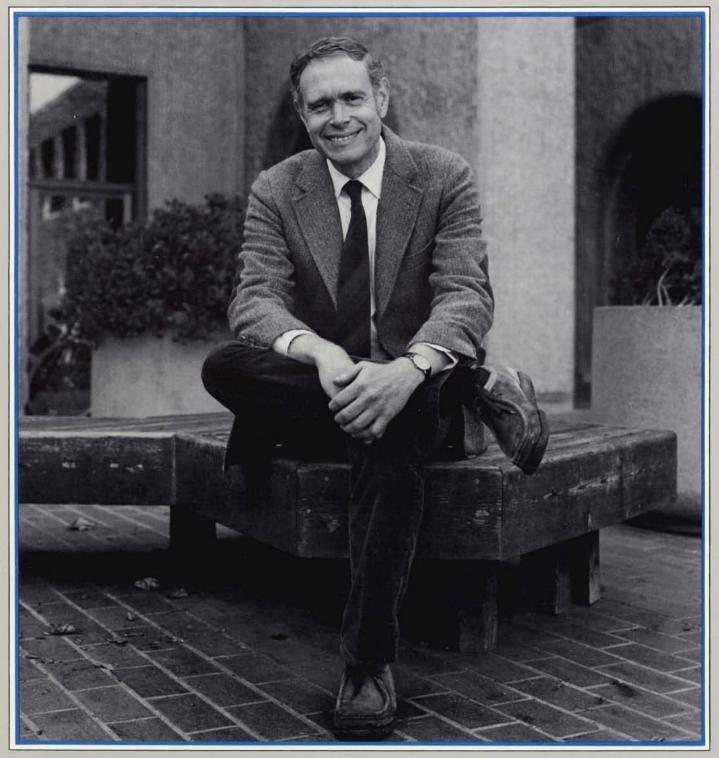


FALL 1987 VOL. 22, NO. 1



New Dean / Constitution / Men's Clubs / Hurlbut / Board of Visitors / Annual Report of Giving

Cover: Paul Brest, the School's new Richard E. Lang Professor and Dean (see page 2). Photo by Carolyn Caddes.

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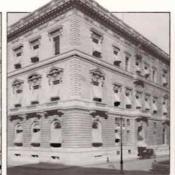
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Paul Brest

AN INTERVIEW WITH THE NEW DEAN

ON JULY 1, 1987, the title of Richard E. Lang Professor of Law and Dean passed from John Hart Ely to Paul Brest. A member of the Stanford law faculty since 1969, Brest received tenure in 1975 and was named in 1983 to the School's Kenneth and Harle Montgomery Professorship in Clinical Legal Education.

Brest is nationally known as a scholar in constitutional law, author of numerous articles in the field, and senior author of an innovative casebook, Processes of Constitutional Decisionmaking (2nd ed., 1985). He received an honorary Doctor of Laws from Northeastern University in 1980 and was elected to the American Academy of Arts and Sciences in 1982.

Brest has also been a clinical teacher. He spearheaded the experimental, first-year Curriculum B, and participated in developing courses in Lawyering Process and Poverty Law.

The following is based on an August 25 interview with Dean Brest by the editor, Constance Hellyer, whose remarks (like this introduction) appear in italic type.

OU'VE BEEN at Stanford Law School for eighteen years and visited at other schools. What strikes you as different or unique about our school?

One of the most distinctive things about Stanford Law School is the nature of our faculty. We are small compared to some institutions, but we represent a greater range of interests and viewpoints than almost any other school — we're extraordinarily heterogeneous. What makes Stanford truly unique is that our diversity has not been divisive. The faculty is a collegial group who get on well with one another.

Do you see differences between the School now and when you came in 1969?

The faculty has grown significantly—from 36 to 43 members. And the breadth and richness of offerings and the

educational opportunities for students have continually increased. When I came, the Law and Economics movement was in its infancy, few faculty did empirical research on the legal system, there was little in the way of clinical teaching, and Critical Legal Studies did not exist. Today, all these approaches are represented, in addition to more traditional forms of legal scholarship.

What led you—a comfortably tenured professor with many intellectual interests—to become a candidate for the deanship?

The Law School seemed at a point of change—full of potential for dramatically improving the quality of education, while retaining its intimate and humane atmosphere. The possibility that I could help bring this about was challenging and exciting. And, at least three months into the job, it still is.

Our previous Dean, John Ely, came from another law school. What advantages and disadvantages are there to your already being a member of this faculty?

The chief advantage is that you know the people and have a pretty good sense of how the institution functions. I've served on University committees and in the Academic Senate, and know faculty and administrators in other departments. Even so, I've found it plenty hard to learn the administrative tasks of a dean. John did a really heroic job, coming in from the outside and assuming leadership as quickly and effectively as he did.

A potential disadvantage is that familiarity with the institution could lead to complacency — to accepting everything just as it is. But I'm not a complacent type.

What do you see as the role of the Dean?

The Dean's main role is to help bring out what is best in the students, faculty, and staff — help them achieve their highest potential. The Dean can support faculty initiatives and build consensus. He can exercise imagination and develop ideas, and hope that they are taken up by the faculty.

I put it this way because the faculty are an autonomous group, and the School is essentially governed by them. That's as it should be. The most important decisions that we make—whom we hire and what we teach—are made by the faculty collectively and individually. As Dean, I can support and help shape change, but only in directions that the faculty wants to go.

Where do the School's graduates fit in?

They are crucial to the School. The Law School has unusually close relations with its graduates, and relies on their support in all sorts of ways—not only financially, though that's obviously important. For example, without their assistance we couldn't provide scholar-ship and loan support to our students, maintain ongoing programs, or develop new ones. But beyond this, our alumni and alumnae have much to tell us about

whether we are providing adequate training for the kinds of practice our students will engage in.

Are you enjoying your trips out to meet the graduates?

To my surprise, very much — both seeing people individually and talking to groups. The alumni themselves have made it easy and fun. They care about the School and are incredibly supportive.

As Dean, how do you expect to relate to students?

One of the things I've valued most about being a professor is contact with students, both in and outside the classroom. So far, I've been able to maintain an open door policy—literally—and students, as well as faculty and staff, drop by. The School's small size makes this kind of spontaneous interaction possible.

Do you plan to continue teaching?

This year, only a seminar in the spring. I thought I had better not overcommit myself at the beginning, when I had so much to learn and traveling to do. But I'd like ultimately to follow the example of Charlie Meyers, who taught a first-year course when he was Dean. Next year, if it looks like I can handle it, I would love to teach the introductory Constitutional Law course.



What is the subject of your seminar?

It's called "Constitutional and Democratic Theory" and is based on a continuing project which I hope will eventually become a book—though certainly not in the next several years. The book and seminar focus on constitutional decisionmaking by institutions other than courts—like legislatures, city councils, and constitutional conventions.

It is often said that students are less excited by their second and third years of law school than the first. Do you see this as a problem?

Whenever law teachers from different schools get together, they bemoan what has come to be called the problem of "disengagement" of second- and third-year students. One shouldn't exaggerate the problem at Stanford. Just think, for example, of the number of students who edit the *Law Review* and *Journal of International Law*, run the Environmental Law Society, and work at the East Palo Alto Community Law Project. Nonetheless, there is a problem with the advanced curriculum at law schools throughout the country, and Stanford is not immune.

This is my single highest priority. I would consider it a great achievement for the School if, five years from now, we could say that Stanford no longer had a "disengagement" problem. We don't have control over all of its causes, but I think there's plenty we can do.

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Such as-

Well, I'll begin with a cause that originates outside the Law School: the job hunt process, which now starts in the first year with summer law-firm positions and continues with increasing intensity throughout most of the next two years. It is difficult for a student to focus on course work when he or she has five to ten interviews a week, and takes several extended excursions for others. We can't fight the market and, of course, we don't want to deny valuable opportunities to our students. But we may be able to channel the interviewing process more efficiently. The experimental "flyback week" next year is one such attempt. We can't be sure how well this will work, but it seems a promising start.

There's a danger, however, in blaming too much on outside forces, and not focusing on what we as faculty can do to engage the students more. For example, we need to spend more time improving our own performance as teachers and working on the advanced curriculum—both its content and methods of presentation. Too many second- and third-year courses are taught just like first-year courses. Though we expose the students to new material, we don't challenge them with new horizons. The advanced curriculum should both broaden and deepen the students' knowledge about the legal system and the environment in which it operates.

Can you give an example?

My colleagues Ron Gilson and Tom Campbell have just finished a draft proposal for an innovative Program in Law and Business. Its most important structural feature is a progressive curriculum, in which each course builds on what has gone before. Students would begin by getting a foundation in economics, finance, and accounting, which would prepare them for a more sophisticated and useful course in business associations than we now offer. This, in turn, would serve as the foundation for a variety of advanced courses — although it could also be the stopping point for students who did not intend to practice business law.

The program sounds like a possible alternative to the JD/MBA route.

The curriculum should give a student a superb preparation for the practice of business law, and some who now go for the four-year joint degree may well decide that they can get more than adequate training within the Law School. Others—especially students who plan to enter the world of business itself—would still pursue the JD/MBA.

By the way, this is another example of the kind of help we get from our graduates. We've consulted some recent JD/MBAs, who have made very helpful suggestions.

Can you foresee requiring students to study economics before they enter law school?

Definitely not. The last thing I'd want to do is encourage a "pre-law" curriculum. "Pre-med" has already done enough harm to undergraduate education. The Law School benefits by having students who come from a wide variety of undergraduate fields. The "core" law school curriculum should get everyone up to speed — even someone like myself who majored in English with minors in philosophy and music.

Some people are bound to think: "Paul Brest—business law? I wouldn't have thought that would be on his agenda."

Didn't you know that Constitutional Law is the mother of all disciplines? Seriously, though, you don't have to be a corporate law teacher to know that this part of the curriculum is in need of a major overhaul—not just at Stanford, but everywhere. The difference is that we have the ability to do it.

This seems a long way from Curriculum B.

Actually not. Curriculum B was a good example of what a small law school with a concerned faculty could do. I believe it was in 1978 that a group of faculty began holding open meetings to consider how we might improve the first-year curriculum. For almost a year, we discussed what we hoped to achieve in our existing courses, where we felt we succeeded, where we felt we could do better, and how we might change the curriculum to make it more effective. We then went to the whole faculty and asked, "Will you give us a third of the entering class to try out these changes?" And for several years, a diverse and constantly changing group of faculty experimented with different ways of teaching and coordinating courses. The new Law and Business program will be a similar experiment, for it will require reexamining and coordinating the entire business curriculum.

I understand that even though Curriculum B was discontinued as a distinct track, it has still had an impact.

Both Lawyering Process and Mitch Polinsky's introductory course in Law and Economics grew out of it. But quite apart from any lasting structural changes, moments like this make the faculty focus on and improve their own teaching. And the very novelty provides an exciting and thus more valuable experience for the students involved.

Are there areas other than business law that you would like to see strengthened?

Oh, yes. For example, we have - or are on our way to

diverse faculty brings different backgrounds and perspectives to teaching and to the analysis of legal policy.

And that is an impor-

educations. ""

tant part of our students'

creating — challenging and rich courses of study in areas of public interest law, international law, law and economics, constitutional law, and what we have come to call "legal studies" — legal history, jurisprudence, and the sociology of law.

Speaking of legal studies, do you wish more graduates went into academia?

Yes. In fact, it's already beginning to happen. I'd like to encourage more people who might be interested in law teaching to apply to Stanford, and more of our students to think seriously about careers in teaching. Having students who are interested in legal scholarship for its own sake tends to enrich the atmosphere for everyone.

Do you plan to add more women and minorities to the faculty?

The Law School is committed to affirmative action, and this is an important goal of my own. Our faculty currently includes two Blacks, two Latinos, five women, and an Asian-American visiting professor—not a trivial proportion, but hardly a reason to be smug. Their presence has affected the nature of legal discourse within the classroom and throughout the School. Not that there's a "minority" or "women's" point of view on legal issues—but a diverse faculty brings different backgrounds and perspectives to teaching and to the analysis of legal policy. And that is an important part of our students' educations.

At a forum last spring, some students argued that the School should adopt a quota system: something like two minorities for every white faculty member hired. You disagreed.

I did disagree. It is important to systematize and widen the search process, to make sure that we don't overlook qualified women or members of minority groups. We must also avoid assuming that there is a unitary standard of excellence, for this can sometimes disguise the pernicious notion that "everyone should be just like me." Especially in a time of so much intellectual ferment in the legal academy — and this isn't an issue concerning only women and minorities — we must constantly scrutinize our received ideas about what counts as innovative and valuable teaching and scholarship. And, of course, we must be willing to consider people who have had unusual educational backgrounds or have followed unconventional career paths. But I don't believe that quotas lead us productively in these directions.

I've read that you were one of the early supporters of the East Palo Alto Community Law Project. The Project is, of course, very helpful to its clients. What, though, do you see as its value to the school?

The Project has been the most exciting thing to happen at Stanford Law School in many years. It has already done a lot and is just beginning to achieve its po-

tential. It provides desperately needed legal assistance to a seriously impoverished minority community. It gives our students an opportunity to see how the law affects America's underclasses — how the law can ameliorate their condition, or sometimes worsen it.

The Project also lets us teach courses in which students can actually participate in the legal system at work. It is one thing to teach abstractly about how administrative agencies function, but there's nothing like having a student directly confront the bureaucratic procedures of a real-life agency. The Project offers a unique educational tool.

Is the Project much different from legal clinics at other schools?

The fact that it was initiated by students and that students are heavily involved in its administration makes it very different, as does the fact that, as its name suggests, it is a *community* law project—closely connected to East Palo Alto and responsive to its needs. The courses taught in conjunction with the Project also differ from most clinical courses in the way that they integrate theory and practice. The students' actual experiences provide the basis for studying legal policies in areas such as welfare, education, and immigration law.

Even before the Project, didn't Stanford have a reputation as an innovator in clinical education?

Stanford was a leader in clinical education through structured simulations, in which students play various legal roles and their performances are videotaped and reviewed.

You had something to do with that, didn't you?

Tony Amsterdam was the pioneer who taught us all. Bill Simon and I then developed the Lawyering Process course as a first-year elective. In it, students perform a number of lawyers' tasks, including interviewing and counseling clients, some aspects of litigation, and negotiating and mediating. Then, in the classroom, we rely on their role-playing experi-

ence as the basis for examining procedural and substantive legal policies, ethics, and the like.

I would think that training of this kind is preferable to being thrown into the real world of practice with nothing but book learning.

Perhaps the course helps in this respect. But its main purpose is not skills training, but rather to use the simulations as background for studying the legal system. I don't think of clinical teaching as an end in itself, but as one of a variety of methods that has a role in teaching almost any subject.

Does the course sensitize students to aspects of law besides litigation?

I hope so. Lawyering Process includes examining some methods of alternative dispute resolution — both negotiation and mediation - and our aim is to examine their possibilities and limitations. For students who want to study these subjects in greater depth, Bob Mnookin offers both an advanced course in alternative dispute resolution and an interdisciplinary seminar in decision analysis taught together with a dazzling array of faculty from the economics and psychology departments and the business school.

Well, it's the Bicentennial of the Constitution, and you're a constitutional lawyer. What sorts of problems or challenges do you see arising in relation to our constitutional government?

What concerns me-concerns any constitutional scholar who watches the Bicentennial events-is how much the document is revered but how little it is understood by those who revere it. For this reason, I've been delighted by the hearings on Robert Bork's nomination to the Supreme Court. They couldn't have come at a more appropriate time, for they have focused national attention on the meaning of the Constitution and how it should be interpreted. The hearings

have given citizens a free course in constitutional law taught by some of the nation's leading legal scholars, including

I don't know what long-range consequences the hearings will have beyond the particular matter of Judge Bork's confirmation. But my sense is that they've brought issues that are usually dealt with only by constitutional lawyers and judges into public discourse. Not only substantive issues, such as whether there is a constitutional right of privacy or whether the equal protection clause should protect women, but also questions about how the Constitution should be interpreted — for example, how much emphasis should be given to the "intent of the adopters" as compared to the traditions of precedent — and also questions about what the Senate's own role should be in the confirmation process.

You have, of course, written a casebook in constitutional law—Processes of Constitutional Decisionmaking. How is it different from other texts in the field?

By contrast to most other constitutional law casebooks, this one emphasizes questions of process — how one goes about interpreting the Constitution and the roles of institutions besides courts. We focus on questions such as: How does one interpret the text? What role does original intent play? What is the role of precedent and history? Who has the power to decide what? (I say "we" because I'm now revising the book together with Sanford Levinson, a former student of mine who now teaches at the University of Texas.)

The book also has a historical theme. It looks at the Court under Chief Justice Marshall, under Chief Justice Taney, and so forth, and examines a cross section of doctrines during each period. Our aim is to see whether, at any given time, there are transdoctrinal forces that unify and explain doctrines that otherwise don't relate directly to each other — for example, the commerce and due process clauses.

Let me turn to some personal topics. Your undergraduate fields were English, music, and philosophy. What drew you to law?

About the same time that I realized I wasn't a good enough musician to be a performing musicologist-I played the Renaissance lute, badly—I got involved in the civil rights

movement. I went to law school mainly to become a civil rights lawyer.

Judge Bork himself—not to mention our own Barbara Babcock and Tom Grey, who testified against the nomination, and Tom Campbell, who supported it.

The Dean's main role is to help bring out what is best in the students, faculty, and staff. "

Didn't you actually practice civil rights law for a while?

My wife, Iris, and I spent the years from 1966 to 1968 in Jackson, Mississippi, working for the NAACP Legal Defense and Educational Fund. Our practice consisted mostly of school desegregation cases.

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How did you get from there to Stanford?

While we were in the South, a former professor of mine at Harvard phoned and asked whether I would like to be a law clerk to Justice Harlan. Although there was plenty of work left to be done, the truth is that we had had our fill of Mississippi, and this seemed a oncein-a-lifetime opportunity. So we went to Washington, where I had an extraordinary year with Justice Harlan—"extraordinary" was one of the Justice's favorite words. And while I was there, various law schools sent profes-

sors to interview at the Supreme Court. Stanford seemed very exciting, in fact exotic for a couple of New York kids. So here we are.

Do you still play the lute?

I switched to the viola a number of years ago. I became envious of our two children, who studied string instruments and played in the Palo Alto Chamber Orchestra. I wanted to play chamber music, too, and now sometimes play with a string quartet.

I've wondered about your other hobby—computer programming. You were in fact one of the first faculty members to use a computer. Was it just intellectual curiosity, or did you see an immediate application?

Both. I've always composed on a typewriter rather than dictating or using a yellow pad. The first time I saw a word processor, and how easily you could move text around or zap it, I knew I wanted one.

I got involved in programming through a mixture of curiosity and wanting to do something that my word processing program couldn't. If you've ever tried revising text that has footnotes at the bottoms of pages, and have had to renumber and move the footnotes—it's a real pain. So I learned how to program, and wrote software that automatically numbers and formats footnotes.

Have you written any other programs?

Yes, together with Iris and a couple of friends. Our main programs today are a database manager for research notes and bibliographies and a program for scheduling classrooms. As you might imagine, both of these grew out of my own needs.

I've heard that your software is commercially marketed.

We have a family-owned company, Pro/ Tem Software, which translates as "for the time being." Once in a while a customer notices this and asks whether we're a fly-by-night outfit. Actually, we've been trying to get rid of the company, so that it can realize the destiny implicit in its name. No luck yet.

Haven't you also been involved in teaching about computers?

I've been co-teaching a seminar on artificial intelligence and law, focused mainly on so-called "expert" systems. An expert system is, in effect, an intelligent data base — a way to provide information efficiently in a form that may be useful to a lawyer.

Last year, for example, a student designed a program to assist aliens in filing amnesty petitions. The computer asks the lawyer or paralegal for information about the client, and at the end of the session it gives its "opinion" about whether the person is eligible for amnesty. The program, when fully developed, would then be able to print out the appropriate application forms, personalized for each eligible applicant. This particular program may be successful because its aspirations are fairly modest and because this is an area of law covered by very detailed regulations and which usually does not require much discretionary judgment.

That's a nice application. I would think a general practitioner might find something like that useful in an area where he's not particularly au courant.

Perhaps. But the danger of expert systems is that they don't know what they don't know. An experienced immigration practitioner might pick up on something that would affect a client's eligibility, which the program just can't have built into it. For this reason and others, I'm skeptical whether expert systems will end up being particularly useful in law. Nonetheless, I think it's worth giving a course in which students try to build expert systems. If nothing else, we can learn a lot about the nature of legal reasoning and the limits of attempts to formalize legal doctrine.

Let me end with my favorite question to professors: If your students learned only one thing from you, what would you want that to be?

To be able to hear and examine unfamiliar views with both openness and a critical stance.

The Bicentennial of the Constitution:

A Racial Perspective

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N THIS YEAR of the Bicentennial you will hear a great deal that is laudatory about our nation's Constitution and legal heritage. Much of this praise will be justified. The danger is that the current oratory and scholarship may lapse into mere self-congratulatory back-patting, suggesting that everything in America has been, or is, near perfect.

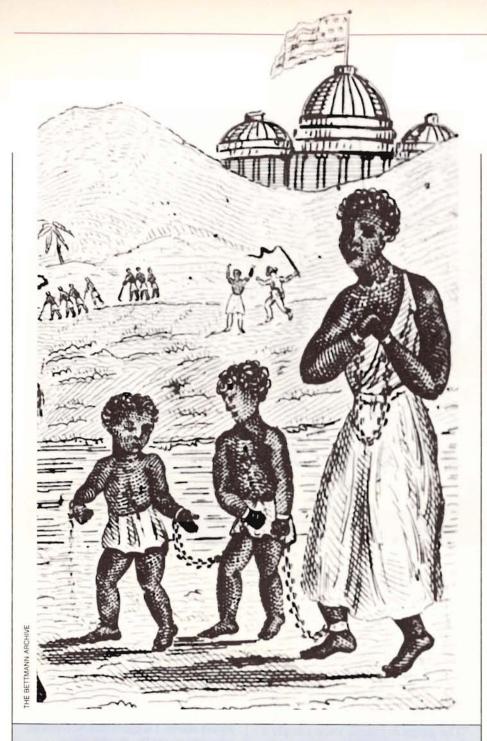
We must not allow our euphoria to cause us to focus solely on our strengths. Somewhat like physicians examining a mighty patient, we also must diagnose and evaluate the pathologies that have disabled our otherwise healthy institutions.

I trust that you will understand that my critiques of our nation's past and present shortcomings do not imply that I am oblivious to its many exceptional virtues. I freely acknowledge the importance of two centuries of our enduring and evolving Constitution, the subsequently enacted Bill of Rights, the Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments, and the protection of these rights, more often than not, by the federal courts.

Passion for freedom and commitment to liberty are important values in American society. If we can retain this passion and commitment and direct it towards eradicating the remaining significant areas of social injustice on our nation's unfinished agenda, our pride should persist—despite the daily tragic reminders that there are far too many homeless, far too many poor, far too many hungry, and far too many victims of racism, sexism and pernicious biases against those of different religions and national origins. The truth is that, even with these faults, we have been building a society with increasing levels of social justice embracing more and more Americans each decade.

My theme, then, is that which President Kennedy suggested in 1961, when he said: "For I can assure you that we love our country, not for what it was, though it has always been great—not for what it is, though of this we are deeply proud—but for what it some day can and, through the efforts of us all, *some day will be.*" 1

It is my hope that a careful scrutiny



"We should of course recognize the contributions of the Founding Fathers as a momentous start... More important, however, is the fact that the Constitution has been an *evolving document*, continuously expanding the freedoms, rights, and liberties of all our citizens."

and balanced understanding both of where we have failed and where we have succeeded can help America to become the fairer and more just nation we someday should be.

WHITEWASHING SLAVERY

The unfortunate incident involving the California Bicentennial Commission's original support and later withdrawal of W. Cleon Skousen's book, *The Making of America: The Substance and Meaning of the Constitution*, ² is an example of how the forthcoming Bicentennial celebration can indeed be distorted.

Skousen states in his preface that the book was written "to fill a special need." He feels that the United States has for many years been drifting away from the Founding Fathers' "original success formula." His purpose, he said, is to help Americans understand what the formula has been and what it is that we should celebrate.

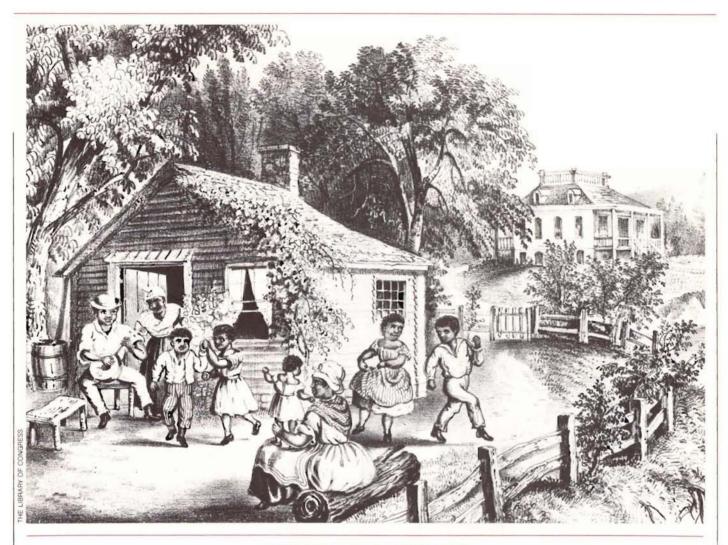
At best, Skousen minimizes the disadvantages of slavery. At worst, he seems more often to applaud it. I shall touch briefly on his four major themes—all of them perpetuating myths long used to justify the oppression and continuing exclusion of blacks.

Myth 1:

Outside Instigators

Skousen suggests that the major deterrent to the elimination of slavery was not the slave owners but outsiders. He argues that slavery was not abolished in the antebellum South in part "because of resentment against the interference of Northern abolitionists." Thus we hear repeated in 1986 the age-old shibboleth stressed by slaveholders of the previous century and by racist governors in the 1960s such as Wallace and Barnett. They all argued that in some peculiar way the plight of blacks in a community deteriorates when there is a protest or when outsiders question those in power.

My response is that of Martin Luther King, Jr., when eight prominent "liberal" Alabama clergymen, all white, issued an



AN ENDURING MYTH

open letter in 1963 calling his activities in their state unwise and untimely. In one of the great documents of this century—King's letter from Birmingham City Jail—he said:

I am in Birmingham because injustice is here. Just as the eighth century prophets left their little villages and carried their "thus saith the Lord" far beyond the boundaries of their hometowns; and just as the Apostle Paul left his little village of Tarsus and carried the gospel of Jesus Christ to practically every hamlet and city of the Graeco-Roman world, I too am compelled to carry the gospel of freedom beyond my particular hometown.³

It seems to me that during the Bicentennial period we should be suspicious of those who continue to put the major blame on critics and outsiders rather than the oppressors.

Myth 2:

The Happy, Docile Slave

Skousen's second theme perpetuates the myth of what I call the "happy, docile black" who deserved and actually enjoyed deprivation. Skousen writes: "The gangs in transit were usually a cheerful lot, though the presence of a number of the more vicious type sometimes made it necessary for them all to go in chains." No one familiar with the history of the chain gang can possibly imagine that such individuals were so very, very happy.

Skousen goes on to make this remarkable assertion: "If the pickaninnies ran naked it was generally from choice, and when the white boys had to put on shoes and go away to school they were likely to envy the freedom of their colored playmates." I cannot believe that George Washington, Thomas Jefferson, James Madison, Patrick Henry or James Monroe envied slave children like those of Virginia, where statutes made it a crime even to teach blacks how to read and write. As partial rebuttal to Skousen's adulation of the joys of slaves, I suggest that he consider advertisements like the following:

Negroes for sale—a Negro woman, 24 years of age, and her two children, one eight and the other three years old. Said Negroes will be sold separately or together, as desired. The woman is a good seamstress. She will be sold low for cash, or exchange for groceries...⁴

This advertisement is typical of thousands of that era. What does it say to you about how happy these people could possibly be when their families were being torn apart and their women exchanged for groceries?

I suggest that during this Bicentennial period—rather than repeating what I must call the Skousen garbage deserving of disposal—we should review some legal cases. (I've found that at Harvard and sometimes at Stanford, people feel more comfortable when given a case cite.)

Look, for example, at *George v. State*, where the Mississippi Supreme Court held that it was not a crime to rape a slave woman. Or at *State v. Boon*, where a North Carolina court found that it was not a crime for a white person to kill any slave. And at *State v. Mann*, where the North Carolina Supreme Court—purportedly the most liberal of the southern supreme courts—held that as a matter of law it was not a crime for a hirer to shoot a black slave without cause or justification.

If, under such circumstances, black slaves appeared happy, perhaps the explanation is found in the words of the great poet, Paul Laurence Dunbar:

We wear the mask that grins and lies, It hides our cheeks and shades our eves.—

This debt we pay to human guile; With torn and bleeding hearts we smile, And mouth with myriad subtleties.

Why should the world be over-wise, In counting all our tears and sighs? Nay, let them only see us, while We wear the mask.

We smile, but, O great Christ, our cries To thee from tortured souls arise. We sing, but oh, the clay is vile Beneath our feet, and long the mile; But to let the world dream otherwise, We wear the mask!8

Myth 3:

Whites as the True Victims

Skousen's third theme is just as preposterous—that whites were hurt far more by slavery than were blacks. He states without further explanation that "Numerous observers, of varied shades of opinion on slavery, agreed that brutality was no more common in the





THE RECORD OF CRUELTY

black belt than among free labor elsewhere, and that the slave owners were the worst victims of the system."

My response to Skousen is that he should talk to the heirs of the slaves who were killed and brutalized by their masters; or listen to those whose children were sold away from them never to be seen again. He should read the narratives of former slaves like Charles Crawley, who had witnessed the sale of children at the auction block:

Lord, Lord I done seen dem young uns fought and kick like crazy folks. Child, it was pitiful to see 'em. Den dey would handcuff and beat 'em unmerciful. I don't like to talk 'bout back dar. It brun a sad feelin' up me.9

And Minnie Fulkes, another former slave who described the harsh treatment black women suffered from the point of view of a child who witnessed the abuse of her mother:

Der was an overseer who use' to tie mother up in de barn with a rope aroun' her arms up over her head, while she stood on a block. Soon as dey got her tied, dis block was moved an' her feet dangled, ya know—couldn't tech de flo'.

Dis ol' man, now, would start beatin' her nekked 'til the blood run down her back to her heels. I took an' seed the whelps an' scars for my own self wid dese here two eyes. Was a whip like dey use' to use on horses...after dey had beat my mama all day...Well honey dis man would bathe her in salt and water...I asked my mother, what she done for 'em to beat and do her so? She said, nothing, tother than she refused to be wife to dis man. 10

It is simply inconceivable that any harm slavery imposed on whites could approach the anguish and powerlessness inflicted by such a system on the slaves themselves.

Myth 4:

Patience and Time Needed

Skousen's final theme was that "a little more time may have solved the problem." If people had just been more patient and allowed slavery to go on for thirty or forty more years, he asserts, the institution would probably have ended naturally for economic reasons. "It likewise seems reasonable to believe," he said, "that by this solution the Negro might have escaped the revulsion of feeling against him that resulted from forcible emancipation and the carpetbag regime."

That is in many ways an astonishing comment. Would anyone suggest now that Jews in 1944 should have been willing to endure a few more decades of the Holocaust while awaiting some more moderate future generations of Hitlers? In 1831 William Lloyd Garrison gave the following response to those who criticized his abolitionist zeal:

I will be as harsh as truth, and as uncompromising as justice. On this subject, I do not wish to think, or speak, or write, with moderation. No! no! Tell

a man, whose house is on fire, to give a moderate alarm; tell him to moderately rescue his wife from the hands of the ravisher; tell the mother to gradually extricate her babe from the fire into which it has fallen;—but urge me not to use moderation in a cause like the present. 11

Skousen considers himself a patriotic American. All of us can and should be patriots; however, under the imprimature of lauding America and applauding the Bicentennial, we should not disregard or underestimate—as Skousen does—the record of systematic cruelty to blacks during the antebellum and post-Reconstruction periods.

FROM SKOUSEN TO STANFORD

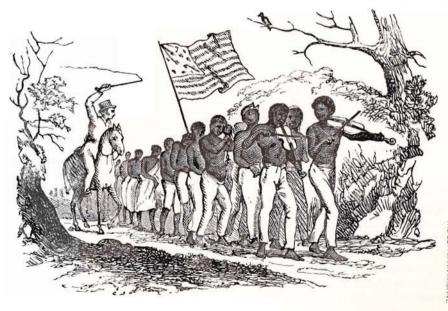
Who is W. Cleon Skousen? Some of you may feel that, as a lever for rhetorical statements, I have set up a straw man, elevating Skousen and his ideas to a status that would never be accorded him by any reputable historian or scholar associated with Stanford or any other prestigious university.

First of all, let me stress that the real world is larger than the boundaries of Palo Alto. And regardless of

whether Skousen would find much credibility among scholars at Stanford, he has credentials that many and perhaps most Americans would consider impressive. A graduate of George Washington University Law School, he spent sixteen years with the Federal Bureau of Investigation, much of the time as an administrative supervisor and special assistant to J. Edgar Hoover. For four years he was chief of police of Salt Lake City. He wrote numerous articles and a book which apparently was acclaimed, called The Naked Communist (1958). And the biography given in his book says that he spent "ten years as a university professor."

Furthermore, according to articles in the San Jose Mercury News and elsewhere, Skousen appears to be an individual of some influence. His main strength lies in political ties throughout the West, where he is reported to have sold thousands of books, and now, with several rightwing Spanish-speaking leaders, is drafting a model constitution for Latin America. Arizona Governor Evan Meacham, who caused a furor recently by cancelling his state's observance of Martin Luther King, Jr.'s birthday, has

"The danger is that the current oratory and scholarship may lapse into mere selfcongratulatory backpatting, suggesting that everything in America has been, or is, near perfect."



THE BETTMANN ARO

called himself "a Skousen protégé."

Finally, Skousen succeeded at least temporarily in having his book adopted with only one dissent by the California Bicentennial Commission. (You'll be glad to know the identity of that lone dissenter: Stanford History Professor Jack Rakove, who has since resigned from the Commission.) And last week, the *Mercury News* reported that Skousen was coming to California to "deliver his political sermon, [that] America should return to its original Constitution." The paper described him as a "constitutional fundamentalist."

Nonetheless, I would have spent too much of your time on Skousen's book if it were merely the product of his own thinking. His book and themes are, however, far more important than his reputation as a part-time scholar and "constitutional fundamentalist" seem to indicate. The fact is that all of the comments I have read to you from Skousen's book were actually quoted (as he himself acknowledges) from a book by the late Professor Fred Albert Shannon: Economic History of the People of the United States. 12 And Shannon is someone who has been taken seriously in the academic world, including Stanford.

"It is my hope that a careful scrutiny and balanced understanding both of where we have failed and where we have succeeded can help America to become the fairer and more just nation we someday should be."

Professor Shannon's significant credentials include winning a Pulitzer Prize in 1929 for another book (The Organization and Administration of the Union Army, 1861-1865). For many years he was a tenured professor at the University of Illinois, and was invited to teach summers at such reputable universities as Cornell, Harvard, Ohio State, Williams, the University of Texas, Columbia, and Wisconsin. In fairness, however, it should be said that Stanford was the most recent university to have him teach-in 1955, one year after the Supreme Court's decision in Brown v. Board of Education.

During the Bicentennial period, then, the challenge for the serious academician is to not write off Skousen as some irrelevant right-wing fundamentalist who does not warrant a response; rather, the challenge is to deal with the enduring historiography of slavery as promulgated by established scholars such as Shannon, who were esteemed enough to win a Pulitzer Prize and be invited to teach at universities of Stanford's caliber.

I have discussed the views of Skousen and Shannon to point out the very real hazards of dwelling exclusively or even primarily on the Founding Fathers of the world of 1787. I fear a return to the "fundamental constitutionalism" espoused not only in the since-rejected Skousen volume but also by other less blatantly biased sources.

WHAT WE SHOULD CELEBRATE

What, then, are the issues we should and should not celebrate this bicentennial year?

I have discussed the views of Skousen and Shannon to point out the very real hazards of dwelling exclusively or even primarily on the Founding Fathers of the world of 1787. I fear a return to the "fundamental constitutionalism" espoused not only in the since-rejected Skousen volume but also by other less blatantly biased sources.

(Continued on page 52)



A. Leon Higginbotham, Jr., has been a federal judge for more than twenty years, first on the U.S. District Court for the Eastern District of Pennsylvania (1964–77) and then on the U.S. Court of Appeals, Third Circuit (1977–).

A graduate of Antioch College (BA, 1949) and Yale Law School (JD, 1952), he served as an assistant district attorney in Philadelphia County from 1953 to 1954, followed by eight years in private practice in Philadelphia. His first presidential appointment was to the Federal Trade Commission, where he served from 1962 until being named in 1964 to his first judgeship.

Judge Higginbotham's writings include the book, In the Matter of Color: Race and the American Legal Process (Oxford University Press, 1978), and more than forty published articles. He has been an adjunct professor in the sociology department of the University of Pennsylvania since 1970, and a lecturer at Harvard Law School since 1983.

Judge Higginbotham spent the 1987 spring term at Stanford as Herman Phleger Visiting Professor of Law. While in residence he taught a seminar comparing race relations law in the United States and South Africa and on April 1 delivered the 1987 Phleger Lecture from which this article is drawn.



Private Clubs and Public Values

by Deborah L. Rhode Professor of Law



To defenders of sex-segregated institutions, the preeminent issue is not equality but liberty, and the values of personal identity and cultural diversity that underlie it. Moreover, some feminists have questioned women's focus on getting in—as opposed to doing in—men's associations. From this perspective, the response to exclusion should be a kind of Groucho Marx stoicism: any club that bans women is not the kind women should want to join.

The issues surrounding access to gender-segregated institutions are not, however, so readily dismissed. The perpetuation of all-male clubs works to women's disadvantage on several levels.

As a practical matter, such clubs constitute a substantial, albeit dwindling, presence on the social and commercial landscape. Membership in the fraternal orders of the Elks, Moose, and Eagles totals well over five million. Along with such service clubs as Lions, Kiwanis, and Rotary, they provide important business and professional networks from which women have been routinely excluded. In a society where men

reportedly obtain almost one third of their jobs through personal contacts (and probably a higher proportion of prestigious positions), the commercial value of social affiliations should not be undervalued. Smaller, more elite institutions like the Bohemian, Century, and Cosmos Clubs also provide forums for highly significant political discussions that later emerge as public policy.¹

Moreover, as a symbolic matter, exclusion of women, like that of racial or religious minorities, carries a stigma that affects individuals' social status and self-perception. Relegating women to separate dining rooms, separate entrances, or separate organizations is an affront to their dignity and sense of self-worth.

Finally, as a theoretical matter, separatism poses questions that have been at the core of feminist legal struggles for the last century: questions about public and private, sameness and difference, and formal versus substantive equality.

Defenders of all-male institutions frequently claim that women do not, in fact, experience separatism as degrading, but rather enjoy having their own clubs or dining facilities. Such rejoinders - which resemble explanations often given for excluding racial and religious minorities - obscure a fundamental distinction. Separatism imposed by empowered groups carries a different social stigma and instrumental significance from separatism chosen by subordinate groups. The latter form of exclusivity does not convey inferiority or serve to perpetuate existing disparities in political economic power. By contrast, the forms of institutional separatism chosen by dominant groups tend to reinforce their privileged position and the stereotypes underlying it.

The lingering potency of such stereotypes is indicated by the explanations that private club members commonly advance for excluding women. It is variously claimed that a female presence would alter club demeanor and decor. As one representative club manager argued, "If a man has a business deal to discuss, he doesn't want to sit next to a woman fussing about how much mayonnaise is on her chicken salad."2

Yet when sexist stereotypes dictate associational policy, they tend to become self-reinforcing. No women are present to counteract the assumption that males' luncheon conversation focuses on mergers while females' fixates on mayonnaise. Men who are uncomfortable associating with women in such social settings will never become less so if discomfort remains a valid justification for exclusivity. And males who have trouble treating women as equals at clubhouse lunches are unlikely to be free of such difficulties in corporate suites. As long as women do not "fit in" in the private worlds where friendships form and power congregates, they will never fully fit in in the public sectors with which the state is justifiably concerned.

Legal Challenges

Given the differing roles of male and female separatism in this society, it is scarcely surprising that almost all the legal challenges to sex-segregated associations have been directed at men's rather than women's organizations. Such challenges have met with only partial success. In general, the membership policies of private organizations are not subject to constitutional scrutiny. Title II of the federal Civil Rights Act bans discrimination in public accommodations on the grounds of race, religion, or national origin, but not of sex. And although public accommodations laws in many states include prohibitions on gender discrimination, virtually none of these statutes apply to private associations. Accordingly, their effect on sex-segregated clubs has been limited.

In the late 1970s and early 1980s, however, concerted lobbying and litigation efforts began to expand conventional understandings of the term "public."

These efforts received cautious approval by the Supreme Court in the mid-1980s, although the scope of its holdings remain unclear. First in *Roberts*

u. United States Jaycees (1984), and then in Rotary International u. Rotary Club of Duarte (1987), the Court held that state antidiscrimination statutes could bar gender restrictions in club membership policies without infringing First Amendment rights of association. In so holding, the Court noted that associational interests had received constitutional protection in two contexts.

One line of decisions has shielded certain intimate human relationships against state intrusion in order to preserve fundamental elements of personal liberty. A second line of precedents has recognized rights to associate in order to engage in other constitutionally protected activities—speech, assembly, and religious expression.

As to the first interest, the Court concluded that Jaycees and Rotary Club members had not exemplified the kind of intimate attachments warranting constitutional protection. As to the second concern, although a "not insubstantial" part of organizational activities constituted protected expression, the Court found no basis for concluding that the admission of women as full members would alter or interfere with that expression.³

If hard cases make bad law, easy cases sometimes do no better, and the Jaycees-Rotary sequence is a good example. The organizational practices at issue were not typical of most sex-segregated clubs, and the Court's opinions were careful to limit their holdings to those practices. What is disturbing about this approach is not the results, but the rationale, and the majority's continued adherence to a public/private framework that does not adequately capture the competing values at issue.

A threshold difficulty lies with the distinction between intimate and non-intimate associations. Under the analysis endorsed in *Jaycees, Rotary International*, and various lower court decisions, the ultimate question is whether an organization seems more an extension of home or market. That leaves many groups occupying an awkward middle ground, and neither of the principal criteria the Supreme Court iden-



SAN FRANCISCO ARCHIVES

hile we cannot eliminate social segregation by legal fiats, we can at least seek to minimize its crudest form and the social legitimacy that underlies it."

PRIVATE CLUBS

tified — size and selectivity — yields satisfactory distinctions.

For example, what level of protection should apply to the organizations that are large but more exclusive than the Minnesota laycees (which, as far as the record reflected, had rejected no male applicant in recent memory)? Many highly exclusive groups have substantial memberships; some 2,000 individuals belong to the Bohemian Club, and restrictive luncheon and country clubs frequently number in the hundreds. It is not self-evident that gender prejudice is more deserving of protection in such elitist organizations than in their more democratic counterparts. So too, the relation between size and intimacy is more complicated than conventional doctrines have acknowledged. Some exclusive organizations, while not intimate in scale, can provide forums for developing intimate relationships.

Also disquieting was the Court's analysis of expressive claims. For example, throughout the Jaycees litigation, defenders of its policies asserted that women might have different attitudes about various issues on which the organization had taken a public position, particularly its support for President Reagan's economic policies. In dismissing such claims as unwarranted "sexual stereotyping," the Court ignored not only a wealth of gender-gap studies, but also an extended array of feminist theory which suggests that the sexes' different social experiences have been reflected in different sex-linked attitudes.

A more fundamental difficulty, however, was the Court's implication that access to an all-male institution may depend on whether female members would endorse its existing values. If the price of admission is a promise of assimilation, that strategy is not one all women's rights advocates will be prepared to embrace.

Equally disturbing was the Court's failure to acknowledge the values that separatism might serve, independent of an association's size or exclusivity. The dynamics of mixed and single-sex organizations differ, and separatism in some contexts may present opportunities for



s long as women do not 'fit in' in the private worlds where friendships form and power congregates, they will never fully fit in in the public sectors with which the state is justifiably concerned."

self-expression and collective exploration that would be inhibited by sexual integration.

Yet the case for full female participation in associations like the Jaycees and Rotary need not depend on a denial of sex-based differences or the value of single-sex affiliations. Rather, it should involve a more contextual assessment of the significance of those differences and values in various cultural settings. One can concede that sexual integration might in some measure affect an association's philosophical cast or social dynamics, without conceding that its basic functions would alter. Inclusion of members with a different perspective might in fact enrich, rather than impair, an organization's expressive activities.

An alternative framework more attentive to gender disadvantages than gender difference would focus more directly on the social costs that flow from single-sex affiliations. Those costs are more extensive than conventional public/private distinctions and state action doctrine have acknowledged. Although the Jaycees and Rotary holdings were an advance over prior decisions, their reach remained quite limited; they permitted states to bar gender discrimination by certain organizations, but fell short of creating a constitutional remedy for such discrimination or of specifying adequately the organizations subject to such regulation. These limitations in the Court's approach reflect more fundamental limitations in its public/private framework. What this analysis fails to acknowledge is how women's exclusion from spheres conventionally classified as private contributes to women's exclusion from spheres uniformly understood as public. As noted earlier, the denial of female access to male associations perpetuates existing inequalities in business, professional, and social status.

The boundary between public and private is fluid in still another sense: Most "private" clubs depend heavily on public support, largely in the form of tax subsidies and municipal services. Clubs gain tax exemptions by claiming to be private organizations in which "substantially all" activities are for pleasure, rec-

reation, and other nonprofit purposes. At the same time, members (or their employers) deduct dues and fees as "ordinary and necessary business expenses." This privileged status points up the difficulties of seeking to dichotomize such associations as either commercial or noncommercial, public or private.

An Alternate Framework

An alternative approach to single-sex organizations will require a reconceptualization of public and private. The focus ought not simply to be on an organization's intimate or expressive character, but also on the totality of its public subsidies and public consequences. Rather than focusing on any single nexus of state involvement, courts and legislatures should consider the aggregate of governmental and commercial entanglements. Grants, licenses, and tax subsidies by the state, as well as reimbursement of expenses by emplovers, could serve as legitimate avenues for governmental intervention. The government could also withdraw support in the form of liquor licenses, tax exemptions, and deductions for sex-segregated organizations. Since employers provide an estimated \$1.6 billion in annual support to private clubs and 40-50 percent of the revenues of certain elite men's associations, the cumulative effect of such strategies might be substantial.4

To be sure, the more categorical the approach, the more over- and underinclusive it is likely to prove. Withdrawal of support for any single-sex association comes at a price. Subjecting associational policies to state oversight increases the risk of harrassing litigation and narrows the range of private choice. We have, however, managed to prohibit racial discrimination by private associations without the disabling social consequences that critics often envision. The issue is not simply whether single-sex associations are beneficial, but whether experiences of commensurate value are avail-

(Continued on page 51)



Deborah Rhode joined the faculty in 1979 and became a full professor in 1985. Since September 1986 she has also been director of the Institute for Research on Woman and Gender at Stanford. In 1983 she became the first woman graduate of Yale College to be elected a fellow of the Yale Corporation (the university's governing body).

As a student at Yale Law School (JD, 1977), Rhode was a law review editor and director of the moot court board. Her clerkships were with Judge Murray Gurfein of the Second Circuit Court of Appeals (1977-78) and Justice Thurgood Marshall of the U.S. Supreme Court (1978-79).

Rhode is an authority on legal ethics and the professional responsibilities of lawyers—the subject of her book with Yale professor Geoffrey Hazard, entitled The Legal Profession: Responsibility and Regulation (Foundation Press, 1985).

The article printed here is adapted from her forthcoming book on Justice and Gender (Harvard University Press) and an article, "Association and Assimilation," from a symposium on the First Amendment in 81 Northwestern Law Review 106 (1986). An earlier version of this exerpt appeared in the Fall 1986 issue of the newsletter QQ — Report from the Center for Philosophy and Public Policy.

VERY SESSION was a feedback session at this year's Board of Visitors meeting. Though traditionally a forum for exchanging views, the 1987 meeting was exceptional for the amount of communication between the School and its graduates and friends on the Board.

To incoming Dean Paul Brest, this was a welcome development and one he plans to encourage. "We at the School," he said, "can only benefit from your scrutiny and counsel."

A diverse group

The two-day meeting—twenty-ninth since the Board's founding in 1958—began with lunch in Hoover Institution's Stauffer Auditorium. Brooksley Born '64, chair of the 1986-87 Board, opened with a welcome to the Visitors and faculty in attendance.

The Board of Visitors is, she observed, "a broad and representative group of alumni/ae and friends of the School." Classes now represented range from 1927 to 1982, covering 55 years of the School's life. Members come from 15 states and the District of Columbia. Their employment is also diverse, including private practice, inhouse counsel, business, the judiciary, teaching, government, and public interest work.

The purpose of the Board is "to learn about and comment on the activities of the School," Born continued. This year's meeting is also an occasion "to thank John Hart Ely for his five outstanding years as Dean, and to welcome Paul Brest as the School's new Dean."



BOARDof

Born concluded by encouraging Board members to think about the School not only during the formal, annual meeting, but throughout the year. "Your input should be ongoing and is welcome at any time."

How law firms grew

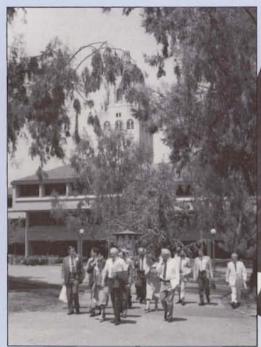
Professor Robert Gordon, in the luncheon address, discussed his research on the genesis of "the big metropolitan law firm as we know it." Through much of the nineteenth century, he explained, lawyers typically practiced in three-man firms consisting of a senior, publicly oriented attorney, a hardworking junior, and a clerk. The change, which accompanied the growth of large railroad companies, occurred first among "the elite lawyers of the New York bar." Gordon has been studying these lawyers in the period from 1880 to 1920—"their backgrounds, clients, what they did for clients, how firms were organized, and what kinds of public service they did."

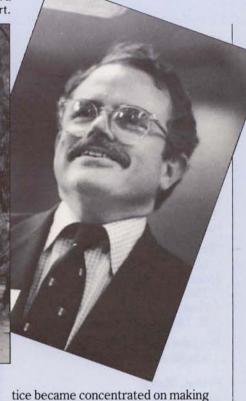
First to accept Gordon's invitation for questions was Thomas Elke '52, who asked, "Why should we be interested in this?"

Gordon's reply: "It sheds light on contemporary firm practice and careers — what the benefits and virtues of aggregate practice are." His research also relates, he said, to current "jeremiads on the decline of law practice from a profession to a business," a trend that necessarily has "an historical dimension."

In response to questions about the state of the profession today, Gordon said: "It's not that good, but will proba-

Board members took a postprandial stroll (below) to Crown Quad, where outgoing Dean John Ely (right) delivered a five-year report.





bly become better. The whole scene has become more mobile," he noted, citing the withdrawal of Fortune 500 companies to in-house counsel. "Business is now more spread around. Everyone is competing for a piece of the action.

"Some aspects of new practice have a sort of sinister aspect—that is, not much time for leisure or other activities," he continued. "Attorneys are less active in public life and have less influence on public policy formation than in, say, the early days of the Republic. Economists have moved to a degree into the vacuum, but their perspective is limited.

"It would be a great pity," Gordon concluded, "if the organization of prac-

tice became concentrated on making money to the exclusion of other societal roles that lawyers have historically played."

With that thought, the luncheon ended, but not the dialogue, which continued throughout the sessions that followed.

State of the School

The first official session of the annual meeting was called to order at the Law School by outgoing Dean John Hart Ely. That the School is in such good shape is due in large part to the support of past and present Boards and the School leaders with which

VISITORS

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BOARD of VISITORS

THE AGENDA

Thursday, May 7

Guided tours of the new Mark Taper Law Student Center

Opening luncheon
Welcome by Brooksley E. Born '64,
Chair

"Corporate Lawyers 100 Years Ago" Prof. Robert W. Gordon

Afternoon sessions
"State of the School" Report
Dean Ely

"The Relation Between Legal Practice, Teaching, and Scholarship"
Assoc. Profs. Ellen Borgersen,
Thomas J. Campbell,
Henry T. Greely, and Barton
H. Thompson, Jr.

Reception with students, followed by a buffet dinner

Friday, May 8

Morning session
Program on Law and Economics
"Punitive Damages"

A. Mitchell Polinsky, Josephine Scott Crocker Professor of Law and Economics

"Mergers, Acquisitions, and Takeovers"

Prof. Ronald J. Gilson

Prof. Myron S. Scholes (also Frank E. Buck Professor of Finance, GSB)

"Reconstructing the Person: The Case of Clara Shortridge Foltz" Barbara A. Babcock, Ernest W. McFarland Professor of Law

Small-group luncheon discussions with students

Afternoon session
Introduction of Dean-designate
Paul Brest

Summary and Advisory Session Brooksley E. Born '64 presiding

Marion Rice Kirkwood Moot Court Competition: Final Arguments (see page 42)

Banquet honoring retiring Dean John Hart Ely they have worked, he said. "We are fortunate in having a solid base for continued improvement."

Ely then gave a comprehensive overview of the School's current status as compared to five years before, when he assumed the deanship. His report—published shortly thereafter in *Stanford Lawyer* (Spring 1987, pages 3–5)—sparked a number of questions.

Several Board members were intrigued with reported changes in the makeup of the student body, which is now somewhat older than in recent years and has slightly lower LSAT scores and undergraduate grade point averages.

Sarah Hofstadter '78 observed that the decline in LSATs may be because applicants who have not attended school recently are "rusty in testtaking skills."

"Is the class just as bright?" asked Sallyanne Payton '68. "I would say yes," replied Ely. "And certainly more interesting."

Frank Mallory '47, recalling the World War II veterans of his law school days, said, "The faculty had a field day with students who really knew they wanted to practice law."

Kendyl Monroe '60 inquired about the criteria used to evaluate applicants who have been out of school for a few years. "We're looking not just at age, but at what they have done since college," said Ely. "Is it interesting and would a law practice build on it?" Following up, Monroe asked if the process is somewhat subjective. "Inevitably," the Dean replied, adding that admissions decisions are not, however, made by a single person but are "spread around the faculty."

Stephen Bauman '59 endorsed the trend, saying, "From a practitioner's point of view, I gravitate towards people who are older, have other experiences, and understand the workplace. Lawyers are generally part of the clients' team. The more life experience they bring, the better they can function as a part of the team."

Judge Pamela Ann Rymer '64 noted a possible disadvantage—that older age may make graduates "even less able to afford the financial sacrifices involved in public service." Ely responded that although this may in part be true, "there are also some indications that people who are thirty are less likely to go with the herd. Basically, I'm proud of the policy."

Richard Mallery '63 was interested in whether the faculty community at Stanford Law School suffered "tension and division such as that elsewhere." Replied Ely: "We have a broad intellectual spread—as much so as anywhere. Nonetheless, we have managed to maintain mutual respect for each other's opinions and realize that we need to keep some sort of balance



Break-time conversations engaged (*left to right*) Tom Elke, Louise LaMothe, Ed Huddleson, Fred Mielke, Richard Outcault, Mal Furbush, Peter Cannon, Jaye Young, and George Dikeou.



Faculty members (*I-r*) Buzz Thompson, Ellen Borgersen, Tom Campbell, and Hank Greely told how their real-world experience influences their teaching.

on the faculty. Zero faculty members vote on the basis of politics."

When asked by Miles Rubin '52 whether any consideration had been given to increasing the size of the student body, Ely said not. "We are locked in by the building, which involved a conscious decision to stay at this size. I'm happy with it."

Kenneth Montgomery posed the final question of the session: "What are your proudest achievements and greatest disappointments as Dean?"

Most pleasing, said Ely, is "the growth in public interest activity among students." He remains dissatisfied, however, with the degree of improvement in the curriculum, particularly for the second and third years of law school.

From practitioner to teacher

There followed a lively session featuring four younger members of the faculty who had spent time in practice and/or government service before coming to Stanford as teachers. Their topic: "The Relation Between Legal Practice, Teaching, and Scholarship."

The speakers—all associate professors at the time—were Ellen Borgersen, Thomas J. Campbell (since named a full professor), Henry T. Greely, and Barton H. Thompson, Jr. In independent presentations, each described the influence of their practical experience on what and how they teach. Though diverse in approach and subject matter, they were alike in bringing fresh perspectives, imagination, pragmatism, and a sense of the actual (as opposed to formal) law to the classroom.

Impressed by what former practitioners could contribute to law pedagogy, George Dikeou '64 asked whether the School had given thought to "incorporating current practitioners into the curriculum."

The Dean's affirmative reply was amplified by Professors Campbell and Thompson, both of whom said they invite practicing attorneys into class to lecture or discuss topics requiring special knowledge. In addition, the School has a few courses—Entertain-





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BOARD of VISITORS

ment Law, for example—that are taught entirely by outside practitioners.

David Fletcher '58 followed by asking about the number of such practitioners. Ely's response: Approximately eight to ten a year.

In a final comment, Thompson, who formerly taught part time at UCLA, said that he nonetheless has "a general bias in favor of teaching full time and integrating with the rest of the faculty."

From this discussion of teaching, the Visitors went on to an informal reception with students. The day ended with a buffet dinner at the Faculty Club, where a barbershop quartet including Associate Dean John Gilliland made a surprise appearance.



Research in progress

The Friday morning session was devoted to reports of ongoing research—"work in progress," to use Dean Ely's words—by members of the faculty.

Punitive Damages. Professor A. Mitchell Polinsky, director of the School's expanded John M. Olin Program in Law and Economics (see page 43), led off with an economic perspective on punitive damages. His analysis shows that if such damages are to act as an economic deterrent to wrongdoing or negligence, they should be set high enough to cover not only the costs of a given accident, but also the probable costs of other, undetected accidents by the violator. Moderating factors would, however, include the financial status and risk-averseness of the injurer; the possible "chilling effect" of high damages on socially desirable behavior; overcompensation of some victims; and increased administrative and litigation costs.

On balance, said Polinsky, the argument for using punitive damages to make up for instances where the injurer escapes paying anything would

have to be strong enough to overcome these disadvantages. Of the current legislative proposals to modify or cap punitive damages, he is most interested in those that "decouple liability," that is, divide the punitive damages awarded between the victim and the state or court system.

The stock market. The second presentation, also in the Law and Economics field—was made by Professors Myron Scholes and Ronald Gilson. The two are interested in using stock market returns "to quantify the impact of events bearing on policy issues," said Scholes. Specifically, they have been working with a model that indicates what the expected, or "normal"

return on a stock would be under various circumstances preceding an event of public interest (such as a change in company ownership).

The model could be useful in a number of ways, said Scholes. A notable example is the controversy over the phenomenon whereby the price of a stock rises markedly in the several days immediately before the formal announcement of a tender offer. The natural suspicion is that some illegal activity, such as insider trading, has occurred. In fact, said Scholes, a complex of factors - some perfectly legal - may contribute to anticipatory increases. These include newspaper mentions, announced foothold purchases (including their timing and size), and rumors of advance negotiations. It is claimed, for example, that over all, about two-thirds of anticipatory increases in stock prices of companies about to receive tender offers can be so explained.

With the model as a guide to the level of return attributable to such factors, analysts can better isolate unanticipated returns—that is, returns that diverge significantly from the level the model would predict. One practical application would be to help regulators



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Prof. Barbara Babcock reported progress in her effort—absent collected papers or archival material—to discover the real Clara Foltz.

differentiate between instances of "normal, healthy economic analysis by buyers" and cases where further investigation may be warranted. But more broadly, said Scholes, the model illustrates how a method for "finding the magnitude and significance of

events" can shed light on regulatory, legislative, and other policymaking questions.

Gilson, a self-confessed "Finance groupie," sees this and similar Law and Economics approaches as a valuable source of empirical information for lawyers. "It allows us to say something serious about what is going on," he said, "and gives our students a set of analytical tools they can take with them."

He and Scholes concluded their presentation by fielding questions from John Sabl '76, Bruce Gitelson '64, Lewis Fenton '50, and James Gansinger '70.

A biographical puzzle. Professor Barbara Babcock, in the third of the works-in-progress reports, described her current research on California's first woman lawyer, Clara Shortridge Foltz. As biographer, Babcock faces a difficulty: her subject, who died in 1934, seems to have left no personal papers or letters. Babcock is thus attempting to "reconstruct the person" from a variety of other sources, including Foltz's published writings, newspaper accounts of her activities, the books and papers of her contemporaries, court records of cases in which she was the attorney, and the historical context and events.

As a case in point, Babcock described her pursuit of the truth concerning Foltz's marital status.

Foltz, who had been married at 15 and divorced (with five children) at 30, seems to have constructed the false tale that she was a widow.

Working with available public sources, Babcock developed the thesis that Foltz did so "not because divorce was socially unacceptable, but to protect herself from charges of being a homebreaker or of choosing to abandon women's proper domestic sphere." Babcock also theorized that although Foltz filed for divorce, and by one account her husband remarried within two weeks of the decree, it was nevertheless Foltz's "ambition and desire for a grand life" that caused the rupture. The same year (1879) that she divorced her husband, Foltz and a friend, Laura deForce Gordon, persuaded the California Supreme Court to open the doors of Hastings Law School to women.

Following this presentation, the Visitors broke for a series of luncheon gatherings with groups of students.

Some 14 student organizations held lunchtime meetings with interested Visitors. Current Law Review members (below, left) compared notes with former editors (I-r) Allan Glikbarg, Clyde Tritt, and Bill Kroener. The Latino Law Students Association (below) welcomed Arnoldo Beltran and other graduates.





The new Dean

John Ely, as outgoing Dean, introduced Dean-designate Paul Brest. Ely described his successor as "an excellent scholar, truly interested in educational innovation," as well as being "a man of deep and unwavering commitment—not a bad foundation to build on."

Brest, in his first talk from a decanal perspective, spoke briefly about his hopes and priorities for the School during the next five to eight years (a subject since elaborated upon in the interview beginning on page 2). He then invited questions and comments from members of the Board.

The discussion that followed focused mainly on proposed improvements in the second- and third-year curriculum.

"Advanced courses are a good idea," said Colin Peters '47. "But are basic courses being lost in the process—for instance, Torts, which used to be taught for a full year?"

Brest explained that tort law is not given solely in the introductory course but also in other, newer courses like Hazardous Wastes and Media Law. "Reducing the one-year courses in both Torts and Property to one term was a conscious choice," he said. "There is probably as much on those subjects taught now as then."

Stephen Bauman '59 stated his belief that present-day graduates are actually better trained. "They seem more broadly educated, with more practical skills, such as negotiation. This is a plus."

Kendyl Monroe '60 wondered whether the issue of shortening law school to two years was settled. According to Brest, the idea, once proposed by former Dean Ehrlich, "got nowhere," due in part to lack of acceptance by the state bars.

John Sabl '76 reported hearing student complaints about a dearth of business courses. "Is there a weakness in the bread and butter areas?" he asked. Brest responded that the School does Dean-designate Paul Brest discussed future plans and

discussed future plans and fielded questions on curriculum, faculty hiring, and classroom participation.

indeed have gaps to fill, particularly in commercial and tax law. For the time being, he said, visitors are filling in, but "the faculty unanimously shares the view that we need to add strength to the business law faculty."

Ely concluded by expressing "great confidence, having listened to Paul, in the future of the School."

Summary and advisory session

Board of Visitors chair Brooksley Born '64 presided over the final, feedback session of the annual meeting. There to listen and respond were Dean Ely and Dean-designate Brest, the School's other deans, and several officers of the School.

Academic issues. The first question concerned curriculum and the experience graduates commonly have of encountering in practice legal areas not covered in law school. Ely replied that, given the evolving and increasingly specialized nature of the law, the best preparation is teaching and coursework "that ground you in ways of thinking rather than in specific subject areas."

Isaac Stein '72 asked how the School, in hiring faculty members, weighs teaching ability versus scholarship. Brest responded that generally the University's criteria are "excellence in one and superiority in the other. Someone who is an excellent teacher but not a scholar is not likely,"

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he said, "to stay a very good teacher for long.'

Susan Nycum asked whether the School was increasing the representation of women on the faculty. Brest said that the School looks hard for potential women candidates, but that many prefer to stay in practice. Nonetheless, he reported, "of three offers made this year, two were to women and both were accepted.'

John Finney '68 inquired about limitations on outside activities, such as consulting, by the faculty. Said Ely: "There's quite a clear rule - not more than one day a week." When asked whether days could be saved up, he said, "Yes, to a degree - at least within a calendar year.

Bill Kroener '71 asked whether faculty moonlighting is a problem. Ely said not. "The one-day-a-week rule seems to be adequate."

Sarah Hofstadter '78, commenting on curricular plans for course sequences, suggested that clusters might be preferable to sequences. The latter, she said, can be "hard to schedule with externships and other clinical opportunities." Ely agreed.

Miles Rubin '52 expressed an interest, duly noted, in opportunities for Board of Visitors members "to attend

Student concerns, Albert Horn '51 raised an issue arising from discussions with students. Some-particularly women, conservatives, and minorities - say they feel inhibited about speaking in class. The faculty, he said, "should be aware of this and encourage variety and a balance of views." Agreeing, Brest told of a recent student meeting on the subject of classroom participation, where the concerns of several groups were expressed. Brest's overall impression is that "more students are willing to take a line outside of center and pursue it than in former years." Nonetheless, he said, there are still some who feel that the student body is "not accepting of their viewpoint."

Bruce Gitelson '64 seconded this. saving that conservative students sense "a lack of openness from others." Acknowledging that this may be true, Ely said: "Talking in law school class is

traumatic for anybody, but particularly for someone who is in a minority."

Born reported that women students feel a lack of places to gather and talk about classes and other subjects. Elv expressed a hope that the lounges and meeting rooms of the new Taper Law Student Center (see pages 45-46) will help fill this need.

Admissions. Charles Silverberg '55 reported that some of the students he had lunched with claimed that they were not intending to be lawyers. "Is any consideration given to this in admissions?" he asked. Ely opined that the students were probably in their first year, when there is "lots of big bold talk." Saying so on their applications would have counted against them, he said. And in the long run, "it is extremely rare for our graduates not to become lawyers."

Kent Granger '62 expressed another concern: "Do we have many



Dialogue was the byword for Paul Ginsburg and Ellen Corenswet (above); Dean Ely and Al Horn (far left); and, at ease in Crocker Garden (near left), Brooksley Born, Pam Rymer, and Born's husband, Alex Bennett.

students with physical disabilities or handicaps? And in the admissions process, does this count as a plus or a minus?" Ely responded that though the number of such students is not large, Stanford is generally a very good place, with a welcoming climate and accessible physical plant. "We count disability positively," he said, "if the candidate is able to overcome it and perform in the acceptable range." Assistant Dean Margo Smith confirmed this, noting that one of the four Kirkwood Moot Court finalists this year is blind.

Financial aid. Sallyanne Payton '68 raised the issue of financial aid, about which she had heard complaints from students. Said Elv: "This was a problem a few years ago, but I'm a little skeptical now, because I've seen the statistics." The Dean explained that recently the School had-in consideration of the high expected incomes of most students - moved away from scholarships towards loans. Loan relief exists, however, for graduates who go into lower-paying public service work. And for older students, he said, aid has become more available. because the School now allows them to claim independence from their parents.

Daryl Pearson '49 recommended that the School conduct "a regular periodic review of our financial aid package to make certain that we are not losing excellent students to other schools." Ely replied, "We do compare aid packages, and ours is good. What we won't do is give extra to individuals we really want. The formula is the same for everyone, and we're pretty committed to doing it that way."

Noting that older students may have families and children, Hugh McMullen '71 asked, "Would that get them a higher scholarship?" The answer—provided by Assistant Dean Margo Smith—was that the scholarship (actually "tuition fellowship") amount would not be higher, but that more loans could be made available.

Sheri Criswell '72 mentioned that

in the past, students sometimes had their financial aid packages or status changed for the worse after their first year of law school. "Does this still happen?" she asked. Generally not, said Smith—at least not unless there is "a striking change in their financial situation."

Russell Johnson '58 wondered how Stanford Law School compares with the University of California. "It no doubt costs less to go to Boalt Hall, which is a wonderful school," said Ely. "But most people admitted to both choose to come here."

Career choices. James Gansinger '70 asked whether students might be pushed into taking high-paying jobs by the increased burden of educational loans. "We don't know," responded Ely. "The one-third of our students who don't need financial aid are also choosing high-paying jobs. This suggests that loans are not the driving force. However," he speculated, "it might influence the lower middle."

Born asked whether the publicinterest loan forgiveness program is much used. Very little, said Ely with some disappointment. "It is there, but the graduates are not choosing qualifying public service jobs." Hofstadter inquired about the availability of government and other public service options. Perhaps, she suggested, student job choices are dictated more by employment opportunities than personal preference. Ely doubted this, noting that students have shown a sometimes embarrassing lack of interest in even seeing representatives of nonprofit and government agencies.

Bill Kroener '71 asked what the School does to encourage students to go into teaching. "We've instituted a year-long seminar in legal studies designed particularly for that pur-

pose," said Ely.

"Does the faculty make a conscious effort to mentor people who show an interest in or potential for academic careers?" asked Born. The answer—from Paul Brest—was that no formal system exists, but "most faculty are delighted to find a student who is interested in their work."

Malcolm Furbush '49 lauded the philosophy espoused by Carl Spaeth, who had served in the State Department before becoming Dean. Accord-

The final summary and advisory session generated more than twenty questions and comments from members of the Board.



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ing to Furbush, Spaeth used to advise students to gain a base somewhere, from which they could then afford to go into government or other public service for a few years. "Many took that to heart," said Furbush. "Is anyone here articulating that philosophy?" Ely replied in the affirmative, saying that this is "a good model and one we alert students to, along with other options."

Thomas Elke '52 asked how the job choices of Stanford graduates compare with those of graduates from similarly ranked law schools. There is a general preference for large corporate law firms, replied Ely, though Stanford is "a more extreme case." However, he pointed out, "most people at fancy law schools end up taking fancy jobs."

On this note of realism, the formal sessions of the annual meeting came to an end. Still ahead, however, was the opportunity to hear the final arguments in the 1986-87 Marion Rice Kirkwood Moot Court competition (see page 42) and an evening banquet honoring the outgoing Dean.

The banquet

The departure of a Dean is by nature a landmark in the history of the School—a time, one might assume, for high seriousness. Serious moments did indeed occur during the farewell banquet, but the predominant mood was, to use one of John Ely's favorite words, "fun."

Master of ceremonies Dan Brenner '76, an experienced nightclub comedian as well as a UCLA law professor, set the tone with a hilarious tribute cum roast to the outgoing Dean. Brenner's explanation of how Ely accomplishes so much? "A very short name—think of the time he saves."

Jim Gaither '64 followed suit with references to the Dean's "wacky irreverence, horrible doodling, and irrepressible productivity." Before closing, however, he praised Ely for "helping us understand and become more concerned about our role in society, and the role that our students must play in society, if we are to better man's predicament."

Dean-designate Paul Brest, in his debut as a standup comic, showed a flair for the genre with some wellaimed zingers.

At the same time, Brest lauded Ely's commitment "to nudge us and our students toward public interest and to be very supportive of clinical education." An important result, noted Brest, is the School's close and supportive relationship with the East Palo Alto Community Law Project—an endeavor in which Kenneth and Harle Montgomery have played an important part. Brest then announced, with evident pleasure, a new donation





of \$100,000 by the couple to establish a Montgomery Program for Clinical Legal Education.

The incoming Dean concluded with the observation that "having John back as a constitutional law and international law teacher will be a productive and satisfactory conclusion to a wonderful deanship." Referring to Ely's impending trip around the world, Brest said: "We look forward to your return."

University President Don Kennedy followed with a number of laudatory remarks. "Working with John has been

Iris Brest and Jim Gaither (top, left) were momentarily serious during a generally hilarious program emcee'd by Dan Brenner '76 (below) and relished by John Ely (top, right). Hornmen Dent Hand '59 and Paul Robertson '61 (below, right) brought the band.

just a terrific privilege," he said. Kennedy congratulated the faculty for having taken "a chance that not many law school faculties in this country have taken—reaching outside for a person who would clearly be different, be challenging, be a leader." Together, he said, the faculty and Ely "made it work superbly and brought the Law School forward a great step.

"In saying goodbye to John as Dean, we pay a final tribute to the wisdom of his colleagues on the faculty," said Kennedy. "Not only did we get him as Dean, but we get to keep him on the faculty."

Next up was Associate Dean Jack Friedenthal, who dubbed Ely "the John McEnroe of Stanford Law School." Ely is, he said, "the only man I know who holds everybody to the highest possible standards, except himself—and his are twice as high." On behalf of the faculty and staff, Friedenthal then presented the peripatetic Dean with two gifts: a world globe and a *London Times* atlas.

Born, as Board of Visitors chair, made the final presentation: a genuine QE2 deck chair designated, she said "for Constitutional Law and Meditation."

Ely declared himself gratified by the turnout—particularly on a night when *Dallas* is broadcast. His closing words: "I feel good about this. Thank you."

-Constance Hellyer



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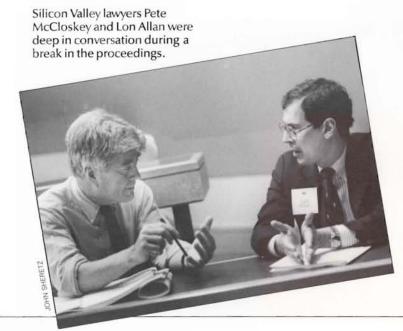
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Kay V. Gustafson '77 Irvine, California

James W. Hamilton '59 Costa Mesa, California

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Teresa Marie Lobdell '79 San Francisco, California

Richard N. Mackay '49 Los Angeles, California

Ellen Maldonado '78 Oakland, California

Frank L. Mallory '47 Newport Beach, California

Paul N. McCloskey, Jr. '53 Palo Alto, California The annual meeting provided an early opportunity for Allan Glikbarg and others to meet the School's new alumni/ae relations director, Cathryn Schember (see page 47).



John R. McDonough (Columbia, LLB '46) Los Angeles, California

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Harry Usher '64 Los Angeles, California

Vincent Von der Ahe '71 Costa Mesa, California

Charles Rice Wichman '52 Honolulu, Hawaii

Charles B. Wright '81 New York, New York

*Deceased



by Ronald J. Gilson Professor of Law

HOCK WAVES from last year's insider trading scandal are still being felt on Wall Street. The prosecution of prominent individuals and the imposition of the largest fines in the history of the Securities and Exchange Commission dominated the financial news in late 1986 and early 1987, and the coming months promise to be no different.

As of this writing, Wall Street awaits re-indictment of important figures at the brokerage firms of Goldman, Sachs and Kidder, Peabody. And the ongoing investigation by the U.S. Attorney for the Southern District of New York is likely to produce a fresh round of indictments. Only the most sanguine observers expect other major firms to escape unscathed.

The general view is, of course, that trading on inside information is wrong, and the bad guys are finally getting caught. This mainstream reaction has been met, however, with a surprising counterpoint: a resurgence of the idea that insider trading is a beneficial practice that should be *legalized* rather than prosecuted.

This laissez-faire view was originally conceived by and is now again being urged by certain conservative economists. As support they advance questionable arguments about providing



The Political Dimension of

Insider Trading

executives with incentives to innovate — that allowing executives to profit from trading before disclosure of favorable news encourages them to work hard to create good news - and about causing the stock market to be more informationally efficient. The latter argument, simply put, is that insiders trading on their confidential information can help move the price of a stock closer to its current "true" value, thereby allowing public buyers to pay a more accurate price than they would have otherwise. So, for example, insiders who buy stock with inside information that will cause the price of the stock to rise when disclosed may increase demand for the stock and, hence, cause its price to rise even before disclosure - a result that insider trading advocates see as healthy.

The most puzzling thing about proposing to legalize insider trading is not, however, the position itself (although it is certainly curious). Rather, it is that conservatives would make it at all. For if the public were to take the position seriously, it might well undermine public support for the very thing conservatives care most about.

A central conservative tenet is that goods and services are better distributed by market forces than by the government. Wealth acquired through success in the market is legitimate; wealth acquired through success in dealing with the federal government is not.

No surprises yet. But here is a surprise: the American people agree! In a recent article, political scientist Robert E. Lane reviewed a large body of public opinion surveys concerning attitudes toward the market and government. He reported - indeed, almost lamented-that "Americans tend to prefer market methods to political methods." The federal government was seen as favoring "a few big interests," while the free-enterprise system gave "everyone a chance." In this country, Professor Lane tells us, "the market is regarded as 'fair and wise' and political practices, at least, are regarded as neither."

For conservatives, this should be

splendid news: in numbers large enough to transcend political party preference, Americans are committed to the market system.

But Lane reports another dimension to the public opinion surveys—one that should make conservatives think twice before arguing that insider trading is a good idea, and that prohibiting it is just another example of muddleheaded economic regulation. For the surveys also show that Americans' commitment to the market is based not on perceptions of efficiency but rather of fairness.

In 1984, for example, more than 85 percent of the public agreed that "America has an open society" and that "what one achieves in life no longer depends on one's family background, but on the abilities one has and the education one acquires." The market, unlike government regulation and transfer programs, is thought to give people what they really deserve. Hard work is rewarded, and we all have the same opportunity for success. In short, what counts is what you do, not whom you know.

One doesn't need a Gallup poll to see that insider trading turns this relationship on its head. Market wealth then depends on whom you know, not hard work. A gain in efficiency may result, although I doubt it.² But the cost is a weakening in the perceptions of fairness which provide the political underpinnings of public support for the market system.

Raising the issue of fairness does not, however, render advocates of insider trading speechless. They reply that fairness need mean only that public investors get the odds they expect. If public investors know that insiders can trade (the argument goes), stock returns will reflect that fact, and no one is cheated.

But that is not what the public means by fairness. A mechanical conception of fairness—however attractive it may be to insider trading proponents—simply does not square with that of the general public. Fairness, in the public mind, is equated with equal access. From this perspective, what is unfair about insider trading is that it is a game that only some can play, and participation is not

based on merit. Thus a very real risk in pursuing deregulation of insider trading is the loss of public support for market solutions in other situations where something really important could be at stake.

The notion that insider trading is really good for us is based on problematic arguments about incentives and information efficiency. These arguments are debatable on technical grounds and they disregard intermediate solutions that may be preferable to either complete prohibition or no prohibition at all.

But that is not my point. Even if the economic arguments for insider trading turned out to be right, the possibility of a slightly more efficient market is simply not worth striking at the heart of why Americans prefer a market economy to a centralized economy.

Economists are fond of cost-benefit analysis. In this case, the game is just not worth the candle.

Footnotes

- ¹ Robert E. Lane, "Market Justice, Political Justice," 80 Am. Pol. Sci. Rev. 383 (1986).
- ² For a skeptical detailed discussion of the economic claims in favor of insider trading, see Gilson and Kraakman, "The Mechanisms of Market Efficiency," 70 Va.L.Rev, 549,629-34 (1984).

Professor Gilson, a member of the faculty since 1979, has been serving as a reporter for the Corporate Governance Project of the American Law Institute and member of the California State Senate Committee on Corporate Governance, Shareholders Rights and Securities Transactions. His book, The Law and Finance of Corporate Acquisitions, was published last year by Foundation Press.

The essay on these pages originally appeared in a somewhat altered form in the New York Times, February 8, 1987.



Race, Death



The Supreme Court

by Robert Weisberg'79 Professor of Law

HE U.S. Supreme Court on April 22 handed down a capital punishment decision which, more than any other of its recent rulings, satisfies the cliche "long-awaited." In *McCleskey v. Kemp* the Court, by a 5-4 margin, finally faced the victim-race discrimination issue — and declared it constitutionally unimportant.

In one sense, *McCleskey* is dramatic only for what it does not mean. Had the Court sided with the defendant instead of the state of Georgia, *McCleskey* would have been the most important capital punishment case since *Furman v. Georgia* in 1972. The result would have meant no less than a serious interruption of all executions in the United States, and conceivably a permanent end to them. But because the Court sided with Georgia, the legal result is not dramatic: Capital punishment will

continue to proceed at a moderate pace as it has for almost a decade.

In another sense, however, the result is dramatic. Because, in responding to McCleskey's losing argument, the Supreme Court articulated (however inadvertently) a confession of a fundamental moral failure of American society.

Let me briefly review the issue in *McCleskey*. In the years leading up to the 1972 Furman decision, opponents of capital punishment argued that, among its other flaws, the death penalty was administered in a racially discriminatory way. The claim in part was that the penalty was disproportionately imposed on black defendants. But opponents also alleged a subtler form of racism: that the death penalty was disproportionately imposed on defendants (of whatever race) who killed white people, as opposed to defendants who killed black people.

Indeed, the statistical evidence was probably stronger for the latter than for the former claim. In *Furman*, which suspended all executions in America, the Court produced a wildly fractured set of opinions whose main theme was

that the unguided discretion given to juries under existing death penalty laws produced both inexplicably arbitrary and explicably racial effects. Four years later, in *Gregg v. Georgia*, the Court held that the new so-called "guided discretion" laws enacted by over thirty states after *Furman* contained the procedural safeguards likely to prevent the arbitrary and racial distribution of death sentences the Court had earlier denounced.

The eleven years since *Gregg* have produced tens of executions in the United States and tens of Supreme Court cases fine-tuning the procedural safeguards. But the big question lingered in the background: Had the new statutes produced more rational results than the old?

To address this question, researchers including David Baldus and Samuel Gross have conducted rigorous new empirical studies of the racial distribution of death sentences. Proof that the death penalty is disproportionately imposed on black defendants now seems hard to establish as an independent factor. Blacks may not suffer the death penalty out of proportion to their

presence among prosecuted or convicted murderers (though this, of course, may beg the question of subtler racism against defendants by the noncapital part of the criminal justice system or by economic factors outside that legal system).

However, the Baldus and Gross studies strongly confirmed (holding constant more factors than one can imagine) that the other kind of racism had indeed persisted under the new statutes. These researchers showed that regardless of your own race, if you kill a white person, you are anywhere from five to eleven times more likely to suffer a death sentence than if you kill a black person. In effect, the system uses capital punishment to protect and value white lives far more than black lives.

As striking as these numbers are, framing the argument in *McCleskey* was not easy. Ironically, the case seems ideal for a literal application of the equal protection clause of the Fourteenth Amendment, since black victims are obviously being denied the equal protection of the death penalty laws. But casting the issue that way obviously raises a standing problem for the defendant. Moreover, parties claiming equal protection violations normally have to prove intentional discrimination by the state, and McCleskey, as I'll discuss below, had no such proof in the normal sense.

The better approach was the Eighth Amendment as it had been confusingly construed in Furman: Capital punishment is illegally cruel and unusual if it turns out to be distributed in a discriminatory and arbitrary way, regardless of the state's intention. In effect, the argument was to look at the 1976 Gregg case anew, not as ratifying the new guided discretion statutes as satisfactory solutions to the Furman problems, but rather as merely stating a hypothesis that the new statutes were capable of solving these problems. This hypothesis the attorneys for McCleskey chose to test and, they hoped, disprove in light of the new statistical studies.

The Court then essentially had three options. (1) It could have challenged the methods or conclusions of the studies.

thereby asserting, or at least suggesting, that the *Gregg* hypothesis had been proven correct. (2) It could have agreed with McCleskey. (3) It could have conceded McCleskey's statistical argument but held it constitutionally irrelevant. Essentially, the Court took the last option.

This I found both surprising and dismaying. I was surprised not because the studies are anything but convincing and systematic, but because I half expected the Court to hedge the key issue and produce some sort of remand for more statistics (the first option). Instead, Justice Powell's majority opinion essentially conceded the empirical argument, relying on the Baldus study that was introduced in McCleskey's original habeas corpus petition.

Powell's opinion is in fact crudely candid. If McCleskey had proven that the state had intentionally engaged in racial



discrimination based on the race of the victim, he would have had a valid constitutional complaint. But McCleskey did not allege, much less prove, intentional state discrimination. Then where does the victim-race discrimination come from? From subtler and perhaps unconscious racism at the stage of prosecutorial discretion and, more importantly, jury discretion. And what inference do we then draw? Justice Powell sees this effect as an inexplicable, irreducible, unavoidable element of American society and our criminal justice system: We must tolerate it in the death penalty as we may be forced to accept it everywhere. In effect, life is unfair, and so is death.

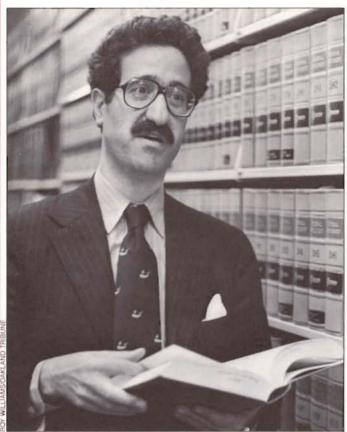
There is, however, a subtler point about state intent that Justice Powell misses. McCleskey indeed did not allege or prove that Georgia officials drew or administered the capital punishment law purposely to protect white lives more than black lives. But despite a disingenuous challenge to the statistics. Georgia must ultimately have recognized that the victim-race discriminatory effect was powerfully present. If Georgia nonetheless persisted in imposing capital punishment, the state was quite knowingly accepting racial discrimination as a cost outweighed by what it perceives to be the benefits of the death penalty.

Such indifference to systemic discrimination as shown by Georgia and upheld by the Court is, I fear, symptomatic of a more widespread moral malaise — a malaise that can, if unchecked, sap the sense of trust and equity among races without which a multiracial society cannot hope to prosper.

Professor Weisberg, a member of the faculty since 1981, became Associate Dean for Academic Affairs on September 1 (see page 38). His publications include "Deregulating Death," an article in the 1983 issue of Supreme Court Review. The present piece is based on a commentary for the student newspaper, Stanford Law Journal (May 15, 1987).



How Sweet It Is: Mnookin Receives Endowed Chair and **Arbitrates IBM-Fujitsu Dispute**



Robert Mnookin

Professor Robert Harris Mnookin has had a big year. On May 12 he became the School's first Adelbert H. Sweet Professor of Law. And on September 15 he was able to announce (with coarbitrator John L. Jones) an unprecedented order creating a framework for the resolution of the international dispute over software rights between computer giants IBM and Fujitsu. The order, which followed a year of confidential arbitration. demonstrates an alternative and cost-saving approach

to settling complex corporate conflicts.

A faculty member since 1981, Mnookin is a leading scholar in the fields of family law and dispute resolution and an innovator in the use of interdisciplinary approaches to the law. In 1983 the American Psychological Association made him first recipient of its award for distinguished contributions to child advocacy. He was honored again in 1986 (with Prof. Michael Wald) by the National Center for Youth Law and the Youth Law Center.

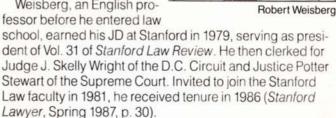
Mnookin is the author of a widely used text, Child, Family and State: Problems and Materials on Children and the Law (1978), and a second book, In the Interest of Children: Advocacy, Law Reform, and Public Policy (1985). "The challenge is to draw upon and use theoretical and empirical work from other disciplines-particularly the social and behavioral sciences-to illumine problems in the field of law." said Mnookin in a recent interview

He is currently engaged in a major empirical study of child custody arrangements and their differing impacts. as seen in approximately 1100 divorcing families in Santa Clara County. His coinvestigator in the study, which is funded by the National Institute for Child Health and Human Development, is noted child psychol-

Weisberg '79 Named Associate Dean

Robert Weisberg, winner of the 1985 Hurlbut Award for teaching, became Associate Dean for Academic Affairs on Sept. 1. His predecessor in the post, Jack H. Friedenthal, stepped down after two years to do more teaching, research. and consulting (see page 48).

Weisberg, an English pro-



As Associate Dean, Weisberg is involved in academic planning, the appointment of visitors and lecturers, academic budgeting and research support, and other matters relating to faculty, curriculum, teaching, and scholarship, He is also continuing to teach courses in Criminal Procedure and Secured Transactions. An article by him appears on pages 36-37.



ogist Eleanor Maccoby.

Mnookin is also spearheading the developmenttogether with faculty from economics, psychology, and business-of an interdisciplinary research and teaching program at Stanford on conflict resolution. "Negotiation, mediation, and other alternatives to adiudication deserve serious attention on the scholarly agenda and in the law school curriculum," says Mnookin. "It's critical for us to better understand the role that lawyers can and do play in resolving disputes outside of court."

In another research study, Mnookin and Stanford law professor Ronald Gilson are using insights from finance theory and economics to examine the legal profession, particularly the corporate law firm. Together they wrote a much-discussed article on how law firms allocate profits among partners, entitled "Sharing Among the Human Capitalists" (Stanford Law Review, January 1985).

Mnookin has further broken ground by exploring the financial side of family law, particularly tax, estate planning, and the economic consequences of marriage and divorce.

Originally from Kansas City, Missouri, Mnookin attended Harvard, where he earned both his bachelor's (AB, 1964) and law (LLB, 1968) degrees. Between his undergraduate and law studies, he spent a year as a Fulbright Scholar at the Econometric Institute of the Netherlands School of Economics. After law

school, he clerked first for Judge Carl McGowan of the U.S. Court of Appeals, D.C. Circuit, and then (in 1969-70) for Justice John Marshall Harlan of the U.S. Supreme Court.

In 1970 he became an associate in the San Francisco law firm of Howard, Prim, Rice, Nemerovski, Canady & Pollak, where he has since 1972 been of counsel.

From 1972 to 1974 he served as the first director of the Childhood and Government Project, Earl Warren Legal Institute, of the University of California, Berkeley. He became a UC-Berkeley acting professor of law in 1973 and a full professor in 1975. In 1978 he was a visiting fellow at the Centre for Socio-Legal Studies, Wolfson College, Oxford.

Mnookin's appointment to the Stanford Law faculty followed a year (1980-81) as a visiting professor and fellow at the Center for Advanced Study in the Behavioral Sciences.

He and his wife, Dale Seigel Mnookin, have daughters at Harvard College and Palo Alto's Gunn High School.

The endowment for the Adelbert H. Sweet Professorship was provided from a bequest to Stanford by the late Elaine Sweet (BA '19) of San Diego (see Stanford Lawyer, Fall 1986, p. 40).

The chair is named in honor of her late father, an attorney and University of Michigan graduate, who was among the founders of the firm now known as Luce, Forward, Hamilton & Scripps.

Gunther Honored by IIT Chicago-Kent

Professor Gerald Gunther was one of two notables—the other being Supreme Court Justice Harry A. Blackmun—to receive an honorary Doctor of Laws (LLD) degree from the Illinois Institute of Technology during the one hundredth birthday celebration of IIT Chicago-Kent School of Law. The presentation took place Sept. 10 at a convocation in Chicago's Orchestra Hall.

Gunther, who was in addition named Centennial Visiting Professor, spent several days at Chicago-Kent giving lectures and meeting informally with faculty and students. A member of the Stanford law faculty since 1962, he holds the William Nelson Cromwell Professorship in Law.

The IIT trustees, in their citation, recognized Gunther as "one of the nation's leading constitutional law scholars" and called his *Constitutional Law* text "a basic source of knowledge and understanding" on the subject.

The citation further described Gunther—a 1938 refugee from Nazi Germany—as standing "in the long tradition of legal scholars and jurists, such as Justice Felix Frankfurter, who have emigrated to the United States and enriched the understanding of our legal and political institutions by their passionate insight into the enduring values served by the Constitution."

Gunther's many previous honors include being elected a fellow of the American Academy of Arts and Sciences, and a member of both the American Philosophical Society and the American Law Institute. □

Honorees Gunther (second from left) and Blackmun (center) with Chicago-Kent Dean Lewis Collens (left), IIT President Meyer Feldberg (center right), and board chair Robert Galvin (right).





Campbell Named to Tenured Faculty

Economist and attorney Thomas J. Campbell, who has taught at the School since 1983, became a full professor on July 1.

Campbell had previously served in Washington as director of the Bureau of Competition of the Federal Trade Commission (1981-83), executive assistant to the U.S. Deputy Attorney General



Tom Campbell

(1981), and White House Fellow in the office of the President's Chief of Staff (1980-81).

He was educated in economics at the University of Chicago, where he did both undergraduate and doctoral work and received a PhD in 1980. His law studies at Harvard, where he was an editor of the law review, earned him a JD magna cum laude in 1976.

Twice a clerk, he served first with Judge George E.

MacKinnon of the U.S. Court of Appeals for the D.C. Circuit (1976-77) and next with Justice Byron R. White of the U.S. Supreme Court (1977-78). He then spent two years in private law practice with Winston & Strawn of Chicago, leaving in 1981 for the White House fellowship.

Campbell's scholarly work, he explained in an interview this summer, involves "the application of economics to legal issues." He has written mainly in the fields of antitrust and employment discrimination law, but has also become interested in international law.

In 1975, while still a law student, he published a much-cited article-"Bevond the Prima Facie Case in Employment Discrimination Law" (89 Harvard Law Review 387)—that was the first use of regression analysis for job discrimination issues. This work, which grew out of his economics doctoral thesis, showed, he said, "the existence of salary discrimination against women in the federal government even when controlling for all measurable explanatory factors other than gender, such as education, age, and experience."

Campbell has also applied statistical approaches to antitrust questions like, for example, What constitutes adequate competition? "You can't simply count the number of companies and say that more than two, or even ten, is enough," he said. "Innovation, for example, may require many small companies instead of a few big ones, because discoveries

are frequently serendipitous." Campbell often testifies on antitrust issues before congressional committees.

His current work in international law confronts major changes since World War II. "We now have to rethink international law, recognizing that some nations cannot be counted upon to follow the rules or to respect international bodies and courts." he said. Campbell sees bilateral treaties as "the only reliable basis for law among nations in today's world." For insights on how such treaties can be negotiated and operate, he is drawing from "welldeveloped economic theory on two-party bargaining independent of courts or other third parties."

On this and other issues, Campbell prefers a pragmatic approach over one that is definably "liberal" or "conservative."

Campbell and his wife, Susanne, live on the Stanford campus. Susanne, who is fluent in Russian, manages tours to the Soviet Union.

In September, Campbell announced his candidacy for the Republican nomination to Congress from the district (California's 12th) in which Stanford is located.

New Faces of 1987

School opened September 10 with the faculty richer by three: a new law librarian and two former business law practitioners from major law firms. Also here for the 1987-88 year are 19 visitors and lecturers expert in areas that contribute to both the teaching and the research enterprise. Additional perspectives are provided by a number of Stanford professors from other departments, who are currently participating in interdisciplinary courses at the School.

First, the three long-term appointees to the faculty:

Lance E. Dickson Law Librarian

The directorship of the Robert Crown Law Library was assumed on Sept. 1 by

Lance E. Dickson, previously chief law librarian and professor of the Paul M. Hebert Law Center of Louisiana State University in Baton Rouge.

His predecessor as Stanford Law Librarian, J. Myron Jacobstein, retired August 31 after 24 years of distinguished service that earned him a lifetime achievement award from his peers of the American Association of Law Libraries (see page 49).

Dickson was honored by the AALL in 1980 with its Joseph L. Andrews Bibliographical Award.

His several publications include Legal Bibliography Index, which he and coauthor W.S. Chiang have issued annually since 1979. He also chairs the AALL's Advisory Committee on Index to Foreign Legal Periodicals.

Dickson is broadly



Lance Dickson

educated, with academic degrees in law (LLB, 1962), business (BCom, 1969), and library science (MLS, 1971).

Born in what is now the Republic of South Africa, he first worked (in 1961-62) as a magistrate's clerk in the civil and criminal courts of the Department of Justice in Cape Town. He gained experience in business as a company secretary's assistant (1963-70) and then company secretary and legal counsel (1970) for Mobil Oil Southern Africa, also in Cape Town.

Dickson came to this country in 1970 to study library science at the University of Texas, Austin, where he earned an MLS and spent an additional year in post-master's work.

In 1972 he became a professional librarian at the University of Texas law library and was promoted in 1973 to associate law librarian, leaving in 1975 to head the Louisiana State University law library.

Dickson's work in Louisi-



Janet Cooper

ana, where the law is influenced by both the common and civil law systems, further enriched his already broad background in the law and legal resources.

In an interview shortly after his arrival at Stanford, he said: "This is a magnificent law library with an excellent staff, but its collections rank only sixteenth nationally. That is not good enough for Stanford. One of my objectives is to bring the library into the ranks of the top ten."

Janet M. Cooper Associate professor

Morrison & Foerster partner Janet Cooper left private practice this summer to join the faculty as an associate professor.

Cooper is an expert in complex litigation, particularly in relation to securities, health care, business, and fraud issues.

She served as program co-chair for the Litigation Section of the American Bar Association's 1987 annual



Barbara Fried

meeting, and has also chaired the Section's Monograph Series Committee (1981-83) and Committee on Special Publications (1983-85).

Cooper graduated in 1978 from Boalt Hall with the unofficial rank of first in the class. She was a member of the law review for two years, the second as head articles editor. After graduating, she served as a clerk to Judge Shirley M. Hufstedler of the U.S. Court of Appeals for the Ninth Circuit. She then clerked, in 1979-80, for Justice Thurgood Marshall of the U.S. Supreme Court.

A member of both the District of Columbia and California bars, she entered law practice in 1980 with the Washington, D.C. firm of Califano, Ross & Heineman, leaving in 1982 to join the headquarters office of Morrison & Foerster in San Francisco.

Cooper is editor of The Attorney-Client Privilege and the Work Product Doctrine, a professional guide published in 1983 by the American Bar Association. She also served as a consultant for the 1984 edition of *California Trial Objections*, a publication of California Continuing Education of the Bar.

Cooper graduated with distinction in 1968 from Swarthmore College, where she majored in English literature and was elected to Phi Beta Kappa. She also holds a 1973 master's degree in English from Stanford.

In 1971 Cooper (then a graduate student known as Janet Weiss) was one of several protestors suspended from Stanford for their role in a demonstration against a campus appearance by Henry Cabot Lodge, thenambassador to South Vietnam. Reflecting on that period in her life, she says: "It's easy to forget how different things were then. I still believe in the ideals that led me to oppose the Vietnam War. But times have changed, the country has changed, and I have changed. I no longer regard myself as an activist."

Cooper is married to attorney Paul Alexander, a partner practicing in the Palo Alto office of Heller, Ehrman, White & McAuliffe. They have a two-year-old child and live in Hillsborough.

Barbara H. Fried Assistant professor

New York City attorney Barbara H. Fried joined the Stanford Law School faculty this fall as an assistant professor. An expert in tax law, Fried was formerly an asso-

(Continued on next page)



Moot Court Finalists Shine

"A marvelous quality of advocacy" marked the 35th annual Marion Rice Kirkwood Competition, according to Judge Pamela A. Rymer, a justice for the moot court finals May 6.

Her benchmates in the simulated high court appeal—Judges Abner J. Mikva and Joseph T. Sneed—were equally laudatory. Mikva, in actuality a judge of the U.S. Court of Appeals for the District of Columbia, said he "would be happy to grant each of you a special dispensation to argue in my court at any time."

Judge Sneed's real-life position is at the U.S. Court of Appeals for the Ninth Circuit, while Rymer, a 1964 graduate of the School, sits on the U.S. District Court for the Central District of California.

The case devised by the Moot Court Board involved the constitutionality of detaining an automobile passenger who walks away when the vehicle is stopped for a traffic offense, of patting down a companion of an arrested individual, and of imposing the death penalty on a person who was 15 at the time of the crime.

The contestants—all third-year students—were Kristina Ament and Steven Semeraro for the petitioners and Jody Tabner and Kent Walker for the respondents. Subjected to rigorous questioning from the bench, they "suffered well," Mikva said,

showing "great dignity and great poise."

Ultimately, the honors went to both teams, with Ament and Semeraro receiving the award for best brief, while Tabner and Walker were adjudged the best team of advocates. Walker was also the top individual oralist

"It was a photo finish," according to Walker, who admits to being "nervous as the devil going in." Looking back, he says the whole moot court experiencewhich includes thinking through a complicated fact situation and preparing briefs and oral arguments for both sides-is "wonderful training." He expects that in future court appearances, "the butterflies may not go away, but I'll know what they feel like!"

Some 48 students partici-

pated in the School's Kirk-wood Moot Court program during 1986-87. The program's advisor since 1984 has been lecturer Lisa M. Pearson, a former Stanford teaching fellow (1980-82) and member of the California and Utah bars.

NEW FACES (continued)

ciate in Paul Weiss Rifkind Wharton & Garrison.

Fried holds three degrees from Harvard: a BA, magna cum laude (1977), an MA in literature (1980), and a JD, also magna cum laude (1983). Her prizewinning undergraduate thesis on William Faulkner was published in 1978 by Harvard University Press, under the title The Spider in the Cup: Yoknapatawpha County's Fall into the Unknowable. In addition. she is coeditor and contributing author of a book on biology and women's issues. also an outgrowth of work done at Harvard.

While in law school Fried served as articles editor of the Harvard Women's Law Journal. She spent the year following graduation (1983-84) clerking for Judge J. Edward Lumbard of the U.S. Court of Appeals, Second Circuit, in New York City, and joined Paul Weiss in 1984.

In a September interview, Fried said her decision to leave practice for teaching was "a simple choice to return to the pursuits that have given me the most pleasure

Kirkwood contestants Ament and Semeraro (left) and Tabner and Walker (right) appealed to Justices Mikva, Sneed, and Rymer (center, I-r).



in life—teaching and writing." She had studied law, she explained, "with the intention of teaching, but felt strongly that I should gain some experience in practice first—both for my sake and the sake of my students."

An experienced teacher. Fried was an instructor from 1977 to 1980 at Simmons College's Graduate School of Management, where she designed the writing program required of all MBA candidates. During this same period she served as a research associate at Harvard Business School. writing and revising course materials on the financial management of for-profit and not-for-profit organizations.

Fried's current writing project is an article on Oliver Wendell Holmes, Jr., and the rise of probability analysis.

Visitors and lecturers

The 1987-88 visitors include eight professors from as many law schools. Expert in a number of fields, they are: Douglas G. Baird (a 1979 Stanford Law graduate) from the University of Chicago. where he is an authority in commercial and bankruptcy law: Daniel A. Farber, University of Minnesota. constitutional law, taxation. and environmental law: William T. Hutton, Hastings, taxation; L. Thorne McCarty, Rutgers, copyright; Gunther Teubner, European University Institute (Florence), comparative law; Eric W. Wright (Stanford JD '67). Santa Clara University, poverty law; and Stephen C. Yeazell, UCLA, civil procedure and legal history.

The lecturers this year include a number of experienced practitioners, namely: Bill Ong Hing, in immigration law; Thomas J. Nolan, criminal law; H. David Rosenbloom, international taxation; Stephen Scharf and Christopher Cameron Murray, entertainment law; Stephen Stublarec, jury trials; and Al Logan Slagle, federal Indian law.

Other lecturers teach subjects in specialized areas: Frances Foster-Simons (JSD '87), the law of socialist countries; Dean A. Schlobohm, computers and law; Cynthia L. Zollinger, accounting; and Lisa M. Pearson and Randee G. Fenner, who both advise the moot court program.

Stanford professors from other departments who are team-teaching at the Law School this year include Albert E. Elsen and Lorenz Eitner of the Art Department (art law, with Prof. John Merryman); psychologist Eleanor Maccoby (child custody, with Michael Wald); GSB labor economist Robert J. Flanagan (labor law, with William B. Gould IV); and Nobel prizewinning economist Kenneth Arrow, psychologist Amos Tversky, and GSB decision science expert Robert Wilson (decision analysis, Robert Mnookin).

All in all, says Associate Dean Robert Weisberg, "the 1987-88 academic year should be as intellectually stimulating as any in the School's history." □

Law and Economics Program Expands with Olin Foundation Support



A. Mitchell Polinsky, Olin Program director

The John M. Olin Foundation of New York has made a three-year grant of \$872,000 to the School for research and education in law and economics—a growing field in which Stanford is, according to Professor A. Mitchell Polinsky, already "a leading player."

Polinsky, who has directed the School's program in the field since 1979, will continue to oversee the expanded and renamed John M. Olin Program in Law and Economics. Holder of both a doctorate in economics and a master's in legal studies, he became the Josephine Scott Crocker Professor of Law and Economics in 1984 and is a professor by courtesy in the Economics Department. His book. An Introduction to Law and Economics (1983), is one of two best-selling texts in the field.

In directing the Olin Program, Polinsky will be assisted by a committee composed of Law School professors Thomas Campbell and Ronald Gilson and Associate Dean Robert Weisberg.

The focus of the program will be "the creation of new ideas and the transmittal of these ideas to students, policymakers, and legal practitioners," Polinsky explained in a recent interview. Several components are planned:

- A law and economics seminar, which will bring ten distinguished lawyers and economists to Stanford each year to lecture and meet with faculty and students.
- A working paper and reprint series to disseminate research results to scholars, policymakers, and legal practitioners throughout the United States.
- Faculty research grants and fellowships, available to three or more Stanford faculty members or distinguished visiting scholars annually.
- Student research grants and fellowships, for up to five law or economics students per year.
- John M. Olin prizes to be awarded annually to the most outstanding student in

(Continued on page 47)



Commencement 1987: "Our Time Together Is Worth Remembering"

At the Law School's 1987 Commencement ceremony June 14, Kresge was filled with not only a capacity crowd but also—a sign of the times—the whir of handheld video cameras.

John Hart Ely, in one of his last official acts as Dean, presided over the School's 94th graduation exercises and announced the names of the top academic achievers (see opposite page).

All in all, over one-quarter of the class won honors, including 42 students who graduated "with distinction," an honor recognizing high academic accomplishment during their law school careers.

Professor Gerald P. Lopez received the John B. Hurlbut Award for Excellence in Teaching. This honor, which is voted on by the graduating class, was presented by 1987 Class President Eric S. Mischel.

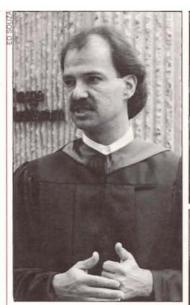
In his Hurlbut address, Lopez reflected on the diverse makeup of the class and its salutary effect on the School:

"You are older than previous classes. More of you had done something between college and law school, and were interested in work that demanded interdisciplinary knowledge. Most importantly, more of you were women than in any other entering class in this Law School's history.

"Over the course of your

three years here, you frequently brought who you were and what you represented to this Law School's life," he said. "You demanded a greater say in how things were donein how the curriculum was designed, in how the placement office functioned and what it stressed. . . . You helped take on the faculty about who's best suited to teach you, and you took issue with much conventional wisdom.

"I'd like to honor who you are and what you've done, because I think that what's gone on here during our time together is worth remembering."



Hurlbut winner Lopez (above) addressed a throng including proud relatives of graduates Hedy McAdams (right) and (top, I-r) Anne Haley, Mark Larson, and Ivan Fong.

PHOTOS BY PAUL WOOD











Laurels Won by Members of the Class of 1987

Nathan Abbott Scholar, awarded for the highest cumulative grade point average over three years of law school: Martha Stacey Hawver

Urban A. Sontheimer Third-Year Honor for the second highest overall average: Andrew G. McBride

The 1986 Second-Year Honor for the highest average during the second year: Richard P. Bress

The 1985 First-Year Honor: Andrew G. McBride

Order of the Coif: Hawver, McBride, and Bress, plus Daniel L. Burchard, Eric Christensen, Gia L. Cincone, Steven J. Cox, Sarah A. Fisher, Keith E. Hansen, Jonathan A. Harris, David M. Hymer, John H. Knox, Tracy L. Merritt, Tyler T. Ochoa, Scott E. Perwin, and Frank P. Prager

Frank Baker Belcher Evidence Award: Richard P. Bress

Steven M. Block Civil Liberties Award: Sophie H. Pirie

Faerie Mallory Engle Prizes, awarded to the finalists in the School's client counseling competition: Andrea M. Fike and Anitra F. Waldo (1986 cowinners); Sean P. Maloney (cowinner, 1984 and 1985)

Carl Mason Franklin Prize in International Law: Andrew G. McBride and Cynthia A. Vroom (cowinners)

Olaus and Adolph Murie Award in Environmental Law: John J. Lyons (1987) and Steven Semeraro (second place, 1987); Eric Christensen (1986) and Thomas S. Waldo (second place, 1986)

R. Hunter Summers Trial Practice Awards, given by officers of Serjeants-at-Law to the best student lawyers and witnesses in each trial: Kristina L. Ament, James M. Carr, Carol J. Hotnit, Lawrence S. Krasner, Sean P. Maloney, and Steven Semeraro

Stanford Law Review, at its annual banquet in April, bestowed the following honors on members of the graduating class.

Board of Editors' Award for outstanding editorial contributions: Karen B. Barr and Merry J. Chavez (honorable mention)

Irving Hellman, Jr. Special Award for the best student note: Marc J. Zilversmit

Johnson & Swanson Law Review Award to the thirdyear member who made the greatest overall contribution during his or her second year: James M. Carr

United States Law Week
Award for outstanding service to Stanford Law Review:
Gary M. Roberts and Marc
Rotenberg (cowinners)

New Law Student Center Dedicated

Dedication ceremonies for the Mark Taper Law Student Center took place Friday, June 26, at Crothers Quad, where the newly constructed building is located (Stanford Lawyer, Fall 1986, page 39).

Funding for the student center was provided by noted philanthropist Mark Taper, a retired Southern California financier. Taper's gift included not only \$1 million for construction but also additional gifts for ongoing maintenance.

Several members of the Taper family—including the donor's grandson, Andrew M. Taper '85—attended the dedication. The senior Taper, in a message read by Andrew, regretted not being present but affirmed his deep desire "to enhance education in our nation today."

University Trustee Thomas W. Ford formally accepted the "wonderful new facility," expressing thanks to Mark Taper and his family "for their great generosity."

Speaking on the School's behalf, Dean Ely said: "This building provides an inviting and much-needed place for law students, particularly those living in Crothers, to relax and exercise." Ely praised former Associate Dean Barbara G. Dray '72 and Assistant Dean Margo D. Smith '75 for their contributions to the planning and realization of the project.

(Continued on next page)

Fall 1987 Stanford Lawyer



STUDENT CENTER (continued)

Student reaction was understandably enthusiastic. "It goes a long way towards improving the quality of life for students and should serve as a welcome node for social interaction," said former Crothers Hall resident assistant Fred H. Cate '87.

The two-story facility, which was developed in consultation with students, includes a sitting room with a piano, a fireplace lounge, a small kitchen, two meeting rooms, and a well-equipped exercise and fitness area with adjacent lockers, restrooms, and showers for men and women.

Composed of tinted glass and stucco, the structure completes the south side of the quadrangle formed by Crothers Hall and Crothers



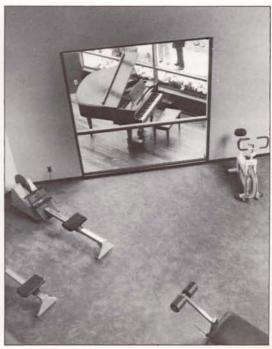
Memorial Hall, while preserving the existing lawn and oak trees on either side. Jan Stypula of Spencer Associates was the architect.

The Taper Law Student Center is governed by a board consisting of Crothers residents and other students, a Law School administrator, and a member of the University's residential education staff.

Linked to Crothers Hall, the new center serves both as a living room (with fireplace and piano) and indoor fitness facility.

PHOTOS BY JOHN SHERETZ





Stanford Lawyer Fall 1987

OLIN FOUNDATION GRANT (continued)

each of four Stanford law and economics courses.

- A major conference or conference series to bring together scholars and policy makers to discuss legal issues from an economic perspective.
- A seminar for senior attorneys from corporate law departments and private law firms, to learn how economic analysis can be used in the practice of law.

Important elements in the Olin Program—notably the Law and Economics seminar and the working paper series—are ongoing activities at Stanford. Thirty-four working papers have so far been disseminated on a range of issues from liability for defective products to the allocation of profits within law firms.

"Stanford's past endeavors were made possible by the generosity of the Crocker family in establishing a professorship in law and economics, and by an advisory group of corporate general counsel who assisted us in getting the law and economics program started," said Polinsky. "We are very fortunate now to be able to build on this foundation with the creation of the Olin Program."

The Olin Foundation has made a major commitment to the law and economics field with grants also to Harvard, Yale, Chicago, and the University of Virginia.

Stanford's work in the field is "well advanced and broadly based," Polinsky observed. Law School professors investigating economic approaches to legal problems include John Barton on the law relating to technology transfer. William Baxter in antitrust law and regulated industries, Thomas Campbell in antitrust, labor, and international law. Robert Ellickson in land use and property law, Paul Goldstein in copyright and intellectual property law. Robert Mnookin in dispute resolution and family law. Robert Rabin in tort law, Myron Scholes in corporate finance, and Kenneth Scott in banking regulation and corporation law.

Several scholars elsewhere in the University are also involved in the law and economics movement. namely Roger Noll of the Economics Department, Robert Hall of Economics and the Hoover Institution. David Baron of the Graduate School of Business, and Aaron Director, Barry Weingast, and Edward Lazear of the Hoover Institution. In addition, two other research institutions at Stanford—the Center for Economic Policy Research and the National Bureau of Economic Research (western office)have related interests.

"There is a growing synergism between lawyers and economists," said Polinsky. "Many lawyers feel that economics offers a way to systematically analyze the legal system."

Economic analysis has already had practical application, he pointed out, in such areas as securities regulation, the telephone company divestiture, airline and trucking deregulation, and employment discrimination litigation. "There are," Polinsky observed, "few legal problems that cannot be studied and better understood from an economic perspective."

The John M. Olin Foundation was established in 1953 by John Merrill Olin (1892-1982), founder of Olin Corporation, a chemical manufacturing firm. The Foundation's stated purpose is "to provide support for projects that reflect or are intended to strengthen the economic. political and cultural institutions upon which the American system of democratic capitalism is based," and "to promote a general understanding of these institutions by encouraging the thoughtful study of the connections between economic and political freedoms, and the cultural heritage that sustains them."

New Director Named for Alumni/ae Relations



Cathryn Schember

Cathryn Fernandez Schember, a 1980 graduate of Harvard College, joined the staff on May 1 as Director of Alumni/ae Relations. She previously had similar responsibilities at Harvard Business School, where from 1984 to

1986 she was assistant director of their alumni/ae relations program.

It was during her freshman year at Harvard that she met her husband, Chris Schember, a fellow student who has since become a mergers and acquisitions expert with Broadview Associates in San Francisco.

The pair spent their first four years after graduation in Los Angeles, within visiting distance of Cathryn's hometown of Fresno. Schember began her career in educational administration at UCLA, first in the medical school's student affairs office, and then with the fledgling UCLA-UCR Biomedical Sciences Program, which she helped coordinate.

At Stanford Law School,

(Continued on next page)



Faculty Notes

Barbara A. Babcock is on sabbatical this year as a fellow at the Stanford Humanities Center. She described her current research on trailblazing attorney Clara Foltz at two gatherings last spring: the Law School Board of Visitors (see page 26) and the San Francisco chapter of Stanford University women graduates. Babcock, a former director of the Civil Division of the U.S. Justice Department, testified in September before the Senate Judiciary Committee at its hearings on the confirmation of Judge Robert Bork (which she opposed).

John Barton is coauthor of a new study on trade in services.—*California Service* Exports: Emerging Global Opportunities—just published by the California State World Trade Commission. He is also currently a member of the National Academy of Sciences panel on conservation of genetic diversity.

Ellen Borgersen was a panelist last February at a conference, sponsored by the Public Interest Clearinghouse, entitled Achieving Public Interest Goals: Forum and Fees. In May, she spoke on "Women, Ethics and the Law" to the graduating class of Castilleja School of Palo Alto.

Thomas Campbell, now a tenured member of the faculty (see page 40), was a witness in support of Judge Bork at the confirmation hearings in Washington, D.C. He journeyed to the

antipodes this summer at the invitation of institutions in both New Zealand and Australia. At the University of Auckland, where he was featured in its Distinguished Lecturer Series, he discussed "Antitrust and Economics." Campbell was also the principal speaker at seminars in Sydney and Melbourne, both sponsored by Monash University Centre for Commercial Law and Applied Legal Research, for which he delivered lectures on "Economic Evidence." Earlier in the year he presented the lead paper for a panel, Antitrust in Labor Law, at the San Francisco Labor Law Conference in Yosemite. And in June, at the Los Angeles County Bar Association's annual antitrust dinner, he spoke on "1986-1987 Developments in Industrial Organization Economics."

Mauro Cappelletti has been elected to a second four-year term as president of the International Association of Procedural Law. He gave the opening speech and closing "synthesis report" at the Association's Eighth World Congress, which took place in August at Utrecht with the participation of over 300 experts from six continents. He also acted as general reporter at the Second World Congress of Constitutional Law, held in September in Paris and Aixen-Provence. Cappelletti's recent publications include a ninth volume in Spanish, La Justicia Constitucional (Mexico, UNAM, 1987) and a fifth volume in Japanese.

The European University Institute, with which he has long been affiliated, has named him "External Professor." Cappelletti has also been appointed chair of the European Advisory Committee of the Encyclopaedia Britannica.

An essay by William Cohen was published as part of a Constitutional Law symposium in the Winter 1987 issue of *U.C. Davis Law Review*. His subject was "Justices Black and Douglas and the 'Natural-Law-Due-Process Formula': Some Fragments of Intellectual History."

Robert Ellickson presented a paper in April at the University of Michigan Law School, on how Shasta County residents resolve disputes over highway collisions with livestock. His most recent published articles are "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (Washington University Law Quarterly, Fall 1986) and "A Critique of Economic and Sociological Theories of Social Control" (Journal of Legal Studies, January 1987).

Jack Friedenthal served during the past spring and summer as a consultant to the Republic of the Marshall Islands. The Micronesian nation had asked him to draft legislation establishing a special tribunal to determine claims and settle disputes regarding the distribution of \$150 million being paid by the United States as compensation for injuries to person and property result-

ALUMNI/AE DIRECTOR (continued)

Schember serves as staff director of the Board of Visitors, organizes the annual Alumni/ae Weekend, and provides guidance and support for a range of other events involving graduates, faculty, students, and distinguished visitors.

One of her first priorities is to find out from alumni/ae "what their current interests and needs are from the School and how we might satisfy them." Already impressed at how eager graduates and students are "to connect with one another," she plans to revive the Meet

the Alumni/ae program whereby students on summer clerkships get together with graduates working in the same city.

Other ways in which interested graduates can be involved include class reunions, student activities, and the local law societies. Schember invites alumni/ae "to call freely, whether to offer comments and suggestions, or simply to get acquainted." Her number: (415) 723-2730.

ing from U.S. nuclear testing in the 1950s. In July, Friedenthal spoke at the Stanford Sierra Camp regarding current problems in intercollegiate sports.

Lawrence Friedman was at the University of Wisconsin's Madison campus Sept. 17 to present a Bicentennial lecture entitled. "Innocent Abroad: The American Constitution in the Global Age.' Earlier in the year, on March 26, he was the Richard J. Childress Memorial Lecturer at Saint Louis University Law School, where he spoke on "The Constitution and American Legal Culture." That month he also gave a talk. on "State Constitutions in Historical Perspective." for a conference at Temple University in Philadelphia.

Ronald Gilson has had a number of works published, including a book, *The Law and Finance of Corporate Acquisitions* (Foundation Press, 1986), an article, "Evaluating Dual Class Common Stock: The Relevance of Substitutes" (*Virginia Law Review*, August 1987), and the *New York Times* op ed that formed the basis of the article on page 34.

Paul Goldstein recently testified before the U.S. Senate Subcommittee on Technology and Law, concerning copyright implications of colorizing motion pictures. He explored the implications of another new technique—digital sampling—in a paper delivered at the annual meeting of the Copyright Society of the U.S.A. Goldstein

received a \$115,000 grant earlier this year from the John and Mary R. Markle Foundation to conduct a study of various questions related to new technological uses of copyrighted works. Thomas Grey was one of three Stanford Law professors (the others being Barbara Babcock and Thomas Campbell) to testify at the Bork confirmation hearings in Washington, D.C. His rec-



William B. Gould IV spent the spring and summer interviewing baseball players, managers, and coaches for a series of newspaper articles, two of which have appeared in the San Francisco Chronicle and San Jose Mercury News. A Red Sox loyalist, he is shown here with center fielder Ellis Burks. The somewhat different subject of Trade Unions and the Law was his focus in a lecture series presented in June at the European University Institute in Florence, Italy, and in September in Poland under the auspices of the University of Lodz Law School.

Robert Gordon spoke in April at Boston University Law School as part of its Distinguished Lecturer series. His topic: "The Independence of Lawyers." Previously in New York, he delivered a lecture on "The Social Conditions of Free Speech" for a conference on the First Amendment at Benjamin N. Cardozo Law School. ommendation: reject. Grey's paper on Kantian legal theory—"Serpents and Doves"—has been published in the April 1987 issue of Columbia Law Review. This summer at Stanford he co-taught, with History professor Jack Rakove, a threeweek seminar on the formation of the U.S. Constitution. Designed for law professors,

the seminar was sponsored by the National Endowment for the Humanities. Grey also participated in the September annual meeting of the American Political Science Association as member of a panel on Property and the Constitution.

Samuel Gross, an acting associate professor who began teaching at the School as a lecturer in 1981, has accepted a position as associate professor of law at the University of Michigan in Ann Arbor, A criminal law teacher and expert on the application of social science research techniques to legal problems, he is best known for sophisticated statistical analysis of the relationship between death sentences and the race of the victim.

Bill Ong Hing was involved in a key refugee case recently decided by the Supreme Court. In INS vs. Cardoza-Fonseca, the Court ruled 6-3 that the standards used by the Immigration and Naturalization Service in determining whether to grant asylum were more stringent than Congress had intended. Hing, who argued the case at the Ninth Circuit, wrote the Supreme Court brief with three other lawyers.

J. Myron Jacobstein, Law Librarian Emeritus since August 31, received the Distinguished Service Award of the American Association of Law Libraries, at its annual meeting in July. The honor recognizes lifetime contributions to law librarianship and to the AALL. In his 24 years

(Continued on next page)



FACULTY NOTES (continued)

as head of Stanford's Crown Law Library, Jacobstein oversaw its development into one of the leading legal research facilities in the country, with holdings of over 312.000 volumes. 18.000 microforms, and computerized access to the holdings of other major law libraries. He is also the author (with Roy M. Mersky) of Fundamentals of Legal Research, a basic text in the field, which continues to be updated twice vearly.

John Kaplan was a recipient of the Western Society of Criminology's 1986-87 Fellows Award, an honor he received last spring in Las Vegas at the Society's Fourteenth Annual Conference, where he was also the keynote speaker. In May, he spoke at a Santa Fe gathering of the Stanford University Alumni of Northern New Mexico.

Mark Kelman had a critical essay on libertarian juris-prudence—"Taking Takings Seriously: An Essay for Centrists"—published in the 1986 California Law Review (74:1829). He has also recently participated in symposia on causation in tort law and public choice.

Charles Lawrence delivered the keynote address, "Promises to Keep," at the 1987 convention of the American Civil Liberties Union of Northern California. Referring to the Bicentennial, he said: "A constitution

is something we DO.... We are our Constitution's framers and we neglect that solemn responsibility at our own peril."

J. Keith Mann has been named by Indiana University to its Academy of Law Alumni Fellows, an honor recognizing IU graduates "who have brought distinction to themselves through their personal achievements and dedication to the highest standards of their profession." Nationally known as an expert on labor law and arbitration. Mann has been a member of the Stanford law faculty since 1952 and its Associate Dean for Academic Affairs from 1961 to 1985, during which period he twice served as Acting Dean. Holder of both BS and LLB (1949) degrees from IU. he was inducted into its academy at a banquet Sept. 11 during the annual Indiana University Law Conference in Bloomington.

John Henry Merryman,

recently become emeritus. has been honored by the editors of Vol. 39 of Stanford Law Review with a three-part tribute in their May 1987 issue. Prof. Mauro Cappelletti described Merryman's international influence in Comparative Law, involving recognition of underlying problems shared by even the most dissimilar societies. Art Prof. Albert E. Elsen told of Merryman's seminal role in creating the subdiscipline of Art and Law. And Law Librarian Myron Jacobstein (now also emeritus—see page 49) revealed Merryman's prescience in 1951 about the possibility of "legal research without books." Hardly retired, however, Merryman continues to write and co-teach his pioneering course in Law, Ethics, and the Visual Arts.

Robert Mnookin, newly named Adelbert H. Sweet Professor of Law (see page 38), presented the inaugural lecture for the chair on October 30 at Stanford, Earlier in the month, he delivered a lecture on "The Interests of Children in Divorce" to a consortium of researchers at Harvard. Last May he was 1986 Hess Memorial Lecturer of the Bar Association of New York City. Mnookin's biggest news-announced in New York on Sept. 15 after a year of confidential deliberations—is the opinion and order in IBM vs. Fujitsu, a fight between the two computer giants over software rights. Mnookin is one of two arbitrators in the pathbreaking commercial arbitration.

A. Mitchell Polinsky

chaired a seminar for attorneys, at Stanford in April, on the use of economic analysis in private and corporate law practice. In May he presented a lecture at Yale Law School, exploring "The Welfare Implications of Costly Litigation for the Level of Liability." He has also recently had an article—"Fixed Price Versus Spot Price Contracts: A Study in Risk Allocation"—published in the Spring 1987

Journal of Law, Economics, and Organization. Polinsky continues to direct the School's program in law and economics as it expands with Olin Foundation funding (see page 43).

Robert L. Rabin is a visiting professor at Harvard Law School for the 1987-88 academic year.

Michael Wald delivered the keynote address, "Family Preservation—A Cautionary Note," at the American Public Welfare Association National Conference for Urban Child Welfare Administrators in July. He is also a member of the California state legislative task force to revise family law dealing with abused and neglected children.

Professor Emeritus Harry J. Rathbun died on September 28 at the age of 93. For thirty years a Stanford teacher of law and business. Rathbun retired in 1959 but continued to teach part time for another eight years. He is probably best known, however, as founder of the Creative Initiative Foundation and the Beyond War movement. A tribute to him, now being prepared for the Faculty Senate, will appear in the next issue.

PRIVATE CLUBS

(Continued from page 19)

able in mixed environments with fewer social costs.

The implications of categorical policies for women's groups present a harder case. In many respects, such institutions stand on a different footing than all-male associations. The point is not that values of choice and intimacy have less social importance for men than women, but rather that their social costs are different. Given this nation's historic traditions and cultural understandings, the exclusion of men from women's political groups or garden clubs no more conveys inferiority than the exclusion of whites from black associations. Nor does such exclusivity serve to perpetuate existing political and economic disparities between the sexes. A legal framework that explicitly recognized such facts would be asymmetrical with respect to sex but not with respect to power. And from a perspective of reducing gender inequality, it is power that matters.

From a prudential perspective, however, it is risky to argue for a policy that explicitly declares the value of female but not male bonding. One advantage of denving favorable tax treatment for single-sex associations rather than prohibiting them outright, is that women's organizations would be less adversely affected than men's, which tend to be more dependent on business expense deductions. Even if a categorical approach works to encourage more women's groups to adopt formal postures of gender neutrality, it is by no means clear that their composition would in fact change. And as women become more fully integrated into male organizations, the need for certain all-female associations also may diminish.

On balance, then, a categorical approach aimed at public subsidies and privileges enjoyed by private organizations excluding either sex—whether male or female—seems to be more promising and legally defensible than alternative, sex-specific strategies.

A final problem with legal strategies lies in their inevitable under-inclusiveness. The law is too crude and intrusive

an instrument to reach many of the most influential separatist networks. Poker games, golfing groups, and luncheon cliques that form along gender lines may well play a more substantial role in limiting women's opportunities than any of the organized entities susceptible to legal intervention. Even in those organized affiliations, access does not necessarily ensure acceptance. Getting women into the right clubs is far easier than getting them to the right tables. But access is a necessary first step. While we cannot eliminate social segregation by legal fiats, we can at least seek to minimize its crudest form and the social legitimacy that underlies it.

Footnotes

¹See U. S. Department of Labor, Bureau of Labor Statistics, *Jobseeking Methods Used by American Workers*, 7, table 3. Washington: GPO, 1975. (L2.3:1886)

²See Calvin Trillin, "U.S. Journal: Tampa, Florida: Four People Who Do Not Lunch at the University Club," *New Yorker*, April 11, 1977. For an array of similar objections, see Rhode, "Association and Assimilation," 81 *Northwestern Law Review* 106, 123 (1986).

³Roberts v. United States Jaycees, 468 U.S. 609 (1984). Board of Directors of Rotary Club International v. Rotary Club of Duarte, ___ US ___ (1987), 107 S.Ct. 1940.

⁴See sources cited in Rhode, *supra* note 2 at 126.

Illustrations: p. 14, Union Club, New York City, undated (The Bettmann Archive). Pp. 17 and 18, Bohemian Grove encampments, Bohemian Club, undated (San Francisco Archives).

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Fall 1987 Stanford Lawyer

THE BICENTENNIAL

(Continued from page 13)

We should of course recognize the contributions of the Founding Fathers as a momentous start to what America is today and also to what America someday must be. More important, however, is the fact that the Constitution has been an evolving document, continuously expanding the freedoms, rights, and liberties of all our citizens. In Justice Cardozo's words, the Constitution exemplifies "the tendency of a principle to expand itself to the limit of its logic." The genius of the Constitution and of our nation has been the ability to go beyond the original views of the men of 1787, who lived in a less complex and far more cruel world than our own.

I submit that our Bicentennial observances therefore should celebrate not the frozen literalism advocated by Skousen and other "fundamentalists," but rather the larger principles and spirit that gave rise to the Constitution - the inherent, indomitable yearning for justice and liberty that is broader than the limited consensual decisions and views of past generations. Our Bicentennial celebration should be a renewal of and a commitment to the ideals expressed in the Constitution's preamble: the formation of "a more perfect union" and the "desire to establish justice" and secure the "blessings of liberty" for all our people.

During this Bicentennial era, therefore, we do not celebrate or condone Article 1, Section 2, Clause 3, which set forth the method by which representatives and direct taxes were to be apportioned among the states, specifying that "the whole Number of free Persons" was to be added to "threefifths of all other Persons." "All other Persons," of course, was a euphemism

for slaves.

We do not celebrate or condone Article 1, Section 9, Clause 1, which provided that the "Migration or Importation of such Persons as any of the States . . . shall think proper to admit" could not be prohibited before 1808; for we know that article was nothing more than a grant of permission to the states to continue the international slave trade.

We do not celebrate or condone the obfuscation in Article 4. Section 2. Clause 3, which for shorthand we will call the "Fugitive Slave Clause," requiring that slaves who escaped to free states be returned to their owners.

And we do not celebrate or condone the original vision of the forefathers. which precluded all women from voting and also denied the franchise to most poor whites.

Nor do we celebrate the limited constitutional vision of the Supreme Court in the decades that followedsuch as that voiced by Chief Justice Roger Brook Taney, who in the Dred Scott case said: "[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted . . . [blacks] had no rights which the white man was bound to respect."13

Nor do we celebrate the vision reflected in Bradwell v. State of Illinois, where the Supreme Court held, with only one dissent, that a married woman, fully qualified except for her gender, could be precluded from practicing law in the state of Illinois without violating the federal Constitution. 14

Instead, during this Bicentennial period, we should celebrate the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments and related civil rights acts-in which our nation has repudiated in part the racism and sexism sanctioned by earlier generations.

We should celebrate the fact that women at long last are starting to have an increasingly significant presence in the legal profession and in the law school community-including the Supreme Court, where a Stanford alumna now sits.

We should celebrate Title VII of the Civil Rights Act of 1964 and Supreme

Court decisions such as that rendered last week in Johnson v. Transportation Agency, Santa Clara County, California, in which the Court held that under Title VII "in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the agency is authorized to consider as one factor the sex of a qualified applicant."15 (Justice Brennan's wise opinion was joined, I am sorry to say, by only one of the Court's two Stanford alumni.)

We should further celebrate during this Bicentennial the historic moments when our nation's consciousness moved forward, as when President Eisenhower, though not in sympathy with Brown v. Board of Education, nevertheless insisted without equivocation that the decree of the district court in Little Rock would be enforced so that eleven black children would be admitted to the high school, even if it required calling out federal troops.

We should celebrate the actions and perspective of John F. Kennedy, who responded to Governor Wallace's efforts to stop two fully qualified black students from going to the University of Alabama, by saying, "The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated."16

We should further celebrate the broad view of President Lyndon Baines Johnson, who in 1966 expressed his solidarity with the cause of black Americans by declaring in his great speech at Howard University, "We shall overcome."

These kinds of advances are what we should appreciate and celebrate during this Bicentennial year. But more than that, we must look at what America someday should be. We should consider reports such as Marian Wright Edelman's Families in Peril, which shows that black children are in even worse shape than they were six years ago.17 What does it mean to celebrate the 200th anniversary of our Constitution when, as Edelman points out, black children are twice as likely to die in the first year of life, to be born prematurely, to suffer low birth weight, and to have mothers who receive late or no prenatal care? When black children are three times as likely to be poor and have their mother die in childbirth; four times as likely to live with neither parent; five times as likely to be dependent on welfare? These are the kinds of issues we should address.

I will close by offering you a Bicentennial theme not from one of the great lawyers of our day or even one of the great professors. I find that my spirits are picked up most often by the poets. Here, then, is what our theme should be, as suggested by Langston Hughes in his poem "Dream of Freedom":

There is a dream in the land With its back against the wall By muddled names and strange Sometimes the dream is called.

There are those who claim
This dream for theirs alone—
A sin for which, we know,
They must atone.

Unless shared in common Like sunlight and like air, The dream will die for lack Of substance anywhere.

The dream knows no frontier or tongue, The dream no class or race. The dream cannot be kept secure In any one locked place.

This dream today embattled, With its back against the wall— To save the dream for one It must be saved for all.¹⁷

Illustrations: P. 9, Slaves taken on board for shipment to America (detail), 1830 (The Bettmann Archive). P. 10, "The Old Plantation Home," Currier & Ives, 1872 (Library of Congress). P. 11, illustrated front page (detail), *Emancipator*, Sept. 2, 1839 (Bettmann). P. 12, "The Domestic Slave-trade," source unknown (Bettmann).

Footnotes

¹J. F. Kennedy, Address to National Industrial Conference Board, Washington, D.C., February 13, 1961. Emphasis added.

²W. C. Skousen, *The Making of America: The Substance and Meaning of the Constitution* (Washington, D.C., National Center for Constitutional Studies, 1985). The passages herein quoted are found on pp. 728-37.

³M. L. King, Jr., Letter from Birmingham City Jail, April 16, 1963, reprinted in J. M. Washington, ed., *Testament of Hope: The Essential Writings of Martin Luther King* (San Francisco: Harper & Row, 1986) p. 290.

⁴G. P. Rawick, ed., *The American Slave* (Westport, Conn.: Greenwood Press, 1977, 1979), vol. 16, p. 31.

⁵George v. State, 37 Miss. 316 (1859).

6State v. Boon, 11 N.C. 246 (1801).

7State v. Mann. 13 N.C. 263 (1829).

⁸P. L. Dunbar, "We Wear the Mask," The Complete Poems of Paul Laurence Dunbar

(New York: Dodd, Mead & Co., 1980), p. 71.

9Rawick, op. cit., vol. 16, p. 7.

10 Ibid., p. 11.

¹¹W. L. Garrison, *The Liberator*, Jan. 1, 1831, p. 1.

¹²F. A. Shannon, *Economic History of the People of the United States* (New York: Macmillan, 1934).

¹³Dred Scott v. Sandford, 60 U.S. 393, 407 (1857).

¹⁴Bradwell v. State of Illinois, 83 U.S. (16 Wall.) 130 (1873).

¹⁵Johnson v. Transportation Agency, Santa Clara County, California, 107 S. Ct. 1442 (1987).

¹⁶Kennedy, Radio and Television Report to the American People on Civil Rights, June 11, 1983.

¹⁷M. W. Edelman, *Families in Peril* (Cambridge: Harvard, 1987).

¹⁸L. Hughes, Poem written for the NAACP, April 1, 1964 (unpublished).

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GATHERINGS





HE OPPORTUNITY to hear Paul Brest just forty days into his deanship drew the largest turnout in recent memory for the School's gettogether at the American Bar Association Annual Meeting, held this year in San Francisco. The Stanford Law alumni/ae event, which took place August 10 at the Four Seasons Clift Hotel, included dinner in addition to the usual social hour.

In an eloquent introduction, Chief Judge Robert F. Peckham '45 of the U.S. District Court of Northern California termed the new Dean "a warm, open, and responsive friend." Citing highlights of Brest's career, the Judge concluded: "His background and stellar achievements portend a celebrated deanship for Paul and the School."

Dean Brest, in the featured talk of the evening, first described the progress of recent years, noting that "morale is high, the quality of education is excellent, and we are fiscally sound." He then provided an early look (since expanded in the interview beginning on page 2) at his priorities and plans. In closing he said: "I am genuinely honored to carry on this tradition and look forward to working with you in the future."

The Dean traveled to Los Angeles on September 21 to lunch with graduates attending the **California State Bar** Annual Meeting. Charles Silverberg '55 made the introductory remarks, after which Brest unveiled his agenda for an enhanced law and business program.

What with other recent Los Angeles events sponsored by the Southern

California Law Society, local alumni/ae enjoyed a busy season. On May 19 a party of forty assembled at the Dragon Restaurant to hear Professor Marc Franklin discuss "What's Wrong with Libel Law." Kudos to Law Society President Pam Ridley '79 for planning that event. Vice-president Bob Epstein '83 organized a "TGIF" gathering July 24 at Casey's in downtown LA-a chance, he said, to "relive the fine tradition of Crothers Hall Pub nights." And on August 8, some sixty-five alumni/ae and guests combined tailgating, Tchaikovsky, and fireworks in a second annual "Hollywood Bowl Night." Credit Chris McNevin '83 for once again arranging this special evening.

The Law Society of Washington, D.C. invited summer associates to join alumni/ae for a wine tasting June 25 at the offices of Crowell & Moring. The selections-all from Bordeaux-were chosen and presented by Bob Carmody '62. A toast also to Neil Golden '73 for

helping host the event.

The South Bay/Peninsula Law Society sponsored a luncheon April 24 featuring Professor Tom Campbell, who described "One Proposal for Civil Justice Reform: Attorneys' Fees Shifting." Bob Maines '66 made the arrangements.

And on August 25 the San Francisco Law Society, with Don Querio '72 at the helm, held a reception at the lofty Bankers Club-a now annual event that enables current students and newly minted graduates to meet and talk with seasoned local alumni/ae.







Clockwise, from top right: Judge Peckham, Melvin Kennedy '73, and Regina Petty '82 at the ABA dinner; assembled graduates at the state bar luncheon, including Robert Paradise '29, George Slaff '29, John McHose '27, and Raymond Tremaine '23; and, at the San Francisco reception, Don Querio '72 and Peggy Russell '84.

LETTERS

BODY LANGUAGE



Peter Blanck's article on nonverbal communication by judges ["Off the Record," Spring 1987] promised more than it revealed. The author is able to pro-

vide only "suggestive" evidence for his first premise—that judges leak or reveal their feelings or beliefs about defendants to juries through nonverbal channels. And concerning his second premise-that nonverbal behavior impermissibly influences juries-the best he can do is assert that the possibility has not been disproven. In view of the judge's admitted right of comment, provided by Art. VI, Sec. 10 of the California Constitution, such conclusions are hardly earthshaking.

What is missing from this article is an adequate appreciation of the judge's responsibility to assist in the search for justice. The California Supreme Court has specifically stated that the trial court may do more than merely summarize the evidence, but may also "critically evaluate the testimony, advising the jury as to the credibility of the witnesses and the weight or significance of the evidence." People v. Cook (1983) 33 Cal.3d 400,407. Appropriate safeguards are provided by instructing the jury in accord with BAJI 15.20 or 15.21.

I suggest that if this overt verbal behavior is both permitted and approved (within prescribed limits), it is chimerical to advise attorneys to spend their time, and that of appellate courts, in efforts to establish the existence of unconscious, impermissible, nonverbal judicial behavior, absent more substantial evidence that such nonverbal behavior has any significant effect on a jury's decision.

> Willard P. Norberg '49 San Francisco

Mr. Norberg's comments are well taken-up to a point. Our findings were merely suggestive, nor did we claim otherwise. My colleagues and I consider the study to be a first cut at a complex question. As such it could hardly be definitive. Indeed, our social science background teaches us that research is a cumulative process in which any single study yields only a limited degree of real world validity.

The study described was an initial effort to apply certain social science research techniques in the courtroom context. We are now conducting additional studies, including an attempt to replicate our California study in the Boston criminal courts. We hope other researchers will critique our work and conduct further

It would, therefore, be premature to conclude that a judge's nonverbal behavior is not "read" by the jury and that the effect on trial outcome is negligible. First, the judges who volunteered for our study may have been particularly careful to avoid any appearance of bias. Second, legal appeals involving impermissible nonverbal behavior from the bench have been made and on occasion won. Third, there is analogous social science evidence from other milieus (e.g., classrooms and psychotherapeutic contexts, where expectations on the part of teachers and therapists have been shown to effect the behavior of students and patients, respectively). In short, the question remains

Whether, given the indeterminate state of the research, lawyers and judges should ignore the possibility of impermissible influence is a matter of individual judgement. Norberg calls it "chimerical," and he may be intuitively right. Other observers, however, may hesitate to assume that influential judicial behavior is an inevitable product of courtroom dynamics. A trial attorney who encounters questionable nonverbal behavior might well consider documenting such behavior for appeals purpose. Judges also may consider ways to minimizing possible expectancy effects on juries.

Of interest in this regard is an effort by New York County Supreme Court Judge William P. McCooe. Instead of delivering his final jury instructions "live," Judge McCooe recently tried playing an audio tape recording of his own voice before and

after counsels' summations. His reasons (given in a January 30, 1987 letter to the New York Law Journal) are that a recording eliminates not only inaccurate or fast reading, but also "any body language the Judge may use during the instructions, [as al Judge should not make gestures which may unconsciously indicate partiality to a party and which cannot be recorded for

appellate review."

McCooe's well-intentioned experiment was challenged on constitutional grounds by a losing plaintiff, who alleged that the use of such an "unusual and bizarre procedure" effectively destroyed his right to a full and fair trial on the issues. Fogel v. Lenox Hill Hospital (1986, March 26) Supreme Court New York County. The state appellate court upheld the verdict but not without expressing disapproval of the judge's prerecorded instructions, citing "various dangers inherent in such procedure, including that of jurors failing to accord the same level of attentiveness to a recording as to the judge speaking first hand." Fogel v. Lenox Hill Hospital, 512 N.Y.S.2d 109 (1987).

Ultimately, of course, the surest way to resolve such issues is through empirical research and a willingness to examine traditional assumptions about the trial process. In a modest yet cumulative way, my colleagues and I hope that our endeavors will contribute to the development of this body of research and, equally important, to the growing spirit of interdisciplinary collaboration among social scientists, legal practitioners, and members of the judiciary.

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