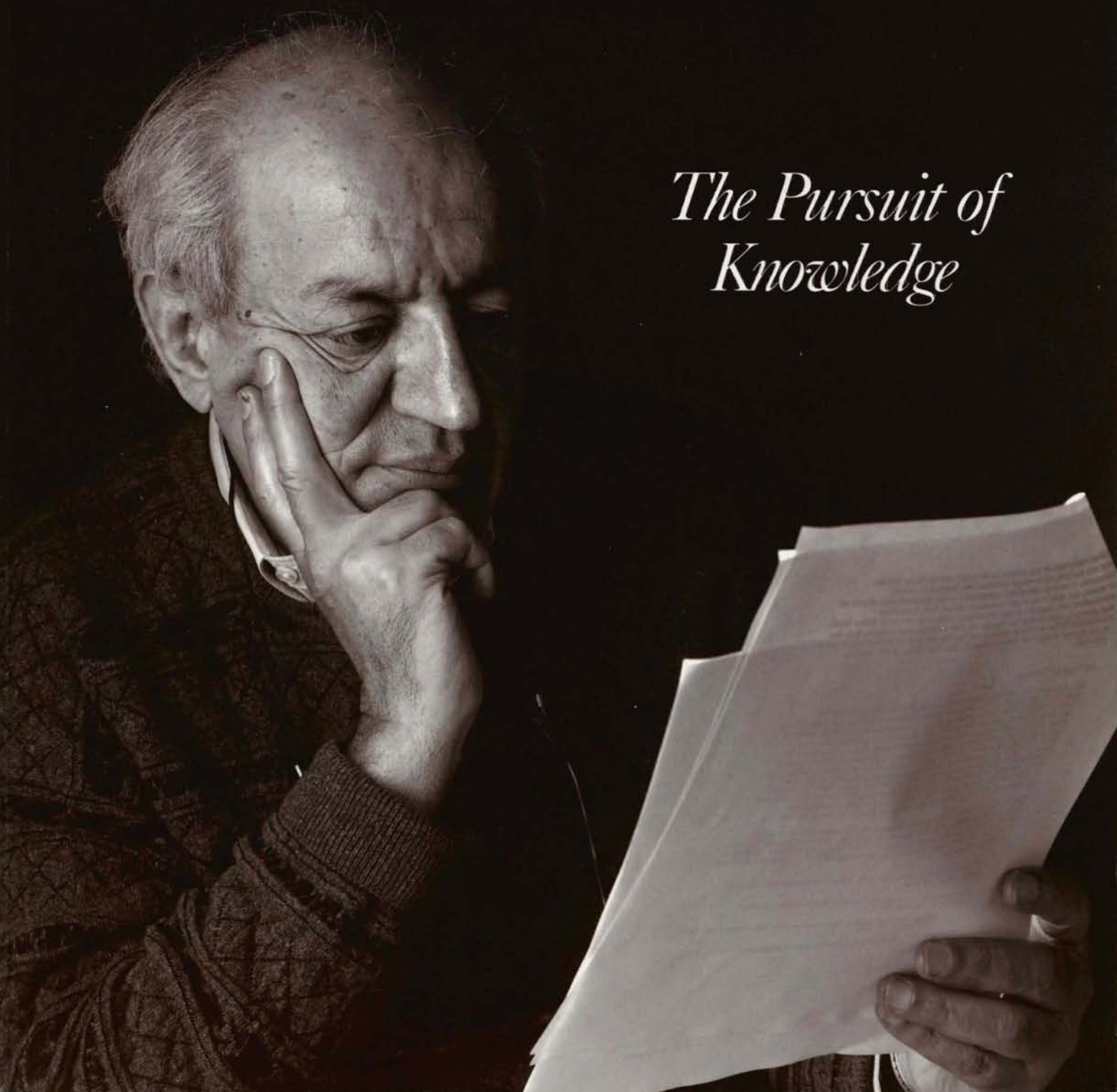



Václav Havel  
Crime in America  
Teaching Ethics

# LAWYER

*Stanford*

*The Pursuit of  
Knowledge*





**Cover:** Gerald Gunther, the School's William Nelson Cromwell Professor of Law. Author of a definitive new book (see pages 4–7ff.), he exemplifies the vital tradition of faculty scholarship discussed by Dean Brest on pages 2–3. Photograph by Steve Gladfelter of Stanford's Visual Art Services.

# LAWYER

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# From the DEAN

## A C O M M U N I T Y O F S C H O L A R S

by Paul Brest

*Richard E. Lang Professor and Dean*

**N**othing is more critical to the vitality of a law school than its faculty. An excellent faculty is the foundation of a great school. It attracts outstanding students who will become leaders in their professions and communities. Stanford Law School's professors are absolutely first-rate—and it is by virtue of their distinction that Stanford is consistently rated among the few top law schools in the country.

This issue celebrates faculty scholarship as personified by two senior professors who have published landmark books this past year: Gerald Gunther, our William Nelson Cromwell Professor of Law, and Lawrence M. Friedman, our Marion Rice Kirkwood Professor of Law. Members of the faculty since the 1960s, they illustrate the high intellectual achievement that has made Stanford Law School what it is today.

Professors Gunther and Friedman illustrate something else as well: the relevance of legal scholarship to contemporary issues and concerns. The two books we feature in this issue have attracted the attention not only of the scholarly and legal press, but also of newspapers and magazines influential among policymakers and legislators. Both, for example, were prominently reviewed in the *New York Times Book Review*.

Five other faculty members also published significant new books this past academic year. Ronald J. Gilson, the School's Charles J. Meyers Professor of Law and Business, joined with Bernard S. Black of Columbia to provide law students with (*Some of*) *the Essentials of Finance and Investment* (Foundation Press, 1993). Miguel Méndez wrote the definitive treatise and guide on *California Evidence* (West Publishing, 1993). Robert L. Rabin, the A. Calder Mackay Professor

of Law, collaborated with Stephen Sugarman of UC-Berkeley on *Smoking Policy: Law, Politics, and Culture* (Oxford University Press 1993). Margaret Jane Radin had a collection of essays on evolving concepts of property published as *Re-interpreting Property* (University of Chicago Press, 1993). And Deborah Rhode created an innovative text for use in a variety of courses, called *Professional Responsibility: Ethics by the Pervasive Method* (Little, Brown, 1994).

While this has clearly been a very good year for Stanford Law scholarship, it is by no means an anomaly. The above-named authors typify a faculty for whom scholarship is a consuming passion. Person for person, there is no more creative and productive faculty in the nation.

I say this advisedly, but you needn't take my word for it. Here is some objective evidence. Keep in mind that the scholarly distinctions I am about to list have been achieved by fewer than 45 individuals with an average age of just 47.

- Authorship of the most-cited law review article of modern times, as well as the fourth and seventh most-cited law review articles of the past decade.
- Two winners of the Triennial Book Award of the Order of the Coif.
- Two authors of books winning ABA Silver Gavel Awards for their publishers.
- At least ten recipients of honorary doctorates from other universities in the United States and abroad.
- Ten fellows and elected members of scholarly societies, including the American Academy of Arts





and Sciences (five faculty members), American Association for the Advancement of Science (two), American Law Institute (six), American Philosophical Society (one), Academia Europaea (one), International Academy of Comparative Law (one), and Council on Foreign Relations (two).

- Six holders of Ph.D.s in fields other than law. Four of these doctorates are in addition to law degrees: Economics, English Literature (two), and Political Science. The other two doctorates are in Economics and Psychology. In addition, several members of the faculty hold M.B.A. or other master's degrees.

- Six professors with joint or courtesy appointments to other Stanford academic departments, namely Economics, Education, Modern Thought and Literature, Political Science, Psychology, and the Institute for International Studies.

- Authors and coauthors of more than 200 books, many of them the foundation of courses in law schools around the country.

No wonder that in the fall 1990 issue of the University of Michigan Law School's *Law Quadrangle Notes*, Michigan Professor Richard Lempert wrote: "From top to bottom, I believe the nation's strongest law faculty is Stanford."

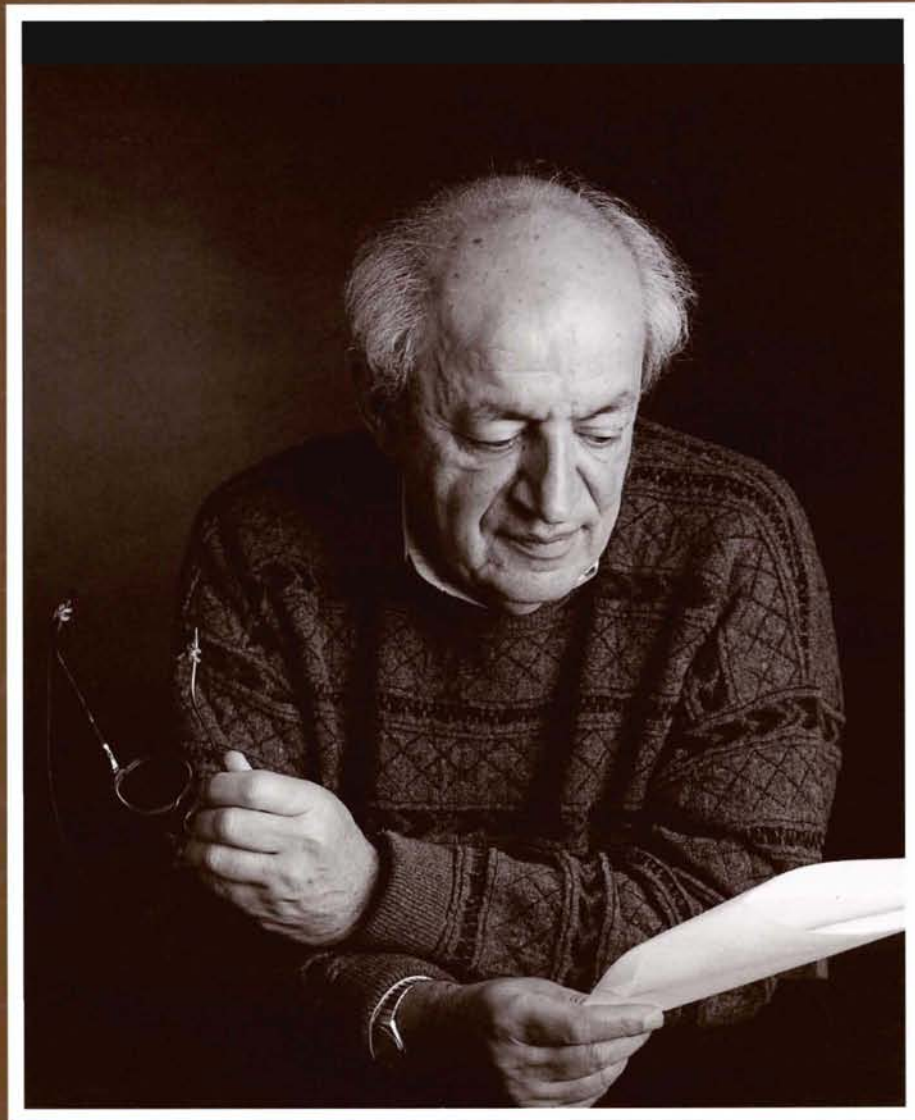
DOES SCHOLARLY ACHIEVEMENT make Stanford Law School a better place to study law? Without a doubt. The field of law must be as dynamic as the society it serves. What better way for students to develop the habits of thought, the insatiable curiosity and openness, the flexibility and foresight that tomorrow's practitioners will need, than by involvement in the ongoing quest for knowledge?

This is what our professors bring to the classroom. And the quest for knowledge involves not only the substance that is taught. It also informs and even revolutionizes the manner of teaching—Deborah Rhode's new ethics book [see pages 18–19] being an outstanding example.

So there is much to celebrate. Not only can we honor blockbuster books by two distinguished professors, but also our vital tradition of scholarship and critical mass of scholars. Impressive evidence of the synergy among faculty members can be found in the prefaces of their books, where appreciation to other Stanford colleagues is commonly expressed. Also significant are the numbers of students credited as participants in these works of scholarship.

Several factors contribute to the vitality of our community of scholars. Of these the most important is the faculty's energy and collegiality. Another is the quality and intellectual curiosity of our students. Also important is access to information—a fine library, databases, and library staff.

All of these, however, ultimately depend on financial resources that are becoming increasingly scarce and inadequate to the task. This is something we will be exploring with you over the next few years. Suffice it to say that this intellectual and educational enterprise is a credit to you and well worth your support. ■





# Mind & Heart

*Judge Learned Hand waged a lonely battle against prosecutorial abuse in this McCarthy-era case. He was ahead of his time*

by Gerald Gunther

*William Nelson Cromwell Professor of Law*

THE LAST of the major cases of the Cold War period to come before Learned Hand's court was that of William Walter Remington, a government economist whose perjury conviction was affirmed by the Second Circuit in 1953. Hand wrote a strong dissent, insisting that the conviction could not stand because governmental misconduct was responsible for the trial at which Remington had allegedly perjured himself. A careful observer characterized the *Remington* case as "a shameful example of the excesses of the McCarthy era," and that is the way Hand viewed the case. His dissenting opinion was the product of a long struggle over many weeks that pitted his long-maintained hostility to overzealous prosecution tactics and his deep disdain for McCarthyism against his belief that he could justify overturning the conviction only if supported by precedents—precedents not readily apparent in this case. In *Remington*, Hand's emotions were at war with the existing state of the law, and he agonized as a result.

WILLIAM REMINGTON was an earnest young intellectual trained in economics who had spent his entire career in government service. He entered Dartmouth College as a sixteen-year-old in 1934, stopped out after his sophomore year to work as a messenger for the Tennessee

Valley Authority, returned to Dartmouth to graduate at the top of his class in 1939, and earned a master's degree in economics from Columbia University in 1940. Remington left Columbia to work in Washington, eventually joining the Department of Commerce, where he became the director of export programs to the Soviet Union's allies in the Office of International Trade.

Remington did not become a public figure until July 30, 1948, when, at a hearing of the Investigations Subcommittee of the Senate Expenditures Committee, he was accused of having passed secret data to the Soviet Union. His accuser was Elizabeth Bentley, one of the major ex-Communist witnesses who testified frequently before congressional committees and grand juries in the 1940s, and who had acknowledged that she had been a courier for a Soviet espionage ring during the war. By then, Remington had already come under suspicion and was under FBI surveillance. A month before Bentley's Senate testimony, he had been suspended from his Commerce Department position pending disposition of a charge of questionable loyalty before a Civil Service Commission regional loyalty review board.

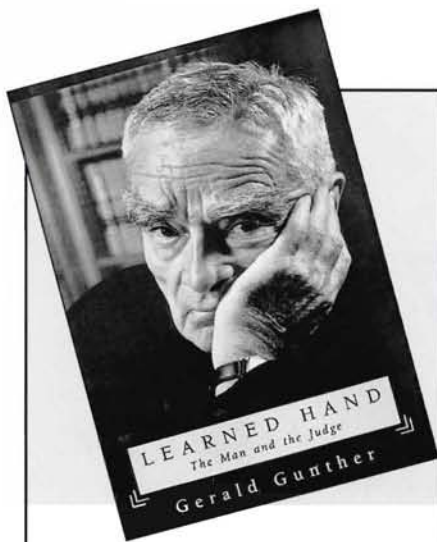
Remington consistently denied that he had spied for the Soviet Union; he did admit that he had met Bentley under her assumed

name, but thought she was a researcher for left-wing journalists. Soon after the Bentley testimony, the regional loyalty review board ruled that there were "reasonable grounds to believe" that Remington had been disloyal. Remington appealed that decision to the president's Loyalty Review Board, which reversed the decision. Remington promptly returned to his government position, with reduced responsibilities.

A year later, additional testimony was given in congressional hearings about Remington's having been a Communist party member when he worked as a teenager for the Tennessee Valley Authority. The Commerce Department began a new investigation that was terminated when the secretary of commerce, though asserting that he did not intend "to reflect in any way on the loyalty of [Remington]," requested that he resign "in the interest of good administration."

Meanwhile, Remington had been called before a federal grand jury of New York investigating espionage charges; that grand jury ultimately indicted him, not for espionage but for perjury during those proceedings: allegedly, he lied in denying that he had ever been a member of the Communist party. Remington thereupon resigned from the Commerce Department, claiming that he was unable to fight two proceedings—the loyalty investigation and the perjury charge—at once.





## *The Book*

### **Learned Hand: The Man and the Judge** by Gerald Gunther

818 pages, Alfred A. Knopf,  
1994

THIS DEFINITIVE biography of the late "Tenth Justice" of the Supreme Court is the result of twenty years' labor by Professor Gunther, a former Hand clerk with exclusive access to the judge's papers. Its publication this spring was heralded in the lay as well as legal press.

"Engrossing and superb. I have never read a better judicial biography."

— Leonard W. Levy  
Editor in Chief  
*Encyclopedia of the  
American Constitution*

"A great biography . . . [Gunther's] approach is—as given the occasion, it should be—balanced, forceful, judicious, and clear."

— *The New Yorker*,  
August 15, 1994

"*Learned Hand* . . . is not only comprehensive but penetrating and illuminating as well."

— Ronald Dworkin  
*The New York Review of Books*,  
August 11, 1994

While Remington denied that he had ever been a Communist party member, he did acknowledge that he was a "philosophical Communist": he believed in organized labor, as well as nationalization and public ownership of industry. He drew a sharp distinction between those who believed in such ideals and those who were actual members of the party, who believed in "dictatorship of the proletariat and overthrow of the Government by force and violence." In his own testimony before the Senate subcommittee and at a press conference immediately thereafter, Remington regretted ever having spoken with Bentley, admitted that he "was very gullible," praised Bentley's courage in "exposing Communism," and emphasized that he had simply been a twenty-four-year-old idealist when he worked for the War Production Board and spoke with her.

After a thirty-two-day trial, Remington was found guilty of having lied to the grand jury when he denied that he had "ever been a member of the Communist Party." He was sentenced to five years' imprisonment and fined \$2,000. . . .

REMYINGTON'S APPEAL of his perjury conviction was argued on June 15, 1951, before a panel consisting of the circuit's three old friends—Thomas Swan, who had succeeded Learned Hand as chief judge earlier in the year, Gus [Augustus N.] Hand, and Learned Hand himself. From the outset, the judges' pre-conference memoranda make clear, Thomas Swan and Learned Hand were sure that the conviction had to be reversed and the case remanded for a new trial; the trial judge's instructions to the jury, they thought, had been inadequate. Only Gus Hand leaned toward affirmance. Ultimately, however, Thomas Swan and Learned Hand persuaded Gus Hand to join in a unanimous opinion reversing the conviction. Chief Judge Swan's opinion found that the judge's instructions to the jury were indeed too "vague and indefinite": the jury had not been told which "overt acts" they could rely on to find that Remington had lied in his denial

of membership in the Communist party.

As it turned out, Remington was not retried on the original perjury charge. The prosecution instead obtained a second perjury indictment, suspiciously like the first, from a new grand jury. The new indictment charged that Remington had lied when he took the stand in his own defense at his first perjury trial. This time, the charge did not include perjury in denying Communist party membership; however, all the charges were related to alleged Communist activities. Remington was convicted on two of these five counts: denying that he had ever delivered government information to Bentley, and denying any acquaintance with the Young Communist League while he studied at Dartmouth.

Remington's appeal of this second conviction brought his case before the same panel that had reversed his first conviction—Learned and Gus Hand and Thomas Swan. This time, Remington put all his hopes into what Gus Hand would call "a rather new and novel argument": having now been able to study the grand jury minutes, he argued that misconduct by both the prosecutor and the grand jury foreman in the first proceeding had led to the trial that gave rise to the second perjury charge. This misconduct, he contended, required that "the first indictment [be] quashed and [the first] trial be declared a nullity." Since he would never have been put on the stand at his first trial "but for the procurement of that indictment by illegal conduct of the Government," he maintained, the government should not be permitted to "gain a benefit from its illegal conduct" by prosecuting him for perjury at a trial that should never have taken place. . . .

FOR LEARNED HAND, the second *Remington* appeal was intellectually and emotionally far more complex than the first. The intellectual problem was difficult enough. Supreme Court precedent did not clearly support Remington's arguments, and, as Gus Hand argued, to immunize the defendant from perjury charges in the circumstances of



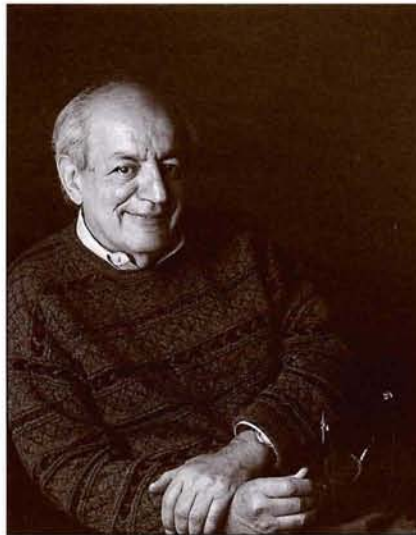
this case might be seen as suggesting "that perjury, although a crime, is an inevitable occurrence in judicial proceedings." Nevertheless, Learned Hand persisted in his view that Remington's conviction had to be reversed. His dissent focused on the first grand jury's interrogation of Remington's former wife, Ann, who had tried to avoid testifying because "her husband's conviction would imperil the support he gave her and her children."

Mrs. Remington's refusal to incriminate her ex-husband led to immense pressure being put upon her in the grand jury room; as Hand pointed out, she had been "questioned continuously for about four hours," up to the point where she broke down and finally admitted that Remington did "give this money to the Communist Party." Once her resistance was broken, "she became generally complaisant, and gave testimony exceedingly damaging to him."

Hand acknowledged that a grand jury was free to press a reluctant witness "hard and sharp," but he insisted that here "the examination went beyond what I deem permissible." The coup de grace that broke Ann Remington's resistance consisted of harangues by the member of the prosecutor's staff in the grand jury room, Special Assistant to the Attorney General Thomas Donegan, and by the grand jury foreman, John Brunini, who said to her:

"Mrs. Remington, I think that we have been very kind and considerate. We haven't raised our voices and we haven't shown our teeth, have we? Maybe you don't know about our teeth. A witness before a Grand Jury hasn't the privilege of refusing to answer a question. You see, we haven't told you that, so far. You have been asked a question. You must answer it. . . . I don't want at this time to—I said 'showing teeth.' I don't want them to bite you."

Hand was especially troubled by the fact that "the examination was *ex parte* and without the presence and control of a judge or any other important official." Hand noted that the First Amendment privilege against self-incrimination



*I raised my face  
and looked up  
into his bemused  
countenance.*

*"Now, now,"  
he gently consoled.*

*"Don't take it  
so hard—  
you did your job;*

*I have to do mine."*

had itself arisen because of the abuses of the Star Chamber in the seventeenth century—the one-sided coercive pressure upon witnesses in secret proceedings. "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination."

Yet Hand was willing to

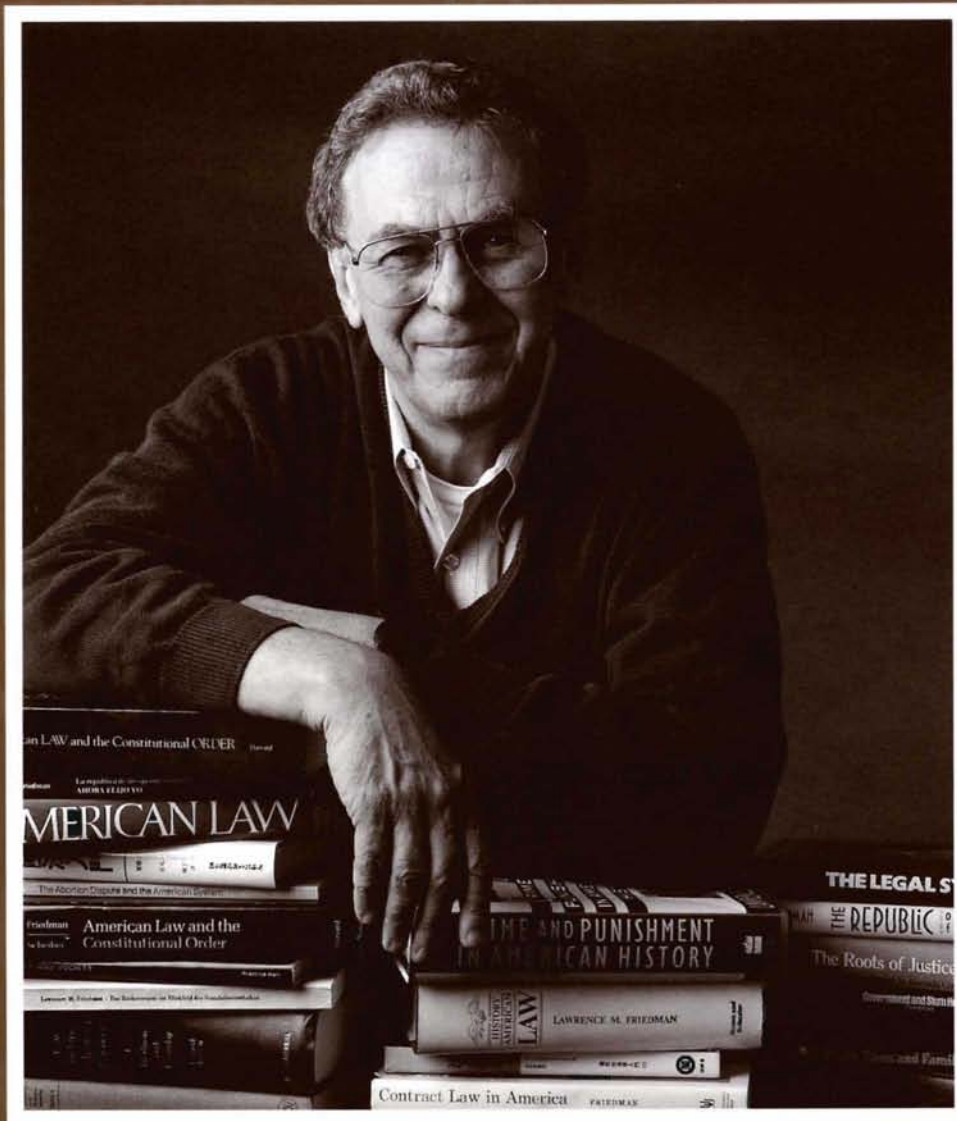
assume for the sake of argument the validity of the grand jury's indictment even considering this controversy. But there was more. The "added circumstance" was that "a very large part of Ann Remington's testimony consisted of confidential communications from her husband to her"; this tipped the scale and convinced him that the indictment had to be invalidated. Confidential communications between husband and wife during marriage are clearly privileged in any courtroom. Hand plausibly assumed that the Remingtons' subsequent divorce did not end the privilege; "indeed, any other view would be completely inconsistent with the theory of the privilege. . . ."

Yet, as Hand emphasized, Mrs. Remington was misled about her right to remain silent. Although ordinarily a grand jury had only to find reasonable ground to suppose an accused's guilt, Hand was "convinced" that other testimony normally sufficient to support an indictment did not "excuse pressure and deceit in procuring [this] indictment. . . . [O]nly by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured; for in modern times all prosecution is in the hands of officials."

CLEARLY, EXCESSIVE PRESSURE on Mrs. Remington might well have supported a dismissal of the first indictment against Remington, but that finding formed only the background of the central issue, which was that Remington had *not* been retried on the first indictment but instead, at the government's request, another grand jury had issued a second indictment, and the second trial had convicted him of perjury not before the first grand jury but at his first trial.

Hand thought the irregularities before the first grand jury justified reversal of Remington's conviction at his trial on the second indictment, and in the most vulnerable part of his opinion, he spelled out two theories as to why this was so. Hand relied, first, on an analogy to

*Continued on page 45*





# CRIME IN AMERICA

*Will harsher laws help? Not much, since the causes lie deep within our culture*

by Lawrence M. Friedman  
*Marion Rice Kirkwood Professor of Law*

**P**EOPLE have always been concerned about crime. But there is reason to believe people today are more worried, more fearful. They are most afraid of sudden violence or theft by strangers; they are afraid to walk the streets at night. Millions of parents are afraid their children will turn into junkies. Millions see some sort of decay infecting society.

These are not completely idle notions. Serious crime *has* skyrocketed in the second half of the twentieth century. We seem to be in the midst of a hurricane of crime. The homicide rate in American cities is simply appalling. It takes months or even years for Helsinki or Tokyo to equal the *daily* harvest of rape, pillage, looting, and death in New York City.

Why is the United States such a violent country? Our past is much less bloody than the pasts of other countries, which today are lambs to our wolves. The samurai code, unlike the Wild West, does not seem to have left Japanese streets littered with corpses. The French Revolution and the Terror do not seem to make Paris as raw and untamed as New York. Something has got to be rotten in the *modern* state of affairs—some sickness that is peculiarly our own, the child of our customs, our times.

Crime is behavior; and its roots must lie somewhere in the personality, character, and culture of the people who do the acts we condemn. Hence the story of crime and punishment over the years is a story of social changes, character changes, personality changes; changes in culture; changes in the structure of society; and, ultimately, changes in the economic, technological, and social orders.

In 1900, women still lacked the vote, and the criminal justice system was insensitive to women's issues, their views on rape, and domestic violence. Blacks were virtual serfs in much of the South. Lynch mobs enforced a brutal code of white supremacy, killing with almost total impunity. Big city police forces were corrupt and brutal.

But a good deal of traditional morality survived. The culture insisted (officially, at least) on self-discipline, control, moderation. Mobility was economic and political; it was not a freedom to contrive a lifestyle. Fornication, adultery, and sodomy were crimes almost everywhere. The way of the social deviant was hard. The body and mind still proceeded within narrow but invisible ruts.

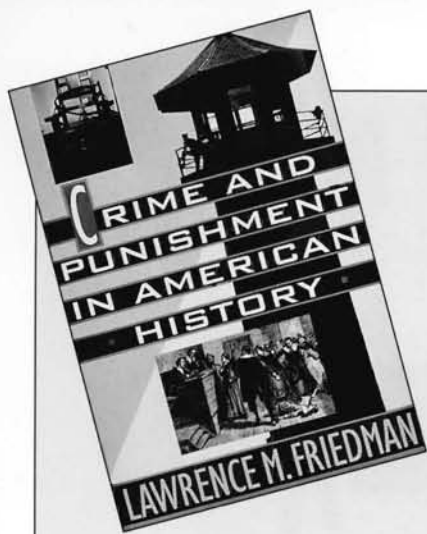
The twentieth century gradually broke with this past. It became the

century of the *self*, the century of expressive individualism. The old century thought it knew a thing or two about political and economic freedom. The new century redefined the terms, and added freedom to shape one's own life, freedom of personality, freedom to spend a lifetime caressing and nurturing a unique, individual self. At least this was the ideal, the great concept that motivated millions of people. It was certainly not the social reality; but it was a powerful impetus to action.

This new concept of the self lies behind the women's movement, the civil rights movement, the sexual revolution. It has worked its will, once more, on crime and punishment. Old rules and arrangements fell like tenpins. The culture of individualism, paradoxically, worked a revolution in the law of groups, races, and classes. People were to be judged for themselves. Women and men had the same rights to be judge or jury. Native tribes had the right to run their own courts, defying majority culture. All this is probably for the good.

BUT THERE IS a dark side to the era of the self. Beaumont and De Tocqueville, writing about juvenile reformatories, used a striking phrase; the children in these institutions were not





### *The Book*

#### **Crime and Punishment in American History**

by Lawrence M. Friedman

577 pages, BasicBooks, 1993

THIS READABLE VOLUME examines American criminal justice from its beginnings in the seventeenth century to the present time. *Crime and Punishment* was a finalist for the 1994 Pulitzer Prize in history and recipient of an ABA Silver Gavel Award for making an outstanding contribution to "greater public understanding of the American legal system." Other reactions:

"A very rich book. . . The author has an astonishing fund of knowledge—about sociology, criminology, law and history, as well as what I would call the politics of crime. . . The writing is clear, crisp and blood warm. And the narrative is peppered with dozens of well-told vignettes about famous cases, colorful personalities and dramatic events."

—Yale Kamisar  
*New York Times Book Review*,  
August 26, 1993

"Friedman. . . makes historical sense of a perennial American obsession. . . His conclusions are persuasive, if disquieting: Crime rates rarely decline, despite successive waves of crackdown and reform."

—California Lawyer,  
December 1993

victims of persecution, they said; they were merely deprived of a "fatal liberty." *Fatal* is a strong word; probably too strong. But the phrase breathes a kind of cautious reminder: even freedom has its costs. This is not the best of all possible worlds; and not all changes are improvements. The shadow of crime haunts "respectable" society. Social pathology lays waste millions of urban lives. There is no free lunch. American liberty comes at a price.

Let me illustrate with a case that straddles the turn of the century. The villain of the piece is a certain Miller, convicted of grand larceny in New York [*People v. Miller*, 169 N.Y. 339, 62 N.E. (1902)] Miller was, to put it plainly, a swindler. In 1899, he had put out the word to friends and neighbors that he knew how to make a killing in the stock markets. Miller promised to pay investors at the astonishing rate of 10 percent a week on their money. The deposit could be withdrawn whenever the "investor" wanted to, and the principal was "guaranteed against loss." Money rolled in.

It was, of course, a scam. Miller had no connection with any stock exchange, and he never invested a penny of the money in securities. He paid the dividends, very promptly, out of new money that flowed in from the "ignorant and credulous." His crime was what would later be dubbed a Ponzi scheme, after Carlo Ponzi, a swindler of the 1920s.

Naturally, the scheme could not go on indefinitely; at some point, the bubble was bound to burst. And burst it did. One day, Miller bought \$100,000 in United States bonds and fled to Canada. Somehow, he was later returned to New York State, where he stood trial on the complaint of one of his many victims, Catherine Moser, who had given him \$1,000 of her hard-earned cash. Miller was convicted, and appealed in 1902.

The precise legal question on appeal was how to label this crime. No one disputed that Miller had been up to no good; but law is law. The state had convicted him of larceny; but, legally speaking, had he actually *stolen* the money? The court thought yes. "Had the defendant actually used the money in speculation, however improvident or reckless, and

lost, his act would not amount to larceny." But this was not the case: he was lying and cheating from the outset. And this, the court said, was most certainly larceny; hence the conviction would stand.

The legal question is not uninteresting; but what attracts attention here is the crime itself. It was, in one sense, a fine example of a nineteenth-century crime of mobility. The victim, Catherine Moser, had aspirations; she saw no reason of class or caste or skill why she, too, could not be rich and famous. She testified: "I read something in the papers somewhere, I do not know where, that Vanderbilt, Gould and all of them made money in Wall Street. I knew this was true and I thought this money was to be used for the same purpose and I would get the benefit of it." If Vanderbilt could make money speculating, and become filthy rich, why not Catherine Moser?

Moser and Miller were thus both products of a culture of mobility, bound together in knots of mutual greed and deception. But Miller's crime was somewhat different from the crimes of most nineteenth-century swindlers, who kept a low profile—even used disguises—so they could move on to new neighborhoods, new cities, and new marks to cheat and steal again. Miller's scheme was more daring and more dangerous. It was open and notorious.

And it was, of course, a house of cards. Miller must have known that. When he felt the end coming, he grabbed a pile of money and ran. But, in an important sense, this fact is not relevant. Unlike most confidence games and swindles, the biggest payoff came *during* the scam, not after: the excitement, the success, the adulation of the investors, the power, the high living. In Miller's crime there seemed to be an element of desperate narcissism. It was a wild, intoxicating party; and someday it was going to end. But while it lasted it was a great game, a marvelous game; and perhaps the game was worth it for itself.

Crimes of mobility merged, then, into another form of crime, which we can call *crimes of the self*. These crimes rest, in some way, on the exaggerated individualism of twentieth-century Americans. It is the notion that one's main task in life is to forge



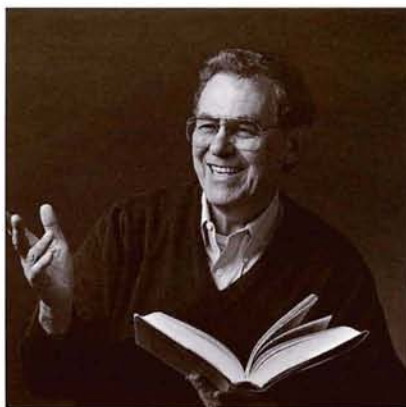
a separate, unique self; to develop one's potentialities. It is the idea that we pass this way only once, must make the best of it, and must make the trip, each of us, our own special way.

Miller, Ponzi and their victims were all pursuing the same goal: quick money, easy money, bonanza money. This in itself was nothing new. There had been no shortage of schemes in the nineteenth century for getting rich quick—it was, after all, the century of land speculation, robber barons, and innumerable Wall Street frauds (none of these are extinct in the twentieth century).

But there was also a standard picture of the way up the ladder of success. It was Ben Franklin's way: hard work and patience, early to bed and early to rise, moderation, frugality, business acumen, self-discipline, and so on. There were few "bonanzas," few ways to vast sudden wealth, and many long and successful careers to emulate.

In the twentieth century, particularly in the second half of the century, Ben Franklin has powerful competition. The new theme has been one of quick, young, early, sensational success. Radio, TV, the movies, and popular magazines all promote the kingship of celebrities: sports heroes, movie stars, popular rock-and-roll singers, the glitterati of popular entertainment. Careers that fascinate the public are not the careers of nuclear physicists or CEOs or Wall Street lawyers; they are careers that rise and fall in a single glamorous trajectory, streaking like rockets across the sky. This is a trajectory, interestingly, that criminal careers also describe. In fact, one way to become an instant celebrity is to commit a vivid or daring or horrible crime.

The whole country was shocked, in 1924, when Nathan Leopold and Richard Loeb murdered Bobbie Franks in Chicago; that was "the crime of the century." What was appalling about this crime was that Leopold and Loeb had no real motive, in the classic sense. They were college students, extremely bright, members of rich families; Bobbie Franks was a neighbor, a mere boy, who was also wealthy. Loeb and Leopold kidnapped Franks and left a ransom note. But money was hardly



**The relationship  
between punishment  
and behavior is not  
a straight line but a  
curve; it flattens out  
as more and more  
people are deterred.  
The few that are left  
become harder and  
harder to influence**

their aim. Sex did not appear to be a motive, either. Why, then, did they kill? No one knows for sure; apparently for the thrill of it, the high, the expressive, orgasmic rush that came from the sensation of crime.

Perhaps, then, it is "crimes of the self" that in some ways distinguish this century from the one that went before. Mobility, the motor force in transforming criminality and criminal justice in the nineteenth century, was, in a way, a structural factor. It opened new opportunities for crime,

and provided the soil in which certain kinds of crime (and certain criminal personalities) were especially apt to grow. Crimes of mobility—swindling, confidence games, market frauds, crimes that rest on simulated identities—are still very much with us; they have not been superseded. Moreover, most people were not and are not criminals. There are still millions of hardworking, disciplined, traditional human beings, millions who are "modern" without narcissism or fundamentalism. We are talking about changes at the margin. At the margin, shifts in personality and culture do affect the *kind* of crimes people commit, and their reasons for committing them.

Crime certainly feeds on poverty; but for many young men, as Mercer L. Sullivan of the Vera Institute has argued, it has meaning "beyond its monetary returns." In the neighborhoods Sullivan studied, the young men who do crime call success in crime "getting paid" and "getting over," terms that "convey a sense of triumph and of irony." These young men steal not only to gain money, but to fulfill a sense of (male) self. Of course, they use the money to buy things; but what they buy is not food or shelter. Fancy clothes are their "first consumption priority. Next comes recreation, including . . . drugs and alcohol . . . sports . . . movies and dances." They participate in crime "to share in the youth culture that is advertised in the mass media," a culture that middle-class kids can afford to buy on their own, *without* stealing.

Crime, supposedly, does not pay; but this is not obvious to the naked eye. Many crimes, in fact, look like they do pay—and quickly, too. Drug dealing is one; robbery is another. Theft produces money which, if not effortless, is at least not earned by hard work in the usual sense. Theft is a way for kids to make quick money. In 1990, a group of young men in New York tried to rob a family of tourists from Utah; in the scuffle that followed, they killed the twenty-two-year-old son, who was trying to protect his mother. The point of the crime was to get money to go dancing—which is exactly what they did after the crime. They went dancing.

*Continued on page 47*







# Welcoming Václav Havel

*In life as in art, the Czech president stands for freedom, democracy, and integrity*

by Paul Brest  
Richard E. Lang Professor  
and Dean

Good afternoon. *Dobry den, dámy a pánové.*

It is wonderfully appropriate that today's proceedings began with a song by Ms. Joan Baez. In 1989, shortly before the fall of the Communist government in Czechoslovakia, she gave a concert in Bratislava, where she invited a number of critics of the regime, including Václav Havel, to join her on stage. Havel later remarked that this event was the drop that caused the cup to spill over.

In 1976, another event related to music—actually, an *anti*-musical and anti-cultural event—had a similarly profound effect on Václav Havel. I hasten to say that Mr. Havel, as author and playwright, had been involved in politics in its deepest sense well before 1976: through his plays, such as *The Memorandum*, which satirize dehumanizing bureaucracies, East and West; through his essays, speeches, and other actions on behalf of the independence of Czechoslovak writers, artists, and intellectuals; and through his courageous open “Letter to Dr. Gustav Husak” writ-

September 29, 1994 (opposite page, clockwise from top): President Havel was greeted by Dean Brest, serenaded by Joan Baez, and toasted by Stanford president Gerhard Casper. Havel spoke at Frost Amphitheater.



Dean Brest introduced the Ralston Prize winner.

ten in 1975, which described the widespread fear, despair, and apathy infecting his country.

But it was the prosecution of a rock group, Plastic People of the Universe, that led to a course of action that made Mr. Havel (from the regime's point of view) an enemy of the state. It led to his participation in the formation of Charter 77 and the Committee for the Defense of the Unjustly Prosecuted; to numerous interrogations, detentions, and ultimately to four years' imprisonment for “criminal subversion of the republic”; to the formation of Civic Forum in 1989; and, in that same year, to the ouster of the Communist government and his election as president of Czechoslovakia.

The trial of these rock musicians was pivotal for Václav Havel—and, as it turned out, for Czechoslovakia. In his own words: “Many groups of differing tendencies, which until then had remained isolated from each other, . . . were suddenly struck by a realization that freedom is indivisible. The freedom to play rock music was understood as a *human* freedom and thus as essentially the same as the freedom to engage in philosophical and political reflection . . . or the freedom to write. People were inspired to feel a genuine sense of solidarity with the young musicians, and came to realize that not standing up for the freedom of others, regardless of how remote their means of creativity, meant surrendering one's own freedom. There is no freedom without equality before the law, and there is no equality before the law without freedom.”

VÁCLAV HAVEL'S reference to law is neither happenstance nor metaphorical. Indeed, the law plays a central role in his thoughts and actions. Because he is speaking today at Stanford Law School, allow me to introduce President Havel by mentioning what he has to say to those of us who study, teach, and practice the law—those of us who, in one way or another, are guardians of the legal system.

First: the critical importance of the rule of law. The Charter 77 manifesto was essentially a demand that the government adhere to the Helsinki Accords, the United Nations Declaration of Human Rights, and other documents having legal force in Czechoslovakia. Indeed,





PHOTOS BY MARCO ZECCHIN

*Czech Ambassador Michael Zantovsky and Dean Brest joined the honoree on stage.*

one of President Havel's highest priorities for the new government was to draft a constitution—for a just society could not be based on a corrupt document. As he wrote during the summer of 1991: "The rule of law is back. And so it is once more important what kind of laws we have. And this depends above all on the constitution, from which all laws are derived. Our everyday lives depend as much on the kind of constitution we have as they do on the kind of country we live in."

Second, for all of its importance, the rule of law alone is insufficient. Again, in his own words: "We will never build a democratic state based on the rule of law if we do not at the same time build a state that is humane, moral, intellectual, spiritual, and cultural. The best laws and best conceived democratic mechanisms will not in themselves guarantee legality or freedom or human rights if they are not underpinned by certain human and social values. . . . Without commonly shared and widely entrenched moral values and obligations, neither the law nor democratic government, nor even the market economy, will function properly."

Upon accepting the Liberty Medal in Philadelphia this past Fourth of July, President Havel noted that such deeply held moral values lie at the core of our own constitutional government. And he went on to argue that individual rights must necessarily be anchored in values that transcend the individual.

This is an important and controversial philosophical issue. But for Václav Havel—as it must be for all of us—human rights require much more than philosophy. They require personal commitment as well. They are only possible, as he wrote, "when one understands that one is responsible for the whole world. . . . The law and other democratic institutions ensure little if they are not backed up by the willingness and courage of decent people to guard against their abuse."

This leads me to a third and final point. Being a lawyer, like being a politician, requires assuming a role within a system. The lawyer's role is, if anything, more constrained because of his or her obligations to a client. Thus, I think you will be interested in President Havel's answer to a journalist's question about his transition from outsider, critic, and dissident to becoming his nation's political leader.

He responded that he was "deeply convinced that politics is *not* essentially a disreputable business. It is simply not true that a politician must lie or engage in intrigue." The truly great lawyers in our history, like truly great politicians, have not ceded their independent judgment or their honor to anyone's will.

In this vein, I quote an observation that would serve as a useful guide, not only for lawyers and politicians, but for every citizen. "As in everything else," Václav Havel has written, "I must start with myself. Of course, I don't know whether directness, truth, and the democratic spirit will succeed. But I do know how *not* to succeed, which is choosing means that contradict the ends. . . . If there is to be any chance at all of success, there is only one way to strive for decency, reason, responsibility, sincerity, civility, and tolerance—and that is decently, reasonably, responsibly,

sincerely, civilly, and tolerantly. I am aware that, in everyday politics, this is not seen as the most practical way of going about it. But I see the only way forward in that old, familiar injunction: "Live in truth."

IN MANY of Václav Havel's plays, there appears a protagonist—sometimes named Ferdinand Vanek—a citizen who in one way or another jams the cogwheels of an otherwise well-oiled and smoothly functioning, repressive bureaucracy. Vanek is an irritant to just about everyone—to those who run the system . . . and those who just want to get along. He is accused of being an elitist intellectual, of disturbing the peace, of being principled. Perhaps he is all of these. But mostly he can't help doing what he does. It is a matter of integrity—of living in truth.

It is an honor, on behalf of Stanford Law School, to present the Jackson H. Ralston Prize to his Excellency Václav Havel, President of the Czech Republic—a writer and statesman, who, through his own example, has inspired others to live in truth. ■

*Excerpted from the introduction to the Jackson H. Ralston Prize Lecture, delivered September 29, 1994, at Stanford University's Frost Amphitheater. This tribute will also be published in the forthcoming Stanford Journal of International Law.*



*Professor Kathleen Sullivan conversed with Havel over dinner.*



# Democracy's Forgotten Dimension

*We need to expand our view to include transcendent moral and spiritual values*

by Václav Havel  
*President of the Czech Republic  
and 1994 Recipient,  
Jackson H. Ralston Prize in  
International Law*

The honor I receive today from your University, this important intellectual center, presents me with an opportunity to set aside the political cares of the day and attempt to make several observations on a very general theme—the theme of civilization as a context for contemporary politics.

The differences between individual cultures or spheres of civilization in the modern world are playing an ever-greater role and are even beginning to show up in international politics. This process was extraordinarily accelerated by the fall of communism and the end of the bipolar division of the world. The unnatural, bipolar system imposed upon the world, which concealed or directly suppressed historical and cultural differences, has collapsed.

These differences are now manifesting themselves with sudden and nearly explosive force, not just in



*The philosopher-president's speech was widely reported and studied.*

the post-communist world but also in the West and many other areas of the globe. I fully agree with those who see in this reality the seeds of one of the most serious threats to humanity in the coming era. The role of the intellectual is, among other things, to foresee like Cassandra various threats, horrors,

and catastrophes. The role of the politician is to listen to all the warning voices, take stock of the dangers, and at the same time think intensively about ways to confront or avert them. I cannot imagine that a politician could simply live with the knowledge that everything will turn out badly and still go on being a politician. That is why I too often think about ways to avert the threat that has been called the "conflict of civilizations."

AT FIRST GLANCE, the solution is so simple and so obvious that it appears banal: The only salvation of the world today, now that the two biggest and most monstrous totalitarian utopias humanity has ever known—Nazism and Communism—fortunately have collapsed, is the rapid dissemination of the basic values of the West, that is, the ideas of democracy, human rights, the civil society, and the free market. The most dynamic civilization of the last millennium, evolved from a blending of classical, Christian, and Jewish elements, has spread and has imprinted its character on the entire global civilization. It has created and developed these values and demonstrated that respect for them will guarantee the



greatest degree of human freedom, justice, and prosperity.

Yet even if this blueprint appears to Western man as the best and perhaps the only one possible, it has left much of the world unsatisfied. To hope in such a situation that democracy will be easily expanded and that this in itself will avert a conflict of cultures would be worse than foolish.

It may, for instance, be observed that many politicians or regimes espouse these ideas in words but do not apply them in practice. Or they give them an entirely different content than the West gives them. Very often we hear it said that these concepts are so closely bound to the Euro-American cultural tradition that they are simply not transferable to other milieus, or that they are only a lofty-sounding disguise for the demoralizing and destructive spirit of the West.

The main source of objections seem to be what many cultural societies see as the inevitable product or by-product of these values: moral relativism, materialism, the denial of any kind of spirituality, a proud disdain for everything supra-personal, a profound crisis of authority and the resulting general decay, a frenzied consumerism, a lack of solidarity, the selfish cult of material suc-



*Thousands came to Frost Amphitheater for the School's 1994 Ralston lecture*

cess, the absence of faith in a higher order of things or simply in eternity, and an expansionist mentality that holds in contempt everything that in any way resists the dreary standardization and rationalism of technical civilization.

At the same time, people in many parts of the world are of two minds. On the one hand they long for the prosperity they see in the West. On the other they reject the importation of Western values and lifestyles as the work of the devil. And if some distant culture does adapt to contemporary technical civilization and prospers, it frequently happens in a way that gives Western democrats goose bumps. In short, democracy in its present Western form arouses skepticism and mistrust in many parts of the world.

I ADMIT THAT I, too, am not entirely satisfied with this recipe for saving the world, at least not in the form offered today. Not because it is bad, or because I would give preference to other values. It does not satisfy me because it is hopelessly half-baked. In fact, it is really only half a recipe. I am convinced that if this were not the case, it would not evoke the great mistrust that it does.

The reason for this mistrust does not, I think, lie in some kind of fundamental opposition in most of the world to democracy as such

and to the values it has made possible. It lies in something else: the limited ability of today's democratic world to step beyond its own shadow, or rather the limits of its own present spiritual and intellectual condition and direction, and thus its limited ability to address humanity in a genuinely universal way.

As a consequence, democracy is seen less and less as an open system that is best able to respond to people's basic needs, that is, as a set of possibilities that continually must be sought, redefined, and brought into being. Instead, democracy is seen as something given, finished, and complete as is, something that can be exported like cars or television sets, something that the more enlightened purchase and the less enlightened do not.

In other words, it seems to me that the mistake lies not only in the backward receivers of exported democratic values, but in the present form or understanding of those values itself, in the climate of the civilization with which they are directly connected, or appear to be connected. And that means, of course, that the mistake also lies in the way those values are exported, which often betrays an attitude of superiority and contempt for all those who hesitate to automatically accept the offered goods.

WHAT, THEN, is that other, missing side of the democratic solution?



PHOTO BY MARCO ZECCHIN

*Shirley Temple Black, former U.S. Ambassador to Czechoslovakia, renewed an old friendship*



What is lacking in the only meaningful way of dealing with future conflict of cultures? Wherein lies that forgotten dimension of democracy that could give it universal resonance?

I am deeply convinced that it lies in that spiritual dimension that connects all cultures and, in fact, all humanity. If democracy is not only to survive but to expand successfully and resolve those conflicts of cultures, then, in my opinion, it must rediscover and renew its own transcendental origins. It must renew its respect for that non-material order which is not only above us but also in us and among us, and which is the only possible and reliable source of man's respect for himself, for others, for the order of nature, for the order of humanity, and thus for secular authority as well.

The loss of this respect always leads to loss of respect for everything else—from the laws people have made for themselves, to the life of their neighbors and of our living planet. The relativization of all moral norms, the crisis of authority, reduction of life to the pursuit of immediate material gain without regard for its general consequences—the very things Western democracy is most criticized for—do not originate in democracy but in that which modern man has lost: his transcendental anchor, and along with it the only genuine source of his responsibility and self-respect. It is because of this loss that democracy is losing much of its credibility.

The separation of executive, legislative and judicial powers, the universal right to vote, the rule of law, freedom of expression, the inviolability of private ownership, and all the other aspects of democracy as a system that ought to be the least unjust and the least capable of violence—these are merely technical instruments that enable man to live in dignity, freedom, and responsibility. But in and of themselves, they cannot guarantee human dignity, freedom, and responsibility. The source of these basic human potentials lies elsewhere: in man's relationship to that which transcends him. I think the

fathers of American democracy knew this very well.

Were I to compare democracy to life-giving radiation, I would say that while from the political point of view it is the only hope for humanity, it can only have a beneficial impact on us if it resonates with our deepest inner nature. And if part of that nature is the experience of transcendence in the broadest sense of the word—that is, the respect of man for that which transcends him, without which he would not be and of which he is an integral part—then democracy must be imbued with the spirit of that respect if it is to have a chance of success.

In other words, if democracy is to spread successfully throughout the world and if civic coexistence and peace are to spread with it, then it must happen as part of an endeavor to find a new and genuinely universal articulation of that global human experience, which even we, Western intellectuals, are once more beginning to recollect, one that connects us with the mythologies and religions of all cultures and opens for us a way to understand their values. It must expand simply as an environment in which we may all engage in a common quest for the general good.

That, of course, presupposes that first, our own democracies will once more become a place for quest and creation, for creative dialogue, for realizing the common will, and for responsibility, and that they will cease to be mere battlegrounds of particular interests. Planetary democracy does not yet exist, but our global civilization is already preparing a place for it: It is the very Earth we inhabit, linked with Heaven above us. Only in this setting can the mutuality and the commonality of the human race be newly created, with reverence and gratitude for that which transcends each of us, and all of us together. The authority of a world democratic order simply cannot be built on anything else but the revitalized authority of the universe.

The effective expansion of democracy, therefore, presupposes a

critical self-examination, a process that will lead to its internalization. More than that, this seems to be the key to saving today's global civilization as a whole, not only from the danger of a conflict of cultures, but from the many other dangers that threaten it.

OBVIOUSLY, THIS is easy to say but hard to bring about.

Unlike many ideological utopians, fanatics, and dogmatists, and a thousand more or less suspect prophets and messiahs who wander about this world as a sad symptom of its helplessness, I do not possess any special recipe to awaken the mind of man to his responsibility to the world and for the world.

Two things, however, appear to me to be certain.

In the first place: This internalization of democracy today can scarcely take the form of some new doctrine; that is, a collection of dogmas and rituals. This probably would have exactly the opposite effect: To all the mutually distrustful cultural currents there would only be added others, ones that would be very artificial because they would not have grown out of the nourishing soil of myth-making eras. If a renaissance of spirituality does occur, it will far more likely be a multi-leveled and multi-cultural reflection, with a new political ethos, spirit, or style, and ultimately will give rise to a new civic behavior.

And secondly: Given its fatal incorrigibility, humanity probably will have to go through many more Rwandas and Chernobyls before it understands how unbelievably shortsighted a human being can be who has forgotten that he is not God. ■

*Excerpted from the Jackson H. Ralston Lecture delivered in Frost Amphitheater on September 29, 1994. The full text will appear in the forthcoming Stanford Journal of International Law.*

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JEFFREY WHITTEN

## A Dilemma

In which a law firm associate learns of dubious practices.  
A senior partner and valued clients are involved.  
But so are professional ethics . . .

by Deborah L. Rhode

*Professor of Law and*

*Director, Keck Center on Legal Ethics and the Legal Profession*

**S**UPPOSE THAT, several months ago, the Internal Revenue Service passed a regulation providing that prepayment interest is tax deductible for certain transactions completed before a specified date. Your firm represents several clients in a transaction that almost closed by the prescribed date, and would have done so but for the managing partner's negligence. In order to spare those clients substantial tax losses, as well as to absolve themselves of any malpractice claims, the lawyers working on the case have backdated relevant forms.

You are an associate in the firm's tax depart-

ment. You are not asked to do any backdating personally, although you are working on the transaction in which backdated documents will be submitted. What do you do?

Would it matter 1) why the managing partner failed to complete the transaction; or 2) what your expectations were for advancement within the firm?

SUPPOSE, instead, that the clients had backdated the forms. No one in your firm signs the return or actively assists the backdating, but you are asked to provide further tax-related representation to those clients. What do you do?



## Some Guidelines

"[A] lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person." However, a subordinate lawyer does not violate the rules by acting "in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

—ABA Model Rule 5.2

"It is unethical to assist the client in the preparation of evidence designed to mislead the [Internal Revenue] Service. . . .

"At times the client in ignorance of the tax law has taken steps resulting in adverse tax consequences or has failed to take steps to prevent such consequences. It is not unethical to make every effort to correct this result, provided that this can be done without destruction of existing documents, backdating of new documents or other steps intended to mislead the Service as to what in fact happened."

—Frederic G. Corneel,  
"Guidelines to Tax Practice  
Second," 43 *Tax Lawyer* 297  
(1990) at 312.

"While the [ABA] Code makes no distinction between the obligations of a partner and an associate, we recognize the reality that an associate's duty to report professional misconduct of a partner may place the associate in a difficult position, and if acted on with undue haste may be potentially unfair to the associate, the partner or the firm as a whole. A client usually retains the partner or the law firm, not the associate. . . . Moreover in particular cases, there may be room for honest disagreement as to whether certain activity is 'misconduct' and a corresponding danger that a less experienced lawyer may not easily distinguish between good faith zealous representation . . . and unethical behavior by a more experienced lawyer.

"For all these reasons, we believe it is desirable that the associate endeavor to raise any dispute over the propriety of a partner's

conduct within the firm before reporting any alleged ethical violation to a tribunal or disciplinary committee. . . .

"In the final analysis, if the associate remains convinced after discussions with both the supervising attorney and others more senior within the firm that a violation of a disciplinary rule has clearly occurred, and that his or her knowledge is unprivileged, then the associate must report the violation to the appropriate tribunal or other authority."

—Association of the Bar  
of the City of New York,  
Commission on Professional  
and Judicial Ethics,  
*Inq. Ref.* 82-79 (1982)

"[A] lawyer shall not reveal information relating to representation of a client."

—ABA Model Rule 1.6(A)

"A lawyer may reveal such information to the extent the lawyer reasonably believes necessary... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

—ABA Model Rule 1.6(B)

A lawyer is permitted but not required to reveal "the intention of his client to commit a crime and the information necessary to prevent the crime."

—ABA *Disciplinary Rule*  
4-101(C) ■



## Ethics in Action

### About this Exercise

THE TEACHING of professional responsibility and ethics in most law schools is confined mainly to discrete courses. Stanford Law School is working to encourage instead a more realistic, "pervasive" approach that incorporates the consideration of ethical issues into regular courses in all fields.

Professor Rhode has written an innovative new book—*Professional Responsibility: Ethics by the Pervasive Method* (Little, Brown and Company, 1994)—to help Stanford and others achieve this aim. Flexible in design, it can be used both as the primary text for a course in professional responsibility and as a source of materials for substantive courses in any of ten areas. The problem reprinted here comes from the tax law chapter but, like many legal ethics dilemmas, raises issues that extend beyond any particular field.

### COMMENTS, PLEASE

We invite you to comment on any aspect of this problem that interests you. For example: What advice would you give to the fictive associate? How useful are teaching exercises like this? And, more fundamentally, how should law schools prepare students to address professional responsibility issues? Responses may be excerpted for the spring 1995 STANFORD LAW ALUM.

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# FORUM

## Antitrust and Innovation

by Hon. Anne K. Bingaman '68

**O**ur nation's experience teaches that innovation comes from unpredictable sources—from individuals and small firms, as well as from giant conglomerates. If you compare the major firms in the computer industry in the 1950s, '60s, and '70s with the major firms today, you will see that rapid technological change can create opportunities for new entrants and individual achievement.

The task of antitrust enforcers is not to prejudice winners but to make sure that private restraints do not narrow the potential sources of innovation.

Antitrust enforcers must assure that an appropriate concern for preserving competition as a source of innovation is brought to bear, while recognizing the need for intellectual property protection as an incentive to innovate. By preserving an economic climate that allows efficient sources of innovation to prosper—be they small or large—antitrust promotes the economic and socio-political values that have been the backbone of the success of the American economy.

In the long run, preserving rivalry in innovation is crucial to consumer welfare.

*Bingaman is an assistant attorney general and head of the Antitrust Division of the U.S. Department of Justice. This text is adapted from her January 10, 1994, address at the celebration of the Division's 60th anniversary.*

## Antitrust Aggrandizement

by Prof. William F. Baxter

**T**he Department of Justice's Antitrust Division is only well suited to achieving changes in the direction of more, rather than less, government intervention in the marketplace. This establishes a one-way ratchet that has contributed substantially over the years to a pattern of meddlesome, interventionist antitrust policy.

Take the problem of the antitrust subversion of the value of intellectual property. One of the most intellectually arid, judicially irresponsible, and quantitatively significant of antitrust errors has been its treatment of the competition/intellectual property interface.

It is, for example, sometimes said with a straight face that we should insist that a patentee base his royalty obligation as narrowly as possible on the patented idea. The theory is that this will facilitate substitution in the production process of other resources for incremental uses of the exclusively held idea and thus increase the elasticity of demand for the idea itself. It is not clear why, in the face of legislative creation of an intellectual property system, we should want to minimize the returns to creativity.

In the 1970s, the Justice Department industriously gathered up nine instances of these enfeebling inanities and bundled them into a policy statement that became known in the industry as the "nine no-nos." The DOJ announced that it would proudly bring antitrust actions against intellectual property licenses that contained one or more of these nine usually benign practices. In the spring

of 1981, we issued a policy statement repudiating the "nine no-nos" and attempted to explain why such devices were frequently useful and efficient devices for minimizing transaction costs and maximizing returns to creativity, usually without any increase in the static deadweight loss associated with the claim to exclusivity.

But it was not clear then, and it is not clear now, how much good the repudiation did. Many, probably most, attorneys who practice in the intellectual property area still abide by the "nine no-nos." It is one thing for the Justice Department to promise not to proceed against licenses that have certain stated characteristics; it is quite another to be able to give assurances that private parties will not do so.

This problem is an extreme—but hardly the only—instance of the one-way ratchet at work.

*Baxter is the William Benjamin Scott and Luna M. Scott Professor of Law, Emeritus, and a former chief of the Justice Department's Antitrust Division (1981–83). Adapted from a talk published in American Economic Policy in the 1980s, Martin Feldstein, ed. (University of Chicago Press, 1994).*

## Unforeseen Complications

by Alexander Alben '84

**P**reachers of the coming age of new media and the Information Super Highway make a dangerous assumption: that motion pictures, television programs, records, and other audio-



visual works will be accessed on demand via a special box on top of a home television or personal computer. The dangerous flaw in this grand vision is that the content owners of films and other media products may not possess the legal rights to deliver their content by new means and in new forms.

Frequently, even the most broadly drafted grants of rights are not sufficient to enable a studio to distribute a motion picture in a medium that did not exist at the time the grant of rights was made. So-called "Future Technology" clauses have often been interpreted narrowly, especially when courts examine technologies not invented or conceived at the time of an original grant of rights.

For example, in 1977, Margret Rey, the surviving author of the *Curious George* books, granted a Canadian company a license to produce and televise 104 animated episodes of her mischievous monkey "for television viewing." Did the contemplated use of "television viewing" extend to home video, which did not exist in 1977? The court concluded that "television viewing" and "videocassette viewing" were not coextensive terms and that Mrs. Rey did not agree to license video rights under the original grant.

Other courts have sought to determine whether a particular new use could reasonably fall within the medium that is the subject of the grant of rights. For example, a New York court recently determined that, when ABKCO Music conveyed "all rights" to certain songs under a 1966 contract, the issue of whether videocassette rights were thereby conveyed was a factual question and found that

one salient factor might be whether the parties were fully aware of the pace of technological change in the music business.

Historically, American courts have not been willing to expand grants of rights to newly created media, even in the presence of broad Future Technology clauses. While we see a brave new world of new media and means of delivering information to the consumer, we should bear in mind that enduring and old-fashioned notions of copyright law will continue to shape the future.

*Alben is director of business affairs of Starwave Corporation and former chair of the ABA's Intellectual Property Committee of the Tort and Insurance Practice Section. Adapted from Entertainment Law Reporter, May 1994.*

## Labor Rights and Labor Wrongs

by Hon. William B. Gould IV

**S**hortly after I arrived in Washington to begin my new job, an acquaintance introduced me at a cocktail party, "This is Bill Gould. He is the last chairman of the National Labor Relations Board."

The comment highlights the crises that confront both the Board and the National Labor Relations Act, which we administer. Both the Board and the Act are confronted with hostility and suspicion from both labor and management. Segments of management have not believed in the mission of the Act, which is to promote the practice and procedure of collective bargaining as well as freedom of association for workers. At the same time, unions have grown increasingly skeptical of our willingness and our ability to deliver on the statutory promise.

So, as the first chairman of the NLRB since 1940 with a background as an impartial and neutral arbitrator, I am committed to an evenhanded and balanced approach to labor-

management relations. I am committed to the collective-bargaining process, but there are both labor rights and labor wrongs. I intend to enforce the law in a balanced fashion and to use our remedies and contempt proceedings against all who break the law, whether they be labor or management representatives.

For example, early in my tenure as chairman, the Board initiated, at my urging, contempt of court proceedings against the United Mine Workers. These proceedings grew out of extensive violent conduct in which the UMW was involved during the 1993 bituminous coal strike.

I am against employer lawlessness in attempts to frustrate union organizing and collective bargaining—but I am also against union lawlessness which undermines the peaceable resolution of disputes. We must be vigilant against lawbreaking, no matter what its source.

In a modern system of industrial relations, democracy means not only that the collective bargaining process is to be promoted, but that there must be rights and obligations on both sides. My hope is to promote a dialogue and a more cooperative environment between the parties.

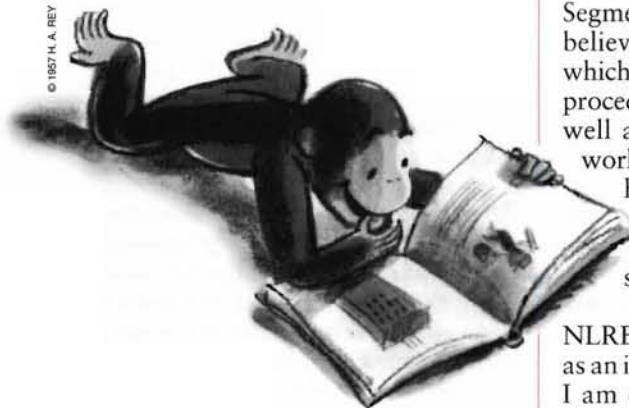
*Gould is on leave as the Charles A. Beardsley Professor of Law while serving as chairman of the National Labor Relations Board. Adapted from speeches on May 6, 1994, to the Metropolitan Detroit AFL-CIO and on June 10, 1994, to the Commonwealth Club of America.*

## Crime and the Constitution

by Prof. Robert Weisberg '79

**P**oliticians and voters say crime is worse than ever and getting worse every day. This is false, but many Americans seem captivated by the belief that they live during an unprecedented criminal epidemic.

They seem to feel we have reached such a catastrophic crisis that we must summon the courage to take



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# Pragmatism in Action

by Prof. Kathleen M. Sullivan

I have known Judge Stephen G. Breyer for over a decade, as we were colleagues on the Harvard Law School faculty before I moved west to Stanford. I believe that he will be an exemplary Supreme Court Justice, in part because of his thoroughly pragmatic philosophy.

Throughout his opinions and other writings, Judge Breyer has expressed a view of law as a practical enterprise, to be applied in a practical way for practical ends. He has situated himself squarely within the great and distinctively American tradition that has dominated the Supreme Court throughout this century: namely, legal pragmatism.

Pragmatism sees law not as an intellectual exercise in abstract theory, but rather as a practical enterprise rooted in the complexity of actual social life. Pragmatism rejects the notion that legal or constitutional interpretation can be reduced to any one grand unified theory or single, simple, overarching approach. Thus, Judge Breyer takes a flexible, undogmatic view of the tools relevant to legal interpretation. Whether interpreting a statute or a constitutional provision, he would look to text *and* structure *and* history *and* tradition as his guides to meaning, rather

than rigidly limiting himself to any one of these tools alone.

Pragmatism likewise stresses the need for legal flexibility and adaptability over time, so that the law, including constitutional law, may continue to serve its underlying purposes amid changed circumstances.

Does pragmatism mean that a judge seeks to impose his own preferences on the law? Absolutely not. Pragmatism is a philosophy of judicial humility, not judicial arrogance: It holds that general propositions cannot decide concrete cases, and that adjudication between two competing legal claims is necessarily a matter of degree.

Does pragmatism mean that a judge resolves legal disputes in an ad hoc way? Again, the answer is clearly no. As Judge Breyer himself has emphasized, a pragmatist judge looks not only backward to our traditions, but also forward to how his ruling will achieve present peace and future stability by resolving disputes in an authoritative manner that enables people to predict what the next case will hold. Of necessity, such an approach embodies deep respect for democratic institutions and the will of the community.

On the other hand, does prag-



Kathleen M. Sullivan

matism sacrifice constitutional rights to the social welfare of the community? Once again, in Judge Breyer's hands it most assuredly does not. As he has stressed, our most basic laws are designed to protect not only harmony but also freedom. And when rights are clearly embodied in the text of the Constitution or a statute, Judge Breyer has not hesitated strongly to uphold them, whatever the will of the community might be.

*Sullivan is a professor of law at Stanford. Adapted from her testimony July 14, 1994, at the Senate Judiciary Committee confirmation hearings on the Supreme Court nomination of Judge Stephen Breyer (AB '59).*

extraordinary measures. Some call for decisions that would cross legal boundaries that even the most conservative judges see as clear, bright lines of constitutional protection—as in the call to legalize “sweeps” of inner-city public-housing apartments to search for weapons.

The situation reflects a historical arrogance, a sense that our time is unique, so different from “ordinary” times that fundamental changes in our constitutional principles must be made.

Though we face serious crime problems today, we are not in a “constitutional moment.” For one thing, though serious crime is certainly far higher than during the relatively peaceful '50s, the greatest increase occurred during and just after the Vietnam War. For most Americans, the risk of violent crime has been on a slight, if erratic, decline in the last decade.

Even if constitutional restraints seem like pedantic inconveniences in particular situations, our judicial sys-

tem cannot easily limit breaches of the constitutional rules to specific cases. For example, if one rule has survived all the political buffeting, it is the rule that unless police have a warrant or can prove specially defined exigencies, they cannot enter a person's home. (The proposed public-housing sweeps do not even meet the criterion that the police have probable cause.) Breach that wall and it will be hard to resist legal arguments for military-style sweeps of homes on all sorts of government-



contrived pretexts, or for highly selective sweeps that seem aimed at minorities.

In our haste to solve our crime problems, we must avoid a terrifying reversion to a world that constitutional government was designed to prevent.

*Weisberg is a professor of law and the inaugural Bernard D. Bergreen Faculty Scholar. Adapted from "A 'Constitutional Moment'?" in the Los Angeles Times, April 24, 1994.*

## Is Flogging Constitutional?

by Doug Bandow '79

**A**merica has had a resurgence of interest in corporal punishment. There is historical precedent. Early America relied on flogging for everything from criminal punishment to maintaining military discipline. But the practice soon faded in popularity other than as a means of disciplining slaves. By 1900, writes Stanford law professor Lawrence Friedman, flogging was "almost extinct," other than in prisons. But not completely: Delaware formally retained the punishment until 1973.

Could flogging be reimposed constitutionally? Under a strict "originalist" argument, renewed use of the whip would probably survive a constitutional challenge, since the Framers presumably did not intend to invalidate a then-common punishment. However, even most conservative scholars acknowledge that the Eighth Amendment incorporates some elasticity and may properly reflect changing mores. The uniform disappearance of corporal punishment across America almost certainly reflects a moral consensus as to its inappropriateness. This suggests that opponents of flogging could make a strong case that it was barred by the Eighth Amendment.

Indeed, even conservative jurists would likely be skeptical about a return to corporal punishment. As Justice Antonin Scalia declared five

years ago: "I doubt whether any federal judge—even among them the many who consider themselves originalists"—would uphold "a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses."

*Bandow is a fellow at the Cato Institute. Adapted from his op-ed, "Is Caning Constitutional?" in the Wall Street Journal, June 15, 1994.*

## Women and Jury Service

by Prof. Barbara Allen Babcock

**F**rom the beginning, the woman suffrage movement was about the right not only to vote, but to serve on juries. The two causes were the twin indicia of full citizenship. Yet even today, gender bias task forces in more than half the states have documented the unequal, and comparatively bad, treatment of women attorneys, witnesses, and parties in the courtroom. The open and unjustified use of peremptory challenges to strike women from juries only adds to the chill.

That situation may soon have to change. The Supreme Court, starting with *Batson v. Kentucky* in 1986, has delivered six full-dress opinions dealing with the use of peremptory challenges, signaling that the Court has embarked on a mission to eliminate racial bias from jury selection entirely. Thus far the Court cases have considered only the strikes of minority men—mostly African Americans. But soon, the Court must decide whether gender can be a legitimate basis for removing individuals from the panel.

Although the *Batson* cases originated in concern for the rights of the black accused, they have, from the beginning, also dealt with harm inflicted on the excluded jurors. The goal of protecting those summoned to serve, once a background feature, has now moved to the center of the analysis. By shifting its equal protection concern largely to the effect of the peremptory on the stricken juror,

the Court necessarily rendered gender-based challenges against women illegal.

The seriousness with which the Court views biased exclusion from jury service is indicated by the remedy it has chosen in these cases: automatic reversal of criminal convictions and civil judgments.

At issue is the jury's fundamental role in a democratic society. It is essential to the jury's functioning that it include all elements of the community. When some identifiable group has been excluded, the jury system is undermined by depriving it of the broad base it was designed to have in our democratic society.

*Babcock is the Ernest W. McFarland Professor of Law. Adapted from "A Place in the Palladium: Women's Rights and Jury Service," University of Cincinnati Law Review, December 1993 (Vol. 61, No. 4) © University of Cincinnati.*

## Discouraging Frivolous Lawsuits

by Prof. A. Mitchell Polinsky  
and Daniel L. Rubinfeld

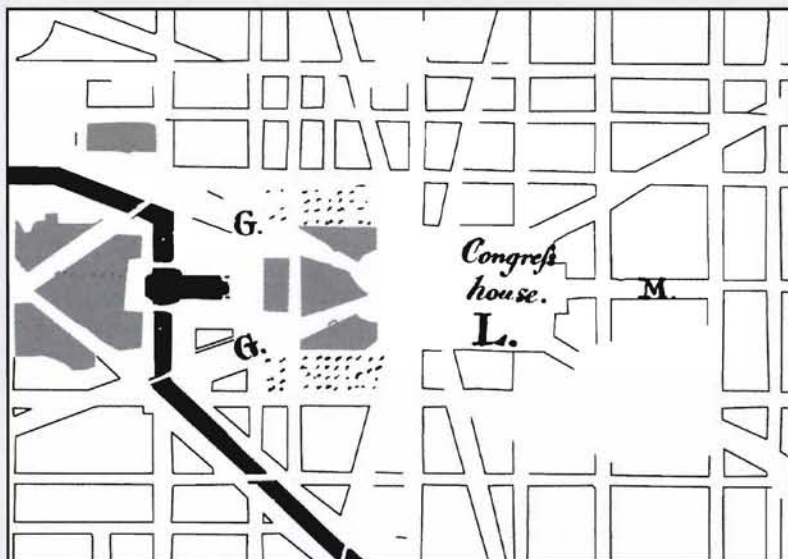
**A**n often-voiced concern in the U.S. is that there are too many frivolous lawsuits. Accordingly, there has been extensive debate about Rule 11 of the Federal Rules of Civil Procedure, which provides for the imposition of sanctions on individuals who present in court a "pleading, written motion, or other paper" that is deemed to be frivolous. Our analysis leads us to the following conclusions about such sanctions:

First, because of the increased litigation costs associated with sanctions, they should not be universally available.

Second, when sanctions are used, their level generally should be set so as to deter potential frivolous litigants rather than to compensate non-frivolous parties for their litigation expenses.

Third, assuming that sanctions are designed to deter frivolous behav-





## The Real Center of Power

by James H. Andrews '76

About a year ago I stood—panting slightly after a long climb—on a narrow outside balcony atop the dome of the United States Capitol in Washington. The day was sunny and the view magnificent. More to the point, this is the only vantage point in Washington from which Pierre L'Enfant's hub-and-spokes design for America's capital city can be seen in its true perspective.

It's useful to be reminded that Congress, and not the white mansion a mile up Pennsylvania Avenue, is the architectural center of the U.S. seat of government. In L'Enfant's mind and, more important, in the minds of the Founding Fathers, Congress

was also the institutional center of government.

The agenda-setting and attention-getting powers of the modern presidency (aided by the magnifying lens of the modern White House press corps) tend to overshadow the national legislature in the public's eye. But lobbyists never lose sight of Congress's importance—and presidents do so only at their peril.

*Andrews reports on legal matters for The Christian Science Monitor. Excerpted from "Congress from Soup to Nuts" in the April 4, 1994, Monitor.*

ior, they should be "decoupled" so as to impose a greater penalty on the frivolous party than the amount awarded to the nonfrivolous party. The difference would go to the court or to the general treasury.

Fourth, although the possibility of mistaken imposition of sanctions tends to discourage legitimate plaintiffs from suing, this effect can be off-

set by raising the award to successful plaintiffs in the original action.

Fifth, if sanctions are not used because of their greater complexity and cost, there are two alternatives that also can deter frivolous suits: a version of the English rule of fee allocation (in which the loser pays an amount greater than the winner's legal costs) and the decoupling of liabil-

ity in the initial trial (such that the award to a prevailing plaintiff is less than what the defendant pays).

*Polinsky is the Josephine Scott Crocker Professor of Law and Economics at Stanford. Co-author Rubinfeld is a UC-Berkeley professor. Adapted from "Sanctioning Frivolous Suits: An Economic Analysis," Georgetown Law Journal, December 1993 (Vol. 82, No.2). © Georgetown Law Journal and Georgetown University.*

## The Dollar Value of Pain

by Prof. Margaret Jane Radin

Many economists have the stubborn intuition that most values can be scaled, with the further unquestioned assumption that all values reduce to money. For them, the idea of monetary compensation for injuries poses no problems; it is simply a quid pro quo. For those who believe that there is no commensurability between injuries and dollars, however, compensation does pose a problem. If corrective justice requires rectification, and if injury cannot be translated into money, how can payment of money ever amount to rectification, so as to satisfy the demands of corrective justice?

Some courts say the purpose of compensation for pain and suffering is to come as close as possible to rectification (aiming to ease the pain and restore the victim's abilities), even while admitting that there is no way we could know what coming close would mean.

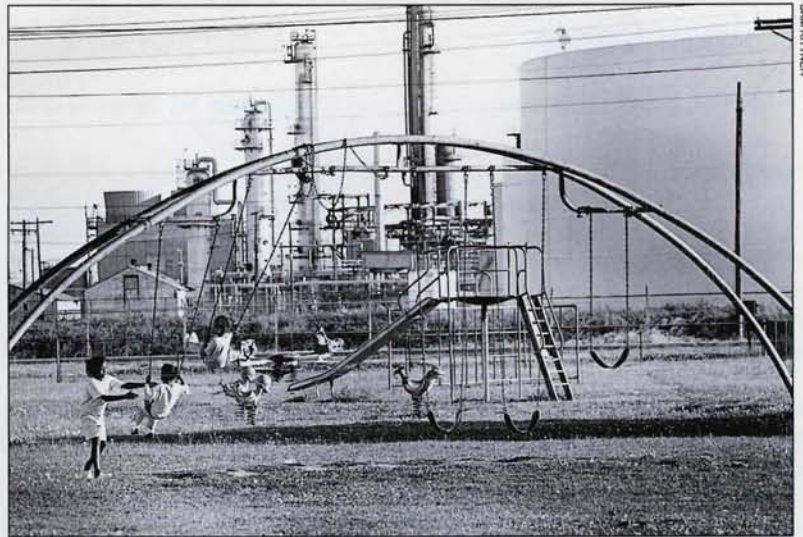
Tort defendants and their insurers take a different view. They say that damages for pain and suffering are indeterminate, that there is no way to evaluate their appropriateness, that there is no serious check on the jury's discretion. Many have the intuition that the mere fact that we cannot quantify pain and suffering is an argument against compensation. Incommensurability is evidently worth big bucks to defendants.



It also links up their interests with the theoretical view of certain economists. In what has become a standard economic view, manufacturers of defective products should not have to pay damages for pain and suffering unless the buyer would have bargained and paid for insurance against her own pain and suffering should an accident occur. The proponents of this view assume that it would be irrational for people to purchase such insurance when they buy a product, and that the purchase price for products therefore does not include payment for implied warranties against such losses. In the absence of such a bargained-for provision, the argument concludes, no damages should be available for pain and suffering.

But if people do not purchase insurance against pain and suffering when they purchase a product, the best interpretation may be that they are affirming the incommensurability between pain and suffering and dollars. Perhaps people reject the idea that their own pain is a commodity replaceable with money. In other words, it may be that people reject the idea of purchasing insurance because they reject the symbolism of the transaction. If, however, we conceive of compensation not as a quid pro quo, but rather as a symbolic action that reinforces our commitments about rights and wrongs—then the practice of paying compensation need not signify that harms to persons are mere commodities. These conflicting conceptions of compensation coexist within our legal practice and discourse. Once we recognize the conflict, we can gain better insight into the debate about compensation for pain and suffering, as well as corrective justice in general.

*Radin is a professor of law at Stanford. Adapted from "Compensation and Commensurability," Duke Law Journal, October 1993 (Vol. 43, No. 1).*



## Race and the Environment

by James H. Colopy '94

**N**umerous recent studies have found a strong correlation between racial demographics and the location of environmental hazards:

- Three out of every five African Americans and Latinos live in communities with uncontrolled toxic waste sites, and African Americans are heavily overrepresented in the six metropolitan areas with the most uncontrolled toxic waste sites.

- Communities with existing hazardous waste incinerators have 89 percent more people of color than average communities, and communities with proposed incinerators have 60 percent more people of color.

- Penalties issued by the U.S. Environmental Protection Agency for violations of hazardous waste laws are as much as 500 percent higher in white communities than in communities of color. Additionally, Superfund cleanup actions begin 12 to 42 percent later in the latter.

This unequal distribution of environmental burdens and benefits is seen by some to consti-

tute "environmental racism." Recent lawsuits brought by community organizations contend that racially discriminatory practices and procedures underlie the disproportionate siting of polluting facilities in communities of color, constituting, in effect, a civil rights violation.

Title VI of the Civil Rights Act of 1964 broadly prohibits the federal government from funding any program that discriminates on the basis of race, sex, or national origin. Since environmental projects, including waste dumps, incinerators, and landfills, are often heavily underwritten by federal funds, Title VI may well prove to be a potent weapon for environmental justice plaintiffs.

*Colopy is an associate at Landels, Ripley & Diamond in San Francisco. Adapted from "The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964," Stanford Environmental Law Journal, 1994 (Vol. 13, No. 1).*



## Why Smokers Lose Cases

by Prof. Robert L. Rabin

There persists among tort activists a sense that cigarette litigation can independently contribute to the social control of a product as harmful as tobacco. This perception may run counter, however, to the effective limits of tort law.

Tort litigation has been most effective in this regard when the plaintiff's claim crystallizes an unsatisfied demand for political action. Some of the major mass tort cases—Agent Orange, asbestos, Dalkon Shield, DES, and such—were strongly colored by the evocative specter of innocent exposure to unseen toxics. Victimization was fraught with symbolic significance. Any of us, taken unaware, might have suffered such misfortune. If there is a responsible party in such actions—where the victim has “clean hands”—the intuition is that he or she should be held to account.

By contrast, conscious risk-taking has not fared very well in tort litigation, harking back to Judge Cardozo's famous remark, in a fun-house slip-and-fall case, that “the timorous may stay at home.” The issue of personal blame has stymied the tort claimant in cigarette cases. Tobacco industry defendants have had success in arguing that claimants do not qualify as “deserving” victims.

Tort law and tort process seem to conspire against any effective role for the tobacco litigant. Nonetheless, in an era of comparative fault, it must be regarded as a remarkable feat that, after decades of litigation, the tobacco industry has not paid out a cent in tort awards. Whatever happens in the future, this record stands as an instructive lesson in the limits of social control through the tort system.

*Rabin is the A. Calder Mackay Professor of Law. Adapted from his chapter “Institutional and Historical Perspectives on Tobacco Tort Liability” in Smoking Policy: Law, Politics and Culture, edited by Rabin and Stephen D. Sugarman (Oxford University Press, 1993).*

## “Kill All the Lawyers”?

by Robert W. Peterson '66

“The first thing we do, let's kill all the lawyers.”

You know the line, from Shakespeare's *Henry VI, Part 2*. Like a mantra, it is mindlessly quoted by pundits and generally marshaled as condemnation of the legal profession from the very pen of the Bard.

Not only is this a gross calumny, it is a symptom of gross cultural illiteracy.

In the play, the Duke of York has laid claim to the throne. To foment rebellion and instability, he hires an ex-convict to set fire to London Bridge and instigate looting, burning, and general havoc. York instructs this fellow, Jack Cade, to claim falsely that he, Cade, is the long-lost child of a noble family and thus is rightful heir to the crown. Cade rides into London with a bunch of ruffians, claims the crown, and sets up a rump court.

To whip the crowds into a frenzy of support, Cade uses a familiar device. Knowing that entitlements are popular and taxes are not, he promises that if he is crowned:

- There shall be no money: “All shall eat and drink on my score.”

- All the realm shall be owned in common—no private property; just take what you want.

- All shall wear the same livery, “that they may agree like brothers, and worship me their lord.”

Well, that sounded pretty good to the crowd. Dick the Butcher shouts enthusiastically, “The first thing we do, let's kill all the lawyers.”

There it is—the phrase so frequently used to damn the legal profession, shouted by a butcher in response to an ex-convict and confidence man who was in London to foment anarchy, burn the city, and loot the commonwealth.

Shakespeare next shows us what Cade's world would be like without lawyers. A clerk enters, and someone accuses him of being able to write and read. Cade orders, “Hang him with his pen and inkhorn about his neck.”

Yes, second thing let's do, let's kill anyone who can write or read.

In the end, Cade is killed and his head is paraded through London. His last words might appropriately have been, “A lawyer, a lawyer, my kingdom for a lawyer.”

*Peterson is associate dean and professor at Santa Clara University School of Law. Adapted from “Kill All the Lawyers? Remember Jack Cade” in the Los Angeles Times, December 14, 1993.*



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# School NEWS

## *Loan Relief*

### Gift from Rubins Will Advance Public Service Careers

**M**iles Rubin '52 and his wife, the former Nancy Dee Hirsch, have created a \$1-million fund to ease the debt load of Stanford Law students and graduates who enter public service. Law students typically graduate with about \$50,000 debt in accumulated undergraduate and law school educational loans—a formidable barrier to entering the relatively low-paying public interest and government sectors.

"We are enormously grateful for this thoughtful and generous gift," said Dean Paul Brest. "It will help open the way to full-time public service careers for the many talented graduates whose hearts and abilities draw them in that direction."

Stanford Law School has since 1985 been offering loan relief to such individuals. However, the start-up funds donated by the Cummins Engine Foundation for this innovative program have been depleted. That's the bad news. The good news? It was commendable career choices by a significant number of recent graduates that brought about

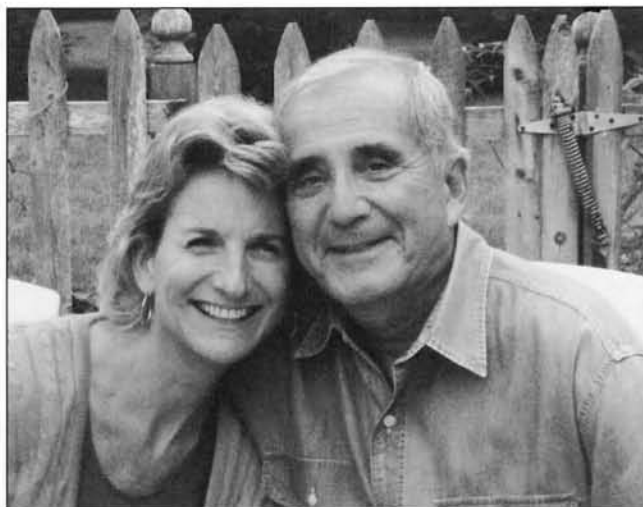
the depletion. The current crop of students appears to be no less altruistic, and new, more permanent funding has become urgent. The Rubins understood and took the lead in responding to this important need.

#### **THE RUBIN FUND**

The Miles L. and Nancy H. Rubin Law Student Loan Repayment Fund was established in June 1994. Scheduled for implementation in January 1995, it will, in Mr. Rubin's words, "go toward paying down the loans and interest for students who elect public interest practice."

Long an advocate of economic and social diversity in the legal profession, Rubin in 1971 joined with Victor Palmieri '54 to provide the cornerstone gifts for the School's Carl B. Spaeth Minority Scholarship Fund. Rubin is also a two-time member of the Board of Visitors and its chair from 1991 to 1993.

His wide-ranging career in corporate law and management includes stints as chief executive officer of Detroit Iron and



**Benefactors Nancy and Miles Rubin '52**

Steel, Reliance Manufacturing Co., National Direct Marketing Corp., and Puritan Fashions Corp. In the mid-1960s he started the nation's first pay television operations in a number of California cities. In addition to his current duties at National Direct Marketing Corp., he is serving as chairman of the Sun Apparel/Greater Texas Group of El Paso and Mexico.

Also prominent in political and philanthropic circles, Rubin has provided significant campaign assistance to Demo-

cratic presidential candidates. He is a founder of Albert Einstein Medical School; former president of the Washington, D.C.-based Fund for Integrative Biomedical Research; and a co-founder of Citizens for Energy Action and the Citizen Labor Energy Coalition. Mr. Rubin also founded and managed the first Minority Enterprise Small Business Investment Company in California. In 1986 he founded and chaired the WOZA Afrika Foundation to support the development of South African writers, playwrights, and



## Ford (AB '88) Joins Faculty

**H**arvard Law School fellow Richard Thompson Ford joined the faculty on September 1 as an assistant professor.

No stranger to Stanford, he received his undergraduate degree here in 1988 as a political science major, after entering as a National Merit Scholar. He went on to receive his law degree with honors from Harvard in 1991.

While still a law student, Ford served as an instructor in legal methods and wrote his first law review article. He also served as a housing policy consultant to the city of Cambridge, Massachusetts, drafting a rent control reform agenda that was largely adopted by the city council.

Upon graduation, Ford joined Morrison & Foerster in San Francisco,

where he had previously worked as a summer associate. He continued to do academic research and writing while practicing law, and in February 1993 took up these pursuits full time as a Harvard fellow. Race and the law has been his focus, particularly the relationship between political power, economic stratification, and jurisdictional boundaries. His own experience as an African American informs this work.

An article he wrote during his fellowship, "The Boundaries of Race," was published in the June 1994 *Harvard Law Review*. Earlier publications include "Urban Space and the Color Line," *Harvard Black-Letter Journal*, Spring 1992, and reviews in *Transition* of books on social issues in Los Ange-

les and on the communitarian movement.

Ford has also presented a number of scholarly papers: "The Role of the Academic in Urban Social Life," at the Critical Race Theory Workshop in July 1994, Miami, Florida; "Political Theory and Land Use Regulation: Community or Commodity?" at the University of San Francisco School of Law in August 1993; "The Boundaries of Race," at the Critical Race Theory Workshop in June 1993; and "Race Consciousness at the End of the American Century or: Go West, Black Man," at the Critical Networks Conference in Cambridge, Massachusetts, in April 1992, among others.

"Rich is a stellar addition to our faculty," said Dean Brest. "As one of the more promising young legal scholars in



Richard Thompson Ford

America, he was much sought after, and we are delighted he has chosen to bring his considerable talents to Stanford."

Ford will initially teach local government law. His other teaching interests include property law, housing law, and race and the law.

Asked about his goals as a teacher, he said: "I hope my students will learn that law and legal institutions can be either liberating or oppressive, and that they as lawyers will be in a position to tip the balance between the two." ■

musicians, which first brought the works of South African township playwrights to Lincoln Center, the Apollo Theater, and then to universities across the country.

Nancy Rubin is serving the Clinton Administration as an official with the Corporation for National and Community Service. Formerly a member of the Carter Administration in the Department of Agriculture and in the White House, she shares her husband's societal concerns.

She is currently a member of the Council

on Foreign Relations and of the Public Support Committee of the Board of Governors for the American Red Cross. She also serves as a director of the International Human Rights Law Group, where she chaired the Election Oversight Committee and reported on elections in countries including Chile, India, and South Korea. As chair of the Women's Campaign Research Fund, she established and continues to direct a continuing education and training program for women who hold or seek public office.

She has previously served on the Bretton Woods Committee; as a director of the Overseas Development Council; on the International Rescue Committee's Women's Committee for Refugees; and as U.N. Delegate to the United Nations Conference on the Status of Women. She has also been a director and active executive of the Overseas Education Fund, an early leader in economic development programs for Third World women. In addition, Mrs. Rubin has been active in and served as a director of the Los

Angeles Psychiatric Service and the Didi Hirsch Community Mental Health Center in Culver City, California.

The Rubins are parents of Jon Rubin (Brown University '90) and Todd Rubin (Stanford '93). Mr. Rubin's two older children are Kim Diane Rubin (Stanford Law School '82) and Richard Rubin (Stanford '81). ■



## Biestman Becomes Assistant Dean of Student Affairs



Karen Biestman

**R**eturning students were greeted by a new assistant dean for student affairs, Karen Williams Biestman. She succeeds Sally Dickson, who last spring became director of Stanford University's Office of Multicultural Development.

Appointed on August 8, Biestman has long been associated with the University of California at Berkeley. "Karen brings an unusual range of talents and experience," said Dean Brest. "She has studied and taught law and ethnic studies, counseled students, and served as a university administrator. In short, she is a wonderful addition to our law school community."

Biestman received both her bachelor's (Native American Studies, 1979) and law (Boalt Hall, 1982) degrees from UC-Berkeley. She began teaching in Berkeley's Native American and Ethnic Studies programs in 1983, serving as Native American Studies coordinator from 1988 to 1990, and from 1993 until her appointment at Stanford. She was also Berkeley's

assistant dean of student life from 1990 to 1993.

Among her awards at Berkeley are an American Cultures and Management Fellowship and a Staff Special Performance Award. Her career also includes considerable campus and Native American community service. Biestman is active as a spokesperson and teacher in the areas of federal Indian law, race relations and the law, and diversity in higher education. She has written on a range of issues. Her most recent research involves the

implementation of federal law governing the welfare of Native American children. Biestman herself was born in Oklahoma, of Cherokee and Choctaw descent.

As Stanford Law School's assistant dean for student affairs, Biestman will provide academic, career, and personal counseling. She will also seek to maintain and increase the diversity of the student body and coordinate a variety of student programs and services.

She was drawn to Stanford Law School, she

says, by its "smaller, more intimate environment, and the opportunity to work one-on-one with such exceptional students, faculty, and colleagues." She also appreciates the "intellectual rigor and maturity" of the graduate students who make up her new constituency.

Karen Biestman is married to Mark Biestman, a vice-president of Metaphor Computers in Mountain View. Mark is a graduate of the Stanford Business School's Executive Program. The couple has two young sons. ■

### Moot Court

## Real Issues, Well Argued

**C**an a judge require a mother convicted of child abuse to accept an implanted birth control device? And can she be denied a sentence reduction for refusing to admit to criminal acts other than those for which she pleaded guilty?

These knotty questions—touching on due process and the Fifth Amendment right against self-incrimination—were at the heart of the hypothetical case developed for the School's 1993-94 moot court program.

"It is hard to rationalize the law in either of these areas," observed Judge Stephen Reinhardt, one of the three jurists for the final Marion Rice Kirkwood Competition

on April 29. "The issues are very interesting, very troublesome, and will be with us for some time."

Reinhardt was joined on the mock Supreme Court bench by two colleagues from the U.S. Court of Appeals, Ninth Circuit: Procter Hug, Jr. and Mary M. Schroeder. Hug, a 1958 graduate of the School, served as chief justice for the Kirkwood competition.

Two teams of students had won the privilege of arguing in the finals. Clarisa Long and Lawrence Makow, both 3L, represented the state's side, while Bradley Joondeph (3L) and Srikanth Srinivasan (2L) raised constitutional objections.

The Kirkwood jus-

tices subjected the contestants to a rigorous grilling. Ultimately, the laurels went to Joondeph and Srinivasan, who won both the Mr. and Mrs. Duncan L. Matteson, Sr. Award for Best Team of Advocates and the Walter J. Cummings Award for Best Brief. Joondeph also received the Cummings Award for Best Oral Advocate.

"It was difficult to decide," said Hug, in his concluding comments. "We had two excellent teams and two excellent briefs, along with really fine performances on all your parts." Schroeder agreed that the Stanford contestants were "extremely well prepared." Also impressed with the



## Kochen to Promote Public Service Opportunities

The School has created the new full-time position of Director of Public Interest Law Programs and named attorney Madeline Kochen to the post. She also holds the title of Assistant Director of the School's Office of Career Services.

"This new position symbolizes Stanford Law School's commitment to public service," says Dean Brest. "Madeline's leadership will help us realize that commitment."

Kochen will provide career counseling to students considering public

interest careers and organize informational programs for all students on the range of opportunities for public service. She looks forward "to working with students, faculty, and the public interest community to create new opportunities and programs as well."

Kochen has fourteen years of related work experience. While a student at Yeshiva University's Benjamin N. Cardozo School of Law, she interned for two years with the ACLU Reproductive Freedom Project. Her first

post after graduation in 1981 was with the Legal Aid Society of Nassau County in New York. Kochen next worked for five years (1983-88) with the New York Civil Liberties Union, initially as a staff attorney and legislative counsel, and later as the founder and director of the NYCLU Women's Rights/Reproductive Rights Project.

A bill Kochen drafted passed the New York legislature as the Marital Name Change Law (Chapter 583 of the Laws of 1985), which enables people getting married to keep or change their names as they see fit. She also coauthored the state's Personal Privacy Protection Law (Chapter 652 of the Laws of 1983), which regulates government record-keeping.

In 1988, Kochen was awarded a Charles H. Revson Fellowship for the Future of the City of New York. As a Revson fellow, she was able to pursue studies at Columbia University in philosophy, sociology, and religion while participating in seminars on inner-city problems and solutions. From 1989 to 1992, Kochen was the law assistant to Acting Justice Elliott Wilk of the New York Supreme Court.

This past year, she has been practicing law while conducting scholarly research on historical and institutional aspects of legal bondage. Her publications include two recent page-one articles in the *New York Law Journal* and a chapter called

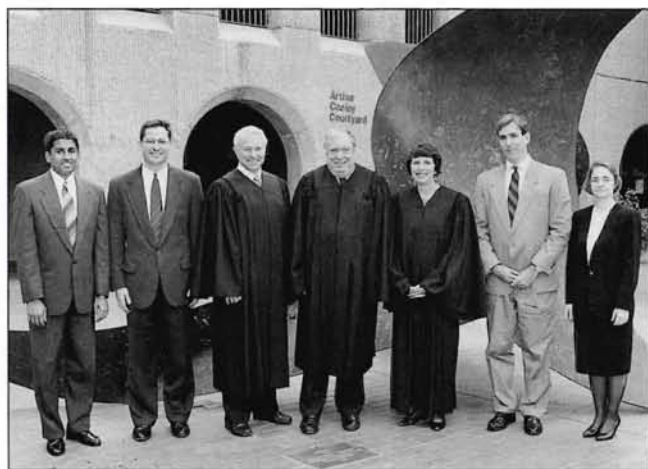


Madeline Kochen

"A Woman's Right to Control her Body" in a book she coauthored, *The Rights of Women* (Bantam, 1983).

Kochen has deep roots in the Jewish community. She majored in Jewish Studies at Yeshiva University (graduating second in her class in January 1978). Before entering law school she pursued in-depth study of Talmudic law in Israel. Later, she worked as a legal intern for Eliash & Eliash in Tel Aviv.

"Public interest law is a natural expression of Jewish—indeed, universal—human values," she says. "My role is to help Stanford students find ways to integrate public service with their lives and careers." ■



Kirkwood participants (l-r) Srinivasan and Joondaph; jurists Hug '58, Reinhardt, and Schroeder; and Makow and Long.

hypothetical problem, she said, "It's a special pleasure to work on something that raises such good issues." "We will probably never hear them argued better," concluded Reinhardt.

Stanford's moot court program is conducted by a board of students

advised by lecturers Lisa Pearson and Randee Fennner. The presidents of this year's moot court board were Molly Brown and Robert Burwell, both 3L. Some 40 students each year are involved in developing and participating in the appellate simulations. ■



## Levine and Zaenglein Boost Fund-raising Efforts



Nate Levine



Kate Zaenglein

**T**his summer, the Law School welcomed two fundraising professionals to the development staff led by Susan Bell, Associate Dean for Development (STANFORD LAWYER, Fall 1992).

Nate Levine has assumed the new position of Director of Leadership Gifts, namely, major donations from individuals, corporations, and foundations. He comes to the Law School with over 15 years of development and marketing experience, the last 10 with the Jewish Community Federation of San Francisco, the Peninsula, Marin and Sonoma Counties.

For the past four years he has served as associate executive director and director of operations for the JCF, which solicits some 40,000 prospective donors and raises approximately \$20 million annually. His areas of expertise include strategic planning, volunteer management and training, marketing and public relations, and capital projects development.

Levine became interested in Stanford Law

School through his friendship with John Freidenrich '63. Attracted by the "cutting-edge" University environment, Levine signed on and is delighted to find Stanford people as "warm, bright, thoughtful, and articulate" as he had anticipated.

Levine received his B.S. in physics and art from Antioch College, and his M.S. in applied and engineering physics from Cornell University.

He lives with his wife and son in Oakland and enjoys running and photography in his spare time.

Levine is joined at the Law School by Kate Zaenglein, a development officer with considerable experience in higher education. Zaenglein succeeds Donna Raub as the Associate Director of Leadership Gifts. (Raub has taken a position in the School of Engineering.)

Fresh from the East Coast, Zaenglein previously served as director of the New York City regional office for the University of Rochester's \$375-million campaign. In this capacity, she oversaw and initiated major gift activities associated with the 8,000 alumni in the New York metropolitan area. Prior to that, she was associate director for development and assistant director of corporate and

foundation relations for the College of Arts and Science at the University of Rochester.

Zaenglein—who holds a B.A. in English literature from St. Lawrence University and an M.B.A. from State University of New York at Binghamton—says she particularly enjoys "the challenge of finding areas of mutual concern and interest" between potential donors and educational institutions.

Zaenglein's leisure interests include the arts, particularly museums and the theater, and outdoors activities. She looks forward to cycling, swimming, running, and skiing in salubrious California.

*Nate Levine's phone number is 415/723-4931. Kate Zaenglein's phone number is 415/725-7008. ■*

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### Innovation

## New Two-Week Term Provides Intensive Skills Training

**T**he School has added a third, short term to the academic year. Scheduled in January between the regular fall and spring terms, it allows students to concentrate on a single course that meets all day, every day, for two weeks. This intensive format accommodates 80 hours of classroom time—more

than most semester-length courses—along with the flexibility for extended learning exercises.

The January term was introduced in 1994 with a choice of two innovative courses: Evidence and Advocacy Skills Workshop. Each has something special to offer.

Evidence is taught by Professor Miguel Méndez, author of *California Evidence* (West, 1993), the most up-to-date guide to the state's code and its relationship to the Federal Rules of Evidence. The course takes a problem approach using materials developed by Méndez. He encourages self-study by



## Dean and Professors Gladly Learn



**Board Chair Pamela Rymer '64**



**Speaker Anne Bingaman '68**

**"W**hat people do when they graduate from law school has changed a lot more than what happens in law school." This observation from Isaac Stein, JD/MBA '72, represents just the sort of insight the School was seeking when planning perhaps the most interactive Board of Visitors meeting in memory.

Held April 28–29 at

Crown Quad, the conclave was chaired by Judge Pamela Ann Rymer '64 of the Ninth Circuit Court of Appeals. "Speak freely and forcefully," she said in her opening remarks. "We are a working board."

The Visitors were asked to consider the changing world of law and the School's role in educating lawyers for that

requiring students to prepare written answers to the problems, which then become the basis of class discussion. Other teaching approaches include 90-minute, self-guided interactive-video sessions simulating courtroom rulings on the admissibility of evidence.

The Advocacy Skills Workshop is designed to provide a sequence of life-like litigation experiences, namely, a deposition, motion, direct and cross examination, opening and closing statements, and a one-day trial. Videotaped playback sessions are also available, so that students can analyze and refine their styles of presentation.

The workshop was developed by a team including then-Associate Dean Ellen Borgersen, Lecturer Tim Hallahan, and attorney-educators Mervin Cherrin, Judd Iversen, and Ann Lehman. The kind of expert individualized skills instruction that the planners envisioned would not have been possible,

however, without more instructors than the School could afford. The solution: volunteers—160 experienced attorneys and judges from the surrounding community, of whom 31 were Stanford Law alumni/æ. "I actually learned what it's like to be a lawyer!" enthused one student.

Generally considered a great success, the January term will be repeated in 1995 with three offerings: the original two courses plus a new workshop on negotiation, to be taught by Lecturer Elizabeth Kopelman, a fellow at the Stanford Center on Conflict and Negotiation and coauthor of *Beyond Machiavelli: Tools for Coping with Conflict* (Harvard, 1994). Called Negotiation: Theory and Practice, the interdisciplinary course will encompass social and cognitive psychological aspects of bargaining, game theory perspectives, and participatory learning activities like role playing and videotape review. ■



PHOTOS BY MARCO ZECCHIN



**The Visitors commented on curriculum directions in small groups hosted by professors (above). Isaac Stein, JD/MBA '72 (below), brought a businessman's and investor's perspective.**



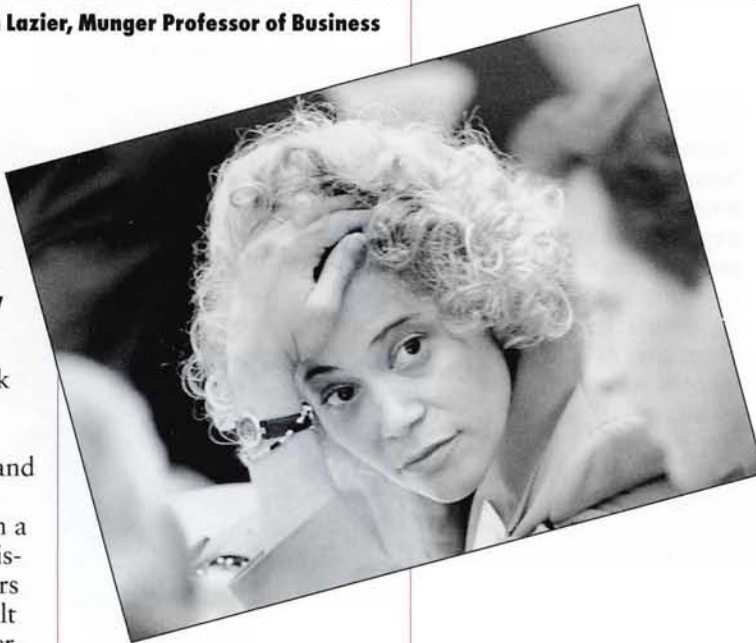


**William Lazier, Munger Professor of Business**



**Arturo Garcia-Costas ('95) and other students shared their views with Visitors.**

**Leonade Jones,  
JD/MBA '73,  
treasurer of the  
Washington Post  
Company**



world. To this vital task the Board brought a range of experience in various practice areas and environments—experience that was tapped in a series of small group discussions led by members of the faculty. The result was a rich fund of observations and suggestions, all carefully recorded by notetakers in each group. A sampling:

"The partner skill set is changing; marketing is more important."

—Lawrence Calof '69

"Basic analytical skills are a lifelong resource."

—Bruce Sattler '69

"Those who fail [in law firms] are invariably those who do not write well."

—James Gaither '64

"Students are well trained to communicate with

other lawyers, but not with clients and other nonlawyers."

—Donald S. Chisum '68

"Why spend law school time on things one can learn elsewhere?"

—John E. Porter '83

"Everyone needs to know how to negotiate."

—Ann Casto '71

"Law schools spend too much time catering to the needs of the Bar."

—Stuart J. Baskin '75

"Students need to understand that the answer isn't always in LEXIS."

—Charles E. Koob '69

The notes on these and other valuable observations were conveyed to Dean Brest, for summary during a plenary session later in the meeting.

#### **BEYOND LEXIS**

One way in which the Law School is teaching students to develop a creative, problem-solving approach was demon-



**Linda Mabry, international business teacher**

strated in a simulated classroom session. Led by the Dean and Linda Krieger, an attorney and acting associate professor, it came from their innovative course titled Problem-Solving, Decisionmaking, and Professional Judgment. The Visitors-cum-students were invited to review a business school-style case prepared for the course and to discuss both the legal and extra-legal dilemmas it raised.

Also on the program were presentations, with





**Judge Procter Hug '58 helped welcome first-year students to the Stanford Law community. Shown here (l-r): 1Ls David Flickinger, Mark Huppin, and Peter Huie.**

question-and-answer periods, by two recent faculty recruits in the vital law and business field. Profiled in the previous *STANFORD LAWYER*, they are William C. Lazier, MBA '57, the Nancy and Charles Munger Professor of Business, and Associate Professor Linda A. Mabry, an expert in international trade and commercial transactions.

Several professors then joined the Visitors for lunch in refurbished Branner Hall, where a visiting member of the faculty familiar to many of the Visitors—Stuart L. Kadison '48 of the Los Angeles legal community—delivered a thoughtful critique of how this country handles judicial selection, tenure, and removal. Regretting the degree to which the process has been politicized, he warned: "Judges will continue to be no better than the means whereby they are appointed and retained." Kadison, then serving as a Herman

Phleger Visiting Professor of Law, was spending the 1993–94 year at the School teaching a course—Philadelphia 1787 Revisited—and doing scholarly research and writing.

#### STUDENT VIEWS

The Visitors enjoyed a number of opportunities to find out what the School's students are thinking, beginning with the now-traditional dinner for first-years hosted by the Board. Anne K. Bingaman '68, head of the Antitrust Division of the U.S. Department of Justice, delivered the keynote speech. Called "Learned Hand's Lessons for First-Year Law Students" and inspired by Professor Gerald Gunther's new landmark biography of the late great judge (see page 4–7ff.), it provided reassurance for the many who don't know quite what they want to do, except to do right. "It's all there before you, and far beyond anything I could

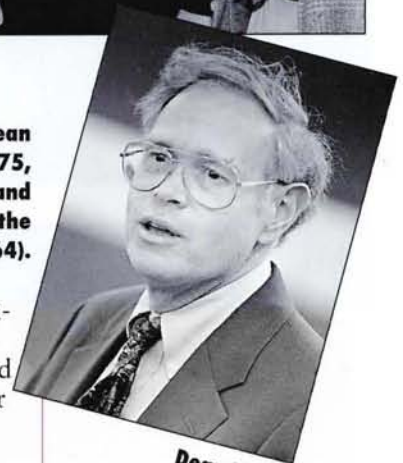


**Above: Indiana Dean Bryant Garth '75, Dr. V. Robert Colton, and Alexander Bennett (the spouse of Brooksley Born '64).**

have imagined," she concluded. "Don't worry—absorb every minute, and the world will be at your feet."

Students from the second and third years had their say the next day in a series of small group discussions with Board members. To encourage candor, no faculty, staff, or notetakers attended. Comments afterward indicated that the Board members enjoyed and valued the confidential exchange.

The final session of the annual meeting—a plenary session with Dean Brest—continued in an interactive vein, with a host of questions, comments, and suggestions from the Visitors. Grateful for the input, the Dean said, "Your perspective from the world in which our graduates practice is



**Dean Brest**

valuable indeed."

As fitting reward for a job well done, the members of the Board were offered ringside seats at the students' Kirkwood Moot Court Final Competition (see pages 30–31), as well as a student musical that evening. The latter—a spoof of life at Stanford Law School—provided a lighthearted postlude to an annual meeting of exceptional import. ■



## A Banner Day at Crown Quad



PHOTOS BY JOHN SHERETZ



**The soon-to-be graduates, backed by proud family and friends. Edward Adams, Jr. (center and below) was the Class of 1994 standard bearer.**

**M**any of the banners fluttering from campus lampposts during this year's Commencement bore soccer balls rather than Stanford emblems. But the applause that echoed through the eucalyptus on Sunday, June 12, was not for World Cup athletes but for the world-class students that received their degrees that day.

A total of 186 law students—173 new recipients of the J.D. degree and 13 receiving other master's-level and doctoral degrees—were honored in the sun-washed ceremony at Crown Quad.

Flagbearer Edward Adams, Jr. of Austin, Texas, headed the formal academic procession of

robed faculty and students. The class marshal for the occasion was Cassandra Knight of Sacramento, Calif.

Dean Paul Brest praised the assembled graduates, saying: "You are as diverse a class as has ever been graduated from this Law School, and you have used your differences constructively, as a source of strength, education, and joy."

The Dean also announced the names of the top two students in the class—Jennifer Sachs of Woodbridge, Conn., the Nathan Abbott Scholar for the highest overall grade point average; and Lawrence Makow of New York, N.Y., who had the second-highest GPA—and





of the newly elected members of the Order of the Coif (see awards, pages 38–39).

This year's John Bingham Hurlbut Award for excellence in teaching went to Kim Taylor-Thompson, associate professor of law. Chosen by a vote of the graduating class, Taylor-Thompson was also the keynote speaker.

Class president Rufus Whitley of San Antonio, Texas, spoke briefly before presenting her with the award. "Our three years were not tranquil," said Whitley, an ordained Catholic priest and oblate of Mary Immaculate. Noting some major political events during the period in which the graduating class was studying law—from the Clarence Thomas hearings to current debate over the treatment of undocumented aliens—Whitley said, "I suspect these or different events have caused us to re-examine what we ex-

## Hurlbut Professor

### Taylor-Thompson Speaks from the Heart

**"I** sincerely believe that if you commit today to be fearless in your quest for change and rebellious in your efforts, you will be able to look back on your careers and your lives with considerable pride.

"Your task is to take the tools that you have received and sharpened here at Stanford and to put them to use, not necessarily in the ways we, your teachers, may have envisioned. Instead, you must employ your talents in ways that we have not yet considered, have not taught you, have not tried.

"The challenge I offer you today is to move us forward. Dare to be bold; dare to have

vision; dare to push the boundaries.

"I wish that I could tell you that the path I am suggesting will be easy. Unfortunately, I cannot.

"Living at Stanford, we have been granted the luxury of stepping back from the world for a brief moment to learn and to prepare ourselves for the struggles ahead. But the world that you left three years ago has continued to decline. Today we are on the brink of losing a generation of young men and women because they have been cut off from the lifeline of jobs, education, and opportunity.

"You may observe, as we often do, that



**Kim Taylor-Thompson**

'somebody ought to do something about that.' Members of the class of 1994, that somebody is you." ■



**Class president Rufus Whitley (above) with fellow graduate Lynn DaDamio. (Left) Class treasurer Steve Oh and son. Class secretary Pilar Keagy is on their right.**





**Professor Marc Franklin and Lisa Beattie, outgoing president of the Stanford Law Review.**

pect of ourselves, what society thinks of the reach of our profession, and even the basic fabric of the world in which we live."

The teaching award to Taylor-Thompson, said Whitley, recognizes the professor's personal integrity and commitment "to questioning how law ought to be taught and practiced," which "guided us, challenged us, and assured us though this journey."

Taylor-Thompson, who joined the Stanford Law School faculty in 1991 after three years as director of the Public Defender Service for the District of Columbia, delivered a speech urging the graduates to "dare to be bold; dare to have vision; dare to push the boundaries" (see box on page 37).

The moment many had been waiting for—the presentation of diplomas—was next. Kathleen Sullivan, faculty marshal for the ceremony, read the names of the graduates,

as they came forward one by one to receive the congratulations of Dean Brest and the faculty.

Also honored at the annual convocation were two associate deans and a member of the staff who are leaving the Law School: Ellen Borgersen, associate dean for academic affairs; Sally Dickson, associate dean for student affairs; and Shirley Wedlake, long-time assistant to the student affairs dean. Dickson and Wedlake are remaining at Stanford University with its Office of Multicultural Development, which Dickson now directs.

Diplomas firmly in hand, the 1994 graduates recessed to the sound of music and whir of camcorders. The School's newest alumni/æ class has two permanent officers in addition to President Whitley: Pilar Keagy of Carmichael, Calif., secretary; and Steve Oh of Los Angeles, Calif., treasurer. ■



**Top scholar: Nathan Abbott winner Jennifer Sachs and family.**

## Honors and Awards

*Many members of the graduating Class of 1994 earned laurels in addition to the J.D. degree. Here are the awards and their winners.*

**Nathan Abbott Scholar**, for the highest cumulative grade point average in the graduating class: Jennifer L. Sachs.

**Urban A. Sontheimer Third-Year Honor**, for the second-highest cumulative grade point average in the class: Lawrence Stephen Makow.

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

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

**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: J. Sachs and Makow, plus Kenneth Henry Bobroff, Alafair S. R. Burke, Jeffrey J. Connaughton, Ariela Julie Gross, Joanna Lynn Grossman, William John James, Bradley Weston Joondeph, Jeffrey David Karpf, Russell Barrett Korobkin, Erik J. Olson, Michael Thomas Pyle, Maria L. Sachs, Stephen Benjamin Thau,



Rufus J. Whitley, and Lauren Elizabeth Willis.

**Hilmer Oehlmann, Jr. Prizes**, for outstanding work in the first-year Research and Legal Writing Program: Burke, Joondeph, Korobkin, Makow, M. Sachs, and Thau, plus Lisa Christina Beattie, Jonathan Alan Beckham, Molly Beth Brown, Robert Erik Burwell, Susan Louise Chua, Orly Degani, Alan Earl Dow, Amy Kathleen Doyle, Pamela Jean Furman, Haywood Stirling Gilliam, Jr., Jordan Bruce Goldstein, Leigh Suzanne Goodmark, Jacqueline Elizabeth Hand, Ramsey Hanna, Shannon Marie Hansen, Mats Fredrik Hellsten, Frances Quarles Johnston, Suzanne Holly Kessler, Junjie Edward Li, Elizabeth Anne McKenna, Lisa Dean Noble, Catherine Mary Polizzi, Karen Pelton Scarr, Valerie Schulthies, Karin Star Schwartz, Catherine Grace Wagner, and Andrea J. Weiss.

**Frank Baker Belcher Award**, for the best academic work in Evidence: Joondeph.

**Steven M. Block Civil Liberties Award**, for distinguished written work on issues relating to personal freedom: Willis (first place), J. Sachs (second place), Scarr (third place), and Joondeph and Michael Arthur Zubrensky (fourth-place co-recipients).

**Nathan Burkan Memorial Competition**



Members of the Class of 1994 in launch formation.

**Prize**, for excellent legal writing in the area of Copyright Law: Kessler (first place) and Thau (second place).

**Carl Mason Franklin Prize**, for the best papers in International Law: Karpf and Nina Lucine Hachigian.

**Richard S. Goldsmith Award**, for the best research papers concerning Dispute Resolution: Thomas George Melling (co-winner), and Korobkin and Christopher Paul Guthrie (honorable mentions).

**Mr. and Mrs. Duncan L. Matteson, Sr. Awards**, for the two teams of finalists in the 1994 Marion Rice Kirkwood Moot Court Competition: Joondeph and Srikanth Srinivasan ('95) as best team; Makow and Clarisa Long as

runner-up team (see page 30-31).

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

**Olaus and Adolph Murie Award**, for the most thoughtful written work in Environmental Law: Korobkin (first place) and Olson (second place).

**Public Service Fellowships**, for demonstrated commitment to public service and academic achievement in law studies: Bobroff, plus Lisa Hayden, Samantha L. Helton Rijken Janabajal, and Shirley Hsian-Lan Wang.

**Board of Editors' Award**, for outstanding editorial contributions to the

*Stanford Law Review*: Elizabeth Anne Robischon.

**Johnson & Gibbs Law Review Award**, for the greatest overall contribution to the *Review* during their second year: J. Sachs and Lee John Papageorge.

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

**Stanford Law Review Special Service Award**, recognizing exceptional contributions to Volume 46 of the *Review*: Gabriela Franco.

**United States Law Week Award**, for outstanding service and unfailing commitment to the *Review*: Gilliam and Carla Jayne Garrett. ■



## Faculty Notes



**Professor Alexander**

**Janet Cooper Alexander** was promoted to the rank of full professor with tenure on June 1. She has also been named a principal investigator for the interdisciplinary Stanford Center on Conflict and Negotiation. Professor Alexander's research has focused on securities class actions and other issues of complex litigation. Her publications this past year include "The Lawsuit Avoidance Theory of Why Initial Public Offerings are Underpriced," *UCLA Law Review* (41:17), "The Value of Bad News in Securities Class Actions" in the same journal (41:1421), and "Judges' Self-Interest and Procedural Rules," *Journal of Legal Studies* (23:647). In August, she testified before Congress on securities fraud litigation reform.

**Barbara A. Babcock**, the School's Ernest W. McFarland Professor of Law, spoke to some three hundred women public defenders at a Golden Gate Law School session last fall about women as jury lawyers. She also appeared at a symposium on the criminal justice

system, sponsored by the Bill of Rights Institute at William and Mary Law School, and later had a related article, "Taking the Stand," in volume 35 of that school's law review. Another article by the professor, "A Place in the Palladium: Women's Rights and Jury Service," appeared in the 1993 *University of Cincinnati Law Review* (61:4) (see page 23). In addition, she was the keynote speaker at a Society of American Law Teachers conference on introducing issues of diversity into first-year courses.

In January 1994, Professor Babcock was diagnosed with breast cancer, but has come "roaring back" after a successful course of treatment to teach first-year Civil Procedure this fall. She is also working (with Professor Toni Massaro of Arizona Law School) on a revision of the Carrington and Babcock text, *Civil Procedure: Cases and Comments on the Process of Adjudication*.

**Joseph Bankman**, the School's current Helen L. Crocker Faculty Scholar, was among the witnesses at an Internal Revenue Service hearing this July on Treasury regulation 1.704-1. An article by him on that issue, "The Proposed Partnership Antiabuse Rule: An Appropriate Response to a Serious Problem," appeared in the July 11, 1994, *Tax Notes*. Last year also saw the publication of the tenth edition of what is now Klein and Bankman's *Federal In-*

*come Taxation*. The professor's other publications include "The Politics of the Income Tax" in the May 1994 *Michigan Law Review* (92:6), and "The Effect of Anti-Discrimination Provisions on Rank-and-File Compensation" in the Summer 1994 *Washington University Law Quarterly*.

**John H. Barton**, George E. Osborne Professor of Law, delivered the keynote speech on the future of biotechnology law for a Santa Clara University symposium last March. In May, he was featured at the plenary session of the international Rockefeller Rice Biotechnology Program meeting in Bali, where he discussed international property issues. At Stanford, he led an interdisciplinary, year-long seminar on Indigenous Peoples and Conservation Regions. The scientifically trained professor continues to serve on the U.S.-Canada Free Trade Tribunal and the U.S. Department of Agriculture's National Genetic Resources Advisory Council.

**William F. Baxter**, Wm. Benjamin Scott and Luna M. Scott Professor of Law, became emeritus as of May 26. A former chief of the Department of Justice's Antitrust Division, he was back in Washington in January 1994 for the division's 60th birthday celebration and again in March to deliver the keynote address, "Modification of Final Judgment—10 Years After," for a confer-

ence on Telecommunication's Public Policy Today sponsored by the School of Business and Public Management at George Washington University. Professor Baxter continues to teach his trademark 4-unit course in antitrust law.

**Paul Brest**, Richard E. Lang Professor of Law and Dean, presented the Thomas F. Ryan Lecture at Georgetown University Law Center on October 12. His subject: "Does Law School Matter?" The Dean has been exploring ways to teach law students decisionmaking and other skills that enable attorneys to be wise counselors as well as technicians and tacticians. With Acting Professor Linda Krieger, the Dean has developed an innovative, multidisciplinary course on the subject and written a comprehensive article, "On Teaching Professional Judgment," for the July 1994 *Washington Law Review*. More on this in the next issue.

**Thomas J. Campbell** is charting an independent course in the California state senate, voting against his party and governor on occasion, while seeking to fulfill his campaign promise to focus on improving the economy. Professor Campbell also continues to teach at the School, with fall-term courses on Transnational Law and on Issues of Law in Public Policy.

**Mauro Cappelletti**, Lewis Talbot and Nadine Hearn Shelton Professor of In-



ternational Legal Studies, has added ten volumes to the 44 books or translations thereof already to his credit. He also acquired two more honorary degrees—both from Argentinean universities—for a total of six, and has been named an honorary member of the Academia of Argentina. He lectured last fall in Buenos Aires and La Plata, as well as in Montevideo, Uruguay, and Florence, Italy. Professor Cappelletti spent the spring 1994 term at Stanford, where he taught a course on comparative law (including European Common Market law) and international human rights.

**Gerhard Casper** is beginning his third year as president of Stanford University. Often called upon to comment on undergraduate education and university-government relations, the professor-cum-president was invited to testify before Congress last July on a more legal matter—the nomination to the Supreme Court of Stephen Breyer. “A lawyer of the highest grade” was Casper’s assessment to the Judiciary Committee of the U.S. Senate.

**William Cohen**, the School’s C. Wendell and Edith M. Carlsmith Professor of Law, has published a casebook for use in undergraduate courses, *Constitutional Law: Civil Liberty and Individual Rights* (Foundation Press, 1994). His coauthor on this project was Stanford

emeritus professor of political science David Danelski. Professor Cohen also had an article, “Discrimination Against New State Citizens: An Update,” in the Winter 1994 *Constitutional Commentary* (11:73).

**Lance E. Dickson**, Law Librarian and Professor of Law, presented a paper, “Global Access to Legal Information,” in April 1994 at the first Congress on Caribbean Legal Studies, sponsored by the Centro de Estudios Jurídicos del Caribe and held at the Escuela de Derecho de la Universidad de Puerto Rico.

**John Hart Ely**, the School’s Robert E. Paradise Professor of Law, has received some attention for his latest book, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, 1993). The *New York Times* and other leading newspapers also published an op-ed by Ely dealing with the war powers issue in relation to the Haitian situation. Ely’s reflections on his role in *Gideon v. Wainwright* were published in the 1993 *American University Law Review* (43:8).

Currently a visiting professor at the University of Miami, the former Dean spent terms last year at Georgetown and Yale, while also giving speeches at Fordham, George Washington, Boston College, and for the Foreign Service Association, the law firm of Arnold & Porter, and others.

**Marc A. Franklin**, Frederick I. Richman Professor of Law, has prepared new editions of his durable Foundation Press texts on media law. The 1993 publication of his third edition of *The First Amendment and the Fifth Estate* was followed this year by a sixth edition of *The First Amendment and the Fourth Estate* and a fourth edition of his *Supplement to Cases and Materials on Mass Media Law*.

**Barbara H. Fried** participated in a faculty workshop at SUNY-Buffalo last fall on the subject of her book in progress on Robert L. Hale and progressive legal economics. This spring she served as a commentator at the UCLA Tax Conference. Here at Stanford, Professor Fried chaired the University Subcommittee on Domestic Partners’ Benefits. This work resulted in a monograph on the policy implications of such benefits that is being published by the College and University Personnel Association.

**Lawrence M. Friedman**, Marion Rice Kirkwood Professor of Law, is the author of the book *Crime and Punishment in American History* (see pages 8–11 ff.), which was not only widely reviewed, but also won the American Bar Association’s Silver Gavel Award for its publisher (Basic Books) and was a finalist for the 1994 Pulitzer Prize in history. The professor is now back in residence after a quarter visiting at his alma

mater, the University of Chicago.

**Ronald J. Gilson**, Charles J. Meyers Professor of Law and Business, is the coauthor, with Bernard Black of Columbia, of an introductory text for law students, (*Some of the Essentials of Finance and Investment* (Foundation Press, 1994). An expert in law and business, he is also an associate editor of the *Journal of Corporate Finance*. Gilson has an article written with former professor Robert Mnookin—“Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation”—in this year’s *Columbia Law Review* (94:509) and recently lectured on comparative corporate governance at the European Science Foundation Network on Financial Markets conference in Sesimbra, Portugal.

**Paul Goldstein**, Stella W. and Ira S. Lillick Professor of Law, addressed more than two hundred Japanese business and legal executives in Tokyo last fall, on the subject of copyright and multimedia. International copyright contracts were the subject of another talk this spring in Kunming, China, at the World Intellectual Property Organization training program for East Asian copyright officials. This past summer, Goldstein delivered the closing address, “Copyright and Author’s Right in the 21st Century,” for a conference at the Louvre in Paris, co-



sponsored by the World Intellectual Property Organization; and a speech, "Rights of Employed Authors in Their Works," at an ATRIP seminar in Ljubljana, Slovenia.

**Robert W. Gordon**, Adelbert H. Sweet Professor of Law, delivered a talk to the Fourth U.S. Judicial Circuit on the question, "Has Law Declined from a Profession to a Business?" The professor dealt with another knotty issue—"Undoing Historical Injustice"—in an invited lecture last March at Amherst College. Gordon is spending the fall 1994 term at Yale as a visiting professor.

**William Benjamin Gould IV** continues on leave as the Charles A. Beardsley Professor of Law while chairing the National Labor Relations Board (see page 21). He added new governmental responsibilities on September 29 with his appointment by the White House to the Council of the Administrative Conference of the United States. This high-level group is charged with making recommendations to the president, cabinet departments, administrative agencies, Congress, and the Judicial Conference of the United States on ways to improve the fairness and efficiency of administrative agencies.

**Henry T. (Hank) Greely** has been increasingly involved with the Human Genome Diversity Project, an international scientific effort to discover the genetic heritage of our species. He is a member of the project's North American Committee and chair of its ethics subcom-

mittee. In this connection, he has given talks at international meetings in Sardinia, Guatemala, and France.

Professor Greely has also been active in the national debate over health care, proposing a solution to the abortion coverage issue in a *Los Angeles Times* op-ed and providing analyses of health alliances at the National Health Law Teachers Conference and at Case Western Reserve University.

**Thomas C. Grey**, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, gave the Cutler Lecture at William and Mary College of Law in early April. The subject—"Molecular Motions: The Holmesian Judge"—was one he had explored the previous fall in a faculty workshop at the University of Michigan Law School.



**Professor Grundfest**

**Joseph A. Grundfest**, director of the School's innovative Roberts Program for Law, Business and Corporate Governance, was promoted to the rank of professor on June 1. The former SEC commissioner is also serving on the New York Stock Exchange's Legal Advisory Board and

advising the Federal Reserve's Board of Governors. Trained in economics as well as law, Professor Grundfest was recently elected to the American Law Institute and the Council on Foreign Relations. Other notable events include his invited speech at the annual meeting of the Association of General Counsel and the publication of his article, "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority," in the 1994 *Harvard Law Review* (107:1961).

**Gerald Gunther**, William Nelson Cromwell Professor of Law, was a visiting professor at Brooklyn Law School last fall. During the spring, he delivered the Donald Brace Memorial Lecture to the Copyright Society of the U.S.A. and was the lead speaker at a symposium at IIT Chicago-Kent College of Law on changing patterns in judging. The biggest news, however, is the publication in May of his much-heralded magnum opus, *Learned Hand—The Man and the Judge* (Alfred A. Knopf, 1994) (see pages 4–7 ff.). The biography was warmly received by reviewers and chosen by the History Book Club as one of its selections. Professor Gunther found himself much in demand this summer for bookstore and radio talks, lectures, readings, and book signings coast to coast.

**Janet E. Halley** has received a grant from the Irvine Foundation to develop a new course, *Races and Nations: Identity in Law and Culture*. This past year she participated

in seminars and symposia at New York University, Chicago Law School, Yale Law School, Syracuse University, and Stanford (at the Stanford University Center for Biomedical Ethics grand rounds). Her recent publications include "Reasoning About Sodomy: Act and Identity in and after *Bowers v. Hardwick*," in the 1993 *Virginia Law Review* (79:1721); "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability" in the February 1994 *Stanford Law Review* (46:503); and two book chapters: "The Construction of Heterosexuality" in *Fear of a Queer Planet: Queer Politics and Social Theory*, edited by Michael Warner (University of Minnesota Press, 1993); and "Bowers v. Hardwick in the Renaissance" in *Queering the Renaissance*, edited by Jonathan Goldberg (Duke University Press, 1994).

**Thomas C. Heller** continues his association with Stanford's interdisciplinary Institute for International Studies as an affiliated professor. He and two University colleagues—Coit Blacker of IIS and Stephen Krasner of the Political Science Department—are cooperating in a project on the changing nature of sovereignty. The scholars will explore how the diverse challenges that modern nation-states confront are revolutionizing the character and conduct of contemporary international relations.

**Bill Ong Hing** has an article, "Beyond the Rhetoric of Assimilation and Cultural Pluralism," in *Boalt*



Hall's 1993 *California Law Review* (81:863). Since January, he has been on the board of directors of the Rosenberg Foundation, a San Francisco-based fund concerned with the betterment of impoverished children and their families, as well as with the social and economic integration of immigrants and other minorities.

**Mark G. Kelman** is shouldering many of the faculty affairs responsibilities of the Law School while continuing to write and teach on legal theory, criminal law, and antidiscrimination law. Professor Kelman's writings-in-progress include an article on nonrational, "context-dependent" decisionmaking and a book on the legal treatment of learning disabilities.

**William C. Lazier**, the School's Nancy and Charles Munger Professor of Business, has co-authored a second book with James C. Collins, *Managing the Small to Midsize Company* (Irwin Press, 1994). Lazier recently co-chaired (with a student) a task force on the management of Trex Memorial Union. The group's recommendations for the student center would alter its administrative structure, eliminate four staff positions, and make possible savings of about \$700,000 over the next three years.

**Linda Mabry** was on a panel on "Export Controls under the Clinton Administration" at the January 1994 State Bar of California Intellectual Property and International Law Section's Confer-

ence on American Intellectual Property and Technology in the International Marketplace. "Alternative Career Paths and Work Options" was the focus of a February panel discussion in which she participated at the Conference on the Woman Business Lawyer, sponsored by the ABA Business Law Section and Prentice Hall. Mabry served as moderator for a panel on "Multilateral and Regional Trade Regimes and the Environment: Challenges and Opportunities" at the Global Challenges Forum sponsored in April by Stanford Law School with the Stanford Global Challenges Network. Recently elected to the Executive Council of the American Society of International Law, Mabry has been appointed to the planning committee for the joint conference between the society and its European counterparts to be held at The Hague in July 1995. She is also active in the ABA Section of International Law and Practice.

**Miguel A. Méndez** has written *California Evidence* as part of West Publishing Company's California Handbook series. Besides providing an authoritative reference on the state's rules, the 1993 volume highlights the major differences between the California Evidence Code and the Federal Rules of Evidence. Thanks in part to a federal grant, the professor has also developed a set of innovative teaching materials in Evidence, which West's textbook division plans to publish next year. On the Stanford front, Méndez

played a key role in ending a hunger strike by undergraduates protesting University policy and actions concerning the lack of Chicano studies and minority personnel.

**John Henry Merryman**, the emeritus Nelson Bowman Sweitzer and Marie B. Sweitzer Professor, is president of two scholarly groups: the American Academy of Foreign Law and the International Cultural Property Society, of which he is a founder.

**A. Mitchell Polinsky**, Josephine Scott Crocker Professor of Law and Economics, served during the past year as president of the American Law and Economics Association and hosted the group's annual meeting in May 1994 at Stanford. He also was awarded a John Simon Guggenheim Memorial Foundation Fellowship for 1993-94 to work on a book with Steven Shavell of Harvard Law School on the economic theory of public enforcement of law. Professor Polinsky's publications since last report include "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" (with Shavell) in the September 1993 *International Review of Law and Economics* (13:3) and "Sanctioning Frivolous Suits: An Economic Analysis" (with Daniel L. Rubinfeld) in the December 1993 *Georgetown Law Journal* (82:2) (see pages 23-24).

**Robert L. Rabin**, A. Calder Mackay Professor of Law, is the author, with Stephen D. Sugarman of UC-Berkeley, of

*Smoking Policy: Law, Politics and Culture* (Oxford University Press, 1993) (see page 26), as well as sole author of law journal articles on various aspects of tort reform. He continues his activities as program director of The Robert Wood Johnson Foundation's Program on Tobacco Policy Research and Evaluation. His presentations this past year include a talk at the RWJ Foundation Conference on Substance Abuse. Professor Rabin is spending the fall term at Northwestern University, where he earned both his undergraduate and graduate (J.D. and Ph.D.) degrees.



**Doctor (hon.) Radin**

**Margaret Jane Radin** was awarded an honorary doctor of laws degree in June by the IIT Chicago-Kent College of Law, where she also delivered the commencement address, "Lawyering and Personhood." The professor had served as the Illinois school's centennial visitor during the previous term. A collection of her articles, under the title *Reinterpreting Property*, was published earlier this year by the University of Chicago Press (see pages 24-25).

**Deborah L. Rhode** is the founding director of the

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School's Keck Center on Legal Ethics and the Legal Profession, of which the Keck Foundation is the major benefactor. In April, she delivered Northwestern Law School's annual Pope, Cahil, and Devine Lecture on Professionalism. And in May, her innovative textbook, *Professional Responsibility: Ethics by the Pervasive Method* (Little, Brown) appeared (see pages 18-19). Professor Rhode has also had an article, "Feminism and the State," published in the April 1994 *Harvard Law Review* (107:6).

**David L. Rosenhan** is the author of a study of the "ripple effects" on the practices of psychiatrists and psychologists of the 1976 *Tarasoff* decision (in which the California Supreme Court asserted a duty on the part of therapists to protect third parties from threatening patients). Professor Rosenhan has also completed research on the effects of notetaking on jurors' memories (it helps), as well as a study of supervised visitation for children who have been abused. And with his co-author, he is now at work on a third edition of *Abnormal Psychology*.

**Kenneth E. Scott**, Ralph M. Parsons Professor of Law and Business, presented a paper in Germany last year at an International Symposium on Bounded Rationality and the Analysis of State and Society. The paper, "Bounded Rationality and Social Norms," subsequently appeared in the *Journal of Institutional and Theoretical Economics* (150:315). The professor is also the au-

thor of chapters in three recent books.

This fall, Professor Scott hosted a trail-breaking conference at Stanford titled Social Treatment of Catastrophic Risk. Co-sponsored by the School, the Hoover Institution, and the Center for Economic Policy Research, the two-day gathering drew participants from the world of business and finance, as well as academia. Their goal: to find common elements and policy lessons from such diverse disasters as industrial accidents, product lawsuits, market crashes and bank failures, and hurricanes and other natural hazards.

**Byron D. Sher**, now a professor emeritus, continues to serve in the California State Assembly, where he recently wrote a law authorizing the state to designate "enterprise zones" for small cities, including East Palo Alto. The veteran legislator is a member of the National Conference of Commissioners on Uniform State Law and serves on the drafting committee to revise Article 2 of the Uniform Commercial Code. Professor Sher was recently named chair of a new joint legislative oversight committee on lowering the costs of electric services, which will be considering various proposals to restructure and deregulate the electric power industry.

**William H. Simon** revisited China in July, speaking on "Conceptions of Property in American Law" at the Department of Economics of the Chinese Academy of Social Sciences in Beijing. His other activities included a talk

on the new Russian constitution at a March conference on Justice and Political Economy sponsored by the University of California at Davis. Professor Simon is currently engaged in writing on legal ethics, particularly the jurisprudence of lawyering.

**Kathleen M. Sullivan** testified before the U.S. Senate Appropriations Committee last February in opposition to the proposed Balanced Budget Amendment to the Constitution; and before the Judiciary Committee in July in support of then-Judge Breyer's nomination to the U.S. Supreme Court (see page 22). High Court changes occasioned two appearances on the *MacNeil/Lehrer News Hour*, where she discussed Justice Blackmun's retirement in April and Justice Breyer's nomination in May.

Professor Sullivan's other public activities included speaking at the Ninth Circuit Judicial Conference in August 1993, moderating Attorney General Janet Reno's Three-Branch Roundtable on State and Federal Jurisdiction in February 1994, and delivering the Judge Irving L. Goldberg Lecture at Southern Methodist University in April. She has also had book reviews published in the *New York Review of Books* and the *New Republic*.

**Kim A. Taylor-Thompson** is the 1994 winner of the John Bingham Hurlbut teaching award (see page 37). Last fall she presented her now-annual lecture to the Yale Law School first-year class on ethics in the criminal justice sys-

tem. Her topic: "Defending the Guilty Without Feeling Guilty." Taylor-Thompson testified before a Kentucky state task force in support of indigent defense funding, and served as a panelist in a discussion, at the ABA's midyear meeting, of the Department of Justice's proposal to permit DOJ lawyers to communicate with represented parties without consent of the parties' counsel. She also conducted two Socratic roundtable discussions: one, on hate crimes for the FBI and Bay Area Hate Crimes Investigators Association; the other, on racism and sexism among teens for WNET-TV.

**Barton H. (Buzz) Thompson, Jr.**, the School's inaugural Robert A. Paradise Fellow, has launched an innovative project—"Common Ground for the Environment"—with conservationist Frank Boren '58 and Professor Jeremy Bulow of the Stanford Graduate School of Business. The multidisciplinary undertaking promotes constructive partnerships among business, government, and community organizations.

Professor Thompson spoke on "The Future of Water Markets" at a December 1993 conference sponsored by Stanford's Center for Economic Policy Research. Among his other presentations are "Constitutional Challenges to Environmental Regulation" at a July 1993 seminar for appellate judges sponsored by the ABA, and two talks at a June 1993 University of Colorado conference on Water Organizations in the Changing West.



**Michael S. Wald** continues on leave as the Jackson Eli Reynolds Professor of Law, while serving in the nation's capital as Deputy General Counsel of the Department of Health and Human Services.

**Robert Weisberg**, Professor of Law and inaugural Bernard D. Bergreen Faculty Scholar, has been serving the University in a number of capacities. In 1993-94 he was a member of President Casper's Commission on Undergraduate Education, and recently he became Vice-Provost for Faculty Recruitment and Development. On the scholarly front, the professor delivered an invited faculty seminar on Law and Lit-

erature at the Indiana University School of Law and has written two articles published this year: "The Impropriety of Plea Agreements: An 'Anthropological' View," *Law and Social Inquiry* (19:45), and "Reading Poethics," *Cardozo Law Review* (15:1103). He continues to teach first-year Criminal Law and other courses.

**Deborah M. Weiss** completed two articles this past year. The first, which is forthcoming in the *UCLA Law Review*, is called "Tax Incentives Without Inequity." The second—a joint effort with Jennifer Arlen of the University of Southern California—concerns the political economy of dou-

ble corporate taxation. Weiss has also been developing a new version, which stresses financial and planning issues, of the introductory Tax course.

**Howard R. Williams**, **Charles J. Meyers**, and their coauthor, **Richard C. Maxwell** of Duke Law School, were chosen to receive the Rocky Mountain Mineral Law Foundation's first Clyde O. Martz Teaching Award, at the Foundation's annual institute in July in San Diego. The three scholars were cited for their many accomplishments and contributions over the years to the field of oil and gas law—particularly their definitive text, *Cases and*

*Materials on the Law of Oil and Gas*, which was originally published in 1956 and is now in its sixth edition.

Williams was the Stella W. and Ira S. Lillick Professor of Law from 1968 to 1982. After his retirement he was recalled to active duty in 1983 as the School's inaugural Robert A. Paradise Professor of Natural Resources Law.

Meyers, who died in 1988, was the first Charles A. Beardsley Professor of Law (1971-76) and was also the first to hold the title of Richard E. Lang Professor and Dean of the School of Law (1976-81). His prize was accepted by his widow, Pamela Meyers of Denver. ■

## GUNTHER

*Continued from page 7*

the "exclusionary rule," a long-standing prohibition against evidence obtained in violation of the Fourth Amendment guarantee against unreasonable searches and seizures. More particularly, he noted the prosecution's obligation to show, if challenged, that none of its evidence was a "fruit of the poisonous tree"—obtained, that is, as a consequence of an illegal search or seizure. What was the underlying premise of this rule? Hand asserted that it was applicable here:

"Now the finding of the first indictment was a necessary part of the evidence in the case at bar, because without it nothing that Remington said in the first trial would have been perjury, no matter how false it was. I do not see any difference in principle between obtaining the first indictment by the unlawful extraction of evidence, necessary to its support, and obtaining a document by an unreasonable search."

This was not an ironclad, total-

ly convincing analogy, but neither was it wholly implausible; it was the best anyone could do.

Second, Hand relied on another well-established principle, that which makes "entrapment" a defense in a criminal proceeding. This defense, as he explained, "depends . . . upon the repugnance of decent people at allowing officials to punish a man for conduct that they have 'incited' or 'instigated,' and to which by so doing they have made themselves accessories." Hand conceded that the first indictment and prosecution did not, in the narrow sense, incite Remington "to repeat on the first trial the testimony that he had given on the grand jury proceeding," but he thought the entrapment rationale, though not strictly applicable here, "should [not] be so narrowly confined." After denying Communist party membership before the grand jury, Remington had in effect no choice but to repeat the denial in his first trial, since failing to take the stand would have been equivalent to pleading guilty. The prosecutors knew that in bring-

ing the first indictment to trial, they had created a situation in which Remington would certainly perjure himself on the stand. "Therefore," Hand concluded, "I do not see how it can be denied that the finding of the first indictment was as direct a provocation of the perjury for which he has been convicted, as the persuasion of agents or officials of the prosecution would have been, had they 'incited' or 'instigated' him to perjure himself; so that in point of causation I insist that the situations are the same."

In the present case, Hand contended, the government's methods of obtaining the indictment were independently unlawful. "For these reasons," he concluded, "it seems to me that the case at bar is within the implied ambit of the doctrine of 'entrapment' as well as it is within that of the doctrine against using evidence unlawfully obtained."

Learned Hand's long opinion was a lone dissent; Gus Hand's majority opinion, joined by Thomas Swan, rejected Learned's argument. Indeed, rarely had he been so vigorously disagreed with,



and repudiated, by his colleagues. He had tried to meet the intellectual puzzles in *Remington* as best he could; he could hope that his dissent might move the Supreme Court to review the case and perhaps overturn the conviction. Hand's efforts to stretch existing precedents were unusual for him; typically, he was an obedient lower court judge, not eager to extrapolate from the Supreme Court's principles too readily. As he had said in a case a decade earlier, "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before [it]." Yet in *Remington*, Hand told himself, the situation was different. He certainly hoped that the principles he was advocating were not ones "whose birth [was] distant"; he thought there was truly a reasonable chance that the Supreme Court would agree with his extension of the search-and-seizure and entrapment principles.

IN SOME WAYS, the writing process that produced the *Remington* dissent was consistent with Hand's usual practice, discussing with his law clerk the approach he proposed to take, arguing back and forth about whether it was defensible, with Hand always eager for critical comments from the "puny judge" who held the clerkship that year. In this case, the back-and-forth process with his clerk continued for weeks, virtually to the exclusion of anything else. I was the clerk that year, and I remember that Hand produced thirteen complete versions of his dissenting opinion, each recast to accommodate whatever criticisms I had raised that he found telling.

After seven weeks, he handed his most recent effort to me. "Now look at this one; see if this one holds water any better." I studied the new draft for several hours and returned to his desk. Hand looked up eagerly: "Well, will it wash?" I responded that portions of the

opinion now seemed reasonably airtight, but there were still weaknesses in other sections.

Hand looked at me darkly, pain and annoyance clouding his face. He heaved a deep sigh, then picked up a small paperweight on his desk and threw it in my general direction, missing me by only a narrow margin. "Damn," he shouted, "I can't go on forever like this! Thirteen drafts and it's still not satisfactory? Son, I get paid to decide cases. At some point, I have to get off the fence and turn out an opinion. Enough!"

I had never heard Hand speak in such anger. I turned pale and retreated, shaken, to my desk in the adjacent office. I flung my head down on the desk and tried to regain my composure. After a minute or so, I felt a hand gently tapping the back of my head. Judge Hand, in his stocking feet, had silently left his desk, come into my office, and hoisted himself to a sitting position on my desk. I raised my face and looked up into his bemused countenance. "Now, now," he gently consoled, "you can't take it that way! It's all part of the job! Don't take it so hard—you did your job; I have to do mine." ...

HAND'S HOSTILITY to the McCarthyite enterprise helps to account for the extraordinary intensity of his emotions when he considered the second *Remington* appeal—emotions in tension with his creed of disinterested, unbiased judging. And in *Remington*, Hand was not only emotionally engaged but also uncommonly firm about the conclusions he reached. As he wrote in response to a letter praising his dissent: "I seldom feel much assurance in the results of my opinion; but I must confess that that case seemed to me so clear that I was a good deal distressed when no one appeared to agree with me. I could not have helped asking myself whether my powers had not begun to fail, if I was so out . . . with the expert professional opinion of my calling."

Hand's deep absorption in his dissent attests to his insistence on articulating adequate legal basis for his position. His opinion was a

craftsman's effort to identify the underlying principles of Supreme Court rulings, and his careful analysis suggests that he had surely not abandoned reason.

Hand's lack of success in persuading his colleagues in *Remington*, painful as that was, was not the end of his suffering about the case. The Supreme Court denied review in December 1954; as usual, the order did not indicate whether any justice had dissented. The decision was a grievous disappointment to Hand, and for the first time in his long relationship with Felix Frankfurter, Hand sent his old friend a *cri de coeur*:

"I felt, shall I confess it?, a sense of professional incapacity when your distinguished Group would not even hear the *Remington* Case. But it does serve as a warning, never to be forgotten, though never really learned, that what may seem to oneself [entirely clear], may seem to others plain tosh. After all, an old dog who has been in the ring for nearly forty-five years mustn't yelp at another bite."

■  
Abridged from the book, *Learned Hand: The Man and the Judge*, © 1994 by Usingen Corporation. Reprinted by permission of Alfred A. Knopf, Inc.



## FRIEDMAN

Continued from page 11

The culture of the twentieth century simply does not encourage people to be modest, self-effacing, to submerge their egos, to sacrifice their personal desires on the altar of some higher cause. The culture exalts the self. It exalts personal success. But not everybody can *have* success, however you define it. There are millions of failed, stunted, poverty-stricken selves. Many of these are people who cannot swallow failure.

Failure, like success, is culturally and psychologically defined. In the nineteenth century, a poor but "respectable" person was presumably no failure. An immigrant dishwasher, escaped from some war-torn country, may think of himself, or herself, lucky to be alive, working, and on the way to a better life. A middle-class American would regard this job and this life as absolute failure. A sense of failure can breed radical discontent; in some instances, crime.

In any event, crime may seem like a better or easier way to "get paid," to lay in a stock of gratification, than any of the obvious alternatives. Education, professional training, talent, and skill pay off; but not everybody can even dream of going these routes, and poverty weighs the swimmer down with stones. For truncated, dead-end lives, lives at the bottom of the barrel, there seems to be no real alternative to crime, except low-paid, low-status jobs (if you can get them). When the choice is between selling hamburgers at McDonald's for minimum wage and running errands for drug dealers or stealing, the illegal options may seem a lot more attractive. The temptations are great—in this culture.

AGAINST CRIMES of the self, the criminal justice system may be singularly impotent. The creaky machinery of justice assumes two things: a strong system of socialization, which does most of the work, leaving only some odds and ends to be taken care of by criminal process; and a stern, efficient system of punishment to teach a lesson to those few who have not gotten the point. A narcissistic, rootless social order, in which even a small fraction of the population does not

swallow and embody traditions of morality, is more than it can handle. Such a social order overwhelms the loose, disjointed system of criminal justice.

American society exalts the individual; but human beings are inherently social; they live in families, packs, clans. As the family weakens, as horizontal authority replaces vertical authority, some people, especially young males, detach from the larger society and reattach to peer groups—groups much more prone to behavior that the rest of us label as crime. Crime and antisocial behavior also come from the loners, the unattached, the drifters and grifters of society. These are particularly liable to be victims of the system as well.

It should come as no surprise, then, that the criminal justice system cannot compete with the culture, cannot go against the grain. In the battle of norms and goals, it is distinctly marginal; more than a spear-carrier, but very much less than a star. It cannot—in our society—even hope to crush crime. Crime is far too complicated; its roots are too deep.

The criminal justice system, to be sure, deserves a great deal of criticism. Hardly anyone has a good word to say for it. But for the public, the real question is: Does it have an impact on the actual crime rate? The answer is far from clear. Many experts insist that its impact, in reality, is slight. How can this be? To the layman, the opposite seems completely obvious: Stiffen the backbone of the system, make it more certain that criminals pay for their crimes, and pay hard; surely crime will dwindle as a consequence. Deterrence—that is the key. Moreover, a burglar in jail can hardly break into your house. This effect is called "incapacitation."

Is anything wrong with the theory of deterrence and incapacitation? Nothing, really—as far as the theory goes. But in the streets, station houses, courts, and jails, and in society at large, where theory meets practice, huge gaps appear. To put it bluntly, the criminal justice system cannot deliver a strong enough wallop of deterrence, *beyond the way it is now*, to justify a policy of toughening up. Even a *tremendous* increase in conviction rates, without something more, would hardly make a dent in

the problem of crime.

There is no doubt that deterrence works. But the question is, how does it work—and on whom, and to what effect? What the public wants is *more* deterrence, deterrence at the margins; and it is hard to make that happen. Most people today start out already deterred; they do not rob, rape, and kill because they think it is dead wrong to rob, rape, and kill. They may also be afraid of punishment, *any* punishment. The relationship between punishment and behavior is not a straight line but a curve; it flattens out as more and more people are, in fact, deterred. The few that are left become harder and harder to influence.

To be sure, there are other factors we have to take into account. Demographics make a difference. Most of the people we arrest are young males; when this age group bulges in the population, arrests and crimes go up, all else being equal; and when the age group shrinks, crime goes down. The drug epidemic—or rather the criminalization of drugs—also makes a big difference to many aspects of the system. The appalling number of guns loose in society must shoulder some of the blame—for the murder rate at least.

IN MY VIEW, however, the "crime problem" today flows largely from changes in the culture itself; it is part of us, our evil twin, our shadow; our own society produced it. Perhaps—just perhaps—the siege of crime may be the price we pay for a brash, self-loving, relatively free and open society. Whether we are better off or worse off than before is for the reader to decide. I myself think we are considerably better off; but at a rather stiff price. ■

*Adapted from the book Crime and Punishment in American History, © 1993 by Laurence M. Friedman. Reprinted by permission of Basic Books, A Division of HarperCollins Publishers, Inc.*



# Alumni/ae GATHERINGS



PHOTOS BY LISA POWERS

**S**OUTHERN CALIFORNIA alumni/ae, led by Judge Pamela Ann Rymer '64, organized an elegant reception May 25 in Pasadena. Co-hosted by 26 graduates and sponsored by the Stanford Law Society of Southern California, it represented a grassroots salute to the School and its Dean of seven years, Paul Brest. The venue was the former Vista del Arroyo Hotel and now "Richard H. Chambers ['32] Court of Appeals Building" (STANFORD LAW ALUM, Spring 1993).

Judge Rymer, a member of the Ninth Circuit bench, cited the "uncommon talent that Paul has for listening to everyone, for innovating, and for consensus building. He is extraordinarily interested in our views about what is going on in the law," she said, "and what the legal landscape is going to look like in the future." Former judge, now practitioner Shirley Mount Hufstедler '49 followed in a similar vein, as did James Gaither '64, who said: "We are very fortunate to have Paul leading the Law School at a very critical time in its history. No one has thought harder or worked harder to build a school that we can all be proud of in the future."

Dean Brest, speaking as guest of honor, looked toward the 21st century and Stanford Law School's continuing leadership in law and legal education. "Many of you have helped fulfill the Law School's mission or destiny through your own careers and through your support for the law school," he said. "Together we stand on the brink of challenges and opportunities that are as great as the School has ever faced. At the risk of immodesty, let me say that Stanford Law School is poised to change legal education for



**Southern California, Pasadena—Top: Dr. Peter Bing and Charles Munger were among the guests at the May 25 reception. Bottom: Dean Brest (center) with well-wishers David Worrell '70 and Julianne Worrell.**





**Phleger Lecture—Top, left:** Stuart Kadison '48 was applauded by Prof. John Merryman and others.

**Washington, D.C.—Above:** Ronald Phillips '92, Mathew Nosanchuk '90, Congressman Xavier Becerra '84, and Robert Edwards '90. **Below:** Mavis Lee '92, Arturo Garcia-Costas (then 2L), and Senator Jeff Bingaman '68.

the next century. I look forward to working with all of you in this important venture."

The Southern California Law Society and its counterpart in New York City both joined forces with the Stanford Alumni Association to present programs in their respective

areas on the crime issue. The New York event was held May 20 at the Cornell Club in Manhattan. The Southern California counterpart took place on June 15 at the City Club on Bunker Hill, where Carlton Seaver '75 handled the introductions. Part of the University alumni

association's regional Downtown Breakfast Business Forum series, the two events featured Professor Robert Weisberg on the topic, "Three Strikes and You're In."

The annual meeting of the School's Board of Visitors also took place during the spring (see pages 33-35). While on campus for the April event, board members enjoyed an opportunity to hear fellow alumnus Stuart Kadison '48 of Sidley & Austin of Los Angeles deliver a lecture in his capacity as a Herman Phleger Visiting Professor.

Come summer, law school graduates greeted current students and members of the newly admitted Class of '97 at receptions in five locations around the country. Kicking off the season was the Stanford Law Society of Washington, D.C.'s reception on June 28 at the U.S. Capitol. Special guests were U.S. Representatives Xavier Becerra '84 (D-CA/Los Angeles) and Don





LINDA BARTLETT

Washington, D.C. (cont.)—Terry Adlhock '70, then-Congressman Don Edwards ('39), and William Allen '56.

Class of '74—Below, left: Carol Swenson '74, Andrew Faber '74, and Marianne Austin (spouse of Alan '74) enjoyed a pre-Reunion reunion.

Below: Professor Barbara Babcock and Judge LaDoris Cordell '74.



STANFORD VISUAL ART SERVICES



STANFORD VISUAL ART SERVICES

Edwards (D-CA/San Jose). Edwards ('39), who has since retired, was honored for his more than thirty years' service in Congress [STANFORD LAW ALUM, Spring 1994].

The Stanford Law Society of Southern California held its summer event at the Kachina Grill in down-

town Los Angeles on July 13. Moving northward, the Stanford Law Society of San Jose hosted a reception at the beautiful Meyer-Buck estate adjacent to the Stanford campus on July 19, and the Stanford Law Society of San Francisco gathered alums and stu-

dents at the World Trade Club in the Ferry Building on July 21. Finally, on August 3, the Stanford Law Society of New York City welcomed their guests to a reception at the Manhattan apartment of Marsha Simms '77.

Back at Crown Quad, aspiring attorneys on campus for bar review courses were invited by the School to a buffet lunch in Crocker Garden with the faculty and staff. The annual affair, held this year on Bastille Day, provides a welcome study break for Stanford and non-Stanford crammers alike.

This fall, some 150 alumni/æ heard experts from the entertainment industry, broadcast news, print media, and advocacy groups explore one of today's hottest issues, "The Power of the Media," in a panel discussion cosponsored by the Stanford Law Society of Southern California and the Stanford Alumni Association. Held on September 13 in the Northwest Campus Auditorium at





UCLA, the panel discussion was moderated by Professor Kim Taylor-Thompson and included Stanford law graduates Nancy Hicks Maynard '87, a writer/consultant and former publisher of the *Oakland Tribune*, and Jim Steyer '83, founder and president of Children Now, a children's policy and advocacy organization.

"Has it really been that long?" was the happy cry of Class of '74 alums gathered at the home of Paul and Iris Brest for a pre-reunion cocktail party on September 27. Class members Alan Austin and Mike Eagan helped organize this warm-up event; the class's official 20th-year reunion took place six weeks later during the School's annual Reunion Weekend (of which more in the forthcoming *STANFORD LAW ALUM*).

The recent visit of Václav Havel, president of the Czech Republic and recipient of the 1994 *Jackson H. Ralston Prize in International*



**Southern California, Los Angeles—Top: Professor Kim Taylor-Thompson served as moderator and interlocutor for a widely attended panel on the power of the media.**

**Below: Panelists Jim Steyer '83 and Nancy Hicks Maynard '87.**

Law (see pages 12–16), included a reception for alumni/æ and friends of the School. This Crocker Garden gathering followed Havel's Ralston Lecture in Frost Amphitheater—a

memorable event graced with songs by Joan Baez, a tribute by Dean Brest, and a deeply philosophical and widely reported speech by the European statesman. ■



# LETTERS

## CURRICULUM DEBATE

Dean Brest's provocative column ["When Should a Lawyer Learn the Way to the Courthouse?," *STANFORD LAWYER*, Fall 1993] expresses beautifully my long-held belief concerning the place and time for lawyers graduating from first-rate law schools to acquire practical lawyering skills. The analogy to medicine is quite apt, though not entirely capable of duplication.

The ABA should be chastised if the McCrate Report and the new rule would make trade schools out of first-rate law schools, instead of professional graduate study centers of fine universities. More power to you!

Martin Perlberger '54  
Los Angeles



## OSBORNE (CONT.)

The legend of George Osborne lives on. At the risk of overkill, I want to add to it.

Before ever hearing a roar or watching anyone devastated by a hypothet, I recall this remark made on the first day of the first-year class: "Some of you have come to law school to learn how to make

money. Forget it. If you want to make money, learn how to sell something."

Outside of the classroom, George was a pussycat. I was privileged to be the scrivener of a presentation made on his last teaching day at Stanford, which was an embellishment of his famous questions about the person falling into a pit with a tiger. Was he or she in possession of the tiger? The Class of 1958 presented George with a tiger tail on a black silk pillow, in a spectacle that became so elaborate it required two rehearsals. We reduced him to tears.

George taught us all an important lesson. This profession is not for anyone who cannot take verbal flak. Any lawyer has to be used to getting roared at and asked questions you cannot answer in a loud imperious voice by judges, other lawyers, or clients, particularly if you have anything to do with the adversarial side of this profession.

Peter T. Hoss '58  
Salinas, California

## A GOOD GROUNDING

Although I attended the law school for only two years and never actually practiced law, I have found that the education I experienced at Stanford Law School gave me a good grounding in the basic subjects, which stood me very well in the FBI and for 32 years as a member of the House Judiciary Committee [*STANFORD LAW ALUM*, Spring 1994]. I especially found useful what I learned in the year-long class on Constitutional Law. I have happy memories of our law school. My years there were exciting and fulfilling.

Hon. Don Edwards ('39)  
San Jose



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# Coming EVENTS

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1995

January 4-8

Association of American Law Schools

Annual meeting

January 5, Stanford reception

*In New Orleans*

March 31-April 2

Class of 1970 Reunion

*At Stanford*

May 4-5

Board of Visitors

Annual meeting

*At Stanford*

October 13-15

Reunion Weekend

With gatherings for the Classes of 1943, 1944, 1945, 1946,  
1950, 1955, 1960, 1965, 1980, 1985, and 1990

*At Stanford*

For information on these and other events, call  
the Alumni/æ Relations Office, 415/723-2730.

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