stanford Workshops on Political and Social Issues) and SCIRE (Stanford Center for Innovations and Research in Education). For example, two ELS members are helping to assemble a SWOPSI course on pesticides and health.

Activism

Two new positions, Community Liaison and Director of Activities, were established this year to increase ELS contacts with organizations and to improve research on laws and legislation. Their work has enabled the ELS to send representatives to the California Public Interest Law Conference held at Santa Clara Law School, and to provide a set of ELS books to the Public Interest Clearinghouse Library in San Francisco. ELS members have attended Department of Energy hearings on nuclear waste disposal, and hearings held by the Palo Alto City Council on the future of commuter train service. ELS members have been invited to participate on state and regional environmental advisory committees. All these activities provide students with important perspectives on the regulatory process.

Outings

Along with all these projects ELS'ers manage to save some time for fun, including backpacking in Yosemite, rafting down the American River, and whale watching off Point Reyes. Despite sunburned noses, sprained ankles, and blistered feet, the enthusiasm of ELS members remains strong.

Sources of Financial Support

As the ELS expands into a more professional organization, careful management of the Society's budget has become a necessity. Since the ELS receives only about \$1500 to \$2000 directly from the Law School each year, the group must constantly reexamine its budget and seek new sources of revenue. From foundation funds and book sales, the organiza-

tion has managed to build up a small reserve. Plans are to allocate this to long-term investments. However, with printing costs rising and public interest monies dwindling, the ELS needs to generate new funds.

The Future

Looking ahead, current President Nan Stockholm comments, "ELS is unique as a student organization, in terms of its autonomy and multi-faceted activities in research, publishing, contracting, and education. We hope to keep the academic research quality high and to contribute to campus and community service and education. There's no shortage of ideas from students and faculty. For example, we'd like to establish a modest conference fund to enable Stanford students to attend ABA, Environmental Law Institute, and other professional conferences which often take place in the East. After participating in a conference, the law students would return to Stanford and share their knowledge with fellow students, faculty, and alumni through luncheon seminars or talks.

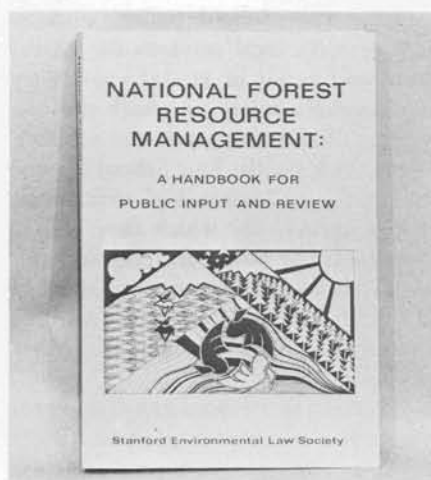
"The challenge facing students active in the ELS is to delegate responsibility efficiently, to maintain good communications internally and with the campus community, and to make careful use of the valuable faculty and administration support available at Stanford. We want the ELS to be a balanced organization, reflecting a reasoned approach to environmental problems, and contributing something concrete to their resolution."

A list of ELS Publications is available on request from Stanford Law School, Stanford, CA 94305. ELS students welcome suggestions from alumni and friends.

Nan Stockholm '80 is president of the Environmental Law Society for 1979-80. Last summer she was an associate at the Chicago firm of Ross, Hardies, O'Keefe, Babcock and Parsons.

Andrew J. Morrow, Jr. '80 is vice president of marketing for the Environmental Law Society during 1979-80. Upon graduation, he will join the firm of Schwabe, Williamson, Wyatt, Moore & Roberts in Portland, Oregon.

Janet E. Neuman '79 is an associate with the Minneapolis firm of Gray, Plant, Mooty & Bennett. During her third year at the Law School, she served as president of the Environmental Law Society.



Book Review

by Ronald K. L. Collins

The Brethren: Inside The Supreme Court, by Bob Woodward & Scott Armstrong, Simon & Schuster, \$13.95 (illustrated)

"I believe in the responsibility of the writers of recent years for the . . . disappearance of the idea of value."

—Simone Weil¹

In a judicious but telling *Stanford Magazine* interview in the Fall of 1978, Professor Gerald Gunther stressed that "[a]ccurate reporting about constitutional law is particularly important."² Mindful of his own responsibilities as a reporter of sorts, Gunther announced the absence of any "predictable" voting blocs in the Court, the likelihood that "there may be too much delegation and too little supervision" of law clerks' work, and the decrease in discourse between the Justices concerning the opinions they hand down. As early as 1972, he reported in the *New York Times* that Justice Powell was taking his judicial cue from Justice Harlan who had then not long before occupied a seat on the Court.³ Given the accuracy of these disclosures, one may ask, as John P. MacKenzie did, "What did Gunther know and when did he know it?"⁴

Enter Bob Woodward and Scott Armstrong. These *Washington Post* reporters are of a different turn of mind than Professor Gunther, though in 444 pages based on two years of "investigative reporting" coupled with "interviews" with "several Justices" and more than 170 former law clerks they do manage to prove, in their own way, the truth of the matters asserted by Professor Gunther.

I.

In some important respects, *The Brethren* signals the emergence of a new wave in investigative journalism. Take for example the \$350,000 advance extended to these two crusading entrepreneurs. For all practical purposes, this

kind of initial stipend is tantamount to a commitment to publish the final product, whatever its merit. In other words, Woodward and Armstrong had to come up with *something*. Though they were unable to turn up any smoking guns, they did succeed in uncovering a mass of titillating inside gossip and even managed to bring to light some early drafts of opinions, preliminary votes, and judicial memos. Given the *Washington Post*-Simon & Schuster capital investment, is it any surprise that the authors would go to *any* length to get a story? But what about their responsibility as journalists?

Maybe, at least in this kind of new journalism, the end is seen as justifying the means. That is certainly the impression one gets considering the initial printing of 500,000 copies, the "60 Minutes" television spot, the extensive coverage in *Newsweek*, the serialization in thirty-nine papers nationwide, not to mention the coveted Book-of-the-Month Club selection notice. Whatever the merit of the doctrine in the abstract, the evidence that Woodward and Armstrong offer in *The Brethren* demonstrates, upon examination, that here at least the end did *not* justify the means employed.

II.

First, the authors offer no analysis to speak of and draw no conclusions about their discoveries. Select reporting—often based on hearsay from unknown declarants—and innuendo are offered in plenitude as substitutes. Second, the authors make every attempt to convey the impression that the vignettes they offer are truly representative of a Justice, a Term, or the Court as then constituted. Finally, the authors take pride in their achievement of demystifying the Court. Scuttlebutt in Hollywood or Washington is sure to sell copy. This brand of "legal realism" feeds on people's baser desires to hear about the darker side—this at the expense of denying the reality of those instances when individuals (and judges) do manage to rise above pettiness and self-concern. Obviously, as Martin Shapiro put it, "[t]here is . . . a certain shock value in showing that even in the marble palace, pants must be put on one leg at a time."⁵ But putting aside the catchword mentality that often accompanies the "demystification" justifi-

cation, is that alone enough of a salutary and responsible reason for going to the lengths that Woodward and Armstrong found necessary?

The Brethren does suggest one instance of wrongdoing. In their discussion of *Moore v. Illinois*, the authors allege that Justice Brennan decided to vote to uphold what he thought an unfair conviction in order to appease Justice Blackmun: "Brennan had his priorities. His priority in this case was Harry Blackmun. There would be no new trial for 'Slick' Moore." This is a very serious⁶ charge, one that a responsible writer ought not to make absent ample and credible first-hand evidence. Yet in the page-and-a-half that is devoted to this "expose"—an account filled with substantive legal errors—the authors fall back on the Justices' clerks as the source of their story. Once, however, Anthony Lewis broke his report⁷ on the matter (based on conversations with a Brennan law clerk for that Term in addition to twenty-nine other law clerks serving in the same year), there was little doubt that the Woodward and Armstrong "report" was seriously mistaken. Responsible journalism demands that the authors publicly account for their allegation now that a fellow journalist has seriously challenged their charges. (Of course, any such admission of error would certainly be detrimental to forthcoming paperback publications.)

III.

The chapter in *The Brethren* dealing with the 1974 Term is basically illustrative of several typical shortcomings found in the book. Generally, each chapter has a single main "find" which the authors buttress with minutiae quite often unrelated to their "big discovery" about a matter that transpired in a given Term. This approach proves unsatisfac-

1. Weil, (letter) *Cahiers du sud*, No. 310 (1951).
2. The *Stanford Magazine* 34, 39 (Fall/Winter 1978) (interview).
3. For a more definitive treatment, see Gunther, 24 *Stan. L. Rev.* 1001 (1972).
4. MacKenzie, *The National Law Journal*, p. 12 (Dec. 31, 1979).

5. Shapiro, *Wall Street Journal*, p. 6 (Dec. 12, 1979).
6. There is also the matter of the affected defendant acting on the authors' story. See *The National Law Journal*, p. 16 (Dec. 17, 1979).
7. Lewis, 27 *New York Review of Books*, No. 1 (Feb. 7, 1980). For an interesting and more current report on the Lewis and "Woodstrong" exchange, see Beckwith, *Legal Times*, p. 28 (March 10, 1980).
8. See e.g. *Brown v. Illinois*, *Meek v. Pitenger*, *Goss v. Lopez*, *Schlesinger v. Ballard*, *Weinberger v. Salfi*, *Jackson v. Metropolitan Edison Co.*, *Hicks v. Miranda*, *Alyeska Pipeline Service Co. v. Wilderness Society*, *Wood v. Strickland*, and *Bigelow v. Virginia*.

Book Review

tory upon examination, as the chapter on the 1974 Term demonstrates.

Less than thirty-five pages are assigned to the Term that produced many major cases⁸ altogether ignored by the authors. Perhaps the *Washington Post* duo was unable to uncover anything about these cases or maybe they just decided to publish their more tantalizing discoveries. It is important, nevertheless, to note that they do organize the book according to Supreme Court Terms, thereby giving the impression that the report in any chapter is representative of that Term. Supposing that this is a fair assumption, then the reader is left with absolutely no report on the deliberative process that produced many of the most important cases that came before the Court in the 1974 Term. What if a report on those cases proved to be entirely different from inside evidence discovered by Woodward and Armstrong in the few cases they examined? Such a report would assuredly cut against the grain of *The Brethren* story. And though such a report would render a more objective account of the Justices, that kind of balanced reporting does not seem to be the trademark of the Woodward and Armstrong brand of the new journalism.

Essentially, the chapter dealing with the 1974 Term can be broken down into fourteen sections. The section on *O'Connor v. Donaldson* itself consumes fourteen pages of the chapter. The remaining sections are all, with one exception, under two pages in length. After *Donaldson*, a total of thirteen cases are cited in the chapter, with only a single case receiving more than a page of discussion. Half of the sections pertain to somewhat interesting but basically unimportant disclosures about the Nixon resignation, a Burger law clerk, a Powell law clerk, the ailing Justice Douglas, and a Court get-acquainted cocktail party. "Unfortunately, the authors, once having collected all that information, insist on sharing seemingly all of it with us. There is no attempt to separate the important from the unimportant."⁹

What then in the chapter is important? Aside from *Donaldson*, the major Woodward and Armstrong case scoops involve

Chief Justice Burger's supposed surprise that Justice Blackmun favored the First Amendment claimant in *Southeastern Promotions, Ltd. v. Conrad* and similar surprise that Justice Powell decided to do the same (switching his vote in the process) in *Erznoznik v. City of Jacksonville*. But how important are these discoveries in light of the fact that a mere reading of the cases in the official *Reports* would tell anyone that Justices Blackmun and Powell were essentially independent-minded jurists. Similarly, we are told that Justice Powell, over Justice Brennan's objection, upheld a "standing" challenge in *Warth v. Seldin*: "Brennan was disturbed that Powell seemed indifferent to the Warren Court tradition of protecting low-income and minority groups." But Justice Powell (the Harlan admirer) may well have had doctrinal reasons¹⁰ that motivated him. Though *The Brethren* account of *Warth v. Seldin* tells us little more than the published opinion, when it comes to the bottom line the authors present their "report" as if the result—rather than the legal principle—were the central issue. Yet even on that score, the authors' "discovery" could just as well have been uncovered in Justice Brennan's published dissent in the case.

Voting shifts and surprise votes are hardly news in the give-and-take world of appellate decision-making. Neither is it that unusual for a Justice to craft an opinion that actually supports a proposition not apparent on first blush. Even so, Woodward and Armstrong lead the reader to believe that they have unearthed some truly revealing news about Justice Rehnquist's majority opinion in *U.S. v. Peltier*. Again, recourse to the published dissents in the case would have told the reader at least as much and perhaps even more. (Ironically, the authors missed the "scoop" about another criminal procedure case they discussed, *Harris v. New York*.)

There is also the disclosure about the Douglas vote:

As it became increasingly obvious that Douglas was physically and mentally disabled, a consensus began to develop. They would hold up on any 5-4 decision that had Douglas in the majority to see if someone in the minority would be willing to switch and make it 6 to 3. If that did not happen, those 5-4 cases would be

treated as if they were 4-4 ties, and they would be put over for reargument the next term.

Unfortunately, Woodward and Armstrong do not state *when* the Justices allegedly made this decision. That is important because there were several important 5-4 decisions (with Douglas in the majority) handed down that Term.¹¹ Likewise, there were some cases where the votes among the nine Justices were fragmented,¹² with some of the cases being decided near the Term's end. *The Brethren* account is thus ambiguous or partially true.

Up to this point, the chapter on the 1974 Term reveals nothing of consequence about the Justices, and nearly everything else we are told can easily enough be found in the *U.S. Reports*. The real merit of the chapter must then turn on the authors' findings regarding *O'Connor v. Donaldson*.

Donaldson is billed by Woodward and Armstrong as "the biggest [case] of the term, as far as Burger was concerned." Basically, the case involved the 14th Amendment constitutional rights of the mentally ill who are involuntarily committed. The Chief Justice, unlike most of the other members on the Court, was well acquainted with this general constitutional issue in that he had published a forceful dissent to Judge Bazelon's 1966 circuit court opinion in *Lake v. Cameron*. Like Justice Marshall or anyone else, the Chief Justice could hardly be expected to abandon the course of the opinions that he charted as a circuit court judge. As far as Chief Justice Burger's supposed dislike for Judge Bazelon, that story is old news by the time it comes up yet again in the *Donaldson* discussion some 369 pages into *The Brethren*. Did the authors—or anyone familiar with the case—really expect the Chief Justice to be anything less than critical about an issue on which he had already publicly expressed serious concern?

Apparently, Woodward and Armstrong latched onto a draft of Burger's opinion that was initially circulated as a majority pronouncement. In fairness to the authors, their story is not without interest when they report on the Burger strategy to entomb the right-to-treatment assertion grounded in the 14th Amendment. Yet the fact of the matter

9. Rothschild, *The Western Law Journal*, p. 17 (Jan./Feb. 1980).

10. See e.g. 422 U.S. 490, 498-502.

11. See e.g. *Wood v. Strickland*, *Goss v. Lopez*, *Linden Lumber Division v. NLRB*.

12. See e.g. *Meek v. Pittenger*, *U.S. v. Ortiz*.

is that the Burger position could not secure enough votes for a majority opinion. In other words, this is just another example of what we already know occurs in the Court—there are winners and losers in nearly every case.

There is also some interest in knowing that Justice Stewart's *Donaldson* dissent eventually became the majority opinion. Likewise, everyone wants in on the secret that Chief Justice Burger's initial majority opinion later was considered as a dissent but finally found its way into the *Reports* as a "strong concurrence." (If one reads the published concurrence it is readily enough detectable that the Chief Justice's opinion on the matter is certainly wide of the majority mark.) Granted, these disclosures are, to my knowledge, news. By the same token, they hardly merit such advertising accolades as "fascinating," "explosive," or a "most penetrating . . . study of the inner workings of the Supreme Court."¹³

The *Donaldson* story as told by the authors does have one other interesting twist, the "clerks' strategy." The authors go to great lengths to set out all the various ploys that law clerks supposedly used to achieve their desired result—a constitutional ruling in favor of the rights claimant. We are treated to the spectacle of these junior "jurists" working on Justices Stewart, Powell, and even Douglas. The conclusion is inescapable, "the law clerks are the powers behind the throne and manipulate the Justices as if they were puppets."¹⁴ Of course, there is no evidence whatsoever that the Justices would have voted differently than they finally did. In fact, Justice Stewart's narrow opinion in the case is true to the Stewart form and is also "fully consistent with conventional due process analysis."¹⁵ No strings pulled here! Putting aside all of the fancy footwork that the clerks are said to have engaged in, the authors are in really no position, based on the sources of their information, to report on how the Justices acted *independently* of whatever influence their clerks may have had on them. More importantly, even the account in *The Brethren* fails to demon-

strate that the law clerks or anyone else actually managed to lead the Justices anywhere beyond where they otherwise planned to go on their own.

IV.

Taken as a whole, the chapter on the 1974 Term proves disappointing: (1) A good deal of what we are told is readily available in the published reports of the Court's opinions; (2) some of what is reported is partially true or misleading; (3) the chapter failed to produce any truly important reports on the inside workings of the Court; (4) there is no reason to believe that what is said about the 1974 Term is actually representative of what transpired during that period; (5) there is no reference to many of the most important cases decided in the 1974 Term; and finally (6) the authors make no attempt to analyze their "findings" nor do they bother to separate the important from the trivial or repetitive.¹⁶

V.

Admittedly, *The Brethren* is eye-catching, at least for the first hundred pages. No denying it, critic and admirer alike do get some very interesting information from the book regarding *United States v. Nixon*. Beyond that, however, *The Brethren* is in no way the book that it has been advertised to be. Its substantively few important merits must be balanced against its many shortcomings. More importantly, this type of journalism establishes a risky precedent. True, the latter is a strong charge. While I agree with most of those who have said that *The Brethren* probably will have no consequential effect on the present Court, it is hard to deny that others will not follow the path that has proven so financially rewarding to all those who were involved in publishing the Woodward and Armstrong book. If that should happen, then reporting based on hearsay and innuendo could take hold in American journalistic and media circles, with all the resulting harm done to the institution under siege.

The March 10th issue of *Time Magazine* reports that "at least one Justice is known to have made a point of emphasizing to his clerks to keep their promise of confidentiality about the court's workings for at least 'a period of years' after they leave." Is it beyond reason-

able speculation that the Court's decision in the CIA secrecy pledge case (*Snepp v. U.S.*) was perhaps sensitized by the publication of *The Brethren*? Maybe, in the words of Stanford Law Professor William Cohen, a case of "unconscious sensitization."

Aside: It does not seem unreasonable to speculate that one of the reasons that Woodward and Armstrong were sponsored to undertake their project was owing to the unpopularity of the Chief Justice in the media. Ironically, *The Brethren* makes it only too clear that neither the Chief Justice nor any "Nixon bloc" wields the kind of terrifying power that the media has editorialized about.

Conclusion

Responsibility among reporters is hardly a new concern. Its importance dates back as far as Alfarabi. Such responsibility implies the existence of an important obligation to improve the common good. What this means is that it is incumbent on writers to employ only those means best suited to the acquisition of truth in the pursuit of worthy objectives. Reasonable minds have cause to doubt the worthiness of Woodward and Armstrong's objectives. It is another matter when it comes to faulting the authors for the means they employed and the resulting product. The argument here is not necessarily that reporters ought to be Platonic guardians or even law professors. The point is simply that the obligation owed to the public demands that writers take their task seriously, mindful of the injury they may inflict on society. For reporters this means greater familiarity with their subject matter,¹⁷ and a more candid and objective statement of their discoveries. In at least the former regard, "Woodward and Armstrong would have benefited from less time on hearsay gossip and more time on the published opinions."¹⁸ On that score, even a reporter as judicious as Professor Gunther would nod in agreement. The virtues of *any* responsible writer are indeed subtle as they are also valuable in the highest sense.

13. Advertisement for *The Brethren*, Los Angeles Times, Jan. 20, 1980, p. 9 (Book Rev. sect.).

14. Gunther, *supra* note 2. The quote is taken out of context. Professor Gunther prefaced the statement quoted by noting that "There is nothing to the argument. . . ."

15. 89 Harv. L. Rev. 47, 72 (1975).

16. "The *Brethren* has no apparent social orientation: it purports to be reporting for its own sake. . . ." Frank, 66 American Bar Association Journal 161 (Feb. 1980).

17. See Franklin, 31 Stan. L. Rev. 1035, 1054-58 (1979).

18. Letter to the editor, The National Law Journal, Jan. 28, 1980, p. 14 (crediting John MacKenzie).

Mr. Collins is a Teaching Fellow at the Law School.

Nation's First Clinical Professorship and a Major Grant Insure Future of School's Clinical Program

Two major gifts—one from Mr. and Mrs. Kenneth F. Montgomery and one from the Carnegie Corporation—will provide urgently needed support to the School's clinical program.

Montgomery Professorship

Mr. and Mrs. Kenneth F. Montgomery of Northbrook, Illinois, have endowed the Kenneth and Harle Montgomery Professorship in Clinical Legal Education, believed to be the first endowed chair in clinical legal education in the country. Professor Anthony G. Amsterdam has been named the first holder of the chair.

The professorship will enable the School to recognize and support Professor Amsterdam's work in the "simulation" method of clinical instruction, which allows students to perform the various tasks of practicing lawyers (including trial and appellate advocacy, negotiation, counseling, and drafting) in mock settings and then makes the performances the subject of systematic, analytical study by the students, under the close supervision of full-time law professors.

In making the gift to establish the chair, Mr. Montgomery said: "I take pleasure in establishing this chair because Stanford, a superb law school, has recognized the value of clinical legal education. On my graduation from law school, among my many deficiencies was an abysmal lack of knowledge of trial procedure. Assigned to the trial department at my request, I managed to lose cases which I might have won had I been grounded in trial procedure. After a painful indoctrination, unfortunately at clients' expense, I managed to fare better.

"What too few people realize is that clinical education, when well done, does much more than train lawyers in important legal skills; it provides an effective means for introducing and examining difficult issues about the legal profession, the adversarial system, and what it means to be a lawyer.

"In endowing this chair at Stanford,

I am not unaware of the fact that my wife, her father, brother and nephew went to Stanford."

Dean Meyers, speaking on behalf of the Law School, observed: "In 1969, under the direction of Professor Amsterdam, the School took its first cautious steps in the development of a clinical program. Today Stanford Law School is recognized as the leader in the use of the simulation method of clinical instruction and Professor Amsterdam is the nation's foremost authority in the field.

"Through their enlightened generosity, the Montgomerys have made it possible for Stanford to continue to break new ground in what is nationally recognized as the most significant advancement in legal education since the casebook. The importance of this gift cannot be exaggerated, for the full impact of the simulation method of clinical instruction on the future of legal education can at this time only be imagined."

Mr. Montgomery is a graduate of Dartmouth College and Harvard Law School. Following graduation from law school in 1928 he joined the Chicago firm of Wilson & McIlvaine, becoming a partner in the firm in 1940. He is now Of Counsel to the firm. He is also a

director of Seaway National Bank of Chicago.

Mrs. Montgomery is a member of the Stanford Class of 1938. Her nephew, Bryant G. Garth of Bloomington, Ind., graduated from the Law School in 1975; her brother, William L. Garth, Jr., in 1936; and her father, W. Leroy Garth, M.D., from the Medical School in 1925.

The professorship is the Montgomerys' third major gift to the Law School. In 1974, Mr. Montgomery established the Kenneth F. Montgomery Research Fund for general research needs, and in 1978, Mr. and Mrs. Montgomery provided the Montgomery Clinical Legal Education Fund to support the on-going work in clinical instruction being done at the School.

The Montgomerys' support for programs in higher education have also included the establishment of a loan fund for foreign students at Stanford University and funding for the Stanford Alumni Association's program, "Stanford in the Aegean."

Mr. Montgomery, a member of the Illinois bar, holds honorary doctorates from Columbia College in Chicago, Miles College in Birmingham, Alabama, and Dartmouth College in Hanover,



Mr. and Mrs. Kenneth F. Montgomery attending a meeting of the Stanford Law School Board of Visitors

N.H. He is a trustee of Lake Forest College, a member of the boards of visitors of the University of Chicago Law School, Notre Dame University Law School, and the Northwestern University Associates. Since 1975, he has been a member of the Board of Visitors of the Stanford Law School. He was awarded the Legion of Merit for his wartime service.

In civic affairs, Mr. Montgomery is a trustee of the Presbyterian-St. Luke's Hospital in Chicago and the Chicago Fine Arts Foundation. His other affiliations have included the Allergy Foundation of America, Chicago Community Fund, Welfare Council of Metropolitan Chicago, the Law Club of Chicago, and the Legal Club of Chicago, of which he was president.

Mr. Montgomery recently established an endowment at Dartmouth College which involved the acquisition of a residence to be occupied for extended periods of time by invited scholars, artists, and outstanding leaders. The current occupant is Harrison Salisbury, author, journalist, and authority on China and Russia.

Mrs. Montgomery's affiliations include being a member of the Women's Board of the University of Chicago and the Field Museum of Natural History, Chicago; a director of the Chicago Council on Foreign Relations; a trustee of the Scripps Clinic and Research Hospital in La Jolla, Calif.; and a director of the American National Theater Association.

Professor Amsterdam

The first Montgomery Professor, Anthony G. Amsterdam, joined the Stanford law faculty in 1969. Since that time he has pioneered the development of clinical instruction at the School and has become the nation's leading expert in the simulation method of clinical teaching.

Professor Amsterdam received an A.B. *summa cum laude* in French literature in 1957 from Haverford College and an LL.B. *summa cum laude* in 1960 from the University of Pennsylvania, where he was editor-in-chief of the *University of*

Pennsylvania Law Review. While a law student he wrote the Note, "Void for Vagueness Doctrine in the Supreme Court" (109 U. Pa. L. Rev. 67), which is often cited and has been reprinted by the Association of American Law Schools.

Following graduation from law school, Mr. Amsterdam served as law clerk to Mr. Justice Frankfurter of the United States Supreme Court. In 1961-62, he was assistant U.S. attorney for the District of Columbia. He joined the University of Pennsylvania law faculty in 1962. While at Pennsylvania he became involved in a wide variety of public interest litigation.

In 1972, a few years after joining the Stanford law faculty, Professor Amsterdam gained national attention when he successfully challenged the constitutionality of the death penalty before the Supreme Court of the United States in *Furman v. Georgia*.

Though best known for his work on the death penalty, Professor Amsterdam's devotion to civil liberties also involved him in some of the most important cases of the '60s and '70s, including the trials of Angela Davis and the Chicago Seven and the *Stanford Daily* case.

Several of Professor Amsterdam's writings, beginning with his student note on "void-for-vagueness," are major landmarks of American legal scholarship. In the mid-sixties he published a fundamental analysis of federal removal and habeas corpus jurisdiction to abort state court trial in the context of criminal prosecutions affecting federally guaranteed civil rights. And in his Oliver Wendell Holmes Devise lecture delivered at the University of Minnesota in 1974, he made a significant contribution to the theory of the Fourth Amendment.

Professor Amsterdam's work, both in the classroom and in the courtroom, has won him national acclaim, as well as numerous awards and honors. Among the most significant are the first Earl Warren Civil Liberties Award, bestowed in 1973 by the ACLU of Northern California, and the 1977 Walter J. Gores Award, presented by Stanford Univer-



Anthony G. Amsterdam

sity for excellence in teaching. He has been twice honored by *Time*: first in 1974 as one of "200 Faces for the Future," *Time*'s own portfolio of rising young American leaders under 45; and again in 1977 as one of "Ten Teachers Who Shape the Future," in which he was cited for his work in both civil liberties and clinical legal education.

Carnegie Grant

To further Professor Amsterdam's work in the simulation method of clinical teaching, the Carnegie Corporation of New York has awarded the School a grant of \$172,000 to be used in the preparation of teaching materials and a program of instruction for the simulation method.

Until now the shortcomings of the simulation model have been its extremely high cost per student and the lack of teaching materials for general use in clinical courses. The Carnegie grant will help to eliminate these shortcomings by allowing Professor Amsterdam to develop a "basic" clinical course which can be taught in a variety of formats and integrated into the curriculum of any law school in accordance with each school's faculty resources, student demand and educational objectives.

Professor Amsterdam will be developing the new course with Dr. Donald T. Lunde, a forensic psychiatrist who has taught in the clinical program with Professor Amsterdam for the last six years.

In announcing the grant, Dean Meyers called it "a milestone in the development of what is recognized as the most important innovation in legal education in this century."

Ernest W. McFarland Professorship Established

The Board of Trustees of Stanford University has established the Ernest W. McFarland Professorship in the School of Law.

The endowed chair, a gift of Ernest W. McFarland '22 of Phoenix, Arizona, will enable the Law School to recognize appropriately the teaching and research contributions of a distinguished legal scholar.

In expressing the Law School's thanks, Dean Charles J. Meyers praised the professorship as "a particularly fitting gift from Stanford Law School's most distinguished graduate in public service. It will be a permanent memorial to a remarkable career and a remarkable man. The chair and the ideals it represents will be constant source of pride and inspiration to future generations of Stanford law students."

Stanford University Chancellor J. E. Wallace Sterling, a longtime friend of Justice McFarland, observed, "No other graduate of the Stanford Law School—and as far as I am aware no one else—has successively and successfully served as a United States senator, a governor, and held the highest judicial office of the same state. It gives me great pleasure to know that the name of Ernest W. McFarland will forevermore grace a professorship in the Stanford Law School in recognition of his extraordinary range of lifelong public service and his close association with his alma mater."

Justice McFarland, who graduated from the Law School in 1922, has devoted over fifty years to public service and has served either the nation or the state of Arizona in all three branches of government, as lawyer, trial judge, U.S. senator, governor, and state supreme court justice.

Born in 1894 in Earlsboro, Oklahoma, Justice McFarland received a teaching certificate from East Central Teachers College in Ada, Okla., in 1914, and an A.B. from the University of Oklahoma in 1917. Following two years in the U.S. Navy he moved to Phoenix, Arizona, where he joined the Valley National Bank. A short time later, he decided to continue his education and entered Stanford University, where he received a J.D. in 1922 and an A.M. in political science in 1924.

He was admitted to the Arizona bar and went into private practice in Casa Grande. In 1923 he became Assistant Attorney General for the State of Arizona, and for the next two years he argued some one hundred cases before the Arizona Supreme Court.

In 1925 he was elected to his first public office, Penal County Attorney, a post he held until 1930 when he returned to private law practice and became attorney for the San Carlos Irrigation and Drainage District. In this position he gained considerable expertise in water law, an area that would closely link him with the subsequent growth of Arizona.

In 1934 he was elected judge of the Superior Court of Pinal County and during the next six years he handed down many landmark decisions in the area of water law which still stand.

In 1940 he was elected to the United States Senate as a Democrat by a 3-1 margin and served during the war years as a major congressional figure in the Roosevelt Administration. During his second term in the 82nd Congress he served as Senate Majority Leader. Throughout his twelve years in the Senate, Justice McFarland made many major contributions, particularly in the areas of water law, veterans' benefits, and communications, including the rewriting of the 1934 Communications Act.

Justice McFarland returned to Arizona in 1952. Two years later he was elected Governor and was re-elected in 1956. From 1958 to 1964 he devoted his energies to private law practice and to his broadcasting and agricultural interests.

Then, in 1964, at the age of 70, he was elected to the Supreme Court of the State of Arizona, serving as chief justice in 1968. During his years on the Court, Justice McFarland wrote over 300 opinions, including the famous *Miranda v. Arizona*. He retired from the Court in 1971.

Since 1971, Justice McFarland has practiced law in Phoenix. He is also chairman of the board of KTVK-TV in Phoenix, the station he helped to establish.

Over the years Justice McFarland has been the recipient of numerous awards and honors, including the American Le-



gion's Distinguished Service Award and the Copper Mike Award of the Metropolitan Phoenix Broadcasters Association for outstanding contributions to broadcasting in Arizona.

On October 9, 1971, more than 1,000 people gathered in Phoenix for Ernest W. McFarland Appreciation Day. In addition to the festivities, scores of messages were sent to the Governor, including those from then President Richard M. Nixon and former Presidents Lyndon B. Johnson and Harry S. Truman.

Justice McFarland's service to his country and his state are matched only by his contributions to Stanford University and its Law School.

Justice McFarland contributed generously to the 1971 campaign to fund new buildings for the Law School, and in 1974, he endowed the Ernest W. McFarland Scholarship Fund to aid needy law students.

In 1977, in recognition of Justice McFarland's continuing interest in the Law School and his strong concern for Stanford law students, the editors of the *Stanford Law Review* for Volume 29 elected to dedicate an issue of the *Review* in his honor, making him the first alumnus to be so honored.

Justice McFarland is married to Edna Eveland. They have one daughter, Jewell (Mrs. Delbert Lewis), and five grandchildren, all of Coolidge, Arizona.

Friedenthal First Osborne Professor

Professor Jack H. Friedenthal has been appointed the first George E. Osborne Professor of Law.

The professorship honors the memory of George E. Osborne, a renowned scholar of mortgages and property law who was a member of the Stanford law faculty from 1923 to 1958. The chair was established last September from the estate of Professor Osborne and by memorial gifts from many of his friends, colleagues, and former students.

Funding for the chair was completed through the efforts of two groups: a committee of Professor Osborne's former students and close friends, co-chaired by Northcutt Ely '26 of Washington, D.C. and Proctor P. Jones of San Francisco, and the 20th Reunion Committee of the Law School Class of 1958, chaired by Joseph G. Peatman '58 of Napa. Together, the groups raised more than \$150,000 from 199 donors.

Professor Friedenthal is a nationally recognized expert in civil procedure and evidence. His coursebook on civil procedure is the leading classroom text in the field. His research has often been relied upon by the courts and has formed the basis for the alteration of rules and statutes governing court procedures throughout the country.

Professor Friedenthal received an A.B. in economics in 1953 from Stanford and an LL.B. *magna cum laude* in 1958

from Harvard, where he was developments editor of the *Harvard Law Review*. From 1953 to 1955, he served in the U.S. Army, Finance Corps.

Following graduation from law school, he joined the Stanford law faculty as an assistant professor, becoming a full professor in 1964. He was a visiting professor at the University of Michigan Law School in 1965 and again in 1971 and at the Harvard Law School in 1976.

He is the author of numerous scholarly articles and books, including *Civil Procedure: Cases and Materials* (with J. J. Coumd and A. R. Miller) and *Sum and Substance of Civil Procedure* (with A. R. Miller).

Since 1969, he has been a lecturer for BAR and BRI Law Review. His lectures on civil procedure are shown throughout the state.

Professor Friedenthal is a member of The Committee on Committees of the Judicial Council of the Ninth Circuit and a consultant to California Continuing Education of the Bar, for which he has participated as a panelist on various occasions regarding matters of procedural law. He has also served as consultant to the California Law Revision Commission on a number of studies.

During his twenty-one years on the faculty, Professor Friedenthal has served on numerous University organizations

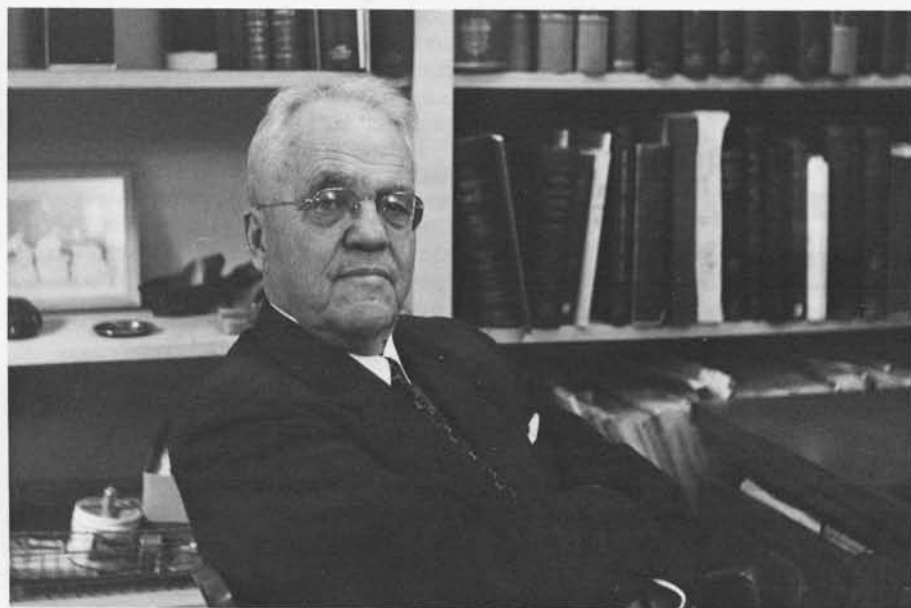


Jack H. Friedenthal

and committees, participating in such major decisions as the selection of the University president and of the current athletic director. In 1969-70, he became the first chairman of the Stanford Judicial Council, the body responsible for student discipline during the turbulent period of the early 1970s. From 1974 to 1976, he served as chairman of the University Committee on Athletics and Physical Education, during the time when men's and women's athletic programs were brought together under a single department.

At present, he serves as chairman of the University Committee on Undergraduate Admissions and Financial Aid, as well as of the Law School Admissions Committee. He has also been president of the board of directors of the Stanford Bookstore since 1975, overseeing a major building project and a dramatic expansion of services.

Over the years, Professor Friedenthal has worked to provide legal services for those in the community who could not otherwise afford them. In the 1960s, he helped to establish the San Francisco Neighborhood Legal Service Foundation and served continuously on its board of directors until 1979. He was also instrumental in establishing an East Palo Alto office of the San Mateo County Legal Service Program.



George E. Osborne

School & Faculty news

And Now for Something Academically Different . . .

"Curriculum B," the experimental first-year curriculum, is nearing the end of the first of its two-year trial period. As with all new programs at the School, it is—and will continue to be—the subject of intensive analysis and review by participating faculty and students.

Though the objectives of Curriculum B are the same as those of the standard first-year curriculum, Curriculum B attempts to integrate core courses more fully and to supplement these courses with shorter ones that provide perspectives on the law from the social sciences, humanities and philosophy, as well as economic and historical analysis of the law. In addition, Curriculum B introduces first-year students to clinical teaching, an area which until now has been restricted to second- and third-year courses with limited enrollments.

In November, the faculty polled the 56 students enrolled in Curriculum B to determine their feelings about the individual courses within the program. Responses to the poll were overwhelmingly positive, with particularly high praise given to the two-week introductory courses in case analysis and legal institutions and the full-term course in Civil Procedure/Lawyer Process, which incorporates some clinical exercises to develop basic lawyering skills.

In a second round of evaluations solicited prior to first-semester exams, the students reaffirmed their initial enthusiasm for the program. The clinical aspect of Civil Procedure continued to be singled out as a particularly effective way to learn the abstract Federal Rules of Civil Procedure. Several students also praised a special class session in which one case was analyzed by different professors to provide several perspectives on the issues involved.

While the format of Curriculum B differs significantly from the traditional

first-year curriculum, the introductory course in case analysis, taught by Dean Meyers, exposed students to the rigors of the Socratic method, an experience that was appreciated by most of the students. As one student put it, "I hope Dean Meyers will be included in it (Curriculum B) again next year, for two reasons: first, you really know you're in law school in his class, and second, so that anyone who has him for Property will be forewarned."

The main criticisms of Curriculum B concerned the unevenness of the workload, with some students finding the writing assignments sometimes falling due too closely to other assignments. Administrative problems, such as changes in class time and room assignments were also mentioned as problems.

Overall, however, the second set of evaluations echoed the enthusiasm of the first set. It is the intention of the faculty, according to Professor Paul Brest, one of the architects of Curriculum B, to solicit student feedback regularly and to use this feedback as the basis for changes in the program for next fall.

At the end of the two-year trial period, the faculty will consider whether Curriculum B should remain an alternative to the traditional first-year program, be dropped altogether, or whether all or part of it should be extended to include the entire first-year class.

Computers, Libraries, and Lawyers

Most lawyers are by now aware of the impact that computers are having on the practice of law and the legal profession. Many law firms have computers that are used for billing and other office-management matters. The use of computers to control the flow of documents generated in antitrust cases and other litigation is becoming commonplace. Similarly, the use of computer-based legal research systems such as WESTLAW and LEXIS are also familiar to many lawyers.

In addition to such use of computers, most lawyers are aware of the growing specialty in the legal aspects of computers. Some may subscribe to the *Computer Law Service* or the *Rutgers Journal of Computers and the Law*; others may be members of the Computer Law Association or the Section of Science and Technology of the American Bar Association.

It is, however, unlikely that most lawyers are aware of the impact that computers are having on libraries and how this may be of value to the practicing lawyer. Computers now play two important roles in library operations. The first is in computer-based library networks which link together the major research libraries of the country; the second is in computer data bases which make available a tremendous amount of business and social science bibliographic information.

Library Networks. During the 1960s the Library of Stanford University developed a system in which the information contained in the conventional library card catalog could be stored and searched by a computer. Subsequently, when many large research libraries, including Stanford, formed the Research Libraries Group, this system—now known as the Research Libraries Information Network (RLIN)—was adopted to assist in reaching the goals of the Research Library Group. These goals are to encourage shared resources, to preserve library materials, and to encourage cooperative efforts among large research libraries.

The advent of RLIN has great potential for legal research at Stanford. The law libraries of Los Angeles County, University of Southern California, Stanford, the Universities of California at Berkeley and Davis, Brigham Young, University of Iowa, University of Michigan, University of Pennsylvania, Rutgers University, Columbia University, and Yale University are now connected in this computer network. Moreover, other large research oriented law libraries are planning to join the network in the near future.

While RLIN has had a significant impact on the technical aspects of the Stanford Law Library, an even more exciting aspect is its use in legal research. The Stanford Law Library can now provide researchers with needed items more quickly, efficiently, and economically.

For example, a law student may be writing a paper for an oil and gas seminar. Through RLIN the Library can locate and borrow a study on oil leases from an important oil-producing state published by an obscure state agency, something which would never have been located prior to RLIN. To cite another example, a faculty member may be doing research in international taxation and need the text of the laws of several countries which are not in the Law Library. Through RLIN it would be possible to determine which libraries had them in their collections and to borrow them. In short, through the use of RLIN the resources of most of the major law libraries are now available to the Stanford legal community.

Bibliographic Data Bases: A separate and different development in the use of computers allows the Law Library to provide yet another new service to those engaged in legal research; that is, the provision of automatic bibliographic literature searches on various subjects. If, for example, one needs information on an industry's reaction to a proposed Congressional law, the Library can quickly provide a computer printout with references to the *New York Times* and the *Wall Street Journal*. These bibliographic data bases also enable the Library to provide virtually instant information on what individuals have testified before a particular Congressional committee, as well as citations to studies on jury selection techniques from hundreds of psychology and social science journals.

Computer technology is enabling the Law Library not only to maintain and increase the excellence of its collection but also to provide greater assistance to legal research. Alumni interested in utilizing these services are encouraged to call or write to the Reference Department, Robert Crown Law Library, Stanford Law School.

Alumnus Heads Law Parents Committee

Jay A. Canel '55 is the national chairman of the Law School Parents Committee for 1979-80.

A vital link between parents and the School, the Law Parents Committee attempts to keep parents informed about the School through various publications and encourages their participation in Law School activities through specially arranged programs. The Committee also solicits financial support through the Law Parents Fund. This year the goal is to raise \$25,000, enough principal for one minimum scholarship.

Mr. Canel is a member of the Chicago firm of Rudnick & Wolfe. An



active volunteer for both the Law School and the University, he is currently serving as a member of the School's Board of Visitors and as president of the Mid-West Law Society, a post he also held in 1974-77. In 1974-75 he was a University volunteer for the Mid-West region.

Mr. Canel and his wife, the former Joan Feinberg (A.B. '53), are Stanford Associates. They have three children: Scott, who is a member of the Law School Class of 1980, Lee, and Sherri.

U.S. Supreme Court Clerkship Announced

Robert Weisberg, a graduate of the Class of 1979, will serve as law clerk to Mr. Justice Potter Stewart of the

United States Supreme Court for the 1980 Term.

Mr. Weisberg received a B.A. *magna cum laude* in English in 1966 from City College of New York. Following graduation he became an associate editor for business publications at Prentice-Hall, Inc.



After leaving Prentice-Hall, he studied English and American Literature at Harvard, where he received an M.A. in 1967 and a Ph.D. in 1971. While working on his doctorate he was a teaching fellow in literature and composition. In 1970 he joined the faculty at Skidmore College as an assistant professor of English and director of composition. He remained at Skidmore until 1976, when he enrolled in law school. During 1973-76 Mr. Weisberg also taught English at Great Meadow Correctional Facility, a maximum security state prison in Comstock, N.Y.

At law school he was president of the *Stanford Law Review* for Volume 31. He was also a research assistant to Professors Gerald Gunther and Thomas Grey. Upon graduation he was elected to Order of the Coif, the national law school honor society.

Mr. Weisberg is currently clerking for Chief Judge J. Skelly Wright, U.S. Court of Appeals, D.C. Circuit.

Alumni Support New Writing Program

A concerned group of recent minority graduates has contributed funding for the new remedial writing program available to law students at the University's Learning Assistance Center.

School & Faculty news

The program was established to provide intensive instruction in basic composition and grammar to those students whose writing difficulties are beyond the scope of the School's first-year legal writing and research program.

Funding for this special program must be provided by the Law School from its annual fund. Sensitive to the importance of the program, particularly for minority students, and to the School's continuing need for additional sources of support for these special programs, the alumni group expressed the hope that their gifts would help to ensure the future of the program.

Placement Notes

Whither the Class of 1979?

In the most recent polling of the 179 graduates of the Class of 1979, 175 individuals responded. Of those, 114 reported positions in law firms; 21 in judicial clerkships; 10 in corporations/CPA firms; 9 in government; 5 in legal aid/public interest work; 2 in non-law positions; 2 in advanced study; 1 in hospital management; 1 in Presidential campaigning and 1 in teaching. The remaining 8 were either traveling or still job-hunting. This distribution closely resembles those of previous classes.

In terms of geographical distribution, the number of states to which students moved increased from 19 to 24 from the previous year. Seventy-one chose to remain in California; 42 moved to the East Coast; 21 to the Southwest; 20 to the Midwest; 11 to Western states other than California.

Median salaries for the various regions were revealed to be: \$25,000 for Northern California; \$28,060 for Southern California; \$20,000 for Mountain states; \$23,285 for the Southwest; \$24,250 for the Midwest; \$23,000 for the Southeast; \$30,000 for the Northeast. (These figures are based on reported beginning salaries for law firms, CPA firms, banks, and corporations and include January increases.)

Calling All Non-practicing JDs . . .

Each year several students express interest in positions that are considered quasi-legal or non-legal in nature. Currently, for example, there is considerable interest in careers that combine law with areas such as energy, health, education, criminal justice, management and technology.

In an effort to aid students in gathering more information about non-traditional careers in law, the Placement Office each year includes a panel on "JDs Who Are Not Practicing Law" as part of the fall careers series. Last fall students heard alumni in arts administration, corporate management and educational fundraising discuss their work. Director of Law Placement, Gloria Pyszka, is eager to acquaint students with a broad range of non-legal opportunities and urges all alumni in non-traditional jobs to contact the Placement Office with details about their work and their careers prior to their current positions. She adds, "Although law students are vaguely aware that JDs move into just about every field imaginable, there are few role models accessible when these students are in school and attempting to make career decisions. Alumni who have chosen non-traditional career paths are a valued resource which the School urgently needs."

To Clerk Or Not To Clerk

The Placement Office, in conjunction with Professor Carol Rose, chairperson of the School's Clerkship Committee, has launched an effort to solicit information on judicial clerkship opportunities from alumni around the country. Students rely heavily on the feedback of former Stanford judicial clerks as well as other alumni who have first-hand knowledge about specific judges and courts. The Placement Office invites all alumni to provide whatever information they can on judicial clerkships in their areas.

Faculty News

Thomas Ehrlich, C. Wendell and Edith M. Carlsmith Professor of Law, was recently appointed director of the new International Development Cooperation Agency (IDCA). IDCA will coordinate policies, programs and budgets of the Agency for International Development, the Institute for Scientific and Technological Cooperation, and the Overseas Private Investment Corporation.

Professor Ehrlich has been on leave from the faculty since 1976, when he became the first president of the Legal Services Corporation in Washington, D.C., the post he held until his appointment to IDCA.

Last May he was presented an honorary Doctor of Law degree by Villanova University School of Law for his contributions to the Legal Services Corporation.

Marc A. Franklin, Frederick I. Richman Professor of Law, is currently conducting a study of the 534 defamation cases reported between January, 1976, and mid-June, 1979, to determine whether differences exist between media and non-media defamation cases. The study considers such things as the types of people and statements that eventuate in litigation, the types of plaintiffs who win and the types of defendants who lose. Though similar studies have been done for accident and malpractice cases, this is the first to deal with defamation cases. It is partially funded by the American Bar Association.

Lawrence M. Friedman, Marion Rice Kirkwood Professor of Law, gave the Gerber Lecture at the University of Maryland Law School in Baltimore on October 30. He spoke at the Earl Warren Memorial Symposium at the University of California at San Diego on November 5. Professor Friedman is currently serving as president of the Law and Society Association.

Professor **William B. Gould** finished negotiating last August as lead counsel for plaintiff a \$5,350,000 settlement for approximately 500 black applicants and employees at the Detroit Edison Company, the largest per capita employment discrimination settlement in history. He then travelled to South America to lecture on American labor law at various universities and to labor and business groups in Brazil, Argentina, and Chile.

In October, Professor Gould visited South Africa to examine new developments in labor law there, both as a consultant for the Rockefeller Foundation and in connection with an article and book he is writing on the subject of black unions in South Africa. He also visited Rhodesia to discuss industrial relations and current political developments in that country with trade unionists, businessmen, and politicians.

Professor Gould was recently designated secretary-elect of the Labor and Employment Law Section of the ABA. He is also a member of the Advisory Council of the New York State School of Industrial and Labor Relations at Cornell and a consultant to the Foreign Policy Council of the Rockefeller Foundation.

Professor **Thomas C. Grey** is on leave from the faculty for the 1980 academic year to work on "The Persistence of Conceptualism on 20th Century American Legal Thought," a topic that combines jurisprudence and legal history. The project is funded by the National Endowment for the Humanities. In January, Professor Grey was one of seven panelists at the plenary session of the annual meeting of the Association of American Law Schools. The topic was, "The First Ten Years of the Burger Court." Professor Grey spoke on the Court's development of the new constitutional law of family and sexual life, which will be published in an upcoming issue of *Law and Contemporary Problems*. Professor Grey is also preparing materials, including an essay he has written on "The Legal Enforcement of Morality," to be used in college undergraduate courses.

Gerald Gunther, William Nelson Cromwell Professor of Law, is spending most of the spring preparing the 10th edition of his constitutional law casebook. When that task is completed, he will take a year's research leave for full-time work on his Learned Hand biography, supported by a grant from the National Endowment for the Humanities.

His recent publications include an article on the constitutional convention method of amending the U.S. Constitution in the *Georgia Law Review*, a piece on equality and the changing role of the federal courts in the *Washington University Law Quarterly*, and a comment on trends in the Burger Court in the *National Law Journal*. In November he testified on proposed constitutional convention legislation before a U.S. Senate subcommittee, and he spoke on that and other constitutional problems before a number of other groups.

Professor **Mark G. Kelman** wrote an article for the *Wisconsin Law Review* entitled, "Choice and Utility," which criticizes the philosophical foundations of neo-classical welfare economics. In October, he addressed the Yale Legal Theory workshop and, in November, the UCLA law faculty on disputes between mainstream and dissident law and economics practitioners. He also chaired a panel on criminal law at the 1979 Conference on Critical Legal Studies, which was held in San Francisco in November.

Professor **James E. Krier** was a speaker at a Program on Economic Analysis in the Teaching of Land Use and Environmental Law, sponsored by the Lincoln Institute of Land Policy in Cambridge, Massachusetts, in December.

Charles J. Meyers, Richard E. Lang Professor and Dean, attended a conference on clinical legal education sponsored by the Council on Legal Education for Professional Responsi-

bility in Key Biscayne, Florida, in October. In November, he was in Buenos Aires to address a conference of Argentine lawyers, judges, and legal educators on the subject of legal education. At the annual meeting of the Association of American Law Schools, held in Phoenix in January, Dean Meyers chaired the Nominating Committee for the 1980 officers of the Association. He then travelled to London for a brief vacation and to meet informally with judges and law professors to discuss aspects of the School's educational program.

On March 29, Dean Meyers was presented the St. Thomas More Award by St. Mary's University of San Antonio School of Law at their annual Law Day banquet. The award is given annually in recognition of achievements in the field of law or for exceptional contributions to legal education.

A. Mitchell Polinsky, Professor of Law and Associate Professor of Economics, chaired a session on "Law and Public Policy" at a conference on public policy in Chicago, gave lectures at the Law School and Economics Department of Washington University in St. Louis, attended a meeting of the Committee on Urban Public Economics in Philadelphia, and presented a paper on nuisance law at a Harvard Law School research conference, during the month of October. In November, he lectured at the UCLA Law and Economics Workshop and at a National Bureau of Economic Research conference on law and economics. In December, he presented a paper on strict liability and negligence at the American Economic Association meetings in Atlanta. His paper on "The Optimal Tradeoff Between the Probability and Magnitude of Fines" (with Associate Professor Steven Shavell of Harvard University) was published in the December 1979 issue of the *American Economic Review*.

Announcing . . .

Alumni Weekend 1980 November 7 & 8

On Friday and Saturday, November 7 & 8, the Law School will host Alumni Weekend 1980—two full days of activities to enlighten and entertain.

Among the special events highlighting the Weekend:

- The Annual Alumni Banquet (November 7)
- Stanford/USC football game (November 8)
- Seminars and panel discussions by Law School faculty (November 7 & 8)
- Reunions for the Classes of 1930, 1935, 1940, 1945, 1950, 1955, 1960, 1965, 1970, 1975 (November 8)



Blocks of rooms will be held until **October 15** 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

Mermaid Inn

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

Tiki Inn

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

If you wish to reserve a room at one of these motels, please call or write the motel offices directly, and identify yourself as a Law School Alumni Weekend participant when making your reservations. (Be sure to make your reservations by the October 15 deadline.)

Rickeys Hyatt House and the Palo Alto Hyatt (formerly the Cabana) are now taking individual reservations only. If you wish to make a room reservation at one of these hotels, please call or write:

Rickeys Cabana Hyatt Hotels
4219 El Camino Real
Palo Alto, California 94306
(415) 493-8000

Further information will be mailed to you soon.



Circle the dates
and plan now
to attend!

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