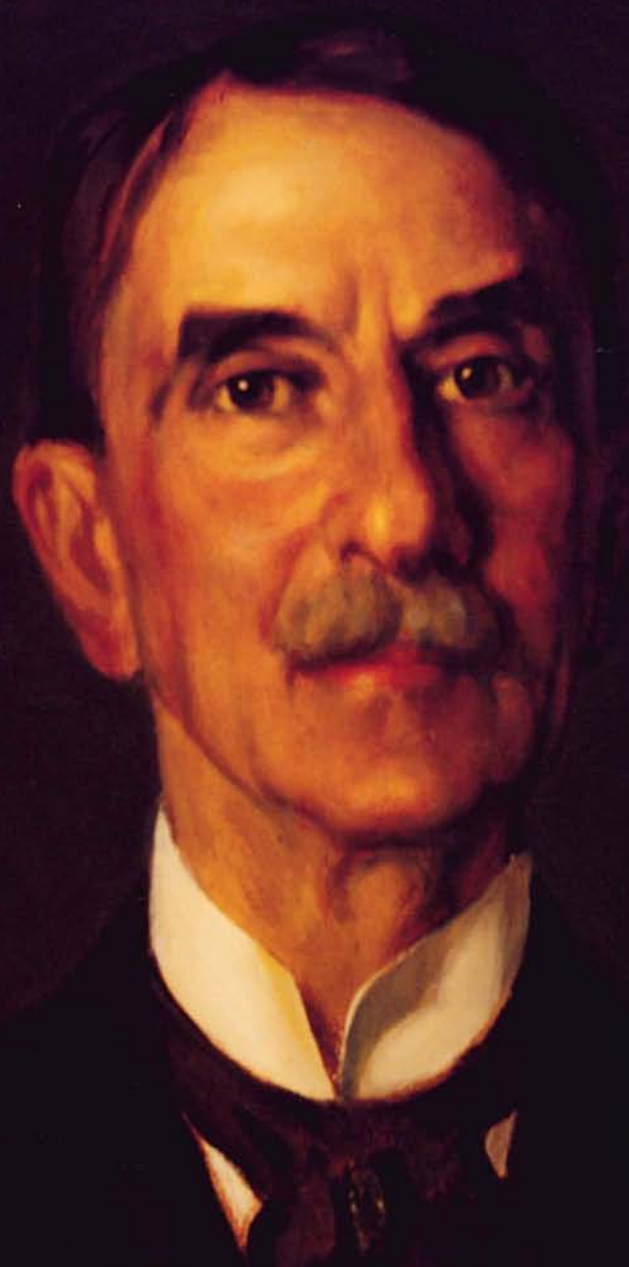


# LAWYER

*Stanford*

Kathleen Sullivan  
An Osborne Reverie  
Learning How to Lawyer



**THE MAKING  
OF A LAW SCHOOL**

**Cover:** Nathan Abbott, founding head of the Stanford Department of Law (see article on pages 4–11). This portrait is from an unsigned oil painting hung in the Harold G. King Moot Court Room and reproduced more fully on page 4. Photography by William H. Smith of Stanford's Visual Art Services.

# LAWYER

Stanford

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# From the DEAN

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## WHEN SHOULD A LAWYER LEARN THE WA

**T**his past August, in a motion proposed by the Illinois Bar Association and introduced by Robert MacCrate of Sullivan & Cromwell, the American Bar Association amended Standard 301(a) of the Standards for Approval of Law Schools to add the language I have italicized:

A law school shall maintain an educational program that is designed to qualify graduates for admission to the bar *and to prepare them to participate effectively in the legal profession.*

The most natural reading of the amendment would be to affirm the historic mission of law schools to provide students with the foundations to

become effective practitioners—foundations on which graduates will build through mentorship, self-education, and continuing education during their years of practice. But there is reason to believe that some bar officials will endeavor to use the amendment to subordinate this mission to the goal of requiring law schools to provide all students with a panoply of applied lawyering skills—including trial advocacy and law office management—so they are “prepared” to practice law without further guidance on graduation day.

I believe that this would be a serious error—short-sighted and injurious to both the profession and the academy.

### THE MACCRATE TASK FORCE REPORT

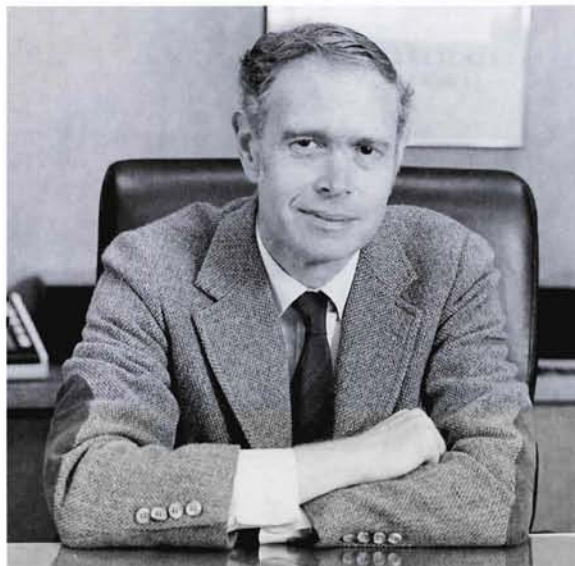
The amendment to Standard 301(a) comes word for word from the Report of an ABA Task Force, chaired by Mr. MacCrate, entitled *Law Schools and the Profession: Narrowing the Gap*. Among its central recommendations is that law schools should “expand instruction in practical lawyering skills” with the aim of instructing stu-

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*Law school may not be  
the best time or place to teach  
applied practice skills*

---





**Paul Brest**  
*Richard E. Lang Professor and Dean*

## TO THE COURTHOUSE?

dents in the "full range" of practice skills.<sup>1</sup> The Task Force urges state licensing agencies to "consider modifying bar examinations that do not give appropriate weight to the acquisition of lawyering skills." And it encourages law firms and other employers that recruit at law schools to "convey to students, both by their words and their decisions, the importance they place on a student's having had exposure to a broad range of skills and values instruction, including clinical courses."<sup>2</sup>

The issue presented by the amendment to Standard 301(a) and by the MacCrate Report is not whether law schools have a responsibility to prepare students to be skillful and ethical practitioners—of course they do—but how that responsibility can best be carried out and how it is shared with postgraduate training. My most fundamental criticism of the Report is that it seeks to impose a unitary answer on all of the 157 law schools accredited by the ABA. Until now, the diversity of American law schools has rightly been regarded as an advantage, allowing each institution to respond to the different needs of students pursuing different legal careers and to undertake continuous curricular experimentation designed to improve legal education. This system has yielded what is generally regarded as the best system of legal education in the world. It was just such experimentation that led to the Langdellian revolution in the late nineteenth century and to the development of clinical legal education in the second half of the twentieth.

### AN INCREDIBLY BRIEF HISTORY OF LEGAL PEDAGOGY

Legal doctrines operate in particular contexts—negotiating a contract, representing a criminal defendant, seeking a zoning variance—and only have meaning in those contexts. Before Langdell, this obvious fact had not permeated the walls of the academy, and the law was taught as a body of abstract principles. Langdell's innovation, now over a century old, was to place doctrine in the context of appellate cases. While this was a great improve-

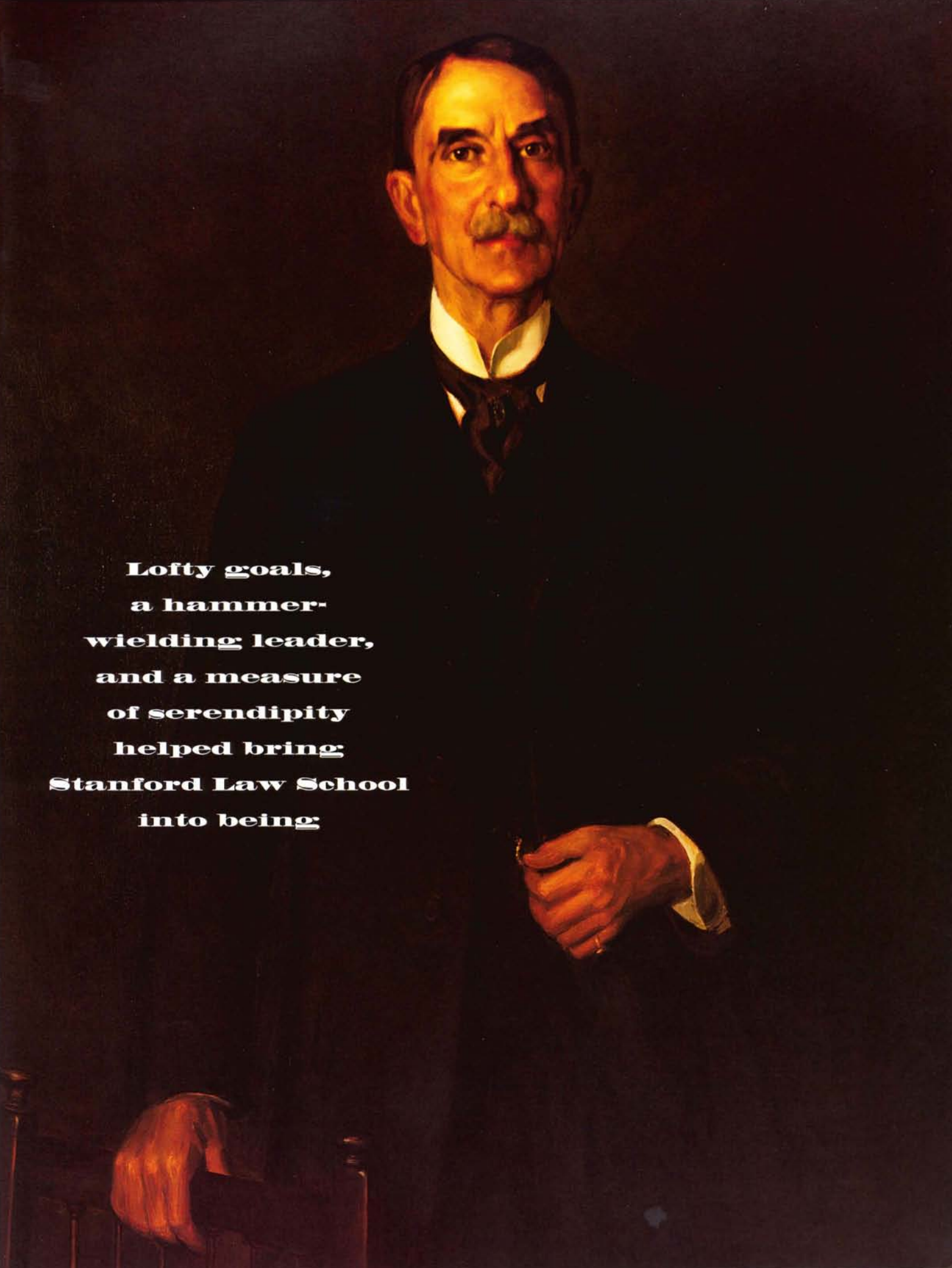
ment, the context was nonetheless a very limited one. An appellate case is, after all, the very last stage in which the law operates, and often represents a failure of the legal system or its actors at earlier stages.

The greatest innovations in legal education since Langdell have been methods of instruction that allow students to learn substantive and procedural law in a much wider variety of contexts. These include clinical teaching through simulations and supervised live practice; detailed case studies of the sort often used in business schools; and amazing new high-technology instructional methods, including interactive video programs which, for example, allow students to observe a trial, interpose objections, and receive rulings on them. There is no better way to understand what a leading question is or what it means to make a record than by observing or participating in a simulated trial process. By the same token, one can learn much about contract, property, or corporation law by drafting and negotiating business agreements in simulated settings.

### WHEN ARE PARTICULAR PROFESSIONAL SKILLS BEST ACQUIRED?

The acquisition of professional skills is at least as important a part of a legal education as learning doctrine, ethics, history, and jurisprudence. A key section of the MacCrate Report, the "Statement of Fundamental Lawyering Skills and Professional Values" (SSV), organizes these skills in ten categories: problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical

*Continued on page 51*

A full-length portrait of a man with a mustache, wearing a dark suit, white shirt, and dark tie. He is standing with his hands clasped in front of him. The background is dark and textured.

**Lofty goals,  
a hammer-  
wielding leader,  
and a measure  
of serendipity  
helped bring  
Stanford Law School  
into being**



# The Early Years

*by Howard Bromberg, JSM '91*

**T**he study of law at Stanford University is nearly as old as the University itself. In April 1893, a year-and-a-half after opening, the University published the plan, organization, and courses for a Department of Law. And four months later, on September 8, 1893, the first class—Elementary Law—convened in the University chapel.

The new Department represented an innovation in legal education. Rather than set up a separate law school, Stanford President David Starr Jordan decided to establish a law department open to both undergraduate and graduate students.

He had two reasons. First, he wanted to make sure that Stanford-educated lawyers earned at least a bachelor's degree—a relative rarity in the profession at the time. Second, he wanted to enable all Stanford students to study the legal system, fulfilling founder Leland Stanford's wish to "present the fundamental principles of law in such a manner that every student may understand them."

As the Department of Law matured, it began to concentrate on the professional training of future lawyers, symbolized by its change in name to Stanford Law School in 1908. This photographic essay recalls those initial fifteen years in which the study of law at Stanford took root.

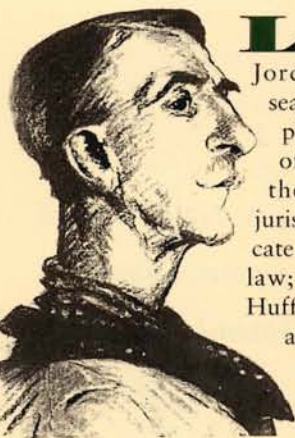




## L LELAND STANFORD, ESQ.

Though best known as a railroad magnate, politician, and university founder, Leland Stanford's first profession was law—a calling that greatly influenced his educational philosophy. In 1848, when this daguerreotype was taken, he had just been admitted to the New York Bar. His subsequent career as lawyer, governor, and senator persuaded him of the

need to educate young Americans in the legal foundations of democracy. In 1893, while planning the Law Department with President Jordan, Stanford wrote: "We want the people instructed in the law, for with the law rests the science of government."



## L LOOKING FOR A LEADER.

Jordan conducted an extensive search for a professor to head the planned Department. His first offer was to Woodrow Wilson, then a Princeton professor of jurisprudence and a leading advocate of the undergraduate study of law; but Wilson declined. Ernest Huffcutt, a brilliant law professor at Northwestern, did accept tentatively in January 1893 and even drafted the Department's curriculum in anticipation of its September 1893

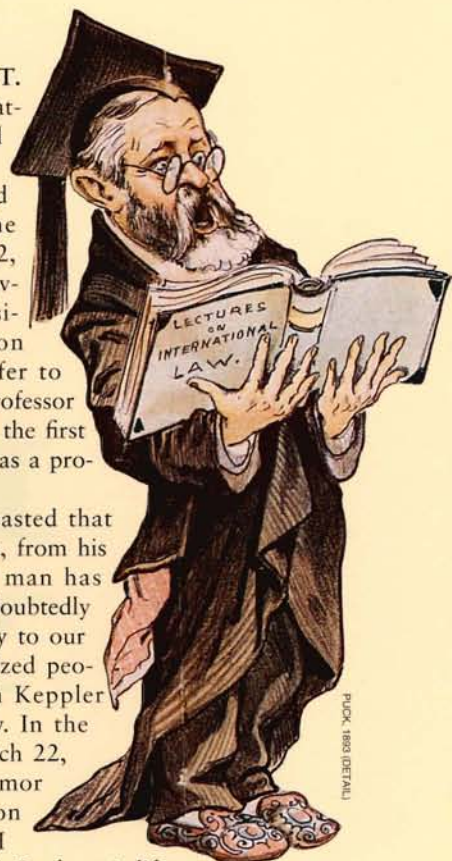
opening. But a few weeks later Huffcutt chose Cornell over Stanford and recommended his colleague, Nathan Abbott. On March 6, 1893, Abbott (affectionately caricatured here) accepted Jordan's offer and became the Department's founding Head.

## A FAMOUS FIRST.

While Jordan was negotiating with Huffcutt and Abbott, Senator Stanford was persuading an old political ally to join the Department. On March 2, 1893, two days before leaving national office, President Benjamin Harrison accepted his friend's offer to become a non-resident Professor of Law at Stanford—and the first former President to serve as a professor anywhere.

Senator Stanford boasted that Harrison had "experience, from his position, that no other man has had. His lectures will undoubtedly be very valuable, not only to our students, but to all civilized people." Cartoonist Joseph Keppler took a less exalted view. In the caption beneath this March 22, 1893, cartoon in the humor magazine *Puck*, Harrison warbles: "Oh, what do I care for a Presidencée? / A Professor's life is the life for me! / Away out on the far Pacific Coast / The youthful Freshmen will I roast; / And the seals of Alaska shall shiver with awe / When I preach on International Law!" (In fact, Harrison arranged to begin teaching in the spring of 1894 to allow time to prepare innovative lectures on the history of the American Constitution.)

With the appointment of Harrison and Abbott, the first law faculty seemed complete. "I think there will be instruction in . . . Law," Leland Stanford wrote triumphantly in his last letter before his death on June 21, 1893.







**A VIRTUE OF NECESSITY.** When Abbott learned of Senator Stanford's death, he became so skeptical about the

University's prospects that in August 1893 he requested a year's leave. The Law Department, scheduled to open in one month, suddenly had no professor! Jordan asked the University Librarian, who happened to have a law degree, to fill in. The librarian, Edwin Woodruff (above), accepted on condition that Jordan come to the first class to explain the unusual circumstances. "But Dr. Jordan did not appear," Woodruff recounted, "so I made a frank explanation of the situation to the members of the class and stated that we would study law together. Thus the work started..."

With this accidental initiation, Woodruff discovered a love and talent for law teaching that led to a 33-year career at Stanford and Cornell (where he would become Dean). "The best law teacher I ever knew," Abbott would later say of Woodruff.



STANFORD QUAD, 1895

**STUDENT REFORMERS.** Crusading students of the new Law Department made a dramatic impact on the larger University. Pledging to reorganize the haphazard student government of the two-year-old University, law student Ed "Sosh" Zion was elected student body president in September 1893. The competition for votes the following spring between Zion's reformers and the insiders was so intense that Jordan complained of "presiding over a young Tammany Hall." The reformers won a decisive victory in April 24, 1894, with the election of engineering student Herbert Hoover as treasurer and law students Lester Hinsdale and Herbert Hicks as student body president and football manager, respectively.

This montage from the university student yearbook pays tribute to the leaders (Hoover is on the left, Zion in the center) who had made a republic of student government.

**FROM THE GROUND UP.** Abbott's early fears were almost realized, as the University approached bankruptcy following Stanford's death. Nonetheless, Abbott did arrive in September 1894, the Department's second year. He installed the Department's first office and library in a bedroom in the men's dormitory, Encina Hall (shown here in an 1895 photograph). He even built much of the furniture himself. To instruct the wide variety of students taking law classes, he evolved a teaching method that "happily combines the lecture, textbook and judicial decision," as one student wrote. "A summary of each subject studied is dictated in the form of notes, and this is supplemented by the informal discussion and 'quiz.'" With the University's financial woes leading to the early departure of Harrison and Woodruff, Abbott was forced to do most of the teaching himself. "I have tried to saw wood with a dull saw," Abbott complained to Jordan, "but I have 'sawed,' although my back has ached sometimes." His labor was rewarded with rapid growth of the Department—by 1897, the second largest on campus.



STANFORD UNIVERSITY ARCHIVES





**O**PEN DOORS. As a primarily undergraduate division of a new university founded on egalitarian principles, the Law Department registered many students who might not have been welcome at more traditional law schools. Hispanic, Chinese, Japanese, and women students were enrolled in the Department's first classes. Walter Fong (left), in 1896 the first Chinese graduate of Stanford, minored in law

and became a member of a San Francisco law firm and later president of a college in Hong Kong.

**S**TUDENT LIFE. For its first decade, the Law Department reflected its largely undergraduate composition. The most celebrated law students were those who excelled on the football field, such as Jackson Reynolds and Charles Fickert (later among the Department's most prominent alumni). Student life was dominated by a proliferation of law clubs, which combined moot court training with social camaraderie. The original members of the Arcade club posed for this turn-of-the-century photograph.





STANFORD UNIVERSITY ARCHIVES



from 1915 to 1937. A comprehensive three-year program was implemented that would form the heart of the curriculum for decades. "We felt quite grown up," recalled Whittier. And in May 1901, the Department awarded its first professional degree, an LL.B., to top student James Burcham.

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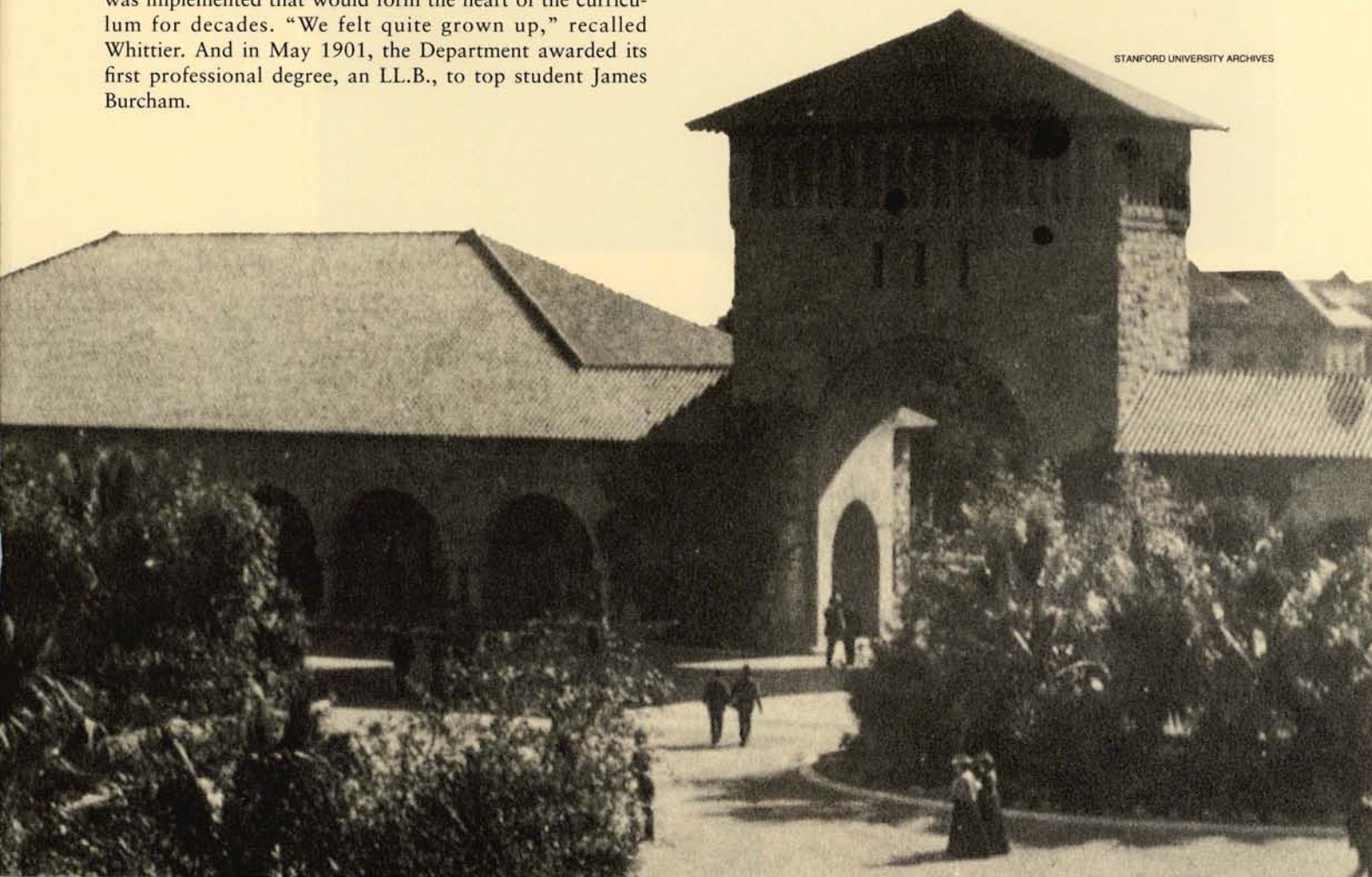
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*San Francisco - Cal. 6*  
*David Starr Jordan*  
*Stanford Univ*  
*Passage assured expect fifteen thousand*  
*majority here Stanford's future certain.*  
*Geo E. Crothers.*

STANFORD UNIVERSITY ARCHIVES

**H**OME ON THE QUAD. In 1900, the Department moved from Encina Hall to the northeast side of the Inner Quadrangle (on the left side of this early photograph). The new quarters, which Law would occupy until 1950, contained two large recitation rooms, three faculty offices, and a library. Whittier's comment: "We were too proud for words."



STANFORD UNIVERSITY ARCHIVES





STANFORD QUAD, 1908

**P**IONEERING WOMEN. One distinguished graduate of the Department was Di Margaret Gardner (left), who became a Deputy City Prosecutor in Los Angeles. The Law faculty had mixed views about women students. Professor Abbott told the *San Francisco Chronicle* in 1901: "I do not believe much in the modern system of educating women....The tendency is to spoil a good woman to make a poor man out of her." But Professor Whittier was more enlightened: "The few young women who joined our ranks were not in any separate category from the men," he would recall. "There seems to be no sustainable objection to the admission of women to law schools."



STANFORD UNIVERSITY ARCHIVES

**L**AW FRATS. Three law fraternities were begun in the early days. Dean Marion Rice Kirkwood would later write that the law fraternities "have regular meetings at which they give over a large part of their time to consideration of some legal matter, the argument of a moot case, the discussion of some proposed law reform, or the presentation of various points of view in practice by lawyers who have made a success in the profession. In these and other ways they develop in their members an interest in law as a science." They also found time for fun, as shown in this photo of Phi Delta Phi, founded in 1897.

**S**HOCK AND AFTERSHOCK. On August 18, 1906, philosopher and psychologist William James was staying at Professor Abbott's home in Palo Alto (center in the early 20th-century photo at right) when the great earthquake struck. James, eager to record his perceptions of the event, refused to budge, saying, "I've been waiting for this opportunity for years." The Law Department headquarters on the Quad emerged relatively unscathed, but the living quarters of some members of the Department were damaged. Law student William Barkley was sleeping when "the chimney fell within 2 or 3 feet of my head. I tried to jump over the side of the railing, but the bricks were coming too thick and I was afraid the front porch would fall and mash me." The Department suffered a greater jolt one month later, when Abbott announced that he was leaving to become a professor at Columbia Law School.





**F**ROM DEPARTMENT TO SCHOOL. Abbott's tenure spanned just about the entire life of the Stanford Law Department. The face of the future can be seen in this photo of the faculty, taken in the spring of 1907 shortly after Abbott's departure. Charles Huberich (center front) succeeded Abbott as executive head. Reflecting a national trend toward higher and more specialized standards for legal education, Huberich called for creation of "a true professional school." By December 1908, President Jordan and the Stanford Trustees agreed and voted to change the Department into a Law School. A new addition to the faculty, Frederic Woodward, became the School's first Dean; Charles Huston (upper

left) would succeed him in the deanship in 1916. Arthur Cathcart (upper middle) taught at the Law School until 1938. Leon Lewis and George Boke (front left and right) were here only briefly. But Wesley Hohfeld (upper right) would become the early School's most eminent scholar and a progenitor of the legal realist movement. Stanford was becoming a leading law school. □

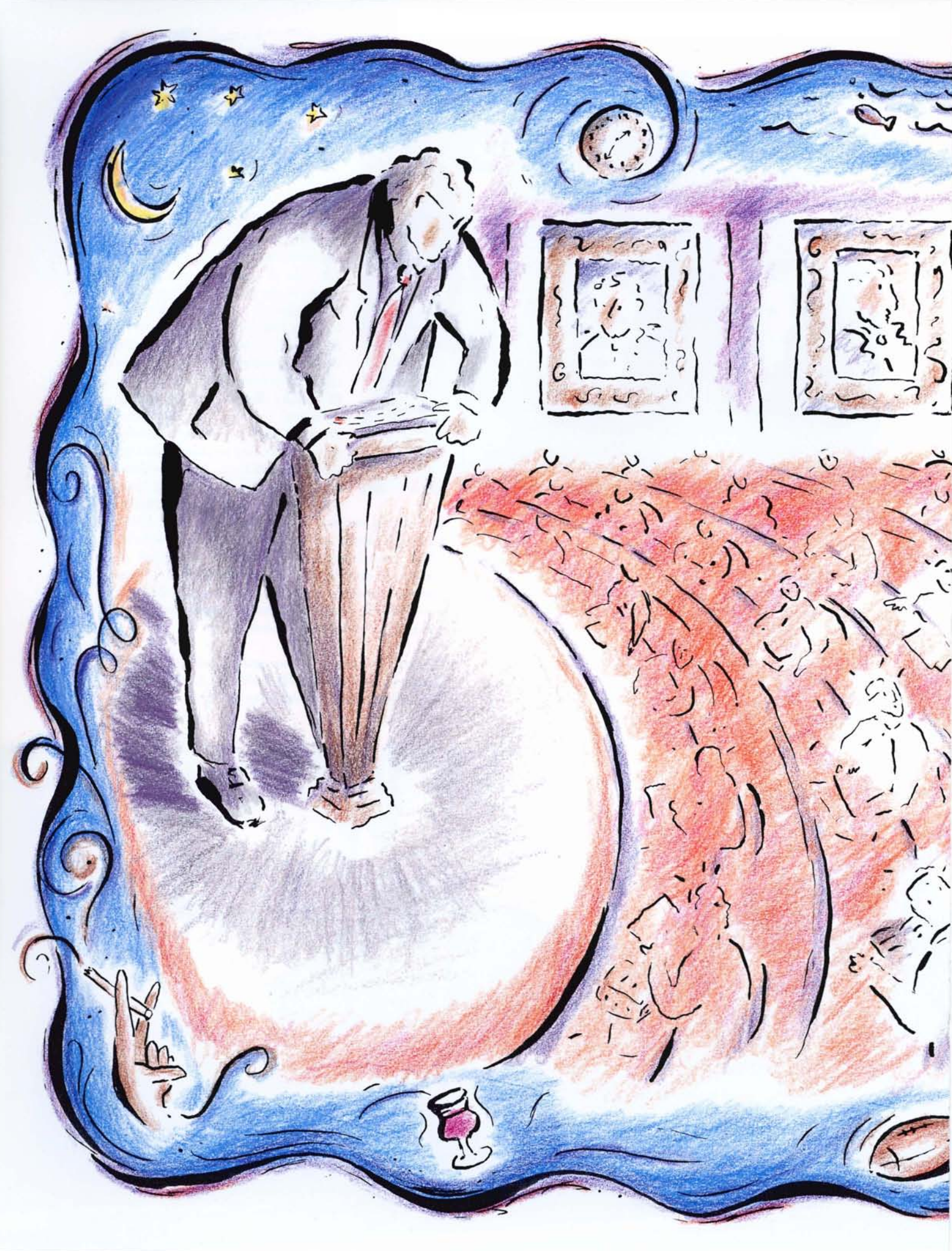
#### FURTHER READING

- Bromberg, "Legal Legacies: A Brief History of Stanford Law School," *Stanford Magazine*, September 1993.
- Bromberg, "Our Professor, The President," *Stanford Lawyer*, Fall 1991.
- Bromberg, "Who Stole the President's Wine?" *Stanford Magazine*, June 1991.
- Henry C. Clausen, *Stanford's Judge Crothers: The Life Story of George Crothers* (1967).
- Orrin Elliott, *Stanford University: The First Twenty-Five Years* (1937).

*Howard Bromberg is currently working on a history of Stanford Law School. He holds a J.S.M. in addition to a J.D. degree, and was a teaching fellow from 1988 to 1990.*









*Imagine (frisson) that you are back in Mr. Osborne's classroom. Accept, too, that the subject is Torts. This prize-winning short story takes it from there.*

# The Lesson

by Arthur Leinwohl ('58)


**T**he venerable George Osborne, professor of law, entered the side door of the auditorium-like classroom as the bell sounded. The room fell completely silent as he moved toward his front and center table, limping slightly and supported by his heavy shillelagh-like cane. His full shock of white hair coupled with his nonsense facial expression of toughness made clear that he was a person of formidable tenacity. Osborne's technique of classroom exchange was legend, and the new first-year class remained profoundly apprehensive though they had advanced to the third week of the term.

Osborne laid his cane on his desk, sat down, opened the class seating chart, and slowly began scanning the array of tense faces. The students appeared to have aligned themselves in perfect diagonally straight lines in the hope of being shielded from his view. Osborne was credited with the uncanny knack of selecting the most unprepared student for the daily racking—or so it seemed, since there was no way to prepare for Osborne.



ILLUSTRATIONS BY MARTI SOUERS





"We will continue our discussion of the law of torts," he said nonchalantly, his eyes deliberating between the class and the seating chart. "Does anyone have any questions as to where we've been so far?" he asked with mock innocence. The class stiffened. Unsubstantiated but spine-chilling rumors had circulated regarding the fate of the last student to volunteer in one of Osborne's classes, back in 1947.

"Very well, then, there being no questions, I will assume that complete understanding is the case—we shall see. Mr.—ah—Mr.—ah." The class froze as Osborne fingered the seating chart. "Mr. LaTourneau." LaTourneau instantly became an island of anxiety amidst a sea of relief. The diagonal lines relaxed. It was known that once Osborne selected his dialogue victim, it was for the whole hour. "Will you briefly state for us, in your own words, your present understanding of the purpose of the law of torts?"

Glancing at his notes, LaTourneau, Phi Beta Kappa from an Ivy League school, president of his undergrad class, and winner of several intercollegiate debating competitions, became resigned and somewhat composed. He began his recitation. "Well, sir, the law of torts exists for the purpose of preventing persons from hurting one another, whether in respect to their property, their persons, their reputations, or anything else which is theirs. The fundamental principle of this breach of the law is *alterum non laedere*, to hurt nobody by word or deed. An action in tort, therefore, is usually a claim for pecuniary compensation in respect of damage so suffered." LaTourneau felt numb but adequate.

"Excellent, Mr. LaTourneau, excellent, Latin and all," said Osborne with dramatic enthusiasm, "but you forgot one word. You forgot to say *unquote*, didn't you, Mr. LaTourneau? Salmond cited those words over fifty years ago and he attributed them to Justinian as the basis for all law. I asked for *your* own words,

Mr. LaTourneau."

"Well, sir, I couldn't hope to offer better words than Salmond's," LaTourneau ventured after an uncomfortable pause.

"Indeed, indeed. I'll not argue that. Evidently, Mr. LaTourneau, you have sufficient time not only to fully comprehend your assigned reading, but to do advanced reading as well. Very commendable. And since you've chosen to speak for Salmond, may I assume that you comprehend his words?"

"Yes, sir," said LaTourneau, unabashed.

"Well then, Mr. LaTourneau, let us focus on Salmond's words 'property, persons, reputations, or anything else which is theirs,' I believe you said. What is property, Mr. LaTourneau?"

"What is property, sir?"

"That's what I asked," said Osborne.

"Well . . . property is either—real or personal," said LaTourneau cautiously.

"Yes, but *what* is it, Mr. LaTourneau?" snapped Osborne.

"Well, sir . . . property is the subject of possession."

"Mr. LaTourneau, you've now introduced a new term—'possession'. If you feel that this term is necessary to your definition of property, then pray tell us what possession is."

"Well . . . possession is the exercise of physical control over . . . ah . . . property." LaTourneau at once wished he could retrieve the word.

"Control over *what*, Mr. LaTourneau? We seem to be going in a circle," said Osborne impatiently.

"Ah . . . control over . . . ah . . . things . . . objects." LaTourneau gestured with his hands as he groped for words.

"And you say that the control has to be physical, Mr. LaTourneau?"

"I think so, sir."

"You think so, Mr. LaTourneau? Do you mean to say that the definition of the term you've introduced has only your speculation as its basis? Mr. LaTourneau, is that your book in front of you?" asked Osborne.

"Yes, sir." LaTourneau showed momentary relief at the question's simplicity.

"Do you have possession of it, Mr. LaTourneau?"

"Yes, sir."

"Physical possession?"

"Yes, sir."

"Are you touching it, Mr. LaTourneau?"

"Ah . . . no, sir."

"Well then, in what manner is your alleged possession physical?"

"Well, sir, I'm not touching it but I do have the physical ability to control it," LaTourneau guessed again.

"I see. Then possession of your book means the physical ability to control it. Is that right, Mr. LaTourneau?"

"I think so, sir . . . I mean . . . yes, sir, it is." A noticeable twitch became evident in LaTourneau's left eyelid.

"Suppose that the student next to you was the world's heavyweight boxing champion, and suppose further that he had adamantly expressed to you his intent to possess the book and he sat poised and determined to have it. Would you, according to your reasoning, still have possession of it, Mr. LaTourneau?"

"Well, sir . . . ah . . . ah . . . I think that my mental intent to possess it would be the controlling factor."

"Mr. LaTourneau, am I to understand, then, that mental intent overrides your requirement to physically control the book—and that physical control is, therefore, no longer a requirement for possession?"

"Well, sir, my intent . . ."

"Mr. LaTourneau, my question was unambiguous and completely susceptible to a 'yes' or 'no' answer—now which is it?"

"No, sir . . . ah . . . the control does not have to be physical."

"Then what you said earlier about physical control was nonsense, was it not, Mr. LaTourneau?"

"I didn't quite mean it that way, sir."

"But you said it, Mr. LaTourneau. Don't you mean what you say?"

"Usually, sir, but sometimes I don't



say what I mean."

"Touché, Mr. LaTourneau, touché," said Osborne quickly. "Then the ability to exercise physical control is not to be taken literally, but now seems to depend upon some sort of mental intent to control it, is that correct?"

"Yes, sir."

"Tell me, Mr. LaTourneau, are you one of our married students?"

"Yes, sir."

"Suppose then, Mr. LaTourneau, that unknown to you, before you came to school this morning, your wife had slipped five dollars into your wallet. Now you couldn't have any mental intent with regard to the five dollars since you weren't aware it existed. Hence, you wouldn't have possession of it and, therefore, no property rights in it, such that if someone took it from you, you would have no claim. Is that your contention, Mr. LaTourneau?"

"Well, not exactly, sir. Ah... ah... if it's the kind of thing that one would normally desire possession of, and it's in his wallet, then I would say he has possession... yes... he would have possession." LaTourneau's answer seemed to lack his earlier conviction, and the eyelid twitch was now amplified.

"So possession seems to depend upon desirability after you find out what it is? Suppose then that it was a black widow spider rather than five dollars: Would you have possession of it?"

"Ah... no, sir."

"But suppose it was a very rare specimen and of considerable money value to a collector?" asked Osborne. Both of LaTourneau's eyelids were twitching, out of sync.

"I can't hear you, Mr. LaTourneau," said Osborne with his palm cupped around his ear in feigned deafness.

"I don't know, sir."

"Mr. LaTourneau, do these questions seem trivial?"

"Not trivial, sir, but somewhat removed from real life."

"I didn't bring up the term 'possession'; you did. And now it appears that you don't know the meaning of words you use. As for real life, Mr. LaTourneau, last week in New York City a man was arrested. He had

a wee bit better than you've done here. Now then, Mr. LaTourneau, what is possession?" asked Osborne calmly, as though the hour had just begun.

"I don't know, sir."

"What is property, Mr. LaTourneau?"

"I don't know, sir."

"Those, Mr. LaTourneau, are undoubtedly the two most accurate statements you have made thus far this hour. Tell me, did you ever think that you knew what property was?"

"Yes, sir."

"And now you don't?"

"No, sir."

"Mr. LaTourneau, are there many things you are quite sure of?"

"I don't know, sir."

"Now then, Mr. LaTourneau—since Salmond has evidently granted you his power of attorney, what did he mean when he professed that a purpose of tort law is to prevent people from hurting one another in respect to their persons. What does that mean, Mr. LaTourneau—in respect to their persons?"

"It means that people can't physically harm one another, sir."

"Mr. LaTourneau, you seem to have a preoccupation with the word 'physical'. Very well, then, have you ever seen a vicious tackle intentionally executed in the course of a football game?"

"Yes, sir."

"Had a tort been committed, Mr. LaTourneau?"

"I don't think so, sir. That's one of the risks of the game."

"Good. Now what if, after the tackle, the downed player was intentionally piled upon by the opposition—an offense that was outside the rules of the game?"

"It still seems to be one of the risks, sir, and the rules of the game provide penalties."



rented a furnished apartment and was occupying that apartment when it was raided the next day by the police, who found a substantial quantity of heroin hidden in a closet panel. The newspapers reported that the man claimed that he had no knowledge of the heroin and that it must have been there before he rented the apartment. New York has a statute making the illegal possession of narcotics a crime. Now it seems to me, Mr. LaTourneau, that the precise definition of 'possession' was very much at issue and that real life was considerably involved in what we've been talking about. It seems further, Mr. LaTourneau, that if you were defending this man on the issue of possession, you would have to do just



"Good. Now what if, after the pile-up was cleared, a member of the opposition intentionally kicked the downed player squarely in the head? Any tort? Does playing the game include the risk of being intentionally kicked in the head long after the whistle?"

"I'm not sure, sir."

"Well, what if he's kicked five times, Mr. LaTourneau?"

"Well, that would be pretty outrageous, sir. I would think that a tort might be involved."

"Good. Now what if he'd only been kicked once?"

LaTourneau sensed the jaws of a trap. "I don't know, sir."

"Well, you were pretty sure about five kicks, Mr. LaTourneau! How about twice?" The trap closed. His eyelids were now twitching in unison and at high frequency.

"Well, sir, I guess it depends on the extent of the injury."

"You've completely lost me, Mr. LaTourneau. It now seems that you've made the extent of the injury the determining factor as to whether a tort was committed. Have you done your assignment for today, Mr. LaTourneau?"

"Yes, sir."

"Well then, in the *Draper* case, spitting in another's face cost thirty-five hundred dollars. And in the *Ragsdale* case, an unconsented-to lusty hug and kiss were priced at forty-seven hundred dollars. Do you agree with these cases, Mr. LaTourneau?"

"Yes, sir."

"Good. Were the physical injuries in those cases very extensive, Mr. LaTourneau?"

"No, sir."

"Does there have to be any physical injury whatsoever, Mr. LaTourneau?"

"I suppose not, sir."

"Are you sure, Mr. LaTourneau?"

"Yes, sir."

"Mr. LaTourneau, if I were to call

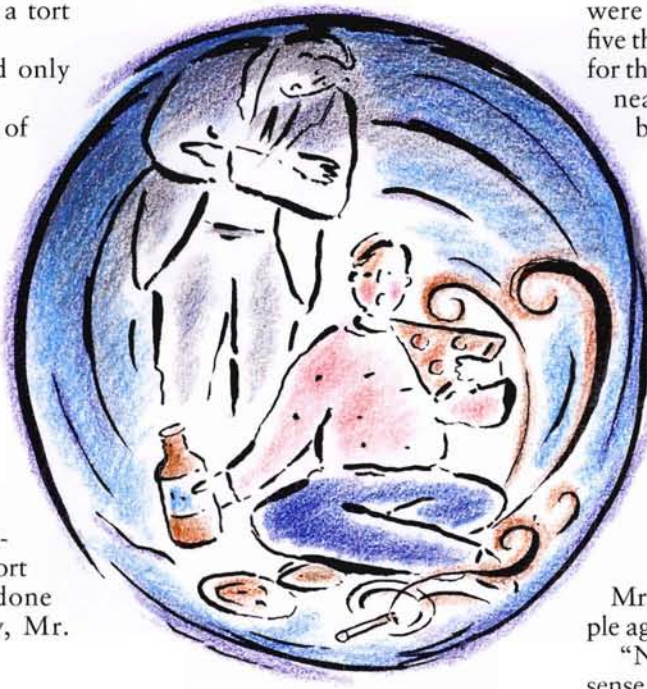
you an idiot, would I be hurting you in respect to your person sufficient to sustain a tort action?"

"I don't think so, sir."

"What if I called you a son-of-a-bitch, Mr. LaTourneau?"

"I beg your pardon, sir!" said LaTourneau, momentarily entertaining anger, then quickly rejecting it.

"A son-of-a-bitch, Mr. LaTourneau. Would that be actionable?"



"I don't know, sir."

"What if I made a mere motion threatening to strike you, Mr. LaTourneau?" asked Osborne, raising his fist.

"Yes, sir, that would be an assault."

"Good, Mr. LaTourneau. Now tell me, where was the harm? I didn't strike you and commit a battery. I merely frightened you by the gesture. What is the hurt?"

"Well, sir, people have a right not to be intentionally frightened."

"Fright. Good, Mr. LaTourneau. Then what about other forms of mental pain? Suppose a drunken truck driver runs down a small child within the sight of its mother? In addition to

the child's injuries, will the mother be hurt in respect to her person for the mental anguish she suffers? And would there be a tort action for her anguish, Mr. LaTourneau?"

"I would think so, sir."

"Are you certain?"

"Yes, sir."

"But suppose this had happened on the Fourth of July, during a parade, and within the sight of five thousand other people, all of whom were horrified by the sight. Would five thousand lawsuits be appropriate for their mental anguish, Mr. LaTourneau? Haven't all five thousand been hurt in respect to their persons by witnessing that dreadful scene?"

"It would certainly be an unpleasant experience for them, sir."

"Will five thousand tort actions stand, Mr. LaTourneau?"

"I guess so, sir."

"Wouldn't the courts fill up pretty fast, Mr. LaTourneau? Does that really make sense?"

"I guess not, sir."

"What doesn't make sense, Mr. LaTourneau—to protect people against mental anguish?"

"No, sir, I guess it doesn't make sense . . ."

"Because it would fill up the courts overnight, Mr. LaTourneau? Is that your reason?"

"Yes, sir." The twitch had invaded LaTourneau's left cheek.

"Is this a good reason for denying remedies for valid legal claims, Mr. LaTourneau—because the court calendars might get too busy? Should that be a limiting or controlling factor?"

"I guess not, sir," LaTourneau answered automatically, aware that his only out was the clock. Why had it moved so little since his torment began?

Osborne, sensing the young man's total frustration, changed the pace. "Do you smoke, Mr. LaTourneau?"

"Yes, sir."



"In view of the growing quality and quantity of cancer evidence, Mr. LaTourneau, are you being hurt in respect to your person by smoking?"

"Yes, sir."

"By whom, Mr. LaTourneau?"

"By the tobacco people, sir?" asked LaTourneau, hoping he had guessed right.

"Are you being coerced to smoke, Mr. LaTourneau?"

He had guessed wrong. "No, sir."

"Then you are smoking of your own free will and accord, right?"

"Yes, sir."

"Are you sure, Mr. LaTourneau?"

"Beg your pardon, sir!"

"Are you a psychiatrist or a psychologist, Mr. LaTourneau?"

"No, sir."

"Then how can you be sure that you are smoking of your own free will and accord? Have millions of dollars in advertising been totally wasted on you, Mr. LaTourneau?"

"I don't know, sir."

"Well, Mr. LaTourneau, not you, perhaps. But what of the rest of us, preyed upon as we are by the best talents of Madison Avenue—luring us, man and youth alike, to the glories of smoking with its promise of sex fantasies with young girls who also smoke; with its promise of the good life in the great Western outdoors; with its proof that athletes of standing enjoy their cigarettes? If this advertising serves its purpose and induces us to smoke, then aren't we being hurt in respect to our persons, Mr. LaTourneau?"

"I guess so, sir."

"Will an action for tort stand, Mr. LaTourneau?"

"I don't know, sir."

"What do you mean, you don't know? Are we being hurt in respect to our persons?"

"Yes, sir."

"What about food, then, Mr. LaTourneau?"

"Sir?"

"Food, Mr. LaTourneau, food. Food is abundantly advertised such that people are induced to overindulge, causing premature cardiac

conditions, liver ailments, and the like. Aren't we being hurt in respect to our persons by this advertising?"

"I guess so, sir."

"Will a tort action stand, Mr. LaTourneau?"

"I'm not sure, sir."

"Damn it, Mr. LaTourneau, are we or are we not being hurt in respect to our persons by being induced to overindulge?"

"Yes, sir."

"Then will a tort action stand?"

"Yes, sir."

"Really? Well, Mr. LaTourneau, by way of summary, it seems as though the law of torts will protect us from heavyweight champions, black widow spiders, football injuries, frights, the sight of dreadful things, smoking, overeating, advertising, unpleasantness, the moon, and a host of other things—limited only, it appears, by the length of our conversation. It seems then, Mr. LaTourneau, that the law of torts is omnipotent and will secure universal peace of mind for all of us. That being the case, there is no need to waste your time on any of the other law courses. Is that your view, Mr. LaTourneau?"

"No, sir."

"Then what is the purpose of the law of torts? What is its scope, its breadth, its depth? What are its boundaries, and are those boundaries fixed or moving? What human interests will it protect—and what human interests are left to other bodies of law or agencies of society for protection—and what human interests aren't protected at all? Well, Mr. LaTourneau?"

"I don't know, sir."

"Of course you don't, Mr. LaTourneau, we know that. That's why you are here. Perhaps after this first year, and the study of a thousand or so cases—and after several years of meditation, reflection, analysis, synthesis and practice—then, Mr. LaTourneau, if you're fortunate, you may experience a sudden blinding glimpse of the obvious. Then you can read Salmond and others and hope to capture some measure of insight. Well, Mr. LaTour-

neau, you seem to have wasted our whole hour, haven't you?"

LaTourneau paused. "I don't think so, sir."

The trace of a smile showed on Osborne's face. "Neither do I, Mr. LaTourneau," he said as the bell rang. "Neither do I." □

*Arthur Leinwohl (AB '56) participated in Osborne dialogues as a member of the Law Class of 1958, with whom he retains ties. A member of the California bar since 1966, he now practices with his wife, Bonnie, in Foster City. "I flash back on Osborne wherever I witness a particularly effective cross-examination, or hear a judge or a justice pose a penetrating or fundamental question to counsel," he declares.*

*The imagined dialogue above was originally written in 1964 and won third place for Short Story in the 1965 Santa Clara Valley (California) Writer's competition. Recently recommended to the editors by a discerning classmate, it has been lightly adapted and abridged for publication.*

#### AND YOU, DEAR READER?

What do you think of the Socratic method of teaching so memorably practiced by Professor Osborne? Was it an unnecessary "trial by ordeal" or a first-class way of training students to think like lawyers?

Please send your comments to the editor, Constance Heller, at Stanford Law School, Stanford, CA 94305-8610. Letters may be excerpted for publication in the forthcoming STANFORD LAW ALUM.



# et ISSUE

## THE TEMPEST-TOSSED

*New groups of refugees and asylum-seekers test our historic generosity of spirit*

by Bill Ong Hing  
*Associate Professor of Law*



The spectacle—some might say, spectre—of boatloads of Chinese at America's shores has fueled the controversy over our refugee policies and contributed to the debate over the impact of immigrants on our society. Arguing that our borders are far too porous, some policymakers have rushed to attack the refugee and asylum system under which an increasing number of émigrés are seeking admittance. Such proposals include summary screening, a higher burden of proof for asylum, and no judicial review. My purpose here is not to address the details of these proposals but rather to offer some background on issues related to the refugee and asylum system. We should, I believe, stop and consider before raising further barriers against people whose lives may be at stake.

The United States takes considerable pride in its long history of providing refuge to foreign nationals displaced by the ravages of war or persecuted by totalitarian governments. As early as 1783, President George Washington proclaimed, "The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed



and persecuted of all nations and religions." For two centuries kindred statements by leaders and citizenry have helped project, even if they did not always accurately reflect, a certain national generosity of spirit.

This generosity has often allowed exceptions to existing policies on immigration from particular countries or regions of origin. Thousands of refugees, sometimes hundreds of thousands, were escorted here by an array of congressional acts that, on an ad hoc basis, superseded national quotas. Prominent among these was the 1948 Displaced Persons Act, which enabled 400,000 refugees and displaced persons to enter, mostly from Europe. The 1953 Refugee Relief Act admitted 200,000 refugees, including 38,000 Hungarians and about 2,800 refugees of the Chinese Revolution.

Refugee migration to the United States finds its origin in the noble pursuit of a humanitarian foreign policy. In passing the Displaced Persons Act, Congress declared: "It is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas [,] . . . admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States."

This rhetoric notwithstanding, refugee law and policy has reflected the tensions between humanitarian aims and practical domestic and international concerns. In the 1930s, for example, the United States turned away thousands of Jews fleeing Nazi persecution, in large part because of the powerful restrictionist views then dominating immigration laws. A 1939 refugee bill that would have rescued 20,000 German children was defeated on the grounds that the children would exceed the German quota. And in 1972 the U.S. Coast Guard and Naval intelligence, confused over proper asylum procedures and indecisive in the face of conflicting objectives, returned an asylum-

seeking Lithuanian seaman to his Soviet ship.

Despite these tensions, policymakers showed every sign through the early 1970s of being satisfied with their system of policies, laws, and ad hoc decisions. As they saw it, whenever large numbers of deserving refugees appeared, new legislation could be enacted or existing laws and regulations manipulated. That sort of flexibility in a legal regime was, to their minds, desirable. It also permitted policymaking consistent with their political preference for refugees from Communism.

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*Refugee law and  
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national concerns*

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A closer look at the basic structure of the system and the policies that informed it bears witness to this ideological bias. Consider the 1952 McCarran-Walter Act, which granted the attorney general discretionary authority to "parole" into the United States any alien for "emergent reasons or for reasons deemed strictly in the public interest." Although the original intent was to apply this parole authority on an individual basis, the 1956 Hungarian refugee crisis led to its expanded use to accommodate those fleeing Communist oppression.

The parole authority was also used to admit more than 15,000 Chinese who fled mainland China after the 1949 Communist takeover and more than 145,000 Cubans who sought refuge after Fidel Castro's 1959 coup.

Satisfaction of policymakers with the status quo began to evaporate with the upsurge in Asian immigration that started in the mid-'70s. The watershed event was the fall of Saigon in April 1975. Initially, the United States merely wanted to evacuate the approximately 17,600 American dependents and government employees. However, to invoke numerical restrictions in the midst of a controversial and devastating war would have been unconscionable, and evacuees soon also included former employees, some 4,000 orphans, 75,000 relatives of American citizens and residents, and 50,000 Vietnamese government employees and officials. Between April and December 1975, the United States thus admitted 130,400 Southeast Asian refugees, 125,000 of whom were Vietnamese.

The exodus did not stop there. By 1978 thousands more were admitted under a series of Indochinese Parole Programs authorized by the attorney general. Following the tightening of Vietnam's grip on Cambodia, several hundred thousand "boat people" and many Cambodian and Laotian refugees entered. In fact, annual arrivals of Southeast Asian refugees increased almost exponentially: 20,400 in 1978; 80,700 in 1979; and 166,700 in 1980.

The unpredictable numbers of Southeast Asian refugees provided part of the impetus for reform and, ultimately, passage of the 1980 Refugee Act. The new law provided two tracks for admission to the United States. The first gives the President power to admit refugees who are outside the United States, while the second relates to procedures by which aliens in the U.S. or at ports of entry may apply for asylum. To obtain either refugee or asylum status, a person must establish a

*Continued on page 52*



# FORUM

*A new section of readings.*

*Impressed by the richness of thought among members of the greater Stanford Law community, we present this sampling.*

## The Question of Force

by Hon. Warren Christopher '49

I have spent a good portion of my life practicing various forms of diplomacy, negotiation, and problem solving, from the effort to secure the release of the American hostages in Iran, to responses to urban unrest and police brutality, to the practice of law over four decades. I have argued, and still believe, that diplomacy is a neglected imperative. I believe we must apply new dispute resolution techniques and forms of international arbitration to the conflicts that plague the world.

I also know from experience that nations do not negotiate on the basis of goodwill alone; they negotiate on the basis of interests, and therefore on calculations of power. As I reflect on our experience in the Cold War, it is clear that our success flowed from our ability to harness diplomacy and power together—both the modernization of our forces and negotiations for arms control; both advocacy for human rights and covert and overt opposition to Soviet expansionism.

In the years to come, Americans will be confronted with vexing questions about the use of force—decisions about whether to intervene in border disputes, civil wars, outright invasions, and in cases of possible

genocide; about whether to intervene for purposes that are quite different from the traditional mission of our armed forces—purposes such as peacekeeping, peacemaking, humanitarian assistance, evacuation of Americans abroad, and efforts to combat drug smuggling and terrorism. While there is no magic formula to guide such decisions, I do believe that the discreet and careful use of force in certain circumstances—and its credible threat in general—will be essential to the success of our diplomacy and foreign policy. Although there will always be differences at the margin, I believe we can—and must—craft a bipartisan consensus in which these questions concerning the use of force will no longer divide our nation as they once did.

However, we cannot respond to every alarm. I want to assure the American people that we will not turn their blood and treasure into an open account for use by the rest of the world. We cannot let every crisis become a choice between inaction or American intervention. It will be this administration's policy to encourage other nations and the institutions of collective security, especially the United Nations, to do more of the world's work to deter aggression, relieve suffering, and keep the peace. In that regard we will work with Secretary General Boutros Ghali and the members of the Security Council to ensure the U.N. has the means to carry out such tasks. . . .

Ultimately when our vital interests are at stake, we will always reserve our option to act alone. As [the President] has said, our motto in this era should be: "together where we can; on our own where we must."

*Christopher is the U.S. Secretary of State. From his prepared statement for his confirmation hearing before the Senate Committee on Foreign Relations, January 13–14, 1993.*



by Prof. John H. Barton '68

We need to build a link for citizens into the United Nations system. The U.N. system is a system of nation states and provides essentially no role for a representative input from the populations of nations. Yet the world has moved on to a much more complex pattern of sub-national, trans-national, and supra-national interests and linkages—and these interests and linkages are particularly important in the development, environment, and economic areas.



Europe has already responded to these concerns. The European Communities have a Parliament, once chosen by national parliaments, now directly elected. Although weak, the Parliament has growing powers and has sometimes compelled significant rethinking of a policy. And the Council of Europe has a Parliamentary Assembly, chosen by national parliaments and responsible for a number of the most important European advances in human rights.

Ultimately, the U.N. will be unable to function without such a body, possibly a popularly chosen "House of Representatives" to parallel the institutions that represent national governments. In the meantime, we must explore more consensual approaches that might be available without Charter amendment.

*Barton is Stanford's George E. Osborne Professor of Law. From his statement before the U.S. Commission on Improving the Effectiveness of the United Nations, January 25, 1993.*

## A Big Hand for Ginsburg

by Prof. Gerald Gunther

**R**uth Ginsburg was my student at Columbia Law School. She was a brilliant student; she demonstrated extraordinary intellectual capacities, as she has in everything she has undertaken throughout her life.

In my close attention to Ruth's career over the years, especially her judicial career, some of Judge Learned Hand's words often come to mind as aptly describing Ruth Bader Ginsburg. Hand once said that the prime condition of great judging is a "capacity for detachment." A great judge, he also said, acts "with patience, courage, insight, self-effacement, understanding, imagination and learning."

Ruth Bader Ginsburg, I am convinced, possesses the ingredients, the "moral" qualities, Hand thought essential for greatness. She is also char-



THE BETTMANN ARCHIVE

## Elephants and National Sovereignty

by Raymond Bonner '67

**M**ost scientists and conservationists believe that culling [elephant herds] is sometimes necessary for ecological reasons—to save trees and forests, to preserve other species, and, however daft it may sound, even to save elephants. . . .

[But] what if Zimbabwe decided to cull elephants for no scientific reason whatsoever, but simply because Zimbabweans were complaining that there were too many elephants? Can one imagine 50,000 black bears in California, which is about the size of Zimbabwe? The issue is not just numbers, but sovereignty: Does the international community have the right to tell a country what to do about its wildlife? Would New Yorkers

tolerate Canadians or Frenchmen, let alone Africans or Asians, telling them how many bison there ought to be in Central Park? Many Americans do not even want their own government interfering. . . . This view echoes the sentiments that many Africans have about elephants and other wild animals—they might be wonderful, and even worth conserving, but not near my farm.

*Bonner has been a foreign correspondent for the New York Times and a staff writer with the New Yorker. From his latest book, At the Hand of Man: Peril and Hope for Africa's Wildlife (Alfred A. Knopf, 1993).*





**Hon. Ruth Bader Ginsburg**

acteristically sympathetic to the fact that the disputes before her involve human beings and that a court's rulings have an impact upon those human beings.

I fully expect to criticize Justice Ginsburg's opinions on the Court—after all, that is my professional task. I am confident, however, I will never have reason to doubt her integrity, her judicial temperament, and her analytical abilities.

*Gunther is the William Nelson Cromwell Professor of Law at Stanford and author of a forthcoming biography of the late Judge Hand. Excerpted from Prof. Gunther's statement to the Senate Judiciary Committee, July 23, 1993, urging the confirmation of Judge Ginsburg to the Supreme Court.*

## Going Through the Motions

by Prof. Deborah L. Rhode

In a series of cases during the late 1970s and early 1980s, the Supreme Court held that states could require parental consent or notification for abortion services to minors as long as adjudicative procedures were available to bypass such require-

ments under specified circumstances. To a majority of Justices, parental involvement rules were justified by the "peculiar vulnerability" of adolescence and the importance of preserving family ties. However, a minor should be able to avoid consent and notice requirements by establishing in court either that she is sufficiently mature and well-informed to make an independent decision concerning abortion or that, even if she is immature, the abortion would be in her best interest. . . .

Do petitions to bypass parental involvement result in thoughtful exercise of judicial discretion? Or should the resources consumed by courts and counsel in bypass cases be directed to more productive approaches, such as pregnancy prevention? . . .

[The evidence is that judicial bypass procedures have not] usefully contributed to adolescent decision making. Of some 1,300 Massachusetts abortion cases involving petitions to bypass parental consent, courts found the adolescent to be mature in 90 percent of these cases and in all but five of the remainder held that abortion was in her best interest. Four of those cases were either overturned on appeal or resulted in abortions authorized by another judge. In the single case where the court refused to permit termination of the pregnancy, the petitioner accomplished that objective in another state. Although the frequency of adolescent abortion has declined in Massachusetts since the implementation of consent requirements, almost all the decline appears attributable to an increase in out-of-state abortions.

Studies of other state notification procedures similarly find that all but a tiny percentage of bypass petitions are granted.

*Rhode is a member of the Stanford Law School faculty. From her chapter, "Adolescent Pregnancy and Public Policy," in The Politics of Pregnancy, edited by Rhode and Annette Lawson (Yale University Press, 1993).*

## Expert Witnesses: A Proposal

by Dan L. Burk, JSM '93

Several factors in our adversarial legal system currently work against judges' ability to ascertain what is objective scientific evidence in particular disputes. First, the written code of conduct governing lawyers' professional behavior does not encourage them to act impartially; it requires them, instead, to act as zealous advocates on their clients' behalf.

The norms of the scientific community, by contrast, hold that scientists are expected to recognize meritorious ideas from whatever the source, to present their findings in an unbiased manner, and to test new ideas rigorously before accepting them. In a court proceeding, however, the norms of science are often quickly superseded by those of law. The most obvious reason for a scientist to abandon the norms of science is money. Working as an expert witness can be extremely lucrative, and it is well known among lawyers that experts can be found who will testify to almost anything if the price is right.

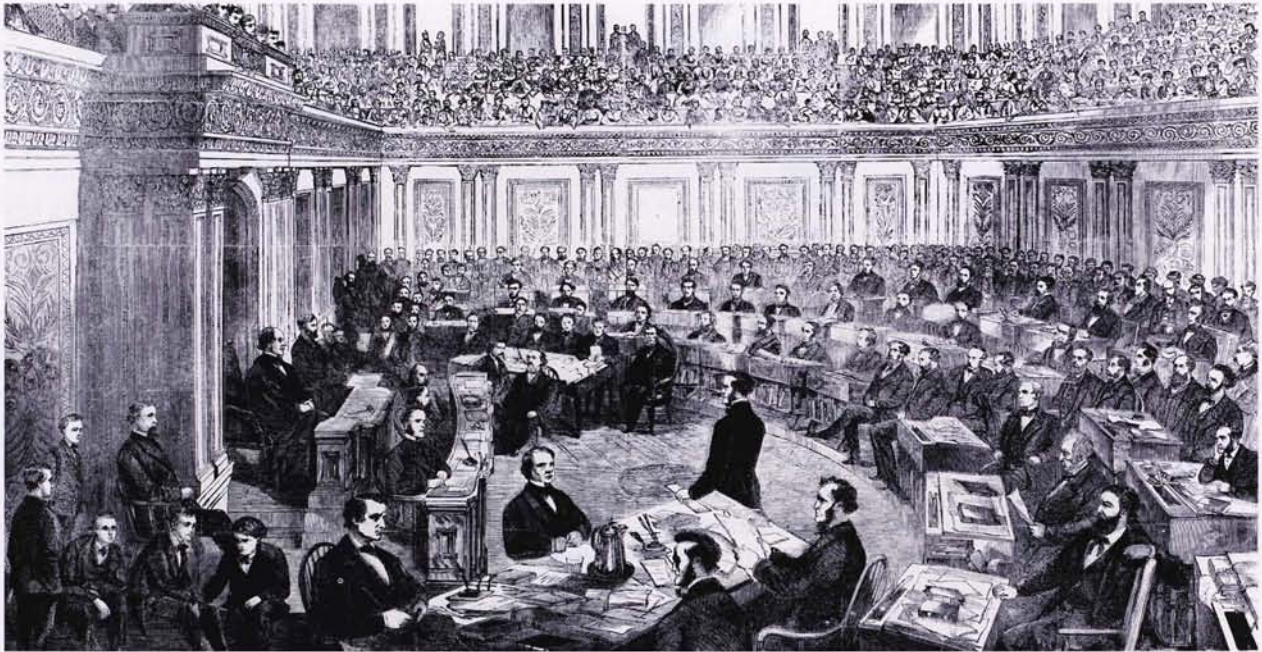
The legal system's inability to manage scientific disputes results largely from its inability to recognize when scientists, for whatever reason, have at least temporarily traded the values of science for those of law.

The most workable [proposed solution] would provide for judges, rather than the parties to the dispute, to recruit the experts and require the parties to pay for the expert's time.

For a system of court-appointed experts to work, though, the judiciary must have assistance in selecting the experts. The most likely source for such assistance is scientific societies. By providing a roster of competent experts in particular specialties and subspecialties, these societies could play a major role in helping the courts deal with scientific issues.

*Burk, a 1992/93 teaching fellow at the School, is a biologist as well as a lawyer. Adapted from "When Scientific Norms are Abandoned in the Courtroom," Chronicle of Higher Education, March 17, 1993.*





The U.S. Senate tries President Johnson

## Two Impeachments that Shaped America

by Hon. William H. Rehnquist '52

**T**he Constitutional Convention [made] two original contributions to the art of government. The first was the idea of a presidential, as opposed to a parliamentary, system of government, wherein the executive is chosen by the electorate and is not dependent upon the confidence of the legislature for his office. The second was the concept of an independent judiciary, with the authority to declare invalid acts of the legislature that exceeded the limits imposed by the Constitution. The first of these was threatened by the impeachment and trial of Andrew Johnson in 1868, and the second was threatened by the impeachment of Samuel Chase in 1805.

Both proceedings took place at a time when the United States was undergoing a sea change in its political beliefs. . . . At such times it is easy for those heavily engaged in the struggle to see it as an apocalyptic confrontation between good

and evil, when customary restraints must be cast off in order that evil may not triumph. . . . Provisions in the Constitution for judicial independence, or provisions guaranteeing freedom of speech to the president as well as others, suddenly appear as obstacles to the accomplishment of the greater good. . . .

The framers, and the authors of *The Federalist Papers*, had not envisioned political parties as we now know them. But they were very much on the scene by 1805, and even more so in 1868. Would the dominant role played by political parties make the Senate a partisan tribunal, which would be willing to undermine the fundamental principles of the Constitution in order to remove a political enemy from office? . . .

Remarkably, in each of these two cases, the answer to that question proved to be no. There were undoubtedly political partisans on

both sides of the aisle in each case, but each time enough members of the majority party balked at the demands for party unity to acquit both Chase and Johnson. . . .

The importance of these two acquittals in our constitutional history can hardly be overstated. We rightly think of our courts as the final voice in the interpretation of our Constitution, and therefore tend to think of constitutional law in terms of cases decided by the courts. But these two "cases"—decided not by the courts but by the United States Senate—surely contributed as much to the maintenance of our tripartite federal system of government as any case decided by any court.

*Rehnquist is Chief Justice of the U.S. Supreme Court. From his book, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (William Morrow, 1992).*



## Can Unions Come Back?

by Prof. William B. Gould IV

**T**he decline of the labor movement—a kind of free-fall descent during the 1980s and 1990s—has made workers more vulnerable than at any time since the Great Depression of the 1930s. The plight of many workers coupled with the inability of unions to represent them at the bargaining table is a volatile combination. It is one that erodes the fabric of democratic institutions and is thus profoundly worrisome to all who value pluralism and a system of checks and balances in the workplace.

Can unions come back? Only a confluence of factors can bring this about. The first is a friendly administration, like Roosevelt's New Deal in the 1930s which provided help to the unions in the midst of the Great Depression, and legislation designed to promote both collective bargaining and industrial democracy.

The second is the unions themselves. They must rid themselves of their lethargy and radically restructure their organizations along the lines of early industrial unions. This of course is unlikely to happen unless some external force, economic or otherwise, prods them to do so. Economic history in this century suggests that the dramatic ebbs and flows of the economy coincide with the growth and decline of the unions.

A cautionary note is in order. While there is no evidence that unions can come back and reverse their downward movement in this century, it is quite possible that unorganized workers, less well protected than their union counterparts in difficult economic circumstances, may be storing away a resentment that will explode in coming years.

*Gould is the School's Charles A. Beardsley Professor of Law. Adapted from his latest book, Agenda for Reform: The Future of Employment Relationships and the Law (MIT Press, 1993).*

## American Workers, Foreign Owners

by Eileen M. Mullen '93

**M**any Japanese corporations have a practice of rotating Japanese managers from Japanese parent corporations into executive and managerial positions in American subsidiaries. Rotated managers typically remain at their American assignments for three to six years before returning to Japan.

The policy of rotating managers is just one example of ASJF [American subsidiaries of Japanese firms] employment practices that Americans allege discriminate in favor of Japanese personnel and prevent Americans from rising within the ranks of management. ASJFs have also been accused of excluding Americans from corporate decision-making, giving Americans titles without authority, and maintaining separate career paths for American and Japanese employees.

Critics maintain that ASJFs exclude non-Japanese employees from the decisionmaking process by inviting only Japanese managers to attend business meetings, conducting meetings in Japanese without providing translation, withholding information from non-Japanese employees, and discussing business during after-hours socializing open only to Japanese personnel.

Moreover, Japanese employees at ASJFs have complete job security, while Americans are employed at will. The result, according to critics, is that American employees bear nearly all of the burden when the firm seeks to reduce its workforce.

Establishing that these practices occur, however, does not mean that they necessarily violate American law. Foreign-owned companies operating in the United States may be exempt from Title VII jurisdiction by virtue of bilateral commercial agreements. Furthermore, the employment practices may not contravene Title VII. Americans would probably expect an American firm located in another country—France, for example—to depend on a cadre of high-ranking, English-

speaking employees.

Whether, and under what circumstances, the practice of rotating managers violates existing American law is unclear. What is clear is that the policy poses complex questions for American EEO jurisprudence. American antidiscrimination law is based on a domestic model, which assumes that employment discrimination in the United States emanates from the policies of American employers and that discrimination based on citizenship will be against *foreigners*, not American citizens.

Current antidiscrimination law offers no guidance as to whether American courts should attempt to protect American workers from practices which appear exclusionary but which originate on foreign soil, and if so, how courts might provide such protection.

These are uncharted waters for the domestic model of EEO jurisprudence.

*Mullen graduated from Stanford Law School in June. Adapted from her note, "Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law," Stanford Law Review, Vol. 45, No. 3 (February 1993).*

## Health Care Reform: A Note of Caution

by Prof. Henry T. Greely

*Editor's note: The developing battle over health care financing gives credence to these 1991 predictions.*

**L**et's start with three hard truths and one bleak scenario.

The first hard truth is that significant reform has to come from the federal government. Washington retains exclusive control over employment-related health insurance.

The second hard truth is that passing any meaningful reform at the federal level will be difficult.



In Washington, the center of political attention, the stalemate is very well protected.

The third hard truth: any program is only as good as its implementation.

These hard truths lead to one possible scenario. Sometime in the next decade, responding to ever louder cries of pain from the middle class about diminishing access and from business about increasing costs, the federal government will institute a major reform of the health care financing system. It will either adopt a Canadian-style single payer system of national health insurance, or, more likely, will require employers to cover their workers and dependents while building a social safety net for the rest. The President and Congress will fight over who is to get credit for this breakthrough, the crisis will be "solved," and the system will soon be in worse shape than ever.

The compromises necessary for passage will have given control over

some strategic aspects of the process to the medical profession, to insurance companies, to large and small employers, and to public interest groups. Those groups, and only those groups, will participate in the implementation of the program, each to guarantee continuance of its own power. The legislation's fine print about implementation will guarantee that the process of providing medical care will continue much as before. The hard questions—about what we mean by a right to medical care, about how we should confront the scarcity of resources that requires some form of rationing, about how medical care should be organized and provided—will never have been answered.

*Greely is a member of the Stanford Law School faculty. Adapted from "The Future of the American Health Care System: An Introduction to the Health Symposium" in Stanford Law & Policy Review, Fall 1991.*

## The Ultimate Will Battle

by David Margolick '77

**W**hen Seward Johnson, Sr., possessor of the Johnson & Johnson millions, died in May 1983, he left his third wife, Basia, virtually all of his \$400 million fortune; but she secured it only after battling her six stepchildren, the bitter fruits of the old man's two prior marriages.

The will contest was the largest, costliest, ugliest, most spectacular, and most conspicuous in American history. There was a huge set of players: lawyers from several of New York's most illustrious law firms, witnesses, family members, jurors, and a judge who was self-made, street-smart, and almost entirely out-of-control. In many ways the contest was less between Johnsons than between the people, variously strong-willed, determined, or opportunistic, who had annexed themselves through marriage to their fortunes and the lawyers who had annexed themselves to *them*. Faced with a series of unfriendly wills spanning more than twenty years, the aggressive, ruthless lawyers Seward's offspring and their spouses hired set out to make the experience so traumatic, so embarrassing, so humiliating, for Basia that she would cry "uncle" to her stepchildren and pay them—and handsomely—just to go away.

The Basia that emerged from the case was alternately compassionate and cruel, cunning and naive, loyal and fickle, generous and selfish, explosive and meek, articulate and tongue-tied, helpmate and tormentor, cheerful country girl and urbane shrew. But Basia survived what she called her "American hell," and emerged as one of the world's wealthiest women.

*Margolick writes the "At the Bar" legal column for the New York Times. Adapted from his book, Undue Influence: The Epic Battle for the Johnson & Johnson Fortune (William Morrow and Company, 1993).*

## Act of Courage

by Dennis deLeon '74

**F**or four years, I have been torn about when and how to say publicly that I carry H.I.V., the virus that causes AIDS. There were always too many compelling reasons not to say anything. Every such excuse started with the word "fear"—fear of employment discrimination, fear of the politics of AIDS, fear of becoming a pariah. . . . Would I be evaluated on my merits if I sought to be a judge, a law firm member or a government appointee? . . .

Given all these reasons for not going public about the disease, why come out? Why put my professional and economic life in jeopardy? Why subject my partner of 15 years (who is H.I.V. negative) to possible reprisals just for living with me?

The simple answer is hope.

If more people proclaim their H.I.V. status, we will change the way society treats persons with the virus. My hope is not based on any expectation that discrimination will end tomorrow but on a sense that it is good to show society that people with H.I.V. are leading productive lives and will tenaciously resist attempts at exclusion. . . .

Every time the public sees one more person with the virus leading a productive life, the possibility of eliminating AIDS-based bigotry becomes more tangible.

*DeLeon is New York City's Human Rights Commissioner. From an op ed, "My Hopes, My Fears, My Disease," in the New York Times, May 15, 1993.*





## The Americans Are Coming

by Martin Kimel '86

**A**ggressive American law firms have descended upon the Continent in search of new business connected with the economic integration of Europe now under way. . . . By working seven-day weeks to impress clients, the American firms are pressuring the reluctant Brussels bar to do the same. . . .

Wonderful. The big New York-based law firms already have largely ruined the practice of law in America. Now they want to ruin it in Europe, too. . . . Paying huge salaries to their new recruits, these firms need to squeeze every billable hour possible out of their associates. To do so, these firms thrive on creating a crisis atmosphere even when no crisis exists.

Since at least the Renaissance, Europeans have been willing to wait until Wednesday—or even the following week (*quelle horreur!*)—for a legal opinion. Now, apparently, they must be convinced that they need the work completed over the weekend.

As a result, instead of leisurely strolling about Brussels' Grande Place or visiting Paris for the weekend, a young lawyer will get to spend Saturday and Sunday inside a law library. The old saying has it that Americans live to work, while Europeans work to live. For European attorneys who value their five-week holidays and time away from the office, there is real cause for concern. . . .

Absent action, it is likely that the relatively laid-back European counselors will pass the way of the Austro-Hungarian Empire.

*Kimel practices law in Washington, D.C. From his article, "Invasion of the Superlawyers," in the Daily Journal, January 12, 1993.*

## Some Pleasures of Law Practice

by Saul Cohen '53

**M**uch has been written lately about the pain of law practice. Surveys show lawyer dissatisfaction with their careers to be widespread and large numbers of lawyers who would change careers if they could. Aggravation with clients or opposing counsel is commonplace, and malpractice suits multiply.

Are there no pleasures in the practice of law? It seems to me that there are, and I have tried to list some in no particular order:

- Being with other lawyers, a good bunch on the whole.
- Following through on a line of inquiry without knowing where it will lead.
- Being a champion for someone who is unable to fight his or her own battle.
- Helping someone make his or her dream come true.
- Being asked by a lawyer or firm to represent them.
- The compliment implied in being asked to act as an arbitrator or mediator.
- Finding the right case, one on all fours with your case. If it's an opinion by an important court, or even the Supreme Court, so much the better.
- Having a colleague ask you a question and being able to refer her to the exact case or statutory provision she needs.
- Giving good advice to clients, especially when the client knows you are giving good advice.
- Being told by clients that regardless of the result, they are pleased with the job you did.
- Negotiating a settlement when your client would have been willing to pay more or accept less.
- Being told that the law is against you, but checking the

Supplement or the Pocket-Part and finding that the law has been changed and that the change applies to your case.

- Reviewing an associate's pleading and suggesting changes that improve it markedly.
- Coming up with a creative solution to break an impasse at which all parties were facing enormous expense and stress.
- Hearing the judge say that your motion is granted.
- Knowing that the argument you just made was a good argument.
- Waiting for the jury to bring in its verdict, and then having them walk in with several jurors looking at you and smiling.
- Getting a substantial new client with an interesting case and the ability to pay a substantial retainer when you are sitting at your desk wondering if anyone will ever call again.
- Being told that some client had spoken very highly of you, or that someone said you handled a matter brilliantly, or that your reputation was certainly good.
- Making a substantial contribution to your community.
- If you went to certain law schools, telling someone where you went to school.

*Cohen is a partner in Sutin, Thayer & Browne of Santa Fe, New Mexico. Adapted from "A Leisurely, Unfootnoted Essay on the Pleasures of Law Practice" in the Bar Bulletin of the State Bar of New Mexico, June 4, 1992. See also "The Pleasures of Law Practice," ABA Journal, June 1993.*



# School NEWS

*Stellar recruit*

## Kathleen Sullivan Here to Stay

**M**ovements of professors from one law school to another are not usually grist for the media. But the decision of Kathleen M. Sullivan to leave Harvard for Stanford was carried on the Associated Press wire and explored in lengthy newspaper articles—not to mention lamentations in the *Harvard Crimson* and *Harvard Law Record*.

The object of all this attention is a prodigious 38-year-old who has already published numerous articles, been honored for her teaching, argued cases before the U.S. Supreme Court, testified on the Hill, and become influential in national policy debates as an op-ed writer and television news commentator.

Sullivan joined the Stanford Law faculty this summer as a permanent, tenured professor. A popular visiting professor here in the spring of 1992, she leaves Harvard after nine years on its faculty, the last four as a tenured professor.

Her decision prompted a delighted Dean Brest to say: "The School fell in love with her, and we are



LINDA CICERO, STANFORD NEWS SERVICE

**Kathleen M. Sullivan**

delighted it was reciprocated. The faculty and students are just ecstatic."

Sullivan's explanation: "Who could resist teaching at a world-class law school in paradise?"

A native of Long Island, New York, Sullivan graduated from Cornell University in 1976 as a member of Phi Beta Kappa. She then spent two years as a Marshall Scholar at Oxford Uni-

versity in England, earning a 1978 bachelor's degree with first-class honors in philosophy, politics, and economics. She received her law degree cum laude from Harvard in 1981, where she was the top oralist in the Ames Moot Court Competition.

Following graduation, Sullivan served as a law clerk to Judge James L. Oakes of the U.S. Court

of Appeals for the Second Circuit. From 1982 to 1984, she practiced law, doing appellate work in constitutional law and criminal defense cases. She began her teaching career at Harvard as an assistant professor of law in 1984, rising to the rank of full professor in 1989.

Sullivan is currently at work on a book about free speech, prompted by the recent dispute over



the National Endowment for the Arts. This past summer she addressed another on-going debate with a critique in the *New York Review of Books* (August 12 issue) of David Brock's controversial *The Real Anita Hill: The Untold Story*.

Gifted with a zesty, colloquial prose style, Sullivan writes as often for general publications like the *New York Times*, *Los Angeles Times*, and *New Republic* as for scholarly journals.

Her toughest editors are the students who run law reviews. "They tend to confuse intellectual rigor with sobriety," she says. "But humor shouldn't be banished from scholarly writing—just most of the footnotes. Academic writing would

be better if it were less homogeneous, if the author's individual voice were allowed to come through."

Sullivan's public appearances range from testimony before the Senate Judiciary Committee on Robert Bork's Supreme Court nomination, to endowed lectures at universities here and abroad, to expert commentary on the influential television programs, *MacNeil/Lehrer Newshour* and *Nightline*. Refreshingly unruffled in that often hot medium, she has proven herself a lucid and engaging commentator on Supreme Court and First Amendment issues.

Among the cases Sullivan has worked on is *Rust v. Sullivan*, in which the

Supreme Court upheld the Bush Administration's gag rule on the mention of abortion at federally supported family planning clinics. Though on the losing side in that instance, she has worked on the winning side of cases for clients from the Commonwealth of Puerto Rico to the state of Hawaii and the city of Berkeley.

Sullivan is also an uncommonly effective presence in the classroom. At Harvard, she was the first recipient of the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence. And as a visiting professor at Stanford Law School last year, notes Dean Brest, she inspired exceptional enthusiasm among students.

Her teaching, Sullivan

explains, is "about getting students excited, about communicating my own love of the subject to them." She habitually draws charts, matrices, spectrums, and timelines on the chalkboard to illustrate her points. Students like to tease her about the homemade visual aids, she confesses, "but these things represent how I've organized the concepts in my own mind."

Sullivan began teaching at Stanford this fall with a section of first-year Criminal Law. Upper-class students will have their chance in the spring, when the stellar scholar will teach Constitutional Law II. □

## New faculty

# Mabry Brings World Trade and Business Experience



Linda A. Mabry

The School's business law program has acquired a new asset in the form of Linda A. Mabry, an expert in international trade and commercial transactions. Mabry left a

partnership in the San Francisco law firm of Howard, Rice, Nemerovski, Canady, Robertson & Falk to join the faculty on July 1 as an associate professor. She had previously spent the Autumn 1992 term at the School as a lecturer.

"Linda Mabry brings unusual international and legal strength to our faculty," says Dean Brest. "She will play a key role in preparing our students for a future in which business, trade, and information are increasingly global."

A noted practitioner, Mabry is also coauthor of a book-length treatise, *Export Controls as*

*Instruments of Foreign Policy*, published in 1987 by the International Law Institute.

Mabry's experience in the international arena includes a childhood in Brussels, a college year at Makerere University in Uganda, and work as an interpreter (French and Spanish) for the State Department.

After graduating magna cum laude in political science from Mount Holyoke College in 1973, she earned a 1975 master's in international affairs from the School of Advanced International Studies at Johns Hopkins. She went on to law school at Georgetown, where

she received a teaching fellowship and edited two scholarly journals on international law before receiving her J.D. in 1978.

Mabry began her law career with a three-year stint in the federal government, first as an attorney-adviser for the State Department and then as a special assistant to the general counsel of the Commerce Department. She entered private practice in 1981, working with two firms in Washington, D.C., before joining Howard, Rice in 1987.

Asked what attracted her to an academic career, Mabry cites the "oppor-



## Thompson, Environmental Law Leader, Wins Tenure and More

**B**arton H. (Buzz) Thompson, Jr., the architect of the School's burgeoning curriculum in environmental and natural resources law, has had a signal year. In January, he received tenure and a promotion to the rank of professor. Then in June, the graduating students presented him with the 1993 John Bingham Hurlbut Award for excellence in teaching.

A seven-year member of the faculty (STANFORD LAWYER, Fall 1986), Thompson seeks, through interdisciplinary and

other innovative means of instruction, to give students an understanding of the complexity of issues in environmental law. The program under his direction has embarked on a number of ambitious initiatives, including the development of new interactive teaching materials; the promotion of environmental partnerships among business, government, environmental groups, and Stanford; and an environmental law clinic.

Coauthor of the latest edition of a leading casebook, *Legal Control of Water Resources*, Thompson was recently referred to by the Los Angeles *Daily Journal* as one of the "movers and shakers" in

the water law field. This July, the *California Law Review* published his article on the role of local water organizations in shaping water policy. With Stanford researchers from other disciplines, Thompson has also studied and reported on how farming regions adjust to reduced water supplies.

He generally favors more realistic pricing and fewer subsidies for water. "Economics is one of the most powerful tools we have for influencing behavior," he said in a recent interview (STANFORD LAWYER, Fall 1992). "We should use it unless it has very inequitable consequences."

A third-generation Californian, Thompson received his law and M.B.A. degrees at Stanford in 1976, and went on to clerk for Supreme Court Chief Justice William Rehnquist.

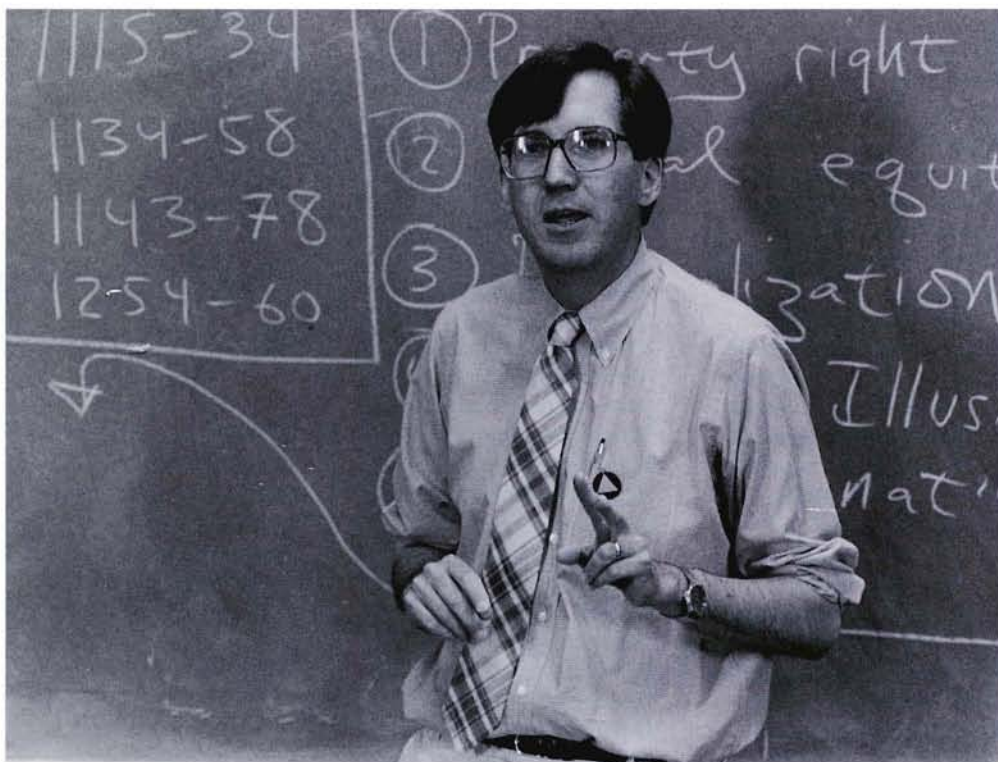
He then joined the

Los Angeles firm of O'Melveny & Myers as a trial attorney, becoming a partner in 1984. His cases included litigation regarding development of oil and gas resources in the Beaufort Sea, distribution of federal water resources, taxation of petroleum resources, insurance coverage for asbestos-related injuries and property damage, and cost overruns on nuclear power facilities.

Thompson espouses the same broad-based approach to the practice of environmental law as he does to its teaching. In his keynote address at the commencement exercises in June (see pages 37-38), he reminded graduates that effective advocacy is not a matter of simply litigating, but also of educating, seeking coalitions, and forging compromise through alternative dispute resolution. □

tunity to reflect on issues on a deeper level. Knowing something to practice is different from knowing it to teach," she observes. "I have spent much of the last ten years representing U.S. and foreign high-technology companies in outbound and inbound trade and investment transactions. Now I have a chance to step back from the details of specific cases and think about the broader principles and implications."

Mabry says she is "thrilled to be returning to academia, where as a student I had some of my most challenging and rewarding experiences." □



MARTIN P. ZECCHIN

Barton H. (Buzz) Thompson, Jr. '76



## Lazier, Munger Professor, Tells It Like It Is



William C. Lazier

Investor William C. Lazier, teacher since 1991 of the eye-opening course, "What Lawyers Should Know About Business," has been promoted from visiting professor to Nancy and Charles Munger Professor of Business.

Lazier brings to the classroom the real-world perspective that the Mungers hope to see imparted to the business lawyers of the future. General partner of Bristol Investment, which he founded in 1971, Lazier also chairs the boards of two metal-products manufacturers: American Security Products, which makes safes, and Columbia Products, maker of stainless steel sinks. Earlier in his career, Lazier held executive posts

with the United States Filter Corporation, Lightcraft of California, and Arthur Andersen & Co.

"To excel as a business lawyer, one must understand the world of business from the perspective of the clients one counsels," Lazier explains. To that end, his course covers, in compressed form, many of the basic business subjects, such as finance, marketing, production and operations, organizational structures and human resource management, and competition and strategy.

Holder of a 1957 M.B.A. from the Stanford Graduate School of Business, Lazier was a popular teacher at the GSB throughout the 1980s, conducting classes in the management of smaller

companies and real estate management. He is also the coauthor with James C. Collins of *Beyond Entrepreneurship* (Prentice-Hall, 1992) and of a forthcoming text from Irwin Press on managing small companies.

Lazier's contributions to Stanford include serving on the board of the Stanford Bookstore. In the community, he and his wife, Dorothy, are known for their support of TheatreWorks of Palo Alto, the San Francisco Ballet, and Interplast, the international medical outreach program. Lazier also serves as chairman of the board of his undergraduate alma mater, Grinnell College.

### NANCY AND CHARLES MUNGER

Charles Munger, who with his wife, Nancy, endowed the Munger

professorship in 1989 (STANFORD LAWYER, Spring 1990), is himself an eminent business executive and investor. Also an attorney (Munger, Tolles & Olson of Los Angeles), he is currently the vice-chairman of Berkshire Hathaway, chairman of several of its subsidiaries, and chairman of the Daily Journal Corp., which publishes two leading legal newspapers and *California Lawyer* magazine. Munger serves on the School's Law and Business Advisory Council and the Dean's Advisory Council.

Nancy Munger is a Stanford graduate in economics (AB, magna cum laude, 1945). A dedicated volunteer for both her community and her alma mater, she has, among other activities, served as a ten-year member and vice-president of the Stanford Board of Trustees. □

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### Promoted

## Professor Fried Sheds Light on Taxation

Tax expert and legal theorist Barbara H. Fried became a tenured professor this June. A Harvard law graduate, she joined the faculty in 1987 after three years with Manhattan's Paul Weiss Rifkind Wharton & Garrison.

Fried has just completed a four-year research and writing project: an intellectual history of

the Progressive-era law and economics movement, focusing on the work of Robert Hale (1884-1969). Hale, she explains, was a lawyer and economist best known to contemporary legal scholars for his groundbreaking theoretical work on economic coercion and property rights. He also wrote





LINDA CICERO, STANFORD NEWS SERVICE

Barbara H. Fried

extensively on public utility rate regulation, an area that, she says, "became a primary battleground for working out the appropriate limits of government control of private property." Fried's book, *Robert Hale and Progressive Legal Economics*, is forthcoming from Harvard University Press.

Contemporary taxation questions have also occupied Fried over the past

few years. Her writings include an article in the May 1992 *Stanford Law Review*, "Fairness and the Consumption Tax."

Asked what she considers the most important current issue with regard to taxes, she says: "Whether we can move the political dialogue away from mindless anti-tax rhetoric, and towards thinking about what we want government to do and how

best to finance it. The current tax phobia leads to bad tax policy, forcing politicians to opt for taxes that are obscure, rather than efficient and fair."

Harvard all the way, Fried earned a B.A. (magna cum laude) in 1977, an M.A. in English and American literature in 1980, and a J.D. (again, magna cum laude) in 1983. Next came a fed-

eral appeals court clerkship and three years with the New York firm doing tax work. At various times also an instructor at the Simmons College Graduate School of Management and a research associate at Harvard Business School, she brought a range of skills to her adopted career as a Stanford law teacher (STANFORD LAWYER, Fall 1987).

Fried's classroom performance won her the 1991 John Bingham Hurlbut Award for excellence in teaching. She tries, she says, to encourage students to "push on arguments—whatever their source—until they have satisfied themselves whether those arguments hold water." And whatever her students' eventual pursuits, she hopes that they become "better equipped to think about policy issues from a societal perspective, so that they can act as quiet leaders in both professional and social circles." □

## Wednesday's children

### Professor Wald Goes to Washington

**D**rafted by the Clinton administration this summer, Michael S. Wald is now Deputy General Counsel of the Department of Health and Human Services. Professor Wald is responsible for dealing with legal issues related to the Aid to Families with Dependent Children program (AFDC) and to foster care and

other child welfare programs. This portfolio involves helping to direct the work of some 700 individuals, including 550 attorneys.

A nationally known authority on family and juvenile law, Wald was a principal draftsman of a major statute, the Adop-

*Continued on page 32*



Michael S. Wald



tion Assistance and Child Welfare Act of 1980 (Public Law 96-272), which established a new structure for regulating the foster care system.

Wald is also coauthor of the text, *Protecting Abused and Neglected Children* (Stanford University Press, 1988), and a recipient of the American Psychological Association Award for Distinguished Contributions to the Cause of Child Advocacy.

In 1991, he conducted a study on the impact that California Proposition 165 would have had on children, and was credited with helping to defeat the measure.

"In modern terms, a society's ability to function economically—its material wealth—depends upon the human capital investment that is made in children," he has observed (STANFORD LAWYER, Spring 1988). "We are in a world in which production turns largely on the education level and thinking capacities of the work force, rather than on physical labor." He also warned: "A society that doesn't invest in its children produces adults who will be threats to society. So there's a public safety interest as well."

A member of the law faculty since 1967, Wald took a leave from his position as Jackson Eli Reynolds Professor of Law to accept the HHS assignment. By a happy coincidence, his wife, National Resources Defense Council attorney Johanna Wald, has just been awarded a grant from the Pew Scholars Program in Conservation and the Environment, for research that she will pursue from the NRDC's Washington, D.C., office. □

## Advisers Consider Innovations in Legal Education



Miles Rubin '52

**T**he practice of law is becoming more demanding, complex, interdisciplinary, and international—as the recently concluded 2010 project of the Board of Visitors made abundantly clear. How can Stanford Law School in particular, and law schools generally, better prepare students for the challenges of the future?

The Board began its consideration of this critical question at its 1992 meeting—the last in the three-year 2010 series (STANFORD LAWYER, Fall 1992). The 1993 meeting continued that work with a look at three areas previously identified as important: the teaching of ethics, problem-solving and professional judgement, and preparation for practice. Also discussed was a resources question—financial aid—with implications for students' career choices.

The two-day annual



Dean Brest

meeting was the Board's 35th. Held May 6–7 at the School, it was chaired for the second year by Miles Rubin '52.

Dean Paul Brest began by welcoming the group and noting the excellent turnout: 54 Visitors, comprising 83 percent of Board members. He praised the Visitors for their dedication and for the unique contribution they make to the School

as experienced outside attorneys and businesspersons.

### LEGAL ETHICS

In the first presentation of the annual meeting, Professor Deborah Rhode discussed the teaching of legal ethics. Stanford, she reported, is making progress in integrating ethics into the core curriculum (the "pervasive" method). This, she believes, is more effective than teaching ethics solely as an isolated subject. "The failure to treat ethics as relevant throughout the curriculum communicates a message about ethics that a single course cannot remedy," she said.

Stanford has pioneered the pervasive approach, with ethics units in such substantive courses as contracts, torts, criminal law, and civil procedure. And Rhode herself is undertaking to prepare a book of materials for the pervasive teaching of ethics that can be used by law schools



Professor Rhode

PHOTOS BY NICHOLAS CREPEA, IMAGE CENTER





throughout the country. The Board expressed support for the School's leadership in this area.

#### **PROBLEM-SOLVING AND PROFESSIONAL JUDGMENT**

Professor Barton (Buzz) Thompson, Jr., addressed the issues of how best to teach problem-solving and enhance professional judgment. He observed that the traditional appellate opinion method, while effective for teaching first-year students, may be less so for second- and third-year students.

Thompson—a former Hurlbut Award winner who heads the School's developing Environmental and Natural Resources Law Program—advocates the use of innovative approaches, such as business-school-style case studies, negotiation games, and full-fledged simulations of disputes. He said he has found that this encourages creativity and originality in the students, while both teaching them the law and helping them to develop vital skills. The only disad-

vantage of these approaches, he said, is that they demand a great deal of time from the faculty and also involve—at least where case studies must be written—new costs.

In the discussion that followed, speakers affirmed that the study of appellate opinions is still useful. In addition, there was considerable enthusiasm—particularly among Board members with business school experience—for the participatory approaches Thompson had described.

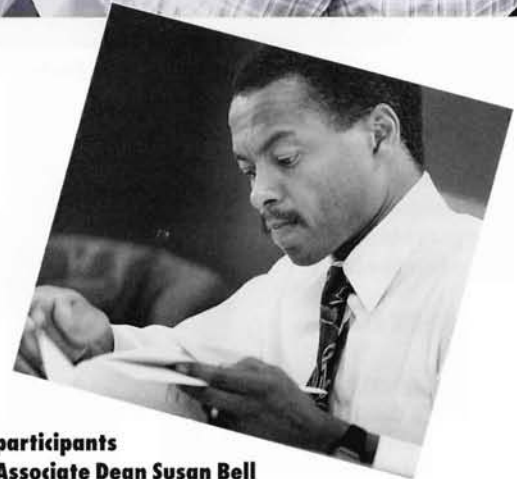
#### **INTERDISCIPLINARY POLICY STUDIES**

Ellen Borgersen, the Associate Dean for Academic Affairs, followed with a discussion of problem-solving in the context of broad policy issues. She recalled the suggestion by an outside speaker at the 1990 Board meeting that the best way to train students to think in policy terms is to offer direct experience in examining problems and designing policies to help solve them.

A number of Stanford Law School professors



PHOTOS BY NICHOLAS CREPEA, IMAGE CENTER



**Meeting participants included Associate Dean Susan Bell (top left), and Board members Stephen Brown '72 (top right) and Gary Williams '76 (above).**

had independently reached the same conclusion. The School has since obtained foundation funding for a series of interdisciplinary research projects in which law students work on real public policy problems with students and faculty from other schools and with policymakers in the field.

"You know you're onto a good idea," Borgersen remarked, "when lots of people have it at the same time."

#### **COMPUTERS IN TEACHING**

Computers have long been known as an effective means of conveying bodies of information. Recently,

however, ways have been found to use high technology for instruction on skills and problem-solving.

David Arfin, president of the CLE Group of Menlo Park, was invited to demonstrate an interactive video package designed to teach practical courtroom skills. Developed largely at Stanford (STANFORD LAWYER, Spring/Summer 1989), the eight lessons combine computer and laser disc technology to allow users to take part in simulations of trials.

Arfin concluded by saying that interactive video is the state of the art





**Professor Gordon**



**Ronald Rosen '57**

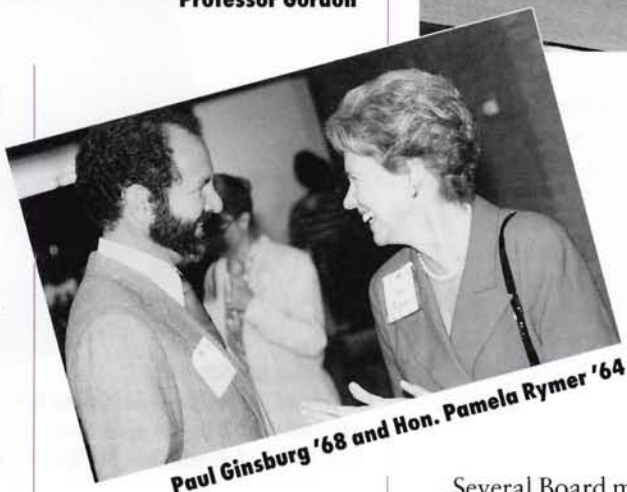
in training for legal skills. He hopes that by 1995 all law students and practicing attorneys will have access to this tool.

#### **PREPARATION FOR PRACTICE**

Professor Robert Gordon moderated a discussion designed to solicit insights from the Board of Visitors on significant developments in the practice environments of the present and future. He asked, "What changes have major implications for how best to prepare young attorneys for practice?"

Gordon—who is himself engaged in research on the legal profession in the United States and, more particularly, the entrepreneurial Silicon Valley—suggested three such changes: a decline in the amount of on-the-job training for beginning lawyers; the growing internationalization of law practice; and more multidisciplinary practice, where lawyers are working closely with accountants and other non-law experts.

The professor also



**Paul Ginsburg '68 and Hon. Pamela Rymer '64**

asked the Visitors to consider what law schools can do to revive the public interest role of the profession. A majority of students enter Stanford Law School with public interest, public service intentions—on a pro bono basis, if not full-time—he noted. It would be good if more channels could be found for people to express such aspirations.

This observation stimulated one of the liveliest discussions of the annual meeting. Speaking from their diverse experiences of the pressures and structure of modern-day law practice, the Visitors variously offered discouragement and hope.

Several Board members observed that public interest and pro bono work are not financially viable options for many of today's graduates, given their education debt burden and the demand for billable hours.

Practitioner James Gansinger '70 sparked considerable interest with his description of an alternative compensation model: his Los Angeles firm pays associates on an hourly basis, which allows them more independence in choosing how they utilize their time and how much pro bono work (or family involvement) they want or can afford.

Professor Gordon noted that the almost uniform sentiment of students is that they would settle

for less income, in exchange for more time for community work and family.

Furthermore, said one Visitor, pro bono work can sometimes be good for business, whether as a type of training or as a way to make contact with potential clients.

Board members also discussed the issue of skills training, and the fact that law firms today seem to have less time for teaching and mentoring new associates. Some Visitors wanted to see more specifically vocational training in law schools, while other members felt strongly that—considering the rapidity of change today—law students most need the general training often termed "learning to think like a lawyer."

Former assistant dean Robert Keller '58 suggested that the School should provide each student with an in-depth understanding of some specific area of the law. He also advocated an emphasis on the pragmatic, pointing out



that law is not just a tool, but also a way to solve people's problems.

Professor Gordon concluded with thanks to the Board for their perspectives. "Perhaps," he said, "we will eventually develop several different prototype models for the legal profession."

### DEAN'S REPORT

Paul Brest provided the Board with an update on developments at the School since the previous year's meeting. This included the news of two notable additions to the faculty: Kathleen Sullivan (regarded by some, he said, as "the best teacher at Harvard Law School"), an expert in constitutional law; and Linda Mabry, a partner at Howard, Rice, Nemerovski, Canady, Robertson & Falk, who will teach international business transactions. (See pages 27 and 28.)

He also noted that Robert Mnookin, developer of the School's alternative dispute resolution program, would be leaving for Harvard, while Charles Lawrence, an expert in constitutional law, has accepted an appointment at Georgetown University. Famed antitrust expert William Baxter is taking early retirement but will continue to teach in his specialty of antitrust law.

Brest went on to say that the past year has seen a tremendous increase in executive education and continuing legal education programs, thanks in large part to the efforts of Joan Gordon and her staff. The benefits of these programs flow both ways, he noted. Not only do the partici-



Hon. Barbara Durham '68

A popular feature of recent Board of Visitors meetings are the dinners, hosted by the members of the Board, for the first-year class. The now-annual event welcomes the lawyers-to-be to the fellowship of the profession and allows Board members to learn more of the concerns and interests of the newest crop of law students.

The speaker this year was the Honorable Barbara Durham '68, Acting Chief Justice of the Supreme Court of the State of Washington.

"My hope," she said, "is to inspire a better legal

system for the future by pointing out the deficiencies of the current one." The jurist called for "a recommitment to the central value and morality of our system—justice. I greatly fear that we have lost sight of this guiding force, burying its meaning under a morass of complicated procedures and bureaucracies."

Among the problems she cited are the multiplication of laws and rules involving the "drug war" and the current "crime of the week." Twenty years ago, she pointed out, criminal cases accounted for only 40 percent of a trial court's docket, while today they average 65 percent. Even so, justice is neither swift nor certain, and "the endless appeal of criminal convictions is eroding the process it was designed to protect."

The problem of "procedure trumping justice" is also evident in the civil law area, she noted, giving as an example land use, and the difficulty of

obtaining decisions—in the face of environmental and other laws and regulations at various levels of government—on proposed construction or other alterations.

Alternative dispute resolution has become increasingly essential in managing the flood, she said—"in fact it would be difficult to function without it." Nonetheless, she observed, "it is important to fully realize what ADR is: a living, breathing acknowledgment that our justice system, while not failing, is at least faltering."

Justice Durham's mission in speaking to the students was, she said, "to challenge you to question the way things are, so that you can influence the way things will be." She urged the lawyers-in-training to "consider some of these 'big picture issues'" and to "give some serious thought to long-term solutions." □

pants learn; in addition, School faculty enjoy valuable interchanges with the business and law communities. (See pages 40–41.)

The Dean also reported that, as part of the University-wide cutbacks, the School's base budget is being reduced by about \$1 million. Susan Bell,

Associate Dean for Development, added that her office is preparing a significant School fund-raising campaign to help make up the shortfall.

Brest went on to describe the School's long-range planning process. The faculty have been looking at the School's

research mission and curriculum to assess what the School is doing now and what needs to be done to maintain its excellence and position of leadership. The Dean acknowledged with gratitude the contributions of the Board of Visitors—particularly the Board's multi-





PHOTOS BY NICHOLAS CREPEA, IMAGE CENTER



Student aid issues were explored by Frank Brucato, Associate Dean for Administration (top left), Prof. Joseph Bankman (top right), and Michele Magar, now 2L (below right), among others. Also shown (center right) are Board members Leonade Jones, JD/MBA '73 and Alma Robinson '75.



year 2010 project—to this effort.

#### STUDENT FINANCIAL NEED

Frank Brucato, the Associate Dean for Administration, was joined for this session by Professor Joseph Bankman and three interested students.

Brucato opened with a report on the situation for current students. Tuition in 1993–94 is \$20,186. With books and living expenses, single students now need to budget a total of at least \$30,000 for the school year; for married students, the minimum annual budget is more like \$37,900. Financial aid is awarded solely on the basis of need, and currently about 70 percent of students get some form of

aid. About half the students receive some out-right grants, with the balance being made up by Stanford and government loans. Even with this aid, students often struggle to finance their education and usually end up with high debt loads upon graduation.

Professor Bankman described the public-interest loan program by which Stanford forgives part of a graduate's debt for each year that he or she is in qualified employment. The advantage of this plan is that it focuses the School's limited aid resources on those who actually turn out to need it most—graduates who work in the low-paying public service sector.

The student panelists expressed appreciation for current programs, but urged that the School consider additional means for aiding students in the face of rising costs.

#### FINAL FESTIVITIES

Dean Brest brought the official proceedings to a close with expressions of appreciation for the Board's attention and thoughtfulness. He particularly lauded Miles Rubin for outstanding work during his two-year tenure as chair of the Board of Visitors.

Deliberations complete, the Board adjourned to Kresge Auditorium for the School's annual Kirkwood Moot Court finals (see page 42). It was—though none knew it at the time—an opportunity to preview the jurist who would become the next justice to join the real U.S. Supreme Court.

There followed a Cinco de Mayo celebration in Crocker Garden—and the dispersal, until next year, of the valued advisers who comprise the School's Board of Visitors. □

—Reported by  
Sherry Symington



## A Day of Celebration, Praise, and Vision

**S**tanford Law School awarded 178 J.D. degrees on Sunday, June 13. An additional 7 students received other law degrees. Many of the graduates had also earned awards and prizes during their three years of law school (see page 39).

The ceremony, which was held on the sunny green north of the Law School, followed the commencement exercises of Stanford University. A throng of relatives and other well-wishers hailed the arrival of the graduating students in an academic procession headed by Dean Brest and the faculty.

The John Bingham Hurlbut Award for excellence in teaching was presented this year to a former graduate and now professor, Barton H. Thompson, Jr. '76 (see page 29). Chosen by a vote of the graduating class, Thompson was also the keynote speaker.

Matthew Lepore, president of the class, presented the Hurlbut Award. In a brief speech before the presentation, he reflected on the exceptional educational opportunities that he and most of his classmates had enjoyed throughout their lives. Citing the efforts of the recently deceased Thurgood Marshall to achieve more equity in schooling for all, Lepore urged his classmates to carry on the late Supreme Court Justice's work.

Lepore concluded with these words: "I offer as a challenge to all of you, to be aware of the educational opportunities available to all the children in your



PHOTOS BY JOHN SHERETZ



**An exuberant James Kershaw '93 (top) signals the conclusion of a ceremony featuring an address by Hurlbut Award winner Buzz Thompson '76 (above).**



**Dean Paul Brest**

communities, and do what you can to improve those opportunities for the less fortunate."

Hurlbut honoree Barton (Buzz) Thompson offered the graduates some personal advice—based on his own considerable experience as a practicing

attorney—on how to make their legal careers both personally satisfying and beneficial to society.

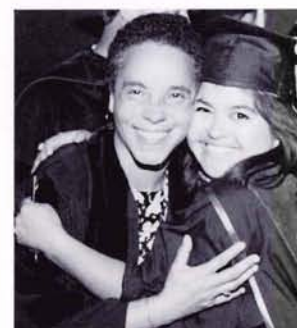
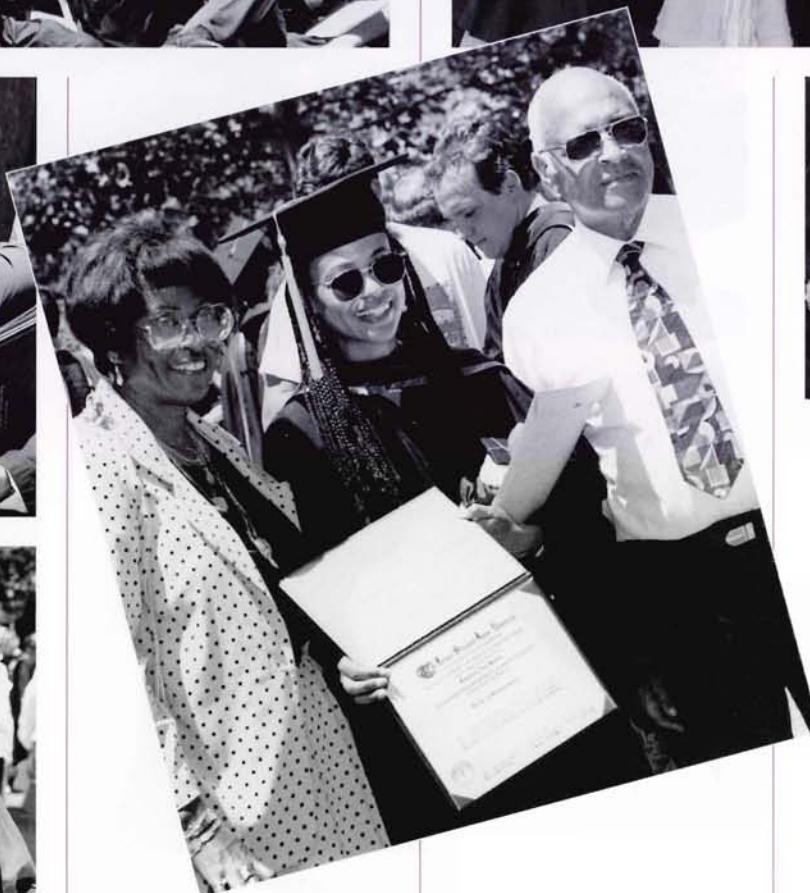
Lawyers need to take a more "broad and creative approach to tackling legal issues," he said. There is in every legal case—no matter how boring or routine

it may appear—both a "human dimension" and "a unique policy question," he said. By focusing on these elements, the graduates will be more successful with the case, whether in court or out. Equally important, the graduates can help change





PHOTOS BY JOHN SHERETZ



**The many celebrants included (clockwise from top left): Coif electees GERALYN SMITHERMAN, JANET SOMMER, CHERYL KRAUSE ZEMELMAN, and ALAN STERN; VICTOR CHENG (JSD '93) and well-wishers; Associate Dean SALLY DICKSON and VELINA UNDERWOOD; the KIMBERLY BOMAR CONTINGENT; PROFESSOR EMERITUS J. E. MOFFATT HANCOCK; and Class President MATTHEW LEPORE.**

the negative views of a public that "sees us more as part of the problem than as part of the solution."

In the closing remarks of the ceremony, Dean Brest spoke of the "virtues" of a good lawyer. These virtues are tested, he said, in two kinds of situations: "in

deciding on whose behalf you will exercise your professional skills, and in deciding how to exercise those skills."

The Dean urged the graduates to make time in their practices for volunteer work on behalf of the less fortunate, particularly "communities of color.

This is not a partisan or an

ideological issue," he said. "Whether out of enlightened self-interest, a sense of justice, or the idea of what it means to be one nation, lawyers must use the skills we possess to help bring about social and economic change in the nation's minority communities."

The ceremony ended as

it began, with a procession—the difference being that those who had entered as students recessed as newly minted lawyers. This happy transformation was celebrated by one and all with much picture-taking and a buffet at Crown Quad. □



## Grads Earn Diverse Honors and Awards

**M**embers of the Class of 1993 have been recognized for exceptional achievement in a variety of scholarly and clinical areas.

**Nathan Abbott Scholar**, for the highest cumulative grade point average in the graduating class: Andrew Graham Brown.

**Urban A. Sontheimer Third-Year Honor**, for the second-highest cumulative grade point average in the class: Jennifer Elizabeth Horne.

**Second-Year Honor**, for the highest cumulative grade point average at the end of the second year: Eileen Mary Mullen.

**First-Year Honor**, for the highest cumulative grade point average at the end of the first year: Cheryl Krause Zemelman.

**Order of the Coif**, the national law honor society, to which were elected those graduating students who rank in the top 10 percent of the class academically and are considered worthy of the honor: Brown, Horne, Mullen, and Zemelman, plus Samuel Wollin Cooper, Michael Andrew Fitzpatrick, Melissa R. Gleiberman, Andrew Steven Komaroff, Anton David Leof, Jonathan Heuer Levy, Demetrios George Metropoulos, Michael Jay Murphy, Geralyn Gayle Smitherman, Janet Elizabeth Cory Sommer, Alan N. Stern, Timothy Scott Teter, Keith Elliott



Eileen Mullen '93 with son, Nicholas

Villmow, and Suzanne Hope Woods.

**Hilmer Oehlmann, Jr. Prizes**, for outstanding work in the first-year Research and Legal Writing Program: Fitzpatrick, Gleiberman, Levy, Mullen, Sommer, and Teter, plus Jonathan Biran, Kimberly Ann Bomar, Matthew Stevens Churchill, William Henri Crosby, Jr., Emily Parks Dentzer, Wesley Dale Felix, Burton Alexander Gross, Eric Gerig Hostetler, Michael Timothy Iglesias, Lori Ann Jackson, Martha J. Kegel, Robert John Kulperger, George S. Lichter, Maria Magdalena Mejias, Torrey Ann Olins, Deepak T. Pai, Florence Y. Pan, Karen Jensen Petrulakis, Roslyn Powell-Lima, Daniel A. Schulze, Martha Louise Senkbeil, and Holly Lorraine Sutton.

**Frank Baker Belcher Award**, for the best academic work in Evidence: Kenneth Eric Baime.

**Steven M. Block Civil Liberties Award**, for distinguished written work on issues relating to personal freedom: Iglesias and Zemelman, plus James John Kershaw III, Mark P. Strasser, and Michael John Weber.

**Nathan Burkan Memorial Competition Prize**, for excellent legal writing in the area of Copyright Law: Teter (first place) and Jonathan Adlai Franklin (second place).

**Carl Mason Franklin Prize**, for the best paper in International Law: Metropoulos and Robert Ashley Madsen.

**Olaus and Adolph Murie Award**, for the most thoughtful written work in Environmental Law: Mullen (1992-93 recipient) and Louise Miller Franklin (1991-92 second-place co-recipient).

**Board of Editors' Award**, for outstanding editorial

contributions to the *Stanford Law Review*: Biran and Gleiberman.

**Irving Hellman, Jr. Special Award**, for the outstanding student note published by the *Review*: Mullen.

**Johnson & Gibbs Law Review Award**, for the greatest overall contribution to the *Review* during his second year: John Michael Glazer.

**Jay M. Spears Award**, for outstanding service to the *Review* during her second year of law school: Gleiberman.

**Stanford Law Review Special Service Award**, recognizing exceptional contributions to Volume 45 of the *Review*: James Stephen Carpenter and Sandra Elaine Chavez.

**United States Law Week Award**, for outstanding service and unfailing commitment to the *Review*: John Hilary Bogart.

**Mr. and Mrs. Duncan L. Matteson, Sr. Awards**, for the two teams of finalists in the 1993 Marion Rice Kirkwood Moot Court Competition: Zemelman and Louise Miller Franklin as best team; Pan and Michael William Quinn as runner-up team (see page 42).

**Walter J. Cummings Awards**, also in the Moot Court finals. For best oral advocate: Zemelman. For best brief: Franklin and Zemelman. □



## Development Team Gains New Talent



**Donna Raub**

**T**wo academic fundraising professionals joined the Law School this spring as part of the team headed by Susan Bell, Associate Dean for Development (STANFORD LAWYER, Fall 1992).

In February, Donna Raub arrived to fill the new position of associate director of development, with primary responsibility for major gifts. She



**Catherine Nardone**

had spent the previous six years at Mills College in Oakland, California, where she helped raise \$73 million—more than double the college's capital-campaign goal. And at Planned Parenthood for the San Francisco region, Raub oversaw the boosting of private donations by 80 percent.

Raub has a master's in

mass communications from San Diego State University and a B.A. in English from the University of Pennsylvania. She and her husband, Don, of the law firm Brooks & Raub in Palo Alto, have three children and live in Menlo Park.

In April, Catherine ("Rinnie") Nardone came aboard as director of the Stanford Law Fund. She succeeds Elizabeth Lucchesi and is working closely with Nancy Strausser, who has been named associate director of the annual fund. (Lucchesi has gone on to become an associate director of the central Stanford University development office, where she has major-gifts responsibility for the East Coast.)

Nardone, who holds a B.S. from the College of Communications at Boston University, worked

five years at Harvard Law School. There she was associate director in a group that succeeded in raising \$7.4 million in 1991-92.

At Stanford Law School, Nardone is striving to relieve pressure on the operating budget by increasing unrestricted annual gifts. She hopes to expand what she calls the current "loyal but small group of strong supporters." Noting that "there's a lot of goodwill out there," she says, "We need to broaden the circle—get more people involved and giving to the School." □

*Donna Raub's phone number is 415/725-7008. Rinnie Nardone is at 415/725-8115.*

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### *Professional education*

## Novel Program Attracts Top Business Executives

**L**eaders of 62 well-known corporations from around the country gathered at the School in June for a path-breaking program titled "Tools for Executive Survival."

Cosponsored with the National Association of Securities Dealers, the three-day "seminar" featured presentations and workshops on the legal aspects of such challenges as dealing with stock

market analysts, entering joint ventures with competitors, and setting executive compensation.

"To the best of our knowledge, this is the first and only law school program designed specifically for business executives rather than for lawyers," says Joseph Grundfest, the Law School associate professor and intellectual entrepreneur who designed the interdisciplinary



**Charles Schwab**





**George R. Roberts**

nary affair. Also instrumental in making it happen was Joan Gordon, the School's director of continuing education.

The innovative program was the inaugural event of the Roberts Program in Law, Business, and Corporate Governance, established this past spring with cornerstone funding from George R. Roberts, a founding partner of Kohlberg Kravis Roberts & Co. (STANFORD LAW ALUM, Spring 1993).

Leading the seminars were professors from Stanford Law School, practicing attorneys, and representatives of Wall Street, institutional investing, venture capital, financial services, the federal bench, and Harvard's Kennedy School of Government. Special luncheon and dinner addresses were made by Charles Schwab of the brokerage firm of the same name; George P. Shultz, the former Secretary of State and Bechtel CEO; and Bill Walsh, coach of Stanford's football team, whose perspectives on management and leadership were recently featured in the *Harvard Business Review*.

"Businesspeople are beginning to realize that the control of legal risk—



**Professor Grundfest**

whether regarding securities litigation, mass torts, or intellectual property rights—is essential to the success of the enterprise," says Grundfest, who sat on the Securities and Exchange Commission before joining the Stanford Law faculty. "If you don't understand the legal environment, you're dead in today's marketplace."

The outwardly oriented program was as beneficial for the Law School as for the participating business executives, notes the law professor. "We gained suggestions from the attendees for research and scholarship. The conference provided an opportunity to combine real-world problems with academic analysis." □

## High Tech

# Brown & Bain Fosters Research

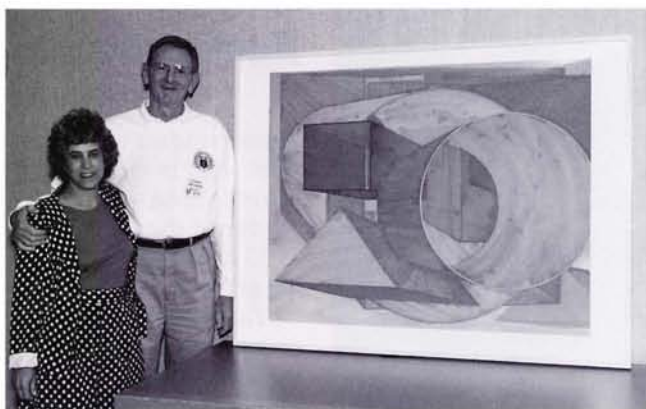
**M**ultimedia works—computer programs that include photos, music, and voice—represent an area where consumer electronics have outpaced the law. Developers of multimedia programs often incorporate bits and pieces from a number of copyrighted conventional works. Is that fair use or copyright infringement? If the latter, what would be an administratively and economically feasible royalty system?

These are the leading-edge questions that student Dale B. Thompson (2L) is pursuing as the first recipient of a Brown & Bain Fellowship in Law and High Technology. Enrolled in the joint degree program in Law and Economics, Thompson has completed two years toward his

Ph.D. in economics.

Brown & Bain—a law firm with offices in Phoenix and Tucson, Arizona, and in Palo Alto—established the fellowship with a grant of \$25,000, which will support a student research project each year for the next five years.

"We hope to expose especially able students to the critical interplay between the transforming quality of new technology and the law's need to protect rights through established principles that can afford certainty and predictability," said Jack E. Brown, a partner in the firm. "Making the law accommodate the needs of the innovators and disseminators of high technology has been a central theme in much of our work over the past twenty-five years." □



## AN ARTFUL TRIBUTE

"Magenta," by noted New York artist Al Held, now brightens the School's faculty lounge. The 1990 aquatint/etching was donated by Charles D. Silverberg '55 in memory of his mother, Freda. Silverberg *filis* is a former chair of the Law School Board of Visitors. A specialist in entertainment law, he is currently of counsel to the Los Angeles firm of Silverberg, Katz, Thompson & Braun. Charles and his wife, Louise, live in Manhattan Beach. □



## Moot Court Competition Gets the Real McCoy

**N**ot all was make-believe in the final round of the 1993 Marion Rice Kirkwood moot court finals. Held on May 7, the mock Supreme Court proceedings had as one of its justices a soon-to-be genuine article: Ruth Bader Ginsburg. Then a member of the U.S. Court of Appeals for the District of Columbia Circuit, she was joined on the Stanford bench by Pamela A. Rymer '64 of the Ninth Circuit and Richard F. Suhrheinrich of the Sixth Circuit.

The hypothetical case developed for the competition involved sexual harassment. Students

Florence Pan and Michael Quinn appeared for petitioner "Betty Blackwell," and Cheryl Zemelman and Louise Franklin for respondent "Rockville County School District."

Counsel had two issues to address. First, in evaluating whether conduct constitutes sexual harassment under Title IX, should the perspective be that of a reasonable person or of a reasonable victim (woman)? Second, does a school district have a duty based on the Due Process Clause to protect students from tortious conduct by other students?

Zemelman and Franklin won the Mr. and Mrs.



NICHOLAS CREPEL, IMAGE CENTER

**Then Judge Ginsburg (center) with fellow Kirkwood jurists Rymer '64 and Suhrheinrich, flanked by '93 finalists Pan and Quinn (left) and Franklin and Zemelman (right).**

Duncan L. Matteson, Sr., Award for Best Team of Advocates. Pan and Quinn were recognized as the runner-up team. Zemelman and Franklin also took the Walter J. Cummings Award for Best Brief, and Zemelman received the Cummings

Award for Best Oral Advocate as well.

This was the forty-first Marion Rice Kirkwood Competition, the annual highlight of Stanford's moot court program. □



**Naomi Mezey ('95) of SPILF**

### Public Interest

## Auction Scores Laughs and Dollars

**E**very student who chose to work in the low-paying public service sector during the summer of 1993 received a supporting grant.

This achievement seemed out of reach early in the year. Lately, the number of qualifying students has outstripped existing resources. But the students of the Stanford Public Interest Law Foundation came up with a creative solution: a "Bid for Justice" auction. Held on March 12, it raised nearly \$17,000. This—when added to Montgom-

ery and SPILF funds already in hand, and a contribution by the School—provided summer stipends for all of fifty eligible students.

Called "the greatest community-building event in memory" by Dean Brest, the auction was organized almost entirely by first-year students, with Naomi Mezey ('95) coordinating. Two Bay Area law firms—Brobeck, Phleger & Harrison and Wilson, Sonsini, Goodrich & Rosati—joined the Stanford Bookstore as cosponsors. And some

400 alumni/æ, faculty members, and students took part, donating and bidding on nearly 150 items.

Bidders competed for prizes ranging from dinner chez Iris and Paul Brest, to salsa dancing lessons, to a Macintosh Powerbook. Also on the block were rare and signed books, original artwork, fine wines, and luxury weekend get-aways. Other noteworthy offerings: lunch with former Secretary of State (now Hoover Institution scholar) George Shultz, a



## Beattie Charts Challenging Course



Lisa Beattie ('94)

**L**isa Beattie, president of *Stanford Law Review*, is no stranger to challenge. She has scaled the Matterhorn and Mount Kilimanjaro.

Elected last spring to head Vol. 46 of the prestigious journal, Beattie is

determined to publish "very important and provocative pieces"—which, she says, is "surprisingly difficult, with law reviews competing for the few great articles. We need to take affirmative steps."

Beattie is involving the *Review* membership more in editorial decisions, such as screening articles and selecting a symposium topic. She is also paying increased attention to members' particular areas of knowledge and making assignments accordingly. Through these and other moves, she hopes not only to enhance the quality of the *Review*, but also

football autographed by Stanford coach Bill Walsh, a limited-edition photograph of the late Justice Thurgood Marshall, tickets to the 1994 AT&T Pebble Beach Pro-Am golf tournament, and a leather jacket commemorating the television show, *The Simpsons*.

Professors Kim Taylor-Thompson and Joe Grundfest served as auctioneers, sharing the stage and the joke production like natural vaudevillians.

Stunts and demos added to the fun. Fencers clashed foils to excite bids for fencing lessons and gear. Ramon Gonzalez ('95) flexed impressively,

hawking his bodybuilding expertise. And the roar of engines heralded the bidding on a motorcycle excursion for three into the Santa Cruz Mountains. There were smiles all around, even before the proceeds were counted.

Also helping to loosen wallets was a wine tasting in Crocker Garden arranged by a former Napa winemaker turned Stanford law student.

Delighted SPILF members plan to hold another auction in the spring of 1994. Alumni/æ with ideas, donations, or simply a desire to attend may call 415/723-3017. □

—Kyle Chadwick (2L)

to make the journal experience richer for students.

A native New Yorker, Beattie attended Stanford as an undergraduate, earning a degree in English in 1988. Next she worked for two years as a writer for the national office of the American Civil Liberties Union. Since beginning law school in 1991, Beattie has also served as a research assistant for Professor Gerald Gunther

on his landmark biography of Judge Learned Hand.

Beattie, who graduates this June, is looking forward to clerking with Judge Harry Edwards of the U.S. Court of Appeals, District of Columbia Circuit. And in 1995-96 she is destined to have another peak experience—a clerkship with Justice Ruth Bader Ginsburg of the U.S. Supreme Court. □



JOHN SHERETZ

### CONTINUING APPLICATION OF THE BAR CODE

Crown Law Library was a hive of activity this summer. A crew of thirteen Stanford undergraduates spent six weeks in the stacks, sticking bar-code labels in thousands upon thousands of volumes. This massive undertaking put the Library well on its way toward the introduction of a more efficient, automated circulation system. □



## Short Takes



Victor Hao Li

### IMPORTED TALENT

Former professor Victor Hao Li is back at the School this fall as an acting professor, teaching a course called Law and Society in Asia. President for several years of the East-West Center, he is currently of counsel to Watanabe, Ing & Kawashima of Honolulu.

The School's roster of 1993/94 teachers also includes two professors from other law schools: Richard Craswell of the University of Southern California, who is teaching Contracts; and Jorge A. Vargas of the University of San Diego (U.S./Mexico Trade). In addition, there are three jurists in the classroom: Hon. William T. Allen of Delaware's Court of Chancery (Advanced Topics in Corporate Law); Judge Barbara Caulfield of the U.S. District Court in San Francisco (Advocacy and the Judicial Decision-making Process, Trial Advocacy); and Hon. Gordon J. Myatt of the National Labor Relations Board (Labor Law).

### PURLOINED BOOKS

A 1977 inventory of the Crown Law Library's rare book collection revealed that 24 of its oldest volumes had somehow been spirited away. The missing works—which had been kept under lock and key—included a 1514 volume by Sebastian Brant, *Expositiones siue declarationes omnium titulorum iuris*, and three titles dating back to the seventeenth century.

The mystery went unsolved until this August, when Associate Law Librarian Rosalee Long was called to the property room of a local police station to see if any of a mass of stolen material belonged to the School. There, to her delight and amazement, were the purloined volumes.

It turns out that a Stanford security guard who worked on the campus until 1976—a gentleman of some taste, apparently—had helped himself to the books (along with a couple of hundred valuable artifacts from other University departments). For a decade and a half, until a tipster called police, the treasures sat on display in his living room in the farming community of Gilroy, California.

Now restored to their rightful place in Crown Law Library, the precious volumes are once again available to scholars—subject, of course, to the most stringent security.

### BEYOND TEXTBOOKS

The "Interactive Courtroom" multimedia program developed at the Law School (STANFORD LAWYER, Spring/Summer 1989) and demonstrated at the 1993 Board of Visitors meeting (see pages 33–34) is earning kudos. It was named Best Program Idea by the ABA's Association of Continuing Legal Education Administrators. And it has received silver medals in the *NewMedia* INVISION 1993 Multimedia Awards competition and in the New York Festivals International Interactive Multimedia competition. Produced by Tim Hallahan, a former senior research associate at the School, the program consists of a series of eight lessons in courtroom techniques. For information about the interactive-video software modules, contact David Arfin of the CLE Group at 415/324-1827.

### A HAPPY OUTCOME

The following letter, dated February 16, 1993, from Adrien Wing '82, brought us much pleasure:

"I have just sent in my last coupon on my student loans to complete payment for money I borrowed from 1979 to 1982. I would like to take this opportunity to publicly thank my alma mater for providing me with the resources that enabled me to chart the course of my life.

"After graduation from the law school in 1982, I spent five years in the private practice of

international law with two firms in New York City. Since 1987, I have been an associate professor of law here at the University of Iowa. I have recently learned that I have been granted tenure and promotion to full professor. I am the first black woman in the history of the university to receive this honor. I am of course involved in a variety of professional and civic activities, including the local schools committee.

"I am confident that I could not have accomplished all of this by the age of 36 if it were not for the firm foundation Stanford provided."

### MAKE THAT 1981

Meyers-era grads will have realized that this portrait of the School's first Richard E. Lang Professor and Dean, Charles Meyers, was painted by Ralph Borge in 1981—not the earlier date indicated by our typo on page 20 of the Fall 1992 issue. □





## Faculty Notes

*Note: In a departure from previous practice, the editor asked contributors to limit their reports to a few highlights of the previous year. Readers are correct to assume that Stanford Law faculty contributions to scholarship and public affairs go far beyond that specified here.*

**Janet Cooper Alexander**, a former clerk of the late Supreme Court Justice Marshall, was the keynote speaker for a forum, "Remembering Thurgood Marshall," at the University of California, San Diego. The April 27 event celebrated the renaming of UCSD's Third College in honor of the path-breaking advocate and jurist. Alexander traveled to the University of Virginia in March for a Conference on Economic Analysis of Civil Procedure, where she spoke on "Judicial Preferences and Procedural Rules." Her publications include a *Harvard Law Review* article, "Unlimited Shareholder Liability Through a Procedural Lens" (102:387).

**Ian Ayres** taught at Iowa Law School in January and overseas, at the Moscow Institute of Foreign Relations, in July. In past months he also presented papers at Toronto, Boston, Chicago, UC-San Diego, USC, UCLA, Emory, and Columbia. The professor's published articles include "Making a Difference: The Contractual Contributions of Easterbrook and Fischel" in the *University of Chicago Law Review* (59:1391), "Designing

Responsive Regulatory Institutions" (with John Braithwaite) in *The Responsive Community* (2:41), and "Price and Prejudice" in the July 6, 1992, *New Republic* magazine.

On a personal note, he and Jennifer Brown, a member of the Emory Law School faculty, were married on May 29. She is a visiting professor this fall at nearby Santa Clara University.

**Barbara A. Babcock**, the School's Ernest W. McFarland Professor of Law, has been studying the issue of women and juries, and whether women summoned to serve may then be struck on account of gender. Hence her chapter in *Verdict: Assessing the Civil Jury* (Brookings, 1993), article "A Place in the Palladium: Women and Jury Service" for the July 1993 *Cincinnati Law Review*, and keynote speech "Gender and Juries" for the annual dinner of Stanford's Center for Research on Women and Gender. She also spoke at the Ninth Circuit Judicial Conference in Sun Valley, where she introduced the first gender-bias study done in the federal courts, subsequently published as "Western Women Lawyers" in the July 1993 *Stanford Law Review*.

Professor Babcock "enjoyed not being attorney general" for a few days last spring, when her name appeared on a short list for the office. The resulting media blitz included frequent mention of her work-in-progress on the late Clara Shortridge Foltz, which led to the

discovery of two new sources: a godchild of Foltz's and a descendant of her Los Angeles law partner.

**Joseph M. Bankman** is celebrating publication of the eighth edition of his casebook with UCLA professor William Klein, *Federal Income Taxation* (Little, Brown, 1993). Also recent and interesting: "Is the Debate Between an Income Tax and a Consumption Tax a Debate About Risk? Does It Matter?" (with T. Griffith) in *Tax Law Review* (47:377). Professor Bankman's presentations include "Teaching Tax Policy," for an Association of American Law Schools teaching workshop last fall in Washington, D.C.

Currently the School's Helen L. Crocker Faculty Scholar, Bankman has been participating in University affairs as chair of the Provost's Advisory Committee on Early Retirement and also of the Faculty Committee on Financial Aid.

**John H. Barton**, George E. Osborne Professor of Law, was appointed by U.S. Department of Agriculture Secretary Edward Madigan to a newly formed National Genetic Resources Advisory Council, which will offer advice on the use of agriculture-related genetic material. Other appointments are to the Soros Foundation Commission on the Study of Law in Higher Education for Russia, and to a binational panel under Chapter 19 of the Canada-U.S. Free Trade Agreement.

**William F. Baxter**, Wm. Benjamin Scott and Luna M. Scott Professor of Law, has become emeritus. He continues to teach the Antitrust course, to serve as of counsel to Shearman & Sterling, and to write and comment on antitrust and other public policy matters. In July-August 1993, he was counsel of record in the American Airlines litigation, successfully defending the carrier against charges of predatory pricing brought by Continental and Northwest Airlines. Once the assistant attorney general and head of the Antitrust Division of the U.S. Department of Justice (1981-83), he is also a former teacher of the present occupant of that powerful post, Anne Kovacovich Bingaman '68 (see page 71).

**Paul Brest**, Richard E. Lang Professor and Dean, has, in addition to a number of Stanford activities, participated in a University of Michigan symposium on legal education. His paper for that event, titled "Plus Ça Change," appeared in the August 1993 *Michigan Law Review* (91:8).

**Frank F. Brucato**, Associate Dean for Administration, hosted a forum on loan forgiveness during the 1993 annual meeting in January of the Association of American Law Schools. Dean Brest and Sally Dickson, Associate Dean for Student Affairs, were also involved. Attended by representatives of 18 major schools, the event provid-



ed perhaps the first opportunity for them to discuss together the problems of financing a legal education—particularly for students going into low-paying public service jobs—and explore some possible solutions.

**Tom Campbell** rejoined the faculty full-time at the expiration in January of his second term as a member of the U.S. House of Representatives. His service in the 102nd Congress earned him two awards. Citizens for a Sound Economy presented him with their Jefferson Award for distinguished service. And the National Taxpayers Union named him the single Most Frugal Member of Congress.

A reformist Republican, Professor Campbell reentered the electoral arena this summer as a candidate for the Peninsula-area California state senate seat unexpectedly vacated mid-term by Rebecca Morgan.

**Mauro Cappelletti**, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies, has been elected honorary president of the newly created Asociación Ibero-Latino Americana de Derecho Procesal Constitucional. He continues to write extensively, including a book in Portuguese, *Juizes Legisladores*, published in Brazil in April. Professor Cappelletti's most notable recent appearance was at the University of Dublin in Ireland, where he contributed to the celebration of Trinity College's 400th anniversary by delivering its Moran Lecture. His subject: "Towards the United States of Europe."

**Gerhard Casper**, professor of law and president of Stanford University, has weathered his first year in the high-profile post. Challenges for the constitutional law expert have included the continuing shortfall in government reimbursement for indirect costs of funded research, formulation of a conflict-of-interest policy for research with commercial potential, implementation of an affirmative action plan for administrative positions, the drafting of a sexual harassment policy, and the selection of a new General Counsel. "To some extent, I can say that I had a ball," said President Casper. But (continuing the metaphor) he added: "Coming in from a ball at 2 or 3 a.m., you sometimes tend to be exhausted."

**William Cohen**, C. Wendell and Edith M. Carlsmith Professor of Law, lectured on "Federal Civil Rights Actions Commenced in State Courts," at the American Bar Association judges' seminar in Portland last September. In January 1993, at the Association of American Law Schools convention in San Francisco, he participated in a mini-workshop on globalization, leading a panel discussion on constitutional law. He was also moderator and panelist for an AALS constitutional law workshop, Perspectives on a Changing Court, in June in Ann Arbor.

Professor Cohen chaired Stanford University's Student Judicial Council during 1992–1993. And in June, the ninth edition of *Constitutional Law: Cases & Materials*, which he coau-

thored with Jon Varat of UCLA, was published.

**Sally M. Dickson**, Associate Dean for Student Affairs and a lecturer in law, was a panelist in June at the 1993 National Conference on Race and Ethnicity in American Higher Education. At Stanford, she organized and taught a course for undergraduates during the spring semester. Called "The Fire This Time: Los Angeles Riots 1965 and 1992—Why," it explored political, socioeconomic and other "percolating factors" related to the Rodney King beating and aftermath. Dickson is the current chairperson for the East Palo Alto Community Law Project. Also the resident fellow for the University's Black/African-American theme house, Ujamaa, she received the Stanford Black Community Services Center's award for Black Institutional Development this spring.

Former dean **John Hart Ely**, Robert E. Paradise Professor of Law, continues on walkabout with a third consecutive visiting professorship, this time at Georgetown University Law Center in Washington, D.C. His much-heralded new book, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, was published this summer by Princeton University Press. In it, he concludes that the mode by which this country has become involved in wars clearly violates the Constitution.

**Marc A. Franklin**, Frederick I. Richman Professor of Law, has been

working on updated supplements to two media law casebooks widely used in law schools and undergraduate courses, and on the third edition—published this past summer—of *The First Amendment and the Fifth Estate*.

Franklin and his wife, Ruth, spent the summer of 1992 in Melanesia and Polynesia studying village life and traditional art—an adventure described by Ruth in an article, "The Call of Distant Drums," in the June 1993 *Stanford Magazine*.

**Barbara H. Fried**, one of the new faces of 1987 and the Hurlbut teaching award winner in 1991, has been awarded tenure (see pages 30–31).

**Lawrence M. Friedman**, Marion Rice Kirkwood Professor of Law, visited Italy in January, giving a series of lectures at five universities. He crossed the Atlantic again in May—this time to Sweden—where he received an honorary doctorate in law from the University of Lund. Professor Friedman, who has written or edited more than a dozen books, has just published *Crime and Punishment in American History* (Basic Books, 1993). It explores the changes over 250 years in our views and laws concerning criminal behavior and relates these changes to changes in the larger culture. "A very rich book," said reviewer Yale Kamisar in a more-than-full-page review in the *New York Times* Sunday book section. "The author has an astonishing fund of knowledge . . . And he is a gifted writer."



**Ronald J. Gilson**, Charles J. Meyers Professor of Law and Business, participated in a conference on the development of commercial law in a transition economy. Held in Kiev in June, the event was sponsored by the Commercial Law Project for the Ukraine. Since last report he has published "The Interaction of Politics and Markets" in *The Deal Decade* (M. Blair, ed., Brookings Institution, 1992), "Understanding the Japanese Keiretsu" (with Mark Roe) in the *Yale Law Journal* (102:871), and "Investment Companies as Guardian Shareholders" (with Reinier Kraakman) in *Stanford Law Review* (45:985), among other works. Gilson presented papers at such expert gatherings as the 25th Annual Institute on Securities Regulation, held last November in New York City; New Theoretical Perspectives on Conflict Resolution, in February at Stanford; and a conference on Relational Investing, which he also helped organize with the sponsorship of Columbia University's Institutional Investor Project, in May in New York.

**Paul Goldstein**, Stella W. and Ira S. Lillick Professor of Law, has been appointed by the Librarian of Congress to a new Advisory Committee on Copyright Registration and Deposit. The 20-member private sector group will consider improvements to the system through which the Library of Congress receives works for its collections.

This year Goldstein also published a chapter, "The E.C. Software Directive—A View from the United States of America," in A

*Handbook of European Software Law* (Oxford University Press); the 1993 supplement to his 3-volume treatise, *Copyright: Principles, Law and Practice*; and the revised third edition of his casebook, *Copyright, Patent, Trademark and Related State Doctrines*.

**Robert W. Gordon**, Adelbert H. Sweet Professor of Law, delivered a series of lectures at the University of Michigan Law School last fall. Endowed as the Thomas M. Cooley Lectures, they were on the topic, "Taming the Past: Histories of Liberal Society in Legal Argument." Since last report, he has also directed an NEH seminar for college teachers on "History in Law: Construction of the Past in American Legal Thought."

**William B. Gould IV**, the Charles A. Beardsley Professor of Law, is President Clinton's choice to head the National Labor Relations Board. Gould's nomination to the NLRB is, as of this writing, before the Congress. The professor's other big news is the publication by MIT Press of his latest book, *Agenda for Reform: The Future of Employment Relationships and the Law*. (An excerpt appears on page 24 of this magazine.) Also published this year was the third edition of his *Primer on American Labor Law*. In August, Professor Gould made his eighth visit to the Union of South Africa, delivering lectures in Johannesburg and Durban on equal pay, under the sponsorship of the South African Employers' Consultative Committee on Labour Affairs.

**Henry T. (Hank) Greely** organized and moderated a National Institutes of Health workshop in February on the ethical and human rights issues in the Human Genome Diversity Project, with which he remains actively involved. February also took him to the University of Southern California, where he spoke on health insurance issues at a symposium on implications of the Project. In April, he participated in a Vanderbilt University conference on medical malpractice attended by 25 state supreme court justices, where he presented talks on AIDS and on institutional liability.

Professor Greely's publications include a chapter, "Legal and Political Considerations," in *Basic Benefits and Clinical Guidelines*, edited by David Hadorn. Also an expert in health care financing (see pages 24–25), Greely has provided advice to the White House Task Force on Health Care.

**Thomas C. Grey**, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, presented two papers at other universities this spring: "Holmes on Torts" at New York University Law School in March; and "James Bradley Thayer's Constitutional Theory" at Northwestern Law School in April.

**Joseph A. Grundfest** has been named to the Legal Advisory Board of the New York Stock Exchange. He recently published "The Limited Future of Unlimited Liability: A Capital Markets Perspective" in the *Yale Law Journal* (102:387), "Just Vote No: A Minimalist Strategy for Dealing

with Barbarians Inside the Gate" in *Stanford Law Review* (45:857), and "Zen and the Art of Securities Regulation" in the *Journal of Applied Corporate Finance* (5:4). A Hoover Institution national fellow for 1992–93, he presented research-in-progress at Harvard Law School and at the UCLA Economics Department, and participated in presentations sponsored by the Practicing Law Institute and by Stanford's Continuing Legal Education program.

Grundfest is also serving as director of the Roberts Program in Law, Business and Corporate Governance (STANFORD LAW ALUM, Spring 1993). For the inaugural event of the Program, he organized the School's first foray into executive education: a seminar, "Tools for Executive Survival," which drew more than 60 senior executives of publicly traded firms (see pages 40–41).

**Gerald Gunther**, William Nelson Cromwell Professor of Law, has delivered the edited manuscript of his monumental biography of the late Judge Learned Hand to the publisher, Alfred A. Knopf, Inc. This spring he also testified before the Senate Judiciary Committee in support of a former student from his Columbia teaching days, Ruth Bader Ginsburg (see pages 21–22). Professor Gunther is spending the Fall 1993 term in New York City as a visiting professor at Brooklyn Law School.

**Janet E. Halley** delivered two invited papers this year: "Reasoning About Sodomy," for a University of Virginia symposium in



April on gay, lesbian and bisexual legal issues; and "Comments on Judge Posner's Economic Analysis of Homosexuality," at Brown University's Conference on Laws and Nature: Shaping Sex, Preference and the Family, in February. Halley served as a legal advisor to the Arlington (Virginia) Gay and Lesbian Alliance concerning the authority of a county board to pass an ordinance banning sexual-orientation discrimination; she co-wrote an advisory opinion that led the board to adopt the ordinance. Finally, Halley has been named to the editorial advisory boards of *GLQ: A Quarterly of Gay and Lesbian Studies* and *Stanford Humanities Review*.

**Thomas C. Heller** is back in residence after seven years as director of the University's Overseas Studies Program and a 1992-93 sabbatical as Jean Monet Professor at the European University Institute in Florence, Italy. At Stanford, he is concurrently serving as Professor of Law and as Professor at the Institute for International Studies. His 1993-94 courses include a seminar on comparative systems of capitalism and another on the problems of free trade and regulation in regional integration.

**Bill Ong Hing** has sparked considerable media interest with his new and timely book, *Making and Remaking Asian America Through Immigration Policy, 1850-1990*. Published this summer by the Stanford University Press, it sheds light on the development and character of the six largest Asian-

American communities: Chinese, Filipino, Japanese, Korean, Vietnamese, and Asian Indian. A passage on refugee immigration forms the basis of his *At Issue* piece beginning on page 18.

**J. Myron Jacobstein**, emeritus law librarian and professor, and his frequent coauthor, Texas professor Roy M. Mersky, have prepared a historical reference book called *The Rejected*. Printed by Toucan Valley Publications, it provides sketches of the 26 men nominated for the Supreme Court but not confirmed by the Senate.

**Mark G. Kelman** published "Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics" in *Stanford Law Review* (45:1215). The professor has also recently consulted with the AFL-CIO on the prohibition of employer-dominated labor organizations and the hiring of permanent replacements for economic strikers.

**William C. Lazier**, the successful business executive who has been teaching the innovative course, "What Lawyers Should Know About Business," has earned the title of Nancy and Charles Munger Professor of Business in the School of Law (see page 30).

**Gerald P. López**, Kenneth and Harle Montgomery Professor of Public Interest Law, delivered the 1993 University of Tennessee Law School's Charles Miller Lecture this spring on "Economic Development in the 'Murder Capital of the Nation

[East Palo Alto]." He also was plenary speaker at the Association of American Law Schools Annual Clinical Conference and at the Western Faculty of Color Conference. Professor López served as lead counsel in *Butler v. Bishop*, a successful \$1.2-million civil rights case against the County of San Diego's Sheriff's Department over brutality by deputy sheriffs.

**Miguel A. Méndez** had a featured article on the disqualification of bilingual jury candidates, "Hernandez: The Wrong Message at the Wrong Time," in the Winter 1992-93 *Stanford Law & Policy Review*. His recent presentations include "The Founding of MALDEF," as part of the introduction of Antonia Hernandez, winner of the 1993 Galarza Prize of the Stanford Center for Chicano Research; and a November lecture, "The Misuse of Character Evidence," for judges attending the California Conference for Judicial Education and Research. Last year Professor Méndez also chaired the Stanford Chicano Faculty Association. And in May he was honored by Stanford's Latino pre-law society, *Derechos*, for his "mentorship and counseling assistance" over the dozen years since he helped found the group.

**John Henry Merryman**, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor, Emeritus, moderated a series of three panel discussions—on museums, collecting, and government funding/censorship—at the Metropolitan Museum of Art

in October 1992. He traveled to Italy in December to deliver an invited lecture at the University of Rome, "Ricordando [Remembering] Gino Gorla," and to Mauna Lani, Hawaii, in February to give an address on the international traffic in cultural property, to the Second Circuit Bench and Bar Conference. His article on the right of artists to share in profits from their work, "The Wrath of Robert Rauschenberg," appeared in the *Journal of the Copyright Society of the USA* (40:241).

**A. Mitchell Polinsky**, Josephine Scott Crocker Professor of Law and Economics, has been elected president of the American Law and Economics Association. A visiting professor at Harvard Law School during the 1992-93 academic year, he is now back in residence and the recipient of a 1993 John Simon Guggenheim Memorial Foundation fellowship. He and a coauthor have also been awarded a \$111,600 grant from the Lynde and Harry Bradley Foundation to study the economic theory of public enforcement of law. Professor Polinsky continues to direct Stanford's John M. Olin Program in Law and Economics.

**Robert L. Rabin**, A. Calder Mackay Professor of Law, spoke on tort reform at the University of San Diego Law School last November, on mass toxics administrative-compensation schemes in January at the Association of American Law Schools annual meeting, and on tobacco tort liability at McGeorge School



of Law in April. He has just published a book—*Smoking Policy: Law, Politics, and Culture* (Oxford, 1993)—with essays from a number of scholars. Professor Rabin is currently serving as program director to the Robert Wood Johnson Foundation program on tobacco policy research and evaluation. He is also on the advisory committee of the American Law Institute's project to draft a new Restatement of Products Liability.

**Margaret Jane Radin** was the Brainerd Currie Lecturer at Duke University in March. Her address, "Compensation and Commensurability," considered whether or how injuries should be understood in market terms (e.g., what is an arm worth?). Later that spring, at a New York University colloquium on law, philosophy, and social theories, the professor presented two chapters from her book-in-progress on commodification.

**Deborah L. Rhode** is the editor (with Annette Lawson) of *The Politics of Pregnancy: Adolescent Sexuality and Public Policy*, a collection of essays and papers published this spring by Yale University Press (see page 22). She also contributed a new entry, on sex discrimination here and abroad, to the *World Book Encyclopedia*. Professor Rhode's presentations include Rice University's Presidential Lecture in January, where she spoke on gender inequality and the challenges of the 1990s. And in March she gave a paper, "Missing Questions: Feminist Perspec-

tives on Legal Education," at a Stanford Law Review symposium on legal education and civic virtue.

Professor Rhode is spending Fall 1993 in Manhattan as a visiting professor at both Columbia and New York universities.

**David L. Rosenhan**, professor of law and psychology, has completed a study on a novel program of court supervision in which senior citizens are employed to monitor visits between parents who had abused their children and the children. The professor is happy to report that "it works." In another study, using trial simulations, he demonstrated that jury members who are allowed to take notes are better able to remember complicated events. A psychologist by training, Professor Rosenhan recently delivered a paper on the psychology of altruistic behavior during wartime.

**Kenneth E. Scott**, Ralph M. Parsons Professor of Law and Business, presented a paper, "Implementing FDICIA—An Interim Assessment," at a Brookings Institution Conference last December on the then year-old Federal Deposit Insurance Corporation Improvement Act. Briefly, he found the agency implementation to be less than enthusiastic. Professor Scott has also been studying the replacement of CEOs in major corporations, relating this event both to the composition of boards of directors and to performance of the affected corporation's stock before and after CEO replacement. A "first cut,"

coauthored with Allan W. Kleidon of the GSB, appeared in December as No. 101 in Stanford's John M. Olin Program in Law and Economics working paper series. Its title: "CEO Performance, Board Types and Board Performance."

**Byron D. Sher**, now professor emeritus, continues to be overwhelmingly reelected to the California State Assembly, where he is the leading environmental legislator.

**William H. Simon** was awarded a John Simon Guggenheim Memorial Foundation fellowship to work on a book provisionally titled "A Theory of Legal Ethics." He is also becoming something of a China hand. An article he wrote with Qing Feng of the Chinese State Council was published in the May issue of *China Lawyer*, the PRC's counterpart to the *ABA Journal*. The first in a projected series of ten, it provided perspectives (in Chinese) on the American legal profession. And in August, he went to Beijing to deliver lectures on that same subject. Closer to home, Professor Simon has been working with The Cannery Workers Project in Watsonville on a recycling cooperative and other community economic development projects.

**Kim Taylor-Thompson** has written an essay on the interplay of race and gender in the treatment of Anita Hill. Published in the January 1993 *Stanford Law Review*, it is titled "Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing."

Her change in name from Taylor to Taylor-Thompson signals a happy personal event: her marriage on May 29 to Anthony Thompson, a deputy public defender in Contra Costa County.

**Barton (Buzz) Thompson, Jr.** traveled to Colorado in June to give two presentations at the Natural Resources Law Center's annual summer program on water policy. In May *California Law Review* (81:671) published his article, "Institutional Perspectives on Water Policy and Markets," looking at the important role of water organizations. His presentations on takings law and the environment include a talk last September to the Washington State Bar Program on Water Rights Law.

Recently awarded tenure (see page 29), Professor Thompson is also the proud recipient of the School's 1993 Hurlbut Award for outstanding teaching (see pages 37–38).

**Michael S. Wald**, Jackson Eli Reynolds Professor of Law, is on leave to the federal government. His appointment as deputy general counsel for the Department of Health and Human Services was announced by President Clinton on August 31 (see page 31).

**Robert Weisberg** has been exploring the phenomenon of vigilantism and related crimes where perpetrators feel they are engaged in self-help law enforcement. His essay—"Private Violence as Moral Action: The Law as Inspiration and Example"—appeared as



a chapter in *Law's Violence*, a 1993 book edited by Austin Sarat and Thomas Kearns as part of a University of Michigan Press series on new issues in jurisprudence. Professor Weisberg, who was recently named the inaugural Bernard D. Bergreen Faculty Scholar (STANFORD LAW ALUM, Spring 1993), is currently writing about literary criticisms of law. He and his collaborator, Guyora Binder of the State University of New York at Buffalo, gave two presentations on the subject in April, one at SUNY-Buffalo and the other at Boalt Hall.

Professor Weisberg has also performed a number of services for Stanford University, such as chairing the search committee for a new University general counsel that resulted in the selection of Michael Roster '70.

Deborah M. Weiss participated in a symposium last December on Social Investing. And in January she had an article, "Can Capital Tax Policy Be Fair? Stimulating Savings Through Differentiated Tax Rates," published in the *Cornell Law Review* (78:206).

James Q. Whitman has an article, "Of Corporatism, Fascism and the First New Deal," in the *American Journal of Comparative Law* (39:4). He spent last fall at UC-Berkeley's Boalt Hall as a senior fellow at the Robins Religious and Civil Law Collection, and is currently at Yale as a visiting professor. His presentations include an August 1992 invited lecture at the University of Tübingen in Germany. □



## Leaving a Legacy

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## FROM THE DEAN

*Continued from page 3*

dilemmas.

The MacCrate Report rightly observes that clinical methods are extremely helpful in learning many of these skills. But, having usefully differentiated among the skills in the SSV, the Report goes on to assert, virtually without discussion, that all law students should be instructed in all of these skills before graduation. My own experience and thinking lead me to make some differentiations, based on the following considerations:

*Pedagogy.* People learn best when they can utilize the skills and knowledge as they acquire them. Without the opportunity to take what one learns in the classroom and apply it outside, the classroom learning becomes attenuated and lost. It is like taking music lessons without having an instrument to practice on at home. This suggests that law school may be a better time for students to develop the skills of legal research, analysis, and writing than, say, those of trial advocacy or law office management.

*Intellectual development.* There are opportunity costs in spending the law school years on applied skills training rather than on building strong intellectual foundations in law, policy, and legal theory, and in legal research and writing skills. Law school graduates are practicing in an increasingly complex legal, economic, and social environment, and they need concomitantly broad knowledge to become effective practitioners. The second and third years of law school, far from being large holes in need of filling, provide the last sustained opportunity for many students to develop breadth and a degree of depth in areas as diverse as finance theory, international law, and intellectual property, and to hone their skills in analysis, problem-solving, and writing.

*Faculty expertise and responsibilities.* As Judge Harry Edwards recently observed, the profession relies on law professors to produce legal scholarship that "analyzes the law and the legal system with an aim to instruct attorneys in their consideration of legal problems; to guide judges and

other decisionmakers in their resolution of legal disputes; and to advise legislators and other policymakers on law reform."<sup>3</sup> While there are professors who excel both as scholars and as clinical instructors of the more practice-oriented lawyering skills, the combination is not all that common. The two activities tend to attract people with different interests; moreover, clinical instruction and scholarship are each so time-consuming that few ordinary mortals can sustain excellent work in both activities.

*Resources.* In a sharp break with the tradition of ABA regulation of law schools, the MacCrate Task Force specifies the appropriate instructors and faculty-student ratios for skills courses and, indeed, the method of pedagogy. Primary responsibility for skills instruction should be assigned to permanent full-time faculty<sup>4</sup> in classes with very small faculty-student ratios<sup>5</sup> and with individualized evaluation.<sup>6</sup> I agree with this as an ideal (though one should not underestimate the potential of interactive video and other emerging technologies that facilitate the self-learning of some practical skills). However, the cost of implementing the recommendations would be massive.<sup>7</sup> Whether or not this allocation of resources is ultimately justified, the Report's failure to discuss these costs and who shall pay them is baffling, not to say irresponsible.

Leaving aside considerations of cost, I would place the ten skills identified in the SSV on a spectrum in terms of the emphasis they should receive during and after law school. At one end of the spectrum lie skills that provide the foundations for virtually any law practice and for continuing professional development during the years of practice. These include problem-solving; legal reasoning, analysis, and research; oral and written advocacy and communication; and recognizing and resolving ethical dilemmas. Every law school should provide all of its graduates with a solid grounding in these skills.

At the other end, I would place the more practical or applied skills of litigation, trial practice, and law office management, which most students will have little opportunity to

apply until they are in practice, if then. I would place some aspects of factual investigation, counseling, and negotiation between these poles. These skills are relevant to virtually every law practice, and indeed to almost all aspects of life, personal and professional; students have opportunities to apply them outside of the classroom; and negotiation has important theoretical dimensions that intersect well with a degree of skills learning.

Of course, these views represent only one of a multitude of positions held by legal educators. They have been shaped by my experience as a faculty member, clinical instructor, and dean at a particular institution. I certainly do not fault the Task Force members for holding different views. I do, however, fault them for seeking to impose them on educators and institutions no less thoughtful or committed to professional education than themselves.

### IF NOT IN LAW SCHOOL, WHEN? THE IDEAL AND THE REAL

In an ideal world, the education of lawyers would follow the pattern in medicine and most other professions: the acquisition of foundational substantive knowledge and skills in school, followed by a closely supervised apprenticeship. Quite a few law school graduates in fact enter private firms and government offices in which they receive personal supervision and mentorship from experienced lawyers. But though a growing number of state bars require continuing education and some require new lawyers to take courses in practical lawyering skills in their early years of practice, no jurisdiction currently requires a period of supervision or apprenticeship for new lawyers. Many law school graduates enter solo or small group practice immediately after they pass the bar. And the quality of on-the-job training even by large firms and institutional employers varies widely.

Bowing to the realities of state bar politics, the MacCrate Task Force does not even hint at an apprenticeship requirement, but rather seeks to regulate the one set of institutions over which the ABA has direct control through the accrediting process. It is also not surprising that the Task



Force should aim for the lowest common denominator. Under these circumstances, it is understandable that law schools should feel beleaguered and dig in against the recommendations of the Task Force. But, in view of our obligation to the profession, it would be irresponsible not to take account of the realities of postgraduate professional education. I think a productive accommodation of the diverse interests might take this form:

*School self-assessment.* As part of the self-study done in preparation for reaccreditation, every ABA accredited law school should assess its skills training offerings in light of its overall mission and the typical career paths of its graduates, including their realistic opportunities for postgraduate education, with the aim of offering and/or requiring skills training it believes appropriate to the circumstances. This requirement acknowledges the diversity of law schools, while requiring every school regularly to examine and justify the role of skills training in its curriculum.

*Postgraduate training.* State bars should ensure that practical lawyering skills training is available at a reasonable price to all lawyers, and should consider requiring new lawyers to take skills training in subjects appropriate to their practices. By the same token, law firms and institutional employers should ensure that their new lawyers receive appropriate skills training. This recommendation, while respecting each jurisdiction's traditional responsibility for maintaining the quality of its bar, emphasizes the importance of lawyers' possessing the skills necessary to their professional work and places an appropriate responsibility on institutional employers.

The MacCrate Task Force recommends these strategies,<sup>8</sup> but seeks to go considerably farther in mandating the curricula, teaching methods, faculty-student ratios, and teaching personnel for all law schools. Nothing in the Report itself justifies this intrusive and counterproductive approach, and I fervently hope that the recent amendment to Accreditation Standard 301(a) will not be understood as a move in this direction. □

## FOOTNOTES

<sup>1</sup> Recommendation C13; pp. 234, 240, and 241. The Report also specifically recommends that law schools offer "well-structured clinical programs [to] help students understand the importance of the skill of 'organization and management of legal work.'" (Recommendation C15)

<sup>2</sup> Recommendations D2 and C22.

<sup>3</sup> Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession," 91 *Mich. L. Rev.* 34, 42-43 (1992).

<sup>4</sup> Recommendation C24.

<sup>5</sup> Pages 248-251.

<sup>6</sup> Recommendation C6.

<sup>7</sup> In a forthcoming article in the *Journal of Legal Education*, Dean John Costonis of Vanderbilt discusses

the enormous impact of the Report's recommendations on resources at his own institution.

<sup>8</sup> The Report recommends that law schools evaluate their programs in the light of the SSV. (Recommendation C7) It also recommends that "the organized bar . . . should strive to make available to all new lawyers effective instruction in lawyering skills and values at a cost that new lawyers can afford." (Recommendation D12) It "urges that all states . . . consider imposing upon all attorneys subject to their jurisdiction a requirement for periodic instruction in lawyering skills and professional values." (Recommendation E2) And it "encourages law firms, corporate law departments and government agencies to examine their in-house training programs for lawyers . . . to ensure that appropriate and effective instruction in skills and values is provided." (Recommendation E4)

## AT ISSUE

*Continued from page 19*

"well-founded fear of persecution"—a term from the 1968 United Nations Protocol.

Since the implementation of the 1980 Act, the United States has allowed in more than a million refugees under the first-track system, making it a leader (although not the per capita leader) among refugee-admitting countries. In contrast, only 5,000 to 10,000 asylum applications have been approved per year. To say the least, the U.S. has not reacted warmly to notable groups who have reached our borders seeking asylum under the second track. When Haitians, El Salvadorans, Guatemalans, and now Chinese began arriving in significant numbers, the powers-that-be were quick to label them as economic rather than political refugees.

This response has manifested itself in humiliating ways. In the early 1980s, for example, the Immigration and Naturalization Service implemented an efficiency plan in Miami by which Haitian asylum hearings were often limited to 15 minutes, im-

migration judges were ordered to increase productivity and hear at least 18 cases per day, and some attorneys were scheduled for hearings at the same time for different clients in different parts of the city. The Fifth Circuit chastised immigration officials for violating due process [*Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982)]. A similar suit in California ended with the INS agreeing to reevaluate potentially up to 500,000 Salvadoran and Guatemalan asylum cases from the 1980s, due to strong evidence of discrimination against those nationals [*American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal./1991)]. (Unfortunately, no such reevaluation has been provided for the hastily rejected Haitians.)

As the move to summarily exclude the recent influx of Chinese seeking refuge heightens, we should remember our nation's experience, not only with Jews in the 1930s, but also with Haitians, Guatemalans, and El Salvadorans in the 1980s. Recent revelations of political repression in



their countries indicates that we repeated with these refugees the mistake we made of barring Jews at the time of Nazi persecution. Do we really know enough about the situation in China to confidently turn away Chinese fleeing from Fujian Province as economic migrants? Why are they so willing to endure hazardous journeys? And is arresting and deporting those who are then subjected to reprehensible work environments in this country a response we will look back on with pride?

Proposals to reform the asylum system have been premised in large part on INS assertions that once a person requests asylum, the process can take years. The implication is that asylum applicants are exploiting the system, thus justifying a process of summary exclusion. But remember that the backlog is largely the INS's own doing, because it has had to reevaluate up to a half-million Salvadoran and Guatemalan cases. Make no mistake, expediting the process is not altogether a bad goal. But due process must be maintained, along with sensitivity to the fact that bona fide refugees have been traumatized and that more than one conversation with each applicant is usually necessary to learn the whole story.

As Congress reacts to the waves of refugees reaching our shores and considers reform, let us hope that its members do not act in a way that betrays our longstanding humanitarian ideals. Those ideals remind us that we are a nation that understands that when we make decisions related to refugees, special values are at play because life itself may be at risk. □

*Bill Ong Hing has just published his second book, Making and Remaking Asian America Through Immigration Policy, 1850-1990 (Stanford University Press, 1993). A Stanford Law teacher since 1985, he helped found and continues to serve as the pro bono director of the Immigrant Legal Resource Center.*





# Alumni/ae GATHERINGS

**G**raduates of the School enjoyed a variety of get-togethers these past few months, from serious discussions of issues in the profession and politics, to light-hearted social receptions and parties.

The Stanford Law Society of Southern California sponsored an April 27 luncheon to explore the familiar plaint about the legal profession's becoming less civil. Professor Ronald Gilson was the featured speaker with a talk, "Cooperation and Competition: Can Lawyers Dampen Conflict?" Not surprisingly, the ensuing discussion was quite animated. The Salvatori Room atop the Chandler Pavilion of the Los Angeles Music Center provided an elegant setting for the event.

Professor Tom Campbell joined the Orange County law society for lunch on May 11 at the Center Club in Costa Mesa, where he recounted some true tales of congressional lobbying. The former representative called his talk "How Congress Really Works." Larry Boyd '77 introduced Campbell to the growing southland contingent.

That evening in San Diego, Ed Luce '48 welcomed Stanford colleagues and fellow associates and partners to a recep-



The Class of 1968, now 25 years out, at the Villa Montalvo

tion at Luce, Forward, Hamilton & Scripps. The firm's "penthouse" conference room provided a spectacular view. Topics of conversation included today's Law School and political matters of a lo-

cal and global scope. Kudos to Stephen Brown '72 for arranging the affair.

Washington, D.C. alumni/ae had an opportunity to hear one of the nation's leading conservationists—Dr. Jay Hair, president of the National Wildlife Federation—on "Politics, Legislation and Other Aspects of a Major Environmental Organization." The June 7 event was held at NWF's headquarters on Dupont Circle. Terry Adlhock, JD/MBA '72, the new president of the Stanford Law Society of Washington, D.C., helped organize the affair, which was cosponsored with the local chapters of the Stanford Business School and Stanford Club.

Far-flung alums in London, England, met for lunch on June 10 at Goldman Sachs International Ltd. on Fleet Street. Professor Kenneth Scott '56 was there to talk about campus developments, helping those present feel as if Stanford weren't so distant after all. The occasion was hosted by Reuben Jeffery III, JD/MBA '81.

Law societies in five cities hosted events this summer for recent grads and current students, including the newly ad-



Students Dahlia Lithwick ('95), Kathy Dourousseau ('94), and Alyse Graham ('95) in Washington, D.C.



mitted Class of '96. The Washington, D.C., affair—a June 23 winetasting—was held at the U.S. Senate Office Building, courtesy of Senator Jeff Bingaman '68. The School's newest congressmen, Eric Fingerhut and Xavier Becerra of the Class of '84, were among those attending. The New York City counterpart was held July 13 at the Manhattan home of Marsha Simms '77.

The Southern California law society welcomed new and old alumni/æ to a gathering on the outdoor terrace of the Kachina Grill in downtown Los Angeles. Shauna Jackson '91 organized the June 30 event and rallied a large number of recent graduates to attend. San Francisco newcomers were invited to a July 15 reception at the high-rise Bankers' Club. Associate Dean Ellen Borgersen welcomed one and all, noting that the assembled group represented over 40 years of graduates of Stanford Law School. And in Seattle, the multigenerational event took the form of a picnic August 15 at the lakeside residence of Justice Barbara Durham '68.

Los Angeles grads converged on the Hollywood Bowl July 24 for their now-annual picnic and concert fete. Mark Bronson '89 and Paul Work '89 were the 1993 organizers. The Los Angeles Philharmonic once again provided a lively program—this year celebrating the 30th birthday of the Pink Panther and conducted by composer Henry Mancini.

The American Bar Association 1993 annual meeting in New York City offered alumni/æ from throughout the country a chance to become acquainted and reacquainted. The associated Stanford reception was held August 11 at Essex House, a Central Park landmark. Those present heard the latest on the School from Dean Paul Brest.

Also this year, the Class of 1968 marked their 25th anniversary with a three-day reunion, April 16–18, at Stanford and environs. Chairs for the gala were Anne Kovacovich Bingaman and Paul Ginsburg.

The Law School's Alumni/æ Weekend 1993 in October coincided with Stanford University's grand Homecoming, making for a rich selection of intellectual and other offerings. A report on the event, with photos, will appear in the spring STANFORD LAW ALUM. Watch your mail also for invitations to local law alumni/æ gatherings. And feel free to call the Alumni/æ Affairs office (415/723-2730) with any questions or suggestions you might have.

—Margery Savoye



Hollywood Bowl, scene of the annual Los Angeles alum fete.



Center: Sen. Jeff Bingaman '68 and Prof. William Baxter '56 at the 1968 reunion. Left: James Amschler '68 and Dean Brest at the ABA meeting. Above: convivial guests at the Hollywood Bowl pre-concert picnic.



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Annual meeting  
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*In Orlando, Florida*

April 8-10

Class of '69 Reunion  
*At Stanford*

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For information on these and other events, call  
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