Stanford LAWYER

FALL 1985 VOL.20, NO.1

Lawyers / Toxic Wastes / Soblen Trials / Board of Visitors / Law Fund Annual Report

We are pleased to announce that the Council for Advancement and Support of Education (CASE) has awarded a silver medal for overall excellence to *Stanford Lawyer* and its editor, Constance Hellyer, for the period including the Fall 1983, Spring 1984, and Fall 1984 issues.

Cover photo by Chuck Painter, Stanford News and Publications

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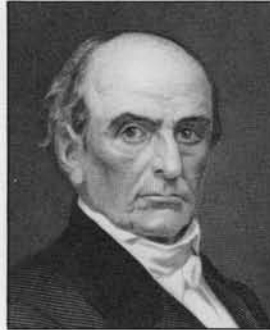
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Lawyers as the 'American Aristocracy'

A 19TH CENTURY IDEAL THAT MAY STILL BE RELEVANT

by Robert W. Gordon
Professor of Law

In America there are neither nobles nor men of letters, and the people distrust the wealthy. Therefore the lawyers form the political upper class and the most intellectual section of society . . . It is at the bar or the bench that the America aristocracy is found.

—Alexis de Tocqueville, 1835

THIS famous passage[1]—torn ruthlessly from context—has passed into professional ritual. When you hear it (most likely at law school commencements or bar association meetings), you know that what follows will be a set piece of high-minded rhetoric, usually in one of three modes: the *self-congratulatory*, in which the Bar is complimented on having lived up to its historic mission of disinterested public service; the *self-critical and inspirational*, in which the speaker, lamenting that lawyers have fallen away from their historic mission into irresponsible privatism, rallies us again to the old standard; or—last and probably most common in our time—a *skeptical and resigned* mode.

In this vein, the speaker wonders whether the lost "tradition" isn't really a myth or hype. Was there ever a time when one could realistically speak of lawyers as an "aristocracy," implying that they enjoyed a privileged status and exceptional influence in society deriving from their duty, regularly and willingly performed, to commit their hours to public business other than that of their clients? If so, the skeptic continues, that time has obviously long since passed—and inevitably so, as the conditions and tasks of practice have changed. Some may regret its passing; others may not, asserting that the aristocratic vision was disgracefully elitist anyway. Lawyers, the argument goes, have no greater claim to influence in public life, or obligation to engage in public-regarding activity, than any other citizens; it's enough that lawyers perform competently the practical jobs they are hired to do.

But is the old idea that lawyers have some higher social mission really so bankrupt as all that? I think not.

Let me try to fill out the content of the idea, as it developed within the

context of the early nineteenth century lawyers from whom Tocqueville derived his view: that of lawyers as entrusted with a distinctive political role in a commercial republic (or "capitalist democracy," to use the modern equivalent)—to be bearers of an autonomous public-regarding civic culture, deputized to spread abroad the values of that culture and to make them real and effective, not just in the occupation of public office, but in every corner of social life, including most definitely the practice of advising and representing clients.

I hope to persuade you that this vision of politically engaged lawyering—though it has often, in both conception and practice, been hypocritical, pretentious to the point of absurdity, and occasionally truly pernicious—is by no means either completely ridiculous or inapplicable to our own situation. The idea that business lawyers have a distinct political role in society once meant something real and important, if not always entirely admirable; it can mean something real and important now. I want to try to rescue the idea both from excessive reverence and from the charge of irrelevance.

ALEXIS DE TOCQUEVILLE

THE BETTMANN ARCHIVE

THE REPUBLICAN IDEAL OF THE LAWYER-STATESMAN

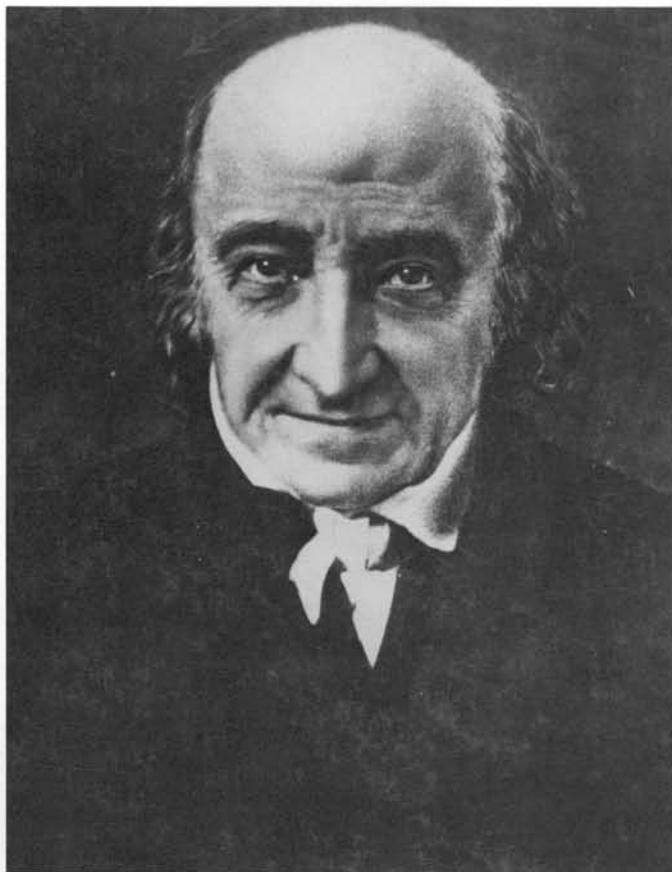
IT was not Tocqueville's intention to flatter the American legal profession, but rather to describe its role in the political sociology of a democratic society. The famous passage on lawyers comes in the middle of his section on counter-tendencies to the tyranny of the majority: in context "aristocracy" refers not to a specially talented or elevated class, but to a class capable of playing a particular political role—the role of balance-wheel (ideally played in classical political theory by a nobility) ensuring that neither kings nor mobs, nor most dangerously the two allied in "Caesarist" tyrannies, encroaches on the privileges of any of the other orders.

What enables American lawyers to carry off this role, in Tocqueville's eyes, is precisely the fact that they are not distinguished by birth or official social rank, but recruited from the mass of ordinary folk. Their willingness to play the nobility's restraining role arises from no elevated sense of service; but rather an inbred professional conservatism—a reflexive attachment to precedent and order. One of Tocqueville's first and most influential informants, the aging Albert Gallatin, told him that, "Instead of being reckless disturbers as they are in Europe, [American lawyers] are rather conservative. But for the lawyers we should already have revised our civil laws, but they defend the abuses and obscurities from which they profit."[2]

Tocqueville, as we know, distilled most of his opinions about lawyers from impressions of a particular, and elite,

segment of the bar—metropolitan, college-trained, mostly Federalist-Whig in politics. As it happened, he caught them in a sour late-autumn mood, when they were increasingly inclined to emphasize their passive role as a restraint on the excesses of Jacksonian democracy. Lawyers of the more self-confident decades from about 1790 to 1830 had developed a much more activist and constructive conception of their social mission: that they were uniquely situated and qualified to diffuse throughout society the culture of civic virtue upon which the success of capitalist democracy would essentially depend.

Everyone is familiar with one of the fragments of this professional ideology: the Federalist view of judges as interpreters of the Constitution as fundamental law; as guardians of the long-term "interests" of the people against their momentary "inclinations" (*Federalist* 78), those spasms of popular false consciousness giving rise to misguided redistributive legislation. Yet constitutional review by high court judges was only the tip of the iceberg, the institutional apex of a vast interlinked network of lawyers deployed throughout society: the collegium of appellate lawyers who advise the judges, the scholars and treatise writers; the lawyers elected to the legislatures and the legal policy intellectuals who suggest legislative initiatives; the lawyers in their professional practice roles, advising clients, addressing juries; and above all as shapers of both elite and popular opinion, as corporate directors, local notables, speakers before mercantile societies, Fourth of July orators, political stump speakers, using any and all occasions for public argument—appellate argument, jury speeches, judicial charges to grand juries, legislative debate—as a means of educating general audiences in the principles and duties of republican citizenship.



NATIONAL ARCHIVES

ALBERT GALLATIN

The most energetic propagandist of this vision, Joseph Story, managed to convert all his multiple institutional roles into platforms for instruction and influence. His opinions as Supreme Court justice were of course designed to build up a corpus juris on issues of federal jurisdiction and commercial law; he turned his circuit sessions into practice clinics on commercial principles for the local bar and short business law courses for the mercantile community, and his grand jury charges into "a plainspoken exposition of the laws to be upheld with a bracing lecture on sound policy and public morality";[3] his commentaries on legal subjects presented complex common law, equity, and civilian principles in the form of chatty generalities easily accessible to the practising bar; he wrote a simplified abridged version of his own constitutional *Commentaries* for use in school systems and got Daniel Webster to reiterate their essentials in Senate speeches that every Northern schoolchild had to memorize; he drafted legislation for Webster to introduce in Congress; and he spent most of his last years trying (with considerable success) to develop Harvard Law School into a national institution that would recruit from, and disperse its graduates to, the whole country.

The ideal animating all this effort was a positive and hopeful version of Tocqueville's view: that the bench and bar could be organized to form a separate estate in society, distinct from ordinary state officers, on the one hand, and from ordinary businessmen pursuing commercial interests, on the other. One way to look at the profession is as an intermediate association, analogous to the business corporation in the theory of the time: a collective of private individuals delegated a share of state power for the purpose of harnessing their profit motive to the furthering of the public good.

Yet in the ideology I'm describing, the legal profession was considered not just another intermediate association, but the *universal* association—the class whose job it is to coordinate the self-seeking activities of all the other classes in civil society, to harmonize the pursuit of private interest with the universal interest of the whole.

Looked at most restrictively, the "universal" role of the Federalist lawyers reduces to that of supplying the cadres of Hamiltonian political economy. Federalist-Whig legal argument and commentary contain many anthems to the blessings of expanding commerce and its historical role in producing liberty, benign personalities, and international peace. The lawyers' restraining role—Tocqueville's counter-majoritarian role—is simply that of standing guard, in the legislature, courts, and fora of public opinion, against misguided popular attempts to interfere with the security of property.

But most lawyers who addressed the subject seem to have been more ambivalent about the social and political effects of commercial activity than was Hamilton. There was a real question whether a democratic republic, supposedly ruled by its citizens, could survive what Adam Smith himself admitted were the belittling effects of commerce on the mind—its tendency to turn attention away from public affairs towards commercial calculation, its annihilation of the traditional social bonds (of customary moralities, traditional communities, hierarchies, deferences and dependencies) and their replacement with relations subsisting only upon the prospect of mutual commercial advantage. Trade, as Tocqueville among many others pointed out, emptied out social space and isolated individuals in their private projects. Self-interest alone was an insufficiently integrative force; something else was needed to supply "virtue" to the scene, that is, to orient all this private maximizing activity to a set of shared values and common purposes, to align private advantage to public good, to teach enlightened restraints upon destructive excesses of commercial acquisition.

That virtue-supplying substance, the lawyers argued, was Law itself; or, to be more precise, was the manifold diverse social practices of lawyers—Law not as a body of rules, but as the powerful autonomous culture produced by lawyers and diffused by them to create what you might call a *social field*, a "connecting chain," in John Quincy Adams's words, among "all the various employments of mankind," linking the specific interests of the "different classes of the industrious" into a common general interest. Tocqueville credited lawyers with the awesome responsibility of creating the common speech of public life:

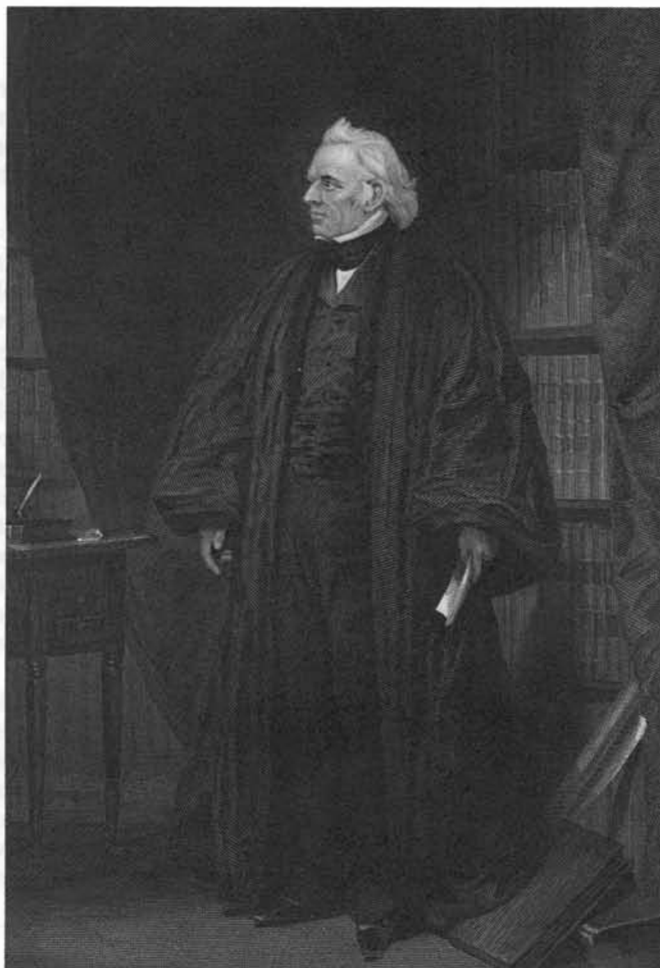
> *As most public men are or have been lawyers, they apply their legal habits and turn of mind to the conduct of affairs. Juries make all classes familiar with this. So legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.*[4]

The elite lawyers, in short, concluded that there was a means for mediating the conflict between virtue and commerce, that there was a way of reconciling the particular with the universal, class and regional factionalism with the common good, utilitarian calculation with social morality; and that that means was themselves.

But what could conceivably have led them to think so? What of the usual objections—familiar for some centuries—that law promotes an adversary rather than cooperative spirit, narrows rather than broadens the mind, works through rules at times repulsive to the moral sense? Lawyers somehow seem unlikely candidates for the virtuous classes.

Yet the lawyers' case for their special stewardship, though quite complex, was not completely implausible.

JOSEPH STORY



THE BETTMANN ARCHIVE

THE CASE FOR LEGAL STEWARDSHIP

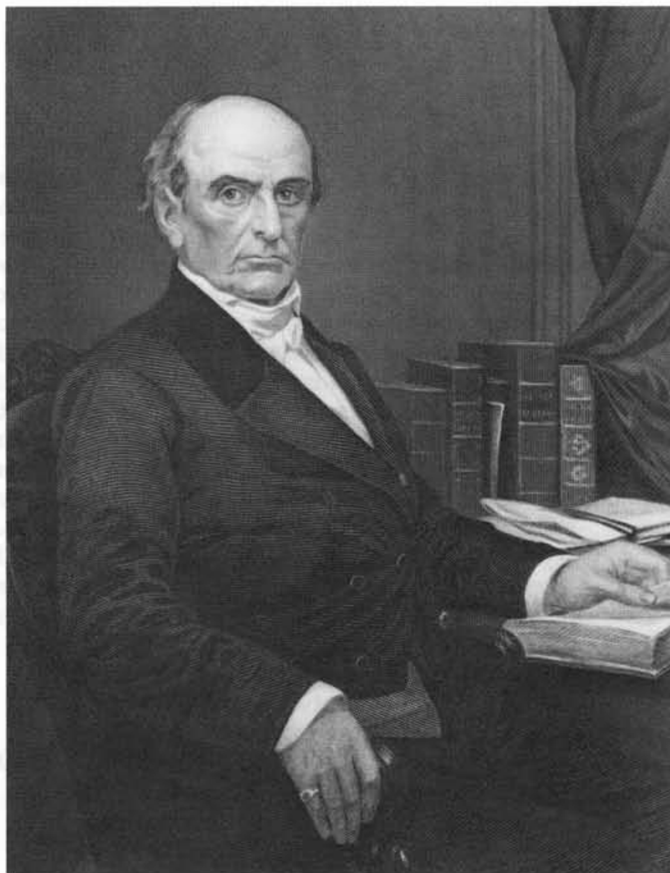
THE first part of the case was simply that social and historical circumstances had landed American lawyers in a position of leadership that it would be irresponsible to waste. Lawyers had, of course, spoken the colonies' grievances in the Revolution, subsequently proved indispensable as constitution-makers, and almost monopolized the pathways to political office and influence. As James Kent put it in 1785, "However crowded the Bar may be as to number, or however limited in their fees, still the Study of the Law is so interwoven with Politics that it will always enable Gentlemen of active Geniusses to attain a decisive superiority in Government."

The lawyer of the early Republic had, moreover, achieved cultural as well as political dominance—had (in Robert Ferguson's words) "seized upon his advantages as Revolutionary spokesman to drive the American clergy and mili-

tary away from civic podiums and the positions of communal control."[5] Law was a branch of public letters, that is, of general intellectual culture; the Constitution was considered the supreme *literary* achievement of the time; lawyers edited most of the literary reviews. In an age whose ideal of the man of letters was the classical-Ciceronian active citizen, law could still be the literary man's vocation.

Law, with its many opportunities for public careers in politics and public letters, was naturally attractive to talent of a certain bent, namely, talent with an ambition for public fame and glory rather than for business success. In fact almost all lawyers of that time sought elective office at one time or another: it was the easiest means of getting public exposure, especially of oratorical talent, and of meeting constituents who could turn out to be clients. Officeholding was rarely very time-consuming, so lawyers continued to practice while in office and were continually mixed up in politics while in private practice. Unlike most commercial men, lawyers had flexible schedules and a structure of office practice that opened up more spare time as one's career advanced. Many city law offices had three members: the law student, or clerk, who functioned as secretary and copy machine; the working partner, who carried most of the load of the office's regular business; and the senior partner, who was reserved for the more important cases but could devote the rest of his time to public business, political pamphleteering, intrigue, oratory, and literary pursuits. In time the working partner would move up and his place be taken by the clerk.

The second part of the case was that the ordinary practice of law was filled with virtue-developing experiences. It was a training-ground for the fundamental paideic skill—eloquence in public oratory—by which the speaker creates community, weaving himself and the audience together in a fabric of evoked shared associations. Forensic argument before juries was a microcosm of, as well as a rehearsal for, teaching citizens their public duties and the principles of government: in both, the skill was to communicate the materials requiring political judgment—complex fact-situations, theoretical abstractions, or bodies of esoteric knowledge—to ordinary understanding, through homely examples, anecdotes, fables, and dramatic metaphors.



DANIEL WEBSTER

GREEN LIBRARY, STANFORD

Law practice also developed the fiduciary muscles. Clients were always entrusting lawyers with their funds and asking them to exercise discretionary judgment in personal and business crises.

Most important: practice habituated the lawyer to people of all different classes, trades, and dispositions. As a lawyer, one lived and worked *among* all branches of commerce and stations of society, but was not *of* any of them; one was neither participant nor spectator; one belonged to the practical intelligentsia, possessing an insider's knowledge, but also the ability to assess it from an independent point of vantage.

THE SOCIAL CENTRALITY OF LAW

NONE of these claims, however, would have been worth anything without the third and crucial claim: that the substance of Law itself—meaning chiefly the common law intelligently supplemented with equity—was capable of forming the integrative paste (the Durkheimian glue, so to speak) for binding the separate and particular activities of a business society into a political unity.

There isn't space to explore all the elements of this claim, with their tangled threads of wisdom and sophistry. Here, however, are the major themes:

- The common law is the repository of the Ancient Constitution, the basic principles of English liberty for which the Revolution was fought; as well as a vast reservoir of experience in handling the conflicts that arise in commercial societies. Of course the common law is also full of anachronisms, useless technical residues of feudalism, and doctrines appropriate to the corrupt, hierarchical social order of England. There's lots of bathwater, but also a lot of babies. Only highly skilled and knowledgeable lawyers can separate them out.

- Skilled lawyers have special resources for dealing with linguistic uncertainty and historical contingency. How can rights be fixed, property secure, and justice universal rather than local, when the language of laws or legal instruments is necessarily ambig-

uous and indeterminate; and where unanticipated new situations—especially in a dynamic capitalism—are always arising? Answer: interpretation is a complex but nonetheless accurate science; there is a set of conventional techniques that in the hands of a skilled practitioner will yield the one correct meaning of a disputed text. So too with new situations: the scientific lawyer is master of the method of extracting *principles* by induction from cases (with the help of learned commentary), and playing the principles back over the new facts—thus guiding the stable and enduring core of principle through all the novel economic and social circumstances to which it must adapt.

• The ideal (if rarely realized) law curriculum of the period was a whole liberal education in itself; thus one could argue that exposure to a course of reading in preparation for a legal career opened up privileged access to certain universals: (1) the universal laws of history, that is, the laws governing the rise and decline of nations, especially of free republics; (2) the cosmopolitan practices of commercial nations, as expressed in their commercial and maritime codes and commentaries (useful guidelines for the development of indigenous legal principles); and (3) the great civilian writers on the law of nature and of nations—Grotius, Vattel, Pufendorf, Burlamaqui—frequently cited as repositories of "universal moral" as well as of cosmopolitan-conventional principles.

The lawyer exposed to this learning becomes a specialist not simply in the positive regulations that make up the law, but also in its brooding spirit of progressive and civilizing tendencies; his moral knowledge is not personal, but of an authoritative system.

The crucial point here was that, in order to realize universal principles (legal, historical, moral) in ordinary social practice, a trained sensibility must be brought to bear at every moment of interpretation, every application to a concrete situation. It wasn't enough to have virtuous (i.e., scientific, liberal-minded, public-regarding) judges; one had to have virtuous lawyers as well. As Rufus Choate put it, "While lawyers, and because we are lawyers, we are statesmen."[6]

But of course there are times when, for reasons of policy or practical necessity ("convenience"), one needs rules that are amoral or at any rate arbitrary with respect to moral conduct—rules that in some instances will punish the worthy and reward the cunning. The policy or necessity might be administrative simplicity, or the protection of autonomy by means of predictable fixed rules, or some more specific policy aim, such as spreading losses by means of bankruptcy statutes.

Yet the occasional immorality of law, like its occasional pockets of feudal absurdities and its chronic ambiguity, furnishes yet another set of occasions for the interposition of professional virtue. The properly trained lawyer best knows when considerations of utility and policy make it counterproductive to legislate moral and needful to legislate amoral or arbitrary policies.

In specific cases, lawyers could distinguish between good guys and rogues and turn policy rules back into moral and equitable ones. The collection lawyer, for instance, should proceed strictly against frauds, but go easy on good faith defaulters in temporary difficulties. The lawyer *for* debtors should not take advantage of every procedural technicality to defeat payment. Lawyers who took seriously their status as republican mediators were encouraged to run their offices as little chancery courts.

Even in the course of adversary proceedings, the republican lawyer was advised to remember that his primary role was the collegial one of helping the judge to reach a correct decision. Opposing counsel's contribution gave him some latitude, but not every latitude: it was all too easy to nullify by "artful interpretation" the effect of a legal principle or instrument. In this spirit, Harvard's Simon Greenleaf declared:

(Continued on page 79)

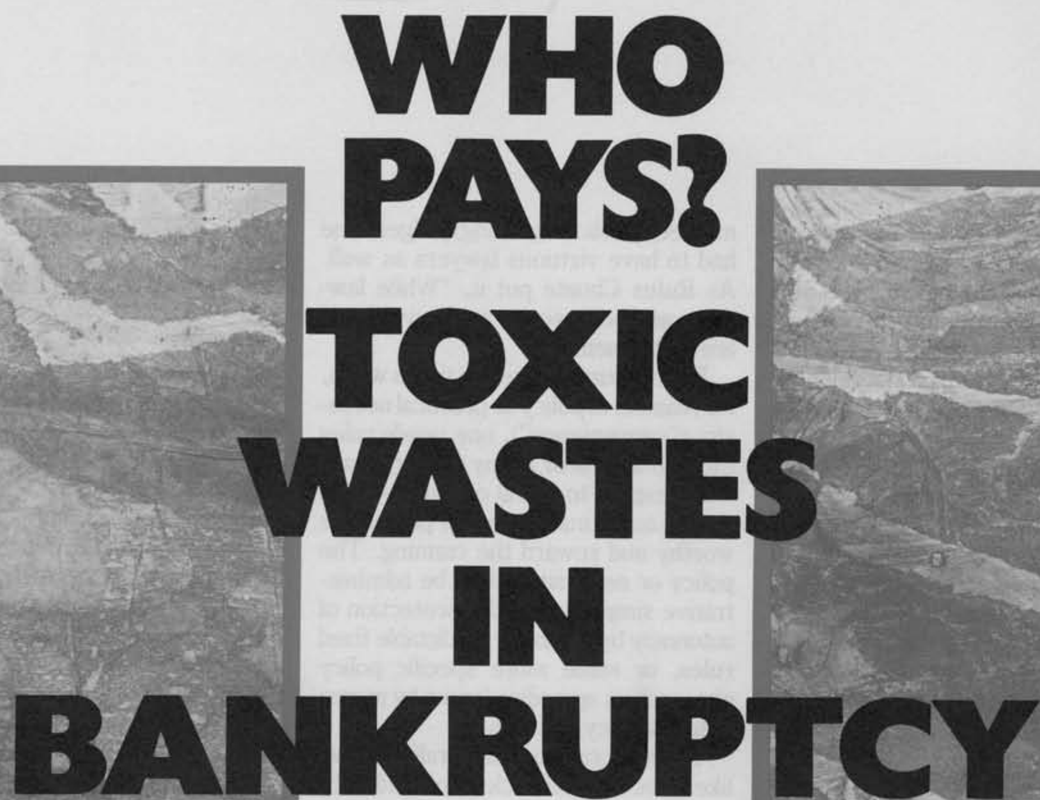
***Robert W. Gordon** was invited to join the Stanford Law faculty in 1983, after a year as visiting professor. Educated at Harvard (AB'67 and JD'71), he was for five years a member of the University of Wisconsin law faculty.*

Professor Gordon is an expert in the history of law, a director of the American Society for Legal History, a trustee of the Law and Society Association, and a member of the editorial board of the Law and History Review.

Gordon is currently at work on a history of the corporate lawyers of New York City between 1880 and 1920, which will describe their law practice, their political activities, and their work in building professional institutions such as bar associations, law firms, and law schools.

The adjacent article is drawn from the two Oliver Wendell Holmes lectures that Gordon presented February 19 and 20, 1985, at Harvard Law School. The ideas in these lectures are, he cautions, "tentative" and may be considerably revised before publication in book form.

WHO PAYS? TOXIC WASTES IN BANKRUPTCY



The unresolved issue of cleanup vs. other claims when there are not enough assets to go around

THOMAS H. JACKSON
PROFESSOR OF LAW

There is a deep suspicion abroad in the land: that somehow, somewhere, someone is using bankruptcy law to do something impermissible. "Bankruptcy-Pollution Ploy Feared in Silicon Valley," read a recent *San Francisco Chronicle* headline. The story began: "Silicon Valley high-tech firms facing financial problems may use bankruptcy as an excuse to abandon sites contaminated with toxic chemicals, officials warned yesterday" (March 20, 1985, p.6).

This may be what the average person—even the average lawyer—suspects is going on. But I think it is plainly wrong. I don't see this as a bankruptcy issue at all. Instead, I see it simply as a question of who pays for the cleanup when the responsible party (a person or company) is insolvent: the other creditors, or society? I would like to tell you why I think this is the only relevant question, and why it has little to do with bankruptcy law per se. I would also like to explain why *thinking* that bankruptcy policy is somehow involved may lead people to decide the real question without ever facing it—a generally bad way of deciding problems.

THE PROBLEM

The basic factual pattern is this: Firm handles toxic wastes. It has a site on which it has stored such wastes, and these have leaked or otherwise represent a health hazard. The State obtains a judicial order directing Firm to clean up the wastes. Before Firm does so, it files for bankruptcy.

The problem has so far come up in three different guises in bankruptcy proceedings. One is exemplified by a case known in the lower courts as *Quanta Resources*,[1] which the Supreme Court has recently taken on certiorari. Quanta was liquidating under Chapter 7 of the federal Bankruptcy Code. The trustee took a look at the site and how much the cleanup would cost. It looked something like this (with more zeros): value of site (cleaned up), $50,000; cost of cleanup, $200,000. The trustee said, in essence: "This property has a negative value; it is a burden to the estate." And he sought to abandon it pursuant to Section 554 of the Code, which provides that, "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate...."

The City of New York fought this abandonment. The Third Circuit held that abandonment was wrong, and viewed the issue as one of "balancing" environmental policies with bankruptcy policies, as reflected in the provision permitting abandonment. Landing on the environmental side, the court reasoned:

The extent... of the expenditures necessary to dispose of the waste properly is not in itself sufficient to outweigh the public interest at stake here. ... If trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default. It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation—the substitution of governmental action for citizen compliance—without an indication that Congress so intended. The supremacy clause does not require the suspension of the operation of New York's hazardous waste disposal laws.[2]

Much the same pattern exists in *Penn Terra*,[3] another Third Circuit case. Here the issue was whether bankruptcy law's automatic stay applied to an action by the state requiring Penn Terra to clean up a toxic waste spill. (The automatic stay, at its core, prohibits creditors from taking actions that dismember the estate.) The relevant Bankruptcy Code sections were 362(b)(4) and (b)(5). The first excepts from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," but (b)(5) goes on to say that while the exception applies to the enforcement of judgments obtained in such actions, it does not apply to the enforcement of *money* judgments. The Third Circuit easily concluded that State's action constituted an exercise of the police power, and viewed the dispositive issue as one of whether the injunction ordering Penn Terra to perform cleanup work was "an attempt to enforce a money judgment." The court held it wasn't, even though the expenditure of money was required. Instead, "the inquiry is more properly focused on the nature of the injuries which the challenged remedy is intended to redress—including whether plaintiff seeks compensation for past damages or prevention of future harm." Thus, because this spill could cause future harms and the action was taken to prevent them, the automatic stay didn't apply.

The third of these cases involved a Mr. Kovacs. Same problem: he (and his companies) had spilled toxic wastes on their land (in Ohio) and hadn't cleaned them up. When Kovacs filed for bankruptcy, the state, and ultimately the Solicitor General, argued that the cleanup order Ohio had obtained did not constitute a "claim" because it was "equitable." The reason for their position was that if the order were a claim, it presumptively could be discharged in bankruptcy, leaving Mr. Kovacs free of any obligation to clean up the site. All the courts, however, held that the cleanup order *was* a claim. The Supreme Court recently concurred, although limiting its opinion to the existing facts: that Mr. Kovacs had been displaced from the business and the only way he could comply was to spend money.[4]

The Court was, I believe, correct in discounting dire predictions (by the Solicitor General) that such a reading

would "wholly excuse" obligations to clean up the environment.[5] The Solicitor General's alarm was partly due, in my view, to the common misconception that bankruptcy law is somehow at the center of the problem. Not so. All the bankruptcy sections we are dealing with make sense construed one way, that is, to distinguish between two things: pre-bankruptcy acts that give rise to rights against a debtor; and post-bankruptcy acts *of* the debtor. The first, I would argue, create the claimants for whom the bankruptcy proceeding is being run. The second reflect the rules of the world that anyone—including a debtor in bankruptcy—has to play by. So viewed, the toxic wastes we are talking about are pre-petition actions, even though they have post-petition consequences. And thus, they should be considered claims, and thus the automatic stay should apply. (Abandonment, I will show, is a non-issue.)

The real issue, which no one has yet faced, is the *priority* issue of cleanup claims vis-a-vis other claims. But that, I maintain, is not a bankruptcy issue. Let me explain my view of what bankruptcy should—and should not—do.

THE ROLE OF BANKRUPTCY

Bankruptcy law, I would suggest, properly does only two things. The first is to give flesh-and-blood humans a "discharge"—a financial "fresh start." That goal, while important, is also limited. It has absolutely no relevance when the debtor is anything other than a human being. To talk about the need of a corporation for a fresh start is to conflate a number of issues. A corporation is a fictitious being. We might care that its assets be used effectively. We might care about its shareholders or workers. But we *don't* care about a corporate charter. So, when a bankruptcy lawyer says that Chapter 11 gives a corporate "debtor" a fresh start, you have to be a bit cautious. The "debtor" is always going to be shorthand for something else—shareholders, managers, workers, or whatever.

> *"Underlying all . . . issues is the common issue of priority."*

The other role of bankruptcy law involves what we usually call "creditors" but that I suggest should be thought of as "owners." These may be secured creditors, unsecured creditors, or shareholders. Secured creditors have first dibs to the debtor's assets; followed by unsecured creditors. Shareholders come last, getting whatever is left over. These are the players, and the question is, What can bankruptcy law do for them?

My answer is: A lot. The basic problem with the system of individual creditor remedies is that it may be bad for the owners *as a group* when there are not enough assets to go around.[6] This is a variant of the common pool problem (well known to lawyers in the oil and gas field). It occurs when many creditors are chasing too few assets. Creditors want to get paid in full, and will race to do so. But in the scramble for assets, creditors may pull them apart and make them less valuable than if held together. I believe that the function of bankruptcy law is to make sure the individual actions of creditors are not destructive of their common weal. Bankruptcy, by imposing a *collective* and *compulsory* proceeding, provides a way to make diverse creditors act as one.

Let me show you how I think this model of bankruptcy law applies to the question of toxic wastes in bankruptcy. It starts from the simple proposition that, just as blood can't be gotten from a turnip, some with rights against an insolvent corporation will not be paid. The fact that, when the debtor is a limited liability corporation, *some one* isn't going to be paid in full, is attributable to state corporation law, not bankruptcy law.

My point is that bankruptcy law takes its cue from relevant attributes *outside* of bankruptcy, and those relevant attributes (identified by bankruptcy theory) have to do with the rights of various people against the assets of the debtor. Bankruptcy marshals assets and distributes them to people with rights against those assets, in a prescribed order. Who has these rights is something decided outside of bankruptcy law, as is the relative priority of those rights. And it is determined as of a specific moment in time—the moment bankruptcy starts. This moment defines and limits those for whom the proceeding is being run, those for whose benefit the assets are held together.

The post-petition implications for debtors that pollute are clear. There are certain costs to running a business, in or out of bankruptcy. One might be required to have environmental smokestacks, or to file reports on environmental compliance. There is no reason why a debtor in bankruptcy should be relieved of such costs. The argument that Firm could make more money by producing silicon chips while polluting the environment is—and should be—irrelevant in a world in which one is *forbidden* to do that. When you operate a business, in bankruptcy or not, you follow the normal business rules.

But is an order to clean up a toxic mess made *before* the petition in that category? I don't think so. The person holding that right is only one of perhaps many claimants for whom the bankruptcy process is trying to maximize assets. This is where I usually part ways with environmental lawyers. They argue that it is a "continuing" violation, because the failure to clean up the site means that the pollution continues. I think the question of continuing consequences is irrelevant to the normative inquiry.

I find it helpful to think of the filing of

bankruptcy as death, in so far as it helps me distinguish pre- from post-petition behavior.[7] A cleanup order for a toxic waste that is already there is pre-petition. It is irrelevant whether the debtor has any future operations. On the other hand, an order that says that the debtor must not pollute while producing silicon only has effect when and if the debtor produces silicon. *That's* future, and it is what, I think, the "governmental regulation" exception in Section 362(b)(4) logically applies.

This brings us to the issue of *priority* of claims. Remember: when there aren't enough assets, bankruptcy law can't grow them—it can only preserve what is there and rearrange who gets what portion. More for one means less for another. We must keep this in mind when considering whether something is a claim, or whether abandonment is proper, or whether the automatic stay applies. Underlying all those issues is the common issue of *priority*—and *that's* not a bankruptcy issue.

WHO COMES FIRST?

Consider the simple case of a corporation. Assume that Firm owns land in California on which it has dumped toxic wastes in violation of state law. Including the land, which would be worth $50,000 without the toxic wastes, Firm has $500,000 in assets. At the request of the state, the court has ordered Firm to clean up the wastes. The cleanup will cost $200,000. Firm also owes $800,000—far more than its assets—to a number of general creditors. Clearly, its obligations cannot all be met. Once the assets of Firm are exhausted and the corporation is dissolved, all those with rights against it would have nowhere else to turn to enforce their rights. This result is dictated not by bankruptcy law but by limited liability. The question is, Who gets what portion of the $500,000 in assets?

Imagine that *no* bankruptcy petition is filed. In a state law dissolution, the assets might be split pro rata between the state and the general creditors, say $100,000 and $400,000 respectively. Or California might have a statutory lien on all Firm's property, in which case it would get paid in full, leaving only $300,000 to be split among the other claimants. Or the state might have a lien only on the dump site. In that case, it would get $50,000 from the dump site, leaving a $150,000 claim, which it would share with the other creditors pro rata in the remaining $450,000 of assets. Whatever the result, it isn't a question of bankruptcy law, because Firm is dissolving without using bankruptcy.

Assume, however, that Firm instead files for bankruptcy. Nothing in the priority issue should change. But it is very easy to lose sight of that when one starts fighting over words in the Bankruptcy Code. Take, for example, the *Kovacs* issue. Is the obligation to clean up the wastes a "claim" for purposes of bankruptcy? The Solicitor General and state took the position (incredible to me) that such an obligation was not a "claim" because otherwise (they asserted) a debtor would run into bankruptcy to avoid environmental cleanup orders. They didn't realize that if they had their way, they would undercut the enforceability of cleanup orders when the debtor is a corporation. Consider our example. If a cleanup order isn't a claim, then California wouldn't be entitled to participate (under Section 726) in the division of assets in bankruptcy—the general creditors would get all $500,000 of Firm's assets.

California's cleanup right would, to be sure, continue. But the right is essentially worthless. A firm without assets may leave bankruptcy and dissolve under state law, leaving California with nothing. And even before Firm dissolves, California is out of luck pursuing Firm–it no longer has any money.[8]

Could California pursue the buyer of Firm's assets? That's a question of state law. But unless California has something like a statutory lien on *all* of Firm's assets, it won't be able to pursue each drill press and office chair into the hands of the buyer. If it *can*, then it had first dibs on assets, and, as a claimant, should have been paid first in bankruptcy. But that's a question of priority in the Firm's assets relative to other creditors. It isn't a question of whether the obligation is a "claim"—or indeed, anything else stemming from bankruptcy law.

Nor would it make any difference if we were talking "reorganization" instead of "liquidation." In fact, holding that the cleanup order was *not* a claim would create the perversity that bankruptcy is designed to avoid—self-interest leading to the wrong result for the group. Let's say Firm's business is worth $600,000 as a going concern. This means people would pay $600,000 to capture its income stream free of liabilities. But it isn't free of liabilities. If the cleanup order isn't a claim, it is going to be asserted against the reorganized firm, which means: paid in full. That takes away $200,000 of the income stream, leaving $400,000 for the other creditors. They, however, won't want to accept only $400,000. If they liquidate Firm—and the decision is theirs—Firm may be worth $500,000 rather than $600,000, but they get the whole $500,000. California would be out of luck. That's exactly the kind of result that bankruptcy law is supposed to avoid—and it explains why a discharge under Section 1141 is appropriate. Without it, creditors are worse off, and would always have an incentive to liquidate. Solicitude for a corporate charter is irrelevant. Holding that the cleanup order is a "claim" is appropriate in Chapter 11 and Chapter 7.

Now saying that the cleanup obligation is a claim simply says that California can participate in the division of assets. It doesn't say what its *priority*

level would be. That, too, is a state law issue. Holders of claims do not always share equally under non-bankruptcy law. If California's claim would come first outside of bankruptcy, it should in bankruptcy as well. That issue requires one to examine the attributes of California's claim under nonbankruptcy law—the lesson of a number of Supreme Court cases from *Chicago Board of Trade* through *Butner.*[9] In many cases involving a specific piece of land, I would argue that the state effectively has a lien on the land to enforce cleanup orders. Because no one can use the land unless the toxic wastes are removed, the land has value only net of that expense. But the issue is less clear when this piece of land has no value—or at least not enough to pay for the cleanup. California can still go against Firm's other assets, but it is far less likely that it does so as anything other than a general creditor. But again, that is an issue of state law, *not* federal bankruptcy law.

> *"When there aren't enough assets, bankruptcy law can't grow them — it can only preserve what is there and rearrange who gets what portion. More for one means less for another."*

This same analysis applies to cases such as *Penn Terra* or *Quanta Resources*. Consider *Quanta,* where the issue is that of abandonment. If you refuse to allow abandonment, the effect is the trustee must do the cleanup, thus paying for the cleanup claim in full. Since the assets being used are those otherwise available for the general creditors, the other creditors would get less. Whether that is the right outcome is the real issue, and it's not a bankruptcy issue—it's a priority issue. Deciding abandonment decides just that and nothing else. One should be aware of what one is deciding.

Consider then *Penn Terra.* The automatic stay should not apply to state injunctions that tell Firm not to pollute in the future. Adhering to regulatory requirements is a cost of doing business, and the fact that bankruptcy has commenced should be irrelevant.

But what about a cleanup order? I have already asserted that this is a "claim" based on a pre-bankruptcy action of Firm. That fits nicely into the automatic stay issue. If the automatic stay doesn't apply, and Firm has to do the cleanup, it will have to spend \$200,000 to do so. (Note how this produces the *same* results as the abandonment issue.) But if California's claim is an ordinary *unsecured* claim (a question of state law, remember), California has no right, under state law, to get \$200,000 ahead of the other creditors. Because lifting the stay would have that effect, it should be denied.

This does not mean that the cleanup shouldn't take place at all. It is simply a question of *who pays* for it. If California wants to clean up the dump site, there is no reason California shouldn't. But California will have to spend \$200,000 of its own money (read: our money) to do that. It would then have a "claim" for that amount against Firm, and get paid according to its entitlements. If California has a statutory lien on all the assets, it will get paid in full; otherwise, it will probably share in the division as an unsecured creditor.

However—one last wrinkle—if California is in fact entitled to be paid first (because *non*bankruptcy law gives its claim priority over the claims of unsecured creditors against *all* of Firm's assets) then there may be a good rea-

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Jackson was educated at Williams (AB'72) and Yale (JD'75). He began writing articles in the field of commercial law while still in school, and now has two books to his credit: Cases, Problems, and Materials on Security Interests in Personal Property *(Foundation Press, 1984) and* Cases, Problems, and Materials on Bankruptcy *(Little, Brown and Co., 1985). Both were coauthored with Stanford alumnus Douglas Baird ('79), who teaches at the University of Chicago.*

Jackson took two years leave (from 1979 to 1981) to practice with Heller, Ehrman, White & McAuliffe in San Francisco. He is currently at work on a book about bankruptcy policy.

The present article is a somewhat modified and shortened version of a talk given March 21, 1985 for the Vanderbilt Law Review Symposium on Bankruptcy, and on April 3 for the Stanford Law faculty.

son to lift the stay. For now there is no objection to having Firm spend $200,000 to clean up the mess. It has to pay the $200,000 to California anyway, and might better do so sooner than later.

CLAIMS AGAINST INDIVIDUALS

Another policy of bankruptcy law comes into play when the debtor is an individual. This is the fresh-start policy, and the concept of discharge. In the case of a corporation, the issue of claims and priorities is the *only* issue, as claimants have the right to reach all of a corporation's assets. At the end of a liquidation proceeding (and subsequent dissolution), a corporation is stripped of assets and ceases to exist. Hence, having an enforceable right—a nondischargeable right—against it following such procedures is meaningless. By contrast, an individual who receives a bankruptcy discharge is usually entitled to keep one of his most valuable assets: his future earnings, often called his human capital. One can, therefore, raise the issue of nondischargeable debts against an individual.

Could an obligation to clean up toxic wastes be considered nondischargeable in a Chapter 7 proceeding? Perhaps if that obligation fell within one of the exceptions to dischargeability laid out in Section 523 of the Bankruptcy Code. The only possible exception that I can see—admittedly a reach—speaks of "willful and malicious injury . . . to another entity or to the property of another entity."

But the normative question is whether such debts *should* be dischargeable. The purpose of discharge in bankruptcy is to free up a person's future income from most legitimate claims. The issue is rather whether *this kind* of claim is different from those that are discharged, because, as a general matter, the costs of discharging it are greater than the benefits an individual gets from discharge. In order to analyze that issue, however, one needs a theory of discharge. I've addressed that topic elsewhere and found it *very* difficult.[10]

One can plausibly argue that toxic waste cleanup orders should not be discharged in bankruptcy, on the ground that we want to discourage toxic waste dumping in the first place. But such a rationale is hardly limited to cleanup orders; it might, for example, apply to *all* tort claims.[11] The more kinds of claims excepted from discharge, however, the less discharge gives a "fresh start." It's hard to decide where the line should be drawn.

And in considering this issue, one should not focus just on the liability of individuals. Deterrence would seem to be as important in the case of corporations as individuals. Why should limited liability shield corporate executives and shareholders from responsibility for toxic waste cleanups? But, since corporate limited liability is an artifact of state law, we are once outside the realm of bankruptcy law.

CONCLUSION

The basic problem of toxic wastes in bankruptcy is not, then, a matter of bankruptcy law. It is the problem that occurs when there are too many liabilities chasing too few assets. Nothing bankruptcy law can do can change that fact. Nor should it try using an ad hoc approach that simply says that toxic waste claims get paid first in bankruptcy. That inevitably means other creditors get less. But this is a quintessential nonbankruptcy issue. If the priority level is not fixed right, states (or the federal government) can change it; and if they do change it, it will (and should) be respected in bankruptcy. But reforms of this type should not be made in a vacuum. We must be cautious about making something a bankruptcy issue that isn't. For we may in the process miss what is likely to be the real issue. □

FOOTNOTES

1 In re Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984), cert. granted, 105 S.Ct. 1168 U.S. (Feb. 19, 1985).

2 Id. at 921-22.

3 Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267 (3d Cir. 1984).

4 Ohio v. Kovacs, 105 S.Ct. 705 (1985).

5 Brief for the United States as Amicus Curiae Supporting Petitioner.

6 I develop this argument in Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain,* 91 Yale L.J. 857 (1982). *See also* Jackson, *Avoiding Powers in Bankruptcy,* 36 Stan. L. Rev. 725 (1984).

7 *See* Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum,* 15 J. Legal Studies 73 (1985).

8 This argument is developed in greater detail in Baird & Jackson, *Kovacs and Toxic Wastes in Bankruptcy,* 26 Stan. L. Rev. 1199 (1984).

9 Chicago Board of Trade v. Johnson, 264 U.S. 1 (1924); and Butner v. United States, 440 U.S. 48, 54 (1979). *See also* Commodity Futures Exchange Comm. v. Weintraub, 105 S. Ct. 1986 (1985).

10 Jackson, *The Fresh-Start Policy in Bankruptcy Law,* 98 Harv. L. Rev. (1985).

11 *See, e.g.,* Note, *Tort Creditor Priority in the Secured Credit System,* 36 Stan. L. Rev. 1045 (1984).

The Three Cases of

By Leonard B. Boudin, *Acting Professor of Law (1984-85)*

It is now more than twenty years since the controversial cases—in three different countries—of the fugitive Dr. Robert A. Soblen. Convicted in the United States of conspiracy to commit espionage, he fled first to Israel, which denied him refuge and put him on a U.S.-bound El Al plane. The dilemma became Britain's when Soblen had to be removed there for treatment of self-inflicted wounds. Denying his legal appeals, Britain ordered his deportation to the U.S.—a fate that Soblen avoided only by taking his life.

Dr. Soblen's tragic odyssey left a wake of recrimination and debate in each country and raised serious questions of national and international law. The United States case shows the abuses that arise from enforcement of the conspiracy laws, particularly in political cases—and other abuses such as the government's failure to disclose information helpful to the defendant.

The issues in Israel and Great Britain related to the use of the deportation device to avoid the internationally accepted political offense exception to extradition laws. And, for Israel, there was also the application of the Law of Return.

The three cases exemplify what Justice Holmes called the "hydraulic pressures" often affecting judicial decisions—at that time, the late Cold War. Soblen's espionage trial began on June 29, 1961, shortly after the U.S.-supported Bay of Pigs invasion. His death in England, on September 11, 1962, occurred in the period of East-West tension that led one month later to the Cuban Missile Crisis. As close U.S. allies, Great Britain and Israel could not but be sensitive to this charged climate.

The Brothers Sobolevicius

Robert Soblen was born Roman Sobolevicius in 1900 in Lithuania, which was then (as now) under Russian control. Of a well-to-do Jewish family, he studied in Bern, Switzerland, where he qualified in medicine. He and one of his brothers, Jack, became active in Communist Party politics in Russia and Germany. Isaac Deutscher, in his biography of Leon Trotsky, charges that the two brothers were Party agents who infiltrated the Trotsky movement as part of the internecine warfare between the Stalinists and Trotskyists.

Robert later served as a physician on the Republican side in the Spanish Civil War. He, Jack, and other family members entered the United States in 1941. Robert, who differed from his family in choosing Soblen over Soble as his surname, became a citizen six years later, married, and had a daughter.

At the time of his indictment in 1960, Dr. Soblen was supervising psychiatrist at Rockland State Hospital in Orange, New York, and was a partner with about twenty other doctors in the Circle Manhattan Medical Group.

During the brief period in which I knew him [see box], he appeared to be a warm, gentle, and intelligent man, although we never had the opportunity to become friends.

The proceedings against Dr. Soblen grew out of an FBI investigation of possible Soviet espionage in the United States. In January 1957 a grand jury of the Southern District of New York had been empaneled, and Jack Soble was arrested.

All agreed—the government and various defense counsel—that Jack was a very disturbed person and possibly psychotic. He pleaded guilty to charges of espionage and was sentenced to seven years in prison. While confined in a prison mental hospital, he swallowed a half-pound of nuts and bolts in order, he said, to convince doctors that he was mentally ill.

Jack Soble's testimony in his brother's case suggests that Soble may have pleaded guilty to so serious a crime as espionage because he had perjured himself in his application for a visa, not because he had actually committed espionage. (It is also possible that he was guilty of both crimes.)

Testimony by Jack Soble had also implicated another person: Mark Zborowski, who was convicted in 1957 of perjury—a conviction that was reversed two years later because the defense, despite its demand, had not been given Soble's grand jury testimony. The Court of Appeals found that testimony inconsistent with Soble's trial testimony against Zborowski. This, then, was the government's chief witness against Dr. Soblen.

U.S.A. v. Robert Soblen

Dr. Soblen's indictment charged in the first count that he and eighteen others had conspired from January 1940 to the date of the indictment to violate 18 U.S.C. 793(a)(c), by obtaining information concerning the national defense, to be used to the advantage of the Soviet Union. The information concerned personnel of the Office of Strategic Services (OSS) in connection with the intelligence and counter-

Dr. Robert Soblen

intelligence of the United States government and "the personnel, arms and equipment of the United States armed forces and activities at other places connected with the national defense." The indicted co-conspirators included Jack Soble and Lavrenti Beria, head of the NKVD (the Soviet intelligence service). One OSS employee, Horst Baerensprung, was named in the indictment as a co-conspirator; another OSS figure who was the key to this case—Dr. Hans Hirschfeld—was not named.

A second count charged a conspiratorial objective: to *transmit* the information to the Soviet Union, in violation of 18 U.S.C. 794—a capital offense. The conspiracy was alleged to have occurred in the Southern District of New York, Moscow, Lithuania and Austria. Twenty-five overt acts were recited, including a 1940 meeting between Jack Soble and Lavrenti Beria, at which time the alleged conspiracy was formed. Significantly, the overt acts do not include any meeting between Dr. Soblen and Beria, nor was Dr. Hirschfeld named.

The trial was presided over by federal Judge William B. Herlands, one of the original assistants to District Attorney Thomas E. Dewey. While Robert M. Morgenthau, the United States Attorney, was technically in charge of the case, it appears to have been handled by two Department of Justice lawyers, Robert Conway Casey and David R. Hyde. The defense counsel, Joseph Brill and Jacob W. Friedman, were experienced criminal lawyers in the City of New York.

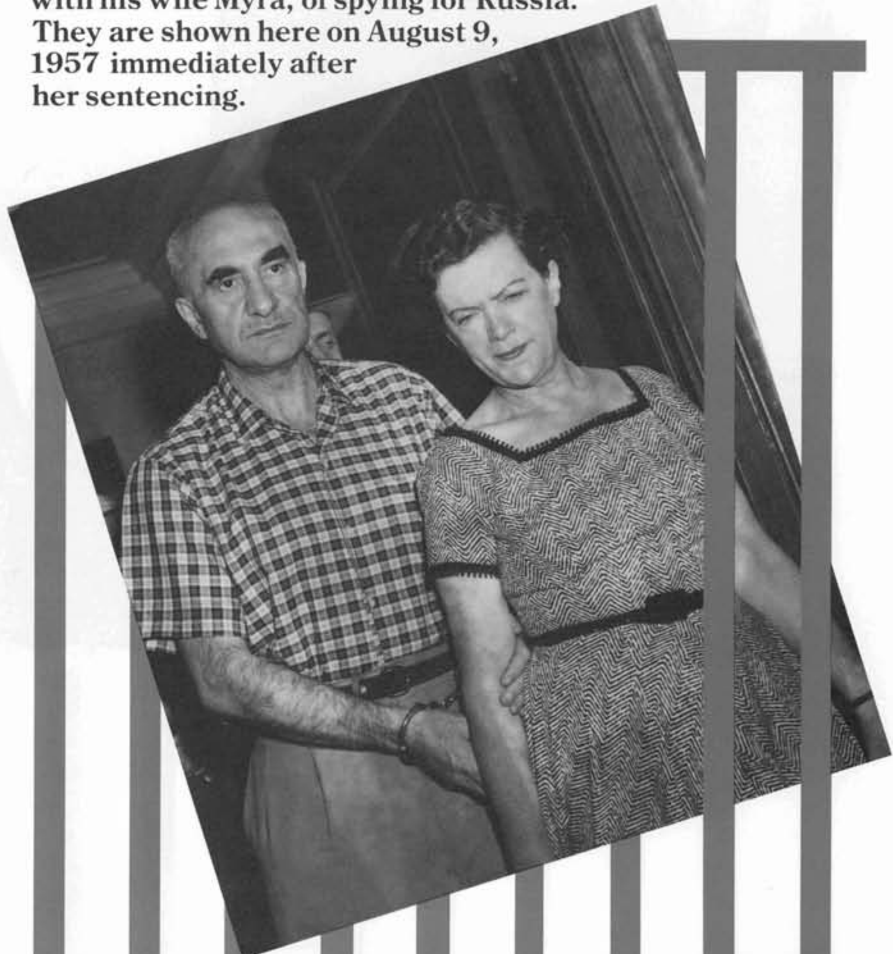
The first principal witness against Dr. Soblen was his brother, Jack Soble, who described an agreement that he, Jack, had made in 1940 with Beria in Moscow. He testified that, in consideration of the government's permission for the Soble family to leave the Soviet Union, Beria had said: "We would like the both of you [Jack and Robert] to go abroad to work for us to gather any information of value to the Soviet Union." It is significant that although Beria spoke of Jack Soble's past anti-Trotskyite work, he made no reference to national defense secrets. Also, neither Soble nor Beria then had any idea as to the Soble family's ultimate destination.

Soble also testified that in 1942, after he and his family arrived in America, he [Jack] met with Vassili Zubilin, a secretary at the Russian Embassy. "I know the whole case about you," Zubilin was quoted as saying. "You came and your brother Robert came to America. You took out all your relatives, your parents, sisters, and we gave you everything you wanted. I mean, the family is now safe and we want you to keep to the other part of the agreement to work for us." According to Soble, Zubilin also referred to the War and the fact that Russia was fighting Germany, saying that "we are allies with America and you have to help in the common general effort and you will work for us and gather any information you can."

Soble did not describe information related to the national defense, unless that connection can be derived from his reported conversation with his brother: "I told him about my field of activity in the Trotskyites and he told me his job was to gather information through a group of people who work in the OSS."

The only direct testimony linking Dr. Soblen to OSS information was provided by Johanna Koenen Beker, whose father had been a leading Communist member of the German Reichstag. Mrs. Beker said that, pursuant to

Dr. Soblen's brother and chief accuser, Jack Soble. Jack had already been convicted, along with his wife Myra, of spying for Russia. They are shown here on August 9, 1957 immediately after her sentencing.



AP/WORLD WIDE PHOTOS

Dr. Soblen's instructions, she had met with two employees of the OSS—Hirschfeld and Baerensprung—from whom she received OSS reports on various German individuals and groups.

Mrs. Beker's most damaging testimony, however, related to something quite different, which was regarded by the court and presumably the jury to relate to the development of the atomic bomb at Los Alamos, New Mexico, and at Hanford, Washington. In two or three reports during the spring of 1945, she said, Dr. Hirschfeld stated that "he had gained the knowledge that the United States Government was working in some important military project and making great progress with it and this would decide the end of the war considerably." A "locality in the northwest of this country," she said, was mentioned. The cross-examination of Mrs. Beker and other government witnesses was quite inadequate. It seems clear that defense counsel were not prepared for Mrs. Beker's testimony with respect to the secret weapon and that they had no knowledge of the workings of the OSS.

Upon conclusion of the government's case, the defendant sought an overnight recess in order to determine whether to take the witness stand. Dr. Soblen was mortally ill from leukemia, a fact known to the court, which nonetheless denied the motion. The defense rested without calling any witnesses.

The jury returned a verdict of guilty on both counts, and the court sentenced the defendant to ten years in prison on the first count and life imprisonment on the second. He was released on $100,000 bail August 3, 1961.

Motion for a New Trial

After the trial, some of the facts came to the attention of Professors Herbert Marcuse (then teaching at Brandeis) and H. Stuart Hughes (an historian at Yale and Harvard and grandson of the late Supreme Court chief justice). Both men had worked in the OSS and were of the opinion that the particular office in New York in which Hirschfeld had worked had nothing to do with the national defense. In addition, Marcuse knew that Hirschfeld (a fellow German by birth) was now an executive assistant to West Berlin Mayor Willy Brandt, anti-Soviet in politics, and a member of the Social Democratic party. Marcuse and Hughes advised defense counsel of these facts. On the basis of this and other newly discovered evidence relating to FBI interviews of Hirschfeld, Dr. Soblen's counsel, now Ephraim S. London, moved for a new trial. The motion was heard (in accordance with the usual practice) by Judge Herlands. Professor Hughes and both defense counsel (Friedman and Brill) testified, as did one of the government counsel, David R. Hyde. The judge concluded that the defense counsel by reasonable diligence could have secured this information in advance of the trial. So despite this and other evidence of deficiencies in Soblen's trial, the request for a rehearing was denied.[1]

The Court of Appeals, which affirmed the denial, seems to have been on solid ground in rejecting defense claims that it had been misled about the precise state of Jack Soble's mental health. However, in my view, it was clearly incorrect in holding that the government had not concealed facts relating to previous exculpatory testimony by Dr. Hirschfeld. The facts are these: Dr. Hirschfeld had been interviewed by the FBI in Berlin on February 27, 1957; by the Department of Justice in West Berlin on October 29, 30 and 31, 1957; and by the FBI on January 26, 27 and 28 and February 21, 1960. He had confronted Mrs. Beker in 1957 in Berlin and denied ever having met her. And on February 5 and 8, 1960, he testified before a grand jury in New York, denying ever having met Mrs. Beker, ever having transmitted any information on behalf of Russia, and ever having obtained information on any secret weapon.

This critical testimony ought surely to have been fully revealed to the Court and to the defendant either by the Court or the prosecution. This was, after all, a capital case, and the sworn testimony of Dr. Hirschfeld before the grand jury was in direct conflict with that of Mrs. Beker. Yet, when the Judge asked one of the Justice Department prosecutors about Hirschfeld's whereabouts, the prosecutor claimed ignorance, replying, "I don't know where he is living. . . . He could be living in the East, but I don't know."

It was of course inconceivable that Dr. Hirschfeld would be living in the East. A prominent figure in West Germany, he was (in addition to being an assistant to Mayor Brandt) Chief of Chancellery of the Senate of West Berlin. The U.S. government had had no difficulty in locating him or in having him testify before the grand jury. Their behavior at the Soblen appeal was obviously deceptive and misleading. It was of course regrettable that the defense counsel had not made an independent investigation, but to the extent that the prosecution deliberately misleads defense counsel, their lack of diligence is irrelevant.

The inadequacy of the Court of Appeals' response to this issue is illustrated by the statement: "No principle that we are aware of required the government to give the defense advance information of the location of persons who will be mentioned in the testimony of a witness for the prosecution." This assumes that the problem is one of "location" or "whereabouts" (the other word used by the Court of Appeals).

The proper question is whether the government's interviews containing exculpatory evidence should have been disclosed to the defense. In this respect the English practice under which the prosecution must give all relevant statements—not merely those of prospective witnesses or Jencks-type evidence—prior to the trial appears preferable. (In a somewhat similar situation, the defense in the Ellsberg criminal case called upon the government for reports describing the damage *vel non* resulting from Ellsberg's use of the Pentagon Papers; it was the

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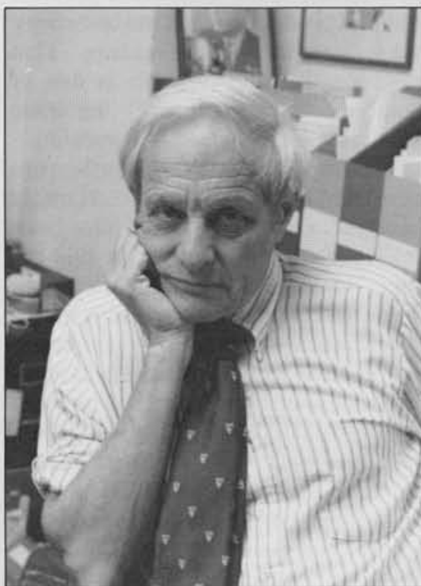
Boudin had a "passing connection" with the Soblen case when the accused was referred to him by a friend of Albert Einstein (to whom many people in political trouble went for advice). Boudin recommended Ephraim London as counsel in the motion for a new trial, and participated in a petition for a writ of certiorari filed by Mr. London. The British phase of the case was also known to Boudin, who shared materials with the leading solicitor representing Soblen and met the principal barristers involved.

The present article is drawn from a longer work in progress, which Boudin discussed in an April 1985 Law School faculty seminar during his year as acting professor of law.



government's deliberate delays in producing those papers that *inter alia* led to the dismissal of the indictment with prejudice. Granting that there defense counsel took the affirmative steps of demanding the information, the defense in the Soblen case was equitably entitled to similar disclosure by the government in a capital case.)[2]

The Appeals Court had further stated that the new testimony sought to be introduced "was merely cumulative and impeaching and such evidence 'ordinarily will not support a motion for a new trial' " (citing *Mesorosh v. United States*, 352 U.S. 1,9). "And even if the testimony of these new witnesses had been received and believed (thus contradicting the witness Beker) a different result could not be anticipated." How could the Court have had such an assurance that the jury would have preferred to believe Mrs. Beker—a woman of tattered reputation and a co-conspirator by her own testimony and by the government's indictment—as against a respected government official in West Berlin?

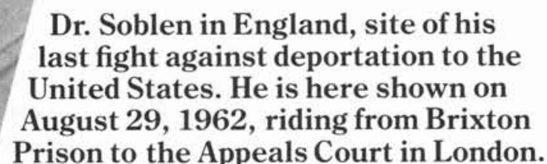
The Court's next sentence is even more disturbing. "Under *United States v. Gorin* [312. U.S. 19] defendant could be guilty even if the work of the [OSS] biographical records section was as limited as they testified it was; and under the loose and shifting sands of conspiracy, Soblen could have been found guilty of conspiring to transmit secrets even if he had not succeeded." It is hardly a comfort to have the Court rely on "loose and shifting sands," particularly when it points out that a conspiracy prosecution does not depend upon success in the commission of the substantive crime. It was precisely the testimony about the biographical records section and the secret weapon that gave substance to the conspiracy charge by revealing the achieved objective of the conspiracy.

One is also appalled at the Court's statement that the supposed agreement with Beria "cannot reasonably be construed to have excluded the gathering of national defense information." This inverts the normal burden of proof on the issue of a defendant's guilt.

And what should we say about the trial judge? He was more experienced in criminal cases than any of the trial counsel, and he knew from the Jencks Act material of Hirschfeld's employment in West Germany and his many statements and his testimony controverting Mrs. Beker. The judge had a responsibility to bring out the facts and to remind defense counsel of the Hirschfeld denials, even to examine Mrs. Beker himself.

The decision of the Court of Appeals discloses a number of problems typical of espionage, conspiracy and political cases, the present one having all three ingredients. One important question relates to the nature of the evidence found sufficient to sustain a conviction for conspiracy to obtain and transmit information relating to the national defense. Could so general a statement as that referring to the secret weapon in the west constitute an advantage to the foreign nation, since everyone knew that weapons research was going on throughout the war? This case, therefore, even transcends the definition of national defense as a broad generic conception in *United States v. Gorin*. The secret weapon information more closely resembles that in *United States v. Heine* (151 F.2d 813 *cert. denied* 328 U.S. 833), which excepted from the concept of national defense information generally known and made available by the government.

Another important issue is the admission into evidence of the defendant's and Jack Soble's activities many years prior to the conspiracy, and of the activities of the co-conspirators before and after the conspiracy. It does seem a little far fetched to introduce evidence of Dr. Soblen's affiliation with Russian and German communist parties between 1918 and 1940, although this kind of evidence is generally deemed admissible as bearing on the "motivations and community of interest of the conspirators." However, it could also be argued that the effect is so prejudicial as to outweigh its relevance and therefore should be ex-



Dr. Soblen in England, site of his last fight against deportation to the United States. He is here shown on August 29, 1962, riding from Brixton Prison to the Appeals Court in London.

cluded (as in Rule 402 of the Federal Rules of Evidence).

Taken as a whole, the U.S. trial and conviction of Dr. Robert Soblen appears to have been sadly flawed.

Expulsion from Israel

Following the Court of Appeals decision affirming his conviction, Dr. Soblen's U.S. counsel petitioned for certiorari. When the petition was denied, Dr. Soblen, using a dead brother's Canadian passport, left New York for Paris and then arrived in Tel Aviv, Israel, using a brother's name to obtain a three-month visitor's visa. He met with an Israeli lawyer, Dr. Ari Ankorion, on Wednesday, June 27, the day after his arrival. Since he had made little secret of his presence, he was arrested by the police on June 28 on a charge of illegal entry and ordered by a magistrate to be detained for ten days.

Ankorion communicated with the Ministry of Interior, met with its director-general on Friday, June 29, and asked for a Sunday meeting (Saturday being the sabbath) with Prime Minister Ben Gurion. A long meeting between the two occurred on Sunday morning beginning at 8:30 a.m., in the course of which Ankorion argued that Soblen, as a Jew, was entitled to remain in Israel under the Law of Return. Ben Gurion disputed this, stating that Israel was not a haven for criminals and that he had received many communications from Jews in the United States. He did not tell Ankorion that he had been visited earlier by the United States Ambassador, Woolworth Bourbon.

But more important, Ben Gurion did not tell Ankorion that earlier that morning (at 7 a.m.) Dr. Soblen had—without the knowledge or approval of the magistrate or other judicial officials—been removed from prison by the police upon instructions of the government and put on a specially chartered airplane, destined for Athens, Greece. The two other significant occupants of the airplane were the chief marshal of the United States, James J.P. McShane, and a Dr. Gottlieb, an Israeli doctor. At Athens, Dr. Soblen, still struggling, was put on an El Al airplane bound for New York with a fuel stop in London. While the plane was over the London airport, Dr. Soblen seriously wounded himself with a steak knife and was taken off the plane to an English hospital, thus opening the English Soblen case discussed later.

Let us consider the legal and moral situation arising from the events in Israel. First, Soblen was under the jurisdiction of the magistrate who had ordered him detained for ten days on the charge of unlawful entry. The government, in precipitously removing Dr. Soblen from prison and from the magistrate's jurisdiction, would seem to have violated this judicial order. Certainly, this was the magistrate's view.

Secondly, the highest officials of the government of Israel engaged in deception by not advising Dr. Soblen's lawyer of their intention to send Dr. Soblen to the United States. Had Ankorion known, he could have gone to the Israeli High Court for a writ of mandamus or habeas corpus. The Israeli government compounded this deception by not telling Dr. Soblen of its intention to expel him, until 10 p.m. on Saturday night, when it was impossible for him to communicate with his lawyer (who previously had been promised by the police that he could meet with his client on Sunday). The

government deepened the deception by arranging for Ankorion and Ben Gurion to meet an hour and a half after Dr. Soblen had been put on the El Al plane.

Let us assume that Dr. Soblen did in fact enter illegally; the appropriate remedy would have been a criminal prosecution for illegal entry or an expulsion—a minor offense punishable by a maximum sentence of three months imprisonment and a fine of 300 lirot.

It is also arguable that Dr. Soblen was entitled to enter Israel under that country's unique Law of Return. Under that law, a visa must be given to every Jew who has expressed a desire to settle in Israel, unless the Minister is satisfied that the applicant is engaged in an activity directed against the Jewish people or endangering public health or the security of the State or (according to a 1954 amendment) is "a person with a criminal past likely to endanger public welfare."

There is some disagreement in the High Court of Israel as to whether a single crime can constitute a criminal past. Furthermore, the Law of Return must be read in conjunction with the Extradition Law (No. 56 of the *Laws of 1954*), which prohibited then as now the extradition to another state of any person "convicted in the requesting state of an offense of a [non] political character."

It is also possible that Dr. Soblen fell under another provision of the Law of Return permitting the entry of "every Jew who has immigrated into this country before the coming into force of this law." Dr. Soblen had received an immigration certificate from the mandatory authorities of Palestine prior to the creation of the State of Israel, and had a license to practice medicine there.

The real issue here is whether this was a disguised extradition forbidden under the terms of a 1954 law prohibiting extraditions of a political character. It cannot be doubted that espionage is a political offense. And in June 1962, there was no treaty of extradition between Israel and the United States (The first one was signed on December 10, 1962, and came into force on December 5, 1963). There was, therefore, no legal compulsion for Israel to return Dr. Soblen to the United States.

In reality, Soblen was extradited: the United States Ambassador did make representations to Ben Gurion; and although the latter responded that this was an internal affair of Israel, Ben Gurion acquiesced in the American request by putting Dr. Soblen in the custody of a United States marshal who was there to prevent his escape. While Soblen's expulsion could be considered an internal matter for Israel, the same could hardly be argued re his ultimate destination.

The government's behavior towards Dr. Soblen produced an uproar in Israel. Motions of no confidence were filed in the Knesset and narrowly defeated (by a vote of 52-58 with 25 abstentions) on July 10. The debate would ultimately lead to stricter procedures for deportation (see conclusion). But for Dr. Soblen, there was only a refusal of an application for asylum, and a series of awkward maneuvers to avoid any Israeli government complicity with Britain's efforts to continue the de facto extradition that Israel itself had initiated.

In brief, the Israeli government acted hastily, unreflectively, and, I believe, wrongly. The British, as we shall see, were more deliberate and analytical, but in the end no less wrong.

England's "Disguised Extradition"

The British government became reluctant hosts to Dr. Soblen only because of his urgent need for hospital care. Notified of his impending arrival, an immigration official boarded the El Al plane to notify him that he was not permitted to land. In view of Soblen's comatose condition, however, the notice was delivered to U.S. Chief Marshal McShane, who asserted that Dr. Soblen was in his custody.

On July 3, 1962, when Soblen had recovered consciousness, he was personally served with a notice of refusal of permission to land under Alien Order 1953, Section 1(1), and further advised that instructions had been given to El Al to remove him "in the aircraft in which you arrived."

Ankorion retained Solomon Kaufman, a leading British solicitor, to represent Dr. Soblen. Kaufman in turn retained two distinguished barristers, Elwyn Jones, Q.C. (later Lord Chancellor of England) and Louis Blom-Cooper, Q.C. They obtained a Writ of Habeas Corpus for Soblen. After a hearing on July 17, the Divisional Court denied the motion for Soblen's discharge from the prison hospital on the ground that he had not been given landing permission and that express refusal to land was given as soon as practicable. An appeal by Sobel's counsel was dismissed by the Court of Appeals, which held that Soblen had not been permitted to land as a "free man"—a construction of English statutory law in which commentators believe the government had the better of the argument.

During the same period, Soblen's counsel also petitioned the Home Secretary for asylum and sought a visa from the Czechoslovakian government. The Secretary refused to grant asylum or allow Soblen to go to Czechoslovakia, which had issued the requested visa.

The British issued a Home Office directive to El Al on August 3 and 4, under Sections 8(1) and 8(29) of the Alien Order of 1953, to remove Dr. Soblen immediately from England on an aircraft bound for the United States. However, on August 4, the Israeli Ambassador to Great Britain stated that Israeli law had required Soblen's expulsion, not his return to the United States (a rather odd statement, since Dr. Soblen had been placed by Israel in the custody of a U.S. marshal on a plane bound for the United States). Further, El Al declined the Home Office order that a transfer of Dr. Soblen's ticket be made to another air-

(Continued on page 82)

Board of VISITORS

BOARD PONDERS NATIONAL ISSUES, CAREER PATHS, AND SCHOOL PROGRESS

PHOTOS BY JOHN SHERETZ

Thoughtful. Probing. Introspective. Such was the predominant tone of the 1985 Board of Visitors meeting. This deep seriousness did not reflect any alarm or dismay—the School is undoubtedly one of the best in the country. But rather a rejection, on the part of both the School and the Board, of complacency; a refusal to stop asking, "How can we do better?"

The tone was set by Board Chairman Charles D. Silverberg '55 in his remarks opening the first formal session: "Our task," he declared, "is one of seeking excellence for this Law School." He urged Board members to "make a commitment to take the *program* seriously, but not *yourselves* too seriously"—lest that inhibit inquiry and the voicing of suggestions.

Earlier that day, some twenty Board members and spouses had taken advantage of an opportunity to tour the East Palo Alto Community Law Project and question its staff and student leaders about their efforts in that largely low-income and minority community.

The full Board, assembled for a kickoff lunch at the Hoover Institution's Stauffer Auditorium, were welcomed by Dean Ely. Luncheon speaker Gerald Gunther, William Nelson Cromwell Professor of Law, discussed "the ebb and flow of events on the U.S. Supreme Court" (the subject of his article in the Spring 1985 *Stanford Lawyer*).

The afternoon session featured Dean Ely's annual State of the School report (see page 22), a rigorous and candid evaluation of the School's progress towards goals set at the inception of his deanship.

The national issue of governmental regulation and deregulation of industry was then explored in a five-person panel (page 25) chaired by Professor Thomas Campbell.

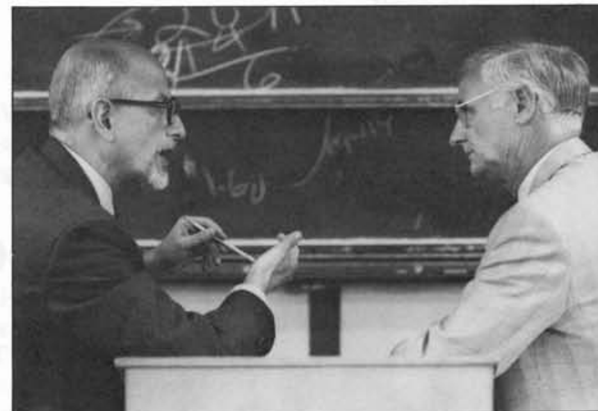
The Board members were joined that evening by spouses and faculty for cocktails and dinner at the Buck Estate, an elegant private home donated to the University in 1979.

The session next morning began with the participatory "Admissions 'Game' " (page 28) during which Associate Dean and George E. Osborne Professor Jack H. Friedenthal (former Chairman of the School's Admissions Committee) and Professor Ronald J. Gilson (its current Chairman) gave Board members the experience of grappling with the kinds of difficult judgments the Committee must make each year.

The alumni/ae panel on career choices (page 30) and luncheon discussions that followed were intended to help students understand the many options open to them. Not a few Board members found themselves reflecting on their own lives as well.

Marc A. Franklin, the Frederick I. Richman Professor of Law, gave the final faculty talk of the day—a proposal (outlined in his At Issue column for the Spring 1985 *Stanford Lawyer*) for changing libel law to provide vindication for plaintiffs while limiting damages payable by the media.

The formal proceedings ended with a Summary and Advisory Session (page 34), presided over by Chairman Silverberg, during which members of the Board were invited to speak freely about any aspect of the meeting or the School's programs and directions. □



Prof. Marc Franklin and Judge William Norris '54, discussing libel law issues after Franklin's presentation of proposed new legislation

On the East Palo Alto Community Law Project tour (left to right): *Roy Steyer (Yale '41), Kristi Spence '81, Judge Pauline Davis Hanson '46, and Donald Mitchell (Hastings '66), with EPACLP co-founder Steven Dinkelspiel '85*

Prof. Gunther at the opening luncheon, where he spoke about Supreme Court trends and the threat of a constitutional convention

Board of Visitors

STATE OF THE SCHOOL, 1985

John Hart Ely
Richard E. Lang Professor of Law and Dean

Hon. Shirley Hufstedler '49 and Dean Ely

Dean Ely's annual report to the Board of Visitors, presented May 2, 1985, is given here in his own words.—ED.

One could give a very short and rosy report on the state of the Law School—it's great! The students are excellent, as good as anybody's. The faculty is person for person the strongest in the country, and it continues to get stronger. Morale is as high as it ever has been: in fact, the general atmosphere here is the envy of our sister law schools. There's certainly no other school of which I'd rather be Dean.

But even the best invariably has problems. In evaluating our performance, I would like (from a long habit of teaching) to use a report card format. I won't reveal the letter grades (would you?), but rather a narrative rating. The categories or goals are ones I prepared shortly after my arrival almost three years ago (honest).

Pluralism with trust

A goal I ranked as high as any was that of helping to maintain a faculty that is pluralistic in approach, but lacks the divisiveness and loss of trust that have developed within other diverse faculties. We have succeeded admirably. This school has both a genuine right and a genuine left—to say nothing of a large and genuine middle—and by and large we truly like and trust each other. Naturally we're all drawn more readily to ideas we find compatible, but at Stanford Law School we don't vote for or against candidates on the basis of whether they agree with our approach to legal problems. On this score—and please don't underestimate its importance—we're doing better than I could have hoped.

Quality of faculty

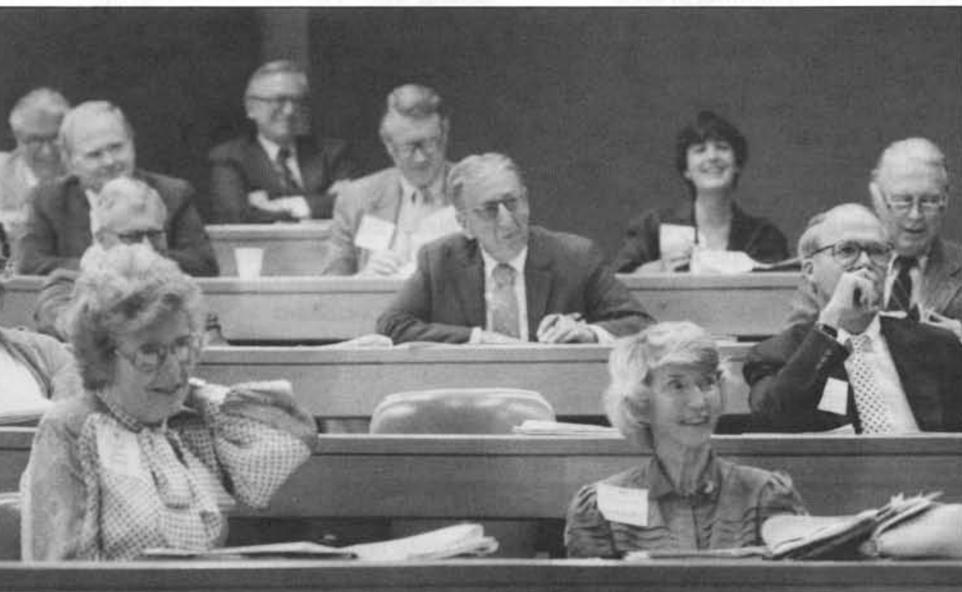
As I said, the Stanford Law faculty was good before, and it is better now. We've added six new people since I was designated Dean. Four—Myron Scholes, Bob Gordon, Tom Campbell, and Ellen Borgersen—joined us during the past two years. The other two—Jerry López and Hank Greely—were recruited this spring.

Jerry López, who will be a tenured professor, is a very hot property, and we are delighted he accepted our offer. Previously a member of the faculty at UCLA, he visited at both Harvard and Stanford over the past two years, and understandably received offers from both. He is a clinical teacher in both senses of the word—that is, he teaches by simulation and role-playing, and he will be working with the East Palo Alto Community Law Project—as well as being a fine scholar.

Hank Greely, a new associate professor, is a partner at Tuttle & Taylor in Los Angeles. He's interested in property and natural resources law—areas we needed to shore up, given the retirement of Howard Williams and the departure of Charlie Meyers. Greely is also interested in government regulation generally, and will be teaching various courses in that area.

At the same time, we have kept our existing faculty substantially intact. Bill

Baxter's return, after three years in Washington, was of course gratifying. And several other members of our faculty have recently turned down very attractive offers from other leading law schools. Unfortunately, we did lose Roberta Romano—a strong young faculty member whom we recently promoted to Associate Professor—to a full professorship at Yale. (This was the fourth professorship Yale had offered to a member of this faculty since my arrival. If at first you don't succeed . . .)



Faculty compensation
Though always a concern, our salaries per se are comparable to those at other major law schools. Housing is a very difficult problem in this area, but the University has programs that mitigate the difficulty (though they certainly don't eliminate it). What concerns me most, and what I have been focusing on, is *faculty research support*. Here, at least in one respect, we are at a competitive disadvantage. The schools to which we generally compare ourselves give every sixth term off for research. Unfortunately we are not in a position to do that.

What I have been doing here is diverting some income from new bequests to support *summer* research. (Limited support has been available for some time, but I have recently made it much more broadly so.) This eases some of the financial strain, so that people wanting to do research won't feel they have to practice law in the summer instead—although we do of course want some of our faculty to maintain contact with the profession by practicing.

For the long run, though, we need new funds earmarked for faculty research. Frankly, it is not easy to raise money for this purpose, but we intend to keep trying.

Computerization and general efficiency of administration
Dull but there—a genuine accomplishment. The introduction of modern information systems is virtually complete for both faculty and administration. We've acquired more than 75 computers and are very pleased with the results. Our records systems are now computerized, and we're already old hands at word processing, computer bibliographic searches, and data crunching. In fact, we have rapidly become something of a model for other law schools in this respect.

Student engagement
Our goal here is to get our students more engaged and involved, in their work and in the world of ideas. There's a laid-back air about Stanford—which is good, but only up to a point. Of course, statistically, our students are top-notch. But every faculty member who has taught elsewhere feels that we could use a greater sense of excitement and involvement. We've made some changes to sharpen things up.

Grading policy: We have dramatically reduced the number of courses one can take on a pass/fail basis. This does seem to have heightened interest perceptibly. It's turning out—though apparently people once believed (or hoped) it wasn't so—that getting a grade does indeed increase the student's involvement.

Admissions: There has a been a rather pronounced recent shift of emphasis in our admissions policy, toward older, more experienced applicants. We're looking for people who have been out of college for awhile—worked overseas, in government, run a business, gotten other advanced degrees, whatever. Though it's too early to give a secure evaluation, this appears—in terms of enriching class involvement and interest—to have been a substantial success, one achieved without discernible sacrifice on the statistical front. Our LSAT median for the Class of 1987 is the rough equivalent of 750 on the old scale—there's a new scoring system I won't bore you with—and the median undergraduate grade point average was about 3.7.

This approach has understandably (though this wasn't the point) generated a class with more women—almost half—49.8 percent. This is a little higher than the percentage offered admission, obviously because more of the women than men we accepted actually decided to come. Apparently Stanford is becoming known as a school

that is hospitable to women. [*For the Class of 1988, the percentage of women declined to 43.6—a little lower than the percentage offered admission.*—ED.]

The number of minority students has stayed about even over the past few years, but the Class of 1987 has fewer Blacks—only six, which is clearly too few. (You will have deduced that there must have been quite a few Hispanics. There were 22.) However, the

Dean Ely, with Board members James Soper '53 (speaking) *and Douglas Jensen '67*

admissions statistics for next fall look great (though it's too soon to be sure); minority acceptances in general are up, as are acceptances by Blacks in particular. [*In fact, there turned out to be 40 minority students in the Class of 1988—16 Blacks, 17 Hispanics, and 7 Native Americans.*—ED.]

Courses: The main burden for stimulating student engagement lies, of course, in the classroom—in making classes more interesting, especially in the second and third years. We've made some progress here. Methodological variety is increasing: there are more clinical classes; more courses involving the East Palo Alto Community Law Project; and more courses using computers, both for teaching "regular" subjects and in the new Computers and Law seminar. We also have more advanced offerings—courses with prerequisites (making a sequence) rather than just the same old succession of survey courses. Though hardly a radical change in the universe of higher education, such advanced work is still too rare at law schools.

Overall, then, I'd rate the state of student engagement as significantly improved.

Student career planning process

Our concern here is not with the career choices made by our students, but rather with the process by which they make those choices. Our first goal is that they know about and consider alternatives, or at least have the *opportunity* to consider alternatives. Lawyers do lots of different things—as evidenced by the people in this room.

Second, we want them to take moral responsibility for their choices, to say, "I'm choosing this because, all things considered, it's what I want to do—nobody made me do it." Right now we hear much rationalization. Some of my best friends work at big law firms —a number of them are in this room! But unlike many in the current generation, you all don't tell me that I'm the one who made you do it!

This is probably the set of problems on which I've worked the most and to which I've had the least response. Our lack of significant progress here is certainly not for lack of trying. We've not only made a major effort to get more information into the students' hands, but also have undertaken some serious efforts to cope with the complained-of coercion of educational debt.

The Montgomery Summer Public Interest Loan Program—funded by a characteristically generous gift from our good friends, Ken and Harle Montgomery—provides low interest summer loans and excuses them should the student return to public interest law after graduation. It was designed so that students wouldn't be forced by the pressures of law school tuition to accept high-paying law firm jobs over the summer when in fact they wanted to try something else.

A more general loan forgiveness program, funded at least for the next several years by a new and generous gift from the Cummins Engine Foundation, will make available "bridge" loans to new graduates who take low-paying positions in the public or public interest sector. That is, the School will loan them money, interest free, to meet their payment obligations on educational loans (college and law school) coming due. The amount the recipients will be expected to repay the School will vary with salary. (There is no eligibility for the program at all for people earning over $30,000 annually.) This bridge loan will in turn be excused in segments for every year beyond a certain point that the graduate stays in the public interest field. This program is initially available only to the three classes currently at the School. [*It has since been extended to the Class of 1988.*—ED.] Longer-range availability will depend on further funding.

These are obviously serious responses. We listened hard to what students were saying and designed programs to meet what they said were their problems—mainly problems of perceived financial coercion. But to our disappointment, student response has, thus far, been limited. There are 20 Montgomery loans available each summer; this year, so far, we have had only 8 applicants [*the final number was 10*—ED.]—despite our effort to make the loans more attractive by reducing the interest rate and adding a provision that the interest won't accrue during law school. (We reached 15 last year, but it took much beating of the bushes.) And the fact remains that when even the best-paying and best-located public interest employers come to Stanford Law School to interview, almost nobody—I mean that literally, it isn't hyperbole—signs up to see them.

I don't wish to overstate: we have a few students every year who are deeply committed to public interest work and really use up some shoe leather looking for these jobs. Certainly the stu-

(Continued on page 78)

Board of Visitors

REGULATION, DEREGULATION, AND RE-REGULATION: THEORY AND PRACTICE

Thomas J. Campbell
Associate Professor of Law and Moderator of the Panel

"There has been remarkable progress over the past eleven years in deregulating formerly regulated industries," began Professor Campbell, former Director (1981-83) of the Federal Trade Commission's Bureau of Competition. This process has not, however, proceeded evenly. "What we now have," he observed, "is a patchwork of unchanged regulation, plus deregulation, partial deregulation, stalled deregulation, and even re-regulation."

There are thus some industries (and parts of industries) where government makes decisions on prices and outputs, and other industries (or parts thereof) where these determinations are made by the market, with the result that "each economic regime carries its own legal structure."

Domestic passenger airlines are the prime example of a deregulated industry, Campbell said. Partially regulated industries currently include telecommunications and financial institutions; trucking and television are in a state of stalled deregulation; while railroads appear to be on their way to re-regulation.

Campbell pointed out that in unregulated industries, where the market decides, "it is antitrust law that predominates—to prevent corruption of the market signals by accumulations of power in the hands of private firms, whether jointly or individually." Good antitrust law is thus an ally of deregulation, while poor antitrust law is its enemy.

Pressures for re-regulation may, Campbell said, occur when a newly deregulated industry discovers antiquated antitrust barriers to efficient operation (e.g., tying laws). Other reasons may be "to reduce problems for an industry not used to antitrust," or simply "the revival of the political forces whose pressure created regulation in the first place."

The panelists (left to right): *Baxter, Allison, White, Campbell, and Scholes*

The panel members were, he explained, chosen to provide illustrations of differing degrees of regulation, as well as to demonstrate "the difficulty of distinguishing true lacunae in the perfect operation of competition, from special pleadings of general economic argument for very private purposes."

Campbell then introduced the first panelist—Professor Baxter—whom he described as "the single most persistent and persuasive spokesman for deregulation in the first Reagan Administration."

Telecommunications

William F. Baxter
Wm. Benjamin Scott and Luna M. Scott Professor of Law

Professor Baxter—Assistant Attorney General in charge of the Department of Justice's Antitrust Division from 1981 to 1983 and a key participant in the AT&T divestiture—explained that "telephone service can be thought of as involving two bundles of assets, one relating to local calls, and another to long distance."

AT&T, he noted, traditionally operated across those lines, as "one nation, one system." The equipment used for local and long-distance calling was

linked. And rates charged for a given service were not closely related to actual costs of that specific service.

Local telephone service "is probably a natural monopoly," Baxter continued, mainly because of the high cost and low utilization of the wires that connect each individual phone to the local office. By contrast, long distance uses its cables and switches to their approximate capacity, so that the costs

Prof. Thomas Campbell

of long distance are proportionate to traffic volume. Hence, "a second or third company providing long-distance service does not uneconomically duplicate the facilities of the first, as a second local phone service would," he said. "Long distance is thus more appropriate an area for competition."

The seven regional companies formed as a result of the divestiture settlement are, according to Baxter, "working well." The situation with long-distance service is, however, problematical. "Other companies are being given equal access to the local network, but no longer at such a big discount," he said, "making their long-distance services less profitable." Allocating the very large fixed costs of the local phone network, which is done through levying 'access charges' on long-distance carriers, continues to be a challenge.

"There is still," Baxter said in closing, "some doubt as to how well divestiture is working in the long-distance area."

Telecommunications (cont.)

Paul H. White
Assistant General Counsel
Pacific Bell/Pacific Telesis Group

"Going through the recent AT&T divestiture was," White said, "like going through the world's largest divorce." Less sanguine than Professor Baxter about the situation of regional telephone companies, he charged that "AT&T made off with a disproportionately low part of the costs and a high part of the assets."

Divestiture has not released Pacific Telesis from regulation, he continued, but simply brought about "a change, and even increase, in regulators"—now including federal Judge Harold Greene, the FCC, State of California, and Congress.

One problem is that "California regulators are not willing to let all relevant costs be charged to the customer," White said. If they were, "the basic residential rate would be more like $20 a month than $8 a month."

White predicted that economic reasons may result in long-distance service going back to one main intercity service (AT&T). "Other companies are not proving that efficient. Unfortunately," he concluded, "what started as a sound theoretical move to deregulation won't, for practical political reasons and the economies of scale, be effectively realized—at least not in my lifetime."

Invited to respond, Prof. Baxter agreed with White on the uneconomic pricing of basic residential service—part, he pointed out, of "a complicated system of cross-subsidies" through which businesses, whose high telephone rates subsidize low residential rates, have to charge more for consumer goods. "Consumers," he pointed out, "end up paying for telephone service when they buy a loaf of bread."

Transportation

Thomas G. Allison
Preston, Thorgrimson, Ellis & Holman

Allison—formerly Chief Counsel of the Senate Commerce Committee and (during the Carter Administration) General Counsel of the U.S. Department of Transportation—stated that there are "important economic differences" among the three transport industries—trucking, airlines, and railroads—that have undergone deregulation in recent years.

Railroad deregulation was largely in response to economic woes, notably the bankruptcy in the early 1970s of Penn Central and seven other railroads.

The industry concentration and mergers that have followed deregulation cause some concern. Today, he said, "we have (with minor exceptions) six major railroad systems, three operating largely in the West and three in the East." Still unresolved is the question of Conrail, which if combined (as proposed) with Norfolk Southern, would compose the largest transportation company in North America. "Fears of market power that could be exercised by this combined entity are," Allison reports, "helping fuel the fires of re-regulation."

At this point, however, "railroad deregulation must be considered largely

successful," said Allison. "The specter of government ownership is no longer with us, and, for the most part, this industry has returned to health."

The trucking and airlines industries were, by contrast "in many cases far more profitable under a regulated scheme than they have so far been in an unregulated environment," Allison continued. "There was simply no reason to artificially protect them from price competition."

Initial fears that deregulation would cause a loss of service to small communities have been largely unrealized, he noted. But labor force compensation in both industries has, as predicted, fallen.

Nonetheless, competition in the trucking industry has indeed effectively lowered rates for shippers, Allison reports, and "there is a consensus that service has improved." He warned, however, that "a certain amount of collective rate making is still permitted within the industry, which might well produce non-competitive rates for shippers with low freight volumes."

The picture in the airlines industry is also mixed, he said. Two problem areas have emerged. The first involves the computer reservation systems on which travel agents (who account for over 80 percent of ticket sales) now rely. Two such systems, each owned by an airline, dominate the field. Though rules have been promulgated requiring that the systems display schedule and fare information impartially, complaints of bias and inaccuracy exist. Late last year, eleven air carriers filed an antitrust suit seeking damages and injunctive relief.

The second problem is carrier access to airports—many already overcrowded. To remove barriers to entry, Allison points out, "either supply must be increased or policies and procedures developed for fair allocation of the limited existing ground facilities and landing slots.

"It should come as no surprise," he concluded, "that the predominant issues after deregulation reflect antitrust concerns. Our experience so far strongly suggests that without antitrust vigilance and a clear federal policy on such issues as mergers and access, the benefits of competition envisioned by the architects of deregulation will not be preserved, and reregulation will be promoted."

Financial Institutions

Myron S. Scholes
Professor of Law and Frank E. Buck Professor of Finance (GSB)

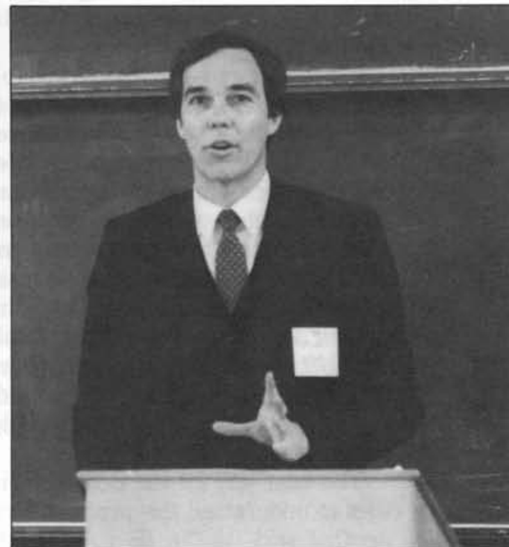
Professor Scholes cautioned against using "distributional purposes" like those cited above as a reason for regulation. If wealth transfers are desired, he said, taxes should be preferred, as "they interfere less with the market."

The financial services industry, he noted, has been undergoing broad adjustments under deregulation. Inefficiencies that flourished under regulation are now taking their toll, as evidenced by recent bank failures. Scholes does not, however, regard this shakeout as necessarily a bad thing.

A factor that continues to "distort the market," he pointed out, is "the presence of insurance. Why should bad managers be protected?"

In banking as in other industries, he concluded, "risk pricing is needed." □

Thomas Allison (above)



Prof. William Baxter (above)
Paul White (below)

Board of Visitors

THE ADMISSIONS 'GAME'

Jack H. Friedenthal
Associate Dean and George E. Osborne Professor of Law

Ronald J. Gilson
Professor of Law and Chair, Law School Admissions Committee

"This exercise is designed to take you inside the admissions process," began Associate Dean Friedenthal, who chaired the Law School Admissions Committee from 1979 to 1983. "It's not an easy thing—we have to arrive at a class of just 170 out of well over 3,000 applicants.

"We don't go simply by the numbers," he continued. The process begins with an initial screening by Dora Hjertberg, Director of Admissions. Hjertberg separates out both the least qualified applicants and those who are clearly superior (high LSAT, outstanding record, interesting outside activities), with the latter being referred directly to the Admissions Committee for action.

This leaves a large middle group—"not superstars, but good, solid, interesting applicants"—from which the rest of the class is selected. Approximately 50 such files are given out to each faculty member, who is asked to provide a written statement recommending four or five students who (focusing on aspects of their records other than grades and test scores), the faculty member would most like to have in a classroom. After these recommendations, the Committee begins a rolling admissions process.

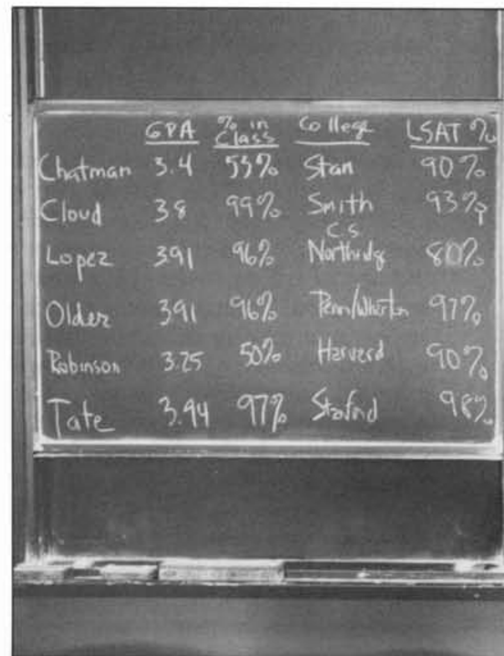
The best way for the Board of Visitors to understand this process, Friedenthal said, is "to do it." For this purpose, Dean Friedenthal and Professor Ronald J. Gilson (current chair of the Admissions Committee) had composed files—including LSAT scores, grade point averages, personal statements, and recommendations—for six hypothetical applicants. "We did make them up," Friedenthal said, "but they're not unusual or strange—they're the kind of files we see every year."

The hypothetical candidates may be roughly characterized as follows:

- Stanford graduate and legacy (father could become a generous donor); modest academic record; LSAT in the 90th percentile (below Stanford's median); a varsity tennis player with a yen to join the pro circuit; recommended heartily but without specifics by father's law partner.

- Assistant professor with degrees from Smith and Columbia (Ph.D.); brilliant academic record; LSAT in the 93rd percentile; rose from impoverished background; twice divorced, with two children; writes of frustration with sexism and academic snobbery; department chairman intimates she's a chronic malcontent.

- Chicano with almost straight-A average from a California state college; LSAT in the 80th percentile; considerable extracurricular work and volunteer experience in legal field; writes with simple eloquence of desire to be a leader; recommendation by professor indicates that he is diligent and participates (perhaps a bit too eagerly) in class discussions.

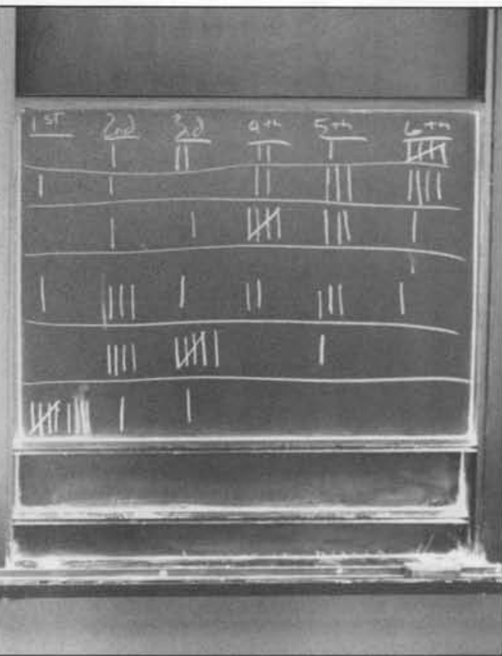


An 'admissions committee' discussion (left to right): *William Kroener '71, Douglas Jensen '67, Judge Cynthia Holcomb Hall '54, Lawrence Calof '69, and John Larson '62*

• University of Pennsylvania accounting major; virtual A average; LSAT way up in the 98th percentile; forthright about being a gay activist; university president recommends him highly, citing leadership in solving student government fiscal problems.

• Harvard woman graduate with less than outstanding grades; LSAT in the 90th percentile; black, middle-class background; very active in community self-help projects; warmly recommended by professor.

• Top Stanford graduate (3.94 average); a female, majoring in the demanding and mostly male field of computer sciences; outstanding LSAT score (98th percentile); recommending professor praised helpfulness to others as well as exceptional intellect; apparently no outside interests at all.



The members of the Board of Visitors were invited to break into small, committee-like groups, to discuss and collectively rank the files. "Look into your soul," Friedenthal urged. Ask, "Why did I make this decision?" "What kind of school do I want built?"

When the small groups reported back, their rankings of the files were found to differ widely (see blackboard tally)—a result that did not surprise Friedenthal and Gilson. "All of these students qualify," Friedenthal pointed out, "so the choices have to be made on other, more subjective grounds."

It could have gone either way (left to right): *Donald Mitchell (Hastings '66), George Coombe (Harvard '49), Roy Steyer (Yale '41), Teresa Lobdell '79, and Talbot Shelton (Harvard '40)*

The discussion that followed revealed some of the issues that shape admissions decision making. To wit:

Breadth vs. depth—are wonderful scores enough, or do we want diverse talents and interest?

Stanford links—how much should relationship to alumni/ae and/or donors count?

High grades at an easier school vs. moderate grades at a challenging school—how to weight?

Crusaders—spice in the broth or a royal pain?

Extracurricular achievers with moderate grades—untapped potential or academic risks?

"The records of some students do point in different directions," Gilson observed. "We could easily fill twice our entering class with people with high grades from challenging schools. It's hard to say no to them. But we need to consider balance and diversity, too."

He and Friedenthal, in commenting on the hypothetical files, brought up a number of balancing factors that get taken into consideration. For example, Chicano applicants, Friedenthal pointed out, "usually do not, because of geography, come from Harvard or Yale." Furthermore, said Gilson, "LSAT scores are skewed downwards for those from non-English-speaking homes."

In response to a comment that the hypothetical black applicant was from a middle-class rather than disadvantaged background, Friedenthal replied, "We don't have many ghetto whites, either."

And what of candidates with lifestyles, politics, or sexual preferences that the evaluator dislikes? A Board member answered: "If the person would be an admit *except* for that, he or she should be admitted."

"Our overall goal," Friedenthal said, "is to make up a *class*. So we look not only at academic record but also at a person's ability to contribute to discussion. As you can see, it's not easy. But we're pleased with the results. Speaking personally, I think our kids are terrific." □

Board of Visitors

SEVEN GRADUATES TALK ABOUT CAREER CHOICES, PUBLIC SERVICE, AND HUMAN VALUES

This session was conceived by members of the Board's Executive Committee to help students as they attempt to make career choices and are concerned about how those choices might affect their public and personal lives. Seven alumni/ae, representing a range of career choices and lifestyles, participated in a panel, which was followed by small-group discussions among students and Board members.

The alumni/ae panelists, explained moderator G. Williams Rutherford '50, were asked to address the following questions: 1) "How did I make my career decisions and how do I see these decisions now?" 2) "What has been my involvement in public service?" and 3) "How have these activities affected my ability to function as a human being?"

Alumni/ae panelists (left to right): *Norris '54, Friedman '56, Rutherford '50, Born '64* (hidden), *Mallery '63, Garcia '78, and Silverberg '55*

Hon. William A. Norris '54
U.S. Court of Appeals, Ninth Circuit
Los Angeles, California

"The legal profession," Judge Norris began, "really does offer a wide spectrum of opportunities for involvement in the community." Norris, for example, has held campaign posts in a number of state and national election campaigns, was four times a delegate to the national Democratic convention, served as a member of the California State Board of Education and the Board of Trustees of the California State Universities, was president of the Los Angeles Police Commission, and was the Democratic nominee in 1974 for California Attorney General. His proudest accomplishment, however, was "playing a leadership role in the establishment of the Museum of Contemporary Art in Los Angeles and serving as its founding president.

"Coming out of law school," he recalled, "I resisted the temptation to go to a structured, large firm and chose a small—in fact, tiny—firm. This, I think, gave me much more freedom to do other things with my life.

"My hardest decision," he confessed, "was to leave law practice in 1980 and accept the federal judgeship. I enjoyed practicing law—the challenge of litigation—and the firm" (Tuttle & Taylor of Los Angeles, where he had been since 1956). "I also enjoyed the freedom of action and, yes, the income of private practice.

"I always meant to do full-time public service," he continued, "but the judgeship was my first real opportunity." Being a judge has its rewards, he said. "You get to be an advocate for your own point of view. It also satisfies my yearning to be a legal scholar."

Judge Norris urged the students to "fight hard to be independent and do other things. There are trade-offs, but it can be done." And when you do get involved, he said, "Forget about being a lawyer representing commercial interests—forget about what the client might think about a position you might take publicly."

Norris regrets that "so *much* legal talent and energy is consumed by legal problems of larger corporations. I worry about the societal effects."

His parting words: "Fight being consumed by the practice of law."

Brooksley E. Born '64
Partner, Arnold & Porter
Washington, D.C.

"I have spent all my career in a single, large firm, and public service has always been a very important element in my practice," said Born. "There were two viable alternatives for me as a graduate: government service, which was traditionally open to women; and a law firm that seemed to be reaching out to women." The latter, she felt, was "the real frontier.

"I chose a firm with a commitment to public service," Born continued. "This was before *pro bono* programs were fashionable." Her initial public interest work was with indigent defendants in criminal and mental health proceedings.

The late 1960s and early '70s offered "new opportunities," she said. Born helped set up the Center for Law and Social Policy ("one of the first public interest law firms"), the Women's Legal Defense Fund ("an ACLU for sex discrimination matters"), and the *Selective Service Law Reporter* ("when a lot of young people across the country were getting into trouble with the selective service"). She has in addition taught law at Georgetown and Catholic Universities.

Born joined the American Bar Association in 1972 in order to "work from within the profession on behalf of women's rights." Within six months, she and several like-minded women lawyers had "persuaded ABA policymakers to support the ERA." She continued to work with the ABA to support legislation against sex discrimination.

"It's important to realize that whatever you go into," she said to the students in the audience, "there will be a lot of opportunities to do things in addition to what you are being paid for."

Born then turned to the "very significant problem" women have in combining law career with family. "More firms are recognizing that some modification of the normal career path for lawyers has to be made—that for certain periods women should not have to travel," she said. Born considers herself "lucky" in that Arnold & Porter allowed a "three-days-a-week program" while she had young children.

However, she pointed out, "there are some sacrifices in part-time work. You don't progress as fast. There are some kinds of cases you can't take"—particularly those that are lengthy, involve travel, or are late-nighters. "You also make big sacrifices in social life," she said. "But the rewards of having both career and family are enormous.

"I encourage you to combine public service with professional life," was her final advice. "It makes life much more satisfying."

Morton L. W. Friedman '56
Partner, Friedman, Collard, Poswall & Virga
Sacramento, California

Friedman became a trial lawyer "almost by chance," he said. Now a diplomate and past president of the American Society of Trial Advocates' Sacramento-San Joaquin Chapter, he advises students "not to be apprehensive about the chance factor—after all, marriage is a chance, too!"

Judge William Norris (above left): *"Fight being consumed by the practice of law."*
Brooksley Born (top right): *"Public service has always been a very important element in my practice."*
Morton Friedman (below right): *"You learn to utilize the tools of the legal profession to carry out your convictions."*

The practice of law, he continued, provides a broad spectrum. "You're making law, learning law, and doing law."

Friedman has made his career in a small firm in a relatively small town—a choice he urges graduating students to consider. "A small firm gives you an opportunity to excel and do many things much faster. And when the firm is in a small community, you can really feel the vibrance of what's transpiring."

He finds the range and variety of cases continually interesting. "One day you're doing an airplane crash and you're learning how to fly a plane. The next day, a medical malpractice case or a right-to-life lawsuit. Or you get into an unusual case like a class action involving disseminating ashes of the de-

ceased. Or you sue the NFL in a class action.

"Whatever you undertake," he said, "if you find it challenging—if you work hard, put your efforts into it—you'll find it very, very exciting."

Friedman admits to being "as excited about today's trial as about my first trial—though a little less nervous."

He finds time to teach occasional law seminars, hold bar association offices, and act as an arbitrator with the American Arbitration Association. "With the knowledge you gain in law school," he said, "you learn to utilize the tools of the legal profession to carry out your convictions."

Robert Garcia '78
Assistant United States Attorney
Southern District of New York
New York, New York

Garcia began his career with an emphasis on international litigation in a large firm—New York's Donovan Leisure Newton & Irvine—"just as the Iranian revolution happened, which led to the largest wave of such litigation in history."

At the same time, he pursued public service work, persuading the firm's *pro bono* committee "to have the firm get involved in death penalty cases" as defense counsel, working with the NAACP Legal Defense Fund, Inc., for death row inmates, even though the firm had no previous experience in that area.

After three years, he left to become an assistant United States attorney. "I wanted," he explained, "to learn more about criminal law and to see the criminal justice system from a prosecutor's perspective."

Another reason for the change was to learn how to try a case, something he had little opportunity for in a large firm. "The first trial I ever did was the first trial I ever saw," he admitted. "I may not be a great trial lawyer now, but there has been tremendous development."

He finds no conflict between his work and his opposition to capital punishment. There is, he pointed out, no viable federal death penalty at this time. But if that changed, he declared, "I would resign rather than seek a death sentence." And he continues "to work against the death penalty in other settings"—for example, as a member of the New York City Bar Association's Civil Rights Committee, which recently published a report urging private lawyers to volunteer to defend indigent death row inmates and which sponsored a training session for such lawyers.

"Society," Garcia said in closing, "needs public interest lawyers to shake things up."

Richard Mallery '63
Partner, Snell & Wilmer
Phoenix, Arizona

"I represent the American mainstream," Mallery said. "After law school, I took the road more traveled by—returned to my home state, married, joined a law firm, raised a family, and became involved in the community. Twenty years later—same wife, same law firm, same community, and four children of whom I'm quite proud. It's been a full life. I recommend it."

He admits to "a compulsive commitment" to public service. "I blame it on the nuns," he said, explaining that he "grew up in parochial schools planning to be a priest." He later entered the Methodist ministry and then taught English literature at Cornell, after which he entered law school.

Mallery praised "the marvelous diversity of practicing law." He considers himself "married to my community." His many extracurricular activities include: teaching law school at the University of Arizona ("you not only learn your subject for the first time, but also have a chance to give something back to your profession"); serving as trustee of the Heard Museum of Indian Art and Anthropology; chairing the Arizona Tomorrow project which published a major study of the future of the state ("lawyers have a chance to see the whole"); acting as the founding president of a new twin-theater performing arts center in Phoenix; and trying to establish an international business research center that ended with Mexico's economic collapse in 1982 ("those who risk accomplishing something also have magnificent disappointments and failures").

Despite these community activities, Mallery has been "actively involved in practice," including serving as a managing senior partner of a 135-lawyer firm. "You can," he emphasized, "engage in community activities and still keep commitments to your partners, your clients, and, above all, your family." (He makes a point of "being home for dinner no later than seven o'clock

Robert Garcia (top): *"Society needs public interest lawyers to shake things up."*

Richard Mallery (below): *"I consider myself married to my community."*

and reserving Sundays exclusively for family.")

"You don't have to choose among practice, teaching, business or public service," he concluded. "You can do them all!"

Charles D. Silverberg '55
Partner, Silverberg, Rosen, Leon & Behr
Los Angeles, California

"I regret never having *made* a career decision," Silverberg began. "But—even though I backed into it—I like what I'm doing. I'm very secure about my work."

His career, he said, is "really a natural extension of my upbringing." His lawyer father used to read him advance sheets. Silverberg ultimately went into practice with his father and, when he died, "gradually moved into his specialty of entertainment law."

In the "human values category," he warned, "your career does impact on personal life. I've had to make choices." One was in the "entertaining aspect" of his field. "Of course, I do spend some time with clients," he said. "But I made a decision that I was not going to do the Hollywood parties. I like to feel that clients come to me because of a sense that they're going to have good, strong, professional representation, not because they met me at a cocktail party."

Making time for your family is, he continued, "very important." For him the turning point came one weekend when he was working at home. His son, then about 6, came into his study and said: "Would you please come out and watch me—*it will just take a minute.*" Silverberg was stunned. "You can't hear something like that without knowing you're doing something wrong," he recalls. "I won't say I've made a dramatic change, but I did try to improve."

In dealing with the pressures of practice, Silverberg attempts "to make my own priorities—not simply respond to the clients who are the loudest screamers." He also uses "simple relaxation techniques" learned from his wife, a stress management expert.

Silverberg's community activities have included leadership as an officer and director of the San Fernando Valley Child Guidance Clinic; president of the San Fernando Valley Area Council of the Jewish Federation Council of Greater Los Angeles; and, this past year, chairman of the Law School's Board of Visitors. He also gets "a lot of satisfaction" out of weekly sessions recording casebooks for blind law students.

In addition, Silverberg serves as a neutral arbitrator with the Screen Actors Guild, the Directors Guild, and the American Arbitration Association—"a nice break, because I'm not fighting with anybody."

Silverberg ended with a quote from poet Robinson Jeffers: *A little too abstract. A little too wise. It is time for us to kiss the earth again.*

Charles Silverberg (above): *"I've had to make choices."*
G. Williams Rutherford (below): *"You can make all things fit together and be a human being."*

G. Williams Rutherford '50
Vice-President and Group Executive
Teledyne, Inc.
San Diego, California

"A lot of people make lousy career choices," observed Rutherford, "and this shows up in bad work. It's best to choose what makes you happy, and then you'll probably do good work and be creative."

A career executive, Rutherford joined Ryan Aeronautical Company (now a subsidiary of Teledyne) right out of law school. He is currently, in addition to his Teledyne positions, chairman of American Ecology, a company specializing in the disposal of radioactive waste.

To the question—"Can one lead a busy life and still help the community along?"—he replies, "You not only can, but you should.

"I've centered my efforts around education," he continued, specifically two Episcopal prep schools that were in difficulty. "I helped merge them, so there is now a single, very fine prep school [The Bishop's School in La Jolla], with 500 students and an endowment." He continues to serve as a Bishop's trustee, as well as being a member of the Law School's Board of Visitors executive committee.

But "make no mistake about it," he warned. "A career and a commitment to public service take an awful lot of time and a lot out of your personal life." His recommendations: "Don't spread yourself too thin. Tackle only projects you're really interested in and things that you are good at. If you discipline yourself to pay attention to those projects, you can get away with it. You also have to make the limited time you have with your family qualitative."

Bearing this in mind, Rutherford concluded, "You can make all things fit together and be a human being." □

Board of Visitors

SUMMARY AND ADVISORY SESSION

With hands upraised (left to right): *Morton Friedman '56, Robert Keller '58, and Charles Armstrong '67. Also shown are Rob Faisant '58* (at left), *Talbot Shelton (Harvard '40)* (foreground), *and Teresa Lobdell '79* (top right)

This final session of the annual Board of Visitors meeting, when the floor is traditionally thrown open to the members of the Board, was presided over by Board Chair Charles D. Silverberg '55.

The discussion initially focused on the meeting's program, with comments by Judge Pauline Davis Hanson '46 (who found the East Palo Alto Community Law Project tour "enjoyable—excellent"), Henry Wheeler '50 (who would welcome more opportunities—in addition to the summary session—for discussion and participation by Board members), David Eaton '61 (who appreciated "hearing the professors talking about real issues"), Robert Keller '58 (who enjoyed the Admissions 'Game' and "would like to see that kind of exercise done about other aspects of the School"), G. Williams Rutherford '50 (who found the small-group luncheons with students "just super—a very good way to get intercommunication"), and Peter Hughes '53 and Marsha Simms '77 (who favored additional opportunities to interact with students).

Alumni/ae Relations Director Elizabeth Lucchesi called the Board's attention to the School's two-year-old Meet the Alumni/ae program. "Students with summer jobs in a given city can ask to meet alumni in that city," she explained. "A large number of students have taken advantage of this opportunity."

"Can we find out about students coming to our area?" asked Douglas Jensen '67. "Sure," Lucchesi replied. "Just call my office, and I'll be happy to put people in touch."

Several Board members also brought up concerns expressed by students. Robert Garcia '78, for example, reported that some were not yet satisfied with the School's performance in the public service job area.

Dean Ely agreed that the School administration's considerable efforts do not seem to be acknowledged or heeded by most students. "I don't see what more, however, could be done," he said. "The information is being made available, and new loan programs developed to ease financial disincentives. The rest is up to them."

Malcolm Furbush '49 said that students he talked with seemed to have "no concept of public interest other than working for a public interest law firm." He would like to see the concept more broadly defined, to include "going out and getting the tools of the law, which can be utilized in any endeavor you find worthwhile." Dean Ely concurred heartily, adding that this is just what the School has been working to do.

Associate Dean Thomas McBride told of the "Lawyers at Work" booklet put together by the Career Services Office. The book, he explained, contains some 55 accounts by various alumni/ae of their career paths, including "many that blend public interest and private law work."

The School in addition holds an annual public interest law program for students. However, McBride acknowledged that there does seem to be in many students "an ideological tilt towards the traditional public interest law firm as the only way to do public interest law."

Roy Steyer commented that in his firm, private and public interest work are certainly not incompatible. Associates "have opportunities to take public interest cases at the same time as working at the law firm." Yet, he reported with regret, he got no questions about such opportunities from students. Dean Ely agreed that "they may see it as black and white."

Simms said some students in her luncheon group admitted that "peer opinion" had a lot to do with their decisions to go to large law firms.

Ann Casto '71 thought the School should "be sure to tell students that short-term corporate law plans don't necessarily mean long-term corporate law. Change is possible," she stated, pointing out that several members of the Board of Visitors have had significant changes in their careers.

Kristi Cotton Spence '81 commended the Admissions Committee for accepting more older students.

The fact that nearly 50 percent of the School's law students are now female brought congratulations from Brooksley Born '64. But what, she asked, is "the situation with the faculty?"

Dean Ely responded that we now have 3 women in a faculty of 37—one less, due to a departure, than the previous year. "We don't think that's enough," he said. "I'm with you. We're working on it. Certainly of the people we interview, half are women."

Morton Friedman '56 volunteered that he, for one, was "delighted" with the two-day meeting. "We have a hell of a good Dean, good faculty, and administration," he said. "We're very proud of Stanford as a law school."

"On that note," said Chairman Silverberg, "and because the time is right—we shall adjourn."

There followed the annual Marion Rice Kirkwood Moot Court final competition, this year presided over by U.S. Supreme Court Associate Justice Byron R. White, California Supreme Court Justice Stanley Mosk, and U.S. Ninth Circuit Court of Appeals Judge Betty Binns Fletcher (see School News section).

Closing Banquet

The evening banquet, which took place at the Faculty Club, included Moot Court participants as well as Board of Visitors members.

Justice White, in brief after-dinner remarks, referred to his several Stanford Law School connections, including one former clerk (Prof. Thomas Campbell) on the faculty, a recent graduate (Palma Strand '84) about to begin clerking for him, and —last but hardly least—a son (Charles Byron "Barney" White '78) as an alumnus of the School. Justice White also served from 1972 to 1974 as a member of the Board of Visitors.

Reflecting on changes in the Supreme Court over the past twenty years, he noted the great increase—from 100 to over 150 cases a year—in the Court's workload. "We can no longer hear all the cases we ought to hear," he said. "I'm one of those mavericks who thinks there should be more appellate capacity in the federal system."

It had been a thought-full meeting. Time then for the well-deserved pleasures of conversation and dancing that ended this, the Twenty-seventh Annual Meeting of the Law School's Board of Visitors. □

At the banquet (right): *Justice and Mrs. Byron R. White.* Below: *Marsha Simms '77, with Profs. Paul Goldstein and Robert Rabin*

BOARD OF VISITORS: 1984-85

Between sessions: Richard Guggenhime and Morris Doyle (both Harvard '32), . . .

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(Yale, LLB '41)
New York, New York

Nan J. Stockholm '81
San Francisco, California

Louise A. Sunderland '73
Chicago, Illinois

John A. Sutro, AB '26
(Harvard, LLB '29)
San Francisco, California

Arthur V. Toupin '49
San Francisco, California

Clyde E. Tritt '49
Los Angeles, California

... Gregory Payne '78 and Henry Wheeler '50

Harry L. Usher '64
New York, New York

Hon. John Van de Kamp '59
Los Angeles, California

†George L. Vargas '34
Reno, Nevada

John W. Weiser
(Harvard, LLB '59)
San Francisco, California

Henry Wheeler '50
Boston, Massachusetts

Charles Rice Wichman '52
Honolulu, Hawaii

Vaughn C. Williams '69
New York, New York

Richard H. Zahm '53
Pebble Beach, California

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† *Since deceased*

School NEWS

Commencement '85: A Fine Celebration

The School's annual celebration of achievement—the award ceremony following University commencement—took place June 16 in Kresge Auditorium.

The happy event opened with the traditional academic procession of deans and faculty robed in the colors of diverse alma maters (the most resplendent being Kirkwood Professor Emeritus Moffatt Hancock in his all-scarlet Dalhousie garb). The entrance of the Class of 1985, uniformly robed in black, was met with applause by proud family and friends.

After welcoming the standing-room-only crowd, Dean Ely announced the top academic achievers of the class: Daniel J. Bussel, Nathan Abbott Scholar for the highest cumulative grade point average (Bussel had also won both the First and Second Year Honors for the highest average at the end of his two previous years); and Laurence J. Stein, winner of the Urban A. Sontheimer Honor for the second highest cumulative average.

Seventeen graduates—Bussel, Stein, and the following—were elected to the Order of the Coif: Karen A. Curosh, Jordan D. Dale, Jordan D. Eth, Marc A. Fajer, David P. Hariton, Louis M. Lupin, John L. MacCarthy, James E. Parsons, John E. Place, Jr., Brent E. Rychener, Martin Wald (who was also president of the Law Review), Gordon K. Wright, Robert A. Zauzmer, Luther Zeigler, and John H. Zobel (also winner of the Frank

Before the procession *(left to right):* **Dean Ely, Assoc. Dean Friedenthal, and Profs. Borgersen, Girard, Weisberg (Hurlbut honoree), and Simon**

Abbott Scholar Dan Bussel

> "Many graduates seem to see private practice as *constrained* by its connection with worldly reality, in sad contrast to some higher, more rarified pursuits. Let me be personal and say this seems bizarre to someone who spent a decade in the liberal arts. The very worldliness of the matters lawyers must address can be *liberating*, not constraining. It means that lawyers have a privileged power to translate political and economic knowledge into action that can change institutions."
> *—Robert Weisberg ('79), Associate Professor and Hurlbut Award Recipient*

A family affair: with graduates Carol Lam and Jenny Van Le *(above),* **and Scott Talliaferro** *(right)*

PHOTOS BY JOHN SHERETZ

Baker Belcher Award for the best academic work in evidence).

Other 1985 graduates recognized for outstanding achievements included: Keith A. Kelly, winner of both the 1985 Faerie Mallory Engle Prize (for client counseling) and the 1984 Olaus and Adolph Murie Award (in environmental law); Michael R. Leslie, winner of the 1985 Murie Award; Leslie Ann Fithian, the 1985 Carl Mason Franklin Prize (international law); and Teresa D. Baer, co-winner of the 1984 Franklin Prize.

Class President Steven E. Dinkelspiel then presented the annual John Bingham Hurlbut Award for Excellence in Teaching, to Associate Professor Robert Weisberg, a 1979 graduate of the School and former teacher of English.

Weisberg spoke eloquently in his address of the role of lawyers in society ("paradoxical"), what drew him to law ("a sense of empowerment"), and the broad relevance of law (see excerpt).

In a brief *envoi*, Dean Ely urged each graduate to "start being your own person *now*. A lot of us," he continued, "put our dreams on the back burner and never get to them. You are part of a lucky minority that has some control over your lives. Take advantage of it." □

Rhode Promoted to Professor

Deborah L. Rhode became a full professor with tenure on July 1.

Educated at Yale (AB'74, JD'77), she joined the Stanford law faculty in 1978 after a clerkship with Supreme Court Associate Justice Thurgood Marshall. In 1984-85 she was a visiting professor at Harvard.

"Deborah Rhode has attracted attention and respect from scholars throughout the country," wrote Dean Ely in his report to the University Board of Trustees. "Her work in the study of the legal profession places her among the leading authorities on the subject."

Dean Ely also noted that Prof. Rhode is a highly productive scholar with "an extraordinary volume of published material for one of her age" (33).

Rhode's most recent publications include a book with Yale professor Geoffrey Hazard, *The Legal Profession: Responsibility and Regulation* (Foundation Press, 1985)—a subject she is exploring further in a casebook now in progress.

"The consistent theme that emerges from my research," she said in an interview last summer, "is that there are inherent problems in lawyers regulating lawyers. Professional organizations are not generally able to make dispassionate judgments where their own self-interest is at issue, and

(Continued on next page)

López Invited to Stay as Professor

Gerald (Jerry) López

Gerald P. López joined the faculty in June as a full professor, after serving in 1984-85 as visiting professor.

Previously a member of the UCLA law faculty, López holds degrees from the University of Southern California (BA'70) and Harvard (JD'74), where he has also been a visiting professor (1983-84).

His legal experience includes a clerkship with the Hon. Edward J. Schwartz, chief judge of the U.S. District Court in San Diego, and three years (1975-77) in private practice as a founding partner in Jones, Adler, Cázares & López of San Diego.

López began teaching in 1976, as an assistant professor at California Western University. In 1978 UCLA invited him to serve as visiting professor, and in 1984 named him a full professor.

He is currently involved in research and teaching on theories of lawyering, which he regards as "a seriously understated aspect of legal education."

He is also author of a landmark study of Mexican workers, "Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy," 28 *UCLA Law Review* 615 (1981). The most comprehensive of its kind, the work combines legal concepts with those of history, philosophy, anthropology, and economics.

"We expect him to make a special contribution to Stanford both as a scholar and a teacher," said Dean Ely. "He's *very* smart and *very* imaginative."

López, who was born in California and grew up in East Los Angeles, is already an active participant in the East Palo Alto Community Law Project and the Stanford Center for Chicano Research.

An innovative practitioner of "clinical" teaching techniques, López has created a new course—Lawyering Theory and Section 1983—that "teaches students to think of litigation as but one of many power strategies available to a civil rights client."

Another practical aspect of López's work on lawyering theory grows out of his effort to examine and elaborate what he calls "lay lawyering," a field in which he is a pioneer. "One of the purposes of exploring lay lawyering," he explains, "is

(Continued on next page)

School NEWS

Greely AB'74 Joins Faculty

Henry T. (Hank) Greely, a private practitioner from Los Angeles, has accepted a position as associate professor of law.

He comes to the School after four-plus years of civil litigation with Tuttle & Taylor, the last year as a partner of the firm.

Henry (Hank) Greely

Before going into private practice, Greely served in the Carter Administration, first with the Defense Department as special assistant to the general counsel, and then with the Energy Department as staff assistant to Secretary Charles W. Duncan, Jr.

A 1974 graduate of Stanford (AB, with distinction in political science), Greely studied law at Yale (JD'77). He clerked in 1978-79 for Supreme Court Justice Potter Stewart, following a year with Judge John Minor Wisdom of the U.S. Fifth Circuit Court of Appeals.

Greely's main teaching and research interests are natural resources law and regulatory law. Much of his recent practice, he explained in a summer interview, was spent "representing the Federal Savings and Loan Insurance Corporation in connection with takeovers of failing or failed savings and loans."

Greely is also intrigued with "the way government regulates industries not commonly perceived as regulated," examples being the defense industry (where the government is virtually the sole purchaser), medical services (where government funding is leading to operational requirements), and various natural resources (where government is an important supplier of raw materials).

He is delighted to be back at Stanford—"far and away my first choice for teaching." His wife, internist Laura Butcher, MD, has joined the Permanente Medical Group at Kaiser, San Jose. Greely, who grew up in Orange County, admits to being a "die-hard" fan of the California Angels. □

LÓPEZ (continued)

to establish that professional lawyering is neither as fancy nor as difficult as we may think—it's really just a variation of the problem solving that all people do day to day."

López and his students, through a new clinical course with field placements in East Palo Alto and San Jose, are developing "ways to teach lay persons how to extend their existing problem-solving skills and how to represent themselves and others in circumstances where the use of lawyers would be too costly." Readers interested in the theory underlying this work are referred to his article, "Lay Lawyering," 32 *UCLA Law Review* 1 (1984).

López is married to a fellow lawyer, Shelley E. Levine, who is serving a second year as teaching fellow at the School. They had their first child in June and live in San Francisco. □

RHODE (continued)

Deborah Rhode

nothing in the history of bar governance reveals it to be an exception." Rhode's view is that questions of admissions, discipline, competence, and formulation of ethical standards ought to be shifted to a "less parochial constituency."

Prof. Rhode's other research interest deals with equality and sex discrimination. She is currently finishing a book for the Harvard University Press on *Feminist Theory and Legal Thought*—an attempt, she explains, "to locate the evolution of sex discrimination legal doctrine against the broader background of the feminist movement."

Rhode was among the first women to attend Yale College, entering just one year after the formerly all-male institution became coeducational. She served as president of the varsity debate association, played varsity tennis, and graduated *summa cum laude*. As a law student, she was an editor of the *Yale Law Journal* and director of the moot court board.

In 1983 Rhode became the first female undergraduate of Yale to become a member of the Yale Corporation, the governing body of Yale University.

She is married to Yale Law classmate Ralph C. Cavanagh, an attorney for the Natural Resources Defense Council in San Francisco and former lecturer at both Stanford and Harvard law schools. □

Justice White Presides Over 'Hot' 1985 Moot Court Finals

"I'd like to congratulate the School on this program," said Supreme Court Justice Byron R. White at the conclusion May 3 of the Marion Rice Kirkwood Moot Court final round. "I've been a professional listener for twenty-three years—it helps when someone knows what they're talking about."

"A remarkably good job," agreed Justice Stanley Mosk of the California Supreme Court, another member of the panel. Mosk also complemented the Moot Court Board for "developing a very interesting case" (a fictional right-of-privacy suit against the federal government).

Further praise came from Judge Betty Binns Fletcher of the U.S. Court of Appeals for the Ninth Circuit. "This was a 'hot' court—we asked difficult questions," she said. "Each of the contestants knew the case backwards and forwards and were not flapped one bit."

Chief recipients of these accolades were the four finalists: Carole C. Cooke and Kirby A. Heller, both of the Class of 1985; and Matthew S. Greenberg and Susan L. Bernhardt, of the Class of 1986. The honors were split, with Cooke and Heller receiving the Kirkwood Award as best team of advocates, while Greenberg and Bernhardt received the Walter J. Cummings Award for best brief. The Cummings Award for best oral advocate went to Carole Cooke.

Others contributing to the success of the event were members of the Moot Court Board, co-chaired by Jordan D. Eth and Laurence J. Stein (both '85); the Moot Court Director, lecturer Lisa M. Pearson; and Assistant Dean for Student Affairs Margo D. Smith. All were honored guests that evening at the Board of Visitors' Faculty Club banquet. □

Honors all 'round

Teammates Bernhardt and Greenberg '86 *(left)* and Cooke and Heller '85 *(right)*, flank Moot Court Justices Fletcher, White *(center)*, and Mosk

Supreme Court Justice Byron R. White

PHOTOS BY JOHN SHERETZ

School
NEWS

Shirley Hufstedler '49 Speaks at Law Review Banquet

Former U.S. Secretary of Education Shirley M. Hufstedler was the featured speaker at the Stanford Law Review's annual banquet, held April 26 at Ming's of Palo Alto.

Outgoing Law Review President Martin Wald ('85) and incoming President Peter Blanck ('86) respectively toasted and roasted members of the Law Review's 37th Volume and Dean Ely and the faculty.

Wald then presented three graduating students with annual Law Review honors: Evan M. Tager, with the Board of Editors' Award, for outstanding editorial contributions; Ann Southworth, the Irving Hellman, Jr. Special Award, for best student note; and Paul S. Caselton, the United States Law Week Award, for exceptional service.

Thomas R. Hurtekant, representing the Dallas law firm of Johnson & Swanson, presented the firm's annual award to Heidi K. Hubbard ('86) and introduced last year's recipient, Carole C. Cooke ('85). The Johnson & Swanson Law Review Award recognizes the greatest overall contribution by a second-year Law Review member.

Dean Ely, in introducing Hufstedler, reviewed her distinguished career in and out of public service, beginning with her participation in founding the *Stanford Law Review* and including stints on the bench (the Ninth Circuit Court of Appeals, the California Court of Appeals, and the Los Angeles County Superior Court), with the federal administration (Carter's first Secretary of Education), at the Law School (Herman Phleger Visiting Professor and two terms on the Board of Visitors), and in private practice (most recently as a partner in the Los Angeles firm of Hufstedler, Miller, Carlson & Beardsley).

"Many of us have cyclical careers," noted Hufstedler. "It doesn't matter how you start out—you may find yourself coming around [to public service].

"Perhaps the most distinguished group who have engaged in public service are those who have moved in and out of government over a lifetime," said Hufstedler. "Warren Christopher ('49) and Cy Vance come to mind.

"These persons have, for one reason or another, become conspicuous—but remember that there are others who have done a great deal that many of you may not know about," Hufstedler observed, "for example, Fred Mielke ('49), who serves as a Trustee of Stanford, in addition to being chairman of the Pacific Gas & Electric Board of Trustees.

"I don't suggest that you give up the idea of a big law firm if that's what means something to you," Hufstedler continued. "But you are in charge of the upkeep of the social debt. You have the talent, the training and the obligation.

"We tend to think we deserve all of this because we're here. In fact, each of us owes a debt to everyone who came before.

"Believe me," Hufstedler concluded—"if you give back what you've received, you will create the opportunity for your own reward and that of others, which means you will have truly earned your seat at this banquet table." □

Albright Heads Career Services Office

Laurie Albright has been appointed Director of the School's Career Services Office. She replaces Gloria Pyszka, who resigned after seven years to accept a position at Stanford Medical School.

Albright held Career Services' number-two position of Recruitment Administrator for almost a year before being promoted to the directorship.

"I truly enjoy talking with all the bright, talented, energetic people in this School," says Albright. "It's a real honor to help them plan their careers."

"We're always interested in hearing from graduates," adds Albright, "whether they're seeking career information or sharing their knowledge of the legal profession."

She was previously Assistant Director of the Law School Placement Office at the University of San Francisco.

Albright attended the University of Nevada, where she earned a BA (1973), MA in Counseling (1974), and an Educational Specialist Certificate (1979). She is currently a doctoral candidate in Higher Education Administration at the University of San Francisco.

Laurie Albright

Albright and her husband Bruce Morely, a physicist at SRI International, tend a bountiful garden at their home in Redwood City. □

Student Musical Admits Humor to Law School

My Fair Lawyer—proof positive that law students do have a sense of humor—played to a full house in Kresge Auditorium April 28. Producer Gary M. Kaitz ('85), Director Jordan D. Dale ('85), and Head Writer Lauren Goldman ('86) adapted the musical satire from Lerner and Lowe's *My Fair Lady*. The story concerned the fate of two fictional first-year students—a Tennessee country bumpkin and an Ivy League frat boy—who came to the Law School as a result of an admissions-policy wager between Professor Tom Heller and Associate Dean Jack Friedenthal.

Music Director John Place ('85) contributed many memorable numbers, including "I Could Have Talked All Class" and "On the Hall Where You Live" (featuring Professor John Merryman on piano). Cameo appearances were made by Professors Barbara Babcock and Robert Weisberg (as themselves), then-visiting Professor Morris ("Cowboy") Arnold, and Associate Dean Tom ("Professor Queensfield") McBride. □

They could have sung all night *(left to right)*: Ellen Brady ('86), Juli Farris ('87), Bonnie Eskenazi ('85), and Meg Spencer ('85).

Happy 90th, Professor Turrentine

Lowell Turrentine, Marion Rice Kirkwood Professor Emeritus, celebrated his ninetieth birthday in September—at an office party. His awesome vigor became evident some twenty-five years ago, when he followed his official Stanford retirement at 65 with three years as a visiting professor (at the law schools of Louisiana State University and Tulane University). Now of counsel to the Palo Alto firm of Keogh, Marer & Flicker, he continues to impress colleagues with his unquenchable spirit and enduring perspicacity.

Professor Emeritus Lowell Turrentine recently found himself up against the D.A.'s office. The police had arrested a young man on his eighteenth birthday for burglarizing a restaurant on El Camino. As his prospects grew dimmer, the father appealed to Prof. Turrentine. Turrentine heard the young man's story, interviewed his companions, and—camera in hand—inspected the restaurant. Convinced of his client's innocence, Turrentine visited the assistant district attorney. The case was dismissed and the defendant exonerated.

Though delighted with this foray into criminal law, Prof. Turrentine is more likely to be found writing wills. His practice is no longer as active as a decade ago, but he visits his office at Keogh, Marer & Flicker two or three times a week. In addition he answers legal questions almost daily for fellow residents of Channing House (a local retirement community he joined in 1976). As he wryly put it in an interview: "That's the kind of law that everyone gets to practice if it's known he doesn't charge anything."

Lowell Turrentine

PHOTO BY ED SOUZA

Professor Turrentine is impressed by the more formal pro bono work represented by the East Palo Alto Community Law Project—"a very important public service and excellent training for the law students involved" (though—ever the professor—he hopes that participating students won't neglect their course work).

Turrentine's recollection of his own student days (at Harvard) constitute a vote for the Socratic method. "My first year of law school was a most thrilling experience," he says. "Here was a real challenge, and men of exceptional ability conducting classes with a fire and a zip—and sometimes quite a bit of humor—that I found quite delightful."

Graduating in 1922, Turrentine spent five years in private practice. He has vivid memories of the 1924 Teapot Dome trial in Cheyenne, Wyoming (then a one-hotel town), where he served as assistant to the U.S. special counsel. Turrentine also wrote the respondent's brief for the Chili Copper Company case, heard in 1927 by the U.S. Supreme Court, where he sat at the counsel table facing a bench still including Justice Oliver Wendell Holmes.

Turrentine returned to Harvard in 1928, earning an S.J.D. in 1929, after which he came west to Stanford. Here for thirty-three years,

(Continued on next page)

School NEWS

Cummins Gift Supports Public Interest Jobs Program

The School's new Public Interest Low Income Protection Plan has received initial funding of $200,000 from the Cummins Engine Foundation of Columbus, Indiana.

The gift supports the program, announced in November 1984, to encourage graduating students to consider jobs in the public interest, public service field (*Stanford Lawyer*, Spring 1985, p. 29).

"This plan is very close to my heart," said Dean Ely, in response to the Cummins gift. "It has been a high priority of my deanship to try to remove some of the financial disincentives to public interest work."

The program initially extends new, interest-free loans to help eligible graduates meet monthly payments on their accumulated educational debts while working in relatively low-paying public interest jobs. Until now, many new graduates have said they felt compelled by their debts (sometimes as high as $40,000) to consider only high-paid corporate law positions with private firms.

However, the greatest benefit for participating graduates is the program's loan forgiveness feature. A substantial portion—depending on how long the graduate stays in public service, and at what salary level—of his or her loan may not have to be repaid.

"A big problem in the private sector is people whose perspectives are limited," commented Cummins trustee Michael Walsh (AB'64), who is also a member of the Stanford Board of Trustees. "Public service work at an early and important time in your life is one of the best ways to build an understanding of society and develop leadership abilities."

Walsh, executive vice-president of the Cummins Engine Company, began his professional career with San Diego Defenders, Inc. (as Dean Ely had three years earlier) and subsequently served as U.S. Attorney for the Southern District of California.

The Cummins Foundation trustees hope their gift will encourage donations by others. "Our gift really amounts to seed money," Walsh said. "More funding will be needed to make the program permanent." □

How do you commemorate a forty-year career encompassing posts at nine different law schools, eight books, an assistant deanship, and four endowed chairs? Why, with *another* chair, of course! Faculty colleagues of Professor Howard Williams selected one bearing the Stanford seal, to which a brass plaque was affixed that reads:

Howard Williams

Holder of the Following Distinguished Chairs

Dwight Chair	*Columbia University Law School*	*1959*
Thomson Chair	*Univ. of Colorado Law School*	*1963*
Lillick Chair	*Stanford Law School*	*1968*
Paradise Chair	*Stanford Law School*	*1983*
This Chair	*Stanford Law School*	*1985*

TURRENTINE (continued)

he shepherded generations of students through Wills, Trusts, Future Interests, Legal Ethics and other courses. His many legal writings included the book, *Cases and Text on Wills and Administration* (2d ed., 1962).

Not one to dwell in the past, Turrentine amazes and delights aquaintances with his interest in developing fields. He recommended to me a recent book on linguistics. "I'm not a great reader," he remarked, "but I've always been interested in languages." With a little prodding, I discovered that he had left college with four, picked up Swedish in his forties, and has to his credit the translation of a book on German industrial exports.

Turrentine also stays up to date on high energy physics and theories of relativity, which he often discusses with a friend, physicist Jean Lebacqz of the Stanford Linear Accelerator Center (SLAC).

Looking back on his many years as professor, Turrentine modestly remarked, "I've been the recipient of good fortune far beyond what I deserved." Those of us who have known him as teacher or friend know that we have too. □

—*Susan Mann ('88)*

Faculty Notes

Thomas J. Campbell testified before the House Judiciary Committee, April 25, on bills concerning hostile take-overs. In other recent presentations, he gave a speech honoring U.S. Circuit Judge George E. MacKinnon to an en banc session of the U.S. Court of Appeals, D.C. Circuit; spoke on "The Supreme Court" at a Stanford Alumni Association event; and, in two Los Angeles appearances, presented a seminar—"Title 7 and Statistical Proof"—at a Stanford Law and Economics Program, and spoke on "Monopolies, Acquisitions, and Joint Ventures" at a Practicing Law Institute. Campbell was also recently appointed to the council of the American Bar Association's Antitrust Section.

Mauro Cappelletti spent the past year as a fellow at the Center for Advanced Study in the Behavioral Sciences, working both on a monograph on "Phenomenology of Justice in Modern Societies," and on two Ford Foundation-sponsored projects directed by him: "Integration Through Law: Europe and the American Federal Experience"; and "Dimensions of Justice: Constitutional and Transnational Protection of Human Rights." On April 25 he delivered the 1985 Pope John XXIII Lecture at the Catholic University of America, entitled "Repudiating Montesquieu? The Expansion and Legitimacy of 'Constitutional Justice'." He traveled to Lund, Sweden in June for the biennial congress of the International Association of Procedural Law, of which he is president.

John Ely is the Chair of the Association of American Law Schools' newly created Special Committee on Placement, which has been charged with examining whether the law placement process has adverse effects on legal education (early student obsession with jobs, intrusion of interviews and "fly-backs," the effect of opulent inducements on student values, etc.) and if so, whether there is a role to be played by the AALS in correcting the situation. The other members of the committee are Professors Alison Anderson of UCLA and Abram Chayes of Harvard, Deans Kenneth Penegar of Tennessee and Norman Redlich of NYU, and Associate Dean Stephen T. Yandle of Yale.

Marc A. Franklin was panelist last May on "Westmoreland and CBS: The Fallout," before the Academy of Television Arts and Sciences in Los Angeles. In April he made a presentation on proposed changes in libel law to the San Francisco chapter of the Society of Professional Journalists. The summer quarter was spent in Oxford teaching a course, "Anglo-American Legal Perspectives," to fifty Stanford undergraduates in the Stanford-in-Britain Law Focus program. In July, in London, he took part in a panel on differences between American and English libel law.

Jack H. Friedenthal has, in addition to his new responsibilities as Associate Dean for Academic Affairs, just ushered into print a text entitled *The Law of Evidence* (coauthored with Michael Singer '81). This "non-case casebook," he explains, contains "hypotheticals, developed over the past ten years, to promote discussion of crucial issues in Evidence." (Close readers may recognize plots from grand opera—long a source of inspiration for the dean.)

Paul Goldstein saw the second edition of his *Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance* published this July by Foundation Press. That same month, he testified before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, in connection with its oversight hearings on the Copyright Royalty Tribunal.

Robert Gordon visited Florida State University College of Law in March, to present their 1985 Mason Ladd Lecture, on the subject, "Unfreezing Legal Reality: Critical Approaches to Law." At Duke Law School, in April, he spoke on "Competing Views of Professionalism in Legal Education." And in May, at a Stanford History Department lecture, his subject was "The Weber Thesis: Law in the Development of Capitalism." His February Oliver Wendell Holmes lectures at Harvard Law School are the basis of the article beginning on page 2.

William B. Gould IV spoke on American labor law February 23 at The Future of Industrial Relations Conference held at the University of California Institute of Industrial Relations, and on May 11 at a Stanford Alumni Association program. Japanese labor law was his subject at a Conference on Japanese Labor Management Relations held March 29 at Columbia University. He has also recently spoken on wrongful discharge litigation and legislation before several groups, including the Northern California Association of Law Libraries (in Sacramento); the New Directions for Industrial Relations conference at McGill University (Montreal); the Industrial Relations Conference for the Department of Energy (Denver); the Rhode Island Industrial Relations Research Association (Warwick, R.I.); and also the University of Connecticut Law School (Storrs). He also addressed the Coalition of Black Trade Unionists' Fourteenth Annual Convention, May 26 in Philadelphia, on black trade unions in South Africa.

Thomas Grey presented a paper ("actually a fictional case about a will, written in verse") at a University of Southern California Law School Symposium on Law and Theories of Interpreta-

tion. The work, titled "The Hermeneutics File," was published in the January 1985 *Southern California Law Review*. A second paper, "The Constitution as Scripture" (first presented in 1984 at Columbia and Yale legal theory workshops) appeared in the November 1985 *Stanford Law Review*. Last February Grey taught a two-day course in jurisprudence, under the auspices of the California Council on Judicial Education and Research, to about twenty California trial court judges.

Gerald Gunther is on leave this academic year, primarily to work on his biography of Judge Learned Hand. He testified in July at the House Judiciary Committee's first hearings on the problems of limiting a constitutional convention. Last spring, while completing the processing of the eleventh edition of his *Constitutional Law* text, he lectured in March as part of the Enrichment Series of George Washington Law School; conducted a Center for the Study of Democratic Institutions seminar in April on congressional control of federal court jurisdiction (to be published in the *Center Magazine*); was a featured speaker, also in April, at a conference on the theme of Equality and the Constitution, at California State University, San Bernadino; was again featured in May at the Annual Conference of the U.S. Court of Appeals for the D.C. Circuit, where he commented on problems of Supreme Court developments and judicial appointments; and participated in June in a program at the Annual Conference of the U.S. Court of Appeals for the Fourth Circuit. Gunther was also a panelist at the annual meetings of the Association of American Law Schools (on the forthcoming Bicentennial of the Constitution) and of the American Political Science Association (on the writing of judicial biography).

J.E. Moffatt Hancock, Marion Rice Kirkwood Professor Emeritus, has seen his 1984 book, *Studies in Modern Choice of Law*, lauded in a review essay in the March 1985 *California Law Review*. "His work provides a fresh approach to law theory," declared UC-Berkeley Professor Herma Hill Kay, praising Hancock's approach of analyzing the content of conflicting laws rather than artificial issues of classification. "Modern writers," she declared, "ignore Hancock at their peril."

Thomas Heller was on leave last spring, spending five weeks as a visiting professor at the European University Institute, in Florence, and eight weeks in Rio de Janeiro working on issues concerning international competition in high technology industries. He became director in September of Stanford's Overseas Studies Program and continues to teach Law School courses on taxation and multinational investment.

J. Myron Jacobstein has had published the third edition of his *Fundamentals of Legal Research* (coauthored with Prof. Roy Mersky of the University of Texas)—now the most widely used textbook in legal bibliography.

John Kaplan was the commencement speaker and recipient of an honorary LL.D. degree (his second) June l8 at the University of Puget Sound, in Tacoma, Washington.

John Henry Merryman has been appointed a Guggenheim Fellow for 1985-86, to write a book on cultural property. He spoke in April to Bay Area alumni/ae at a San Francisco Law Society gathering, on the topic, "Unspeakable Practices and Unnatural Acts in the Art World." Later that month, Merryman was in Geneva, Switzerland as *orateur* (invited paper-giver) at the Colloquium on the International Trade in Art, jointly sponsored by the International Chamber of Commerce and the University of Geneva.

A. Mitchell Polinsky has been awarded a Hoover National Policy Fellowship to study the law and economics of punitive damages, while on sabbatical this year. Last March, he participated in a conference at the Keystone Center in Colorado, on reforming U.S. products liability law. In July, he testified before the U.S. Senate Judiciary Committee about a bill providing for individual damage responsibility among joint antitrust defendants. His 1983 book, *An Introduction to Law and Economics*, recently appeared in a Spanish translation.

Robert Rabin spoke at an American Bar Association conference on critical issues in tort law last May in Lexington, Kentucky. In July he was a panelist in a discussion of tort law developments, held in Washington, D.C. by the ABA Section of Corporation, Banking and Business Law. Environmental law was the subject of a panel he moderated in San Diego in June, at the annual Law and Society meeting. Rabin has articles coming out in current issues of the *Stanford Law Review, Journal of Legal Studies*, and *Wisconsin Law Review*.

Byron Sher was one of the top five pro-environment California state legislators in 1984, according to a study released in April 1985 by the California League of Conservation Voters. Sher, who is now chairman of the Assembly Natural Resources Committee, received a l00 percent rating from the League.

Michael Wald has recently completed a study, soon to appear as a book, of the impact of foster care on abused/neglected children. Also scheduled for publication is a paper (coauthored with Sophie Cohen and Ellen Gray) on "Prevention of Child Abuse." In May Wald conducted a two-day training course for the Arizona Department of Economic Security, on "Future Directions for the Child Welfare System." □

Alumni/ae GATHERINGS

THE American Bar Association Annual Meeting in London this year was the occasion for a reception July 7, organized by 1980 graduates Cynthia Lewis Beck and Ron Beck, in the boardroom and terrace garden of the Time & Life Building on New Bond Street. Ralph M. Parsons Professor Kenneth Scott and Charles A. Beardsley Professor William B. Gould were there, as were over 50 alums.

Considerably nearer to home was the School's luncheon September 30, in San Diego, during the annual **California State Bar Meeting**. Dean Ely provided an update on developments at the Law School, after which Deborah Rhode (whose appointment to a full professorship is reported in the School News section) spoke on the sensitive topic of "Regulating the Legal Profession."

The annual **Washington State Law Society** barbecue took place July 12 at the lakeside home of Colleen and George Willoughby ('58). The shirt-sleeve affair drew summer clerks and newcomers to the area, as well as established local alumni/ae.

Associate Dean Barbara Dray ('72) was the Society's guest speaker at a breakfast September 12 in conjunction with the Washington State Bar meeting. Dray, who practiced in Seattle for several years, was introduced by Tom Price ('78), the Society's new president.

Stanford Women Lawyers organized two events this summer, one each in Southern and Northern California. On August 8 they co-sponsored with the **San Francisco Law Society** a reception welcoming summer clerks and students newly admitted to the School. And on August 17, a similar group got together in Los Angeles. Among other accomplishments, the group could point to the publication last May of the first Stanford Women Lawyers newsletter. SWL co-chairs Christine Curtis and Patricia Cutler (both '71) were its instigators and editors.

The **Meet-the-Alumni/ae** program had its busiest season since its inception three summers ago, with over 150 students taking part. Through the good offices of the School's Alumni/ae Relations staff, graduates in cities throughout the country met (usually over lunch) with law students temporarily employed in their area. Cities represented included not only the usual clerkship locations but also Honolulu, Detroit, Seattle, Philadelphia, Minneapolis, Albuquerque, Hartford, San Diego, Boston, Baltimore, Portland, Denver, and Dallas. (For information, call 415 497-2730.) □

At the State Bar gathering: *Prof. Deborah Rhode (left) addresses SLS alumni/ae; and Dean Ely (below, left) visits with Dixon Q. Dern '53 and Edgar A. Luce, Jr. '48.*

STATE OF THE SCHOOL

(Continued from page 24)

dent-created East Palo Alto Community Law Project is a very gratifying development. And undoubtedly many of our current students—like many of our graduates—will end up pursuing "mixed careers," settling into what is basically a corporate practice but using it as a base for some public interest work. [*See alumni/ae panel, page 30.*]

However, the buck-passing persists—in fact it is intensifying—and it suggests that I, and we, are failing in the moral aspect of the education we are supposed to be providing. So on this one, we're falling short. It's my greatest disappointment as Dean.

Financing a student's legal education

How are individual students supposed to finance their educations? This is a crisis question that educators everywhere have to face. And as you know, it's a problem that is worsening. We've tried to help in a couple of ways.

Independence policy: We're the first major law school (Harvard has since followed suit) to liberalize the definition of "emancipation." We used to presume that *all* our students received support from their parents. This led to some heart-rending cases of 30-year-olds who hadn't in fact received support from their parents in years; this School, like others, would attribute their parents' wealth to them and say, "Sorry, no scholarship." We now regard students as financially emancipated after three years of independence.

Shift to loans: The theory here, which you've heard me talk about, is that what we get back we can use to help others. We've therefore shifted from scholarships to loans as the principal component of our financial aid package—but only as far as we felt we could in good conscience. Humanity demands some kind of ceiling on indebtedness, which we've set at $35,000. But that in turn creates a need for more scholarship funds, especially with the simultaneous problems of rising costs and falling government support.

Student aid monies: I'm happy to report that we're doing quite well in raising funds both for loans and for scholarships. In fact this is the most successful of our several development initiatives. We recently received a quite unexpected grant from Hong Kong banker General S.K. Yee, which will generate $100,000 a year in perpetuity for scholarships. And our national scholarship drive headed by Rod Hills '55 is off to a good start, including gifts of full scholarships from Rod and Carla themselves, and from Anheuser-Busch. In addition, classes approaching (and a few that have passed) their twenty-five year reunions are being asked to establish scholarship funds, and some are already on their way.

Law, science, and technology program

Our goal here has been, since my arrival, to raise an endowed chair as the focus for developing a program in law and technology. We now have in place a committee to help us seek funding—comprising John Freidenrich '63, Brad Jeffries '55, John Larson '62, and Larry Sonsini (Boalt '66). Although we're off to a slower start on this than we should be—the School's fault, surely not the committee's—there's a compelling logic about the enterprise that should carry us forward.

Alumni/ae Relations

Generally I think we're doing quite well in communicating with graduates of the School. We've certainly worked hard at it. The *Stanford Lawyer*, I think, is much improved in this regard. I also have personally visited alumni/ae in a variety of places: Portland, Seattle, Oakland, Phoenix, Denver, Boston, Sacramento, Fresno, and Bakersfield, as well as what had been the more routine stops of San Francisco, the Peninsula, Los Angeles, Orange County, San Diego, Washington, D.C., and New York.

Tangible measures of our relations with alumni/ae include turnout at the annual reunion weekend, which reached a new high last fall, especially at the final banquet. (The new Award of Merit probably helped, but of course that was one of the points.)

Law Fund giving by alumni/ae is also up, though overall the general Law Fund total stayed about even with last year. We—George Sears '52, Kate Godfrey, and myself—focused on alumni/ae giving (you may remember my letter last fall), with what we feel are encouraging results. Participation by alums went up from 31.6 to 34.0 percent, and the dollar amount of gifts from graduates went up by 10 percent. What went down were corporation and foundation dollars, which means we need to pay more attention on those fronts.

Conclusion

Thus there's certainly room for improvement on several fronts (particularly with respect to some of our development initiatives). But overall it's a report card we should all be proud of. Stanford Law School is perceived by faculty members (here and elsewhere) as a uniquely pleasant and exciting place to be, and by students as perhaps not so exciting, but certainly very pleasant, and a place where you can get a terrific education. Since this is the core mission, we should feel pretty good about our School. □

LAWYERS AS 'ARISTOCRACY'

(Continued from page 7)

While our aid should never be withheld from the injured or accused, let it be remembered, that all our duties are not concentrated in conducting an appeal to the law;—that we are not only lawyers, but citizens and men;—that our clients are not always the best judges of their own interests,—and that having confided these interests to our hands, it is for us to advise to that course, which will best conduce to their permanent benefit, not merely as solitary individuals, but as men connected with society by enduring ties.[7]

A Legacy of Achievement

The Republican Vision—on the one hand so exalted and yet on the other, tinged with self-serving rationalizations—was bound to fall short of realization. But it is useful to remember what an astonishing amount the people who believed in it actually accomplished.

A short list would have to include: (1) the triumph of the idea of the Constitution as law and acceptance of the institution of judicial review; (2) the whole nationalizing and vested-rights defining corpus of the Marshall Court, clearly the joint work-product of the justices and the small group of regulars at the Supreme Court Bar; (3) Webster's amazing success in promoting Law and the Constitution as culturally unifying symbols of nationhood; (4) the legal profession's continued domination, without serious rivals, of political officeholding; (5) by default, the assumption by state courts and their coteries of leading advocates of the major share of responsibility in defining and enforcing the ground-rules of property rights and exchange rules, and in supervising corporations; (6) a large body of law reports and treatises interpreting them; (7) a respectable start on modern legal education, with the revival of Harvard under Story and Greenleaf; and (8) retention of control—despite Jacksonian attacks on professional privilege and demolition of formal entry barriers—of access to the upper echelons of law practice and judicial office.

Yet there's no question that by the time of Tocqueville's visit in the mid-1830s, many of the Federalist-Whig lawyers had begun to think that the project of making lawyers into the universal class had run into deep trouble. The project continued to founder for a number of good historical reasons [elaborated at length in the original version of these lectures]: the less than lofty actualities of the conditions of law study and practice, a major split in the profession over the slavery issue, a decline in respect for oratory per se, the increasing profitability of private practice over public service, growing ties between lawyers and the corporations—all culminating in a virtual revolt by a large part of the bar against the Federalist-Whig vision of the lawyer's role. As New York law reformer David Dudley Field put it (while attacking vestiges of the statutory fee structure):

We cannot perceive the rights of the state, to interfere between citizens, and fix the compensation, which one of them shall receive from another, for his skill or labor . . . If it be said, that the attorney is an officer, admitted by the courts, and therefore in a position different from the others, we answer, that he is not a public officer, chosen to perform public duties. He is admitted to practice in the courts, for private purposes, and on behalf of private persons. He is in every respect, a private agent . . . Freedom of industry is one of the strongest demands of the time.[8]

The collapse of the vision was, so it would appear, complete.

Yet the vision had not in fact collapsed at all, but was on its way to becoming institutionalized in the professional culture of the late nineteenth century. The lawyers of that period constructed the modern institutional forms of the professions' elite: bar associations; university law schools; large specialized law firms; legal, political, and civil-service reform organizations; and finally the bureaucracies of the regulatory state. Though mixed motives underlay these movements, predominant among them was the bar's desire to reconstitute itself as a Third Force in society, sufficiently independent both of its corporate clients and of democratic politicians to be able to mediate between them and to restrain the excesses of both. In the process, lawyers would resurrect, in the vocations of the bureaucratic statesman and the counselor to corporate managements, the republican vision of their Federalist-Whig predecessors; and they would have the same experience of disillusion and decline.

[The original lectures at this point go on to describe in detail the accomplishments and failures of this "Progressive" vision of public-interest lawyering. This excerpt, however, now skips to the conclusion.]

The Modern Fate of the Republican Ideal

What then of the present? Is the republican conception that lawyers in their ordinary private practices can and should act as public servants and statesmen a hopeless anachronism? Or does it hold out still some possibilities, however modest, of reality?

As I said at the outset, the ideal is still invoked, but mostly vaguely and rhetorically, rather than in connection with any practical program. In fact, it's when somebody proposes to give the tradition substantive content that you hear all the arguments for why it's obsolete, inappropriate, and futile. I want now to raise and try to respond to some of these disabling arguments.

• "There's no chance in my practice to realize any kind of political values—Federalist, Progressive, or Zoroastrian; it just isn't that kind of practice. Some of it is just ritual paper-pushing

or filling in blanks on boilerplate. Increasingly we do transactions rather than counselling anyway: house counsel spreads the fragments of a deal around to various outside lawyers for technical execution; and we have no idea of how our fragment fits into the client's business plans as a whole."

This is a powerful argument; and it may be that the lawyer committed to republican values in such a situation has no alternative but to leave it—perhaps indeed for an inside counsel's situation, where there may be a better chance to evaluate transactions in context and to exercise some judgment. But even this may concede too much to the argument: ritual and boilerplate may simply represent routinized practices that can be critically examined, reformed, or abolished. And lawyers don't have to accept definitions of their role that limit their capacity to exercise judgment. Most tax lawyers of any reputation, for example, won't comply with a request to narrow their advice to an estimate of audit risk; and some won't give a cursory opinion even if that's all that's wanted and paid for.

• "It's not appropriate for lawyers to bring to bear an autonomous judgment or try to exercise autonomous influence: the only function of the lawyer is to advance his client's interests within the constraints of the law."

This has been answered many times (see, for example, William Simon's "Ideology of Advocacy"),[9] but the gist of the answer is that the "hard" boundaries of the lawyer's role are actually very mushy. The client's "interests" are indeterminate because a corporation is not monolithic: it has indefinite long-term as well as short-term profit-maximization objectives; it has levels, divisions, and staff people pursuing different objectives; and it is composed of people whose conceptions of their company's true interests may be shaped and transformed by, among other things, conversations with their lawyers. The "law" is also indeterminate when one factors in leeways in interpretation: the possibility of unsettling current conventional interpretations (turning "easy" cases into "hard" ones by making a fight of it); of creating factual complexity out of the client's situation, of choosing between advising compliance even when the risk of detection *is* slight, and advising simply that the risk of detection is slight. When one hears lawyers say that they just apply the "law" (a hard objective thing), or that when they find a loophole in the statute they can assume that's the "law" because Congress must have "intended" all possible loopholes—one can hardly suppose such arguments are meant to be taken seriously.

Furthermore, we as lawyers cannot escape influencing, by how we construct the situation, the client's *interests* and their application to the "law." Denying this is just another way of saying: whatever the influence, we don't want to analyze it. But though we may refuse to analyze the effect of our professional culture, we can't refuse to have an effect! Even if we adopted the purest positivism—advising clients to do anything they are likely to get away with—we would be participating in the construction of a certain kind of culture, in this case a culture of terrifying normlessness. Whatever we advise, we are helping to realize in society a distinctive set of conventional understandings of a legal-regulatory scheme, with a distinctive set of social effects, as contrasted to some other set of interpretations and effects that we could instead be helping to realize. The agnostic view that we should have *no opinion* about what we are doing simply acquiesces by default in whatever happens to be going on.

• "But the only alternative to the agnostic view is to believe in something, and who are we to impose 'our' values on the situation? Who knows what's good? Who knows what the social effects of our advice, in the aggregate, will be?"

To this heartfelt cry, the historical traditions I have been discussing tried to provide a quite specific answer: that to know the Law was to know its immanent purposes. The problem is that, for many if not most of us, history has left us bereft of any confident knowledge of the purposes of the law. The political economists of both right and left have finished us off by reducing our purported universal, "the purposes of the law," to a chaos of conflicting particulars. Judgment and influence may be inescapable, but they are also terrifying; no wonder we avoid them.

This argument, though, has never struck me as the clincher it's supposed to be. I can't see why it would be worse to impose "my" deliberately reflected-on views on the client's situation than to impose without any reflection at all the current conventional view, whatever it may be. It takes extreme modesty about the worth of one's chosen actions to believe that unchosen ones, however arbitrary in their effects, must be better—or else an amazingly complacent commitment to the rather loony invisible-hand argument that unreflectively self-interested actions must always cancel each other out in the best possible way.

• "Actually the problem with exercising autonomous judgment is that we feel caught in a tough web of constraints: those of the social field of practice through which law is transmitted—the expectations of partners, their shared understandings with clients and regulators, their opinions about what's appropriate behavior (what is or isn't 'sound,' 'reasonable,' 'realistic,' and the like)—all backed by social sanctions so powerful that it's futile to think about trying to change it."

In other words, there *is* a professional culture; it forms a system; the system ties in with other systems (the business system, the regulatory system); and they all buttress each other. This makes any thoughts we might have of trying to influence any piece of that culture pretty hopeless.

Sometimes there follows the further disabling argument that makes illegitimate, as well as futile, any attempt by participants to change the system.

• "You've bought into the system and accepted its rewards. Acquiescence comes with the contract: to be in a position of elite influence is to renounce the exercise of that influence on any other terms but those of the people who have given you the position. To attack and try to alter the system, you must be outside the system, give up its privileges, and sacrifice yourself to the Franciscan vocation."

There are two fallacies here. One is the fallacy of the purity of intentions and the aspirations for a wholly authentic self. I celebrate—we all must celebrate—those who choose self-sacrifice and the Franciscan vocation; but it's absurd to suppose that if we are somewhat compromised, we must therefore be totally paralyzed.

The other is the fallacy of reification: there *is* in fact no system, save as we and others like us create one through acquiescence. The history I've been recounting is of people who refused to acquiesce, who went about building new systems. That's presumably why they interest us.

The Modest Relevance of the Ideal

Is there anything left of the core concept of activist lawyering as a politically aware project of connecting the interpretation and application of the law to republican values and working to diffuse such values through society?

First, I think it's obvious that the demand for public-regarding roles is still around. The opportunity to represent justice in civil society is still the reason many people seek legal careers. And there's still demand from the clients' side as well: from the business executives, for example, who want to think of themselves as law-abiding and socially responsible; and from their environmental or safety divisions, which want the lawyer's help in backing up their compliance programs. Indeed there has been a strong revival of republican rhetoric recently around the newfound prospect of using in-house counsel as corporate superegos, using their insight into legal purposes to generate constraining and socially integrating norms. The problem isn't some quantitative lack of idealism: it's in finding ways to mobilize and pilot that energy into practical tasks, without insisting that lawyers make sacrifices that most people can't be expected to make.

What if anything can history—this history—contribute to the task? Not a great deal, obviously; it's a task mainly for practitioners themselves. But history can perhaps help us reclaim, as lawyers, our connection to a political tradition, some pieces of which are worth preserving—in particular its conception of professionalism. "Professionalism" has come to suggest insulation from politics, painstaking devotion to the details of craft and procedure, neutrality in judgment. But to the Federalist lawyers who made the Revolution and administered the early Republic, and the Progressive lawyers who built and staffed the regulatory state, the essence of professionalism was political and social commitment and the infusion of that commitment into all one's practice activities.

Some may argue that the tradition is "elitist." One must be careful not to convert this into the common disabling argument that one should never try to change anything if one is a member of an elite group, since that would be to impose one's elite views on others. It is fair to say that one of the persistent illusions of the elite lawyers in the tradition I've been describing was the notion that their crowd, "the best men," had some specially privileged claim to articulate the ideals of legality for the society as a whole. (In fact the leaders of the great legalist movements of our own time—the New Deal and the black civil rights movement—were staffed by many lawyers who were hardly members of the Establishment.)

In mining the historical tradition, one does, of course, have to avoid the vein that sees lawyers, because of their curatorship of law, as exclusive oracles of public values. On the other hand, I think it would be a mistake to dismiss all claims for law and lawyers as important *articulators* of such values. The best part of the tradition in my view is the *teaching and empowering* role—the use of public speaking and the popular press to bring complex aspects of government home to lay understanding, for the purpose of enabling the citizens to rule. Furthermore, the discourse of law, unlike most others available, does for all its well-known limitations at least provide a rich vocabulary—richer by far (because of its appeals to morality, equity, social reciprocity, trust, tradition, and community, as well as to efficiency) than the principal competing vocabulary of economics—for the common discussion of public values.

Yet I think the strongest argument for lawyers' self-consciously trying to develop and act on a political view of their practices ultimately rests, not on any special virtue or expertise they may claim, but simply on their special situation—the fact that they occupy (as Tocqueville pointed out) positions all over civil society from which they *can* exert some influence.

The serious objections to such an enterprise are that the constraints of the social field are too strong; as a practical matter, lawyers can't break away without being marginalized as mavericks and losing their influence. And that, conservatizing and restricting as the existing professional constraints may be, they do provide lawyers with some independence and room for autonomous judgement; if lawyers start substituting their "own" politics, they will lose all defenses to being simply submerged in their clients.

Both these objections point to the same solution: the need for groups of lawyers to take collective action to build up countervailing cultures and institutions—meeting groups of associates, factions of law faculties, public-interest law firms, little enclaves within bureaucracies, sections of the bar associations—in which they can discuss with each other the work they do and how they can push, in Michael Oakeshott's words, for "the amendment of existing arrangements by ex-

ploring and pursuing what is intimated in them."[10]

It has been done before. History tells us of many failures, but a lot of successes too—some awful warnings in the successes and some inspiration in the failures. Purposes may not inhere in the law, but lawyers working together can help create cultures of common purposes. If it helps them to do so, they can reflect, with perfect accuracy and only the faintest irony, that political conspiracies aimed at recapturing their profession's sense of virtue are among the great traditions of the bar. □

Footnotes

1. Alexis de Tocqueville, *Democracy in America*, J. P. Mayer, ed. (1969), 268.

2. Gallatin, A., quoted in George W. Pierson, *Tocqueville and Beaumont in America* (1938), 139.

3. R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Republic* (1985), 85.

4. Tocqueville, *supra*, 270.

5. Robert Ferguson, *Law and Letters in American Culture* (Harvard, 1984), 17.

6. Rufus Choate, "The Positions and Functions of the Bar" (1845).

7. Simon Greenleaf, "Inaugural discourse as Royall Professor" (1834).

8. D.D. Field, *First Report of Commissioners on Practice & Pleading* (1848).

9. William Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics," 1978 *Wis. L. Rev.* 28.

10. Michael Oakeshott, *Rationalism in Politics* (1962), 123.

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SOBLEN TRIALS

(Continued from page 20)

line. Simultaneously the Israeli government announced that if Dr. Soblen were placed on an Israeli aircraft, it would be ordered to return him to Israel.

On August 8, the *Times* of London announced that the political counsellor of the United States Embassy had requested that the British government return Dr. Soblen to the United States.

Three days later, the English issued a fourth order that El Al remove Dr. Soblen from England on El Al Flight 265, destined for New York. This deportation order was made under Article 20(2)(b), authorizing deportation for the "public good." In response, El Al advised the British government that it had canceled Flight 265.

The next day, the British announced yet another deportation order, under Articles 20(2)(b) and 21(1), directing Dr. Soblen's deportation in "the public good" and "on board any ship or aircraft which is about to leave the United Kingdom."

This led to Dr. Soblen's second application for a writ on the ground that a deportation order could not direct an airline to return a national to his or any other particular country, and that the offense of Dr. Soblen, being political in nature, was non-extraditable by reason of Section 3(1) of the Extradition Act of 1870. The application was granted by Mr. Justice Stephenson in the Vacation Court.

Dr. Soblen's counsel then requested the Treasury (*i.e.*, the Home Office's counsel) to confirm the report that the United States had made a diplomatic request with respect to Dr. Soblen. Treasury Counsel admitted that the U.S. had made "representations," but refused to disclose their contents. When Soblen's counsel subpoenaed the Home Secretary to produce the United States request, the government responded by a claim of Crown privilege, asserting that the "disclosure would be injurious to good diplomatic relations."

Both the court of original jurisdiction (the Vacation Court) and the Court of Appeals (Lord Denning, M.R. Donovan and Lord Pearson) upheld the validity of the deportation order, finding that it was indeed a deportation order, not an extradition order. They ruled that if the government's *purpose* were to respond to the United States government's request, the order would be illegal, but that such a purpose could not be found in the *effect* of the order, which made the United States Dr. Soblen's destination. The Appeals Court also held that the assertion of Crown privilege under the state secrets doctrine was a valid bar to disclosure of the actual representations by the United States government.

In this second phase of the litigation, Dr. Soblen's counsel had attacked the application of the Alien Order of 1953 as ultra vires because it was not supported by statute. He also argued that Soblen had a right to be heard on "whether it was conducive to the public good to order his deportation." He lost on both points.

The main issue, however, was very much like that which would have been posed to the Israeli High Court—was this in fact an extradition or a deportation? They agreed with counsel that Soblen's offense was not an extraditable offense, and that therefore extradition would be unlawful. Whether Soblen's expulsion would be a lawful deportation or an unlawful extradition depended, Justice Denning wrote, on the purpose for which the act is done. If, he stated, "the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful; but if his purpose was to deport him to his own country because he considered his presence here to be not conducive to the public good, then his action is lawful."

Justice Denning recognized that the United States had made representations to the government, and that "we do not know whether the Home Sec-

retary was influenced by the representation." Nonetheless, he said, he could only conclude that the purpose of the Home Secretary was to refuse the applicant leave to land because "in his opinion the presence of the applicant in this country was not conducive to the public good."[3]

The opinion certainly obscures the distinction between deportation and extradition. A deportation is the expulsion of an alien from the country. An extradition is a delivery to the foreign country that has requested him. The failure to recognize this distinction would render extradition laws and extradition treaties meaningless, particularly those that prohibit extradition for political offenses.

It is true that the statute authorizes the Home Secretary to select the means of departure, but this clearly is for the purpose of ensuring prompt removal from the country, not to determine the destination. Where, as here, Czechoslovakia was prepared to receive Dr. Soblen—and even Israel would have done so if Dr. Soblen were placed on an El Al airplane—it is doubtful that the statute authorized the Secretary to designate any other destination.

Secondly, to treat the Home Secretary's purpose as divorced from the demands of the United States is to move into abstraction, if not unreality. The Home Secretary can decide it is for the public good to get rid of an alien; it is doubtful that the public good requires that the alien be returned to the United States, particularly since here, as in Israel, the relevant statute must be read in conjunction with the Extradition Law.

His appeals exhausted, Dr. Soblen was removed from the Brixton Prison hospital by British authorities for transportation to the airport, where a Pan Am plane was to return him to the United States. He fell into a coma—evidently caused by a large self-administered dose of barbiturates—and died a few days later in an English hospital.

Aftermath and Reflections

It is ironic that all three countries involved in a sense betrayed their basic traditions: the United States, which had an unparalleled record among nations for the protection of the rights of defendants in criminal cases; Israel, in turning its back upon a Jew with clear roots in that community and whose offense, if any, was of a purely political character; and Great Britain, in disregarding its historic availability for aliens, particularly those charged with political offenses. Their actions were a natural result of the anti-Communist mood of the period and of the dread of atomic espionage. The actions of Israel and Great Britain were undoubtedly also a response to the power of the United States.

The legacy in the United States of the Soblen conspiracy trial has, I believe, been mainly unfortunate. The Soblen precedent, because of the amorphous nature of the "agreement" between the conspirators, extended the concept of conspiracy in our federal system. The case has in addition been cited for the admissibility of pre- and post-indictment conduct of the defendant and *co-conspirators* in a criminal case.

The outcome in England has also been in the direction of affirming the Soblen precedent, in that more precise British legislation was enacted to ensure the Home Secretary's power to repeat the actions taken in Dr. Soblen's case. The case also, but to less effect, stimulated considerable scholarly literature, principally under the heading of "disguised extradition."

The Israel case, by contrast, resulted in some amelioration of the Israeli laws of deportation. Today, as a result of regulations adapted by the Minister of the Interior because of the Soblen case, there can be no deportation until three days after the service of an order for deportation, with notice that the detainee may institute proceedings for judicial relief. □

Footnotes

1. United States v. Soblen, 301 F.2d 236 (2d Cir. 1962), *cert. denied,* 370 U.S. 944 (1962).

2. United States v. Russo and Ellsberg (C.D. Cal. No. 9373-WMB-CD [unreported opinion]).

3. *All England Law Reports* [1962] All E.R. 661.

LETTERS

PROFESSOR Franklin ["The Trouble with Libel Law," Spring 1985] makes some interesting observations and draws some conclusions which, I suggest, are subject to challenge. One of the turning points in libel law (as Prof. Franklin notes) was the 1964 decision in *Times v. Sullivan*, which imposed upon "public figure" plaintiffs an almost insurmountable burden of proof. But the same case clothed reporters and broadcasters with a blanket of security which has fostered a widespread disregard for the virtues of accuracy and responsibility.

When Sam Thurman taught torts (ante *Times v. Sullivan*) "Truth," when published without malice, was an adequate defense; and prompt retraction and apology would usually compensate for inadvertent error. But reporters were schooled to be extremely accurate and to specifically attribute any matters of opinion. One has but to read the editorial pages of newspapers of the 18th and 19th century to marvel at the bitterness and the vicious language that was almost standard in a partisan press. But libel actions did not result, for two possible reasons: (1) There was great respect for the First Amendment right to express opinion (however wrong); or (2) Public figures (particularly) recognized that the influence of editors was in inverse ratio to the extravagance of their vitriol. A measure of damages was almost impossible to prove.

Perhaps the idea of punitive awards is inappropriate, but there must be some method to compel reporters and editors (print and electronic) to adopt a high regard for accuracy and fairness of access. Perhaps the problem will solve itself as sloppy reporting so damages the reputation of specific media that even the award of Pulitzer Prizes does not rehabilitate. The (apocryphal?) story attributed to Mark Twain comes to mind. The editor threatened to write a scathing attack and was met with the reply, "You just go right ahead and do that. I can *walk* outside your circulation in fifteen minutes."

The use by the media of unidentified (and, in the minds of many, "non-existent") sources for damaging quotations just must be curbed if media are to continue to have any modicum of respectability. *Times v. Sullivan* has been used so widely as a shield for irresponsibility that the attitude of juries which give ridiculously large awards is understandable.

Ernest L. Newton ('49)
Greensboro, N.C.

Coming EVENTS

1986		
	APRIL 17-18	**Board of Visitors Annual Meeting.** At Stanford.
	MAY 2	**Marion Rice Kirkwood Moot Court Finals.** Presiding judge, The Hon. Richard A. Posner, U.S. Court of Appeals, Seventh Circuit. In Kresge Auditorium, Stanford.
	OCTOBER 24-25	**Alumni/ae Weekend 1986.** With reunions for the classes with years ending in -1 and -6. At Stanford.

For information on these and other events, call (415) 497-2730.

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