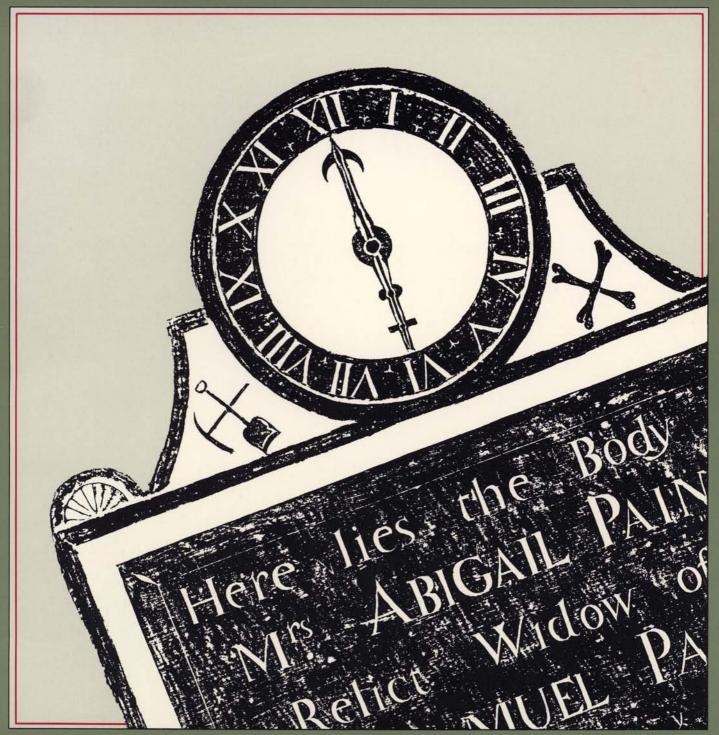


SPRING 1985 VOL. 19, NO. 2



Supreme Court / McCloskey / 'Right to Die' / Libel Law & the Media / Alumni/ae Weekend

The cover:

Gravestone, in Woodstock, Connecticut. The full inscription reads: "Here lies the Body of Mrs. Abigail Paine, Relict Widow of Mr. Samuel Paine; She Died Jan. 13th 1752; in the 80th Year of Her Age." From Early New England Gravestone Rubbings, by Edmund Vincent Gillon, Jr. (Dover Publications, Inc., New York, 1966), courtesy of Stanford University Art Library. Other examples of gravestone art appear with the article, "The Elusive 'Right to Die'," beginning on page 16.

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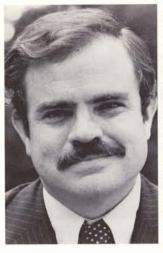
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From the DEAN



John Hart Ely

The first year of law school, though the object of endless faculty studies, is the one year that doesn't really need attention. The students are new to the entire subject of law, and generally they are fascinated by it. It is in the second and third years that keeping their attention gets tough, if only because these are their nineteenth and twentieth years of school. One of the reasons that law school gets boring is that school gets boring!

The old model of law teaching was a Professor Kingsfield model, wherein a student was singled out for questioning and humiliation in

front of a classroom of peers. Contrary to folklore, such exhibitions did not require a master teacher (though some of those who practiced it certainly were masters). As readers of this journal well know, *any* answer to a difficult legal or social question can be made to look shaky or worse; and a room full of fellow students can always be counted upon to giggle at the victim's plight—if only from relief that someone else is being roasted.

Professor Kingsfield is largely a thing of the past, for three related reasons. First, the political ferment of the late 1960s and early 1970s produced a generation of students who were simply unwilling to put up with such degradation (and lest we forget, many of today's teachers are from that same generation). Second (whether or not we like to face it), today's law students are, overall, smarter and better educated than we were; and precisely because they get the idea so much sooner—including the idea that any answer can be made to look silly—they are especially unwilling to undergo or witness such ordeals. Third, educational psychologists, while agreeing on little else, do seem to agree that teaching by fear is not good teaching. Sweating palms may keep you awake, but they are not conducive to considered reflection on what is being discussed.

Oh, I know that a lot of us romanticize those good old sweat sessions in law school, but then I've heard people romanticize Army basic training too. In fact I'm tempted to do so myself sometimes; but when I'm honest about it, I remember that basic training was really quite dreadful. Maybe it was justified insofar as there was a genuine possibility that I might one day be sent into combat. Some would say the "preparation for combat" argument applies to law school too. But you know, I was a litigator—as, of course,

most lawyers are not—and never, not once, was I ever called on by the judge to recite on a case other than the one I had fully prepared and was in the midst of trying.

What, then, has replaced Professor Kingsfield? All too often a technique I call "Socratic Solitaire," wherein the professor (probably using his old notes) asks *himself* the questions he used to ask the students, answers them, and demonstrates the problems with the answers—complete with all the wild goose chases and blind alleys we all came to know and love. You see the problems. It's inefficient teaching, and with the element of fear removed, it's boring teaching too.

What might be better?

One obvious possibility is lectures, of a sort that work reasonably well in college survey courses. The problem here—in addition to the fact that law students are older and thus less tolerant—is that lectures also tend to get boring. What's more, they too are inefficient: instruction on, say, developments in the law of restrictive covenants could probably proceed just as effectively by assigned reading as by lecture. Of course, in law as elsewhere, a lecture setting forth an original and creative theory can be a true thing of beauty. The problem is that such beautiful theories generally take years to develop—even the best of us are lucky to come up with half a dozen in a lifetime—and, paradoxically, to the extent they *are* fully developed they too can probably be better presented in a book. So college-style lectures don't really seem to be the answer.

Much legal doctrine seems custom-made for teaching by computer. In fact, computer teaching can offer many of the advantages of the old Kingsfield method without its degrading aspects. A computer program provides the student with an opportunity to participate in the instruction, as well as what she often says she wants—"feedback". (I grant you that feedback from a machine is not quite the same thing as feedback from a human being, but it's something: I know I used to discourse for hours with those Jack-in-the-Box puppets who were trying to sell me onion rings.)

Actually I think computer teaching is a wave of the legal future. The problem is that as of 1985 the programs—at least those I've seen—seem a trifle primitive; more important, there simply aren't that many available. And I am frankly hesitant to ask our brilliant faculty to spend time writing programs (which is unusually time-consuming work). For the moment, therefore, we are "free riding" on what good computer programs do exist, in the hope that intelligent people will increasingly be drawn to the task of developing them further, because law really does seem to be an area in which much of the necessary routine teaching could be done with the help of a machine.

The rage for some time, of course, has been so-called "clinical teaching," though it is unclear exactly what that

THE CHANGING LAW SCHOOL CLASSROOM

word means in a law school context. In fact it has meant two quite different things.

On the one hand "clinical teaching" has referred to teaching done in conjunction with the representation of live clients, typically poor clients, typically in a legal aid clinic. There is certainly enormous value to this sort of operation. It keeps the students interested; it gives them real-world experience to help enrich our classroom discussions; and by and large it is helpful to the community being serviced. Pedagogically, however (as Chuck Marson once pointed out to me), there are at least three serious problems here. The first is that real cases are notorious nonrespecters of the semester system, and have a tendency to run on so long (or blow up so suddenly) as to render them inferior teaching vehicles. The second is that real cases are unlikely to involve more than one or two genuinely interesting legal issues: if a mix of fascinating problems is desired, one does better to write one's own cases. Third, serious problems of legal ethics can be created by the conflict between the duty to one's client to settle the case in her best interest, and the temptation to keep the case alive as a teaching vehicle.

Overlaid on these problems is the consideration that legal aid clinics are very expensive, consuming a large percentage of the budgets of law schools much like ours. That's why Stanford has never started one, though as I reported in my last Dean's message, our students appear to have set up such a superior program in the East Palo Alto Community Law Project that we may soon inherit an ethical duty to try to convince our friends to help keep it alive. But in any event, for the reasons mentioned, this "live client" kind of clinical teaching cannot be *the*—and probably not even the principal—answer to the current crises in legal education.

The other kind of "clinical" legal education involves role playing—simulated situations of various sorts, in which law students are called upon to play various lawyering* roles (interviewing, negotiation, mediation, arbitration, litigation, and so forth) in the performance of which they are videotaped and subsequently evaluated by their instructors and their fellow students. In this kind of clinical teaching, Stanford Law School is way out front.

By way of confronting an obvious objection, let me quickly admit that we are aware that we are less qualified than some of you to teach young lawyers *skills*, especially litigating skills. Certainly some such skills are conveyed by the sort of clinical teaching we do, but the principal values are elsewhere: in conditioning our students away from supposing that litigation is necessarily the most sensible way to deal with all legal problems; and more broadly, in conveying the same sort of legal doctrine that typically is taught in

There is a critical problem with this kind of teaching, however: it is extremely labor-intensive and thus extremely expensive—it is no coincidence that a school like Harvard's tuition is a good deal lower than ours—and in human terms it is fatiguing to the point where clinical teachers are likely to "burn out" and begin looking desperately for ways to teach in more traditional (and less tiring) modes. My own idea, as the faculty is aware, is that *each* of us should teach one of his or her courses in a "clinical" mode and the others in some more traditional way. For good reasons, however, the power of Deans is limited, and this is a utopia to which we will be able to proceed only very slowly, if at all.

Another approach, and in fact we are making significant progress along these lines, is to encourage the faculty to try incorporating into their "traditional" courses certain "clinical" elements—interludes involving, say, mock judicial, legislative, or bar discipline hearings, client interviews or letters, negotiations, briefs, jury instructions . . . whatever. A cynic might suppose that the students would think all this to be "Mickey Mouse"—playing Lawyer for a Day—and I confess that that was my own original expectation. In fact this is almost never the reaction: the students appreciate the variety, as well as the opportunity to taste what it will be to be a lawyer.

Finally I'll let the other shoe drop. It seems to me we are ready for a return to the Socratic method—but as practiced by Socrates, without the sadism. There are ways of leading students along the path of righteousness without belittling them. As between "Where'd you get that idea—from a bar review outline?" and "Frankly, Mr. Smith, I don't think that's going to work, and here's why...," can there be any doubt which is the less denigrating? Direct disagreement is entirely consistent with respectful treatment.

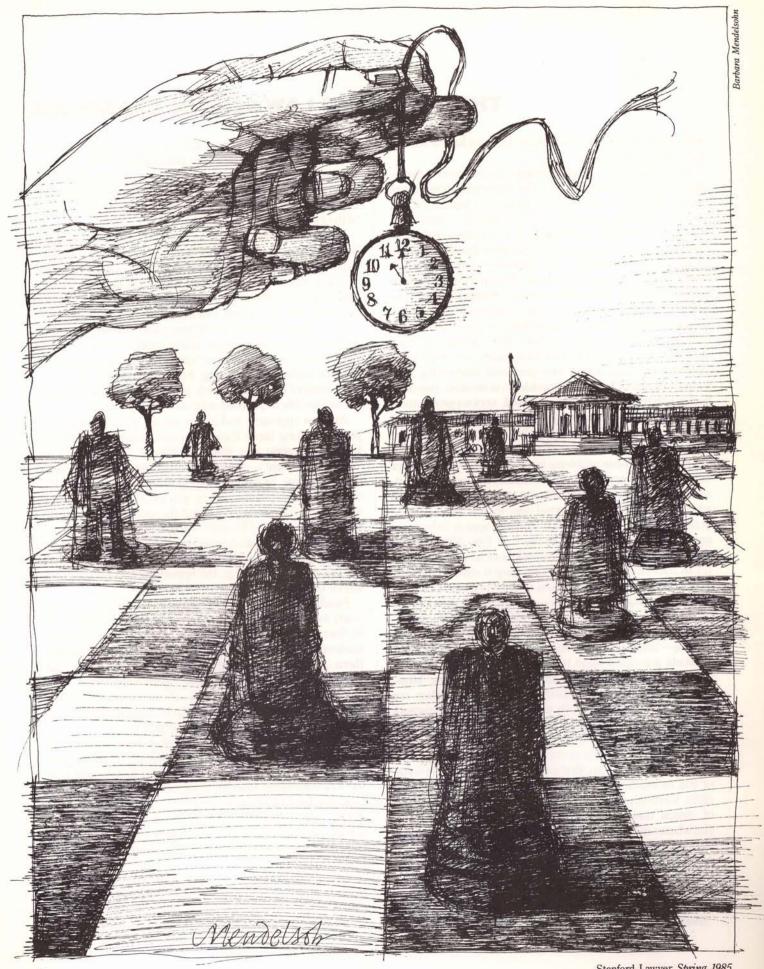
With infinite money and manpower, it would probably be best if we could teach most subjects clinically (in the second, role-playing sense), and in fact Stanford Law School is at the forefront here. But that mode of teaching is not suited to all teachers or all subject matters, and what's more, we simply can't afford it. We already run an expensive law school, precisely because we do so many creative things in the classroom, and I think we've just about hit the limit in that regard.

It is therefore time to recognize that there was a baby in the bathwater—that right as we were to get rid of the ridicule, that doesn't mean that we are not also right to make serious and sometimes public demands of our students.

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second and third year "Socratic" classes, but in a way that will prove more interesting to the students. Thus we are teaching lawyering skills in passing, but centrally what we mean to be teaching—in a way that will hold their interest—is family law, land finance, or whatever may be the content of the clinical course in question.

^{*}I'm afraid this neologism received official recognition at Stanford Law School before I got here, when The Lawyering Process course was created.



Gerald Gunther William Nelson Cromwell Professor of Law

ries of alarm over the future direction of the Supreme Court were rife during the election season just past. Commentators in and out of the media pointed out that the health (variable) and ages (a majority over 75) of the present Justices would most probably open a number of vacancies during the next four years. If President Reagan, with his conservative agenda, were reelected, the argument ran, these vacancies would be filled with sympathetic Justices who would reverse long-standing Supreme Court doctrines going back to the activist Warren Court. Warren Court jurisprudence would, in short, be doomed.

Now President Reagan has been reelected. But does it follow that the Court will drastically change?

In evaluating the predictions, some historical perspective is useful. We had similar warnings of dramatic change when Richard Nixon was elected, but Nixon's impact on the Court fell far short of the initial alarms. There is real basis for beliefs that Ronald Reagan's impact will be greater; but it is also wise to recall that the Court is remarkably resistant to change through appointment. In short, I am concerned, but not panicky.

But I *am* clearly alarmed about a real and little-publicized threat to our institutions—the possibility of a convention to amend the Constitution—of which more later.

First, the Court.

Looking Back

Since with the Supreme Court, past is prologue, let me begin with a look backward. Richard Nixon named Warren Burger Chief Justice in 1969. Within the next three years, Nixon put three additional Justices on the Court: Harry Blackmun, William Rehnquist, and Lewis Powell (but not Clement Haynsworth, and—happily—not Harrold Carswell, nor Herschel Friday, nor Mildred Lillie).

Since Nixon, we have had three Presidents: Jimmy Carter, Gerald Ford, and the present incumbent. Carter had no appointments to the Court. Each of the Republicans has chosen one Justice: Ford named John Paul Stevens; and Reagan has so far named Sandra Day O'Connor.

That makes six Justices selected by recent Republican presidents; plus one Eisenhower appointee, William Brennan. Only Byron White and Thurgood Marshall were the nominees of Democratic Presidents (John F. Kennedy and Lyndon B. Johnson, respectively).

In short, seven of the nine present members of the Court are Republican selections. And all of the recent Republican Presidents, starting with Nixon, have been strong critics of Warren Court directions; only Kennedy and Johnson were clear supporters of the Warren Court.

False Alarms

The recent outcry about the Court is not new. The political orientation of the nominators—beginning with Nixon—had pundits predicting a dramatic turnaround from Warren Court

Reflections on

The Burger Court

and on the perils
of now calling a
Constitutional convention
to enact a balanced
budget (or any other)
amendment

The Burger Court

jurisprudence almost from the day he appointed Burger. And what the pundits expected, they soon claimed to see. By the early 1970s, the *New York Times* and other newspapers were running think-pieces and editorials, buttressed with statistical analyses, under headlines such as "Conservative Profile of a Nixon Court Discernible," "Supreme Court Begins Swing to the Right That was Sought by Nixon," "The Nixon Radicals," and so forth.

I argued then, in the *Times* and elsewhere, that such assessments were vastly overstated. The Nixon appointees, I pointed out, were not peas out of the same pod, would not be a solid bloc, and were mostly disinclined to engage in a radical discarding of Warren Court achievements.

"There was no drastic rush to the right," I wrote. "The changes were marginal, not cataclysmic. [So-called] 'retreats' were more typically refusals to extend Warren Court tendencies and narrow readings of Warren Court precedents. Not firm strides to the rear but side-steps and refusals to step forward were characteristic. And in a considerable number of cases, Warren Court principles were embraced and applied." I concluded that "portrayals of a dramatic turnabout do not ring true. Rather, I see a Court divided, uncertain and adrift."

I have never written anything that produced so much hooting from colleagues around the country and from some of my friends in journalism. I was "whistling in the dark" or currying favor or had, so the charges went, leapt from the ivory tower into the wild blue yonder. Some people even bet me that, if I gave the Nixon appointees another two or three years, I would surely concede that there had indeed been a radical turnabout.

Well, here it is, twelve years later—fifteen years after Warren Burger took his seat—and I still have not had to pay up. Indeed, I think that my 1972 assessment can still serve as a valid retrospective evaluation of the Burger Court. Some of my sharpest 1972 critics have in fact done a volte-face in a 1983 book whose subtitle is especially

apt—The Burger Court: The Counter-Revolution that Wasn't.²

Quite so. The most controversial, innovative decisions of the Warren Court still stand: *Brown* v. *Board of Education* (the school segregation case); *Reynolds* v. *Sims* (the reapportionment decision); even *Miranda* v. *Arizona* (requiring detailed warnings when criminal suspects are arrested). Continuity, not counter-revolution, has been, to many people's surprise, the dominant theme.

And, quite apart from the leading cases, the major trends of the Warren Court persist. Judicial activism was the hallmark of the Warren Court; greater judicial self-restraint was one of the refrains of Richard Nixon in his campaigns and, allegedly, in his selection process. Yet, if anything can be said of the Burger Court, it is that activism is still very much a dominant strand in the Court's institutional performance. It is a more "rootless" activism—a more centrist, ad hoc activism—than that of the Warren Court. But it is activism nonetheless.

After all, a Court—the Burger Court—that hands down *Roe* v. *Wade* and the later cases removing most legal barriers to abortions can hardly be called a shrinking violet. (John Ely, for example, has called *Roe* as unjustified a judicial performance as *Lochner* v. *New York*, the 1905 case—widely condemned as instituting three decades of economic policy-making by the Court—striking down a state limit on the hours bakery employees may work.)

Moreover, in a rough sketch such as this, it is fair to say that the Burger Court by and large has *not* retreated drastically from Warren Court First Amendment decisions; indeed, much of First Amendment law was put on more solid footing in the Seventies—though that footing has gotten more slippery in the Eighties.

In the school segregat

In the school segregation area, the Burger Court has not only repudiated Administration efforts to curb busing remedies but has indeed been remarkably willing to endorse new ways of curbing intradistrict segregation.

Similarly, despite increasingly stri-

dent oppostion by the Reagan Administration, almost all affirmative action remedies that have reached the Court have in effect been sustained, from Bakke, involving preferential admissions in higher education, to Weber, involving preferences by private employers, and Fullilove, upholding congressional "set-asides" for minority businesses. And other than some nibbling away at the edges of Warren Court doctrine, especially in criminal procedure cases, the Court so far continues to reject the major Administration pleas to change direction, as with the most recent group of abortion cases and the denial of tax exemptions to racially discriminatory private schools.

Going Their Own Way

What has happened, then, to confound so many expectations about the Republican appointees of the last decade and a half?

First of all, most of the new Justices have obviously taken their robes, their judicial independence, quite seriously. They have gone their own ways, often to the disappointment of those who named them to the bench.

One does not have to stop with the Nixon appointees' rejection a decade ago of the President's claims in the Watergate tapes case to repudiate the excessively deterministic analyses of those who expect direct quid pro quos by political nominees and who exaggerate the impact of politics on the Court.

In 1972, a lot of commentators expected Harry Blackmun to be Warren Burger's Minnesota Twin. I thought that prediction wrong; but it was simply a guess then, unsupported by data. Now, the outcome is clear: Blackmun has proved to be quite independent, lining up on the liberal side with Brennan and Marshall a surprising and indeed growing number of times.

Lewis Powell, I argued in 1972, was independent and impressive from the start; and he has continued to be that in many areas. John Paul Stevens—selected by Ford, the least ideological of recent Republican Presidents (more

accurately, perhaps, selected by the best Attorney General in many years, Edward Levi)—has been quite independent from the beginning. Even Sandra O'Connor-expected by some to be merely Rehnquist's Arizona and Stanford twin—not long ago spoke for the Court in rejecting Rehnquist's efforts to undermine the semi-suspect, intermediate scrutiny level for gender classifications developed during the mid-Seventies. Of the six sitting appointees of recent Republican Presidents, only one-William Rehnquist-has shown real eagerness to reexamine and repudiate some major formulations of the Warren Court.

What went wrong? Why haven't recent Republican Presidents been more successful in their efforts to change the Court's direction?

I do not, of course, mean to say that they have had no impact: most of the appointees are more conservative, with respect to states' rights and social justice and criminal procedure, for example. They lack the overarching value commitment to equality of the Warren majority, and they are more receptive to competing claims of individuality and autonomy; and these values have from time to time had impacts

on statutory interpretation and constitutional law.

But I deliberately emphasize the really quite remarkable continuity, the institutional unwillingness to engage in any radical turning back of the clock—the phenomenon, in short, of the "counter-revolution that wasn't." And that continuity has taken place not because most of the recent Republican Presidents, like most Presidents in our history, have been uninterested in and inattentive to the Court. It is precisely because at least Nixon and Reagan made the Court a campaign issue, and be-

The Burger Court and its Republican appointees have at least so far left a remarkable part of the Warren Court legacy quite intact...

cause both had strong ideological disagreements with the Court, that expectations of dramatic changes in constitutional law arose. In the face of that, what explains the continuity? Let me suggest several factors.

Some Reasons for the Continuity

First of all, there is the inherent shortsightedness, the inherent limited attention span, of most Presidents. By and large, even those Presidents who have reason to pay very serious attention to the Court tend to worry about the Court only with respect to a narrow cluster of issues.

Recall, for example, the case of Franklin D. Roosevelt. The major changes in the economy that the Roosevelt Administration enacted in its first term ran into repeated vetoes from the Court. FDR was frustrated because the Nine Old Men stood in his way: and he did not have an opportunity to replace even one of them during his first term. Shortly after, his Court-packing plan of 1937 failed in the Senate. But the dam soon broke, and before FDR left office, he had nine opportunities to send Supreme Court nominations up to the Hill.

All of his appointees proved to be loyal New Dealers in the sense—the only sense—that he hoped: all joined in dramatically changing the constitutional ground rules by eliminating many of the barriers to governmental regulation of the economy. But Roosevelt had no special interest in the ideological direction of the Court beyond that. His nominees, unanimous about regulatory power, soon spread all over the lot on individual rights. Again and again, for example, one found Felix Frankfurter and Robert Jackson on one

side, Hugo Black and William O. Douglas on the other.

So it proved to be for Nixon. To him, the critical issue—virtually the only Court-related one he expressed interest in—was law and order. Even there, he proved only marginally successful: as I have said, despite some significant whittling away, there has been no overturning of major Warren Court criminal procedure landmarks—at least not yet. As to most constitutional issues, the Nixon appointees have gone their own different ways.

For Reagan, the social issues-



abortion, school prayer, busing—have been central. Sandra O'Connor was with the dissenters in the most recent abortion cases, to be sure; but she has shown some independence. And she did, as noted, repudiate Rehnquist on the sex discrimination issue.

Another source of explanation for the relatively limited impact of the Republican Presidents lies in the nature of conservatives and conservatism. To some conservatives—those who are conservative rather than radical reactionary in outlook—precedent and continuity rank high in the scale of values. And for those conservatives (Justice Lewis Powell is probably the best contemporary example), well-established law is not to be readily overturned, even if the Justice would not have supported its creation had he sat on the Warren Court.

Moreover, the mood of the country—despite all of the annoyances with particular Supreme Court decisions—has to a very large extent absorbed the major, initially quite startling developments that came from the Warren Court, from legislative reapportionment to race discrimination. The ideological clock *has* moved forward over the years, and that makes it harder for anyone to engage in persistent efforts to turn it back.

Don't misunderstand me: I am not trying to paint an admiring portrait of the Burger Court. I can—and often do—go on at great length criticizing particular opinions and trends. And I have repeatedly criticized the institutional processes of the present Court. When I said in 1972 that this was a Court divided and adrift, I expected the Justices to get their footing and develop greater coherence before long. I by and large still await that. It is often

a terribly fragmented Court, with too many separate opinions, too many casual dicta (for which one can blame the explosion in the number of law clerks only in part).

But none of that seems to me to undercut my basic theme—that the Burger Court and its Republican appointees have at least so far left a remarkable part of the Warren Court legacy quite intact.

Looking Ahead

What of the future? I am certainly *not* willing to make any bets or predictions that there will be as few dramatic changes from the Supreme Court in the next few years as there have been for the last fifteen. Ronald Reagan, like Franklin Roosevelt, may well have several opportunities to leave his imprint on the Court. And President Reagan's commitment to his social agenda shows no signs of lessening.

The *kind* of impact future Reagan appointments have will in my view turn on the *nature* of those appointments. Will he name people of the ilk of Ed Meese—a trusted political ally but not a person with a long-developed, wellformed constitutional philosophy? Or will he name people such as Bob Bork, the former law professor at Chicago and Yale and Solicitor General in the Nixon Administration, who now sits on the federal Court of Appeals for the District of Columbia?

I suspect that those who fear or desire dramatic long-term change in Court direction had better look to the Bork rather than the Meese type of appointee. The Reagan administration has been quite sophisticated, in my view, in naming some of the nation's outstanding conservative scholars to

Courts of Appeals vacancies—not only Bob Bork but also Nino Scalia of Chicago, who now sits with Bork on the D.C. Circuit, and Ralph Winter of Yale, now on the Second Circuit in New York, and Dick Posner of Chicago, now on the Seventh Circuit there.

A Bork type of Supreme Court Justice might well be more of an intellectual leader, even more ready to reexamine precedent, than William Rehnquist has been. A Meese-type appointee can probably be counted on more reliably in terms of short-term results.

I suspect that the prospects—or horrors—of basic and lasting constitutional change are more likely to be realized from strong-minded academics than from more run-of-the-mill political appointees. For better or for worse, academics such as Bork have thought about constitutional law and the role of the Court for years, broadly and deeply. They have a considered, coherent (some would say unduly rigid) constitutional philosophy. I doubt that anyone would say that of the Meese type of nominee.

Even now the exclusionary rule is undergoing re-examination. Soon, with the strong prospect of changed personnel, a good many more well-established parts of Warren Court doctrine may well be up for reconsideration.

However, a Reagan Court of the future will not necessarily be a catastrophe, though the risks *are* greater than proved to be the case with the shrill prophecies of the early Seventies about the Nixon-Burger Court.

The Constitutional Convention Threat

But I ought not to stop without saying a word about a fear I have that may more closely resemble a nightmare. My fear goes less to what the *Court* may do than to what the *country* may do. My fear stems from the ongoing campaign to resort to a hitherto unused method of amending the U.S. Constitution.

The 26 amendments to our Constitution have all been added by only one

The Burger Court

of the two amendment routes delineated in Article V: two-thirds of Congress has proposed amendments; three-fourths of the states have then ratified. The untried alternative route is to have amendments proposed not by Congress but by a constitutional convention—a convention that Congress *must* call if two-thirds of the states demand one. Two-thirds of the states today means 34 states.

Today, 32 of the necessary 34 state legislatures have applied to Congress to demand a convention to consider a balanced budget amendment to the Constitution. If two more states follow suit, and if Congress hasn't in the meanwhile proposed an amendment of its own, Congress will have to call a convention. And no one really knows how that convention will be organized, and, most important, how broad its scope will be.

In my view, convention delegates may consider *any* issue perceived by those who elected them as important to the country; thus, a convention would *not* be limited to the single, balanced budget issue. We simply have had no experience with that convention route—unless you consider the arguably relevant one of the Philadelphia Convention of 1787, which was called for narrow purposes and itself became a "runaway" one.

Convention applications are now pending in a number of states. Recently, California very nearly became the critical state. We were about to confront an initiative on the November ballot to press our legislature to apply for a balanced budget convention—or else lose all salaries and other benefits. A California Supreme Court decision removed that issue from the ballot. But the issue continues very live indeed in other states.

And this is not the only movement afoot for constitutional change. A scattered number of moderate and liberal leaders—with Lloyd Cutler, President Carter's White House Counsel, in the lead—are also holding meetings to consider allegedly necessary constitutional changes, such as moving toward a parliamentary system, increasing ex-

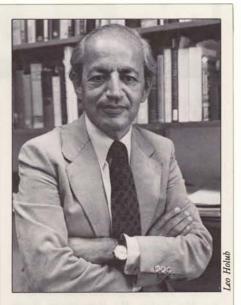
ecutive power, or what have you. And, though this campaign has not yet hit the headlines, there is a growing undercurrent of noise claiming, as Cutler does, that the Framers would be shocked if they knew there had been only 26 amendments to the document wrought nearly two centuries ago.

Why does a constitutional convention give me nightmares? I am not denying the legitimacy of the convention route. Nor do I have strong feelings about the merits of the balanced budget amendment (although I think it mighty ironical that some of its strongest supporters are also among the strongest critics of the Court, and yet tell us that the uncertainties in the budget amendment's language would be resolved by—who else?—the Supreme Court, which would thus gain a major role in fiscal policies as well as the present range of political and social ones).

No, my concern comes from the *process* by which we have come so very close to reaching the necessary number of states to trigger a convention—a process which has in most state legislatures been one of perfunctory debate simply on the pros and cons of fiscal responsibility, with virtually total inattention to the *risks* of the convention route (at least no discussion beyond unfounded reassurances about the risk-free nature of calling a limited convention).

I think that is an extraordinarily irresponsible invocation of constitutional processes. And, given the political dynamics and possible scenarios, the convention that confronts us could well produce as much substantial constitutional change as anything we have seen or indeed can anticipate from the Reagan-Burger Court.

Footnotes



Professor Gunther, a noted Constitutional Law scholar, is a longtime observer of the Supreme Court, where he served in 1954-55 as clerk to Chief Justice Earl Warren. A Harvard Law graduate (LL.B., 1953), he practiced law in New York City and was a professor at Columbia University Law School before coming to Stanford in 1962. He was named to the William Nelson Cromwell Professorship in 1972.

Professor Gunther is author of several books, including the definitive textbook (now going into an 11th edition), Constitutional Law (Foundation Press). He is presently preparing the first full biography of Judge Learned Hand, for whom he clerked in 1953-54.

This article is based on a speech by Professor Gunther to the San Mateo County Bar Association, on December 6, 1984, one month after the national election.

¹ Gunther, "Law and the 'Burger-Nixon' Court," New York Times, Aug. 9, 1972, 37:2. See also Gunther, "Foreword: The Supreme Court, 1971 Term," 86 Harvard Law Review 1 (1972).

² Blasi, V., ed., The Burger Court: The Counter-Revolution that Wasn't, Yale University Press, 1983.

A Conversation A Conv

Two years ago, on January 3, 1983, Paul N. McCloskey, Jr. (AB'50, JD'53) resumed the private practice of law, as a resident partner in the Palo Alto office of Brobeck, Phleger & Harrison of San Francisco. He last practiced in 1967, as founder and senior partner of McCloskey, Wilson, Mosher & Martin (the Palo Alto firm now known as Wilson, Sonsini, Goodrich & Rosati).

The intervening fifteen years, during which McCloskey represented Stanford and environs in the U.S. Congress, were fraught with change and controversy—for McCloskey, the Republican Party (where he gave the term "maverick" new meaning), and the nation, as well as for the troubled lands of Southeast Asia.

McCloskey, a decorated Marine and teacher of legal ethics, did not shrink from battle, up to and including challenging his party's sitting President in the 1972 primaries. His congressional career ended in 1982 following a bluntspoken and unsuccessful campaign for the Republican nomination to the Senate.

"Pete" (as he is commonly called) now lives in Woodside with his wife of two years, the former Helen Hooper. He has four grown children from his first marriage.

The following conversation—in which McCloskey discusses his experiences in law, politics, and public service—took place on December 18, 1984, in his sunlit corner office at Brobeck, Phleger's new east-of-Bayshore offices. Editor Constance Hellyer (whose remarks appear in italics) served as interlocuter.

Opinions expressed herein are not necessarily shared by the editors or Stanford Law School.

How do you like being back in private practice?

I'm enjoying it tremendously. It's a pleasure to be in the clean combat of trial law and dealing with local problems of real people, instead of in the Washington rat race. I haven't missed Congress at all. Occasionally there are issues that I'd like to speak out on—Congress provided a chance to do that, which I no longer have. But the challenge of learning to be a lawyer again is much more exciting than the day-to-day life of a Congressman.

Was it difficult to get back in gear after fifteen years in Congress?

No. The problem with the Congress is that you have only one or two times a year when you can affect the national decision-making process—and that's an exhilarating thing. But 98 percent of the work of an individual Congressman is really not work at all. You're just going through a process, not hammering out a hard answer or a brief or a contract. That's one reason I think any good lawyer or productive individual is going to be rapidly frustrated in the Congress.

What kind of practice do you have now? Well, I think the firm hoped that I would bring in all kinds of large corporations because of my experience in dealing with Washington; and indeed I have done maybe one or two cases a month that involve untangling some red tape or trying to affect the legislative or executive administrative process in some way.

But essentially I've come back to Palo Alto and started taking every kind of case that comes by, primarily in the trial field or in business negotiations—the same specialties that I handled before. I was then, I suppose, a civil trial lawyer, but I could also do criminal defense, write wills, give people tax

advice, and do real estate transactions. I can't do any of that anymore. They are all specialties now, and I'm trying to sharpen my skills as a trial lawyer.

Most people come to me because they want representation in a cause. The old black citizens of East Palo Alto wanted me to contest the incorporation election over there. We've done that—a historic, landmark decision. It's going to the state supreme court. It may go to the United States Supreme Court.

We just won another case. I had a five-day trial for a local black church that had deeded its property to the national church under rules entitling the national church to hold all of the property. Then thirteen years later the local church wants to break out. We were successful in getting the judge to allow them to take their property with them. People broke into tears in the courtroom. It was a marvelous victory.

Didn't you get quite a bit of flack over that East Palo Alto incorporation case?

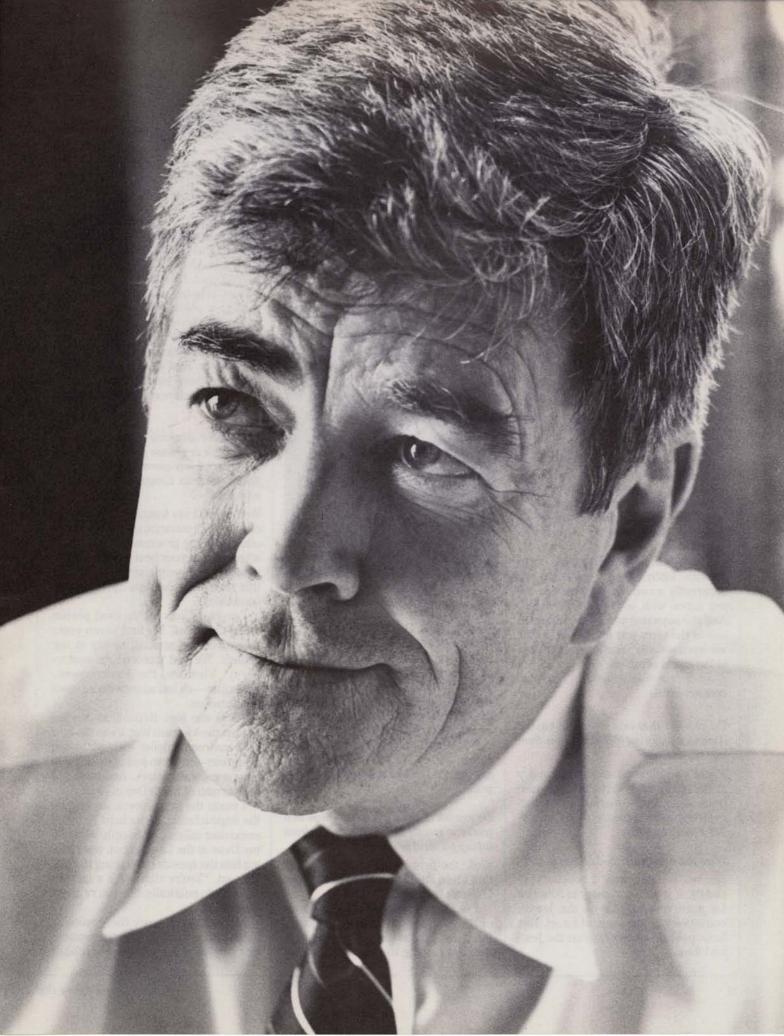
The flack didn't bother me. It's less than I got when I said Richard Nixon was a crook, or that we ought to get out of Vietnam, or that the Jewish lobby was too active in regard to Israel. It sort of blows off your back after a while.

So you weren't arguing a side that you didn't personally agree with?

I have never taken a case where I didn't feel the client was either right or was entitled to a better shot than he was getting from whatever authority was attacking him.

In this case, the senior citizens of East Palo Alto—people that have owned their homes, run their churches, and battled to get their kids equal education—those people essentially oppose incorporation.

The people for incorporation say, "Regardless of what else, we want to



govern our own fates." That's a point of view, and I value it; and for fifteen years I tried to help them create their own city. But it was all contingent on getting a tax base that would support a city. They are sitting out there now with millions of dollars worth of road work that they can't perform. Consequently, I think incorporation ought to be deferred until such time as economic conditions permit a tax base that will support a city.

What about the Jewish lobby issue—didn't that hurt you in your Senate race?

Yes, it did. A number of Jewish business executives and community leaders who had supported me changed their position in the middle of the campaign.

The debate between Wilson and myself was that he advocated the annexation of Gaza and the West Bank, and I advocated that we cut off aid to Israel unless they gave up the West Bank and Gaza. That was a bona fide issue.

There was objection to the term "Jewish lobby," because there are apparently a number of Jews who do not agree with what Israel is doing. And the objection was made that even use of the term was anti-Semitic. But we were *not* anti-Semitic—that existed in the minds of others.

So it was controversial, and it is controversial.

Do you feel that this lobby has pushed American policy out of shape—away from our self-interest?

There's no question but that our policy in the mid-East is distorted, because there is no Arab-American lobby that even begins to compare with the Jewish-American lobby.

Were you misunderstood on this issue?

No, no. I stated what I believe very clearly. It is not customary in America for politicians to take on the Jewish community on the issue of Israel. Just basic politics—*never* take on the Jewish lobby.

Chuck Percy lost his seat in the Senate very probably because of it. When you raise a million and a half dollars in Los Angeles to defeat a senator in Illinois because that senator had suggested there should be a Palestinian state—.

There is no lobby in the country more dedicated to its cause than the



The freshman congressman and the House majority leader

Jewish lobby. The only two that begin to match it are the National Rifle Association and the right-to-life groups. In all three cases, it is a deeply held, sincere view that makes all other issues pale to insignificance. For the Jewish lobby, the view is that the United States should aid Israel at all cost.

But I have no regrets. My political career has essentially been trying to say what is truthful rather than what is politic.

Do you feel at all constrained—now that you're a member of a law firm—from taking political positions?

Well, the firm would probably prefer that I be a little less controversial. But I haven't backed off an iota.

I've also undertaken to be chairman of the local legal aid service—something that I did twenty-five years ago. And I'm helping to raise money from this big firm and others to finance the Stanford Law students' effort to provide legal services for the poor people of East Palo Alto.

But there's always that pressure to contribute your share of the income of the firm. I will be doing that, but nobody does it their first year, or even their second year. I feel I've got to reestablish my reputation as a lawyer rather than as a politician, and the two are entirely different. A lot of people wouldn't go to a lawyer because they think he's a politician and not a competent lawyer. That's a challenge. I figure I'm about three years short of regaining the competence and skill that I had in 1967.

You've been speaking very warmly about being back in private practice. Can you summon up any warm feelings for your fifteen years in Congress—frustrating as it was?

Well, when I say frustrating, it's not all negative. Frustration can be a marvelous part of the process, because that's when you get your best government—when a lot of people get so frustrated that they work hard to try to change something.

I probably was the luckiest person in the Congress. My first seven years there were as exciting as any in our history. We had tremendous controversy: Vietnam, the environment, Watergate—all had an incredible impact on the nation.

I was the first Republican elected against the Vietnam War. I was the first real environmentalist elected to the Congress—my firm had specialized in environmental matters. And I was the cochairman of Earth Day in 1970.

I made the first speech suggesting the impeachment of Richard Nixon. I remember calling Carl Spaeth, who was my Dean at the Law School, and reading him the speech I was going to give. He said, "You're right—it's a terrible thing to do politically, but you're absolutely right."

My last seven years there were as an ordinary working Congressman. I became ranking on the Merchant Marine and Fisheries Committee—got to go to the Whaling Conference, was an advisor of the Law of the Sea Conference. I learned a lot about international law, traveled to forty or so countries, and met with Begin, Sharon, and Mubarak, and with Indira Gandhi. And there was the work with the FBI and the CIA.

Yes, I was glad to be there. But I'm even gladder to be back. If something opens up—if George Bush got to be President and said, "We'd like you to come back and serve in some capacity"—I'd be glad to do that.

But I don't have any sense of regret over losing that Senate race. For the next year I watched Pete Wilson as a freshman Senator, and I'll tell you that job looked even more frustrating than the House!

After fifteen years in Congress, can you recommend any changes to improve its effectiveness?

Not really. I feel that I can do as much as a private lawyer in Palo Alto as I could in the House.

Do you think the party primary system is a good way to choose candidates?

I'd prefer an open primary where people could chose which primary they wanted to vote in.

The current system favors right-wingers getting nominated on the Republican side and left-wingers on the Democratic side, because the zeal-ots on both sides tend to support candidates who satisfy their views on abortion, gun control, Israel, or some other special issue. At the same time, more and more people in the middle of the road have been registering as Independent, refusing to vote in either party primary. So the moderate candidate is penalized in the primary process.

I've worked on two occasions to get this changed, but been unsuccessful thus far.

The Republican Party in general didn't do nearly as well as the President in the last election. What advice would you give them? Well, I don't know that I'm the best person to speak on this. I joined the Republican Party when I became 21 in 1948, because of the view then that the Democratic Party was the party that had put down blacks in the South for a hundred years. We were the party of Teddy Roosevelt, conservation, civil rights, and women's rights.

That's changed, so that the Republican Party appears to be the party of business, and the Democrats the party of labor and intellectual esoteric thought. Democrats are generally warmer and more compassionate, but a little fuzzy about how to get there. Republicans are sort of drummed-up patriots—convinced that their way is right, and the other side wrong.

I don't fit in either political party very well, and I don't choose to make my efforts in either party. I think that I have to be what I am and do what I do. That infuriates some Republicans.

I campaigned for Reagan and Bush in the last election, despite my disagreements with some of the Reagan policies, because I thought they were preferable to Mondale, Hart and Ferraro. But I went to Iowa to campaign for Tom Harkin, a Democratic Congressman, against Roger Jepsen. Jepsen had said that the election was a test of atheistic humanism versus Judeo/ Christian absolutes. When those guys

on the right wing bring in religion as a litmus test of political electability, I rise up in anger.

Actually I held maybe five fund-raisers in Palo Alto for senators, mostly Republicans like Bob Dole of Kansas, and Bill Cohen of Maine. But we raised three times more money for Jim Hunt, who was running against Jesse Helms, than we had for any of the Republicans.

[Democrat Hunt ultimately failed to dislodge Helms (R.-N.C.). Incumbent Cohen (R.-Maine) and challenger Harkin (D.-Iowa) won their races. Dole (R.-Kansas) is not up for reelection until 1986.—Ed.]

So you don't subscribe to the philosophy of "my party right or wrong"?

From the Courthouse to the State House—No. I would rather work for the man or woman than the party.

The big problem in our political system is getting good, solid, successful people to run. And it's very difficult to raise money for them. So I've said I will help any person willing to enter politics in *either* party, if they're honest, work hard, and are willing to give a few years to public service. You know, it's hard to be a leader in the American system. We built it to elect representatives, not leaders. So you can't expect courage from an elected official. You

A White House meeting with the President





The candidate in New Hampshire, with fellow also-ran Muskie (1972)

can expect him to be responsible, but you can't expect him to lead. People who lead get beaten rather hard about the head and ears.

Was that your experience when you ran against President Nixon in the 1972 primaries?

Well, I ran against Nixon because we couldn't get any other good Republican to challenge him. I tried to get Chuck Percy or Mark Hatfield to do it. The Vietnam War was on. If no Republican challenged him, he had another eight months to do as he pleased.

So I ran, not with any expectation of winning, but just to force him to debate the war. He frustrated that completely by going to China the closing weeks of the New Hampshire primary, and the voters forgot about Vietnam.

Looking back, though, it was a worthwhile effort—crazy, but worthwhile.

What do you hope we as a country would have learned from that whole, sad episode?

That we have the best system and the best government in the world, but you've got to work at it. And it probably proved Lord Acton's comment, "Power tends to corrupt and absolute power corrupts absolutely," and always will. So people better pay attention to how people in power are operating, or they'll steal us blind.

You know, these are my *friends*. John Ehrlichman ['51] was my debate part-

ner in Stanford Law School—one of the best, ablest lawyers I knew. He said later, when I visited him in the federal penitentiary, that it took them about three-and-a-half years to become corrupt in the sense of believing so strongly in what Nixon was doing that they thought it was appropriate to violate the law in order to keep Nixon in power.

I think that's an absolute truism—that as you're in a position of power, you will begin to believe so much in your value that you will do whatever is necessary to stay in power. And the counterforce to that is the American constitutional system, which allows us to throw them all out.

You once said, during the Watergate affair, that your faith in the ability of human beings to resist the corruption of power was shaken. How does one resist this in Washington, D.C? How did you?

Well, I never had power. All I can say is that many times, in looking at what those fellows were going through, I wondered whether, had I been in their situation, I would have gone along. The basic rule of politics from the moment you get there, by all your elderly colleagues, is "Go along and get along."

A great example of a person who resigned rather than carry on something illegal was my own law partner, Lewis Butler ['51], who had also been in those famous Moot Court finals in 1950. Lew, who quit about two years into the Nixon Administration, wrote a

letter I'll never forget.

It went like this: "Mr. President: With this letter I am returning your commission appointing me an Assistant Secretary of the Department of Health, Education and Welfare. The accomplishments of your administration will always be a source of pride for me. But they are overwhelmed by the enormity of the wrong we are doing in bombing North Vietnam. All of us as Americans will carry to our graves responsibility for this monstrous act. In that sense returning this commission means nothing. It is merely the only way I can express privately to you my sorrow and shame. Sincerely, Lewis H. Butler."

There will always be people like that who may stand alone for a time but who set a standard that the country looks at.

Those were dark days. I wrote a book in 1971 for my children to try to explain why the system of government was worth supporting even though everything seemed to be going bad. I'm going to write another one in 1985 for the anniversary of the Annapolis Convention, saying that, "Really, the system is working very well."

What's missing is the involvement of good people in the system. Most of them run banks or law firms or universities and do not get into politics.

Is that what you'd say to your Law School friends—"Get involved"?

Yes. I make that speech about once a week to some group of people who are sitting here fat and sassy on the Peninsula and thinking politics is a dirty business. That used to be my view when I was practicing law. I thought only bad lawyers went into politics—people who couldn't make it, and were indulging their desire for power and glory. I had no idea whatsoever of going into politics. I was 39 when I first ran for Congress.

It was 1967 and our local congressman suddenly died. We had this special election. Ronald Reagan was our Governor, George Murphy was our Senator, and Shirley Temple was the odds-

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on favorite to be our Congresswoman. There seemed to be some reason to challenge that lineup. So I ran. And through a lot of good friends and a sort of amateurish effort, I got elected.

Do you think that two years is too short a term?

No. The beauty of it is that the people of the United States every two years can throw the entire House of Representatives out if they want to. And going through that exercise, I think, tempers the otherwise rebellious spirit of the people.

But you mentioned one of the real difficulties with politics—time. When you get into the system of running for office and then serving in office and thinking about the election, it's essentially a twenty-hour day. There is so much to learn, so much to see, so many issues to study, and so many people to talk to. You can get so enmeshed in it that you forget about your kids and your wife. And I was.

Those were difficult years—'67 to '74. I had I think seven tough elections in about five years. I'd always fight off a Republican opponent in the primaries. And I had trouble in the '72 general election when I challenged Nixon. I would have been defeated in '74 except that Stanford kids all registered Republican—they turned a defeat into a narrow victory.

Those years cost me. My family broke up. It's a very grueling existence if people work at it. And there are no financial rewards. I earned three times as much the last year I practiced law as I earned as a Congressman.

What would you say if one of your kids wanted to go into politics?

I hope they will. But my advice to young people is: learn a career first. Get good at something, so that you never *need* to be in office—so you're never in a position where if you get defeated you can't earn a living. That's where you really get your crooked politicians.

I think everybody ought to be willing

to serve in public service for one year, five years, ten years, fifteen years. That's a civic duty.

Almost the Greek ideal of the citizenpolitician—

Exactly right. When I was a private lawyer, I wanted to be a citizen-soldier. In time of war, you fight; in time of

peace, you stand ready to fight. I stayed in the reserve. The reason I could take the position I did against the Vietnam War was I'd volunteered to go to Vietnam in '65. I'd commanded in the Marine Corps insurgency school—was an expert on insurgency warfare. So I could speak out and say, "Look we can't win this war," and have some facts and arguments behind it.

What about El Salvador—?

I think we're crazy. I don't think we make any friends in Latin America by trying to say who governs or who doesn't govern. I opposed our intervention in Nicaragua. I opposed what Nixon did in Chile. It's a self-serving position we take, and I think it's counterproductive. I think we actually *create* communists by trying to support autocractic right-wing governments against people who have a history of rebellion for the last 200 years.

Looking back on your years in politics, has it all—the criticism, the campaigning, the stress, and the loss of income—been worth it?

Sure. I'd do it again. The privilege of participating in the shaping of events is more than enough reward for all of the other things you could have—with the possible exception of your family. The greatest error I made, in retrospect, was forgetting that I had kids and a wife, who also had needs at the time

that I was getting all involved in this exhilarating process of ending a war.

Anything you'd like to add?

No. You're looking at a happy man sitting in probably the finest community



in America, with the best weather, the best recreation, the best people, the most talented and success-oriented community in the world—right here.

Well, thank you very much. My pleasure.

The Elusive Right to

Michael Gilfix '73

Few issues are as emotion-laden or complex as the oddly named "right to die." An outgrowth of advances in life-support technology, it evokes images of paradoxically sophisticated, yet intrusive, medical treatment. It creates dilemmas in public policy, medical economics, and human ethics. And it presents a number of legal questions that go well beyond the scope of settled law.

Despite these difficulties, life-support technologies are undeniably withheld or withdrawn in medical practice every day. Such decisions are commonly made by the physician in consultation with members of the patient's family. Fear of court involvement has, however, cast a pall over this already sensitive decision-making process.

Unfortunately (or fortunately, if you prefer), this fear is not without basis. In California, for example, two physicians who withdrew life-support systems from a terminally ill patient have faced both criminal homicide charges and civil damage actions. Still other physicians and their hospital have been sued for *refusing* to terminate life-support systems.

Until recently, the few courts to address this issue have taken an approach best described as reactive, with predictably little in the way of objective guidelines. Legislative initiatives have also, with rare exceptions, failed to define appropriate medico-legal standards.

As a result, many health professionals continue to feel exposed, uncertain, and at risk of becoming involuntary litigants every time they decide to withhold or withdraw life-support technology from terminally ill, dying patients.

This ongoing uncertainty as to legal standards and liability has created a role for legal counsel. Attorneys are now participating on medical ethics committees at major hospitals across the nation. Some medical centers, including UCLA School of Medicine, have added attorneys to their faculties. And many individual doctors now seek legal advice before making or implementing decisions previously considered a private matter between physician and family.

While the body of law relating to terminal care is still evolving, there are precedents and procedures to which practicing attorneys may refer. This article explores the present status of the law in terms of both judicial interpretation and legislation—with particular attention to new "Durable Power

of Attorney for Health Care" laws allowing an individual to plan in advance for decision making during her own terminal illness.

It is, however, important to remember that such laws—though helpful to individual patients who have made legal arrangements for their own care—still leave medical professionals and hospitals without general decision-making guidelines and procedures applicable to that majority of terminally ill patients less knowledgeable about the law.

The lack of clear law in this area also has societal costs. With medical expenditures already consuming 10.8 percent of our gross national product, inappropriate spending on defensive terminal care is likely to be at the expense of other, more effective efforts, such as preventive medicine or care of patients with better chances of returning to health.



Judicial Interpretations: The Development of Patients' Rights

The existence of sophisticated lifesupport technology is, by definition, historically unprecedented. Cases raising issues of high-tech care of the terminally ill or comatose patient have been few, and courts have accepted them reluctantly. They consistently state that such issues are best left to families, physicians, and legislatures. In their rulings, they have had to build creatively upon legal principles crafted in simpler times.

One recurrent and appropriate theme in "right to die" litigation is the penumbral right to privacy—a principle rooted in *Union Pacific R. Co. v. Botsford*, 144 U.S. 250 (1891), and more recently developed in *Griswold v. Connecticut*, 381 U.S. 479 (1965). This

right to bodily and personal integrity has found its way to related areas of contraception, procreation and abortion. It is a concept heavily relied upon in *Bartling* (see below), one of the California "right to die" cases featured in a recent episode of "60 Minutes."

No less important is the seemingly well-established right of a competent individual to approve or reject any lawful form of medical treatment, as in Cobbs v. Grant. 8 Cal. 3d 229, 104 Cal. Rptr. 505 (1972). Justice Cardozo most lucidly established the principle in Schloendorff v. Society of New York Hospitals, 211 N.Y. 125, 105 N.E. 92, 93 (1914): "Every human being of adult years or sound mind has a right to determine what should be done with his own body." As we will see, however, this right has been far more elusive than Justice Cardozo could ever have anticipated.

Paramount among these cases ad-

dressing this issue is that of Karen Ann Quinlan, a young New Jersey woman who went into an irreversible coma some nine years ago and whose name has since become synonymous with the suffering of family members and the search for answers to impossible questions.

Ms. Quinlan's father, Joseph Quinlan, relied heavily upon his daughter's right to privacy in successfully petitioning a court to become her guardian. Backed by unanimous family agreement, he was given the right to withdraw the respirator that was, in expert medical opinion, keeping her alive. Ms. Quinlan confounded medical science and made her own situation even more poignant by surviving her sudden weaning from the respirator. She continues to exist to this day, but, significantly, her father has not sought court permission also to withdraw nutrition and hydration support from his daughter.

Unlike *Quinlan*—where the New Jersey court made a point of deferring to concurrence on the part of the physician, the family, and the hospital ethics committee—a Massachusetts court later held that court approval was necessary for the withholding of "extraordinary" life support. There, 67-year-old Mr. Saikewicz, who was both mentally retarded and terminally ill, was not capable of giving or refusing consent on his own behalf.

A later Massachusetts case, *In the Matter of Dinnerstein*, 6 Mass. App. 466, 380 N.E. 2d 134 (1978), departed from *Saikewicz* and reinforced the family/physician approach. It held that an attending physician may, with family agreement, issue an order for "no resuscitation" in the event of respiratory

or cardiac arrest.

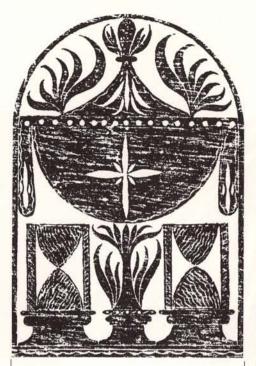
A 1981 New York court confirmed the patient's right to determine his own medical treatment. Brother Fox (a monk) was comatose and dependent on a respirator for life. On the basis of statements he had made to others about Karen Ann Quinlan's situation, it was established by clear and convincing evidence that, if he were able, he would have refused consent for use of the respirator, and such use was withdrawn. Brother Fox is highly significant because of its reliance on both oral and written statements previously made by a patient now hopelessly ill and totally lacking in capacity.

California Leading Cases: Barber and Bartling

The filing of criminal charges against physicians who exercise their best medical judgment and obtain unanimous family consent in ordering withdrawal of life-sustaining treatment would be viewed as an unconscionable and horrific development by the medical community. It would confirm their worse fears, and have a classic chilling effect on traditional, well-established medical care practices. Yet this is precisely what happened in the aftermath of a decision by two California physicians to let Clarence Herbert die.

Mr. Herbert had suffered cardiopulmonary arrest shortly after surgery for closure of an ileostomy, went into a coma, and was placed on a respirator. After five days, the physicians determined that Mr. Herbert's condition was irreversible and so advised his wife and family. With Mrs. Herbert's consent, use of the respirator was discontinued. Mr. Herbert continued, though still comatose, to live without assistance from the respirator. The physicians then obtained written spousal permission to terminate administration of nutrition and hydration; six days later, Mr. Herbert died.

Doctors Barber and Nejdl were shocked, as was the entire medical community, when murder charges were



subsequently filed against them by the Los Angeles District Attorney. A legal roller coaster followed, with a municipal court judge dismissing the murder charges, a superior court judge reinstating them, and a court of appeals ultimately resolving the matter by effectively dismissing the charges in a precedent-setting opinion, *Barber* v. *Superior Court*, 147 Cal. App. 3d 10006 (1983).

The appellate court scolded the California legislature for failing to take the initiative, and stressed the lack of reliable standards and decision-making methods that would eliminate or minimize the need for court involvement.

The Barber court took a major and protective step forward in finding murder charges to be inappropriate. Going further, it outlined decision-making criteria that placed substantial reliance on the March 1983 Report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. After confirming that a patient's wishes are always dominant, the court addressed situations with a focus on whether a particular procedure was "ordinary" or "extraordinary," and described a bal-ancing analysis. That analysis focused on "whether the proposed treatment is proportionate or disproportionate in terms of the benefits to be gained versus the burdens caused."

The court went on:

Under this approach, proportionate treatment is that which, in view of the patient, has at least a reasonable chance of providing benefits to the patient, which benefits outweigh the burdens attendant to the treatment. Thus, even if a probosed course of treatment might be extremely painful or intrusive, it would still be proportionate treatment if the prognosis was for complete cure or significant improvement in the patient's condition. On the other hand, a treatment course which is only minimally painful or intrusive may nonetheless be considered disproportionate to the potential benefits if the prognosis is virtually hopeless for any significant improvement in condition.

Citing Quinlan and Dinnerstein, a very definite dichotomy was drawn by the court between a normal, sentient existence on the one hand, and a "biological vegetative existence" on the other. Using this analysis, and because Mr. Herbert was diagnosed as irretrievably comatose, the court then addressed the question of who should make treatment decisions. It noted that the physicians acted properly in relying on Mr. Herbert's wife, who was identified as the most appropriate surrogate. In fact, Mrs. Herbert was joined by eight of their children in deciding to withdraw the medical treatment. This decision was bolstered by reports that Mr. Herbert had told his wife that he did not want to become "another Karen Ann Quinlan.'

While *Barber* is lauded by medical care providers for affording them a measure of protection from criminal charges, it did not address exposure to civil litigation and its less demanding standard of proof. Indeed, the same physicians who implemented nontreatment decisions in Mr. Herbert's case are currently defending a multimilliondollar civil action brought by Mr. Herbert's spouse, despite her earlier written approval of the actions taken.

While Doctors Barber and Nejdl are being sued for seemingly following a family's decision, other physicians and a hospital in Glendale, California, were recently sued for refusing to follow a patient's and his family's instructions.

In this case, William Bartling, now deceased, suffered from at least three terminal conditions. None of these conditions were certain to cause his death in the immediate future. The hospital's legal counsel was apparently the source of advice to maintain Mr. Bartling's treatment, indicating that to do otherwise could be viewed as active euthanasia. Causes of action in *Bartling* include violations of his constitutional rights (life, liberty, privacy), battery, intentional infliction of emotional distress, and conspiracy.

The Bartling family's approach represents a new aggressiveness in asserting patients' rights to self-determination—an approach also used in another 1984 California case, that of Elizabeth Bouvia, a cerebral palsy victim who unsuccessfully sought a hospital's assistance to effectively starve

herself to death.

On December 27, 1984, a California appellate court rendered an opinion in *Bartling*, 209 Cal. Rptr. 220 (1984), that contributes even more clarity to legal and medical practitioners who are grappling with this issue. While not questioning the motives of the medical care providers in their refusal to withdraw Mr. Bartling's respirator, the court ruled that withdrawal should have been allowed. The court emphasized that

The right of the patient to self-determination as to his own medical treatment . . . must be paramount to the interests of the patient's hospital and doctors. The right of a competent adult patient to refuse medical treatment is a constitutionally guaranteed right which must not be abridged.

Significantly, the court concluded that prior judicial consent to withdraw treatment in such cases is not legally required.

Cases like these, widely reported in the media, illustrate the legal hazards surrounding decision-making about terminal care. What advice can attorneys give clients concerned about possible difficulties surrounding their own eventual dying process?

Planning for Decision Making in Terminal Condition

From both common sense and legal perspectives, it is wise to establish and exercise one's right to plan for incapacity, and a terminal condition. In recent years, this has been done by executing a "living will," which is an excellent expression of desire to die without needless and extraordinary medical interventions. Particularly, however, in states that have explicit legislation addressing this issue, the living will is not enough.

This discussion will focus on California law, because its two legislative enactments have conceptual siblings and progeny across the nation.

Natural Death Act

California's 1976 Natural Death Act, Cal. Health and Safety Code §§ 7185-94, was the first of its kind in the nation. In limited circumstances, an appropriately executed Natural Death Act (NDA) directive legally compels a physician to withhold or withdraw "life sustaining procedures."

The problem with this legislation is how rarely the confluence of all necessary facts occurs. If, for example, a person who is not facing death in the immediate future signs an NDA directive, it is not legally binding on a physician. To be binding, all of the following must be satisfied.

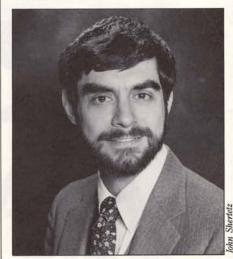
- The patient, a competent adult, must first be "certified" by two physicians as being "terminally ill"—a term defined as meaning that he is expected to die "imminently," which, though not defined in the legislation, is often taken to mean a period of two-to-three weeks.
- The patient must then survive 14 days, still be competent, and sign the directive in the presence of appropriate witnesses.

This has been aptly described as a classic Catch 22. And even if all conditions for the directive are met, the attending physician may still exercise Michael Gilfix (AB'69, JD'73) practices in Palo Alto with Gilfix Associates, a four-attorney legal and consulting group including his wife and fellow Stanford Law graduate, Myra Gerson Gilfix ('76). He also serves on the ethics committee of El Camino Hospital in Mountain View.

His interest in the "right to die" issue grows out of long involvement with the problems of the elderly. In 1973, just after graduating from the School, he founded and became first director of Senior Adults Legal Assistance, in Santa Clara County.

Gilfix has served on the California State Bar Committees on Aging and on Legal Services for Handicapped Persons, and was from 1976 to 1979 a member of the executive committee of the Bar's Legal Services Section.

He and Dr. Thomas A. Raffin of Stanford University Medical Center recently coauthored an article for physicians, "Withholding or Withdrawing Extraordinary Life Support" (Western Journal of Medicine, September 1984), from which some material for the present article was drawn.

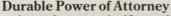


The artwork is from Early New England Gravestone Rubbings, by Edmund Vincent Gillon, Jr. (Dover, 1966), a book in the Stanford Art Library collection.

decision making.

extensive independent judgment with relative impunity.

The NDA directive, then, represents a positive step but stops far short of securing patients' rights in this most difficult area of medical



A much more significant development is the Durable Power of Attorney for Health Care (DPAHC) act, recently adopted in a handful of states, including California, where it passed in 1983 as a new section, § 2412.5, of the Uniform Power of Attorney statute, Cal. Civil Code §§ 2400 et seq. (1981). This measure lets a competent adult do two things.

First, she can name another person—the "attorney in fact"—who will be legally empowered to make medical care decisions for her if she is subsequently incapacitated and unable to do so on her own behalf. Thus, a sur-

rogate decision-maker is effectively appointed without costly, cumbersome, and unreliable resort to the courts for such authority.

Secondly, she can specify the treatment she does or does not want. So long as such instructions are lawful, there are no restrictions on their content. They can pertain to potential complications and treatments for serious medical problems that are known to the principal. For example, a person with

lung cancer may become very sophisticated about her affliction and either authorize or reject particular treatments.

Again, this document would be utilized only in the event of the patient's incapacity. So long as she is able, she retains the legal, albeit sometimes elusive, right to make her own medical care judgments.

While DPAHC legislation does not provide guidelines for appropriate levels for terminal care, it nonetheless does empower

decisions about use or non-use of extraordinary means. When these and other treatment issues are faced, the attorney-in-fact is to act in the principal's "best interest"—a term not, unfortunately, defined in the legislation.

The term, however, was discussed in precisely this context in the 1983 Report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. The Commission recommended considering such factors as relief of suffering, and the chance of restoring or preserving a functioning, qualitative life, with an emphasis on "the possibility of developing or regaining the capacity for self-determination."

Most persons executing a DPAHC indicate, with greater or lesser degrees of sophistication, that they do not want any medical treatments that would serve only to prolong the dying process. Motives include a sense of personal dignity and integrity, concern about needless suffering, and a desire to protect family members by removing such decision-making responsibilities from their shoulders. Another and major consideration is the cost of such care; older persons are particularly concerned that their dying will wipe out the cherished security-the "nest egg"-left their surviving spouses.

Reflective of the conceptual neutrality of this legislation on the "right to die" vs. "right to life" debate is the fact that a person can, as effectively, indicate that all conceivable steps be taken to preserve life. The objective, again, is to give adults the right to determine their course of treatment in advance, not to compel a particular result.

Critical to the ultimate reliability of DPAHC documents is the fact that physicians who rely on them are by statute insulated from criminal prosecution, civil liability, or proceedings that could expose them to findings of unprofessional conduct. To obtain these protections, a physician must believe in good faith that the attorney-in-fact has been properly authorized, and that the decisions being made are consistent with the wishes of the patient, either as expressed in the document



itself, or in some other way.

DPAHC legislation, then, is both reinforcing of the patient's rights and protective of the physician's interests. These ingredients, being inevitably intertwined and interdependent, are necessary to realistic, progressive legislation.

Withholding Nutrition and Hydration

One special problem deserves attention: instances where a person is irreversibly comatose or in a persistent vegetative state, survives independently of any mechanical medical device, but continues to depend on artificial administration of nutrition and hydration.

Are such life-sustaining procedures to be viewed in the same way as more obviously intrusive and/or technological treatments? Will instructions in DPAHCs to withhold such support be followed by physicians, and will such physicians be protected from criminal charges and civil judgments?

This question was addressed in *Barber*, where the appellate court was explicit in viewing artificial nourishment and hydration in the same way as any other life-support equipment. Most physicians and ethicists who have addressed the issue agree, but there is a subjectively credible view to the contrary. Some believe that there is symbolic significance in withholding food and water—the basics of life—and that doing so raises serious social policy issues that must be viewed differently from those of the more clearly mechanical forms of support.

The question was also addressed recently by the New Jersey Supreme Court in *In the Matter of Claire C. Conroy* (N.J., Jan. 17, 1985). Claire Conroy, now deceased, was an 84-year-old nursing home resident with severe physical and mental impairments. Although not in a vegetative or comatose condition, she was severely demented and unable to express any thoughts. She was maintained by a nasogastric

feeding tube. Her closest relative, convinced that removal of the tube would be her wish, sought court approval to do so.

The New Jersey court held that lifesustaining treatment can be removed in cases where it is clear that the incompetent patient would have refused if she were able. The court's remaining analysis is conceptually similar to the "proportionate treatment" test of *Bar*ber. Where patient wishes are not crystalline, it would use the "limited-objective test." Under this, treatment may be withdrawn where there is "some trustworthy evidence that the patient would have refused the treatment," and that the burdens of life, such as prolonged suffering, outweigh the benefits.

In a third scenario, where there is no evidence of what the patient would have wanted, the court explained its "pure-objective test." Here, the court focused on a net benefits vs. net burdens of life inquiry, and discussed such burdens in terms of pain—"recurring, unavoidable and severe"—such that continued life would be "inhumane."

Interestingly, the *Conroy* court ruled that none of these three alternative criteria were satisfied in Mrs. Conroy's case, and that there was no basis for withdrawal of her tube feeding.

Notwithstanding some points of disagreement, then, the most appropriate approach to this issue would seem to be clear. It is most consistent with court decisions, as well as the views of the Presidential Commission referred to above, and would apply the "proportionate-disproportionate" test developed in Barber and Conroy. Potential for improvement, rather than non-salient maintenance, should be paramount in determining the appropriate level of intrusive treatment. Using this approach, it is probable that clear rejection in a DPAHC of nourishment in the event of irreversible coma would be respected.

Lacking such a document, other evidence of the patient's desires must be given great credence, as should the patient's "best interests" as evaluated by the physician and family. Resort to

the courts, however unavoidable in many instances, must be viewed as a last resort.

Conclusion

When all the symbolic, "greater good" rhetoric and constitutional theory are cleared away, the individual human beings—Karen Ann Quinlan, Clarence Herbert, Claire Conroy, and William Francis Bartling—remain. Afflicted with varying medical crises and differing levels of capacity, they each suffered, and with them their families. Assessing each case were teams of physicians who did their best to determine the most appropriate course of medical treatment.

Their cases are by no means exceptional. Every day, dying patients seek dignity, freedom from pain, and relief. They seek to protect their loved ones from the agony of decision making and, it must be acknowledged, from economically devastating medical care costs. Physicians and families must grapple with these same, impossible questions, and find solutions that are as respectful as possible of the differing realities facing each party.

The courts, with admitted reluctance, have recently developed criteria and standards that can be utilized on a case-by-case basis. Far more productively, some legislatures have taken bold steps forward. They have provided a means by which individual wishes can be expressed and, ideally, respected without involvement from the courts.

It now remains for the legal and medical communities to educate the public about such developments as California's Durable Power of Attorney legislation, and, I would urge, to ensure passage of similar legislation in those states that have not yet done so. Nothing can be deemed more basic than the individual's right to control his or her own medical treatment without interference from others with a larger agenda.



The Trouble with Libel Law

Marc A. Franklin Frederick I. Richman Professor of Law

bel law, as presently constituted, may well have a chilling effect on the willingness of the news media—especially small-town papers and broadcasters—to cover controversial issues and engage in investigative reporting. A number of recent court cases have made it clear that the media are vulnerable to increasingly costly libel suits.

The Supreme Court's 1964 decision in *New York Times* v. *Sullivan*—which recognized libel to be a First Amendment as well as a tort problem—did for a time make the media feel more secure. However, the Court's commitment to protecting the media from extensive exposure to liability for libel has become weaker over the past decade.

The problem is not so acute for larger newspapers and television networks, the targets of such recent "megasuits" as those brought by Ariel Sharon and General Westmoreland. As leaders of the media, those defendants are motivated by considerations other than possible libel charges. Their goals are to produce award-winning features, and to attract large numbers of viewers or readers. Their stance, at least publicly, is, "We will not be cowed—we will do what we think is right."

Even the big-city media might run scared, however, if one of those huge

verdicts given in recent years were upheld on appeal. (So far, the largest award upheld on appeal has been in the range of \$500,000.)

The more serious problem at the moment involves small-town media and broadcasters. They are not used to being sued and lack the resources—financial and professional—to stand up to threats of suit. Many, according to surveys, do not have any (or adequate) libel insurance, and even those who do, know that their insurance requires them to pay the first several thousand dollars of legal expenses on each claim filed, before the insurance company takes over.

This vulnerability to lawsuits—even those successfully defended—may inhibit smaller newspapers and broadcasters from aggressive reporting of local issues. Their fear is not so much that they might lose such a case, as that the very fact of being sued, with all the implied costs, could wipe out a small-scale operation.

After all, small-town newspapers don't have to cover litigious plaintiffs or report litigation-sensitive occurrences. They are not in a competitive situation and don't need to look for controversial stories to boost circulation. They can perform their social role by reporting marriages, deaths, and county fairs, without having to go into the question of, say, why the city council acted as it did over a certain land development.

Whenever the media, whether large or small, are reluctant to engage in serious reporting of controversial issues, democracy becomes the loser. We would learn less about our society and our government and be able to make collective decisions less wisely.

Ironically, plaintiffs are also mightily unhappy with current libel law, because they win so few cases, even when the media have made an undeniable mistake. If such an error was not due to negligence (when plaintiff is a private person) or to a deliberate lie or recklessness (when plaintiff is a public person), no recovery is possible.

The problem, then, is that current law serves both sides and the public poorly. The Supreme Court can draw overall lines to protect the press in libel cases, but it cannot provide the necessary fine-tuning. The next step is for state legislatures and courts to take the initiative in making libel law more responsive to the needs of the community, the press, and defamed individuals.

My first suggestion would be to reduce the media's fear of crippling financial exposure by requiring *all* plaintiffs—public or private—who seek damages to meet the rigorous *New York Times* standard for public figures, i.e., that the story be shown to be not only false but that the falsity have been deliberate or have resulted from recklessness. The evidence supporting such a showing must be clear and convincing, and be subject to expansive appellate review.

Secondly, punitive damages have no place in a damage action for libel, which should provide solely for redress. Judges must still exercise control over the compensatory award, because there is so little in the way of solid evidence



to support even compensatory damages.

Thirdly, individuals who simply want their reputations restored after a false defamatory story should have an alternative, nonmonetary means of redress, such as a judicial declaration that his or her reputation had been harmed by a false statement. Fault would be irrelevant, and no damages would be awarded.

Finally, parties should be encouraged to settle their libel disputes—

defendants by being more willing to correct errors, and plaintiffs by accepting offers of space or time to state their side. To help guide the parties away from litigation, in the damage action, the losing party would have to pay the winner's fees. This would encourage plaintiffs to choose the alternative route unless they were fairly confident of being able to prove deliberate or reckless falsity. On the other hand, successful plaintiffs would recover reasonable legal fees in addition to

compensatory damages.

In the alternative action, a losing defendant would likewise pay the assessed attorney's fees.

This kind of balancing adjustment in libel law would go far toward freeing the media—large and small—to pursue their vital informational role without fear of punitive libel suits. It would also provide defamed citizens with a chance to restore their reputations without having to threaten the media with large damage claims.



REHNQUIST HONORED DURING RECORD TURNOUT



Law alumni/ae set a new record last November, with more than 500 in attendance at the class reunions and other Alumni/ae Weekend 1984 events.

The high point of the Weekend was the presentation, to Supreme Court Justice William H. Rehnquist ('52), of Stanford Law School's first Award of Merit.

The Award, which honors a graduate of the Law School who has distinguished himself or herself in public service, will, Dean Ely said, "always be more remembered because of its first recipient."

Justice Rehnquist referred in his brief remarks to "the kind of intelligence-awakening that you get from law school. My mind was being stretched in a way it hadn't been before," he said. "This is the perfect occasion for me to express my appreciation to Stanford Law School for its invaluable contribution to my success. I thank you with all my heart."

Judge Joseph T. Sneed, a former faculty member now on California's 9th Circuit Court of Appeals, participated in the award ceremony, which took place Saturday evening, November 3, during the all-alumni/ae banquet at the Faculty Club.

Attending this and other Weekend activities were alumni/ae from not only the continental United States, Hawaii and Alaska, but also France, the United Arab Emirates, and Zaire.

The Weekend began Friday evening with reunions for the Classes of 1934, 1939, 1949, 1954, 1959, 1964, 1969, 1974, and 1979. The Class of '49, celebrating its forty-fifth year since graduation, gathered again on Saturday for a barbecue before the Stanford-USC football game.

The Saturday morning program featured a brief "State of the School" report by Dean Ely, and talks by three faculty members: John Henry Merryman, on the "covetous neglect" by many countries of indigenous objects of art; Thomas C. Heller, on computer technology and the law; and Robert W. Gordon, on historical changes in the American legal profession.

Members of the venerable Half-Century Club (alumni/ae from classes graduating fifty or more years ago) dined



together Saturday night during the all-alumni/ae banquet, as did the Class of 1944. The evening—with the award ceremony for Justice Rehnquist, a sumptuous Faculty Club dinner, and live dance music—made a festive climax to the Weekend.

A new finale was provided Sunday morning by a four-mile run around the campus, lead by James Madison ('59), and including refreshments in the School's Cooley Courtyard.

The 1985 Stanford Law Alumni/ae Weekend is scheduled for October 11–12, coinciding with the Stanford-UCLA football game. Reunions for the Half-Century Club and classes graduating in years ending in -5 and -0 are being planned. However, alumni/ae of *all* classes will, as always, find a warm welcome.

(1) Honoree Bill Rehnquist '52, with banquet companions Sheila (Mrs. Carl) Spaeth and Joseph Sneed. (2) Warren Christopher '49 during the morning Law School talks. (3) Keith Mann and Mrs. Spaeth, at the Class of '49 reunion. (4) Philip Grey Smith '24 (the earliest class represented), at the pre-game lunch. (5) Sunday morning runners.

PHOTOS BY JOHN SHERETZ













Friedenthal Named Associate Dean

Jack H. Friedenthal, the School's George E. Osborne Professor of Law, became Associate Dean for Academic Affairs on February 20.

Friedenthal's appointment was occasioned by the planned sabbatical leave of Prof. J. Keith Mann. Mann has served in the associate worthy replacement. Thank heaven for both of them."

A member of the law faculty since 1958, Friedenthal chaired the Law School Admissions Committee from 1979 to 1983 and currently serves as Law School member on the University Panel on Laboratory Animal Care.

Professor Jack H. Friedenthal

dean's position since 1961, with two periods as acting dean of the School.

"If ever a leave was wellearned, this is it," said Dean Ely in his announcement of the changes. "Jack's knowledge of the School, plus his abilities to get a lot done in a limited time, make him a He helped found the East Palo Alto Community Law Project and is vice-chairman of its board of directors.

Friedenthal's long record of University service includes ten years (1975-) as president of the Stanford Bookstore and four (1980-) as faculty representative to both the National Collegiate Athletic Association (NCAA) and the Pac-10.

Friedenthal earned his A.B. in 1953 from Stanford and an LL.B. magna cum laude in 1958 from Harvard, where he was developments editor of the Harvard Law Review.

An expert on civil procedure and evidence, he has published extensively, including the widely used text, Civil Procedure: Cases and Materials (with J.J. Cound and A.R. Miller), and Sum and Substance of Civil Procedure (also with Miller). Two additional books are now in press: Civil Procedure (with Miller and M.K. Kane) and Evidence (with M. Singer).

Friedenthal's current scholarly work is on policy underlying evidentiary privileges, i.e. the exemption of spouses from the obligation to testify against each other, and protected communications between lawyer and client, patient and physician or psychiatrist, and confessor and priest.

As Associate Dean for Academic Affairs, Friedenthal deals with Law School faculty and students on all phases of curriculum and standards.

He will also continue teaching, with a course in Evidence this spring.

Friedenthal and his wife, Jo Anne, an attorney, have three children and live on the Stanford campus.

Ambassador Koh Given Ralston Prize

Tommy T.B. Koh, Singapore's ambassador to the U.S. and long-time representative to the United Nations, received the School's Jackson H. Ralston Prize in International Law during a February 1985 visit.

The Prize, which recognizes "original and distinguished contribution by a man or woman to the development of the role of law in international relations," was first awarded in 1977, to Swedish Prime Minister Olof J. Palme.

Recipients are nominated by the Dean of the Law School and selected by a distinguished committee consisting of the University President, Chief Justice of the California Supreme Court, and Secretary General of the United Nations.

President Don Kennedy, who presented the 1985 award with Dean Ely, pointed out that Koh's many and varied achievements entitle him to use any of several distinguished titles: Ambassador (to both the U.S. and Brazil, 1984-); Commissioner (Singapore's High Commissioner to Canada, 1968-71); President (of the Third U.N. Law of the Sea Conference, 1981-82); and Professor and Dean (of the University of Singapore law faculty, 1971-74).

"It is," Kennedy said, "a measure of the man that of all

these titles he prefers simply 'Professor'."

In the first of his two Ralston lectures at the School, Feb. 7, Koh discussed the past accomplishments and future prospects of the United Nations, now forty years old. He called on the United States and the other democracies to "develop an agenda. Damage control is not enough," he declared. "The West should play a more active role."

The current situation in Southeast Asia, ten years after the

Ralston honoree Tommy Koh of Singapore

President Kennedy with Professor Koh



fall of South Vietnam, was the subject of his second lecture, Feb. 12, in which he expressed grave concern over communist Vietnam's domination of Laos and interference in Cambodia. The much-feared "domino effect" is happening, he said, urging the U.S. to make recognition and trade with Vietnam conditional on progress in both internal and external policies.

The texts of both lectures will be published in the Stanford Journal of International Law.

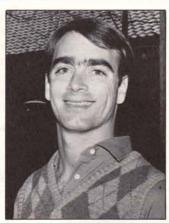
The Ralston Prize was endowed by Opal Ralston in memory of her husband, Jackson H. Ralston, a prominent international lawyer. Members of the Ralston family were honored guests at the lectures and receptions surrounding Professor Koh's visit. □

Dinkelspiel '85 Wins Stanford Service Award

Third-year student Steven Dinkelspiel has been honored with a University Award for Service. The award, conferred by Stanford's Dean of Student Affairs, recognizes students who make exceptional contributions to the University community.

Dinkelspiel received the honor primarily for his fundraising and organizing contributions to the East Palo Alto Community Law Project (EPACLP). The Project, which opened its doors a year ago, provides legal education and counsel to largely low-income, minority clients. It also provides Stanford law students with training in poverty law and other legal matters under the supervision of the office's three staff attorneys.

"I am touched and honored to be given an award which is really a recognition of the tremendous effort put in by the many students who



Steve Dinkelspiel

started the Project and those who are working currently on it," said Dinkelspiel.

Dinkelspiel became involved as a EPACLP fund raiser during his first year of Law School. Today he serves as co-chair of the Project's Steering Committee.

Dinkelspiel was also cited for his role in organizing the Law School's first Holiday Giving Project. The 1984 drive, which focused on hunger relief in Ethiopia and the Bay Area, succeeded in collecting over \$3,500 in just six days.—Reported by Steve Silverman ('86)

Paul Wood



Computer Seminar On Line

The innovative new seminar on Computers and Law, in preparation last spring, became fully operational in September 1984.

Created by Professors Paul Brest, Robert Mnookin, and Thomas Heller, the seminar now involves several practicing lawyers, computer scientists, and computer science graduate students, in addition to twelve law students.

The interdisciplinary group meets weekly in the School's new IBM-sponsored computer lab, where they enjoy access to five IBM advanced technology (AT) computers and a library of software.

The seminar, operating as it does on the frontiers of technology, is intended as an open-ended exploration of various interfaces—actual and potential—between computers and the law

Experts from within and beyond the University are being tapped as guest speakers, with visitors so far including: Prof. Paul Goldstein, an expert on copyright law (re the growing problem of protecting software producers against illegal copying); Rick Giardina, general counsel for MicroPro, publisher of Wordstar software (re the exhilaration and stress of working with a fast-growing, high-risk company); Carolyn

Students Form Law & Tech Group

Several Law students have organized a new group—
Stanford Law and Technology Association (SLATA)—
with Prof. Thomas Heller as advisor. Profs. Paul Brest,
Paul Goldstein, and Robert
Mnookin are also involved.

SLATA's purpose is to promote student and faculty interest and scholarship in such fields as law and computers, law and medicine/biotechnology, and law and techology policy

(both international and domestic).

Most of the participating students—including copresidents Ivan Fong (an MIT graduate) and Michael Sears (Annapolis)—are first-year students with a prior interest in some aspect of law and technology. □

Gandalfo, a self-employed venture capitalist (on how, in just six years since graduating from Boalt Hall, she built a \$2 million investment fund that has provided critical capital for several local high-tech firms); and Doug Englebard, inventor of the "mouse" mechanism used in systems as diverse as the Xerox Star and Apple MacIntosh (re innovative ways to make computers more "user friendly").

Seminar members are also interested in potential applica-



Seminar leaders Brest and Mnookin (center), with students Gary Kaitz '85 (left) and Mark Shull '86 (right)

tions of computer technology (beyond routine word processing and records keeping) for practicing lawyers, particularly the development of "expert legal systems"—computer programs incorporating a particular body of law. Such a system could, according to Brest, not only provide quick answers to legal questions but even print out appropriate forms on demand.

Though the potential applications in law for information technology are yet to be realized, the sense of expectation and excitement among seminar members is almost palpable. Stanford is, as Brest says, "ideally situated" to pioneer in the field, and the new seminar is an important initial step.—

Reported by Brian Anderson ('86)

□

Regulating Land Use: A Handbook

"The options available to communities or citizens who want to implement planned growth policies are numerous," say the editors of a comprehensive new Environmental Law Society publication: Land Use Regulation: A Handbook for the Eighties.

The volume was researched and written from 1982 to 1984 by eight law students led by Project Editors Michael R. Leslie and William B. Dawson (both '85), with Karen Zacharia ('84) as managing editor.

Options described include various kinds of zoning, subdi-

vision regulation, annexation and incorporation, open space acquisition, comprehensive plans, and growth control programs. And for the action-oriented, there is a rundown on relevant national and local (California) agencies and a chapter on such tactics as citizen pressure and lawsuits.

Copies are available for \$10 (plus \$1.50 postage and handling and, in California, \$.45 tax) from the ELS, Stanford Law School, Stanford, CA 94305; telephone (415) 497-4421. □

Between Just Deserts and Tragic Irony

Students of the School trod the boards once again last December, in Tom Stoppard's 1967 hit, Rosencrantz and Guildenstern Are Dead.

The play—an existential takeoff on Shakespeare's Hamlet as seen by the two feckless friends—was given fresh staging by Marc Fajer (Class of '85), whose many other directoral credits include two previous Law School productions, Merchant of Venice and Hot L Baltimore, as well as the Stanford Ram's Head production this spring of Sweeney Todd.

Stoppard's tongue tanglers were nimbly delivered by Paul Haigney ('86) and John Zobel ('85) in the title roles, and by Andy Powell ('85) as the Leading Player. Others in the cast of fifteen made cameo appearances (and disappearances) in their Shakespeare roles—"every entrance," observed one character, being "an exit somewhere else."

Jazz interludes for the production were composed by



Zobel '85 and Haigney '86 as Rosenkrantz and Guildenstern

John Place ('85) and recorded by a combo including Place on piano and alumnus Bob Murphy ('66—see page 49) on soprano saxophone.

It was, all in all, a fine intellectual romp. But then (as the Leading Player said), "Between just deserts and tragic irony, we're left with quite a lot of scope." □



Mariposa Grove, Yosemite National Park

Loan Plan to Help New Grads Enter Public Service

Graduating Stanford Law students are freer to choose public service jobs, thanks to a new "Public Interest Low Income Protection Plan" announced in November 1984 by Dean Ely.

The new program is designed to help eligible graduates meet payments due on educational loans incurred during their many years of schooling.

This will be done by extending new, interest-free loans, which may be partly forgiven, depending on how long the graduate stays in public service.

To qualify, graduates must

be employed in law-related, relatively low-paying, public interest/public service jobs, either in government (excluding judicial clerkships) or with nonprofit organizations qualifying as taxexempt under the Internal Revenue code.

The new program has been established on an experimental, three-year basis. "Whether we will be able to provide this sort of program for ensuing classes remains to be seen," Dean Ely said, "but we are pleased we can do so for the three classes currently on the premises."

ary M. Kaitz



Faculty Notes

Thomas J. Campbell has been invited to present (with Carter antitrust chief Sandy Litvack) the annual Texas Law Review speech, April II, this year entitled "Antitrust: The Carter Administration v. the Reagan Administration." He chaired a lengthy panel (March 6-7) on antitrust use of economics, at the Conference Board in New York City. Since last report he has also addressed the New Mexico State Bar Association (in October, on antitrust in the 1984 Supreme Court term), the American Management Association (November, on vertical restraints in antitrust), and the Hoover Conference on Antitrust (August, with William Baxter and Tom Moore), which he also co-hosted.

Mauro Cappelletti was elected in 1984 to the prestigious Accademia Nazionale dei Lincei ("Academy of Italy"). He also had a new book published—Giudici legislatori? ("Are Judges Legislators?")-and two previous books published in new languages: Access to Justice and the Welfare State (1981, into French); and Judicial Review in the Contemporary World (1971, into Portuguese). He was a guest lecturer in August at the University of Puerto Rico law school and in November spoke at various institutions in Argentina and Brazil, where he gave the closing speech for an international

congress of Latin American and Spanish jurists. A volume will soon be published from the June 1984 Congress of the International Association of Legal Science, of which he was both president and general reporter, on the topic of "Judicial Review of Legislation and Its Legitimacy." Cappelletti has been spending the 1984-85 year as a Fellow of Stanford's Center for Advanced Study in the Behavioral Sciences.

William Cohen delivered a paper, "Is Equal Protection like Oakland? Equality as a Surrogate for Other Rights," at a November 1984 Tulane Law School Colloquium on Comparative Constitutional Law, to be published this spring in the Tulane Law Review. The seventh edition of a text by Cohen and E.L. Barrett, Jr., Constitutional Law Cases and Materials, was published in March.

Marc Franklin spoke at the Libel and Fiction Symposium in New York last October and at conferences in Toronto, at William and Mary, and at the University of San Diego. He also participated, as chairman of a session on tort reform, in the Yale tort law conference last September. An editorial by Franklin appears on page 22.

Jack Friedenthal has in press a treatise on Civil Procedure (with A. Miller and M.K. Kane, West Publishing Co.), as well as a new classroom book on Evidence (with M. Singer). His appointment this February as Associate Dean during J. Keith Mann's sabbatical is reported on page 26.

Lawrence M. Friedman and coauthor Robert V. Percival won the 1984 Western History Association's Robert G. Athearn Award for their book. The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910 (Univ. of N. Carolina Press, 1981). The award is given, according to the citation, "for the outstanding book published on the twentieth-century American West." Friedman's latest book, American Law (Norton, 1984), got a rave review in the Jan. 6, 1985 Los Angeles Times.

Ronald Gilson has been appointed a reporter for the American Law Institute's Corporate Governance Project, with special responsibility (along with Marshall Small of Morrison & Foerster) for Transactions in Control.Last year he also served as a special consultant to the Project. Gilson has recently delivered papers for law and economics workshops at the University of Chicago, Yale, and Georgetown University. And his "Value Creation by Business Lawyers: Legal Skills and Asset Pricing" appeared in the December 1984 Yale Law Journal.

Paul Goldstein went to Paris in November as an invited expert for a weeklong meeting, jointly sponsored by UNESCO and the World Intellectual Property Organization, on rental rights in videotapes and audiotapes. He later (Dec. 12) delivered the inaugural address in the 1985 series of the Washington Program of the Annenberg School of Communications. His subject: "New Strategies for Collecting Copyright Royalties."

Robert Gordon presented the Oliver Wendell Holmes Lectures at Harvard Law School, Feb. 19-20, on the the subject of "Lawyers as the American Aristocracy" (a title inspired by Tocqueville's observations during the first half of the nineteenth century).

William B. Gould IV has been much in demand to speak on the wrongful dismissal issue—the subject of the State Bar ad hoc committee he cochaired last vear. Appearances include talks at the second Oxford University (England) BNA Symposium on Comparative Industrial Relations (Aug. 10), testimony before the California state assembly's Labor and Employment Committee (Oct. 15), talks at the Society of Professionals in Dispute Resolution Conference (Oct. 14-15), and a speech at the American Arbitration Association's Seventh Annual Artibration Day Conference (Nov. 15). Gould also spoke at a conference marking the fiftieth anniversary of the NLRA and the NLRB (Cornell, Oct. 22-23) and another on the Twentieth Anniversary of the Civil Rights Act (Rutgers, Nov. 16-17).

Gerald Gunther has completed the manuscript for the 11th edition, to be published this summer, of his widely used Constitutional Law text. An article by him on "Congressional Power to Curtail Federal Court Jurisdiction" appears in the April 1984 Stanford Law Review. A grant for another work—to be the authorized biography of Judge Learned Hand (for whom he clerked in 1953-54)—has been awarded by the National Endowment for the Humanities. Gunther took part in a nationally televised debate in October on the convention campaign to achieve a balanced budget amendment to the U.S. Constitution. And in January he participated in an AALS symposium on the forthcoming Bicentennial of the Constitution. The impact of the 1984 elections on the Supreme Court was the subiect of talks to Stanford Law alumni/ae at the State Bar meeting in Monterey in September, and at a meeting in December of the San Mateo County Bar (as well as of the article beginning on page 4.)

John Kaplan, for the past year a visiting professor at Harvard, presented the Law Day lecture at the University of Bridgeport, in Connecticut. He spoke on "Defending the Guilty."

J. Keith Mann hopes to complete his service as Special Master in the lengthy *United States v. Alaska* dispute during his sabbatical leave.

John Henry Merryman's 1969 book, The Civil Law Tradition, has just been published in a second edition by Stanford University Press. The first edition, one of the Press's best sellers, has been published in Italian, Spanish, and Chinese translations.

Robert Mnookin has a new book in print-In the Interests of Children: Advocacy, Law Reform and Public Policy (W.H. Freeman, 1985), which examines the use of litigation to affect public policies relating to children. He's also given a number of lectures and papers, including the Ruth Stern Memorial Lecture on "Children's Rights" (for the National Council of Jewish Women, Oct. 29, in Kansas City); "The Uses of Computers in Estate Planning" (to the American Association of Law School's workshop on decedants' estates and estate planning, March 3, Houston); a paper on ethical and legal dilemmas posed by medical decisions concerning handicapped newborns (at the National Conference on the Legal Rights of Mentally Retarded Citizens, March 15, Cincinnati); and a keynote address to a Columbia Law School conference on divorce custody and mediation (April 26, New York City).

A. Mitchell Polinsky has been appointed to a steering committee of the Keystone Center in Colorado, to help organize a series of meetings on reforming U.S.

products liability law. He chaired a session at a Hoover Institution conference in August on antitrust law and economics, and another session in September at a Yale conference on the economics of tort law. And in November he attended a conference at Columbia Law School on new directions in law and economics.

Robert Rabin led a legal theory workshop on his research dealing with the evolution of the administrative state, at the University of Toronto in March. He also serves on a visiting committee evaluating the American Bar Foundation.

Roberta Romano has two new publications: a Stanford Law Review article (April 1984) on "Metapolitics and Corporate Law Reform," and a Law and Economics Working Paper (No. 19) on "Some Pieces of the Incorporation Puzzle."

On a less happy note, Romano, who joined us in 1981 and was promoted to Associate Professor in July of 1984, has accepted a position as Professor of Law at Yale. An increasingly valued component of the School's law and business program, she will be missed.

Byron Sher was reelected in November to a third term in the California State Assembly.

Michael Wald has been honored by the American Psychological Association for "Distinguished Contributions to Child Advocacy." (Colleague Robert Mnookin is the only previous winner of the awardmaking it two-out-of-two for Stanford Law School.) Wald, who was recently named director of the Stanford Center for the Study of Youth Development, has a number of new publications: "Smith v. OFFER: Litigation as a Means of Reforming the Foster Care System" (with D. Chambers, in Mnookin's In the Interest of Children, 1985), "Confidentiality Laws and State Efforts to Protect Abused or Neglected Children" (with Robert Weisberg, Family Law Quarterly, Summer 1984), and "Physician Attitudes Towards Confidential Care of Adolescents" (with Joan Lovett Wald, Journal of Pediatrics, March 1985).

Ammi/ae GATHERINGS

Oregonian graduates and friends enjoyed a convivial breakfast together September 21 in Portland, during the annual State Bar meeting.

Sacramento-area alumni/ae met with Dean Ely and Associate Dean Barbara G. Dray ('72) on November 28 at a reception hosted by Marcy and Mort Friedman ('56). The Friedmans' Carmichael home provided a handsome venue.

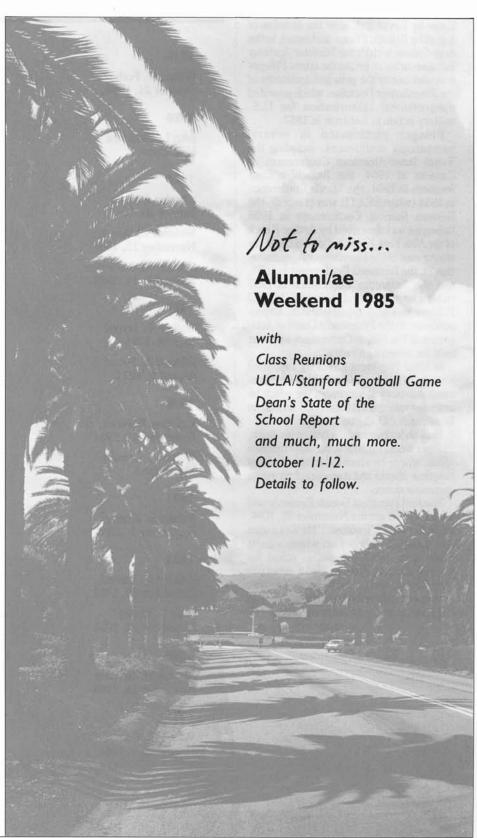
The famed Heard Museum in Phoenix was the site of another memorable reception, this one hosted by Richard Mallery ('63). Deans Ely and Dray were among the delighted guests at the December 10 event, as well as a luncheon for Inner Quad donors held the next day, also hosted by Mallery.

Ely and Dray were in Denver January 10 and 11 for a mile-high gathering arranged by Bill Murane ('57) at the Denver Club. Former Dean Charles J. Meyers hosted a dinner for the two envoys that evening, and Bruce Sattler ('69) arranged a luncheon for Inner Quad donors the next day at the historic Oxford Hotel.

Southern California Inner Quad members were feted March 19 at a reception hosted by Wally Weisman ('59) at Le Bistro in Los Angeles. Deans Ely and Dray were there to thank donors for their generosity this past fund year.

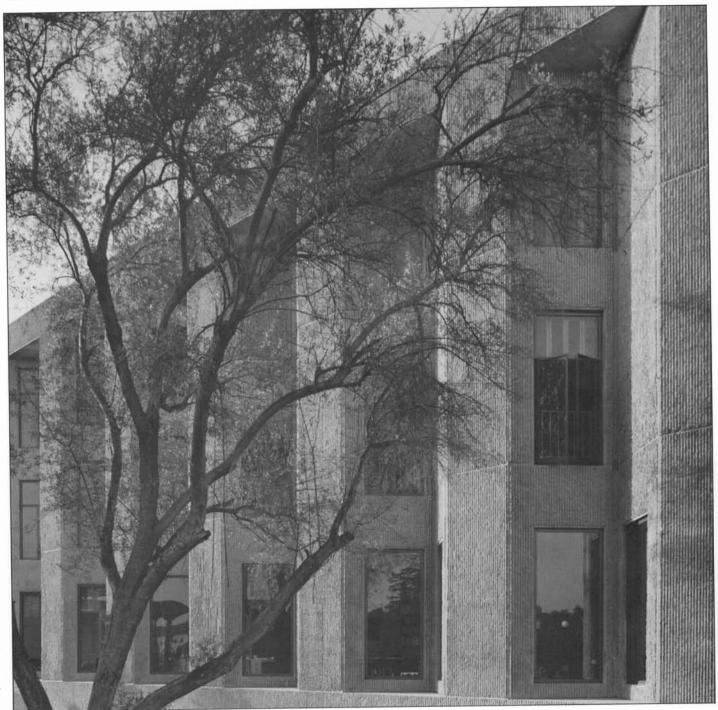
And on the East Coast, the Stanford Law Society of Washington, D.C., invited the Washington chapter of the Business School to join in a luncheon March 27th featuring Law alumnus Max Baucus ('67). Now serving a second term as U.S. Senator from Montana, Baucus talked about the national budget, tax proposals, and trade issues. The event, which was held in the courtyard of J.J. Mellon's, drew over seventy alums of the two Schools, reports D.C. Law Society President Neil Golden ('73).

The biggest Stanford Law alumni/ae gathering of them all—Alumni/ae Weekend—took place on campus the weekend of November 2-3. Supreme Court Justice William Rehnquist ('52) was there to receive a special Award of Merit. See page 24 for details and photos. □



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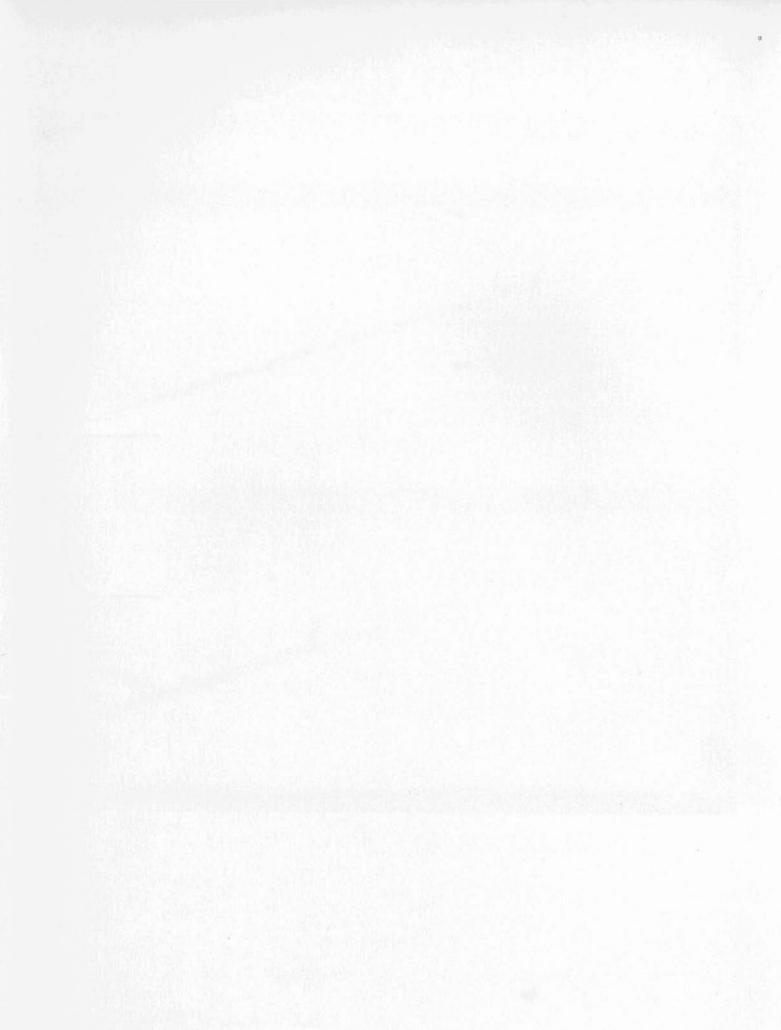
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MAY 2–3 Board of Visitors annual meeting, at Stanford.

MAY 3 Marion Rice Kirkwood Moot Court Competition, in Kresge Auditorium,

Stanford.

JULY 1 Stanford Law alumni/ae reception,

American Bar Association annual meeting, in Washington, D.C.

SEPTEMBER 30 Stanford Law alumni/ae luncheon,

California State Bar annual meeting, in San Diego.

OCTOBER 11–12 Stanford Law Alumni/ae Weekend and reunions, at Stanford.

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