

Banks in Trouble
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High Tech

Cover: The high-tech economic community of the Pacific Rim (see article beginning on page 4). Painting by Barron Storey, 1988.

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From the **DEAN**



CAROLYN CADDES

On Legal Education: The Advanced Curriculum

By Paul Brest

THERE has been a growing sense among both faculty and students that our advanced curriculum is in need of revision. By contrast to the first year, which excites and engages almost all students, the second and third years seem somewhat dull. Students have little sense of progression—of deepening knowledge or of greater challenge—as they move from one year to the next.

This problem is not peculiar to Stanford. Students encounter essentially the same course of studies with the same limitations at all major law schools in the country. What I believe distinguishes Stanford is our commitment to embark on some bold experiments to redesign the advanced curriculum.

It is noteworthy that two groups of faculty, studying two different areas of legal study—business law and public interest law—have come to the same conclusion: that the best legal education requires the development of courses that build on foundational knowledge and then become more demanding semester by semester. There are skills and bodies of knowledge—including knowledge about the social, economic, political, and practical worlds in which the law operates—that one must master to be a well-qualified practitioner in any field of law.

Moreover, the very process of acquiring mastery over one domain prepares students to master other fields of law as well. At one level, the curriculum has always reflected this insight; thus, the main purpose of the first-year courses is to teach students to “think like lawyers.” Beyond this, however, we believe that a student who is well trained as a business lawyer will be better prepared to learn how to address the needs of poor clients, and vice versa, than someone who has had only a smorgasbord legal education—a smattering of this, that, and the other. (My colleague, Gerald López, has described our new approach as “anti-generic” legal education, because of the importance it ascribes to a student’s gaining a degree of expertise in at least some area of law.)

Thus, we are on our way to developing coordinated, sequenced courses of study in several areas of legal study. In Law and Business, for example, background courses in accounting and financial economics provide the skills necessary for the basic offerings in business associations, capital markets, and their regulation. These in turn lead to a rich choice of advanced theoretical and practical courses concerned with domestic and international business transactions. The curriculum in Lawyering for Social Change begins with courses in legal and social theory and the Lawyering Process, which provide the foundation for advanced work, including supervised clinical practice at the East Palo Alto Community Law Project.

These curricular developments are not intended to press students to pursue separate, mutually exclusive “tracks.” It would be ir-

responsible to discourage would-be business lawyers from understanding the needs of minority groups and the poor, or to deny would-be public interest lawyers a solid grasp of the world of business law. Furthermore, it would be a great error to encourage any law student to commit himself or herself in advance to becoming a business lawyer, poverty lawyer, litigator, or whatever.

Instead, we must offer students the opportunity to acquire the foundational knowledge necessary to pursue advanced courses in several fields. A student who wishes to concentrate heavily in one area will find a plentiful curriculum available. But students may decide—as I hope many would—to develop a reasonable degree of sophistication in more than one area, to make connections among different disciplines, and to take advantage of our rich curriculum to expand their intellectual horizons. I can assure you that we shall not compromise the breadth of knowledge that has become a hallmark of a Stanford legal education.

We are keenly aware of our responsibility to prepare lawyers to address the problems of an increasingly complex, technical, and specialized world. But only a wide-ranging curriculum can prepare our students to address issues that neither we nor they can presently anticipate. Thus, the challenge facing us is to strike the balance between an education that is deep and one that is broad.

I look forward to keeping you informed of our continuing work on the advanced curriculum, and to having your reactions as we work better to prepare our students for their futures as lawyers, policymakers, and public citizens. □

*“The challenge facing us is to strike
the balance between an education that
is deep and one that is broad.”*

HIGH TECH

An interview with
John H. Barton '68, Professor of Law



Professor Barton is organizing the School's new International Center for Law and Technology. He was a systems engineer before enrolling at Stanford Law School, where he served on the Law Review and was named to the Order of the Coif. A

member of the faculty since 1969, he teaches the seminar in Law and High Technology and courses in International Business, Human Rights, Law in Radically Different Cultures, and, on occasion, International Environmental Law and first-year Contracts.

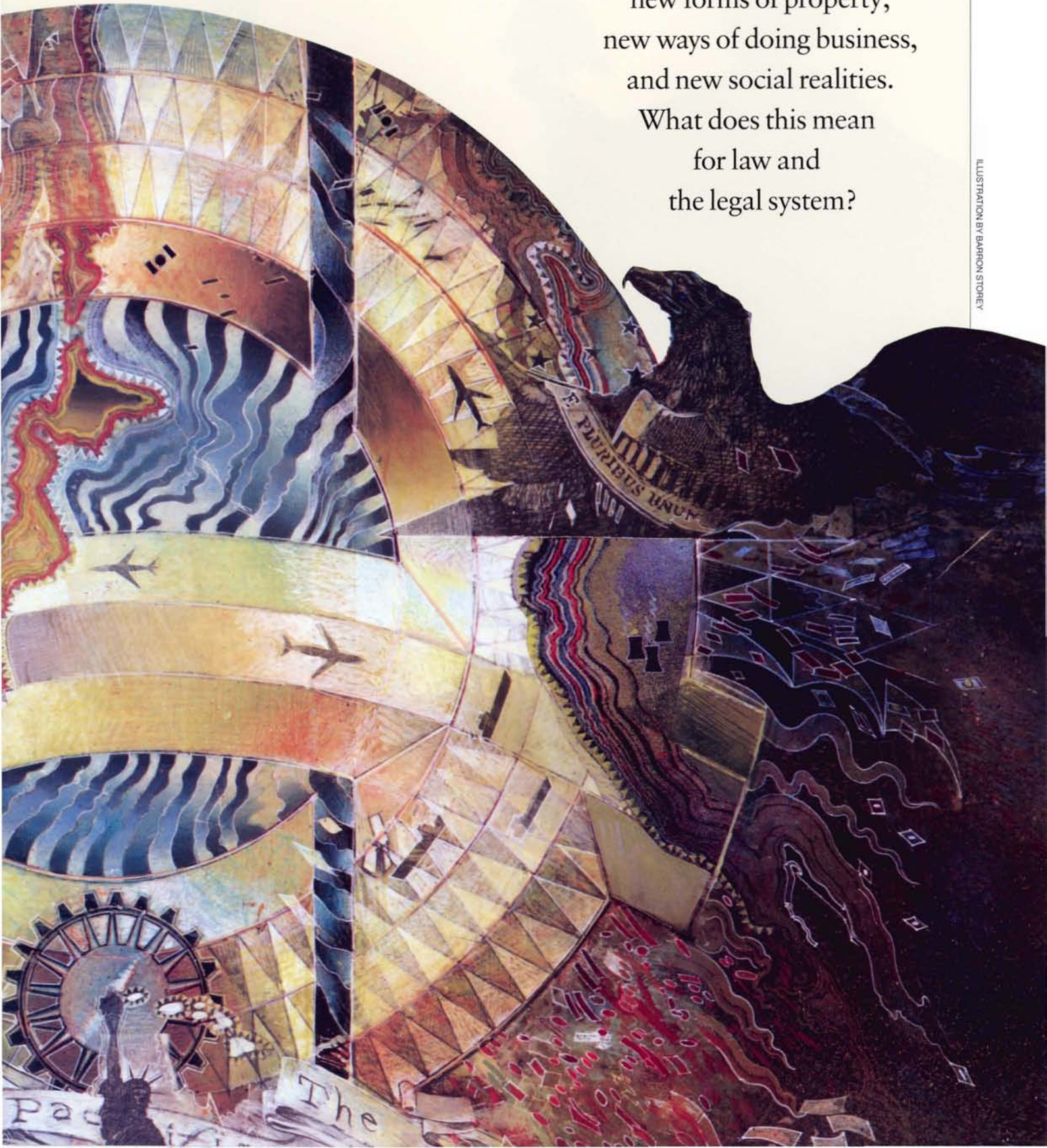
*Barton is the author of four books, the most recent being *The Regulation of International Business*, with Bart Fisher (Little, Brown, 1986). An earlier book written with James Gibbs, Victor Li, and John Merryman, *Law in Radically Different Cultures* (West, 1983) received a certificate of merit from the American Society of International Law. Barton serves frequently as a consultant and adviser on legal technological issues to governmental and private bodies.*

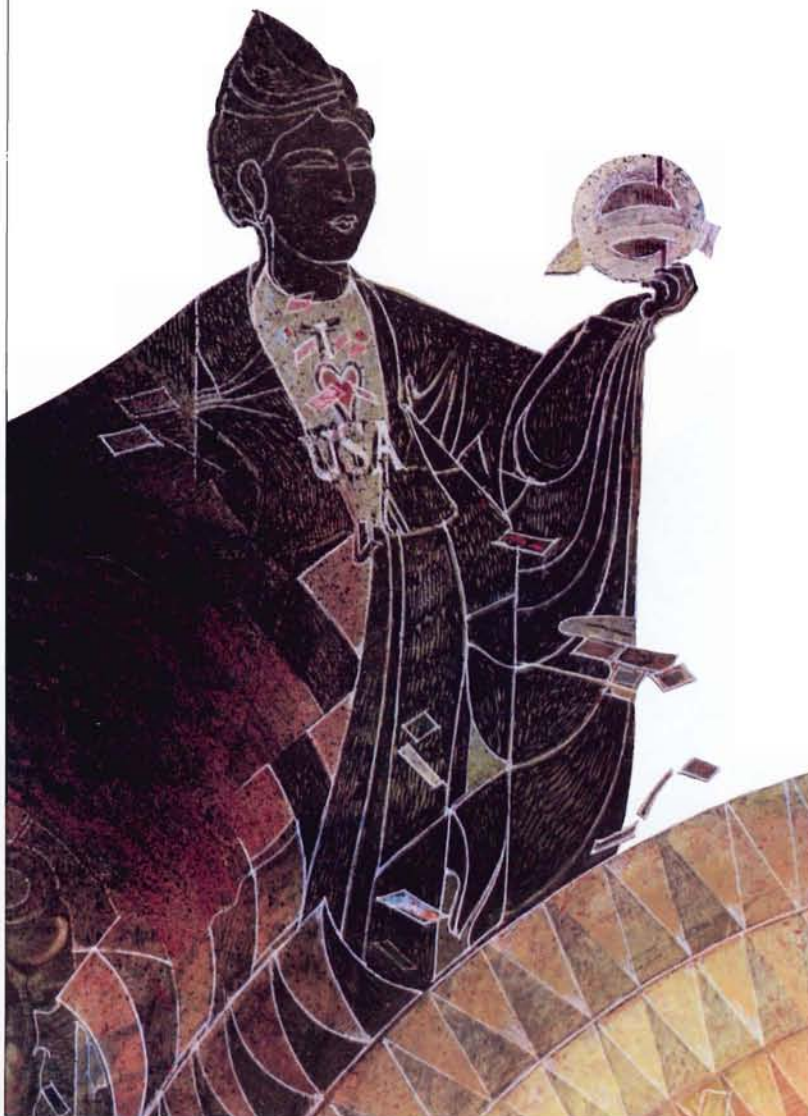
He was interviewed July 19, 1988, by Constance Hellyer, editor of this magazine and, coincidentally, a member of the National Association of Science Writers.



Technology is creating
—on a global scale—
new forms of property,
new ways of doing business,
and new social realities.
What does this mean
for law and
the legal system?

ILLUSTRATION BY BARRON STOREY





**"Technology is not
a crown jewel—it's a process
that you use and develop.
It dies if you
hide it."**

W

hy the current excitement over "Law and Technology"? Haven't lawyers been dealing with technological issues since the Industrial Revolution?

There are big differences between today's high-tech companies and traditional manufacturing firms. The life cycles of high-tech products are typically shorter, and R & D budgets typically larger. A company's competitive advantage is more in technological innovation than in marketing or manufacture. And the key resource is people—the human resource. This means a different kind of legal practice, as anyone who compares a Palo Alto practice with an East Coast practice will tell you.

More broadly, it's a phenomenon of the Pacific Rim—which is highly interlinked and is about to develop a host of new linkages with the diaspora of talent and money from Hong Kong. We're seeing the emergence of an integrated industrial complex from California to Japan and Southeast and East Asia. This complex is finding an essentially new way of doing business.

So it's not just a matter of being faster and fancier?

Not at all. The nature of international competition has fundamentally changed. Today, our competition with other countries is in technological capabilities. Yet our trade law, for example, is designed for old market concepts that don't take into account product cycles and learning curves and, more seriously, don't recognize that there's a significant benefit when another country has an innovation that we're able to use. We have an opportunity—which we don't fully appreciate—for a free global market of scientific ideas, a free market of technology.

Instead, we seem to want to keep it to ourselves.

But that's foolish. Technology is not a crown jewel—it's a process that you use and develop. It dies if you hide it.

The Pacific Rim phenomenon is a dramatic example. It's a new form of technological community—international and becoming very integrated. You have U.S. design, Japanese production techniques, and Southeast Asian or Mexican production. These companies see this as absolutely natural, and they're introducing their new products in all the markets at the same time. It's a very important process and, interestingly, one that has developed without significant diplomatic cooperation or nation-to-nation agreements. There's a strong free-trade feel about it.

What does this mean for the legal system?

There are all kinds of legal questions, such as whether we need new international organizations, trade agreements, and commercial arrangements. We're going to see new forms of technological joint ventures and changes in capital market flow (particularly if Japan opens up its capital markets). And we'll need new approaches to commercial arbitration—Bob Mnookin's work in the Fujitsu-IBM software dispute is a wonderful example. It's fun.

A lot of lawyers must be having fun, then! Because technological issues seem to be cropping up in just about every legal specialty—DNA fingerprinting in Criminal Law, VCRs in Copyright Law, nuclear power in Environmental Law, test-tube babies in Family Law...

It's happening everywhere. Technology is, I think, changing the way we face legal issues.

In the past, whenever the character of property changed, the legal system had to change. When the key form of property was land, the legal system focused on real property. When the key kind of property became intangibles (such as share ownerships in corporations), changes had to be made in the tax system, in how assets are collected—how, in fact, we view wealth.

Now we're entering a new phase in which the key form of property is people's knowledge and personal capabilities, and the capabilities of teams to do kinds of projects that couldn't

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and
Southeast
and
East Asia."**

be done before. So the legal system is going to have to change its whole concept of personal income and wealth, and of how an employee is to be dealt with.

Would you give an example?

One interesting question is, What do you recoup against if a person or company goes bankrupt? The assets of a high-tech enterprise are not so much in banks and factories as in people's heads.

What issues have you been working on?

I've got three key projects for my sabbatical this year. The first involves the regulation of biotechnology in developing countries.

The problem is that many developing countries do not have the expertise or the budget to evaluate new biotechnological products. Some of those products present potentially enormous benefits, but some also present significant risks. Since many such products—for example, medicines for tropical diseases—aren't going to be evaluated or marketed in the United States, it's up to the developing countries to decide which to adopt and how to regulate them. I'm trying to understand how their regulatory systems now operate and will be visiting several nations in Asia this fall. Then, I may be able to come up with some suggestions for new laws or treaties or even training programs.

I'm also currently working with the National Academy of Sciences on the genetic diversity question.

What do you mean by genetic diversity?

The genes in food plants, medicinal plants, and animals. A number of developing countries perceive a problem that is, in essence: A firm goes down to Latin America and picks up or buys cheaply seeds that remote farmers have been using and that may contain an important disease resistance. The firm brings the seeds back to the U.S., breeds them into an improved variety, and then sells the variety

back in Latin America at a profit.

Some people in the developing world feel this is unfair. I don't think the problem is so bad—provided the developing nations have a genuine chance to develop their own breeding industries. Moreover, the existing research system works very effectively in many ways to benefit developing countries. But nevertheless this has been a point of tension, and I've been asked, as someone who has written on this kind of international legal issue,¹ to work on it.

I've also been working on some questions about international technology licensing. Last spring a group of students and I organized a symposium with experts from all over the country.²

Is this about licensing foreign companies to manufacture your products overseas?

In part. We looked at why companies would choose to market a technology in this fashion rather than by manufacturing it here for sale abroad. There can be real economic advantages either way, as some of the experts at the symposium explained.

But we're also beginning to see another kind of technology licensing, that looks more to development and marketing. Often now, direct U.S. and Japanese competitors license each other for specific development programs. This reflects the fact that, for really new products, you often need technologies of more than one company. A small biotech company might have the expertise to develop a new drug, while a big pharmaceutical company may be more expert in manufacture and marketing, so the two get together.

Another good example is when a biotech company cooperates with a computer company to develop new kinds of electronic software and instrumentation for the biotech industry. Similar arrangements are being made between U.S. and Japanese companies with complementary expertise in the semiconductor industry.

Basically what's happening is that the character of the products is changing faster

**"We
should
recognize
that a
prime
form of
wealth
is an
educated
person."**

than companies can change—making it easier to collaborate than reorganize. The collaboration may be healthy—but can sometimes raise antitrust issues—and often leaves behind any chance of distinguishing U.S. industry from foreign industry.

There's been some concern lately about the theft or illegal export of military technology—such as the escape of our method for manufacturing quiet submarine propellers. Any comments?

I think that our government greatly overrates this problem. They forget that technology is changing so fast that our key defense is to stay ahead of the competition. Obviously we have to control the export of military technology and some other technologies. But unfortunately, the way we run our program greatly hurts our industry.

Because of our emphasis on secrecy?

I was thinking more of the problems and delays that U.S. firms encounter in trying to get government approval for possible sales. This delay gives foreign competitors a chance to make the sales instead.

Computers and communication technology seem chameleon-like. Isn't it difficult to determine whether they might be used for military purposes?

There's obviously room for reasonable disagreement about what you do and don't want to export. My sense is that computers are one of the best ways to break down secrecy problems in the Soviet Union.

What was the focus of your text on regulating international business?

The book,³ which is actually a casebook, follows a relatively traditional international business law approach. There is, however, quite a bit on technology licensing and on

(Continued on page 49)

Progress to date

LAW AND TECHNOLOGY PROGRAM

Legal issues raised by high technology have, over the past decade, become a major interest at Stanford Law School. Much has been done, and much is planned. Some significant developments:

By 1984

- **Coursework.** High-tech issues are included in courses and seminars on intellectual property, environmental, business, and international law, taught chiefly by Professors Barton, Gilson, Goldstein, Heller, and Rabin.

1984

- **Seminar.** Professors Brest, Heller, and Mnookin team-teach "Computers and the Law," with guests from the high-tech legal and business community.
- **Advisory group.** The Dean and faculty invite several expert practitioners to form a Law and High Technology Council.
- **Student organization.** Interested students establish the Stanford Law and Technology Association (SLATA).

1986

- **Conference.** SLATA sponsors "How Government Policy Affects Private R & D" and publishes the conference proceedings.
- **Seminar.** Professor Barton introduces "Law and High Technology," with input from practicing attorneys.

1988

- **Working conference.** SLATA and the *Journal of International Law* sponsor "Law and Economics of International Technology Licensing."
- **A comprehensive program.** Law School begins organizing a "Stanford International Center for Law and Technology," with strong interdisciplinary and practitioner participation...

A major new initiative

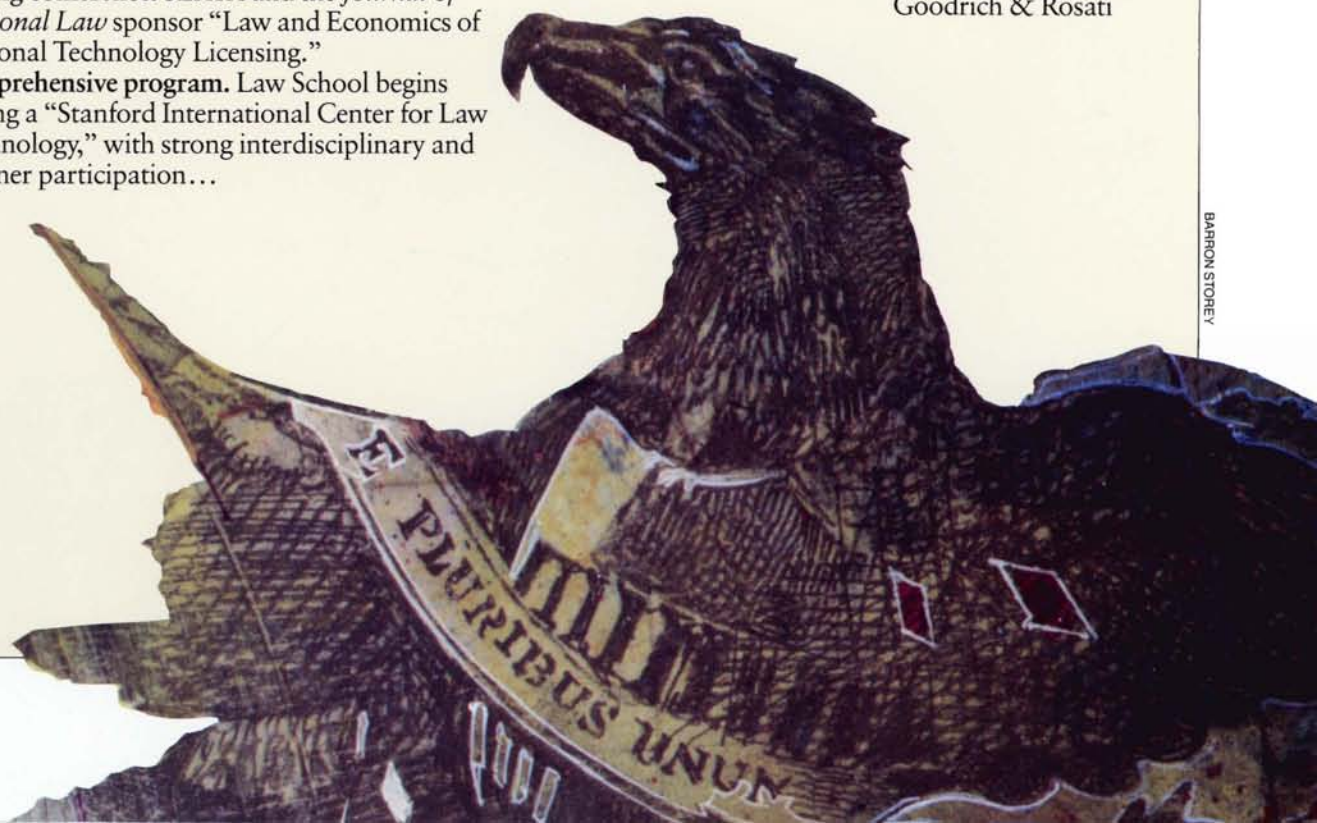
STANFORD INTERNATIONAL CENTER FOR LAW AND TECHNOLOGY

Designed as an interdisciplinary forum for teaching and research, the Center will explore legal issues—both domestic and international—raised by advances in technology. Center plans complement existing activities and provide for the following new ventures:

- **Research.** Academic research on legal questions posed by technological advances, entrepreneurship, and the global economy.
- **Fieldwork.** Expanded opportunities for students to do research with high-technology businesses, legal practitioners, and industry associations.
- **Publications.** Rapid dissemination of research and scholarship through a working-paper series.
- **Conferences and symposia.** On such topics as technology transfer, trade secrecy, and U.S./Japan antitrust issues.
- **Summer institute.** Annual programs for lawyers from throughout the high-tech Pacific Rim economic community.

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ABORTION

THE
LAW



COLOR LITHOGRAPH BY AUGUSTE RODIN,
LE JARDIN DES SUPPLICES (PARIS, 1902), PLATE 6 (DETAIL).
COURTESY OF THE METROPOLITAN MUSEUM OF ART.

By John Kaplan
Jackson Ely Reynolds
Professor of Law

"WASHINGTON, D.C.—The Supreme Court today opened the door to prohibitions against abortion at the state level. Greeted with jubilation by pro-life activists, the decision effectively overturns the Court's controversial 1973 decision in *Roe v. Wade*. Among the justifications offered by the Court for its reversal are technological advances making fetuses viable at an increasingly early state of gestation..."

NO, it hasn't happened—yet. But the members of the High Court who may be counted as solid supporters of *Roe v. Wade* number only four, and they are elderly. At the same time, opponents of abortion can be expected to carry on their crusade even if rebuffed in the upcoming *Webster v. Reproductive Health Services* case. Let us, then, engage in a thought experiment: What if *Roe v. Wade* were, in fact, reversed?

To begin with, the political battle over abortion would by no means end. Overturning *Roe v. Wade* would simply permit—but not require—states to prohibit or otherwise curb abortion. In order for abortion to be effectively outlawed, legislatures in most states will have to pass, and their governors sign, new statutes.

This would present a number of difficulties to opponents of abortion. In many states, the old anti-abortion statutes have been repealed, either to get rid of restrictions thought to be unconstitutional under *Roe v. Wade* or as part of new abortion restrictions intended to be compatible with that ruling. Moreover, if the putative overruling of *Roe v. Wade* were not complete but required certain particular exceptions or formalities, new abortion laws might have to be enacted in virtually every state, as was the case some years ago with respect to capital punishment.

The most important obstacle to the enactment of new anti-abortion laws would, however, be the lack of general public support for such a prohibition.

What if the Supreme Court changed its mind ?

Roe v. Wade did not, after all, come out of the blue. In the previous decade, twenty-seven states had liberalized abortion laws. Of these states, four permitted essentially free abortions, and several others, including California, applied a somewhat restrictive statute to provide what still amounted to free abortion. Although a backlash set in shortly after *Roe v. Wade*, we must not forget that at the time, the decision seemed to be the culmination of a national (indeed, international) movement to relax the laws on abortion.

Public opinion appears to have stabilized, with those for abortion on demand as numerous as those against. A 1984 poll showed a strikingly even split between respondents on whether abortion should be allowed because "the family has low income and cannot afford any more children"; the woman "is not married and does not want to marry the man"; or the woman "is married and does not want any more children."¹ Similarly in 1986, the Gallup poll asked its sample: "The U.S. Supreme Court has ruled that a woman may go to a doctor to end pregnancy at any time during the first three months of pregnancy. Do you favor or oppose this ruling?" Nationwide, 45 percent said "yes," 45 percent said "no," and 10 percent had no opinion.²

When, however, certain exceptional circumstances are considered, the public's willingness to permit abortion becomes overwhelming. About 80 percent of respondents support a woman's right to have an abortion when the child was conceived "as a result of rape"; when there is a "strong chance of serious defect in the baby"; and when the "woman's health is seriously endangered."³

Disagreements over whether to compromise on such exceptions in order to gain passage for anti-abortion proposals can be expected to cause problems among "pro-life" advocates. One who regards abortion as murder will not tolerate lightly even those exceptions found acceptable by 80 percent of the populace. Catholic doctrine, for example, prohibits abortion even where childbirth will result in the

death of both mother and baby—a position that has already helped doom the passage of a constitutional amendment to overturn *Roe v. Wade*. Another exception with wide acceptance—when the baby is likely to be born seriously deformed or otherwise defective—is felt by anti-abortion activists to be particularly heinous.⁴

The matter is further complicated by the interplay between the legislature and the voting public (acting by initiative or referendum). Anti-abortion activists, for various reasons including their higher level of commitment, have considerably more political power in state legislatures than their numbers alone would indicate. In a direct vote by the populace, however, the anti-abortion forces will probably be far less effective. Even in Massachusetts, which one might have predicted would be a staunchly anti-abortion state, a 1986 referendum to prevent public financing of abortions was soundly defeated.

In short, it is likely that an overruling of *Roe v. Wade* would result—not in a general criminalization of abortion—but rather in a halting accretion of localized controls, leading ultimately to an awkward patchwork of jurisdictions in which the procedure is either prohibited or allowed, or is allowed under varying sets of conditions. Capital punishment provides an instructive analogy. Though heavily supported by over 70 percent of Americans (and hence considerably more popular than anti-abortion laws), the death penalty for murder is still not in place in some thirteen states and the District of Columbia—and this some eleven years after the Supreme Court's decision finally validating capital punishment.⁵

A Legal Hodgepodge

It is impossible, given these many variables, to predict which and how many states will ban abortion. But unless large blocks of contiguous states did so, a less enforceable policy can hardly be imagined.

The reason is not that within-state prohibitions against abortion would be so difficult to enforce (a matter we will return to later), but rather that so

**The demand for
abortion appears
to be relatively
inelastic, and
those who want
abortions want
them very much.**

long as traveling to an area of legal abortion is easier than violating the law of one's own state, the great majority of abortions performed would not even be illegal. The demand for abortion appears to be relatively inelastic, and those who want abortions want them very much. Moreover, though increases in the effective price of abortions bear most heavily on the poor and depress the number performed,⁶ the availability of low-cost interstate bus transportation would probably prevent local abortion restrictions from having a major impact.

The problem of states that permit abortion but lie near others that forbid the practice is a difficult one. States liberal on abortion would be able to subvert their neighbors' more restrictive policies in a way that cannot be done with capital punishment. Indeed, abortion restrictions could be even more easily undermined than restrictions on guns, cigarettes or liquor, where there is at least contraband to be identified and seized.

States have, in fact, been known to deliberately subvert the policy of other states to advance their own interests. Nevada's permissive divorce law for some time attracted a great deal of business from elsewhere, and its legalization of gambling and perhaps even houses of prostitution have had the same effect. Several states also seem to have designed their lotteries to subvert the anti-gambling policies of their neighbors.

A state in which abortion is illegal might attempt to criminalize a resident's temporarily leaving the state to receive an abortion. However, such a prosecution not only is fraught with difficulties of proof, invasions of privacy, and perhaps even constitutional problems, but also has the great disadvantage of bearing upon the consumer of the illegal service rather than the provider. (Even before *Roe v. Wade*, the woman who obtained an abortion was typically not made a criminal, at least in part because that would make her less likely to cooperate in the prosecution of her abortionist. Moreover, if she were made guilty of a crime, she would in many states have to be considered an accomplice, with the result

that her testimony would have to be corroborated. But probably the most important reason was that there were simply far too many women obtaining abortions to prosecute.)

Nor can a state prevent its citizens from receiving out-of-state abortions by inhibiting information about such services.⁷ Any attempt would raise difficult First Amendment issues and probably be unenforceable as well. Even if enforceable within a state, such a ban on information could be readily overcome by telephoning or visiting a nearby state known to allow the provision of such information.

Federal Dilemmas

If the many political battles fought within states do indeed result in a patchwork of states prohibiting or allowing abortion, the major anti-abortion effort would presumably move to the national level. Pressure would then be brought upon Congress to throw its weight against abortion.

There are various ways this might be done. One is by making the performance of an abortion (subject probably to certain narrow exceptions) a federal crime. Another is by passing a law threatening to withhold federal medical care or other social service funds from any state that permits abortions. Though this latter course would most likely coerce recalcitrant states into banning abortion, neither course is particularly attractive. The former might raise serious constitutional issues, including Federalism concerns. And the latter would probably result in lackadaisical enforcement by states compelled to make the practice illegal.

Instead, the thrust of attempted anti-abortion legislation might be to use the interstate commerce power. Thus, Congress could make it a crime to cross state lines to obtain an abortion. The rationale could be that the federal government, rather than taking sides, was leaving abortion decisions to the individual states and only intervening to prevent one state from subverting another's public policy. Though there are numerous analogies to this in our federal criminal jurisprudence,⁸ such a solution does not seem well

adapted to the abortion problem. Indeed, it would face many of the problems encountered by a state statute seeking to control the travel of its own residents by similar laws.

A statute making it a federal crime to perform an abortion on a resident of another state might seem better adapted to the problem. The closest analogy would be the laws preventing a gun dealer in one state from selling arms to a resident of another state.⁹

The important point here is that without some sort of national action, any state anti-abortion laws passed in the wake of a *Roe v. Wade* reversal could so easily be evaded that the number of legal abortions performed in the United States will probably not be significantly diminished. Whether the political climate of America at the time these issues arise would permit the weight of the federal government to be brought to bear against abortion at all is, of course, another question.

A Different World

The world has changed considerably since *Roe v. Wade*, making it unlikely that abortion law comparable in severity to that prevailing before 1973 could reduce the number of abortions to anything approaching 1973 levels. Too many changes, both technological and social, have taken place.

Technological advances. Methods of determining pregnancy have progressed until today, for only about \$10, a woman can purchase home testing kits that are at least as sensitive as those used by physicians in 1973. Research in this field is continuing. One recently developed test, the enzyme immunoassay, can detect pregnancy as few as ten days after conception.¹⁰ States would probably not be able to interfere with the distribution of such tests, because they are too useful for those who wish to bear children and begin prenatal care as early as possible. For women who do not want to be pregnant, however, the tests offer a means of detection that is quick, inexpensive, and entirely private.

The technology of abortion has also changed significantly—to a point where it is unlikely that the safety and



Professor Kaplan is a noted expert on Criminal Law and Evidence, and author of leading texts in those fields. With Stanford since 1965, he has written on such sensitive and timely issues as the abuse of hard drugs, marijuana laws, gun controls, and AIDS. The present article is based on his study, "Abortion as a Vice Crime—A What If Story" (unpublished monograph, 1987).

The research was supported by the Stanford Legal Research Fund, made possible by a bequest from Ira S. Lillick and by gifts from other friends of Stanford Law School.

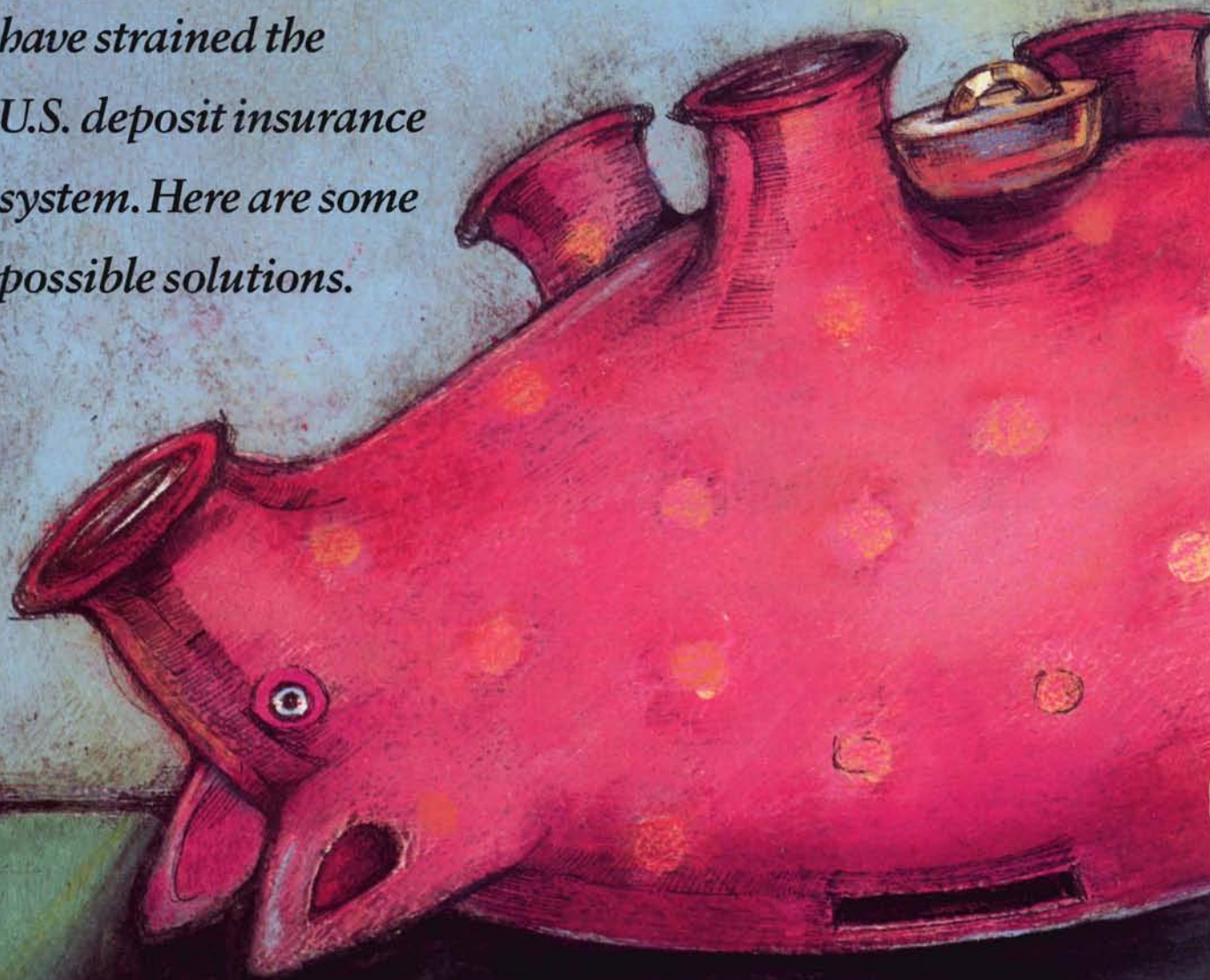
ease of the operation will ever regress to the levels seen before *Roe v. Wade*.¹¹

In former days, abortions were usually performed by the surgical procedure called D and C (for dilatation and curettage), a relatively risky method requiring the insertion into the uterus of a rakelike object. After the twelfth week of pregnancy, even this procedure was customarily avoided on the theory that the uterus had become too large; abortion then tended to be postponed until the sixteenth week, at which time saline abortion, an even more complicated procedure in which labor is induced, was used.

Today, an entirely different procedure—suction, or vacuum aspiration—is used in the great majority of first trimester abortions and often up to the fourteenth week of pregnancy (by which time over 90 percent of all abortions are currently performed).

(Continued on page 52)

*Recent failures of
commercial banks
and thrift institutions
have strained the
U.S. deposit insurance
system. Here are some
possible solutions.*





BANKS IN TROUBLE

By Kenneth E. Scott '68
*Ralph M. Parsons Professor of Law
and Business*

THE BANKS and thrift institutions of this country are experiencing great difficulties: This is generally known. What is less well known, however, is the extent of the problem and the threat it poses to the solvency of the government funds established to protect depositors. In this article I shall briefly examine some of the problems and proposed solutions currently under discussion.

The changing economic environment of the last two decades has had a revolutionary impact on financial institutions in this country and abroad. Technological advances in the computer and communication industries have drastically lowered the costs of transmitting and processing information and thus of executing financial transactions. Financial-services products have been redefined; the efficient scale of operation has been increased, enlarging geographical market areas. The result has been a trend toward a worldwide integration of credit and capital markets.

While in many ways exciting, these changes have exerted pressure on a system of legal regulation of banking in the United States that was designed in large part over fifty years ago. The loosening of some strictures on fi-

nancial institutions by the current Administration has produced—along with the looked-for flexibility and creativity of response among financial institutions—an inevitable measure of uncertainty and exposure.

Commercial banks. The recent rise in bank closures indicates the difficulties facing regulators. In the 35 years from the end of World War II through 1980 the Federal Deposit Insurance Corporation (FDIC) reported the closure on the average of just 6 banks a year. Since then the number has been increasing sharply, from 10 in 1981 to 42 in 1982, 48 in 1983, 79 in 1984, 120 in 1985, 138 in 1986, and 69 in just the first four months of 1987. The number of "problem banks" has also continued to mount, being currently at 1,555 or 10.7 percent of total banks.

As a result of its disbursements and losses, the \$18-billion FDIC deposit insurance fund has stopped growing, while the ratio of the fund to insured deposits has declined to 1.1 percent—the lowest level since its inception.

Thus far, most of the failures and problems have been relatively small agricultural or oil belt banks, but the assistance list included the nearly \$40-billion Continental Illinois National Bank in 1984. Looking ahead, there is a distinct possibility of trouble at other large banks, due in substantial measure to the international debt situation.

During the 1970s, the foreign lending activities of U.S. banks expanded at a rapid pace, and by September 30, 1986, foreign loans constituted \$301 billion or 11 percent of the total assets of the U.S. banking system. The debt service problems of Brazil, Mexico and Argentina have attracted wide attention, but Peru, Chile, Bolivia, Venezuela, the Philippines, Liberia, Nigeria and others are in difficulty also. The

consequences for the U.S. banking system are concentrated in a relatively small number of key institutions: as of September 30, 1986, for example, the nine largest money center banks held \$51 billion in Latin American loans, representing 1.14 times their total capital.

The financial exposure of such banks is, in fact, worse than is apparent. Generally accepted accounting principles (GAAP) require mark-to-market accounting for assets held in trading portfolios but not for assets being held to maturity in a loan or investment portfolio. The balance sheets of most money center banks, therefore, do not reflect large losses in the market value of their international loans or their true solvency. Some indication of the extent of the hidden losses may be found in the decision announced by Citicorp on May 19, 1987, to sharply increase its loan-loss reserves (by \$3 billion) to a total of \$5 billion; that would correspond to a 40 percent write-down of its

\$12.8 billion in loans to its six biggest Third World borrowers. Other large banks followed suit, and the FDIC may yet have to confront the possible insolvency of another large money center bank.

Thrift institutions. The potential problems of the FDIC have been upstaged, however, by the visibly urgent problems of the Federal Savings and Loan Insurance Corporation (FSLIC), which insures accounts at thrift institutions (savings and loans). Beginning in 1981, the thrift industry encountered adverse developments, first in money market interest rates and then in real estate markets, that rendered a majority of the industry insolvent.¹ By 1983 it became apparent that the \$6 billion FSLIC fund would not have the resources to close all the bank-



*We have two distinct choices:
to make the deposit insurance
system viable, or to make it
largely superfluous.*

rupt institutions and pay off insured accounts, so it embarked on a program of keeping them in operation and postponing the day of reckoning.

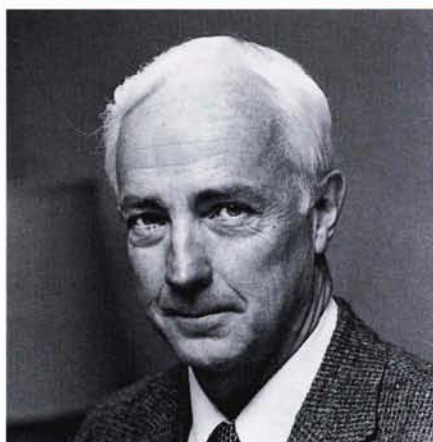
Gradually the liquid resources of the FSLIC dwindled to a level in May 1987 of about \$500 million. In terms of existing claims, that left the insurance fund insolvent to the extent of about \$6 billion, while the FSLIC's estimate of the amount required to resolve the industry's insolvency rose to \$23 billion. Estimates from outside observers are on the order of twice that sum. The response of Congress, in the Competitive Equality Banking Act of 1987, was to allow the FSLIC to borrow enough to increase its resources by a mere \$10.8 billion.

In short, the U.S. deposit insurance system is under considerable stress, and that leads to an inquiry into causation.

Possible Causes

The first explanation is that the national and world economies have simply been undergoing some random shocks—more severe than most in some areas, but the sort of thing that has to be expected over the long run. If the deposit insurance funds are showing signs of strain, it may indicate no more than that the annual insurance premium level (1/12th of 1 percent of the deposit base) was set at too low a figure fifty years ago when the statutes were enacted. For a long time the funds seemed adequate, but now the random fluctuations of events are catching up with them. There is no fundamental problem, except perhaps to correct an underestimation of the appropriate premium level.

A second explanation is that recent events have revealed a need for better supervision of banking. Indeed, banking supervisors are always saying that they need more regulatory authority—over capital ratios or conflicts of interest or international lending or enforcement techniques. Their critics, on the other hand, are always saying that the supervisors do not exert their existing authority forcefully enough. Both supervisors and their critics seem to assume that, unlike other business enterprises, banking firms have an



Professor Scott is a 1956 Stanford Law graduate and past article editor of the law review. Before joining the faculty in 1968, he had served as chief deputy savings and loan commissioner for California (1961-63) and general counsel of the Federal Home Loan Bank Board in Washington (1963-68). He has co-authored two books: Retail Banking in the Electronic Age (1977) and Economics of Corporation Law and Securities Regulation (1980).

Currently a senior research fellow at the Hoover Institution, he holds the School's Ralph M. Parsons Professorship in Law and Business.

The present article was drawn by the editor from Scott's extended monograph, Domestic Bank Regulation in a World of International Banking (John M. Olin Program in Law and Economics, Working Paper No. 35, September 1987).

inherent tendency to self-destruct and consequently require stringent supervision if they are not to be led by management into excessive risk and frequent insolvency.

A third explanation attributes the current difficulties to the deposit insurance system itself. The insurance premium is assessed at a uniform rate to all institutions. No recognition is taken of the variations in risk presented by variations in factors relevant to failure, such as the composition of asset portfolios, the matching of asset and liability durations, leverage or "capital adequacy," or managerial competence. A bank can raise insured deposits (which for the banking system represent close to 80 percent of total deposits) at something approaching the risk-free rate of interest, due to the implicit government guarantee, and invest them in risky loans and investments, keeping the higher expected rate of return. In short, the uniform premium structure creates an incentive for a bank to take higher risks than it would otherwise choose—an incentive that actually increases as the capital ratio of the bank diminishes.²

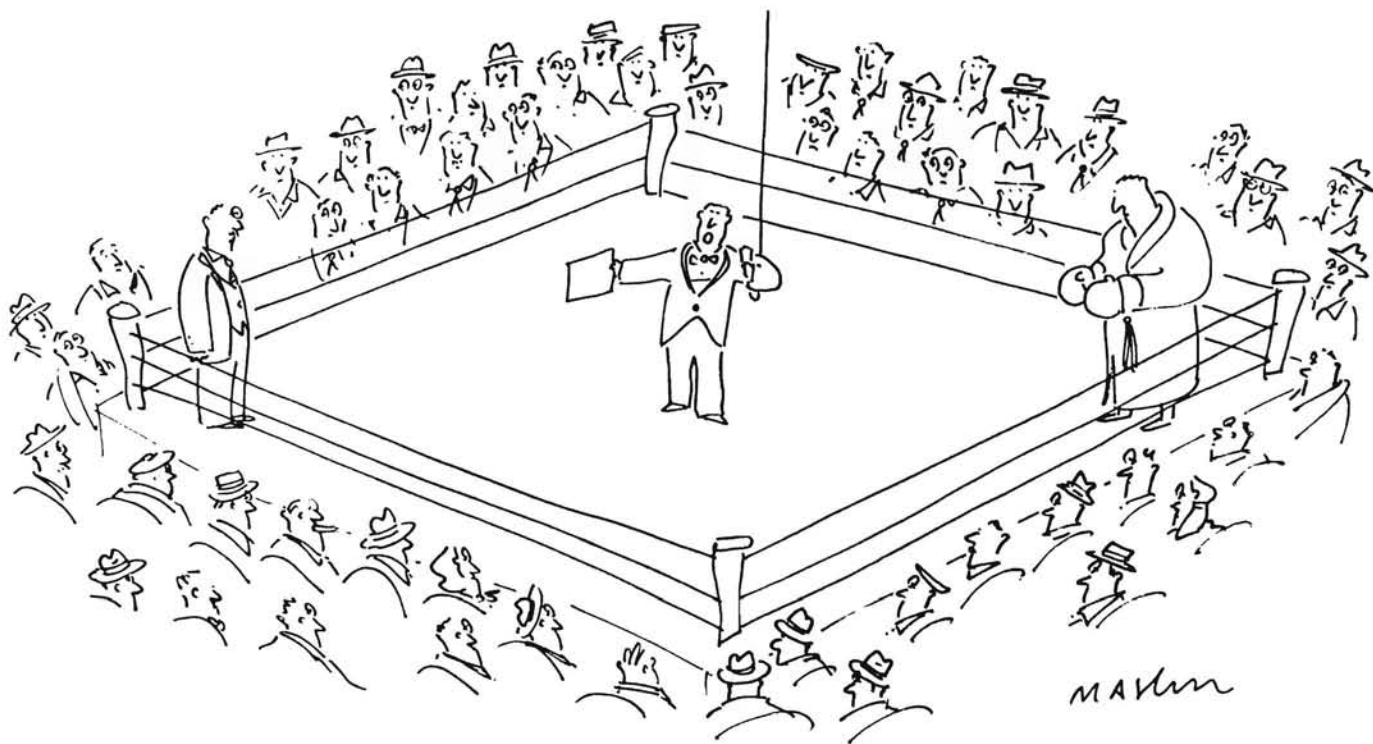
These explanations of the current strains in the U.S. banking system are not mutually exclusive and may all have a degree of validity. The one on which I have focused my work concerns the incentives created by a mispriced premium structure and the proposals that have been made to correct it, on the assumption that mandatory deposit insurance will continue to be a politically imperative feature of American banking.

Some Proposed Solutions

In face of the pressures on the deposit insurance system, we have, I think, two distinct choices: to make the deposit insurance system viable, or to make it largely superfluous. The second choice—which is the more radical and thus perhaps more interesting—will be discussed later in this article. But first, let me briefly indicate the kinds of approaches that have been proposed to improve the viability of the system as now constituted.

(Continued on page 55)

School NEWS



DRAWING BY MASLIN, © 1981 THE NEW YORKER MAGAZINE, INC.

"In this corner, a man prone to costly and lengthy litigation."

New Center Promotes Research in Conflict Resolution

STANFORD University made a major commitment to the study of alternative methods of dispute resolution (ADR) with the establishment this fall of the interdisciplinary "Stanford Center on Conflict and Negotiation." Directed by Law Professor Robert H. Mnookin and housed in the Law School, SCCN is designed to promote research and education on approaches to the many

disputes where litigation and other adversarial methods are needlessly costly and time-consuming.

The new Center constitutes "a broadly based effort to identify barriers to the resolution of conflicts and develop strategies for reaching better, quicker negotiated settlements," says Mnookin, who holds the Adelbert H. Sweet Professorship in Law. The core faculty, in addition to Mnookin, consists of Nobel laureate economist Kenneth J. Arrow, social psychologist Lee Ross, cog-

nitive psychologist Amos Tversky, and game theorist Robert B. Wilson.

SCCN is funded by the William and Flora Hewlett Foundation, with additional support from the Law School, Graduate School of Business, School of Humanities and Sciences, and several individual and corporate donors.

A solid beginning. With more than \$200,000 in start-up funds, the new Center has already engaged a full-time associate director—Daniel R. Abbasi, MA '88 (Political Science)

—and launched a number of key programs. Applications are being accepted from law and other Stanford graduate students to become SCCN Fellows and for research grants of up to \$2,500. Planning has also begun on a spring 1989 workshop for legal practitioners.

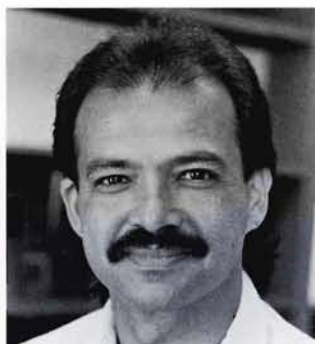
The Center is in addition about to distribute the first five in a projected series of working papers. These include three faculty studies, plus the top two student papers submitted in the University's new Richard S. Goldsmith Award competition for research in dispute resolution (see *Stanford Lawyer*, Spring 1988, pp. 39-40). Law students Gillian K. Hadfield, JD '88, and J. Bradley Johnston, JSM '88, were the first winners.

Another complementary activity—in which all five SCCN principal investigators participate—is the Interdisciplinary Seminar on Decision, Conflict and Risk. Open to students throughout the University, this seminar is cross-listed in the schools of Law and Business and the departments of Psychology, Economics, and Operations Research. Law students have further opportunities to study ADR in courses like Mnookin's Dispute Settlement: Negotiation and Mediation (see page 41).

A broad foundation. The SCCN faculty brings a wealth of interests and experiences to the interdisciplinary enterprise.

Mnookin is currently conducting one of the largest, long-term studies of divorce ever done in America. And with Wilson, he recently analyzed the

López Named to Montgomery Chair in Public Interest Law



Jerry López

mutually damaging commercial dispute between Pennzoil and Texaco. Mnookin is best known, however, for an elegant exercise in applied conflict settlement: the arbitration (with John L. Jones) of the IBM and Fujitsu dispute over property rights to software programs.

Arrow, who holds dual Stanford appointments as Joan Kenney Professor of Economics and Professor of Operations Research, has been studying the role of information in individual and collective decision making, particularly how economic and social context influences the course, form, and outcome of negotiations.

Tversky, the Davis-Brack Professor of Behavioral Science in the Department of Psychology, has won a MacArthur Prize and the American Psychological Association's Distinguished Scientific Contribution Award. He investigates barriers to conflict resolution by examining how, under conditions of uncertainty, individuals make judgments and resolve in-

PROFESSOR Gerald P. López has been appointed to the Kenneth and Harle Montgomery chair in Public Interest Law.

A 1974 Harvard Law graduate, López began teaching here in 1984 as a visitor and became a tenured member of the faculty the next year (see *Stanford Lawyer*, Fall 1985, pages 39-40). He had previously been a professor at UCLA. In 1987 the Stanford Law graduating class voted to award him the John B. Hurlbut Award for Excellence in Teaching.

"Jerry López is one of the outstanding law teachers in the country," said Dean Brest, in announcing the new appointment. "Beyond this, he is a true innovator in legal education, whose ideas for reforming the law school curriculum carry far beyond the area of public interest law."

Creative approaches. López is currently developing a program of sequenced courses, *Lawyering for Social Change*, concerning

(Continued on next page)

ternal conflict. One intriguing finding is that, in the minds of decision makers, "losses" loom larger than equivalent "gains."

Ross, a professor of psychology, has done a series of studies indicating that disputants tend to devalue concessions and proposals coming from their adversary. This research helps explain the value of third-party mediators in removing this source of bias, as well as the often disappointing response to unilateral concessions.

Wilson, who is the Atholl McBean Professor of Economics at the Graduate School of Business, employs game theory to investigate communication problems and other inefficiencies in the negotiation process. Recently he has been researching strikes and other methods used to drive up the costs of delay in reaching agreement. He is also exploring the idea that under some circumstances (such as market trading), computerized procedures may be preferable to face-to-face negotiations.

The creation of the new Center as the focal point of such efforts is an exciting development for the Law School and the profession. In the words of Dean Brest: "It is clear that much of the future of the legal system relies on alternative dispute resolution. The engagement of social scientists from a variety of fields will help provide the theoretical foundation for a better understanding of how to put that into practice."

Individuals and organizations interested in ADR can become Center Affiliates and receive regular updates on its work. For further information about this and other SCCN activities, write or call Daniel Abbasi, Associate Director, Stanford Center on Conflict and Negotiation, Crown Quad, Stanford, CA 94305-8610; (415) 723-2574. □

Reported by Kathleen O'Toole,
Stanford News Service

López Appointed

(continued)

the representation of individuals and groups who are politically and socially subordinated (see page 41). "Working with subordinated peoples requires training in a range of traditions and skills not usually covered in the law school curriculum," he said in a recent interview. "Students interested in becoming public interest lawyers need to learn not only the relevant laws, but also an understanding of the social context, concerns, and values of the person or group they plan to work with."

López uses a variety of teaching approaches, including field placements in community institutions, classroom simulations, and videotaped exercises. He has pioneered the concept of "lay lawyering"—the idea that people who are not lawyers can draw on their everyday problem-solving skills to perform some tasks traditionally thought to require a lawyer.

His publications include articles in the *Journal of Legal Education*, *Harvard Law Review*, and *UCLA*

Law Review, and a text coauthored with Addison Mueller and Arthur I. Rosett, *Contract Law and Its Application* (3rd ed., Foundation Press, 1983).

Supreme Court case. López, in a 1987 case before the U.S. Supreme Court, successfully defended the principle of full compensation for the legal fees of clients whose civil rights have been violated. The case (*Riverside v. Rivera*) grew out of a lawsuit by some Chicano citizens against the city of Riverside and several police officers, for wrongfully arresting and trying them for misdemeanors for which they were acquitted. The city had lost the suit but resisted paying the legal fees ordered by the trial judge in line with the Civil Rights Attorney's Fees Awards Act of 1976.

The Act is important because it "removed an economic barrier to aggrieved people getting a lawyer," says López. The city's attempt to avoid full payment would, if successful, have undercut the ability of lawyers to serve poor and

middle-class clients with civil rights claims.

López, who is California born, grew up in the East Los Angeles barrio, attended a Catholic high school, and graduated in 1970 from the University of Southern California. His Harvard Law education was followed in 1974-75 by a clerkship with Chief Judge Edward J. Schwartz of the U.S. District Court in San Diego.

López then helped found Jones, Adler, Cázares & López—a storefront San Diego firm serving mainly poor and middle-class latinos and blacks. It was during this period that he represented the Rivera family in the case that arrived ten years later at the Supreme Court.

López is married to Shelley Levine, a former Stanford Law teaching fellow (1984-86) and current staff attorney to Judge J. Anthony Kline of the California Court of Appeals, Northern District. López and Levine live with their two young children in San Francisco.

THE MONTGOMERY PROFESSORSHIP

The Kenneth and Harle Montgomery Professorship in Public Interest Law was established in 1980. Originally designated for clinical legal education, the chair was first held by Anthony Amsterdam (1980-81), who is now director of clinical and advocacy programs at New York University Law School, and then by Paul Brest (1983-87), the current Dean.

The donors, Mr. and Mrs. Montgomery of Northbrook, Illinois, are great and good friends of the School. In 1987 they

funded the Montgomery Program for Clinical Legal Education, focused on the East Palo Alto Community Law Project. Other gifts include the Kenneth F. Montgomery Research Fund (1974), Montgomery Clinical Legal Education Fund (1978), and Kenneth and Harle Montgomery Public Interest Loan Fund for students doing summer work in the public service field (1983).

Kenneth Montgomery is now of counsel to Burke, Wilson & McIlvaine, the Chicago law firm with

which he has been associated since his graduation in 1928 from Harvard Law School. A longtime leader in legal and financial circles, he is a director of Seaway National Bank of Chicago and a member of the School's Board of Visitors.

Mrs. Montgomery's community activities include serving as a director of the Chicago Council on Foreign Relations and the American National Theater Association, and as a trustee of the Scripps Clinic and Research Hospital in La Jolla. □

Stanford Law School in Washington

THE Great Hall of the Supreme Court was Stanford's on the night of May 16, 1988. Billed as a "celebration of Stanford law alumni/ae," the black-tie affair specifically honored the three Stanford graduates on the High Court: Chief Justice William H. Rehnquist (AB/AM '48, LLB '52), Associate Justice Sandra Day O'Connor (AB '50, LLB '52), and Associate Justice Anthony M. Kennedy (AB '58).

For Washington-area alumni/ae, it was also a first chance to meet Paul Brest in his relatively new role as Dean. University President Donald Kennedy provided a warm introduction.

Many at the banquet had participated earlier that day in the University festivities inaugurating the Stanford-in-Washington program. Dean Brest had organized a noteworthy panel for an afternoon session at the National Press Club, entitled "Constitutional Equality in the 1990s." Moderated by Chief Justice Rehnquist and broadcast by C-SPAN, the panel also included law professors John Hart Ely, Gerald Gunther, Charles Lawrence III, and Deborah Rhode (see box).

A second panel, "Whither Deregulation," featured, among others, Professor William F. Baxter, the former Justice Department official who oversaw the AT&T breakup.

Associate Dean Thomas F. McBride, a member of the Stanford-in-Washington Advisory Committee, was also there for the celebration. □

"Constitutional Equality in the 1990s" — a panel



Chief Justice William H. Rehnquist presided with a most judicious reticence.



"Color-blind or affirmative action? The language of the equal protection clause doesn't say which path to follow."

—Paul Brest



"Traditional theories of equal protection demand similar treatment for those similarly situated. But the issues of pressing concern to most women—poverty, sexual violence, child support, and reproductive liberty—do not find them similarly situated."

—Deborah Rhode



"The battleground of the '90s will be de facto hurts to minorities—deciding which laws that don't discriminate on their face against disadvantaged groups should nonetheless be strenuously reviewed."

—John Hart Ely



"There's a chasm between the Supreme Court's vision of equal protection and my own. Mine is a vision with substance as well as form; a vision that demands inclusion rather than rationalizing exclusion; a vision that is suspicious of race and gender-neutral practices that produce discriminatory results; a vision that is suspicious of discrimination against the poor."

—Charles Lawrence



"I hope that the ideal of color blindness—the idea that individuals warrant respect and treatment as individuals, that condemns gross and often demeaning group generalizations—will ultimately be realized, and that we not lose sight of that ideal in the meantime."

—Gerald Gunther

PHOTOS BY ED SOUZA, STANFORD NEWS SERVICE

Professors Babcock and Ely Honored by Other Law Schools

THE 1988 commencement season brought honorary doctorates to two members of the faculty: Barbara Allen Babcock and John Hart Ely. Babcock is the School's Ernest W. McFarland Professor, while Ely has just been named to the Robert E. Paradise chair.

BARBARA ALLEN BABCOCK

Babcock's new degree was conferred by the University of Puget Sound in Tacoma, Washington. She was also the featured speaker at the UPS law school's graduation exercises on May 15.

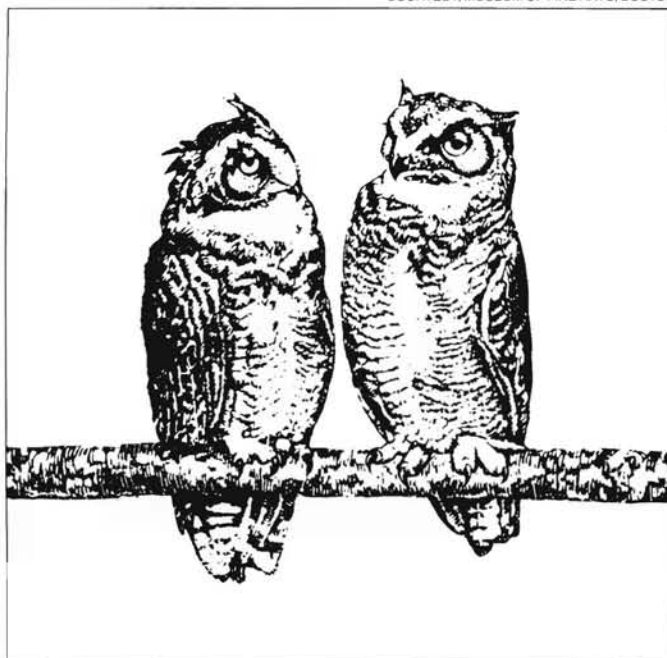
Puget Sound Law Dean James E. Bond praised Babcock for upholding the values of "professional excellence, commitment

to equal opportunity and to the disadvantaged, and public service."

Babcock, a 1963 Yale law graduate, was for many years a defense attorney, first with noted trial attorney Edward Bennett Williams (1964-66) and then with the Public Defender Service of Washington, D.C. (1966-72). A Stanford law teacher since 1972, she became the first woman to gain tenure and the first to be named to an endowed chair (the McFarland Professorship). From 1977 to 1979 she also headed the Civil Division of the U.S. Department of Justice.

Professor Babcock is coauthor of a classic text on sex discrimination and of a casebook on civil procedure. She is currently writing a biography of pioneering public defender Clara Shortridge Foltz.

COURTESY, MUSEUM OF FINE ARTS, BOSTON



Two wise owls (adapted from a wood engraving, "The Judges," John Andrew & Son, U.S., 19th Century)

JOHN HART ELY

John Ely — Stanford's Dean for the five years ending in June 1987 — was honored by the University of San Diego, which also asked him to speak at its May 17 law commencement exercises.

USD Dean Sheldon Krantz cited Ely for "the successful recruitment of highly qualified new faculty members, including several women and minorities," and for the launching of new programs "designed to involve students in public interest

legal services."

During the Ely deanship, more than half the tenured and tenure-track faculty members hired were minorities and women. The East Palo Alto Community Law Project, the Montgomery Public Interest Grant Program, and the Cummins Public Interest Low Income Protection Plan were also initiated on his watch.

A Yale Law classmate of Babcock's, Ely was named to the Stanford deanship after teaching posts at both

Harvard and Yale (where he held the chair in constitutional law) and a presidential appointment as General Counsel of the U.S. Department of Transportation (1975-76).

Ely's 1980 book, *Democracy and Distrust: A Theory of Judicial Review*, earned him the 1983 triennial award of the Order of the Coif. Now returned to teaching and research, he is focusing on the roles of the President and Congress in committing U.S. forces to combat. □

Gunther Crowned with New Laurels

THE Federal Bar Council has bestowed its 1988 Learned Hand Medal for Excellence in Federal Jurisprudence upon Professor Gerald Gunther. The award was presented at the Council's Law Day dinner on May 3, in the Grand Ballroom of the Waldorf-Astoria Hotel in New York City. The 1,200 Second Circuit lawyers and judges present gave Gunther two standing ovations during the course of an evening that included his acceptance remarks on the subject of the late Judge Hand.

Gunther, who holds the School's William Nelson Cromwell chair, is one of a very few nonjurists to

win the Medal. Council trustees cited Gunther's "status as the outstanding constitutional scholar of this generation" and added that his forthcoming biography of Hand made the award especially fitting.

The Federal Bar Council award came on top of several other recent tributes to Gunther (see *Stanford Lawyer*, Fall 1987, p. 39, and Spring 1988, p. 42) and simultaneously with yet another—this by the editors of the *National Law Journal*. In a May 2 article, "Profiles in Power," Gunther was listed for the second year running as one of the 100 most influential lawyers in America and credited with (among other things) helping "sink efforts to convene a new constitutional convention." □



Gerry and Barbara Gunther in New York

Nobelists Grace Fete for Olin Law and Economics Program

TWO Nobel laureates in economics—Kenneth Arrow and Milton Friedman—agreeably disagreed on a variety of issues, at the inaugural lectures celebrating the expanded and newly named John M. Olin Program in Law and Economics (*Stanford Lawyer*, Fall 1987, pp. 43, 47).



Kenneth Arrow

The event, which took place May 5 in Kresge Auditorium, featured presentations by each Nobel laureate on the topic, "The Relationship Between Law and Economics." A far-ranging discussion ensued, with questions from a large audience including members of the Board of Visitors (then on campus for their annual meeting). The issue most raised? Unsurprisingly, the Wall Street crash of October 19, 1987.

Olin Program director A. Mitchell Polinsky served as moderator, with an able assist from Dean Brest. Polinsky is both the Josephine Scott Crocker Professor of Law and Economics, and a professor by courtesy in the Economics Department.

Arrow, who won the 1972 Nobel Prize in economic science, is the Joan

Kenney Professor of Economics, a professor of operations research, a senior fellow by courtesy at the Hoover Institution, and a principal investigator in the new Stanford Center on Conflict and Negotiation (see page 18).

Friedman, the economics Nobel laureate in 1976, is currently a Hoover senior research fellow. He has long been associated with the University of Chicago, where he holds the title of Paul Snowden Russell Distinguished Service Professor of Economics, Emeritus.

The two laureates treated the Olin inaugural audience to a display of wit as sharp as their differences. Thus invigorated, they mingled with Law School and other interested comers at the reception that capped the celebration.

The Olin Law and Eco-

nomics Program at Stanford explores the use of economic analysis for a broad range of legal questions. Since the Program's genesis in 1979, 46 working papers have been issued. In addition, nearly a hundred scholars and policymakers have made seminar presentations, and more than a hundred attorneys have attended workshops on economic analysis in litigation. For further information, call Barbara Adams, Administrative Director, at (415) 723-2575. □



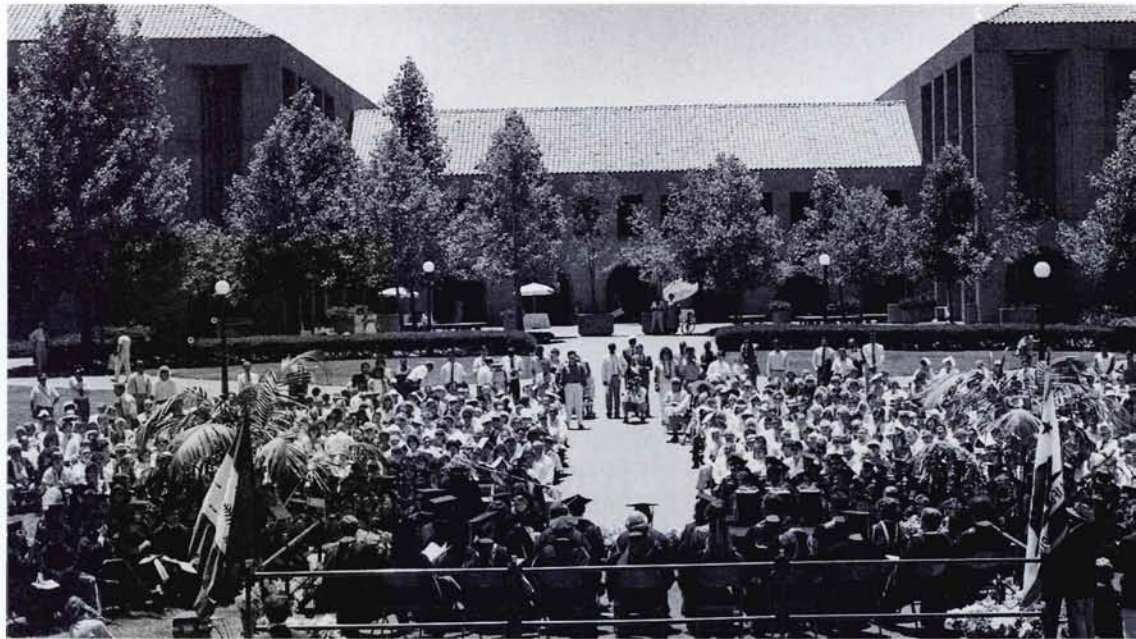
Milton Friedman

"Not Adios, but *Hasta Luego*"

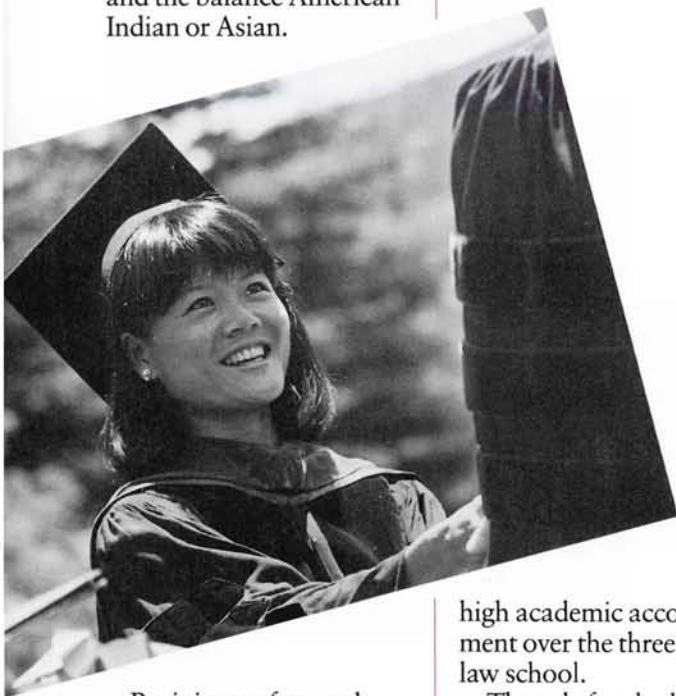
PHOTOS BY JOHN SHERETZ

THE Class of 1988 received a sunny send-off June 12 at the School's 95th Commencement, which—in a break with tradition—was held outdoors, on the lawn between Crown Quad and Meyer Library.

Dean Paul Brest opened the festivities with a welcome to the 163 graduates and their more than 1,100 relatives and friends. Strikingly diverse, the class consists of 89 men and 74 women hailing from 28 states, 1 territory, and 4 foreign countries. Thirty-nine are individuals of color, of whom more than a third are black, a third Hispanic, and the balance American Indian or Asian.



The outdoor ceremony featured a talk by Hurlbut honoree Patricia Bryan.



Recipients of several awards and honors, including the top academic achievers (see page 25), were announced at the ceremony. In addition, 44 members of the class graduated "with distinction," an honor recognizing

high academic accomplishment over the three years of law school.

The sole faculty honor of the day—the John B. Hurlbut Award for Excellence in Teaching—was presented by Class President Susan M. Woolley to former Visiting Professor Patricia L. Bryan. Bryan, a member of the University

of North Carolina, Chapel Hill faculty, taught tax law at Stanford during the 1986-87 academic year.

In her Commencement address, Bryan expressed the following hope for the new graduates: "That you are able to use your legal training so that it does make a difference in people's lives; that you retain a sense of compassion for others as well as a sense of humor; that you achieve a balance between your personal and your professional lives . . .; and that you do something that you can take pride in, that is consistent with your own values and beliefs, and that demonstrates to you and to others that law does have the capacity to do good."

The graduates were headed for positions in 22 states and around the world, with the largest

areas of geographic concentration being the West Coast (45 percent) and the New England/Mid-Atlantic region (47 percent). Almost a quarter (23 percent) are beginning with judicial clerkships.

Dean Brest, in his parting words to the class, said: "You have helped shape this community, and even as you begin exciting new careers, you're still part of it. So I wish each of you good luck—and say, not *Adios*, but *Hasta luego*." □



Awards Won by Graduating Students

THE following honors and awards were earned by members of the Class of 1988.

Nathan Abbott Scholar, awarded for the highest grade point average over three years of law school: Gregory M. Priest. (Priest also earned the 1986 First-Year Honor, the 1987 Second-Year Honor, and the 1988 Frank Baker Belcher Award in evidence.)

Urban A. Sontheimer Third-Year Honor for the second highest overall average: Stephen H. Warren.

Order of the Coif: Priest and Warren, plus Jeffrey M. Bandman, Stuart A. Banner, Daniel Barton,



Jonathan Bernhardt, Michael L. Cheever, Daniel P. Collins, Marian J. Dillon, Mark S. Gimpel, Gillian K. Hadfield, Christy V. Keeny, Scott P. Klein, Richard D. Klingler, Robert S. Libman, Howard M. Privette II, and William M. Sage.

Steven M. Block Civil Liberties Award: Linda S. Bosniak and Susan B. Mann (co-winners).

Nathan Burkan Memorial Competition, for the most outstanding paper on copyright law: Gillian K. Hadfield and Linda A. Newmark (second place).

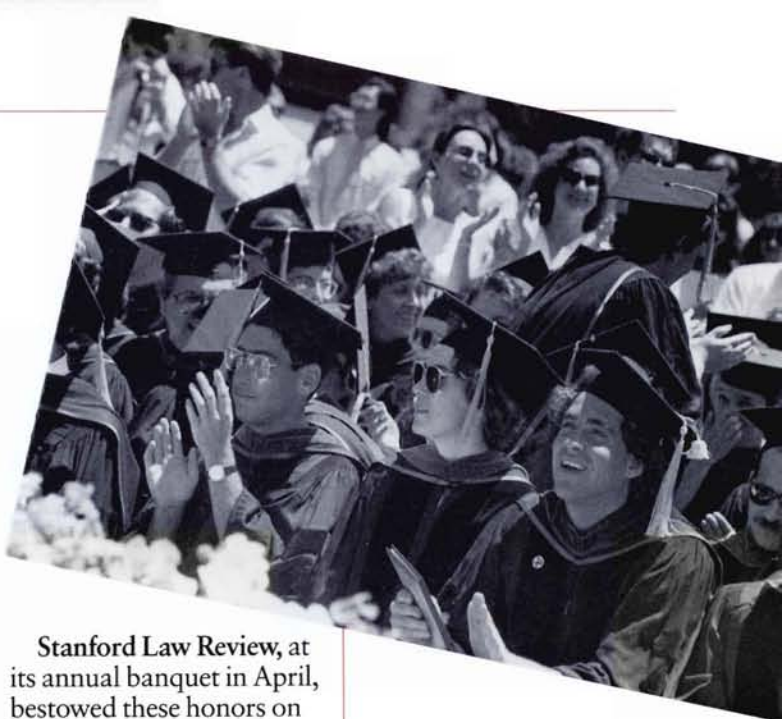
Carl Mason Franklin Prize in International Law: Gregory C. Shaffer.

Richard S. Goldsmith Award, for the best research paper concerning dispute resolution: Gillian K. Hadfield and J. Bradley Johnston (co-winners).

Olaus and Adolph Murie Award in Environmental Law: Lynn D. Fuller and Bruce D. Goldstein (second place).

R. Hunter Summers Trial Practice Awards, given by officers of Serjeants-at-Law to the best student lawyers and witnesses in each trial: Michael J. Barry, Daniel P. Collins, Daniel A. Counts, Manuel San Juan DeMartino, Scott F. Doering, Curtis E. Floyd, Nathan J. Hochman, Noel Bridget Joyce, Victor M. Minjares, Howard M. Privette II, Christopher J. Raboin, Jose Silva, and William B. Tate II.

Constance Baker Motley Award, given by the NAACP Legal Defense and Educational Fund: Greer C. Bosworth (see page 26).



Stanford Law Review, at its annual banquet in April, bestowed these honors on graduating members.

Board of Editors Award for outstanding editorial contributions: Daniel P. Collins.

Johnson & Swanson Law Review Award to the third-year member who made the greatest overall contribution during his or her second year: Marguerite T. Grant.

United States Law Week Award for outstanding service to *Stanford Law Review*: Michael L. Cheever. □

The 163 degree recipients included (left to right) Hui-Lin Shiao, William B. Tate III, Lisa Lindelef, and (below) a happy trio consisting of Susan Mann, Tom Rubin, and Marcy Wilder.



Scalia Offers Tips on Oral Advocacy

THE standing-room-only audience gathered in Kresge on May 6 for the 1988 Marion Rice Kirkwood Moot Court Competition received an unexpected bonus—advice, from no less than Associate Justice Antonin Scalia of the U.S. Supreme Court, on how to argue an appellate case. On stage as a judge for the final round of the competition, Scalia had this to say:

- **Welcome questions.** “The worst thing in the world is to have a cold court; the best is to get questions.”
- **Don't present your argument in its most logical order.** “Put your best point first, because you may never get to it otherwise.”
- **Use your own style.** “There's no best style—no particular advantage to being dry versus being enthusiastic.”

Scalia was joined on the panel by Judge Dorothy W. Nelson of the U.S. Court of Appeals, Ninth Circuit, and Justice Allen E. Broussard of the California Supreme Court. The three were unanimous in praise of the student competitors.

Describing their decision as difficult and close, the judges ultimately gave the Walter J. Cummings Award for best oralist to Stuart A. Banner (3L), and the Marion Rice Kirkwood Award for best team to Banner and his partner, Manuel San Juan DeMartino (3L). The two also won the Cummings Award for best brief.

The other two finalists, Nathan J. Hochman and



Justices Broussard, Scalia, and Nelson put competitors Sutton and Hochman (left) and San Juan and Banner (right) to the test.

James R. Sutton (both also 3L), received the Stanford Law Society of San Francisco and Marin Award as runner-up team.

“You've seen good examples of the art of oral advocacy today,” Justice Scalia said in closing. “We congratulate all the participants.” □

Bosworth '88 Wins National Honor

THE nation's top award for a black female law student went in 1988 to Greer C. Bosworth of Stanford. Then a 3L, Bosworth was chosen by the NAACP Legal Defense and Educational Fund as winner of its twenty-first annual Constance Baker Motley Award. She (along with a male counterpart) was honored May 17 in New York City at a banquet during the LDF's yearly Civil Rights Institute.

Motley Award recipients are selected from among women in the LDF's Earl Warren Legal Training Pro-

gram, the nation's only private scholarship program for black law students. Two years ago another Stanford woman, Giji M. Dennard '86, was the recipient.

Bosworth arrived at law school with a BA in criminology and psychology from the University of Maryland, an MPA from the University of Baltimore, and ten years' work experience in the Maryland state criminal justice system.

While at Stanford, she was managing editor of the *Stanford Journal of International Law* (Vol. 24) and a member of the student steering committee of the East Palo Alto Community Law Project.

Bosworth is spending her first two postgraduate years with Judge A. Leon Higginbotham, Jr., of the U.S. Court of Appeals, Third Circuit. Now a research associate for a book and courses at the University of Pennsylvania, she will serve next year (1989-90) as his judicial clerk.

Bosworth credits her parents—a janitor and a housekeeper who sacrificed to send their five children to parochial schools and beyond—with much of her progress. “They were always encouraging,” she said. “Although they did not pressure me to do well, I wanted to make them proud.” □



Greer Bosworth '88



Running Like the Wind

THE School has its own Olympian in PattiSue Plumer (3L), who won a place on the United States track team and ran a personal best in Seoul to qualify for the women's 3000-meter final.

Battling food poisoning, the former Stanford all-American ultimately finished in the middle of the field — but not before her stateside fans had seen her on television going stride for stride with the world's finest. "It was more than I expected, but less than I hoped for," she later said.

Plumer, who is now externing with the Public Defender's Office in San Jose, regularly swims and lifts weights, as well as running 60 miles a week. Is she looking toward Barcelona in 1992? "Definitely!" □

PattiSue Plumer (No. 592) held her own in Seoul.

Students and Faculty Engage in the Great American Pastime

SPRING weather lured Law School denizens from their offices and carrels for the annual student-faculty baseball game. Held April 22, this year's contest was organized by Assistant Professor Hank Greeley. Youth, it must be said, prevailed. □

PHOTOS BY NATHAN HOCHMAN '88



Chuck Lawrence (right) was one of several professors (see following pages) to accept the challenge. Students Linda Sciuto, Jeffrey Bandman, and Marguerite Cephas (above) were snapped at a different, all-student contest.



FACULTY NOTES

Barbara Babcock was honored twice this spring. The University of Puget Sound gave her an LLD and made her the featured speaker at their May 15 law school commencement (see page 22). And on May 20 in Palo

raised by new technologies begins on page 4.

William Baxter was invited to a Euromoney Seminar in Paris last May for a panel on "International Acquisitions and U.S. Competition Law." That month he also gave a talk—"Deregulation or Reregulation?"—at the opening ceremonies for the new Stanford-in-Washington center (see p. 21). Returning to the capital city in June, he participated in an ABA annual meeting panel, "The Cutting Edge of Antitrust: Lessons from Deregulation." Later that month in Toronto, he provided the overview for a Fraser Institute symposium, "Economic Competition and the Law." Other recent appearances include two panels: "New Directions in Antitrust," at the ABA spring meeting (Washington, D.C., in March); and "Vertical Arrangements," for a Practising Law Institute seminar on Distribution and Marketing (San Francisco, in June).

Professor Baxter, a former chief of the U.S. Justice Department's Antitrust Division (1981-83), was singled out for praise in the May 1988 issue of *The Washingtonian*. Writer Fred Barnes, in an article titled "Reagan's Report Card," credited Baxter with revolutionizing antitrust enforcement and called him "probably the best sub-Cabinet official in the entire Reagan tenure."

Thomas Campbell was elected to the U.S. Congress in November and thus began a two-year leave of absence in January. A former director of the FTC Bureau of Competition, he

represents the district—California's 12th—of which Stanford is a part.

Mauro Cappelletti helped organize the *Academia Europaea* (European Academy), a select international association of scholars representing all the natural and social sciences. The new Academy was formally established in September at a meeting in Cambridge, England, during which Cappelletti was designated a "Founding Member" and elected to the Academy's council. The Italian-born scholar was already a member of the academies of Belgium, Great Britain, Italy, and France.

Cappelletti has been spending this year at Cambridge as the Goodhart Visiting Professor of Legal Science. Last May he traveled to Rio de Janeiro for the annual congress of the Ibero-Latinamerican Association of Proceduralists, where he delivered a report, "New Challenges to Procedural Scholarship." And as president of the International Association of Procedural Law, he delivered the opening and closing speeches at its First Extraordinary Congress, "Judicial Protection of Human Rights at the National and Transnational Level," in Bologna in September.

Professor Cappelletti's latest publications include *La Justicia constitucional* (in Mexico), *La responsabilidad de los jueces* (Argentina), and a Japanese translation of his landmark 1981 volume, *Access to Justice and the Welfare State*.

Lance Dickson is serving as chairman of the publisher's advisory committee for the



Paul Brest

Alto, the Resource Center for Women presented her with an award for "leadership achievements."

John Barton has received a grant from the Rockefeller Foundation to study the regulation by developing nations of biotechnology products. The grant provides for research in India, the Philippines, Thailand, and (by way of contrast) Japan. An interview with Professor Barton on this and other legal issues

PHOTOS BY NATHAN HOCHMAN '86



Mark Kelman

Index to Foreign Legal Periodicals. He is also a member of the Law Library Editorial Board of the R.R. Bowker Company.

John Ely received an LLD *honoris causa* this spring from the University of San Diego Law School, where he was also the commencement speaker (see page 22). Pursuing his new specialty in war and the Constitution, he is a Senior Research Fellow this fall at the Hoover Institution on War, Revolution and Peace. His recent writings include a magazine piece on the Persian Gulf, "Whose War Is It, Anyway?" (*New Republic*, May 23, 1988), and a scholarly article, "Suppose Congress Wanted a War Powers Act That Worked" (88 *Columbia Law Review* 1379). Pursuing a longer-term specialty in racial discrimination, he was one of five lawyers filing the Supreme Court brief of the American Civil Liberties Union in *Richmond v. J.A. Croson Co.*, defending the constitutionality of a minority set-aside program for the construction industry. (To those "placed in distress by the combination of Hoover and the ACLU," John sends his "condolences.")

Marc Franklin brought out a fourth edition in May of his book, *The First Amendment and the Fourth Estate*. Last summer he co-taught an undergraduate law focus course, with Visiting Professor Eric Wright '67, at Stanford's overseas campus in Oxford, England.

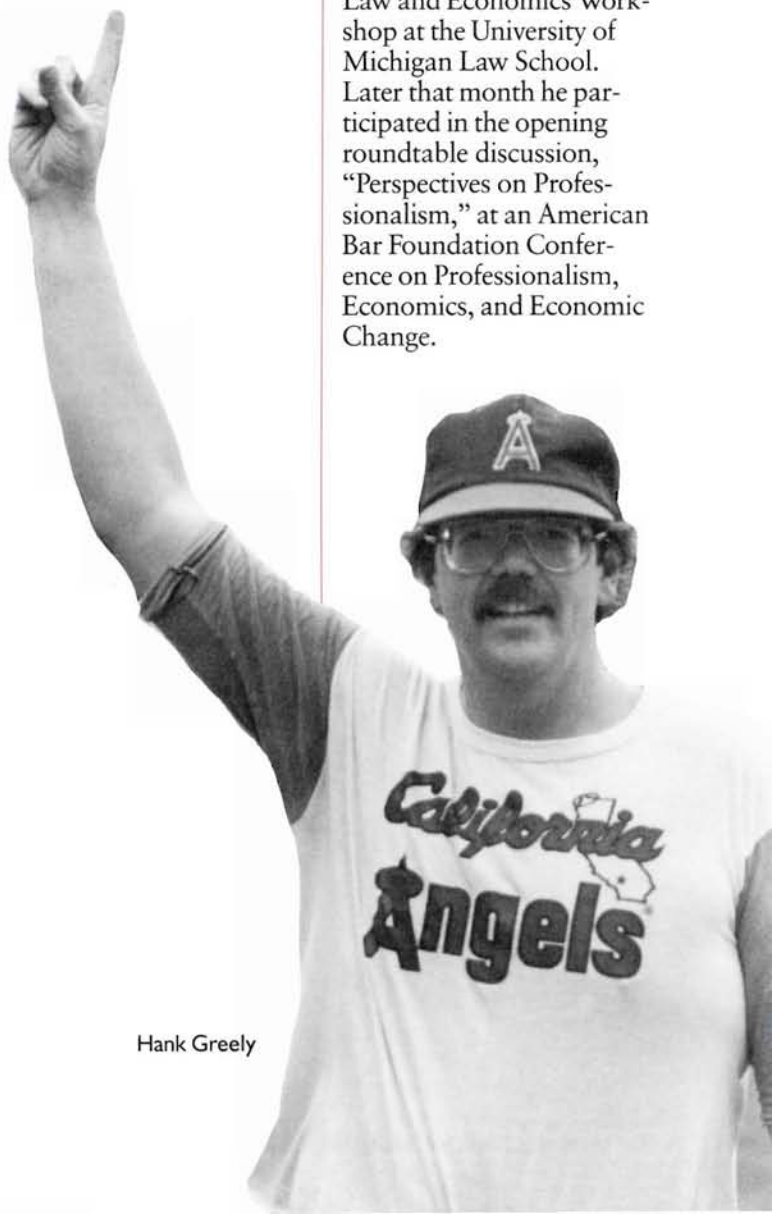
Lawrence Friedman delivered the Vinson Memorial Lecture at Mercer Univer-

sity Law School in Macon, Georgia, last April. In June he lectured in Europe at the Universities of Rome and Bologna.

Ronald Gilson was elected to the American Law Institute this spring. He has recently completed a working paper with **Robert Mnookin** on the legal profession, "Coming of Age in a Corporate Law Firm: The Implicit Contract for Associates," and, with Reinier Kraakman of Harvard, "Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to the Proportionality Review?" (Nos. 42 and 45, respectively, in Stanford's John M. Olin Program in

Law and Economics series). He and Kraakman have prepared the 1988 supplement to Gilson's book, *The Law and Finance of Corporate Acquisitions* (Foundation Press, 1986).

Gilson has in addition made several recent oral presentations, beginning in May with "Market Review of Interested Transactions: The American Law Institute Proposal on Management Buyouts," at a conference sponsored by the Salomon Brothers Center for the Study of Financial Institutions at New York University's Graduate School of Business Administration. In September he delivered the paper for the inaugural meeting of the Law and Economics Workshop at the University of Michigan Law School. Later that month he participated in the opening roundtable discussion, "Perspectives on Professionalism," at an American Bar Foundation Conference on Professionalism, Economics, and Economic Change.



Hank Greely



Friendly rivals at the faculty-student baseball game, April 22, 1988.

Professor Gilson is spending the 1988-89 academic year as a Visiting Scholar at the Hoover Institution.

Paul Goldstein participated in two overseas meetings last summer. The first, at Ringberg Castle outside Munich, was a conference titled "New Tendencies in International Protection of Intellectual Property." The second, in Tokyo, was the U.S./Japan Bilateral Session (sponsored by the Keidanren and People to People International), for which he chaired the committee session on intellectual property law and trade policy. Goldstein's book, *Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance*, has been issued in a revised second edition by Foundation Press.

Robert Gordon spent the 1988 winter term at Oxford University in England as a visiting professor of law. Back in the U.S. for the spring term, he presented the annual Addison Harris Lecture in April for the Indiana University at Bloomington Law School. His topic: "Visions of Order and Disorder in the Regulation of Speech, Crowds, and Sexuality." August took him to Sydney, Australia, where he was a keynote speaker at the annual conference of the Australasian Universities Law School Association.

Professor Gordon was also among several Stanford participants in the above-mentioned American Bar Foundation conference (see Gilson note), where he and **William Simon** presented a paper on "The Future of Profes-

sionalism." The legal profession was also the subject of a Gordon article, "The Independence of Lawyers," published in the July *Boston University Law Review* (68:1).

William B. Gould IV went to Italy in May as a visiting professor at the European University Institute, where he presented some special seminars. This spring he also sponsored an informal Stanford seminar on Sports and Law, which involved not only lawyers and law students, but also sports-writers, team managers, and athletes. In two noteworthy August appearances, he presented a paper at the ABA Labor Law Section meeting in Toronto, and then participated in a People to People conference in Tokyo on comparative labor law.

Thomas Grey gave a paper, "The Uses of an Unwritten Constitution," at a June symposium on the Bicentennial. The event was held in Taipei for scholars from both Taiwan and the U.S.

Gerald Gunther was called to New York City in May to receive the prestigious Learned Hand Award of the Federal Bar Council (see page 23). He returned East later that month as a panelist in the inaugural program of the Stanford in Washington center (page 21). July was spent in Salzburg, Austria, as faculty chair of the annual session on American law and legal institutions of the Salzburg Seminar in American Studies (a program begun after World War II as an "intellectual Marshall Plan"). Gunther's session provided an intensive residential program to some fifty mid-career lawyers and judges from 26 countries. The six-person faculty also included U.S. Supreme Court Justice Anthony M. Kennedy (AB '58) and University of Chicago Professor **Douglas Baird '79** (a Stanford Law visiting professor in 1987-88).

John Kaplan was elected on May 5 to the chairmanship of the Stanford University Faculty Senate for 1988-89. His recent writings include the article beginning on page 10 concerning the probable consequences of reversing *Roe v. Wade*.

Charles Lawrence allowed himself to be "roasted"—in a good cause—at a banquet May 9. Organized by the Black Law Students Association, the event benefited the School's Carl B. Spaeth Scholarship Fund.

(As it turned out, the popular professor was more celebrated than lampooned.)

John Henry Merryman delivered a lecture—in Italian—at the University of Trieste this April. The title (translated): "The International Traffic in Cultural Property." The School's Sweitzer Professor Emeritus is serving during 1988-89 as president of the Stanford Faculty Club.

Robert Mnookin recently journeyed to his hometown of Kansas City, Missouri, to receive a Distinguished Alumnus Award from Pembroke Hill School, from which he graduated in 1960. The University of Alberta invited him to present their Weir Memorial Lectures, September 27 and 28. The next day, at the University of Missouri—Kansas City, he spoke on "Barriers to Negotiated Resolution of Conflict." In October at a University of Chicago law and economics workshop, he gave a paper on the Pennzoil-Texaco dispute.

Professor Mnookin has been named to the steering committee of the National Academy of Sciences' National Forum on the Future of Children and Families. He is also busily engaged in establishing, with Hewlett Foundation support, the Stanford Research Center on Conflict and Negotiation (see page 18).

A. Mitchell Polinsky had an article, "The Deterrent Effects of Settlements and Trials," published in the June 1988 *International Review of Law and Economics*. Professor **Daniel Rubinfeld**, a visitor this year from Berkeley, is co-

author. This spring Polinsky also presided over the inaugural event of the enlarged John M. Olin Program in Law and Economics (see page 23).

Robert Rabin was invited to Canada in October by the Ontario Council on Graduate Studies, to evaluate the graduate program at the University of Toronto Law School. He is currently working on a study of no-fault alternatives to the tort system in environmental and product liability cases. The study is part of an American Law Institute project on tort reform.

Deborah Rhode had four articles published this spring and summer. Two—"Perspectives on Professional Women" (40 *Stanford Law Review* 1163) and

"The Woman's Point of View" (38 *Journal of Legal Education* 39)—were part of symposium issues on women and the law. The two others, which appeared in books marking the Constitution's Bicentennial, were "Constitutional Celebrations: The View from the Margins," in *Blessings of Liberty: The Constitution and the Practice of Law* (ABA-ALI Institute, 1988), and "Gender Equality and Constitutional Traditions," in *America in Theory* (Oxford University Press, 1988), edited by Leslie Cohen Berlowitz, Denis Donoghue, and Louis Menand.

Professor Rhode, as director of the Institute for Research on Women and Gender, helped organize a May 4 symposium at Stanford titled "Constitutional



Tom McBride



John Kaplan

Celebrations: Views from the Margins—Women, Law and Public Policy.” She also presented a paper, “The Politics of Professionalism,” at the American Bar Foundation’s September conference on the legal profession.

Kenneth Scott has been studying and writing about the parlous state of the nation’s commercial banks and savings and loan institutions. The article beginning on page 14 gives his thinking on some proposed regulatory solutions.

Michael Wald was interviewed by Ted Koppel on the April 19 *Nightline*, concerning when and how state agencies should be able to investigate allegations of child abuse. The professor is currently serving as general editor of a

study entitled “The Conditions of Children in California,” which is the first comprehensive effort to assess the well-being of the state’s youngest citizens.

Charles J. Meyers, the School’s Dean from 1976 to 1981, died July 17 at his home in Denver. The School held a memorial service in his honor September 23 in Stanford’s Memorial Church. Speakers included Dean Paul Brest, Professors Gerald Gunther and Howard R. Williams, Stanford President Emeritus Richard W. Lyman, alumnus A. Dan Tarlock ’65 (now a professor at IIT Chicago-Kent Law School), and the late Dean’s brother, Hon. James R. Meyers of Austin, Texas. Over 200 people attended the service and a subsequent reception at the School. A tribute to Dean Meyers appears in the In Memoriam section.

Former Professor **Samuel D. Thurman** ’39 received an honorary doctor of laws degree from the University of Utah at its 1988 commencement exercises. At Stanford for twenty years (1942-62), he then became dean and professor (1962-75) of the Utah law school, where he continued as a Distinguished Professor until 1986. A vigorous 73, he currently teaches at the University of California’s Hastings College of the Law. □

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**Graduate of Stanford Law School*

Board of VISITORS

I'M GOING to put you to work," Dean Brest told the members of the Board of Visitors. And so he did, in a packed two-day meeting that not only tackled fundamental academic issues but also generated three follow-up task forces.

The Board is "an astounding group with vast experience and talents," said Brest. "I view this meeting as an opportunity not just to tell you about the Law School, but to ask you about our ideas and to test our plans against reality."

ACADEMIC DIRECTIONS

The core of the agenda, explained Board Chair Richard K. Mallery '63, was an examination of three of the School's developing academic programs: the Law and Business curriculum; the Program in Alternative Dispute Resolution; and Lawyering for Social Change. The groundwork was laid in a morning session on Thursday, May 5, with presentations by the professors—and in one case, students—who were most involved in the programs (see pages 40-42).

The luncheon following these initial presentations featured the Dean's annual State of the Law School report. Brest opened with an overview of progress during his first year as Dean (pages 37-39). Then, in a thoughtful disquisition related to the agenda of the day, he discussed the role of academic programs or tracks within the School's developing curriculum (a subject further elaborated in his "From the Dean" message on pages 2-3).



Thus prepared, the Visitors began their assigned task: to consider the academic programs described that morning and share insights and suggestions with the School. This the Visitors did in small groups—one for each of the three programs—chosen according to interest and including relevant faculty members.

The resulting discussions proved to be candid, penetrating, and, according to the professors concerned, highly enlightening.

The substantive agenda for the second day, Friday, May 6, began with two reports. The first, given by Associate Dean John Gilliland and Law Fund Director Elizabeth Lucchesi, dealt with the Law School's place in the University's Centennial Campaign. "Every gift to the Law School during the next five years contributes to the \$1.1 billion goal of the University campaign," said Gilliland. School needs designated as Centennial goals come to \$250 million. Plans for raising this sum include doubling the School's personal solicitation efforts, promoting reunion class giving, and increasing the overall participation rate of Law graduates from the present, comparatively low 31 percent.

The second report of the morning concerned the Quality of Intellectual Life at the School—a vital and sensitive subject explored in depth during the past year by a group of faculty and students (pages 43-45). Board members were able to pursue this and other questions with students in the small-group luncheons that followed.

CONTINUING FEEDBACK

The final segment of the working agenda was the traditional "summary and advisory session." Held off the record to encourage what Mallery called "the spirit of brainstorming," it touched on a wide range of issues. Among them: student career choices



(said Brest, "We can't counteract market forces, but we can show, and have been trying to show, students what the alternatives are"); the quality of teaching ("I am strongly committed to finding effective and nonthreatening ways to improve classroom skills"); and grading and evaluation ("the messages are mixed, with some students wanting more and some less").

The Visitors also talked further about the academic issues introduced the previous day. Questions were raised about the relative merits of specialized versus general education (the issue explored by Brest on pages 2-3). And several Visitors advocated giving all students—not just those participating in the proposed Lawyering for Social Change program—greater exposure to the content and concerns of public interest law. In the words of one member: "Students going into law firms should have some understanding of social issues." Said another: "Public interest law should be something that all lawyers consider part of their professional life."

The discussion then moved to the Board itself—its composition (less diverse than it could be, but more than it once was) and function. Said one graduate: "You could make better use of us." It was at that point that something quite remarkable happened. Chairman Mallery invited the Visitors to indicate, by raising their hands, whether they would be will-

ing to commit additional time to the School. Some forty hands went up.

In the months since, three Board task forces have indeed been created. Each is devoted to an area in which Visitors expressed interest, namely Dispute Resolution, Lawyering for Social Change, and a long-range planning group called "Stanford Law School in the Year 2010." (Task forces were not formed for programs with standing advisory groups, namely Law and Business and the International Center for Law and Technology).

To Brest, as Dean, this is all "highly gratifying." The School, he told the assembled Board, recognizes "the considerable difference between designing a program from an academic point of view, and understanding how its students are likely to fare when they enter practice. We welcome your assistance."

HONORS AND THANKS

The annual coming together of the Board offered opportunities not only to work but also to publicly recognize some graduates who have been especially helpful to the School. This the Dean did over luncheon on Thursday.

Brest began by thanking Dick Mallery—a "tremendous source of support and encouragement"—for his sterling contributions as Board chair. Mallery, who was initially on



Dean Brest (*above*) and Chairman Dick Mallery '63 (*top*) invited Visitors to brainstorm in sessions that included a lunch with students (*top left*).

the Board from 1967 to 1970, began a second term in 1985 and has served continuously since that date on the Board's Executive Committee.

The vice-chair and chair-designate, Kendyl Monroe '60, also came in for praise. Monroe, another second-term Visitor, has long carried the Stanford Law banner in New York City.

The Dean then called forward the two previous Board of Visitors chairs, Charles Silverberg '55 (1984-85) and Brooksley Born '64 (1986-87). Both were presented with



Thanks were due such volunteers as Brooksley Born '64 (*left*), Lucinda Lee '71 (*above*), and Kendyl Monroe '60 (*above left, with Gary Williams '76 and LaDoris Cordell '74*).



engraved mantle clocks and certificates expressing the School's "esteem and gratitude." (The 1985-86 Board chair, Judge William A. Norris '54, received similar tokens during a subsequent trip to Los Angeles by the Dean.)

Lucinda Lee '71, the president of the Law Fund in 1987 and 1988, was also honored with a clock. Under Lee's leadership, the Law Fund reached its highest level ever.

Recognition of a different sort went to current volunteer leaders Stephen Bauman '59, the president of the Law Fund, and Guy Blase '58, chair of the School's Keystone Program (personal solicitation effort). Grateful for their service during a time when the School and University

are attempting giant steps forward, the Dean said simply, "Thanks in advance."

SPECIAL EVENTS

Visitors at the two-day meeting were also included in three other events sponsored by the School. The first, a public program inaugurating the newly named John M. Olin Program in Law and Economics, featured Nobel prize-winning economists Kenneth J. Arrow of Stanford University and Milton Friedman of both the Hoover Institution and the University of Chicago. Their subject, appropriately, was "The Relationship Between Law and Economics." Olin Program Chair A. Mitchell Polinsky

moderated the discussion and subsequent question-and-answer period. This landmark event took place Thursday afternoon, May 5, following that day's Board of Visitors sessions (see page 23).

The Board sessions Friday were followed by another public program, the annual Marion Rice Kirkwood Moot Court Competition finals. Always fascinating, the mock appellate court arguments were this year presided over by Associate Justice Antonin Scalia of the U.S. Supreme Court, with Judge Dorothy W. Nelson of the Ninth Circuit U.S. Court of Appeals and Justice Allen E. Broussard of the California Supreme Court as co-panelists (page 26).

The third and last of the events—the annual banquet of the Board of Visitors—was made memorable by a distinguished guest speaker, Justice Scalia. Dean Brest introduced the Justice and welcomed him back to the School. A visiting professor in 1980-81, Scalia had been, the Dean said, "a very popular teacher and a generous and lovely colleague." Declaring after-dinner speeches to be "barbarous," Scalia delivered the very opposite: an elegant Bicentennial discourse on the Constitution

THE AGENDA

Thursday, May 5

Welcome by Richard K. Mallery,
Chair

Developing Academic Programs: Presentations

"Law and Business Curriculum"
Professor Thomas J. Campbell
Professor Ronald J. Gilson

"Program in Alternative Dispute
Resolution"

Robert H. Mnookin, Adelbert H.
Sweet Professor of Law

"Curriculum in Law for the
Disadvantaged"

Gerald P. Lopez, Kenneth and
Harle Montgomery Pro-
fessor of Public Interest Law

The State of the Law School

Paul Brest, Richard E. Lang
Professor and Dean

Developing Academic Programs: Discussion

Inauguration of the John M. Olin
Program in Law and Economics
(see page 23)

Reception and dinner

Friday, May 6

Report on Centennial Plans

John Gilliland, Associate Dean
for Development

Elizabeth Lucchesi, Director
of the Law Fund

Quality of Intellectual Life: Task Force Report

Henry T. Greely, Associate
Professor

Sharon Buccino (IL)

Gillian Hadfield (3L and PhD '85)

Lunch with students

Summary and Advisory Session

Richard K. Mallery, Chair,
presiding

Marion Rice Kirkwood Moot Court
Competition: Final Arguments
(see page 26)

Cocktails and Dinner Dance

Remarks by Antonin Scalia,
Associate Justice of the U.S.
Supreme Court

("the substance of what makes us
one people") and its genesis ("in a
four-month seminar consisting of the
most erudite and politically experi-
enced individuals in the nation").

The closing remarks of the eve-
ning—and, with it, the 1988 Board of
Visitors meeting—were offered by
Board Chair Dick Mallery. "The al-
umni, together with the faculty and
the students of the School, form a

community," he said. "We the alumni
are the keepers of tradition—tradi-
tions of excellence and of service,
particularly public service. We help
provide continuity; we span the
decades and constitute a reservoir of
talent and energy that can be utilized
by the School. Thank you for coming
so far, for working so hard, and for
caring about the School." □



Justice Scalia appeared both robed and
in mufti (left). Nobel economist Ken-
neth Arrow (above, with Professor
William Baxter) helped inaugurate
the Olin Law and Economics Program.



STATE OF THE SCHOOL

Paul Brest
Richard E. Lang Professor and Dean

THIS is an extraordinarily exciting time to be at the Law School," began the Dean. "We are continuing to improve the core curriculum that has placed us among the top law schools in the United States. At the same time we are working on innovative curricular developments to teach our students better to serve their clients and the society at large." Noting that three of these developing programs were the focus of the Board of Visitors meeting (see pages 40-42), he reported on a number of other matters of interest.

STUDENTS

The Class of 1990, which entered last fall, contains 97 men and 71 women; 34 of these students are members of minority groups, and 33 have earned advanced degrees in non-law fields. Some 72 colleges or universities granted the students' undergraduate degrees. And geographically, 36 states, 1 territory, and 5 foreign countries are represented. The Dean called particular attention to the fact that almost half the class (88 out of 168)

are at least twenty-four years old, and 14 are over thirty—a reflection of "the School's policy of looking, not for students who are older per se, but for students who have had some experience since college."

The number of applicants for admission this year was unprecedented: 4800 compared to 3800 in 1987—for 170 places. The Dean noted that similar surges have occurred at other top law schools. Explanations for the phenomenon include the stock market fall and scandals involving investment firms, both perhaps making business careers seem relatively less attractive than law. Another theory is the influence of the popular television series, *LA Law*. Whatever the reason, observed the Dean, "we have had a wonderful range of applicants from which to choose our next entering class."

Also entering this fall are the first two candidates in the expanded JSD program for aspiring law teachers (Spring 1988, pages 2-3). One is Black-Asian, one Hispanic, and both are female. The Dean was pleased to tell the Board that this new graduate program grew out of a comment at the 1987 Board of Visitors meeting by Michigan Professor Sallyanne

Payton '68: "Law schools have been saying the reason we don't hire more minority faculty is that the pool of minority law teachers is too small. Don't you think we have a responsibility to do something about it?" These two doctoral candidates, said Brest, represent a first step by the School to respond to Payton's challenge.

CAREER CHOICES

A great majority of the School's graduates (discounting the year or two that many spend in clerkships) continue to go into private practice, reported the Dean. Perhaps 8 to 10 percent choose government or public interest work, and a small but increasing number go into teaching. Generally, though, "the largest number of our students are going to work in large firms in big cities."

"Is this a problem?" he asked, noting that student autonomy in their career choices is an important Stanford tradition. The central question should be, "Are our graduates in fact doing what they really want to do?" For many the answer is, "Yes." However, said Brest, "we have a sense that many others are not all that happy in large firms in large cities, and that after four or five years of practice, quite a few graduates are looking to smaller firms and perhaps thinking about locations outside of Los Angeles, Washington, New York, and San Francisco." The Dean hopes to begin a longitudinal study of graduates five or ten years into their careers, in order "to understand better not only what kinds of jobs they have, but also how content they are."

Brest also reported that he and the deans of several other law schools have been discussing the possibility of increasing the amount of attention paid by their placement offices to sec-

"Only a school that is strong and self-confident could be this ambitious," said the Dean.





Utah Dean Edward Spurgeon '64, his wife, and Dean Jack Friedenthal of George Washington took part (*above*), as did Anne Bingaman '68, Rod Hills '55 (*right*), and Richard Anderman '69 (*top right, with Dean Brest*).



ond placements. "Perhaps we should provide more service to graduates who are dissatisfied with their present jobs and want to relocate."

In the meantime, he said, the School will continue to offer current students as much information as possible about a range of career options, including smaller firms in smaller cities and government and public interest jobs. In addition, students can explore different opportunities for practice through summer jobs, externships, the East Palo Alto Community Law Project, and other hands-on experiences.

FACULTY

The faculty currently consists of 43 members, generously augmented by visitors and lecturers. "It's a productive and nationally renowned faculty," declared the Dean. "It is also diverse—in race, in sex, in interests and approaches to law, and in ideologies." Despite that, he emphasized, "it continues to work together in harmony, and is not factionalized."

Dean Brest mentioned two particular individuals with school-wide responsibilities. The first—a familiar person in a new role—is Professor Robert Weisberg '79, who is serving as Associate Dean for Academic Affairs (Fall 1987, page 38). Brest

praised Weisberg, a dedicated teacher of criminal and commercial law, for his "sheer good citizenship" in taking on the administrative job.

The second person—a relatively new name to the Visitors—was Lance Dickson, then in his first year as the School's Law Librarian (Fall 1987, pages 40-41). Dickson had been enthusiastically recommended by the search committee charged with finding a successor to retiring Law Librarian Myron Jacobstein. "Time has proved that enthusiasm justified," said the Dean. "The library is alive, well, and dynamic."

The Dean then noted two upcoming departures: Professor Robert Ellickson, who is moving back to his alma mater, Yale; and former Associate Dean Jack Friedenthal, who has been named Dean of George Washington University Law Center. "We never like to lose significant scholars and teachers, but we take as much from other schools as we give," said Brest. Movement among law schools can perhaps be considered as "a pro-

cess of cross-pollination."

On the plus side, continued the Dean, the faculty added two members this year: Janet Cooper, from Morrison & Foerster in San Francisco; and Barbara Fried, from Paul, Weiss, Rifkind, Wharton & Garrison in New York (Fall 1987, pages 40-42). Further efforts to strengthen the private law area are in work for 1988/89. Brest also revealed that Joseph Grundfest '78 will join the Stanford Law faculty when he completes his term as a commissioner of the Securities and Exchange Commission.

CURRICULUM

The School's curriculum is "rich," said the Dean, with a range of courses running alphabetically from Accounting to Water Law in the fall; and from Advocacy to Tort Reform in the spring. "Depth, however, is as important as breadth"—hence the current effort to develop programs with course sequences and clusters. Three of the programs—Law and Business,

Alternative Dispute Resolution, and Lawyering for Social Change—are the subject of discussion at this Board of Visitors meeting (pages 40-42).

The Dean also called the Visitors' attention to two other programs of significance: Law and Economics, which is making good progress thanks in part to a grant from the John M. Olin Foundation (Fall 1987, pages 43, 47); and Technology and Law, in which Professor John Barton '68 is taking the lead. Brest noted that the technology effort, like the Law and Business program, will have a significant research component and an international focus. (For more on this program, see the interview with Barton beginning on page 4.)

Dean Brest then discussed some general issues relating to course sequencing. He said that these programs were not intended to narrow the educational experience. Rather, "Our hope is to improve the second- and third-year curriculum by making it more efficient, more engaging, and more valuable. We want to build in more structure and coherence." (See "From the Dean" on pages 2-3.)

The effort to develop advanced curricula is, Brest believes, an important one—in fact, his highest priority. "If, by the end of my term as Dean, we have made substantial progress in this area, I and my Law School colleagues will have a great sense of achievement. And what we will have done may be a model for others."

He concluded his remarks on the curriculum with the observation: "Only a school that is strong and self-confident could be this ambitious. We are building on strength."

ACCREDITATION REVIEW

The ABA accreditation committee that visited the School in 1987 concluded that Stanford's reputation as one of the nation's top law schools was well deserved—"hardly surprising," said the Dean. But Brest also reported that the committee had

identified some valid concerns for the future and had warned that the School's continued excellence depends importantly on maintaining financial strength.

Faculty salaries were identified as one potential problem. Among top law schools, Stanford is only twelfth in the level of faculty compensation. "We have not yet failed to get a faculty member or lost a faculty member because of salary," said the Dean, "but we feel in a defensive and vulnerable position."

The School is also not competitive in the research leaves granted to its faculty. Michigan, Yale, and a number of other law schools now offer mid-sabbatical leave, so faculty can be relieved of teaching responsibilities every third or fourth year, rather than waiting seven years, to pursue their research and writing. Dean Brest noted that although Stanford Law School provides junior faculty with one semester off to concentrate on scholarship, it lacks the resources to increase faculty leave generally. In

addition, he said, released time will be needed for faculty involved in creating curricula for the above-mentioned developing programs.

The ABA reviewers also evaluated the School's Crown Law Library, noting that it is extraordinarily well managed, but too small for a school of this quality. "Size isn't everything," said Brest, "but there are times when faculty need books that have to be borrowed from a long distance."

Another area in which the School must work to stay competitive is financial aid—particularly if it hopes to maintain a diverse student body. "We now have more older students who are independent of their parents and more who have children depending on them," observed the Dean.

Fortunately, he said, the University regards the Law School as "one of Stanford's jewels" and is understanding of its needs. Several of the School's objectives have been given Centennial priority, specifically three endowed professorships, operational support for the East Palo Alto Community Law Project, and substantial new financial aid resources. However, the Dean pointed out that Centennial goal status does not in itself ensure that the School will get the desired funding. "The development work is essentially our responsibility. The University is not going to do it for us."

Dean Brest closed on a personal note, saying that he had "really enjoyed" his first year as Dean. The most unfamiliar part of the job—meeting and working with alumni/ae—has turned out to be a genuine pleasure. In addition, Brest has found the faculty and staff to be strong and supportive and the student body "wonderfully talented and very demanding." He noted rather ruefully that student feedback includes few pats on the back—at least in the student newspaper. But, he said, "That goes with the job. If you can avoid being defensive and distinguish the valid criticisms from the rhetoric, you can learn a lot." □



INNOVATIVE ACADEMIC PROGRAMS

A NUMBER OF initiatives are under way at the Law School to develop programs of curriculum and research in subject areas important to lawyers and the larger society, said Dean Brest. All are innovative in nature and thus hold promise for improving legal training not only at Stanford but at law schools generally, he continued. Of these programs, three were selected for discussion at the 1988 Board of Visitors meeting.¹

Descriptions of these programs, as provided by the professors directing their development, follow. Not here-in reported—but much valued by these same professors—were the comments and observations made by Visitors in discussion sessions held for that purpose later in the same day and during the summary and advisory session the next day.

LAW AND BUSINESS

Professors Ronald J. Gilson and Thomas J. Campbell

"We have been dealing with a Shetland pony, when there is a large stallion loose in the world," said Professor Gilson, about the way law schools have traditionally approached the teaching of law and business. Taking as an example the standard course in Securities Regulation, he said: "A syllabus that focuses on the sale of securities to U.S. citizens is not particularly relevant in the era of 24-hour trading around the globe." As co-chairs of the School's emerging Program in Law and Business, Professors Gilson and Campbell have been working on what amounts to a revolution in the study and teaching of business law (*Stanford Lawyer*, Spring 1988, pages 4ff). In brief, the

program will embrace three main components: curricular innovation, research, and practitioner involvement.

The research component, which is still being designed, will focus, Gilson said, on the central question of "private ordering": how businessmen and -women structure their transactions independent of regulation. Only after understanding private ordering, he explained, can we decide how the legal and regulatory systems might be helpful.

The practitioner component is expected to take two forms: an ongoing seminar including experienced attorneys and business persons; and occasional public lectures by eminent practitioners. "Feedback from members of the practicing bar is critical," Gilson observed. "We need to tell them what we're doing, ask if it makes sense, and listen to what they say."

The most fully realized of the three components—the Law and Business curriculum—offers training approaching that of a JD/MBA, but within the three years of law school. As described by Professor Campbell,

it begins in the spring term of the first year with foundation courses in Economics (primarily microeconomics), Accounting, and Finance.

Thus prepared, students may choose during their second and third years from a broad array of upper-level courses, including Antitrust, Banking, Bankruptcy, Business Associations, Business Planning, Commercial Law, Copyright Law, Corporate Acquisitions, Economics of Legal Rules and Institutions, and so on through the alphabet. An even more sophisticated group of courses, such as Advanced Antitrust, Advanced Corporate Finance, and so on, then also becomes accessible.

"The building blocks are firmly in place," said Campbell. "We can now say to students: 'If you want to be a business lawyer, we've got the course sequence to do so.'"

Of the Law and Business Program as a whole, Campbell concluded: "The Dean has made this one of his highest priorities, so we expect soon to have the most exciting JD-Biz program in the nation."



Presentations by Professors Gilson, Campbell, Mnookin (left to right) and Lopez (next page) laid the groundwork for discussion of three new course concentrations.

ALTERNATIVE DISPUTE RESOLUTION

Robert H. Mnookin
Adelbert H. Sweet Professor of Law

"Most disputes do not require adjudication," Professor Mnookin pointed out. And yet until recently little attention was paid in law schools to negotiation, arbitration, and other alternatives to litigation. Mnookin, who chairs the School's efforts in this field, is working to make Stanford an important center for research and teaching about dispute resolution.

"The fact that most disputes don't need adjudication doesn't mean that there is not a role for law and the legal system," he continued. On the contrary, lawyers play a central role. In addition (and this is a focus of his own research) what happens or would be expected to happen in court affects how people behave out of court—a phenomenon Mnookin calls "bargaining in the shadow of the law."



It follows that negotiation is a critical lawyering skill. While acknowledging that the "pas de deux" of negotiation is an art, Mnookin said it is also a science. "The skills involved are teachable; one can improve one's performance."

There is much lawyers can learn from other disciplines, he said—particularly economics, psychology, and anthropology. One example, from economic theory, is the concept of Pareto optimality. Negotiations have been known to fail not because the parties could not come to an agreement, but because the settlement, when reached, served the interests of the parties involved less effectively than possible alternatives, i.e. when the settlement is "Pareto crummy." A notorious example: the recent Pennzoil-Texaco dispute, which ended up in bankruptcy for one party and avoidable tax costs for the other.

The concepts and methods of resolving disputes outside of court are being increasingly incorporated into many of the School's courses, including, in the first year, Contracts, Civil Procedure, and the elective in Lawyering Process (an innovative, team-taught course now taken by about a third of all Stanford Law students).

The most intensive training, however, is offered in Mnookin's upper-level offering in Dispute Settlement, in which students are exposed to a range of social theories and clinical simulations of negotiation and mediation. The course, which is very "labor intensive," is being co-taught with Gary Friedman, a prominent Bay Area mediator.

Another and highly significant effort is on the scholarly, theoretical front: the Interdisciplinary Seminar on Decision, Conflict and Risk, which is taught in cooperation with the Economics and Psychology Departments and with the Graduate School of Business. The professors involved, in addition to Mnookin, are Nobel economist Kenneth Arrow, GSB deci-

sion scientist Robert B. Wilson; and psychologists Amos Tversky and Lee Ross. The initial themes of the seminar, according to Mnookin, have been theories of negotiation and risk.

Mnookin then told the Visitors about two recent developments: the establishment of an annual Richard S. Goldsmith Award for student work on dispute resolution (Spring 1988, page 39); and the creation, with Hewlett Foundation support, of a Stanford Center on Conflict and Negotiation with Mnookin as its director (see pages 18–19).

Stanford is thus "in the forefront of alternative dispute resolution," concluded Mnookin, with progress being made in both theory and practice. He closed with a statement of the program's underlying goal: "Training our students to be more effective as lawyers and citizens, and to participate constructively in the resolution of disputes."

LAWYERING FOR SOCIAL CHANGE

Gerald P. Lopez
*Kenneth and Harle Montgomery
Professor of Public Interest Law*

"In the law, we commonly assume that people are essentially generic or fungible—that differences among them are not important," said Professor Lopez. "This may be an attractive idea when we are talking principles—say, equal protection," he continued. "But when we are talking about the actual practice of law, and how best to help a group pursue equal protection, the assumption of equivalency among clients proves false."

Nowhere is this more true, Lopez said, than in legal practice on behalf of relatively disempowered individuals or groups—"people subordinated politically and socially by reason of poverty, race or ethnicity, gender, sexual orientation, age, or disability." Lawyers who wish to



Jerry Lopez (*above*) and Thomas Elke '52 (*right*) advocated special courses in law for the disadvantaged.

work with such clients need different skills, knowledge, and understanding than lawyers serving more privileged clients, he said. It is not enough to learn the content of, say, the laws relating to entitlements, immigration, and discrimination. One must also, Lopez believes, arrive at some understanding of "the role and meaning of law, lawyering, and legal systems in their lives."

It is here, Lopez believes, that traditional legal curricula and modes of teaching fall down. He has been meeting with other law teachers, students, and community members to explore the question: What would it take to create a meaningful and effective curriculum in Lawyering for Social Change?

The curriculum proposed by the group would begin in the second semester of the first year with a "fairly radical restructuring" of the existing elective in Lawyering Process. This course—while good in that it introduces students to interviewing, counseling, and negotiation—offers "no sense of who you are working with," he said.

A second and completely new foundational course, also to be offered in spring of the first year, would deal with "subordination—traditions of thought and experi-

ence." The content would be drawn from (1) political, social, and economic theory on how and why some groups are disadvantaged; (2) literature—autobiography, fiction, oral testimony, drama, poetry, and so forth—expressing "the experience of that form of living and life"; and (3) observations by people in allied efforts, such as social workers, organizers, and lay people.

Electives in the second and third years would consist of two kinds of courses. The first would provide core literacy in subjects such as civil rights law, housing, welfare, labor law, small business, nonprofit corporations, etc.—but not taught in the traditional manner. "Using class time to transmit textbook information is wasteful," Lopez asserted. "We can devise much finer self-teaching instruments" for that purpose.

The other kind of upper-division course—what Lopez called "the heart" of the proposed curriculum—would consist of coordinated workshops on either or both of two things: "elements of social life" (for example, housing, life of a poor family); and lawyering skills, including "what it means to collaborate with someone significantly different from you."

In developing this proposed new curriculum in Lawyering for Social Change, Lopez and his colleagues will draw on insights gained in Bill Ong Hing's Immigration Law policy and clinic courses, Lopez's Workshop

in Teaching Self-Help and Lay Lawyering, the Poverty Law clinic and seminar currently taught by William Simon and Santa Clara Professor Eric Wright '67, and other such innovative efforts. The rich clinical resources of the East Palo Alto Community Law Project will also be invaluable.

The developing curriculum is, nonetheless, "a fragile enterprise, requiring an immense amount of us," said Lopez, who last May became the School's Montgomery Professor in Public Interest Law (see pages 19-20). From the faculty there is the time involved in developing new courses and modes of teaching. Students, in turn, would be challenged "to participate more strongly in their own teaching." The School, alumni/ae, and other donors would be called on to provide money for an area in which there has traditionally been little funding. Finally, said Lopez, both the practicing Bar and the subordinated themselves would need "to open up—to consider that academics may actually have something to offer them." □

¹ Information about other academic programs has been, or will soon be, provided elsewhere. These include the International Center for Law and Technology (see pages 4ff) and the John M. Olin Program in Law and Economics (Fall 1987, pages 43, 47).

QUALITY OF INTELLECTUAL LIFE

Henry T. Greely
Associate Professor of Law

Sharon Buccino (1L)

Gillian Hadfield (3L and PhD '85)

THE TERM 'quality of intellectual life' encompasses many different things," began Professor Greely. For example, "whether students are well prepared for class discussions, whether they are doing enough scholarly work, and whether they are talking about law in the Law Lounge."

Professors tend to be "people who are captured by issues," he continued. "Law school excited us—was one of the great intellectual experiences of our lives." Greely and other faculty members have sensed, however, that this is not the case with many students, that "students are not as excited about the law as we would like them to be."

Seeking to raise the level of student engagement, Dean Brest in October 1987 created a Task Force on the Quality of Intellectual Life at Stanford Law School. The group, which Brest himself chaired, included Professors Greely, Robert Ellickson, Gerald Lopez, and five students:

The findings of a nine-member task force were presented by Buccino, Greely, and Hadfield (*left to right*).

Sharon Buccino (1L), Gillian Hadfield (3L and PhD '85), Robert Murray (2L), Jeffrey Schneider (2L), and William Tate (3L). Additional student input was solicited through a detailed questionnaire distributed to every member of the student body.

Greely noted that, though faculty and student task force members had begun with different ideas, they ultimately reached a surprisingly high level of consensus about both "what things we were worried about and what the Law School might do to improve them." Generally, however, the sense was that "the situation is good, but can and should be improved."

A report with tentative recommendations was released by the Task Force on May 4, 1988 (the day before the Board of Visitors meeting). "Our interest today," Greely told the Visitors, "is in getting your questions and comments." A School-wide meeting to solicit student reactions would take place the following Monday.

THE SURVEY

Sharon Buccino, a first-year student on the Task Force, described the survey conducted by the group to assess student attitudes and experiences related to intellectual life at the Law School. "We had to investigate a very broad range of issues," she said,

naming classroom atmosphere, curriculum, teaching approaches, the grading system, and the extent of out-of-class discussions on law and public affairs.

The questionnaire was both comprehensive and long—twelve pages, requiring about two hours to complete. One-quarter of the student body (126 students) voluntarily returned it. A comparison of their responses with those of 26 students from a randomly selected control group indicated that there were no important differences between volunteers and controls.

The survey revealed certain common concerns among students, reported Buccino. These were a "clear dissatisfaction with the Law Lounge as a place to meet and talk before and after class"; "dissatisfaction with feedback," especially in courses where the grade depends only on the final exam; and "dissatisfaction with the curriculum," specifically, the difficulty for a student in developing a unified individual curriculum.

Buccino also noted a concern among some students that "atmosphere both in and out of the classroom" may reflect intolerance of certain ideas or political philosophies. There were students, she said, "who expressed an inhibition about being able to express a view and interact with different views."



Task Force on the Quality of Intellectual Life

RECOMMENDATIONS

Ambiance

- Any proposals for improving the quality of intellectual life at the Law School should give weight to the importance of maintaining its informal, friendly, relaxed, and relatively non-competitive atmosphere.

Curriculum

- The School should supplement the *Bulletin* with written information about the advanced curriculum, and should hold more helpful public meetings to assist students in choosing advanced courses.
- The School should consider adopting a faculty advisor system, under which each student would confer with a faculty member at least once a semester.
- The School should expand and coordinate the offerings in business law and should consider expanding offerings in litigation.

Teaching

- The School should give considerable weight to teaching in hiring and promoting faculty, and should structure compensation and other incentives to encourage and reward good teaching.
- The faculty should regularly discuss methods of teaching and should work systematically to improve their teaching. Earlier this year, the faculty held several teaching workshops. We recommend that these be conducted regularly, and that the faculty and administration consider additional means of helping faculty to improve their teaching.

Evaluation and Feedback

- Faculty members should provide prompt and adequate feedback on exams.
- Faculty members should seriously consider alternatives to making the grade in a course depend only on a final examination.

Extracurricular Intellectual Life

- The student lounge should be improved to make it a more congenial place for discussion; the Library should consider how to expand and improve common reading and meeting areas; the administration and student organizations should consider ways to encourage use of the meeting areas at the Taper Center.
- The School should foster more extracurricular intellectual interchange between faculty and students, including brown-bag lunches, lectures, and panels.
- First-year instructors should encourage students to form study groups.

Placement

- The Career Services Office should provide students with much better information about alternatives to large-firm practice.

Diversity and Tolerance

- Our final recommendation, and one that we regard as crucial to the School's well-being, is that all members of the Law School community should work to create an atmosphere of tolerance for our diverse backgrounds, ways of being, experiences, goals, and beliefs. We should strive to maintain an environment in which people are accepted for what they are, and feel safe to explore and express the broadest range of ideas—including ideas that others may find unfamiliar, threatening, wrong, or even obnoxious. This requires a willingness to eschew simplifying rhetoric and to engage in dialogue that shows respect for the views of those with whom we disagree. It requires active collaboration in protecting the expression of views that are not considered "politically correct." We specifically recommend that the leadership of a broad spectrum of student organizations begin conferring regularly with each other and with members of the administration and faculty toward these ends.

IMPACT

Gillian Hadfield, a third-year student member of the Task Force, discussed some of the outcomes of the group's work, the first being "a perception of the problems that is quite far ranging. For example, it had not been generally realized that some students felt "silenced" by other students.

Bringing such issues out in the open—particularly the need for tolerance and understanding of politically diverse views—has "raised the consciousness of students and faculty," Hadfield said. This resulted just yesterday (May 3) in a school-wide panel on the perceived silencing of conservatives.

Hadfield also said that the Task Force may have helped "to focus faculty attention on the issue of quality of teaching." While teaching at the School is generally considered to be good, she observed, "more could be done to make discussions engaging and interesting." Hadfield, who has completed doctoral studies in the Economics Department, mentioned the desirability of "alternatives to the Socratic method and single-exam approach."

She then reviewed the specific recommendations of the Task Force, as contained in their report of May 4 (see box). Readers interested in the full report may request a copy from Sharon Doyle, Assistant to the Dean, Stanford Law School, Stanford, CA 94305-8610.

DISCUSSION

In the ensuing discussion, Visitors asked about the honor code (still effective), student evaluation of teachers (published regularly), and practitioners in the classroom (a frequent occurrence). Extracurricular activities—when law-related and mentally challenging—were also praised as a means of constructive engagement.

Disengagement among upper-



classmen may arise from the clerkship experience of the first summer, suggested one Visitor. "Perhaps law firms aren't nurturing interest in academics." If so, he said, the problem may be beyond the power of law schools to solve.

Another Visitor had heard student complaints of being booed and hissed when speaking up in class. "We believe that is completely unacceptable, intolerable behavior," declared Greely. Faculty members can help by demanding that students show respect for classmates with different opinions.

Buccino reported that "most people are positive about the atmosphere in the classroom but striving towards an ideal." The previous day's student panel on silencing was, she said, very encouraging, in that "there were people of all different attitudes who realized the value of diverse views and wanted their classroom experience to be exciting and vibrant."

On this note, the session on the quality of intellectual life ended—but not the dialogue, which extended into the student/Visitor lunch meetings and on into the afternoon summary and advisory session, where Dean Brest pledged that implementing the recommendations of the Task Force would be among his highest priorities. □



Hugh McMullen '71 (*above*) and Charles Silverberg '55 (*top, with Hadfield*) were among the many Visitors with comments and suggestions about student life.

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Kenneth and Harle Montgomery
(shown here with Dean Brest) received
a round of applause for their continuing
and enlightened philanthropy on behalf
of public interest law. (See page 20.)

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The 102 current members include solo practitioner Kenton Granger '62 of Kansas (*right*), ACLU attorney Gary Williams '76 of Los Angeles (*top right*), and law firm partner Sandra Weiksner '69 of New York (*above*).

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*Photos by John Sheretz
Design by Nancy Singer*

HIGH TECHNOLOGY

(Continued from page 8)

some Pacific Rim policy issues. I expect that the next edition will also give some attention to service exports.

"Service exports" — Are those people you send as consultants and managers?

Partly, but it's much more than that. It became a big issue with telecommunications, which, for example, allow a computer network to provide data processing for banks or airlines all over the world. Service exports also include insurance, construction, education and training, professional services, entertainment, transportation, travel and tourism (the hotel industry, for example), and hospital services. One of California's surprising exports is the management of hospitals throughout the world.

Another interesting fact is that—contrary to what people may expect—unionization is about as high for jobs in the export services sector as for jobs generally.

I got involved through a study for the California State World Trade Commission.⁴ The state's service exports are now \$12 million, vs. \$14 million for goods. You could say that we export almost as much in airline seats and over the wires as we do in the holds of planes and ships.

That's amazing. Is there a problem?

Not a problem, but a very complicated negotiation. Several people in government, together with certain large U.S. businesses, have pushed to have international negotiations on services, and they're now on the agenda for the current Uruguay Round of international trade negotiations.

Firms like IBM and AT&T see the potential for becoming major movers of information, providing all kinds of complex, sophisticated computer services over global networks. They

want to make sure the trade regime is set up so that the market is available internationally, rather than as 150 little markets within individual countries, with problems translating data from one country to another. The issue is not just the quantity of sales, but also the quality and efficiency of services that can be provided.

Of course, other countries are making similar requests that we open up our service markets to them. Don't be surprised if you hear that groups in India are offering to provide comprehensive legal research services to American firms!

What about "technology transfer"? Tell me about your study for the U.S. Agency for International Development.

We were interested in the most effective ways to help developing nations acquire modern technologies. The debate had tended to focus on patents, license arrangements, and the like. However, we concluded that the key issues are entrepreneurship, management, and the ability to acquire technologies. If you put a technology into a developing country and walk away, nothing is going to happen. You have to have a group there that wants to use the technology.

A classic example is what happened in Korea, where fifteen or twenty years ago some little construction company would get a subcontract from a U.S. company to build something, and learn enough to build a second one themselves. The third one, they exported. Today Korean construction companies are among the most efficient and successful in the world.

We therefore recommended that U.S. development programs emphasize entrepreneurship in the developing world—that they make sure there's a group that really wants the technology and that the management and training aspects of the project are consistent with that.⁵

Do some people say, "Why should we give technology to others? They'll just take business away from us."?

Yes—we're hearing that very strongly, particularly in the agricultural area. A number of American farmers are concerned about the help we've given to farming throughout the world. They've even gotten legislation against helping with crops for which there are U.S. surpluses.

I have some very strong counter-arguments. Fundamentally, there is the equity argument that those people need a chance, too. And you can certainly convert that into the self-interest argument that if we try to keep the other four-fifths of the world down, we're asking for all kinds of trouble—comparative birth rates make that clear.

But there are a couple of other good reasons. First off—it's going to happen anyway. Technology is not as controllable as it used to be. If you try to stem the flow, people will sneak across the borders. There is no way to confine it, now that we are in a world economy.

Nor should we want to. This is our competitive advantage: developing technology. When we supply it to other countries, we will go on and develop more, because that's what we're best at. This is what happens with the United States and Japan.

And for developing countries, it's like priming the pump. You have to provide some strength to these economies if they're to become better trading partners—particularly when the debt crisis makes it essentially impossible for these countries to get large-scale investment capital. Importing technology is the only chance they have.⁶

To repay their loans?

Exactly. Indeed, statistics show that, for the United States, technology is responsible for about half the economic growth since World War II—

not capital investment, but new ideas.

Should our government start treating R & D expenses more favorably? I've heard that they are subsidized in Japan.

Well, Japan doesn't subsidize them as much as some U.S. people will tell you. But, yes, I think our government should be more encouraging.

You mentioned borders. Would you say that one solution to illegal immigration is the export of technology, so that people can earn a living in their own country?

Absolutely—and not just technology. One good approach is the *maquila-dora* program, which is in essence a program of production in the northern strip of Mexico for the U.S. market. That area is now the most prosperous in Mexico. This has undoubtedly helped some people stay at home, though others have perhaps made it a way station to the U.S.

I'm uncomfortable with immigration restrictions on ethical grounds. Moreover, with economic disparities as great as they are now, there's bound to be a flow of people, regardless of what the law says.

What is your interest in human rights?

This grew out of my interest in developing countries. My Human Rights course asks: Under what conditions does it make sense to handle human rights internationally, and when are we better off letting nations handle it for themselves? The answer isn't always obvious.

I also look at what might be called "international human rights"—rights that arise simply because we have an international system. The question here is not, Why do we have international institutions to protect freedom of speech within countries? But rather, What is *international* freedom of speech? Is it, for example, allowing

me to speak to the Soviet people?

Technological advances make this an immediate question. What about the direct-broadcast satellite that is going to hover over the U.S. and transmit programs into Canada and Mexico, completely upsetting the economics of each nation's television system? And what if the messages being broadcast into these or other countries are ones that their governments don't want? Is this a problem?

I don't think so. I think you should be entitled to broadcast wherever and whatever you please, provided you satisfy radio interference rules. But a lot of major international law scholars believe that governments should have a right to restrict what comes in from broadcast satellites.

I imagine that for Moslem countries trying to maintain a regime of morality, Hollywood-style broadcasts from the sky would be a horror.

Of course. And a lot more examples like that are in the offing. There's little question that the VCR is among the most important sociological developments since the book. The extent to which videotapes are being smuggled into countries with even the most puritanical regimes is fascinating.

With technology moving so fast, how can political and legal systems keep up?

Technological changes do change the political context in which we face problems. Every major technology may undercut some body of regulation—perhaps in a very healthy way—and it's hard to predict what those changes will be. Just think of the automobile and its implications for personal mobility, family structure, and sexual mores, let alone tort law. The personal computer will have comparable implications, as will some of the biotechnologies.

We have a bizarre way, however, of focusing on the technological issue

when we should be focusing on the social issue. Take, for example, Bhopal, Three Mile Island, and Chernobyl. In all those cases, the technology was dangerous, but the human problems were what produced the disaster. You can't read the history of the Chernobyl mess without saying, "How could anybody be so stupid?"

The obvious implication: We ought to be thinking less about technological fixes (like fancier kinds of computers) and more about human factors—like education, training, and management structures.

Another example has to do with Accutane, a chemical beneficial to people with certain complexion problems. Because it may also cause birth defects in pregnant women, we have been considering taking it off the market. Isn't there a way, by working with doctors, to give people who are not at risk the opportunity to use the drug?

Do you think medicines are being overregulated?

I want to know more before giving a solid answer—liability risks may be as much of a brake as regulation on the development and sale of drugs. However, regulatory barriers do seem to be holding back new biotechnologies that might be less detrimental to the environment than chemicals currently used in agriculture.

What else should we be doing differently?

I'd like to see less emphasis on the Export Administration Act. I would like us not attempt to restrict arrangements like Fujitsu and Fairchild mergers. And I think we should not intervene over trade barriers.

What we should do is more work on education—our own education.

And I think we should be trying to deal much more responsibly with technology in the administrative process. How long does it take to approve a product, a chemical? Can we move

more rapidly and still be safe? I suspect we can do a lot better.

Congress and the state legislatures also need to think more about technology. They tend to forget that almost any barrier to flexibility is a barrier to the development of new technologies. And I think they probably forget also that the biggest innovations are most likely to come from the small- and medium-sized companies.

Do you think legislators focus too much on the big companies?

It's a risk, particularly given the PACs and other campaign contribution arrangements. The numbers show that most new jobs in the last decade have been created by the small and middle-sized companies. Yet it's the big ones which often have the greatest political access.

I think the small- versus big-company issue is going to be important. The current arrangements emphasizing patents and trade barriers sometimes tend to protect large companies, which can afford litigation, at the expense of small ones.

The standards debate also relates to this issue. Should we encourage a whole industry to agree on product standards, so that parts will be interchangeable? The person who defines the standard—usually the bigger person—has some advantage over the others.

Are there other issues we should watch for?

Oh, yes. There are going to be a lot of legal questions on spin-offs, trade secret law, and the liability of employees. One issue is balancing the ability of a spin-off group to proceed without enormous litigation costs, versus the ability of the original company to conduct a long-term R & D program without losing its technology.

Product liability may also have to be rethought. We want to make sure that we get an optimal level of innova-

tion. Unless product liability rules are right, we're going to slow the development of technologies and slow the extent to which we can benefit from them.

How can Stanford Law School help?

There's an urgent need for serious intellectual work on trade secret questions, the U.S./Japan technological relationship, and other issues we've been talking about. I'd like us to develop suggestions for legislation and other ways of changing the legal system to help the high-tech sector work better or more safely.

There are also important questions about the kinds of changes likely to be imposed on the legal system as a result of specific technological developments, for example, the new sorts of evidence. It's the nature of this field that new questions will crop up for every one that gets answered.

The School has, as you know, undertaken to organize a Stanford International Center for Law and Technology. A lot of the building blocks are there; others will take additional funding and people [see page 9—ED.]. It's something I'm working very hard on. But being where we are—at a leading research university, in the middle of an area of high-tech innovation, in the state most active in trading with the Pacific Rim—makes us a natural leader for this kind of work.

What led you—a Sylvania engineer in your late twenties—to go to law school?

I suppose, like many people in the mid-Sixties, I wanted to solve the world's problems. I figured I wouldn't be able to help unless I learned a new perspective in addition to that of the defense industry.

You've obviously made a smooth transition from science to law. But do you notice a gulf between what C.P. Snow termed the "two cultures"?

I think it's a real problem. People are unwilling to risk trying to learn something about the other culture, although usually once they do, they do pretty well.

The gulf seems to be narrowing, though—at least in our student body. We've had the Stanford Law and Technology Association since 1984. Students are very interested in high-tech questions and seem to be more comfortable with them than in the past. There are computers all over the place, and you can talk about recombinant DNA in the classroom without too many eyebrows going up.

What would you tell a graduate who says, "I'd like to know more about science and technology, but can't go back to school."

Start reading, whether it's *Scientific American*, *Science* magazine, or just the articles about science and technology in the *New York Times*. Don't feel threatened. Read in the areas that are of interest to you.

Is there any message you'd like to leave with our readers—mostly practicing attorneys?

I think lawyers should be aware that the character of property is changing. We should recognize that a prime form of wealth is an educated person, and we should develop arrangements to give that person the incentive and tools to produce. That has implications in employment law, trade law, product liability—all kinds of areas.

I'm also concerned that the legal profession is organized in a way which makes it very difficult to respond more than incrementally to the changes technology is producing. We're going to need much more than incremental change. There's some question as to whether we have the necessary legal R & D capability for reforming the legal system. We need to develop institutions—probably around law schools, but not neces-

sarily as law schools are traditionally operated—which can consider broader changes and build a constituency for such change.

Our International Center for Law and Technology is, of course, designed to help with these needs. We have a good academic foundation, an advisory council loaded with practical experience,⁷ and excellent students. It's a real opportunity! □

Footnotes

¹E.g., J. Barton, "The International Breeder's Rights System and Crop Plant Innovation," 216 *Science*, 1071 (1982).

²Stanford Law School Working Conference on the Law and Economics of International Technology Licensing, April 29, 1988. The background paper and rapporteurs' report are being published in the *Stanford Journal of International Law* (1989, forthcoming). The conference was funded by the School's John M. Olin Program in Law and Economics.

³J. Barton and B. Fisher, *The Regulation of International Business* (Little, Brown & Co., 1986).

⁴J. Barton, B. Fisher, S. Levy, R. Mendelson, et al., *California Service Exports: A Strategy for the Post-Industrial World* (contract study, California State World Trade Commission, June 1987).

⁵J. Barton, *The Role of Private Enterprise in Technology Transfer* (contract study, U.S. Agency for International Development, August 1986).

⁶See J. Barton, "Coping with Technological Protectionism," *Harvard Business Review*, Nov./Dec. 1984, p. 91.

⁷The members of the Law and Technology Advisory Council are: Lee F. Benton of Cooley, Godward, Castro, Huddleson & Tatum, Palo Alto; John Freidenrich '63 of Bay Partners, Cupertino; Carey Heckman of Ware & Freidenrich, Palo Alto; C. Bradford Jeffries '55 of Cooley, Godward, San Francisco; Craig W. Johnson '74 of Wilson, Sonsini, Goodrich & Rosati, Palo Alto; John W. Larson '62 of Brobeck, Phleger & Harrison, San Francisco; Susan H. Nycum of Baker & McKenzie, Palo Alto; and Larry W. Sonsini of Wilson, Sonsini, Goodrich & Rosati, Palo Alto.

ABORTION AND THE LAW

(Continued from page 13)

Faster, less painful, and far less subject to complications than older procedures, it requires only the insertion of a thin hollow plastic tube (cannula), through which the uterine contents are removed. In fact, until the eighth week of pregnancy, the cervix may not even have to be dilated.

Nor has technology ceased advancing in this area. A new abortifacient drug known as RU 486 has, despite anti-abortion protests, been approved by the French government for sale and distribution. Taken orally, it is a steroid that blocks the action of progesterone, a hormone which normally prevents the uterus from expelling the fetus. The drug appears to have minimal side effects and is 80 percent effective when administered within the first six weeks of pregnancy. A combination of RU 486 and another drug has raised the percentage of successful abortions to at least 90 percent. RU 486 is expected to become widely available in Europe, China, and Third World countries.¹²

The importance of this drug (and any successors) is that it will permit self-abortion—safely and privately—at a time and place convenient to the woman. But once a pregnancy can be terminated at home with a drug or drugs, we have in great part transformed the enforcement of laws against abortion into an attempt to suppress a drug traffic. Since drugs are easy to conceal and sell illegally, obtaining an illegal abortion may become as easy as purchasing a narcotic drug.

In short, technological advances may already have let the genie out of the bottle, so far as society's ability to control abortion is concerned. Equally significant, however, are the changes that have occurred since 1973 in society itself.

Social changes. These fall into two related but independent categories: institutional changes and changes in

the public consciousness.

Prominent among the former are laws in other nations. In Canada today, abortion is legal; in Mexico, though not legal, it is easily obtainable. And a number of Caribbean countries, which have in the past helped Americans evade their nation's laws, would be likely to do the same regarding abortion.

Moreover, the price of travel has declined sharply, thus making an extraterritorial abortion affordable for a much higher percentage of American women than in pre-*Roe v. Wade* days. Those who are young or poor will, of course, experience greater difficulty, but for the many who live close to our borders, the added cost will not be great.

Institutions within the United States have changed as well. Agencies such as Planned Parenthood are now far more numerous (up from 800 in 1968 to 4,400 today) and widely distributed.¹³ Since these agencies do much more than provide abortions, they will probably continue to function even where abortion is illegal. And it is likely that, within the limits of the laws against aiding and abetting, many agencies will give emotional support and information to women seeking abortions.

Moreover, unless the federal government criminalizes abortion throughout the nation, there will still be operational abortion clinics in some states. These will not only serve out-of-state women to the extent that the law allows, but will also provide a constant reservoir of trained abortionists and counselors, some of whom may be persuaded to assist women disabled by law from receiving legal abortions.

Another institutional change since *Roe v. Wade* (or more precisely, since about five years before that decision) has been the development of numerous women's groups whose members are convinced that women have a right—constitutional or moral—to an abortion should they desire one.¹⁴ Members of such groups would probably act not only as a support for those seeking

abortion, but also as a conduit of information. Of course by doing so, they might become criminally liable for aiding and abetting criminal acts. It is not clear, however, whether the threat of prosecution would be real, nor how many women would be so ideologically committed as to be undeterred by the law.

Perhaps more important than such institutional changes is the basic shift in popular consciousness on abortion. In 1965, only about 15 percent of the population believed in a right to abortion on demand; now (as the polls mentioned earlier indicate¹⁵) half the population does—and a significant proportion believes in that right passionately. This would have a number of effects besides the obvious ones of preventing the reenactment of anti-abortion laws in many states and making major federal intervention in the area difficult.

One effect would be in the willingness of competent medical personnel to perform abortions forbidden by law. The recent period of legal abortion has reduced the stigma attached to the procedure and rendered formal, non-governmental sanctions (such as expulsion from medical societies) less likely. Also of potential importance is the fact that one-half of the obstetric and gynecological residents in the United States today are women. Thus the physicians performing abortions under a future regime of illegality might tend to be somewhat more moved by ideology and compassion, and less by desire for profit, than the illegal abortionists of pre-*Roe v. Wade* days.

Women seeking and obtaining abortions would also be affected. They would fear less the social stigma of being revealed. And if, as also seems likely, the percentage of botched abortions were well below the pre-1973 level, there would be fewer women with a motive to cooperate with the police—and fewer cases to come to police notice through routine medical channels.

Perhaps the most important effect, however, would be on the behavior of the legal system. The increase in public tolerance of abortion would make it hard for prosecutors to come by juries willing to convict individuals who perform abortions. Difficulty in obtaining convictions would of course tend to make prosecutors more reluctant to prosecute abortionists and police to investigate them. Police priorities may also be influenced by the fact that in abortion cases, there is no seizable and forfeitable property. Such forfeitures, which are increasingly a source of earmarked funds for law enforcement, provide an incentive for police departments to devote more energy toward the drug problem than to less profitable vice crimes.

Symbols and Realities

The ultimate result of the overruling of *Roe v. Wade* would be to reintroduce abortion as a vice crime, and one especially hard to suppress, at that. The result could be seen as a kind of pragmatic American compromise—intended and desired by no one but not completely without precedent. Although we are adamantly opposed on moral grounds to opiate addiction, we give methadone to large numbers of heroin addicts. While we are opposed on moral grounds to gambling, we permit many states to have lotteries and, indeed, do not enforce gambling laws in most of the others. Though we spend hundreds of millions of dollars battling marijuana, the drug is widely available in virtually every American high school and college.

Does this mean that the energy and passion spent in politicking by both the pro-choice and the pro-life sides would have been wasted? The answer, on reflection, is perhaps more complicated than appears. Although the abortion issue can be seen as a kind of zero sum game in which two groups, both of whom care passionately about the matter, are engaged, in fact, there are several dimensions along which

the struggle can be measured.

First, the number of abortions performed. It is my contention that because of technological advances and the nature of our political institutions, no great decrease in abortion would occur as the direct result of any overruling of *Roe v. Wade* and its statutory aftermath.

That is not to say that, in the long run, even the relatively ineffective enforcement of the criminal law would have a negligible effect. We have often seen that a demand which seems quite inelastic in the short run turns out to be more elastic over time. Even slight increases in the difficulty of abortion may be met by some increase in the use of contraception, some decrease in sexual activity, and some increase in childbearing. It is likely, however, that abortion rates will in the long run be more influenced by such factors as changes in overall fertility, greater or less absorption of women into the job market, variations in welfare policies, and changes in contraceptive methods, than by the legal treatment of abortion.

The number of abortions, however, is not the only dimension by which groups may measure their success in this battle. We must remember that the two groups that care most deeply about the issue are engaged in a symbolic as well as practical struggle. According to Kristin Luker's superb and sensitive study of the issue,¹⁶ the basic dispute is over the proper role of women in our society. Many, if not most, "right-to-lifers" regard motherhood and the raising of a family as the most important function a woman can perform, and their entire ideology, including their views as to the proper purposes of sex and the status of the fetus, follows from this view. Others have different reasons for assimilating the fetus to the status of human life (rather than merely "prospective life") and, hence, for regarding abortion as murder. All, however, hold their position as a moral one and often refer with some contempt to abortion proponents as "utilitarians."

On the other hand, the "pro-choice" group, which espouses abortion on demand as a woman's right, regards motherhood as but one part of a woman's role. They see abortion as a necessary means of controlling a woman's fertility so that she can perform adequately in the labor market as well as in her own family, should she choose to have one.

The symbolism of the overruling of *Roe v. Wade* and its likely aftermath would clearly be more to the liking of the anti-abortion advocates. It was the shock of that Supreme Court decision which galvanized many of them into action to begin with, even though many lived in states such as California and New York where abortion was already relatively free. Which particular facet of *Roe v. Wade* triggered their activism may determine whether they can be satisfied with a situation in which abortion is no longer legal but is still for the most part obtainable.

Nonetheless, widespread criminal laws against abortion would remove several affronts to the anti-abortion forces. First, they would no longer be shocked by the high number of abortions reported by health and census authorities. Under today's conditions all of the 1.3 million legal abortions are counted, classified and published, and the number itself appalls many people. Illegal, covert activities are not tallied nearly as well and must be estimated—a process far more easily disputed or ignored.

Next, the passage of anti-abortion laws—even without a significant reduction in the number of abortions—would remove the feeling of complicity that has clearly disturbed many of the "pro-lifers." One anti-abortion writer argues that political action is essential "to rid us of the guilt we involve ourselves in as a nation by permitting mass nationwide abortion to continue."¹⁷

Finally, anti-abortion activists desire the criminalization of abortion for educational and moral reasons. Many believe abortion must be outlawed in

order to express correctly the value society gives to human life.

For pro-choice advocates, however, the overruling of *Roe v. Wade* would be a setback, both symbolically and practically, with no compensating improvement. The symbolic defeat will be felt not only by those who are ideologically committed to the pro-choice position, but also by non-ideological women with unwanted pregnancies. No matter how easy it may be to procure an illegal abortion, there is an inevitable loss of dignity in having to act surreptitiously and participate in a violation of the law.

Those committed to a pro-choice ideology would also be concerned that the burden of anti-abortion measures is borne primarily by the poor and ignorant—an affront to ideals of equality as well as of women's rights. Moreover, abortion, when illegal, will always be more dangerous than when legal.

Pro-choice advocates would further lose by being forced back into the political arena to defend what they see as an inalienable right. Being generally more involved in careers and other activities outside the home than are the anti-abortion activists, they would feel much more keenly the additional demands upon their time and energies. Nonetheless, it can be expected that they would continue to contest every effort by anti-abortionists to enact new statutes, and that, given the permissive climate of public opinion, they would frequently prevail.

In sum, if *Roe v. Wade* were overruled, we might safely predict political battles over abortion on an unprecedented scale, leading eventually to a situation where somewhat fewer abortions would take place than under conditions of complete legality. The change would unavoidably be felt mainly by the poor and the ignorant. Nonetheless, most looked-for abortions would take place and at a cost and a level of medical risk considerably closer to that of a legal abortion today than to the illegal abortions of

the days before the Supreme Court's controversial 1973 ruling. □

Footnotes

¹ "Opinion Roundup: Abortion," *Public Opinion*, April/May 1985, at 27.

² See G. Gallup, Jr., *The Gallup Poll*, Jan./Feb. 1986, at 18.

³ *Supra*, note 1.

⁴ K. Luker, *Abortion and the Politics of Motherhood* (1984) at 154, 236.

⁵ See J. Kaplan and J. Skolnick, *Criminal Justice* (4th ed., 1987) at 619. Also F. Zimring and G. Hawkins, *Capital Punishment and the American Agenda* (1986), Ch. 2.

⁶ See W. Cates, "The Hyde Amendment in Action," 246 *JAMA* 1109 (Sept. 1981).

⁷ *Bigelow v. Virginia*, 421 U.S. 809 (1975) holding states may not strip speech of First Amendment protection by criminalizing abortion information advertisements.

⁸ For example, 18 U.S.C., Section 1821 (1982) making the transportation of dentures into states with local monopolies illegal.

⁹ 18 U.S.C., Section 922 (1982).

¹⁰ See M.C. Brucker and N.J. MacMullen, "What's New in Pregnancy Tests," 14 *Journal of Obstetric, Gynecologic, and Neonatal Nursing*, Sept./Oct. 1985 at 353.

¹¹ See "Illegal Abortion Deaths in the United States," 14 *Family Planning Perspectives* No. 3 (May/June 1982) at 164. See, generally, Center for Disease Control, *Abortion Surveillance 1974-1976* inclusive for trends in illegal abortion and mortality, both pre- and post-*Roe*.

¹² See "France Ordering Company to Sell Its Abortion Drug," *New York Times*, Oct. 29, 1988.

¹³ See "Organized Family Planning Services in the United States, 1976-1977," 11 *Family Planning Perspectives* 6 (Nov./Dec. 1979) at 342.

¹⁴ See K. Luker, *supra*, note 4.

¹⁵ *Supra*, notes 1 and 2.

¹⁶ *Supra*, note 4.

¹⁷ See H.O.J. Brown, *Death Before Birth* (1977) at 156.

BANKS IN TROUBLE

(Continued from page 17)

• **Decrease institutional risk.** The idea here is to control the risk of each institution so that it fits the statutorily fixed, uniform insurance premium. That involves two main elements—(a) control of asset risk, and (b) control of financial (leverage) risk.

The control of asset risk is the objective of portfolio regulation. Banking law contains a number of restrictions on investments in securities and loans, and various avenues exist for expanding and refining them. Foremost of the several criticisms made of such asset regulation is that it focuses on the riskiness of individual investments and loans, or categories thereof, in isolation. This is contrary to the basic tenet of modern portfolio theory that the riskiness of a portfolio is determined in the aggregate by the co-variance of its various elements. Another shortcoming is that such legal rules are not well adapted to foreign loans and investments, for which they were not designed.

The second element of institutional-risk control is to focus on the bank's capital position or leverage. In the strongest form of this technique, one could let the institution choose the asset composition and risk level it preferred (which is difficult to prevent in any event), but then adjust the required capital accordingly.

Whether a banking authority relies on controlling asset risk or controlling financial risk, or on some mix of both, it needs to be able to measure an institution's risk in a fairly accurate and defensible manner. Modern portfolio theory affords the analytical tools for doing so, but the necessary empirical data are only partially available. That makes fine distinctions hard to justify, and leads regulators to use broad categories or uniform requirements. So a distortion of managerial incentives seems certain to persist under this approach, though it should be possible to make it less severe than under the

existing uniform insurance premium system.

• **Variable premiums.** Rather than making the institution fit the premium, the objective would be to make the premium fit the institution. Premiums would, therefore, vary on the basis of assessed risk, much as they do for auto and other insurance.

Under this approach, it is even more essential to be able to measure the risk of each institution. As already noted, that is a difficult assignment for a bank regulator, both empirically and politically. For this and other reasons, the banking insurance agencies have fluctuated between tepid support and outright hostility.

The alternative to public agency discretion in assessing risk and premiums would be to rely on a private market consensus. One such suggestion includes a requirement that the institution obtain private insurance for a portion of its deposit liability. A simpler device in my view would be to require at least the larger insured banks to issue short-term unsecured debt, on a parity with the status of FDIC as subrogee of insured deposit claims.

A caveat relates to information costs and disclosure policies. Bank examination and supervision has functioned historically in an atmosphere of secrecy and confidentiality, lest the public be unduly alarmed and cause unnecessary runs. A trend towards greater disclosure has developed but by no means equals that customary in, say, the area of securities regulation. Additional difficulties in information and disclosure occur with respect to international operations.

Another caveat lies in the definition of risk. For various reasons, regulatory and political, the procedures by which banks are declared insolvent differ from those in other business enterprises—a situation addressed next.

• **Timely bank closures.** If troubled banks were consistently closed at or just before the point at which their liabilities exceeded their assets, there would in theory be no depositor (or

creditor) loss for the insurer to bear. Premiums could thus be uniformly nominal without a distortion of managerial and owner incentives.

There are, however, practical problems in this approach. To begin with, the grounds for closure of a bank are specified by the law of the jurisdiction in which it is organized, so there are differing provisions across the federal government and fifty states. The problem is confounded by the discretionary nature of the decision, which is vested in the bank's primary supervisor (chartering agency).

Another current problem is that the insolvency determination is usually made on the basis of the book value of assets and liabilities, as defined by regulatory accounting (rather than GAAP) principles. Book value insolvency usually indicates a substantial loss to the insurer upon liquidation: the market value of the equity of large banks has in fact been below book value for more than ten years.

The suggestion that banking agencies adopt market-value accounting requirements has been met, among other objections, with the assertion that markets needed to give valuation do not exist for many categories of bank assets. The point is both valid and susceptible to exaggeration. Secondary trading markets are being developed in previously rarely traded assets, such as foreign government loans, and the process could be deliberately encouraged or even mandated.

These difficulties with automatic closure based on market-value insolvency, while not technically insuperable, pale before the problem of political willingness and feasibility. There seems to be a near-universal political tendency to delay action detrimental to the recipients of government credits and guarantees. The Federal Home Loan Bank Board has for several years been keeping hundreds of insolvent thrifts in operation. And in the case of large banks, the FDIC has adopted an implicit policy that it will avoid liquidation or deposit insurance

payout. In 201 failing bank situations between 1979 and 1984, the FDIC afforded de facto 100 percent coverage of all liabilities in all but one case (Penn Square Bank, in 1982), when the size of the bank was greater than 1 percent of FDIC's reserves. Such policies, while perhaps politically necessary, obviously run counter to economic cost-minimization.

What can be said, then, of these approaches to making the present deposit insurance system viable? Portfolio regulation, or control over asset risk, has always been the least satisfactory form of bank regulation—conceptually defective, limited in coverage, and historically ineffectual. It is not likely to be more effective in the evolving international markets. But capital requirements, market-value accounting and closure rules, and variable insurance premiums could be combined in a number of ways to yield an insurance system that is sounder and less incentive distorting. That is the direction the banking authorities are likely to take, though no doubt in a slow-moving and erratic way.

A More Radical Proposal

Let us now look at another, more revolutionary alternative: separating deposit banking from risky lending and investment activities. If this proposal were implemented, bank regulation, including concern over international operations, would be greatly simplified or eliminated. Neither banks (with a subsidy to protect) nor bank regulators (with careers to protect) could be expected to be enthusiastic about the concept—which makes it a fitting subject for academic attention and further exploration.

The idea is to create "riskless" banks through a separation of their payments and investment functions.³ Deposit banking would be carried on in a "narrow" bank, which could invest only in virtually risk-free assets, such as short-term Treasury securities or perhaps commercial paper; the checking

and savings accounts offered by such a bank would be covered by federal deposit insurance. On the other hand, commercial and consumer lending and other riskier assets would be transferred to an affiliated nonbank institution and funded by uninsured investments and instruments; since federal deposit insurance would not apply to the affiliate, it would raise its funds at market rates commensurate with its portfolio risk and not be restricted in its permissible investments or activities.

This proposal can be seen either as an intellectual descendant of earlier suggestions of 100 percent reserve banking⁴ or as an extension of recently developed money market mutual funds. It undertakes to break the link between risky assets and riskless claims that is the vulnerable spot in the present structure of banking and deposit insurance. The role of deposit insurance would be diminished, but not necessarily eliminated. If a bank failed, the insurance corporation would provide continued access to checking account balances and uninterrupted clearance of transactions while the securities pool was being marshaled and liquidated. For these functions, the cost would presumably be low and hence a small premium sufficient. There would probably be no necessity for the insuring agencies to make risk determinations for individual institutions; if the portfolio restriction for investment of deposit balances permitted little variation in risk, a uniform premium would be quite feasible.

Criticism of the riskless bank concept centers on two aspects. The first is the question of inefficiency, engendered by segregating deposit services from nondeposit services with a resulting loss of economies of scale or scope. The extent of such economies is at present difficult to estimate, but developments generally in the field of financial services suggest they can be significant. However, the point has less force in the context of the riskless bank proposal, because the separation is not necessarily of production or delivery,

but only of investment risk. Although proponents formulate their proposal in terms of separate incorporation, that does not seem essential. The needed separation could be accomplished in the setting of a single institution, simply by requiring that "deposit" or "transaction" account balances be invested in and secured by a lien on a pool of relatively riskless assets.

The second objection calls into question the operational practicality of the intended separation. Since deposit account balances would earn only at the risk-free rate of return and would generate large costs from the payment clearance process, the return to the customer would be lower than at present and might at times be negative. That, it is said, would create incentives to avoid the separation by devising new payments instruments, uninsured but offering higher returns, so the outcome would be a payments system comprising both riskless (insured) and risky (uninsured) instruments. Such a system would again be vulnerable to panics and general runs on solvent but illiquid institutions—the very result deposit insurance was instituted to forestall.

This objection is not without merit, and a full discussion of the bank run issue would greatly extend this article, but a few observations may be in order. The general run or panic phenomenon is basically an information externality problem and would best be dealt with as such. It grows out of an inability on the part of creditors to distinguish confidently between solvent and insolvent institutions—an uncertainty the traditional "bank secrecy" treatment of examination reports certainly does nothing to relieve. As for a run on an individual bank of dubious solvency, it is wholly appropriate; indeed, it is an integral part of that "market discipline" which the banking agencies are now starting to promote.

A final advantage of the narrow bank concept today is that the extent of international lending or activities becomes irrelevant, since it does not

affect the deposit security pool. Would the nonbank affiliate be at a competitive disadvantage in carrying on such activities, because it would be deprived of the core deposit base? Perhaps—in the sense that it was deprived of an existing subsidy obtained from the government in the form of an insufficient deposit insurance premium. Only a banker, however, could consider that unjust. □

Footnotes

¹ These and other factors affecting savings and loans were discussed in Scott, "Thrift Institutions in a Changing World," *Stanford Lawyer*, Fall 1983, p. 10.

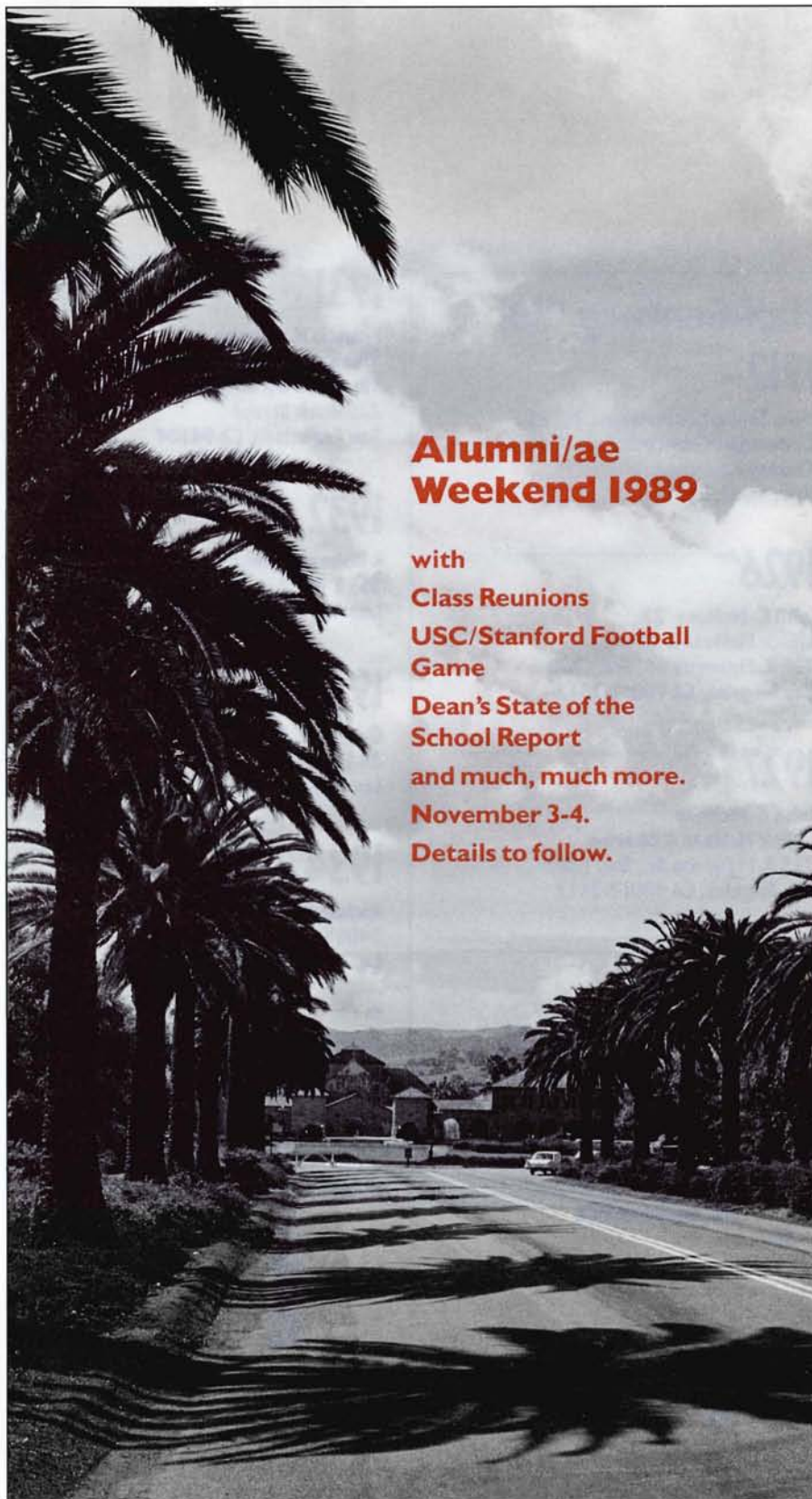
² See E. Kane, *The Gathering Crisis in Federal Deposit Insurance* (1985); and K. Scott, "The Defective Design of Federal Deposit Insurance," *Contemporary Policy Issues* 5:92 (Jan. 1987).

³ See, e.g., J. Kareken, "Federal Bank Regulatory Policy: A Description and Some Observations," 59 *J. Bus.* 3 (1986); R. Litan, *What Should Banks Do?* (Brookings, 1987).

⁴ H. Simons, *Economic Policy for a Free Society* (1948), 62-65; M. Friedman, *A Program for Monetary Stability* (1960), 65-75.

Alumni/ae Weekend 1989

with
Class Reunions
USC/Stanford Football
Game
Dean's State of the
School Report
and much, much more.
November 3-4.
Details to follow.



Alumni/ae GATHERINGS

GRADUATES in the Pacific Northwest had their turn to meet the new Dean last spring, as Paul Brest continued his circuit of alumni/ae strongholds throughout the country. He was accompanied on this swing by his wife, Iris, and Associate Dean John Gilliland.

The first event, in Seattle on April 27, was a reception with the **Washington Law Society**. Over 75 interested graduates came. George Willoughby '58 provided both the venue (the Rainier Club) and introductory remarks for the Dean's talk.

The decanal party was in Portland the following evening for an **Oregon Law Society** get-together. Held at the River-Place Alexis Hotel, the reception drew some 70 grads. Doug Houser '60 did the honors.

The Oregon group put on another event September 15, this time at the Hilton in Eugene. Law Society president Mary Ann Frantz '78 arranged the wine-and-cheese reception for Stanford lawyers at the Oregon State Bar's annual meeting.



DAVIS FREEMAN



Seattle, April 27. Dean Brest was welcomed by a group (top) including George Willoughby '58, Jackie Brown '75, and Joseph Gordon, Sr. '34 (at left), and John Reed '77 and wife, Karen (at right, with Brest).



Portland, April 28. Douglas Houser '60 (below, right), John Fenner '51 and Michael Holmes '60 (left, with associate Dean John Gilliland) were among the Oregonians who turned out for the decanal reception.



The Dean's travels last spring included a remarkable gathering of Stanford alumni/ae in Washington, D.C. The occasion was the two-day inaugural celebration of the University's new Stanford-in-Washington campus. For alumni/ae lawyers, there was a special, black-tie dinner May 16 held (thanks to Associate Justice Sandra Day O'Connor '52) in the Great Hall of the Supreme Court (see page 21).

The Law Society of Washington, D.C. continued their tradition of annual wine-tastings for summer associates and

graduates, with a July 21 gathering at Arnold & Porter. Former Professor Jack Friedenthal (now dean of the George Washington University National Law Center) and his wife, Jo Ann Friedenthal '60, were among the 65 guests. Credit for this affair goes to Law Society President Neil Golden '73, wine maven Bob Carmody '62, and Arnold & Porter host Norm Sinel '66. This year's wine selections were, by the way, French champagnes.

The Law Society of Southern California held a variety of events, beginning

May 22 with a tour of the J. Paul Getty Museum in Malibu. Terry Hughes '84 and Pam Miller Ridley '79 arranged the excursion, which included a reception in the museum courtyard.

The group's now annual Hollywood Bowl Night took place September 10, with a picnic and concert featuring Boston Pops conductor John Williams and the Los Angeles Philharmonic. The lighthearted program was titled "Hooray for Hollywood." Hooray also for organizers Geoff Bryan '80 and Frank Melton '80.

JOHN SHERETZ



UNIVERSITY OF TORONTO



Crown Quad, July 15.

A crowd of frazzled Bar aspirants, including Kimberly Pesa-vento '88 (near left), partook of the Crocker Garden buffet. Fellow 1988 grads Tom Galli, Scott Reisch, Randi Teichman, Stephen Villanueva, and Teresa Taurino were snapped (far left) with Professor Hank Greely.



Toronto, August 8.

The AALS reception drew Sam Barnes '49 and Ralph Perry '63 (above) with their wives, Beverly and Betsy. Also shown (right) are Myrl Scott '55, his wife, Joan, and JoAnne DeLuce (wife of Richard '55).



The indefatigable Angelenos reconvened November 12, for a Stanford-UCLA football match in the Rose Bowl. Bob Epstein '83 and Frank Melton '80 (again) arranged a pregame tailgate party and block seating for the game itself. Reports are that the good company more than made up for the Cardinal's 17-27 loss.

The San Francisco Law Society sponsored a luncheon May 19 featuring Hon. Winslow Christian '49, senior vice-president and litigation director of the Bank of America and a former justice of the California Court of Appeals. Christian discussed lender liability, in a talk titled "Bankers and Borrowers: How Will the Game Develop?" The event, which Don Querio '72 organized, was appropriately held at the Bankers' Club in the B-of-A building.

The San Francisco highrise was also the site, on August 2, of the Society's annual reception for Bay Area alums, summer associates, and incoming students. This year's gathering provided a welcome opportunity for the School's new Assistant Dean for Student Affairs, Sally M. Dickson, to meet nearby members of the Law School community.

Stanford law alumni/ae from throughout the state attended a School-

MARCO ZECCHIN



Monterey, September 26. Associate Dean Robert Weisberg '79 (left) spoke to a CBA gathering including Judge Miriam Wolff '39, Orrin Finch '53, and Rose Finch (below), as well as Charles Page '58 (shown at bottom, with John and Nancy Gilliland).



sponsored luncheon in Monterey on September 26, coincident with the annual meeting of the **California State Bar Association**. Professor Robert Weisberg, Associate Dean for Academic Affairs, was the main speaker, with a thought-provoking talk on "Capital Punishment: The Future in California." John Gilliland served as host for the Monterey Plaza affair.

Stanfordites venturing northward for the 1988 **American Bar Association** meeting in Toronto crossed paths at a reception August 8 at L'Hotel. Gilliland brought greetings and news of the School.

Most of the School's newest graduates were, however, more preoccupied with qualifying for the Bar. Out of compassion for those cramming at Crown Quad, Dean Brest sponsored a buffet luncheon on July 15 in Crocker Garden. Both faculty and staff showed up to lend sympathy and support.

Upcoming events include the biggest annual gathering of them all: Alumni/ae Weekend, scheduled in 1989 for November 3-4. News of this and other gatherings for Stanford lawyers will follow. In southern parlance, "Don't be a stranger!" □



LETTERS



I wholeheartedly applaud the approach to the Law and Business Program ("What's Next for Business Law," Spring 1988). As a JD/MBA out of law school only a few years, I still appreciate the place on the learning curve where the combined program placed me vis-a-vis my contemporaries.

My particular concern, however, is that internalizing the MBA portion of the joint degree program may deny students some of the "shared experience," which often helps form relationships with business clients. For example, I am treated differently by finance directors merely because I have a business degree and am therefore deemed to be a member of the great fraternal business world.

Secondly, one of the most valuable learning experiences in the Graduate School of Business was the day-to-day interaction with business students; their focus on life, success, and the spectrum in between is very often considerably different from that of the typical law student.

Finally, I cannot stress enough the importance of the familiarity with a personal computer obtained at the Business School. The ability to construct spreadsheets myself and to quickly understand the underpinnings of analyses by others are priceless advantages, which I gained much earlier than colleagues who pursued more traditional legal paths.

These reservations aside, I wish your project all the success in the world.

Kristin H. R. Franceschi, JD/MBA '85
Baltimore, Maryland

We are pleased to reassure readers that the established four-year JD/MBA joint program is alive and well. The developing Law and Business Program described in our article simply provides a needed alternative for the many students interested in preparing for a business practice within the normal three-year span of law school.

Attention: Public Interest- Oriented Graduates

A group of students and alumni/ae have formed an organization — **Progressive Lawyers Alumni Network of Stanford Law School (PLAN)**— to promote communication and information exchange among those with similar concerns.

The first issue of our semiannual newsletter was sent out this summer, and a directory of members is being prepared.

To join our network, please send \$5.00 and your name, address, phone number, year of graduation, and current employment to:

PLAN, c/o NLG
Stanford Law School
Stanford, CA 94305-8610

For further information, call
Anne Richardson (3L) or
John Tweedy (1L)
at (415) 723-3017.

TWO HEADS ARE BETTER

Stanford Lawyer magazine is intended as a forum for a range of views and ideas. Readers are encouraged to join the dialogue.

Space constraints may limit the number and length of letters published, but all will be read with great interest.

Publication does not constitute endorsement by the editors or the School as a whole. Opinions expressed are those of the authors.

Please address letters to: Editor, Stanford Lawyer, Stanford Law School, Stanford, CA 94305-8610.



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Coming EVENTS

1989	May 4-5	Board of Visitors annual meeting <i>At Stanford</i>
	August 7	Stanford Law alumni/ae reception American Bar Association annual meeting <i>In Honolulu, Hawaii</i>
	September 15-18	California State Bar annual meeting Stanford Law alumni/ae event (date to be announced) <i>In San Diego, California</i>
	November 3-4	Alumni/ae Weekend 1989 With reunions for classes with years ending in -4 and -9 <i>At Stanford</i>

For information on these and other events, call Cathryn
Schember, Director of Alumni/ae Relations, (415) 723-2730

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