
Stanford Lawyer

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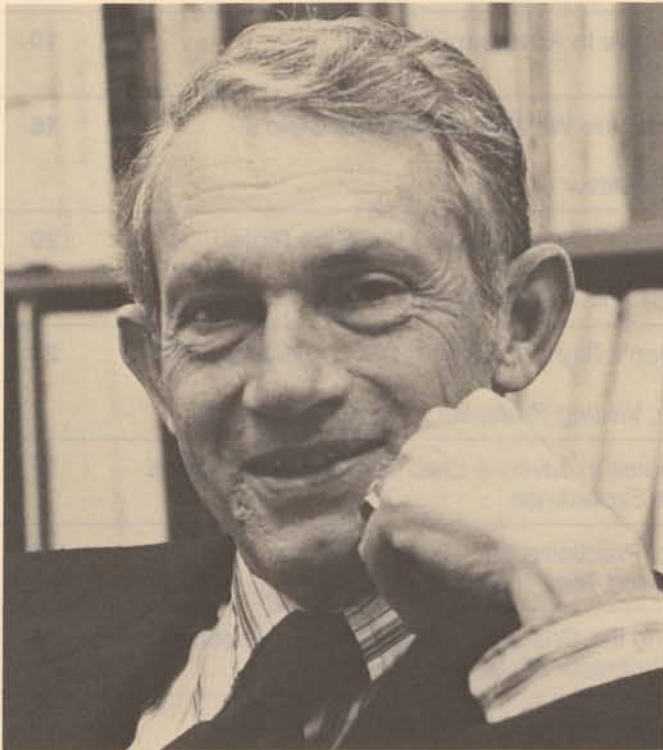
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Cover: Portrait of Dean Charles J. Meyers by Barbara Mendelsohn

Dean's Page



This is my last appearance on this page, as my resignation takes effect on August 31, 1981. Despite the challenge of a new life in practice, Pam and I leave Stanford with regret for the separation from our many friends on the campus and among the alumni. We cherish our years here and will always remember the many kindnesses extended to us.

This being in the nature of a valediction, a brief account of my stewardship during the past five years would seem to be in order. The School is in good health. We have a youthful and vigorous faculty concerned with effective classroom teaching and innovative scholarship. The curriculum, which in most law schools stoutly resists change, has been modernized with the addition of a number of new courses in business law, law and economics, and clinical education. The most striking curricular innovation has occurred in the first year, which has been made more realistic with the introduction of trial advocacy in Civil Procedure and with the addition of perspective courses (such as legal history) which enable law students to take a broader view of the law and legal institutions. While the new first-year curriculum has been limited so far to one-third of the class, I have every confidence that the plan to extend it to all entering students will be fulfilled.

The student body continues to be outstanding, with an increasing number of students having had work experience between college and law school. Financing a legal education has become for the students (and therefore for us) a growing problem, for inflation has driven up costs far faster than we have been able to obtain offsetting scholarship and loan funds. This problem must be solved soon if we are to preserve a diverse student body.

As for finances, which have been among my chief concerns, the School is in "comfortable circumstances," as my grandmother used to say — which means, not rich but not poor either. In the last five years, generous donors have endowed six new chairs in the School for an increase in endowment of nearly five million dollars.

One of those professorships is for work in Law and Economics, a new field I regard as very important to the future of the practice, and another is for Law and

Business, the first of its kind at any major law school in this country.

Twenty-nine new named scholarship funds have been established in the capital amount of about two million dollars, with a good bit more pledged for the future. Over all, with these and other gifts and through recapitalization of income endowment, the book value of the endowment has risen from eight to twenty million dollars, and the annual fund has increased from \$471,000 to \$781,000 in the period 1976-81.

These gains in the intellectual and financial life of the School could not have been achieved without the unstinting efforts of the faculty, the administrative staff, the volunteers, and the friends and alumni of the School. To all, I owe an enormous debt which I can only confess but never repay.

But looking backward, satisfying as it may be, is not enough. The future holds much promise and some risks.

First. Legal education has not yet caught up with the sophisticated knowledge of the last thirty years. Stanford is doing better, perhaps, than most other law schools, but many of our students still graduate without an elementary understanding of economics and statistics, two powerful analytical tools indispensable in dealing with issues of public policy. This point is not confined to those specific disciplines; the broader suggestion is that law schools must be alert to the opportunities to apply the learning of other disciplines, especially emerging disciplines like computer science, to legal problems.

Second. The law school in a university setting is a hybrid: It is a professional school training lawyers for the practice, but it is also an academic institution educating the mind. Those two responsibilities are not in conflict, but keeping them in balance requires constant attention. Undue emphasis on the current concerns of the practice may deprive the student of the means for dealing with the future. But preoccupation with theory may leave the student unable to cope with the demands of practice either now or later.

Third. Law schools may become victims of their own success. The power of law to effect social change has

attracted large numbers of exceedingly able students to our halls. Upon graduation these students become movers and doers in society. That exercise of power invites attempts to influence the education of the students, to channel their thinking in one direction or another. These attempts must be resisted, to preserve plurality among law schools and to encourage intellectual diversity within each law school. If the time ever comes when an accreditation agency can prescribe curriculum, law schools will slide from their present ascendancy into the mire of mediocrity.

A concluding note. When I came to Stanford, nearly twenty years ago, a capital campaign called PACE was underway, operating under the slogan, "A University on the brink of greatness." One Eastern cynic added, "and always will be." That gibe proved false. This is a great University and a great Law School. The School enjoys a superbly qualified student body, a faculty dedicated to stimulating teaching and imaginative scholarship, a splendid physical plant housing a research library of high quality, and a sound financial foundation that makes possible the pursuit of excellence. But our success is fragile. Continued double-digit inflation, absence of loan and scholarship funds to finance students' education, faculty dissention or student disaffection could collapse the structure in short order. By recognizing that our success is precarious we can avoid complacency and work together to consolidate past gains for a solid future.

Charles J. Meyer

Charles J. Meyers: A Leader in the Stanford Tradition

An Interview with the School's Eighth Dean

Several histories of the Stanford Law School have been written over the years, and while each account may differ in perspective or emphasis a unifying theme emerges: the direction the School took at any point in its history can be attributed to the man charged with its governance at the time — the Dean.

The modern history of Stanford Law School begins with Marion Rice Kirkwood, dean of the School from 1922 to 1945. During those twenty-odd years Dean Kirkwood laid the foundations of excellence upon which the School squarely rests today.

At the end of World War II, Carl B. Spaeth assumed the deanship and during his tenure introduced into the curriculum innovative ideas and programs that changed the direction of legal education at Stanford and ultimately across the nation. Among the areas developed during the Spaeth years were interdisciplinary programs, law for undergraduates, and law and international affairs. Moreover, recognizing that the alumni body had burgeoned in the post-War years and would continue to grow rapidly, Dean Spaeth sought to establish a more formal line of communication between the School and the alumni. In 1958 he established the Board of Visitors. Since that time hundreds of alumni have served on the Board, providing the School with the benefit of their counsel on a wide range of matters affecting the development and improvement of the School's educational program.

Bayless Manning, successor to Carl Spaeth, once described his years as dean (1962-70) as a period "of consolidation, of implementation . . . of institutionalizing those things begun by Carl Spaeth." During the Sixties Dean Manning concentrated on building the faculty by recruiting nationally recognized scholars and teachers from many of the nation's top law schools. In addition, he developed with the Graduate School of Business the first joint-degree program in the country. The establishment of the JD/MBA program signaled the growing awareness at Stanford of the interrelationship of law to business and the need to train law students to deal effectively with the business community both as

practitioners and as policy makers charged with the responsibility of regulating business practices.

Equally revolutionary during the Manning years was the introduction of clinical teaching at the School. As early as 1970 the first experimental steps were taken to close the gap between law study and law practice by exposing students to procedures and problems as they would occur in actual practice.

In 1971, with students, faculty and books overflowing the law building, Thomas Ehrlich assumed the leadership and set as his primary objective the construction of new buildings for the Stanford Law School. In 1975 that goal was realized with the completion of Crown Quadrangle, the first facilities specifically designed for the Law School. Also under his stewardship, the School saw significant expansion of the clinical program as well as advancement in interdisciplinary studies.

In 1976 the leadership passed to Charles J. Meyers. A member of the faculty since 1962, Dean Meyers brought to the deanship an extensive background in legal education, both as a teacher and as an administrator. During 1975-76 he served as president of the Association of American Law Schools and in this capacity observed firsthand law training at

schools across the country. That same year he chaired the School's Curriculum Committee and led a special study of possible curricular changes.

Shortly after his appointment, Dean Meyers told a reporter for the *Stanford Daily*, "I really see myself as building the School internally." With that mandate Dean Meyers set about the task of strengthening the curriculum in certain key areas, including business, tax, law and economics, and international law. A random sampling of the courses offered during academic year 1980-81 attests to Dean Meyers' success in these areas: Business Planning, Financial Accounting as a Disclosure Process, International Business Transactions, International Taxation, Legal Economics, Practice of Securities Law, Tax Policy and the Taxation of the Family, Transnational Law.

Another major concern of the Meyers administration has been the expansion of the clinical program. This expansion has been accomplished not only by the conversion of formally traditional second- and third-year courses into clinical courses but also by the introduction of a clinical course into the first-year curriculum through Curriculum B, an experimental alternative to the traditional first-year program. Curriculum B is currently offered to one-third of the



first-year class, and it is anticipated that it will be extended to include the entire first-year class within the next few years.

To ensure that these programs are not subject to changes in the economic climate or passing opinions, Dean Meyers has sought to make them a permanent part of the curriculum. That objective has been met with the establishment of six new endowed professorships, including chairs in law and economics, law and business and clinical legal education, each being the first of its kind in the nation.

As Charles Meyers prepares to leave the deanship to undertake the challenge of private practice, he does so secure in the knowledge that, like his predecessors, he has continued the tradition of excellence established with Marion Kirkwood. He has brought to fruition many of the projects he inherited as a new dean, while sowing the seeds for future deans to cultivate.

In a recent interview with the Editor, Dean Meyers talked about his five years as the School's chief administrator and his personal and institutional expectations for the future.

An Interview with Charles J. Meyers

Editor: You've been a law professor for virtually your whole professional life. What made you decide now to enter private practice?

Dean: It has been thirty-two years that I have been teaching law, although in the very early part of my career in Austin I took a leave to work for a law firm. As my teaching career progressed and I began to specialize in oil and gas, I had many opportunities to consult. In fact, in recent years there have been many more requests than I could possibly accept for consultation.

But to answer your question, the timing was right. I accepted the deanship five years ago at a point when I was burned out on full-time teaching and research. I continued to teach first-year Property while dean, except for this year when I taught the new edition of my water book. But I knew that when my term as dean ended I would not want to return to full-time teaching, and I also felt that I did not have much new or dif-

ferent to say by way of scholarship. So, when Gibson, Dunn & Crutcher called me, I was ready to talk to them.

At this stage of my life, practice is a very attractive alternative, and particularly this arrangement because it allows me to put to work all of my expertise in water law and oil and gas law with a very fine law firm in a new office in the center of the natural resources business. It really is an extraordinary opportunity.

Editor: Exactly what will you be doing in Denver?

Dean: We will be opening an office of between eight and ten attorneys. There will be four partners, including myself. The other three partners will be coming out of the Los Angeles office — a litigator, a tax lawyer and a corporate lawyer. Then, there will be four to six associates. We will be a full-service firm. I will be concentrating on energy and natural resources law and will be developing that aspect of the practice.

Editor: What has been the reaction of your colleagues?

Dean: It has been very flattering because many of them have told me that they were very pleased with my deanship and that they were sorry I am leaving. I think they don't relish choosing the next dean; it is generally more comfortable maintaining the status quo than venturing into the unknown. I don't think I flatter myself by saying that they will miss me. And I will miss them.

Editor: What about alumni reaction?

Dean: I've had a lot of reaction from the alumni. I have a stack of letters, four inches thick, in what I call "The Farewell File." Most of them express regret that I am leaving but offer congratulations and best wishes in the new endeavor. I have my ups and downs. Sometimes I'm extremely excited about the change, but when these letters come in they add to the pangs I have about saying goodbye.

Editor: In your first Dean's Message for this publication you noted that there are three basic elements that make for excellence in a law school: faculty, students and library. After five years as dean, do you feel that is still an accurate statement?

Dean: I think if you are measuring a law school as a component of a university that is a statement I would continue to make. The quality of the faculty as

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teachers in the classroom and as active scholars exploring new ways of thinking is critical to any first-class educational institution. Equally critical is having a group of students who stimulate each other and stimulate the faculty. And, of course, the quality of the work that is produced by both the faculty and students can only be as good as the resources at their disposal — and these include not only the law library but also the total university library facilities. So, in the narrow sense of what makes a first-rate intellectual institution, those three elements are fundamental.

In the broader sense, however, looking at the responsibility of the School to society and the profession, I would want to include some other elements that after five years in this office I have come to appreciate as critical to the well-being of



Charles J. Meyers

an institution of national prestige and influence. Specifically I would single out the Placement Office as an invaluable resource in providing students with the fullest range of career choices as well as providing employers with an adequate means of selecting employees.

I would also want to add the Dean of Students Office, particularly for its role in the recruitment of minority students and its efforts to solve the problem of proper representation of minorities in the profession.

And finally, the alumni. Stanford law alumni have a very strong sense of continued attachment to the School, which is evidenced in their participation in the Board of Visitors, Alumni Weekend and the wide range of other activities that involve alumni throughout the year. They are, of course, extremely important to the School because they give us financial support, they hire our students, and they trumpet our praises and build our reputation all over the United States.

Editor: Have you found, then, that while dean your perspective has changed from when you were a member of the faculty?

Dean: Absolutely. But rather than perspective, I would say my concerns have changed from the time I was a full-time faculty member. I think this law school is

very wise in the way it runs itself. The faculty determines matters of curriculum, admissions policy, etc. It governs the academic enterprise and it delegates to the dean all of the outside concerns — from fundraising to representation of the School's views to the ABA and the Association of American Law Schools to participation on various Bar and judicial committees. That is, in my opinion, a very sound division of labor.

On an individual basis faculty members are quite willing to help with such things as fundraising and participating in programs for the alumni and the Board of Visitors, but they are also quite willing to

let the dean decide what those programs should be and simply to pitch in where they are needed.

The concerns I had as a full-time professor were my classes and the internal governance of the School as it related to the academic enterprise and to my scholarship. My concerns as dean are far more wide-ranging — seeing that admissions and placement run smoothly, that student complaints are handled, that faculty concerns are met, that we get enough

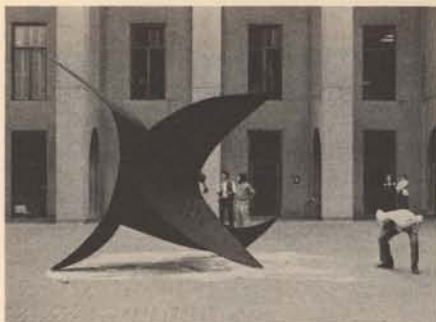


conferring degrees at Commencement ...



hosting the annual picnic for first-year students ...

Dean Meyers performing some of the myriad duties of the office:



inspecting the newly-installed Calder stabile, Le Faucon...



presenting the School's first Ralston Prize in International Law to Olof J. Palme, former Prime Minister of Sweden.

money to run this really excellent educational vehicle.

I also think it is very important for the dean to have a deep sense of responsibility for when he speaks and when he doesn't. I have avoided, for example, speaking out as dean of the Law School on the questions of nuclear power or the draft, because I don't think they are matters that concern the School. I felt free as a citizen to talk about them, but not as the dean. On the other hand, with regard to national and regulatory matters of legal education, I think it is essential for deans to represent their schools and legal education to outside groups — the legislature, the ABA, the state bar. I was very active in opposing the Clare and Devitt Committees in their attempts to dictate curriculum in law schools because I perceive that to be a major responsibility as dean: to defend the School from this misguided regulation of legal education.

Editor: Getting back to your first message in the *Lawyer*, you said, "Change is not a choice; it is a condition. It is how we respond to change that determines our fortune." In your opinion, how has the school responded over the last five years?

Dean: I think it has responded quite well. When I came into the deanship I thought there were three serious deficiencies in our curriculum that needed immediate attention. The first was inadequate coverage of business law. By that I mean insufficient courses in tax, corporations, advanced corporate work (such as business planning, corporate finance, international business, and international tax).

I thought that whole area was understaffed and undervalued, and I put a lot of effort into recruiting faculty and sensitizing the existing faculty and alumni to the deficiencies and into deciding how we could best remedy them. The result has been extremely gratifying. We now have the Ralph M. Parsons Professorship, the first chair in law and business in the country. In terms of faculty strength, we were able to attract Ron Gilson, an experienced corporate attorney with the firm of Steinhart, Goldberg, Feigenbaum & Ladar in San Francisco, and Tom Heller, former associate professor of law at the University of Wisconsin and an expert in international and domestic tax. Next fall

"There is a distinction that needs to be made between law and business and law and economics with regard to the curriculum. Law and business was a deficiency in an existing area. . . . The lack of courses in law and economics, on the other hand, reflected the School's failure to look ahead and to prepare students for the kinds of problems that lawyers more and more have to deal with."

Roberta Romano will be joining us. A graduate of Yale, she is described by Professor Marvin Chirelstein, nationally known corporate legal scholar, as the best student he ever had. So we have made tremendous inroads and have really turned that part of the curriculum around.

The second major deficiency, as I saw it, was a lack of central and guiding work in law and economics. There is a distinction that needs to be made between law and business and law and economics with regard to the curriculum. Law and business was a deficiency in an existing area; we were simply not doing a good job in an existing discipline. The lack of courses in law and economics, on the other hand, reflected the School's failure to look ahead and to prepare students for the kinds of problems that lawyers more and more have to deal with. You can't think about environmental law or corporate law or antitrust or health and safety law without understanding some economics. Fortunately, through the generosity of a family who has always been very close to the School we were able to fund the first chair in law and economics in the country, which means we can now be sure this area will get the attention within the curriculum it deserves.

The third area that needed immediate attention was the clinical program. When I became dean in 1976, the clinical program was in an embryonic stage. At that time Tony Amsterdam was still dividing his time between developing his

clinical seminar in the Trial of the Mentally Disordered Criminal Defendant and teaching a traditional course in Criminal Procedure. Mike Wald was developing his clinical course in Juvenile Law, but beyond these there was really nothing. So at best we were able to offer clinical experience to 40 or 50 students.

Since that time we have added two faculty members, Chuck Marson and Miguel Mendez to teach primarily clinical courses. In addition several other faculty members, including Paul Brest, Barbara Babcock and Paul Goldstein, are developing clinical courses.

But what is even more exciting is that the clinical program has been extended to a part of the first-year class through Curriculum B. Though still in an experimental stage, Curriculum B exposes one third of the first-year class to clinical instruction in civil procedure, so students are learning how the courts work, as well as developing skills in drafting, pleading, interviewing, etc. Curriculum B has been a tremendous success and I have every confidence that it will soon be extended to include the entire first-year class.

Editor: I suppose one change you can never plan for is losing faculty, whether it be to other law schools, government service, private practice, whatever.

Dean: That's right. Actually we have lost very few people since 1976. This year has been the worst because we are losing Tony Amsterdam, who has been here since 1966 and has been the mainstay of the clinical program, and Victor Li who is a unique and irreplaceable resource. But at a recent faculty meeting I pointed out that this kind of change is inevitable and that we have thirty-six full-time faculty members who are tenured or on the tenure track and of those thirty-six only six were members of this faculty when I came here in 1962. That's a remarkable statistic.

Editor: It is a relatively young faculty then.

Dean: Yes. The median age is about forty.

Editor: Is that by design?

Dean: No. I haven't gone back to figure out historically what happened, but I think the faculty was quite stable in the '30s and '40s and many retired in the '50s. The faculty grew quite a lot in the '50s but

many of them, who were rather young, left for various reasons. Then, four of us came from Columbia in 1962-63. We were young then and have now been at the School twenty years. I suppose we haven't got quite the number of senior faculty that most law schools have, but I think that's just a quirk of fate.

Editor: You have often said that not every law school needs to teach everything, that every law school should offer a basic legal education and then specialize in two or three areas.

Dean: I still believe that.

Editor: What do you think Stanford should specialize in?

Dean: One area should be law and business and all that is related to it, including law and economics, because 80 to 85 percent of our students go into the private sector and practice some form of business law.

Another area is litigation. That is an area that has grown tremendously in importance in the last few decades. I would guess that today in major firms forty to fifty percent of the partners are litigators. So, students who are interested in litigation should have the opportunity to do clinical work at the School.

Given our location, an emerging area that I think we are in a particularly good position to develop is the law of business transactions in the Pacific Basin. We certainly have the resources right here on campus, including experts on Northeast Asia and Japan, and we should get together to develop a program for the Law School.

Editor: Where would you like to see this school ten years from now in terms of the size of the faculty and the student body?

Dean: I have a clear, definite answer for that question. Since I joined the faculty in 1962 there has always been a consensus on the faculty, in fact a unanimous view, that the student body should not exceed 500 full-time students. That view still holds. Therefore, it follows that the faculty size should be somewhere around 40 to maintain a student/faculty ratio of about 12 to 1. That number is not cast in bronze. Obviously, if we had the opportunity to hire a specialist in East-West trade, for example, we would. But we would want to preserve that ratio at any cost.

"I have felt for a long time that seven years would be the optimal length of time to be dean."

Editor: How about the curriculum ten years from now?

Dean: I think there remains a deficiency that needs to be remedied, and that is in the area of quantitative methodology — risk analysis, decision sciences, computer science. We have made some headway in the computer science area, thanks to the efforts of Associate Dean Joseph Leininger, but we certainly need more statistics and decision sciences. I would like to see that deficiency corrected over the next few years and certainly within ten.

Editor: If one looks over the succession of deans since Marion Kirkwood, it appears that the tenures have grown considerably shorter. Marion Kirkwood was dean for twenty-three years, Carl Spaeth for 16, Bayless Manning for eight, Thomas Ehrlich for 4-1/2 and yourself for five. Does this say something about the function of the dean today? Is it a position one does not expect to hold for more than a few years?

Dean: I think the growing complexity of law school and law school administra-

tion explains why tenures are shorter. Of course, you also have to look at the age of the individual when he becomes dean. I was 50 when I became dean and I suspect my energy level wasn't what Bayless Manning's was when he became dean at 41. So obviously age has some bearing on the length of tenure.

When Stanford University President Donald Kennedy was Provost he suggested at a meeting of the Council of Stanford Deans that he thought five years should be institutionalized as a standard term of office. In fact at Yale they have institutionalized 5-year terms which are renewable.

But in terms of my own reasons for resigning, I have felt for a long time that seven years would be the optimal length of time to be dean. It just happened that this special opportunity came along so I had to leave a bit ahead of schedule. The reason I set seven years as the deadline is because the job simply takes too much out of you. There are so many constituencies to deal with. There are the students, both as individuals with their personal and financial problems and as groups who need support for their various organizations. There is the faculty with their individual views on how the School ought to be run and where it ought to go. These concerns, of course, affect faculty appointments, which are critical to the complexion of the School.



Dean Meyers with his wife, Pamela.

Then there are alumni matters. Fundraising, for example, requires an enormous amount of time and energy, and yet a private school of this quality simply cannot operate without ever-increasing endowment and annual fund.

Then there is another concern that I wasn't aware of when I came into this job, and that is the tremendous amount of interaction with the University, particularly in the area of funding. The dean of each school must be constantly looking out for the interest of his school, making sure the funds he raises stay in the school and that he gets a fair share of unrestricted general funds from the University. Recently I have been spending almost half of my time dealing with individual housing problems for new faculty members and with the broader problem of what the University should be doing with regard to faculty housing and personnel policies.

And finally, there are the facilities themselves and the problems that occur. One of the first problems I faced as a new dean was having to replace all of the gutters because they didn't work. And even now, after five years of aggravation, the ventilation system is still not operating properly, and yet I have no authority to go out and hire a crew to fix it. It's a very frustrating situation indeed.

What I'm trying to say is that there are so many problems that need the dean's attention that you're constantly using your psychic energies to find solutions. The fact is that the dean has an enormous amount of responsibility across the board. That is the way it has to be — and should be — but it is exhausting.

Editor: In terms of your fundraising efforts, you must be very proud of the fact that the endowment has jumped from 8 to 20 million in five years and that contributions to the annual fund have more than doubled. To what do you attribute this success?

Dean: To the hard work of all of us involved, beginning with Assistant Dean Barbara Dray and her staff, including Linda Feigel, director of the Annual Fund, and Elizabeth Lucchesi, director of Alumni Relations. Barbara is unceasing in her efforts to lend personal attention to every alumni concern. She and her staff work very hard to make sure

programs for the Board of Visitors and Alumni Weekend are informative and worthwhile and to persuade every alumnus that the School is doing everything possible to produce the very best practicing lawyer we can.

Editor: Scholarships have always been a major concern of yours and an area to which you have devoted considerable time. During your tenure you have raised an additional \$2.3 million in scholarship funds. Is the School out of the woods now?

Dean: No. It's in worse trouble now than ever before because of inflation. Costs are escalating faster than the money is coming in. The Carter Administration made a fundamental error in eliminating the need test from the student loan program. It has led to a great deal of abuse, and now the Reagan Administration threatens to cut the program way back. Frankly, we're scared to death that there's not going to be enough loan money available.

You also have to keep in mind that endowed scholarship funds, because of the need to recapitalize, only pay 5% annually while the inflation rate is 12 or 13%.

Editor: When Tom Ehrlich left the deanship, he noted that historically private business has done very little for legal education and that Stanford could benefit enormously from this support. Has this situation changed very much while you have been Dean?

Dean: I think so. The Parsons chair, of course, can be attributed to business, since it was funded by the Ralph M. Parsons Foundation and the William Randolph Hearst Foundation. Moreover, the chair in law and economics was funded by a family whose interests are business-related. The School is beginning to attract ongoing corporate support. Exxon is helping to fund the Law and Economics program, and I have an application into Shell Oil Company to support the Law and Business program. In addition, the Dean's Council on Law and Business, which is composed of corporate executives from around the country, is working very hard to develop contacts and to widen our base. The ground has been plowed and I am hopeful that the next Dean will continue to broaden our reach

in the corporate area.

Editor: Are there other sources you think should be tapped?

Dean: I would like to see more law firm matching gift programs established. A year ago I and the deans of five other law schools — Chicago, Columbia, Harvard, Pennsylvania and Yale — sent a joint letter to 200 of the country's largest law firms asking them to establish matching gift programs. I think there is tremendous potential there.

Also, I think we could do more to encourage people, and particularly alumni, to remember the School in their wills. Often the testator doesn't have a particular charity in mind but wants to do something. In those instances the School would benefit enormously.

Editor: There are undoubtedly things you set out to accomplish as dean and haven't. What are they?

Dean: I would have liked to have made more progress with corporate giving. It has taken longer to fill the Parsons chair than I had anticipated. And, I wish the heating and ventilation system in the building worked better.

Editor: Do you expect or hope that your successor will continue where you leave off?

Dean: I hope. I don't know what to expect.

Editor: What do you consider your biggest accomplishment?

Dean: Perhaps the greatest thing I've accomplished is keeping a faculty that could have drifted into factions and gotten into conflict, a cohesive, relatively happy group. There is a good morale in the student body and a positive, forward-looking, cohesive spirit in the faculty.

Editor: Fifty years from now when a history of the law school is written, how would you want to be remembered?

Dean: I hope I will be remembered for putting law and economics, law and business and clinical legal education in fixed, endowed positions at this law school. These programs are not whims of the moment. They are central to the School's educational mission, and I have no doubt that fifty years from now they will remain central. And, because they are endowed, they will always be part of our permanent program.

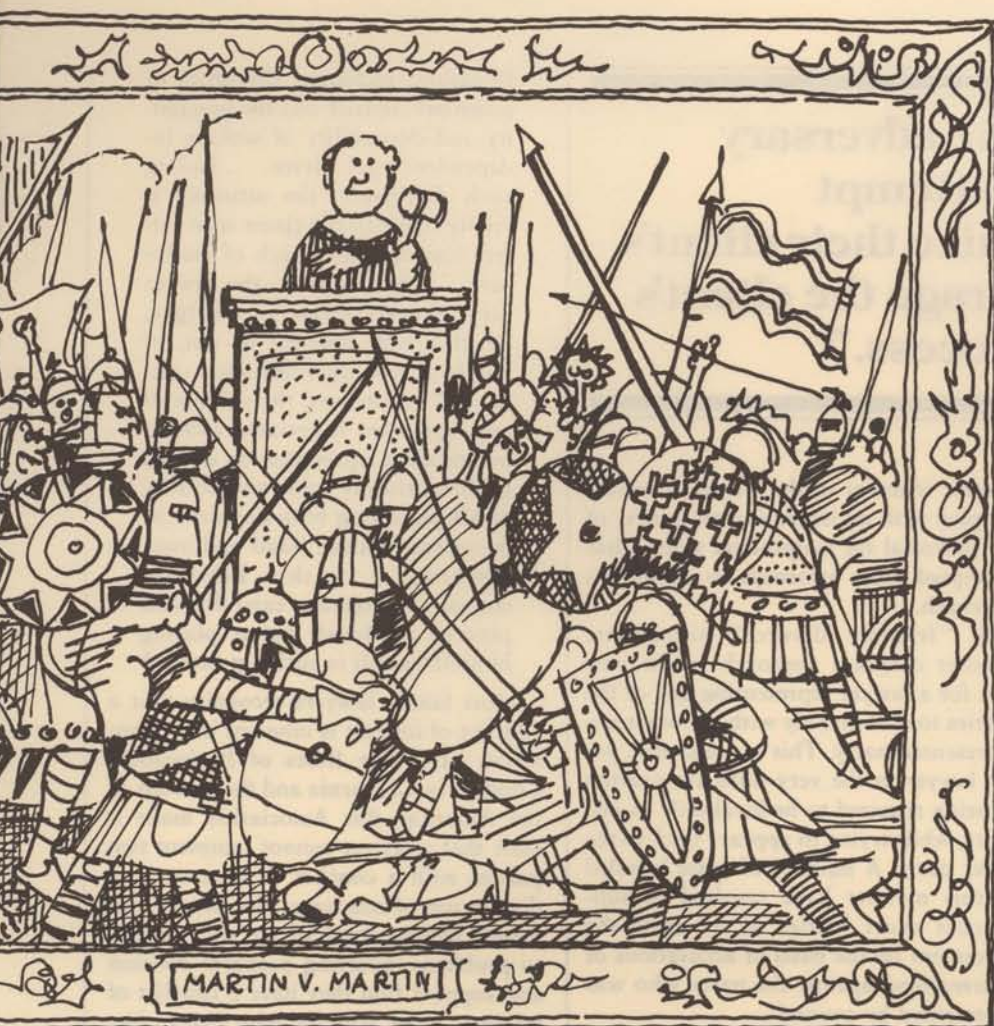
It's been a good five years.

Mediation—

An Alternative to Adversary Divorce

by George H. Norton





Mediation offers an alternative non-adversary method of dispute resolution in family law cases. In California, a number of lawyer mediators are working directly with both parties involved in a dissolution of marriage to help them resolve the issues of property division and support. Counselors are being appointed by the Superior Court to mediate all problems related to custody and visitation as required under recent legislation.¹

The availability of mediation as an alternative approach in family law cases has not been widely publicized among lawyers. This is probably because mediation is new and experimental as applied to the resolution of disputes concerning property and support, and because of some uncertainty among lawyers engaged in mediation regarding their professional responsibilities. Now, after several years of successful experience and research into the ethics of the process, lawyers using mediation are beginning to encourage their colleagues in the family law field to consider it a viable alternative method of dispute resolution.

Adversary Divorce Problems

The need for mediation arises out of problems inherent in applying the adversary system to family law disputes. Dissolution of marriage is a highly emotional crisis period usually involving feelings of anger, depression, and guilt. Most states have followed the leadership of California in trying to remove fault as an issue in divorce, thus eliminating one outlet for the anger of the parties.

Now the determinations to be made concerning the division of property, setting of support, and establishment of rights with respect to children are the focal issues of divorce. Under the adversary process, these determinations often escalate into a battle which gives vent to the anger of the parties.

Unlike most litigants in the adversary process, couples dissolving their marriages often must retain a close connection after the termination of the litigation. The parties usually have children in common, often retain co-ownership of a house or other property, may have joint rights in a pension, or have interconnected relationships with the Internal Revenue Service and face continuing adjustments relating to support. "Divorce" is only partial in most cases and not complete. It is beneficial, and even necessary, for the parties to cooperate for years after the dissolution of marriage has become "final." Such cooperation requires that some form of relationship be maintained by the parties.

The adversary process, particularly when it results in litigated court hearings, works against maintenance of a reasonable relationship between the parties. Each party is encouraged to take a

“Lawyers trained in the adversary process are taught to attempt aggressively to maximize their client’s position and to encourage the client’s cooperation in this process.”

strong position rather than to be conciliatory, because to do otherwise is usually thought to weaken one’s negotiating position. Highly-charged, emotional issues, such as custody or the right to remain in the family home, are sometimes used as leverage when support and property issues are being bargained. Each party is encouraged to marshal facts which will allow him or her to obtain more property and result in a favorable support determination, to the detriment of the spouse. Lawyers trained in the adversary process are taught to attempt aggressively to maximize their client’s position and to encourage the client’s cooperation in this process. Unfortunately, most lawyers obtain little or no training in observing and evaluating the emotional damage adversary litigation can do to the client and to the necessary ongoing relationship of the parties after the dissolution.

Early Non-Adversary Approaches

Some lawyers, through experience and by natural inclination, have recognized the potentially damaging effects of adversary divorce proceedings and have attempted to find alternative solutions. Occasionally, a lawyer friend of a separating couple has tried to help the husband and wife avoid the destructive pattern of litigation by offering to act as a lawyer-arbitrator. This approach can lead to serious problems. The lawyer friend may not be an expert in the field of family law or have any training in psychology or counseling. The lawyer’s objectivity is often compromised by his friendship with the parties. A further consideration is the obvious conflict of

interest inherent in the situation which, coupled with an increasing awareness of the potential for malpractice claims, has prompted most attorneys to avoid this approach.

In “friendly divorce” situations, another common approach in the past was for a lawyer representing one of the parties to deal directly with the other unrepresented party. This arrangement put the lawyer in the very difficult position of being required to be loyal only to one party, while trying to appear “fair” to the other party. A number of cases handled in this manner have resulted in subsequent court battles to set aside the agreement on the basis of accusations of overreaching against the party who was represented by counsel.

Many lawyers specializing in the family law field are approached by couples who want to be represented by one lawyer and cannot understand why they have to engage in an expensive adversary process. A 1978 California case, *Marriage of Klemm*,² suggests that it is possible for a lawyer to represent a divorcing couple both of whom truly have no conflict of interest and to obtain a dissolution of their marriage. After all, lawyers routinely put together partnerships and corporations for persons who have a potential (and sometimes actual) conflict of interest. However, the Appellate Court in the *Klemm* case warns:

Attorneys who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the

litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice.... Failing such disclosure, the attorney is civilly liable to the client who suffers loss caused by lack of disclosure.... In addition, the lawyer lays himself open to charges, whether well founded or not, of unethical and unprofessional conduct.... Moreover, the validity of any agreement negotiated without independent representation of each of the parties is vulnerable to easy attack as having been procured by misrepresentation, fraud and overreaching.... It thus behooves counsel to cogitate carefully and proceed cautiously before placing himself/herself in such a position.³

Most family lawyers recognize that a conflict of interest is inherent in a dissolution case. The Rules of Professional Conduct in California and the Canons of the American Bar Association make it clear that a lawyer cannot represent two parties with a conflict of interest. In a dissolution of marriage, almost any two people seeking legal advice with respect to problems involving property division and support find they have a conflict of interest. Even couples who think they have settled all issues before they see a lawyer may find out after consultation that they have not considered the tax ramifications of their solution, that they have failed to consider certain property items (such as the community interest in unvested retirement rights), or that they have simply misunderstood the law. Often, in such situations, the settlement has been dominated by one party.

Some family lawyers, including the author, have on occasion tried to avoid adversary proceedings by offering to represent one party and work out a settlement with both. When this approach is taken, it must be made clear to the unrepresented party that the lawyer’s duty to the represented party is one of undivided loyalty. The unrepresented party is told that, upon completion of a tentative agreement, he or she should have the agreement reviewed by another attorney. This step is intended to provide assurance that the agreement is reasonable,

which assurance is necessary to protect the represented client from a later attempt to set aside the agreement. This procedure does work for some people, but it takes a rather secure and sophisticated individual to sit down and attempt to work out an agreement with a spouse who has adverse interests and is represented by a lawyer.

The Mediation Alternative

Because the situation just described is less than satisfactory, mediation is a logical solution for family lawyers who want to help people work out their property and support problems in a non-adversary manner. In mediation, the lawyer can use the background, training, knowledge, and skills of a family lawyer as a truly neutral independent mediator. The key to the process is a clear-cut understanding by the parties that the mediator is not acting as the attorney for either party. Both parties are strongly advised to obtain their own independent legal counsel to review any agreement reached with the mediator's help. Some mediators are willing to process the necessary paperwork to obtain a dissolution of marriage, but most feel that the mediator crosses the line at this point and becomes the attorney for one party or has a conflict of interest problem and is thereby violating the Rules of Professional Conduct.

Is there an ethical problem for the lawyer-mediator who does not represent either party? Mediation has been an historical and traditional role for lawyers in labor, business, and international law. It is difficult to see why that role cannot extend into the family law field. This question has been specifically addressed in Massachusetts by the Boston Bar Association's Committee on Professional Responsibility, which decided that a lawyer indeed can mediate family law disputes without transgressing ethical rules.⁴ Rule 5 of the American Bar Association's proposed new ethical rules allows for a lawyer to act as an "intermediary" when mediating a dispute between clients.

Mediation of the issues in a dissolution of marriage raises the question of whether the mediators should be lawyers, mental health professionals or

both. In California and nationwide the field of family law has become one of the most complex, fast-developing of all areas. More cases have appeared in the appellate reports of California relating to family law problems in the past five years than in all of the preceding years since 1850. Family law is the most recent branch of law certified as a specialty by the California State Board of Specialization. Today, any divorce involving ownership of a residence, retirement rights, and a marriage of medium length without parity of earning ability between spouses involves complex problems and decisions relating to valuation, taxation, finance, and support rights. It has been the author's experience in discussing these matters with mental health professionals that they do not want to be involved in helping people make such decisions and almost uniformly advise legal help.

On the other hand, O.J. Coogler, the author of the leading text on mediation and divorce, *Structured Mediation in Divorce*, states:

Lawyers or others with legal experience have much to offer (as mediators) but skills in behavioral science are usually lacking. It is generally easier for one trained in behavioral sciences to acquire legal knowledge required for mediation than for the legally trained person to gain knowledge and a feel for behavioral science and counseling skills.⁵

Coogler is suspect of some bias on the subject as reflected in the dedication to his book:

I am indebted to my former wife and the two attorneys who represented us in our divorce for making me aware of the critical need for a more rational, more civilized way of arranging a parting of the ways.

However, Coogler is now working with the court system in Atlanta, Georgia, and has modified his position somewhat. Coogler has organized the Family Mediation Association to resolve divorce disputes. The mediators are mental health professionals, but lawyers are now used as consultants to the non-lawyer mediators for review of any legal problems involved.

The lawyer does not act as attorney for either party but is strictly a consultant.

Most lawyers doing mediation consider the possibility of working directly or indirectly with a mental health professional in the mediation process in particular cases. The author's experience is that most people coming to mediation have a background of prior counseling with mental health professionals. Indeed, many referrals to mediation come from mental health professionals who do not want to deal with the property and support aspects of separation.

In cases where there are serious problems relating to custody or visitation, I, as a mediator, always recommend that the parties seek help from a mental health professional to resolve these issues. Today, more and more mental health professionals are specializing in custody and visitation problems, and this specialization can be expected to further increase under the mandatory mediation provisions of California Civil Code §4607. In the county where I practice, the court conciliator's staff has already been substantially increased to meet the requirements of this statute. In addition, many lawyers in the adversary process as well as those doing mediation automatically refer custody and visitation problems to the county mediation service.

What does the lawyer-mediator actually do and how does one become a mediator? My own interest in mediation developed after several years of working successfully with cases in which I worked with both parties to achieve a settlement and then referred the unrepresented party to another family lawyer for review of the proposed agreement. I had experienced some frustration with this method because of the understandable fear some of the unrepresented parties had in the process.

In 1977, I learned that two lawyers in the San Francisco Bay Area had been experimenting with mediation and had occasion to discuss the process in some detail with one of them. Shortly thereafter, a potential client, whom I will call "Jane," was referred to me. Jane and her husband "Bob" were both mental health professionals and had worked out a marital settlement with the help of their two lawyers. The agreement did not get

“I estimate that the total cost of mediation, plus the two reviewing attorneys, averages approximately one-third of the cost to parties engaging in the standard adversary means of handling a settled dissolution.”

signed because of one or two minor unresolved issues involving personal property. A substantial period of time passed and during this interval California experienced an enormous jump in real estate values. Bob now wanted to re-negotiate the agreement using the updated residence valuation. He changed attorneys and retained a well known, highly regarded family lawyer. Jane became concerned and consulted with me about the possibility of taking over the case as her advocate.

After reviewing the facts with Jane, I advised her to stay with the lawyer who was representing her and doing a competent job. It appeared to me that the case was in danger of becoming over-litigated. I pointed this fact out to Jane and advised her that litigation would be expensive and could do more damage than would ever be compensated for by monetary gain. I told Jane that although I would not act as her lawyer, I would consider the possibility of serving as a mediator. After some questions, Jane expressed interest and said that she would discuss it with Bob.

Two days later, Jane called me and said that Bob liked the mediation concept but was concerned because Jane had already given her viewpoint to me. I suggested that Bob and I could meet alone for an hour so that he would have had “equal time” and then could decide whether or not to enter the process. I also talked with both lawyers to ensure that they would have no objection to my involvement as mediator. Bob and I had the preliminary discussion, which was followed by two fairly lengthy mediation sessions with the couple. During these sessions we were

able to resolve all of the issues of the case. I then prepared an agreement which was ratified by the attorneys for the parties.

At the end of the second mediation session Jane and Bob both inquired where I had obtained my training for mediation. The honest answer was that I had had no training beyond my experience as a family lawyer. The only other education I had received for counseling was a Parent Effectiveness Training course I had attended with my wife, which in retrospect I regard as a very good introduction to mediation techniques.

After the experience with Jane and Bob, I made an effort to find and talk with other lawyers doing mediation and to interested mental health professionals. I attended a course given by the Mental Research Institute in Palo Alto and read books on mediation and counseling. Opportunities to do mediation came from contacts with certain mental health professionals and interested lawyers. In 1980 I and another lawyer, Claire Anton, began Family Mediation Service, announcing to a number of our friends in the legal and mental health professions the availability of mediation as an alternative to the adversary process in divorce.

Mediation Explained

How does the mediation process actually work and what have been the results? Our approach to mediation follows a general format. First, the participants are apprised of the purposes, limitations, and rules. I advise them that the mediator is not the lawyer for either party and I strongly recommend that the parties consult with their own attorneys before sign-

ing any final agreement. The parties are advised that they must rely on each other's honesty to disclose assets fully and if they have any doubts, they will need their own lawyer to conduct discovery. They are told that they can engage other professionals for legal advice, tax counsel, accounting, appraisal, etc., and that the mediator may advise them to do so specifically in certain instances. Matters relating to confidentiality and fee are discussed.

The next step is usually one of “breaking the ice.” Each party is encouraged to tell the mediator the general background of the marriage and about himself. Ages and number of children, length of marriage, work history, and a general review of assets are ascertained. The parties are then asked to tell the mediator if they foresee any special or particular areas that they feel will present a problem in working out a division of assets, support rights, and respective rights and duties relating to children.

As a mediator, I usually give the parties some background about how dissolution settlements are made. The California rule of equal division of assets is discussed, as is the fact that support rights are generally predictable under certain objective standards (guidelines used in most counties). Other factors that may be pertinent in their particular case are also considered. If the parties have a fairly simple asset and liability picture or if they have brought details concerning their assets and liabilities to the first session, we may proceed to a preliminary discussion relating to division of assets. As mediator, I try to give the parties some guidelines and alternatives in settling these matters.

The first session ends with a request by the mediator for the parties to do some homework. Most often this is a cataloging in greater detail of assets and liabilities and the collection of data relating to earnings, other income, and expenses. Unless communication between the parties is particularly bad, the parties are encouraged to meet and talk over suggested methods of dividing property and setting support.

By the second session, most participants are able to get down to the hard areas of dispute resolution. Often they

will have some agreement concerning a division of assets with possibly one or two items being a problem because of disagreement over valuation or which party is to receive a specific asset. The most repetitive problem is providing for division of the family home when one or both parties want the children to stay in the home but the party leaving wants some cash out of the house and protection from tax problems.

My experience has been that the success rate of the mediation process is phenomenally high — above 90 percent. The median number of meetings required to achieve an agreement has been three. Some cases have actually been settled in one meeting and a marital settlement agreement drawn as a result of that single session. Others have extended to six or seven sessions because of the complexity of the problem or because one or both of the parties have difficulty making or accepting a decision.

What is the cost of mediation and what is its relative cost compared with a standard adversary dissolution action? I charge for mediation on the same hourly basis as handling any other legal work. Most mediators I have talked with do the same, although at least one mediator has indicated a flat fee is used for the service with certain limitations as to the amount of time allowed. Participants in mediation often question at the onset how it can be less expensive to use three lawyers (including the mediator) than to use two lawyers. My evaluation has to be subjective, but the bulk of my practice is still adversary divorce cases and the great majority of these cases are settled. I estimate that the total cost of mediation, plus the two reviewing attorneys, averages approximately one-third of the cost to parties engaging in the standard adversary means of handling a settled dissolution. In mediation the parties do much of their own legal work, primarily in the field of discovery. The actual processing of the divorce once a settlement has been achieved is a fairly routine task requiring little attorney time.

Do the settlements attained through mediation last? All of the settlements I have mediated have survived review by independent attorneys, sometimes with minor changes. On one occasion, the re-

viewing attorney strongly advised against the settlement (which was anticipated) but the client made the decision to go ahead with the agreement. To date, I know of no mediated settlement that has been set aside or that resulted in subsequent litigation.

It seems obvious that a settlement arrived at through active participation of the parties is more readily accepted than a judgment imposed by a court or a settlement forced on a client by a lawyer, as often happens at the time of trial or at a settlement conference just preceding trial. Mental health professionals have advised me that many people are particularly frustrated in the dissolution process because they feel that the decisions made are out of their control. Necessarily, this results in increased inability to accept the result.

Lawyers often ask me how a mediator handles the problem of the stronger and more articulate partner who can overwhelm his or her spouse in argument in the mediation process. There are a number of techniques used by negotiators and counselors to meet this problem. My particular method is to suggest to the more articulate partner that if his or her spouse obtained an attorney, the attorney's answering position would almost certainly be as follows (and then set out the other party's position). Almost invariably, the less verbal partner starts nodding his or her head in agreement and may further amplify on that position. Obviously, the mediator has to be careful not to become the advocate for one party, but the device, used carefully, can put the issue in a framework that permits it to be settled by compromise.

Some lawyers have expressed the doubt that mediation can work unless there is good communication between the parties. By good communication, they usually mean that the parties behave reasonably toward each other without a great deal of acrimony. I have not found this to be necessarily true. I have had clients involved in mediation who get into shouting sessions in the office, cry, bully, and use a variety of unfair tactics against each other. What I have observed in these situations is that often many of these people were able to back down and calmly compromise after venting their

anger. The mediator's job is one of carefully listening and then sorting out areas of agreement and disagreement. When there is disagreement, the mediator tries to help each party understand the other's position. If compromise cannot then be reached, my particular technique is to suggest what a court might do with the problem if required to rule on it and then to suggest alternatives that might be more attractive than a court ruling.

It has been my experience that the kinds of compromises made in mediation are often more satisfactory than the solutions imposed by a court. There are many more creative alternatives available to the mediator than there are to the court, which is bound by appellate rulings preventing certain types of compromise. A typical example of this is agreement of the parties to steps down in support over a period of time. Appellate courts frown on step-down orders by trial courts because they assume certain facts in the future that cannot be in evidence.

The public and the media are becoming more and more aware of mediation. Within the past year I have seen articles in *Money* and *California Living* magazines, in *The Wall Street Journal*, and, in a great number of other newspapers and periodicals discussing and often advocating the concept of mediation. Although I do not suggest that mediation is a panacea for the easy resolution of all divorce cases, I do hope that the legal profession keeps an open mind toward its use in family law. The legal profession is in service to the public and should be open to change.

1. California Civil Code §4607
2. 78 C.A. 3d 893.
3. *Id.* at 901.
4. Opinion 78-1, 5 E.L.R. 2606. (The subject is generally discussed in 7 E.L.R. 4001-11 in a monograph, "Professional Responsibility Problems of Divorce Mediation," by Professor Linda J. Silberman of the New York University School of Law.)
5. *Structured Mediation in Divorce*, D.C. Heath and Co., p. 75

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Child Custody Disputes:

Are We Abandoning the Child's Best Interests?

by Michael S. Wald

In 1979 the parents of over a million children divorced. Under the best of circumstances divorce usually constitutes a traumatic event for children. In general, the best of circumstances means that parents agree on custody, maintain good relations with each other, maximize both parents' contact with the child, and do not engage in litigation involving the children. When parents cannot agree on custody, problems are created for the legal system as well as the children.

In this article, I do not address, let alone try to resolve, most of the hard questions concerning custody adjudication. I focus only on two aspects of the current legal response: the recent adoption by some legislatures of a presumption for joint custody in contested custody cases and the length of time the decision-making process takes in resolving disputed cases. While one of these involves a substantive issue, i.e., the standard for decision, and the other procedural issues, they have a common element. I believe that under current laws and procedures, there is a substantial danger that the real interests of children are being ignored to accommodate the needs of adults and adult institutions.

The Custody Standard — The Move Towards Joint Custody

The question of which parent should receive custody in disputed situations has plagued decision-makers since at least the time of Solomon. Determining the appropriate legal response to custody disputes requires solving a number of extraordinarily difficult questions. For example, in establishing custody rules should the focus be only on the child's needs or should we weigh the interests of all family members? By what standards should we determine who is a "better" parent? How do we go about assessing the parenting capabilities of each parent, assuming we can articulate standards? How can we protect the child's interest in retaining ties to each parent and each

parent's desire to continue his or her relationship with the child in a society where divorced parents may end up living hundreds or thousands of miles apart? These questions present perplexing value choices on issues about which we have limited knowledge. Moreover, the intense emotional ties make the decision-making process extremely painful for everyone involved.

The legal system has never developed an "ideal" way of resolving contested cases. In the 19th century, fathers had an absolute right to custody. Beginning around 1900, most state legislatures adopted the "best interest" test, which directs the judge to focus solely on the child's interests and place the child with that parent who will best promote the child's well-being. In addition, many legislatures also established a maternal preference, at least for children of "tender years." Under this test, it is presumed that most children are better off in the

mother's custody, although the father can try to persuade the court that he better meets the child's interests.

Under all these tests, it is generally assumed that one parent will get custody and the other will have visitation rights. In recent years, however, a number of state legislatures have abandoned the maternal preference or tender years presumption. In its place a new presumption is being substituted — for joint custody. In California, for example, a new custody law enacted in 1979 provides for joint legal and physical custody as the first preference in custody determinations. While there is some confusion as to the meaning of the term "joint custody" — parents can have joint *legal* custody and decision-making authority without equal amounts of *physical* custody — in many situations joint custody is equated with splitting the child's time between two homes.

Support for joint custody has come



from many sources, including experts in child development, fathers' rights groups, and academics from many disciplines. Although some proponents appear to be motivated primarily by self-interest, there certainly are good arguments that joint custody can be beneficial to children. At the core of the case for joint custody is substantial evidence that children fare best following a divorce when they have maximum contact with both parents. The evidence indicates that in "sole" custody arrangements most fathers (90% of all custodians still are mothers) visit with the children infrequently. Thus, to the extent that a joint custody arrangement encourages both parents to stay involved with the children, it can be assumed that joint custody will be in the child's best interest.

It is also argued that joint custody helps each parent cope with divorce and that their improved coping benefits the children. In addition, joint custody may be a means of avoiding protracted court disputes, which usually are extremely harmful to all the parties. Finally, joint custody means that one of the parents doesn't "lose" the child, a loss which is very great for many non-custodial parents.

Joint custody is not without potential drawbacks, however. As two experts recently wrote:

Disruption, uncertainty, and inconsistency, especially following parental separation, are ordinarily detrimental to a child. A custodial arrangement that involves shuttling the child between different homes, churches, lifestyles, and socioeconomic situations and subjects the child to inconsistent rules, regulations, methods of discipline, and styles of parenting invites continual instability.

The probability of temporariness is increased by the likelihood of remarriage or the mother's obtaining employment outside the home. Thus, an arrangement that appears workable at the time of the divorce may be destined to crumble, conceivably just as the child is becoming used to it. In any event, the child remains exposed to the disquieting threat of upheaval and is likely, with considerable justifi-

cation, to perceive his or her custodial status as in a perpetual state of precarious balance.

When parents live any distance apart, as is often the case, prospects for mutual decision making may be negligible. . . . [Moreover], shared decision making may do nothing but expose the child to unnecessary confusion and trauma.¹

It is extremely difficult to assess the claims of the proponents and opponents of joint custody. There has been virtually no sound research evaluating its impact. Although a few studies are widely cited as demonstrating the feasibility of joint custody, all the studies are of families in which both parents wanted joint custody. At best these studies demonstrate that, where both parents agree, joint custody may be workable. Even this statement must be qualified, however, since very few studies have actually looked at the children in assessing the impact of joint custody arrangements. To a disappointing degree, the "research" has consisted more of pieces of advocacy than of scientifically sound studies.

In any given case it may well be that joint custody is likely to best promote the child's interest. Until recently courts in most states assumed that they could not, or should not, ever award joint custody. To the extent that new laws merely remove barriers preventing courts from ever awarding joint custody, the change seems clearly correct. Despite the absence of research, it is reasonable to assume that if *both* parents *want* joint custody, the arrangement is likely to be workable, even beneficial, for the children. In such situations, joint custody may help maximize the child's ties to each parent. Moreover, whenever parents agree, their decision should be followed because it is highly unlikely that a judge can determine the child's best interests better than both parents can.

However, the move towards joint custody has not been limited to situations in which the parents agree to this arrangement. Under California law the court can impose joint custody over one parent's opposition or can use the threat of awarding sole custody as a means of coercing an unwilling parent into accepting

joint custody. We know nothing about the impact of joint custody on the children in such situations. Certainly the chances of success are diminished and the likely problems for the child, such as loyalty conflicts between battling parents, are increased.

My greatest concern is that, in light of the preference, judges may order joint custody, despite the opposition or reluctance of one or even both parents, as a way of avoiding hard decisions in cases where both parents seem basically competent. Under the traditional best interest test most contested cases involved situations where there were significant differences in parenting abilities or lifestyles between the two parents. While decision-making under the best interest test is



not without problems (as a result of the vagueness of the standard, judges are able to impose their views of appropriate upbringing and lifestyle as the determinative factor; at least in some cases, judges have favored traditional over non-traditional lifestyles, ignoring a child's psychological or emotional ties to a caretaker merely because the judge disapproved of the caretaker's lifestyle) — the test does at least make the child's interest the focus of the proceeding.

The nature of the contested custody cases is changing, however, reflecting the changing roles of men and women. The new role, and potential, of fatherhood, as glorified in the movie *Kramer v. Kramer*, is leading to more disputes between two "fit" parents. It seems likely that in future years there will be more contested custody cases in situations where there are not significant differences in lifestyle or fitness of parents. And, as more cases between two

Child Custody Disputes

seemingly fit and competent parents are presented to the court, it is likely that judges will be reluctant to deprive either adult of custody.

In such situations, it is all too easy for a judge to split the difference — in this case the child — without focusing sufficiently on the child's needs. I am familiar with several recent cases in which courts in California ordered joint custody under circumstances which are clearly adverse for children. For example, in one case each parent was given physical custody for two weeks at a time. One parent lived



in Southern California, the other in the Bay Area. The child, who was three, was to be shipped back and forth every other Sunday. I believe that there would be unanimity among child development experts that such an arrangement is likely to be very detrimental to the child. In another action an appellate court unwisely suggested that the trial court award joint custody in a situation where the custodial parent had sole custody for virtually all of the child's life (five years) and despite the fact that the child was doing very well in the father's sole custody.

Why do decisions like these occur? They may just reflect the problem that under the best interest test, judges have wide discretion in determining a child's best interest and a judge's view may not coincide with that of child development experts. However, I think the problem lies elsewhere — in the joint custody law itself, rather than in the best interest test. Although the joint custody preference is not supposed to alter the focus from the child's best interest, in fact it must. Given the painfulness of deciding between two "fit" adults, the fact that the court usually sees only the adults, not the child, and the natural desire to have everyone come out with something, it is all too easy for courts to ignore the needs and interest of the child and focus only on the



adults, assuming that just because both parents are fit, the child will benefit from joint custody.

The potential for ignoring the child's best interest is even greater during the pretrial negotiation process, where custody issues are most frequently decided. With a statutory preference for joint custody, there is substantial reason for lawyers to advise their clients to accept a joint custody arrangement out of concern that the court will impose it in any case or, even worse, award primary custody to the "cooperative" parent. It is all too possible that joint custody will be accepted by an unwilling party in order to avoid litigation, despite the fact that the arrangement may be detrimental to the child. In addition, some parents may use the threat of requesting joint custody as a negotiating tool in order to minimize child or spousal support. And, it must be noted that children are unrepresented throughout the bargaining process; only the parents have counsel.

In order to avoid this problem the legislature ought to repeal the current law and substitute one which requires courts to explore joint custody but without a presumption for any particular custodial arrangement. The current law just goes too far on too small an informational base. A law favoring joint custody should be adopted only after there is far more evidence about the impact of laws allowing, but not favoring, joint custody.

It will be several years, at least, until there is more information available on how these non-consensual or "semi-consensual" arrangements work out. Even then the evidence will probably be anecdotal, since little research is being done.

If the current law is not changed, I hope that courts will approach the use of joint custody very cautiously. The focus should remain on the child's needs and

the likelihood that a joint arrangement will really be in the child's, not just the adults', best interest. In many cases joint custody may be the best from everyone's perspective. We should continue to seek ways of keeping both parents involved with the child. However, the fact that both parents are fit is not, in and of itself, a reason to order joint custody. The court must be convinced that cooperation is possible, that the child-rearing styles are essentially similar and that the likelihood of on-going disputes, in or out of courts, is minimal. When a court orders joint physical as well as joint legal custody, it must take into account a child's very strong need for stability, continuity, and consistency in parenting.

The Decision Process — Avoiding Delay

Developing ideal standards for contested custody issues may be an impossible task. Virtually any rule is going to be undesirable in some situation, and the alternative of no rules at all, i.e., giving the judge (or other decisionmaker if we decide to turn the decision over to other professionals) total discretion also has many drawbacks. Perhaps the best we can do is decide which standard is likely to be the least detrimental.

Whatever the standard, however, there is a second problem in custody litigation which is inexcusable — the length of time it takes the judicial system to decide contested custody cases. While the problem exists at both the trial and appellate levels, it is particularly acute at the appellate level. For example, appellate courts in California have decided six child custody cases in the past four years. For these six cases, it took an average of 18 months for the appellate process to be completed. The shortest time period was 15 months; some cases took two years to decide. Similar statistics prevail in other cases, which raise the same concern over timeliness as do custody cases, such as those dealing with abused and neglected children or with the validity of an adoption. In many of these cases the pretrial process also took many months and the trial judge may not have rendered a decision for weeks after the hearing.

Of course, there are many "good" reasons for such delays. Appellate courts are busy and have other important cases, including those brought by criminal defendants who have been sent to prison. Lawyers are busy and cannot file appeals immediately. Transcripts take time to be prepared. Trial courts, too, are overburdened and cannot render quick decisions.

Yet from the child's perspective such delays are extremely damaging. Child development experts of many different backgrounds and persuasions agree that, while children can grow and thrive in a variety of environments, most children are harmed when they are subjected to instability and uncertainty. Children, especially younger children, develop strong psychological attachments to their caretakers; it is hazardous to destroy these relationships. Equally important, children can suffer severe emotional problems if faced with uncertainty as to who will be their custodian or whether they will "lose" their parent(s). In addition, as all parents know, a child's time perspective is much different from an adult's. While the problem is especially acute for younger children, older children also are affected. The child's perspective was voiced by an eleven-year-old boy being interviewed recently by a Stanford graduate student who is doing a dissertation on the impact of custody disputes on the children. When asked about the court process the boy said, "I thought we'd all

place. Yet the child has suffered the harm of the removal and of a lengthy separation. Moreover, children who have become attached to their new family must undergo another separation. Even if the custodial arrangement is upheld, both the parent and the child worry about the security of the situation, which may impair the parent's ability to care for the child as well as cause emotional trauma for the child.

If we recognize that two years is a very long time in the life of a child, can we do anything about the situation? I believe we can. The easiest response is to establish a time limit in which these cases must be decided. Children's cases already are given calendar priority at the appellate level by statute, but this has had little impact. I would establish a deadline from trial court decision to appellate decision. This deadline should be no longer than *four months*, in recognition of children's time sense. In addition, the trial court should be required to render its decision within a week of the time the case is submitted. Time limits should also be established to ensure that cases get to trial as quickly as possible.

Of course, such time limits place enormous pressure on both the lawyers and judges. However, we are dealing with only a small number of cases a year. Even if a faster appellate process would encourage more appeals, the number of cases involved should be no more than

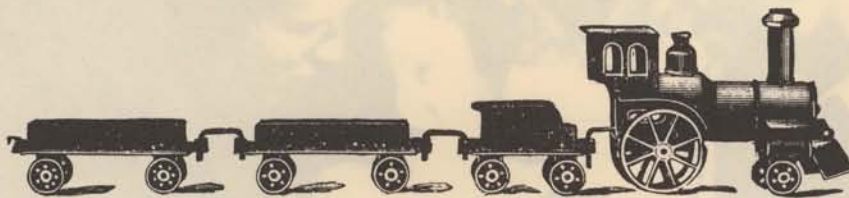
possible step. A more substantial change would be the creation of a special court of appeals to handle cases involving custody of children. Depending on the workload this court might handle only custody cases or it could hear other cases as time permits. In addition, the process should allow for only one appeal. The benefit in extra protection against error provided by a multi-level appellate process is simply not sufficient to justify the costs to the child that the time required for two or more appeals entails. States should, either by statute or by Constitutional amendment, provide for a one-step appellate process. One possibility is to create a special appellate court made up, on a rotating basis, of trial judges who handle domestic cases. Thus judges with special expertise would be reviewing discretionary decisions made at the trial level.

Of course, good arguments can be made for expedited appeals in all other areas of the law. Why should children's cases be singled out? First, the welfare of innocent children is at stake. No element of our society is more deserving of our special attention and of the expenditure of scarce resources. Second, the cost is not that great. There are only a few hundred children's cases each year. Finally, a coherent program that focuses attention on these problems may well result ultimately in sensible standards that will lower the cost of administration in all areas.

Making these substantive and procedural changes will not guarantee that the legal system meets the child's best interests. As stated initially, the best situation is that in which no litigation is necessary. However, the proposed changes will help minimize the damage to the child. Under the present system we keep letting adults' needs take precedence over those of the child. The proposed changes would help the legal system protect the child's best interest.

1. E. Benedek and R. Benedek, "Joint Custody: Solution or Illusion?" 136 *Amer. J. Psych.* 12 (1979).

Professor Wald joined the Stanford law faculty in 1967. His principal subjects are juvenile law and family law.



go to court and that would be that. Instead it dragged on and on. I don't know how long it really lasted but it seemed endless . . . It took a long time because the courts have more important things to do like taking care of robbers and murderers, so we just keep falling back on their schedule."

A lengthy appellate process also disrupts the continuity of caretaking children need. In some cases a child is returned to the care of a parent who never should have lost custody in the first

one hundred. The legal system is capable of handling this number of cases in an expeditious fashion without sacrificing quality. Unfortunately, it is difficult to enforce such a limit, at least if delay is the fault of the court and not the parties. Moreover, the attorneys may agree to the delay in the interests of their clients, the parents. No one will be around to enforce the time limits on behalf of the children. However, short time limits should result in significant improvement.

Establishing a time limit is only one

Home v. Public Education: Should Parents Have the Right To Choose?

by Thomas J. Owen '81 and Marjorie Horton

Home education is a subject of growing controversy in the field of education, in the media, and in the courts. Unfortunately, this attention reflects the number of situations in which the choice by individuals to educate their own children has conflicted with state compulsory attendance laws. The last half-century has seen state-mandated, state-controlled schooling become so widely accepted that parents must now justify once traditional prerogatives and responsibilities of the family in this very important area of child-rearing.

For the purposes of discussion, we are assuming certain characteristics of home and public education. The public education model referred to is the traditional classroom situation with one teacher presenting basically standardized instruction to a group of approximately thirty same-age students of heterogeneous ability. The teacher structures, paces, and disciplines the class in accordance with a comprehensive curriculum.

In the typical home education program discussed here, the parent (whose competency is passed on by the school board according to more or less formal criteria) creates a basically original curriculum for the child. One-on-one instruction allows the child's interests to influence the course of the lessons. Motivation, discipline, and standards are kept in line with overall family child-rearing practices. Of course, some public schools are much more responsive to the individual child than the one pictured here; parents may also recreate the traditional mistakes of public education within the home. But we believe these models of home and public education to represent the general rule.

A Question of Socialization

The crucial difference between public and home education has been argued in terms of socialization. Is public education uniquely structured to provide necessary and appropriate group experiences? What are the legitimate state interests concerning methods and results in this area? And what other interests are being implicitly furthered through the socializing experiences of public education?

The case of *Perchemlides v. Frizzle*¹

illustrates the basic conflicts. The Massachusetts school law establishes a program of compulsory education for all school-age children. The plaintiffs sought to educate their son on their own, pursuant to a provision in the law which exempts from public school attendance any child who is "being otherwise instructed in a manner approved in advance by the superintendent or the school committee."²

The crux of the argument in the *Perchemlides* case, as it has been in almost all of the disputes on home education, was the issue of "equivalency." To gain official approval, a home education proposal must be sufficiently responsive to state requirements to produce a satisfactory program. In dispute generally are the degree to which the home program must be equivalent to the public school program, and the particular areas in which equivalence is required. These are questions

of reasonable accommodation. Public schools themselves violate any strict principle of equal education for all pupils through tracking (grouping students by ability) or the use of vocational/academic curricula.

Defendant school superintendent Frizzle gave four reasons in *Perchemlides* for denying equivalence and rejecting the plaintiffs' request:

The program (1) did not indicate that the proponents had appropriate training or background; (2) did not indicate curricular sequence based on skill development and capacity; (3) did not indicate what opportunity Richard would have for group experiences which were "essential to a child's personal and intellectual growth;" and (4) had "not adequately prepared Richard for the second grade."³



These objections reflect three broad types of assumptions about children's education which underlie legal policy-making towards home programs.

The first class of assumptions addresses the academic quality of home versus school education: Is it possible for children educated at home to receive academic training equivalent to that provided in school? The second type of assumption concerns the political and cultural socialization function of education and questions whether home education can adequately serve this function. The third set of assumptions focuses on a narrower aspect of socialization, the child's social development and adjustment. For example, can children who are deprived of the peer interaction provided by the traditional school experience be expected to develop and adjust socially in a normal fashion, or at least in a manner comparable to their school-educated peers? The distinctions among these three types of assumptions are not always clear-cut; intellectual and social development clearly interact at times.

Of the four reasons cited by Superintendent Frizzle, only the first and second deal with any specific degree of strict academic equivalence. At trial, the plaintiffs produced expert witnesses who testified that the proposal was equal to or better than the public school program, and that the plaintiff parents were more than adequately qualified to teach their child.

These types of equivalence represent specific fact questions; they theoretically can be met within any home education program. Parents can obtain additional training in teaching. Topics and sequences of study can be added where necessary to the proposed curriculum. The requirement of school board approval and, in some states, of certification of the teaching parent, provide suitable controls.

Superintendent Frizzle's third argument, that home programs lack appropriate group experiences, is based on the only inherent difference between home and public education at issue and the most cogent objection to home education programs. But in denying equivalent socialization in the past, the courts have never fully articulated or empirically

supported the actual methods and results they assume characterize the public schools. The following excerpt is representative:

... I cannot conceive how a child can receive in the home instruction and experiences in group activity and in social outlook in any manner or form comparable to that provided in the public school. . . . It does seem to me, too, quite unlikely, that this type of instruction could produce a child with all the attributes that a person of education, refinement and character should possess.⁴

At best in these opinions, a judge will refer to expert testimony predicting a possible detriment to the child's learning due to the lack of classroom competition.

Legal Issues and Responses

In contrast to the judiciary, the legislatures have been explicit in their perceptions of the proper role of socialization in the public schools. Section 44806 of the California Education Code, on the duty of teachers concerning instruction of pupils in morals, manners, and citizenship, is typical:

Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties and dignities of American citizenship, including kindness toward domestic pets and the humane treatment of living creatures, to teach them to avoid idleness, profanity, and falsehood, and to instruct them in manners and morals and the principles of a free government.

The training of schoolchildren in good citizenship, patriotism, and loyalty to the state and the nation as a means of protecting the public welfare has been upheld in the courts as a legitimate and primary purpose of the public educational system.⁵

Any compulsory education law will eventually bring into conflict the state's interest in a particular program of socialization and pluralistic interests in child-

rearing. State and federal courts have almost universally upheld the constitutionality of compulsory education requirements when challenged as violative of the parents' right to control the upbringing of their children.⁶ But in two major decisions, the Supreme Court has placed significant limitations upon permissible state regulation and use of education to further its socialization goals.

In *Pierce v. Society of Sisters*,⁷ the Court struck down an Oregon statute, sponsored by several nativist groups (including the Ku Klux Klan), requiring all children to attend public schools. And in *Wisconsin v. Yoder*,⁸ the plaintiff, on behalf of his children, also successfully sought exemption from the state's compulsory attendance law, on the grounds that formal education past the eighth grade would, in itself, violate their religious beliefs and practices as members of the Old Order Amish.

In both cases, the Court implicitly found a valid collectivist function in compulsory education, a legitimate state interest in requiring education to the point at which an individual no longer threatens to be a liability to society either politically, economically, or socially.⁹ Since both the plaintiff Catholic school in *Pierce* and the Amish system in *Yoder* fulfilled this requirement, the Court found no further state interest in forcing all children to submit to public education for the purposes of "secularization" or "modernization."

Pierce was decided under the rubric of "personal substantive due process," based on a concept of liberty drawn from the Fourteenth Amendment. It would probably now be argued under the "right of privacy" doctrine developed in *Roe v. Wade*,¹⁰ the landmark abortion decision, which specifically includes choices about child-rearing within the sphere of individual and family autonomy. The practical result is that a compulsory attendance statute should be subject to strict scrutiny; it should be "narrowly and precisely drawn" in furtherance of "a compelling state interest." Even the recognition of a compelling state interest in some minimum level of compulsory education requires that the state employ the least restrictive means reasonable to achieve that end.

As the *Perchemlides* court stated in finally upholding the plaintiffs' claim:

It follows from the very nature of the right to home education that the school committee or the superintendent may not reject a proposal submitted by parents on the grounds that the home environment is *socially* different from the classroom environment. . . . The question here is, of course, not whether the socialization provided in the school is beneficial to a child, but rather, who should make that decision for any particular child. Under our system, the parents must be allowed to decide whether public school education, including its socialization aspects, is desirable or undesirable for their children. [original emphasis].¹¹

Current Research on Socialization

Apart from the legal and political questions about whether the state has the right to control the political and cultural socialization of all children through its schools, we may ask whether schools actually do successfully socialize students by shaping their political attitudes and social values. The general conclusion of two large-scale literature reviews is that curriculum does not have much of an effect on students' political attitudes.¹² What is more, the small body of research on the impact of textbooks typically used in schools suggests that they also have minimal influence on the beliefs and attitudes children develop about their social and political world.¹³

One final criticism of the socio-political education in schools concerns the competence of teachers who are supposed to provide this education. A study based on interviews with high school teachers suggests they are not always intellectually competent to discuss political and social issues adequately.¹⁴ For example, when presented with a simple statement of opinion and asked to identify it as fact or opinion, about fifty percent of the teachers misinterpreted it as fact. Even half of the social studies teachers made this error.

The general findings that explicit educational efforts often have little impact on students' political attitudes and knowledge, and that what is taught is often neither objective nor accurate, indicate that all schools do not provide adequate socialization, at least in this domain. This inference casts some doubt on the general claims of both courts and educators that public schools are uniquely situated to provide the necessary foundations for adult political life.

The impact of the second type of socialization — peer interaction — is also extremely difficult to measure or investigate empirically. We have no arguments with the concerns underlying most court decisions regarding the importance of peer contact *per se* for a child's development. What is questioned is the assumption that sufficient and appropriate peer contact can only be obtained through school experiences.

There appear to be no published research findings which address such questions as what types or amounts of peer interaction are "necessary" or critical for normal human social development in children at any age. Of course, such questions hardly seem amenable to experimentation. Anecdotal reports both from testimony in legal cases and from recent press coverage of the home education controversy indicate there are several alternatives to traditional education to insure that children can participate in peer group activities.

Parents report using situations such as cooperative play groups, community recreation centers, organized sports, and siblings. Whether these contacts provide sufficient peer experiences and whether they are the appropriate kinds of interactions required for normal socialization is open to question. We would argue that the burden rests with the opponents of home education to demonstrate any meaningful nonequivalence.

In general, we have found no concrete evidence supporting assumptions that the traditional school experience is necessary for the child's social development. Most of the existing research on peer interaction bears indirectly at best in this issue. To say that home education is not equal to public education because it deprives children of critical socialization experiences

with their peers is unwarranted, in light of this lack of empirical support.

Given the paucity of comparative scientific data and the consequent shallow legal reasoning in cases involving home education, there is a need for substantial and systematic research comparing the alternative social experiences and the general social adjustment of school-educated and home-educated children. To this end we have outlined a research project designed to provide some of this information.

A Proposed Research Design

In presenting this proposal, we are assuming that home-educated children are not socially isolated but do in fact have identifiable opportunities for regular peer contact; for example, through informal neighborhood play groups or more structured activities such as Scouting. Peer groups would be identified and located through interviews with the parents and the children themselves. We would draw our school-educated sample from these same peer groups. Ideally, we would want only those home-educated children who have never attended public schools prior to their home education, although in many of the publicized cases, the children have received public education for a few years.

We propose four different assessment procedures that will provide converging information about the social adjustment of the two groups of children. These methods will include rating of each child's peer acceptance, assessment of his or her interaction with peers, measurement of the child's self-esteem, and evaluation of his or her general social-emotional adjustment.

For the peer acceptance measure, the actual procedure suggested would be peer ranking, a technique of obtaining peer assessments through asking each group member to rank all of the other group members from best to worst along one or more lines. The actual content of the ranking criteria would have to be chosen with the intellectual capacities of the chosen peer group in mind, but such characteristics as "friendliness," "agreeableness," "leadership," and "maturity"

would indicate the spectrum of adjustment being examined.

Direct behavioral observation of peer interactions would also be used for evaluation purposes. The continued observation of an identified behavior by trained objective observers has been held out as a major assessment strategy in child behavior modification because so few inferences have to be made from collected data to actual behavior.

The child's self-esteem is also an important aspect of his or her social adjustment and interpersonal skills. To assess and compare the self-evaluations of our two types of subjects, we would use the Self-Esteem Inventory developed by Stephen Coopersmith for his extensive research project on the self-esteem of elementary school aged boys.¹⁵ This inventory provides useful information about four areas of children's self-esteem — peers, parents, school, and general self-evaluation.

In his own use of this inventory, Coopersmith had the children fill out the inventories themselves, which involved reading or hearing a series of attitude statements such as "I'm popular with kids my own age," "I'm never unhappy," etc., and indicating whether the statements applied to themselves. Questions about school would be modified here to be neutral as to the alternative education programs. Coopersmith has compared the children's assessments with ratings from their teachers on behaviors that presumably were related to self-esteem and with ratings from other psychological tests designed to assess unconscious self-evaluations, and has found substantial agreement among the different indices.

As the final measure for our comparison, we propose a behavior checklist to assess the child's general social-emotional adjustment. Behavior checklists are a major evaluative instrument often used in child psychopathology research as a quick screening device.¹⁶ Employing a wide variety of behavior checklists to measure both male and female children across a wide age range, researchers have consistently found three clusters of common behavior problems: (1) conduct problems (e.g., disobedience, fighting), (2) personality problems (e.g., social withdrawal, feelings of inferior-

ity), and, (3) immaturity problems (e.g., laziness, lack of interest). In form, such checklists usually contain a list of statements for a parent or teacher to read and to determine whether they apply to an individual child.

One checklist particularly appropriate for our use is the Louisville Behavior Checklist, modified so that all the items would apply to home-educated as well as to school-educated children. This checklist, to be completed by the subjects' parents, covers the whole range of behaviors indicative of childhood emotional problems and includes descriptions of both deviant and prosocial behaviors, such as "cries easily," "constantly fighting," or "secure and confident."¹⁷

In general, we believe that these four measures — peer assessment, direct observation, self-evaluation, and a behavior checklist — will converge to provide a meaningful profile of a child's general social adjustment. Our assessment battery has the advantage of being based on a series of well-known, validated measures of various relevant aspects of a child's personality and social development. With the data collected from our proposed study, we will be able to draw reliable conclusions concerning social behavior and peer relationships, and apply those conclusions to a comparison of our two populations. This comparison, we are confident, will eliminate any serious doubts about the possible harm resulting from the deprivation of peer-based socialization experiences.

As an additional control on the use of these assessment procedures, we would apply the same experimental measurements to a third group of subjects. This sample population would be composed of children who had been categorized on independent grounds as socially or interpersonally maladjusted. The type of objective, systematic criteria needed to identify this population might be found, after the fact, in reports already on file by teachers or school psychologists.

If our assessment procedures identify the same population as maladjusted, it will support the proposition that this experimental design is sensitive to the type of socialization problems home-educated children might be assumed to develop (at least on a level of disability equal to that

employed in the schools). Such research will be of primary importance while socialization is seen as an exclusive advantage of the public schools and the determinative factor in the free exercise of the right to home education.

Footnotes

1. *Perchemlides v. Frizzle*, No. 16641 (Super. Ct. Hampshire Co., Mass., filed Nov. 13, 1978).
2. Mass. Gen. Laws Ann. ch. 76, sec. 1 (West).
3. *Perchemlides*, No. 16641, slip op. at 3.
4. *Stephens v. Bongart*, 189 A. 137 (1937).
5. *Gabrielli v. Knickerbocker*, 12 Cal. 2d 85, 92 (1938).
6. *Education Project*, 74 Mich. L.Rev. 1373, 1390 (1976).
7. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
8. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
9. *Education Project*, 74 Mich. L.Rev. at 1394.
10. *Roe v. Wade*, 410 U.S. 113 (1973).
11. *Perchemlides*, No. 16641, slip op. at 13.
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Thinking About Children's Rights— Moving Beyond Kiddie Libbers and Child Savers

by Robert H. Mnookin

For the past few years, much of my research has concerned children's rights and family law. In this article, my purpose is to suggest a framework for thinking about children's rights — one that I hope will define appropriate questions, if not provide easy answers.

Before setting out on this journey, I should supply a road map of where I am going. First, I shall describe two dominant varieties of child advocates: the kiddie libbers and the child savers. While both sing of children's rights, their songs are very different. I must confess that the lyrics of both groups often strike me as garbled. Each does pose, however, important philosophical issues.

Most individuals and organizations involved in debate over children's rights — and especially child advocates — claim to speak for the best interests of children. In the next section I shall critically examine the best interest standard. My purpose is to show that in many critical areas what is best for an individual child or for children in general is usually indeterminate or speculative, and is not demonstrable by scientific proof, but is instead fundamentally a matter of values. Using this notion of indeterminacy, I shall briefly explore three critical policy issues facing pediatric medicine: medical experimentation on children; institutionalization of disturbed or deserted children; and withholding treatment for severely defective newborns.

If what is best is often indeterminate, then one quite naturally becomes concerned with who gets to decide what is best for a child. My primary message is that we should focus more attention on how power and responsibility for children are allocated and should be allocated. Who decides now? Who should decide? These are, I believe, critical questions and I hope to show their relevance by examining the three critical policy areas.

There are no value-free answers to these questions, and I should make clear at the outset that my own philosophical preference is for the family to have primary responsibility for child rearing. From this perspective, I shall offer some cautionary warnings about certain propositions often suggested in discussion about children's rights.

Kiddie Libbers and Child Savers

The law of childhood is complex, but, in general, children have less liberty than adults and are less often held accountable. Parents have legal power to impose a wide range of important decisions upon the child, though they are held responsible by the state for the child's care and support. Children have the special power to avoid contractual obligations but are not normally entitled to their own earnings and cannot manage their own property. Moreover, on the basis of age, persons younger than ages designated by certain statutory limits are not allowed to vote, hold public office, work in various occupations, drive a car, buy liquor, or be sold certain kinds of reading material, quite apart from what either they or their parents may wish.

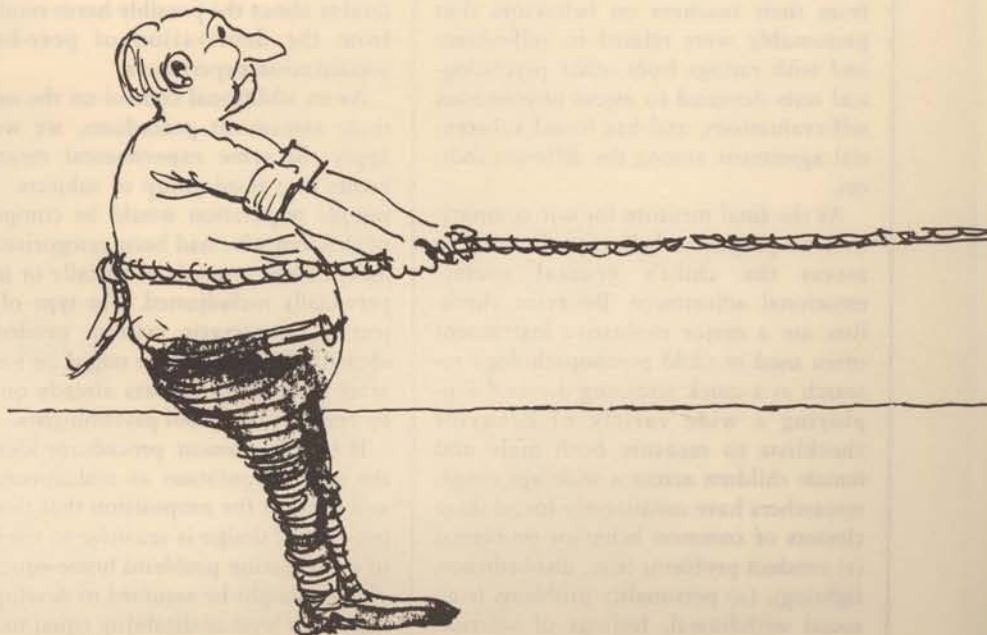
Because of such legally imposed limitations on the child's power to decide, some reformers — the kiddie libbers — suggest that a children's liberation movement should follow the trail blazed by the civil rights and women's rights movements. The emancipators' rhetoric often compares the legal status of children to that of "slaves" or "property." To modify this, one child liberator endorses

the adoption of "A Child's Bill of Rights" that begins by proclaiming a child's "Right to Self-Determination."

Children have the right to decide the matters which affect them most directly. This is the basic right upon which all others depend. Children are now treated as the private property of their parents on the assumption that it is the parents' right and responsibility to control the life of the child. The achievement of children's rights, however, would reduce the need for this control and bring about an end to the double standard of morals and behavior for adults and children.²

Other reformers — the child savers — see salvation not through liberation but through expansion of a child's legal right to government intervention into the family. An extreme example is found in yet another Bill of Rights proposing that a child "should have a legal right" to be "a person within the family" and to "receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult."³

It is hard to transact intellectual business in the coin of either the liberators or



the child savers. Kid libbers have transmogrified the traditional conceptions of right and liberty. At the core of the civil rights movement and the women's movement has stood the idea that a person's legal autonomy should not be made dependent upon race or sex; it is straightforward and intelligible. By contrast the broad assertion that age is also irrelevant to legal autonomy inescapably collides with biological and economic reality. Because the young are necessarily dependent for some period after birth, the relevant question is often which adult should have the power to decide on behalf of the child. The argot of the child savers has a similar ring of unreality;

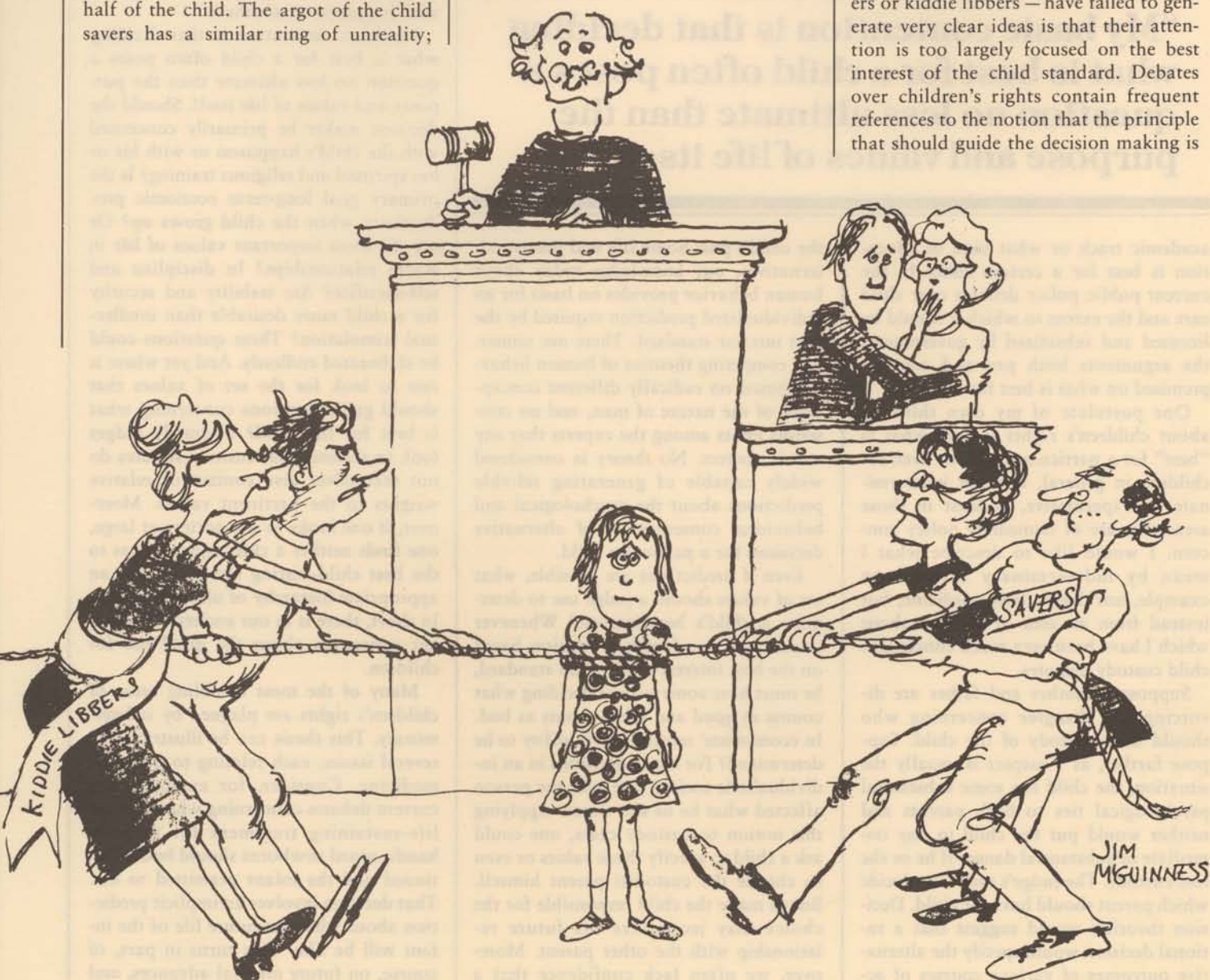
here the difficulty is understanding how legal claims to "love and affection" would be monitored by government or enforced by courts.

But one must avoid dismissing too quickly either the liberators or the child savers. Buried in their rhetoric are important questions. That an element of domination of children by adults is inevitable gives one no license to ignore the moral dimension implicit in the liberators' challenge: What are the justifications for giving one human being power over the

nurture, training and experience of another? Similarly, the problems to which the child savers point — for example, the abuse and neglect of some children — are serious ones and implicitly raise an important question about the roles of government and the family in child-rearing.

The Indeterminacy of the Best Interest Standard

In my view, one reason some advocates for children's rights — whether child savers or kiddie libbers — have failed to generate very clear ideas is that their attention is too largely focused on the best interest of the child standard. Debates over children's rights contain frequent references to the notion that the principle that should guide the decision making is



the best interest of the child. In divorce custody disputes, for example, and in some juvenile court determinations, the best interest standard is the legal rule that is supposed to guide judicial decision. In deciding what to do with the minor who has committed a crime, or who has been neglected by his parents, or has run away from home, the court is supposed to appraise the alternatives by the best interest principle.

Educators often invoke the principle when deciding what reading group or

tion and then choose that alternative that "maximizes" what is good for the child. The judge would, for example, wish to compare the expected utility for the child of living with his mother against that of living with his father. This requires considerable information and predictive capacity as well as some source of values by which to measure utility for the child. My own hunch is that all three are typically very problematic.

Assuming for the moment that the judge has substantial information about

child has the capacity and maturity appropriately to determine his own utility.

Whether or not the judge looks to the child for some guidance, there remains the question whether best interests should be viewed from a long-term or short-term perspective. The conditions that make a person happy at age seven to ten may have adverse consequences at age thirty. Should the judge ask what decision will make the child happiest in the next year? Or at forty? Or at seventy? Should the judge decide by picturing the child as an adult looking back? How is happiness at one age to be compared with happiness at another?

My basic contention is that deciding what is best for a child often poses a question no less ultimate than the purposes and values of life itself. Should the decision maker be primarily concerned with the child's happiness or with his or her spiritual and religious training? Is the primary goal long-term economic productivity when the child grows up? Or are the most important values of life in warm relationships? In discipline and self-sacrifice? Are stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet where is one to look for the set of values that should guide decisions concerning what is best for the child? Normally judges look to statutes, but custody statutes do not themselves give contact or relative weights to the pertinent values. Moreover, if one looks to our society at large, one finds neither a clear consensus as to the best child-rearing strategies, nor an appropriate hierarchy of ultimate values. In short, there is in our society no apparent consensus about the good life for children.

Many of the most troubling areas of children's rights are plagued by indeterminacy. This thesis can be illustrated by several issues, each relating to pediatric medicine. Consider, for example, the current debates concerning when, if ever, life-sustaining treatment for severely handicapped newborns should be discontinued and the infant permitted to die. That decision involves an implicit prediction about what the future life of the infant will be like. This turns in part, of course, on future medical advances, and

"My basic contention is that deciding what is best for a child often poses a question no less ultimate than the purpose and values of life itself."

academic track or what kind of education is best for a certain child. In the current public policy debates over child care and the extent to which it should be licensed and subsidized by government, the arguments both pro and con are premised on what is best for children.

One postulate of my own thinking about children's rights is that what is "best" for a particular child, or even for children in general, is often indeterminate and speculative, at least in those areas that are of immediate policy concern. I would like to describe what I mean by indeterminacy through an example, not drawn from medicine, but instead from an area of the law about which I have been very much concerned: child custody disputes.

Suppose a mother and father are divorcing and disagree concerning who should have custody of the child. Suppose further, as I suspect is usually the situation, the child has some substantial psychological ties to both parents and neither would put the child in any immediate or substantial danger if he or she had custody. The judge's task is to decide which parent should have the child. Decision theorists would suggest that a rational decision would specify the alternative outcomes of various courses of ac-

tion and then choose that alternative that "maximizes" what is good for the child. The judge would, for example, wish to compare the expected utility for the child of living with his mother against that of living with his father. This requires considerable information and predictive capacity as well as some source of values by which to measure utility for the child. My own hunch is that all three are typically very problematic.

Even if predictions are possible, what set of values should a judge use to determine a child's best interest? Whenever someone is faced with a decision based on the best interest of the child standard, he must have some way of deciding what counts as good and what counts as bad. In economists' terms, how is utility to be determined? For many decisions in an individualistic society, one asks the person affected what he or she wants. Applying this notion to custody cases, one could ask a child to specify those values or even to choose the custodial parent himself. But to make the child responsible for the choice may jeopardize his future relationship with the other parent. Moreover, we often lack confidence that a

what parental reactions to the handicapped child would be. These predictions are, I suspect, often very difficult to make. More fundamentally, one is faced with an issue of values. Some believe that it is morally appropriate to consider the costs — emotional, social, and economic — for the child's family and society if the child is permitted to live. Others believe that it is appropriate only to consider the interests of the newborn himself. But who is to define the newborn's interests and how are they to be measured? Finally, there are many in our society who believe that life is sacred and that it is never morally acceptable to permit a defective newborn to die when treatment can extend life.

I think a similar indeterminacy plagues the question of whether and how medical research relating to children should be permitted. It is axiomatic that children are not small adults, and that the extension of our medical knowledge about children often requires their participation in research. Nevertheless, the child, particularly the very young child, is not able himself to give valid consent. This poses profound legal and moral dilemmas, particularly when research exposes healthy children to some risks. But predictions are difficult. One characteristic of and reason for research is that we often do not know the consequences of our action. Moreover, medical experimentation, particularly on healthy children, poses fundamental value conflicts. There is a substantial utilitarian argument to permit such research on healthy children when the risks are comparatively slight and the potential benefits are very great. Nevertheless, a Kantian who focuses primarily on the importance of individual autonomy and the integrity of the individual can make a strong argument that it is immoral for a healthy child incapable of consent to be a subject of non-therapeutic research.

A third example of indeterminacy relates to the question of whether or not a disturbed or handicapped child should be institutionalized. Like our custody case, this involves a prediction of the consequences of staying home and to some extent living in the community as opposed to living in an institution. Evaluating these alternatives requires predicting parental reactions, an extremely dif-

ficult task, and predicting how the child will respond to institutionalization. While many are justifiably critical of all available alternatives when a child is about to be institutionalized, I suspect that what is best or least detrimental for the child is in many situations indeterminate.

The Critical Questions: Who Decides? Who Should Decide?

Given my premise that the means and ends of child-rearing are largely indeterminate, a critical question draws quite naturally into focus. It is: Who decides? Or, more precisely, how does law allocate power and responsibility for children in our society? How should power be allocated?

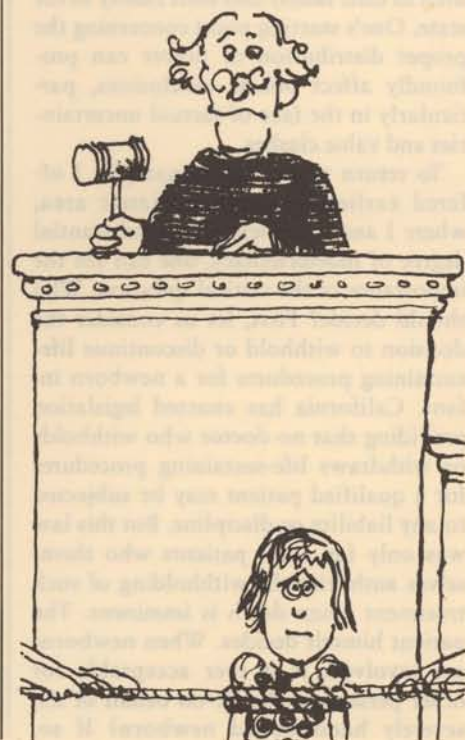
Whoever enjoys the power of decision will influence not only the means, but the very objectives, of child-rearing. In my view, the primary function of this question in law in relation to children is to outline a framework for the distribution of decisional power among the child, the family, various professionals, and agencies of the state. There is, of course, no need that any one person have all the power. It can be shared in various combinations.

The traditional answer to the question, Who decides concerning medical care? is reasonably clear: Although there are exceptions when a child is neglected or there is an emergency, or when public health issues are at stake, parents generally have the power to decide about a child's medical treatment — their consent is normally a prerequisite of medical treatment.

This traditional allocation — with parents having the primary power to decide — is now being questioned, both from the perspective of child liberators and from the perspective of child savers. Liberators want more power of decision given to the child. At times their arguments rise to constitutional dimension. The Supreme Court has made clear that state law cannot give parents an absolute veto over the decision of a pregnant teenager and her doctor to terminate pregnancy by abortion.⁴ Many states today already allow young people to consent to treatment of venereal diseases and to secure birth control devices. Should the age

of medical consent simply be lowered from eighteen to fourteen or twelve? Should a fifteen-year-old be able to consent to a vasectomy? What weight should be given when a nine-year-old objects to elective surgery? Is the problem today that our age-based lines are too high? Or is it that we should have no arbitrary age requirements at all and instead allow for individualized determinations of competence and maturity?

The emancipators, while raising important and profound questions, fail to provide any coherent theories for determining when and how the law should give the child primary power of decision. Very young children are incapable of making decisions about many important questions affecting their lives. It is not simply unwise to emancipate them; it is impossible. A two-and-a-half-year-old will be the subject of the will of either an older person or the elements. If the child emancipators are libertarians and simply want children to have the same liberty as adults, then they must explain what is to become of younger children. There is no libertarian alternative until the child is competent to survive and function in the manner of an adult. Obviously, for many



matters, therefore, the question is not whether the child should decide, but which adult should decide on behalf of the child.

Child savers also are critical of the parental consent requirement, but from a different perspective. Their concern arises not from the notion that children should have a greater voice in their treatment, but rather because they fear that parents all too often inadequately provide for their children's medical treatment. Some propose national health visitors who, with the power of the state, use coercion to inspect the home and compel preventive medicine. Others would simply do away with parental consent requirements concerning basic inoculations.

While the problems to which the child savers point are real, the theoretical difficulties of their position are exposed by focusing on the question, Who should decide? Child savers often implicitly suggest that government should have a very broad role in the protection of children, but they do not define the limits, if any, of the appropriate use of government coercion. Delineating the scope of child protection by government poses profound questions of political and moral philosophy concerning the proper relationship of children to their family and their family to the state. One's starting point concerning the proper distribution of power can profoundly affect policy conclusions, particularly in the face of factual uncertainties and value clashes.

To return to the three examples I offered earlier from the pediatric area, where I asserted there was a substantial degree of indeterminacy, one can see the importance of the critical question, Who should decide? First, let us consider the decision to withhold or discontinue life-sustaining procedures for a newborn infant. California has enacted legislation providing that no doctor who withholds or withdraws life-sustaining procedures for a qualified patient may be subjected to any liability or discipline. But this law was only for adult patients who themselves authorize the withholding of such treatment when death is imminent. The patient himself decides. When newborns are involved, is it ever acceptable for other persons to decide on behalf of the severely handicapped newborn? If so,

"The real issue is: Who gets to define the child's interests? When put this way, a broad parental role strikes me as altogether appropriate."

who should decide? The parents and doctors? A hospital committee? A jury of lay people? A juvenile court judge? And by what criteria and procedures is the decision to be made?

Similarly, in the area of medical experimentation on children, I believe the critical questions are: Who should decide whether the research should be going on? and What standards are essential — the government? Foundations? Medical schools? The hospital? The individual doctor? If the research is to go forward, should parental consent be sufficient to allow a healthy child to participate? Or should the child also have to consent? Or should the state decide by "drafting" (perhaps by lottery) the necessary children? A lawsuit brought in San Francisco in 1973 alleged that neither parents nor a hospital should have the power to volunteer an infant.⁵ In all events, I believe the proper allocation of decisional power is the critical question.

The third area — involving the commitment or institutionalization of disturbed or handicapped children — poses a similar question. Adults can volunteer themselves for a commitment or can be involuntarily committed if they are a danger to themselves or others, or are gravely disabled. How about children? Should parents be able to commit a child after consultation with the family doctor? Or should the child be able to object? Should there be a hearing before an independent judge with the judge deciding? Once again, the question is, *Who is to decide* in a situation where what is best is often indeterminate?

Four Warnings

I certainly cannot offer any simple or pat answers to the questions of how power and responsibility for children should be

allocated, and who should decide. I suspect that our society will evolve different answers in different contexts. But I can offer some warnings. Like cigarettes, there are some easy generalizations that are habit forming and that may be hazardous to the health of public policy. My purpose is not to prohibit their use but to stamp a cautionary warning on four hazardous propositions.

Dubious Proposition 1: Legally imposed age requirements should be rejected because age and maturity or competence are imperfectly correlated.

Although competence and age are not altogether unrelated, age requirements are highly arbitrary. As Norman Fost has written:

The designation of a single birthday, whether the 7th, 18th or 21st, as a definition of intellectual competence is arbitrary. Although most children before their teen years will be incapable of providing meaningful consent to a medical procedure, many adolescents will be as competent as some adults to do so.⁶

Some fifteen-year-olds would be better-informed voters than many forty-year-olds. Similarly, I have no doubt that some thirteen-year-olds would be better drivers than many nineteen-year-olds.

But the fact that any age requirement will sometimes qualify older people who are quite incompetent and disqualify some younger people who are quite competent does not necessarily imply that we should allow for individual determinations of maturity or competence rather than have qualifications based on a minimum age. Qualification by individualized determinations must give some person a great deal of discretion to determine competence or maturity. But

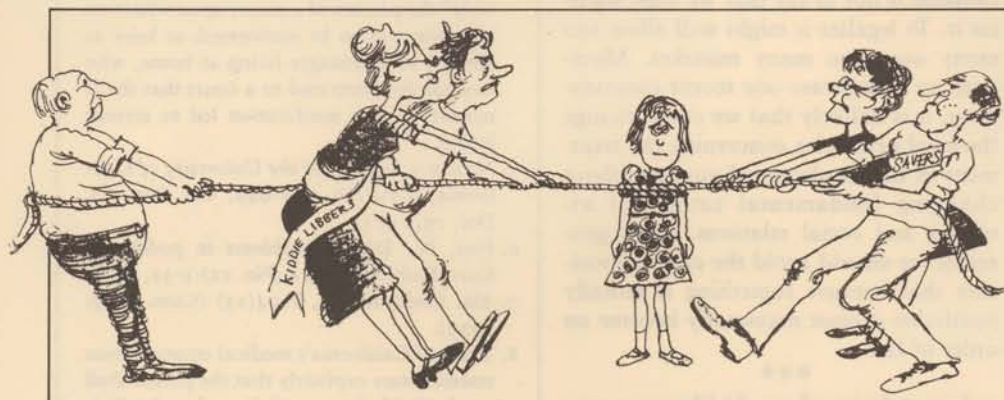
there are no litmus paper tests for judgment or maturity, and, as a consequence, the power to decide this question not only can be abused but can raise profound questions concerning unequal treatment and cost. How would we feel about a legal system that allowed persons of any age to vote but only if a state official first determined that they were sufficiently responsible and mature? That state magistrate would have enormous power to determine who participated in the political process. I, for one, plainly prefer age-based lines for voter qualification, even though I recognize

will often be intimately involved and affected by the outcome. It is certainly true that parents sometimes expose their children to risks and may occasionally seek or withhold medical treatment for reasons of their own, apart from any benefits to the child. A vain mother might be seeking plastic surgery for her daughter because the daughter's nose bothers the mother. Some parents may seek the commitment of their retarded or handicapped child or seek a medical prescription for cough medicine not so much for the benefit offered the child, but rather for the relief offered the parents.

make a long-term institutional commitment of a disturbed child), some additional safeguards seem essential. Moreover, where the child's health is seriously endangered by parental action or inaction, doctors have a legal and moral obligation to see that the child is protected. But apart from extreme situations where the decision will abrogate the parent-child relationship entirely, or the child's health is put in serious jeopardy, I am loath to reject parental prerogatives simply because of a potential conflict of interest, especially when the child's interests are indeterminate or speculative. The real issue is: Who gets to define the child's interests? When put this way, a broad parental role strikes me as altogether appropriate.

Dubious Proposition 3: When a young person is competent to perform a task, the youth should be given the legal right to decide without parental interference.

A sixteen-year-old may certainly be competent to drive a car, date, and engage in sexual intercourse. But should a sixteen-year-old girl have the legal right to go to court to enjoin her disapproving and perhaps overprotective parents from prohibiting her from seeing her eighteen-year-old boyfriend? Based on the recent Supreme Court abortion decision I mentioned earlier, a credible constitutional claim for this young woman might well be possible on the grounds that the parental decision infringes upon her privacy and associational rights. Nevertheless, in focusing on the young person's competence in a particular area we must not ignore the young person's broader relationships to his or her family. Most teenagers in our society are still economically and socially dependent on their parents, and many of us still view the family as a basic social unit. There is no doubt that lawsuits are a very crude and disruptive method of settling disputes. It strikes me as somehow dangerous and inconsistent for a young person to be able to go to court to restrain her parents from grounding her and at the same time to require parents to be responsible for her economic support. Perhaps young persons should have greater legal power to escape parental domination by leaving home. But I find very problematic and inconsistent the



that this excludes many competent people under the age of eighteen from the political process and allows voter participation by many unsophisticated adults.

I believe we should also be wary of wholesale elimination of age-based lines having to do with medical consent. Perhaps the lines should be lowered. Alabama, for example, has lowered the age for general medical consent to fourteen.⁷ But elimination of age-based lines altogether will, I fear, create enormous uncertainty and, frankly, give too much personal power to someone — presumably a doctor or a judge — charged to make the individualized determination of maturity.

Dubious Proposition 2: Whenever a parent has a potential conflict of interest with the child, the parent should no longer be permitted to decide on behalf of the child.

Lawyers are trained to be sensitive to potential conflicts of interest, and if one uses as a model of neutrality a disinterested judge, then the parent-child relationship is replete with opportunities for child exploitation because the parent

Nevertheless, the critical question that must be addressed is, If the parents are not to decide, then who is to decide? My own hunch is that a careful examination of the alternative decision makers may, in many contexts, suggest that the parents are more appropriate decision makers than some disinterested third party (like a judge) or a professional (like a doctor). A doctor must be prepared and willing to offer parents his guidance. But in most circumstances it is the parents, not the professional (much less a judge), who must live with and be responsible for the child on a day-to-day basis after the decision has been made. Moreover, parents will often bring to the decision intimate knowledge about the child and the family's values that an outsider may not have.

I am not arguing that parents should always have the exclusive right to decide everything concerning the child's medical treatment. Indeed, where the result of a medical decision will, in effect, terminate the parents' relationship with the child (as is the case with the decision to let a severely handicapped child die or to

Thinking About Children's Rights

liberator's notion that the law should make parents economically responsible for their children after relinquishing all power to discipline them. In this respect, it is interesting that under California law when a young person gives legal consent for his or her own treatment, the parents are not legally liable to pay for the treatment.⁸

Dubious Proposition 4: Whenever the law as written might be applied to criminally punish behavior that many believe to be morally blameless, the law must be formally amended.

This can be best illustrated by the problems involved in deciding whether the severely deformed newborn infant should be allowed to die. Existing homicide statutes, if blindly applied, would subject doctors and parents to manslaughter charges in situations where they choose a course of action or inaction directed at deliberately allowing the infant to die. To my knowledge, no doctor or parent has ever been criminally prosecuted for intentionally permitting a seriously deformed infant to die. Some might suggest that doctors or parents should be prosecuted in such circumstances. Others argue that because of the risks of such prosecution, a euthanasia law must be drafted to tolerate such conduct in defined circumstances. Such a law, it is argued, would avoid widely conflicting practices, would provide guidance for decision making, and would insure that no parent or doctor is unfairly harassed for a decision that many would view as morally justified.

I would oppose such a law for several reasons. First, I think the risk of enforcement today is negligible. Most district attorneys and prosecutors have better ways to spend their time than in the enforcement of law in circumstances where there is no social consensus that the conduct is morally reprehensible. Moreover, if such a prosecution were brought, I am reasonably confident that a jury would either refuse to convict or an appellate court would find some way to reverse. In this regard, the *Edelin* case, which involved a manslaughter prosecution for an abortion, confirms my point. There, the Massachusetts Supreme Judicial Court reversed Dr. Edelin's manslaughter conviction.⁹

While the risks of unfair application of the criminal sanctions are negligible, I have severe doubts whether a statute can carefully define the circumstances for euthanasia for newborn infants. We simply lack the necessary social consensus concerning the circumstances when it would be appropriate. Absent this consensus, the legal principle that human life is worthy of protection should remain the primary standard. Having a discontinuity between the law on the books and contemporary practices certainly does have unfortunate effects. But to argue that euthanasia is at times morally unobjectionable is not to say that we must legalize it. To legalize it might well allow too many uses, too many mistakes. Moreover, to paraphrase one recent commentator, it is unlikely that we could change the legal principles concerning the treatment of the handicapped young without changing fundamental emotional attitudes and social relations. More generally, we should avoid the easy proposition that because something is morally justifiable it must necessarily become an order of law.

In conclusion, I would like to suggest that children's rights pose profound and fascinating intellectual questions. As a general proposition, one would expect that law, particularly in an area so intimately related to family, would largely reflect the dominant cultural norms and would have a rather limited capacity to change those norms or shape individual behavior. Nevertheless, it is part of the well-established American tradition to view law as a means of producing cultural change and political response. As a general proposition it appears that the legal process is used increasingly as a forum for debate over competing perceptions of the world, where the protagonists hope to effect on a broad scale both social values and behavior. Plainly, much of the debate over children's rights has ramifications that are beyond the legal, and indeed, for many child advocates, these more remote consequences may be the primary goal. In the meantime, because our society presently lacks a social consensus in many of these areas, we should not expect the law to provide clear guidelines.

Footnotes

1. Coigney, V.: *Children Are People Too: How We Fail Our Children and How We Can Love Them*. New York, William Morrow & Co., Inc., 1975.
2. *Id.* at p. 197, citing R. Farson: *Birthrights*. New York, Macmillan, Inc., 1974.
3. Foster, H. Jr.: *A Bill of Rights for Children*. Springfield, Ill., Charles C. Thomas, Publisher, 1974. p. xv.
4. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979). Compare *H.L. v. Matheson*, U.S. (March 23, 1981) (upholding a Utah law that requires a doctor to "notify if possible" the parents of a minor upon whom an abortion was to be performed, at least as applied to a teenager living at home, who has not demonstrated to a court that she is mature or that notification led to serious harm).
5. *Nelson v. Regents of the University of California*, Civil No. 665-049, Cal. Sup. Ct. Dec. 19, 1973.
6. Fost, N.: Ethical problems in pediatrics. *Curr. Probl. Pediatr.* 6 (No. 12):1-31, 1976.
7. Ala. Code, tit. 22, §104(15) (Cum. Supp. 1973).
8. Three of California's medical emancipation statutes state explicitly that the parent shall not be liable for care delivered under their provisions. Cal. Civil Code, §§25.5, 34.6, 34.7 (West 1954). In addition, the courts have made it clear that "the policy . . . to protect minors against their own improvidence does not extend to depriving others of the reasonable value of necessities furnished minors having capacity to contract for them": *Burnand v. Irigoyen*, 30 Cal. 2d 861, 186 P.2d 417 at 421 (1947).
9. *Commonwealth v. Edelin*, 359 NE 2nd 4 (Mass. Sup. J. Ct. 1976).

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Professor Mnookin spent 1980-81 as a visiting professor at the School, while on leave from the law faculty of the University of California at Berkeley. At Stanford he taught courses in The Child, the Family and the State, Tax Policy and the Taxation of the Family, and Family Tax and Financial Counseling. Mr. Mnookin will be a fellow at the Center for Advanced Study in the Behavioral Sciences in 1981-82.

Stanford's Clinical Course in Juvenile Law: Combining Simulated with Actual Courtroom Experience

The Law School's clinical seminar in Juvenile Law is a mandatory pass/fail course for second- and third-year students concentrating in Juvenile Law. The seminar, which is taught by Professor Michael Wald and Adjunct Professor William Keogh '52, is one of five clinical courses currently being offered at the School. The seminar bears a strong resemblance to the other clinical courses with one important exception: it involves students in *actual* as well as *simulated* litigation.

The format of the course is designed first to acquaint students with the juvenile system and then to expose them, through simulated exercises, to the various skills required to enter the last stage of the seminar — the handling of actual cases.

In the first weeks of the course, Professor Wald uses traditional classroom instruction to acquaint students with the philosophy of the juvenile court, the law pertaining to minors, and the various stages of a juvenile case — from the detention hearing through the investigation of the case, the actual trial, and follow-up on the case.

The second phase of the course enables students to put into practice what they have learned through a series of simulated exercises. Students actually "act out" a case, step by step, as it would happen in real life. The exercises are videotaped and reviewed by Professor Wald. They cover such things as interviewing the juvenile client, contacting the juvenile's parents, talking with the probation officer, and representing the client at the "trial."

Having had the exposure to various skills through the simulated exercises and the benefit of Professor Wald's critiques, the students are then ready to undertake the third phase of the course — the handling of actual juvenile cases.

Under the supervision of Professor Keogh, each student is assigned to a case. The cases, which have been chosen by Professor Keogh with the cooperation of the San Mateo County Juvenile Court, are registered with the California Committee of Bar Examiners in accordance with the "Rules for the Practical Training of Law Students."

At their initial meeting, Professor Keogh interviews the detained juvenile,



The Juvenile Law course gives students like Susan Kupferberg '82 the opportunity to learn about the juvenile court system through firsthand experience.



At Juvenile Hall Professor Keogh and Susan review files to choose Susan's "client."

Clinical Course in Juvenile Law

while the student lawyer observes. Professor Keogh then contacts the child's parents, informing them of the student's participation in the case. He also handles the preliminary hearing.

Following the first hearing, the student takes charge of the case and Professor Keogh assumes the role of observer/adviser. Subsequent interviews are videotaped and conversations recorded, and at each stage of the process the student and Professor Keogh analyze the steps taken as well as what still needs to be done. Working with the juvenile client, and with the expert guidance of Professor Keogh, the student carefully develops a strategy for the child's defense and, simultaneously, acquires the litigative skills necessary to represent that client in court.

As is the case with all the clinical courses at the School, student evaluations of the Juvenile Law course are extremely positive, with many students singling out the course as the most valuable of their Law School experience.

In assessing the value of allowing the students to work on real cases, Professor Keogh points out that in addition to sharpening the student's judgment and practical skills — something all of the clinical courses are designed to do — the Juvenile Law course provides an invaluable emotional education. "Student lawyers learn to accept the full range of successes and disappointments peculiar to the profession. And they learn to live with the occasional abuses to which the juvenile court system subjects them."



Susan and Professor Keogh meet with the juvenile's parents on the morning of the detention hearing. Following this conversation, Susan meets again with her client to prepare him for the hearing.



With Professor Keogh acting as observer/adviser, Susan meets with her client for the first time.



While Professor Keogh listens in, Susan contacts her client's parents and explains her participation in the case.



At the hearing, Susan represents her client while Professor Keogh (left) acts as adviser. Present also are the client and his parents.

And When They're Not Practicing Law... How Seven Alumni Spend Their "Leisure" Time

Editor's Note: For several years now we have thought about publishing an article on graduates with interesting hobbies. Through reunion questionnaires, conversations with alumni, and other sources, we have compiled an extensive list of individuals whose avocations appear to be as interesting and demanding as their vocations. Indeed, at times it is difficult to discern which is which.

In the hope that our readers would enjoy such an article, we are happy to present the first of what we anticipate will become a continuing series on Stanford lawyers with intriguing and unusual hobbies. Moreover, we are hopeful that this article will encourage more alumni to let us know about their outside interests or about classmates with noteworthy avocations.

The Editor would like to thank Sara Wood for conducting the interviews and compiling the information that made this article possible.

Edward L. Butterworth '39

Helping today's youth realize their full potential

Edward L. Butterworth '39 is one of those rare individuals who has dedicated a lifetime to helping others reach their fullest potential. During his fifty-four-year association with Boy Scouts of America, he has served the Scouts in virtually every capacity — from boy scout to eagle scout, camp director to scoutmaster, commissioner to president of the council.

The Scout council of particular interest to Butterworth is the San Gabriel Valley Council in Southern California, which he helped to develop. The council serves some 20,000 young men and women each year. In 1979, for his service to this

Even while attending law school Butterworth found time for scouting. He recalls one summer when he was an assistant camp director on Catalina Island and spent his free time studying law on an old camp table.

Following law school, he served as a Deputy Solicitor General of the United States. During that time he was a scoutmaster and discovered that being a scoutmaster was virtually a full-time occupation in itself. At that point, he admits, he gave serious thought to pursuing a career in professional scouting.

Today Butterworth devotes a great deal of time and energy to fundraising for the San Gabriel Council. Since the council receives no financial support from the government, Butterworth and others must raise some \$750,000 each year from large corporations and organizations that support the philosophy of scouting.

Butterworth sees scouting as an important supplement to a child's formal education. Using the Explorer Program as an example, he explains that the program is now devoted to career training and helps to fill the void created by high schools. "The high schools," he says, "simply don't teach many of the things we teach in scouting."

As a result of the emphasis on career training courses, membership in the Explorer Program has doubled in the past eight years. Moreover, Butterworth points out, these scouting programs are now open to young women so they, too, can benefit from the same career training opportunities.

After a lifetime of service to the Boy Scouts of America, Ed Butterworth may well be the organization's most ardent, as well as its most eloquent, supporter:

The Boy Scouts teach a boy how to use a knife and an axe without cutting a hand or a foot off; to help elderly people across the street; and to do a good turn daily. We do this without apology, but it is a small part of scouting. We teach a



council and to scouting in general, Butterworth was awarded scouting's highest honor, the "Distinguished Eagle," an award shared by such well-known recipients as film star Ozzie Nelson and Robert Finch, former Lieutenant Governor of California.

Butterworth's involvement in scouting provides a pleasant diversion from his responsibilities as chief executive officer of FEDCO, a position he has held since 1978. Prior to that time, he served as general counsel to the company. But Butterworth's interest in scouting can be traced back to his days in the boy scouts.

And When They're Not Practicing Law

boy love of God, love of country, love of mankind and all living creatures. These lessons come naturally and easily to a boy.

What does scouting strive for? Perhaps it is to enable an adult man to answer, "Yes," to the inquiry, "Would the boy you were be proud of the man you are?"

William R. Mitchell '47



On building an igloo

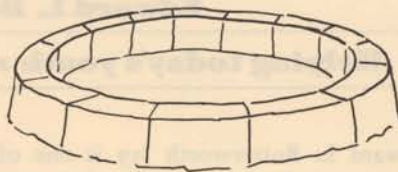
How do you build an igloo?

"First, you have to find snow six feet in depth; otherwise, you'll be in the bushes. And wherever you build an igloo, you have to make a good ground covering of compact snow," explains William R. Mitchell '47 of Modesto, California.

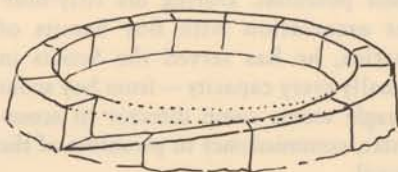
While it is unlikely that igloo building will ever replace jogging or tennis as a national pastime, Mitchell, who has pursued the hobby for the last fifteen years, describes it as an enjoyable winter "sport" that is perfect for group participation.

Moreover, there are some practical reasons why people build igloos. "In the winter, when you're camping in the snow, an igloo provides shelter from biting chill factors and heavy winds. And

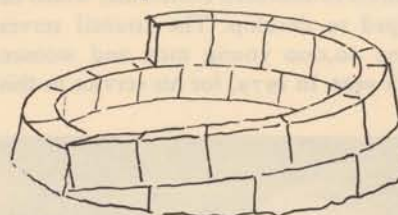
Step One: Lay a ring of blocks.



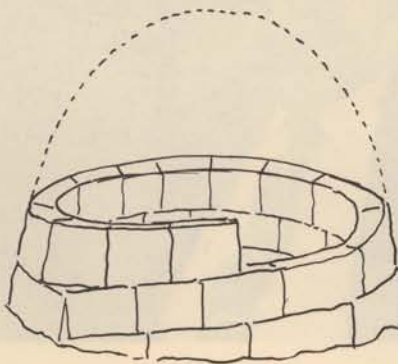
Step Two: Cut a ramp.



Step Three: Lay up a second course of blocks in a spiral.



Step Four: Continue up to apex, slanting each course slightly inward.



These illustrations appeared in the January 1977 issue of Country Journal in the article, "How to Build an Igloo," by Clyde H. Smith.

because of the airtight way it is constructed, an inhabited igloo will always be about twenty degrees warmer inside than the outside temperature," Mitchell points out.

Mitchell developed his interest in igloos after reading an Army survival booklet that included instructions on how to build one. He felt it would be an interesting family project for his wife and six children, four of whom are Stanford graduates. (His daughter, Sandy Creighton, is a member of the Class of 1981 at the Law School.)

The sites for Mitchell's igloo building are in the Sierra Nevada mountains northeast of Modesto. Once a place with sufficient snow depth is located, the building site must be located in a shaded area, away from the sun's direct rays. The next step is to pack the snow, which is accomplished by walking with snowshoes single-file in a circle marking the building site.

Then, a ski pole is placed in the center of the igloo site to provide a point of reference for the "arc" or exterior building line.

Once the site is prepared, a close-by quarry of snow from which to carve the snow blocks must be established. The blocks should not be too heavy or icy. The snow is then cut with a curved pruning saw and trimmed with a carpenter's saw. It is important to use saws with wooden, rather than aluminum, handles so they don't freeze one's hands, according to Mitchell.

"When building the dome," he explains, "the snow blocks should gradually tilt inward as you build higher so that adequate height is attained. It is also very important to make sure that each successive block doesn't leave 'cracks' which would prevent the structure from being airtight."

Mitchell estimates that it usually takes six people six hours to build an igloo. "We generally start at 10 a.m. and finish before sundown."

Once an igloo has been built, a special windshelter can be constructed to protect the camp stove, since all cooking must be done outdoors. Too much heat inside will cause the snow to melt and the structure will collapse.

During the evening hours, votive candles can be used in the igloo. Three candles will provide sufficient light to read a newspaper, according to Mitchell.

With the right temperatures and plenty of shade, an igloo can last as long as a month. For the Mitchells building an igloo is a satisfying way to spend a long weekend. Among the places they have pursued their hobby are Lake Tahoe, Boreal Ridge, and Dodge Ridge. It's also a great way to avoid the crowds. "In fact," admits Mitchell, "I've never met another person who has built an igloo. It would be interesting to compare notes."

When William Mitchell is not building igloos, he practices with his Modesto firm, Mitchell & Vance, where he specializes in estate planning. He also teaches a University of California extension course for legal assistants.

Martin Anderson '49

Spreading the spirit of "harambie"

The primary objectives of the environmentalist are first to control people and then to build a balance between man and nature. To achieve this balance people must be taught to work together, and this is what Martin Anderson '49 attempts to do on a worldwide scale.

As senior partner in the Honolulu firm of Goodsill, Anderson & Quinn, Anderson divides his time between a demanding antitrust practice and environmental projects centered in Hawaii, California, and Kenya, East Africa. While the three projects are quite different from one another, they share a common purpose: to enable man to derive maximum benefit from his environment without destroying it.

In Kenya, Anderson is helping Africans to achieve a better balance between wildlife and the environment through a program known as The Galana Game Ranch Research Project. Established in 1967, the Galana Project is the largest free enterprise big game management and conservation project ever launched on the vast continent of Africa.



Martin and Illie Anderson and friend.

Located on the eastern border of Africa's largest game preserve, Tsavo National Park, the Galana Ranch encompasses some 1.5 million acres of land, an area four times the size of the island of Oahu. Here, Galana Game and Ranching Ltd., of which Anderson is chairman of the board, is attempting to prove that this formerly unproductive area of Kenya can be developed to yield a profitable commercial cattle ranch operation, which can peacefully coexist with the natural game population that includes elephants, rhinos, buffalo, leopards, and lions.

The land, which has been leased to Anderson's company for 45 years from the Kenyan government, is currently being used for several purposes, including game control or "cropping," ranching of domestic livestock, meat processing, cultivation of cattlefeed crops, and tourist development. A condition of the lease is that the company manage the natural game population so that it is encouraged to increase. Toward this end, Anderson and his company are attempting to increase the "carrying" capacity of the land by improving the environment for all animals, thereby reducing the amount of cropping necessary. To achieve its goals, the company has enlisted the help of the Waliangulu, a local tribe who helps control poaching on the ranch.

The success of the Galana project, according to Anderson, will prove that the combination of game conservation and commercial ranching, under close government supervision, is a workable one. "Not only will the Galana project be achieving one of the world's great nature conservation programs, but it will provide a booming economy in an area that once produced nothing."

Anderson describes the atmosphere at Galana as one of everyone helping everyone else — what the Kenyans call *harambie*. He explains, "One of the great problems of the world is overpopulation and lack of sufficient protein supplies. At Galana we are making productive a section of Kenya that had not been contributing to the country's protein supply. We build labs on the ranch and we provide housing for foreign scientists who work with local veterinarians to understand how to make these two protein-producing sources — cattle and game — work together. In this way, what we achieve at Galana will benefit not only Kenya but many other countries around the world."

At Lake Tahoe, California, where he is a major owner of Heavenly Valley Ski Resort, Anderson attempts to create yet another balance between man and nature. His challenge here is to show that one can open up a wilderness area with as little impact as possible on wildlife and nature, enabling man to enjoy this unique resource without destroying it.

"You cannot just have a wilderness unless that wilderness is perceived as an enjoyable resource," says Anderson. "At Heavenly Valley, we are giving people a recreational outlet to a wilderness that they can appreciate for the years to come."

In his home state of Hawaii, Anderson is involved in yet another pioneering effort: the development of geothermal sites for the production of energy to substitute for fossil fuels.

Nine years ago, Anderson assisted three Canadian brothers to begin exploration for these sites. Together with people from the University of Hawaii and the state and federal governments, they located steam on a producing well for the State of Hawaii. Recently, the group

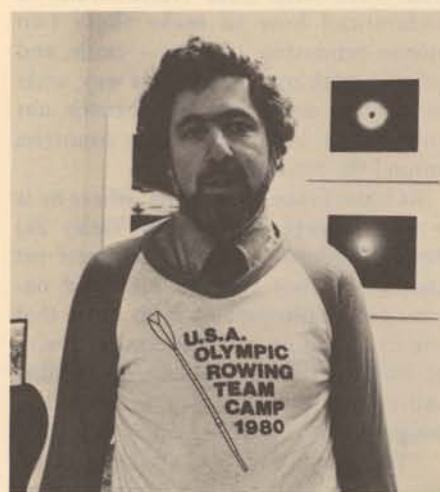
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drilled its first geothermal hole in the Puna area on the island of Hawaii and is now actively drilling the second one.

As with his other projects, Anderson's foremost concern is conservation. He points out: "Since Hawaii is dependent on fossil fuels and must import all of its gas and oil, anything we can do to develop geothermal resources will be helpful, but we must develop these sites in a way that will not destroy the magnificent Hawaiian landscape."

For Martin Anderson, each of these projects presents important and interesting challenges — challenges which he is meeting creatively, intelligently, and in the spirit of "harambie."

Peter E. Lippett '62



Turning the U.S. women's rowing team to gold

They came off the line imperfectly: a bit of a scramble, a sense of uncertainty. But as in any great boat, an unsure moment only serves to pull the athletes together in reaction. Heads came up; legs began to drive. Holly, the cox, took one glance out at the Easties ahead, and you could see the U.S.A. begin to race.

On the shore at the finish line, heads started to crane; peripheral conversations stopped, and one by one people rose until the first voice rang out: "Go, USA!"

The Easties were still ahead, but the USA was surging, surging, leaning on it, driving into the sprint and finally bursting across the finish line ahead of East Germany for the first time in history.

As we loaded boats, drank beer and cheered ourselves through team pictures, we knew for sure that even if the Easties caught the gold in Moscow, they had been beaten once by the American eight.

[Ed. note: East Germany won the gold in Moscow. This text is excerpted from "Women's European Tour," by Anne Warner, member of the 1980 U.S. Olympic Women's Rowing Team, in *The Oarsman*, July/August 1980.]

The above passage provides a sense of the excitement (and frustration) Peter Lippett '62 has experienced as head manager of the 1980 U.S. Olympic Women's Rowing Team. An attorney with offices in San Francisco and Oakland, Lippett specializes in estate planning and probate. He is also the author of *Estate Planning — What Anyone Who Owns Anything Must Know* and a popular lecturer on the subject. But above all, Peter Lippett is a rowing enthusiast who, according to wife Joellen, devotes 364 days a year to the advancement of the sport. (He takes his birthday off.)

Lippett's love affair with rowing began the day he registered as a freshman at the University of California at Berkeley. "Here I was standing in line when this huge guy (Jim Lemmon, who was later to become Cal's head coach) came beating down on me and the first thing he said to me was, 'Son, let's talk about crew and you.'

"Being a runty kid of 101 pounds, I never dreamed of being involved in one of Cal's seven varsity sports." But get involved he did, as the all-important coxswain.

Since that time Lippett has devoted himself to the sport and particularly to the advancement of women's rowing.

Although European women have been competing in rowing since the 1930s,



Peter Lippett exchanges a few words with 1976 Silver Medalist, Joan Lind, a member of the 1980 Olympic Women's Rowing Team.

American women's teams were not organized until 1962. Then, in 1972, at the Munich Olympics officials voted to include women's rowing in Olympic competition. After the Munich vote, Lippett was named the first chairman to organize an American team. He managed the teams that went to the world championships in Lucerne, Switzerland, in 1974, and New Zealand in 1978, and was the chairman of the U.S. Olympic Women's Rowing Committee from 1973 to 1981. He now serves as rowing's representative on the Executive Board of the U.S. Olympic Committee.

In Montreal, the first American Women's Olympic rowing team won two medals: the silver for the single scull and the bronze for the eight-oared shell, finishing behind East Germany and Russia in that event.

When preparations for the 1980 Olympics got under way, Lippett was chosen head manager for the team. He was responsible for handling "anything that would detract from the concentration of the athletes and coaches," namely, the training camp, travel and hotel accommodations, provisions of special foods and medicines, and such logistical chores as the trailering of a fleet of boats through Europe and Russia.

With characteristic thoroughness, Lippett readied himself for Moscow by returning to school to learn Russian, which he did for one and a half years. He also headed the rowing delegation to the 1979 Spartakiade Games in Moscow.

When hopes were highest, news of President Carter's decision to boycott the Moscow Olympics came down on the team like a ton of bricks, as it did for all

of America's Olympic hopefuls. But unlike many of the athletes who are young enough to try again, the women rowers slated for Moscow were a mature group, mostly ranging in age from 26 to 34. Many of them had trained for eight years for Moscow, and several took a year's sabbatical from careers to train.

After the eight managed to beat the East Germans in Lucerne last summer, Lippett says, "I'm convinced our eight would have won the gold in Moscow. The devastation of not being allowed to try, for what we considered shabby and obviously non-effective motives of a failing politician, will last a lifetime for thirty-six superb Americans who deserved better."

Lippett reports that the women's rowing team was perhaps the single most militant of the 1980 Olympic teams. They made and defiantly wore T-shirts proclaiming themselves to be "Jimmy Carter's Threat to National Security." When "honored" for their sacrifice in Washington, several of them wore those shirts to a reception on the White House lawn where only three of the thirty-six stepped forward to shake the President's hand. In fact, they actively explored the possibility of defying Carter by proceeding to Moscow on their own, taking advantage of Lippett's ploy in pre-purchasing long duration airline tickets for the team's European racing in order to thwart Carter's threat of pulling passports and imposing currency restrictions. "I almost had to become a Constitutional lawyer," Lippett quips.

What is it about this sport that has captured the heart and soul of Peter Lippett? "This sport," he says, "is populated by unique individuals ... people who subvert their own egos to compete in one of the most demanding endurance tests, even though they will remain personally unknown and will never be offered a professional contract. It's the last of the true amateur sports, and that plus the people in it is the attraction for me."

Lucinda Lee '71



Restoring San Francisco to its original beauty

For Lucinda Lee '71 the impetus to pursue her avocation — restoring San Francisco's Victorian houses — evolved from her law practice. As a tax specialist with the San Francisco firm of Flynn & Steinberg, Lee spends much of her time helping entrepreneurs start their own businesses. From this experience she has developed the know-how and the confidence to make her own dream a reality.

Restoring Victorians is a family affair for Lee and her husband, Jon Parker. Jointly they prepare a financial evaluation of each property to be acquired; the restoration uses her legal and artistic talents, and he lends his experience in construction.

Each restoration takes about six months to plan and implement, according to Lee. "We have a good realtor who helps us find the old buildings. We negotiate the price and terms along with a budget for the renovation costs. Everything has to be done in stages, and we try to move through these stages as quickly as possible."

For Lee and her husband, restoration is more than profitable hard work, it means starting at the beginning. Once they have located and purchased a house, they re-



These "before and after" photos illustrate one of Lucinda Lee's restoration projects.

search the house, tracing back through deeds and building and water permits to find such information as the original architect and plans. After they determine the original character of the house, they bring in an architect and organize a construction crew to help them with the jobs they cannot (or will not) do themselves.

"When we are looking for a house to restore," says Lee, "we never pass up the 'hopeless' cases. In fact, the more run-down a house is, the more fun we have restoring it to its original state. In the 1880s these homes were beautiful, but over the years tenants and landlords have done crazy things, like adding bathrooms and kitchens in ornate living rooms or painting marble fireplaces pink."

When Lee takes on a restoration project, much of the work, like demolition of partition walls, remodeling kitchens, restoring original light fixtures, and insulating, she and her husband do themselves. In a condemned building, for

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example, they will replace entirely the electrical, heating, and plumbing systems. "We try to use as much of the original architectural detail as possible," says Lee. "That way, when we rent the building, it shows pride of ownership and we often can afford to keep the rent low."

Would she ever forsake her legal practice for a full-time career in restoration? "Probably not," says Lee. "While restoring Victorians could be as lucrative as practicing law, there's not the same rewarding client relationship and intellectual challenge one gains from being a lawyer, and I would not trade that. It's great to have the best of both worlds. Restoring Victorian houses and practicing law require a high energy level; the reward is that in our own way we're making a contribution to the neighborhoods and helping to restore San Francisco to its original beauty."

Irwin H. Schwartz '71



Filling a need for non-verbal expression

For Irwin H. Schwartz '71 photography and building furniture provide two therapeutic outlets to complement his work as Federal Public Defender in Seattle. As Schwartz explains it: "I took up furniture building in 1972, principally to have something to do with my hands rather than my mouth."

Since that time Schwartz has completed several large projects, including a



Irwin Schwartz won "Best of Show" award in an amateur photography contest for this shot of Mt. St. Helens.

dining and buffet set and a bar for the family recreation room.

"The real joy," observes Schwartz, "comes in finishing a piece that stands without wobbling (too much), works as intended (doors, locks, etc.), and serves some purpose. Because the work requires a good deal of concentration and is almost totally non-verbal, it is great therapy."

When not in his garage sawing and sanding, Schwartz can usually be found "skulking" after the perfect photograph. Like furniture building, photography offers him another non-verbal pastime which "produces a tangible product that is pleasing to the eye." So far, all of Schwartz's works have been for personal enjoyment or for gifts. His first entry in a Seattle amateur photo contest brought him a "Best of Show" award.

Half the fun in both woodworking and photography, he finds, is meeting true craftsmen and learning how to find the right materials and techniques. "The people and the work make a fine break from law."

Edward A. Firestone '73



Food for Thought

It all started in law school. As editor of the *Stanford Law Journal*, Ed Firestone

'73, now counsel for regulation for General Electric's Nuclear Energy Group in San Jose, first displayed his interest in local restaurants by writing a review column. One review for the *Journal* led him to Heinz Selig, owner of Des Alpes restaurant on California Street.

After two years of friendship, Firestone decided that it might be interesting to find out what it was like to prepare food instead of consume it, so he asked Selig for a job as apprentice cook. Before long, Firestone graduated from chopping and preparing vegetables and now even occasionally runs the kitchen and prepares main courses, including the Des Alpes specialty, poached salmon with hollandaise sauce. Loyal devotees of such fare include such well known epicures as Law Professor Howard Williams and Mrs. Williams.

Generally, however, Firestone prefers to prepare desserts and he spends every Tuesday or Wednesday evening at Des Alpes creating the restaurant's specialty, a Greek walnut spice tort with Grand Marnier filling and chocolate glaze. The dessert takes about three hours to prepare, but for Firestone the time he spends at Des Alpes is akin to "being on an island in a different part of the world."

"For years, I never appreciated the fact that cooking is hard physical labor," observed Firestone. "However, it is certainly a welcome break from the strenuous mental effort of practicing law." "In addition," he remarks, "in law, it is difficult to know whether you have succeeded or failed until months or years later. In cooking, you know immediately how the food looks and tastes."

In addition to his duties as dessert chef at Des Alpes, Firestone finds the time to sing occasional leads with the Stanford Savoyards and participate with other singing groups in the Bay Area.

Putting the Crisis in El Salvador in Perspective

by William B. Gould

The focus of today's headlines is upon both strife-torn El Salvador, where the junta's land reform policy constitutes the heart of all controversy, and, as well, Nicaragua's Sandinista-led government and the extent of its involvement with Cuba. The problems that plague those countries affect all of Central America, i.e., declining export prices, inflated oil bills, and consequent diminished economic growth, as well as increased tension and violence. This writer's recent visit to three Central American countries — Honduras, Costa Rica, and Guatemala — garnered ample evidence for the proposition that El Salvador and Nicaragua are just the tip of the iceberg.

Honduras, the poorest of American countries in the northern hemisphere aside from Haiti, is now formulating a new constitution with free elections to be held later this year. But the country is hobbled by a relative lack of arable land, an unambitious land reform program that has carefully avoided the seizure of any Honduran national's property, and an infrastructure so deficient that it has thus far deprived the nation of its export potential for lumber. Moreover, the populace is increasingly aware of military corruption and unsettled by the arbitrary implementation of conscription. One observer told me of army "roundups" of younger people emerging from movie theaters — a policy made necessary by the unwillingness of Hondurans to comply with the draft law.

As is true throughout Central America, conversation inevitably focuses upon the United States. "We celebrated with firecrackers the night Reagan won," said a well-to-do Honduran businessman. But his view is by no means representative. A leftist leader of the Liberal Party (it has a narrow plurality as the result of 1980 elections) characterized American intervention in El Salvador as harmful and designed to support the "big, privileged people" and American business interests which are so concentrated in that country. And he spoke critically of the involvement of the AFL-CIO supported American Institute for Free Labor Development (AIFLD) because of its opposition to moderate Christian Democratic unions in Honduras on the ground that they have some Marxist leaders.

An increase in union-sponsored stoppages during the past year seems to reflect the turmoil that has spread throughout Central America. The same pattern has emerged even in democratic and stable Costa Rica, where inflation is approximately 20 percent (Honduras is about the same) and the external debt has made the nation's currency worthless outside its borders. Again, the price of oil is the principal culprit. And, as in Honduras, where United Brands and Standard Fruit banana workers went on strike last year for the first time in a decade, it is impossible to separate labor-management relations from politics.

Costa Rican industrialists complain that they are confronted with communist union organizational drives (they resist them fiercely) and not those of the moderate Social Democratic trade union movement. The Costa Rican banana workers' union's strike last summer was triggered by leftist leaders reportedly inspired by the Nicaraguan example.

But Costa Rica, once a haven for the Sandinistas when they did battle with Somoza, has seen public opinion turn against the new Marxist-type government. Although the Costa Rican Minister of Labor stated in an interview with this writer that industrial turmoil has declined, a Social Democratic politician differed: "The communist-led unions are restrained because they don't want to see a backlash against Nicaragua."

Despite some predictions that its rate of inflation will double in 1981, Costa Rica's problems pale into insignificance compared with those of Guatemala. There is no part of that country which is safe from guerrilla onslaught, even though the rebels' numbers under arms do not exceed 2,000 (the army has 14,000 troops). Excessive pressure on the land has made for greater dependency and virtual peonage for a growing Indian population which is forced to leave the temperate central highlands to work the coffee and cotton plantations on the steaming tropical southern Pacific coastal plains. The right-wing Garcia government has offered land reform as an answer. But this means resettlement to the sea-level terrain of the northern province of Peten — hardly an attractive prospect for highland people.

Accordingly, the Havana-financed guerrillas are able to move at will through much of Guatemala. Awareness of illiteracy and poverty has been raised by access to the transistor radio (Radio Moscow as well as Voice of America) which, along with the bicycle and the lightweight plastic water jug, has transformed the expectations of the average Indian.

The Indians supported a farmworkers' strike last year which resulted in a 180 percent increase in the minimum wage (the daily minimum is now \$3.20) — an amount which many owners have refused to pay. This has meant an acceleration of violence in the rural areas, i.e., guerrilla executions of plantation administrators of the absentee plantation owners. Indians who work at less than minimum wage have also been targeted.

What is particularly remarkable about the newfound Indian solidarity is that it has been realized at the teeth of increased use of hit squad assassinations by the right (and the left also) against anyone who speaks out politically. Even non-political assassinations have now become commonplace. Lawyers and judges who displease the relatives of a criminal defendant are the principal targets.

The pity is that of all the Central American countries, Guatemala may have the grandest opportunity for expansion and reform — unlike overpopulated El Salvador, where there is simply no more room. But, regrettably, the lesson that Guatemala seems to draw from President Reagan's campaign speeches is that America will circle the wagons around its right wing friends when confronted with a left wing guerrilla threat — and perhaps even tacitly support an audacious intervention by Guatemala on the side of the junta over the border in El Salvador.

The tragedy is that America is already identified with the forces of oppression in Central America — an image which would be more firmly implanted if the conflict is internationalized. Defeat for the left in El Salvador is unlikely to make this problem disappear. As one American diplomat said to me in Honduras, "The left may well be stopped in El Salvador by American military aid. That only means that they will be heading this way sooner."

Kudos for Stanford Supreme Court Advocate

This article appeared in the monthly column "A View from the Gallery" in the American Lawyer (March 1981). Jon Blue, the subject of the article, is a graduate of the Class of 1973. The article is reprinted here with permission.

At times (if rarely), legal talent can come cheap. For the price of airfare, a hotel room and a couple of meals, the Supreme Court got Jon Blue. It got more than a bargain.

Blue, it is true, is not one of the visible giants of the bar. He works for Legal Assistance to Prisoners in Hartford, Connecticut. He is a little man in stature, too, a tiny Alice-in-Wonderland figure.

But he took it very seriously when he was appointed by the Court (no fee, expenses only) to handle a penniless convict's appeal in *Little v. Streater*, and he stood very tall when his argument ended.

Indeed, he appeared to have won the case for Walter Little, needing only to offer Justice Lewis Powell, Jr., "a limiting principle" so that the victory would not force the Court to go too far.

The *Little* case is about paternity lawsuits and whether a state must pay the cost of a blood test when a man with no funds is accused of being the father of a child on welfare.

Blue offered the Court a magnificent brief filled with legal and medical lore to prove that blood tests are a unique kind of evidence — conclusive and nearly unassailable and thus crucial to the only question at issue in a paternity case.

Cleverly, the brief offered as "the best judicial expression" of the customary difficulties of proof of paternity a 1950 New Jersey precedent written by now-Justice William Brennan, Jr. (A pleased Brennan confessed he did not remember the decision exactly.)

The basic issue Blue posed was the one of "equal protection" for indigents. If blood test evidence is the key to justice in paternity cases, it must be equally available to all, as *Little's* lawyer saw it.

But as soon as he was on his feet in the courtroom, Blue learned that the justices saw much more than simplicity in his case. Over and over he was asked: If a state is obliged to provide one kind of evidence to aid indigents, where does that

principle lead? As Justice Harry Blackmun phrased it, "My real question is whether we are getting on a slippery slope."

Hands in pockets, relaxed, thoroughly prepared, Blue calmly repeated his point about the uniqueness of blood grouping tests. Conclusive in more than 90 percent of all cases, he stressed.

"Are you familiar," Chief Justice Warren Burger digressed, "with the fact that there have been numerous malpractice suits against laboratories which have done blood tests when those tests were used and injury resulted?"

He was not familiar with that, Blue answered, but then he reminded Burger gently that, while "there are several types of blood tests," only one kind was at issue in his case.

The justices, who kept their questions on point, were troubled mainly about forcing states to pay for high-priced expert witnesses.

At first, Justice Potter Stewart tried to help Blue out on that, suggesting that "expert testimony" always was a matter of opinion and thus probably not crucial. Blue graciously accepted the aid.

After thinking about it, however, Stewart said that "the distinction may be blurred" between expert testimony and scientific evidence. With no hesitation, the attorney retorted that he "would dispute that," at least as it concerns blood-grouping tests.

As is often true when a lawyer has displayed confidence at the podium, Justice Byron White was ready to reward Blue. "Every doctor, every doctor," White said, "would agree with the result of this test." Blue nodded, saying, "That's correct."

Then he summed up. "The important thing I want to leave with this Court is that the fact that these tests are treated as decisive is exactly the reason why they should be equally available."

Powell, still troubled, was not ready to let it go at that. Referring to the "abundance of questions" from the bench about the slippery slope, Powell asked, "Will you state a limiting principle?"

Boldly, Blue did, going so far as to suggest just how the Court could "craft the opinion" to stay off the slippery slope. "When the nature of the evidence, unlike

other evidence, will conclusively and indisputably show the answer to the question, that distinguishes it," he said.

Stephen McGovern, Connecticut's assistant attorney general, obviously had a long way to go when his turn came, but he went almost nowhere. Aside from one comment (after he had been refreshed at the lunch break) about the slippery slope that so bothered the Court, he made pathetic attempts to save his case.

His lowest point came near the end, when the justices began exploring the "burden of proof" in paternity cases in Connecticut.

Justice Brennan, forcing himself to be a lot simpler than he normally is, asked, "If the woman takes the stand and says, 'He's the father, he's the father, he's the father' — never deviates — 'He's the father,' but then the defendant takes the stand and says, 'I am not, I am not, I am not, I am not, I am not,' she wins?"

Before McGovern could affirm that, there was a chorus from the bench, several justices nearly shouting, as if in triumph, "She wins!"

Justice William Rehnquist asked of McGovern, "where, in the case materials," that was spelled out; but the assistant attorney general only stumbled.

Stewart interjected with yet another kudos for Blue: "The discussion of the case law begins at page 30 of the appellant's brief."

Grinning devilishly, Rehnquist said, "Thank you, counsel."

Unsmiling, Stewart muttered that he was only giving "my impression." But White, uncustomarily joining the fun, looked at Stewart and finished the sentence. "Based upon a careful reading of the briefs," he said.

All of that, though, was more at McGovern's expense than Stewart's. But the assistant attorney general was long since finished by then, anyway.

Fortunately for McGovern, he has a strong brief, devoted heavily to the basic proposition that the only constitutional right to equal justice, in a civil case at least, is the "opportunity to be heard." If the Court went with Blue's argument, the Connecticut brief argued, it would next have to assure the availability of "any other evidentiary tool an indigent might desire to use in his defense."

Nation's First Professorship in Law and Business Established at the School

The first endowed professorship combining law and business at any major American law school has been established at Stanford.

The professorship, named in memory of the late Ralph M. Parsons, founder of the worldwide engineering and construction firm that bears his name, was made possible by a grant from The Ralph M. Parsons Foundation of Los Angeles and an earlier challenge grant from the William Randolph Hearst Foundation of San Francisco and New York City.

Creation of the Ralph M. Parsons Professorship in Law and Business was announced on October 14 by Stanford President Donald Kennedy following acceptance by the University Board of Trustees.

In announcing the professorship, Kennedy thanked the two foundations "for joining together to take this first step in this new combined field." He added, "It is of great importance to Stanford and will set an example that other universities can be expected to follow."

Joseph G. Hurley, president of the Ralph M. Parsons Foundation, said the professorship "signals a new era of intellectual inquiry in an area of intense interest" to the foundation's founder.

"It is particularly fitting that this chair should be established at Stanford, which has not only the nation's foremost Business School, but a Law School well known for its innovative approach to legal education," he added.

The professorship is the culmination of intense efforts on the part of both the Law School and the Business School to develop a fully integrated joint degree program.

Stanford initiated the nation's first combined law and business program 15 years ago, leading to a joint degree option of Juris Doctor/Master of Business Administration.

In addition to scholarship and teaching, the Parsons professor will be responsible for strengthening this J.D./M.B.A. program and for developing a "mini-major" in law and business within the School's three-year J.D. curriculum.

The Parsons professorship will be the cornerstone of the Law and Business Program now being developed by the law faculty in consultation with the Dean's



On October 27, Dean Meyers hosted a dinner and reception in San Francisco for members of the boards of the Parsons Foundation and Hearst Foundation. Attendees included Joseph G. Hurley, president of the Parsons Foundation, and Barbara Stokes Dewey, executive director and secretary/treasurer of the Parsons Foundation (pictured above); and John R. Miller, member of the board of directors of the Hearst Foundation (pictured below to the right of Dean Meyers).



Council, a group of corporate executives who have assumed responsibility for helping create and fund the program.

Law School Dean Charles J. Meyers said the Parsons professorship "will permit us to make a giant step forward in this field of vast importance to the Bar, the business world, and society as a whole."

Throughout his long business career, Parsons firmly believed a good grasp of the legal environment in which business operated was extremely important to the business executive.

Conversely, he felt that lawyers as legislators, judges, and government officials should have a more thorough knowledge of the workings of modern business, so that the regulatory climate, which they create and over which they preside, would be favorable to the development of a good system of competitive, private business enterprise.

Born in Springs, Long Island, the son

of a fisherman, Parsons got his first taste of the business world at age 13 when, in partnership with his 18-year-old brother, he set up a garage in his uncle's blacksmith shop.

The engineering, and construction company which bears his name was established in 1944 with seven employees. It now has more than 8,500 full-time employees providing design, engineering, and construction services to private and governmental clients for a variety of petroleum-chemical, mining and metallurgical, public and civil, transportation and power, and nuclear projects in more than 40 countries around the world.

"Ralph Parsons would be delighted with the benefits that undoubtedly will accrue to the lawyers and business leaders of tomorrow from the establishment of a chair in law and business at Stanford," Foundation President Hurley said.

The Ralph M. Parsons Foundation was established in 1961. It currently supports higher education, primarily in the fields of engineering, business, law, science, and medicine; social programs, including assistance to children, battered women, and seniors; and local cultural and civic projects.

The Foundation's officers and directors are: Joseph G. Hurley, president; Everett B. Laybourne, vice-president; Barbara Stokes Dewey, executive director and secretary/treasurer; Albert A. Dorskind, Alex Haley, Leroy B. Houghton, Edgar R. Jackson, Marvin R. McClain, and the Honorable Donald R. Wright, Chief Justice of California (retired).

The William Randolph Hearst Foundation was founded in 1948 by William Randolph Hearst, Sr. Its principal interests are the areas of education, health, culture, and social services.

David W. Hearst, one of five sons of the founder, is president and director of the foundation. Other directors are: Frank A. Bennack, Jr., Richard E. Deems, George R. Hearst, Jr., John R. Hearst, Jr., Randolph A. Hearst, William Randolph Hearst, Jr., Joseph Kingsbury-Smith, Harvey L. Lipton, Frank Massi, John R. Miller, Raymond J. Petersen, and Franklyn C. Snyder. Robert H. Frehse, Jr., is executive director and head of the New York office. Charles Gould manages the San Francisco office.

School & Faculty news

Search Committee for New Dean Appointed; Alumni Views Sought

On May 5, Stanford University President Donald Kennedy announced the formation of a committee to advise him in selecting a successor to Dean Meyers. The committee members are Law Professors Paul Brest, Robert C. Ellickson, Gerald Gunther, Deborah L. Rhode, and Robert L. Rabin, who will chair the committee; law students Glen D. Nager '82 president of the *Stanford Law Review* for 1981-82; and Ronald K. Noble '82, president of the Law Association for 1980-81; and University Provost Albert H. Hastorf.

Alumni are invited to submit suggestions as to candidates and/or criteria they would like to see considered. The committee will be conducting a thorough search in which they will consider both inside and outside candidates for the position. Suggestions should be sent in writing as soon as possible to Professor Rabin or any other member of the search committee.

During the Board of Visitors meeting at the end of April, Professor Rabin met informally with members of the Executive Committee to discuss the dean selection process. On behalf of the search committee, he has also written to the present and former chairs of the Board of Visitors, to present and former chairs of the Council of Presidents of Stanford Law Societies, and to the current president of each local Law Society, inviting their assistance in soliciting the views of alumni on the selection of a new dean.

Associate Dean Mann Appointed Acting Dean

While the search is under way for a successor to Dean Meyers, Associate Dean J. Keith Mann will serve as Acting Dean. This will be the second time Associate Dean Mann has assumed the leadership of the School, having served as Acting Dean when Thomas

Ehrlich relinquished the deanship at the end of 1975.

A member of the faculty since 1952, Associate Dean Mann is responsible for academic affairs relating to the School's educational and research programs. He is a graduate of Indiana University and its law school, where he was article and book review editor of the *Indiana Law Journal*. Following law school he served as law clerk to Justices Rutledge and Minton of the Supreme Court of the United States. He then practiced law in Washington, D.C.



for a short time and served as special assistant to the chairman of the Wage Stabilization Board in 1951. In 1952, after a year on the law faculty of the University of Wisconsin, he came to Stanford.

An expert in labor law, Associate Dean Mann has served on numerous presidential boards and commissions in national labor disputes. In 1980, he was appointed by the Supreme Court as Special Master in *U.S. v. Alaska*, a case involving some 500 miles of boundary between areas of state and federal interest along the northern coast of Alaska from Icy Cape east to the Canadian border. The outcome of the case will determine title to submerged lands containing oil reserves amounting to as much as two billion dollars.

Associate Dean Mann will become Acting Dean on September 1.

Amsterdam Resigns From Faculty



Anthony G. Amsterdam, Kenneth and Harle Montgomery Professor of Clinical Legal Education, has announced his resignation, effective August 31.

In disclosing his intention to resign, Professor Amsterdam said he and his wife, Lois P. Sheinfeld, also an attorney and lecturer in undergraduate studies at Stanford, wanted to return to a more urban environment. He added, "We will miss the Stanford Law School very much. We leave with lasting memories and friendships that will always tie us to the School, and to all of the colleagues, students and staff who have enriched our lives immeasurably."

The Amsterdams have accepted appointments to the faculty of New York University, he as director of the clinical and advocacy programs at the law school and she as associate professor of journalism and metropolitan studies.

A member of the Stanford law faculty since 1969, Professor Amsterdam pioneered the development of clinical instruction at the School and is the nation's foremost expert in the simulation method of clinical teaching.

In 1980, in recognition of Professor Amsterdam's monumental contributions to clinical teaching, Mr. and Mrs. Kenneth F. Montgomery of Northbrook, Illinois, endowed the first chair in clinical legal education in the country, naming Professor Amsterdam the first holder.

Professor Amsterdam received an A.B. in French Literature from Haverford in 1957 and an L.L.B. in 1960 from the University of Pennsylvania, where he was editor-in-chief of the *University of Pennsylvania Law Review*. In 1960–61 he served as law clerk to Justice Frankfurter of the Supreme Court of the United States. The following year he was assistant U.S. attorney for the District of Columbia. He joined the law faculty of the University of Pennsylvania in 1962, remaining there until 1969, when he came to Stanford.

In 1972 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*.

His work, in both the classroom and the courtroom, has won him national acclaim, as well as numerous awards and honors, including the Earl Warren Civil Liberties Award, bestowed in 1973 by the ACLU of Northern California, and the 1977 Walter J. Gores Award, presented by Stanford University for excellence in teaching.

Commenting on Professor Amsterdam's resignation, Dean Charles J. Meyers said, "Tony is a great teacher, and his pioneering work in clinical legal education will leave a permanent mark on this School. The Law School community offers Tony and Lois Amsterdam its best wishes for personal and professional satisfaction as they move to a new location where they will both be pursuing their respective careers in the law."

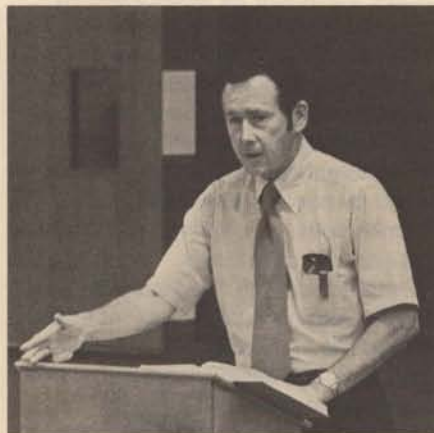
Baxter on Leave to Justice Department

William F. Baxter, Wm. Benjamin Scott and Luna M. Scott Professor, has taken a leave from the Law School to serve as Assistant Attorney General in the Antitrust Division of the Justice Department. His appointment became effective in April, following Senate confirmation.

Nationally recognized for his work in the field of antitrust and regulated industries, Professor Baxter was described by former Solicitor General, Robert Bork as one of the "five most influential antitrust experts in the country."

A member of the faculty since 1960, Professor Baxter received his A.B., with great distinction, in 1951 and his LL.B. in 1956 from Stanford. He was note and comment editor of the *Stanford Law Review*. Following two years as an assistant professor at the Law School, Mr. Baxter joined the Washington, D.C. firm of Covington & Burling. He returned to the Law School in 1960.

In 1968 he was appointed to a program of studies established at the Brookings Institution to produce a systematic evaluation of government practices and policies for regulating business activities. That same year he was



also a member of White House Task Forces on Antitrust Policy and Communications Policy. He was a consultant to the Federal Reserve Board from 1969 to 1974, and a fellow at the Center for Advanced Study in the Behavioral Sciences in 1972-73.

Professor Baxter's writings on economic regulation are enriched by an extensive background in economics and mathematics. He is co-author of a major book on *Retail Banking in the Electronic Age: The Law and Economics of Electronics Funds Transfer* (1977) and author of *People or Penguins: An Optimum Level of Pollution* (1974). He has also worked as a legal consultant on antitrust affairs to several corporations.

In an interview with Robert Riggs '82, editor of the *Stanford Law Journal*, Professor Baxter said his approach as head of the Antitrust Division would be "to try to put into effect the policies I've discussed in my Antitrust classes for the last twenty years." Among those would be de-regulation of the energy industry and the abolition of regulations preventing banks from operating in more than one state to promote competition between banks in different states.

Li to Head Hawaii's East-West Center

Victor H. Li, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies, has been named the next president of the East-West Center in Honolulu. The appointment will become effective October 1.

A world-renowned expert on China's legal system and foreign trade practices, Li testified before the U.S. Senate Foreign Relations Committee on the legal implications of de-recognizing Taiwan, and he produced several studies for the Committee on U.S.-China Relations.



In 1972 he served as host-interpreter for the visit of the Chinese ping-pong team which opened American relations with the People's Republic. Since that time, he has been to mainland China five times, and on one of those visits he met with Premier Chou En-lai. In 1978 and 1979 he lectured in Taiwan at the

invitation of the Academia Sinica and the Institute of International Relations.

Born in China, Li came to the United States with his parents and became a naturalized citizen in 1957. His father was governor of Kwangtung province in China from 1938 to 1945, and now lives in New York.

Li received a B.A. (1961) in mathematics from Columbia and a J.D. (1964) *cum laude* as a Harlan Fiske Stone scholar there. He also holds LL.M. and S.J.D. degrees from Harvard.

Li joined the Stanford law faculty in 1972, after teaching at Columbia and Michigan and the summer session of the University of Hawaii's Asian studies program. During 1974-76 he directed Stanford's Center for East Asian Studies.

At the Law School, Li has taught courses in international law, transnational law, and Chinese law, in addition to co-developing and teaching the two-year-old course Law in Radically Different Cultures.

He is the author or editor of five books and numerous scholarly articles. He has also been involved in the production of two films on China, one of which was a 30-minute dramatization of a trial in the People's Republic made by the East-West Center's Culture Learning Institute.

Student Wins Prize for Disarmament Essay

Michael H. Shuman '82 was awarded the \$5,000 Rabinowitch Prize for his 4,000-word essay on disarmament, "The Mouse That Roared," in a contest sponsored by the *Bulletin of Atomic Scientists*.

Published in the January issue of the *Bulletin*, the essay calls on the Third World, particularly those non-nuclear nations that have signed the Nuclear Non-Proliferation Treaty, to band together and force the nuclear big powers to disarm completely. Among the methods Shuman suggests to accomplish this are moral persuasion or withholding necessary resources the

larger nations need. If those methods fail, the "ultimate" threat, according to Shuman, would be "outright weapons proliferation."

"Imagine," says Shuman, "the impact of 100 nations announcing in a clear, unified voice: 'If the nuclear nations do not dismantle ninety percent of the nuclear weapons in the next ten years, we all promise to go nuclear.'"

Shuman links nuclear energy with nuclear armament because the technology to turn the byproducts of nuclear energy into weapons is no longer as esoteric as it once was, and most nations now have the capability for acquiring nuclear weapons if they want them badly enough.

For that reason, Shuman says, it is necessary to phase out all nuclear energy projects, which he believes are uneconomical and are not a very important substitute for scarce energy supplies. He points out that if every nation built all the reactors it needed to produce electricity it would cut oil consumption worldwide by only ten percent; most oil is used for home heating and automobiles and its use is unaffected by nuclear power sources. Shuman sees solar energy as "the best and easiest" alternative.

The Rabinowitch Prize is named for Eugene Rabinowitch, a nuclear scientist and the first editor of the *Bulletin*. More than 800 essays were submitted for the competition.

Shuman holds a B.A. in international relations from Stanford. His interest in nuclear proliferation began in his freshman year when he took a course in Arms Control. In addition to attending the Law School, he teaches a freshman course, "Soft Energy Paths and Non-Nuclear Futures."

When asked how he will use his prize money, Shuman said, "Attending the most expensive law school in the country simplifies my decision about how to use the money. Happily, I am now able to relieve my parents of the financial burden of my law school education."

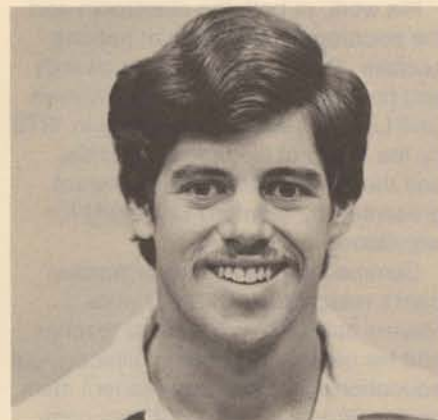
Shuman also plans to elaborate on his paper proposal and to send copies to each non-nuclear nation, as well as

to give speeches and write articles for "building a disarmed world order."

Three Grads Named U.S. Supreme Court Clerks for 1981-82

Three graduates of the Class of 1980 have been chosen to fill U.S. Supreme Court clerkships for the October Term 1981. They are Robert B. Bell of Arvada, Colo.; David F. Levi of Libertyville, Ill.; and Christopher J. Wright of Berkeley.

Mr. Bell received a B.A. *summa cum laude* in Government from Dartmouth in 1975. That same year he was awarded the Benet Prize for the best Government honors thesis and the Colby Prize



Robert B. Bell

for the outstanding Government major. In 1975-77 he was a Keasby Scholar at Cambridge University, where he received an M.A. in Economics. At law school he was president of the Law Forum and articles editor of the *Stanford Journal of International Studies*. He also published articles on environmental economics, airport noise, and supervision of charitable trusts. He received the 1980 Murie Award for the most thoughtful written work in the field of Environmental Law for that year. Upon graduation he was elected to the Order of the Coif. Mr. Bell is currently clerking for Judge Thomas Flannery of the District Court for the District of Columbia. His U.S. Supreme Court clerkship will be with Justice Byron R. White.

Mr. Levi graduated *magna cum laude* from Harvard, where he received an A.B. in History and Literature in 1972. The following year he received an M.A. in Modern European History from Harvard. He was then awarded a Mark deWolfe Howe Fellowship to pursue research in England on the English law reform movement of the 1850s for his doctoral thesis, which he is currently completing. While in graduate school, Mr. Levi was a teaching fellow in British History and Literature. At law school he was president of the *Stanford Law Review* for Volume 32. He also authored the Note, "The Equal Treatment of Aliens: Preemption or Equal Protection?" (31 *Stanford L. Rev.* 1069). Upon graduation he was elected to the Order of the Coif. Mr. Levi is currently clerking for Judge Ben. C. Duniway '31, U.S. Court of Appeals,



David F. Levi

Ninth Circuit. He will clerk for Justice Lewis F. Powell, Jr. on the U.S. Supreme Court.

Mr. Wright was awarded an A.B. *cum laude* in General Studies from Harvard in 1974. Before enrolling in law school he conducted evaluations of experimental educational programs for the Vice-Chancellor at the University of California at Berkeley, where he also received an M.A. in Educational Research and Development in 1975. At law school he was senior note editor of the *Stanford Law Review* for Volume 32. He wrote a case comment concerning the permissibility of picketing aimed at consumers at sites other than



Christopher J. Wright

the property of the employer of the picketers. In addition, he participated in an empirical study of the voting patterns of interim appointees to the California Supreme Court. (Mr. Wright blames the time required to write these articles for his failure to become a top squash player.) Upon graduation he was elected to the Order of the Coif. He is currently serving as law clerk to Judge Joseph T. Sneed, U.S. Court of Appeals, Ninth Circuit. He will clerk for the Honorable Warren Burger, Chief Justice of the United States.

New Faculty Appointments Announced

The Board of Trustees has approved the appointments of four new faculty members. They are Professor Robert C. Ellickson of the University of Southern California Law Center; Roberta Romano, a 1980 graduate of Yale Law School; William H. Simon, an attorney with Legal Services Institute in Jamaica Plain, Massachusetts; and Robert Weisberg, a 1979 graduate of the Law School.

Robert C. Ellickson An expert in land use planning, Professor Ellickson comes to Stanford following eleven years at USC. He is a graduate of Oberlin (A.B., 1963) and Yale (LL.B., 1966). Following graduation from law school he spent a year at MIT in the

Department of City Planning. He then served on the Presidential Commission on Urban Housing under President Johnson. The next year he took a managerial position with Levitt & Sons.

In 1970 Professor Ellickson joined the faculty at USC, interspersing his tenure there with visiting stints at the University of Chicago Law School (1974-75) and Stanford (1977-78). In 1977 he was awarded the USC Associates Award for Teaching Excellence. That same year



he received the prize for distinguished scholarship in law and economics, awarded by the Law and Economics Center of the University of Miami School of Law.

Commenting on Professor Ellickson's appointment, Professor Paul Goldstein, a property expert in his own right, described Professor Ellickson as one of the most well-informed people on real property issues in the country.

When Professor Ellickson isn't teaching or writing about property, he enjoys the intellectual excitement of playing word games. A tournament-class Scrabble player, he has competed in the Western Regionals, and last year narrowly missed qualifying for the National Finals.

Roberta Romano Ms. Romano spent 1980-81 as a law clerk to the Honorable Jon O. Newman, U.S. Court of Appeals, Second Circuit. She is a graduate of the University of Rochester (1973), where she received a B.A. with highest honors and distinction in history and highest distinction in English. She holds an M.A. in history (1975)

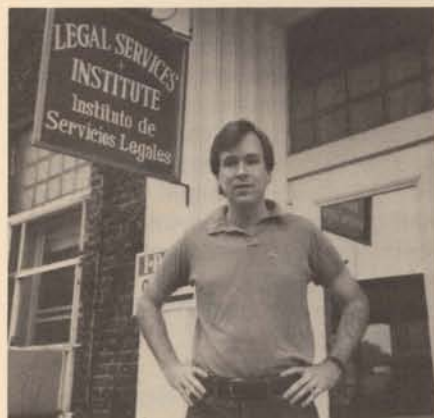


from the University of Chicago, where she also was a doctoral candidate in Japanese history.

While at Yale Law School, she was note editor of the *Yale Law Journal* and winner of the 1980 Nathan Burkan Memorial Competition for her essay, "The Author's Right to Credit: An Economic Analysis for Providing Copyright Protection."

Ms. Romano will offer courses in Business Associations and a seminar on Regulation of the Corporate Form.

William H. Simon A graduate of Princeton (A.B., 1969) and Harvard (J.D., 1974), Mr. Simon has been a staff attorney with Legal Services Institute since 1979. The institute is a practice



training center supported by Harvard and Northeastern Law Schools and the federal Legal Services Corporation. While at the institute, Mr. Simon has engaged in a general poverty practice, supervised staff training, and participated in the development of a full

third-year curriculum focusing on poverty law, which was taught to students from Harvard and Northeastern for the first time last fall. He also taught part time at the two law schools during 1980.

Prior to joining the institute, Mr. Simon was an associate with the Boston firm of Foley, Hoag & Eliot.

Mr. Simon will teach first-year Civil Procedure with Professor Brest in the Curriculum B program.

Robert Weisberg Since his graduation from the Law School in 1979, Mr. Weisberg has served as law clerk to Chief Judge J. Skelly Wright, U.S.



Court of Appeals, D.C. Circuit (1979-80) and to Justice Potter Stewart, U.S. Supreme Court (1980-81). While at the 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.

Mr. Weisberg received a B.A. *magna cum laude* in English from City College of New York in 1966. 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. (1967) and Ph.D. (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 until 1976, when he enrolled in law school.

During 1973-76 he also taught English at Great Meadow Correctional

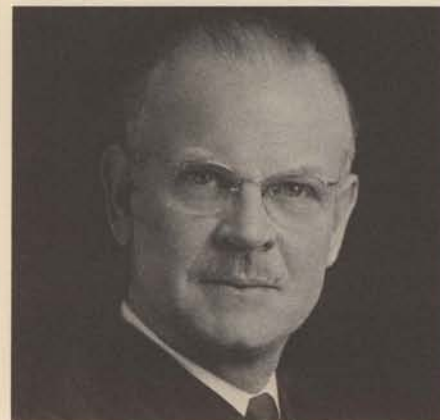
Facility, a maximum security state prison in Comstock, N.Y.

Mr. Weisberg will teach Commercial Law and a first-year course in Statutory Analysis.

Scholarship Fund Named for Distinguished Alumnus, Justice Homer R. Spence

A scholarship fund commemorating the remarkable career of Justice Homer Roberts Spence, one of Stanford's most distinguished graduates, has been established by his sister, Mrs. Samuel Morton Smith.

The first Stanford Law School graduate to be appointed to the California Supreme Court, Justice Spence was a prominent member of the California



judiciary for thirty-three years.

Justice Spence received his A.B. from Stanford in 1913 and his J.D. in 1915. That same year he entered private practice in San Francisco and Alameda Counties. In 1917 he interrupted his law practice to enlist in the militia. He served with the French 6th Army Corps during the Aisne-Marne defensive and was discharged in 1919 with a commission as Captain of Field Artillery.

Shortly after returning to civilian life, he was elected to the 35th District of the California Assembly and served during the sessions of 1921, 1923, and 1925. He was elected Speaker Pro-

Tempore for the 1925 session.

In 1927 he left private practice to accept an appointment to the Alameda County Superior Court, thus beginning a judicial career that would span more than three decades. In 1930 he was elevated to Associate Justice of the District Court of Appeal, First Appellate District, a position he held until 1945, when Governor Earl Warren named him to the Supreme Court of California. He retired from the Court in 1960.

During his years on the bench and up until his death in 1973, Justice Spence remained a prominent member of virtually all of the major state and national legal and judicial associations, including the American Judicature Society, the American Bar Association, and the Conference of California Judges, of which he was a charter member and president (1938-39). He was also an honorary member of the Los Angeles County Bar Association, the Jonathan Club of Los Angeles, and the Sutter Club of Sacramento.

His civic affiliations were equally far-reaching: the Commonwealth Club (of which he was a past president and member of the board of governors), American Legion, California and Alameda Historical Societies, Bay Area Educational Television Association, National Register of Prominent Americans, the Wisdom Society (from which he received the Wisdom Award of Honor in 1969), as well as many health and charitable organizations.

Upon retiring from the bench, Justice Spence was elected vice-president of Pittock Block, Inc. and Dodge Land, two corporations owned and managed by his brother-in-law, Samuel Morton Smith. In 1961, when Samuel Smith died, Justice Spence became president of both corporations.

Through the years, Justice Spence served the University and the Law School in a number of capacities. He was a charter member of the first Stanford Law Society, organized in 1932, and was instrumental in establishing a series of Practicing Law Lecture programs, which were the forerunners of the present Continuing Education of the Bar series. Justice Spence was also a charter member of the Stanford

Associates and co-founder of the Stanford Half Century Club.

In 1950, in recognition of his tireless efforts on behalf of Stanford, the University elected him a member of the Board of Trustees, a post he served with distinction for ten years. He was elected Trustee Emeritus in 1960.

Upon the occasion of his death Thomas Ehrlich, then Dean of the Stanford Law School, observed: "We are proud of our ties to the Justice, not only because of the example he set by his distinguished career, but also because of his deep affection for Stanford. His impact on the School has been substantial. Over the years, his counsel was invaluable; we are fortunate to have had the benefit of his considerable talents and enthusiasm. He was a great man and a great friend. We shall miss him."

The Justice Homer R. Spence Scholarship Fund is the second fund established at the School by Mrs. Smith. In 1964 she established, with the help of Justice Spence, the Samuel Morton Smith Scholarship Fund, in memory of her husband.

Memorial Scholarship Fund for Heaton L. Wrenn Established

The Heaton Luse and Carolene Cooke Wrenn Scholarship Fund has been established at the Law School.

A gift of Carolene Cooke Wrenn in memory of her husband Heaton L. Wrenn, the fund will provide urgently needed support to deserving law students.

Mr. Wrenn was a graduate of the Law Class of 1924 when he received his Doctor of Jurisprudence.

A former president of the Hawaii Bar Association and director of a number of business firms in Hawaii, Mr. Wrenn is remembered as a pioneer in Hawaii in the field of securities and public utilities regulations.

Following graduation from Law School, Mr. Wrenn moved to Hilo, Hawaii to begin his practice of law prior to moving to Honolulu. Mr. Wrenn became "Of Counsel" to his firm, Anderson, Wrenn & Jenks (now Good-sill, Anderson & Quinn) in 1968 after more than forty years of practice.

His directorships included the Bank of Hawaii, Hawaiian Electric Company, Dillingham Corporation, C. Brewer & Co., and many others. His numerous other affiliations besides the Bar Association, included the American Judicature Society and Strong Foundation (of which he was a former secretary and trustee). He also served as president of the Honolulu Symphony Society and of Keys and Whistles (a Honolulu Police Reserve Organization). Mr. Wrenn was active in the Police Reserve Force during World War II.

His Stanford affiliations were many and far-ranging. He was a supporting



member of the Friends of the Law Library and Law Fund Regional Chairman for Hawaii. He was an active supporter of the Athletic Department and the Buck Club, for which he served as an Area Leader for Hawaii. Mr. Wrenn's keen interest in sports was rooted in his own exceptional abilities as an athlete. While an undergraduate at Stanford he excelled as a rugby player and competed in the 1920 Olympic games.

Mr. Wrenn died on January 16, 1978.

Fund Honors Memory of Judge Norman F. T. Main



A scholarship fund in memory of the Honorable Norman F.T. Main '24 has been established by his wife, Clarisse Haberfelde Main.

One of California's most respected jurists, Judge Main sat on the Kern County Superior Court bench from 1947 until his retirement in 1965. Judge Main received an A.B. from the University of Missouri in 1920. He attended Harvard in 1920-21 and then entered Stanford Law School, receiving his J.D. in 1924.

Following graduation from law school, he served as deputy to the Superior Court in Bakersfield. From 1926 to 1933 he was in private practice in Taft. He was appointed deputy district attorney for Kern County in 1933, a post he held until 1947 when he was sworn in as Kern County Superior Court Judge. From 1942 to 1946 he served in the United States Navy, achieving the rank of Lieutenant Commander. During that time he was Security Officer for the budding Naval Ordinance Test Station at Inyokun.

Until his death in 1974, Judge Main maintained strong ties to Stanford. He was appointed to the Law School Board of Visitors three times. He was also a life member of the Stanford Alumni Association and actively worked to further Stanford activities in Bakersfield.

Mrs. Main received an A.B. in economics from Stanford in 1922. A member of one of Bakersfield's most prominent families, she is a director of

George Haberfelde, Inc. Investments, and a former director and secretary-treasurer of Bakersfield Community Hotel Corporation.

Mrs. Main was a delegate to the 1932 Democratic Convention in Chicago.

Like her husband, Mrs. Main has been a loyal supporter of the University. She, too, is a lifetime member of the Stanford Alumni Association.

The Honorable Norman F.T. and Clarisse Haberfelde Main Scholarship Fund is a further example of the Mains' enduring commitment to educational excellence.

Alumnus Funds Classroom

George H.N. Luhrs, Jr., a graduate of the Class of 1920, has provided funding for a large classroom in the Crown Quadrangle to be named The Luhrs Room.

One of Arizona's most respected families, the Luhrs have played a prominent role in the history and growth of Arizona since 1869. George H.N. Luhrs, Jr., born in Phoenix in 1895 when the population was 2500, continues today to have an active interest



in community affairs. In 1979 he completed the first draft of a book on the Luhrs Family and its relation to the history of Phoenix. That same year he received a special recognition award from the Phoenix Historical Society.

Mr. Luhrs received an A.B. in 1918 and a J.D. in 1920 from Stanford. As an undergraduate, he was a member of

the Glee Club, serving as president in 1918. The same year he was head yell leader and president of Delta Chi Fraternity. Following graduation from the Law School, he returned to Arizona, served as assistant clerk of the State Legislature and studied for the Arizona bar examination with his schoolmate and friend, Ernest W. McFarland '22, who later became U.S. Senator, Governor of Arizona, and finally Chief Justice of the Arizona Supreme Court.

After passing the bar, Mr. Luhrs joined the Phoenix firm of Armstrong, Lewis & Kramer. In 1924 he took a leave of absence to arrange the financing and construction of the Luhrs Building, and stayed on to build the Luhrs Tower in 1929 and, in the 1960s a large parking center, all in downtown Phoenix. Mr. Luhrs managed these properties and the Luhrs Hotel, which his father built in 1895, until his retirement in 1976.

In 1957 the Downtown Merchants Association honored George Luhrs for his outstanding contribution to the development, improvement and beautification of downtown Phoenix. In 1972 he was chosen "Mr. Downtown" by the Civic Plaza Association.

Since his undergraduate days, George Luhrs has maintained strong ties with the University. He has been instrumental in developing Stanford programs in Phoenix. He organized and was the first president of the Stanford Club of Phoenix in 1932. He also served as financial chairman of the 1954 Stanford Phoenix Conference. Among his other Stanford interests he counts the Law School, the Buck Club, the Alumni Association, of which he is a life member, and his Delta Chi Fraternity brothers. Earlier this year Mr. Luhrs was elected a member of Stanford Associates in recognition of his faithful interest and generosity.

20th Kirkwood Competition Held

The final round of the 29th annual Marion Rice Kirkwood Moot Court Competition was held on April 10 in Kresge Auditorium.

This year marked the second straight upsurge of student interest in the Stanford moot court event, with 32 teams composed of second- and third-year students participating. One major factor contributing to the increased popularity of the Kirkwood Competition was the decision by the faculty in December to award competitors two units of academic credit as well as the satisfaction of one required writing course.

The hypothetical case used in the 1981 competition, *Civiletti v. Archdiocese of San Francisco*, concerned a challenge by an organ of the Roman Catholic Church to the Pregnancy Discrimination Act. This recently-enacted provision of Title VII would require the Archdiocese as a covered employer to provide health benefits for certain abortions, and such funding would be considered a serious sin under Catholic doctrine. As a threshold question, the court considered whether the Archdiocese had standing to challenge the statute in federal court in the absence of a complaint by an aggrieved employee.

Kenta Duffey '82 and Robert Riggs '82 argued the government side of the case in the finals; they were pitted against the team of Richard Gray '81 and Stephen Miller '81, who represented the Archdiocese. In addition to being declared the overall team winners, Ms. Duffey and Mr. Riggs were also awarded Best Brief honors. Mr. Gray was named Best Oral Advocate.

Sitting as the Supreme Court were Oregon Supreme Court Justice Hans Linde and U.S. Ninth Circuit Court of Appeals Judges William A. Norris, a 1954 Stanford Law School graduate, and Betty B. Fletcher, whose husband, Robert, now a law professor at the University of Washington in Seattle, is a graduate of the Class of 1947 and former winner of the Kirkwood Competition, and whose son, William, is currently a visiting associate professor at the School.



Richard Gray '81 and Stephen Miller '81 arguing for the Archdiocese.



Kenta Duffey '82 and Robert Riggs '82 representing the government.



Following their deliberation, Judge William A. Norris '54, Justice Hans Linde, and Judge Betty B. Fletcher return to Kresge Auditorium to announce their decision.

Faculty Notes

Professor **Barbara A. Babcock** was one of four faculty members selected in October as University Fellows for 1981-82 by President Donald Kennedy. The Fellows receive five months' salary support to pursue projects of their own choosing. The stipend can be applied toward summer employment or used during the academic year to allow for time away from normal department responsibilities.

Professor **John H. Barton** spent the month of January in Egypt collecting materials and information on the legal system there for his course Law in Radically Different Cultures, which he co-teaches with Law Professors Victor Li and John Henry Merryman and Professor of Anthropology James Gibbs. Funding for Professor Barton's work in Egypt was provided by the Education Programs office of the National Endowment for the Humanities. Professor Gibbs received a similar grant to study the legal system of Botswana.

Professors Barton, Merryman, and Gibbs addressed a meeting of the Association of American Law Schools in San Antonio in January at which they discussed the "Rad Cult" course. In April Professor Barton addressed a meeting of the World Affairs Council of the Desert in Palm Springs. The subject of his talk was "Life with the Soviet Union on a SALT-free Diet." Professor Barton will spend the fall semester as a visiting professor at the University of Michigan School of Law.

Professor **Paul Goldstein's** second edition of his casebook, *Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on the Law of Intellectual Property*, as well as a Statutory Supplement and a Problem Supplement to the casebook, were published in May by Foundation Press. During the fall term, 1981, Professor Goldstein will be a Visiting Scholar at the Max-Planck Institute for Intellectual and Industrial Property Law, where he will pursue comparative research and analysis in some topics in copyright law.

Professor **Thomas C. Heller** has been awarded a three-year partial release grant from the W.K. Kellogg Foundation to explore certain aspects of the political and cultural consequences which attend increasing economic integration of nations. Specifically, he will be studying the movement of North American capital into Latin America and the reverse migration of Latin American labor into North America to determine how these flows can be regulated. Professor Heller sees the objectives of the project as twofold: to develop for the Stanford curriculum a program on international investment and to formulate policy recommendations which he hopes will serve as governmental solutions.

The second edition of *Fundamentals of Legal Research*, co-authored by Professor and Law Librarian **J. Myron Jacobstein** with Professor Roy M. Mersky of the University of Texas School of Law, will be published in July. The text has been adopted by more than eighty schools for use in connection with courses in legal bibliography and legal writing.

A research monograph by **John Kaplan**, Jackson Eli Reynolds Professor of Law, entitled "The Court Martial of the Kaohsiung Defendants," has been published by the University of California Institute for East Asian Studies. His article, "The Wisdom of Gun Prohibition," appears in the latest *Annals* of the American Academy of Political and Social Sciences.

John Henry Merryman, Sweitzer Professor of Law, lectured in Italy at the Universities of Bologna, Catania, and Sassari in January. He was also a consultant on bibliographic organization of the law library at the European University Institute in Florence.

Mr. Merryman has been appointed Affiliated Professor in the Department of Art at Stanford. Professor Merryman, with Professor Albert Elsen of the Art Department, teaches a course in Art and the Law at the Law School, which is open to graduate students in art history.

Charles J. Meyers, Richard E. Lang Professor and Dean, participated in a short course in September on the Windfall Profits Tax presented by the Federal Judicial Center for a group of federal judges. In October Dean and Mrs. Meyers were guests of the Faculty of Law of the University of Alberta in Edmonton, where Dean Meyers delivered the Weir Memorial Lecture. The subject of his lecture was "National Policies Governing Local Resources." The Dean later joined a faculty retreat at Banff Springs.

A. Mitchell Polinsky, Professor of Law and Associate Professor of Economics, was recently appointed to the Law and Social Sciences Advisory Subcommittee of the National Science Foundation. He attended a meeting of the Subcommittee in November in Washington. In December he gave a talk at the University of Michigan Law School and attended a law and economics conference in New York City co-sponsored by the Liberty Fund and the Center for Libertarian Studies. He gave talks at the University of Toronto Law School and the University of Western Ontario's Economics Department in January. His article on "Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis" (co-authored with Professor Steven Shavell of Harvard Law School) appeared in the February issue of the *Stanford Law Review*.

Professor **Byron Sher** was elected to the State Assembly in November. An environmentalist and consumer advocate, Professor Sher emphasized energy conservation and protection and consumer affairs, the area in which he specializes at the Law School, during the campaign. In 1981-82 Professor Sher will offer a seminar in Legislation at the School.

