

Stanford Lawyer

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Harvard Professor Will Be Next Dean	1
Acting Dean's Page	2
Sandra Day O'Connor: The Making of a Precedent <i>by Susan Mann and Dan Fiduccia</i>	4
The Great Medfly War: A Short Memoir of the Legal Battle <i>by Roderick E. Walston '61</i>	10
The Uncertain Course of Bank Deregulation <i>by Kenneth E. Scott '56, Professor of Law</i>	17
The Wisdom of Gun Prohibition <i>by John Kaplan, Jackson Eli Reynolds Professor of Law</i>	23
The Politics and Law of Transboundary Air Pollution <i>by Armin Rosencranz '62</i>	31
Alumni Weekend 1981	36
School and Faculty News	39
Class Notes	47
In Memoriam	73

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Cover: Portrait of Associate Justice Sandra Day O'Connor '52 by Barbara Mendelsohn

Harvard Professor Will Be Next Dean



John Hart Ely, nationally recognized constitutional law expert and Ralph S. Tyler, Jr. Professor at Harvard Law School, will become the ninth dean of Stanford Law School on July 1, 1982.

The selection of Ely was announced on November 24 by University President Donald Kennedy, who called him "an outstanding scholar with a demonstrated capacity for leadership." The unanimous choice of both the search committee and the faculty, he is the first dean chosen by a major law school from outside its own faculty in more than a decade. Ely succeeds Charles J. Meyers, who resigned last August to enter private practice. His full title will be Richard E. Lang Professor and Dean of the School of Law.

Ely is a graduate of Princeton (A.B. *summa cum laude*, 1960) and Yale (LL.B. *magna cum laude*, 1963), where he was note and comment editor of the *Yale Law Journal*. Following law school he served on the staff of the Warren Commission, which investigated the assassination of President Kennedy, and subsequently served as law clerk to Chief Justice Earl Warren. In 1965-66 he was a Fulbright scholar at the London School of Economics and Political Science.

From 1966 to 1968, Ely was an attorney with Defenders, Inc. in San Diego. In 1968 he joined the Yale law faculty as an associate professor, moving to Harvard as a full professor in 1974. He served as general counsel for the Department of Transportation in 1975-76, and in 1978-79 he was a fellow at the Smithsonian Institution's Woodrow Wilson International Center for Scholars.

A prolific scholar, Ely has been widely acclaimed for his book, *Democracy and Distrust: A Theory of Judicial Review*, the culmination of a decade's work addressed to the central problems of modern constitutional law and the role of the U.S. Supreme Court.

At Harvard, Ely has served on the law appointments committee and is credited with having had a key role in identifying and recruiting several of the five women currently in tenure track positions. He has expressed a strong interest in appointments at Stanford and sees "a clear need" to attract minority and women professors to the Law School.

Despite what will undoubtedly be a heavy work schedule, the new dean plans to teach one course each term.

Until Ely joins the faculty in July, Associate Dean J. Keith Mann will continue as Acting Dean.

Acting Dean's Page



Having failed to use up all of the "Acting Dean" stationery that was printed for me when I served in this capacity during the interregnum between Deans Thomas Ehrlich and Charles J. Meyers, I was not entirely surprised when I was called upon once again to fill this role. I can tell you that perhaps the greatest pleasure of being an Acting Dean is participating in the announcement of the appointment of the next Dean, since it not only signals that a new leader has been found for our School, but also that the Acting Dean can then turn to other duties. As I will explain, the last months have been momentous and happy ones for Stanford Law School, and I have been honored to serve during this period.

Our able Dean Search Committee, led by Professor Robert L. Rabin, conducted an extensive survey, in the course of which the Committee consulted with alumni/ae, as well as with others deeply committed to the future of the School, and proposed a candidate who won the endorsement of the entire faculty and of University President Donald Kennedy.

Professor and Dean-designate John Hart Ely emerged clearly as the ideal choice for the Deanship. Professor Ely is widely recognized as one of the leading constitutional law scholars of his generation. His output has been unusually stimulating and important. Not for almost twenty years has a book on judicial review spurred as much commentary and analysis as has his recent *Democracy and Distrust: A Theory of Judicial Review*. Along with these academic distinctions, Professor Ely earned the highest praise from top policy-making colleagues for his administrative work during the Ford Administration as General Counsel of the Department of Transportation.

With Professor Ely's appointment, Stanford Law School will be adding a valued colleague, confirming its commitment to teaching and scholarship of the highest quality, and assuring continued vitality in relations with its supporters. I am confident that "the Ely years" will be viewed with the same pride and warm feeling that we have when we consider the enduring legacy of Charlie Meyers and his predecessors—to mention those whom I have known, Deans Ehrlich, Manning, Spaeth, and Kirkwood. Dean Ely will, of course, need the same commitment from our alumni/ae and friends that has been so evident in recent years and that has been

strongly reaffirmed in the many personal letters we have received since the announcement of his appointment.

In addition to the great good fortune of the appointment of John Hart Ely, this fall has also been marked by the historic occasion of the elevation of a second Stanford Law School graduate (and second member of the Class of 1952!), Sandra Day O'Connor, B.A. '50, LL.B. '52, to the Supreme Court of the United States. Her personal and public accomplishments are reported elsewhere in this issue, but as one who has had the privilege of working with Sandra and her husband John over the years in their myriad activities in support of Stanford, I take particular pleasure in the appointment.

Universities like to claim credit for the accomplishments of those individuals who pass through their gates, and Stanford is no exception. As President Donald Kennedy has observed, one point in this regard deserves special mention, since so much attention has been paid to the fact that Justice O'Connor is the first woman to serve on the Court: Stanford has always welcomed talented individuals of both sexes into its academic life. From its founding day, the University has been dedicated to the principle that the joy of learning and the opportunity to provide service to the greater community is not the unique province of any particular portion of humanity. It is most fitting that Sandra D. O'Connor, who attended Stanford Law School at a time when other doors would have been closed to her, is the first woman to serve on the Court.

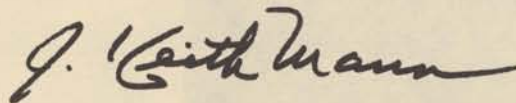
But we prefer not to be in the position of basking only in reflected glory. Rather we choose to celebrate our confidence that Justice O'Connor will not halt or be halted in her service to the Court, to the public ("that one great club to which we all belong"), and to equal justice under law.

In my Law Fund letter in October, I told you about a third happy occasion this fall: the entrance of a group of 170 first-year law students, which, as Undergraduate Admissions Dean Fred Hargadon is wont to say, is another average excellent class, chosen from over four thousand applicants. Stanford Law School has continued its record of finding classes with great intellectual homogeneity combined with great diversity in almost every other respect. I cannot say enough for their academic capabilities and the range of their interests.

Finally, we also welcomed five new regular faculty members, Professors Robert Ellickson and Robert Mnookin, together with Assistant Professors Roberta Romano, William Simon, and Robert Weisberg, whose appointments have been announced in these pages and in my prior letter. As trustees of the School's institutional future, we regard faculty recruitment as our most important business. When you come to know them, their teaching and their scholarship, we trust you will agree that we (and they!) have chosen well.

These four events—the appointment of Dean-designate Ely, the elevation of Justice O'Connor, the entrance of an outstanding first-year class, and the arrival of five new faculty members—have combined to make this autumn an especially happy time for me, my colleagues, and our School.

In addition to sharing such felicitous information with you, I want to take this opportunity to express again my abundant thanks to you for sharing your substance with us now and in the past. I know from personal experience how encouraging it will be to Dean-designate Ely to come to a School so blessed with the loyalty of its alumni/ae and friends. I express hope bordering on conviction that he will benefit from your continued support.



J. Keith Mann
Acting Dean

P.S. This time I am burning all remaining stationery.



Sandra Day O'Connor: The Making of a Precedent

by Susan Mann and Dan Fiduccia

On September 25, 1981, Sandra Day O'Connor raised her hand in Washington, D.C. and, within a few moments, made history as the nation's 102nd Supreme Court justice and as the first woman ever to sit on the country's highest tribunal. And, at that moment, Stanford Law School became the first law school to seat two members of the same class on the winged bench in the Supreme Court's colonnaded courtroom.

When President Reagan announced O'Connor's nomination, he lauded her as "a person for all seasons." In the days that followed, Reagan's nominee received enthusiastic endorsement from liberals, moderates, and conservatives alike. Indeed, with the exception of ultra-conservative groups, such as The National Right to Life Committee and The Moral Majority, support for the first female justice was nationwide. An Associated Press-NBC poll revealed that 65% of the country supported O'Connor's appointment.

When the time came for the Senate to give its crucial assessment, O'Connor was confirmed 99-0. And, with that vote, a 191-year-old tradition was broken; the brethren finally had a sister.

Who is Sandra Day O'Connor? What unique set of experiences and circumstances guided her walk into history? What will her appointment mean for the Court?

Shortly after O'Connor's nomination was announced a Presidential aide involved in the search for the first woman justice observed: "She [O'Connor] really made it easy. She was the right age, had the right philosophy, the right combination of experience, the right political affiliation, the right backing. She just stood out among the women."

Indeed, an examination of Sandra O'Connor's record and career discloses an individual with such impeccable credentials and such an amazing background that one can scarcely believe a single person accomplished it all.

Descended from pioneers, O'Connor grew up on the Lazy B, a 260-square-mile cattle ranch on the Arizona-New Mexico border. As a child, she learned to drive a tractor, ride horses, rope steers, and repair windmills. Life on the iso-

"She [O'Connor] really made it easy. She was the right age, had the right philosophy, the right combination of experience, the right political affiliation, the right backing. She just stood out among the women."

lated ranch, O'Connor has observed, taught her to be "very self-sufficient." O'Connor showed an early brilliance that prompted her parents to send her off to her grandmother's home in El Paso, Texas, in search of better urban schools.

The Stanford Years

After attending a private school, O'Connor confidently applied to one college, Stanford, at age sixteen. Despite stiff competition and lacking an entrance exam which her school had forgotten to administer, O'Connor was accepted on the strength of her high marks and many extracurricular activities.

At that time, Stanford was attracting ex-servicemen eager to take advantage of the GI bill. As one of O'Connor's classmates has noted, the GIs, who brought the average age of the class up to 22, "wanted to get on with their lives, and they took education very seriously."

O'Connor sailed through her courses, neatly completing the economics program in three years and collecting a degree (with great distinction), presidency of her dorm, membership in Cap and Gown, and the plaudits of her friends.

"The thing I remember most about her," recalls Atherton Phleger, "aside from her brilliance, was that you never thought of her as a woman because she never isolated herself in that way. She was a complete person, interested in everything and not cloistered."

Another classmate, Mary Howarth, remembers her to be "so poised, you never thought of her as being younger." Others have noted that "not only was she bright but she was lots of fun."

Having completed her economics program one year early, O'Connor applied to the Law School and was accepted under the 3-3 program, whereby the first year of law school also counted as the last year of college. To go to law school in 1950, at a time when many law schools, including Harvard, did not accept women, was something of a feat in itself. Though alumnae agree that there was no post-admission distinction made between men and women, the School was a tough place in those days. One-third of each entering class flunked out.

Beatrice Challiss Laws '52 recalls that both O'Connor and she studied very hard the first year, "concerned that we might be rolled out." But O'Connor's roommate, Catherine Lockridge Lee '53, notes, "Sandra always managed her time so she could go out socially as well as get all her work done."

Other classmates remember O'Connor as "brilliant" and "endowed with a comfortable, quiet strength." Emeritus Law Professor John B. Hurlbut, who came to know O'Connor quite well while she was a student, speaks warmly of her: "I have a very high opinion of her intellectual capacities . . . I am delighted with her appointment because I feel she is well qualified to serve on the Court."

O'Connor eventually made Order of

Sandra O'Connor Day at the Law School

October 5, Sandra O'Connor's first day as a justice of the United States Supreme Court, was officially proclaimed a day of celebration at the Law School.

Students, faculty, and staff commemorated the event by wearing a ribbon and by contributing to a new library fund established in Justice O'Connor's name. The fund will be used to purchase books relating to the Supreme Court.

In a letter addressed, "To The Students of Stanford Law School," Justice O'Connor expressed her appreciation and hailed the event as "one of the most touching" of the tributes she had received. She added,

The Law School was such a joy to me (except possibly during Dead Week). I marveled at the talents of my great professors including John Hurlbut, Lowell Turrentine, and Marion Rice Kirkwood. I developed some of the closest friends I will ever have. . . . I crammed for finals at the end of my first year with my good friend, Bill Rehnquist, next to whom I now sit and whose chambers are next to mine. I met my husband on a Stanford Law Review assignment (beware of proof reading over a glass of beer).

Beyond those personal relationships, my opportunities for service as an assistant attorney general, as a state senator and as a judge all flowed from the school you now attend.

Thus it was in this context of my indebtedness to the Law School that I received notice of your tribute.

Students responsible for the celebration included Henry Barry '83, Kenta Duffy '82, Lourdes Hernandez '84, Robert Riggs '82, and Diana VanEtten '82.

the Coif and secured a post as one of the revising editors of the *Stanford Law Review*. There she met John O'Connor, who was a year behind her. They dated for the next 41 consecutive nights. This notable achievement eventually culminated in their marriage shortly after her graduation.

The Early Years in Law

With a law degree in hand, O'Connor interviewed with San Francisco and Los Angeles firms but, as she has explained it, "none had ever hired a woman before as a lawyer, and they were not prepared to do so."

O'Connor finally located a job as a law clerk with San Mateo County District Attorney Keith Sorenson. Later, promoted to deputy district attorney, she worked on civil cases, advising county officials on government codes.

Although O'Connor worked only briefly for Sorenson, he remembers her quite well. He notes that she "was exceptionally bright, very quick at catching on to questions to be researched . . . her legal writing was exceptionally good. I tried to convince her to stay."

San Mateo attorney James Parmelee worked in the District Attorney's Office with O'Connor. He remembers her as "knowledgeable, intelligent, and a great attorney." Another former colleague from that office is Associate Justice Allison Rouse of the California Court of Appeal. "She was bright and had a great sense of humor," Rouse recalls.

Following John O'Connor's graduation in 1953, the couple spent three years in Germany, he with the Judge Advocate General's staff, and she as a civilian lawyer with the Quartermaster's Corps.

Establishing Roots

In 1957, the O'Connors moved to Arizona, where John joined the Phoenix firm of Fennemore, Craig, von Ammon & Udall*, and Sandra worked briefly as a part-time suburban lawyer before settling down to five years as a full-time housewife. During this period, their three children, Scott, 24, Brian, 21, and Jay, 19, were born.

While raising her family, Sandra be-

came involved in a number of social concerns, serving as president of the Junior League, an adviser for the Salvation Army, a volunteer at a minority school, and, most recently, a member of the board of the Smithsonian Associates.

O'Connor was also one of the few non-academics ever to serve on the Arizona panel of the American Council of Education, which seeks out and promotes women to college administrative posts. "We thought so highly of her in terms of her support for women that we invited her to sit on the panel," explains Sarah Dingham, panel coordinator and a professor at the University of Arizona.

In addition to their various state and community affiliations, the O'Connors continued to maintain strong ties with Stanford. John, well-known for his ready wit and unflagging enthusiasm, served for four years on the executive committee of the Law School's Board of Visitors and is currently serving his second year as president of the Law Fund. Sandra served on the University's Board of Trustees from 1976 to 1980. William Kimball, current president of the Board, remembers Sandra's tenure on the board: "Whenever she spoke, we all listened. She was a super person."

Two of the O'Connor children have continued the Stanford tradition. Scott graduated from the University in 1979, and Jay is presently enrolled as a sophomore.

In their private lives, the O'Connors have exhibited the same commitment to perfection that typifies their public activities. When building their home in Paradise Valley, for example, both Sandra and John helped prepare the adobe by soaking the bricks in skimmed milk, an old preparation process. Friends have described Sandra's cooking as "gourmet," and have marvelled at John's seemingly boundless repertoire of anecdotes and jokes. Former Dean Charles J. Meyers once applauded their two-step as "almost professional."

*On January 1, 1982, John O'Connor became a partner at Miller & Chevalier, a Washington, D.C. firm specializing in federal tax matters.

From Homemaker to Legislator

But brick-making and dancing, however finely done, were not enough to fill Sandra's life. In 1965, when her youngest son went off to school, Sandra decided she "needed a paid job so life would be more orderly." She joined the Arizona attorney general's staff.

She also became active in Republican politics and, in 1969, the Maricopa County Board of Supervisors appointed her to fill a vacancy in the state senate. She was elected to the seat in 1970 and again in 1972. That same year, O'Connor's Republican colleagues elected her Majority Leader, making her the first female senate majority leader in the United States.

Bill Jacquin, head of the Arizona Chamber of Commerce, was president of the senate when O'Connor was elected majority leader. He supported her for that post because "she possesses all the attributes—she does her homework, she knows how to get the proper things out of her staff."

Her colleagues were not alone in noticing O'Connor's talents. In 1971 Dickson Hartwell of *Phoenix* magazine commented, "It's doubtful if any fledgling legislator in Arizona's history contributed as much to key legislation as Mrs. O'Connor."

Her work in the senate included support of bills to remove sex-based references from state laws, to expand the number of positions open to women by removing outdated job restrictions, and to reform husband-biased community property laws. Also to her credit: anti-pollution and water control management legislation; maverick support for Medicaid, a program which Arizona alone out of the fifty states did not endorse; virtually solo opposition to state aid to private schools; support of a bill to reinstate the death penalty and of bills compelling open meetings for public agencies and reviews for mental institution inmates.

Her achievements brought the rueful admiration of her opponents. Democratic Senator Alfredo Gutierrez once commented, "She worked interminable

hours and read everything there was It was impossible to win with her. We'd go to the floor with a few facts and let rhetoric do the rest. Not Sandy. She would overwhelm you with her knowledge." He called her legislative record "a very activist civil rights record."

Her Years on the Bench

Her name was mentioned often as a potential Republican candidate for governor, but O'Connor rejected further legislative or executive offices and returned to the law, which she has called "marvelous because it is always changing."

O'Connor was elected to the Maricopa County Superior Court in 1975,

where she remained until Governor Bruce Babbitt appointed her to the state court of appeals in 1979.

On the bench, O'Connor earned the reputation for tough-minded fairness and strict literalism. She also earned the respect of those who argued before her. Phoenix attorney Alice Bendheim recalls: "O'Connor was tough on plaintiffs in personal injury cases. She was hell on lawyers who weren't prepared. And you had to say something awfully funny to get her to smile on the bench. But I liked her courtroom because you were always treated with dignity there. You always got a fair shake."

In the 1980 Arizona Bar judicial poll, she scored well in all areas except judi-



Sandra and John O'Connor with their three sons, Scott (left), Brian (right front), and Jay.

"Yale Law Professor Paul Gerwitz called her 'smart, fair, self-confident and altogether at home with technical legal issues.' Stanford's Gerald Gunther rejoiced that the Reagan administration had 'taken the high road' in filling the Supreme Court vacancy."

cial temperament and courtesy to litigants and lawyers. Her low scores in these areas probably stem from a perfectionist's impatience with incompetence: on one occasion she advised a litigant to switch to a better-prepared lawyer.

O'Connor, who referred to her occupation in an alumni questionnaire as "administering old-fashioned justice in a modern age," did occasionally tend toward tough sentencing. She imposed the death penalty on 23-year-old Mark Koch, a convicted hit man. Upon appeal, a new trial was ordered for Koch.

However, former Maricopa County Public Defender John Foreman found O'Connor to be "flexible and fair." He cited one case in which O'Connor sentenced a defendant convicted of possession of heroin and stolen property to five year's probation. The young man is now in college with a steady job.

O'Connor also gave a minimum term to a battered wife convicted in a jury trial of murdering her husband. After sentencing, O'Connor wrote to the governor urging clemency for the defendant.

As an appellate judge, O'Connor was "pretty careful and thoughtful," according to former colleague Judge Donald Froeb. While the 29 opinions she wrote on the appellate bench do not approach the intellectual and philosophical heights she will be expected to explore on the Supreme Court, the consensus is that they are scholarly and lucid, and they show considerable deference to trial judges, a principle O'Connor espouses

in an article she wrote for the Summer 1981 issue of Volume 22 of the *William and Mary Law Review*. In the article she states, "It is a step in the right direction to defer to state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court . . . We should allow the state courts to rule first on the constitutionality of state statutes." She calls for continued efforts to improve judicial selection and training processes so that federal and state judicial "parity will become less a myth and more a reality."

Justice O'Connor

What effect Sandra O'Connor will have on the Supreme Court can only remain conjecture for the present. In the storm of approval that followed her nomination, feminists cheered the choice; politicians rejoiced in a candidate acceptable to almost all political persuasions; lawyers admired her intelligence and legal acumen.

Ultra-right conservatives, however, accused President Reagan of breaking a campaign promise by appointing a "pro-abortionist." They also criticized O'Connor for being against tuition tax credits (O'Connor has been a trustee for private schools), having sponsored the Equal Rights Amendment, and being in favor of no-fault divorce.

Plaudits came from the Court—where Chief Justice Warren Burger and Justice

William Rehnquist gave warm endorsements—and from law schools. Harvard's Laurence Tribe observed, "She's entirely competent, a nominee of potentially great distinction." Yale Law Professor Paul Gerwitz called her "smart, fair, self-confident and altogether at home with technical legal issues." Stanford's Gerald Gunther rejoiced that the Reagan administration had "taken the high road in filling the Supreme Court vacancy."

Few people expect O'Connor to produce drastic changes in the Court. Like Justice Potter Stewart, her predecessor, she is likely to remain among the five on the Court who are not completely committed to any political persuasion.

Her legal abilities aside, O'Connor is certain to have other effects on the Court. Her warmth may reduce the somewhat chilly atmosphere and the tendency to be, as Justice Lewis Powell put it, "nine one-man law firms." Most importantly, every case and issue will now be subjected to a woman's perspective.

As her close friend, Sharon Rockefeller, wife of West Virginia Governor John D. Rockefeller IV, has observed: "She [O'Connor] understands very well the conflict between a woman's desires to be part of the professional world and yet to be a perfect mother and wife as well. . . . If anyone was born to be a judge, Sandra was." So it would appear that if anyone can handle the challenge of being the first woman on the Supreme Court, Sandra O'Connor can.

The background of a Supreme Court nominee has sometimes proven to be a poor predictor of how that justice would vote on landmark cases. Though it may be years before Associate Justice Sandra Day O'Connor can be classed with individual colleagues and predecessors, all indications are that the wait will not be disappointing. ■

Susan Mann spent the summer as an editorial assistant in the Office of Publications at the Law School. She is currently enrolled as a junior at Bryn Mawr.

Dan Fiduccia is a Bay Area freelance journalist. He received his B.A. from Stanford in 1979, and has worked as a publishing assistant to attorneys.

Stanford's Day in Court



University President Donald Kennedy, Justice O'Connor, Acting Dean J. Keith Mann, and John J. O'Connor III



*Above:
The new Justice receives
congratulations from
Kendyl K. Monroe '60.*



*Right: Justice O'Connor chats with
longtime friend and University Trustee,
Sharon Percy Rockefeller.*

On November 17, more than 400 University and Law School alumni and friends attended a reception for Associate Justice O'Connor at the Supreme Court Building.

Stanford University President Donald Kennedy proclaimed the occasion "Stanford's day in Court." Recalling his association with the Justice when she was a member of the Board of Trustees and he was Vice President and Provost, Kennedy said, "No one could be more confident than those of us who have known her work for Stanford that she will bring extraordinary personal qualities to the vital work of this Court."

Kennedy also credited Stanford's long tradition of providing women with equal access to higher education—a tradition established in 1895—for the many "firsts" Stanford women have to their credit. He added, "The first woman career ambassador in the United States Foreign Service was a Stanford woman. So with the first woman to serve as Secretary of HUD, and the first woman to serve as Secretary of Education."

"The message is," he continued, "that we are proud of Sandra O'Connor whose own accomplishments brought you here; but proud too that we provided an atmosphere and perhaps a set of values that gave her encouragement."

Speaking for the Law School, Acting Dean J. Keith Mann praised "the wisdom and prudence displayed by the nomination and confirmation of one of appropriate legal competence, intellect, virtue, and hard-working potential to this Supreme Court of the United States."

He added, "Cheers to you and for you, Sandra. . . . This Stanford community is meaningful to you and to us. Wherever you may be, even behind the brass gates here, you can never really leave it. You have given us, and now the nation, the treasure of yourself. I presume to thank you on behalf of us all because it is a gift shared by us all."



Barbara Mendelssohn

The Great Medfly War:

A Short Memoir of the Legal Battle

"During the early months, the Medfly infestation seemed to most laymen to be a modest scientific problem, akin to determining the social mores of the dung beetle. But as the infestation spread, the Medfly problem assumed political dimensions as panic-stricken communities argued whether the main problem was the Medfly or the pesticides needed to eradicate it."

by Roderick E. Walston

Peeing into the tent-like trap located in a citrus tree in a San Jose orchard, the young field worker spotted two tiny dead flies that looked different from ordinary flies. His suspicions aroused, he plucked them from the trap and sent them to Sacramento for laboratory analysis. He could not have known then that the tiny corpses would trigger the greatest agricultural crisis in modern California history. Or that they would lead to a bigger legal war among several states that would reach the United States Supreme Court.

The flies, laboratory analysis confirmed, were Mediterranean fruit flies, a dreaded species popularly known as the Medfly. A native of Italy, the fly thrives on certain types of fruits and vegetables, causing them to become discolored and mushy. And, with a reproductive capacity that would have daunted Malthus, the female can produce as many as 100 generations in a few weeks, thus laying waste an entire agricultural area within months.

Now the Medfly had migrated to Northern California and threatened to destroy the heart of the nation's agricultural economy.

During the early months, the Medfly infestation seemed to most laymen to be a modest scientific problem, akin to de-

termining the social mores of the dung beetle. But as the infestation spread, the Medfly problem assumed political dimensions as panic-stricken communities argued whether the main problem was the Medfly or the pesticides needed to eradicate it. Not surprisingly, the urban dwellers of San Jose viewed the problem differently from the anxious farmers of the Central Valley.

Eventually, as often happens in our litigious society, all eyes turned to the courts for the answer. Since California's interests were affected in several different ways, the Attorney General's office was soon thrust into the middle of the controversy.

As senior attorney, I was selected to head the task force assigned to the project. We were quickly hit by lawsuits from all sides, and I began to feel like Custer at Little Big Horn. Unlike Custer, however, I have survived to write my memoirs. They now follow.

The Battle with the Southern States

The Medfly legal battle began on a Wednesday in February 1981, when I received an urgent telephone call from a high California agricultural official. He informed me that a quarantine was

being threatened by one "Reagan V. Brown." Since I could not imagine why the President would sue our Governor over a quarantine, I quickly suspected an inter-office prank. He went on to explain that Reagan V. Brown was not a lawsuit, but a Texas agricultural commissioner who was threatening to embargo California produce in response to the worsening Medfly crisis.

While it was clear that California had a serious problem, it appeared to us that Texas was overreacting to it. Since the infestation was confined to a relatively small area in Northern California, we reasoned, it made little sense to embargo produce grown all over California, particularly hundreds of miles from the infested area. A proper quarantine, it seemed, should be tailored to the biological area of infestation, not California's artificial political boundaries.

Both California and the U.S. Department of Agriculture (USDA) had already adopted quarantines that included the biological area of infestation, plus a larger surrounding buffer zone. This, we thought, was the proper response to the crisis.

We quickly resolved to bring an action against Texas in the U.S. Supreme Court, under the Court's original jurisdiction. A suit by one state against another state can *only* be brought in the Supreme Court; the Court's jurisdiction is both original and exclusive in such cases.¹ The Supreme Court often declines to hear such cases, however, on grounds that the plaintiff state is actually representing private economic interests, not the sovereign interests of its people. Which interests, we asked ourselves, are we representing here?

We decided that Texas' quarantine affected California's sovereign interests, not just private agricultural interests. We reasoned that the agricultural industry, as the largest industry in the State, is a mainstay of the State's economy. It provides the basis for many other industries, such as the retail, food processing, and transportation industries. It sustains, directly or indirectly, about one of every three jobs in California. California's own sovereign interests were at stake, and Texas should thus be held to answer before the nation's highest court.

“When a stewardess asked what was in the boxes, I replied, ‘A Supreme Court suit.’ She said that I could hang it at the front of the plane. I politely demurred, as I expected Texas to do.”

We worked virtually around the clock for the next few days, aided by a large support staff. Since Texas’s quarantine was already in effect, we were under pressure to file our papers as soon as possible. We prepared a motion asking the Court to take the case. And, we prepared a brief arguing that the Texas quarantine was preempted by the USDA quarantine,² which applied only to a small part of Northern California. We also argued that the Texas quarantine unreasonably burdened interstate commerce. Finally, we prepared an application for temporary restraining order (TRO). Since the Court is rarely, if ever, called on to issue a TRO, we were operating near the edge of the legal frontier.

Thanks to the miracle of modern word-processing machines, we finished quickly, at about 6 p.m. on Monday night. I wheeled the finished product to the San Francisco airport in two large boxes, in time to catch the “redeye special” that departs promptly at midnight. Afraid that the boxes might otherwise greet the dawn at some distant foreign airport, I took the boxes directly on the plane with me. When a stewardess asked what was in the boxes, I replied, “A Supreme Court suit.” She said that I could hang it at the front of the plane. I politely demurred, as I expected Texas to do.

After arriving at Washington’s National Airport the next morning, I waded through the assembled press corps at the Supreme Court Clerk’s office, pre-

cisely at 10:30 a.m., and deposited the required 60 copies on the Clerk’s desk. The reporters fought over the remaining copies. Glancing anxiously at their watches, they asked me a series of rapid-fire questions in the corridor, then ran off to write their stories under pressure of encroaching deadlines.

The Court, I learned, was quite aware of the case, and had been awaiting our papers. At its next Friday conference it voted, 6-3, to issue a TRO against Texas. The order was not announced until the following Monday, however. In the meantime, Texas—in an agreement worked out with the USDA—had withdrawn its quarantine. The Court then asked for briefs on the question of whether the matter was now moot. We argued that the Court should defer ruling on this question. After all, we reasoned, we had not yet licked the Medfly, and Texas might adopt a new quarantine at a later date. The Court disagreed. It declined to review the matter, without prejudice to our right to file a new action if Texas adopted a new quarantine. Still, having obtained a TRO from the Supreme Court, we believed that we had mightily discouraged other states from following Texas’s example.

We were wrong. A few months later, while vacationing near Ensenada, Mexico, I read that several southern states, following the lead of the ubiquitous Mr. Brown of Texas, had adopted new quarantines as a result of the worsening Medfly crisis. The new quarantines were

more sophisticated than the old one: instead of embargoing all California produce, the quarantines embargoed only California produce coming from an area with insufficient detection traps. Whether an area had insufficient detection traps was to be determined, of course, by the southern states. It was difficult to argue with the idea that sufficient traps were needed to detect the insect’s movement. But California and the USDA had already agreed on the number of traps that were necessary for that purpose. Indeed, the number of traps insisted on by the southern states was far greater than all the traps then in existence. Thus, the southern states were again embargoing California produce. Once again, we decided to go to the Supreme Court to overturn the quarantines.

We dusted off the papers that had been filed in the earlier case, adapted them to the new situation, and filed them in the Supreme Court. Two of the southern states, Alabama and South Carolina, quickly backed off, changing their quarantines to parallel the one adopted by California and the USDA. The other two states, Texas and Florida, were then sued in the district courts of both states by California agricultural interests. We appeared in an amicus capacity in both actions, providing voluminous briefs and lengthy exhibits in support of the California interests.

We were successful. The district courts of both states issued TROs against the quarantines, largely on grounds that the quarantines were preempted by the USDA quarantine. In short, some states’ quarantines had been withdrawn; the others had been enjoined by lower courts. There was little reason for the Supreme Court to act, and to date it has not.

During this period, our attorneys were flying all over the country, plugging their fingers in many distant dikes. When Medflies were found in the Central Valley, Texas asked the district court to vacate its TRO. While in Texas checking on this dike, I met Reagan V. Brown, the Texas agricultural commissioner who was masterminding the southern states’ strategy. A bluff, personable man, Mr. Brown was certainly on home turf

when, in response to a question posed by a Harvard-accented cross-examiner, he said, "You'll have to speak up son. I don't hear Yankees too well." The district judge chuckled, but refused to vacate his TRO.

We had thus stopped the southern states in their effort to embargo California produce as a weapon in the Medfly war. Any quarantine must achieve a fair balance between the need to stop the infestation and the human and economic needs of those who live and work in or near the infested area, with the primary goal being to stop the infestation. Our quarantine, we thought, achieved a fair balance by stopping the Medfly's advance with minimum effect on those who grow crops near the infested area. The southern states, attempting to protect their agricultural economies above everything else, would probably have struck a different balance. Only time will tell who was right.

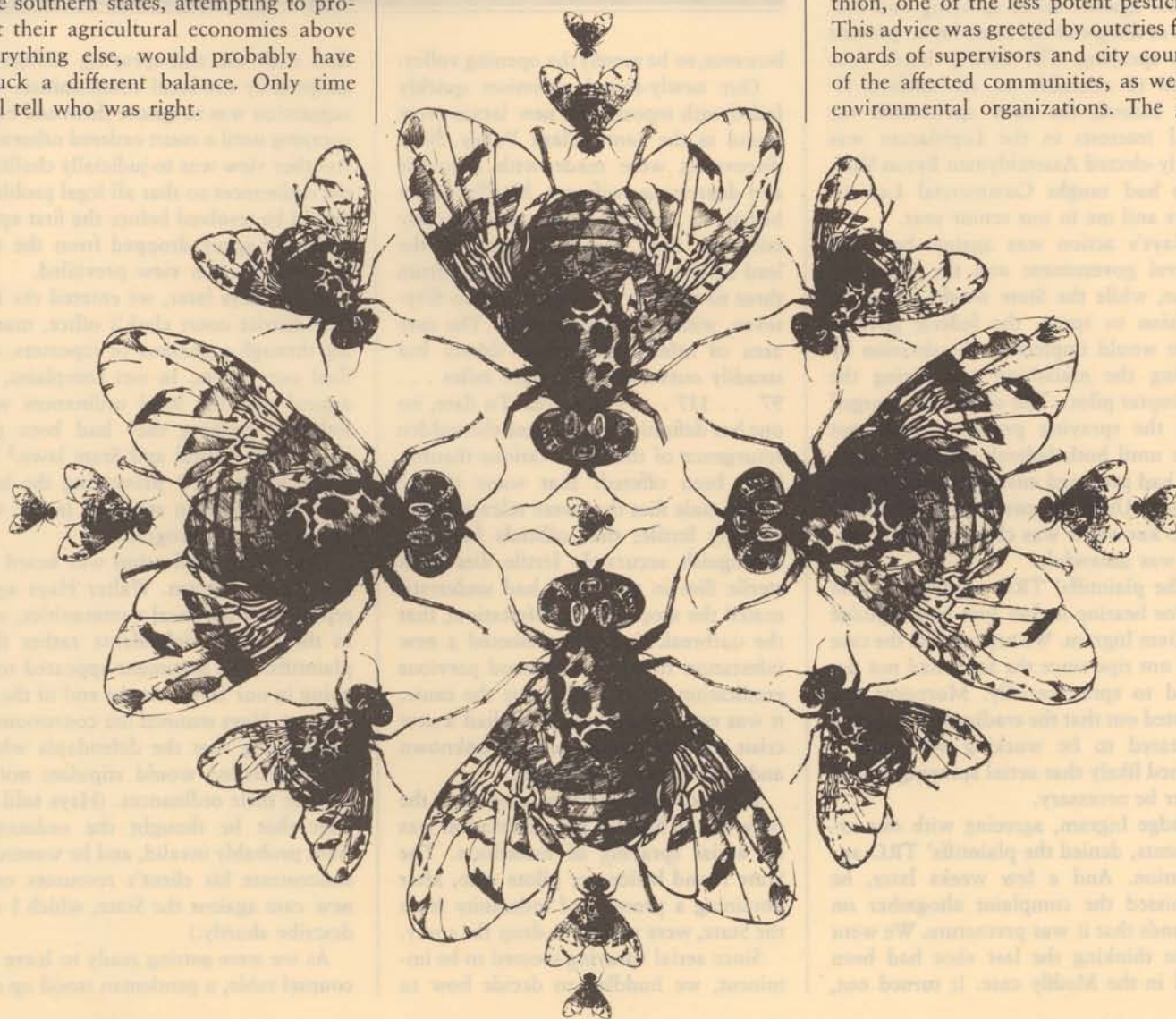
The Aerial Spraying Controversy

Although we had protected California's economic interests in interstate markets, the Medfly crisis continued. We had provided an economic shield, but a technological sword was still needed. The sword, as it turned out, consisted of an aerial bombardment campaign featuring the chemical malathion.

On Christmas Eve, 1980, when it became apparent that the Medfly was spreading, the Governor declared a state of emergency. Many state agencies leapt into action. Members of the California Conservation Corps stripped fruit trees

that could serve as hosts to the Medfly. Later, under threat of penal sanctions provided under the Governor's emergency decree, residents in communities in the infested area joined in the fruit-stripping operations. Employees of the California Department of Transportation sprayed chemicals on the ground to kill the larvae entering the soil and the adults emerging from the pupae. Millions of sterile male flies were released each week to mate with fertile female flies in an effort to break the insect's reproductive chain.

Yet, despite these efforts, many entomological experts declared that the battle against the Medfly was being lost. The only effective weapon, they said, was aerial application of malathion, one of the less potent pesticides. This advice was greeted by outcries from boards of supervisors and city councils of the affected communities, as well as environmental organizations. The gov-



erning bodies of several cities, and Santa Clara County, adopted ordinances prohibiting aerial spraying on grounds that malathion posed a significant threat to public health.

Widespread opposition (combined with the fact that the Medfly hibernates in the soil during the winter and would not be as vulnerable to the spraying) persuaded state officials to refrain from aerial spraying at that time.

A few months later, in early April, I received a telephone call from my old friend and former classmate, Walter Hays '61. Although assuming that Hays was calling about the class reunion that was scheduled for later in the year, I soon learned that he was representing the communities that had adopted ordinances against aerial spraying and that he was filing suit the next day to prevent such spraying. The Medfly battle thus began to resemble an all-Stanford affair. Indeed, the chief spokesman for local interests in the Legislature was newly-elected Assemblyman Byron Sher, who had taught Commercial Law to Hays and me in our senior year.

Hays's action was against both the federal government and the State because, while the State would make the decision to spray, the federal government would implement the decision by buying the malathion and hiring the helicopter pilots. The complaint charged that the spraying program could not start until both federal and State agencies had prepared environmental impact reports. Until the environmental effects were known, it was charged, the spraying was unlawful.

The plaintiffs' TRO application was set for hearing in San Jose before Judge William Ingram. We argued that the case was not ripe since the State had not decided to spray aurally. Moreover, we pointed out that the eradication program appeared to be working well and it seemed likely that aerial spraying would never be necessary.

Judge Ingram, agreeing with our arguments, denied the plaintiffs' TRO application. And a few weeks later, he dismissed the complaint altogether on grounds that it was premature. We went home thinking the last shot had been fired in the Medfly case. It turned out,

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however, to be merely the opening volley.

Our newly-found optimism quickly faded with reports that new larvae were found in the Santa Clara Valley. New discoveries were made with dramatic and depressing swiftness. Medfly stories began to appear at the end of daily telecasts; they eventually became the lead stories. Larval finds increased from three to thirteen to twenty-nine to fifty-seven, with no ceiling in sight. The core area of infestation bulged slowly but steadily outward—47 square miles . . . 97 . . . 117 . . . and so on. To date, no one has definitively explained the sudden resurgence of the flies. Various theories have been offered: that some of the sterile male flies that were released were actually fertile; that officials failed to distinguish accurately fertile flies from sterile flies in traps and had underestimated the scope of the infestation; that the outbreak simply represented a new infestation that had withstood previous eradication efforts. Whatever the cause, it was now apparent that we had a new crisis on our hands, one of unknown and frightening proportions.

Entomologists quickly agreed that the only way to halt the new infestation was by aerial spraying of malathion. The State found helicopter pilots who, after obtaining a promise of indemnity from the State, were willing to drop the spray.

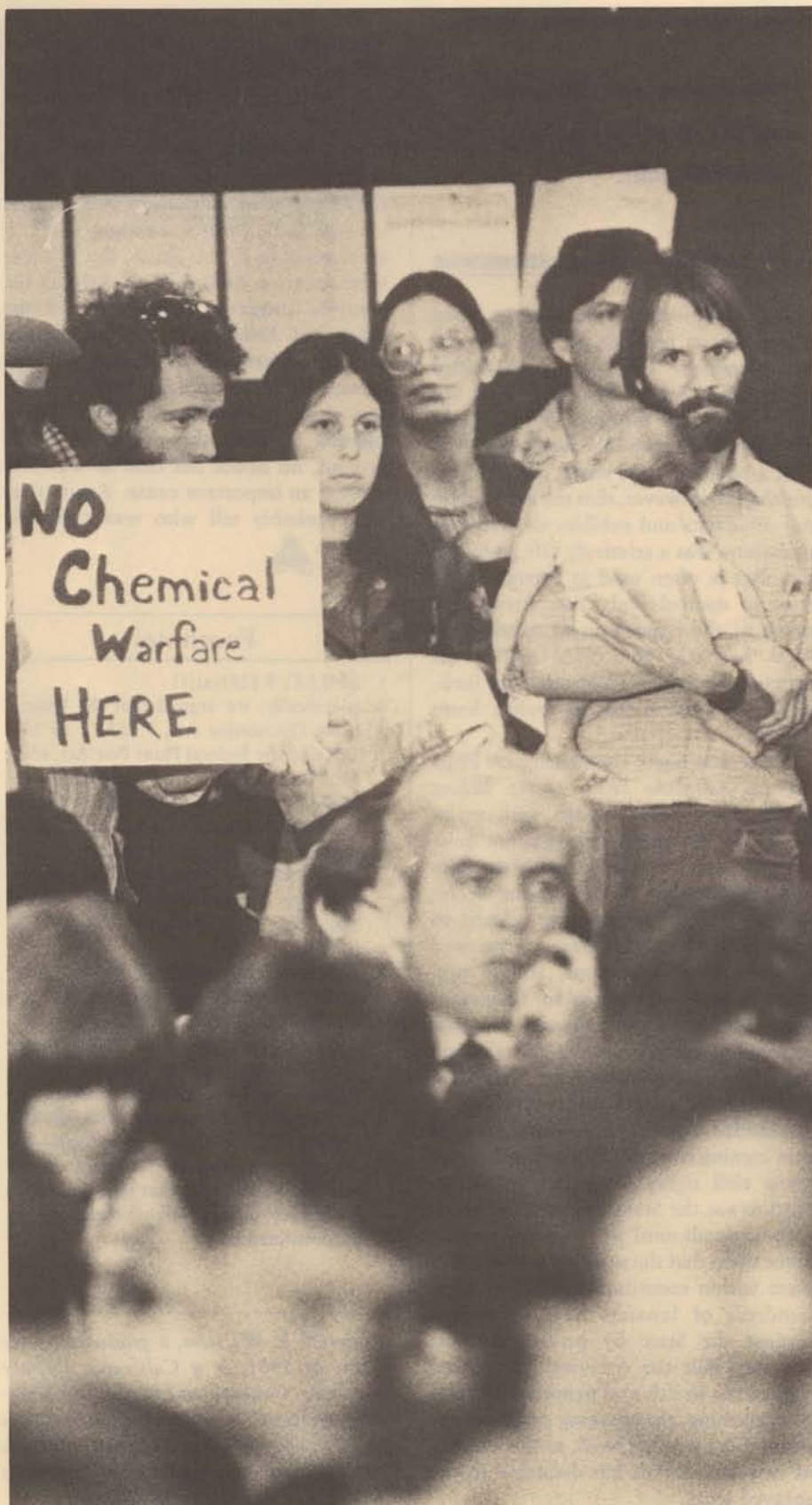
Since aerial spraying seemed to be imminent, we huddled to decide how to

deal with the anti-spraying ordinances adopted by the local communities. One suggestion was to ignore them and begin spraying until a court ordered otherwise. Another view was to judicially challenge the ordinances so that all legal problems would be resolved before the first application of spray dropped from the sky. Fortunately, this view prevailed.

A few days later, we entered the federal district court clerk's office, marching through a phalanx of reporters, and filed our papers. In our complaint, we argued that the local ordinances were unlawful because they had been preempted by federal and State laws.³ We asked for a TRO preventing the local communities from standing in the way of the spraying program.

Our TRO application was heard before Judge Ingram. Walter Hays again represented the local communities, now in the role of defendants rather than plaintiffs. The argument appeared to be going in our favor. At the end of the argument, Hays stunned the courtroom by announcing that the defendants whom he represented would stipulate *not* to enforce their ordinances. (Hays told me later that he thought the ordinances were probably invalid, and he wanted to concentrate his client's resources on a new case against the State, which I will describe shortly.)

As we were getting ready to leave the counsel table, a gentleman stood up and



Peninsula Times Tribune

announced that he represented the City of San Jose, and he would not enter into the stipulation. The argument resumed. The San Jose attorney argued that the judge should throw out the case against San Jose, because no new flies had been recently found in San Jose and thus the State was not planning to spray San Jose. The judge looked thoughtful on the latter point, and asked for my response. As I was responding, the San Jose attorney approached the lectern and announced that, according to a wire dispatch just handed to him by a reporter, the Governor had apparently decided *not* to spray aerially. The courtroom was again stunned. If this is true, I said, there is no need for a TRO. After confirming the dispatch, I withdrew the TRO request.

Two days later, I was in Sacramento at the request of the Assembly, which had convened as a Committee of the Whole for the apparent purpose of overriding the Governor's decision. I was about to testify when the Governor announced that the federal government was threatening to quarantine the entire State of California. He had decided, therefore, to begin aerial spraying.

My office immediately called Judge Ingram to have our TRO request placed back on his calendar. (The Judge was at home in Palo Alto stripping his fruit trees.) Two hours later, we were back in San Jose, appearing before Judge Ingram. I reported that a fertile Medfly had been discovered in San Jose, and disavowed that I had planted it. The Judge, ignoring my feeble attempt at humor, simply jotted down the comment. He then enjoined San Jose from enforcing its anti-spraying ordinance.

The legal fight was not over. Three days before the spraying was to start, Hays filed a new action to stop it. Since the State rather than the USDA had hired the helicopter pilots, the federal involvement in the spraying program had largely ceased; so Hays filed his new action only against the State, in State Superior Court in San Jose. In the new action, Hays argued that the spraying program was beyond the State police power, because of the public health dangers posed by malathion. Also, he argued that the State could not spray with-



out preparing an environmental impact statement. The latter question was left unanswered when the federal judge had dismissed the earlier action on ripeness grounds. The question was certainly ripe now. But we argued that an environmental impact statement is not required in emergencies such as the Medfly crisis, because the statement cannot be prepared before the necessary action must be taken.

The plaintiffs' TRO request was set for hearing before Judge Bruce Allen on Monday morning, just hours before the spraying program was to begin. As I walked into the courtroom that morning, I encountered one of the most astonishing sights of my professional life. The entire jury box was filled with electronic media bearing the logos of national networks; the courtroom was filled with journalists. Reporters encircled the lawyers at every opportunity.

In his opening statement, Hays argued that malathion is potentially dangerous to public health. It can trigger reactions in certain individuals, he said, and is a potential cause of cancer, mutations and birth defects. He further argued that the new infestation was caused by the accidental release of fertile flies from Peru, not from a breakdown of the overall eradication effort. Therefore, he concluded, the State should continue with its safe ground spraying program rather than inaugurate a dangerous aerial one.

In reply, I argued that malathion does not pose any significant risk to the public health, according to the weight of scientific evidence. I also pointed out that the dosage used would be extremely small to minimize even further any possible health risks. Since the chemical had been used in the ground spraying for several months without incident and had also been used in aerial programs in other states without apparent health problems, I argued that there was no evidence to substantiate any claims of significant risk to public health.

Turning to Hays's suggestion that conventional ground spraying could arrest the spread of infestation, I likened that to "trying to put out a prairie fire with garden hoses." "The hour is short," I concluded, "for the laws of biology do not follow the laws of man."

**"Whether or not the spray
licks the Medfly, nothing else
apparently will."**

Eager to move the proceedings along as quickly as possible, we did not call any witnesses. The hearing concluded promptly at 5 p.m. The courtroom fell silent. The judge then said that he would stop aerial spraying if he were convinced that a single person might get sick. He concluded, however, that the evidence in our affidavits and exhibits showed that malathion was a relatively safe pesticide, one that is often used in foreign countries to control body lice. Attributing much of the opposition to spraying to local "hysteria," he decided to allow the spraying to begin, while retaining jurisdiction to ensure that no public harm results.

Later that night, the helicopters lifted off on schedule from secret hiding places, their booms laden with malathion. But the legal battle was not quite over, for new crises occurred in the days and months that followed. The Secretary of Defense temporarily refused to allow federal military bases to be used for helicopter operations, so we prepared a new legal action to "commandeer" San Jose's civic airport; San Jose relented at the last minute and allowed use of its airport. Later, the California Highway Patrol set up roadblocks at quarantine borders, and seized fruit in cars coming from Medfly-infested areas; some civil rights organizations threatened to sue the State on Fourth Amendment grounds until we were able to convince them that the searches and seizures were within constitutional limits. Also, hundreds of lawsuits have been filed against the State by private citizens, claiming that the spraying has caused damage to health and property. In spite of everything, the spraying program appears to be working well, as the number of new larval finds has dwindled in the sprayed areas.

Reflecting on the history of the Medfly legal fight, no one could have imagined the many Odyssean turns and detours that it would take. We have won all our legal battles, but biological victory still eludes us at this writing. From a personal perspective, the lawyer who argues on behalf of an important social cause in which he firmly believes earns a great reward. In this sense, the rewards were great on both sides. In helping the spraying program literally get off the ground, I believed that I had helped serve an important social cause. Whether or not the spray licks the Medfly, nothing else apparently will. Walt Hays, fighting to keep the program on the ground, no doubt felt that he was also serving an important cause. Again, time will probably tell who was right. *Sic semper.*



Footnotes

1. 28 U.S.C. § 1251(a)(1).
2. Specifically, we argued that the Federal Plant Quarantine Act, 7 U.S.C. §§ 151-167, and the Federal Plant Pest Act, *id.* at §§ 150aa-150jj, which authorize the USDA to adopt quarantines with respect to new and dangerous pests, prohibit the states from adopting quarantines that are more restrictive than the USDA quarantine. See *Oregon-Washington R.R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926).
3. We argued that, under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-316y, Congress has provided for exclusive regulation of pesticide use by federal and state agencies, and has withheld such regulatory control from local agencies. We also argued that the Governor exercises exclusive power when he declares a state of emergency, and thus that the Governor's emergency proclamation preempted the local ordinances.

Roderick E. Walston, a graduate of the Class of 1961, is a California Deputy Attorney General and heads the Environment Section in San Francisco. He is the lead attorney representing California in litigation involving the Mediterranean fruit fly crisis.

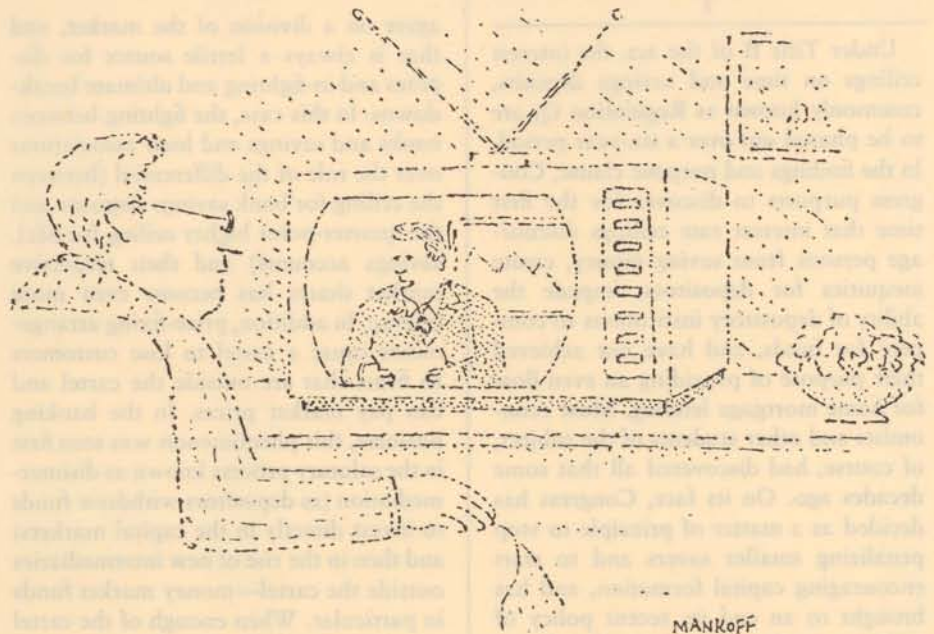
The Uncertain Course of Bank Deregulation

by Kenneth E. Scott

In many quarters there is a belief—be it hope or fear—that a mood of deregulation is sweeping the country. A prime candidate for such a movement would certainly be the banking business—one of the first industries in the United States to be regulated and by now probably the most thoroughly and extensively regulated of all. And in fact 1980 did see the enactment of the Depository Institutions Deregulation and Monetary Control Act. That title is something of an exaggeration, however, and the prospects for deregulation in the banking business are far from clear.

Most of the intricate mass of bank regulation is left quite untouched by the 1980 act. The cumbersome and outmoded tangle of provisions dealing with portfolio regulation is preserved intact. Truth-in-lending was simplified, if that is the proper word, by another twenty pages of statutory enactment. And reserve requirements were extended to all banks and to thrift institutions (mutual savings banks and savings and loan associations) in the most sweeping expansion of federal regulation in that domain since 1913.

What the 1980 act does represent is a dismantling of the anticompetitive cartel structure that was created by the Banking Act of 1933. The Banking Act, in a manner consistent with the economic thinking that characterized that period, sought to deal with the problems of the depression by creating an industry cartel to divide markets and fix prices, in the



"On Wall Street today, news of lower interest rates sent the stock market up, but then the expectation that these rates would be inflationary sent the market down, until the realization that lower rates might stimulate the sluggish economy pushed the market up, before it ultimately went down on fears that an overheated economy would lead to a reimposition of higher interest rates."

name of preventing that excessive competition which was seen as the major cause of business failure and economic depression. In essence, the Banking Act of 1933 undertook to create a buyers' cartel among banks, restraining competition among them for demand deposits and for time and savings deposits. Under the cartel the maximum rate of interest payable for time and savings deposits was to be established through the regulatory agencies, the Federal Reserve Board, and the Federal Deposit Insurance Corporation (FDIC), while the maximum rate to be paid on checking accounts was fixed in the law itself, at zero. The 1980 deregulation act memorializes, more than anything else, the collapse of this cartel.

I

Under Title II of the act, the interest ceilings on time and savings deposits, commonly known as Regulation Q, are to be phased out over a six-year period. In the findings and purpose clause, Congress purports to discover for the first time that interest rate ceilings discourage persons from saving money, create inequities for depositors, impede the ability of depository institutions to compete for funds, and have not achieved their purpose of providing an even flow for home mortgage lending. Most economists and other students of the subject, of course, had discovered all that some decades ago. On its face, Congress has decided as a matter of principle to stop penalizing smaller savers and to start encouraging capital formation, and has brought to an end its recent policy of trying to make savers subsidize home mortgage borrowers.

Why did Congress take this step in 1980? It is not, I would suggest, because its members gained economic insight previously denied them. Instead, it is because the buyers' cartel created by the Banking Act had largely disintegrated, and for the usual reasons. Cartel members have a laudable tendency to cheat on each other by deviating from the established price. In this case, they have been offering premiums and finder's fees and free services for years. Along with fixing prices, cartel members have to

“Though it is under severe strain, therefore, the savings account cartel is not yet definitively broken, and the struggle continues. The S & Ls want to preserve their rate differential, which is why the banks have concluded that on balance they want out of the cartel.”

agree on a division of the market, and that is always a fertile source for disputes and in-fighting and ultimate breakdowns. In this case, the fighting between banks and savings and loan associations over the role of the differential (between the ceiling for bank savings deposits and the quarter-point higher ceiling for S&L savings accounts) and their respective market shares has become even more intense. In addition, price-fixing arrangements cause a cartel to lose customers to firms that are outside the cartel and can pay market prices. In the banking business, this phenomenon was seen first in the salutary process known as disintermediation (as depositors withdrew funds to invest directly in the capital markets) and then in the rise of new intermediaries outside the cartel—money market funds in particular. When enough of the cartel members conclude that their arrangements are no longer beneficial, they will break up. Since this cartel was originally achieved through legislation, its breakup takes the form of a repeal of that legislation.

But the outcome here is not yet free from doubt. Some members of the cartel hope that it can still be patched up—that the dissidents can be forced back into line, that the controversy over the differential and market shares can be resolved, and that outside competitors such as money market funds can be brought under control or forced into the

cartel also. On the one hand, Title II calls for the elimination of Regulation Q, but on the other hand, it extends rate control authority for six years—the longest extension it has received since the new era of 1966 when S&Ls, which were then outside the cartel and had been vigorous competitors, were brought within the cartel by legislation.

Though it is under severe strain, therefore, the savings account cartel is not yet definitively broken, and the struggle continues. The S&Ls want to preserve their rate differential, which is why the banks have concluded that on balance they want out of the cartel. At the very least, the S&Ls would like to shift the phase-out regulatory authority from the Depository Institutions Deregulation Committee, where their representative is in a minority, to the more favorable setting of the Federal Home Loan Bank Board acting alone or through a veto. Both the banks and S&Ls agree that the money market funds should be hobbled, because the funds are paying market rates to smaller savers—the supposed objective of Title II. “Housing,” of course, serves in its customary role as the rationale for all of this.

The second major feature of the 1980 act was the authorization of nationwide NOW accounts in Title III, otherwise known as the Consumer Checking Account Equity Act. The enactment of this title commemorates the well nigh total

collapse of bank control over checking accounts. Back in 1933 banks had a legal monopoly over checking, so that when the Banking Act of that year fixed the rate of return on checking accounts at zero, there were no firms outside the cartel in a position to undermine it. But the product monopoly eroded over time, as other financial institutions developed close substitutes for checks, which they proceeded to do when it became highly profitable. Checking account balances became very valuable when market interest rates started climbing well above the old 2 to 4 percent levels that characterized much of the period from 1933 to 1964. From the late 1960s through the 1970s, market rates moved to ever higher levels, and other financial institutions started devising ways to attract checking account business. The mutual savings banks came up with negotiable orders of withdrawal (NOW) as a device for converting savings accounts into a species of checking account, and in 1972 won a court battle over its legality. In the last years of the 1970s, the S&Ls started offering bill-paying services and affording immediate and easy access to savings account balances through remote service units, while credit unions devised share draft accounts and money market funds began making withdrawal orders or pay-through drafts available to their customers also. All of these check substitutes have one element in common—they pay a higher rate of interest than zero. In an attempt to hold their market shares against such competition, banks developed automatic transfer services and zero balance checking, with the approval of their regulatory authorities.

By the end of the decade, this aspect of the 1933 cartel was in ruins: banks no longer had a monopoly on checking accounts, and there was widespread payment of interest on checking account balances. The U.S. Court of Appeals for the District of Columbia Circuit, with its usual economic acumen, briefly propped up the crumbling cartel by its 1979 decision in *ABA v. Connell*, which invalidated the entire decade of financial innovation. But the weight of political force was now outside the cartel, and Congress overturned the court of appeals' decision in Title III of the 1980 act,

by authorizing all of the various substitutes for checks and extending NOW accounts nationwide. Thus, in substance if not in technical form, the prohibition against paying interest on demand deposits was repealed in the 1980 act for individuals (although not yet for businesses).

II

It should not come as a surprise that the 1933 bank cartel disintegrated, for cartels are inherently difficult to maintain, but one may still ask why that occurred in 1980 rather than earlier or later. One can seek explanations on many different levels, ranging from the vagaries of political personalities and end-of-session maneuverings to broad trends that work throughout the economy. The latter are the more relevant to my inquiry here, and I want to emphasize two major forces.

The most important single factor bringing matters to a head by 1980 was the Federal Reserve Board's conduct of monetary policy and the resulting inflationary swings over this decade that drove nominal interest rates first to the 10 percent and then to the 20 percent level. To put it another way, the effect of inflation is to drive down the real interest ceiling that is imposed by a fixed nominal rate, such as 5¼ percent or 0 percent. The ceilings become negative in real terms, so that depositors are paying the depository institution to take their money. So when nominal interest rates are going up, fixed ceilings become ever more costly to depositors. Concomitantly, there are created strong financial incentives to find a way around the ceiling. That is precisely the situation that characterized the decade of the 1970s, and in particular the last two years.

Second, the destruction of the cartel was assisted by another development that started to be felt in the 1970s—namely, the technological advances that are lumped under the acronym EFT (electronic funds transfer). The products and markets of depository institutions, like those of any industry, reflect existing technology. As the production costs of banks and the access costs of their

customers change, so will the structure of the industry.

For example, branching was not an important issue in nineteenth century banking. Some banks had branches, but most did not, and nobody much cared. The subject was not even mentioned in the National Bank Act of 1864. There was no particular advantage to branching, beyond a small distance at most, at a time when communication and travel were slow and expensive. That state of affairs changed beginning around 1910 and especially after 1920, under the impact of the telephone and automobile. These technological advances lowered transportation and communication costs for banks and their customers and thereby expanded banking markets and increased scale economies in banking.

The electronic and computer revolution that began after World War II and accelerated in the 1970s is having a similar impact. Geographical markets in banking have again expanded and economies of scale have again increased. These technological advances have helped destroy the product monopoly and market division structure created by the Banking Act of 1933. Non-banks can offer demand deposit and check substitutes over a wide area through EFT networks, consisting at this point mostly of automatic teller machines (ATMs). The Federal Home Loan Bank Board has aided this process by encouraging the deployment of remote service units.

III

Against this background, what may we expect in the 1980s? Predictions are always hazardous. The most dismal part of the dismal science of economics is its forecasting record, and certainly lawyers can claim no comparative advantage in this exercise. Let me plunge ahead, however, exploring the implications of two premises. First, the economic trends of the 1970s have not yet spent their force or had their full impact. Second, the provisions of the 1980 act become a new factor, its own effects.

Beginning with the first, should we regard high and volatile rates of inflation as a thing of the past, to disappear under

the new administration and the new Federal Reserve Board? Perhaps, but we have heard those claims before. What if the future is like the recent past? It is clear that enormous strains are being placed on thrift institutions, under their inherent imbalance between the maturity structures of their assets and their liabilities. Two types of responses are to be expected: (1) For some time there have been efforts to reduce that maturity imbalance, by affording thrift institutions more short-term assets and more long-term liabilities. Indeed this trend is visible in the 1980 act itself. Title IV allows federal S&Ls to invest in consumer loans, commercial paper, and corporate debt securities. These measures are economically sound and desirable, but bit by bit they move thrift institutions from being an intermediary confined to housing investments to being more of a broad-spectrum financial intermediary. Since that undermines its proven formula for political success, the thrift industry is less than wholeheartedly enthusiastic about such measures. (2) Efforts are being made to shelter thrift institutions from the forces of competition or to obtain subsidies for them, at the expense of savers or taxpayers. Examples are the industry's drive to hamper money market funds, to maintain or enlarge its rate differential, and to obtain an increased income tax exemption for savings account interest. It is all supposed to be justified in the name of helping housing or helping the poor, even if the supporting arguments and evidence seem thin. There is very little reason to believe that deposit rate ceilings result in lower borrowing costs for home buyers, for example, and even if they did, it would be a grossly inefficient way to help the poor. What rate ceilings do ensure is that the poor shall not earn market rates on savings. But in Congress, it does not matter if the arguments do not hold up, so long as the political coalition does.

Both types of efforts serve the interests of thrift institutions, and no doubt the industry will try to have it both ways—seeking expanded investment authority and greater fund-raising flexibility, while also seeking legal shelter from competition and various forms of government

assistance in the name of housing. But in the long run, the first strategy undercuts the second, as it takes thrift institutions more and more in the direction of being a general intermediary and away from being a mere housing prop. A continuation of this process should ultimately lead to the dominance of the first strategy, which is the only way the thrift institutions can overcome their structural unsoundness.

The other economic force that I mentioned was the growth of EFT technology. So far, we are not even close to realizing the full potential of EFT. There are in place relatively small networks consisting of dozens or hundreds of ATMs, but the maximum savings from this technology will come from networks consisting of thousands of point-of-sale (or even home) terminals. As this evolution continues, scale economies and geographical banking markets are again being increased. The remaining pieces of the old bank cartel—the barriers to competition in natural market areas—will come under increasing assault. Unit banking laws, and the notion that there is something terrible about bank competition across state lines, seem sure to be effectively undermined or completely eliminated before the decade is out.

Adding to these economic forces will be the effects of the 1980 act itself. A number of its features point toward more competition and lower profits for the isolated or monopoly bank. As we have noted, the checking account monopoly of banks has ended *de facto* if not *de jure*; S&Ls, mutual savings banks, and credit unions have now entered the field, while money market funds, brokerage firms, and national retailers are poised on its outskirts. At the same time, the ban on the payment of interest on demand deposits has also ended, except for business deposits. (The latter prohibition was never really significant, since it was more easily circumvented. But even this last remnant of the interest prohibition is not likely to survive.) The natural geographic market areas for banking services are expanding, which means more competition from other banks, as well as from S&Ls and credit unions which are not hobbled by a counterpart of the branching limitations imposed on na-

tional banks by the McFadden Act. Small state banks in particular, which have historically not been members of the Federal Reserve, will now experience a new tax through the form of the mandatory reserve requirement imposed on them by the 1980 act. All of these factors will come together with increasing force, bearing particularly upon those banks that have heretofore been the most sheltered from competition.

The 1980 act also brings S&Ls into a much more competitive environment. The protection afforded them by interest rate ceilings and their cherished differential are on the way out, or so we are told. Their investment powers are increased, but the markets that they will be entering are already in most instances highly competitive. And their forays into the world of transaction accounts will now likewise be burdened with a reserve requirement. Meanwhile, inflation has devalued their mortgage portfolios, creating solvency problems quite apart from the effects of Regulation Q or its elimination.

IV

When one puts this all together, what impends? Some major trends seem clear. First, our artificially balkanized banking structure will move toward a more efficient configuration, with fewer firms, of substantially larger average size, operating within natural market areas. That does not mean that small banks will vanish or that only a handful of giants will survive. It does mean, however, that many existing firms will disappear. The nonprice competition for deposits that has marked much of the last two decades has led to overinvestment in branch capacity for many institutions; the liquidation of that excess capacity is sure to produce some capital losses. Enhanced competition will have its normal, and desirable, effect of eliminating those institutions that are not competently managed or not efficiently diversified.

Our present structure of 14,000 commercial banks, 5,000 S&Ls, and 20,000 credit unions is hardly optimal. As market segmentation ends, that diffuse institutional structure will coalesce into far

“Even if it does not make good economic sense to prevent bank customers from reaping the benefits of economies of scope or scale, it may make good political sense for members of Congress to vote that way.”

fewer entities. The extent of this shake-out should not be underestimated. One very crude and simple approximation can be derived by projecting the banking structure of a state like California, which has operated since 1909 with statewide branching and a low level of market entry barriers, to a national scale. If that is done, the result is a banking system of around 2,000 commercial banks, with over 10,000 of the units lost being the small ones (under \$50 million in assets). Even if these rough numbers were doubled, they would still suggest the potential for disappearance of over 70 percent of the institutions now comprising our banking system. While markets would be more competitive, the total number of firms would be much smaller, in national terms.

From a public standpoint, it is critical whether the shrinkage occurs through merger and acquisition or through bank failures. If it occurs by failure, there will be major drains on the resources of the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, and the National Credit Union Share Insurance Fund—which predictably would lead to political uproar. To lessen that prospect, the banking agencies have recently again proposed legislation to facilitate supervisory mergers or holding company acquisitions across state lines. That proposal may have gone too far politically for the last Congress, where it never came to hear-

ings, but it does not go nearly far enough in economic terms. Mergers and acquisitions, within antitrust standards, should be encouraged—and certainly not barred by phobias about state or industry boundaries—long before the institution becomes a problem case.

As depository institutions experience these pressures in the 1980s, they will probably become much more concerned about activity restrictions that keep them from offering services in which they have some degree of comparative advantage and profit potential. The argument about the harmful consequences of combining banking and commerce in a single company, on which the Nixon administration relied in enacting the Bank Holding Company Amendments of 1970, was always a straw man. During the previous 200 years of our banking history, there was no legal impediment to the combination of banking and commerce under a single parent company. Why then did we not see that dreaded combination of Chase Manhattan with U.S. Steel, or Citibank with DuPont? The answer is much the same as why we do not see McDonald's combining with MGM, or Levi Strauss with General Foods. The combination has no economic advantage but significant diseconomies of management. There are, however, economic advantages in banks or S&Ls expanding into some related lines of financial and consumer services. While the 1970 pressure group tug-of-war in Congress did not

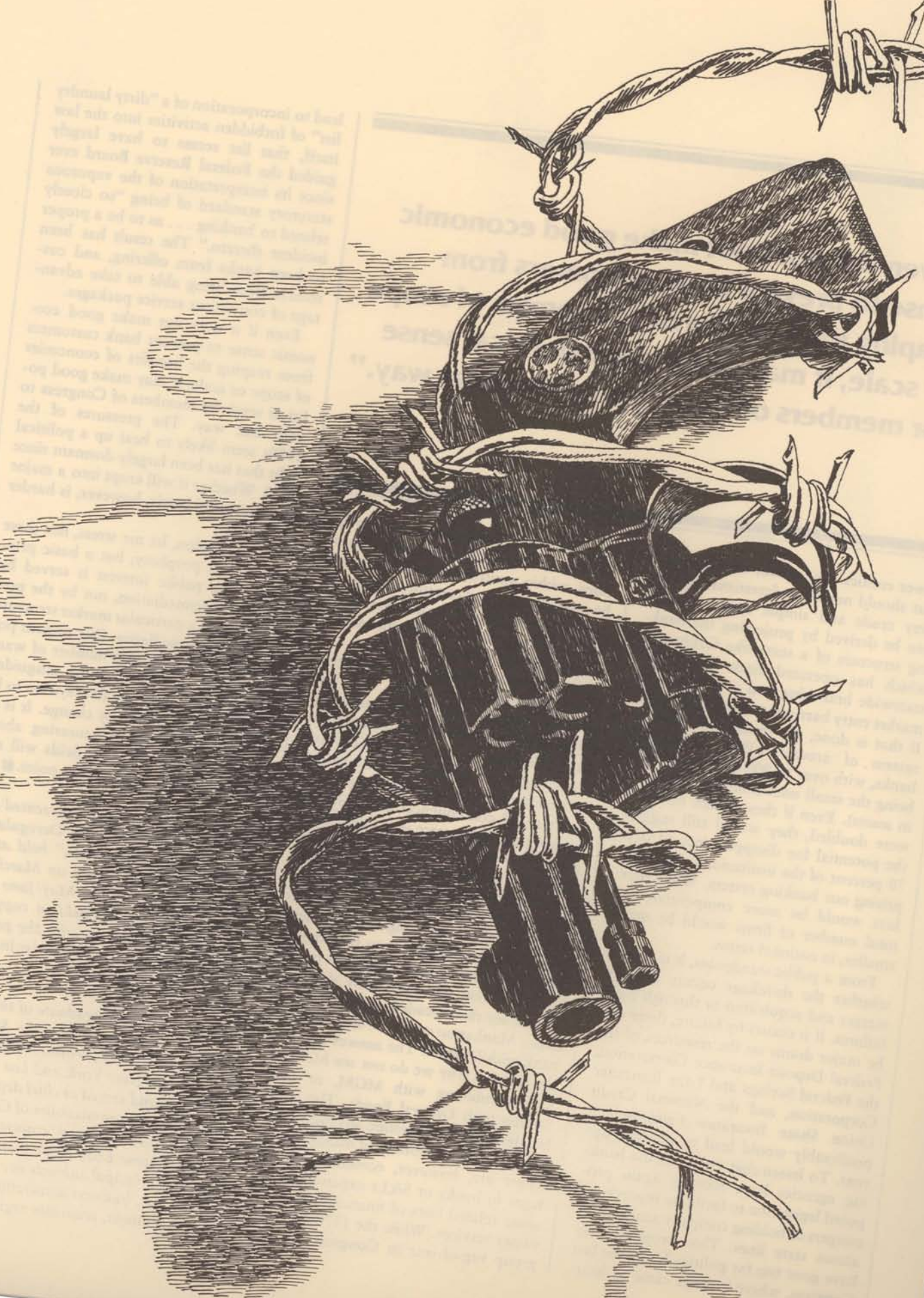
lead to incorporation of a “dirty laundry list” of forbidden activities into the law itself, that list seems to have largely guided the Federal Reserve Board ever since its interpretation of the vaporous statutory standard of being “so closely related to banking . . . as to be a proper incident thereto.” The result has been to keep banks from offering, and customers from being able to take advantage of convenient service packages.

Even if it does not make good economic sense to prevent bank customers from reaping the benefits of economies of scope or scale, it may make good political sense for members of Congress to vote that way. The pressures of the 1980s seem likely to heat up a political fight that has been largely dormant since 1970. Whether it will erupt into a major and successful battle, however, is harder to foresee.

In conclusion, let me stress, not these attempts at prophecy, but a basic principle: The public interest is served by efficient intermediation, not by the preservation of a particular market structure or set of intermediaries. Our present position is the result of a number of waning forces, as well as some misguided legislation; it is not an ideal system to be maintained unsullied by change. It is to be hoped that the sloganeering about housing or level playing fields will not cause us to lose sight of that point. ■

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THE WISDOM OF GUN PROHIBITION

by John Kaplan

ABSTRACT: The fact that not everyone will obey a law is a very important determinant of the wisdom of its enactment. As applied to gun prohibition legislation, widespread violation of the law may place upon us unacceptable societal costs of enforcement, which would cast doubt upon the wisdom of enacting what might be thought to be a reasonable policy.

Many discussions of what is called gun control proceed by demonstrating the advantages, in terms of the homicide, assault, and robbery rate, of our disarming all or part of the civilian population of the United States.¹ Rarely does anyone embark on a serious attempt to compute either the cost or the likely success of the policies designed to achieve these ends—and social realities are brought into the area only in denunciations of the political groups and attitudes that prevent the adoption of gun control policies that will “work.”

In this respect, one must be struck by the similarity between the arguments for gun control and those concerning prohibition of drugs.² With respect to the latter, the discussion typically focuses on the dangerousness of the drug in question and the kinds and amounts of harm it can be expected to do if avail-

able to the population. Little time and energy are expended in computing the costs of attempting to enforce such laws and the degree of effectiveness that can be expected from any particular policy, considering the abilities and the other demands upon our criminal justice system.

Indeed, both with respect to drugs and various gun policies, it is often assumed that the mere passage of a law, with very little more, will guarantee that people obey it. Unfortunately, in both cases we are dealing with large numbers of people who think that they have strong reasons and justifications for engaging in a kind of conduct—possession or even sale—and can do so in private, so that it is difficult to catch them. In both cases, therefore, it is difficult for the law to raise the risk of apprehension of law violators high enough to outweigh their desires.

The Likely Extent of Voluntary Compliance

Gun owners have a variety of reasons for owning guns. Often owners enjoy the use of their guns in hunting or other sports, the feeling of power that comes from hefting such a lethal device, the feeling of security, whether or not warranted, that comes from knowledge that one has such a weapon at hand, and the symbolic association of guns with the frontier and with a large portion of the history of America. In addition, those who like guns often find a certain fascination in the precision with which they are built. The gun, after all, is a remarkable piece of engineering that can send a small piece of metal at extremely high speeds with an accuracy that one would regard as phenomenal if he did not know in advance about the properties of such

weapons. Indeed, the gun is comparable only to the camera in its precision and in the intricacies of its mechanical engineering. Though there are no data on the issue, one might hypothesize that the same aspects of personality that may cause one person to be interested in cameras would cause another to be equally fascinated with guns.

Gun owners may also be prepared to offer rationalizations and justifications for their behavior in terms of contributing to a better world. Even if these reasons are not very persuasive to the rest of us, they bolster the desires of the users with the kind of ideology that makes such behavior more tenacious than if defended solely in hedonistic terms. Thus a gun owner defends his gun ownership with reference to the Second Amendment. He may assert that an armed citizenry is important in a democracy to protect the freedoms of all from Communist coups; to be ready to engage in guerrilla warfare should the country's armed forces be overwhelmed by those of a foreign power; or in the words of one well-known civil libertarian, simply to make sure that we do not have to "trust the military and the police with a monopoly on arms and with the power to determine which civilians have them."³

It is not necessary to agree with these justifications; of course, a large fraction of the society does not. The problem, however, is that in a criminal justice system that needs a sizable degree of consensus in order to operate, what may be a large enough percentage of the population does agree.

Moreover, entirely apart from the strengths of the justifications used to defend an illegal behavior, there may well be a distinction between making criminal a behavior before it is widespread and doing so after it is engaged in by large numbers of people.

Where the formerly legal behavior was popular—as was the case in Prohibition and as would be the case if guns were prohibited—one would expect the law to meet more resistance. Those who engage in the behavior may not only have the force of habit to push them toward continuing, but they also are more likely to see the law as a direct attack upon

them. And having joined others openly engaging in the behavior while it was legal, they may be able to count on the support of more or less organized groups in disobeying the law.

If this is so, it may be very important that gun ownership holds a unique place in American history. The continent was settled after the invention of firearms, and firearms were necessary not only to the body politic and for the militia, but also necessary for protection from hostile natives. Perhaps even more important, guns were used to provide a food

"In large areas of the United States, gun ownership still forms part of a rite of passage where boys learn to use weapons from their fathers and pass this along to their sons."

supply. In large areas of the United States, gun ownership still forms part of a rite of passage where boys learn to use weapons from their fathers and pass this along to their sons. Interestingly, the situation was quite different in Europe, which was well settled before the invention of practical firearms; there were no hostile natives, gun possession by the ordinary citizen was repressed as a threat to the classes in power, and hunting, for the most part, was a monopoly of the rich.⁴ It is not surprising that they do not have the kind of gun problem that we do today.

It is possible, of course, that the gun owner's respect for law would outweigh his desire to continue his behavior—

should the law so provide. After all, the gun user, so far as we can tell, is more likely to be conservative and devoted to law and order than is the average person.

Nonetheless, one cannot make too much of this factor. Many groups in society denounce the lack of respect for law and order in others, but have rationalizations for their own misbehavior. The same police who deplored the law violations of draft evaders and antiwar demonstrators have joined in illegal strikes, and the very men who orchestrated the American presidential campaign most devoted to law and order felt little compunction about obstructing justice themselves.

It is an empirical question in each case whether the desire of an individual to engage in illegal behavior is outweighed by his adherence to law. Moreover, the issue is more precisely whether the desire to engage in the illegal behavior is outweighed by some kind of sum of his adherence to law and his fear of apprehension. So far as the first term of the sum is concerned, probably the best guess is that a sizable portion of the gun-owning population would simply ignore any law interfering with their possession of weapons, unless the likelihood of apprehension could threaten them into obedience. So far as the second term is concerned, it is likely that any given gun owner would run an extremely small risk of apprehension. First of all, the great majority of gun owners do nothing to attract police attention. Even if the authorities suspected someone, they would probably not have the probable cause necessary for a search warrant. Moreover, if the number of illegal handgun possessors were very large, it would be impractical to obtain and execute search warrants for any sizable percentage of their homes.

In fact, it is hard to think of any way we could coerce those gun owners determined to ignore any prohibition into giving up their weapons, short of instituting a massive program of house-to-house searches. These are, in fact, practiced occasionally in other countries—often in the wake of a revolution—to remove weapons from private hands. Typically, they are buttressed with summary and extremely high penalties,

usually death, for those caught in violation. On constitutional, practical, political, and moral grounds, this would be inconceivable in America today.

In any event, if the rate of violation of a gun prohibition approached what we are presently experiencing with respect to marijuana or what we experienced with respect to alcohol during Prohibition, we would be faced with a whole series of problems. I will discuss later the rallying cry, "When guns are outlawed, only outlaws will have guns." For the purpose here, it is more relevant to state, "When guns are outlawed, all those who have guns will be outlaws." Laws that turn a high percentage of the citizenry into criminals impose serious costs on society over and above those incurred in attempted enforcement.

A variety of sociological studies have shown that an important social norm may very commonly be broken without serious consequences to the individual or society. For instance, studies of college cheating have revealed that a very high—indeed, an amazingly high—percentage of college students have cheated on at least one occasion.⁵ Significantly, however, even those who have cheated tend to regard the rules against cheating as morally justified and, though they typically have some rationalization to justify their conduct to themselves, they consider themselves supporters of the rules against cheating and are fully prepared to censure those who are caught in violations. The same is almost certainly true of tax evasion and a whole series of other misbehaviors.

Where the laws are not only widely violated, but are violated on the basis of widely accepted rationalizations, such laws are many times not even considered morally binding by those who have violated them.⁶

Costs of Prohibition

Presumably gun owners—unlike cheaters—would not rationalize their use of the gun as an aberrant event unrelated to their total personality, and as a result it would become especially unhealthy for their society to declare them criminals. It is obvious that when any

society criminalizes a large percentage of its people, it raises very serious social problems. We do not know whether those who violate such serious criminal laws will thereby become more likely to violate others. It may or may not be true that the second crime comes easier. It is hard to see, however, how a realization that one has committed what is officially a serious crime can fail to engender at least a somewhat more generalized lack of respect for both the law and the society that has so defined his action.



This alienation from both the rule of law and our democratic society would then be a serious cost of many gun control laws.

Moreover, it is likely that if the violation rate is high, attempting to enforce any law against gun possession will be extremely expensive. Prohibition and the marijuana laws resulted in a paradox in which the threat of laws sanctioned was not sufficient to deter huge numbers of violators. As a result, violations are so common that they frequently come to police attention without great police effort. Even though those apprehended constitute a very small number compared with the total number of violators, they are numerous enough to constitute

a major burden on the criminal justice system.⁷ If a similar situation is created with respect to gun owners, their numbers would presumably raise similar problems, further overtaxing a criminal justice system already unable to cope with the kinds of violent and predatory crimes that upset us much more than does the private possession of guns.

Few people who are not directly involved in it can appreciate the degree to which our criminal system is already overcrowded. A recent editorial in a local newspaper gives details on a typical situation—in this case in one of California's most affluent counties:

One day recently, Judge Stone's calendar listed a record 269 cases. A courthouse holding cell designed to accommodate 20 defendants was jammed with 100. The judge says they were unguarded because the sheriff didn't have enough deputies to assign one to the holding cell. . . .

Judge Stone estimates it could cost up to \$1 million a year to provide Santa Clara County with enough prosecutors, public defenders and adult probation officers to keep the courts operating efficiently, which is to say justly. He doesn't know where the money will come from and, at this point, neither does the board of supervisors, which is facing the prospect of a budget deficit. . . .

A million dollars isn't going to build a new jail, but \$1 million would go a long way toward clearing the Superior Court's criminal trial calendar, thus reassuring the public that the criminal justice system isn't about to collapse."⁸

This and worse is the case throughout the nation. The police are unable to investigate all but the most serious crimes; in court-processing institutions the prosecutors, the public defenders, and the judiciary are all so crowded that some 85 percent of cases are disposed of by plea bargains, which leave neither side nor the public satisfied;⁹ and our jails and prisons are grossly overcrowded—with offenders that almost all of us would regard as far more serious than simple, otherwise law-abiding gun possessors.

As a result of this, we would be forced to adopt one of three courses if voluntary compliance did not produce an adequate level of obedience to the gun control laws. First, we would have to transfer a very sizable amount of resources into the criminal system, in all probability a political and perhaps even economic impossibility today. Second, we would have to make room for the gun possessors by treating more leniently the rapist, armed robber, drug peddler, and others who make up the grist of our present criminal system. Third, we would simply have to treat gun possession very much like marijuana possession or a number of other very trivial crimes that are on the books, but are so sporadically enforced that the criminal law is not regarded as a serious molder of behavior.

Obviously, none of these choices is an attractive one, but it is quite clear that one of these choices—in all probability, the second and third, with emphasis on the third—will in fact be the course we adopt.

Another serious consequence of asking the police to enforce a law that results in violations so numerous that the police cannot possibly pursue them is that this invites selective enforcement, a problem all too common in American law with respect to drug and various other “nonvictim” offenses.¹⁰ Allowing the police to pick and choose among a group and to decide whom they will and whom they will not investigate or arrest for a crime leads to a feeling of unfairness among those selected for prosecution, to the bribery and corruption of the police, and to the covert use of all kinds of discriminations—including race, class, and “appropriate” attitudes toward the arresting officer—which we would not condone if they were overt. Since political deviants of the Right or the Left are among the most paranoid of Americans, and perhaps the least likely to obey a gun prohibition, we would soon find the police bearing down most heavily upon them. This should be a matter of considerable concern to those worried about restrictions on First Amendment freedoms.

To be sure, gun owners presumably would not come to the attention of the

police as often as marijuana users, since marijuana use gives off a discernible odor. Nonetheless, we are familiar with the cast of characters that adds to the number of arrests in marijuana—the inquisitive baby-sitter, the former lover working off a grudge, and the fireman on the premises fighting a blaze. All of these would presumably cause gun arrests as well.

It is likely that in the case of guns, a death or injury resulting from the use of the illegal weapon would bring the vio-

“[I]f the rate of violation of a gun prohibition approached what we are presently experiencing with respect to marijuana . . . we would be faced with a whole series of problems.”

lation to public attention. In many cases, the event would demonstrate the wisdom of the gun prohibition. Where the gun owner commits a murder with his weapon, prosecution on a gun possession charge might be a supererogation, but the event itself would serve to reinforce the educational purposes of the criminalization. Similarly, the lessons of the law would be taught where the illegal gun goes off accidentally, though perhaps where a family member is killed, some would be offended by the additional prosecution of the bereaved on a gun possession charge.

Enough of the cases coming to the public attention, however, would involve a householder who fought off a burglar or rapist with an illegal gun. We may speculate that these cases

would cause law enforcement serious problems. Since the prosecutorial authorities presumably would not regard the subsequent use of the weapon as negating its initial illegality, they would probably feel forced to prosecute the householder. In such cases, however, one would expect it to be extremely difficult to keep the jury's attention focused upon the violation of the gun possession law and away from the fact that the case before them was one where, to put it bluntly, the defendant was right and the law was wrong about his or her need for the protection of a firearm. The result of this, then, would be jury nullification and a refusal to convict.

Not only would convincing a unanimous jury to convict be a difficult and time-consuming task, thus adding to the expense of enforcing gun prohibition, but such cases would probably achieve political significance. Groups working to repeal the prohibition would have every incentive to make the case a *cause célèbre* in their campaign against the gun laws. Since the case might drag on long after the burglar or rapist had been disposed of, its facts would be given greatly increased publicity, leaving the public with the impression that instances of successful self-defense with firearms are far more common than they actually are. This, in turn, would help convince more people of the need to possess guns for self-defense and would encourage resistance to the gun law.

In short, the basic problem here is that while the benefits of even a successful prohibition are due to its effect on the relatively small numbers of those who would cause social harm by their activity, the costs of the prohibition are proportional to the number of people who nonetheless continue to engage in the activity.

The fact is that the solid majority of gun owners do not cause any social problem at all. The great majority of gun owners are non-criminal, and their guns create no social problems. It is true that the gun that created no problem at all this year may, next year, kill in an accident or in a crime of passion, or be sold or stolen and thereafter used in a robbery. Even so, when one considers that there are over 100 million guns in

private possession, it seems clear that on a per-gun basis, the great majority of guns in private hands will impose no costs at all upon society.¹¹

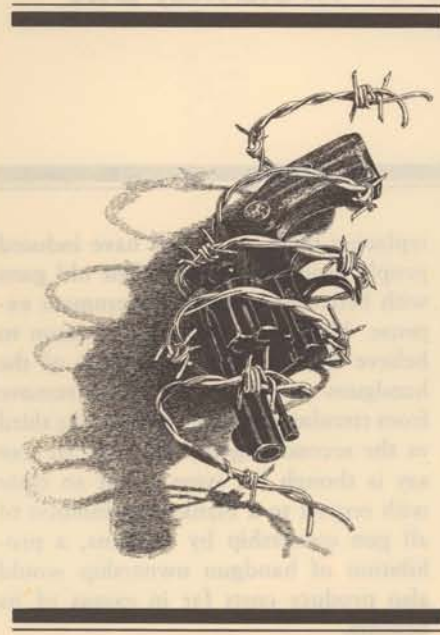
Moreover, prohibitions are differentially effective with respect to different kinds of users. Often, they are most effective with respect to the users about whom we are least worried. For instance, the laws against marijuana are most effective in denying access to the drug to middle-class citizens of middle age or above. They are far less successful, indeed almost completely unsuccessful, with respect to the high school students, the unstable, and the marginally adjusted—those who are far more likely to harm themselves through their use of the drug.

With respect to guns, it is likely that the reduction in gun possession would not produce a proportionate decrease in the social harm caused by guns. It is, of course, a considerable exaggeration to say that “when guns are outlawed, only outlaws will have guns” if by this one means that all those criminals now involved in gun crimes would continue to have access to guns. A prohibition, even imperfectly enforced, would lower somewhat the number of guns in private hands and even in the hands of some outlaws. Nonetheless, we would expect that individuals who already risk more serious criminal sanctions for committing crimes with their guns would be among those least affected by a gun prohibition.

The more interesting question involves the basically law-abiding individuals who would otherwise use their guns in crimes of passion. To the extent that they give up their guns because of the law, their homicide rate presumably would be lowered. However, not only are we unable to predict the overall rate of noncompliance with a gun prohibition law by otherwise law-abiding citizens, we are also unable to tell whether those who would use their guns in a crime of passion would be less likely to obey a prohibition than the average non-criminal gun owner. It is hard to think of any reason why those individuals who would commit crimes of passion with their guns would be more likely to obey a prohibition. And if, as seems likely,

those who commit the crimes of passion are less law-abiding than the rest of non-criminal gun owners, they might be less likely to obey the gun prohibition law as well.

Since the crucial determinant of the balance of costs and benefits in any prohibition law is the extent of violation, a matter very difficult to predict, one can only speculate upon the result of a gun prohibition. We do not now have any such prohibition, and it is impossible to prove any hypothetical statement to be



true or false. Nonetheless, my own guess is that the magnitude of violations would be such that the costs of attempting to enforce general prohibition of gun ownership would far outweigh the benefits we might achieve from the somewhat lowered availability of firearms that such a law would produce.

Such a conclusion, of course, does not resolve the issue of gun control. The great majority of Americans already live under laws that prohibit the carrying in public places of concealed weapons. Similarly, different kinds of guns have already been subjected to differing regulations. Machine guns and sawed-off shotguns are prohibited; sales of handguns are legally restricted, though in a somewhat halfhearted way; and long-guns are subject in some areas to regu-

lation.¹² As a result, it may be argued that even if the criminalization of all firearms imposed costs that outweighed its benefits, the balance might tilt the other way with respect to a more specific category of guns. Of course, the type that first comes to mind is the handgun. After all, there are far fewer handguns than longguns in private hands, and on a per-gun basis, handguns are far more dangerous, accounting for about 80 percent of the gun homicide.¹³

Limiting the Prohibition for Handguns

Though prohibition of handguns would have many aspects in common with the more general prohibition of all guns, the fewer weapons involved and the greater social cost per weapon would lead us to expect that, all other things being equal, prohibition would achieve a better balance of costs and benefits. Despite this, there are still a great many handgun owners whose resistance to complying with the prohibition would impose on us many of the costs I have previously discussed. We cannot tell, of course, whether handgun owners as a class will be more or less resistant to a prohibition than other gun owners. There are reasons, however, to expect some differences.

While the owners of longguns primarily give hunting and sport as their reasons for gun ownership, the most common reason given by handgun owners is self-protection.¹⁴ One would think that this kind of elemental justification, whether valid or not, would be the hardest to override through the threat of legal punishment. Nonetheless, it may be that the much greater danger to the owner and his family inherent in handguns makes the owners more ambivalent about their possession. It is interesting, as well, that whereas the longgun has deep cultural roots in America, the widespread possession of handguns is a relatively recent phenomenon. In fact, in 1964, less than 750,000 new handguns were purchased in this country. The number had doubled by 1967 and increased more than threefold in 1968.¹⁵

“Instead of attempting to deal with the huge reservoir of guns or even only of handguns, a more cost-effective means of gun control might be the application of what is called the vice model, which forbids the sale of firearms, but not their ownership.”

It can be argued that if the handgun prohibition is partially effective, the law might lower the perceived need to own firearms for self-defense. This, in turn, might increase obedience to the prohibition and become part of a circular process that feeds upon itself to make the prohibition more and more effective. The problem is that most handgun owners do not see their weapons as necessary to protect them from others with handguns. Rather, they see their weapons as protection from unarmed but younger or stronger intruders. It is, of course, possible that if handgun owners really do keep their guns for protection, they can perhaps be talked out of the idea. So far as we can tell, handguns are not much good for defense, since they are much more likely to injure the owner and his family than to protect them.¹⁶

Again, the major unknown in computing the likely costs and benefits of a handgun prohibition is the extent of cooperation by the citizenry. An experimental buy-back program in Baltimore offered \$50 per operable handgun, which was considerably above the average cost of those weapons. The program managed to recover only 8400 handguns in a period of almost a year.¹⁷ This figure was estimated to represent about one-fourth of the handguns in the city. The relatively high price offered for the weapons, as compared to the cost of

replacing them, may well have induced people simply to replace their old guns with better weapons at government expense. Moreover, there is no reason to believe that the second quarter of the handguns would be as easy to remove from circulation as the first—or the third as the second. Again, the most we can say is though the issue is not so clear with respect to a blanket prohibition of all gun ownership by civilians, a prohibition of handgun ownership would also produce costs far in excess of its benefits.

The “Vice Model”

Instead of attempting to deal with the huge reservoir of guns or even only of handguns, a more cost-effective means of gun control might be the application of what is called the vice model, which forbids the sale of firearms, but not their ownership. The major advantage of such a law would be the avoidance of the large social costs inherent in turning millions of otherwise law-abiding citizens into criminals. At the same time, an effective prohibition on sale would, over time, gradually reduce the number of guns in private possession.

At first glance, criminalizing the selling of guns might appear logically inconsistent with our failing to punish the

buying as well. In fact, this is not the case. In drafting laws, we often draw the line between legal and illegal conduct so that maximum reduction in the proscribed behavior can be gained at minimum social cost. Frequently it turns out that laws aimed solely at suppressing sales are more cost-effective in reducing the possession and use of a substance than are laws that attempt to suppress possession directly.¹⁸

There are several reasons for this. First, there are fewer sellers than buyers; this permits a concentration of law enforcement efforts where they do the most good. Second, juries are likely to be more sympathetic to a “mere” user, who may be ill-advised, than to a businessman who makes a profit from the weaknesses of others. States that have decriminalized small-scale marijuana possession and other “nonvictim” crimes have relied on this technique. Offenses treated under the vice model range from gambling, where the person who takes illegal bets is guilty of a crime, while the person who places them is not, to the offense of selling new automobiles not equipped with seat belts, where the seller, rather than the buyer, is guilty of an offense.

Although it is true that a simple prohibition on sales or transfers of guns would probably be more efficient than a broader prohibition that also forbade their use or possession, even prohibitions on sales would be ineffective if the demand for the product and the resistance to the law were too great. We must remember that Prohibition itself never criminalized the possession or use of alcohol. As a result, we will examine a prohibition upon the sale of guns as if it encompassed only handguns, on the theory that the same factors that would make a complete prohibition on handguns more cost-effective than one on all guns would also apply to application of the vice model.

There is, however, a very important difference between guns and alcohol. In theory, alcohol can be handled to the complete satisfaction of the prohibitionist simply—or not so simply—by cutting off the sources of supply. After all, the average drinker rarely has on hand more than enough to tide him over a few

weeks. Guns, however, are not perishable, consumable items. A gun in private possession is presumably dangerous for its entire useful life, a period not only of years, but of decades—though, as recent research has shown, guns used in crimes are disproportionately newer weapons.¹⁹ As a result, the enormous reservoir of firearms in private possession will greatly lower the effect of even an enforceable prohibition on handgun sales in reducing the social cost of the use of such weapons.

In this respect, the best analogy to alcohol would be prohibiting the sale of ammunition, which is moderately perishable, rather than the sale of guns. The problem here, however, is technical. First, handgun ammunition is basically the same as longgun ammunition, so any attempt to control handguns by this method would involve the more difficult, costly, and stubborn problem of longgun regulation as well. Second, serviceable ammunition is simpler to make than any of the illegal drugs being manufactured in the laboratories all over the United States. The difficulty of manufacturing ammunition lies somewhat closer to distilling liquor than to making phenyl-cyclohexyl-piperidine (PCP) or amphetamines.²⁰ In other words, the likelihood is that by forbidding the sale or manufacture of handgun ammunition, we would be adding yet another major substance-abuse problem to our already crowded inventory.

On the other hand, the very permanence of the gun works to lower the social costs of attempting to suppress sales of the weapon. In the case of guns, the illegal seller will have a much smaller market for repeat business than is the case with alcohol or drugs. It is difficult to speculate on what an illegal handgun supply industry would look like if sales were forbidden. It is by no means clear that it would look like the alcohol industry under Prohibition or our present illegal drug industry, since both the total demand and the economies of scale would seem to be far greater in the former cases than with respect to guns. Even if the robber had to dispose of his weapon more often, illegal sellers would probably lack the repeat business that characterizes a drug connection.

“Even without the economies of scale or the repeat business of the illegal drug industry, enough people living on the fringes of legality might accommodate acquaintances and provide large numbers of guns to noncriminal users.”

That is not to say that an illegal market would not spring up to serve those who wish to buy illegal handguns. Even without the economies of scale or the repeat business of the illegal drug industry, enough people living on the fringes of legality might accommodate acquaintances and provide large numbers of guns to noncriminal users. The analogy here might be to the procuring of prostitutes. According to folklore, sizable numbers of taxi drivers, bellhops, and bartenders make some extra cash at this illegal activity, even though it generally does not constitute a large fraction of their total income. Of course, we can predict that a prohibition on gun sales will raise the price of guns, since the seller will demand additional profit to compensate him for his risk of detection.

To examine further the effect of a sales prohibition on the social cost of handgun ownership, we much look more carefully at two kinds of handgun owners: the basically law-abiding owner and the criminal who acquires his gun with the intention of using it in illegal activity. The law-abiding owner, even though he may not be willing to give up or register his handgun, may draw the line at acquiring one illegally. Moreover, it is quite possible that he will not know an illegal seller and will be unwilling to go to the trouble of finding one. The criminal gun owner, on the other hand, pre-

sumably will have a greater incentive to obtain a handgun and will be more likely to know an illegal seller.

We cannot tell at this point how common handgun purchases would be under such conditions. This depends on two factors: (1) whether large numbers of potential purchasers see their need for handgun protection as great enough to justify purchasing from illegal sellers and (2) whether an illegal market can operate under the constraints of whatever law enforcement can be brought to bear on the situation.

So far as the latter is concerned, our experience with alcohol and other drugs indicates that if the demand exists, there will be many who, despite the efforts of law enforcement, will step in to supply the need. Al Capone could rationalize his bootlegging empire by saying the following:

I'm a businessman. I've made my money by supplying a popular demand. If I break the law my customers are as guilty as I am. When I sell liquor it's bootlegging. When my patrons serve it on silver trays on Lake Shore Drive it's hospitality. The country wanted booze and I've organized it. Why should I be called a public enemy?²¹

There will be many who can justify selling guns to respectable people even if such sale is illegal. Moreover, if they

cannot justify it satisfactorily, experience indicates that they will do it anyway.

Nor is it clear that salesmen would be unable to find the guns to sell. Even if the illegal gun market would not in itself support many full-time sellers, illegal wholesaling and smuggling might still be quite profitable activities. We must remember that marijuana, which at least on a per-volume basis is less valuable than handguns, is quite profitably smuggled into the United States in enormous quantities.

There are several serious costs to any partially successful effort to stop the sale of handguns. On a smaller scale, though, many of these drawbacks parallel the costs of attempting to prevent handgun ownership directly. The chances are that there will be a considerable number of illegal handgun sales, including sales by those who are in the business of handgun supply and sales by handgun owners who wish to sell their guns rather than give them away or destroy them. It is very likely that an attempt to interdict what may be considerable demand for guns will consume a good deal of investigatory time and prosecutorial and judicial resources, although this would not be as expensive as attempting to administer sanctions directed at the user himself.

If the citizenry is sympathetic to such prosecutions, enforcement expense might be worthwhile. Unfortunately, however, it is possible that once we have made the sale of all handguns illegal, those who sell them will appear to some otherwise law-abiding citizens as Robin Hoods, violating the unpopular laws for the greater good. It does not take a very significant minority of the population to deadlock juries and cause the legal system a considerable amount of difficulty and expense.

The means that the police would have to use to enforce such laws are already familiar to us because of their use in the drug area. Preventing a sale between a willing buyer and a willing seller requires intrusive techniques. Indeed, even to inadequately enforce such laws, the police must use informants, undercover agents, methods that border on entrapment, searches and seizures, wiretapping,

"It is possible that once we have made the sale of all handguns illegal, those who sell them will appear to some otherwise law-abiding citizens as Robin Hoods, violating the unpopular laws for the greater good."

and a whole panoply of enforcement techniques that not only often transcend the borders of constitutionality, but that, even where they are legally permissible, tend to bring the police into disrepute. Use of such means against relatively small numbers of serious criminals may be worth this kind of cost. However, where the police are asked to enforce laws of such methods against large numbers of people who have public support, the consequences can be more serious.■

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Footnotes

1. See, for example, "The Case to Control Handguns" (Washington, D.C.: National Council to Control Handguns, 1978).

2. See John Kaplan, "Controlling Firearms," *Cleveland State Law Review*, 28(1) (1979) (hereafter cited as "Controlling Firearms").
3. D. Cates, "Why a Civil Libertarian Opposes Gun Control," *Civil Liberties*, 3:24 (1976).
4. See Lee B. Kennett, *The Gun in America* (Westport, CT: Greenwood Press, 1975), pp.13-18.
5. See William J. Bowers, "Student Dishonesty and Its Control in College" (Bureau of Applied Social Research, Columbia University Press, 1964).
6. See John Kaplan, *Marijuana, The New Prohibition* (NY: World Publishers, 1970), p. 34 (hereafter cited as *Marijuana*).
7. *Ibid.*
8. "Overloaded Justice," *San Jose Mercury News*, 20 Jan. 1981, p. 6B.
9. See J. Casper, *American Criminal Justice: The Defendant's Perspective* (Englewood Cliffs, NJ: Prentice-Hall, 1972), pp. 77-81.
10. See Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago, IL: University of Chicago Press, 1970), pp. 4-6.
11. Philip J. Cook, "Guns and Crime—The Perils and Power of Long Division," unpublished manuscript (Duke University, Dec. 1980).
12. Philip J. Cook and James Blose, "State Programs for Screening Handgun Buyers," *The Annals of the American Academy of Political and Social Science*, 445:80-91 (May 1981).
13. See George D. Newton and Franklin E. Zimring, *Firearms and Violence in American Life* (Washington, DC: U.S. Government Printing Office, 1970), p. 49.
14. James D. Wright, "Public Opinion and Gun Control: A Comparison of Results From Two Recent National Surveys," *The Annals of the American Academy of Political and Social Science*, 455:24-39 (May 1981).
15. Newton and Zimring, p. 174.
16. "The Case to Control Handguns," p. 14.
17. *Baltimore News American*, 19 Oct. 1974, p. 5, col. 1.
18. See Kaplan, *Marijuana*, p. 315 ff.
19. Franklin E. Zimring, "Street Crime and New Guns: Some Implications for Firearms Control," *J. Criminal Justice*, 4:95-107 (1976); and Steven Brill, *Firearms Abuse* (Washington, DC: The Police Foundation, 1977).
20. Kaplan, "Controlling Firearms," p. 20.
21. A. Sinclair, *Prohibition, Era of Excess* (NY: Harper & Row, 1964), p. 220.

Transboundary Air Pollution

by Armin Rosencranz

During 1979 and 1980 I directed the German Marshall Fund Study of Transboundary Air Pollution at the Environmental Law Institute, Washington, D.C. The study focused on sulfur oxides (SOx) and acid rain. Acid rain results when airborne sulfur and nitrogen oxides, emitted primarily by power plants and industrial processes, combine with moisture in the air.

The accumulation of these man-made acids in acid sensitive lakes and streams causes drastic reduction of fish stock and destroys other forms of aquatic life. Moreover, there is evidence that sulfur oxides and acid rain may also damage crops, retard forest growth, destroy the surfaces of stone buildings and monuments, corrode materials, reduce visibility, and contaminate drinking water (by leaching toxic metals from water conduits).

In all affected regions, the acidifying pollutants originate partly from transboundary sources. The United States and Canada exchange airborne pollutants across their common border, and much of the sulfur in the air over Scandinavia comes from other "upwind" countries of northern Europe.



International Law and Transboundary Pollution

At the 1972 U.N. Conference on the Human Environment, held in Stockholm, the problem of Scandinavian lake acidification from airborne sulfur compounds originating outside Scandinavia was first brought to international attention. The same Conference produced a Declaration of Principles, of which Principle 21 is the most pertinent:

States have, in accordance with the Charter of the United Nations and the principles of international law . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States. . . .¹

This principle has impressive antecedents. It was articulated in 1949 by the International Court of Justice in the Corfu Channel case. The Court, holding that Albania had an obligation to warn (British) users of its waters that those waters contained minefields, declared:

. . . It is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.²

For the purposes of this discussion of transboundary pollution, the most apt reference is the famous Trail Smelter arbitration, which helped to resolve a protracted air pollution dispute in the 1920s and 1930s between Canada and the United States. Canada conceded that fumes from a smelter at Trail, British Columbia, were causing damage in adjacent areas in the State of Washington, and a tribunal was created to determine, *inter alia*, the amount of damages. In a widely quoted dictum, the tribunal stated that,

No state has a right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the case is of serious consequence and the injury is established by clear and convincing evidence.³

An even hoarier antecedent is the U.S. Supreme Court, which declared in *Georgia v. Tennessee Copper Co.* (1907):

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.⁴

All of these principles derive, generally, from the ancient Roman legal maxim, *Sic utere tuo ut alienum non laedus*: Use your own property so as not to injure your neighbors.

No doubt a student of international law could summon up numerous additional references. Unfortunately, these principles are of little consequence in the case of transboundary air pollution. Nations rarely give up jurisdiction over cases of pollution emanating from their territory, and even more rarely admit liability for such pollution. The *Trail Smelter* case is, in fact, *sui generis*: Canada admitted liability and agreed to allow U.S. courts to fix damages. When the U.S. courts declined to do this, both countries agreed to let a special bi-national tribunal "arbitrate" the amount of damages. There has been no case like this before or since, and it is highly unlikely ever to arise again.

Nations today are exceedingly jealous of both their sovereignty and their pollution prerogatives. They are especially resistant to suggestions that they add pollution control costs to the already high cost of producing electric power, even though they may grant that the production of that power causes unintended but real damage in other countries. A Norwegian diplomat privately admitted that, "One can't expect Europe to reduce its sulfur emissions just to save some Scandinavian fish." Scandinavian environmental officials themselves concede the temerity and impracticality of their request for abatement of European sulfur pollution.

Multilateral Agreements: Attempts at Control

On November 16, 1979, the first broad international agreement covering acid

rain and snow, the "Convention on Long Range Transboundary Air Pollution,"⁵ was signed in Geneva by thirty-four member countries of the United Nations Economic Commission for Europe (U.N.E.C.E.). The Convention, the first environmental accord involving all nations of eastern and western Europe and North America, is the perfect solution to the victim countries' need for international recognition of the acid rain problem and the polluting countries' need to continue to pollute.

The Convention dutifully invokes Principle 21 of the Stockholm Declaration in its preamble, but the West German government officially noted that preambles have no force of law and that in any case it does not hold itself legally bound by that principle.

While the Convention was hailed by its chairman, Olof Johansson of Sweden, as "a breakthrough in the development of international environmental law," it merely provides for the sharing of information, collaborative research, and continued monitoring of pollutants and of rainfall. It contains no numerical goals, limits, timetables, abatement measures or enforcement provisions. Signatories have merely undertaken to "endeavor to limit, and, as far as possible, gradually reduce and prevent air pollution, including long-range transboundary air pollution" (emphasis added). They have also agreed to adopt "the best available technology economically feasible." No country has to alter its *status quo* unless it wants to. To date, there are few indications that any but the victim countries (Sweden, Norway, Canada and the United States) are considering further sulfur pollution control measures.

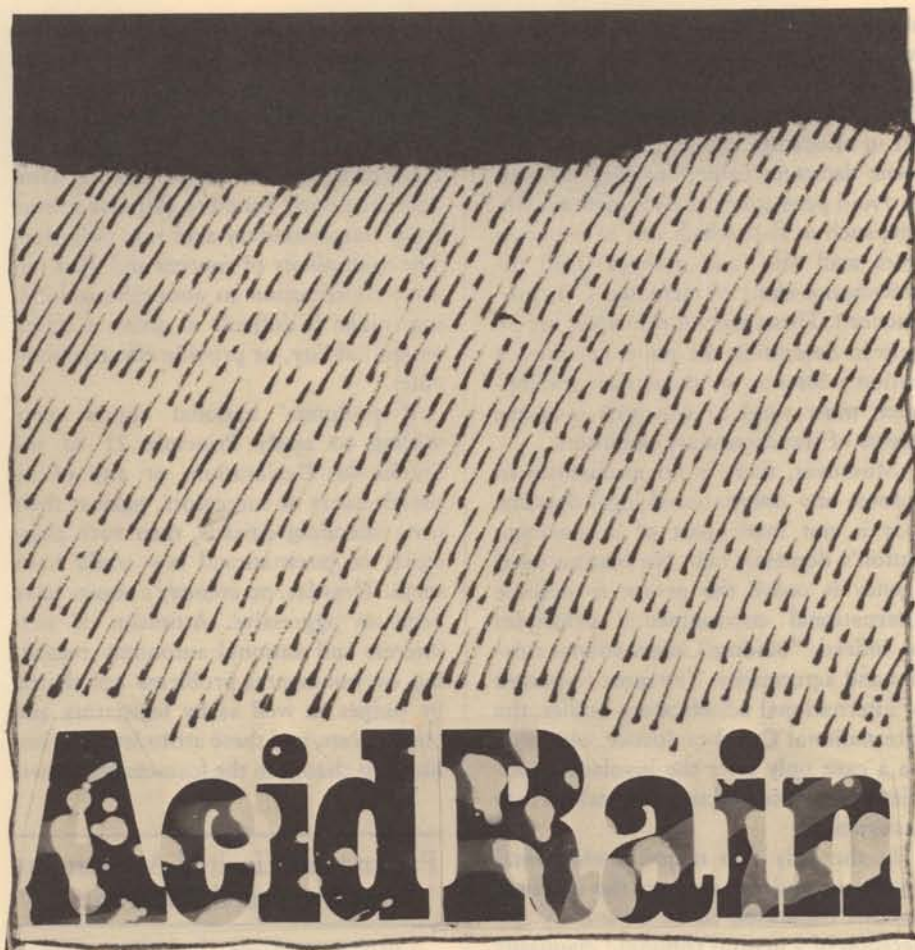
The European Community, whose nine member states include Western Europe's major polluters (Britain, West Germany, France, Italy, and Belgium), enacted, on June 30, 1980, its long-awaited SO₂ directive.⁶ The resolution accompanying this directive incorporates the E.C.E. formula ("to endeavor to limit, and as far as possible, gradually reduce and prevent air pollution"), *verbatim*. The directive is so weak that at least two environmentally progressive countries—the Netherlands and Denmark—were reluctant to approve it. The

senior air pollution official in the Dutch Ministry of Health and the Environment estimated that less than 5% of the land area of E.C. member states would fail to comply with the new SO_2 standard at its enactment. Member states apparently can comply with virtually no change in present practices and with no appreciable impact on SO_2 emissions or on the total sulfur load in the atmosphere over Europe.

Bilateral Negotiations: Canada and the United States

Multilateral action is necessary to cope with the problem of transboundary SO_x pollution in Europe since numerous countries contribute to the sulfur load. But in the context of North American SO_x emissions and the resulting acid rain, a bilateral arrangement between the United States and Canada would be both more efficient and easier to enforce than would a multilateral treaty. Both countries are "victims" of acid rain since both countries have large acid-sensitive regions. The United States sends three times as much sulfur pollution to Canada as it receives from that country, but Canada exports far more SO_x per capita than does the U.S. Thus, acid rain is a mutual problem and the two countries have a mutual interest in abating its flow across their common border. But Canadian-U.S. negotiators are far from a formal agreement after three years of talks, and both countries are now contemplating energy policies which would increase their SO_x pollution in the face of this supposed mutual interest and, incidentally, in abrogation of the E.C.E. Convention which they both so recently signed.

To be sure, in the waning days of the Carter presidency, and anticipating, presumably, a new administration even less disposed to controlling power plant emissions than were their predecessors, the Canadian Parliament enacted legislation authorizing its federal government to reduce pollution from sources contributing to problems (*vis.* acid rain) in other countries. The immediate and perhaps sole effect of this legislation was to give life to Section 115 of the U.S. Clean Air Act, under which the U.S. Environ-



mental Protection Agency can compel states to reduce air pollution when such pollution has been found by a duly constituted international agency to endanger public health and welfare in a foreign country, if and only if the foreign country has the legal ability to take reciprocal action under the same circumstances. Section 115 has been moribund because it was unclear whether Canada—whose federal government has generally deferred to its provinces in pollution control matters—could reciprocate. The new Canadian legislation apparently removed that cloud. But in the end, it did little more than enable the E.P.A. Administrator to issue a hortatory statement saying that his staff would examine the issue and recommend the offending states to be formally notified. Such recommendations must come before President Reagan's much less sympathetic E.P.A. Administrator, and early or sig-

nificant remedial action would appear to be highly unlikely.

This small example should serve, once again, to indicate that the whole area of transboundary air pollution is fraught with political and economic considerations which have little to do with international law and agreements and which, indeed, may effectively neutralize domestic law with an international purpose.

The Limits of International Law and Institutions

Numerous agreements, most notably the E.C.E. Convention on Transboundary Air Pollution, promote international consultation and cooperation in research, monitoring, and assessment of the environmental impacts of present or planned sources of pollution. But nothing in the present international legal framework effectively fosters preventive

action. General principles concerning the responsibilities of nations to compensate for the damages caused by transboundary pollution may occasionally be useful in allocating expense and may have some deterrent value, but they do little to avoid permanent environmental damage, such as that which can be expected from acid rain (and perhaps from the greenhouse effect of increased CO₂ production). These general principles are no help in describing the point at which a nation's interest in industrial development must yield to concerns over the effects of transboundary pollution.

Moreover, there is no mechanism to enforce any international legal doctrine that is not made part of a sovereign nation's domestic law. No international agency is ceded the power to enforce international environmental principles or, indeed, "binding" international treaties and agreements. The most respected of international adjudicatory bodies, the International Court of Justice, may rule on a case only after the involved countries have consented to a referral—a rare occurrence.

In the only two major international environmental cases where the involved nations consented to be bound by the decision of a neutral tribunal,⁷ claimants were required to demonstrate specific causes of specific environmental injury. Unfortunately, because of the incomplete scientific understanding of both the atmospheric chemistry and the effects of transported sulfur pollutants, one cannot yet establish that specific sources are responsible for acidification of distant lakes and soils. If action had to await a clear link between emissions and distant environmental effects, or the full determination of the damage by acidity, irreversible damage would almost certainly take place in various parts of the world.

Using Domestic Procedures To Resolve Transboundary Disputes

Domestic procedures are sometimes successfully enlisted to resolve international environmental disputes, especially when there are no difficult "choice of law" questions and where the source of

the injury and amount of damages are determinable. The effects of increased acidification—loss of fish stocks, enhanced corrosion and reduced agricultural productivity—are compensable types of injury; but judgments for damages are poorly suited to disputes arising from transboundary acid rain pollution. The multiplicity of sources and their relative contribution to atmospheric loadings make it difficult to prove a claim, assign liability, or provide effective remedies.

If polluters' national courts were willing to apply Principle 21 of the Stockholm Declaration, or any of its predecessors or successors, against their own offending citizens, then such principles of international law could have teeth. Thus far, no country's courts have been so aggressive. Attitudes of self-interest and national autonomy regarding environmental problems are shared by judges as well as by legislators and bureaucrats, and these attitudes seem unlikely to change in the foreseeable future.

Prognosis: Limited Abatement But Increased Awareness

Current controls, including general principles of international law and the new E.C.E. Convention, are not adequate to abate SO₂ emissions sufficiently to remedy the transboundary acid rain problem. Numerous control strategies, policies and technologies are available and could be extremely effective, but few nations seem willing to bear the cost. Indeed, the pressures today are in the opposite direction—*viz.*, to relax air quality and emissions standards to make coal-generated electric power more efficient and economical.

Prospects for timely action look unpromising. Sweden and Norway will undoubtedly call on the E.C.E. signatories to implement the principles of the Convention, *viz.*, to "endeavor to limit, and, as far as possible, gradually reduce and prevent air pollution, including long-range transboundary air pollution." The polluting countries will probably continue to call for proof of damage, identification of specific sources, and resolution of scientific uncertainties. The pol-

"[J]udgments for damages are poorly suited to disputes arising from transboundary acid rain pollution. The multiplicity of sources and their relative contribution to atmospheric loadings make it difficult to prove a claim, assign liability, or provide effective remedies."

luters may propose to bear the modest costs of liming acidified lakes—an offer which the recipient countries will undoubtedly reject as an inadequate substitute for abatement and as potentially dangerous to aquatic ecosystems.

No international principles or practices, and certainly not the qualified language of the recent E.C.E. Convention, can compel remedial action. Nevertheless, many consciousnesses were raised at the Stockholm Conference of 1972, and at all the international meetings and negotiations on environmental matters since then, certainly including the negotiations culminating in the 1979 E.C.E. Convention. The Stockholm Conference led to the creation of numerous national institutions to protect the environment and made everyone aware of the acid rain phenomenon, if not of its danger. The E.C.E. Convention on Transboundary Air Pollution, like earlier multilateral agreements on water quality and marine pollution, at least may keep matters from getting any worse.

The most likely area for progress may come through implementing the Convention's provisions for exchanging available information on "major changes in national policies and in general industrial development, and their potential

"Sooner or later these ripples are bound to reach policymakers and concerned citizens, and to influence national agendas. In this lies the main hope for progress in international environmental protection generally, and specifically in the area of long-range pollution."

impact, which would be likely to cause significant changes in long-range transboundary pollution." Aggressive implementation by victim countries of this provision and of its attendant notice and consultation requirements would afford an opportunity to attract media and citizen attention in the polluting countries, which could not help but have a salutary influence on the polluters' plans for sulfur control.

The projected publication by the E.C.E. Secretariat of member states' energy scenarios could offer another wedge for victim countries to influence the policies of the polluting countries.

Information exchanges among E.C.E. countries on developing coal-utilization technologies should guarantee rapid dissemination of new technological developments. Broad multilateral subscription to such technologies may yield economies of scale sufficient to make them affordable.

Finally, E.C.E.-mandated multilateral research on crop damage and health effects from sulfate aerosols and acid rain may sooner or later demonstrate clearly the cost-effectiveness—indeed the necessity—of controlling and abating sulfur emissions throughout the industrial world. That, ultimately, would in-

duce responsible officials to revise upward their estimates of what is economically feasible.

Transboundary air pollution is governed not by international law but by national self-interest. That self-interest, however, combined with the consciousness-raising effect of vigorous international discussion and negotiation about sulfur (and nitrogen) pollutants and their potentially irreversible effects, can induce thoughtful and enlightened public officials to worry about and try to abate acid rain for *their own nation's sake*.

Accordingly, during the last three years:

- West German scientists began ambitious research programs, with government support, on the effects of acid deposition on conifer forests and on buildings and on monuments, including the Cologne Cathedral.
- The United States committed large sums to research the effects of acid deposition and to develop new pollution control technology. Significant progress has been made in developing a unique ("low NO_x") boiler to reduce drastically nitrogen oxide emissions from coal burning facilities. (Nitrogen oxides are precursors to nitric acid, which accounts for one-third of the acid in North American acid rain.)
- The Ontario Ministry of the Environment ordered the Inco smelting plant at Sudbury, Ontario—the single largest pollution source in the world, emitting one million tons of sulfur pollutants annually into the atmosphere—to reduce SO₂ emissions by more than 50% by December, 1982.
- Most Western European countries reduced their annual SO₂ emissions somewhat, by efficiently employing low-cost sulfur control strategies, such as burning low-sulfur coal and oil, washing coal before combustion, and producing more electricity from (sulfur-free) nuclear power.

International organizations and agreements serve the essential function of educating the international political community. They help to build a consensus about a transnational problem,

and to develop a context in which sovereign states pursue pro-international policies by perceiving that it is in their own interest to do so. By making and keeping issues like transboundary air pollution salient topics for international investigation, discussion, and negotiation, they create a ripple effect: International monitoring, data gathering and scientific research help to form a consensus among scientists that a problem is serious and deserves remedial action, perhaps urgently. Sooner or later these ripples are bound to reach policymakers and concerned citizens, and to influence national agendas. In this lies the main hope for progress in international environmental protection generally, and specifically in the area of long-range pollution. ■

Footnotes

1. *Report of the United Nations Conference on the Human Environment*, Stockholm Declaration on the Human Environment, Principle 21, U.N. Doc. A, Conference 48/14/Rev. 1, 5 (1972). Reprinted in 11 Int'l. Legal Mat. 1416 (1972).
2. *Corfu Channel Case*, 1949, I.C.J. 4, 22.
3. *Trail Smelter Arbitration*, 3 R. Int'l. Arb. Awards 1905 (1941), 33 Am. J. Int'l. Law 684 (1941).
4. 206 U.S. 230 at 238 (1907).
5. U.N. Doc. ECE/GE 79-42960, reprinted in 18 Int'l. Legal Mat. 1442 (1979) and 6 Env. Pol. & L. 37 (1980).
6. See Directive on SO₂ and Suspended Particulates, 23 O.J. Env. Comm. (No. L229) 30 (1980).
7. The *Trail Smelter case*, *supra* m. 3, and the *Lac Lannex case* (Spain v. France) 12 R. Int'l. Arb. Awards 281 (1957).

Mr. Rosencranz is a 1962 graduate of the Law School and a former trustee of the University (1974-78). This article is adapted from a talk given by Mr. Rosencranz at a joint meeting of the American Bar Association and the Canadian Bar Association on "Common Boundaries, Common Problems," held in Banff, Alberta, on March 21, 1981. Mr. Rosencranz resides in Inverness, California, where he is currently at work on his forthcoming book on the politics and law of transboundary air pollution.

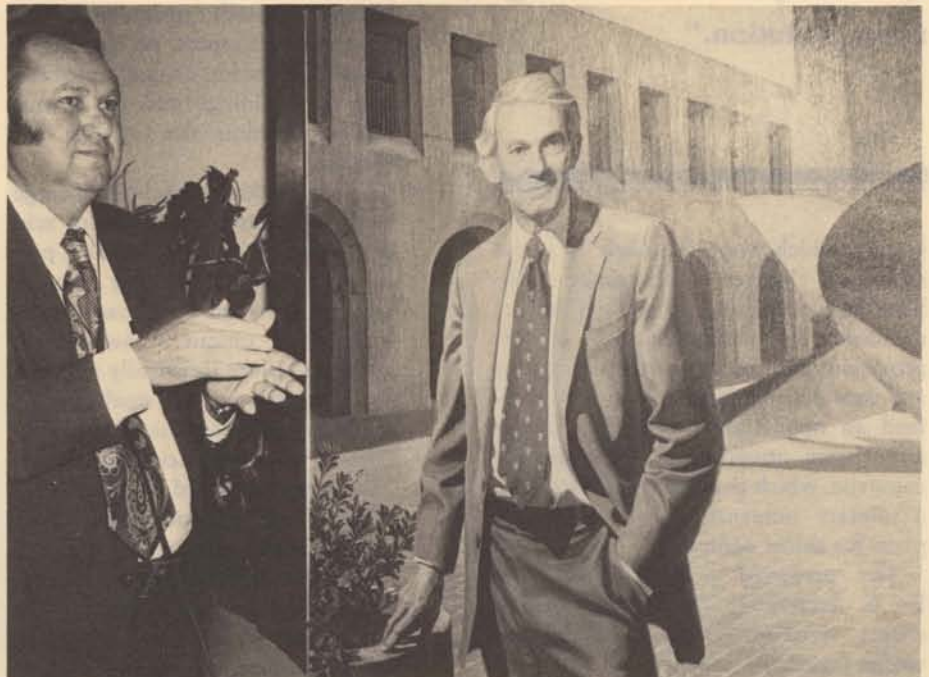
Alumni Weekend 1981

Football, reunions, faculty talks, and an evening with Pam and Charlie!

On October 9 and 10 a record number of alumni returned to the School for Alumni Weekend '81.

This year's program was a richly varied one that included a luncheon address by Reynolds Professor John Kaplan on "Teaching Law and Literature," and classroom presentations featuring Professor Byron D. Sher, "A Legislator Teaches Legislation"; Assistant Professor Deborah L. Rhode, "The ABA's Proposed Model Rules of Professional Conduct: What Do They Say and Does It Matter?"; Professor Kenneth E. Scott, "Can You Bank on Banking?"; and Visiting Professor Donald J. Weidner, "Real Estate Tax Shelters in the Classroom and in Practice." Acting Dean J. Keith Mann gave a report on the state of the School, which included an update on the admissions process by Osborne Professor Jack H. Friedenthal, chairman of the Law School Admissions Committee, and a progress report from Professor Robert L. Rabin, chairman of the Dean Search Committee.

A highlight of the weekend was the annual Alumni Banquet held at the Menlo Circus Club. The evening was a particularly memorable one because it honored recently resigned Dean Charles J. Meyers and his wife, Pamela. The



Above: Acting Dean J. Keith Mann unveils portrait of Dean Charles J. Meyers that will hang in the Moot Courtroom.

Meyers were treated to a series of tributes that quickly turned the evening into a "roast," as colleagues, friends, and former students shared humorous anecdotes and remembrances of the Meyers years at Stanford. The "roasters" included W. Parmer Fuller III, a member of the University Board of Trustees, who acted as master of ceremonies; Charles R. Bruton '71; Myra G. Gilfix '76; Albert H. Hastorf, vice president and provost of the University; J. Keith Mann, acting dean of the Law School; John J. O'Connor '53, president of the Stanford Law Fund; and John Kaplan, Jackson Eli Reynolds Professor of Law.



Following the tributes, Acting Dean Mann unveiled a portrait of Dean Meyers by artist Ralph Borge, which will hang in the Moot Courtroom along with those of previous deans. In presenting the portrait Dean Mann observed:

By any measure, Charlie has been one of the most influential and successful of the great band of Stanford deans and of this time anywhere. . . . He holds our respect, our gratitude, and our affection. He has touched and changed the life of the entire Law School community, including the way we think of friendship and of loyalty.

Stanford survives and lives only in the memory of those who have shared its fellowship. In the enduring stream of such memories, Charlie Meyers is found and will continue to be found.

My profound hope and sincere expectation is that his portrait hanging in our moot court will evoke Charlie Meyers's contribution to Stanford and to all who have or will live and study here.

In recognition of Pamela Meyers's special contributions to the life of the School, Dean Mann presented her with a pen and ink drawing by artist James



Top: Charlie and Pam Meyers are serenaded by surprise guest, Mae East.

Center: Professor Michael Wald (right) talks with University Vice President and Provost Albert Hastorf and his wife, Barbara.

Bottom: Dean Meyers accepts an album of photographs from one of his former students, Myra Gerson Gilfix '76.



Smyth of the Meyers's Stanford residence. About Pam Meyers Dean Mann said:

The partnership of Meyers and Meyers, now some 27 years old, had its base office at 730 Frenchman's Road in the "faculty ghetto," but its influence was widely felt. As all who have been close to the Law School can attest, neither managing partner had exclusive domain over any of the partnership's activities.

Throughout the Meyers years here, Pamela has been a vital, giving, and important part of the life of the Law School. Not only because of her support and love for Charlie, but also through her direct relationships with those many of us: faculty, students, alumni/ae, University people—that large and yet close family called Stanford—who have had the pleasure and privilege of knowing her and working with her, did she affect us, and this School and University.

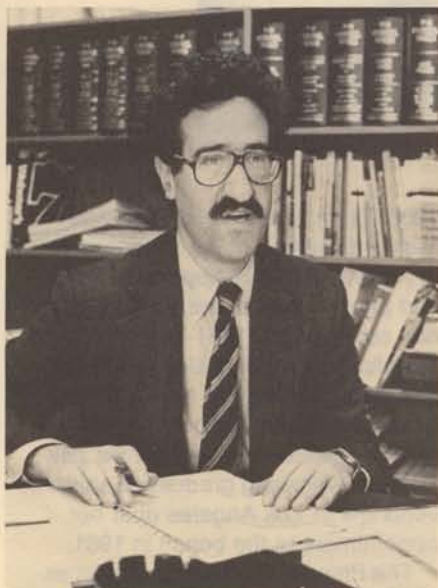
The weekend concluded on a joyful note as Stanford trounced UCLA, and post-game celebrations continued at class reunions held at various locations on the Peninsula.

*Members of the Class of 1976,
Tom Fenner and Nick Miller.*

*Stanford University President Donald Kennedy greets
members of the Class of 1966:
Craig Brown, Peter Baird, and
Richard Stall, Jr.*



Family Law and Taxation Expert Robert H. Mnookin Joins Faculty



Professor Robert H. Mnookin, who visited at the School during 1980-81 from Boalt Hall, U.C. Berkeley, joined the faculty on September 1.

Mnookin is a nationally recognized scholar whose primary research interests have concerned a variety of family law issues, with particular emphasis on how law distributes power and responsibility for the child among the child, the family, and the state. During his year at Stanford, he taught courses in "The Child, The Family, and The State," which drew upon his extensive work in this area; "Family Tax and Financial Counseling," which dealt with the financial consequences of marriage and divorce, the taxation of the family, and estate planning; and a year-long seminar on "Tax Policy and the Taxation of the Family," which addressed the basic tax system problem of how to treat families and the related questions about whether the system should recognize some unit larger than the individual and how that unit should be defined.

In addition to complementing the work of Professor Michael S. Wald in the family and juvenile law fields, Mnookin's work will reflect fundamental

questions about how the tax system is to treat families, the disposition of family wealth, and the role of the lawyer in family counseling and financial planning.

A graduate of Harvard (A.B., 1964) and its law school (LL.B., 1968), where he was a member of the *Harvard Law Review*, Mnookin spent 1964-65 at the Econometric Institute, Netherlands School of Economics, as a Fulbright scholar. Following law school he served as law clerk to Judge Carl McGowan, U.S. Court of Appeals, D.C. Circuit (1968-69), and to Justice John M. Harlan, U.S. Supreme Court (1969-70).

Mnookin practiced law in San Francisco from 1970 to 1972, when he joined the law faculty at the University of California at Berkeley and became director of the Childhood and Government Project, a foundation-supported, interdisciplinary research project concerned with policies affecting children. He became a full professor in 1975.

In 1978, Mnookin was a visiting fellow at Wolfson College and the Centre for Socio-Legal Studies at Oxford.

He is a member of the American Law Institute, the National Academy of Science's Committee on Child Development Research and Public Policy, the Executive Council of the International Society on Family Law, and the George Washington University Family Impact Seminar.

During 1981-82 Mnookin is a fellow at the Center for Advanced Study in the Behavioral Sciences. Among the projects he is working on while at the Center is a book, "The Sovereigns of Childhood: Thinking About Policy Affecting Children," which he is writing with Professors John E. Coons and Stephen D. Sugarman at Boalt Hall. He is also conducting an intensive case study of *Bellotti v. Baird*, a case involving the question of what legally mandated role, if any, the parents of a pregnant teenager should have in her decision whether or not to abort. The study, which is sponsored by the Foundation for Child Development, will be one chapter in a book Mnookin will edit.

Mnookin will return to full-time teaching in September 1982.

New Faces in Law School Development



Victoria S. Diaz, a graduate of the Class of 1975, has been appointed Assistant Dean for Alumni Relations and Development. She replaces Barbara G. Dray '72, who resigned last May to return to private practice.

Since her days as a law student, Diaz has maintained strong ties with the School. Following graduation, she entered private practice with Pillsbury, Madison & Sutro in San Francisco, where she specialized in employment/labor litigation and counseling. In 1977 she returned to the Law School to become its first Assistant Dean for Student Affairs. The following year she took a two-year leave of absence to join the law faculty at the University of Santa Clara to teach Civil Procedure, Environmental Law, Employment Discrimination, and Legal Research and Writing. She returned to Stanford in 1980 to become Assistant Dean for Special Projects, with responsibilities that included the Extern Program and the Moot Court Program.

Diaz serves as an adviser to Hispanic organizations on civil rights matters in the areas of employment, immigration, and criminal justice. In 1979-80, she chaired the Hispanic Advisory Committee to the U.S. Attorney General. She is also a member of the board of directors of the Mexican Museum in San Francisco. Diaz is a member of the California bar.



New Law Fund Director

Kate Godfrey became the new director of the Law Fund on July 27, filling the position left vacant by Linda Feigel, who joined the University development staff as director of prospecting. A member of the California bar, Godfrey is formerly the director of volunteers at Senior Adults Legal Assistance in Palo Alto. She holds a J.D. from the University of Santa Clara (1977) and an A.B. from Stanford (1973).

New Course Combines Law and Literature, Professors Kaplan and Chace

Imagine a course that looks at the law through the eyes of Sophocles, Melville, Kafka, and Capote. That's what Professor John Kaplan of the Law School and Professor William Chace of the English Department have done. The result is a new course, Law and Literature, offered for the first time this fall.

The seed for the course was planted five years ago when Professor Kaplan was a participant at the Alumni Association's Summer College, along with Professor Robert McAfee Brown who spoke on *Crime and Punishment*. "Ever since then," says Kaplan, "I have wanted to learn more about novels involving law."

Then, about a year ago, while having lunch with Chace, associate dean of the School of Humanities and Sciences, Kaplan suggested they teach a course together.

Law and Literature is open to 10 graduate students in English and 10 law students. During the term nine books are covered, including Melville's *Billy Budd*; *Antigone* by Sophocles; *Caucasian Chalk Circle* by Brecht;

Kafka's *The Trial*; *The Partners* by Auchincloss; Wright's *Native Son*; *The Book of Daniel* by Doctorow; *In Cold Blood* by Capote; and Koestler's *Darkness at Noon*.

Through these works the class examines issues such as civil disobedience, the obligation to obey the law, and the nature of Law and Justice from the views of those in the legal system and from the novelists' and playwrights' perspectives. Each student then writes a paper on a particular issue covered during the course.

"The focal point," explains Chace, "is that every novel and play we have chosen revolves around some major aspect of the law, and each one also is an excellent book in its own right."

"Graduate students in English should learn that literature takes place in the real world, and that Melville, Doctorow, and Wright wrote about real problems, real people, real circumstances. Law students, too, should have a larger framework. The study of law should be more than casebook law and law established by the courts."

Kaplan adds, "The law students will learn, at the very least, how non-lawyers look at the law, and I suspect they will be better people for getting into the course."

Shirley Hufstedler In Residence as Phleger Professor

Shirley M. Hufstedler '49, former U.S. Secretary of Education, will spend the spring term at the School as the Herman Phleger Visiting Professor of Law.

Hufstedler will offer a seminar on "Comparative Decisionmaking in the Three Branches of Government." She will also give at least one public lecture during the term.

Hufstedler is currently practicing law with the Los Angeles firm of Hufstedler, Miller, Carlson & Beardsley. Her husband, Seth (Class of 1949), is also a partner in the firm. Prior to her appointment to the Cabinet by President Carter in 1979, Hufstedler was a judge on the U.S. Court of Appeals, Ninth Circuit, and the nation's highest ranking female jurist, a position she had held since



1968. From 1966 to 1968 she was an associate justice of the California Court of Appeal, Second Appellate District, and prior to then a Los Angeles superior court judge (1961-66).

Hufstedler holds a B.B.A. (1945) from the University of New Mexico. While at the Law School she was a founding editor of the *Stanford Law Review*. Following graduation she practiced law in Los Angeles until her appointment to the bench in 1961.

The Phleger Professorship was established in 1972 by Mr. and Mrs. Herman Phleger. Mr. Phleger is an emeritus trustee of the University and a longtime partner in the San Francisco firm of Brobeck, Phleger and Harrison. The professorship allows for a leading person in the field of law, either in private practice or in government, to spend a term at the School to teach and to provide faculty and students with insights into the legal system.

Hufstedler is the fourth distinguished legal figure to hold the Phleger Professorship. Previous recipients include former U.S. Attorney General Edward H. Levi; Simon H. Rifkind, partner in the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison; and U.S. District Judge Charles E. Wyzanski.

Seven Law School Alumni and Friends Honored by the University

Gold Spike Recipients

Donald W. Crocker '58, chairman and president of First Lincoln Financial Corporation of Los Angeles, and Morris M. Doyle, a partner in the San Francisco firm of McCutchen, Doyle, Brown &

Enersen, were among four Stanford alumni to receive the 1981 Gold Spike Award for outstanding volunteer fundraising service to the University.

Presentation of the award was made on September 18 by University President Donald Kennedy at the annual Gold Spike Award Banquet sponsored by the Stanford Associates and held at the Stanford Faculty Club.



Donald W. Crocker, who holds an A.B. (1956) as well as a J.D. from Stanford, has been involved in fundraising activities continuously since his graduation from the Law School. In 1980 he received the University's Certificate of Outstanding Achievement for his "exemplary service" to the Law School, which includes chairman of the Board of Visitors for two consecutive terms and founder and first chairman of the Dean's Council, the Law School's own major gifts committee. He was also instrumental in helping to establish the Law and Business and Law and Economics programs at the School.



Morris M. Doyle holds an A.B. (1929) from Stanford and an LL.B. (1932) from Harvard. He is a former trustee of the University, having served as president of the Board of Trustees from 1962 to 1964. In the early Seventies he co-chaired the Northern California

Major Gifts Committee for the \$300 million Campaign for Stanford. He has also served on the Board of Overseers of the Hoover Institution and is a former president of the Stanford Associates. Doyle's service to the Law School includes membership on the Board of Visitors (1967-70) and the establishment in 1971 of the Morris M. and Juliet C. Doyle Fund. His daughter, Barbara Doyle Roupe, is a 1976 graduate of the Law School.

Four Law School alumni in addition to Donald Crocker have received the Gold Spike Award. They include the late Benjamin S. Crocker '58, brother of Donald Crocker; Richard D. DeLuce '55; Nathan C. Finch '34; and David B. Heyler, Jr. '51.

Stanford Associates Award Recipients

Five Stanford Associates Awards were given to Law School alumni and friends in honor of their "commitment to the University over an extended period of time" and in recognition of their volunteer service "in support organizations of the University, as well as contributions in and outside of fundraising programs."

Henry W. Hoagland, Jr. '37, vice-chairman of Fidelity Venture Association, was honored for earning the title of "Mr. Stanford" in the greater Boston area for outstanding leadership in the Major Gifts program and for consistent support of many other areas of the University, in particular the Law School and the Hoover Institution. Hoagland is a former member of the Law School's Board of Visitors (1975-78).

Talbot Shelton, A.B. '37 (Harvard LL.B. '40), first vice-president of Smith Barney, Harris Upham & Co., received the award for his distinctive service in the Annual Fund and the New York Major Gifts program, which includes bringing together faculty and alumni in the New York area. He was further cited for establishing in 1972 the Lewis Talbot and Nadine Hearn Shelton Professorship in International Legal Studies at the Law School. Shelton served on the Law School's Board of Visitors from 1970 through 1973. He is currently a member of the executive board of the Stanford Alumni Association.

Howard Sugarman, acquisitions librarian and Anglo-American curator, emeritus, at the Law School, was cited for his more than twenty years of volunteer service on behalf of the Stanford Music Guild and for organizing the Senior Outreach Program, as well as other programs providing important links between the University and the community.

H. Melvin Swift, Jr. '49, a member of the Los Angeles firm of Burris, Langerlof, Swift & Senecal, was honored for service to several programs—from Buck Club to Major Gifts—and for being "an all-American athletic fundraiser." Swift is a former member of the University Board of Trustees (1973-76) and a former president of the Stanford Alumni Association (1963-64).

Walter L. Weisman '59, president and chief operating officer of American Medical International, received his award in recognition of his "devoted service and innovative leadership on behalf of the Law School," both as chairman of the Board of Visitors for 1980-81 and as founding member of the Dean's Advisory Council on Law and Business.

Thomas Ehrlich Becomes New UP Provost



On June 19 the Board of Trustees of the University of Pennsylvania confirmed the nomination of Thomas Ehrlich, Carlsmith Professor of Law and former dean of the Stanford Law School, as provost of the university and professor of law.

A member of the Stanford law faculty since 1965, Ehrlich served as dean of the School from 1971 to 1976. Since then he has been on leave from the

School while serving in various federal executive positions.

From 1976 to 1979 he served under Presidents Ford and Carter as the first president of the Legal Services Corporation, the non-profit organization established by federal statute to support civil legal assistance to the underprivileged.

In 1979 he was named by President Carter as the first head of the International Development Cooperation Agency, which oversees the work of the Agency for International Development (AID), the Overseas Private Investment Corporation, and the United States contributions to the World Bank, the regional development banks, and the United Nations and Organization of American States development programs.

An expert in international law, Ehrlich is the author of six books, including the three-volume study, *The International Legal Process*, with Abram Chayes and Andreas Lowenfeld.

Ehrlich is a graduate of Harvard University and its law school, where he was articles editor of the *Harvard Law Review*. Between graduation from law school and joining the Stanford law faculty, he served as law clerk to U.S. Circuit Court Judge Learned Hand and as special assistant in the State Department, first to the legal adviser, then to the undersecretary of state.

Adjunct Professor Keogh Granted Emeritus Status

William T. Keogh was granted the status of Adjunct Professor, Emeritus, effective September 1, 1981. Although he will be devoting more time to his practice in Palo Alto, Professor Keogh intends to volunteer his services to the clinical program as often as his schedule will permit.

A 1952 graduate of the Law School, Keogh served as Associate Dean for Admissions and Financial Aid at the School from 1961 to 1967. In 1967 he entered private practice in Palo Alto, returning as Associate Dean in 1969. In 1978 he turned to full-time clinical teaching, collaborating with Professor Michael S. Wald in Juvenile Law, an



area of particular interest to Keogh.

During his long association with Stanford, Keogh has held several University appointments, including chairman of the Campus Judicial Panel (1973-75) and University Defender for Honor Code and Fundamental Standard cases, a position he has held continuously since 1977. Keogh has also represented or advised students and faculty on numerous matters, often on a *pro bono* basis. In addition, he held for several years the national position of chairman of the Finance Committee of the Law School Admission Council.

A 28-year Army veteran, Keogh served with anti-aircraft artillery and infantry units during World War II, then received a regular Army commission after a brief period on the Kansas State faculty, where he received his B.S. in 1942.

Following graduation from the Law School, Keogh was a judge advocate for three years, then served as chief of international law at the Army's European headquarters from 1955 to 1957. He was military judge for the Army's Ninth Judicial Circuit from 1959 to 1961, when he joined the administrative staff of the Law School.

Acting Dean J. Keith Mann described Keogh's association with the Law School and the University as "years marked with dedication, warmth, wit, and collegiality." He added, "It is good to know that he will still be here and about, for he continues to have much of value to give."

Donald Lunde Leaves Law School for Private Practice

Donald Lunde, who held a joint appointment as clinical associate profes-

sor of psychiatry at the Medical School and lecturer and senior research associate at the Law School, resigned from the University in August to enter private practice in Palo Alto.

A key participant in the Law School's clinical program since 1974, Lunde collaborated with Professor Anthony Amsterdam in his course, Clinical Seminar in the Trial of the Mentally Disordered Criminal Defendant, acting as a consultant and expert witness.

For the last two years he also worked as a senior research associate with Professor Amsterdam and Kathleen Mack, a graduate of the Class of 1975, on the development of a basic course of clinical instruction that can be incorporated into any law school curriculum. The project was funded by the Carnegie Corporation of New York.



Lunde is a nationally recognized expert in the field of forensic psychiatry and author of *Murder and Madness* (1976), a study of murder in America which is based on his consulting work in forty murder cases, including several mass murders. He was also a court-appointed psychiatrist in the Patty Hearst case and has done extensive research on brainwashing in military settings.

Lunde holds degrees in psychology (M.A., 1964) and medicine (M.D., 1966) from Stanford. In 1969, following an internship in internal medicine and a residency in psychiatry at the Stanford Medical Center, he was appointed to the medical faculty. Prior to obtaining his advanced degrees, Lunde served as trial counsel for special courts martial in the U.S. Navy (1958-60) and a member of a military court (1960-61).

Thirty-Four Graduates Fill 1981-82 Judicial Clerkships

Seven recent graduates and twenty-seven members of the Class of 1981 are currently serving as judicial clerks.

United States Supreme Court

Chief Justice Warren E. Burger
Christopher J. Wright '80

Associate Justice Byron R. White
Robert B. Bell '80

Associate Justice Lewis F. Powell, Jr.
David F. Levi '80

United States Court of Appeals

District of Columbia

Judge J. Skelly Wright
John H. Schapiro

Second Circuit

Judge Amalya Kearse
Bernard W. Bell

Third Circuit

Judge Arlin M. Adams
Michael E. Cutler

Fifth Circuit

Judge Robert Ainsworth, Jr.
Paul J. Larkin '80
Judge Thomas G. Gee
Mark C. Brewer

Sixth Circuit

Judge Nathaniel R. Jones
Fred P. Schwartz '78

Ninth Circuit

Judge Joseph T. Sneed
Adam W. Glass

Judge Cecil F. Poole
Norman M. Hirsch '80

Judge William Norris
Michael S. Levinson

Judge Jerome Ferris
William K. Rawson '80

Judge Ben. C. Duniway
Alan L. Reeves

Judge Procter R. Hug, Jr.
Dana M. Warren

Tenth Circuit

Judge James K. Logan
James L. Hand

United States District Court

California, Northern District

Judge Samuel Conti
Thomas C. DeFilippis
Judge Thelton E. Henderson
Alan K. Goldstein
Judge Marilyn H. Patel
Victoria M. Gruver
Stephen F. Heller
Judge Robert F. Peckham
Marilyn O. Tesaro

California, Southern District

Judge William P. Gray
Todd H. Baker
Judge David V. Kenyon
Susan E. Nash

Georgia

Judge Newell Edenfield
Richard C. Mitchell

Hawaii

Judge Samuel P. King
David W. K. Wong

Indiana

Judge William E. Lee
Michael P. Padden

Ohio

Judge Frank Battisti
William E. Weinberger

Massachusetts

Judge Walter Skinner
Kevin B. Wiggins

State Courts

Supreme Court, Alaska

Justice Allen T. Compton
Bruce J. Highman

Supreme Court, California

Justice Otto Kaus
Jonathan V. Holtzman

Supreme Court, Washington

Justice Robert F. Utter
John W. Phillips

Court of Appeal, California

Judge Winslow Christian
Valerie J. Ackerman

Court of Appeals, Oregon

Judge John C. Warden
Christine E. Patton

Superior Court, Alaska

Judge Victor D. Carlson
Marie G. Sansone

Professor Turrentine Honored



On October 28, Acting Dean J. Keith Mann presented Lowell Turrentine, Marion Rice Kirkwood Professor of Law, Emeritus, with a limited edition book commemorating "An Evening in Honor of Lowell Turrentine," which was held on November 7, 1980, during Alumni Weekend.

The presentation was made during a luncheon at the Stanford Faculty Club, which included Turrentine's former student and longtime friend and colleague, Adjunct Professor William T. Keogh '52, who acted as master of ceremonies for that evening.

Known affectionately as "Tut" to the legions of students to whom he taught Property and Wills, Turrentine was a member of the faculty from 1929 until his retirement in 1961. His long association with the School was preceded by nine years of private practice and two years of government service, which included Assistant to the U.S. Special Counsel in the Teapot Dome case, the scandal that rocked the administration of President Warren G. Harding.

Turrentine is a graduate of Princeton (A.B., 1917) and Harvard (LL.B., 1922; S.J.D., 1929).

Professor Friedman's New Book Examines Roots of Criminal Justice System

Our criminal justice system is too complex, too disorganized for reform. There are too many little sovereignties, and no one is in command.

It has been like this for 100 years, while our ideas about what needs reforming in the system have tended to change with each generation.

Thus concludes Lawrence M. Friedman, Marion Rice Kirkwood Professor of Law, in his new book, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910*. (University of North Carolina Press.) Written with Robert V. Percival '79, an attorney with the Washington office of the Environmental Defense Fund, the book is the culmination of more than four years of exhaustive research combining statistical analysis of documentary sources, contemporary newspaper accounts, and explorations in criminal casefiles.

Friedman and Percival chose as the area of their study Alameda County, the principal city of which is Oakland, across the Bay from San Francisco.

Aided by several law students, Friedman and Percival combed the basement of the Alameda County Courthouse, reading old documents and arrest records and photocopying thousands of papers in an effort to piece together an accurate picture of crime and punishment in one U.S. community over the 40-year period of 1870 through 1910.

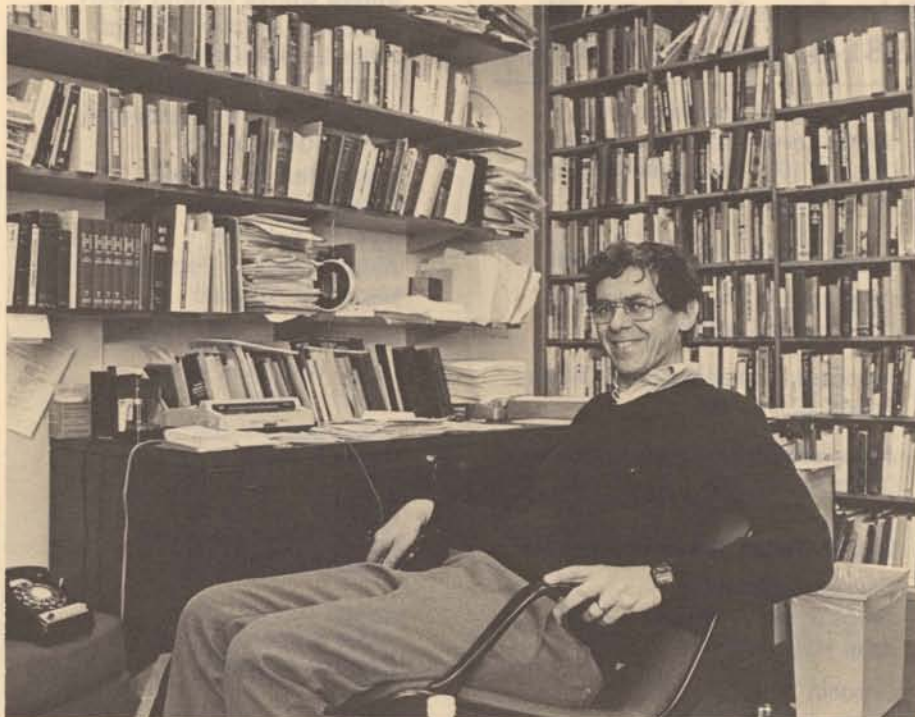
The original Oakland police arrest blotters, as well as the records of felony trial courts, appellate courts, and the California prison systems were examined to determine how crime was dealt with during that period.

The study finds that criminal justice, both in theory and practice, has never satisfied everybody. Waves of reform sweep across the face of the system but without effecting permanent change.

"The criminal justice system," the authors sum up, "was bumbling and confused. It still is."

Laws reflect society

A major cause of disorganization and fragmentation within the system, according to the authors, can be attributed to the fact that each generation brands "criminal" those acts it sees as



especially dangerous. "Changes in the Penal Code . . . show shifts in social judgments about the danger or innocence of conduct."

During the period covered by the survey, for example, there were many moral crusades: against cigarettes, drugs, prostitution, and liquor.

Crime, on the other hand, was not considered a major problem. In contrast, notes Friedman, "The crime rate today is dangerously high. Violence and fear haunt our cities. People are deeply disturbed about crime. No wonder that 'reform' has changed its direction. Even parole is under a cloud. Voices everywhere call for tougher treatment."

As a result of these various social forces tugging in different directions, the criminal justice system has over time become "decentralized, fragmented, made up of bits and pieces."

Change through happenstance

While massive reform would not be possible, according to the authors, changes do take place constantly. But they seem merely to happen rather than to result from cool and rational planning. "Coordination is hopeless or impossible. The system is like some huge and primitive beast, with primeval

power to regenerate; snip off a leg, an arm, an organ here and there—the missing part simply grows back. No brain is in control, no central nervous system"

That was true 100 years ago in Alameda County, says Friedman, as it was no doubt true throughout the rest of the country at that time. And it remains true today.

A major contribution

The Roots of Justice is the first study to examine the criminal justice system by examining in detail basic legal records. "It should stand as a criticism of the world of legal scholarship that not much like this has been attempted before. There has been little attempt to look at the system from the point of view of how it is working, how it worked in the past, and how we got the system we have."

The Roots of Justice is Friedman's eleventh book. In 1976 he received the coveted Triennial Award of the Order of the Coif for his books, *A History of American Law* (1973), which was also nominated for a National Book Award and won the SCRIBES award as the best book on law published in that year, and *The Legal System: A Social Science Perspective* (1975).

Faculty Notes

Professor **Barbara A. Babcock** spent the fall term on sabbatical during which time she revised her casebook, *Civil Procedure, Cases and Comments on the Process of Adjudication*, written with Paul D. Carrington, Dean and Professor of Law at Duke University. Professor Babcock continues for the second year as a University Fellow. In this capacity, she meets regularly with other Fellows from various disciplines to learn about and discuss University governance. She is also using the fellowship, which carries a stipend, to study the institution of the Feminist Studies program at Stanford.

Professor **John H. Barton** has written a new book, *The Politics of Peace: An Evaluation of Arms Control* (Stanford University Press, 1981). He is also serving as principal investigator in a project funded by the Ford Foundation entitled "The Cuban-Haitian Refugee Crisis of 1980." Victor H. Palmieri '54, former U.S. Coordinator for Refugee Affairs, is collaborating with Professor Barton on the project.

Professor **Mauro Cappelletti** was awarded the *Premio Linceo* on June 26 by the Academy of Italy for scientific accomplishment in law. He also received the *Premio Europeo Lorenzo il Magnifico* from the International Academy in Florence for accomplishment in the humanities. A co-recipient of the latter award was Luciano Pavarotti.

Professor **Robert C. Ellickson** has co-authored with Professor A. Dan Tarlock '65 of Indiana University School of Law a casebook, *Land-Use Controls*, which was recently published by Little, Brown & Company. His article, "The Irony of 'Inclusionary Zoning,'" appears in the September issue of Volume 54 of the *Southern California Law Review* and in a collection of essays entitled *Resolving the Housing Crisis: Government Policy, Decontrol, and the Public Interest*, a book compiled by the Pacific Institute for Public Policy Research

and published by the Ballinger Publishing Company (1981).

Marc A. Franklin, Frederick I. Richman Professor, recently completed a study of defamation cases, "Suing Media for Libel: A Litigation Study," which appeared in a recent issue of the American Bar Foundation's *Research Journal*. The study, which analyzed 291 defamation cases from January 1977 to September 1980, follows a broader study of 500 cases that Professor Franklin conducted last year. The new study upholds the findings of the earlier one, i.e. that "suits against media defendants are not likely to be rewarding. Of the 136 appellate cases finally resolved, media defendants won 126 and plaintiffs won 10. The study also finds that two 1979 Supreme Court decisions, *Wolston v. Reader's Digest* and *Hutchinson v. Proxmire*, have had "no major impact" on defamation cases yet. Research for the study was supported by a grant from the American Bar Foundation and by the Stanford Legal Research Fund.

Professor Franklin's article, "Expunging Criminal Records: Concealment and Dishonesty in an Open Society," written with Diane M. Johnsen '82, appeared in the Spring issue of Volume 9 of the *Hofstra Law Review*. The article examines the role of expungement statutes and their impact on the media, and explores the underlying conflict between rehabilitation and access to information.

The second edition of Professor Franklin's undergraduate text, *The First Amendment and the Fourth Estate*, co-authored by Robert E. Trager '82, former Associate Professor of Journalism at Southern Illinois University, appeared last spring. The second edition of his casebook, *Mass Media Law*, will be published this spring.

During the summer Professor Franklin taught at the Stanford Campus in Cliveden, England, in conjunction with the Law Focus program. He taught the course, "Comparative English and American Legal Systems," with Professor Eric Wright '67 of the University of Santa Clara Law School, who visited at Stanford during 1980-81. In the

spring quarter Professors Franklin and Wright taught "Introduction to American Legal Process" to undergraduates in preparation for the summer at Cliveden. During the summer Professor Franklin also taught "Freedom of Communication in the United States and Britain."

On December 12 Professor Franklin addressed a Michigan State Bar seminar on "Libel Trends and the First Amendment."

Professor **William B. Gould** delivered a paper, "The Supreme Court's Labor and Employment Docket in the October 1980 Term: Justice Brennan's Term," on August 10 during the ABA Convention in New Orleans. Later in August and in early September he lectured on labor law in Brazil, Chile, and Paraguay. He then attended a labor law conference sponsored by the Institute of State and Law of the Polish Academy of Sciences in Warsaw, where he met representatives of Solidarity. On October 2 he spoke before the Royal Institute of International Affairs in London on "Trade Unions in the Age of Renewal: Solidarity and Labor Law in Poland." He spoke on the same subject to the Labor Law Section of the New York City Bar Association late in October.

Gerald Gunther, William Nelson Cromwell Professor, returned to teaching this fall after a year's leave to work on his biography of Judge Learned Hand. The leave was in part supported by a Senior Fellowship from the National Endowment for the Humanities. During his leave year, his other activities included the delivery of an address—on Hand and judging—at the installation ceremonies for Judge Ruth Bader Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit. Professor Gunther continued to participate in the work of the Federal Judicial Center Advisory Committee on Experimentation in the Law, which submitted its report to the Chief Justice last spring. He also participated in an American Enterprise Institute Conference on the Supreme Court and published the annual supplement to his widely used casebooks on constitutional law.

Since returning to teaching, Professor Gunther has served as chairman of a two-day conference considering congressional attacks on the federal judiciary. This Washington conference in October was sponsored by the American Enterprise Institute and included among its participants dozens of constitutional law and federal jurisdiction teachers from around the nation. This fall, he also lectured on equal protection to appellate judges from around the country gathered in Seattle for the American Bar Association's Appellate Judges' Seminar series. Professor Gunther also served as a member of the Dean Search Committee. Earlier in the year, he was elected to the American Philosophical Society, the nation's oldest general learned society. (He was named a Fellow of the American Academy of Arts and Sciences, the second oldest society, several years ago.)

Law Librarian and Professor **J. Myron Jacobstein** participated in September in a panel sponsored by the Society of American Archives on "Creation, Control, and Use of Privileged Records." He also presented a paper to the Society on the "Lawyer/Client Relationship and Its Impact on Archives and Archivists." In October he presented a paper on "Rare Books and Law Libraries" at the annual meeting of the Western Pacific Chapter of the American Association of Law Libraries.

Associate Professor **Mark G. Kelman** was named one of America's "5 Hottest Young Law Professors" in the October 1981 issue of *American Lawyer*. Entitled "At the Head of the Class," the article features the magazine's choices for "the five most promising young law professors—thirty-five years old or younger." Selection was made following interviews with law professors, students, and graduates from law schools around the country. Cited for his scholarship, Professor Kelman was said to be "considered by many legal scholars to be the most persuasive young neo-Marxist critic of mainstream American law," particularly in the areas of taxation and law and economics.

Professor Kelman spoke at the plenary session of the Law and Society Association's annual meeting in June in Amherst. The topic of his talk was, "Critical Legal Thought and the Empirical Social Science Tradition." His article, "Interpretive Construction in the Substantive Criminal Law," appears in issue 4 of Volume 33 of the *Stanford Law Review*. The article attempts to expose the structure of the rhetoric in criminal law arguments that masks the politically problematic nature of the underlying material.

John Henry Merryman, Sweitzer Professor, has been appointed chairman of a new University Panel on Outdoor Art. Members will encourage donations and longterm loans of major works of outdoor art (primarily sculpture) for campus sites and will also make recommendations to the President of the University on proposals for installations of outdoor art on the campus. In April Professor Merryman was the principal speaker at the "Art Law Conference: Protection of the Rights of Artists," held in Houston. In September he spoke at the national conference of the American Association of Archivists in Berkeley on "Cultural Property as an Emerging Legal Concept."

A. Mitchell Polinsky, Professor of Law and Associate Professor of Economics, attended meetings in April and November of the Law and Social Sciences Advisory Subcommittee of the National Science Foundation in Washington.

David Rosenhan, Professor of Psychology and Law, recently addressed the American Academy of Forensic Psychology on the roles of social scientists in litigation and mediation. He also lectured on the uses of hypnosis in evidentiary proceedings at the meetings of the American Psychological Association. Professor Rosenhan is currently serving as president-elect of the Division of Psychology and Law of the American Psychological Association.

Professor **Byron D. Sher** took his seat as assemblyman in the California legislature on December 1, 1981. He

is serving on the Assembly committees on revenue and taxation, energy and natural resources, utilities and energy and consumer protection and toxic wastes. Last February Professor Sher participated in a Conference on Land Policy and Housing Development, sponsored by the Lincoln Institute for Land Policy at the University of Southern California Law Center.

Assistant Professor **William H. Simon** was one of ten runners-up chosen by *American Lawyer* in the article, "At the Head of the Class," (October, 1981) as law professors "whose work is expected to make an impact on legal thinking in coming years." The ten runners-up were selected in addition to five professors featured as "America's 5 Hottest Young Law Professors" (see note on Mark Kelman). Professor Simon, who joined the Stanford law faculty in September, has written on legal ethics and legal education. During his first year at Stanford he is teaching Civil Procedure I and a clinically-oriented first-year course in Lawyering Process with Professor Paul Brest.

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