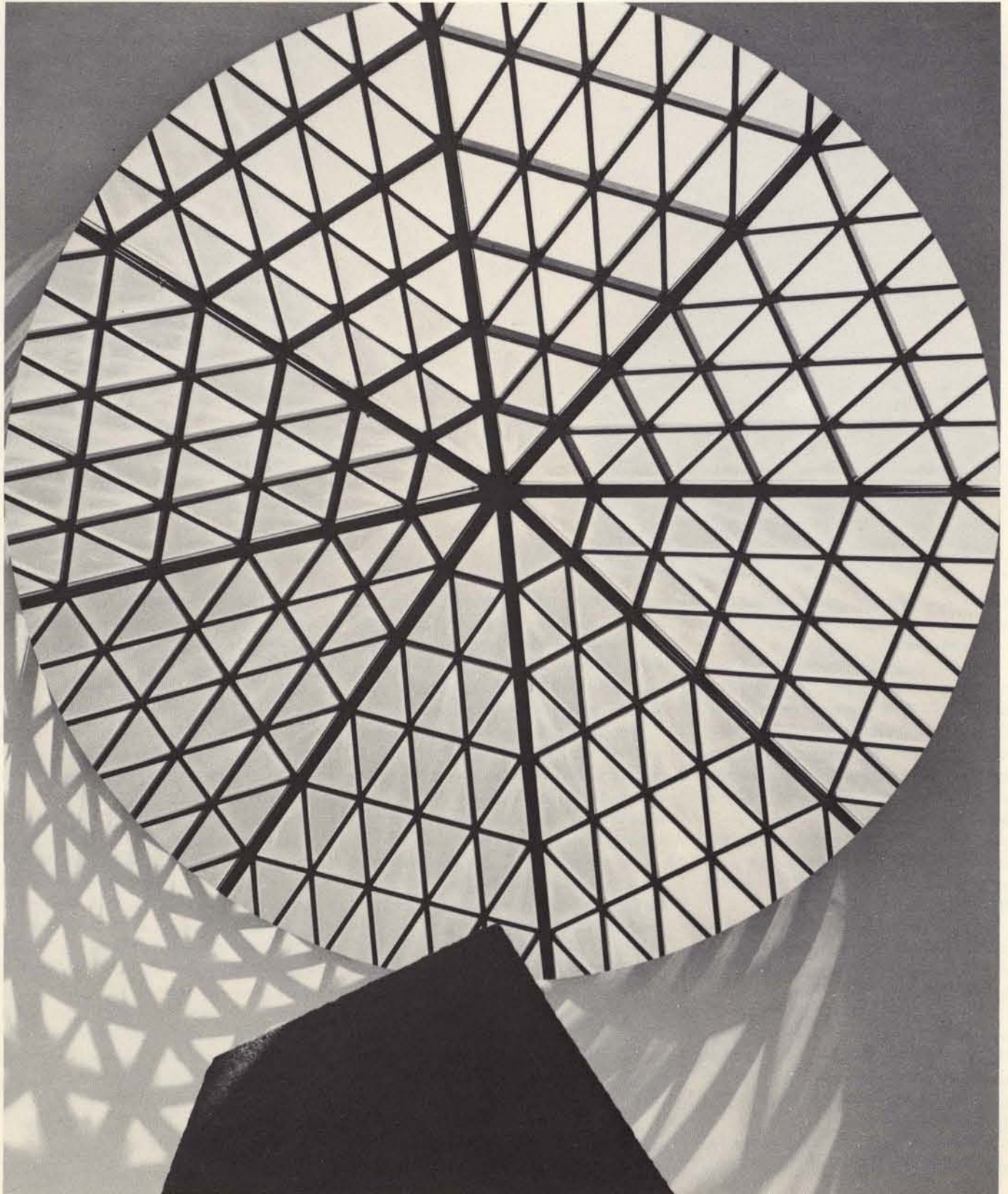

Stanford Lawyer

Spring/Summer 1982

Volume 17, No. 1



In Memoriam

Joseph E. Leininger 1923 - 1982



Joseph E. Leininger, associate dean of the Law School since 1970, died on June 3 of heart disease. He was 59.

Known to his many friends and colleagues as "Joe," Dean Leininger was the School's chief administrative officer. His responsibilities encompassed a wide variety of concerns, ranging from general supervision of budget and personnel matters to administration of special academic programs.

In 1970, with the help of an IBM grant, he established the law and computer program at the School. It was the first of its kind in the country.

He also directed the visiting scholar program and the extern program, an off-campus operational training program for students.

A native of Cleveland, Dean Leininger entered the University of Rochester in 1941. He interrupted his studies in 1943 to join the U.S. Army. He was assigned to the Office of Strategic Services and stationed in China.

In 1947, he joined the CIA, filling assignments in Washington, D.C., Korea,

and Austria. During this period, he received a bachelor of arts in history and Far Eastern studies from the University of California at Berkeley. He left the agency in 1955 to enter Harvard Law School and received his degree in 1959.

He practiced law in Denver from 1960 to 1962. In 1962, he joined the staff of the Harvard Law School as secretary of international legal studies. In 1966, he became vice dean, a position he held until 1970, when he came to Stanford.

He is survived by his wife, Genevieve; his son, George; his daughter, Sally; his mother, Esther Fisher Leininger of Cleveland; and his sister, Esther Mae Petersen, of Fairview Park, Ohio.

Family, friends, and colleagues have established the Joseph E. Leininger Memorial Fund at the Law School. Contributions to the fund are welcome and should be sent to Assistant Dean Victoria Diaz, Stanford Law School, Stanford, California 94305.

Joe Leininger Remembered

At a memorial service held for Dean Leininger on June 14 at the First Congre-

gational Church in Palo Alto, Acting Dean J. Keith Mann shared with the congregation the thoughts and sentiments expressed by several deans who had worked with Joe Leininger at Harvard and Stanford.

Erwin Griswold, who was dean at Harvard from 1960 to 1967 (and Solicitor General of the United States from 1967 to 1973), described him as "a great human being, who always contributed wherever he was."

Bayless Manning, who was dean of the Law School when Joe Leininger came to Stanford, recalled "the quality of invariable and irrepressible goodness which radiated from him—the consistent kindness, thoughtfulness, and good natured sensitivity. This special quality illuminated every aspect of his professional life. And the same aura surrounded the personal life of this fine man, with his love of music, of beauty, of young people, of friends and of the splendid family to which he was so devoted."

From Thomas Ehrlich, dean from 1971-75, came the observation, "I remember Joe. Joe at the piano, Joe at our side, always at our side, with an answer, with a smile, with the facts, with a quiet, firm way to handle almost any problem. When I became dean, Joe was there—to help, as a partner, and he never failed to tutor me, patiently and with great, good humor. He was a warm and caring friend. I cherish his memory."

Charles J. Meyers, dean from 1976 through 1981, recalled, "Joe took a neophyte and with patience, tact, and an ability to teach—and I taxed each of those resources to the limit—taught him to be a dean. Joe was a professional: he knew his job, he performed it superbly . . . with grace and a sense of humor."

Adding his own sentiments, Acting Dean Mann said, "The marvel of such a man does not rest on all that he was capable of doing. For talents of mind and music are simply gifts received from God and need not be a source of special tribute—or pride. Rather we should look to what a person blessed with such gifts does with them. This is where Joseph Leininger outdid others."

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Cover photo: Yemima Rabin

ACTING DEAN'S PAGE



We are reminded in a familiar valedictory that riders do not stop when they reach the distance. Rather, there is a finishing canter at the end of the race. While John Hart Ely has begun his tenure as Richard E. Lang Professor and Dean, and I find myself mercifully transformed into the Associate Dean I was before, the composition of this brief letter to you, recapping last year, is my last duty as Acting Dean. I hope that I can communicate to you with some perspective my view of the School's progress in the past year and its prospects.

On the latter score, one of Dean Ely's first acts at Stanford will reassure those who might have feared that a change at the helm would signal an abrupt change of course: he banished from his office the Danish-modern teak desk which had been there and reached into

the University's past to replace it with a hand-built desk, complete with carved griffins, which Mrs. Stanford had acquired in Italy in the early years of the century. Certainly the coming years will be a time of change in many ways for the School. As aptly symbolized by his choice of desks, however, I can say after working with him during this time of the novitiate that Dean Ely's years will be marked by continued progress such as that which has built Stanford Law School to its current eminence and that he appreciates our institution's evolving history and the people who have helped to make that history. Still it may be a fitting time to note Alexander Heard's well-spoken wisdom as he became Chancellor Emeritus of Vanderbilt last May: "A new generation is as capable as a previous one of taking care of itself and ordering its own affairs."

This past year as Acting Dean has allowed me a unique vantage point from which to survey our School's strengths and its weaknesses. I come away with renewed institutional pride which I hope all of you feel as well. The resources available to Stanford Law School are tremendous. Supportive alumni and friends who remain close despite geographical distances; a contributing and collegial faculty; a gifted and interested student body; a place at one of the great centers of learning; and a dedicated and professional staff which does not flinch from the extra time and effort required to achieve and to maintain excellence—all these Stanford Law School has in abundance.

As I look back on the past year I am particularly grateful for the extraordinary assistance rendered the School by graduates and friends. The maintenance of our teaching and scholarly programs and financial support to worthy students who could not otherwise attend Stanford Law School turn on the willingness of alumni and friends to give of their time and of their substance. With continued involvement such as that which I saw over this past year, the future of Stanford as one of America's leading law schools can be assured.

The record attendance at Alumni Weekend, the 9% increase in the 1981 Law Fund donations, despite national

economic problems, and the successful program for the Board of Visitors under the leadership of Chairman Del Fuller '55 and Vice Chairman Les Duryea '50, all exemplify the help I received and on which I know Dean Ely will greatly depend.

Similarly, the School's administrative staff provides the teamwork and support that also ensure the continued success of our programs. The strengths of the staff have been revealed at the year's darkest moment: the tragic and untimely loss of Associate Dean Joseph E. Leininger in early June.

There are many, many people with whom one might work and conclude that they were highly professional, conscientious, or good administrators, and never really know another thing about them. In Joe, we found an abundance of those professional qualities in a man of unassuming graciousness, a man who took the time, and showed the patience, and who knew how to make people smile when they least wanted to but most needed to. In many ways Joe was the conscience and the emotional glue of the School.

Joe's sudden passing is a blow to this School. Yet his colleagues have delayed personal plans, rearranged schedules, picked up extra responsibilities, and worked together to try to fill the gap until his successor is chosen. While Joe's moral support may never be fully replaced, the staff that he helped build over the past twelve years is indeed a worthy institutional legacy, and a morale and spirit that I can see, at this sad time, will in the coming years provide the School with strength and Dean Ely with support. For their abiding help, we are grateful.

Now the baton has been passed to Dean John Hart Ely, and we trust that no stride has been lost in the transfer. John's arrival is an extraordinary moment in the history of the School and of the University of which it is such an integral part. I know all who are part of Stanford join in welcoming the Ely era.

J. Keith Mann

J. Keith Mann
Acting Dean



Democracy and Judicial Review

by John Hart Ely, Richard E. Lang Professor
and Dean of the School of Law

Illustration by Marvin H. Simmons

Two years ago I published a book called *Democracy and Distrust*.¹ I know a number of you have read it (because you told me you did) but I want to take a few moments to sketch its outlines for the others. It is not the subject of this evening's talk, but a brief

description should help set the stage. I argue in the book that whereas many, in fact most, of the provisions of the Constitution are reasonably specific—not in the sense that they mechanically generate answers, but rather in the sense that one at least knows by reading them what their general subject matter is—there are a few that are inescapably open-ended. That is, the document contains clauses whose meaning cannot be discerned from either their language or their legislative history. For example,

the Fourteenth Amendment provides that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” and the Ninth Amendment (this one is applicable against the Federal Government) provides that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Most of the book is about how the courts should give content to these Delphic provisions. The answer I give is not the prevailing one, that appointed judges should overrule elected officials essentially on the ground that what they

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did is wrong or even outrageous—or, what is the same thing, that they should overrule elected officials on the ground that those officials have violated some right, not mentioned elsewhere in the Constitution, that the judge thinks is precious. For some years this has been the dominant academic view of what judicial review should comprise, and we know that at various times (apparently including the present) it has also been the view entertained by a majority of the members of the Supreme Court. One notable judicial episode occurred early in this century when something called “liberty of contract” (which translated into the right not to pay your employees the minimum wage or to work them more than the maximum hours) was vigorously protected by the Supreme Court, even though it is nowhere mentioned in the constitutional document. The Burger Court has created a modern counterpart of liberty of contract by constitutionally enshrining the right to have an abortion, although, of course, that right too is nowhere suggested in the document. (I might add parenthetically—if only because the dominant view is one that blurs the distinction—that I agree that the political branches should grant women the right to have an abortion. Indeed, I suppose it is not even clear that minimum wage laws do a great deal of good—it is at least asserted that they actually have the effect of keeping some people from being employed at all—but that judgment too, in my opinion, is properly left to elected officials.)

What, then, *should* the courts protect constitutionally? To begin with, they should protect those rights that are designated with some specificity in the constitutional document as entitled to protection. That much is easy. The harder question is what should be protected under open-ended provisions of the sort I mentioned. To that question the book suggests two answers. The first is that the courts should protect rights of political access: the right to vote, to have one’s vote counted equally, to run for office, to organize politically, to speak, and so forth. That cannot be the whole story, however. I go on to argue in the book that the duty of our representatives to represent all their constituents



also implies certain equality rights, or rights of various minorities not to be treated by a set of rules different from that which the majority has prescribed for itself.

Platonic Guardians

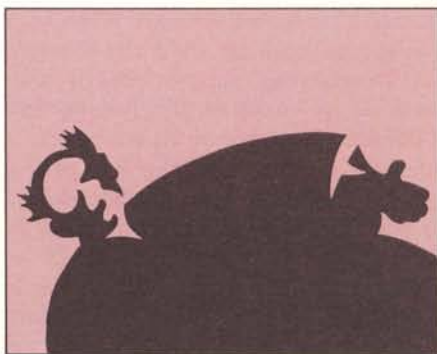
The system I have sketched can be seen as self-policing: if we all have a right to significant political input, and if at the same time a majority cannot treat various minorities worse than it treats itself, it will follow that none among us will be treated very badly. (If I have to do to myself what I am prepared to do to you, I am not likely to treat you outrageously.) I was informed that the one hundredth review of my book was published just last week. (Now if we could just get the sales figure up as high as the review figure, we might have something.) Its title caught my eye. It was a review by Professor Samuel Estreicher in the *New York University Law Review*, and it was entitled “Platonic Guardians of Democracy.”² It was not an especially friendly review, but I do think the title captures my general idea rather well. Whereas Plato’s platonic guardians (the real platonic guardians) actually were to take substantive control of the government decisionmaking process, my “guardians” (as Estreicher’s title suggests), while they do indeed sit largely apart from and immune to the political process, sit primarily to safeguard democracy, to make sure that political incumbents do not manipulate things so as to deny others an effective right to participate in either the democratic process or its outcomes.

Obviously the book’s discussion proceeds at some length; let me close my summary by listing the three general arguments I make for this “participation-oriented” form of judicial review. The first is that the sorts of rights I have designated—access rights and equality rights—are those with whose protection we should least trust elected officials. Such officials have every incentive to bar the access of various insurgent and dissident groups to the process (for the obvious reason that such access is likely to turn said officials out of office). And they have a similar incentive to cooperate with some dominant majority of their constituency (enough to return them to office) so as to tyrannize, or at least to discriminate against, certain minorities whose continued support they do not need. To be contrasted in this regard is judicial protection of “society’s fundamental values,” the favored recipe of the academic theorists. For if it is truly “the values of the people” that the theorists want enforced, elected officials have strong incentives to define them correctly (and thereby to insure their return to office), and thus the intervention of the judiciary cannot be justified.

The second argument involves a rather lengthy review of the constitutional document and is one, you will be relieved to learn, I do not intend to repeat here. Its overall claim, however, is that the general concerns of the Constitution (to the extent it is not concerned simply with housekeeping details) are with just the sort of rights I have mentioned, rights of access and rights of equality. I might add that this claim is particularly strong with respect to the amendments that have been ratified since the Civil War, most of which have been concerned precisely with increasing the access to the process of groups that had previously been denied it. (Lest you be tempted to dismiss that as not “our real Constitution,” I would note that the period since the Civil War constitutes three-quarters of our national history.)

Finally I argue, again distinguishing my position from the dominant academic theory, that my representation-reinforcing approach on judicial review is more consistent with the underlying democratic theory of our institutions. It

is, I suggest, entirely incompatible with democracy for courts to define their mission as one of correcting elected officials who have strayed too far either from what the judges think is right or from what they claim they know (and the legislators do not) that “the people” really think is right. The theory I propose, on the other hand, is one that is geared to making democracy work by insuring the access of all groups to the process and insuring, further, that the dominant majority coalition will not prescribe one set of rules for itself and another, less favorable set for groups that are not part of that coalition.



Why Are We a Democracy?

I mentioned that there had been a number of reviews of my book, a gratifyingly large number in fact. And most of them have been quite flattering. Unsurprisingly, however, the flattery generally is followed by a healthy dose of criticism. One recurrent theme of the criticism is that the last argument I mentioned, the argument from democracy, is *ipse dixit*. Why can one not, the critics ask, just as well announce that the preservation of certain rights that judges or philosophers think are important flows from the true meaning and rationale of “democracy”? What right, they ask, has Ely to announce that the form of review he favors is any more consistent with democracy? Isn’t this simple question-begging? It’s that question I’ve been pondering of late and concerning which I want to share my tentative thoughts. In particular, I want to spend some time this evening asking why we’re a democracy—that is, what are the various rationales, or at least the various plausible rationales, for democracy—and what

“The theory I propose . . . is one that is geared to making democracy work by insuring the access of all groups to the process and insuring, further, that the dominant majority coalition will not prescribe one set of rules for itself and another, less favorable set for groups that are not part of that coalition.”

each of these various rationales seems to imply for the appropriate role of judicial review.

An account of democracy which one finds in Rousseau, and in a number of contemporary theorists as well, is that it is a system of government that enhances the autonomy of the citizen and thus puts her in a position where she can behave morally.³ (The notion here is that a robot, or a slave, can be judged neither moral nor immoral—that is, she simply is not a moral being—because her actions are controlled by another: only by being granted autonomy or control over a range of significant decisions is one placed in a position where she has the option of behaving morally.) Democracy, the argument continues, increases the range of significant decisions for which the citizen has responsibility and thus increases her opportunities to behave in a moral manner. To the extent this rationale is valid, it should lead to a form of judicial review that increases the opportunities of the citizenry to participate in politics and political decisions and, having done that, leaves the product of their decisions alone. (If there is a judicial veto over the substance of the citizenry’s choice, that obviously will decrease the autonomy of the citizenry.) This first account of democracy is thus not simply in the position of not generating judicial authority to overrule the democratic process on grounds of substantive disagreement—it is *incompatible* with such authority.

The second rationale for democracy to which one commonly hears reference is that it is an unusually *stable* form of government, that if change can come

peacefully through the system, there is a lessened chance of violent revolution. This account too seems quite clearly to generate a form of judicial review that facilitates popular decision (including the equal representation of all citizens) and seems incompatible with any judicial or other elite veto with authority to thwart such decision.

The third sort of account of democracy would take the following general form: “democracy is a system of government that is likely to generate laws of type *x*, and laws of type *x* are good.” Finally, we have an account that would generate a mode of judicial review different from that recommended in my book. For it would seem to follow from the account just given that the courts too should pursue goal *x* and correct the product of the legislature when it has failed to pursue that goal or has done so with less efficiency than the courts think appropriate. To flesh the concept out even that far, however, is to begin to indicate the reasons why we do not often hear any such rationale for democracy. For if the idea is to produce policy decisions of a certain type, one is not likely to select democracy as the preferred governmental system. Much more efficient would be some sort of dictatorship or oligarchy which could quite straightforwardly and efficiently pursue the goal in question. Democracy is a form of government ill-suited to the efficient generation of laws of a certain type; people differ and thus the products of democracies differ as well.

It is precisely for such reasons that we hear a great deal more of a quite distinct, indeed opposite, rationale for de-

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mocracy—that everyone should have a say in how we are governed because no one can be sure that she knows what's right (and even if she thinks she does, she has no right to impose her notion of what's right on others who think differently). This attitude was perhaps put most succinctly by the distinguished political scientist E. E. Schattschneider: "Democracy is a political system for people who are not sure that they are right."⁴ Actually, the thought is a little richer than this. In a recent article in the journal *Political Theory*, Michael Walzer argued for a theory of judicial review that was gratifyingly similar to that which I had proposed.⁵ (It's true he credited it to Richard Ely, but at least that keeps it in the family. It might, after all, have been credited to Ron Ely, who used to play Tarzan but, alas, is not a relative.) The reason the adoption of such a theory of judicial review by Walzer merits special mention is that he has for some years been an explicit and forceful spokesman for a democratic socialist perspective. Walzer is a person who *does* have an answer, an admirably well-articulated one at that, to our various public policy choices. And yet, to his credit, he feels—despite this confidence—that he has no right to impose that preference on the rest of us through the judgments of politically unaccountable judges.

This fourth account of democracy can be stated under three separate rubrics which, though different, in this context come to much the same thing. The first is the rubric of equality, the idea being that although it is obvious that we are not all equal in all respects, we *are* equal as regards our right to decide what is the right policy for our government to pursue.⁶ The second (shudder) is the rubric of natural rights. Here I have in mind particularly John Locke's assertion that none among us has a right to impose on another his view of proper public policy.⁷ The final relevant rubric is that of utilitarianism, the theory which defines as moral that course of action which conduces to the greatest good or greatest happiness of the greatest number of people.

"Utilitarianism" has become of late something of a dirty word,⁸ but it cer-

tainly bears noting that it is a moral philosophy that proceeds from the same underlying impulses as democracy, namely, a scepticism that any among us has the "right answer" to questions of public policy and the tenet that the opinion of everyone on such questions is entitled to equal consideration. And indeed democracy can be viewed as a form of "applied utilitarianism."⁹ It is possible, I suppose, to imagine our appointing someone to make an estimate of what will make most of us most happy, but that would be a roundabout and obviously disingenuous way of pursuing utilitarianism. The more efficient (and candid) way of making that estimate is to give everyone a vote. There are many subjects on which I am prepared to yield to the expertise of others, but the subject of what makes me happy is not among them.

Utilitarian Calculus and Democratic Process

I just noted, and of course you knew it already, that utilitarianism has been subjected to a good deal of recent criticism. What I want to do next is briefly look at the various objections that have been made to utilitarianism and ask how many of them remain applicable when that philosophy is translated into a democratic political system. We will find that some of the standard objections are simply inapplicable when we are talking about democratic public policy decisions as opposed to individual moral decisions, and that others among them actually operate to *strengthen* the argument for democracy. We will also find, I think, that one of the most often cited objections to utilitarianism—that it is indifferent to considerations of distributional equality—while it is an objection that can fairly be leveled at some theories, including some theories of democracy, is not one that can legitimately be directed, or at least so I will argue, at the utilitarian account.

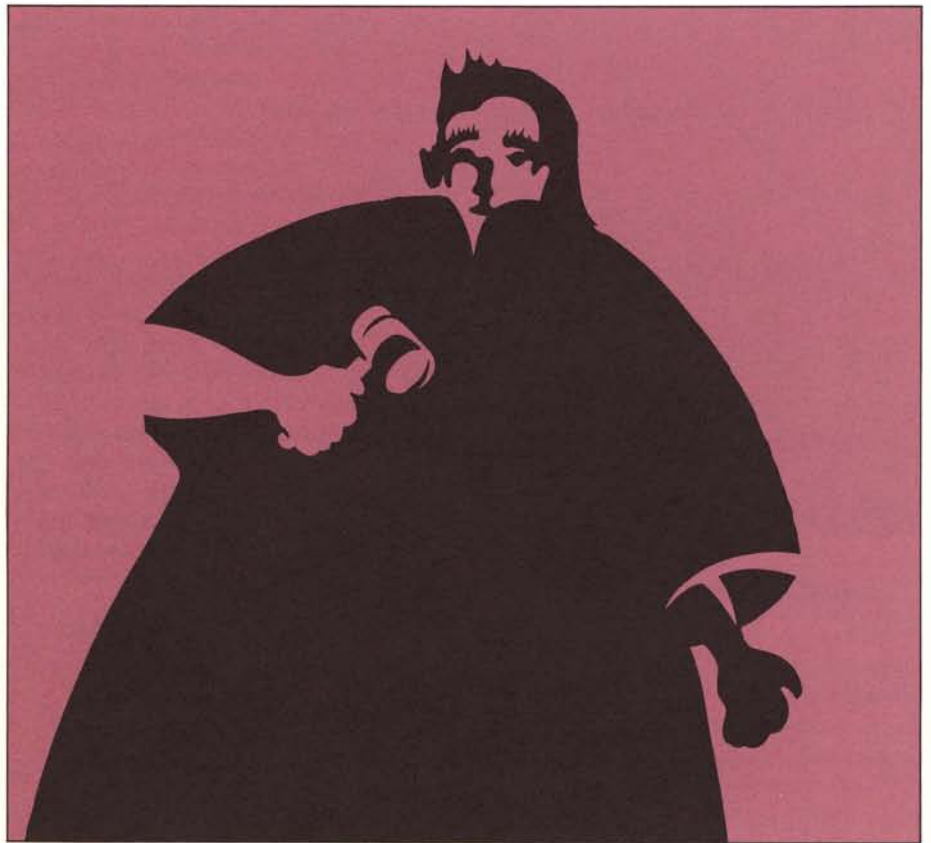
There exist a number of familiar objections to utilitarianism as a guide to personal morality—among others, that it occasionally counsels lying or breaking promises, and that it ignores the distinction between positive and negative re-

sponsibility. (What is meant by this last objection, for example, is that utilitarianism would counsel a person to shoot one innocent person in order to keep another from shooting ten innocent persons, an outcome the critics think unacceptable.¹⁰) My own view, though this is not the subject of tonight's talk, is that such objections are invalid—that a sensible utilitarian would lie or break a promise only very rarely indeed (the maintenance of such conventions is not only entirely justified, but required, on utilitarian grounds) but that she should on rare occasions be prepared to do so. (For example, one should lie to keep a deranged killer from finding an innocent child she is intent on slaughtering. I expect this is how most of us would in fact behave, and I cannot for the life of me see how it is immoral.) As for shooting one person to save nine, I would note first that it is not a problem that is likely often to arise. (I am older than most people in this room, and I can assure you that it has arisen for me only rarely.) And should a real-world situation arise, we probably would conclude, correctly, that there was serious doubt that ten people would in fact be shot if we did not shoot the one. But given the unrealistic laboratory conditions necessary to set up the dilemma, my view would be that the moral course of action is to shoot the one person to save the ten, and that my likely refusal to do so would testify more to my weakness than to any lack of morality. Having already commented too long on something that is not really to the present point, I should get to the point that *is* to the point, namely that such considerations, although they bear in interesting ways on personal moral codes, have little or nothing to do with this evening's question, which is how *governmental* policy decisions should be made.

I react much the same way to two objections that have been stated by various people, recently and forcefully by Charles Fried: first, that utilitarianism is "suffocatingly universal" in that it makes every decision on how to act a moral decision and second, that in enjoining us to treat the happiness of others as equal in moral terms to our

own happiness, utilitarianism thwarts human nature and thus is an “unreasonable” morality.¹¹ He’s right to a point: there is no doubt that each of us often places our own happiness somewhat above the happiness of other human beings. That does not mean, however, that we are behaving in a morally admirable way when we do so, and I do not believe that we are. And while I certainly agree that people generally lack the stamina to treat every decision as a moral decision—at least not without the help of various “rules of thumb”—it seems to me that every decision that affects the happiness of other people *is* a moral decision, and at least when the effects are serious and the computation is doable, we should behave on precisely that assumption. Again, however, I’ve strayed from the relevant point, one with which I’m sure Charles would agree, that every *governmental* choice is a choice with moral implications.¹² (I also assume that no one would argue that it is morally right, though unfortunately it is common, for those who govern to favor their own welfare above that of the rest of us.)

Other common objections to utilitarianism are not simply irrelevant, they strengthen the argument for a democratic system. The first objection I would cite is one made by Marshall Cohen, that utilitarianism would justify the suppression of political rights, such as voting and free speech.¹³ If, however, the way we do our utilitarian calculus (and it is certainly the most sensible way) is by a democratic political process, it follows inexorably that such rights must be preserved. To be taken more seriously is a threshold issue in utilitarianism, namely the question of what it is that should be maximized. Is it happiness? Pleasure? Lack of pain? What do we say to the person who says that the commodity to be maximized is wisdom, or physical prowess?¹⁴ These are hard questions, but democracy provides us with an institutional way out by letting each individual decide for herself what the commodity to be maximized should be. That objection leads straight to another commonly made to utilitarianism, that there is no workable way of measuring various individuals’ intensities of feeling or



degrees of happiness.¹⁵ When utilitarianism is translated into democracy, the objection becomes that *the vote* does not reflect such intensity.¹⁶ It can tell us how many prefer ballet to basketball, and vice versa, but not by how much.

That, however, is true only on certain assumptions: that there is only one issue before the voters, that everyone is obligated to vote on it, and that the vote is taken immediately after the question is announced (leaving no time for pre-election politicking). Those assumptions are patently untrue. We are not required to vote, and if one does not care about the issues on the ballot, one need not—indeed I am tempted to commit the heresy of saying one should not—vote. If one cares, one should vote. If one cares more intensely, she should urge others to vote as she does, acquire the information necessary to become a source to whom others will turn to find out how *they* should vote, and so forth—in short, one should politick.¹⁷ Moreover, things are rarely decided by one-issue referenda. Instead we vote for *packages* of views and attitudes—packages we

call candidates. Of course candidates tell us (sometimes) how they stand on the various issues, but more often than not we will be confronted with a choice among candidates who *all* hold some positions with which we disagree. How, then, do we choose? In large measure by placing greatest stress on those issues about which we care most, that is by taking into account our various intensities of preference. Beyond that, at the stage at which laws are actually made in our legislatures, our representatives allocate their persuasive energies, even trade votes, in accord with the intensity with which they (and their estimate of the intensity with which we) care about the various issues. The reflection of intensity is certainly far from perfect, money being the most obvious distorting element (which, parenthetically, is why the decisions in *Buckley v. Valeo*¹⁸ and its progeny seem questionable to me), but nonetheless our democratic system is one that is in various ways programmed, at least roughly, to register the intensities of preference that utilitarianism makes crucial.

Democracy and Judicial Review



Equality and Democracy

At least in a representative democracy—which is all we’re realistically going to encounter nowadays—equality poses serious theoretical and practical problems.¹⁹ Of course it is often inevitable that numerical minorities must bear some special burden, and I am not talking about a situation where everyone’s happiness has been taken into account, but it has been decided that the greater good requires some regrettable but unavoidable sacrifice from some minority. I mean to pose instead a situation where a controlling majority of our representatives have weighed some sacrifice by a minority as a good or, if not that, have treated it as a matter of indifference. One answer, which seems to have been given by James Madison as well as certain modern pluralist theorists, is that that won’t happen, given our system of shifting political alliances and, in particular, the realization on the part of the various subgroups that make up the majority on a given issue that they will in future battles need the help and friendship of some or all of those who make up the present minority. This is often an accurate description of the process, indeed I think it is most often so, but we know perfectly well that there are exceptions, as is tragically evidenced by the role that racial prejudice has played throughout our history, politically dividing groups that have much in common (such as poor blacks and

poor whites) and uniting groups that actually lack substantial common interest (for instance, poor whites and more affluent whites).²⁰

This sort of possibility is an objection to a “pure” representative democracy—some safeguard does indeed seem necessary—but I do not think it is a valid objection to utilitarianism. I have in mind here particularly John Stuart Mill’s famous dictum that “each is to count for one, and none for more than one.” (One also finds this thought in Bentham and Sidgwick.)²¹ Nor is that an accidental or a nonessential appendage to utilitarian theory: remember that the critical impulse underlying utilitarianism is that no one is to be counted as superior to anyone else. Interestingly,

“There must be some way of ‘hiding the car keys’ to protect us from ourselves . . .”

therefore, a “utilitarian” theory of democracy will yield a brand of judicial review that is richer on the subject of equality than would be yielded by a theory of democracy that is geared to equality *simpliciter*. A pure “equality” account might be satisfied by giving everyone one vote. If, however, one is serious about Mill’s dictum, a stronger form of review would seem to follow. Of course we cannot really expect judges to figure out whether our representatives have really considered everyone’s interests equally—indeed, it would be overly intrusive if they tried—but we *can*, I think, identify the extreme cases of malfeasance, cases where the welfare of some people has been valued negatively (what in the book I call first degree prejudice) and cases where the welfare of some minority has been valued at zero or wholly ignored. (This would include the case of the wildly overdrawn stereotype whose incidence of counterexample is much higher than the political decisionmakers thought it was—as in “There’s no point in letting women be police officers since none of them are big or strong enough.”)²²



“Hiding the Car Keys”

The final objection one is likely to encounter to “utilitarian democracy” is that it is indifferent to rights. Note that I am *not* now talking about political or other rights that are prerequisite to participation in the political process: those must be protected on a theory of utilitarian democracy. Nor are we talking about guaranteeing to politically disadvantaged minorities the same rights that the people in power have seen fit to grant themselves: those too will be substantially protected, by the “each to count as one” aspect of utilitarian democracy. Instead this last objection must focus on those nonpolitical rights that the majority has denied to everybody, including themselves.

Some nonpolitical rights undoubtedly should be protected. They should, as an initial matter, be protected by the political process (and if, in fact, there is a consensus to support such a right, they *will* be protected by the political process). But I agree that that probably won’t be enough. We should have some method for protecting ourselves and our progeny, majorities and minorities alike, against the hasty or ill-considered acts of future legislatures. There must be some way of “hiding the car keys” to protect us from ourselves in future times of anticipated drunkenness. In fact, our system does provide a method of hiding the car keys, when there really does exist a calm consensus (as opposed to the mere preference of some elite) in

favor of the right in question, and that is to write it into the constitutional document. Nothing I have said would suggest (and indeed most of my career has been devoted to the contrary proposition) that there is anything at all improper in vigorous judicial protection of those various rights that are marked for shelter in the constitutional document.

Thus we must add a third qualification. The objection must posit the protection of rights that (a) are not to be found in the Constitution, (b) are not prerequisite to political participation, and (c) are not among those that the controlling majority has assured to itself. That kind of judicial review not only does not follow from any of the theories of democracy we have canvassed but indeed is incompatible with them. We are a democracy precisely because we do not as a society believe that any of us has a greater right than any other of us to dictate what is ultimately important, that no elite's definition of what is right and good is entitled to any special deference. Thus I say to courts: Enforce those rights respecting which there has at some period in our constitutional history been sufficient popular consensus to secure for them a place in the document. Enforce those rights that are needed to let us all freely and equally register our preferences. Enforce for minorities those rights that the majority has seen fit to guarantee for itself. Enforce all those rights with all the vigor you can muster. But beyond that, you simply have no right in a democracy—no more than philosophers or law professors or anyone else has—to tell the rest of us that we have made a mistake and that you know better.

Dean Ely delivered this talk as the Rocco J. Tresolini Lecture in Law at Lehigh University on March 8, 1982. It is reprinted here with permission. The footnotes were added later.

Footnotes

1. Harvard University Press (1980).
2. 56 N.Y.U.L. Rev. 547 (1981).
3. Jean Jacques Rousseau, *The Social Contract*, Bk. 1, Ch. 8 (1762). See also, e.g., Carl Cohen, *Democracy* 268-73 (1971); Ramon Lemos, *A Moral Argument for Democracy*, 4 *Social Theory & Practice* 57 (1956).
4. *Two Hundred Million Americans in Search of a Government* 54 (1969).
5. *Philosophy and Democracy*, 9 *Political Theory* 379 (1981).
6. E.g., Robert Dahl & Charles Lindblom, *Politics, Economics, and Welfare* 41-45 (rev. ed. 1976); Carl Cohen, *Democracy* 241-67 (1971). Cf. Joseph Schumpeter, *Capitalism, Socialism, and Democracy* 264-65 (2d ed. 1947).
7. See J. Roland Pennock, *Democratic Political Theory* 126 (1979).
8. At least in law schools, where moral philosophy is currently in vogue, one gathers points by denying that he is a utilitarian and affirming just as loudly that he is a "Kantian." The latter term is used so broadly (and so often under conditions that must raise a doubt whether the user has ever actually read Kant) that it is probably safest to translate the adjective "Kantian" as "moral." Even more surprisingly in light of the historical antecedents, "utilitarian" seems for these people to connote something like "ruthless."
9. See, e.g., Carl Becker, *The Declaration of Independence* 236-37 (Vintage ed. 1958); Alexis de Tocqueville, *Democracy in America* 233 (Anchor ed. 1950); Jack Lively, *Democracy* 111-19 (1975).
10. See Bernard Williams, *A Critique of Utilitarianism*, in J. J. C. Smart & Bernard Williams, *Utilitarianism: For and Against* 93-100 (1973).
11. Charles Fried, *Right and Wrong* 13-14, 169-70 (1978).
12. Cf. Charles Fried, *Contract as Promise* 16 (1981) (rule-utilitarian/act-utilitarian dispute irrelevant to legislative choices.)
13. N.Y. Times, Book Review Section, July 16, 1972, p. 1.
14. E.g., Bruce Ackerman, *Social Justice in the Liberal State* 45-49 (1980).
15. E.g., Germain Grisez, *Against Consequentialism*, 23 *Amer. Journal of Jurisprudence* 21, 26-41 (1978); John Finnis, *Natural Law and Natural Rights* 111-18 (1980). But see James Griffin, *Are There Incommensurable Values?*, 7 *Philosophy & Public Affairs* 39 (1977).
16. E.g., Ronald Dworkin, *Taking Rights Seriously* 276 (1977).
17. But cf. Anthony Downs, *An Economic Theory of Democracy* 246 (1957) ("it is individually irrational to be well-informed.")
18. 424 U.S. 1 (1976).
19. In a direct democracy, one might argue, the fact that every affected person can vote on every issue assures individuals and minorities all the representation to which they are rightfully entitled (even when the majority outvoting them is taking pleasure from inflicting suffering upon them). Cf. 56 N.Y.U.L. Rev. 543 (1981) (commentary of Lawrence Sager). Whatever persuasive power that assertion might have in a direct democracy vanishes, however, when we switch to the representative democracy situation. In that context it is nonsense to suppose that minorities on whose support the representative does not count for reelection—in fact, it may behoove her to mistreat them—are in any plausible sense "actually represented" in the process, and thus we must insist upon a kind of "virtual representation" by insisting that the representatives not value the welfare of such persons either negatively or at zero.
20. See Frank Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 *Calif. L. Rev.* 275, 313 (1972).
21. J. Mill, *Utilitarianism* ch. 5, in 10 *Collected Works of John Stuart Mill* 157 (1969). See also J. Bentham, *Constitutional Code*, in 9 *Works of Jeremy Bentham* 107 (J. Bowring ed. 1843); Henry Sidgwick, *The Methods of Ethics* 416-17 (1930).
22. See generally John Ely, *Democracy and Distrust* ch. 6 (1980).

THE BANKRUPTCY

Like seasons and fashions, particular bankruptcy statutes may come and go. The bankruptcy process itself, however, not only endures but grows in prominence—an intricate sub-specialty of the law, toiled over by dedicated professionals.

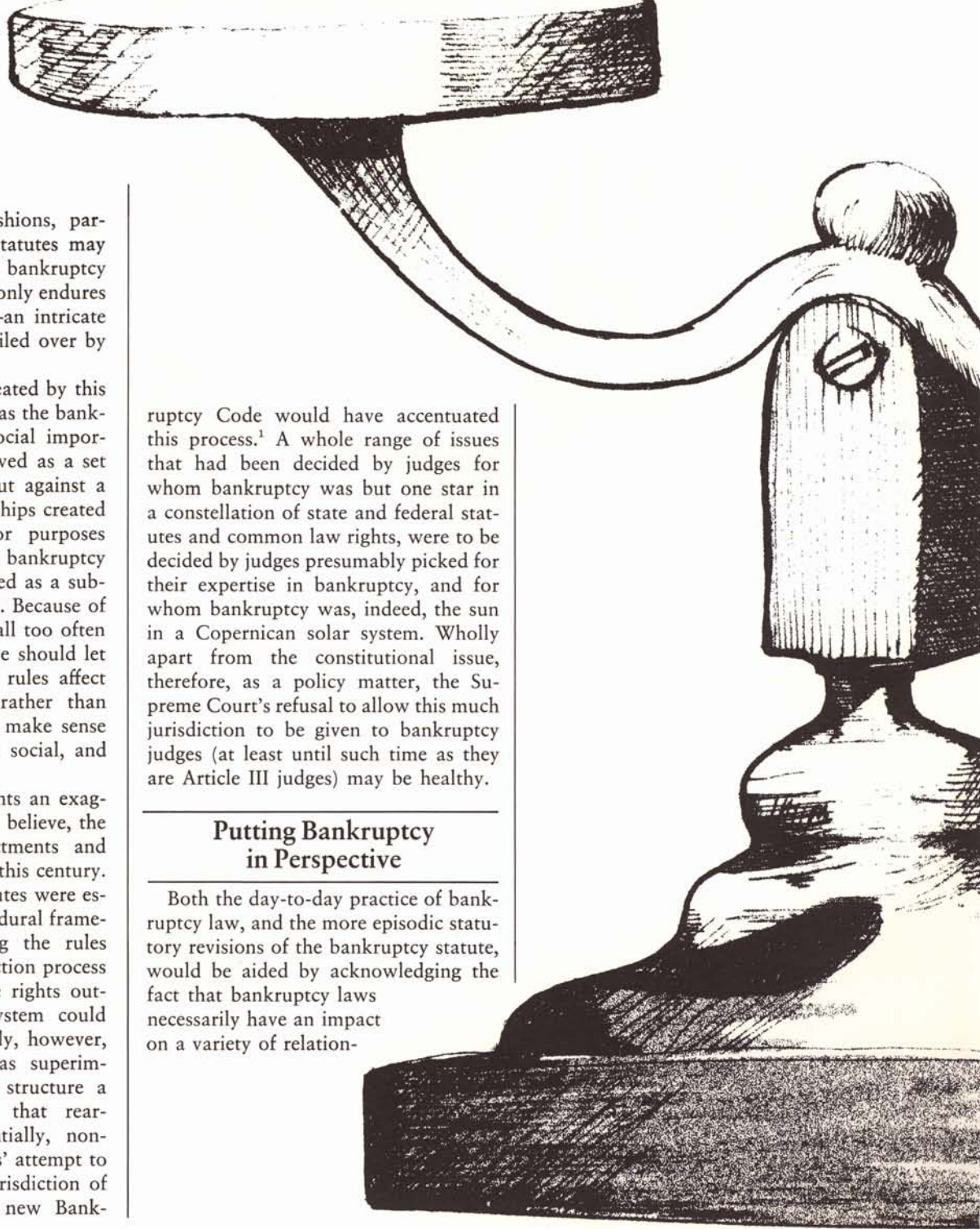
The danger, I believe, created by this specialization is heightened as the bankruptcy process grows in social importance. Instead of being viewed as a set of procedures that plays out against a web of substantive relationships created outside of bankruptcy, for purposes other than bankruptcy, the bankruptcy process seems to be perceived as a substantive world unto its own. Because of that, the question asked is all too often “is there any reason that we should let these non-bankruptcy legal rules affect the bankruptcy system?” rather than “does this bankruptcy rule make sense in light of the larger legal, social, and economic picture?”

While this obviously paints an exaggerated picture, it reflects, I believe, the trend of bankruptcy enactments and their interpretations during this century. Originally, bankruptcy statutes were established to provide a procedural framework—essentially providing the rules governing a collective collection process—within which substantive rights outside of the bankruptcy system could be implemented. Increasingly, however, federal bankruptcy law has superimposed on this procedural structure a substantive superstructure that rearranges, sometimes substantially, non-bankruptcy rights. Congress’ attempt to dramatically expand the jurisdiction of bankruptcy judges in the new Bank-

ruptcy Code would have accentuated this process.¹ A whole range of issues that had been decided by judges for whom bankruptcy was but one star in a constellation of state and federal statutes and common law rights, were to be decided by judges presumably picked for their expertise in bankruptcy, and for whom bankruptcy was, indeed, the sun in a Copernican solar system. Wholly apart from the constitutional issue, therefore, as a policy matter, the Supreme Court’s refusal to allow this much jurisdiction to be given to bankruptcy judges (at least until such time as they are Article III judges) may be healthy.

Putting Bankruptcy in Perspective

Both the day-to-day practice of bankruptcy law, and the more episodic statutory revisions of the bankruptcy statute, would be aided by acknowledging the fact that bankruptcy laws necessarily have an impact on a variety of relation-



OF BANKRUPTCY POLICY



by Thomas H. Jackson, Professor of Law

ships that are created in a world in which bankruptcy is only a part. The goal of bankruptcy law should be to facilitate the maximization of the aggregate advantages all players in the game have across the social and economic world. Articulating and implementing this goal, in turn, calls for a sensitive awareness of the impact of a particular bankruptcy rule on a set of relationships.

If bankruptcy were in fact an isolated event, inconsistent rules would be unfortunate, but containable. But since bankruptcy rules do not exist in the abstract, the dislocations are broader, making a perspective on bankruptcy necessary. Because bankruptcy is a predictable event, people can and will make adjustments for the consequences that they can foresee will be visited upon them in bankruptcy. In any case, of course, there may be persuasive reasons for a bankruptcy rule that imposes those adjustments. But until we ask the question in terms that consider non-bankruptcy responses to bankruptcy rules, we simply cannot know.

How do we approach the proper goals of bankruptcy? We can start by observing the historical structure of bankruptcy statutes. Virtually all of the substantive provisions of bankruptcy laws, past and present, belong in one of the two areas of general concern: discharge or creditors' rights. In the first area are the rules that discharge a debtor's existing debts in exchange either for current assets or for a promise to pay the value of current assets out of future earnings. This "fresh start," although not integral to a system of bankruptcy law, is of course the major reason why *debtors* initiate the bankruptcy process. Yet these rules account for only a fraction of the substantive provisions in recent bankruptcy statutes. Most of those provisions, although set against the framework of discharge, relate to creditors' rights *inter se*: rules govern the marshalling of assets for allocation among claimholders; priority rules de-

Illustration by Mell Hall

termine which claimant will get what and in what order; the trustee's "avoiding powers" deal with what pre-bankruptcy transactions can be undone in the name of "equal distribution."

This historical orientation of bankruptcy suggests the starting point for analysis. I will briefly sketch here how this analysis might proceed, when we become sensitive to the broader picture in which bankruptcy is only a part. I will first look at issues relating to creditors' rights, and will then turn to examine discharge-related issues.

Creditor-Oriented Rules: Relative Priority in Bankruptcy

If there were no system of bankruptcy law, creditors, be they secured or unsecured, would still have procedures available to satisfy claims and, when the assets of a debtor were insufficient, to determine priorities among creditors. A standard feature of bankruptcy laws since their inception has been respect within the bankruptcy system for at least certain of the property and priority rights created outside of bankruptcy. Yet all creditors have their individual remedies impinged upon to some extent in the bankruptcy process, and a number of other rules upset negotiated non-bankruptcy entitlements.

Without a perspective on bankruptcy, it will be difficult to understand the reasons for recognizing, in bankruptcy, property and priority rights created outside of bankruptcy, just as it will be difficult to understand the reasons for the instances in which a deviation from those non-bankruptcy created rights exists.² The basic contours of a justification are not difficult to find, however, if we start our search from a non-bankruptcy perspective. When the debtor is solvent and clearly has enough assets to go around, each creditor can protect his interests without major problems. But when the debtor is insolvent, the situation dramatically changes. There no longer is enough to go around to satisfy all creditors. The creditors in such a situation may be substantially better off if they act together to preserve and carve up the assets among them equally. But,

"When the debtor is solvent and clearly has enough assets to go around, each creditor can protect his interests without major problems. But when the debtor is insolvent, the situation dramatically changes."

absent a mechanism for ensuring such cooperative behavior, each creditor has an incentive to "race" to use his individual remedies, lest by delaying, another creditor beats him out. The basic dilemma, therefore, is clear: creditors would be better off acting collectively, but have no effective contractual mechanism to agree, ahead of time, to any such arrangement. Bankruptcy law solves that dilemma by providing a collective proceeding as a standard "term" that the creditors cannot effectively provide for themselves.

Out of this emerges a basic principle that may explain the presence and operation of many of the creditor-oriented rules in the bankruptcy process: displacement of individual creditor remedies by a collective process may benefit all creditors. Such a rule may also explain, moreover, why secured creditors are entitled to "better" treatment in bankruptcy than are their unsecured counterparts. Treating secured and unsecured creditors equally in bankruptcy diminishes the advantages of security interests in the first place: secured creditors would bear substantially the same risk as unsecured creditors. But if secured credit is desirable,³ such a bankruptcy rule, by undermining the utility of secured credit, would impose a cost on all creditors and their debtors outside of bankruptcy. Respecting the value of the secured creditors' entitlements outside of bankruptcy, therefore, can be seen as simply recognizing the existence of secured credit, and respecting the belief that, on balance, the institution of secured credit is desirable.⁴

A number of intricate bankruptcy rules may be approached using a more elaborate version of this model, as can be seen from consideration of one feature of bankruptcy law. Section 547 of the Bankruptcy Code contains rules governing what have come to be known as "preferences." The preference power enables the trustee to undo certain transfers of property or priority rights in the immediate pre-bankruptcy period. Modern preference law, as commonly recounted, has two operative principles. The first is a principle of "anti last minute grabs." Let's imagine that a debtor, D, has assets worth \$100 and two creditors, X and Y, each owed \$100 by D. D is contemplating declaring bankruptcy, so as to discharge his debts. In bankruptcy, under the collective rule, each of X and Y would receive \$50. If D "prefers" X by paying his debt in full, or by granting him a security interest in all of D's property, immediately prior to the institution of bankruptcy, the trustee may well be able to set aside either transaction as a preference, with the result that X and Y will both receive \$50 in a bankruptcy proceeding.

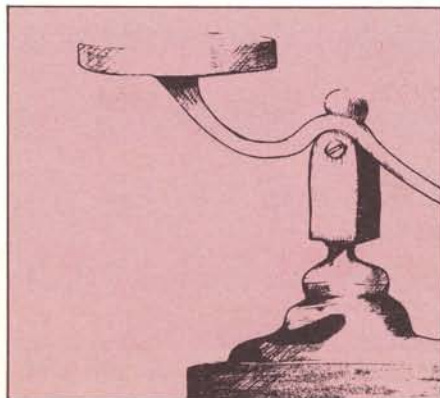
A second principle contained in the preference section may be described as the "anti secret lien" principle. Suppose that X had, a year or two prior to bankruptcy, entered into an agreement with D to secure X's \$100 loan with a security interest in all of D's property. X, however, neither took possession of D's property nor filed a financing statement until ten days prior to D's bankruptcy. Since X filed his financing statement before Y got an execution lien, X

would be entitled, under applicable provisions of the Uniform Commercial Code, to be paid ahead of Y, even though X was exceedingly slow at perfecting his security interest. Bankruptcy Code Section 547(e), however, ignores that outcome by manipulating the time of the transfer of the security interest: by his delayed filing, X is said to have received a transfer at that moment, which, because it is on account of an antecedent debt, is subject to avoidance by the trustee in bankruptcy.

Both the "anti last minute grab" and the "anti secret lien" principles may be seen as necessary complements to the basic idea that bankruptcy substitutes a collective procedure for individual remedies in allocating assets among creditors. For although a collective procedure is desirable for the creditors as a group, individual creditors will nonetheless attempt to "beat out" that proceeding by collecting their claim in full prior to the institution of the collective bankruptcy process. The preference section, by striking down "last minute grabs" designed to benefit individual creditors, enables the creditors as a group to gain the advantages of a collective proceeding.

The "anti secret lien" principle has, at first glance, little to do with the "anti last minute grab" principle. After all, the property right itself was granted well before the preference period, and the problem with the transaction from the perspective of third party creditors was that of "ostensible ownership," not that of a last minute grab. Even so, the "anti secret lien" principle's disregard of the applicable non-bankruptcy rule facilitates the underlying role of the preference section in protecting the collective proceeding. For, during the time that the "anti last minute grab" principle prevents the general creditors from upping their status to that of a lien creditor, the "anti secret lien" principle restricts existing *secured* creditors from improving their position vis-à-vis general creditors by imposing a similar limitation on them.

Set against these two principles was the "epic" battle in the late 1960s and early 1970s between Article 9's "floating lien" and the trustee in bankruptcy asserting his preference power.⁵ Al-



though a number of technical and metaphysical theories were spun to support one party or another, I always found more convincing than most the analysis of Judge Hufstедler in *DuBay v. Williams*.⁶ In *DuBay*, she measured the floating lien against the two principles of the preference section described above, and was able to find nothing in the floating lien *itself*⁷ that violated either. Accordingly, she upheld the floating lien against the trustee's preference attack. *DuBay* also noted that the result was not inconsistent with the statutory language of the preference section. Although that tie to the statutory language has been the subject of sharp criticism, *DuBay* has always struck me as a good example of using the perspective of reasoned principles to reach an intelligent result in the face of obviously ill-fitting statutory language.

Congress, however, has had the last word (to date) on the subject of Article 9's floating lien in bankruptcy. Under a "two-point net improvement" test in Bankruptcy Code Section 547(c)(5), a security interest in inventory or receivables otherwise falling prey to the requirements of the preference section is protected against avoidance by the trustee in bankruptcy to the extent that the secured party either does not improve his position during the preference period or can show that his improvement in position was not "to the prejudice of other creditors holding unsecured claims."

This provision is generally considered a compromise between the two sides of the floating lien battles in the 1960s and early 1970s. But it seems to me to be best understood as simply another example of the principle animating the

"anti last minute grab" provisions of the preference section. The "two-point net improvement test" announces a presumption: improvements in position by a secured creditor holding a security interest in inventory or receivables within the preference period are unusual, and therefore will be presumed to result from a last minute grab by the secured creditor. That creditor, however, may defeat that presumption by showing that the increase was not the result of a last-minute grab—*i.e.*, was not to the prejudice of other creditors holding unsecured claims. So viewed, a general rule has been substituted for case-by-case analysis, but the general rule implements an established policy, and is not a "compromise" in any major sense.⁸

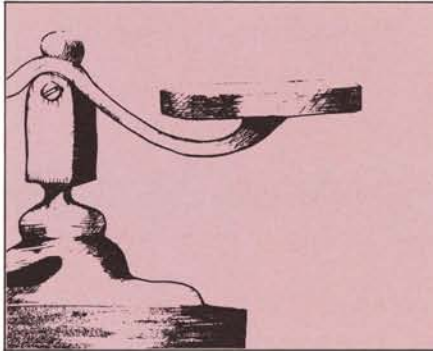
There is, however, a danger that tinkering with the preference section, such as by redefining "transfer," may obscure its underlying policies and cause unrelated transactions to be struck down. Consider, for example, garnishments of wages by creditors or assignments of rents to creditors that are put in place outside of the preference period. Are wages or rents paid to such creditors inside of the preference period, pursuant to such assignments or garnishments, preferential? The newly fashioned definition of "transfer," designed to make recurrence of the statutory reasoning of *DuBay* and its progeny impossible, states that no transfer can be made for purposes of the section until the debtor has "rights in the property transferred." Does this mean that no transfer of wages or of rents is made until they are paid? Although the statutory definition of transfer may seem to compel that they are, neither the garnishment of wages nor the assignment of rents outside of the preference period violates either of the two principles that animate the preference section when wages or rents accrue within the preference period. Under Judge Hufstедler's broader reasoning in *DuBay*, neither should be declared preferences. Judge Friendly recently took a similar route in finding that, upon a garnishment, the garnished wages were no longer property of the debtor, and that, therefore, no transfer of property of the debtor took place within the preference period.⁹

Debtor-Oriented Rules: Discharge

Discharge-related issues may be approached in a similar vein. What is the function of discharge? Why is it mandatory? These fundamental questions are nowhere systematically and critically explored. Discharge, in one respect, may perhaps be understood as a form of social insurance policy that ensures that no one can dig himself into a hole from which extrication is impossible. And, seen from the dynamics of debtor-creditor relations, discharge may be a more effective way of implementing the policy than would actual social insurance: creditors are presumably better able to monitor their debtor against incurring excessive debts than would the government. But this analogy is tentative only and, ultimately, does not answer why *this* form of compulsory social insurance is appropriate here. Analysis of the reasons for discharge, its non-waivable nature, and its alternatives, while necessary to understand the scope of the discharge right, is as yet non-existent. And even if we could understand why we have a system of discharge, and why discharge cannot be waived, we would still have to place discharge in the larger context of debtor-creditor relations.

The availability of discharge to a debtor is a cost as well as a benefit. Whatever the justifications for a non-waivable right of discharge, the likelihood of its exercise will be reflected in the terms on which credit is extended.¹⁰ Assuming that creditors adjust to the aggregate possibility of discharge, if the right of discharge were otherwise costless to a debtor, one would expect that such an adjustment by creditors would be quite large.

Discharge, however, is not "otherwise costless." In a Chapter 7 liquidation proceeding, a debtor must turn over all non-exempt assets as the "price" for his discharge. This limits the extent of the discharge, and may also cause a debtor to lose assets for which he has a high personal value. Undoubtedly, a part of the phenomenal recent popularity of Chapter 13 plans is that Chapter 13, like Chapter 11 but unlike Chapter 7, does not impose any "asset-loss" costs



on the debtor, although the extent of the discharge is measured by the value of those assets. The remaining economic cost of using discharge is reputational in origin: a person who uses bankruptcy and obtains a discharge may find it more difficult to obtain credit in the future, as he has given a signal to creditors that he will, in fact, use discharge.¹¹ These costs limit the likelihood of a debtor availing himself of discharge. They also limit the "before the fact" adjustments that creditors would otherwise make in contemplation of potential discharge.

How substantial these limits are affects the magnitude of the creditors' adjustments. The Bankruptcy Code, in Section 525, provides that governmental agencies, in effect, may not take into account the use of the bankruptcy process or any discharge obtained thereunder. While no comparable provision presently restricts private parties, the proposed Bankruptcy Act of 1973 provided, in Section 4-508, that:

A person shall not be subjected to discriminatory treatment because he, or any person to whom he is or has been associated, is or has been a debtor or has failed to pay a debt discharged in a case under the Act.

If a provision such as this (assuming it were effective) were coupled with an ability to obtain a discharge without giving up current assets, few legal or economic restrictions would exist to inhibit the incentives to obtain a discharge. While this world might look attractive to debtors who have already obtained credit, it may appear far less attractive from the "before the fact" position of those needing to obtain credit. As I have asserted before, the world can, and will, adjust for this bankruptcy rule. In such a world, one

would expect that the presence of such an *ex post* "costless" discharge would substantially affect the cost and existence of credit in the first instance.

From that perspective, debtors might be less happy with the non-waivable nature of the "right" to a discharge. However they might feel on balance, the relevant point is that discharge policy should be, but rarely is, analyzed in these terms. Freely available, non-waivable, "costless" discharge rights are not costless at all, once adjustments to the legal rules are considered.

Student loans illustrate the predicted effects of freely available discharge rules. As a general matter, college and graduate students have few current assets but a large future income stream. A liquidation is relatively painless to them, in a lost-asset sense, while a discharge has a substantial benefit in "freeing up" that future income stream from the large existing obligation of repaying a student loan. It should come as no surprise that many students, prior to the fall of 1977 (when 20 U.S.C. § 1087-3 became effective), enthusiastically discharged their student loans shortly after completing their education. Had the private market been providing funds, one can predict that student loans would have been substantially more expensive than many other loans, because of the increased risk of nonpayment represented by that freely available discharge. If students had been provided with the opportunity to "opt out" of their discharge right with respect to such loans in return for a significantly lower cost of such loans, undoubtedly many would have, sensibly, elected such an option. The exemption from discharge in bankruptcy for certain student loans¹² makes that election for students (and effectively lowers the extent of the government subsidies). It illustrates the type of response that may selectively be considered, even if one concluded that the right to a discharge should be, in general, non-waivable. For example, given recent indications that the federal government wishes to curtail its student loan largess, an exemption from discharge for *privately* funded student loans may facilitate the availability of student credit from private sources.¹³

"Too often bankruptcy rules are formulated by dedicated specialists without a sensitive awareness of the effects those bankruptcy decisions may have on the way the game is played outside of bankruptcy."

Conclusion

To suggest, as I have done here, that there is a trade-off between substantive bankruptcy policies and life outside of the bankruptcy process, is far from saying that the bankruptcy enterprise is itself misguided. Indeed, I believe quite the opposite. But it is to suggest that the dialogue over bankruptcy policy should not to be carried out in a vacuum. Too often bankruptcy rules are formulated by dedicated specialists without a sensitive awareness of the effects those bankruptcy decisions may have on the way the game is played outside of bankruptcy. For that reason, in bankruptcy "reform," we may oftentimes merely be witnessing the costs of specialization.

Professor Jackson joined the Stanford law faculty in 1977. His principal subjects are contracts, commercial law, and bankruptcy.

Footnotes

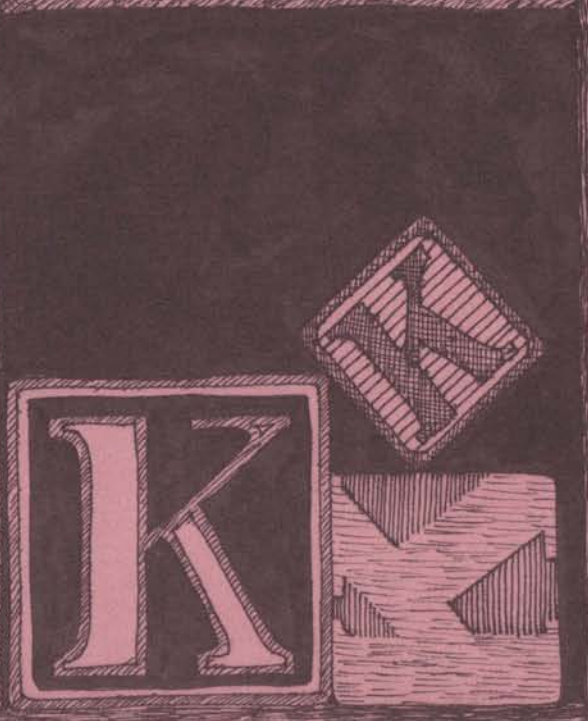
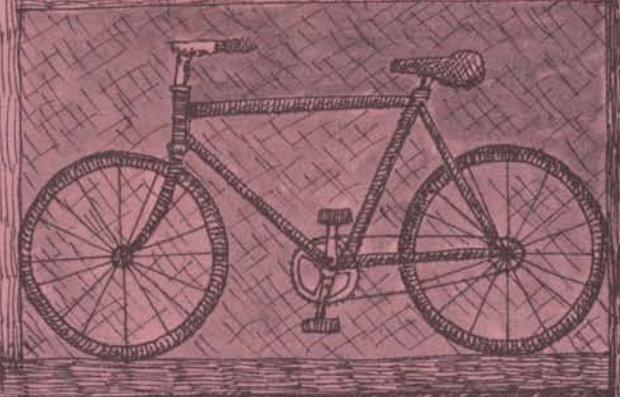
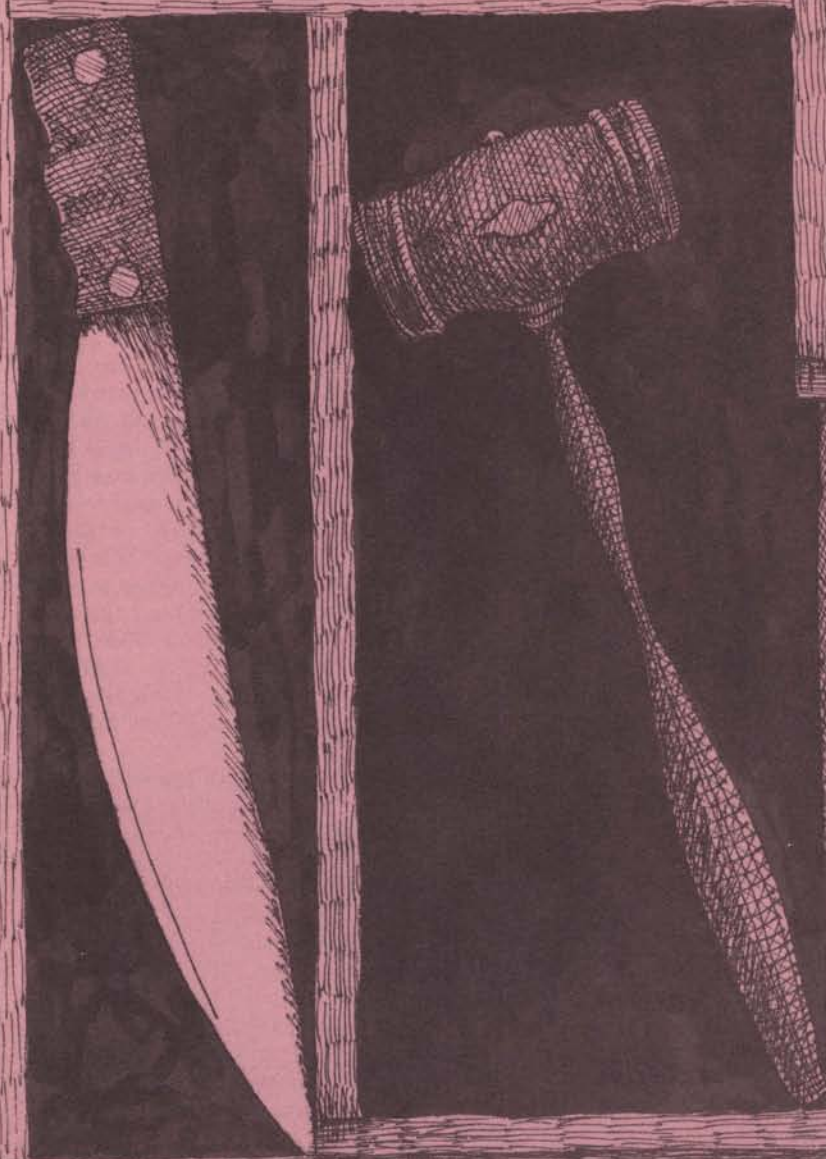
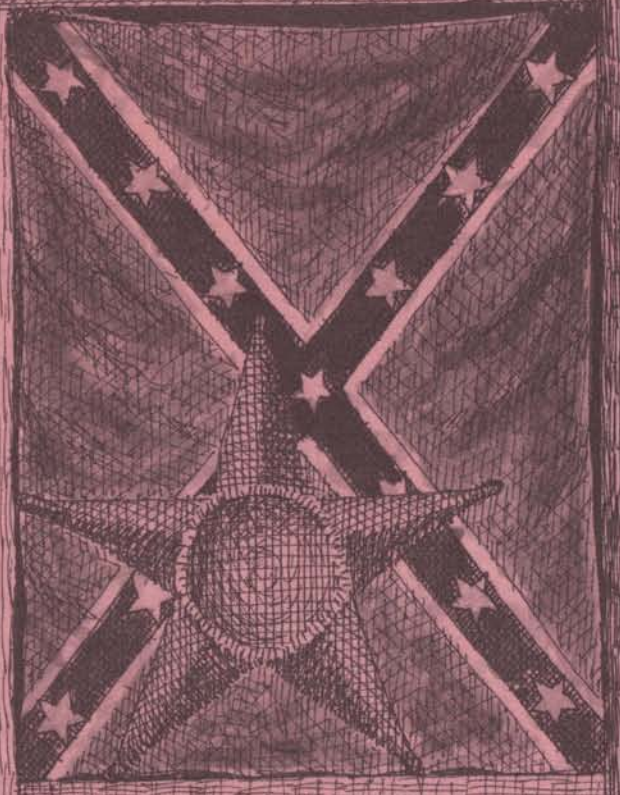
1. This attempt has been thwarted by the Supreme Court's opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982). It is uncertain from the opinions in that case, however, how much of the jurisdictional grant to the bankruptcy judges is unconstitutional.
2. A more systematic treatment of those rules, in the context of a more elaborate model, is explored in Jackson, *Bank-*

ruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L.J. — (1982). This, and the next, paragraph summarize certain arguments made in that article.

3. The normative desirability of secured credit is explored in Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. Legal Stud. 1 (1981); Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 Yale L.J. 1143 (1979).
4. This decision has been reached, by implication, in virtually every state by passage of Article 9 of the Uniform Commercial Code. If Congress disagrees with that decision, it is probably free to change it. But, if so, it should consider doing it across the board, not simply in bankruptcy. See Eisenberg, *Bankruptcy Law in Perspective*, 28 U.C.L.A. L. Rev. 953, 963-71 (1981).
5. This battle is recounted in Kronman, *The Treatment of Security Interests in After-Acquired Property Under the Proposed Bankruptcy Act*, 124 U. Pa. L. Rev. 110 (1975).
6. 417 F. 2d 1277 (9th Cir. 1969).
7. *DuBay v. Williams* seems to have left open the validity of an improvement in position due to a last minute grab.
8. This perspective may also help one interpret the "to the prejudice of other creditors holding unsecured claims" test—a test that, considered abstractly, is almost impossible to apply in a coherent fashion. For, in one sense, anything that goes to one creditor is "to the prejudice" of other creditors.
9. *In re Riddervold*, 647 F. 2d 342 (2d Cir. 1981). Holders of assignments of rents

have been less fortunate. See *In re Diversified World Investments, Ltd.*, 12 Bankr. 517 (Bankr. S.D. Tex. 1981).

10. In the case of non-consensual "extensions" of credit, such as torts, the possibility of discharge affects the amounts paid and, accordingly, the extent of deterrence imposed by the liability rule. Certain "intentional" torts are non-dischargeable, Bankruptcy Code Section 523(a)(6), although these rules do not, at present, apply to standard discharges in Chapter 13 cases, Bankruptcy Code Section 1328(a).
11. Under Bankruptcy Code Section 727(a)(8), a new discharge in Chapter 7 cannot be granted for six years after the commencement of a previous Chapter 7 or Chapter 11 case leading to a discharge. This may be seen, oddly, as a debtor-protective device in some respects, as it facilitates obtaining credit during that period. Bankruptcy Code Section 727(a)(9) bars use of Chapter 7 within six years of use of Chapter 13 under certain circumstances. Neither Chapter 11 nor Chapter 13 bars the use of those chapters within six years of a Chapter 7 case, nor does either bar repetitive use of these chapters.
12. Bankruptcy Code Section 523(a)(8) exempts from discharge educational loans "made, insured, or guaranteed by a government unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution of higher education" unless the loan first became due more than five years before the filing for bankruptcy or the exemption from discharge would impose an "undue hardship." It is possible, however, to discharge up to five years' worth of such loans in a Chapter 13 proceeding. Bankruptcy Code Sections 1328(a), 1322(b)(5). 20 U.S.C. § 1087-3, mentioned in text, has been replaced by Bankruptcy Code Section 523(a)(8).
13. Another, more general, approach is illustrated by S.2000 (97th Cong.; 2d Sess.), currently under Congressional consideration, which would amend the Bankruptcy Code so as to limit the use of Chapter 7 by excluding most individuals with the ability to pay "a reasonable portion of his debts out of anticipated future income." Whether students would be captured by that exclusion would depend upon, at least in part, the expected timing of the start of their income stream.



North Carolina v. Robert Henry McDowell

July 1979: A brutal attempted rape culminating with the machete murder of a four-year-old white girl and a gruesome slashing assault on her fourteen-year-old aunt cuts through the summertime stillness of rural Sanford, North Carolina. A week later, a young black man employed at the local steel factory is arrested and charged with the murder. There is an eyewitness identification. The trial, held in the heart of Ku Klux Klan country, is "an open and shut case." The accused, Robert Henry McDowell, is sentenced to die in North Carolina's gas chamber. "Justice has been done," trumpets the local press. If sentence is carried out, Robert McDowell will become the first black person executed in the United States in more than fifteen years.

June 1981: As the recipient of a summer grant from Stanford Public Interest Law Foundation (SPILF), I was able to accept a 10-week summer clerkship with the NAACP Legal Defense and Education Fund, Inc. (Inc. Fund) in New York. Shortly before I arrived, the capital punishment division of the Fund had taken over as defense counsel in the McDowell case seeking initially to block the scheduled execution. With only days remaining before McDowell's date with the gas chamber, certain "weird factual reports" from local sources in Sanford reached the Inc. Fund. The lawyers in New York immediately contacted the North Carolina Supreme Court and requested a stay of execution based on the newly discovered facts. The temporary stay was granted just days before my summer clerkship began.

The Original Case Against McDowell

When the Inc. Fund took the McDowell case, the facts were as follows. On July 14, 1979, two white girls, four-year-old Carol Ann Palmer and her fourteen-year-old aunt Patsy Allen, were attacked in a bedroom of the house

Remembrance of an Unusual Summer Clerkship

by James P. Steyer '83

where they lived with Patsy's parents (Carol Ann's grandparents).

After an attempted rape, the assailant slashed Carol Ann to death with a large knife and left Patsy for dead as well. Miraculously, Patsy survived, though her face and arms were badly scarred. About a week later, Patsy leafed through a series of mugshots from her hospital bed and identified the photo of Robert McDowell, 28, a local steelworker who had earlier served seven years on a second-degree murder charge.

The Sanford police immediately arrested McDowell, essentially considering the case closed. Represented by court-appointed attorneys, McDowell never took the stand in his own defense (due to his prior conviction), though he steadfastly maintained his innocence. Owing to the ugly racial overtones and "the fear of an attempted escape," McDowell was tried in the autumn of 1979 in neighboring Smithfield, which, as a huge sign proudly proclaims upon entrance to the town, is the center of regional Ku Klux Klan activities.

Although the prosecution was unable to produce any evidence linking McDowell to the scene, he was convicted and sentenced to death following a short trial. The key evidence against McDowell was Patsy's eyewitness testimony. The prosecution also produced evidence to show that he owned a machete, a bicycle (a neighbor heard one around the time of the attack), and other items which Patsy claimed her assailant car-

ried. In addition, McDowell's girlfriend testified that he had returned home shortly after the time of the attack and had stayed outside on her porch for nearly thirty minutes before entering the house. He was carrying his machete, as was his habit when riding his bike.

McDowell's original attorneys presented a very limited defense, believing the prosecution's case to be weak. Further, they were not allowed to introduce evidence showing that John Allen (Patsy's father and Carol Ann's grandfather) had taken out a life insurance policy on the two girls shortly before the incident.

The original appeals were rejected by the North Carolina Supreme Court, and McDowell's execution date was set for June 1981. At this point the Inc. Fund took over McDowell's defense. This is a common pattern in capital punishment cases, since the Inc. Fund's death penalty team coordinates virtually all of the capital punishment defenses in the United States (with the help of former Stanford Law Professor Anthony Amsterdam, Samuel Gross, currently a visiting lecturer at the Law School, and James Liebman, graduate of the Class of 1977). The team has been remarkably successful in opposing the death penalty on the basis of its arbitrary and discriminatory nature: only one person, John Spinklink, has been executed against his or her will in the United States in more than a decade.

McDowell's case was of great concern to the office, both because of the gruesome nature of the crime and because he would be the first black person executed in a very long time.

New Evidence

Shortly before I arrived at the Inc. Fund, the office received some strange news. The mother of the deceased, twenty-five-year-old Terry Palmer (who was also Patsy's half-sister), had contacted a local sheriff upon hearing that McDowell was about to be executed.

"He talked openly about his life on Death Row—the racial fights instigated by the guards, the terrible food, the ready availability of various drugs, the desperate loneliness."

She was extremely upset and insisted that the execution be stopped because McDowell was innocent. The truth, according to Ms. Palmer, was that John Allen (Terry's stepfather and Patsy's father) had committed the assault with a butcher knife.

Based on these newly discovered facts, the Inc. Fund sought and was granted a temporary stay of execution from the North Carolina Supreme Court.

Shortly after the stay was granted, I arrived at the Inc. Fund, expecting to spend my summer researching and writing briefs in a peaceful law library in New York City. Instead, I was immediately assigned to the McDowell case. My first assignment: to draft a *habeas corpus* appeal to the Supreme Court to secure an indefinite stay of execution which would afford the Inc. Fund the opportunity to pursue a new trial motion on grounds of newly discovered evidence and prosecutorial suppression.

While I was working on the appeal brief, we received more news from Sanford, including evidence that the victims, Patsy and Carol Ann, knew McDowell quite well before the attack. This revelation was particularly puzzling since Patsy had identified McDowell only after looking at mugshots. Moreover, she had testified at the trial that she thought she had never seen McDowell before.

The Inc. Fund lawyers now faced a major dilemma. With two other cases "close to execution" the four-person capital punishment team was already stretched too thin. And, they could not afford to hire a full-time investigator or another attorney to go to North Carolina to look into this bizarre new set of circumstances. As they searched for a

solution, I volunteered. (Having just broken my shoulder in a hit-and-run collision with a New York taxi, I was ready for any "safer environment.")

Despite major initial reservations, the team agreed to let me go, with the understanding that one of them would meet me in Sanford for part of the time.

My shoulder in a sling and carrying clothes for "a few days' visit," I flew to Raleigh-Durham, where I met with some local attorneys who had agreed to help on the case. They brought me up to date, told me whom to contact in Sanford, and suggested I see McDowell in prison before going to Sanford.

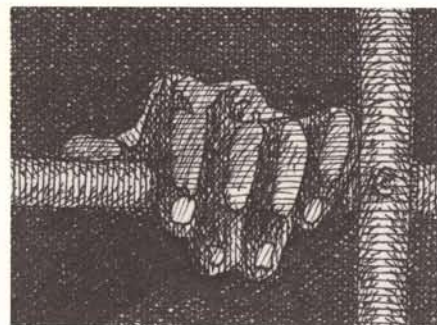
Death Row

My first experience with Death Row was something I shall never forget. Maximum security prisons are spooky, grim places, and North Carolina's Central Prison is reputed to be among the worst. I have so many vivid, chilling images of that first visit—the gun towers glistening in the sun as you approach the prison . . . the lengthy check-in and search procedure (they especially love visitors with slings) . . . the massive steel doors . . . the guards: suspicious, gruff, unfriendly . . . the darkness . . . the cold . . . the smell of urine . . . the seemingly miles of iron bars . . . the prisoners with their hand and leg chains.

The prison officials had granted me a "contact visit" with McDowell so that I could have him sign some releases and go over some evidence. As he entered the room he seemed haggard but intense. He was dark-skinned, with a short, muscular build. It was obvious he lifted weights. His hair was plaited and he wore basic prison garb.

At first he just stared stonily ahead, and it took quite a bit of tense small talk to break the ice. Finally he began to relax and asked me to call him "Mack." He spoke with a very thick Southern accent, his language full of prison slang. I discovered that we shared an interest in sports, and he finally cracked a smile when I compared the University of North Carolina's basketball team to Stanford's.

Our first meeting lasted about five hours. For Mack, the opportunity to be out of his tiny cell was something he wanted to stretch out as long as possible. He talked openly about his life on Death Row—the racial fights instigated by the guards, the terrible food, the ready availability of various drugs, the desperate loneliness. He also described at great length the code of ethics and manhood on "The Row."



With regard to his case, he volunteered a lot of new information. He said that he knew the victims, Patsy and Carol Ann, quite well. He explained that they often came over to the black section of town with Terry Palmer. Terry, he said, was a prostitute in the black community and she and her family were the only whites who ever visited the black section of Sanford. Terry and her black boyfriend Ivan operated a bootleg liquor and pool parlor there. Patsy often worked as a waitress, and Mack said he had spoken with her many times and had even danced with her. Moreover, he had several witnesses to prove it, including Patsy's parents, John and Sarah Allen, who would come there to pick up the girls.

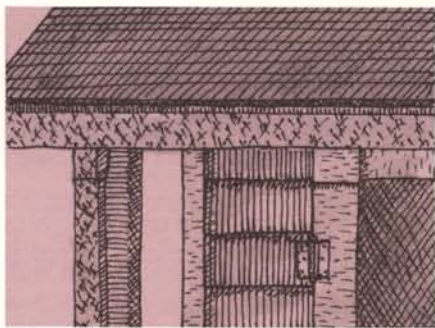
When I asked him why he carried a machete, Mack explained that he needed it when he was on his bike to scare off the numerous dogs that roamed around

Sanford. I then asked him to recount his actions on the night of the murder. He explained that he had gotten in a fight on his way home with two white men and that he had stayed on the porch fearing that they had followed him.

Throughout the five-hour period, I pressed him hard on the various details of the affair, but he stuck to his original story, despite my persistent questioning. At the end of our meeting, Mack gave me a list of people to contact when I reached Sanford. As I was getting ready to leave, he grasped my hand and smiled. "Thank you a lot," he said, his voice cracking a little. I will never forget the look in his eyes at that moment.

Sanford

My first stop in Sanford was the home of George and Lillie Mae Johnson, the



parents of Mack's wife, from whom he had been separated for some time. The Johnsons were fond of Mack and were eager to see the case reopened. They shared a lot of information with me, some of which was new and startling. To begin with, they "had heard" that Patsy admitted to the hospital nurses and her family that her assailant was white. They said that John Allen was known to have beaten his children and his wife. (Allen's alibi on the night of the crime was that he was asleep in the next room. He claimed never to have heard any screams, despite the fact that neighbors were awakened by them and called the police). Finally, the Johnsons confirmed that Terry had been a prostitute and that she had repeatedly told them Mack was innocent.

Mrs. Johnson offered to be my guide in Sanford and her help proved indispensable. She introduced me to a num-

"One evening, as I was leaving town in my rented car, I was forced off the road by a white pickup truck, missing a 200-foot drop by a matter of inches."

ber of people who verified the fact that Mack knew Patsy and Carol Ann. It quickly became clear that there was a great deal of investigating still to be done, so I telephoned the Legal Defense Fund supervisors who reluctantly agreed to let me continue my investigation, provided I return first to New York for some strategy sessions. (My friends in Sanford also urged me to get a haircut, explaining that "folks don't take too kindly to hippies around here." Alas, I followed their advice and was shorn.)

During the next few weeks in North Carolina, I often felt like Perry Mason set loose in Peyton Place. The plot grew more and more bizarre as family feuds, racial tensions, and long submerged fears as well as new information slowly surfaced. Much of the vital new evidence came from members (cousins, aunts, etc.) of the Allen family. Several of them confirmed the fact that Patsy had initially described her assailant as white, often doing so in the middle of a diatribe about how "they ought to hang that nigger." I also learned of two incidents that occurred at the Allen house shortly before the attack, one that same afternoon. In both cases, Patsy and her cousins had seen a white intruder brandishing a knife. Since both incidents had been reported to the police, I wondered why they had not revealed this information to the defense attorneys.

These weeks in Sanford were not without personal incidents, some of which prompted me to consider dropping my investigation altogether. The Johnsons, my main contacts in the black community, began to receive threatening calls, and though they remained friendly they were no longer comfortable having me sleep in their house. One

evening, as I was leaving town in my rented car, I was forced off the road by a white pickup truck, missing a 200-foot drop by a matter of inches. The next day I changed cars and resolved never again to stay in Sanford past dusk.

Shortly thereafter, I decided that it was time to contact Terry Palmer and John and Sarah Allen directly. I was extremely nervous as I walked up the path to their house one afternoon around 2:00 p.m. Before I reached the front steps, two figures appeared behind the screen door. "Stop and git out of here or else," warned a gruff male voice. I stopped dead in my tracks, took a deep breath, and began to explain why I had come. After several minutes the door cracked open and Terry Palmer peered out. We talked for a few more minutes before I finally persuaded her to let me into the house. She agreed, but not before she and her brother James searched my sling for a tape recorder.

I talked with Terry for approximately two hours. Terry's mother Sarah listened to our conversation, staring balefully at me the entire time. Terry's stepfather, John Allen, was at work. (I had counted on that.) Terry denied having implicated her stepfather but strongly reaffirmed her belief that McDowell was innocent. She also acknowledged that Patsy knew McDowell quite well and that the whole story "just didn't fit."

In subsequent conversations with Terry she confirmed the "white assailant" story and suggested that Patsy was covering up a lot. She also provided a variety of new leads.

My next move was to interview Patsy. I had learned through various family members that after the trial Patsy had

Carolina v. McDowell

married (at age 15) a local boy and had moved to Wilson, a town about four hours' drive from Sanford.

When I arrived at Patsy's house, I was invited in by her eleven-year-old cousin. We watched "Gilligan's Island" until Patsy came home from work. She was extremely nervous upon discovering me there and asked me to refrain from questioning her until her husband came home. After he arrived, I made them a "vegetarian" dinner, and they slowly began to relax.

We talked for about two hours. I was very impressed with Patsy's calm and thoughtful manner. She was unwilling, however, to talk about her father, John Allen, except to say that he did not commit the crime. Further, she insisted her assailant was "a black man with big eyes and a big knife," and that she did not remember seeing McDowell at the pool parlor where she had waitressed. She also said she did not remember the two incidents involving intruders prior to the night of the crime.

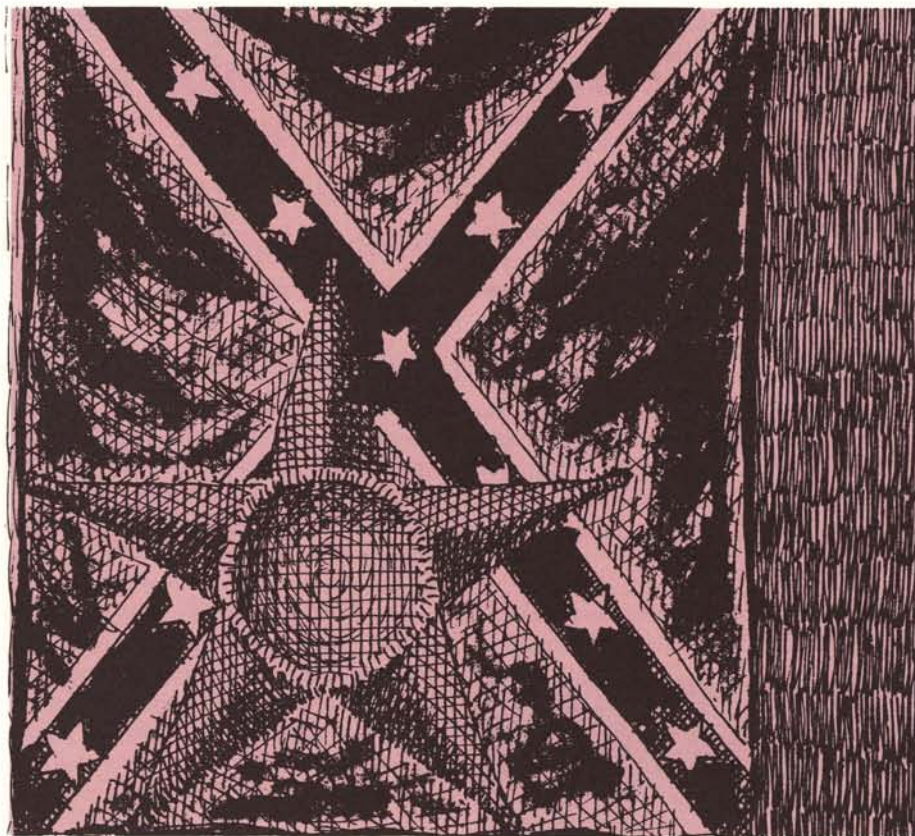
While she said she was fairly sure her assailant was McDowell, she displayed no sign of anger toward him and seemed reluctant to talk about him. In fact, when I returned to Patsy's house two weeks later to serve her with a subpoena, I had the clear impression that Patsy was not convinced of Mack's guilt. I also believed that she had received a lot of "coaching" on her testimony.

The Sanford Police

During my stay in Sanford, I called New York almost every night for advice and support. As each new fact was uncovered we would discuss its legal significance. One step seemed critical: to establish that the Sanford police were aware that Patsy knew Mack and that she had told them after the attack that the assailant was Caucasian.

By this time a major evidentiary hearing to determine whether McDowell should be granted a new trial had been scheduled for late August. Much remained to be done. In particular, it was time to approach the police with the information I had gathered.

My first visit to the Sanford police was curtly rebuffed, but a phone call



from the Legal Defense Fund lawyers to the district attorney straightened things out. No one, after all, wanted to be accused of "obstructing justice." I continued to visit the police station for almost a week, interviewing the officers involved in the case one by one. While I was subjected to considerable harassment by the officers, I viewed their baiting remarks as a positive sign, an indication that they were genuinely worried.

Slowly evidence began to surface. The single most important fact, which was confirmed by four different officers, was that Patsy initially described her assailant as white. In fact, she held to that story for at least three days.

When I asked why this information was never given to the district attorney, they replied, "Nobody ever asked. It was not important."

They also verified that Patsy "probably" knew Mack and thus noted their surprise when she picked him out of the mugbook. Finally, they admitted having investigated the two "white intruder" reports but said that they had dismissed them as "imagination."

A New Trial

A few days before the new trial hearing, three lawyers came down to Sanford to prepare McDowell's defense: one from the Legal Defense Fund, one from UNC Law School, and James Ferguson, the celebrated North Carolina trial attorney who had recently completed the successful defense of the Reverend Ben Chavis and "The Wilmington 10." Together we visited McDowell again and then began planning our strategy for the hearing.

A quick look at the new evidence indicated that our main argument would be prosecutorial suppression of the police reports). "Knowing use of perjured testimony" was our second claim, and "newly discovered evidence" the backup.

By this time, the trial was attracting the attention of the media, which worried several of our witnesses. Considerable time was devoted to calming their fears about courts and police, before we could prepare them to testify.

A few days before the hearing, I personally delivered the subpoenas to the



Allen family, wanting to explain to them why we were putting them through this ordeal again. They seemed grateful that I had done this, especially John Allen. It was the last time I spoke with them, for I suspect they were instructed by the prosecutor not to talk with me at the hearing.

The hearing was a remarkable view of the southern legal system. A very experienced trial judge was brought in from the other side of the state to preside. Since the case had provoked such controversy, the state attorney general sent his top lawyer, who worked in tandem with the local district attorney.

I sat with McDowell as I watched our strategy unfold. Since the key to our position was the police reports, the first morning was spent arguing over our right of access to them. The judge finally ruled that the prosecution had to turn them over to us. As we expected, the reports were a gold mine, containing far more exculpatory evidence than any of us had ever imagined.

The reports revealed the following. Patsy had indeed identified her assailant

as "white" and the police proceeded on this premise for the first few days; the police also knew about the two "intruder incidents" and had investigated them at length; the prosecution knew that Patsy and McDowell had danced and talked together on a number of occasions; the police had discovered a young witness who saw a white person on a bicycle enter the Allen house shortly before the time of the attack; once Patsy changed her story and described her attacker as "black" she gave varying descriptions of the man, the composite sketches of whom looked nothing like McDowell. In addition, Patsy had told the police that she had dreamt that her attacker was named "Mack," and the next day she picked McDowell's photo out of the mugshot file. The prosecutor was aware of all of this evidence but never shared any of it with McDowell's attorneys.

Once the police reports were put on record, we called several witnesses who could testify that Patsy knew Mack prior to the incident. Our witnesses, who had never been in this role before came

through beautifully under Ferguson's skillful questioning.

On cross-examination the assistant attorney general attempted to discredit our witnesses by implying that I had badgered them into lying. This tactic proved fruitless, but it revealed the extent of our opponents' frustration.

Though the hearing had gone well, our side remained guardedly optimistic. As one of my colleagues put it, "It would take a great deal of courage for a North Carolina judge to overturn a conviction in this case."

Saying goodbye to Mack and all of the witnesses was hard. I ate my last plate of greens at the Johnsons and played one last game of one-armed basketball. I promised I'd be back if and when there was a new trial. And even though the likelihood of a new trial was far from certain, it was wonderful to leave all of them with at least a spark of hope.

Upon returning to Stanford, I often found myself wondering if what I had experienced over the summer had really happened. The incredible cast of characters, the countless plot twists, the poverty and racial tensions all seemed from another time and place. And as law school "on the Farm" resumed it all grew more and more unreal.

Postscript

One gray December morning I was awakened at 7:00 a.m. by the telephone. It was one of the Legal Defense Fund attorneys. "Jim, you're not going to believe this; we just got the result in the McDowell case. His conviction was reversed. . . ." I didn't hear anymore. I was already out the door yelling to the trees and anyone else who cared to listen.

The names of several individuals in this account have been changed to conceal their true identity.

Jim Steyer '83 is a founder of the East Palo Alto Community Law Project, which will get underway in September. He also coordinates the Rape Education Project for the University. This summer Jim is working for Public Advocates in San Francisco.



Expunging Criminal Records

Concealment and Dishonesty in an Open Society

by Marc A. Franklin, Frederick I. Richman Professor of Law, and Diane M. Johnsen '82

Adults who have been convicted of crimes face problems that can be overwhelming when they try to settle into a normal life after their release from prison. They seek jobs, credit, and housing; they may want, in all ways, to live as if the convictions had never occurred. But once outside prison, convicts¹ find their futures constricted by their pasts: official records tell prospective employers, creditors, and landlords of their criminal backgrounds, and the former prisoners may as a result be refused the essentials of a "normal" life.

Many states try to aid convicts in their return to society through "expunge-ment" statutes, which allow convicts to make information about their criminal pasts physically unavailable to others.² Though well-intentioned, these statutes are ineffective and too high in both

moral and legal costs. While providing little real benefit to convicts, they foster dishonesty, limit access to judicial records, and threaten first amendment rights of expression. For these reasons, public decisionmakers should consider rejecting expungement in favor of less offensive ways of assisting convicts after their release from prison.

Rationales for Intervening

Government intervention to prevent direct or indirect economic and social discrimination against the convict may be justified by one or a combination of rationales. One approach asserts that it is unfair for public opinion to inflict continued punishment on the released convict. Proponents of this view argue that when a state releases a convict from prison, it certifies that the convict is once again "equal" to other members of society. State intervention is seen, therefore, as a means of eliminating this second round of punishment administered by some citizens to persons the state officially considers to have paid adequately for their crimes.

Second, a concern for public safety may be the paramount justification for protecting the convict from public discrimination. It may be thought that a convict who cannot return smoothly to society will return to crime instead. Discrimination is curbed, therefore, in the belief that the societal costs of recidivism will be reduced as well.

A third justification is concern for the convict's own sake that he or she

not return to crime. Under this view, whether or not criminals are in fact rehabilitated while inside prison, their prospects of staying clear of crime after their release are much reduced if the public holds their prior misconduct against them. Although this rationale stresses concern for the convict, society clearly benefits as well.

A fourth and final justification for government intervention neither attempts directly to aid rehabilitation after incarceration nor assumes that rehabilitation results from incarceration itself. Rather, intervention is justified as a reward for individual convicts who show they have actually become rehabilitated. Thus, intervention under this rationale may indirectly aid rehabilitation by encouraging individual convicts to reform.

Each justification for intervention necessarily has its own clock. When government acts out of concern for any of the first three rationales, or a combination of them, the action, to be effective, should occur immediately upon the convict's release from prison. If intervention is sought because it is thought that a released convict is already rehabilitated and therefore should not be subject to discrimination, for example, intervention would be most appropriate upon the occasion of that rehabilitation; that is, upon release. If government intervenes because it seeks to prevent recidivism, it must act no later than immediately upon release, for it is then that a convict, presented with difficulties in finding a job, housing, and credit, is most likely to return to crime. Similarly,

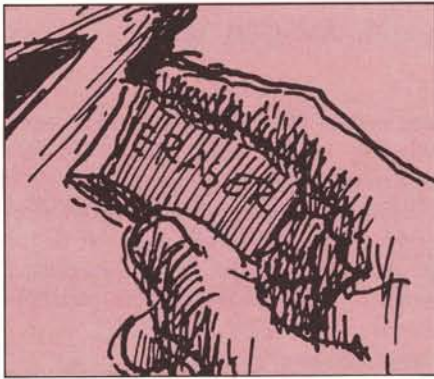
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Expunging Criminal Records

if the state's purpose is to aid rehabilitation for the released convict's own sake, again that help is most appropriate when it is most needed; that is, upon release.

It is only for the fourth purpose, rewarding those who have demonstrated rehabilitation by conduct after release, that intervention logically would occur sometime after the convict leaves prison. Here, because intervention acknowledges successful rehabilitation, it is appropriately withheld until after the convict has demonstrated that achievement.



What "Expungement" Entails

Although their rationales for intervening may vary, many states have acted to aid convicts overcome their pasts by a similar approach that may be generically termed expungement. Expungement statutes have several common features. First, and most important for our analysis, expungement without exception occurs no earlier than several years after a convict's release from prison. The expungement order is granted by a court at that time only upon the request of the convict, after an open hearing. The pretrial hearing and trial in the original criminal case remain open to the public and press; it is only several years later that the records are closed.

Second, the expungement order itself typically requires that the convict's conviction and related criminal records be collected and then sealed, segregated, open only to limited inspection, obliterated, or actually physically destroyed.

Third, some states bolster the physical expungement of records with statutory provisions that require officials to lie in response to outsiders' questions about the existence of criminal records

that have been properly expunged.³ In addition, several states allow convicts with expunged records to deny that such records exist.⁴ Thus, in some states a court clerk must respond untruthfully to an inquiry from a prospective employer or other outsider about the existence of a criminal record if it has been expunged; in others, the convict may choose without penalty to respond untruthfully to the same question.

A fourth common aspect of the standard expungement statute is a provision that prohibits an employer from inquiring about any criminal conviction that has been properly expunged.⁵ That may be accomplished by barring any questions on employment applications about criminality other than the question, "[h]ave you ever been arrested for or convicted of a crime that has not been annulled by a court?"⁶ Some states attempt to achieve the same result by prohibiting employers from asking any questions regarding criminal records or, perhaps, from asking questions about records of criminal convictions that may not be directly applicable to the position sought by the convict.⁷

Expungement Is Ineffective

As practiced, expungement renders criminal records unavailable only several years after the convict is released from incarceration. It is therefore totally ineffective in achieving any of the first three legislative goals—eliminating discrimination against presumptively rehabilitated convicts, reducing recidivism, and aiding rehabilitation for the convict's own sake—because the records are shielded from the public too late to help the convict find the initial job, credit and/or housing that will prevent a return to crime.

A state seeking to achieve any of these goals may try to correct the deficiency by eliminating the gap between the convict's release and the time when the record is suppressed. But even so, expungement might still fail because information about the conviction would remain public through official records that are left untouched by the statutes and through unofficial sources such as media accounts and the memories of

those who witnessed or otherwise knew of the crime, the trial, or the sentencing.

As written, for example, expungement statutes commonly expressly allow conviction information to be disseminated to certain persons under specified conditions. Some states allow access only to certain law enforcement officials, who may be the source of "leaks" to others about the convict's record.⁸ Where statutes secure the records more thoroughly, questions remain of exactly which records will be expunged. But even if the records to be expunged are

"[I]n some states a court clerk must respond untruthfully to an inquiry from a prospective employer . . . about the existence of a criminal record if it has been expunged; in others, the convict may choose without penalty to respond untruthfully to the same question."

specified in detail, gaps remain: entries on police blotters, for example, are not erased or sealed; neither are entries on appellate court dockets outside the jurisdiction of the expunging court. In addition, it is common practice for law enforcement agencies of different states to share among themselves and with the federal government identification and other information about criminals. A state court is powerless to order expungement of data sent outside the state.

Even if the time between release and expungement were eliminated and all official sources of information about the conviction suppressed, problems would

confront a convict who must prepare a resume or job application listing an employment history over several previous years. If the applicant is honest, a period corresponding to the incarceration will show no employment. Since statutory authorization for the convict to lie about his or her background may extend only to direct inquiries to and responses by the convict, it may not help fill in a sparse employment record. Even in states that prohibit employers from asking applicants *directly* whether they have



served a prison term, therefore, employers may logically assume a prison sentence when they are presented with an incomplete employment history.

In addition, the world of unofficial sources of information also remains. Witnesses to the crime who testified in court, attorneys, cellmates of the convict, and reporters who covered the trial all may recall the conviction and relate it to others. Unofficial written records also remain in files in newspaper libraries, in reporters' notes, and in public libraries that retain newspaper and magazine issues containing the original articles about the conviction.

A fully effective expungement statute would shut off these unofficial sources by closing the entire criminal process from arrest and arraignment through trial and sentencing and by prohibiting speech or publication by those who somehow manage to obtain information about the case. But because of the sixth amendment and *Richmond Newspapers, Inc. v. Virginia*,⁹ criminal trials may not constitutionally be closed as a matter of course, and it is inconceivable that the public would stand for the broad speech and press restrictions that would be nec-

essary to seal the other "unofficial" sources of criminal record information.

If, however, the legislative goal is the fourth, that is, if expungement is considered a reward to be given to those convicts who have achieved rehabilitation, the time lapse between release and expungement is entirely appropriate. But many of the deficiencies that make expungement ineffective in reducing recidivism and discrimination also make it ineffective as a reward for those who are rehabilitated. Expungement as a reward becomes that much less of a reward—and that much less of an incentive to reform—when so many sources of information about the conviction remain available.

The usual expungement procedure, moreover, lacks sufficient flexibility to be used effectively as a reward for convicts who rehabilitate themselves. In some states, expungement is awarded to all convicts who can demonstrate certain facts.¹⁰ But the privilege is available only a number of years after release. The time period usually is the same, regardless of the convict or the specific crime committed.¹¹ Thus a convict who becomes truly rehabilitated earlier than the prescribed statutory period is not rewarded for doing so. At the same time, a convict not truly rehabilitated but able to satisfy the minimum statutory conditions—of having "stayed clean" for a minimum number of years—will be "rewarded" with expungement.

In summary, the typical "delayed-expungement" model is likely to be ineffective at achieving the first three legislative goals, and sporadically effective, at best, at achieving the limited fourth goal.

Expungement Is Costly

Against the minor benefit thus provided by expungement must be balanced its tremendous social costs in dishonesty and secrecy:

Dishonesty—As described above, several states expressly provide that a convict whose conviction is expunged may lie when responding to an inquiry about it. Other provisions *require* lies by certain officials who are asked about a criminal record that has been expunged.

"Dishonesty, whether explicit or implicit, thus is a fundamental aspect of expungement that should be considered carefully. Are the benefits of expungement so great that they outweigh the preference for truth that is inherent in any society, and in ours particularly?"

But expungement itself, without these provisions, introduces its own brand of implicit dishonesty. For even where convicts and officials are not authorized or required to lie, the very act of expunging is an attempt to conceal the past and to convey the impression that something that has in fact occurred has not.

Dishonesty, whether explicit or implicit, thus is a fundamental aspect of expungement that should be considered carefully. Are the benefits of expungement so great that they outweigh the preference for truth that is inherent in any society, and in ours particularly? Apart from concerns about the value of truth, expungement statutes also call into question the basic morality of a government whose officials lie to its citizens. It would be naive to argue that government should never be permitted to lie—national security and terrorist attacks may in some cases justify dishonesty. But it is legitimate to ask whether the benefits of mandatory dishonesty in the expungement context justify the loss of public confidence in government such dishonesty fosters. It may be argued that governmental lying about expunged records is permissible because the people, through their elected legislators, adopted

Expunging Criminal Records

“When the public is deceived by the concealment of criminal records or by lies about their existence, it is deprived of the opportunity to learn to accept convicts, particularly those who have rehabilitated themselves.”

the expungement statutes; that in effect the people have asked to be lied to, presumably because they realize it is for their own good. But consent may justify a lie only where it is given freely, after open debate and upon adequate information. It is questionable whether the full implications of expungement statutes, whose goal is to rewrite history, were ever made known to voters.

Reinforcing Prejudice—Expungement’s dishonesty, moreover, handicaps society by preventing it from confronting and clarifying its own attitudes about convicts and their reentry into society. When the public is deceived by the concealment of criminal records or by lies about their existence, it is deprived of the opportunity to learn to accept convicts, particularly those who have rehabilitated themselves. Indeed, it is encouraged to think it appropriate to look askance at those whose conviction records are available.

Limited Access to Records—The Supreme Court has not recognized any constitutional right of access to records in the possession of government.¹² As emphasized in *Richmond Newspapers, Inc. v. Virginia*, however, our tradition of public criminal trials of adults suggests a long-perceived value in the openness of the criminal justice process. Thus, a common law right of access to judicial records and evidence exists.¹³

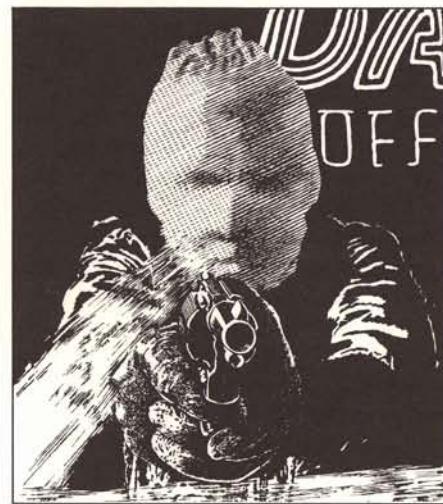
As Justice Brennan argued in *Richmond Newspapers*, the free flow of information about the criminal justice system plays an important structural

role in our democratic society.¹⁴ A statute that limits access to expunged records prevents, for example, the public from informing itself about the conduct of players in the criminal justice system: the prosecutors, the police, and the judges. The public as well as the press is free to attend the original sentencing and the hearings that precede expungement orders. But it is unrealistic to expect the press or the public to be in attendance in every courtroom every day for every hearing or trial. The thorough compilation of information and the proper perspective required if the public is to make well-informed electoral judgments are possible only if records are permanently available for perusal.

Constitutional Rights of Expression—Although a statute expunging criminal records may constitutionally limit access by the press and the public to the records, further provisions in some statutes infringe first amendment freedoms by prohibiting “any person” from divulging information contained within the expunged records.¹⁵ The statutes ban statements by members of the public or the media who wish to convey information about an expunged conviction, presumably even if the speaker obtains the information from a source left untouched by the expungement order. But *Cox Broadcasting Corp. v. Cohn*,¹⁶ protecting the accurate publication of information found in public court records, and *Smith v. Daily Mail Publishing Co.*,¹⁷ failing to find a required state interest “of the highest order” when a statute

barred a newspaper from printing lawfully obtained information about a juvenile suspect, both indicate that a flat ban on divulging information about expunged convictions is unconstitutional. The first amendment bars punishment for publication of accurate information about once-public official records, whether or not those records are now open to public view.

Other Costs—Rather than eliminating discrimination against convicts, expungement statutes may instead actually encourage wider discrimination against discretely identifiable groups. This might occur because employers and creditors who, because of the statutes, are allowed no criminal background informa-



tion about applicants may simply subtly discriminate against members of identifiable groups that have, or are thought to have, disproportionately high conviction rates. Expungement statutes, moreover, make criminal records less available for research, thus depriving the public of knowledge about the criminal justice system and its participants. In addition, expungement may implicate expression rights guaranteed by state constitutions.¹⁸

Conclusion

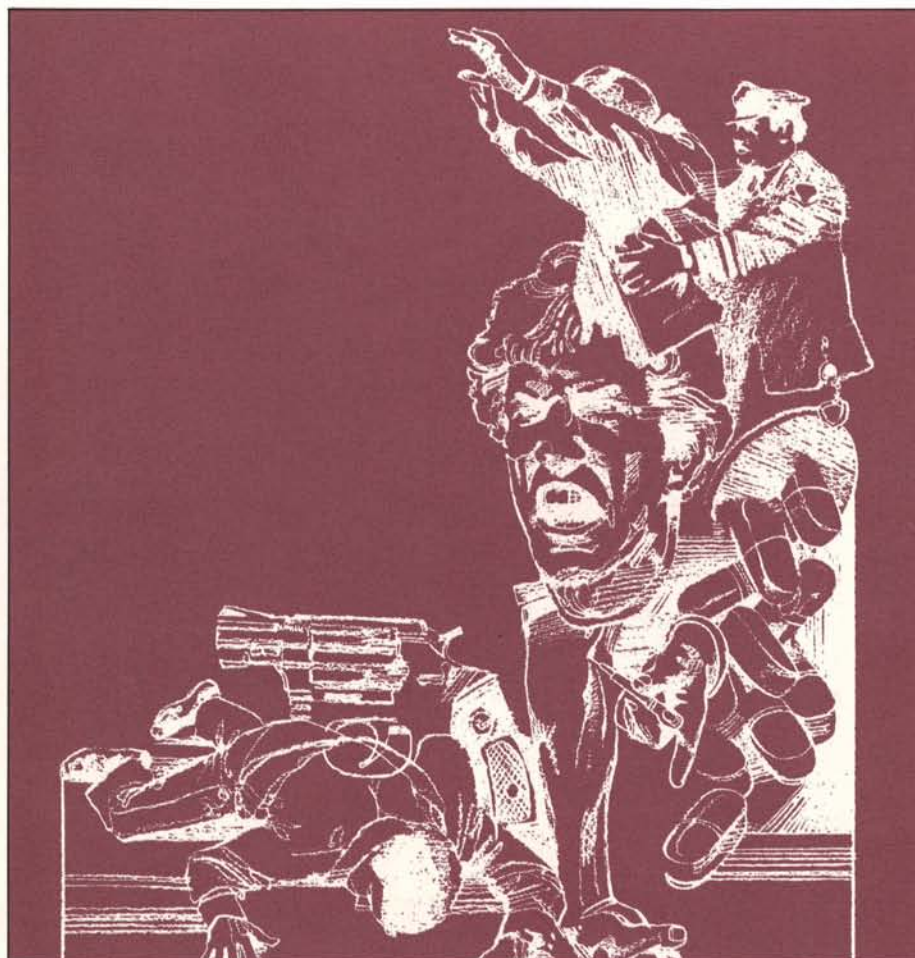
A legislature seeking ways to aid convicts’ reentry into society has a wide choice of means of preventing or discouraging discrimination against the former prisoners, ranging from wage subsidies, tax incentives and half-way

"Given the very limited effectiveness of expungement . . . public decisionmakers have an obligation to first consider and reject other less costly means toward the same end."

houses to civil rights acts. Given the very limited effectiveness of expungement, especially compared to the limits it imposes on free expression and access to information vital to the democratic structure of government, and the very real dangers it causes by permitting, even requiring, lies by citizens and by government itself, public decisionmakers have an obligation to first consider and reject other less costly means toward the same end.

Footnotes

1. "Convict" will be used here to mean a person who has been convicted of a crime and is now released after serving a prison or jail sentence. Black's Law Dictionary 403 (4th ed. 1968).
2. "Expunge" means "[t]o destroy; blot out; [or] obliterate. . . . The act of physically destroying information—including criminal records—in files, computers, or other depositories." Black's Law Dictionary 522 (5th ed. 1979). The term is variously used by commentators and statute drafters, however, to cover sealing, purging, setting aside, and/or segregating records. Expungement, as used here, refers in general to statutory processes that seek in some way to hide information in conviction records from the public's eye. For examples of such statutes, see, e.g., Ohio Rev. Code Ann. § 2953.32 (Anderson Supp. 1979); Colo. Rev. Stat. § 24-72-305 (Supp. 1980).
3. See e.g., Kan. Stat. § 21-4619(h) (Supp. 1980); Mass. Gen. Laws Ann. ch. 276, § 100A (West Supp. 1981); N.J. Stat. Ann. § 2C:52-15 (West 1979).



4. See, e.g., Kan. Stat. § 21-4619(g) (Supp. 1980); Nev. Rev. Stat. § 179.285 (1979).
5. See, e.g., Mass. Gen. Laws Ann. ch. 151B, § 4(9) (West Supp. 1981); Utah Code Ann. § 77-18-2(3) (Supp. 1980).
6. N.H. Rev. Stat. Ann. § 651.5 (VIII) (1974).
7. See, e.g., Ohio Rev. Code Ann. §§ 2953.33 to -.35 (Anderson Supp. 1979).
8. See, e.g., Ark. Stat. Ann. § 43-1235 (1977).
9. 448 U.S. 555 (1980).
10. See, e.g., Colo. Rev. Stat. § 24-72-308(b) (Supp. 1980); Utah Code Ann. § 77-18-2 (Supp. 1980).
11. See, e.g., Ark. Stat. Ann. § 43-1233 (1977). Some states, however, distinguish broadly between felons and convicts who have committed misdemeanors. See, e.g., Utah Code Ann. § 77-18-2 (Supp. 1980).
12. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).
13. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978).

14. 448 U.S. at 587-89 (Brennan, J., concurring in the judgment, joined by Marshall, J.).
15. See, e.g., N.J. Stat. Ann. § 2C:52-30 (West 1979).
16. 420 U.S. 469 (1975).
17. 443 U.S. 97 (1979).
18. See, e.g., Kan. Const. Bill of Rights, § 11.

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Mendelsohn -

EDUCATED AMERICANS—AN ENDANGERED SPECIES

by Shirley M. Hufstедler, 1982 Herman Phleger Visiting Professor of Law

Even for the casual visitor, a glimpse of the Stanford campus in the spring is an exhilarating experience. The tranquil beauty of Memorial Chapel seen from Palm Drive is justifiably famous. The emerald green of the hills, dotted with spreading oaks, is a beautiful backdrop for the mellow sandstone of the old buildings. Once on the campus itself, the student exuberance is evident, albeit somewhat harrowing to the uninitiated. Student cyclists are darting and zooming on the walkways with casual proficiency and unnerving speed. For returning alumni, a visit to the Farm in the spring is a pungent amalgam of feelings—remembrance of things and people past—of the Santa Clara Valley with wave upon wave of fruit trees in bloom, of bucolic scenes around the campus, of big games won and lost, of soft nights walking with fellow students in the Inner Quad enjoying the arabesques of light cast by the arches, of professors, tame or terrifying. The alumni, as well as the remembered scenes, have changed with the years, but the excellence and the vitality of this University appear constant.

To speak of educated Americans as an endangered species in this setting sounds irrelevant, if not altogether foolish. The physical plant is magnificent; administration and faculty are excellent; no university or college attracts a finer student body. Even as we celebrate these joys, alarms must be sounded because multiple forces are gathering rapidly that are imperiling not only marginal institutions but the great universities of America as well. The abundance that we see at Stanford is the harvest of remark-

"(M)ultiple forces are gathering rapidly that are imperiling not only marginal institutions but the great universities of America as well."

able investments, private and public, federal and state, in institutions and in human resources for many decades. The investment in the land and physical plant at Stanford since its founding in 1885 is obvious. Far less obvious is the investment in the human resources that are the foundation for the entire structure of higher education in America. Think, for a moment, about how many human beings and how many institutions over how many years are necessary to turn one newborn infant into one Stanford law graduate. Failure of that support system for more than a few hours for a newborn infant, a few days for an older child, or a few months for an adolescent will slow or halt the progression of that child. A whole series of events and circumstances are eroding those support systems and, unless we act swiftly, educated Americans will very shortly be an endangered species.

Financial support, both public and private, is rapidly ebbing for all levels of the educational enterprise. The causes for this diminution are many and complicated. Of these I have chosen three sets of circumstances for comment, all of which are interrelated: public perceptions and attitudes about education, changing demographics, and changing state and national priorities.

Loss of Public Confidence

Public confidence in the nation's schools has been slipping, in some respects sharply, during the last twenty years. A stranger to our country reading comments about education could easily assume that American education reached its apex forty or more years ago and has been deteriorating ever since. That impression would be enhanced if the stranger listened to an older American recounting his own school days—trudging through the snow to the little red schoolhouse to sit at the feet of a gifted teacher whose saintly nature kept perfect classroom order, taught every student the basic skills, with never a thought about a pay raise. The stranger might not know that we Americans are crazy about nostalgia, but we do not like history very much. The raconteur would not recall that, apart from a handful of elite schools for elite young ladies and gentlemen, elementary education in the United States forty and more years ago was mediocre to poor, and secondary education was non-existent for the vast majority of Americans.¹ By 1940, less than one-quarter of Americans had completed high school.² In rural and semi-rural America the average youngster ended his or her formal

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education in the eighth grade. Significant numbers of American youngsters had even fewer educational opportunities, or none. Those children had black or brown skins, or they had some kind of handicap and were never admitted to school at all. In those days, it would have been ludicrous to express concern about high school dropouts—too few youngsters had dropped in to high school. By 1980, over two-thirds of our youngsters graduated from high school, and of that group almost half entered colleges and universities.³

A significant part of the dissatisfaction now expressed with American education is a product not of our failures but of our successes. When 75% of our people never had a high school education, the youngsters who completed high school had a valuable credential for upward economic and personal mobility. Later, a college degree was necessary to achieve the same opportunities, and still later, as the number of college degree holders escalated, post-graduate education replaced the undergraduate degree as the necessary credential. Today, even a post-graduate degree, except in some fields, is not enough to assure entry in the American Dream Sweepstakes.

These success stories have also been a significant factor in the lessening prestige of elementary and secondary school teachers. In 1940 and earlier, teachers stood out because they had a college degree; that prestige is dimmed when a college degree has become such common coin. Add declining prestige to the failure of teachers' salaries to reach or maintain parity with blue-collar wages⁴ and the difficulty of attracting and retaining high quality teachers is apparent.

The barrage of criticism leveled at elementary and secondary schools, of course, does not stem entirely from these attitudinal changes or from success records. Many of our schools have serious problems, but our perspective must not be distorted by failing to place the issues in historical context. Elementary schools in the United States are far better than they were a generation ago, but they are not as good as they can be and must be. The most serious trouble spots are junior and senior high schools, predominantly in our largest urban areas. Those

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troubles are primarily, but not exclusively, caused by forces outside the control of educators. The major difficulties are symptoms of distress within the larger community in which the schools are situated. If a community is riven by violence, drug abuse, poverty, and corruption, we will find all of the influences, for good or ill, that come from the home, the street, the neighborhood, the church or temple, and the television.⁵

That does not mean that the schools can or should be excused from omissions or failures by teachers or school administrators. Members of the educational enterprise have too often become more interested in the preservation of their territorial imperatives than in the children to be taught, in ill-considered theories of teaching methodology than in reaching real children in a real classroom, and in moving children through a system rather than helping each child to learn.⁶ These deficiencies are present, and they cannot be ignored. But they should not distract our attention from the reality that we have built the most diverse, pluralistic, and egalitarian school system in the world, and, at the same time, we have produced more achieving youngsters than we ever did before in this nation.⁷

The Effects of Changing Demographics

Perceptions of education have been heavily influenced by convulsive changes in demographics during the last twenty years. None of us needs to be reminded that a baby boom followed the second world war. Or that the boom ended quite abruptly in the sixties. The fact often overlooked is that the baby boom was a middle-class phenomenon. Although the birth rate has been declining for all income, ethnic, and racial groups during the same years, the rate of decline for lower-income nonwhite groups has been significantly less than for middle-income, traditional "white" groups.⁸ Moreover, during the same period, we have experienced more immigration, legal and illegal, than at any time since early in this century.⁹ These immigrants—and we are a nation of immigrants—reached our shores as so many of our forebears did, non-English speaking and poor. These demographic shifts have profound effects, only dimly perceived by a majority of Americans.

The American middle class has been primarily responsible for the support of public education in the United States. As long as the overwhelming majority of

middle-income families had children in school, the confidence level of public schools was very high. These parents took an active interest in their schools, built in the suburbs and exurbs that sprung up following the Second World War.¹⁰ Those suburbs created new kinds of ghettos inhabited by identifiable income-level, race, ethnicity, and age. With the reversal of the baby boom cycle, the children of the middle class moved out of the elementary and secondary schools, through undergraduate training, and the trailers are now in post-graduate education. Suburban and exurban elementary and secondary schools are closing all over the country. The aging suburbanites' active involvement with elementary and secondary education rapidly dwindled as their own children left for college. The suburbanites did not think about and reject the children of the poor; for the most part, they did not think about them at all, because they never saw them, at least until their passions as well as their interest were stirred by court-ordered desegregation.

The level of confidence in the schools is directly correlated to the interest and involvement of the middle class in the schools. The perception that elementary and secondary public education is failing is most strongly held by those who have had no immediate contact with those schools for at least a decade. That lack of confidence is particularly acute when the schools in question are inhabited by students from families who are not like "us," that is, traditional, white, middle-income families. The estrangement from the elementary and secondary schools attended by the poor is enhanced by news media coverage of urban schools suffering the most acute problems.¹¹ The alienation and detachment of middle-income parents from elementary and secondary public education is also a strong factor in preventing the same people from appreciating the true significance of the demographic changes earlier mentioned.

In this decade, we shall have 15% fewer youngsters in the United States who will reach age 18 than we did in the decade of the seventies.¹² "Of that group a large percentage are not children of middle-income parents, and of



children of families below the poverty line, nearly a majority are youngsters who used to be called minority youth."¹³ In many of our urban school districts, "minority" students are now a majority of the children in public schools.¹⁴ The proportion of "minority" to "majority" students is rising, and by the next decade, in school district after school district, "minority" youth will be more than half of these student populations.¹⁵

While public and private elementary and secondary schools are closing in the suburbs, those urban and rural schools serving disadvantaged youngsters are all too frequently running double sessions. Large numbers of the children attending those impoverished schools are the very children whose multiple needs are far greater than their contemporaries in middle-income homes. They need help in learning to speak proficient English, to adjust to a dominant culture very different from the one in which they live at home, to cope with the unhappy reality of lingering racial and ethnic prejudice. In addition, many of these youngsters, like their more affluent contemporaries, also suffer from physical handicaps or learning disabilities.

Changing Priorities

At the very time the need to address the educational problems of disadvantaged youngsters is the greatest we have ever known, all forms of support for these children are crumbling. In many states, the property tax is still the principal source of funding for school districts. However equitable it may have been during the era in which the property tax became the financial foundation for funding schools, that era has long since ended. The property tax does not and cannot yield enough revenue to pay for the educational needs of children who go to school in blighted areas.¹⁶ Efforts to change the funding mechanisms for school systems by legislation and by judicial decision have been inadequate to the task.¹⁷ Taxpayer rebellions, such as Proposition 13 in California, have very seriously eroded income to both local and state governments. The impact of Proposition 13 and its counterparts has not only depleted the total income available to local and state governments, it has also necessitated very large income transfers to be made from local governments to state governments

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as well as to the federal government.¹⁸

The decreasing availability of funding from local and state resources has generated serious financial problems for school districts all over the nation.¹⁹ But those difficulties have been even more seriously exacerbated by major changes in federal priorities as perceived by our leaders in Washington. The outcome of the budget struggles on the Potomac right now will have very serious consequences for every aspect of the American educational systems not only in this decade, but well into the next century. The national priorities expressed by our leaders have resulted and are resulting in immense transfers of federal funds from domestic programs to the military budget and from public coffers to private hands.²⁰ Those decisions have been and are being made by members of both political parties, many if not most of whom are responding to their own perceptions of the needs or the demands of their constituencies. Those perceptions may be grossly erroneous because Americans, as yet, have not formed their opinions on the policy choices that must be made. We have not done so because we have not had enough coherent information conveyed to us to help us decide; and we have not been asked the questions that must be asked to permit us to express our views.

It is a paradoxical fact of national life that the technological means of conveying huge quantities of information to the public has in so many respects made us less rather than better informed. Television and newspapers present us with

hundreds of facts per day, but those facts are predominantly headlines that do not reveal the relationship of one issue to another, the point at which choices must be made, the relationships between past, present and future events and decisions. That deluge of headlines distracts us from the task of sorting and assimilating those bits of information into the designs that help us separate wheat from chaff, the evanescent from the lasting. The information emerging from our televisions and newspapers resembles brightly colored tiles randomly removed from the social, political, and economic mosaics of which they are a part. We cannot instantly detect the pattern from which those tiles were taken.

In adults, as well as children, the learning curve rapidly escalates when our interest is piqued or we are entertained. For instance, it is no small irony that so many Americans instantly recognize the implications to their favorite professional athletic team when a coach is hired or fired, or a well-known player is traded, but the same Americans are completely unaware of the impact on their families or their communities of cutting in half federal aid to students attending institutions of higher education and slashing aid to impoverished elementary schools. In the former instance, the reader or viewer can place the bit of information in context. For decades newspapers have carried lengthy sports sections and, no news telecast is complete without the sports rundown, all of which are avidly followed by sports enthusiasts. If we compare the column inches devoted to sports with the column inches devoted to national affairs, we very quickly appreciate the level of public interest in both topics. The sports fan will debate the choice of coach or player vigorously, even vehemently, with his friends, acquaintances, and his bartender. In contrast, the same American knows so little about the context of the federal budget that he cannot immediately understand how to interpret the headlines, and he therefore cannot debate the issues.

Our lack of coherent information about the federal budget is not surprising. The ignorance is not caused by the fact that the budget process is compli-

"Our learning curve is rising but still too slowly to comprehend the significance of the present budget battles."

cated. After all, the mass of sports statistics, team histories, rules of the game, and the finer points of strategy are complicated too. Other factors are much more determinative. The amount of coverage by news media is important. But perhaps even more important is the fact that budget battles on the Potomac have not adversely affected most Americans for almost 50 years. Until very recently the benefits continued to flow from Washington, or were increased, after the then-current budget battle was fought.

In the middle- to late-seventies, we began learning very slowly that the era of escalating private and public resources had ended. Millions of Americans had experienced no period of American history other than the thirty years of rising expectations and rising GNP following the end of the Second World War. We could not be blamed for assuming that the most prolonged period of prosperity in the history of the world was a natural state of American economic affairs and not an aberrational blessed American event. During that prolonged economic boom, we were not compelled to make those hard choices and we, therefore, did not learn very much about the economic landscape.

Our learning curve is rising, but still too slowly to comprehend the significance of the present budget battles. We have so long been accustomed to the receipt of myriad benefits from the Federal Government that many of us almost believe that those bounties did not come from the Government or from our taxes, but were care packages shipped to us on the Mayflower.

If we conducted a national opinion poll today beginning "Does America need" followed by the list "strong national defense, full employment, increased productivity, low interest rates, safe streets, cheap energy, medical care, quality education, old age security, pure air and water, lower taxes, and freedom and justice for all?" we could anticipate a rousing response: "All of the above." We could have asked the same questions with the same anticipated results in 1975. We would thereby learn nothing remotely useful to the citizenry or to governmental leaders charged with the responsibility of formulating policy.

With only slight modifications, the same questions become powerful campaign rhetoric: "Is our national defense as strong as it must be to protect us from our enemies?" "Are you satisfied with the level of employment in this country?" "Should we diminish social security payments to the elderly?" "Are our children receiving the quality of education that they need?" The anticipated responses would be resoundingly negative on all of those questions. But neither the questions nor the answers could usefully inform the citizenry or political aspirants because none reveals the real choices that have to be made by the people and by our leadership.

We now face some very grave choices, and the decisions that must be made are confronting us so quickly that we must rapidly accelerate our learning curves. First, we must understand the matrix in which the decisions must be made.

Budget Cuts: Who Will Pay the Price?

For the reasonably foreseeable future, the total resources available, public and private, federal and state, are not expanding, because our Gross National Product is rising almost imperceptibly.²¹ Despite the well-publicized cuts in the federal budget, the total federal budget has not been significantly reduced. The total federal budget for fiscal years 1982 and 1983, even after adjustment for inflation, is only a few percentage points less than the respective total budgets for fiscal years 1980 and 1981.²² The fiscal year 1982 budget, for the most part

"The American people are perfectly capable of making rational choices, once the options are placed before us. We can and we must insist that we are fairly informed, and that our opinions shall be heard."

adopted last year, and the 1983 budget now being debated reflect fundamental policy changes: (1) huge transfers of federal funds move money from investment in human capital to investment in hardware, (2) the movement of funds also transfers policy decisions from the federal government to state governments, and from all governments to private persons, natural and corporate.²³ Transferring to private persons the power to decide the kinds of investments to be made in human capital as well as in institutions removes those decisions from public scrutiny that is the usual concomitant of governmental decisions affecting domestic affairs. Although the level of total federal spending already approved and proposed for fiscal years 1982 and 1983 has not significantly declined, the policy changes are evidenced by the enormous transfers of federal funds from domestic programs to the department of defense, and the very large transfers of funds from the federal treasury to selected taxpayers in the form of many different kinds of tax breaks.²⁴

The political and economic theories that are the motivating force for these fundamental changes have been given a number of familiar labels. Those labels do not help us to understand the context or the impact of the decisions that must be made. The slogans and catch words at least imply that the choices to be made are too complicated for ordinary Americans to understand, and suggest that the decisions should therefore be left to economists, military and political leaders who have the necessary expertise. That implication is false. The Amer-

ican people are perfectly capable of making rational choices, once the options are placed before us. We can and we must insist that we are fairly informed, and that our opinions shall be heard. In becoming informed, we do not have to know any state secrets to make sensible judgments about those choices that most directly affect our lives, the lives of our children, and the future of our nation.

We already know that we cannot have our social programs maintained or increased, a huge military budget, low taxes and no deficits. We know, although we may not have thought about it very much, that a strong national defense requires much more than weaponry. The needs of the military are only one component of the strength of the country. National security rests on the strength of our people—how we perceive ourselves and how others perceive us. Our people are strong when we adhere to the ideals and principles that have made our country great, when we enjoy material blessings but we do not accept them as a substitute for nourishment of the spirit, when we suppress our desires for instant gratification and invest in our futures and the futures of others. Every one of those elements of strength requires education—formal and informal, public and private, personal and institutional. Material things—no matter how sophisticated—cannot be substituted for human beings.

When we add some additional data to the information we already know, we have the context in which we can debate the issues and come to decisions. The budget proposals, in part adopted

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last year, and now being debated in Washington, would transfer to the military establishment \$1,600,000,000,000 over the next few years.²⁵ These sums are so vast that we have almost as much difficulty grasping their meaning as we do comprehending interstellar mileage charts. Some other figures may help us put these numbers in perspective. The total annual GNP of the United States is about \$3 trillion.²⁶ In 1980, the whole nation spent a small percentage of the GNP on all elements of education, i.e., \$166 billion.²⁷ The military build-up for the Vietnam war cost us \$121.8 billion.²⁸ The budget for the Department of Education in fiscal year 1980 was \$14,200,000,000.²⁹ That is a very large sum, but as compared to \$1,600,000,000,000, it pales into insignificance.

What did that budget for the Department of Education buy? The Department supplied financial aid to disadvantaged elementary and secondary school children in 14,000 of the nation's 16,000 school districts. That \$5,600,000,000, 48% of the budget, supplied financial aid to school districts to meet the needs of millions of disadvantaged youngsters who otherwise would have gone unserved or underserved because their needs were beyond the resources available to the school districts helped. The Department spent 40% of its budget, \$5,600,000,000, providing financial assistance to students attending universities and colleges; in that year, about one-half of all students in the United States who attended post-secondary institutions received some form of financial help from the Department. The programs included grants to the most needy students, heavily subsidized loans to students, work-study programs and other means of financial help. The remainder of the budget, \$1,700,000,000, was spent on many smaller programs. Illustrative are the following: funding to states to help defray the costs of educating handicapped children; to provide adult and vocational education; financial aid to school districts struggling with desegregation; grants to libraries, museums, and educational television; monies for research to develop rehabilitative services for disabled adults and children; funds for the education of children of migra-

"Children cannot be dropped for two or three years and then be restored undamaged when we realize we made a mistake. The educational needs of children must be met week by week, year after year."

tory workers; challenge grants for programs of excellence in higher education; funding for national collection of educational statistics and research.³⁰

The Department of Education was administering more than 160 educational programs, created over a period of more than 30 years by Congress.³¹ The appropriations to the Department were all annexed to programs created by Congress. We do not have to guess about the success of the programs, because their effectiveness has been carefully documented by elaborate studies over a period of many years.³² The validation of educational programs cannot be done on a short-term basis, because the results of investment in human development do not appear in quantifiable forms for many years. For instance, we could not know the beneficial effects of Headstart programs or of programs providing language and other kinds of assistance to disadvantaged first-graders until we were able to compare the performance of those youngsters a decade or more later with the record of those who had not had the benefit of the programs. When that comparison was made, we had very strong evidence that the children who had the programs had dramatically higher levels of achievement than those who did not.³³ We had no difficulty in finding groups with whom to compare the benefited children because, even at the level of funding maintained for those programs in 1980 and 1981, we were only able to reach about one-half of the youngsters eligible for assistance. The money was adequate to reach about 6,000,000 children.³⁴

Trading Brains for Brawn

To give \$1,600,000,000,000 to the military, appropriations for the federal education programs are being systematically stripped.³⁵ Although all non-military appropriations in other federal departments and agencies have also sustained cuts, the most severe have been taken in education and labor. Deep cuts were taken last year in the programs designed to help school districts meet the needs of the most disadvantaged youngsters in the country. The proposed cuts now being debated are even worse. These are the same children who will comprise almost half of all the children who will reach age 18 by 1999.³⁶ These are the same children who must overwhelmingly provide the personnel for the armed forces, the labor force whose work must support an aging America. Abandoning these children makes them the cruelest victims of the current budget policy, but it also makes them the most costly to the whole society. Children cannot be dropped for two or three years and then be restored undamaged when we realize that we made a mistake. The educational needs of children must be met week by week, year after year. If we abandon the education of these children because we do not believe we can afford it right now, the whole society ultimately pays and pays tremendous prices by producing young people who will be burdens, not benefits, to the country. We will not see the results for years, but we will ultimately pay the costs in unemployment, welfare dependency, and crime.



Much more visible to the middle class will be the immediate impact of the proposed cuts in aid to students attending institutions of higher education. Over 65% of that aid has heretofore helped children of middle income parents.³⁷ Half of those young people, now eligible for student loans, will no longer be able to get them. The middle class will awaken to find out that their sons and daughters cannot attend the universities and colleges of their choice. Less apparent, but even more devastating, are cuts to programs designed to help children of lower income families to attend universities and colleges. The proposed budget severely cuts Basic Educational Opportunity Grants and proposes to eliminate entirely Supplemental Educational Opportunity Grants; those programs are specifically tailored for lower income young people attending post-secondary institutions.³⁸ These are the same youngsters whose financial means make it extremely difficult to obtain loans even if they were otherwise eligible for them. Other aid programs marked for extinction include loans for all graduate students, women's educational equity, funding for talented minority youth.³⁹

Questions We Must Ask

We now have before us enough information to permit our asking some hard questions. Will the level of funding supplied to the Department of Defense improve our national security when the price is the destruction of the programs sustaining our human capital? Since we must make a choice, is our national se-

curity better served by giving up some nuclear warheads, a few aircraft carriers, or even the B-1 bomber in order to teach our disadvantaged children, keep our libraries open, or educate our brightest students through graduate school? Would we be safer to postpone construction of more sophisticated weaponry in order to educate people who can operate it, repair it, design it, or build it? Will our national prestige and security be enhanced or impaired if we choose to open more defense factories at the cost of closing many universities and colleges? If we choose to escalate weaponry at the expense of educational institutions, how many years will it take to recover from that choice if we have made a mistake? What kind of place will Stanford University, and the other great private universities and colleges, become if only the rich can afford to attend? Where will the children of the middle class and the poor be educated to become our future scientists, engineers, mathematicians, computer technologists, businessmen, and investors?

A few more facts may be illuminating when we try to answer these questions in the framework of our competition with the Soviet Union. As our investment in Education is decreasing, the investment in the U.S.S.R. is increasing. We have an acute shortage of secondary school teachers qualified to teach mathematics, science, computer technology, and languages. About 100,000 students in the secondary schools in the United States now receive calculus in high school.⁴⁰ All students attending high school in the U.S.S.R. now receive three full years of mathematics before graduation.⁴¹ The U.S.S.R. has more teachers of English than we have students of Russian.⁴² We have almost obliterated scholarships for foreign students in this country. In contrast, the U.S.S.R. now has tens of thousands of foreign students on scholarships, in large part from third world countries.⁴³ What are the implications to our national security from these contrasts? Whose system of government will appeal to the loyalties of the future leaders of third world countries educated in the U.S.S.R.? All of the questions that I have posed and many others in a similar vein must

be asked by Americans. Moreover, do you doubt that the average American knowing even that much of the context of the debate that rages in Washington would be unable to come up with some very sensible judgments?

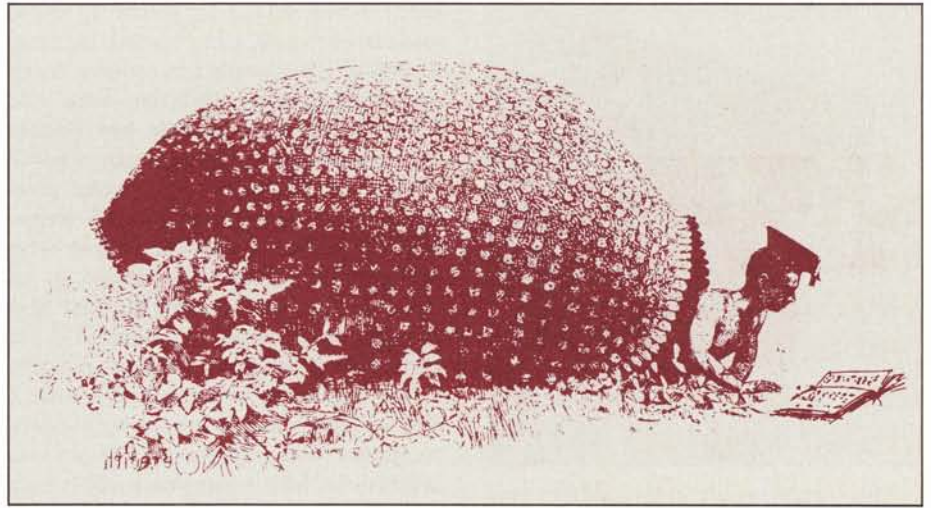
Americans can easily recognize that the choice is not between a strong and a weak national defense. We already have a strong national defense. The question is how much more military might do we need or can we safely use? Huge expenditures on any program do not inevitably result in a stronger program; the reverse can also be true. Poor performance on a rich diet is all too familiar. Waste, of course, is not a word foreign to defense contracts or to the Pentagon. The Defense Department has not justified the need for many of the long list of items on its wish lists, but that does not mean that no increases are warranted. The most acute military need, however, is not hardware, it is human resources: The armed services are suffering from chronic shortages of the most highly trained and experienced personnel, for example, computer technologists, engineers, and mechanics of all kinds.⁴⁴ These persons are constantly being drained by private industry and business, especially the industries and businesses that need those skills to fulfill defense contracts. Increased funding is therefore necessary to improve incentives to entering and remaining in career military services. Incentives include not only direct pay increases, but also very important indirect benefits, such as improvement of the quality of schools available to children of military personnel at home and abroad. Why, then, is federal funding of such schools being decreased in the budget being debated?

The suggestion that the venture capital for investment in human resources now stricken from the federal budget can be supplied by state funds or voluntary contributions will not withstand casual scrutiny. Even without the financial strictures imposed by a Proposition 13, very few of our states have the financial means to make up the deficiency. The few states that do have the resources to help disadvantaged children have historically shown little or no inclination to use them for those purposes.

Educated Americans

Little children do not vote. Immigrant parents, all too frequently, do not vote. Many private persons and corporations have given, and given generously, to universities and colleges, to the arts, and to other philanthropic causes. But again, history teaches that such measures of generosity are not a universal attribute of the well-to-do. Furthermore, even if every wealthy person and every corporation with a profit to report gave generously, the resulting funds would not be enough to begin to meet the deficits resulting from the multiple program cuts, not only in education, but in the other departments and agencies. Finally, educational institutions are required to prepare budgets using income projections upon which they can reasonably rely. Voluntary contributions have an unhappy record of unpredictability. Of at least equal importance, the suggestion assumes a premise which is surely questionable if not totally faulty. The premise is that the investment in our human resources is not a national concern and not a national responsibility. In the domain of education, surely the investment in each child or older student, is an investment for the benefit of all. We are a nation, not an aggregation of city states. We are, in every aspect of our lives, interdependent, and we abandon our commitment and concern for the smallest and poorest of us at the peril of all of us.

Those observations are not meant to imply that the federal government should control or dominate elementary and secondary education, or any other segment of our complex educational systems. For more than 30 years, until last year, the federal government supplied no more than 8% of the costs of elementary and secondary education.⁴⁵ That level of funding cannot be remotely described as "control." Those funds were nevertheless extremely precious because they were concentrated on the children with special needs, on programs designed to improve quality, access, and equity. With the shrinkage of state resources, the level of financial assistance from the federal government should be rising, not falling—although never rising so much as to impair the sense of state and local responsibility for elementary and secondary education, or



"We are, in every aspect of our lives, interdependent, and we abandon our commitment and concern for the smallest and poorest of us at the peril of all of us."

to rouse even the fear of federal financial dominance. Federal financial aid for students attending universities and colleges is one of the great success stories of America. Federal financial support for higher education, as well as for elementary and secondary education, began in the 18th century with land grants for schools and colleges. But the impetus for direct aid to students is a much newer development, tracing its history to the G.I. Bill of Rights enacted to benefit returning World War II veterans. These programs, as they were amended and expanded by new authorizing legislation and more appropriations, are directly responsible for the extraordinary changes in the levels of education in the United States since 1940. Despite the fact that the government has been supplying some form of financial aid to students in post-secondary institutions in very large numbers for all of those years, federal financial aid to students has not adversely injected the Federal Government into universities and col-

leges, as the extraordinary pluralism, diversity and strength of higher education readily demonstrates.

The federal-state, public-private cooperative ventures in the financing of education have been a combination for success. I do not, however, mean to imply these relationships do not need improvement. They do. The federal government has not imposed as much paperwork as local and state governments have demanded, but that is no excuse for the excessive paperwork burden that has so long been imposed by federal programs. Not every single federal program, in education or elsewhere, has been a success; some have been conspicuous failures. The remarkable story is how many successes we have had because we have been doing some things that were never done before. Again, to put the matter in context, not every program launched by business has been a success. In the present condition of the automobile industry, it is almost mean to evoke the ghost of the Edsel.

"It is imperative that we Americans make those choices, make them now, and tell our leaders what we think. If we fail to do so, we must accept the bitter truth that it is we who have placed educated Americans on the endangered species list."

How assured are we that the B-1 bomber, or any of the other new weaponry, will be a success?

Choices We Must Make

Investment in human beings always entails risks. We will not know for many years after we make the investment in our children precisely how they will turn out. Human beings are so much more complicated than machinery. But children are not only our greatest growth stock, they are the only stock we have for the future. Education of our nation's children is expensive. The only decision that is more expensive is failure to make that investment. That choice is before us today in Washington, in our communities, and in our states. It is imperative that we Americans make those choices, make them now, and tell our leaders what we think. If we fail to do so, we must accept the bitter truth that it is we who have placed educated Americans on the endangered species list.

Footnotes

1. See, e.g., V. Thayer, *Public Education and Its Critics* (1954).
2. United States Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 148 (101st ed. 1980) [hereinafter cited as *Statistical Abstract*].
3. *Id.*
4. *Id.* at 158, 414, 425; *Education Week*, March 10, 1982, at 1, 13 (reporting a National Education Association survey).
5. See, e.g., M. Berger, *The Public Education System* 17-25 (1977).
6. See generally J. Hughes & F. Schultz, *Education in America* (4th ed. 1976).
7. See, e.g., Kirst, *Loss of Support for Public Secondary Schools: Some Causes and Solutions*, *Daedalus*, Summer 1981, at 45, 45-46; Ravitch, *In Defense of the Schools*, *Compact*, Summer 1980, at 7.
8. *Statistical Abstract*, *supra* note 2, at 64.
9. *Id.* at 91-97.
10. See, e.g., D. Duke, *The Retransformation of the School* 115-21 (1978).
11. See, e.g., T. Husen, *The School in Question* (1979); Kirst, *supra* note 7, at 46-47, 51-53.
12. *Statistical Abstract*, *supra* note 2, at 29.
13. United States Department of Commerce, Bureau of the Census, *Population Profile of the United States: 1980* 10, 44-45, 51 (1981); *Characteristics of the Population Below the Poverty Level: 1978* 19 (1980).
14. United States Department of Housing & Urban Development, Office of Policy Development & Research, *Changing Conditions in Large Metropolitan Areas* 15-16, table 10 (1980).
15. See, e.g., notes 13-14 *supra*.
16. See R. Kemp, *Coping with Proposition 13* (1980); Kirst & Garms, *The Demographic, Fiscal, and Political Environment of Public School Finance in the 1980's*, in *School Finance Politics and Practice* (J. Guthrie ed. 1980).
17. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). See generally Note, *The Constitutionality of Public School Financing Laws: Judicial and Legislative Interaction*, 8 *Fordham L. J.* 673 (1980).
18. Because property tax is deductible from both state and federal gross income, when the property tax was lowered by Proposition 13, it not only reduced revenues for local government, but increased state and federal taxation. See R. Kemp, *supra* note 16.
19. See *id.*; *Education Week*, Jan. 26, 1982, at 1, col. 4.
20. See *New York Times*, Feb. 7, 1982, § 1, at 11, col. 1 (President Reagan's Budget Message to Congress).
21. *New York Times*, Jan. 21, 1982, § 4, at 1, col. 6.
22. See note 20 *supra*.
23. *Id.*
24. *Id.*; *New York Times*, Feb. 26, 1982, § 1, at 1, col. 2.
25. *New York Times*, § 1, at 2, col. 1.
26. See note 21 *supra*.
27. *Statistical Abstract*, *supra* note 2, at 140.
28. *Id.* at 370.
29. United States Department of Education, *1980 Annual Report*, at 5.
30. *Id.* at 21-90.
31. *Id.* at 2-4.
32. See, e.g., *id.* at 22-23.
33. *New York Times*, Jan. 10, 1982, § XIII, at 42, col. 1; *id.*, Jan. 29, 1982, at 27, col. 1.
34. Edelman, *Action Priorities for the 1980's*, in *The Future of Public Education in the 1980's* 147, 152-53 (Department of Health, Council of Chief State School Officers ed. 1981).
35. *Education Times*, Feb. 15, 1982, at 1, col. 2; *New York Times*, Feb. 6, 1982, at 1, 8, col. 1.
36. See note 15 *supra*.
37. See *New York Times*, Nov. 16, 1980, § XII, at 1, col. 1; *id.*, Nov. 29, 1980, at 30, col. 1.
38. *Education Week*, Feb. 10, 1982, at 1, 15, col. 1.
39. *Id.*
40. Department of Health, Education & Welfare, National Center for Education Statistics, *Course Offerings, Enrollments, and Curriculum Practices in Public Secondary Schools 1972-1973* 36 (1976) [hereinafter cited as *Course Offerings*].
41. J. Dunstan, *Paths to Excellence and the Soviet School* 39 (1978).
42. *Course Offerings*, *supra* note 40, at 38; Central Statistical Board of the U.S.S.R., *Cultural Programs in the U.S.S.R.* 186-87 (1958).
43. *London Times Higher Education Supplement*, Nov. 13, 1981, at 8, col. 2.
44. See, e.g., *New York Times*, June 28, 1981, at 17, col. 1.
45. See *Statistical Abstract*, *supra* note 2, at 153; Kirst, *supra* note 7, at 48 (citing HEW National Center for Education Study survey).

DREAMS FOR SALE

A Visual Essay

Photographs by Yemima Rabin



*"Pensive
Moment"*

"In the past, I chose painted wall advertisements and garden objects as principal organizing themes—in order to create images that expressed this dual sense of the commonplace and surreal. More recently, I have focused on store window mannequins as an expression of the same linkage between the public and private worlds that merge and blend into each other constantly. To me the mannequins can be seen as caught in a world apart and under a spell, despite their often garish or mundane setting. In many of them, I find echoes of lost dreams and forgotten stories. The 'make believe' scenes are haunting and enchanting, just because they are almost as real as everything else. Taken out of their regular store-front context, they come alive in a new way—they illustrate my feeling that everyday objects, which we so often take for granted, frequent a secret world of illusion for those who would have it so."



"The Search"

"I have always been interested in the photograph used as a metaphor—transforming the casual and commonplace into images, often surreal, that hint at a world of fantasy."



"The Search"



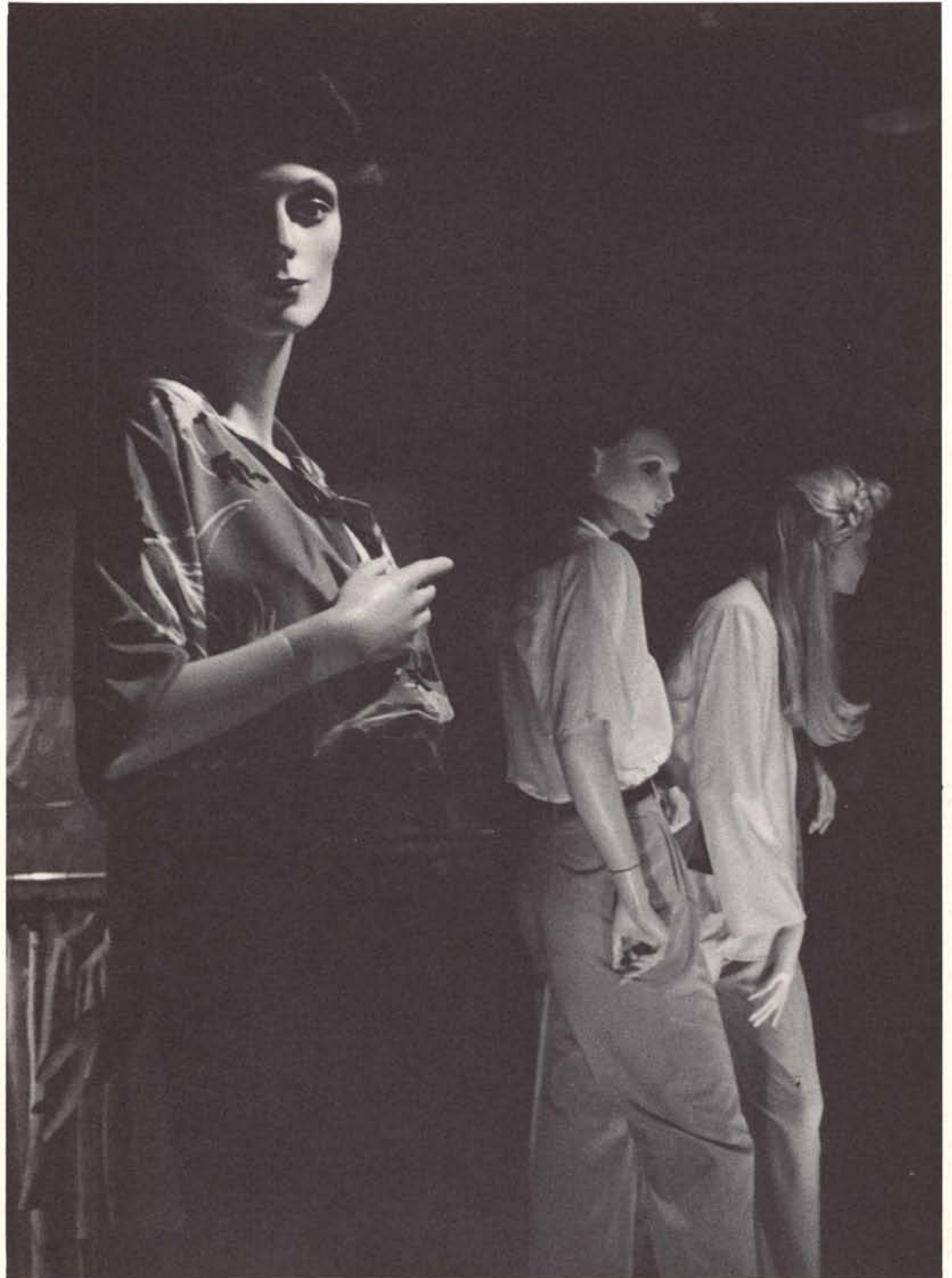
"Spellbound"



"Come As It May"



"While a photographer can use the camera to record and document the world as seen, she can also impose a different order on a given subject— thus revealing new dimensions or relationships that are not evident at first glance. It is the attempt to capture this elusive quality that I find most interesting and challenging. "



"For Me To Know And You To Find Out"



"Come As It May"

Yemima Rabin has worked for a number of years as a freelance photographer. Her work has been frequently exhibited at Stanford and in the Palo Alto community. Earlier this year, her one person show, "Shadows, Dreams, and Other Apparitions," from which the photographs shown here were chosen, appeared at the Gallery House in Palo Alto and at I. Magnin in the Stanford Shopping Center.

This essay, like others she has done on wall signs and garden objects, expresses Ms. Rabin's interest in the photograph as metaphor—the transformation of the object photographed into an often surrealistic world of fantasy.

A graduate of Hebrew University in Jerusalem and Northwestern University, Ms. Rabin is married to Professor Robert L. Rabin of the Law School.

School & Faculty NEWS

Professors Jackson and Kelman Granted Tenure

At their May meeting the Stanford University Board of Trustees approved the promotions of Associate Professors Thomas H. Jackson and Mark G. Kelman to full professors. The promotions become effective September 1.



Professor Jackson

A member of the faculty since 1977, Professor Jackson has taught and written primarily in the areas of commercial law and contracts. Most recently he has written with particular attention to secured transactions and problems arising out of bankruptcy and reorganization. He is a graduate of Williams College (A.B., 1972) and Yale (J.D., 1975), where he was an editor of the *Yale Law Journal* and chairman of the assistants in instruction. In 1975-76 he was a law clerk to Judge Marvin E. Frankel, U.S. District Court for the Southern District of New York. The following year he served as clerk to Justice William H. Rehnquist of the U.S. Supreme Court.

From 1979 to 1981 Professor Jackson was on leave from the School to practice law in San Francisco for the purpose of enriching both his classroom work and his research. He is currently at work on the first comprehensive casebook on secured transactions.

In the span of a few years Professor Jackson has achieved national prominence in his areas of expertise, particularly in commercial law where he has published widely and is regarded as one of the major young academics in the field.



Professor Kelman

Since he joined the faculty in 1977 Professor Kelman has attracted national attention for his contributions to recent developments in modern American legal thought. His efforts have been devoted in large part to development of sophisticated criticism of the dominant modes of legal thought, with application of the criticism to specific problems within substantive legal fields, in particular taxation and criminal law. In the October 1981 issue of *American Lawyer* Professor Kelman was named one of America's "Five Hottest Young Law Professors" and described as "the most persuasive young neo-Marxist critic of mainstream American law," particularly in the areas of taxation and law and economics.

Professor Kelman was educated at Harvard (A.B., 1972; J.D., 1976). While at Harvard Law School he was a teaching fellow in social studies. He later served as director of criminal justice projects at the Fund for the City of New York. In addition to Taxation and Criminal Law, Professor Kelman teaches Property Law. He is also the author of one published novel, *What Followed Was Pure Lesley*, and continues to work, now and again, on two others, *Collision* and *Lost and Found*.

Assistant Dean Cordell Appointed to the Bench

Assistant Dean LaDoris Hazzard Cordell has been appointed to the Santa Clara Municipal Court bench by Governor Jerry Brown. Scores of friends and colleagues from the Law

School and the community were on hand to celebrate her investiture on June 11 in Kresge Auditorium.

A 1974 graduate of the Law School, Judge Cordell returned to the School in 1978 to become assistant dean for student affairs. Among her primary responsibilities was the recruitment of minority applicants, and during her tenure minority enrollment rose to a record high of twenty percent.

Commenting on the appointment, Acting Dean J. Keith Mann observed:

LaDoris Cordell has made a splendid contribution to this School, not solely in terms of making educational opportunity at Stanford available to more and more qualified applicants—although her achievement in that area has been great—but also in her personal qualities and relationships with students, faculty, and alumni . . . I express our sincere institutional pride on this day and our abundant confidence in Dean Cordell's dedication to equal justice under law for all.



In addition to her Law School duties, Judge Cordell practiced law in East Palo Alto, where she opened her office in 1977. At that time the only legal services available there were offered by San Mateo County Legal Aid. During 1980 and 1981 she served as judge pro tem of the Municipal Court.

Judge Cordell received a B.A. from Antioch College in 1971. While at the Law School she was president of the Black American Law Students Association and vice president of the Law Association. During 1973 she participated in the School's extern program

as a law clerk to Alameda County Superior Court Judge George W. Phillips, Jr. In 1974 she became the first recipient outside the South to be awarded the NAACP's Earl Warren Fellowship for young black lawyers.

Following graduation from the Law School she joined the San Francisco office of the NAACP Legal Defense Fund as a staff attorney. A year later she entered private practice in East Palo Alto.

Kirkwood Moot Court Finals Held

The 30th Annual Marion Rice Kirkwood Moot Court Competition was held on April 13 in Kresge Auditorium before a near capacity crowd.

The four finalists, all third-year students, were chosen from among twenty-eight teams who competed in several elimination rounds during the year.

Arguing for the petitioner in the hypothetical case of *Daniels v. United States* was Jonathan Rowe and Alan Sparer. Lee Bendekgey and Richard Mendelson represented the respondent.

The teams addressed their arguments to a three-judge panel sitting as the Supreme Court of the United States. The panel included Chief Judge Wilfred Feinberg, U.S. Court of Appeals, Second Circuit, who presided; Judge Damon J. Keith, U.S. Court of Appeals, Sixth Circuit; and Justice Frank K. Richardson, California Supreme Court.

This year's case, prepared by the Moot Court Board, arose from a criminal prosecution directed against Ellis B. Daniels, a journalist who published an article that revealed sensitive Defense Department plans. The Defense Department obtained an order from a federal judge authorizing a wiretap of Daniels' telephone under the Foreign Surveillance Act of 1978 (FISA). The evidence discovered by the wiretap was used to support the prosecution of Daniels for bribery of a Defense Department official.



Lee Bendekgey and Richard P. Mendelson



Jonathan D. Rowe and Alan W. Sparer

The issue in the case concerned whether the order approving the surveillance should ever have been issued under FISA, which requires any person subject to surveillance to be an "agent of a foreign power" and forbids surveillance "based solely upon activities protected by the first amendment to the United States Constitution." A second issue concerned the question of whether the evidence obtained by the Government should have been suppressed if the surveillance order was unlawfully issued, or whether the

case fell into a "good faith" exception to the exclusionary rule.

Following a thirty-minute deliberation, the judges declared Richard Mendelson the best oral advocate. He and Lee Bendekgey were chosen the top team. Jonathan Rowe and Alan Sparer took the award for best brief.

Justice Richardson summarized the performances of each of the competitors with the observation, "The quality of the presentations today was as good as any I've seen before the California Supreme Court."

Environmental Law Society Announces Eight New Publications

Water rights, land use in California, historic preservation, hazardous waste disposal, and container laws are among the subjects of this year's Environmental Law Society Publications.

Headlining the year's publications is *Who Runs the Rivers? Dams and Decisions in the New West*. The culmination of three years of research, this 450-page study is the most ambitious project ELS has ever undertaken. With a foreword by U.S. Senator Daniel P. Moynihan, the book examines the controversial New Melones Project and its role in *California v. United States*, the recent U.S. Supreme Court decision involving a major federal-state conflict over the management of water impounded by a joint Army Corps of Engineers/Bureau of Reclamation dam. California's system for the administration of water rights, federal agency and congressional decisionmaking, and the role of the courts in resolving water allocation disputes are also considered.

The Society's most popular recent publication continues to be *Hazardous Waste Disposal Sites: A Handbook for Public Input and Review*. The book explores the opportunities for public participation in one of the most hotly contested areas of environmental regulation: the siting of hazardous waste disposal facilities. Widely reviewed in industry publications, the book is heavily requested by law firms and corporations interested in this area.

The Society collaborated with the Public Interest Research Group at Berkeley to produce *Can and Bottle Bills*, a survey of container law. This handbook includes an historical analysis of non-returnable containers, a description and evaluation of current container laws, a consideration of the economic and social effects of minimum deposit legislation, and several suggestions for new legislation to deal with this problem.

Historic Preservation in California: A

Legal Handbook, published this spring, is an update and expansion of the Society's 1975 edition by the same title. It includes information for citizens on where to go and what to do to save local landmarks, significant buildings, and historic districts. Archaeological mitigation, cultural preservation, and federal tax policy are also covered. Funding for the new edition was provided by the Skaggs Foundation.

Two other books are scheduled for publication this fall. A comprehensive summary of the law of land use, including planning and environmental regulation, can be found in the *California Land Use Manual*. Designed for use by citizen activists, developers, and public officials, the book outlines political and legal tactics for those wishing a voice in land use decisions.

Another citizen's guide, *The Use of Initiatives and Referenda in Environmental Regulation*, explores the use of the initiative and referendum process in environmental and land use regulation at the local government level.

Projects in Progress

The Society has just received a grant of \$5,000 from the Rocky Mountain Mineral Law Foundation for the researching and publishing of a book on *The Wilderness Area Review and Selection Process of the Federal Government*. Although the budget for the project is about \$12,500, this grant, plus a gift of \$1,500 from Utah International, Inc., will fund the initial stages of the project. Three law students were assigned to begin research this summer while additional funds were sought.

The Society is also developing proposals for studies of the legal consequences of the malathion spraying program in California, development of a solar law handbook, and a citizen's guide to offshore drilling.

ELS Annuals

In addition to the handbooks, the Society also publishes the Environ-

mental Law Annual series. Each year the ELS chooses an environmental law topic of current concern and solicits articles from students on that topic. The best of these are published as the Annual. The 1982 Annual, the fourth in this series, considers *Land Use Regulation on the San Francisco Peninsula*. Papers for this volume were submitted in a seminar conducted by Professor Robert Ellickson. Together they provide a comprehensive description of the total impact of development regulation in a discrete geographic area.

Previous Annuals include *California Water Law* (1981), *Coastal Futures: Legal Issues Affecting the Development of the California Coast* (1979), and *Energy Production: Selected Issues* (1978).

Funding Concerns

The ELS handbook series now contains thirty titles, all authored and edited by Stanford law students. The Society pays students a salary over the summer to research and write these books. The books are then cite-checked and edited during the school year. One book now costs the Society between \$12,000 and \$15,000 to produce. Funding for these projects is provided primarily by foundation and private contributions. Funds generated by the sale of the books also help to defray the Society's expenses.

Increasing publishing costs coupled with the current recession are forcing the ELS to cut back its publishing program. Because the organization provides a unique experience to many students, as well as a valuable service to the legal community, the ELS is constantly seeking new avenues of support to insure its continued effectiveness. The Society welcomes any suggestions or support that can aid in these efforts. Please write: Environmental Law Society, Stanford Law School, Stanford, CA 94305. A publication list will be sent upon request.

New Law Fund President Named



Myrl R. Scott '55 has been chosen to head the Stanford Law Fund for 1982. He succeeds John J. O'Connor III '53, who has served in this capacity since 1980.

A senior partner in the Los Angeles firm of Sheppard, Mullin, Richter & Hampton, Mr. Scott has been an enthusiastic participant in Law School activities and an energetic volunteer for many years. He recently completed his second term of service on the School's Board of Visitors, including a year on the executive committee.

In 1980 Mr. Scott spearheaded the fund drive for the 25th reunion of the Class of 1955, an effort that culminated in the creation of a new endowed book fund for the library. He has also served as president of the Stanford Law Society of Southern California and as director and president of the Stanford Club of Los Angeles County. In recognition of his many years of volunteer service to the University and the Law School, he was awarded the Block S pin by the Stanford Associates.

Mr. Scott brings to his new role a wealth of fundraising expertise, having served as Inner Quad National Chairman since 1980 and as Inner Quad Regional Chairman from 1977 to 1980.

Mr. Scott and his wife Joan live in Flintridge. They have four children, Susan, Ronald, Colin, and Evan.

Stanford Team Reaches Moot Court Semifinals

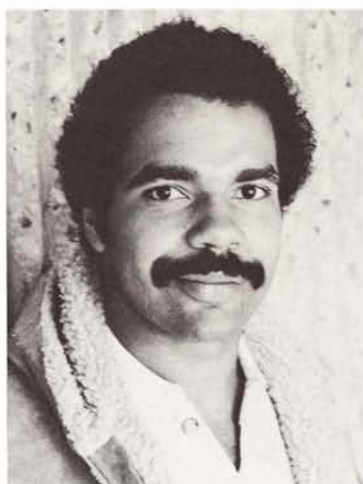


Peter M. Cannon

Third-year students Peter M. Cannon and Ronald K. Noble represented Stanford in the 1982 Frederick Douglass National Moot Court Competition held in Philadelphia in March.

Facing eleven other top teams from around the country, the Stanford team—the first ever to compete in this event—reached the semifinals. Mr. Noble was named National Best Oral Advocate.

The competition, established in 1976, is co-sponsored by the Black American Law Students Association and the National Bar Association.



Ronald K. Noble

Three Grads Named U.S. Supreme Court Clerks



Cory Streisinger

Three recent graduates will fill U.S. Supreme Court clerkships during the October 1982 Term. They are Cory Streisinger '80 of Eugene, Oregon; Bernard W. Bell '81 of Fort Lauderdale, Florida; and John H. Schapiro '81 of Buffalo, New York.

Ms. Streisinger, an associate with the law firm of Johnson, Harrang & Swanson in Eugene, will clerk for Justice Harry Blackmun. She received an A.B. with distinction from Cornell in 1977. While at the Law School, she won the Kirkwood Moot Court Competition in her second year and served as vice president of the Moot Court Board in her third year. Upon graduation she was awarded the Urban A. Sontheimer Third-Year Honor for second highest cumulative grade point average in the class and was elected to Order of the Coif. During 1980-81 she clerked for Ninth Circuit Court of Appeals Judge Betty Binns Fletcher in Seattle. Ms. Streisinger is a member of the Oregon bar.

Mr. Bell, who will clerk for Justice Byron White, recently completed a clerkship with Judge Amalya Kearse of the U.S. Court of Appeals, Second Circuit. He received a B.A. *cum laude* from Harvard in 1978. At Stanford he was note editor for Volume 33 of the *Stanford Law Review* and received the Irving Hellman, Jr. Special Award for



Bernard W. Bell

the best student note published in the *Review* during 1980-81. He was elected to the Order of Coif upon graduation.

Mr. Schapiro received a B.A. *summa cum laude* from Yale in 1978. While at the Law School, he received the Hilmer Oehlmann, Jr. Prize for outstanding work in the first-year research and writing program. In addition, he served as managing editor of Volume 33 of the *Stanford Law Review* and as a research assistant to Professor Gerald Gunther. He also worked on a volunteer basis with the San Mateo Women's Shelter helping battered women find legal protection for themselves and their children. Mr. Schapiro was elected to the Order of the Coif upon graduation. During 1981-82 he served as law clerk to Judge J. Skelly Wright of the U.S. Court of Appeals, D.C. Circuit. His Supreme Court clerkship will be with Justice William Brennan, Jr.



John H. Schapiro

Twenty-eight Graduates of Class of 1982 Will Fill Judicial Clerkships During 1982-83

Twenty-eight members of the Class of 1982 will fill judicial clerkships in 1982-83. They include:

United States Court of Appeals

District of Columbia Circuit:

Judge J. Skelly Wright

Glen D. Nager

Judge Patricia M. Wald

Bernard S. Black

Third Circuit:

Judge A. Leon Higginbotham, Jr.

Ronald K. Noble

Ninth Circuit:

Judge James R. Browning

Martha C. Luemers

Judge Herbert C. Choy

Anna L. Durand

Judge Ben. C. Duniway

Diane M. Johnsen

Judge Betty B. Fletcher

Robert R. Riggs

Judge Procter R. Hug, Jr.

David M. Morehouse

Judge Dorothy W. Wilson

Michael V. Gisser

Judge Joseph T. Sneed

David B. Goodwin

Kirk D. McQuiddy

U.S. Bankruptcy Court

Northern California:

Judge Seymour J. Abrahams

Katherine A. Mason

United States District Court

California, Northern District:

Judge Thelton E. Henderson

Jonathan D. Rowe

Judge William A. Ingram

Roger E. Brodman

Judge Robert F. Peckham

Peter F. Stone

Judge Spencer M. Williams

Michelle A. Facktor

California, Central District:

Judge Robert J. Kelleher

Brian M. Monkarsh

California, Southern District:

Judge Judith N. Keep

Robert A. Naeve

District of Columbia:

Judge Thomas A. Flannery

Paul R. Kingsley

Judge Harold H. Greene

Steven D. Arkin

Judge Charles R. Richey

Pamela S. Krop

Georgia:

Judge Horace T. Ward

Susan L. Kupferberg

Maryland:

Judge Frank A. Kaufman

Joshua M. Rafner

Massachusetts:

Judge Robert E. Keeton

Karen C. Burke

Minnesota:

Judge Harry H. MacLaughlin

Jeffrey S. Paulsen

Virginia, Eastern District:

Judge Robert R. Merhige, Jr.

Donald L. Creach

State Courts

Court of Appeal, California:

Judge Winslow L. Christian

James B. O'Connell

Supreme Court, Washington:

Justice Robert F. Utter

Carlton F. Gunn

Faculty Notes

Professor **Barbara Babcock** was a lecturer at Stanford's 1982 Campus Conference for alumni in May. She spoke on "The Adversary System of Criminal Justice: Does It Have a Future?"

Professor **William Cohen's** new edition of *Constitutional Law: Civil Liberties and Individual Rights*, written with Professor John Kaplan, was published in May by Foundation Press. The 1982 Supplement to his *Constitutional Law, Cases and Materials*, co-authored with Professor Edward L. Barrett, Jr. of the University of California at Davis School of Law, was published this summer.

Professor **Robert C. Ellickson** testified in October before a committee of the President's Commission on Housing in Los Angeles. His testimony focused on the topic "inclusionary zoning." In January he delivered a principal paper entitled "Cities and Homeowners Associations" to a symposium on the Public/Private Distinction convened in Philadelphia by the editors of the *University of Pennsylvania Law Review*. Professors Paul Brest and Robert Mnookin also attended the symposium. In May Professor Ellickson spoke to Stanford alumni on "What is the Key to Affordable Housing" at the 1982 Campus Conference, the 50th such conference to be held at the University.

Mr. Ellickson's article, "Public Property Rights: A Government's Rights and Duties When Its Landowners Come Into Conflict with Outsiders," 52 S. Cal. L. Rev. 1627 (1979), was selected as the top land use article of its year by a peer review panel and reprinted in the *Land Use and Environment Law Review—1981* (Clark Boardman Co.).

Marc A. Franklin, Frederick I. Richman Professor, participated in the Twenty-Eighth Annual Program on Legal Aspects of the Entertainment Industry, held at the University of Southern California in April. The topic of this year's program was "Fictional Characters and

Real People." Professor Franklin spoke on "Defamation in the Context of Depictions of Real People and Actual Events." The program is co-sponsored by the Beverly Hills Bar Association.

Lawrence M. Friedman, Marion Rice Kirkwood Professor, was awarded the 1982 James Willard Hurst Prize in American Legal History by the Law and Society Association for his book, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (1981, University of North Carolina Press). The award was presented on June 5 during the annual meeting of the Association held in Toronto, Canada. Also in June Professor Friedman attended a joint meeting of American and Chinese scholars in Beijing where he presented a paper on "The Role of Law in American Society." The meeting was co-sponsored by the Chinese Academy of Social Sciences and the Ford Foundation.

On April 28 Professor Friedman delivered the Winslow Crosskey Memorial Lecture at the University of Chicago Law School. The topic of his paper was "All in the Family: Some Remarks on the History of Family Law."

Professor **Ronald J. Gilson** published his second tender offer article, "The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept," in the April issue of Volume 34 of the *Stanford Law Review*. His first article, "A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers," appeared in 33 *Stan. L. Rev.* 819 (May 1981) in April he and Professor Robert Mnookin spoke on "Reducing the Cost of Outside Counsel: Strategies for Controlling Your Company's Legal Costs" at the USC Law Center and the South Coast Plaza Hotel in Orange County. Co-sponsoring the seminars with them were the USC Law Center and USC Graduate Business School.

Professor **William Gould** in February led a symposium discussion at Stanford on the history of the civil rights movement and the 1964 Voting Rights Act in conjunction with Black Liberation Month. His book, *A Primer on American Labor Law*, was published by MIT Press in June. Professor Gould gave a lecture, "The Unfair Labor Practices System in the U.S.," at the Symposium of Law celebrating Korea-U.S.A. centennial relations at Seoul National University in Seoul, Korea, on June 18.

Gerald Gunther, William Nelson Cromwell Professor, participated in a panel discussion on constitutional law at the annual meeting of the Association of American Law Schools in Philadelphia in early January, co-conducted a seminar on constitutional developments for a Ninth Circuit Judges Workshop in San Diego later that month, and went to St. Louis in April to engage in a planning session for studies in law and liberty co-sponsored by the Center for the Study of Law, Liberty, and Justice at Washington University and by *Daedalus*, the Journal of the American Academy of Arts and Sciences. The studies are occasioned by the impending bicentennial of the Constitutional Convention of 1787 and are expected to be the subject of a series of symposia and of an issue of *Daedalus*.

Professor and Law Librarian **J. Myron Jacobstein** presented a paper in October entitled "Librarians, Literature, and Copyright" as part of a seminar series held at the Oakland Public Library on Personal, Ethical, and Legal Dilemmas Confronting Librarianship. The program was sponsored by the California Council for Humanities in Public Policy. In January he attended the Annual Meeting of the Association of American Law Schools and, in his capacity as vice-chairman, attended the Law Program Committee of the Research Libraries Group.

John Kaplan, Jackson Eli Reynolds Professor, will serve as a resident fellow in one of the two new University dormitories scheduled to open this fall. Well known for his undergraduate course in Criminal Law, Professor Kaplan accepted the one-year appointment in the hope that it would afford greater opportunity for contact with undergraduates. In April he participated in a panel discussion on "Are We Living Through a Social Revolution," which was part of The Stanford Great Powers Seminar 1982, a continuing education program sponsored by the Stanford Alumni Association and the American Studies Program at Stanford.

J. Keith Mann, Professor of Law and Acting Dean, and his wife Virginia were the guests of honor at a banquet held at Ming's Restaurant in Palo Alto on May 26, 1982. Dean Mann was presented a plaque by Professor John Kaplan on behalf of the faculty and staff. The plaque bears the inscription, *Presented to J. Keith Mann, Our Acting Dean, January 1, 1976-August 31, 1976; September 1, 1981-June 30, 1982, From His Colleagues At Stanford Law School.* Professor Kaplan pointed out that sufficient room has been left on the plaque for a third term if Dean Mann should choose to serve if and when the occasion arises.

John Henry Merryman, Sweitzer Professor, has become a consulting editor of *The Journal of Arts Management and Law* and a member of the board of editors of the *International Journal of Museum Management and Curatorship*. In April he presented a paper on "The International Trade in Stolen and Smuggled Works of Art," at the International Seminar on the Penal Protection of Works of Art held in Siracusa, Sicily. His article, "On the Convergence (and Divergence) of the Civil Law and the Common Law," was published in Volume 17 of the *Stanford Journal of International Law*.

A. Mitchell Polinsky, Professor of Law and Associate Professor of Economics, attended a conference in February on "Punitive Damages in Tort Law," held at the Law and Economics Center of Emory University. In April and May he attended a meeting of the Law and Social Sciences Advisory Subcommittee of the National Science Foundation and gave lectures on the economics of products liability at the Federal Trade Commission, the University of Pennsylvania, and Harvard University.

Assistant Professor **Deborah Rhode** was promoted to Associate Professor at the May meeting of the Board of Trustees. She has recently published two articles on professional responsibility. Her study, "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibition," appeared in Issue 1 of Volume 34 of the *Stanford Law Review*. She was also a contributor to a Symposium on the American Bar Association's Proposed Model Rules of Professional Conduct. Her article, "Why the ABA Bothers: A Functional Perspective on Professional Codes," appears in Volume 59 of the *Texas Law Review*. In March she participated on a panel in San Francisco sponsored by the Clearinghouse for Public Interest Law on "Defining the Ethics of Our Profession." She is completing an article on "Class Conflicts in Class Actions" for an issue of the *Stanford Law Review*.

Assistant Professor **Roberta Romano** published "Recouping Losses: The Case for Full Loss Offsets" in 76 *Northwestern L. Rev.* 709 (December 1981). The article was written with Mark Campisano, law clerk to United States Supreme Court Justice William J. Brennan, Jr.

Professor **Byron Sher** continues to serve as a member of the California State Assembly and is a member of

several standing committees and the Select Committee on Utility Performance, Rates, and Regulation.

Assistant Professor **William Simon** argued before the United States Supreme Court in March in behalf of the appellees in *Schweiker v. Hogan*. He represented a class of indigent social security recipients challenging, on statutory and constitutional grounds, a practice of the Medicaid programs of some states which provides lower benefits to social security recipients than to aged and disabled public assistance recipients. Also in March he participated in the Conference on Critical Legal Studies at Harvard lecturing on "Legality and Bureaucracy in the Welfare System." Other Stanford Law School participants included Professor Paul Brest, who spoke on "Sexual Politics;" Professor Thomas Heller who lectured on "Structuralism;" and Professor Mark Kelman who spoke on "Law and Economics."

Professor **Michael Wald** has been awarded a Guggenheime Fellowship for 1982-83 to write on policy towards abused and neglected children. He provided training on issues of foster care to California juvenile court judges for the California Judicial Research and Education Foundation and to child welfare departments in twenty counties. Professor Wald was the guest speaker at the 16th Annual Minnesota Symposium on Child Development at which he presented a paper on "Developing Research on the Impact of Foster Care." It will be published in the annual that results from the symposium.

Assistant Professor **Robert Weisberg** has written an article with Douglas Baird '79, Assistant Professor at the University of Chicago Law School, on "Rules, Standards, and the Battle-of-the-Forms: A Reassessment of 2-207," which will appear in the September issue of the *Virginia Law Review*.

COMMENCEMENT 1982

More than 650 relatives and friends attended commencement exercises for the Class of 1982, the School's 89th graduating class, on June 13 in Kresge Auditorium.

Acting Dean J. Keith Mann departed from the program to introduce U.S. Supreme Court Justice Sandra Day O'Connor, who made a surprise appearance after delivering the main address at the University's commencement exercises earlier in the day. Justice O'Connor, a 1952 graduate of the Law School, shared reminiscences of her law school days.

Class President Ronald K. Noble delivered a memorial tribute to Associate Dean Joseph E. Leininger, who died on June 3.

Mr. Noble also presented the 1982 John Bingham Hurlbut Award for Excellence in Teaching to Professor Eric W. Wright, who visited at the School during 1980-81. A 1967 graduate of the Law School and a member of the University of Santa Clara law faculty since 1971, Professor Wright specializes in consumer law. Following the presentation he gave the commencement address.

Carlton F. Gunn was named Nathan Abbott Scholar for achieving the highest cumulative grade point average in the class. The Urban A. Sontheimer Prize for second highest cumulative grade point average went to Bernard S. Black.

Seventeen members of the Class were elected to the Order of the Coif, the national law school honor society. They include Jeff Belfiglio, Bernard S. Black, Karen C. Burke, Kenneth J. Cohen, Anna L. Durand, Michael V. Gisser, Joseph A. Greco, Jr., Blaine E. Greenberg, Carlton F. Gunn, Paul R. Kingsley, Kerry L. Macintosh, Andrei M. Manoliu, Glen D. Nager, James B. O'Connell, Robert R. Riggs, Peggy L. Snodgrass, and Peter F. Stone.



Professor Eric W. Wright '67, 1982 Hurlbut Award Recipient



Emeritus Professors Lowell Turrentine and J. E. Moffatt Hancock



Several members of the Class were recognized for outstanding achievements during their three years at the Law School. The Frank Baker Belcher Award for the best academic work in evidence went to Anna L. Durand. Mark D. Eibert and Douglas R. Tueller shared the 1982 honors for the Carl Mason Franklin Prize for the most outstanding paper in international law. 1981 recipients of the award were Karen C. Burke and Grayson M.-P. McCouch.

The Faerie Mallory Engle Prize, awarded to the finalists of the School's Client Counseling Competition, went to Michael J. Kelly and Gordon B. Wright for their 1981 performances.

William J. Palumbo received the Olaus and Adolph Murie Award for the most thoughtful paper in environmental law.



Stanford Law Review awards went to Jeff Belfiglio for outstanding contributions to the *Review*, Donald L. Creach for the best student note published in the *Review*, and Michael D. Howald for outstanding service to the *Review*.

The R. Hunter Summers Trial Practice Award, given by officers of Serjeants at Law for outstanding student performances in trials conducted during the year, went to David V. Herriford, Carol D. Fisler, and Carlton F. Gunn.



Betty L. Meshak

The Nathan Burkan Memorial Competition Prize, law school division, was awarded to Joseph A. Greco, Jr. for the best paper on copyright law.

Robert R. Riggs was recognized for receiving the First-Year Honor for highest cumulative grade point average at the end of his first year. Bernard S. Black was similarly recognized for receiving the Second-Year Honor.

Following the ceremony, a luncheon was held for the graduates and their families in Crocker Garden amidst hundreds of balloons imprinted with the Law School shield.



U.S. Supreme Court Justice Sandra Day O'Connor '52



Brian F. Berger and parents