Stanford LAWYER

SPRING 1987 VOL. 21, NO. 2

Ranchers and Lawyers / TV and Politics / Nonverbal Behavior / Volunteer Attorneys / Alumni/ae Weekend

Cover: Five of the more than 500 students whose diversity enlivens the School (see "From the Dean," pages 3–4). Charic Daniels (*left front*), a 1984 Harvard graduate from Houston, Texas, is currently co-chair (with Curtis Floyd) of the Black Law Students Association. Tom Waldo (*center front*) of Dartmouth (1981) and Needham, Massachusetts, serves as president of the Environmental Law Society. Janet Taber (*right front*), a 1982 UCLA graduate from Lomita, California, is president of the Law Association. Jose Silva (*top left*), a 1983 Harvard graduate from Los Angeles, co-chairs (with Manuel San Juan) the Stanford Latino Law Students Association. And Ivan Fong (*top right*), holder of both a B.S. (1983) and M.S. (1984) from M.I.T. and former resident of Gaithersburg, Maryland, is president of Stanford Law Review. *Photograph by Randolph Falk.*

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Editor: Constance Hellyer
Associate Editor: Jo Ann Coupal
Graphic Design: Nancy Singer, Barbara Mendelsohn, Steve Reoutt
Production Art: Linda Ruiz

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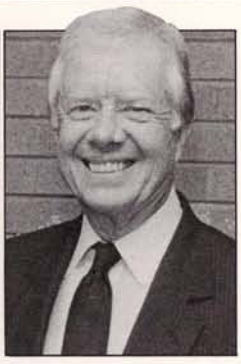

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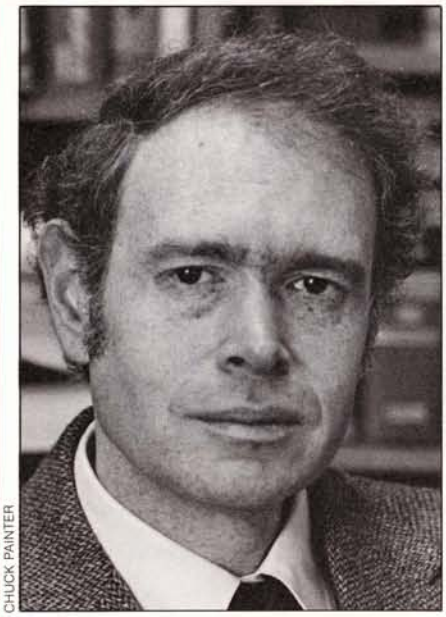
About the (New) DEAN



CHUCK PAINTER

Paul Brest

PAUL BREST, Kenneth and Harle Montgomery Professor of Clinical Legal Education, will become the School's tenth dean on September 1, 1987. A member of the faculty since 1969, Brest is a noted constitutional law scholar and pioneer in the development of new educational approaches. His title as dean will be Richard E. Lang Professor and Dean of the School of Law.

Brest succeeds John Hart Ely, who is stepping down after five years to do more teaching and research. "Paul is an unusually capable, energetic, and good man," Ely said recently. "Under his leadership Stanford Law School can only continue to get better."

Brest was the first choice both of a search committee headed by Prof. Marc Franklin and of the Stanford Law faculty. The committee was composed of Acting University President James N. Rosse; Law professors Robert Rabin, Gerald Lopez, Deborah Rhode, Robert Weisberg, and Thomas Campbell; and two students—Stanford Law Review president Ivan Fong and student body president Janet Taber. The committee considered communications from all elements of the Law School community, including faculty, students, staff, and alumni/ae.

Acting President Rosse, who announced the appointment February 13, called Brest "an outstanding scholar and intellectual leader, who has demonstrated his commitment to education and to Stanford." Accompanying the news of Brest's appointment was an announcement—by Rosse, Acting Provost Robert Street, and Brest—of the creation of a new faculty position in business law.

Brest is known for his searching intellect and creativity. His publications include a widely used casebook, *Processes of Constitutional Decision-Making* (1975, 2d ed., 1983) and numerous law review articles.

An innovative teacher, Brest spearheaded the development of a course introducing first-year students to the legal process and ethics through a series of exercises simulating actual legal work. He was also an early supporter of the East Palo Alto Community Law Project and chair of the Law School evaluation committee that recommended support for the Project. The Montgomery professorship, which he has held since 1983, is the first chair in the country dedicated to clinical legal education.

Brest has in addition been in the forefront of study on computers and the law. One of the first Stanford Law professors to use a computer, he helped establish a seminar on the uses and legal impact of new information technologies.

Brest graduated in 1962 from Swarthmore College as an English literature major, with minors in philosophy and music. His law degree was earned in 1965 magna cum laude from Harvard Law School, where he was Supreme Court and Developments Note Editor for *Harvard Law Review.*

After graduation Brest served for a year as clerk to Chief Judge Bailey Aldrich of the U.S. Court of Appeals, First Circuit, in Boston. He then spent two years, from 1966 to 1968, as an attorney with the NAACP Legal Defense and Educational Fund in Jackson, Mississippi. He served a second clerkship—for U.S. Supreme Court Justice John M. Harlan—in 1968-69.

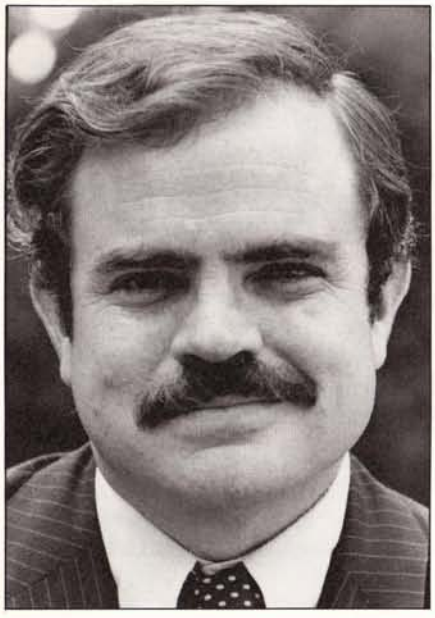
Brest joined the Stanford Law faculty in the fall of 1969, and was named a full professor in 1975. He spent 1977-78 as a visiting professor at Yale Law School, and 1983-84 as a fellow at the Center for Advanced Study in the Behavioral Sciences. In 1980 he received an honorary doctorate of laws from Northeastern School of Law, and in 1982 he was elected to the American Academy of Arts and Sciences.

Brest's chief hobbies are playing the viola and computer programming.

He and his wife, Iris, were fellow students at Swarthmore, which their two children (Hilary, 21, and Jeremy, 17) have also attended. Iris Brest, an attorney, is staff counsel in the office of the vice president and general counsel of Stanford University. □

From the (Old)

DEAN



JANE REED

John Hart Ely

ALMOST MANDATORILY, my final column as Dean will attempt to review the accomplishments of the last five years. (Four and two-thirds years, actually — all hell may break loose this spring and, if I'm lucky, there won't be any record of it.) You won't find any unifying "program" here: I think it's the Dean's job to help the *community* identify its aspirations and assist with their implementation. Neither is this a list of personal accomplishments, since in everything we have done I have enjoyed the collaboration of a supportive staff, faculty, and alumni/ae friends, and all of us in turn have stood on the shoulders of those who have gone before.

FACULTY

■ Since 1982 we have added, laterally from other faculties, Professors Gordon, Lawrence, Lopez, Scholes (and Ely); we lost to other faculties Professors Jackson and Romano. We also lost, to retirement, Professors Barnett, Merryman, and Williams, but made entry-level appointments of Professors Borgersen, Campbell, Greely, and Thompson, and "redeemed" Professors Barton and Baxter from other pursuits. There have thus been some serious losses, but over all we have a significantly strengthened faculty.

■ The number of tenure-track faculty members who are members of ethnic minorities went from two to four (two Blacks and two Latinos), the number of *tenured* minorities from one to four (out of a total of 36). The number of female tenure-track teachers has gone from three to five (though I'm not allowed to tell you who the two new additions are until they are approved by the Board of Trustees). Since 1982 we have also named our first minority and first woman to endowed chairs.

■ Over the past four years our Phleger Visiting Professors have been Nicholas Katzenbach and A. Leon Higginbotham, our Ralston Lecturers Tommy T. B. Koh and Jimmy Carter.

CURRICULUM

■ Our course offerings have continued to change to keep up with emerging societal interests and problems. New courses include Computers and Law, Dispute Settlement: Negotiation and Mediation, The Law and Regulation of Hazardous Waste, High Technology and Law, The Homeless and the Law, Immigration Law, Multinational Investment, Race and Sex Discrimination, and Sports Law.

■ We have concentrated on developing course-and-seminar "sequences," creating more advanced offerings which presuppose that certain foundational courses have already been taken. (For example, there now are offered in the second term of the first year a course in Economics and another in Finance Theory, which are prerequisite to a number of advanced business courses.)

■ The bifurcated first-year curriculum that a generation of you experienced was eliminated in 1983, the strongest features of both Curriculum A and Curriculum B being made available to all students.

■ The number of courses a student is permitted to take "3K" (essentially pass/fail) has been substantially restricted.

■ Awaiting approval is a revision of our academic calendar that would schedule examinations for second- and third-year students before Christmas and additionally provide a week off during the Fall Term for "flybacks" to law firms. (The former has been a widespread and understandable student demand; the purpose of the latter is to minimize disruption of the educational process.)

From the (old)

DEAN

STUDENT BODY

■ We find ourselves increasingly the "school of choice" for those we admit: it is thus now necessary to admit about 40 fewer students than it was four years ago to reach our target class of 170.

■ Statistically the quality of the class seems to have declined slightly over the past few years. The median GPA has gone from 3.79 to 3.63. This apparent decline is somewhat deceptive, however, as we are admitting an older class, whose college records benefit less from "grade inflation," as do the GPAs of those admitted from the more prestigious undergraduate colleges, from which we seem to be drawing a somewhat higher percentage of our class of late. However, our median LSAT score has also declined slightly, and this decline —though hardly precipitous (our median is still at the 95th percentile nationwide) — cannot be comparably explained.

■ In fact, this trade-off was made intentionally — we didn't feel we had a lot left to prove in the "hard to get into" department — as part of a decision three years ago to renew our efforts to admit a more diverse class in terms of background, looking in particular for prior experience on which the applicant could build in law school. Consequently, to take but three indicators: 53% of the class entering in 1982 was straight out of college as opposed to only 28% of the class entering in 1986; the newer class has 18 people over thirty years of age whereas the earlier one had 7; it also has 36 members with advanced degrees, as opposed to the earlier total of 13.

■ Partly because of this tilt toward "older" students (though partly just because of a change in the applicant pool) the percentage of women students during the period in question has gone from roughly one-third to about 45%.

■ Though such things obviously vary from year to year, there has been an upward trend in the number of minority students: the class entering in 1982 contained 19, while the class that entered last fall contained 38.

PUBLIC SERVICE / PUBLIC INTEREST CAREER ALTERNATIVES

■ The East Palo Alto Community Law Project was founded in 1982, substantially by the efforts of our students, roughly half of whom now volunteer their services to the Project. In 1986 the School pledged annual support of $150,000 a year (inflation indexed), which should cover about half the budget, the other half to be raised by the students (who have proved to be very adept fund raisers).

■ The Montgomery Summer Public Interest Program was begun in 1983 as a loan program, and has recently been converted to a grant program.

■ The Cummins Public Interest Low Income Protection Plan — basically a loan forgiveness program — was launched in 1985 on an experimental basis, and has recently been made permanent.

■ For the academic year 1986-87 we have added a full-time Special Assistant to the Dean and Director of Public Interest Programs, principally to advise interested students.

■ We have conducted, annually since 1983, a Public Interest Careers Day, and publish and distribute, biweekly, *Public Interest News Notes*.

■ Starting in 1986, any student wishing to delay making a job commitment in order to explore the public interest market has been permitted to designate one of his or her law firm offers to be kept open until April 15; agreement to this arrangement is a condition of a firm's interviewing at Stanford.

■ In 1984 we initiated a tradition of awarding, at the annual reunion banquet, an Alumni/ae Award of Merit for distinguished public service. The first three recipients were William Rehnquist, Warren Christopher, and Ben. C. Duniway.

FUND-RAISING

■ In dollar terms, the Law Fund has done extremely well during the period in question, going from $731,870 in 1982 — which was higher than any prior year — to $1,009,548 in 1985 and $1,462,906 in 1986. (No one should count on a continuation of this rate of growth, as the 1986 figure must have been substantially affected by revisions of the tax law.) On the other hand, our alumni/ae participation rate remains disappointing, at about 33% (as compared, for example, with Yale's rate of over 50%). This means, of course, that those who do give, give generously, and consequently our average gift size is a good deal higher than that of our competitors.

■ In terms of major, non-recurring gifts — the Law Fund counts only annual gifts — we also have done well during the period in question. The book value of the Law School's endowment has gone from $20,131,889 in August 1982 to $33,842,708 in February 1987. (During the same period, its market value, a more ephemeral figure, has gone from $25,091,394 to $62,234,655.)

■ A number of large gifts are not reflected in endowment either. One conspicuous recent example is the Mark Taper Law Student Center, scheduled for completion in May of 1987.

Despite our overall success, certain emerging areas of academic concern continue to need significant funding at Stanford, particularly Law and Technology, and Alternative Forms of Dispute Resolution.

PUBLICATIONS

■ *Stanford Lawyer* has had a new look and vitality since 1983 (and in the process even picked up an award), as have all the Law School's publications.

■ New publications include the annual *Photo Directory,* which identifies and pictures the entire Law School community (students, faculty, visitors, and staff) and thus helps to bring us closer together; the comprehensive *Financial Aid Handbook,* issued by the Financial Aid Office; *Alumni/ae at Work,* issued by the Office of Career Services; and *Financing the Future of Stanford Legal Education,* a comprehensive statement of the Law School's major gift objectives, published in 1984. Also that year we published the first *Alumni/ae Directory* in ten years.

■ To give the students some credit under this head, too, the *Stanford Law Review* is publishing on time—which it manifestly was not a few years ago—and has in recent years published, inter alia, influential symposia on Critical Legal Studies, The Law Firm as a Social Institution, and The NLRA After 50 Years. In March the *Review* elected the second woman President in its history.

ADMINISTRATIVE REFORM AND COST-SAVING

■ The staffing of the Law School has changed considerably. We have new directors in all but one of our administrative, financial and student function areas. There is also an entirely new set of Associate and Assistant Deans.

■ In 1982 the School was essentially uncomputerized. (Five professors used word processors.) Now the entire secretarial corps save one, and all but seven professors, use word processors, and all administrative offices have integrated computers into their work. The law library has computer access to over 100 different databases; a number of courses and seminars are taught with the aid of computers; we have "on line" (thanks to a generous grant from IBM) a substantial microcomputer facility for instructional work; all the student publications and other activities now use computers; and we have added a word processing center for students in the library and are installing a second one in Crothers.

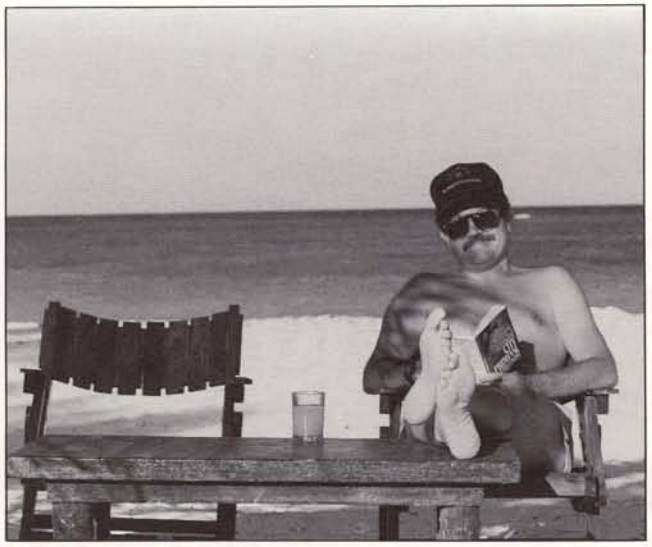
■ The School's budgeting and reporting system has been totally overhauled, so as to reflect more accurately and quickly actual income and expenditures and thus to facilitate planning.

■ Partly thanks to computerization, but partly also because of the good faith and hard work of our staff, administrative expenditures have, in real dollar terms, been significantly reduced. We have two fewer managerial positions than we had in 1982, and although the number of faculty requiring secretarial assistance increased by four, we employ one less faculty secretary. Our overall annual increase in administrative costs has been running between 3% and 4%—well behind inflation—and our administrative salary budget has been reduced by $64,000 (adjusted for standard increases).

■ Success in fundraising and reducing administrative costs has enabled us to devote our resources to functions more central to the School's mission. Faculty salaries have increased 34% between 1982-83 and 1986-87 (as compared with inflation of 20% and university-wide faculty raises of 28%) and faculty research support provided by the School has been increased by 76%. Over the same span student scholarship aid has increased 30% and Law School loans to students 45%—all during a period, I would add, when our ability to rely on central university funds for support has been reduced annually. Our total spendable reserves (most of them highly restricted) have also been increased by 119%, our unrestricted reserves by 76%. However, while these last two sound like impressive percentages, the amounts they represent are less so, and in all honesty we have moved here from a worrisome level to one that qualifies as acceptable but still not entirely comfortable.

I'm not going to be so falsely modest as to say this all would have happened if I hadn't been here—though certainly a lot of it would have. I've worked very hard at this job, and the things we've accomplished are things I care about. However, dynamism has long been the order of the day at Stanford Law School, and while Dean Brest will probably concentrate on other priorities, the overall momentum will be maintained. This is that kind of place, and he's that kind of person.

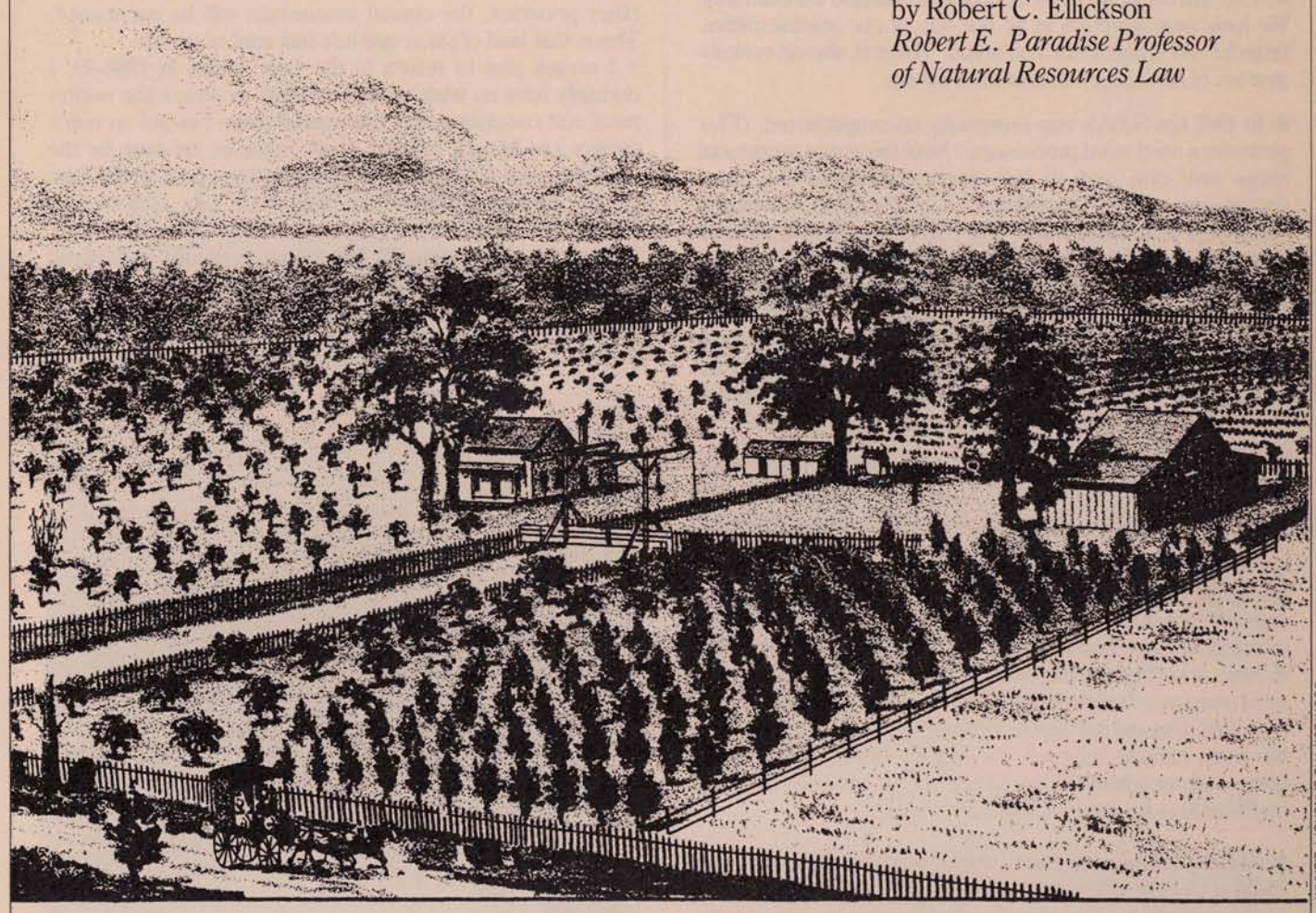
I myself plan to return to the Law School in 1988-89: I certainly have no wish to leave entirely to others the excitement and commitment of this special place I've put so much energy into helping to build. I will, however, be away for the academic year 1987-88. Next spring will be spent as the John Harlan Visiting Professor at New York Law School (my grandfather's alma mater, which is probably how I got the job). Before that, this coming fall, I'll be found in various ports of call around the Indian Ocean and South China Sea—doing a lot of diving, taking a lot of pictures and, yes, pausing occasionally to think deep thoughts about the law. □



Notes from the Field

Why Ranchers Don't Use Lawyers

by Robert C. Ellickson
Robert E. Paradise Professor of Natural Resources Law



LOWE RANCH, 8 MILES WEST OF ANDERSON, SHASTA CO. CALIFORNIA

COURTESY, THE BANCROFT LIBRARY

REGULAR PEOPLE can settle disputes by themselves, without help from lawyers. This is the attitude I found among the ranchers and farmers of Shasta County, California. They do of course sometimes turn to lawyers, for help with such things as property tax exemptions and wills. But to these rural people, hiring a lawyer for help on a problem with a neighbor is virtually unthinkable. Only deviants — termed "odd ducks" or "bad apples" — would do such a weird thing.

There is mounting evidence that my findings in Shasta County are in no way peculiar. Even in urban and suburban areas, most people live their entire lives without hiring an attorney for a nonbusiness dispute other than, perhaps, a divorce. When and why people choose to involve lawyers is a question with implications for attorneys who never see clients in cowboy hats. Before discussing these implications, however, let me briefly describe my Shasta County project and the somewhat unusual research approach I adopted.[1]

Field research, especially interviewing ordinary people about dispute resolution, is an uncommon form of legal scholarship. Traditionally, legal scholars have relied mainly on sources available within the law library — cases, statutes, treatises, and so on.

In the last generation many law professors have ventured beyond the law building to the university library to bring another discipline — say, Economics, Psychology, or Philosophy — to bear on a legal topic. This is the predominant research approach today.

A third form of legal research, the one I chose for the Shasta County study, requires the researcher to leave campus altogether and to gather primary data about how the legal system actually impinges on people's lives. The pioneering field researchers on law were the legal realists of a half-century ago. More recently law-and-society scholars, and some law-and-economics scholars, have been the preeminent field researchers. Stanford is, in fact, a prominent center of empirical legal research — not because our faculty does much of it, but because so little is being done elsewhere. Our standouts include Lawrence Friedman, a dedicated law-and-society scholar, and Ron Gilson and Bob Mnookin, who recently analyzed from a law-and-economics perspective some scattered primary data on how law firms split profits.

Although the current diversity of scholarly modes is perfectly healthy, law professors have in my view been overly prone to engage in armchair speculation. The empirical grounding of legal analysis enriches teaching, enriches scholarship, and enriches legal practice. Having undertaken some field research, however, I now know one reason that scholars shy away from it: It is hard, and harder than it looks.

My field project focused on how residents of a small rural area dealt with a particular low-level problem, namely, damage resulting from the escape of livestock. Why did I choose to travel to Shasta County, California (county seat: Redding) and to study that exotic problem? Why not undertake research on, say, used car sales in Oakland or real estate closings in San Diego?

Of Coase and Cattle

The answer lies in a classic law-and-economics article by Ronald Coase.[2] In this article (one of the most cited of the past generation), the author developed what has since come to be known as the Coase Theorem. The Theorem states that if people have all relevant information and can bargain at no cost, changes in rules of liability do not affect how resources are allocated. In developing his argument, Coase relied on a hypothetical problem of cattle trespass. Suppose, he said, that a rancher ran cattle on one side of a boundary line and that a farmer raised crops on the other side. Would it matter how the law allocated the risk that the cattle might wander across the line and eat the crops?

Coase's surprising answer was that if transactions and information were costless, the content of the legal rule would not affect how many cattle the rancher would decide to run, how many crops the farmer would decide to plant, whether anyone built a fence to separate the two neighbors, and so on. In presenting his theoretical analysis, Coase considered how the parties would respond to two different legal rules: first, one that held the rancher liable for cattle trespass damages; and second, one that placed that risk on the farmer. If there were zero transaction costs, Coase concluded that under either rule the world would look the same. This result is of course quite unintuitive. Most people would predict that ranchers would run fewer cattle if they were liable for cattle trespass. Partly for this reason, the Coase Theorem sparked a theoretical debate that has yet to subside.

I went to Shasta County because there I could obtain an empirical perspective not only on the general Coasean analysis, but also on the exact problem that Coase had chosen for his main example. Historically, different counties in California have had different rules of liability for cattle trespass. No county, however, has seen as much turmoil on this legal issue as has Shasta County. In 1945 the California legislature enacted a statute empowering the Board of Supervisors of Shasta County, and no other county, to vary the rule of liability in different parts of the county. Since then, the Board of Supervisors has in fact exercised this power on dozens of occasions. Shasta County is consequently an ideal laboratory for testing the assumptions underlying Coase's analysis.

Ranchers and Farmers

The primary data for my study was gathered in Shasta County, during several week-long stays in the summer of 1982. Although I searched court records and the like, I spent most of my time on interviews. My approach was more like that of in-depth journalism or anthropology than of econometrics or

sociometrics.

I sought out people who might know how residents settle actual cattle-trespass disputes. I tracked down lawyers with rural clients, all the local judges, insurance adjusters who settle cattle-trespass claims, relevant public officials, and leaders of the Shasta County Cattlemen's Association.

But more importantly, I went out into the countryside and talked with ranchers and hay farmers. As we sat on their porches, often in withering heat, I asked whether they had been involved in trespass incidents, how they had resolved those problems, whether they knew of applicable legal rules of liability, how they had shared fencing costs with their neighbors, and so on. To find out the influence of legal changes, I concentrated these field interviews in an area of the county where the board of supervisors had recently been altering cattle-trespass rules.

My basic finding, as I stated at the outset, is that rural neighbors typically resolve most of their problems beyond the shadow of the law. Yet the story is not quite that simple. In rural Shasta County the law is more likely to reach some sorts of disputes than others. To begin, I will identify two domains where the law is largely toothless.

Fencing expenses. Since 1872, California has had a statute (Cal. Civ. Code §841) that governs how neighbors are to share the costs of building and maintaining boundary fences. But although ranchers and farmers spend a great deal of time and money on fences, almost no one I talked to was aware of this statute. (The only two people who knew about it had not followed it when resolving fence issues with their neighbors.) Instead, rural landowners in Shasta County resolve fence-finance problems according to general norms of neighborliness. These norms call for neighboring large-scale ranchers to split fencing costs fifty-fifty, for ranchers to assume all the costs of fencing common boundaries with small-fry ranchettes, and so on.

How do these norms emerge, and how are they enforced? Rural landowners are enmeshed in complex, continuing relationships. They come together, for example, to burn brush, man the volunteer fire department, attend church, and run 4-H Club events. These interactions enable them to enforce fencing norms through social pressure. They thus are able to cooperate without help from the legal system.

Would suburbanites act any differently? Although their relationships with their neighbors would typically be more attenuated, most suburbanites probably also tend to resolve fence problems without investigating the letter of the law. I never dream of referring to §841 when my neighbors and I work on fence repairs. To "legalize" a fence-finance issue is a hostile act, because it may require a neighbor to hire a lawyer. Good neighbors therefore don't refer to the law, but stick to norms of neighborliness. As the ranchers of Shasta County put it, "When you litigate, only the lawyers make money."

Animal trespass. Yet more dramatic are the findings on how Shasta County farmers and ranchers resolve cattle trespass disputes. Because of recent political flaps, rural residents there are quite aware of where ranchers are legally liable for trespass damages and where they are not. But although they know the law varies, in practice the rights and duties of landowners in trespass cases do not. Today, in all parts of rural Shasta County, a cattleman is morally responsible for the acts of his cattle. Perhaps surprisingly, the norm of cattleman's responsibility trumps any legal rule to the contrary even where the legal rule is widely known. Thus a rancher should always apologize for even a minor trespass, and, if significant damage has been done, do a compensating favor for the victim.

Norms in Action

What if a rancher fails to meet the moral obligation to control cattle? When norms conflict with law, people must resort to nonlegal methods of enforcement. In Shasta County, rural residents enforce their norms through "self-help." Their self-help remedies are many, and they apply them in a measured way, thereby avoiding the escalation of conflicts.

A victim of repeated cattle trespasses should first respond with negative gossip about the careless cattleman. Most rural residents of Shasta County are obsessed with being known as good neighbors. Members of families that have lived in the county for several generations are particularly concerned about their reputations. Gossip is a vital part of social life everywhere, because it is a handy way of disciplining deviants.

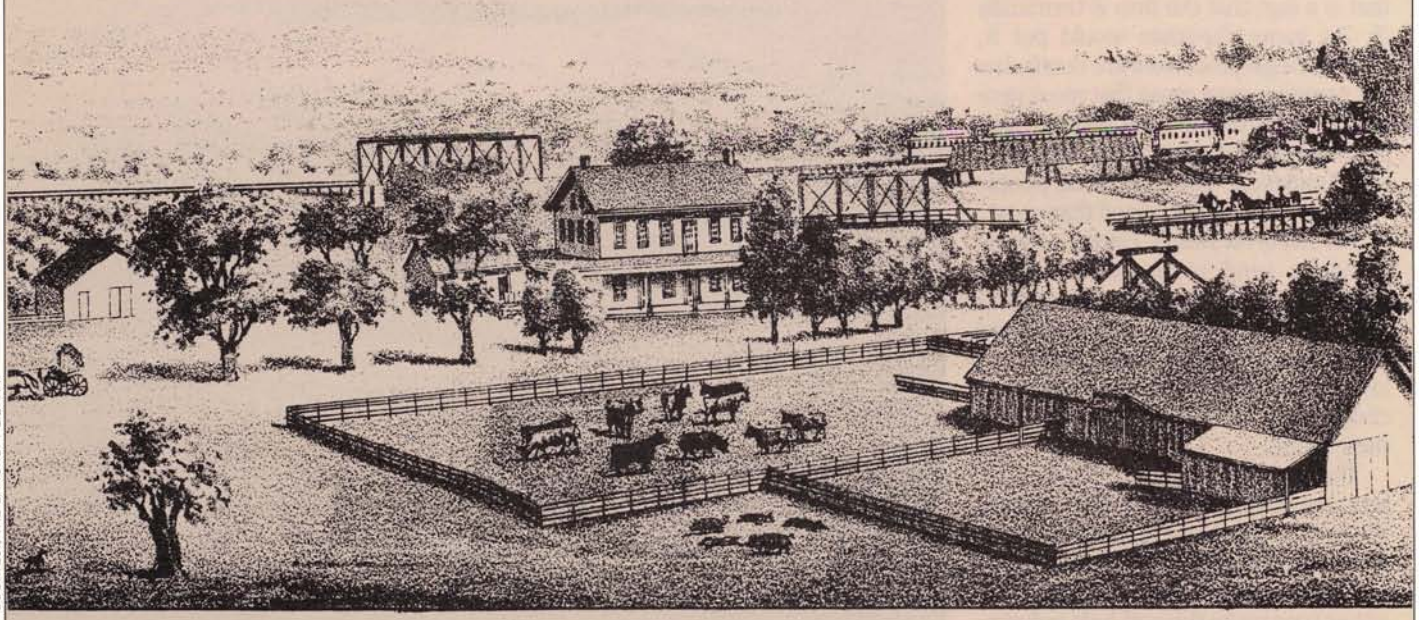
Some deviant cattlemen in Shasta County, especially those with shallower roots, do not fear adverse gossip and therefore require tougher treatment. A somewhat harsher self-help remedy is to herd the trespassing cattle to an inconvenient location.

If that response isn't effective, then trespass victims are ultimately allowed to use violence on the trespassing animals. Wounding with shotguns seems the most common measure. One rancher told me of a more exotic form of self-help he had committed years ago. He had repeatedly been the victim of trespass by a neighbor's bull, the most destructive and dangerous of livestock. The rancher eventually went to a law-enforcement officer and said he wanted to castrate the bull—"to turn it into a steer." When the officer replied, "If you do, I'll have deaf ears," the rancher carried out his plan.

Although all this has a Wild West flavor, I was in fact deeply impressed at how strongly most residents were inclined to cooperate with one another. The informal systems of cooperation among Shasta County residents work so well that they only rarely need to employ self-help sanctions, especially of a violent variety.

Resort to third parties is also minimal. Court and insurance-company records in Shasta County reveal a few claims for trespass damages (but none to recover boundary-fence costs). And although cattle trespass is a frequent

"Although all this has a Wild West flavor, I was in fact deeply impressed at how strongly most residents were inclined to cooperate with one another."



"Mc COY'S RANCH", CLEAR CREEK, (NEAR REDDING) SHASTA, CO. CAL.

COURTESY, THE BANCROFT LIBRARY

event, I discovered only two incidents during the prior decade in which the parties had actually turned to lawyers. According to mainstream Shasta County opinion, the four people involved in these two incidents were eccentrics, not "regular people."

To Use or Not to Use Lawyers

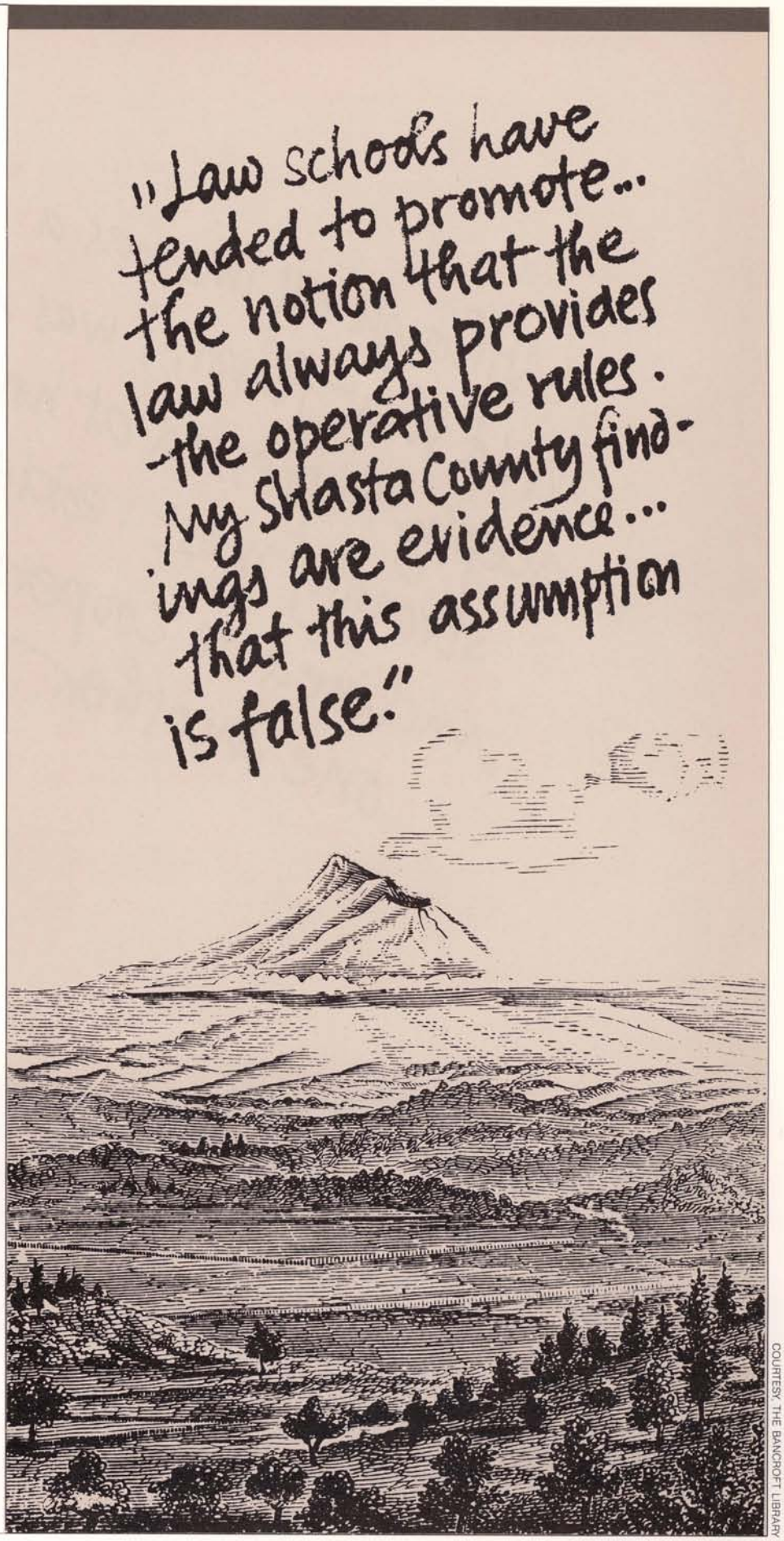
When, if ever, would a "regular person" invoke the legal system against a neighbor? A dispute over water rights, I was frequently told, is something that would warrant going to a lawyer, although I interviewed no one who had in fact done that.

This poses an important theoretical question: Why does the law matter in some domains of life and not in others? Without pretense of great originality, I identify four key variables.

The nature of the relationship between the two parties. Neighboring landowners and others involved in continuing relationships are less likely to use attorneys than those involved in one-shot relationships. A continuing relationship provides reciprocal power. Spouses in a viable marriage are therefore highly unlikely to sue one another. And when partners in a law firm sue one another, that is a sign that the firm is terminally ill. As game theorists would put it, because legal processes are costly, law is a negative-sum game that most people normally try to avoid playing. Litigants are indeed not a random sample of the population, but tend to be people who are less well socialized than most.

The size of the stakes. Cattle trespass damages tend to be small; water rights, by contrast, involve large stakes in a seasonally arid environment such as Shasta County. When small stakes are involved, legal information and procedures are less likely to be worth their costs.

The degree of complexity. Simple matters are easier to resolve without law. There are two basic sources of complexity in disputes: factual ambiguity and rule intricacy. Complexities of either type make the self-help enforce-



COURTESY, THE BANCROFT LIBRARY

ment of norms a more risky business, because the other party may regard the self-help response as excessive. The facts of, say, fence-cost disputes are usually clear, and rather simple rules can be applied to these conflicts. Natural water systems, by contrast, are hard to observe and for sensible management require relatively intricate rules. This complexity tilts water disputes toward legal resolution.

Who ultimately bears the cost. Law is *not* a negative-sum game when the parties can use the legal process to externalize a loss to a third party. For example, when spouses in a viable marriage do sue one another, it is usually because an insurance company will pick up the tab. This is one reason why Shasta County residents are more likely to sue over highway collisions between vehicles and livestock than over a failure to contribute to the maintenance of a boundary fence.

Landlords and Professors

These points suggest that in many contexts the law will be relatively unimportant—in fact, much less important than most law professors and lawyers seem to think.

Take landlord and tenant law. Property teachers currently spend a good bit of class time on the seemingly revolutionary shift during the 1970s from a rule of caveat lessee to the imposition on landlords of an implied warranty of habitability. However, minor latent defects in apartments involve small sums, arise between parties with a continuing relationship typically of value to both, and often involve both simple factual issues and losses that cannot be externalized to third parties. Landlords are usually the best repairers, because they can exploit efficiencies of scale and will consider the entire remaining life of the building when repairing. I therefore surmise that the prevailing norm all along has been that a landlord is responsible for repairing latent defects. Tenants could enforce this norm by threatening to live elsewhere, paying the rent late, and so on. In practice, then, although the advent of a legal implied warranty of habitability may have had an effect in a few contexts, I suspect it mostly simply confirmed an already operative norm of habitability.

Consider also the photocopying practices of university professors. The Copyright Act of 1976 formally imposed significant new legal constraints on the systematic photocopying of copyrighted articles for classroom materials. As far as I can tell, however, this statute has had little or no effect on faculty behavior. We still do not hesitate to photocopy copyrighted articles without permission. We recognize that we are all better off if we have reciprocal liberties to do so. Our norms thus trump the law. We would in fact ostracize a colleague who tried to enforce the Copyright Act against a professor who had photocopied an article. (Books are another matter. Because they bring royalties, academic norms do not permit them to be freely copied.)

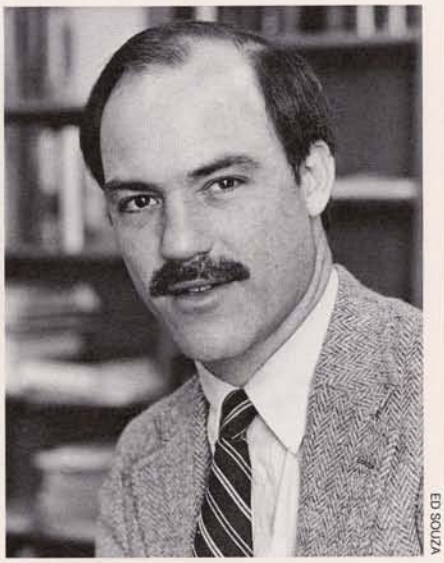
Law schools have tended to promote what Oliver Williamson has called "legal centralism"—the notion that the law always provides the operative rules. My Shasta County findings are evidence, and hardly the first evidence, that this assumption is false. We would better serve our students by helping them to understand where the law has bite and where it doesn't. □

Footnotes

[1]For a more detailed account, see Ellickson, "Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County," 38 *Stanford Law Review* 623 (February 1986).

[2]Ronald H. Coase, "The Problem of Social Cost," 3 *J. of Law & Economics* 1 (1960).

The illustrations for this article are from a booster publication in UC-Berkeley's Bancroft Library, *Shasta County: Illustrated and Described, Showing its Advantages for Homes* (1885). W.W. Elliott of Oakland is identified as lithographer and publisher.



ED SOUZA

Robert C. Ellickson *personally interviewed 73 residents of rural Shasta County—a kind of grassroots experience that he highly recommends. The genesis of the present article was a talk he gave during Alumni/ae Weekend 1986.*

A member of the faculty since 1981, Ellickson was in 1985 named Robert E. Paradise Professor of Natural Resources Law. He teaches first-year Torts and Property and an advanced course in Land Use Controls. Fieldwork by students in one of his seminars was the basis of the Stanford Environmental Law Society Annual Journal for 1982, Land Use and Housing on the San Francisco Peninsula.

Ellickson's publications include a text coauthored with A. Dan Tarlock '65, Cases and Materials on Land-Use Controls *(1981) and numerous law review articles.*

TV

AND THE AMERICAN POLITICAL SYSTEM

IN ITS IMPACT on modern society, television surely equals any technological invention. It has, perhaps more than any other, led directly to profound changes in our political system, changes we may not yet fully understand or even appreciate. What is clear, however, is that television has in less than forty years come to play a commanding role in the election process and the conduct of government. An inevitable result is the weakening of other elements in the system. Such changes—which are not without cost—are the focus of my Phleger lecture. I confess that I am more aware of some of the problems than of how they can be resolved.

by Nicholas deB. Katzenbach
Herman Phleger Visiting Professor of Law, 1986

WIDE WORLD PHOTOS

Chicago, 1968

Let me emphasize at the outset that my concern is not with any improper or undue influence by those who control the television networks or local stations or by those who report the events and issues of the day. Within the limits of the medium itself, I think there is for the most part a genuine effort to report fairly and objectively. My concern is deeper and goes to the effect television has had, and is having, on the more traditional institutions of government.

TELEVISION has, for better or for worse, all but totally replaced the party as the principal conduit between our national government and our citizens. The same is largely true at the state level. (In local politics, however, the role of television is less clear, and parties still play a part, though with diminished impact.)

Television's great power is a result both of its reach and of its intrinsic character as a dynamic, visual medium. It has an unprecedented capacity to permeate virtually every household. Ninety-eight percent of all American homes have at least one television set. What is seen and heard there is the principal source of political knowledge for most citizens and virtually the sole source for probably over half. Unfortunately, knowledge gained solely or predominantly from the tube barely skims the surface of today's complex issues. Television has nurtured, on the broadest possible scale, a political awareness without real political knowledge. One hesitates, in a democracy, to argue against the widest achievable political awareness. But such awareness, when coupled with at best superficial knowledge, is not an unmixed blessing.

Political beliefs rest upon a view of facts and values. These views may be based upon rigorous analysis and the weighing of a multitude of variables, but more often they are not. Television, with its unprecedented ability to transmit dramatic visual images, contributes powerfully to this tendency. Impressions and feelings derived from fast-moving broadcasts readily take the place of thoughtful analysis.

Television has in fact become the medium of truth. It is believed more than any other information source for the simple reason that "seeing is believing." All of us feel in a better position to assess both people and events if we personally experience them, and TV allows us to do so — or at least gives us that illusion. And, ultimately, political power rests on belief.

Let me illustrate briefly. When I was in the Department of Justice, the civil rights movement was at its height. I have no doubt that the success of that movement, the enactment of the 1964 and 1965 civil rights legislation, was the result of television. Scenes such as the voting-rights march at Selma — where white lawmen attacked marchers with tear gas, nightsticks, and whips — were precisely the kind of drama television covers so effectively. No one was prepared to defend such conduct in the full view of the nation.

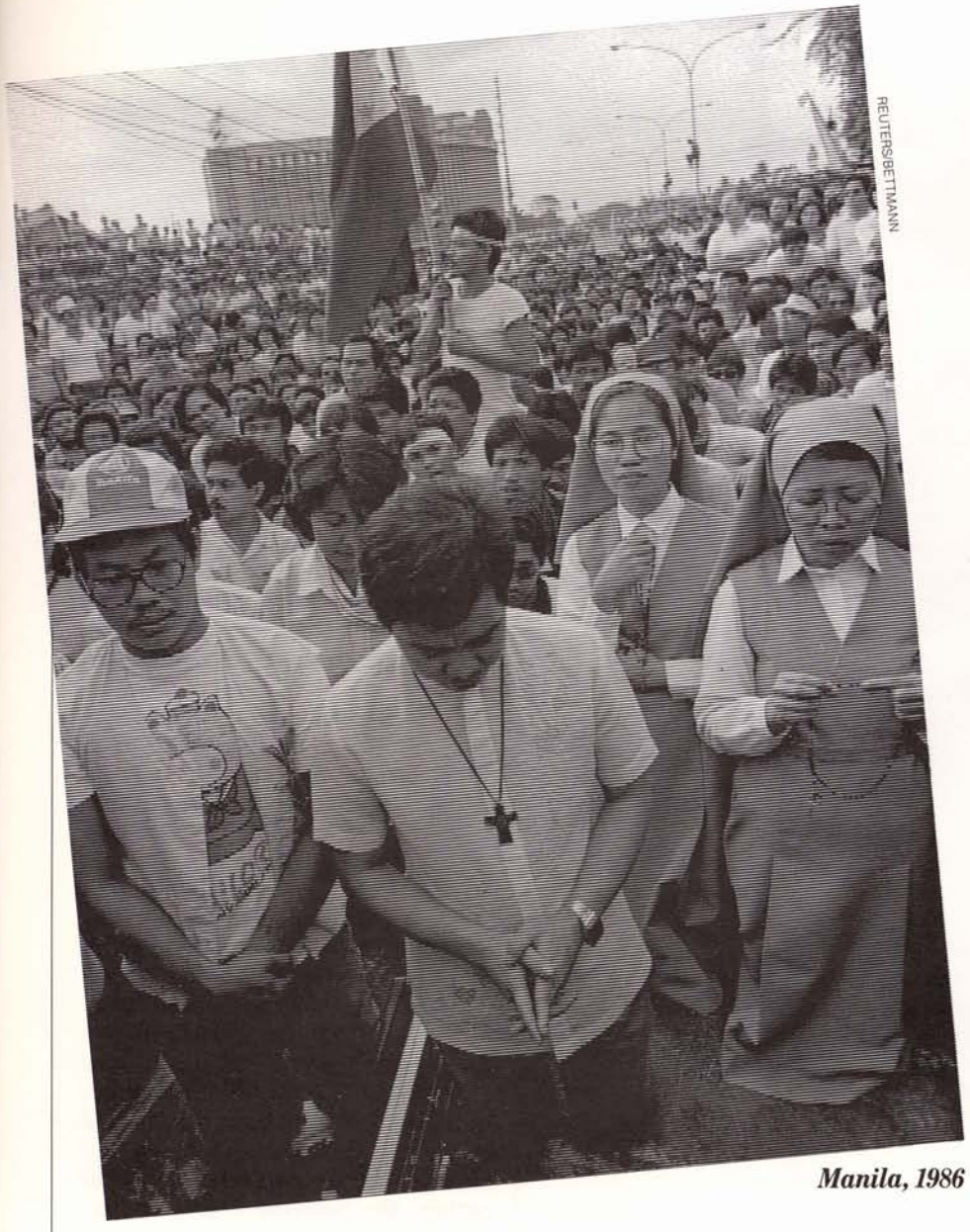
If you still doubt the political impact of viewing such conflicts, consider the backlash generated by the 1965 Watts riots; or the harm to Humphrey's campaign when anti-war demonstrations at the 1968 Democratic Convention seemed to prove Nixon's contention that violence and disorder were rife in the nation; or the boost to Mrs. Aquino's cause when nuns were shown kneeling in the path of army tanks — a scene that affected politics not only in the Philippines and the United States, but in South Korea as well. The South African government's current ban on television coverage of racial disturbances is, therefore, hardly surprising. As South Africa, Vietnam, and the Philippines demonstrate, TV can seriously influence foreign policy in situations where there are pictures with which the general public can readily identify.

Television can also be seen as a factor in Mr. Reagan's prolonged honeymoon with the general public — what Reagan detractors have called the "Teflon presidency." Most of the public seem to have concluded, from seeing and hearing Reagan on television, that he is a decent and sincere man. It follows that his frequent and well-publicized misstatements are the innocent kind you and I might make without intent to deceive. [*Events since this lecture — namely the drop in public confidence surrounding revelations of secret dealings with Iran — appear, after six years, to have broken the spell.* — N.DEB.K.]

JUST HOW television may influence perceptions of a given event can be hard to predict. One factor may be that the camera sees more than the naked eye. The 1984 Reagan-Mondale debate, for example, was thought by many reporters in the auditorium to be a Mondale victory. But to almost everyone watching on television, Reagan appeared the victor. Both groups saw and heard the same debate, but the television audience also saw close-up shots of Reagan's gestures and facial expressions that conveyed a warmth not so easily perceived from a distance.

Another television characteristic with political impact is that it is an entertainment as well as a visual medium. Audience ratings, not educational value, are its god. Political issues (or, for that matter, political antics) with pictorial drama or human interest have enormous editorial advantages. They have emotional appeal and can fit within the time constraints of news segments.

The effect on our political process is readily apparent in the street politics and demonstrations that have accompanied the medium's growth. There is an irony in this. The sit-ins, bus rides, and marches of the 1960s civil rights activists were all intended to make a substantive point by asserting constitutional rights, i.e. to use equally public accommodations and to enjoy the protection of the First Amendment. The beatings and arrests inflicted by local authorities in support of racial discrimination were all real — and only incidentally made effective television. The attention-grabbing ability of such scenes was, however, recognized and adapted throughout the '70s for overtly political techniques. It is now the protestors more than the authorities who act unlawfully. Street politics and dem-



REUTERS/BETTMANN

Manila, 1986

onstrations are made-for-television dramas, and they work by creating suggestive pictures, not by rational argument.

THESE ATTRIBUTES of television—its power to deliver almost instantly an immense audience and its need for dramatic visuals and short, simple explanations—have several major consequences for our political system.

The first is that television tends to set the nation's political agenda. Thus TV-newsworthy events become politically important independent of what politicians may want or of how intrinsically significant the events may be (a fact that terrorists well understand). The converse is also true: what a politician wishes to make important he must convert into an issue capable of attracting the camera.

A second is that television is a medium ideal for single-issue politics. Issues with emotional appeal, that lend themselves to simple, dramatic presentations, are likely to get more coverage and attention than the less popular and less spectacular problems that are the daily grist of government.

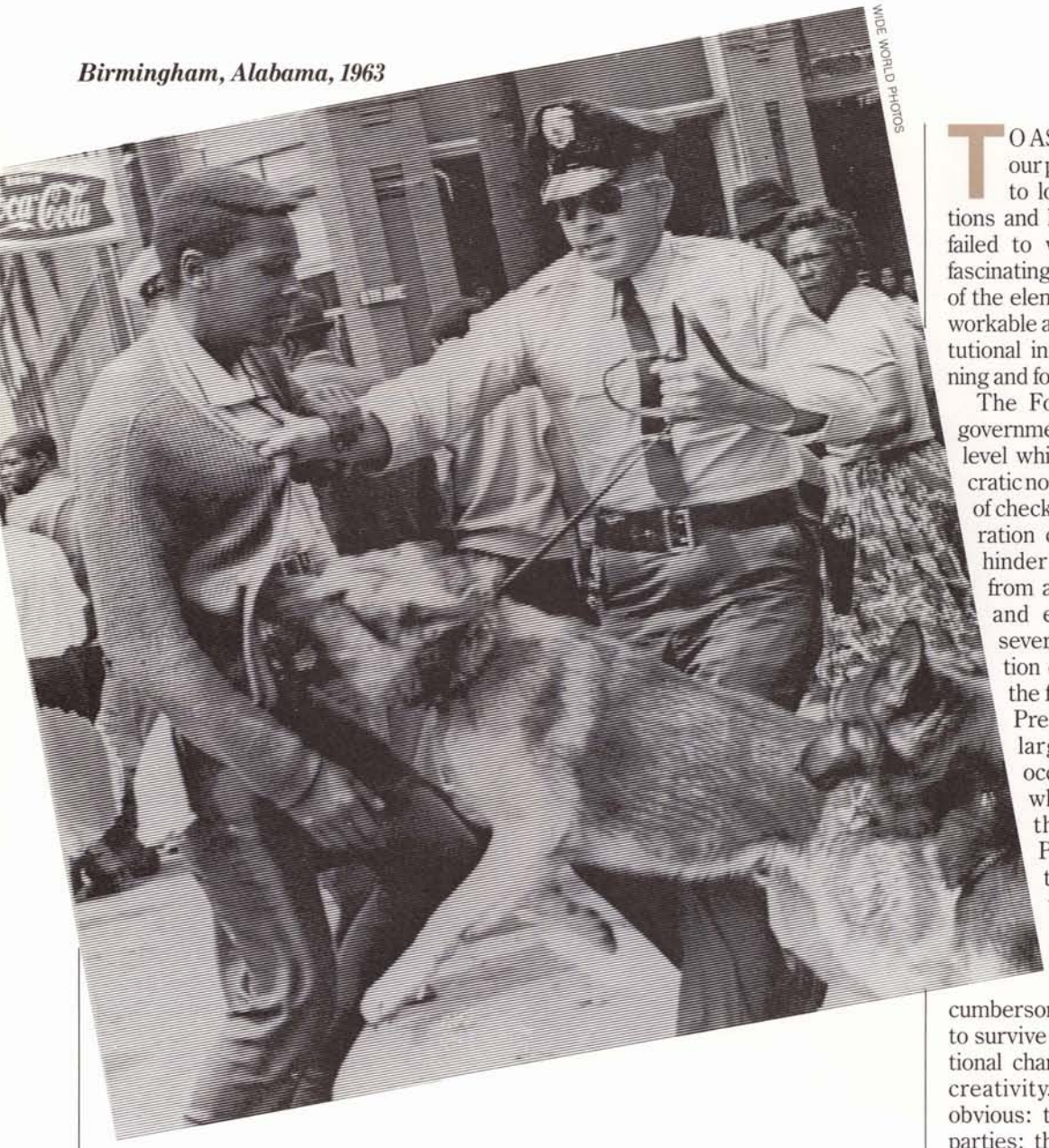
A third consequence is the expansion of the base of political participation through the immediate access television provides. No longer does a candidate for political office have to work his way up through political organizations, which, in the past, only occasionally reached out from their ranks for a candidate for office.

This increased access is not, however, as broad as would seem at first blush. One constraint is financial—the huge expense of almost any campaign in which television is a factor. This tends to limit access to those who are wealthy or who can raise substantial contributions for a campaign. And, for this reason, it also tends to promote single-issue candidates when the issue is one that can attract significant numbers of contributors and money.

Other and related consequences involve changes in the election process. Primary elections have become more important, because it is the ordinary voter who can be influenced by television. Campaigns—especially presidential campaigns—have become prolonged, because voter identification with candidates rather than party is so important. This tends to favor incumbents, both because they can more readily attract money and because they are intrinsically newsworthy.

Finally, television, with its interlocking national networks and local stations, blurs the distinction between regional and national politics. It may focus national attention on regional or even local problems or, similarly, national attention on problems in other countries. It thus tends to promote national solutions, but in a somewhat indiscriminate way—by reason of human interest rather than political merit. Some problems, however, may be better solved at a state or local level. Also, ignorant solutions to complex problems may be better withstood in a decentralized system. In addition, some problems may require an extended time-frame to resolve or even mitigate—and television is indisputably a medium of immediacy.

Birmingham, Alabama, 1963



WIDE WORLD PHOTOS

WHAT A POLITICIAN WISHES TO MAKE IMPORTANT HE MUST FIRST CONVERT INTO AN ISSUE CAPABLE OF ATTRACTING THE CAMERA

TO ASSESS television's impact on our political institutions, we need to look briefly at those institutions and how they have worked—or failed to work—over time. What is fascinating is the extent to which many of the elements that make our system workable are the result of extra-constitutional innovations rather than planning and foresight.

The Founding Fathers created a governmental system at the national level which was neither very democratic nor very workable. The system of checks and balances and the separation of powers was designed to hinder the national government from acting without a consensus, and even then its power was severely limited by the specification of powers delegated to it in the federal system. The office of President was conceived of as largely ceremonial, with its occupant elected by electors who essentially represented the Federation of States. Political power rested with the bicameral Congress, where the two senators from each state were the creatures of state legislatures.

What has permitted this cumbersome governmental structure to survive with relatively few constitutional changes has been our political creativity. I would single out the obvious: the development of political parties; the Supreme Court's arrogation of the ultimate power to interpret the Constitution; and the downgrading of the Electoral College to a group of automatons. This last change, which in effect allows the voting public (though not necessarily a majority) to elect the president, appears to make the national government more democratic, as has the direct election of senators and the extension of suffrage to former slaves and women.

But while less elitist than the Founding Fathers intended, the national government has remained more representative than democratic. Elected officials could not, of course, ignore

their constitutents' views on local matters. But the political system has nonetheless given elected representatives considerable latitude to follow presidential or party leadership on most policy issues, and presidents have often taken the unpopular course where they believed it to be right.

This relative freedom to follow presidential or party leadership has until recently been a function of political parties. While American parties have never enjoyed the ideological cohesion, discipline, or responsibility of parties in a parliamentary system, they have traditionally been the link between citizens and government. And that link has been vital not merely in the election process but in the conduct of government itself. That fact is crucial.

There is no question today that the party structure has been weakened to the point that in elections of the president—and, to only a slightly lesser degree, governors and senators—we have essentially a no-party system. Television has not only helped destroy the political party in such elections, but it has also to a large degree become the substitute means linking citizens to government—a development with vast consequences.

THE DWINDLING of the institution of the political party is alarming because of the unique and balancing role parties have played in our system. Paralleling our federal structure, the parties have been highly decentralized entities operating almost exclusively at a state level. Their purpose has been to control public office by getting candidates who are identified with, and selected by, the party organization elected to office at city, county, state and congressional levels and, every four years, the presidency. Parties have served traditionally (and always with some exceptions) as organizations through which candidates for public office were channeled, which they served, and to which they owed their offices.

Our system of two parties is, of course, the creature of our electoral system—the state winner-take-all requirement coupled with the need for a majority of electoral votes to elect a president. This fact has created the need to maintain a party label across the nation without, of course, any need to insist upon rigorous ideological commitment and conformity. The national party became a loose confederation of state and local party leaders who got together in convention every four years to negotiate the presidential nomination and a platform. They then planned and executed, in collaboration with the candidate, a campaign strategy and mobilized local party members to campaign, raise money, and turn out the vote on election day. Thereafter, so far as national politics was concerned, the parties went largely into hibernation for three years, leaving matters to the President and party leaders in Congress.

While this system provided competition and choice, it did not require sharp ideological differences between the parties, nor, for that matter, did it encourage or require an issue-oriented (on a national basis) or well-informed electorate. There was in fact little ideological cohesion within parties and only modest mean differences between them. It was a system that encouraged compromise and a centrist, often vague, view in which profound ideological differences among members of a party could be ignored, or obfuscated, by the unifying force of the common goal of gaining office. Importantly, there was little opportunity in this system, particularly at a national level, for single-issue politics—and efforts in this regard were normally dealt with and diffused by the party in its platform. Proponents of divisive issues had no place other than the two parties to turn; the third-party alternative was impractical.

This system worked because—despite the Constitution—it permitted quite strong presidential leadership. While party discipline was not strict, it nonetheless existed to a degree—and

(Continued on page 36)

ARNOLD NEWMAN

***Nicholas deB. Katzenbach** is a former Attorney General of the United States (1965-66) and Under Secretary of State (1966-69). He spent the 1986 Spring term at the School as Herman Phleger Visiting Professor of Law. The endowed Phleger lecture he presented April 14 is the basis for this article.*

Mr. Katzenbach's varied and distinguished legal career began at Yale, where he earned his LL.B. (1947) and was editor-in-chief of the law review. He has also been a Rhodes Scholar (1947-49) and, during the Korean War, an attorney adviser in the Office of the General Counsel of the Air Force.

Mr. Katzenbach taught law for several years, as an associate professor at Yale (1952-56) and then professor at the University of Chicago (1956-60). At Chicago, he collaborated with Morton Kaplan on the book, The Political Foundations of International Law.

He was called to Washington in 1961 and, as a member of the Kennedy Justice Department, personally witnessed some of the events referred to in this article. His eight years in government were followed by seventeen (1969-1986) as an officer of International Business Machines Corp., most recently as Senior Vice-President, Law and External Relations, and as a director and member of IBM's corporate management board. In June of last year, he joined the New Jersey law firm of Riker Danzig Scherer Hyland & Perretti.

OFF THE RECORD:

Nonverbal Communication in the Courtroom

by Peter David Blanck '86

Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge. —Judge Learned Hand[1]

THE central importance of the judge in determining the courtroom atmosphere and ultimate fairness of a trial has long been recognized in law. "Atmosphere" is, however, a subtle factor, often not readily apparent from the dry appellate record.

Recent empirical research I conducted with two colleagues (psychologist Robert Rosenthal, Ph.D., and Judge LaDoris Hazzard Cordell '74) indicates that a trial judge's nonverbal behavior—gestures, facial expressions, tone of voice, and general demeanor—might reveal opinions and beliefs about the defendant's guilt or innocence that are at odds with the actual words spoken.

The more obvious nonverbal messages are relatively easy to spot. Any trial lawyer can recount the classic anecdote in which the judge, in addressing the jury, looks at the ceiling and rolls his eyes while saying with sarcasm the otherwise innocuous words: "If, on the other hand, you believe the defendant..."

But the leakage of judge opinion we found tended to be more subtle and, to all appearances, quite unintentional. Our study raises interesting questions for trial judges, counsel, and appeals courts as to just what constitutes a fair trial and how such fairness can be determined.

I cannot at this point suggest answers. But our research may contribute to awareness of the issues and serve as a first step toward developing a methodology for detecting and analyzing nonverbal influence in the courtroom. I hope, also, that our research process demonstrates the potential fruitfulness and relevance of interdisciplinary, social science approaches to the field of law.[2]

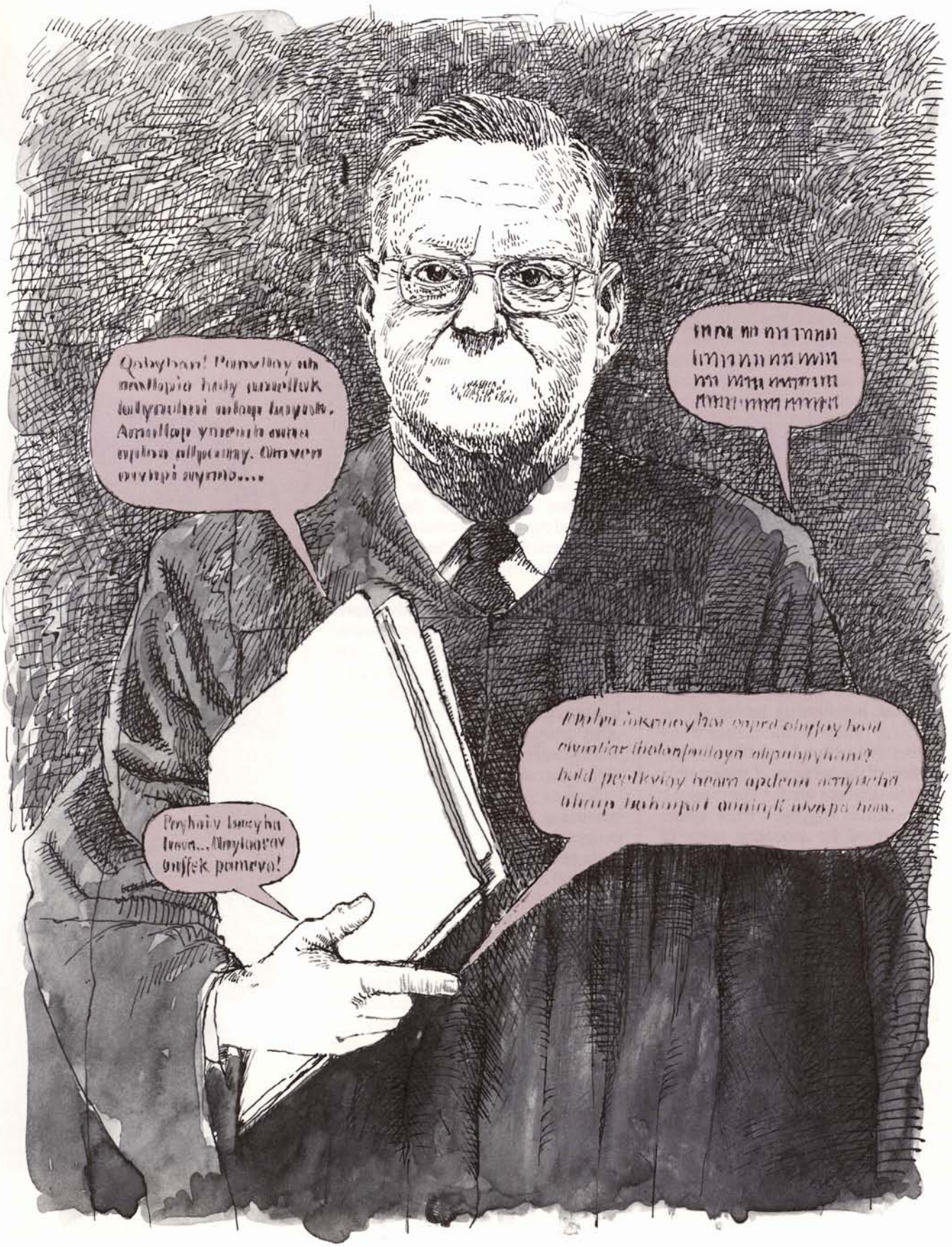
Legal Issues

The U.S. Supreme Court determined thirty years ago that due process requires not only the absence of actual bias by the trial judge toward the defendant, but also that the judge "satisfy the appearance of justice."[3] Appellate courts have nonetheless been reluctant to review a defendant's contention that a trial judge's nonverbal behavior constituted an expression of opinion reflective of bias against the defendant. However, some reversals have been made on these grounds.

In a 1971 Missouri case, the appeals court reversed a burglary conviction on the grounds of "nonverbal" prejudicial error. When listening to the defendant's brother testify that the defendant was at home watching television when the alleged burglary occurred, the trial judge had placed his hands to the sides of his head, shook his head negatively, and leaned back, swiveling his chair 180 degrees.[4]

In another case, reviewed in 1976 in Iowa, a trial court's verdict was overturned because, during the testimony of state witnesses, the trial judge smiled approvingly, nodded his head in agreement, and muttered "Uh-hum." During the testimony of defense witnesses, by contrast, the judge repeatedly expressed disapproval by shaking his head and muttering such negative reactions as "Hump," "Hu," and "No."[5]

Appellate courts have only recently begun to qualify longstanding rules that a trial judge's nonverbal messages are not reviewable on appeal.[6] In 1985, the Georgia Supreme Court declared that in Georgia claims of prejudicial verbal *and* nonverbal error by the trial judge are now reviewable if the appellant has prepared a record that will enable an appellate court



STEVE REQUTT

adequately to review the matter.[7] (How a trial attorney might develop such a record was left open.)

On the other hand, appellate courts recognize that a trial judge should not be an automaton. For example, the judge may, within certain limits, assist the jury in its deliberations by commenting on the evidence. The judge is certainly not required to be a statue that shows no reaction to anything happening in the courtroom. Amusing testimony may draw a smile or a laugh, just as shocking or distasteful evidence may cause a frown or scowl, without per se reversible error being committed. As one appellate court noted: "We have not, and hopefully never will, reach the stage in which a stone-cold computer is draped in a black robe, set up behind the bench, and plugged in to begin service as judge."[8]

There is no bright-line standard for determining the permissible limits of judicial behavior and influence, that is, for separating a trial judge's remarks or behaviors that are appropriate from remarks that might unduly influence a jury. Only recently have some appellate courts tried to balance a number of factors through a "sliding scale" approach. Factors considered include the relevance of the behavior or comment, the overbearing nature of the behavior or comment, the efficacy of any curative instruction, and the prejudicial effect of the behavior or comment in light of the trial as a whole.[9] Our research may eventually suggest a more systematic method for assessing many of these factors.

Before describing our study, I should like to review briefly analogous findings in other disciplines that suggested our line of investigation and provided a basis for the methodology.

Evidence from Other Settings

There exists considerable evidence from social science research of the important influence of nonverbal behavior in settings other than the courtroom. One of the earliest hints that nonverbal cues were involved in the covert communication of beliefs came from the study of "experimenter expectancy effects."[10] In these early experiments, college students designated as "experimenters" asked other students ("subjects") to judge whether a person pictured in a photograph had been experiencing success or failure in life. All "experimenters" were to read the same pattern instructions to their subjects. However, some "experimenters" were led in advance to believe that the person in the photograph was successful, while the other experimenters were told the opposite.

The result: subjects responded in accordance with the beliefs that had been induced in the minds of the "experimenters." In other words, student subjects thought the individuals in the photographs were more successful when that was what the "experimenters" had been led to believe. Because the verbal instructions were identical, these results indicated that the nonverbal components of the interaction led the "experimenters" to *cause* the results they had been led to expect.

In another interesting study, experienced hypnotists read pattern instructions to individuals from one of two groups.[11] The hypnotists had been told that one group contained people of high susceptibility to hypnotic cues and the other group people of low susceptibility. When reading the instructions to subjects supposedly less susceptible, the hypnotists' voices were significantly less convincing. These results were obtained despite the fact that the hypnotists were cautioned to treat their subjects identically and were told that their performance would be tape recorded.

Expectancy effects also emerged in a recent study of psychotherapists that I conducted with Dr. Rosenthal and others.[12] We found that, although the therapists related to their patients in what was overtly (verbally) a very professional and appropriate manner, their nonverbal messages seemed to "leak" hidden expectations concerning patient prognosis. For example, when these therapists talked to resident in-patients (assumed to be more seriously disturbed), their tone of voice was much

STEVE REOUTT

more anxious and hostile than when they spoke with out-patients (presumably less disturbed). The subtle messages received by the in-patients appeared comparatively pessimistic about recovery. We suggested that, in the extreme, such covert messages might operate as "self-fulfilling prophecies," influencing the course of therapy and perhaps the rate of patient recovery.

In similar studies of expectancy ("Pygmalion") effects in the classroom, differences in outcome were not simply suggested but actually documented. Students who had been randomly identified to their teachers as "late bloomers" (on the verge of significant progress) did in fact make such progress; students of equivalent promise who were not so identified stayed on a relative plateau.[13]

In many ways, the trial judge is analogous to the experimenter, hypnotist, psychotherapist, or teacher, and the jury is analogous to the subject, client, or student. Each of the communicators or instruction-givers is in a position of authority and assumed to be more knowledgeable than the listener or subject.

It was against this background of highly suggestive research in other settings that we undertook our study of nonverbal communication in the courtroom.

Our Study of Judicial Behaviors

We set out to explore empirically "the appearance of justice." We realized that during a criminal jury trial, judges, like other human beings, develop beliefs and attitudes about a defendant's guilt or innocence. The development of such beliefs is not necessarily bad; we want humane and concerned judges sitting in our courts. But when these beliefs influence significantly the trial judge's behavior in relating to the jury, often in ways difficult for the defendant to document, defendants might be denied their constitutionally protected right to a fair and impartial trial.

Our hypothesis is that when judges expect a certain trial outcome, they may intentionally or unintentionally behave toward jurors in subtle ways that indicate what they think the outcome should be, perhaps increasing the likelihood of the jury's bringing about that outcome.

We were fortunate that a group of forward-looking California state court trial judges were interested in exploring this hypothesis. These judges opened their courtrooms to our research in the spirit of collaboration. Without them our hypothesis would have remained just that.

We studied 34 trials, each conducted by one of 5 (3 male and 2 female) cooperating judges. These trials involved 331 jurors and 61 attorneys. The charges, all criminal misdemeanors, included vehicular manslaughter, drunk driving, carrying a concealed weapon, assault, and prostitution. The data we collected are of three types:

- Evaluations of the trial by participants (including the judges, jurors, and attorneys), as given in questionnaires administered after each trial.
- Defendant variables, including charges and criminal record, also obtained from questionnaires.
- Videotapes of each judge as he or she delivered final pattern instructions to the jury.

The videotapes of judges were subsequently evaluated by 80 students. These tapes were shown in four different versions so as to isolate the various verbal and nonverbal channels of communication. The versions were: (1) normal video plus audio tape; (2) audio (sound) only; (3) visual (picture) only; and (4) tone of voice only, through a distorted audio recording that allowed rhythm, pitch, and tone to be conveyed but not verbal content.

Thus we attempted to "control" the effects of the judge's particular verbal and nonverbal behaviors from the content of the instructions themselves. We believed also that the use of pattern instructions would further lessen any impact that the verbal content of the jury charge might have on the results.

The information we gathered from the trial participants' questionnaires enabled us to correlate differences in the judges' behavior with such variables as the defendants' felony and misdemeanor criminal history, the judges' expectations for trial outcome, and the actual verdict.

Initial Findings

We sought first to determine whether there are distinct patterns or styles in the ways judges relate to juries, and to describe those styles. In doing so we considered both verbal and nonverbal behavior.

Four general styles emerged: (1) *judicially proper,* in which the judge appears professional, honest, competent, dignified, and wise; (2) *judicial warmth,* characterized by positive regard, concern, and caring toward jurors—a style similar to the client-centered psychotherapists we have studied; (3) *judicially directive,* embodying more "advocate-type" behavior and a nonverbally involved style; and, finally, (4) *nervous,* in which judges appeared hostile, anxious, and uncomfortable in relating to their juries.

While our sample of five judges is too small for general conclusions, our

impression is that most judges probably operate in different styles at different times, depending on the situation or stage in the trial process. Our chief interest, however, was in how their styles, particularly their nonverbal styles, varied in relation to what they knew or felt about the defendant.

In the 34 trials we studied, information about the defendants' criminal histories—information that the jury is ordinarily not allowed to learn unless the defendant takes the stand—did in fact relate to the judges' behavioral style toward juries. Specifically, we found that in the overt, *verbal* channels, these judges were evaluated as more judicially proper, warm, or directive when delivering jury instructions for defendants with relatively more serious composite criminal histories than for defendants with less serious composite criminal histories. The *nonverbal* channels, however, told a different story. When rated without the audio, "content" portion, the judges were perceived as noticeably less judicially proper and directive, and more nervous.

Our results indicate that trial judges may inadvertently "leak" or reveal their underlying feelings, beliefs, or expectations about defendants to juries through nonverbal channels. Whether such covert communication actually influences the decisions of juries is still, however, open to question. Our results on that question, though suggestive, are equivocable. Future researchers will have to replicate many of our preliminary findings and begin analysis of the more complex interactions that are a part of the trial process.

Our own research efforts are now focused on more fine-grained analyses of our data, including analyses of the relationship between judicial behavior and defendant variables, as well as variables in the makeup of the jury, the nature of the charge, and so forth.

We are also closely analyzing the videotapes in an attempt to pinpoint specific nonverbal "microbehaviors" involved in the leakage of judge opinion. These behaviors include the pace at which the judge reads the instructions, the amount of eye contact with the jury, head nods and shakes, hand movements, and fidgeting. We hope such analyses will provide the basis for further investigations of how such microbehaviors—relatively objective behavioral correlates—might be used to identify or distinguish among the four communicative styles of trial judges described earlier. If specific microbehaviors prove to have predictive validity, they could serve as methodological shortcuts both for avoiding and for recognizing potentially prejudicial nonverbal behavior.

Implications

The courtroom is a special place where actions and behavior are scrutinized and controlled by legal rules. Trial judges have a responsibility in a jury trial to avoid any word, action, or behavior that could indicate or "transmit" his or her beliefs, attitudes, or expectations for the defendant's guilt or innocence.

We have explored the longstanding observation that subtle, and perhaps unintentional, judicial behavior might sometimes influence trial processes and trial outcome. We believe that in some cases extremely prejudicial nonverbal behavior might deny defendants their constitutionally protected right to a fair and impartial trial.

The evidence on leakage of judge opinion, via nonverbal channels, is suggestive, especially in relation to the defendant's past criminal record. What is less clear is the impact of such leakage on the jury decision-making process. The fact that this evidence was lacking in our trials may be taken as a positive sign—either that our judges were generally successful in overcoming their personal opinions and maintaining an appearance of impartiality; or that the jurors were able, even when receiving nonverbal indications of the trial judge's expectations or opinions, to arrive at an independent decision.

It is, however, too soon to conclude that covert judicial influence on jury decision making does not occur. The five judges who participated in our study may not have displayed behaviors representative of other judges on the bench. First, they were willing to subject themselves to examination by outsiders. Second, they were aware that they were being scrutinized. They may thus have conducted these trials with exceptional alertness to the dangers of nonverbal leakage of opinion. The fact that we nonetheless found some evidence of leakage puts us in a position to speculate that these findings could be even more robust throughout the larger population of trial judges. Finally, there is the outside evidence of numerous decisions reversed because of judicial behavior, demonstrating that impermissible influence, both verbal and nonverbal, is a real possibility.

What, then, might be the implications of this issue for courtroom process?

Documentation of Nonverbal Behavior

Our findings strongly indicate that the "dry" appellate record often may not accurately reflect the behavioral style of the trial judge in relating to the jury or to other trial participants. Trial lawyers concerned about behaviors indicative of partiality must clearly document the impact of the judge's behavior in ways that will enable appellate courts to determine whether the behavior constitutes reversible error.

Documenting a trial judge's nonverbal behavior for the written trial record may be a particularly difficult task for counsel. Although counsel must object to and document the alleged prejudicial behavior for that behavior to be reviewed on appeal, counsel must be careful not to be overzealous or risk losing credibility in the eyes of the judge or the jurors. Objections by trial counsel to a judge's every nonverbal communication and behavior would soon antagonize any judge.

Unfortunately, in the absence of the videotaping of trials, there is simply no handy tool with which to evaluate a claim that a judge's nonverbal behavior might have biased a trial against the defendant.

For the most part, appellate courts continue to approach the problem on a case-by-case basis by studying and reading the record and paying particular attention to every comment of the judge.

We hope our research approach—using both videotape analysis and questionnaire data—will stimulate development of practical and useful ways for counsel to document the nonverbal behavior of judges, not only in the delivery of pattern instructions but in other aspects of the trial process as well.

Trial Process

There are occasions in some courts when an audiotape of the judge's final instructions has been given to the jury for reference in the jury room.[14] This practice should probably be viewed with caution, given the possibility that the judge's opinions or expectations may be inadvertently revealed in his or her tone of voice, pace of delivery, and verbal emphases.

One way to ensure that pattern instructions for each trial are delivered in a manner free of bias would be to have standard prerecorded videotaped instructions. The judge could make a tape of him- or herself delivering the instructions (or certain sets of instructions) at a time when no specific case was at issue. This tape could be substituted at each trial, as appropriate, in place of the customary "live" delivery of pattern instructions. Such videotaped instructions could even be independently prepared and/or rated as to their nonverbal influence. I hesitate, however, to go too far in sanitizing and dehumanizing the courtroom without more extensive evidence of prejudicial behavior.

A complementary approach might be to educate jurors to the importance of nonverbal communication by judges or, for that matter, other trial participants. Increased awareness may reduce jurors' susceptibility to subtle nonverbal influence. A standardized videotape showing some of the more telltale forms of covert communication could be part of any pretrial training program for jurors.

Finally, another corrective measure might be to examine the pattern instructions themselves. We are now exploring the hypothesis that jurors who have difficulty understanding legal aspects of the instructions are more easily influenced by, or weigh more heavily, nonverbal components of a judge's behavior.

Educating Judges

Alerting judges, jurors, and lawyers to the verbal and nonverbal components of judges' behavior may in itself reduce unintended influence in criminal jury trials. The judicial profession is already studying the role of nonverbal behaviors in courtroom atmosphere. Judicial training centers exist across the country, teaching judges in ways consistent with the procedures suggested here. One example is the California judiciary's program for improving the administration of justice—California Center for Judicial Education and Research (CJER)—which offers courses on effective courtroom communication, complete with videotaping.

Such approaches are not intended to dehumanize judges or to make them overly self-conscious about ordinary gestures and reactions. Certainly, justice is not and never can be a science; human factors are a necessary and desirable part of the process. Neither would justice be served by burdening an already overloaded appellate case docket with large numbers of appeals based on the alleged biasing effects of judges' every nonverbal action. The purpose is instead preventive—to avoid or decrease such appeals.

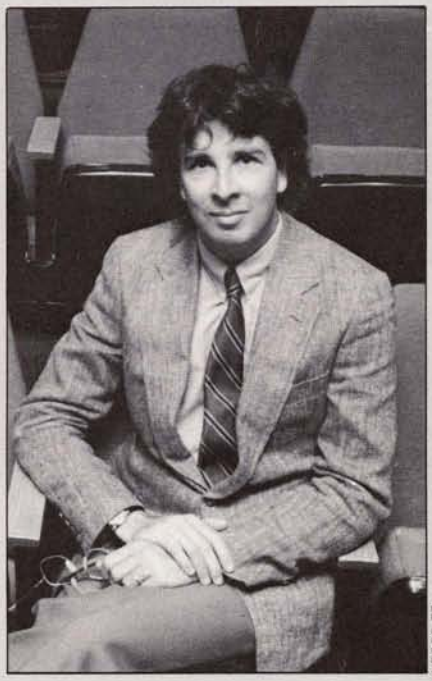
Our goal in this research is straightforward: to help increase general understanding of the importance of nonverbal communication during the trial and to help provide analytical tools for reliably detecting and analyzing any such covert influence. Our main belief is supported by case law, by empirical research, and by discussions with members of the court system: a judge who is nonverbally fair, as well as verbally fair, remains an important condition for satisfying the appearance of justice and the requirements of procedural due process. □

(Footnotes on page 39)

***Peter David Blanck** '86 is trained in social psychology as well as law. Before entering the Stanford J.D. program in 1983, he earned a Ph.D. at Harvard (1982), where he also served a postdoctoral fellowship. The American Psychological Association and Psi Chi gave him their 1981 national award for research excellence for his Harvard doctoral dissertation, "Nonverbal Communication in Children." His several published works include* Nonverbal Communication in the Clinical Context *(co-edited by Drs. Ross Buck and Robert Rosenthal, Pennsylvania State University Press, 1986).*

At Stanford, he was president of Vol. 38 of Stanford Law Review. *The study discussed in this article was first reported in the November 1985 issue—"The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials"—coauthored with Dr. Rosenthal and Judge LaDoris Hazzard Cordell '74 of the Santa Clara Municipal Court.*

Blanck is currently serving as law clerk to Judge Carl McGowan of the U.S. Court of Appeals, District of Columbia Circuit. He is also writing a book on procedural due process and nonverbal communication in the courtroom.



ED SOUZA


PAUL WOOD

ALUMNI/AE WEEKEND

A Time of Laughter and Remembering

THE SCHOOL welcomed some 300 graduates to the campus for a varied menu of activities during Alumni/ae Weekend, October 24-25, 1986.

Members of eleven law school classes—1936, 1941, 1946, 1951, 1956, 1961, 1966, 1971, 1976, and 1981—kicked off the weekend with reunions held at congenial sites on campus, at local restaurants, and the homes of hospitable classmates. Dean Ely and other faculty members were seen at several of the gatherings. And former Professor Sam Thurman '39 was an honored guest of the Class of 1956.

Inner Quad donors, including National Chair Nicholas Counter '66, enjoyed a sumptuous breakfast Saturday morning in the Faculty Lounge, where they received "a thousand thanks" from Dean Ely for their increasing generosity to the School.

Large numbers of Law alumni/ae—many in red garb for the afternoon football game—filled the Moot Courtroom at 9 a.m. for a morning program of talks. Professor Robert C. Ellickson started with a description of his field research among farmers and ranchers in Shasta County (see article beginning on page 6). Dean Ely then provided an update on developments at the Law School (the subject of his more comprehensive report beginning on page 3).

After a break in sunlit Cooley Courtyard, the group reassembled in the Faculty Lounge for a lively "game" of competition and cooperation led by Prof. Robert Mnookin and psychologist Jerry Talley, Ph.D. The exercise, which Mnookin uses as a teaching tool early in his course on Dispute Settlement, proved as engaging to this year's Alumni/ae Weekend participants as it had in 1984 to the Board of Visitors.

The morning ended with box lunches in Crocker Garden. While some graduates lingered to talk, others departed for the Stanford vs. USC football game. The event, which was nationally televised, showed the Cardinal to be a worthy if not victorious opponent of the high-ranked Trojans.

The alumni/ae banquet that evening honored the recipient of the School's third annual Award of Merit for distinguished public service: the late Judge Ben. C. Duniway '31 (see In Memoriam, *Stanford Lawyer,* Fall 1986, p. 76). The Award, which has been given twice before—in 1984 to then-Supreme Court Associate Justice William H. Rehnquist '52, and in 1985 to former Deputy Secretary of State Warren Christopher '49—is not intended to be posthumous, Dean Ely explained. Judge Duniway was in fact "alive at the time we decided he should receive the award and was extremely pleased."

There followed an outpouring of praise for the late Senior Judge of the U.S. Court of Appeals for the Ninth Circuit. "One of the great federal judges during any of our memories," said Ely. "His opinions had a special elegance," observed Robert F. Peckham '45, judge of the U.S. District Court, Northern California. "A uniquely good and, indeed, a noble man," added Stanley A. Weigel '28, judge of the same court. "A valued colleague and mentor," said William A. Norris '54, a member with Duniway of the Ninth Circuit bench. The formal presentation of the Award medal was made by Norris. Judge Duniway's three children—Anne (Mrs. Ray Barker), Carolyn (Mrs. Edward P. Hoffman), and John Mason Duniway—were there to receive it in his stead.

Also present that evening was former Dean Carl Spaeth and his wife, Sheila—a visit described by Dean Ely as "a special treat for us all." The remembering and celebrating continued through the evening, bringing to a close yet another happy Stanford Law School Alumni/ae Weekend.

The 1987 annual gathering will take place Friday and Saturday, October 23-24 (rather than the previously announced Oct. 2-3). Reunions are planned for many of the classes graduating in years ending in -2 or -7. All alumni/ae are warmly invited to attend. □

Top: Vincent Cullinan '36 and Dean Ely.

Right: Assoc. Dean Jack Friedenthal with Judge Harkjoon Paik '61, Carol Peter, and E.E. Clabaugh, Jr. '61.

Below: Assembled alumni/ae in the Harold G. King Moot Court Room.

JO ANN COUPAL

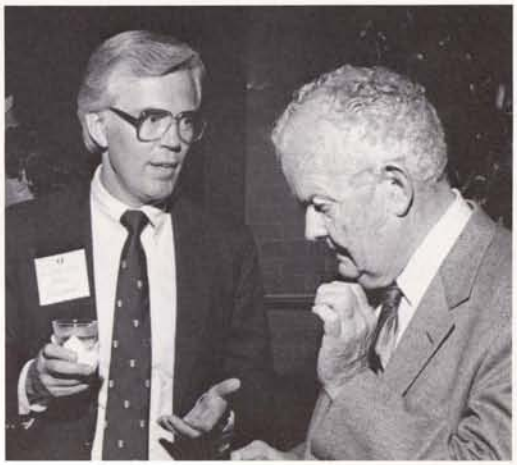
PAUL WOOD

ALUMNI/AE WEEKEND

Above (l-r): Richard Timbie '71, George Olmstead '66, Cindy Rodi, Kenneth Walters '66, and Heather and Sandford King-Smith '66.

Left: Former Dean Carl Spaeth with law school friends.

Below: Assoc. Dean John Gilliland and Bruce Thompson '36.



PHOTOS BY PAUL WOOD

School NEWS

Carter Visits Stanford as Ralston Lecturer

Former President Jimmy Carter provided a long view on the presidency and world affairs in a jam-packed day March 10 as a guest of the School.

Here to receive the Jackson H. Ralston Prize in International Law and deliver the 1987 Ralston Lecture, Carter also gave a press conference, met with students for an hour-long session of questions and answers, and personally greeted some 200 guests at a Hoover House reception.

Carter's Ralston Lecture on "Principles of Negotiation" was, as Dean Ely said in his introduction, "obviously timely—at least the 'negotiation' part." The opportunity to hear the former President's views drew a crowd that filled Kresge's 580 seats and most of two classrooms linked by audiovisual hookups.

Several members of the Carter Administration were present, including Warren Christopher '49, the Deputy Secretary of State who successfully negotiated the end of the earlier Iran hostage case. (Now in private practice, Christopher serves as president of the Stanford University Board of Trustees.) Also on hand was former FDA Commissioner Donald Kennedy, who as University president shared in introducing Carter.

Carter's focus in his Ralston Lecture was, "How a President shapes or forms permanent international law by his own negotiation or diplomacy." Examples from his administration included the Panama Canal Treaty, Salt II, Iran hostage release, Camp David Accords, and the normalization of relations with China. The text of the lecture will be published in a forthcoming issue of *Stanford Journal of International Law*.

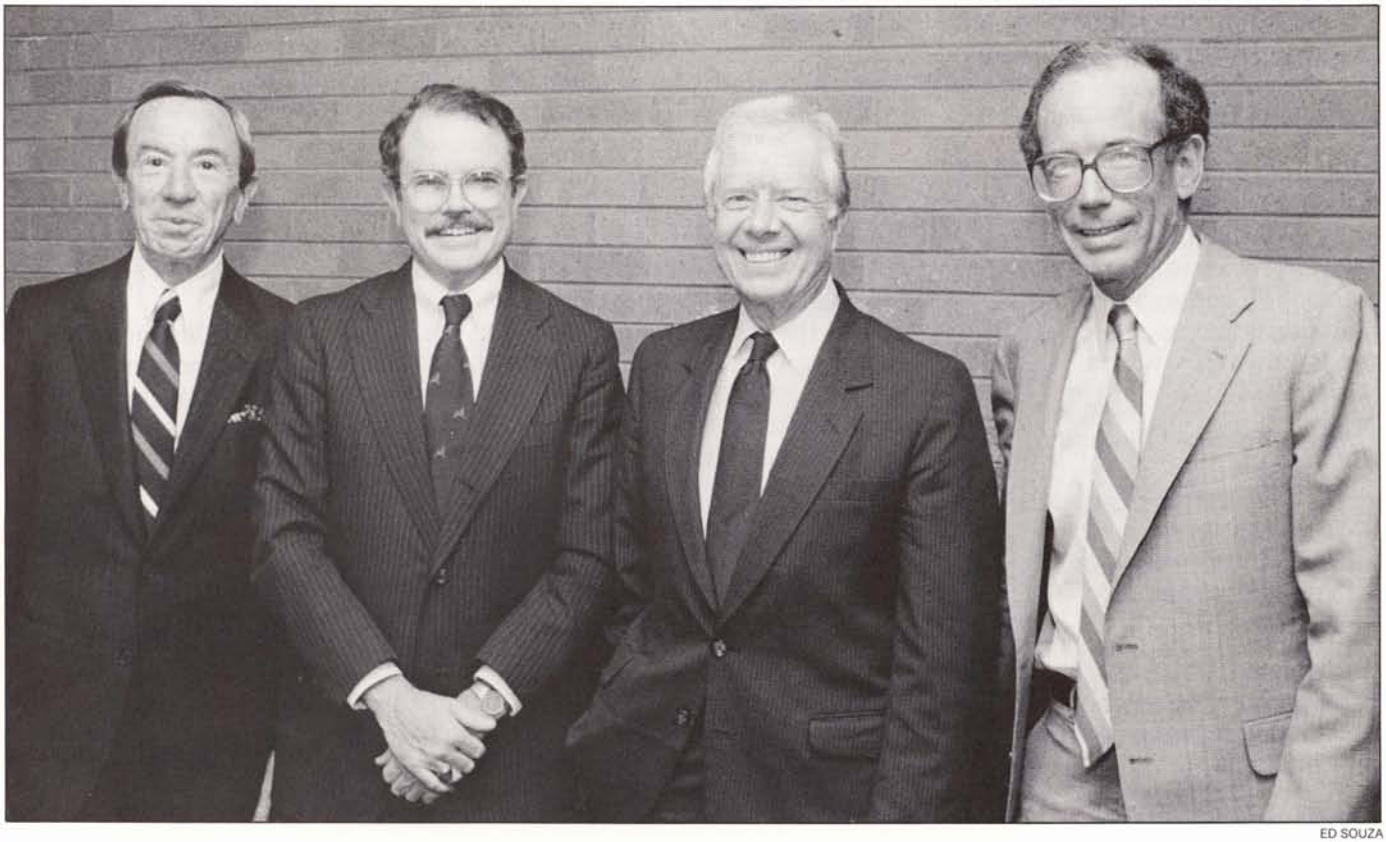
In the course of a day that included three question periods, the former President discussed a wide range of topics. Some excerpts:

Iranscam. "The worst thing that President Reagan is doing to himself is not taking strong and effective action . . .to put all the information out as rapidly as possible."

The Carter presidency. "We never had any problems. . .with credibility. We did have a problem with

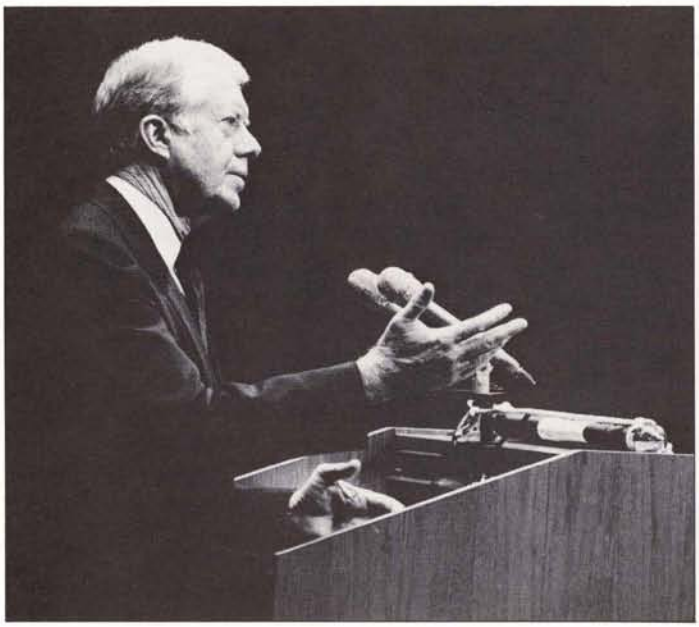
(Continued on next page)

Warren Christopher, John Ely, President Carter, and Donald Kennedy



ED SOUZA

School NEWS



ED SOUZA

Former President Carter, in a Q&A session with students

CARTER VISIT (continued)

effectiveness" (particularly, he noted, in relation to the 14-month hostage crisis).

Contra aid. "A blind alley. I don't think there's any chance the Contras are going to prevail militarily, primarily because they are not prevailing in the struggle for support among the Nicaraguan people."

Threats to peace. "The third world war will start—if anywhere—in the Middle East, because of our commitment to Israel and the Soviet's to Syria. Neither of them can be controlled."

World peace. "The prospects are not hopeless, because most people on earth want peace."

America's role. "[In my administration] negotiation and diplomacy were looked upon as a daily responsibility of the President and Secretary of State. . .The opportunities for peace were kept alive by intimate and eager involvement of the United States."

Divestment vis-a-vis South Africa. "I think the great universities of this country ought to be part of the conscience of our nation."

Student activism. "Our nation's policies [have on occasion been] transformed by students. There is a phase in life that opens up the opportunity for enlightened activism."

Amy Carter. "Quite an independent young woman."

Acquired Immune Deficiency Syndrome (AIDS). "It should be approached with compassion, concern and Christian love."

Human rights. "Our nation has an obligation, as the greatest nation on earth, to promote and defend human rights. When we don't speak from the White House to condemn human rights abuses, the silence reverberates around the world. There's no one else that can take our place." □

The Jackson H. Ralston Prize in International Law was established at Stanford Law School by Opal V. Ralston in honor of her late husband, a noted international lawyer. Ten members of the Ralston family attended the Carter lecture and presentation.

Prize recipients are recommended by the dean of the School and approved by three judges: the president of Stanford University, chief justice of the California Supreme Court, and secretary-general of the United Nations.

President Carter is the third person to be so honored. The Prize was first given in 1977, to Olof J. Palme, former (and subsequent) prime minister of Sweden. Tommy T.B. Koh, ambassador from the Republic of Singapore to the United States and the United Nations, was the recipient in 1985.

The Prize recognizes original and distinguished contributions to the development of the role of law in international relations and in the establishment of peace and justice.

Lucinda Lee '71 Chairs Law Fund

Leading the team of alumni/ae volunteers who helped make 1986 the biggest year in Law Fund history [*see story at right*] is Lucinda Lee '71, the Fund's National Chair. Lee is the youngest person and first woman ever to head the Fund.

For nine years agent of the Class of 1971, Lee chaired the single most successful tenth-year reunion drive ever held on behalf of the School. She was also the first holder, from 1983 to 1986, of the position of Class Agents National Chair.

ELSON-ALEXANDRE

Lucinda Lee '71

Lee has in addition been a prime mover behind the recent rebirth of the San Francisco Law Society and an active member of Stanford Women Lawyers. She was named to the Stanford Law School Board of Visitors in 1981-84 and its executive committee in 1983-84, positions she is also holding during her two-year term (1986-88) as Law Fund chair.

A tax attorney with many publications to her credit, Lee is a partner in Dick, Lee, White & Chalmers of San Francisco. She is married to Jon Parker and has two young children.

Her many and continuing contributions as a volunteer have been recognized with membership in the University's Stanford Associates and a "Block S" pin.

Joining Lee on the Law Fund national team are several other alumni, all seasoned volunteers already among the ranks of Stanford Associates and with five- or ten-year awards for service. They are:

Stephen A. Bauman '59, Vice-Chair for Reunion Giving and Class Agents. In 1985, with Bauman and James Madison as class agents, the Class of 1959 was highest in the total amount given and among the top in other measures of success. Bauman is a partner in Pollard, Bauman, Slome & McIntosh of Beverly Hills.

Kendyl K. Monroe '60, Chair, Sterling Circle (a new University designation replacing the School's long-standing "Dean's Fellows" category for donors of $5000 or more annually). Monroe, a partner of Sullivan & Cromwell in New York, served as that city's Inner Quad chair for twelve years and is now in his second term (1975–78, 1986–89) on the Law School Board of Visitors. His work for the School and University were acknowledged in 1984 with a Stanford Associates Award.

J. Nicholas Counter '66, Vice-Chair for the Inner Quad (focusing on annual gifts of $1000 or more). A volunteer since 1972, Counter is a former member (1981-84) of the Board of Visitors. Professionally, he is president of the Alliance of Motion Picture and Television Producers in Sherman Oaks.

William F. Kroener III '71, Vice-Chair of the Quad program (which encourages annual giving of at least $100). Kroener, a former class agent and regional chair, has been on the Board of Visitors since 1983 and executive committee since 1986. He is a partner with Davis, Polk & Wardwell of Washington, D.C.

James T. Danaher III '58, Law Parents Chair. Himself the father of a Stanford Law graduate (Michael '80), Danaher has served as a class agent, volunteer for the George E. Osborne Professorship Committee, president of the Stanford Law Society for Santa Clara County (1971), and twice as a member of the Board of Visitors (1965-68 and 1972-73). He is senior partner of Danaher & Klynn in Palo Alto.

Nearly two-hundred other alumni/ae—including class agents and regional and area chairs—are also involved in fund raising on behalf of the School. Their

(Continued on next page)

1986 Giving Breaks Records

Gifts to the Law Fund came to $1,462,906 in 1986—up 45 percent over the previous year. When combined with other gifts, the total in 1986 was $2,378,609—an increase of 50 percent in overall giving to the School.

Also up sharply was the average size of gift per alumni/ae donor—to $453, as opposed to $408 the previous year.

Current tax changes, Dean Ely notes, may explain a hefty proportion of the large monetary increases—but not all. This year's increase, though unusually large, follows upon several years of more modest annual increases.

Ely praises the efforts of Law Fund Chair Lucinda Lee '71 and other alumni/ae volunteers [*of which more at left*], Law Fund Director Elizabeth Lucchesi, Associate Dean John Gilliland, and staff.

"We are deeply gratified at the generosity, both in time and money, shown by the School's graduates during the past year," Ely concludes. "This has been a banner year." □

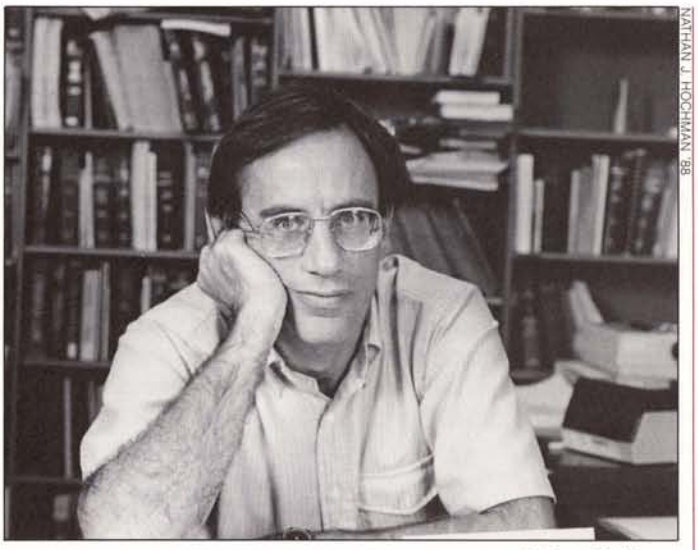
School NEWS

Weisberg '79 Earns Tenure

Robert Weisberg, a former president of *Stanford Law Review* (Vol. 31), was promoted to full professor at the September 9 meeting of the University Board of Trustees. A 1979 graduate of the School, he is one of a very few alumni appointed to its tenured faculty.

"Bob has become a leading figure in two major fields—criminal law and commercial transactions," Dean Ely said in his report to the Trustees. Also cited by the Dean was Weisberg's teaching, which won him the 1985 Hurlbut Award.

Weisberg was already a college professor when he decided in 1976 to enter law school. Holder of a Harvard Ph.D. (1971) in English Literature, he had been teaching both at Skidmore College and at the Great Meadow Correctional Facility in Comstock, New York.



NATHAN J. HOCHMAN '88

Robert Weisberg

At Stanford, he was elected to Order of the Coif, as well as heading the Law Review. His clerkships were with Judge J. Skelly Wright of the U.S. Appeals Court in Washington, D.C., and (in 1980-81) Supreme Court Justice Potter Stewart. He was admitted to the California Bar in 1980 and began teaching at the School in 1981.

Asked in a recent interview about the influence of his English Literature background, Weisberg said: "Although I didn't set out deliberately to take a 'humanities' approach to the law, I do seem to treat legal texts in the way that I treat literary texts—that is, looking at things in a cultural context."

He sees culture as a powerful shaping force in the two fields of law— criminal and commercial—that he has most closely studied.

"The criminal justice system is used, abused, and exploited to solve things that are beyond its capacity to control," he said. "It has come to serve an expressive goal in our society—a way to vent frustration about larger, vaguer things."

Weisberg is particularly concerned with problems surrounding capital punishment, the subject of his article, "Deregulating Death," in the 1983 issue of *Supreme Court Review*. He serves as a consulting attorney to the NAACP Legal Defense Fund, Inc., and is currently involved in a San Quentin death row appeal.

In future research, he would like to explore the relationship between criminal law and the latest findings in criminology.

Of his other specialty—commercial law—Weisberg observed: "There has been an explosion of new law but a paucity of academic analysis, except from a micro-economic view." To understand bankruptcy, for example, "you need to understand the importance of debt and credit in society." He has laid the groundwork in a forthcoming *Stanford Law Review* article tracing the history of bankruptcy law from its beginnings in sixteenth-century England.

Weisberg teaches courses in Criminal Law, Criminal Procedure, Commercial Law, and Secured Transactions. He also chairs the School's Admissions Committee and served on the recent Dean Search Committee.

A native of New York City, Weisberg attended the Bronx High School of Science and City College of New York, where he received a B.A. magna cum laude in 1966 and was elected to Phi Beta Kappa.

He and his wife, Susan, a medical social worker at Stanford University Medical Center, have two children. □

LEE (continued)

names will be listed in the forthcoming 1986 Law Fund *Annual Report of Giving*.

"I'm enormously proud of the 1986 accomplishments of the Stanford volunteers and appreciative of the Law School's very generous graduates and friends," says Lee. "Our next challenge is full support for the next five years of the University's Centennial Campaign." □

Note to '85 and '86 Graduates

If you are employed in government or other public interest jobs (excluding judicial clerkships), are not earning a lot of money, and have educational loans to pay off, you may be eligible for financial assistance under the Law School's Public Interest Low Income Protection Plan. For information, write or call the Financial Aid Office, Stanford Law School, Stanford, CA 94305-8610, at (415) 723-9247. □

Cappelletti Named Shelton Professor

Mauro Cappelletti has been named to the Lewis Talbot and Nadine Hearn Shelton Professorship in International Legal Studies.

A native of Italy, Cappelletti has since 1970 been affiliated with both Stanford and the University of Florence. In 1976 he also became professor at the European University Institute, a graduate research center operated by members of the European Economic Community (EEC).

"Mauro is a world-renowned scholar in the fields of Comparative Law and Civil Procedure," said Dean Ely in a December 9 report to the University Trustees. Cappelletti's leadership positions include the presidencies of the International Association of Legal Science (UNESCO), in 1983-84, and of the International Association of Procedural Law, from 1983 to the present.

A member of the Academy of Italy (Accademia dei Lincei) since 1984, he is also corresponding member of the Royal Academy of Belgium, British Academy, and Institut de France (Academie des Sciences Morales et Politiques). Honorary doctorates have been awarded him by the Universities of Aix-Marseille (1976) and Ghent (1979).

Cappelletti has written or edited some thirty books and numerous major articles, many in English. Several of his works have been translated into other languages as well.

From 1979 to 1985 he directed and contributed to a landmark international project reported in a six-volume series, *Integration Through Law: Europe and the American Federal Experience* (in press). Consisting of over

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Mauro Cappelletti

twenty studies by joint teams of European and American scholars, the project examined similarities and converging trends in the legal systems of Europe, with an eye to how such similarities might lead to integration on a federal model.

He has also studied the availability of legal aid to the poor and the international problems of consumer and environmental protection—subjects of another major project, published in four volumes as *Access to Justice* (1978-79) and *Access to Justice and the Welfare State* (1981).

"Research that looks only backwards is mere erudition," he says. "Research ripens into scholarship only when it is able to fulfill the important task of contributing to a better understanding of present and actual problems and realities—thus providing a rational basis for building the future."

Cappelletti earned his J.D. with high honors from the University of Florence in 1952. That same year he was admitted to the Italian bar and began a three-year clerkship to its national president. In 1956 he received a second Florence degree, the *libera docenza* (in university teaching), having spent two years as a research fellow at the University of Freiburg in Germany.

He joined the faculty of the University of Macerata School of Law in 1957, moving in 1962 to the University of Florence, where he founded and for 14 years directed the Florence Institute of Comparative Law. He has also served as chair of the European University Institute's Law Department, from 1977 to 1979, in 1983, and in 1985-86.

Since 1970 he has spent between one-sixth and one-fourth of his time at Stanford Law School—a proportion that will increase thanks to new arrangements with the Italian government. Beginning in 1985, he also became a senior research fellow at the Hoover Institution.

Cappelletti's primary teaching subject at Stanford is Comparative Law, with other areas being Comparative Constitutional Law, European Community Law, Access to Justice, and Jurisprudence.

Joining him in California is his wife, Carla Pieraccini, who holds a doctorate in history of arts. Their daughter, Matelda, is a student at the University of Florence. □

The Shelton Professorship in International Legal Studies was established in 1972 with gifts from Talbot Shelton (AB '37) and funds from the Ford Foundation. Shelton, a 1940 Harvard Law School graduate, is a former first vice-president of Smith Barney, Harris Upham & Co., New York investment bankers.

An active and generous alumnus, he has twice served on the Law School's Board of Visitors (1970-73 and 1983-86), and is a member of the School's Major Gifts Committee, a Stanford University Associate, and member of the Alumni Association executive board.

The Shelton Professorship is named in honor of his parents. Shelton has also recently established a loan fund providing financial aid to law students.

Professor Cappelletti is the second holder of the Shelton Professorship. The first, Victor H. Li, is now president of the East-West Center in Hawaii.

School NEWS

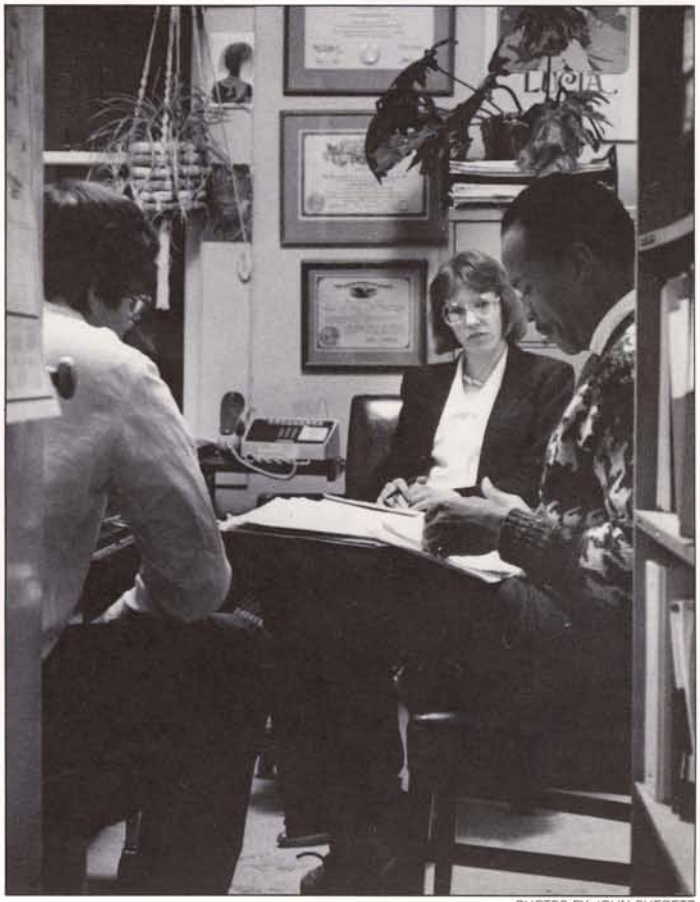
Local Attorneys Volunteer at East Palo Alto Project

Lawyers from seven Peninsula law firms are participating in a "Volunteer Attorney Program" at the East Palo Alto Community Law Project. Begun in March 1986, VAP involves Stanford law students in its weekly intake sessions and, where practicable, the subsequent conduct of cases.

The volunteer program, says EPACLP's founding executive director Susan Balliet, "expands the range and quality of legal services available to low-income residents of the community, as well as offering students first-rate opportunities for developing their lawyering skills."

Another EPACLP development is Balliet's recent departure (as of January 1, 1987) to become director of impact litigation at the San Mateo County Legal Aid Society. Bill Ong Hing, a visiting associate professor at Stanford Law School and head of the EPACLP Immigration Clinic, is serving as the Project's interim executive director.

The EPACLP Volunteer Attorney Program was initiated by three local Stanford Law alumni who had formerly worked in San Francisco: Norman Blears '80 of Heller, Ehrman, White & McAuliffe; Ian Feinberg '79 of Ware & Freidenrich; and Derek Daley '80 of Wilson, Sonsini, Goodrich & Rosati. "The mainstream legal practice



PHOTOS BY JOHN SHERETZ

Top:
Norman Blears '80 *(center)* in conference with the Heller, Ehrman team, and students Donald Gagliardi (2L) and Anne Richardson (1L)

Below:
Volunteer attorney Katherine Wagner and law student meet with EPACLP client *(right)*

on the Peninsula is as complex and challenging as in most major cities," Blears explained in a recent interview, "but I missed the opportunity down here to continue public interest work."

With the legal services program of the San Francisco Lawyers Committee on Urban Affairs as a model, the three attorneys approached Balliet. Planning for a Palo Alto counterpart grew to include Stanford Law students (particularly Chris Paci '87) and representatives from several local law firms. Seven firms—the three mentioned above plus Brobeck, Phleger & Harrison; Cooley, Godward, Castro, Huddleson & Tatum; Blase, Valentine & Klein; and Lakin-Spears—are currently participating. So far, over 300 clients have been served.

VAP is designed to pick up where other local resources—e.g., public defenders, legal aid, private attorneys, and the EPACLP—leave off. Legal areas include consumer fraud, collections and credit, bankruptcy, personal injury defense, evictions and foreclosures, zoning variances, corporate work for small nonprofit organizations, and the overflow from EPACLP's landlord/tenant and youth law programs.

Intake sessions, which are held each Tuesday evening at EPACLP's east-of-Bayshore office, rotate among the seven law firms. Firms typically send a team of two-to-four lawyers and one or two legal assistants. Joining them are two or three law students trained in intake procedures.

Clients, who have been scheduled by EPACLP staff, are greeted by the students and/or legal assistants for a history and synopsis of the problem. The law firm teams and students then gather in the conference room to discuss how best to handle the cases and make preliminary assignments. Normally the client is seen again that evening, this time with the attorney present, for a more in-depth discussion of the case.

Providing that the client and case matter meet program guidelines, the law firm takes on the case and represents the client in the same manner it would represent any paying client.

Whether and how the student continues to be involved depends on the nature of the case and is arranged between the student and attorney. So far, reports student coordinator Brian Mahoney (2L), "students have followed up with client and witness interviews, prepared an employment grievance, helped with a will, and assisted with legal research."

Blears welcomes the interaction. "It's a lot of fun to work with students— to hear their perspective and find out what's going on at the Law School," he said.

Blears invites other attorneys to get involved, either as part of a rotation team or for individual referrals. "We particularly need help in bankruptcy, family law, and immigration law," he said. Spanish fluency would also be an asset.

Most cases, however, do not require special expertise. Blears has been amazed at how many clients are victims of simple mistakes or bureaucratic oversights. One client found himself the target of a suit that should have been filed against another man with the same name. A second client had had a default judgment entered against him for medical bills already paid by a third party. Yet another was being blamed for an accident that occurred before he bought the car in question.

"Mistakes like this happen all the time," observed Blears. "The question is whether the people involved understand the problem and have the ability to deal with it. If not, they may find that their wages are being garnished and they don't have enough to feed their families.

"Work like this has shown me that it isn't just Supreme Court decisions and precedents that make a difference," Blears concluded. "We all enjoy working on impact cases, and certain matters which have come through the Project have impact potential. But it is also important and satisfying to address legal needs on the other end of the spectrum—the micro-problems as well as the macro-problems."

Attorneys interested in knowing more about the Volunteer Attorney Program may call Blears at (415) 326-7600. □

Centennial Gift to Enhance Business Law Program

The effort to develop a coordinated second/third year curriculum in business and law has been funded with $100,000—a strong start for the Law School's portion of the Centennial Campaign.

Dean Ely, in announcing the funding, noted that an overwhelming majority of Stanford Law graduates ultimately enter one of the fields of business law. The creation of new courses that "more closely link law with business" will, he said, "expand the business training available to our law students generally," as well as strengthen the existing Law School-Business School JD/MBA program.

The funding has been provided by Kendyl K. Monroe '60, a partner of Sullivan & Cromwell in New York City. Long a generous supporter of the School, Monroe is currently chair of the Law Fund's Sterling Circle (*see page 29*).

The curriculum development program is led by Prof. Myron Scholes, a faculty member at the Law School as well as the Graduate School of Business, where he is Frank E. Buck Professor of Finance. □

School NEWS

Faculty Notes

Barbara A. Babcock has been honored by the Society of American Law Teachers with its 1986 Distinguished Teaching and Service Award. Speakers at the presentation, which took place Jan. 5 in Los Angeles, included **Paul Brest** (see page 2) and Visiting Professor **Stephanie Wildman '73**. Babcock also recently received a grant from the National Endowment for the Humanities (NEH) for research on pioneering public defender Clara Shortridge Foltz. Foltz was the subject of a talk Babcock gave October 14 as part of a program—Then and Now: Women in the Law—sponsored by the Historical Society for the U.S. District Court for the Northern District of California.

Ellen Borgersen wrote a tribute—"On the Power of Balance: A Remembrance of Justice Potter Stewart"—for the *Hastings Constitutional Law Quarterly* (Winter 1986). The issue was dedicated to the late U.S. Supreme Court associate justice, for whom she clerked in 1977-78.

William Cohen moderated a debate October 20 between former California Supreme Court Justice Otto Kaus and Loyola Prof. Gideon Kanner on the impending California judicial elections, at a meeting of the Stanford Law Society of Southern California. Cohen himself engaged in debate—with Professor Martin Shapiro of UC-Berkeley—on two occasions: October 16 in Los Angeles, as part of a UCLA Extension series of Great Constitutional Debates; and on January 17,

NATHAN J. HOCHMAN '88

Students Out-Score Professors in Softball Contest

Some 40 members of the Law School community—faculty, staff, and students—gathered October 17 at Roble Field for the traditional faculty-student softball game.

The challenge was issued this year by the faculty (in the persons of general manager Hank Greely and coach Bob Weisberg) to members of the Law Review, Journal of International Law, Environmental Law Society, and the Law Journal.

Playing for the faculty were Deans Ely (at short), Friedenthal (on the mound), and McBride (behind the plate). They were joined on the field by Bill Baxter, Bob Ellickson, Ron Gilson, Tom Grey, Sam Gross, Bill Hing, Mark Kelman, Greely, and Weisberg. Veteran arbitrator Keith Mann served as umpire.

After a spirited battle, the students staged a come-from-behind 8-4 victory. "They were strong on batting, running, and fielding, but they need some work on respect for their elders," observed Greely. "If they keep this up, we'll have to graduate them." Further matches are expected. □

in Monterey, at Monterey Peninsula College. At issue were egalitarian versus libertarian conceptions of the First Amendment. Cohen was also invited to speak in Philadelphia March 17—on "Economic Rights Under State Constitutions"—at a Temple University conference entitled State Constitutional Law in the Third Century of American Federalism. "When the Bicentennial celebration ends," he wryly observes, "all the coaches and horses of constitutional law professors will once again turn into pumpkins and mice."

Theodore Eisenberg, visiting this year from Cornell, has recently finished two articles: "Bankruptcy in the Administrative State," for *Law and Contemporary Problems*; and "The Reality of Constitutional Tort Litigation" (with Stewart Schwab), for *Cornell Law Review*. He has also completed work on the second edition of his casebook, *Civil Rights Legislation*. On February 23, he and Schwab presented findings from their empirical study of civil rights cases to the Alan Fortunoff Criminal Justice Colloquium at NYU Law School.

Robert C. Ellickson has been appointed by the American Law Institute as an Adviser for the Restatement of the Law, Property 2d (Servitudes). In November he presented a paper entitled "A Hypothesis of Wealth-Maximizing Norms" at Harvard Law School. Readers who missed his Alumni/ae Weekend talk on dispute settlement in rural Shasta County are referred to the article beginning on page 6.

Marc A. Franklin—in addition to overseeing the successful conclusion of the work of the Dean Search Committee (see page 2)—has updated his two casebooks. The third edition of *Mass Media Law* is now in use. And a fourth edition of *Tort Law and Alternatives* (coauthored with Robert Rabin) is due out this April.

Lawrence M. Friedman spoke November 21 in Williamsburg, Virginia, at a conference on The Media and the Bicentennial of the Constitution. The two-day event was cosponsored by the Institute of Bill of Rights Law at the College of William and Mary, and by the Virginia Commission on the Bicentennial of the United States Constitution.

Robert W. Gordon gave a lecture, "A Critical View of the First Amendment," at the University of Utah law school in September. The next month in Dallas, he served as a faculty member for an AALS workshop on contract law teaching. In November he presented one of the Jefferson Memorial Lectures, on "Tocqueville, Law and Lawyers," at UC-Berkeley's 150th Anniversary Celebration of Tocqueville's *Democracy in America*. He also delivered a paper, "Does Law Presuppose Virtue?" at the American Bar Foundation/Northwestern Law School Legal Theory Workshop, in Chicago in December. And in January, he spoke in Los Angeles at a workshop on Emerging Traditions in Legal Scholarship, during the AALS annual meeting.

William B. Gould IV delivered the Fourth Annual Farr Lecture at Brigham Young University's J. Reuben Clark Law School on November 7, 1986. In October—for a complete change of pace—he covered the American League playoffs and first four games of the World Series as a reporter for the *San Francisco Chronicle*. Other recent activities include a trip in August to Sydney and Melbourne, Australia, for a Congress of Comparative Law conference; and in January to Los Angeles, where he chaired a session on the Law of Wrongful Discharge, at the AALS annual meeting.

Thomas C. Grey took part last September in a symposium on Kantian legal theory, sponsored by the Liberty Fund and Columbia Law School in Harriman, New York. His review-essay of Richard Epstein's *Takings* appeared in the *Miami Law Review* in November. A second review, of Ronald Dworkin's *Law's Empire*, appeared in *New York Review of Books* in February 1987. That month he also delivered a paper on constitutional interpretation to the Legal Studies Workshop of the University of Toronto Law School.

Bill Ong Hing was recently appointed first chair of the Immigration and Nationality Law Advisory Commission of the California Board of Legal Specialization. He is also co-chair of the United Way's Southeast Asian/Hispanic Refugee and Immigrant Underserved Population Subcommittee. And since January he has been serving as interim executive director of the East Palo Alto Community Law Project.

John Kaplan described the policy implications ("urgent") of the spread of AIDS among heroin addicts, in a Sept. 16 *Wall Street Journal* editorial. And in another op-ed, published November 17 in the *Los Angeles Times*, he discussed paradoxes in the roles of legislatures and courts as related to the recent ouster of three judges of the California State Supreme Court.

John Henry Merryman, now emeritus, is a member of the International Bar Association's newly formed Division on Cultural Property; and of the International Institute for the Unification of Private Law's Study Group on the International Protection of Works of Art. His "Two Ways of Thinking About Cultural Property" was recently published in *American Journal of International Law* 80: 831 (1986).

Robert H. Mnookin—together with Professors Kenneth Arrow (Economics), Amos Tversky (Psychology) and Robert Wilson (Business School)—has received a grant from the Hewlett Foundation to explore how Stanford University might

(Continued on next page)

School NEWS

FACULTY NOTES (continued)

best develop a program or center concerning conflict resolution. Mnookin and Prof. Eleanor Maccoby (Psychology) have also had their NIH grant renewed for completion of an ongoing study of divorce custody that involves 1100 families in San Mateo and Santa Clara counties.

A. Mitchell Polinsky's comment, "Detrebling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement," was published in the April 1986 *Georgetown Law Journal*. In November in Washington, D.C., he lectured on the economic effects of legal rules at a conference for journalists on modern tort law reform and the insurance crisis. Polinsky was also recently appointed to the editorial advisory board of the *Journal of Risk and Uncertainty*.

Robert L. Rabin served as Reporter to the ABA Action Commission to Improve the Tort Liability System, and authored its report, which was published in December. He has also spoken on this subject at the AALS meeting in January, Harvard Law School in March, and Northwestern Law School in April. Recent publications include articles in current issues of *Stanford Law Review* and *University of Houston Law Review*, and the above-mentioned new edition of the torts casebook coauthored with Professor Franklin.

Deborah L. Rhode gave the opening address, on "Justice and Gender," in the Lyman Lecture Series sponsored in February by the Institute for Research on Women and Gender, of which she is the director. That month she also participated in the Institute's national interdisciplinary conference, Theoretical Perspectives on Sexual Difference. Rhode taught a short course this winter at Boalt Hall, on Gender and Jurisprudence, as a Chancellor's Distinguished Professor. She and **Robert Weisberg** are among five junior professors labeled "rising stars" by the *National Law Journal* in its December 29 issue.

■

Former Dean **Thomas Ehrlich** has been appointed president, beginning August 1, 1987, of the eight-campus Indiana University system.

■

We are sorry to have to report that **John Bingham Hurlbut** '34, distinguished and admired teacher to four decades of law students, died on March 27 at the age of 81. A tribute will appear in the next issue. □

TV and the Political System

(Continued from page 17)

with a minimal amount of confrontation between the President and Congress. Apart from the solid South, Democrats would vote with a Democratic president and Republicans with a Republican one unless the proposed legislation gave him or her a serious problem back home. Where this was the case, enough members of the other party could usually be found to make a majority for essentially similar local reasons (such as common farm problems). In short, it was a system in which everything could be compromised and ideology was an obstacle to success.

The most important aspect of this system was the connection between achieving office through party organization and governing through party organization. That connection made government not only possible but reasonably effective. The need to accommodate Congress restrained presidents. Identification with political parties made it possible for presidents to lead—albeit modestly—even in the absence of a national crisis.

The decline of political parties as the key to bridging the separation of congressional and presidential powers began before the television explosion. But television has greatly escalated this process and left us as a nation with a series of problems which should concern us all. The most serious of these are:

The importance of money in the selection of candidates and of issues—to the point where money may have become what Senator Moynihan has called "the primary arbiter of political outcomes." Wealthy candidates have a distinct advantage, and it is no coincidence that today so many elected officials (particularly in the Senate and statewide offices where television plays a role in elections) are rich men.

Individuals or organizations with money to give to politicians are also in a stronger position. They can in effect buy votes on particular issues—something close to bribery in the guise of political contributions. The need for money to run campaigns (hugely expensive because of television) gives access and influence to those who have it, whether directly through lobbying activities or indirectly by influencing public opinion through the media.

This combination of money and media also make possible single-issue—even fanatical—campaigns, such as the 1986 Democratic primary in Illinois, where La Rouche candidates successfully shut out Adlai Stevenson III and other regular Democrats. Almost certainly we will see an increase in lobbying connected with political contributions, in conflicts of interest, and in outright corruption.

Difficulties in governance. The ability of the political party to serve as a mechanism for governing well has been impaired. This is, I believe, a serious loss.

Though fragile on many issues and certainly without the party discipline which goes with issue-oriented party politics, parties have historically helped to facilitate both presidential leadership and governmental decision. Party labels helped create some interdependence among elected officials of the same party. Further—and most important—the Senate and the House of Representatives had themselves sufficient party structure and organization and were sufficiently responsive to their own leadership to make possible the bargaining and negotiation necessary for workable coalitions.

While there is still some interdependence between the President and congressional members of his party, it has been greatly weakened by the fact that the members have become far less dependent upon the party for money or election and far more dependent on non-party organizations with economic or ideological interests. A corollary of this is that many fewer members have been active in the give and take of party politics—the kind of experience that teaches the art of negotiation aimed at consensus. The net result is that members of Congress are less responsive not only to the President but also to their own congressional leadership.

The decline in the effectiveness of Congress might seem to benefit the office of President. However, television further aggravates the problem it already helped create. Undoubtedly, on complex issues highly publicized by the electronic media, people turn to the President for guidance, particularly if bombarded with a variety of different viewpoints. However, the President is equally a potential scapegoat. Turning the constitutionally limited power of the President into effective policy-making in collaboration with Congress has never (except in times of crisis) been easy. And using television skills to go over the heads of Congress to the people, though increasingly practiced, is not only confrontational and coercive, but may also in the long run be counterproductive—as even Ronald Reagan, deservedly called the Great Communicator, has had reason to learn.

Manipulation of opinion. This problem, which is closely related to the first two, arises out of the fact that popular opinion can be readily manipulated, and television is a powerful medium for doing so. Selling the presidency like soap powder, though distasteful, is effective. Though Mr. Reagan's skill in using television may be unprecedented in the office, such skills may well have now become part of the job description. So too may have physical attractiveness. We could well find that television has severely limited our political choices. Hollywood may replace Virginia as the cradle of Presidents.

Slapdash policy-making. What television can do for political candidates and officeholders, it cannot do in the area of policy, except in the most scattershot manner. The medium, as I said earlier, is much more likely to persuade than inform, and it encourages both superficiality and a short attention span. Arguably, too, a generation brought up on the tube seeks easy solutions and instant gratification.

Lack of a developed and well-grounded policy consensus may not be too great a problem on domestic matters, where our separation of powers and federal system provide checks and balances (even though on ideological issues there is a danger today that a majority may seek to force a particular view on a large minority—something difficult to achieve in a political system which worked at building consensus).

But in foreign policy matters, these constraints are less effective. Congress tries to hobble a too-adventuresome executive. The President seeks to extend American power, and this, too, can lead to confrontation. No foreign policy can possibly be successful without broad public support and the capacity to maintain a steady course—whatever that course

may be — through changing administrations. Television can effectively promote or impact a particular foreign policy initiative at a particular time. But it is poorly suited to the ups and downs of the steady course. And, today, we lack the political instrumentalities to build what used to be a bipartisan policy that did have the consensus achieved through effective party leadership. [*Recent divisions over our country's policies towards disarmament and state-sponsored terrorism demonstrate just how inadequate the techniques of television and public relations are in the formation and conduct of foreign policy.* — N.DEB.K.]

I DO NOT, as I said at the outset, have answers to these problems. Obviously, television is here to stay, and so is our peculiar form of government. We have for almost two centuries been sufficiently innovative to make a clumsy political system work moderately well with only rare constitutional amendments. So, until persuaded to the contrary, I am opposed to draconian solutions leading we know not where.

I confess to being less than enthusiatic about democracy for its own sake. A complex world requires informed debate and intelligent policies arrived at by a search for consensus. I worry about the potential tyranny of the majority and the capacity of demagogues to manipulate public opinion to sell unsafe political products. I worry about a president unconstrained by peers and tempted to take excessive risks to gain public support, particularly in foreign affairs. And I worry equally about a president unable to take any effective action because he has not the means to create an informed consensus. I also worry about corruption, both in the traditional sense and in the more sophisticated forms that large campaign costs make ever more likely.

The threat of money as political power is a very hard one to fix for two reasons. First are the real and serious First Amendment issues. There are ways of dealing with direct political contributions, although *Buckley v. Valeo* (which surely went too far in equating money and speech) makes the problem more difficult than it should be. But the regulation of PACs and NITPACs does raise genuine First Amendment problems. In sum, creating constitutionally acceptable limitations on spending is extremely difficult and, I suspect, relatively easy in practice to evade.

Second, and closely related, is the fact that current campaign practices give advantages to the rich, which they will be reluctant to abandon or dilute. Political parties can probably block a La Rouche from assuming Republican or Democratic party labels. But that will not prevent single-issue candidates from running and spending money for election; or stop coalitions of single-issue groups from electing candidates outside the major parties; or prevent single-issue groups from buying political support through campaign contributions or the threat of targeting an adamant officeholder.

Building a political system that encourages a reasonable working relationship between the President and Congress may require constitutional amendments. The most promising might be to establish a four-year term for congressmen, concurrent with that of the President. If members of the House ran for election only in presidential campaign years, interdependency between the President and Congress would probably increase. It also might strengthen leadership in the House and help to restore the constraining, but not confrontational, role of Congress. Such a system could, however, prolong any stalemates that should develop. Nonetheless, the idea is, I believe, worth considering.

To move away from direct primaries and endless campaigns is probably not possible. (I wish it were — but that may be simply nostalgia.) Perhaps we should instead experiment, as we are about to do in the South, with regional approaches and with more concentration of primary dates. Oddly enough, while television has vastly increased public awareness of political issues, voter turnouts have declined. If primaries (and, for that matter, general elections) are to take on increased importance, it is essential that we do not let them become the instrument of a fanatical few.

With respect to the problems of demagoguery, gullibility, and the manipulation of public opinion, we have too little experience to draw conclusions. Television has shown itself capable of exposing as well as promoting deceptions, and the media today is generally anxious to act responsibly. I suspect that, as long as the press is free, dangerous excesses are not a clear and present danger.

The problem of building a consensus on foreign and defense policy is, however, both critical and difficult of solution. I do not think it can be done without leadership from the President, from the Congress, and from an informed public. And, obviously, it cannot be done until and unless leadership in the White House and Congress is prepared to compromise out of the conviction that the nation is best served by broad public support for a consensus that is achievable and lasting.

A major difficulty is the temptation of a president to espouse the immediate and engage in ad hoc adventurism. Nothing is so heady as the role of Commander-in-Chief, and nothing can unite people more than appeals to patriotism without a heavy price. Yet such ventures can, as Vietnam demonstrates, become more costly and divisive than unifying.

The cohesion and constancy that I believe so important cannot be achieved by presidents acting unilaterally or by Congress seeking, as through the War Powers Act, to debate every step of the way. A viable and enduring foreign policy is not built on such shifting sands as aid to the Contras, Granada, the attempt to rescue the Iranian hostages, the raid on Libya, or a summit conference made for television. Whether these actions were right or wrong, I am unable to see them as a foundation of a foreign policy or, indeed, as related to one that will have broad support over time. Nor is television the instrument to formulate a policy, though it may assist in selling a product that has broad support among elected representatives and foreign policy experts.

Let me conclude by saying that we are not dealing with some evil force that must be controlled and regulated. Television gives enormous opportunities for broader public participation and familiarity with issues, albeit at a superficial level. What we need to focus on is how to achieve the time and opportunity to formulate policy in a more thoughtful framework without succumbing to the temptation to use the enormous power of television to sell cheap imitations. We have in the past successfully developed political institutions to do this, and I expect and hope that history will repeat itself. □

Nonverbal Communication

(Continued from page 23)

Footnotes

[1] *Brown v. Walter,* 62 F.2d 798, 799-800 (2d Cir. 1933).

[2] P.D. Blanck, R. Rosenthal, & L. H. Cordell, "The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials," 38 *Stanford Law Review* 89 (1985); Blanck, "The Process of Field Research in the Courtroom," *Law and Human Behavior* (in press, 1987).

[3] *Offutt v. United States,* 348 U.S. 11, 14 (1954); *In re Murchinson,* 349 U.S. 133, 136 (1955).

[4] *State v. Barron,* 465 S.W.2d 523, 527-528 (Mo. 1971).

[5] *State v. Larmond,* 244 N.W.2d 233, 236 (Iowa 1976).

[6] See, e.g., *Oglen v. State,* 440 So. 2d 1172, 1175 (Ala. Crim. App. 1983); *United States v. Poland,* 659, F.2d 884, 893 (9th Cir.), *cert. denied,* 454 U.S. 1059 (1981).

[7] *Milhouse v. State,* 264 Ga. 357, 329 S.E.2d 490 (1985).

[8] *Allen v. State,* 290 Ala. 339, 342-43, 276 So. 2d 583, 586 (1973).

[9] See, e.g., *United States v. Olgin,* 745 F.2d 263, 268 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 2321 (1985); *United States v. Anton,* 597 F.2d 371, 374-75 (3d Cir. 1979); *Stevens v. United States,* 306 F.2d 834 (5th Cir. 1962).

[10] See Rosenthal, *Experimenter Effects in Behavioral Research* (1976); for later demonstration, see Blanck & Rosenthal, "The Mediation of Interpersonal Expectancy Effects: The Counselor's Tone of Voice," 76 *J. Educational Psychology* 418 (1984).

[11] Troffer & Tart, "Experimenter Bias in Hypnotist Performance," 145 *Science* 1330 (1964).

[12] Blanck, Rosenthal, Vannicelli & Lee, "Therapist's Tone of Voice: Descriptive, Psychometric, Interactional, and Competence Analyses," 4 *J. Social & Clinical Psychology* 154 (1986); Blanck, Buck & Rosenthal (eds.), *Nonverbal Communication in the Clinical Context* (Penn. State Univ. Press, 1986).

[13] See Rosenthal and Jacobson, *Pygmalion in the Classroom* (1968); Rosenthal, *On the Social Psychology of the Self-Fulfilling Prophecy: Further Evidence for Pygmalion Effects and Their Mediating Mechanisms* (1974) (Module 53, MSS Modular Publications).

[14] See, e.g. *United States v. Watson,* 669 F.2d 1374, 1385-86 (11th Cir. 1982). □

1985 Annual Report Changes and Additions

The Law Fund staff regrets the following errors in the 1985 *Annual Report.*

- Laurel A. Nichols is not (repeat, *not*) deceased, but rather in the best of health—contrary to the impression given by the cross next to her name in the Class of 1972 listing [see p. 19 of the *Report*].
- Robert M. Arhelger is a member of the Class of 1968, not (as would appear from the class listing) 1969 [p. 18].

The names of a number of deserving individuals were inadvertently omitted from relevant donor rolls. They are:

- Frederick M. Brosio, Jr. '57, Merrill E. Jenkins '69, and B. Daniel Lynch '71, whose efforts as Quad volunteers in Los Angeles IV are much appreciated [p. 5].
- Darrell Johnson '69 and Douglas C. White '57, whose generosity in 1985 elevated them to the rank of Nathan Abbott Fellows [p. 7].
- Darrell Sackl '73, who continues as a George E. Crothers Fellow [p. 8].
- John Alden '59, a new Marion Rice Kirkwood Fellow [p. 9].
- Edward V. Anderson '78 and Robert Greening '72, donors at the Law Quad level of giving [pp. 10–11].

Recognition should also be given for two previously unpublished memorial gifts [p. 29]:

- By Nataline Vincenti Scott, in memory of Louis R. Vincenti '30
- By Myrl R. Scott '55, in memory of Marshall V. Zinner '55

And for the following honorific gifts [pp. 29–30]:

- By David Freeman '55, in honor of Prof. J. Keith Mann.
- By David Freeman '55, in honor of Charles Stearns '33

Belated thanks to all for their generosity on behalf of excellence at Stanford Law School. □

LETTERS

EARLY WOMEN GRADUATES

I love the article by Leelane Hines ["The Venturesome Women of Stanford Law, 1920–1945," Fall 1986]. You did a beautiful job with our 43-year-old photo. It gave me a warm feeling to see Margaret Morton Feinlieb '44 looking so alive and happy.

Avis Winton Walton '45
Atherton, California

I have often tried to imagine what it was like to be such a pioneer. The reality is even more interesting.

Patricia A. Cutler '71
San Francisco

Thanks for the article, which serves as a partial history of women's integration into the legal profession. It reminds us of how much we owe to those who went before. Most lawyers, regardless of sex, tend to be individualistic and persistent, but these early women certainly had to be. As they usually numbered only one or two to a class, they must have been lonely at times, despite incidents of support from their classmates. Indeed, without the pre-law program, it seems that few could have attended law school at all.

The article also showed how limited employment opportunities then were for women, both in and out of the field of law. Even thirty years after, when I was in law school, female lawyers seemed to be employed mainly in government positions. Indeed, women in my class worked with Dean Ehrlich on sex bias in law school recruitment by private firms. (I was one of the first women hired by Coudert Brothers.)

Now, of course, most women lawyers do not face entry level barriers, and for this we are very pleased. Yet, there is still much to do to integrate the legal profession. Many women attorneys are still not being promoted to their rightful levels or are not receiving appropriate partnership consideration or dividends.

A Stanford Law School male graduate, Dale Hanst '60, has been instrumental in addressing these problems. When he was president of the California State Bar and I was president of California Women Lawyers, he agreed to create a State Bar Committee on Women in Law. Several Stanford law alumnae served with me on the Committee: Mary Cranston '75, Annie Gutierrez '71, Susan Illston '73, and Louise LaMothe '71.

After extensive research and consultation, the Committee identified a number of issues, namely gender bias in the courtroom (by the court and by counsel), sex-discriminatory clubs, pregnancy and childrearing leave, professional visibility (for those in small firms), client rain making, and partnership status (for those in large firms).

Several significant actions have resulted in part from the Committee's work. The California Judicial Council has adopted a policy against gender bias in courtrooms. The State Bar Board of Governors has published a letter in *California Lawyer* urging all lawyers to resign from discriminatory clubs. More women have been placed on CEB panels and Bar committees. And programs have been held at State Bar meetings on such issues as gender bias and pregnancy, childrearing, and part-time options in the legal profession (for both men and women). This year, the Committee will be asking that each workplace for attorneys adopt such policies concerning work and families. We are also working with individual law firms on these and other issues.

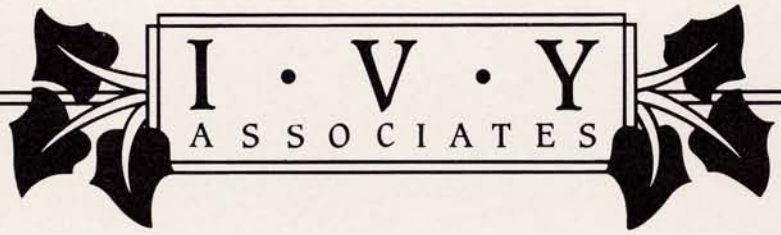
I believe that Stanford has taken an important lead in eliminating sex bias in the legal profession, such as in admissions policies. It is clear, from the great number of women now enrolled, that aptitude and promise rather than sex are considered. I hope that such efforts continue.

Christine Curtis '71
(Chair, Women in Law Committee,
California State Bar, 1985–86)
San Francisco

CHIEF JUSTICE

I naturally enjoyed reading the story about my appointment ["The President's Choice," Fall 1986], which I thought was a good one.

Hon. William H. Rehnquist '52
Washington, D.C.



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Coming EVENTS

1987	**MAY 7–8**	Board of Visitors Annual Meeting At Stanford.
	JUNE 26	Taper Law Student Center, Dedication Ceremonies At Stanford (Crothers Courtyard).
	AUG. 6–13	American Bar Association Annual Convention In San Francisco. (Stanford Law Alumni/ae reception to be announced)
	SEPT. 18–22	California State Bar Association Convention In Los Angeles. (Stanford Law Alumni/ae luncheon to be announced)
	OCT. 23–24	Alumni/ae Weekend 1987 With reunions for the classes with years ending in -2 and -7. At Stanford.

For information on these and other events, call the Law School's alumni/ae office, (415) 723-2730.

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