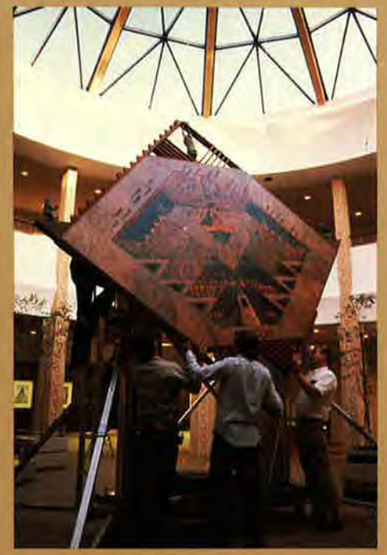
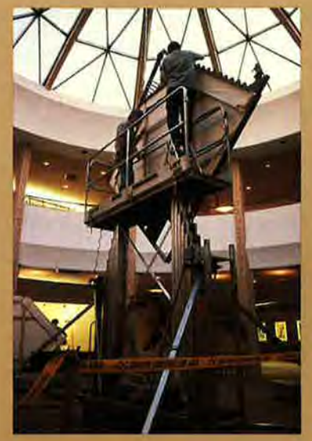
Arizona State University
College of Law

LAW FORUM

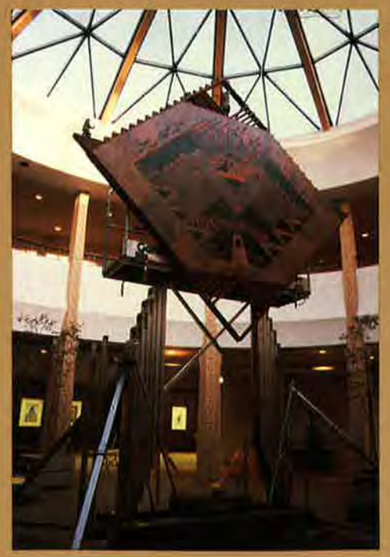
SPRING 1989





The cover of this issue is a photo of "Temple of the Spirits," a two-sided mural by Hopi architect/artist Dennis Numkena. The oil painting was commissioned by the College to hang in the school's rotunda, and graces the recently renovated and expanded building.

The artist's description of the painting, which is hung on the diagonal, is printed here with photos taken as the 8′ × 8′ painting was being suspended.

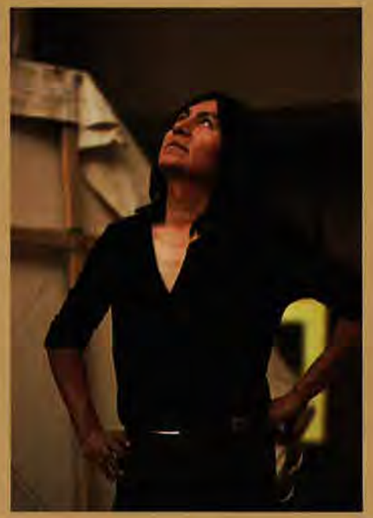


"Temple of the Spirits:

The visionary Anasazi people of years ago dedicated their lives to living Life at its fullest against all odds. Harsh environmental conditions and prophecy predicated that worship and respect of Mother Earth be an important ingredient of Life. As a Hopi architect/artist and a descendant of the Anasazi, here is my concept of what might be possible if life continued to be amongst the majestic cliffs of Canyon de Chelly, Chaco Canyon, Mesa Verde and other sites throughout the Four Corners area.

The west mural depicts the kiva with its interior partially viewable where ceremonies are held. Leaders of the village held counsel within the sacred chamber along with saying prayers.

The east mural depicts the exterior of communal life, a combination of dwellings next to the ceremonial chambers. The cylindrically-shaped elements with wood



ladders are ceremonial chambers called kivas which are typically underground but here are presented as part of an overall expression of the kind of architecture I visualize it to be if the Anasazi civilization had continued to exist.

The carved cottonwood figures are the keepers of the "Temple of the Spirits."

Numkena — 1988

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ARIZONA STATE UNIVERSITY COLLEGE OF LAW

THE LAW FORUM SPRING 1989 VOL. 13, NO. 1

In This Issue . . .

Law Forum takes a look at the flurry of activity which occurred in the College of Law during 1988, and highlights some of the more memorable. The year was a difficult one for the State of Arizona, with the impeachment of its governor and the change in state leadership. The issues being decided in the state and in the nation were reflected in the activities of the Law School. Air pollution, the death penalty, and English as the official state language are some of the topics addressed at the College and featured here. The gubernatorial impeachment process, which consumed the Arizona legislature and its constituents for months, also found its way to the College. Dean Paul Bender, Associate Dean Jonathan Rose, and Professors Gary Lowenthal and Joe Feller were called upon continuously to give scholarly interpretations to the media. Dean Bender appeared six times on the PBS program "Horizon" to discuss aspects of the proceedings, and Professor Feller wrote an extensive article that spring, which is reprinted here.

Also included are pictorial highlights of the 1988 Annual Dinner held in the spring, and the building dedication ceremony which it followed. No year would be complete without graduation, and this issue looks at the ceremony that took place in 1988.

Lastly, the issue contains the Annual Report of Giving for the 1987-88 academic year. Levels of giving decreased in 1987 as a result of the October crash but private support from alumni and friends this year is encouraging, and we remain optimistic that the school will receive the support it so badly needs.

I extend my personal thanks to all who contributed to this issue, and to all who so generously support this institution.

Kathy Neitzel, Editor

Staff

Editor: Kathy Neitzel

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The *Law Forum* is published semiannually for alumni and friends of Arizona State University College of Law.

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Letter from the Dean

As most of you know, this is the last issue of the *Forum* to go to press during my tenure as Dean; I will step down from that position (after five years) at the end of the 1988-89 academic year. This seems a good time to review the major developments at the law school during the past five years, as well as to mention principal challenges that may face the school in the immediate future.

The most visible accomplishment of the past five years has undoubtedly been the planning and construction of a 17,500 square foot addition to the law school building, accompanied by a thorough refurbishing of the original Armstrong Hall. We now have a warm and functional environment, with adequate office space, a new student lounge, carpeted and refurnished classrooms and seminar rooms, enlarged space for the law school clinic and student organizations, etc. Through the generosity of Jim Bialac and Jack and Suzanne Brown, the enlarged building displays a wonderful art collection; the Rotunda is dominated by a major work by Hopi artist Dennis Numkena that gives focus to the entire building.

The accomplishment of which I am most proud is the development of extraordinary diversity and excellence in our student body. About 30% of the class that will enter in the Fall of 1989 will be comprised of members of minority groups (about three times the percentage of minorities in U.S. law schools generally), and over 40% will be women. This will be a truly national class, with about 40% of the members coming from outside of Arizona. At the same time, the academic achievements of these students are outstanding: the average student will have scored within the top 15% of the nation on the LSAT test and have an undergraduate point average of about 3.5. We've shown, I think, that affirmative action *does* work; the result is a wonderful increase in the intellectual life of the school at all levels.

Our success in admissions has been made possible by the creation of a separate admissions office, headed by a full-time Admissions Director. This is part of a general professionalizing of the law school staff. We now have full-time professional Placement and Development Directors as well, and a separate student services staff, headed by Assistant Dean Chris Smith. The law school is, I believe, uniquely "user friendly" within the vast and bureaucratic ASU campus.

Significant curricular evolution has occurred during the past five years. With support through the Brewer Professorship of Trial Advocacy, we have expanded our trial practice offerings in response to sharply increased demand. Support from the Arizona Bar Foundation has permitted the creation of two new clinical programs — one a community based clinic and the other operated in conjunction with our new Capital Representation Project. We have instituted a Perspectives course requirement in the first year that encourages the development of thinking about the law through courses such as legal writing, jurisprudence and law and social change. The first year legal writing program has been successfully restructured utilizing a full-time director and hands-on instruction by highly talented third-year students.

In the co-curricular area, the Law Journal has been reorganized to provide a core of third-year officer-editors who devote full time to the Journal and give it a center of intellectual gravity that makes the experience of Journal membership much more rewarding. Our moot-court program has been enormously successful. We have won two national titles in the last two years and have seen a large increase in the number of students who get involved in our increasing number of challenging intra-school competitions.

Perhaps our most innovative substantive development has come in the area of Native American law. We have been very fortunate in having Leigh Price with us for the last three years on sabbatical from the Federal Environmental Protection Agency, where he has specialized in Indian matters. Leigh has begun a number of innovations that have developed into a full-fledged Indian Law Program adopted by the faculty last year. Through this program we have become the center of tribal-court judicial education in Arizona, the site of an ongoing series of conferences on Indian Law issues, and the focus of interaction between tribal governments and state and federal officials. We have substantially increased our Native American student population (four Indian students graduated last year and at least six will be in the incoming class), placed student externs with a number of tribal courts and governments (including several who have served as law clerks with the Navajo Supreme Court) and started a Tribal Court Reporter project.

Eight new members have joined the tenure-track faculty during the last four years — Jane Aiken, Mark Hall, Douglas Blaze, James Weinstein, Robert Suggs, Bonnie Tucker, Betsy Grey and Joseph Feller. These are all extraordinary bright, active and productive people with a deep interest in teaching and involvement in the issues of the day. As they have joined the faculty the school has increasingly become an active part in the legal community, contributing to it and drawing from it in equal measure. At the same time, outside financial support for the college has multiplied greatly. That support was about $100,000.00 per year five years ago; we now receive over $500,000.00 each year in gifts from firms, alumni and other private donors and in foundation and other grants to support specific programs.

The principal tangible challenge now facing the school is the need to begin construction on a new library. A fund-raising campaign to raise the necessary $2,000,000.00 in private funds has started promisingly (with over $600,000.00 pledged in the first few months) but there is still some way to go. In my view, however, an intangible challenge exists that is even more formidable. That is the challenge — facing all law schools at the present time; to integrate more *professional* education and involvement in current issues into the curriculum, without sacrificing the traditional analytic core of American legal education that has been so successful in the development of the profession, and without abandoning the role of law schools as the source of new ideas and legal principles. I have really enjoyed my role in prodding the law school toward these ends during the last five years, and hope that I have been able to make some useful contribution to the development of the institution.

With Very Best Regards,

Paul Bender
Dean and Professor of Law

Impeachment and Trial in Arizona: Some Key Issues

Joseph M. Feller

Under Article VIII, part 2, of the Arizona Constitution, the Governor and other state executive and judicial officers may be impeached by a majority vote of the state House of Representatives. An impeached official is then tried in the state Senate, with the Chief Justice of the Arizona Supreme Court presiding over the trial. Conviction, which requires a two-thirds vote of the Senate, subjects the convicted official to "removal from office and disqualification to hold any office of honor, trust, or profit in the State."

The recent impeachment and impending trial of the Governor of Arizona has brought these constitutional provisions, rarely invoked in the past, to center stage in Arizona government. This article briefly discusses five issues that are likely to arise in the upcoming trial. While these issues are not the only unsettled ones concerning the impeachment process in Arizona, they are of central interest and importance because they require consideration of the nature and purposes of the process. The issues are: (1) What are impeachable offenses? (2) May an official be impeached and tried for acts he committed before assuming office? (3) Is the trial a criminal proceeding? (4) What is the standard of proof? (5) Should the Arizona Rules of Evidence be applied in the trial?

In addressing these questions, I have relied on Arizona materials where possible. Beyond the text of the Arizona Constitution, however, such materials concerning impeachment are extremely sparse. Therefore, I have by necessity also made substantial use of materials concerning impeachment under the federal Constitution, whose impeachment provisions closely resemble those of Arizona, and on materials concerning impeachment in other states, many of which also have constitutional provisions for impeachment very similar to Arizona's.

1. Impeachable Offenses

Article VIII of Arizona's Constitution provides that state officials shall be liable to impeachment for high crimes, misdemeanors, or malfeasance in office." "High crimes and misdemeanors" is the same phrase used in the federal Constitution; "malfeasance in office" is found in a number of state constitutions — including those of Utah, Washington, and Wyoming — but not in the federal Constitution.

The narrowest interpretation given the phrase "high crimes and misdemeanors" as used in the federal institution is that it encompasses only those offenses that are indictable as crimes under criminal statutes.[1] Whatever the merits of this minority view in the federal sphere, such a narrow construction of the impeachment power in Arizona is clearly excluded by the addition of the phrase "malfeasance in office."

The more prevalent view of the phrase "high crimes and misdemeanors" is that it includes serious abuses of official power, whether or not such abuses are crimes under the ordinary criminal law.[2] As the Supreme Court of Texas has stated:

> Impeachment . . . was designed, primarily, to reach those in high places guilty of official delinquencies or maladministration. It was settled that the wrongs justifying impeachment need not be statutory offenses or common-law offenses, or even offenses against any positive law. Generally speaking, they are designated as high crimes and misdemeanors; which in effect, meant nothing more than grave official wrongs.[3]

Such an inclusive view is justified because a public official, especially a judge or a high executive, has powers not granted an ordinary citizen. Misuse of those powers constitutes a unique class of offenses, not necessarily covered by the ordinary criminal law, that the impeachment power is designed to reach. For example, an official who uses the powers of his office for personal gain at the expense of the public good should be subject to impeachment, whether or not he has violated any criminal laws.

Just as an impeachable offense need not be an ordinary crime, not all crimes committed by government officials are impeachable offenses. As with non-criminal offenses, the legislature must decide whether a crime that an official may have committed is sufficiently serious to prove him unfit to continue in office. A crime that is also an abuse of an official's power and public trust would present the strongest case for impeachment. There are also, however, some ordinary crimes — murder, for example — that are so serious as to render the offender's continuation in office intolerable even though the crime be unrelated to the powers and duties of the office.[4] Thus, a definition of "high crimes and misdemeanors" might be abuses of power and public trust, or crimes, that are so serious as to render an official's continuance in office intolerable to the sensibilities of those he purports to serve."

It remains to address the import of the additional words "malfeasance in office" in the Arizona Constitution. It is

interesting to note that a similar term, "maladministration," was considered by the federal Constitutional Convention as a possible ground for impeachment. The phrase was rejected after Madison objected that it was so vague as to allow removal of an official at "the pleasure of the Senate."[5] One might argue that, by including the phrase "malfeasance in office," the framers of the Arizona Constitution intended to confer on the Arizona legislature the broad, unconstrained power of removal that the framers of the federal Constitution declined to confer on the federal Congress. Such an inference would be unjustified, however, in the opinion of this author. Malfeasance, literally "bad doing," has been defined by the Arizona Supreme Court as "[e]vil doing, ill conduct; the commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which the person ought not to do at all,"[6] and as "doing that which an officer has no authority to do, and is positively wrong or unlawful."[7] Thus, unlike "maladministration," "malfeasance" cannot reasonably be taken to refer to mere mismanagement, incompetence, or the execution of policies with which the legislature disagrees. Indeed, an act committed in office that is "positively wrong or unlawful," if sufficiently serious to call into question the fitness of the offender to continue in office, should qualify as a "high crime or misdemeanor." Therefore, the primary effect of the additional phrase "malfeasance in office" in the Arizona Constitution is simply to make clear that a violation of a criminal statute is not required.

It may be argued that such a limited view of the import of the phrase "malfeasance in office" fails to give sufficient effect to the framer's decision to place the phrase in the Arizona Constitution despite its absence in the federal Constitution. There is, however, a quite plausible explanation of why the framers may have found such words to be necessary. At the time of the drafting of the federal Constitution in 1787, the term "misdemeanor" did not refer exclusively to a criminal offense.[8] However, by the time of the drafting of the constitutions of Arizona and other far western states, the term "misdemeanor" had taken on its current meaning: a minor criminal offense.[9] Thus, the addition of the phrase "malfeasance in office" may have been considered necessary in order to clarify that non-criminal offenses may be impeachable.

2. Is Impeachment Limited to Offenses Committed in Office?

The question of whether an official may be impeached for acts he committed before he took office has received little attention.[10] However, a few courts and legislatures have considered a related issue and have concluded that re-election to a second term of office does not shield an official from impeachment for offenses committed during his first term.[11] The reasoning, as explained by the Iowa Supreme Court, is that:

> The very object of removal is to rid the community of a corrupt, incapable, or unworthy official. His acts during the previous term quite as effectually stamp him as much as those of that he may be serving. Re-election does not condone the offense.[12]

The same could equally well be said of acts committed before an official took office. If, after an official assumes office, acts he previously committed come to light that reveal his unfitness for that office, the fact that he was elected or appointed after committing those acts should not serve as an absolute bar to impeachment.[13]

The case for impeachment based on pre-official acts is strongest where the offenses are directly related to the assumption of office. Unlawful acts committed in the course of, or for the purpose of, attaining office cast doubt on the legitimacy of the offender's claim to office, and impeachment for such acts serves to vindicate the public's right to a fair and lawful selection of officials.[14]

There is at least one precedent for the impeachment and conviction of a state chief executive for acts committed before he assumed office. In 1913, the Articles of Impeachment brought against Governor Sulzer of New York included charges that he had, while governor-elect, made and verified by oath false statements of the contributions to, and the expenditures by, his campaign, in violation of New York criminal law.[15] He was also charged with having misappropriated campaign funds for his personal use during the campaign.[16] Governor Sulzer was convicted of the charges and removed from office.

There should be two important limitations on impeachment for pre-official acts. First, impeachment should not be used to directly reverse a judgment that was made by the electorate with full knowledge of the facts. If the fact that a candidate had committed certain offenses was publicly aired before an election and he was nonetheless elected, the decision of the electorate should be considered final. It would simply be too disruptive of public confidence in government for the voters to see their decision overturned by the legislature in the absence of significant new information.

Second, the range of impeachable offenses must be considerably narrower for offenses committed prior to holding office than for offenses committed in office. Impeachment for acts committed prior to holding office should be limited to violations of criminal statutes.

The justification for holding non-criminal acts impeachable is that the powers attendant to public office are a sort of public trust. Abuse of such powers is a violation of that trust and therefore may be grounds for impeachment whether or not it constitutes a crime. This rationale would not apply, however, to acts committed prior to holding office, when one had no official powers to abuse. The impeachment power should not be used retroactively to disqualify from office an individual who had conformed his behavior to the ordinary criminal law prior to assuming office.

This view is supported by the wording of the Arizona Constitution, which authorizes impeachment for "high crimes, misdemeanors, or malfeasance in office." If one accepts the hypothesis, offered above, that the effect of the word "malfeasance" is to clarify that non-criminal acts may be impeachable, then one must conclude that the limitation "in office" strongly suggests that non-criminal acts are impeachable only if committed in office.

3. Is the Trial of the Impeachment a Criminal Proceeding?

The language used in the Arizona Constitution and in Arizona statutes governing impeachment proceedings is sometimes taken to imply that the trial of an impeachment in the state Senate is a criminal proceeding. The constitution speaks of the defendant being "convicted or acquitted";[17] the statutes require him to plead "guilty" or "not guilty."[18] It would be a mistake, however, to jump from these few words to the conclusion that impeachment is indeed a criminal proceeding. The purpose and effect of an impeachment trial are much different from those of a criminal trial.

Unlike a criminal proceeding, impeachment is not a procedure for punishing someone who has broken the law. Prison sentences and fines, the usual punitive tools of the criminal law, are not authorized. Rather, the Arizona Constitution, like the United States Constitution, provides that judgment in impeachment cases "shall extend only to removal from office and disqualification to hold any office of honor, trust, or profit." The apparent purpose of these sanctions is to protect the state, not to punish the offending official. As eloquently stated by Joseph Story with respect to impeachment under the federal Constitution, "It is not so much intended to punish an offender as to secure the state against gross official misdemeanors. It touches neither [the offender's] person nor his property, but simply divests him of his political capacity."[19] The Arizona Supreme Court has similarly stated, "The object of the removal of a public officer for official misconduct is not to punish the officer, but to improve the public service."[20] Moreover, the Arizona Constitution, like the United States Constitution, clearly distinguishes between impeachment and ordinary criminal proceedings by providing that, regardless of whether an official is convicted or acquitted in the trial of his impeachment, he may still be tried and punished in an ordinary criminal proceeding for any crimes he may have committed.

While any analogy is imperfect, it may be instructive to compare impeachment to a civil judicial proceeding that deprives an individual of certain civil rights, not for the purpose of punishing the individual, but for the protection of others. The closest analogy is probably a civil proceeding for termination of parental rights on grounds of neglect. Like the neglectful parent, the impeached official is alleged to have demonstrated through his actions that he is unfit to continue in his position of responsibility. He is therefore removed from the position for the benefit of the state/child. Like the termination of parental rights, impeachment and conviction unquestionably impose a severe stigma and a painful deprivation of civil rights on the defendant. But both proceedings are inherently civil in that their goal is protection of society rather than punishment of the offender, and in both cases the essential question is not whether the defendant has committed a crime, but rather whether he has seriously failed to responsibly exercise the powers entrusted to him.

There is also statutory support for the proposition that, in Arizona, impeachment should not be treated as a criminal proceeding. Prior to 1977, Arizona's Criminal Code defined a "crime or public offense" as:

> an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, the punishment of death, imprisonment, fine, removal from office or disqualification to hold and enjoy any office of honor, trust or profit in this state.[21]

On the basis of this definition, an Arizona Court of Appeals in 1970 held that a statutory proceeding, analogous to impeachment, for removing a local official from office for misconduct[22] was a criminal proceeding governed by the Rules of Criminal Procedure and by the statute of limitations contained in the Criminal Code.[23] However, in 1977 the Criminal Code was revised and the definition of "crime" is now simply a "misdemeanor or felony."[24] By so amending the definition of "crime" the legislature appears to have removed impeachment proceeding from the sphere of the criminal law in Arizona.

4. The Standard of Proof

Given that impeachment is not a criminal proceeding, the question arises as to whether the standard of proof in the trial of an impeachment need be the same as in a criminal trial, i.e., "beyond a reasonable doubt."[25] Two state supreme courts, those of Nebraska in 1893 and Alabama in 1941, trying impeachment under constitutional provisions that committed such trials to their jurisdiction, have answered this question in the affirmative.[26] The courts' reasoning in both instances was that due process requires a criminal standard of proof in impeachment proceedings because such proceedings may result in a significant deprivation of civil rights and the attachment of a serious stigma to the convicted defendant. Such reasoning is oversimplified, and, in light of current due process jurisprudence, erroneous.

The standard of proof allocates the risk of error between the parties in litigation. As Justice Harlan has explained:

> In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
>
> The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.[27]

A high standard of proof does not reduce the probability of an erroneous decision. Rather, it decreases the

probability of an erroneous conviction at the cost of an increase in the probability of an erroneous acquittal. In a criminal case, the very high standard of proof reflects "the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[28] Because of our abhorrence of the thought of an innocent person in prison, we are willing to accept the risk that such a high standard of proof may allow a larger number of guilty persons to escape punishment. In the impeachment of a high state official, however, the balance of the harms resulting from the two types of erroneous outcomes is substantially different from that in a criminal case. An erroneous conviction would not subject the defendant official to any penalty other than removal from office and, possibly, disqualification from holding any future state office. While removal and disqualification are very serious consequences, they leave the convicted official with his freedom and all of his other civil rights. On the other hand, the harm to the state of an erroneous acquittal is potentially much greater in an impeachment than in an ordinary criminal trial. Instead of simply leaving one more criminal at liberty, an erroneous acquittal would leave an unfit individual holding the reins of state government, with potential adverse consequences for the entire citizenry of the state.

There are a number of civil proceedings — termination of parental rights, deportation and denaturalization and civil commitment, for example — that may result in a deprivation of civil rights, and a stigma, at least as serious as that attendant to conviction in the trial of an impeachment. The United States Supreme Court, however, has constitutionally held that due process of law does not require that the criminal standard of proof beyond a reasonable doubt be applied in such cases. Rather, the lower standard of "clear and convincing evidence" is sufficient.

Santosky v. Kramer[29] concerned the termination of parental rights. The Court found the defendant's interest at stake to be "commanding." "[A] natural parent's desire for and right to the companionship, care, custody and management of his or her children is an interest far more precious than any property right." Similarly, with regard to deportation, the Court in *Woodby v. INS*[30] recognized "the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." Finally, regarding civil commitment, in *Addington v. Texas*[31] the Court found such commitment to be a "significant deprivation of liberty" that "can engender adverse social consequences" and "have a very significant impact on the individual." Nonetheless, the Court found in each of these types of cases that proof beyond a reasonable doubt was not required. The Court noted that that standard "historically has been reserved for criminal cases" and should not be applied "too broadly or casually in noncriminal cases."[32]

The deprivation of liberty suffered by an impeached and convicted official is surely no more grave than that suffered by a parent severed from his or her children, by an individual stripped of his or her citizenship or expelled from the country, or by a person committed to a mental institution. And the state's interest in ensuring that unfit individuals are removed from the highest positions of government is surely as great as its interest in terminating the rights of an unfit parent, or committing an insane individual to an institution. Therefore, the "clear and convincing" standard of proof should satisfy the requirement of due process.[33]

5. The Rules of Evidence

Although the trial of an impeachment is not a criminal proceeding, it is a judicial, or at least quasi-judicial, proceeding in the sense that it is designed to discover facts regarding the conduct of an individual and to apply a legal standard — "high crimes, misdemeanors, or malfeasance in office" — to those facts. This function is "essentially judicial in [its] nature."[34] The Arizona Constitution requires the Senators to be on oath or affirmation "to do justice according to law and evidence" and assigns the state's highest judicial officer, the Chief Justice of the Supreme Court, to preside over the trial.

Given the judicial, fact-finding nature of the trial of an impeachment, it would seem natural to apply in the proceeding the Arizona Rules of Evidence, which have been promulgated by the Arizona Supreme Court with the avowed intent "to secure fairness in administration, elimination of unjustifiable expense and delay, and the promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[35] Certainly fairness in administration, avoidance of delay, and ascertainment of the truth are desiderata of the trial of an impeachment. Why, then, should the Rules of Evidence not be applied in such a trial?

A common response to this inquiry is something like, "The Rules of Evidence are a bunch of lawyers' technicalities. An impeachment is too important for this sort of thing. All the evidence needs to be brought out so that the Senate can find the right answer." The assumption behind this response is, of course, that the Rules of Evidence do not serve the purposes they purport to serve, that they are a collection of arcane lore unrelated to the actual determination of truth.

If such is the case, then the rules should be repealed immediately. Certainly, many cases tried in the ordinary courts are much too important to be governed by such rules. Careers, fortunes, and even lives depend on the outcome of civil and criminal trials. Is the determination of truth less important in a murder case that could result in the death penalty than it is in the trial of an impeachment?

Fortunately, the Arizona Rules of Evidence are not a collection of technicalities designed to obscure the truth. Like most modern evidentiary codes, the Arizona rules, promulgated in 1977 and largely modeled on the Federal Rules of Evidence, are replete with provisions designed to ensure that important and probative evidence is *not* arbitrarily excluded. For example, the opinion of a lay witness is admissible if it is "rationally based" on his perceptions and "helpful to a clear understanding of his testimony." (Rule 701). The requirement of authentication of physical or documentary evidence "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." (Rule 901(a)). Hearsay is admissible if the court determines that it is material, more probative than other available evidence, and if "the general purposes of these rules and the interests of justice will best be served" by its admission. (Rule 804(b)(5)).

Where evidence is excluded by the rules, it is generally for a good reason. For example, fairness to a defendant requires that general evidence of his character does not serve as evidence that he committed a particular act. (Rule 404(a)). Fairness and accuracy in fact-finding are promoted by the exclusion of irrelevant evidence. (Rule 402). Trial by rumor is prevented by the requirement that a witness have personal knowledge of the matter to which he testifies. (Rule 602).

These functions of the Rules of Evidence are just as important in the trial of an impeachment as they are in an ordinary judicial trial. While there may be reasons to set aside certain specific requirements in certain instances,[36] the presumption should be that, absent such specific reasons, the rules should be applied in the trial of an impeachment.

Another argument that is often offered against the application of the Rules of Evidence in an impeachment trial is that such a trial is inherently "political" and therefore should not be governed by rules applicable to ordinary judicial proceedings. The Arizona Constitution, however, like the federal Constitution, clearly provides that officials are to be impeached for identifiable offenses that they have committed, not because of disagreements with the legislature over issues of policy.[37] True, both constitutions commit the trial of the impeachment to a legislative body rather than to a court, but the historical record, at least in the federal context, suggests that the trial of impeachments may have been committed to the Senate not because the Senate was more "political" than a court, but because it was believed that only the Senate would possess the fortitude and independence to render a judgment uninfluenced by the political sway of either the President or the House of Representatives.[38]

Although it may be naive to believe that purely political factors are not likely in fact to enter into the Senate's decision, the trial procedure should be designed to minimize, not encourage, the entrance of such factors into the proceeding. By focusing attention on the facts and excluding matters not relevant to the offenses charged, application of the Rules of Evidence can lend dignity and credibility to the impeachment process. ■

Joseph Feller is an Associate Professor of Law at Arizona State University. He received his law degree from Harvard Law School where he was editor of the *Harvard Law Review.*

END NOTES

[1]*See, e.g.,* **I. Brant, Impeachment: Trials and Errors** 23 (1972) (impeachment requires criminal offense or violation of oath of office); **C. Warren, The Supreme Court in United States History** 293 (1922).

[2]*See, e.g.,* **R. Berger, Impeachment: The Constitutional Problems** 53-78 (1973); **C. Black, Impeachment: A Handbook** 33-36 (1974); **L. Tribe, American Constitutional Law** 293-94 (2nd ed. 1987); Commentary, **"The Awful Discretion": The Impeachment Experience in the States,** 55 **Neb. L. Rev.** 91, 102-06 (1975).

[3]Ferguson v. Maddox, 114 Tex. 85, 96-97 (1924).

[4]The relationship between ordinary crimes and impeachable offenses was aptly stated by Lord Mansfield:

> There are three sorts of offenses for which an officer or corporator may be discharged. First, such as have no immediate relation to his office, but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise; second, such as are only against his oath, and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his franchise or office; third, the third sort of offense for which an officer or corporator may be displaced, is of a mixed nature, as being an offense not only against the duty of his office, but also a matter indictable at common law.

Rex v. Richardson (1 Burr. 517, 538) (*quoted in Guden v. Dike,* 71 App. Div. 422, 75 N.Y. Supp. 794, 797 (1902)). *See also* **C. Black,** *supra* note 2, at 35-36, 39.

In Arizona, there is a statutory provision that removes from office any state official who is convicted of a felony or of "an offense involving a violation of his official duties." *See* A.R.S. Section 38-291, Paragraph 8. This provision is separate from, and operates independently of, the constitutional provisions for impeachment. Although this provision appears to alter the constitutional scheme for election and removal of state officials, it was upheld as constitutional by the Arizona Supreme Court in *State ex rel. DeConcini v. Sullivan,* 66 Az. 348, 188 P.2d 592 (1948).

[5]M. Farrand, **The Records of the Federal Convention of 1787,** at 550 (1911).

[6]*Sims v. Moeur,* 41 Ariz. 486, 503-04 (1933).

[7]*Holmes v. Osborn,* 57 Ariz. 522, 115 P.2d 775, 783 (1941).

[8]*See, e.g.,* **R. Berger,** *supra* note 2, at 59-67.

[9]*See, e.g.,* Rev. Stat. Ariz. Sections 16, 17 (1913); Compiled Laws of the Territory of Arizona chap. X, Section 145 (1877).

[10]Some state courts, interpreting state provisions for removal of lower officials than those subject to impeachment, have stated that an official may not be removed for acts committed prior to assumption of office. *See, e.g.,* Smith v. Godby, 174 S.E.2d 165, 171 (W.Va. 1970); *In re* Theofel, 143 Misc. 666, 258 N.Y. Supp. 61, 63-64 (1932); *Speed v. Common Council,* 98 Mich. 360, 57 N.W. 406, 407-08 (1894). *But see infra* notes 13-14.

[11]*See* Opinion of the Justices to the House of Representatives, 308 Mass. 619, 627-28, 33 N.E.2d 275, 279 (1941); *State v. Welsh,* 109 Iowa 19, 21, 79 N.W. 370, 371 (1899); Commentary, *supra* note 2, at 109-10. The Supreme Court of one state, Alabama, has held that an official may not be impeached for acts committed in a previous term of office. *State v. Hasty,* 184 Ala. 121, 125, 63 So. 559, 561 (1941). That court's decision, however, was based on the unusual terms of the Alabama Constitution, which provide that impeachment and conviction serve only to remove an official from office for the current term, leaving him free to run again for a subsequent term. The Arizona Constitution, in contrast, authorizes the Senate, on conviction, to disqualify an impeached official from holding any future state office. *See* **Ariz. Const.** art VIII, pt. 2, Section 2.

[12]*State v. Welsh,* 109 Iowa 19, 21, 79 N.W. 370, 371 (1899).

[13]A justice of the Supreme Court of Florida has argued that a failure to report campaign contributions as required by law is a continuing offense that continues until such contributions are reported, and therefore may constitute impeachable misconduct in office even though the contributions were received before the candidate assumed office. *See Maloney v. Kirk,* 212 So.2d 609, 620-22 (Fla. 1968) (Ervin, J., concurring in the judgment).

[14]State courts have permitted removal of lower officials based on pre-official acts, such as bargains to confer appointments in exchange for support or contributions, that were closely connected to the subsequent assumption of office. *See, e.g., Wysong v. Walden,* 52 S.E.2d 392, 396-97 (W.Va. 1938); *Guden v. Dike,* 71 App. Div. 422, 75 N.Y. Supp. 794, 797-800 (1902), *aff'd, 171 N.Y. 529, 64 N.E. 451.*

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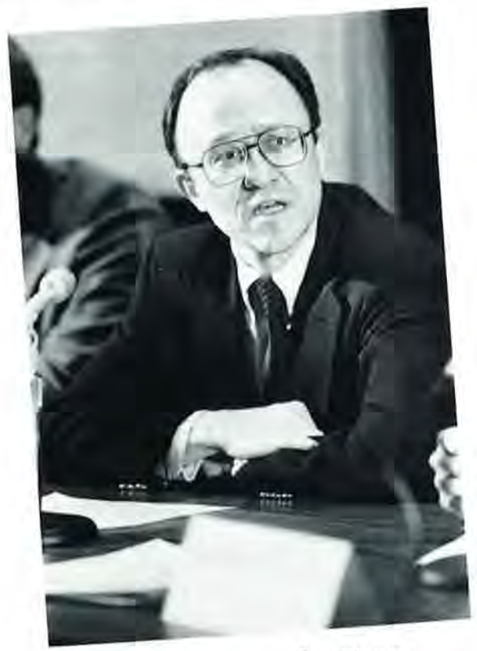
"Is There Hope for Clean Air in Phoenix?"

A Panel Discussion on Air Quality in Phoenix

Professor Joseph Feller



Peter Wyckoff

On Wednesday, March 16th, 1988, the Center for the Study of Law, Science, and Technology and the Student Bar Association sponsored a panel discussion on the air pollution problem in Phoenix and the surrounding metropolitan area.

Professor Joseph Feller, who teaches Environmental Law at the College, served as panel moderator.

As head of the Air Quality Assessment Section of the Arizona Department of Environmental Quality, **Gary Neuroth** started the discussion by giving an overview of the air quality problem throughout the state. With the state's air quality poorest in Phoenix, he told of "carbon monoxide . . . concentrations in the central and western parts of Phoenix that are approximately two times the federal health standard." In comparison, he described Tucson as having a concentration of approximately half that. Predictions of standards attainment are not, he said, very optimistic. Because of the brown cloud that looms over downtown Phoenix, particulates are judged by the public as the more serious air pollution problem. In fact, particulates are a pervasive problem in Phoenix, Tucson and many rural industrial areas. Levels of ozone in Phoenix also exceed the recommended standard.

Next, **Peter Wyckoff,** the Assistant General Counsel of the United States Environmental Protection Agency (U.S. E.P.A.) and their top lawyer in charge of the implementation of air quality standards, gave a brief history of the Clean Air Act. Under the 1970 Clean Air Act, states, he said, were to implement plans to bring air quality in line with the standards set by the E.P.A. When, in the mid '70's, standards had not been attained, Congress overhauled the Clean Air Act. Areas were now designated according to their air quality status: attainment, unclassifiable, or non-attainment. Wyckoff explained that states with non-attainment status were to come up with plans by early 1979, or put up with an E.P.A. ban on the construction of new, major stationary sources of pollution. The E.P.A. also reserved the right to impose restrictions on highway funding, if it was determined that the state was not making reasonable efforts to create a plan. States that had submitted plans were supposed to reach attainment by 1982.

When the E.P.A. designated Phoenix as non-attainment for both carbon monoxide and ozone, the state submitted planning measures over the next several years. But because

Representative Jack Jewett

David Baron

Councilman Paul Johnson

they were late, the construction ban was put into effect in 1979 for both ozone and carbon monoxide. In time, the E.P.A. conditionally approved the carbon monoxide plan and lifted the construction ban. The state then asked for an extension to 1987. When the E.P.A. failed to grant the request, the Arizona Center for Law in the Public Interest sued the E.P.A., forcing it to either approve or disapprove the plan. The lawsuit eventually matured into an order from the Federal District Court in Tucson compelling the E.P.A. to create its own plan for Arizona. The use of oxygenated fuels in cars and trip reduction ordinances are, Wyckoff explained, two of the strategies being considered in the E.P.A.'s plan.

State Representative **Jack Jewett,** who spoke next, focused on the decreasing carbon monoxide problem in Maricopa County. He explained that the new car standards imposed on car manufacturers by the federal government, requiring reductions in the number of grams per mile of carbon monoxide burned, have helped dramatically, as has the car emissions inspection program adopted by the state legislature in the mid '70's. Representative Jewett, who has been a leader in developing and sponsoring legislation to deal with the state's air quality problem, also outlined House Bill 2014 currently before the legislature. Its passage would help bring Arizona into attainment, by means of an oxygenated fuel program and a trip reduction ordinance.

City Councilman **Paul Johnson** of Phoenix, who has pushed to enact measures at the local level to help deal with the air quality problem, said: "the Center for Law in the Public Interest is suing the State of Arizona, the E.P.A., the City of Phoenix, and the City of Tucson for us to come into compliance with the National Ambient Air Quality Standards. . . . We have violated those standards in the last year or so more than any other city in the nation, and currently we are the first city in the nation . . . to be found guilty in a court of law." According to Councilman Johnson, the resulting economic impact of the news about Arizona's air quality prompted the Maricopa Association of Governments (M.A.G.) two years ago to study ways in which Arizona could come into compliance with the suit. They developed 43 strategies to deal with the air quality problems, including the building of freeways, the building of transit, the timing of lights, an improved vehicle emissions program, a trip reduction ordinance and the possibility of either voluntary or mandatory no-drive days.

Interestingly, among all the 43 strategies, it was found that the greatest reduction in carbon monoxide is achieved by the implementation of an alternate fuels program. All 42 strategies combined do not equal the reduction that can be achieved by a ten percent additive of alcohol alone. M.A.G., has thus, he continued, concentrated on the alternate fuel issue. Their unanimous consensus has been to mandate an alternative fuel program, but to leave the choice between adding alcohol (which reduces carbon monoxide 21-25%) and MTBE (the petroleum product made by the oil companies which reduces carbon monoxide 13-15%) up to the consumer, by providing both products at the pump.

The panel's final speaker was **David Baron,** the Acting Director of the Arizona Center for Law in the Public Interest, a leading environmentalist who has pursued significant litigation in the federal courts to push E.P.A. and Arizona to do something about the state's air quality problems. He offered a frank assessment of the state's failure to comply with the Clean Air Act. "Here we are," he stated, "in 1988, and so far the State has yet to even develop an adequate plan, let alone attain clean air standards. . . . In terms of (reducing) vehicle traffic, which is ultimately the best solution to meeting clean air standards, Phoenix has done nothing."

Baron went on to discuss the Center's lawsuit against the E.P.A. He said that "although the response to the litigation had been encouraging — a strengthened auto emission testing program, the real possibility of alcohol fuels, and trip reduction ordinances — what we're seeing . . . is an almost desperate search for technological fixes that will avoid the necessity of requiring some lifestyle changes, even modest lifestyle changes. . . . We really need to start focusing on the rest of the problem, which is urban growth and a doubling of our traffic every ten years. . . . (People) have the right to breathe clean air."

Following David Baron's remarks, Professor Feller asked for responses from the panel to the comments that had been made. The lengthy and open panel discussion that followed highlighted the fundamental policy disagreement between environmentalists and the E.P.A. After questions were taken from the audience and with thanks to the SBA and the panel participants, the exchange came to a close.

Air Pollution Panel

(*Editor's Note*) In August of 1988 EPA, responding to the court order obtained by the Arizona Center for Law in the Public Interest, issued a proposed carbon monoxide clean-up plan for Maricopa County. Before EPA promulgated the plan in final form, however, the Arizona Legislature finally passed its own carbon monoxide plan, thus averting the need for action by EPA. The state plan, which requires the wintertime use of oxygenated fuel additives (either alcohol or MTBE) beginning with the winter of 1989-90, was subsequently approved by EPA. The Center for Law has returned to federal court to challenge the adequacy of Arizona's plan. ■

(Continued from page 7)

[15]Editorial, *Some Legal Questions Involved in the Impeachment of Governor Sulzer,* 6 **Bench and Bar** 1,2 (1913). *See also* Commentary, *supra* note 2, at 109.

[16]Editorial, *supra* note 15, at 2.

[17]**Ariz. Const.** art. VIII, pt. 2, Section 2.

[18]**Ariz. Rev. Stat. Ann.** Section 38-320.

[19]*J. Story, Commentaries on the Constitution of the United States Section 803 (1905).*

[20]*State v. Sullivan,* 66 Ariz. 348, 359 (1948). *See also Ferguson v. Maddox,* 114 Tex. 85, 98 (1924):

> The Constitution, in relation to impeachment, has in mind the protection of the people from official delinquencies or malfeasance. The Penal Code, on the other hand, has in mind an offender merely as a member of society who should be punished for his individual wrong-doing. The primary purpose of an impeachment is to protect the State, not to punish the offender.
>
> True, he suffers, as he may lose his office and be disqualified from holding another; but these are only incidents of a remedy necessary for the public protection.

[21]Former **Ariz. Rev. Stat. Ann.** Section 13-101 (1956).

[22]*See* 30e **Ariz. Rev. Stat. Ann.** Sections 38-341 to 38-343.

[23]*State v. Burr,* 12 Ariz. App. 72 (1970).

[24]*Ariz. Rev. Stat.* Ann. Section 13-105.4.

[25]Some commentators have questioned the relevance of debates over standards of proof and suggested that the statement of a standard of proof has little if any effect on the outcome of a trial. I believe, however, that it is plausible to assume that the words "beyond a reasonable doubt" do convey, to the non-legal mind, a sense that a very high level of certainty is required, and that therefore the use of such a standard could lead to an acquittal in at least some cases where a lower standard would result in a conviction. *See, e.g., In re* Winship, 397 U.S. 358, 369 (1970) (Harlan, J., concurring).

[26]*State v. Hasty,* 184 Ala. 121, 63 So. 559 (1941); *State v. Hastings,* 37 Neb. 96, 55 N.W. 774 (1893).

[27]*In re* Winship, 397 U.S. 358, 370-71 (Harlan, J., concurring).

[28]*Id.* at 372.

[29]455 U.S. 745 (1982).

[30]385 U.S. 276 (1966).

[31]441 U.S. 418 (1978).

[32]Addington, 441 U.S. at 428.

[33]For another discussion concluding that the standard of proof should be less than "beyond a reasonable doubt," see **C. Black,** *supra* note 2, at 15-18. Professor Black suggests a standard of "Overwhelming preponderance of the evidence." *Id.* at 17.

[34]*Ferguson v. Maddox,* 114 Tex. 85, 94 (1924).

[35]**Ariz. R. Evid.** 102.

[36]For a discussion of the application of specific rules of evidence in the trial of an impeachment, with emphasis on the question of when civil and when criminal rules should apply, see Futterman, *The Rules of Impeachment,* 24 **U. Kan. L. Rev.** 105, 112-18)1975).,

[37]*See, e.g.,* **R. Berger,** *supra* note 2 at 86-88; **C. Black,** *supra* note 2, at 27-33.

[38]*See* **R. Berger,** *supra* note 2, at 112-13.

English Only? — A Debate on Proposition 106

On October 4th, 1988, the Chinese American Professionals Association of Arizona, the Asian American Faculty Staff Association of Arizona State University, the Chinese American Citizens Association, the Arizona Asian American Association and the Associated Students of Arizona State University Political Union co-sponsored a debate on "English Only ? — Proposition 106" in the Great Hall of the College of Law.

Viewed as the most controversial issue facing Arizonans in the November, 1988, elections, Proposition 106 was a proposed amendment to the Arizona Constitution requiring the State to conduct business in English and "in no other language", with certain exceptions.

The heated debate which took place that evening mirrored the stormy campaign surrounding the proposed amendment. Proposition 106 eventually passed by a narrow margin, leaving several Arizonans deeply concerned about its possible impact on their fundamental rights.

***Dean Paul Bender** moderated the October 4th debate between **Robert Park,** Chairman, Arizonans for Official English, and **Armando Ruiz,** Chairman, Arizonans Against Constitutional Tampering. A transcript of their exchange follows.*

Dean Paul Bender

Our two debaters tonight are the most prominent people on either side of this issue. Sitting on my right, and speaking for Proposition 106 is **Robert Park,** Chairman of Arizonans for Official English. Sitting on my left is **Armando Ruiz,** Chairman, Arizonans Against Constitutional Tampering and a member of the State Legislature of Arizona, representing District 23.

Before starting the debate proper, let me direct your attention to this page that you have, which is what is going to be voted on in about a month by the voters of Arizona. It is a proposed amendment to the constitution of Arizona. It has four sections. Let me just describe them to you very briefly.

The first section says: "The English language is the official language of the State of Arizona. It is the language of the ballot, the public schools and all government functions and actions." In sub-section 3 it then states what it means by "the State of Arizona." It says it means "the legislative, executive and judicial branches, all political sub-divisions, departments, agencies, organizations, and instrumentalities of the State, including local government and municipalities." It applies to all "statutes, ordinances, rules, orders, programs and policies." And it applies to all individuals, "all government officials and employees during the performance of government business."

Section 2 requires "the State and all political sub-divisions to take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona."

Section 3 is a prohibition section. It states, "except as provided in sub-section 2, "the State and all political sub-divisions of the State shall act in English and in no other language." And then it has a couple of sub-sections that expand on that. It then contains in sub-section 2 of section 3, five exceptions to this prohibition. And only these five exceptions apply. They are, briefly: "a. to assist students who are not proficient in the English language to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English; b. to comply with other federal laws; c. to teach a student a foreign language as part of a required or voluntary education curriculum; d. to protect public health or safety; and e. to protect the rights of criminal defendants or victims of crime."

And finally, the fourth section is the enforcement mechanism. It is entitled "Enforcement; standing" and it says that "a person who resides in or does business in Arizona shall have standing (shall be able) to bring suit to enforce this article in a court of record of this State. The legislature may enact reasonable limitations on the time and manner of bringing suit under this sub-section".

So there you have the four sections: general policy, the requirements to take steps to further English, the prohibition of the use of a language other than English (with the five exceptions), and the enforcement provision. With that introduction, I now introduce Bob Park.

Bob Park

Thank you, Dean Bender. You stole all my opening remarks. You did a fine job and I appreciate it.

I noticed as I came in a sign on the door that talks about something I wasn't prepared to discuss, except to say that it has no relationship to what this debate is all about. There's

a sign out there on the door that says "English Only Debate". This is not an "English Only" debate. This is a debate about making English the official language of the State of Arizona. "English Only" is a term created by our opponents to confuse the voters and divert attention from the real issue. The real issue is simple. Should Arizona's official language — the official language is the language of government — be the English language, or should it be, as our opponents tried to accomplish, the official recognition of all other languages, which would lead us into a great deal of chaos?

I want to point out something, besides the fact that they have mischaracterized what this debate is all about. People ask me all the time why we need this. Well, it's no secret that I had a 29-year career in the U.S. Immigration and Naturalization Service, and when I was back in Washington, D.C. in 1982, I became very aware that a representative from the city of Los Angeles had instituted legislation in Congress to do away with the English language requirement for citizenship. That was my first inkling that there was an effort to take attention away or to reduce the importance of the English language in the United States. Well, that led to a lot of other things. I think that it's evident right now that there is a continual expansion of the effort to get official recognition of languages other than English.

Most recently, this occurred in the State of Colorado. We had an initiative measure on the ballot up there but our opponents went to court and got it taken off the ballot, even after it accomplished all of the requirements of an initiative effort in Colorado. The federal district judge up there took it off the ballot because petition forms were not printed bilingually. Here is an attempt to expand the interpretation of the voting rights act to include petitions, which are privately paid for and circulated by citizens. They effectively disenfranchised nearly two million people in the State of Colorado.

But that's not enough. The battle has now been taken to Florida where a similar initiative qualified. Today they filed suit in federal court in Florida to get the amendment "English as an official language" off of the ballot. I don't know how many people there are in Florida, but I know that 81%, in the most recent survey of the citizen voters in the State of Florida, approved of making English the official language of their state. Now, if they go in there and effectively disenfranchise those people, that's going to be one of the most divisive things that could happen in this country.

I submit to you — notwithstanding what our opponents have said about filing a law suit in Arizona to prevent Proposition 106 from coming to a vote — that I fully expect a law suit to be filed in Arizona, probably before the end of the week, in another attempt to disenfranchise the voters.

We're talking about unity, unity through our common language, English. And we believe that it is the duty of government to take the lead in promoting the English language, not through accommodating other languages with official recognition. If you have a chance on November 8th, vote yes on Proposition 106. Thank you.

Armando Ruiz

If you remember anything tonight, and if you go home with anything tonight, I hope it will be the facts. I hope that you will read the Proposition and understand what is going on in Arizona. Because what you will vote on is the Proposition itself. It has the facts. Do not confuse what you would like to see on the ballot with what is actually on the ballot. Do not confuse Proposition 106 with what other states have passed. The proposition in Arizona is unique. It is the only one that absolutely says you cannot use other languages. Do not confuse the rhetoric, but insist that any comment we make we back up with the wording on the Proposition.

What does Proposition 106 mean? The first section basically tells you that it applies to every entity, person, and act in the State of Arizona . . . it goes on to say all rules, orders, programs, statutes, all government officials and employees during the performance of government business.

What would the effect, what would the impact be? For one thing, the Office of Tourism would be prohibited from advertising in other countries in other languages. The assistant director in the Office of Tourism has already halted sixty thousand brochures that were being printed and distributed in other parts of the world advertising Arizona, bringing money into the State of Arizona from tourism. There are 100,000 jobs that are affected by tourism in this state. It is the second largest industry in Arizona and generates six million dollars each year in government revenue.

The other impact is that the Governor would be prohibited from addressing other groups in other languages. Native Americans would not be able to communicate with their constituents. Ninety percent of all Native Americans over the age of sixty-five are mono-lingual, they do not speak English. We would be disenfranchising that entire constituency. Teachers would be prohibited from communicating with parents and students. Public libraries would be prohibited from distributing books that are printed in Chinese or Japanese. Section 3, sub-section 1 of the initiative, states that "the State and sub-divisions shall act in English and in no other language." That would make this proposal English only. It says, ". . . shall act in English and in no other language." That is English only! The impact of Proposition 106 is that it would make Arizona the only state in the Union to completely ban the use of another language!

If you'll look at section 3, sub-section e., it says criminal courts fall under one of the exceptions and civil courts do not. Child custody cases, divorces, preparation of wills, even the collection of damages or civil damages will be impeded. For example, if you are involved in an accident, and you have a witness that is bilingual, that person may be prohibited from testifying on your behalf. You would not be able to collect damages because the witness or documents necessary would not be printed in English.

There is also no provision to teach people how to speak English. The English Only organization and members say "trust us, we know what's good for you." They tell you that if there are any problems, they will fix them free of charge. They tell you that if anybody sues them in this provision, not to worry, because they'll fix it free of charge. They say if the constitution somehow gets eroded, they'll fix that free of charge. Well, I think we understand that the English Only group is becoming the Joe Isuzu group of Arizona politics. If they were selling us a car, they would have been prosecuted already for misrepresentation and fraud. Vote no!

Dean Bender

With the Valley of the Sun becoming one of the fastest growing cities for tourism, how will Proposition 106 help or hinder Arizona if all government documents, i.e., tourist maps and brochures, have to be printed in English?

Bob Park

Well, first of all, I had a supporter when I came in. If you are still here, don't leave; I'm probably going to need you!

There is nothing in our proposition that is going to prevent the State of Arizona from printing travel brochures. The operative words in our measure are "acting in English and no other language." A brochure is not a contract with the state. If it is not binding on the state, then it is not a contract. Thus, travel brochures and any other form of advertisement to extol the virtues of Arizona can freely be printed without any consideration of Proposition 106.

Armando Ruiz

Let's talk about the facts, and the facts are these. Look at your initiative. Under the first section, it says that this article applies to all political sub-divisions, departments and agencies. The Office of Tourism is an agency of the state. It says that all government officials and employees, during the performance of government business, are prohibited from using any other language except English. The deputy director at the Office of Tourism has already halted the printing of 60,000 brochures. There is only one Arizona entity which promotes tourism throughout the world and that is the Office of Tourism. It will be affected by this proposal.

Dean Bender

While professing a desire to establish a policy of English proficiency during a recent failed initiative drive, why did your proposal at the same time contain language which would have given official government recognition and enforcement to all languages other than English, a contradiction which would have had just the opposite effect?

Armando Ruiz

I think one of the things you have to understand is that the English Only people are not in favor of English proficiency or English literacy. When we had our proposal before the legislature, it failed by one vote in the Senate in the last night of the session. Had it passed, it would have been the official policy in the State of Arizona to promote English literacy — to teach people how to read, write and speak English. They hired a lobbyist who worked the last month of the session to kill that bill. Our opponents said that that measure would have made Spanish the official language. I have a letter here, from Mr. David Thomas, the deputy director of the Arizona Legislative Counsel, who writes all legislation and all referendums. And it says, "Dear Mr. Ruiz, this is to confirm that according to the records of this office you have not requested, and this office has not prepared, legislation, either in draft form or otherwise, to make Spanish the official language of the State of Arizona." Again we should deal with the facts.

Bob Park

Thank you. Let's deal with the facts. You had an initiative measure which Armando and the Arizona English group began sometime in the later part of September or early October. It contained the language and the guaranteed right and freedom to use other languages. That is unprecedented in any constitution in any state in the United States, and that was what the question was about. That particular language was deleted very intelligently when the measure was presented to the House of Representatives. They deleted that language and it went forward as an official policy of English literacy or English proficiency. But the question was, why have that language in there giving official government recognition and enforcement to languages other than English?

Dean Bender

The second question is for Mr. Park. At the present time, police officers must read people their rights in whatever language is necessary so that they fully understand their rights. Will Proposition 106, if passed, eliminate this measure? And how do you feel this would help or hinder law enforcement?

Bob Park

In no way would Proposition 106 do away with the Miranda warning. Our measure specifically addresses the rights of criminal defendants and victims of crime. The Miranda warning is a mandate by the U.S. Supreme Court, and nothing in our measure has any effect whatsoever on it.

Let me offer a quick scenario. Suppose a DPS officer arrests a car load of people on the highway who can't speak English. Before the police can even begin an interrogation, they have to inform the suspects of their rights and take them to a place where they can talk to someone in their own language, and speak with an attorney, if that's what they want. The Miranda warning is not going to be hindered by Proposition 106.

Armando Ruiz

This section is correct. It does not have any impact on any criminal defendants or victims of crime. And this section is under section 3, sub-section 2e. However, he (Bob Park) failed to address what the impact of Proposition 106 will be in the civil courts, which handle 80% of all litigation. There, witnesses, judges, and attorneys will not be allowed to speak any other language except English. You may be able to bring your own personal translator in, but that translator is going to be talking only to you, because no one else in the courtroom is going to be allowed to speak any other language but English.

Dean Bender

Since English proficiency is required to obtain citizenship in the United States of America, why should tax payers pay money to have government conduct business in a foreign language?

Bob Park

The government primarily functions in the English language, and all we're asking in Proposition 106 is to continue the function of government business primarily in the English language. Yet, there is a continued resistance to conducting all government business in the English language. That is something that I can't fathom. We have debated this issue for two years now, and he (Armando Ruiz) has never convinced me why English should not be the official language of Arizona.

Dean Bender

The third question for Mr. Park is as follows. If Proposition 106 passes, will it provide for classes in English instruction?

Bob Park

Proposition 106 will, in no way, incumber the teaching of English. The full thrust of Proposition 106 is English. English — that's all we're talking about here. Proposition 106 even states that the legislature shall take steps to promote and enhance the English language. There is nothing in this measure that will prohibit the teaching of English at any level.

Armando Ruiz

First of all, Proposition 106 would prohibit the teaching of English instruction. And second of all, they don't promote English instruction. They in fact, killed legislation that would have provided for English proficiency throughout the state. If you'll look at your initiative, and you'll look under section 3, sub-section 2a, it says, "to assist students who are not proficient in the English language." And there's a comma there, a very important comma, that adds, "to the extent necessary to comply with federal law." And there is another comma behind that. If you read that and understand grammatical English, it tells you that you can only teach to the extent necessary to comply with federal law. Under federal law, there is not one program which mandates English instruction . . . no law which mandates English proficiency. So to that end, there is no requirement at all to provide for any English instruction.

Dean Bender

The third question for Mr. Ruiz is as follows. What efforts are you engaged in to promote the learning of English in the private sector, outside of government?

Armando Ruiz

Privately, I teach English at home, so I guess that would qualify. I try to teach my children English, so I guess that somehow I have participated in that venture. I'm not sure that the private sector has the responsibility to teach people English. I'm not sure that the private sector has that responsibility, in terms of acculturating groups into American society. People who live in this country believe in the American dream. In my personal experience, after six generations here, we speak English; some of us still speak Spanish. We can do this because there were classes available . . . there were educational opportunities not only for myself, but for my parents and my grandparents, that enabled them to learn English in the schools. That's what education does — it provides opportunities, it doesn't take them away, it doesn't disenfranchise groups hoping and wishing to learn the English language.

Bob Park

Spoken like a politician, Armando. Don't let the citizens out there do anything for themselves. Discourage anybody in the private sector from wanting to come forth and help people who want to learn the English language. Big brother has to do it all. Don't let anybody assume any responsibility out there for learning English. I think that's absurd!

Dean Bender

The last question for Mr. Park is as follows. Why won't the English Only group reveal who the contributors are?

Bob Park

The burning question of this whole debate is who gave us money to conduct our campaign. U.S. English is a national group based in Washington, D.C. It has 350,000 members, nationwide, and about 67,000 members in the State of Arizona. It is no secret that U.S. English has undertaken a national movement to make English the official language of the United States through an amendment to the United States Constitution. And that has been made perfectly clear since 1983 when the organization was founded.

The money which supported us came from the U.S. English legislative task forces, also no secret. It was reported in our financial statement. Incidentally, along that line, there's a big, mysterious group funding Armando over there, too, which he doesn't want to reveal — the Arkansas Social Justice Committee, whatever that is. The real point is that non-profit organizations are not required by law to produce their membership lists, and indeed, we're not going to.

Armando Ruiz

They won't tell you who is funding them because they are afraid of letting the public know who is sponsoring U.S. English. Ninety-eight percent of their funding came from Washington D.C. I think it is only right and proper for the citizens of Arizona, if they are going to vote to make English the official language, to know which group is behind this effort to change the constitution in the state. If the money comes from Washington, D.C., fine and dandy. But if it is going to change the constitution here in Arizona, we ought to know who is behind it.

Dean Bender

The final question for Mr. Ruiz is as follows. Isn't it a beneficial goal to integrate our society by moving toward a common language for everyone?

Armando Ruiz

It is. If that was what Proposition 106 was about, then more people might support it. But that's not what it does. If you'll look at the initiative, it doesn't talk about acculturating groups. It doesn't talk about accommodating groups. It doesn't talk about incorporating people into the American mainstream. What it talks about is suggesting who can and who cannot speak certain languages. That is not unification. That is disenfranchising groups solely by one criteria, and that is who your parents were. If you were unfortunate enough, under this Proposition, that you were born to Native American parents, if you were unfortunate enough to be born to Chinese or Japanese parents or Hispanic parents who spoke only one language at home, then you fall into this provision. And that's the sole criteria by which you qualify under Proposition 106. It does nothing to incorporate groups into the American mainstream.

Bob Park

The entire thrust of Proposition 106 is the English language. Contrary to the opponents of Proposition 106, who had a measure out there on which they tried to gather signatures, which would have given a guaranteed right or freedom or official recognition to all other languages except English, there is certainly nothing unifying in having the government give official recognition to languages other than English.

Question from the Audience

How would Proposition 106 affect Arizona voters who are bilingual but may not be able to read a ballot in English?

Bob Park

Proposition 106 will not affect voting rights at all. All jurisdictions are required to print ballots bilingually and until that is changed, indeed, all ballots in the State of Arizona will continue to be printed in English and Spanish.

Armando Ruiz

If you'll look at section 1, sub-section 2, it says, "As the official language of the state, the English language is the language of the ballot." If you'll look further, section 3, sub-section 2, says, "To comply with federal laws we will still have bilingual ballots." But, at the point where they change the federal law, we will no longer be required to have a bilingual ballot in certain areas.

Dean Bender

Who gains from such a restricted approach to language? I have a pretty good idea who looses!

Bob Park

Well, if you want to believe the signs on the door and the rhetoric of Armando here, I guess you could say that it's restrictive. But this in no way is restrictive for people learning English, or any other language. I invite you to read it again. There are provisions in here for students to learn other languages, if they want to.

Armando Ruiz

I think we all loose, and I think we all loose on a moral ground more than anything else. Because in the history of this state and, more importantly, in the history of the nation, the Constitution has always acted as a document that protects individual rights. It is a document that separates us from other countries like Russia and China, that have official language provisions. It is a document that provides for individual rights that all people in the world hope to copy. At the point where we begin to dilute our Constitution and begin to put a language in there that disqualifies people because they speak another, than we've all lost. Because our Constitution will then move away from a document that protects individual rights to a document that punishes people based on individuality. We'll all loose as a result.

Dean Bender

If Proposition 106 is passed, would the use of foreign language in classes other than foreign language classes, such as language and culture, or other linguistic classes, be illegal?

Bob Park

In a word, no!

Armando Ruiz

In another word, yes, it would! All you have to do is look at the initiative. It says that you can only speak English in a classroom either when you want to move people toward English, or when you want to teach people another language. Beyond that, it is illegal.

Dean Bender

The state motto is in Latin. Would this have to be changed?

Armando Ruiz

Section 3, sub-section 2, says that in order for contracts and documents in this state to be valid, they have to be in English. When the seal is affixed on a document, it has to be in English in order to be official.

Bob Park

I have to remind you that 14 other states have declared English their official language and it certainly hasn't changed any of the language on their official documents from the standpoint of the Latin. ■

Armando Ruiz

Robert D. Park

Chief Justice Frank Gordon On Writing Opinions

A Workshop Presented by the
ASU Indian Legal Program

Last year, the College of Law formally adopted an Indian Legal Program to address the critical issues of Indian law in Arizona and the Nation. According to ***Leigh Price,*** *a Visiting Professor now serving as administrator of the program, the new initiative will have three objectives: education, scholarship and service to the Arizona community. He explains that the "College of Law plans to offer better educational opportunities for Native Americans, use its research capability to clarify some of the more complex issues in Indian law and, ultimately, be of significant service to tribal governments and the State of Arizona."*

As part of its new effort in Indian law, the College of Law presented a two-day workshop last October on writing legal opinions. The workshop, which was attended by 27 tribal judges from Arizona and surrounding states, featured a panel discussion by ***Chief Justice Frank X. Gordon*** *of the Arizona Supreme Court,* ***Judge William C. Canby*** *of the U.S. Court of Appeals for the Ninth Circuit and* ***Dean Paul Bender*** *on the problems of opinion writing. Professor* ***Charles Calleros*** *also held a practical opinion writing exercise to supplement the panel presentation.*

The following remarks are excerpted from the address of Chief Justice Gordon.

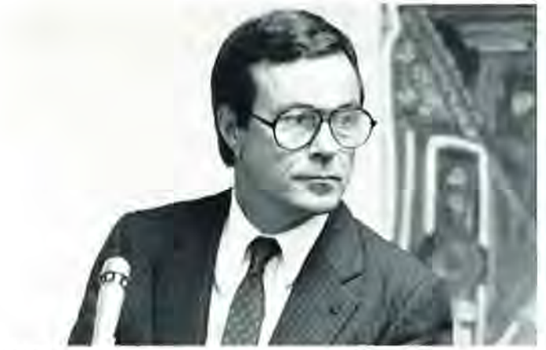
Chief Justice Frank Gordon First, I would like to thank all of you for being here. It is a pleasure to see the growing numbers of judges at these ASU seminars. I also would like to add my thanks and congratulations to the Arizona State University College of Law for making this kind of learning session more accessible to tribal judges. I think it is great, and I do not know where else it is happening. I know the federal government does not do this kind of thing, and I think we should be very proud that the Arizona State University College of Law is taking the time and devoting the staff to do this.

When I first became a judge a long, long time ago, Chief Justice McFarland of the Arizona Supreme Court — he was a former Governor of our state, Chief Justice of our court, former U.S. Senator, a very, very astute man and a very good politician — came by my court one time. I think I had been on the bench a few months, and I was very impressed that he had come up there to see me in Kingman. He said, "Frank I hope you learn early in your career what I learned. You never explain why you rule the way you did." I said, "Oh? Why, Governor?" He said, "Well, in most cases you only have two people in front of you when you are trying a case, and when you rule, without explaining why you ruled, you make at least half of them happy. And they think you are real smart. But," he said, "if then you start explaining why you ruled the way you did, you lose a good portion of them."

That may or may not be true, but I think under the law we do have an obligation, when we make a decision, to explain to the litigants why we decided the way we did. Written opinions are what, in most cases, we have to rely on to do that. As a trial judge, you do not have to do it as often as an appellate judge.

Why do we really write opinions? I think the purpose of the written opinion, as **Judge Canby*** says, is to, first, clearly announce the decision of the court in simple language; second, to explain the reasons for the court's decision factually and legally; and, third, to show that you have considered each of the party's contentions. Those three things are very important, and the last two especially give credibility to your decision because you have, in fact, shown the parties that you have heard the case. You have

*Judge William C. Canby, U.S. Court of Appeals for the Ninth Circuit.



Visiting Professor Leigh Price

listened to each of their arguments. You have decided it, and while you may either reject one side or accept the other, you showed them you thought about it. Those three things are very important. The by-products of the written opinion are three things, at least. First, it makes judges think about the facts and resolve any disputes. Second, it makes you research the law and make sure that you are applying correct law. Third, it makes you organize your thoughts before you actually make your decision. So writing opinions makes judges think and not just react.

I have a little quote from a book here that I thought was good. It is by **Judge Laskey,** who wrote an article, "A Return to the Observatory Below the Bench in 1965." He says, "When a judge need write no opinion, his judgment may be faulty. Forced to reason his way, step-by-step, and set down these steps in black and white, he is compelled to put salt on the tail of his reasoning to keep it from fluttering away. Holmes said that the difficulty is with the writing rather than the thinking. I am sure he meant that for the conscientious man, the writing tests the thinking." And I think that is true. When we sit down and converse we can say a lot of things, but a lot of these things are irrelevant, a lot of these things do not really hone in on the basic reasoning. And as **Judge Canby** said, it would be nice if we could force ourselves to write with a quill pen because then our opinions would be shorter. I had one lawyer suggest that we do it on stone with hammer and chisel and maybe it would even be shorter. Especially if we had to carry the stone. We do tend to write too much. In fact, the old saw goes that, "I just did not have enough time to make it short." And that is often true. It takes a lot of time to distill your written opinion into the most concise, factual, and legal terms. But that is the ideal to work toward: To do it, redo it, and do it again until you can get it down to where it is clear, articulable, and understood by the person with whom you are communicating.

And I think that is the next thing to consider. You have to ask, "For whom are you writing?" If you are writing only for the parties before you, to announce your decision, then you do not have to say as much and you do not have to be as flowery about it. But there is another reason for a written opinion that sometimes makes us write more. That is, when you are writing an opinion you are developing the common law of your court. You are setting precedent. You are writing *stare decisis.* These are the things that other judges can follow. To do that, you should have a principled reason for coming to your conclusion, based upon either previously stated law or facts that are similar to the issue before you. So in writing your opinion, you are developing a body of law which you can follow, go back to, and follow in future cases. Your fellow judges, as well, can follow what is now becoming common law. So that is a thing to think about.

Now, on the issue of whether it should be a memorandum decision, uncitable and unpublished, or whether it should be a published opinion, a lot of judges have difficulty with that. All of us have pride of authorship and think that every case or every opinion we write is so important that it ought to be in bold type and plastered on the wall somewhere for everybody to read. That is not really true in most cases, probably ninety percent of the cases that we write are at the intermediate level and at the trial level. We really do not establish much law. It may be a refinement here or there, but if it were up to me, I would suggest that somebody other than the judge who writes the opinion should decide whether an opinion should be a memorandum decision, or whether it really sets any precedent and is important enough that it should be published. Publishing is expensive. Luckily you have a good law school here which is willing to be the repository of your opinions. I do not know, if I were to call and ask Dean Bender to have a copy of a certain opinion, whether he is going to honor me by making a copy, and I hope also that it will not be an eighty page opinion that I ask for, like some of our opinions get to be.

Dean Paul Bender

Dean Paul Bender We do not plan to charge for the service.

Chief Justice Frank Gordon But it is something to think about. We should decide whether what we are writing is, in fact, a precedent setting opinion. If it is, then publish it. If it is not, if it just covers matters that have been decided before, does not involve any unusual set of facts or laws, why bother to publish the opinion? Eventually you may come to a situation where you will want to have it published in publications like West Publishing or the like, and every page is expensive. You want to make sure that

Robert Yazzie and Calvin Yazzie

what you are publishing is important enough to be printed and stored for long periods.

As to footnotes, I agree with Judge Canby that opinions should really have very few footnotes. There are legitimate reasons for footnotes, but they do not happen very often. If you have a reason to state something that is collateral to the case, that is a good place to use a footnote. I have used it occasionally where I was citing an opinion that stated the law of my jurisdiction, although I did not agree with it. In fact, once I had dissented to the principle of law that I was about to expound on on behalf of the court, and I was writing because three of the members of my court had previously said that was the way to solve that problem. I wrote and said, in effect, "This is the way my court says this problem is answered", but I dropped the footnote saying that although I had previously disagreed in my dissent, this was the law in this jurisdiction. I think you can legitimately use a footnote. **Justice Jack Hays,** who used to be on my court, said he allowed himself seven footnotes per year, and when he ran out he never used any more. I like that attitude. He never used up his seven annual footnotes.

I have a handout that contains thirty-three suggestions about written opinions by **Justice Hopkins,** formerly a Justice of the Appellate Division of the Supreme Court of New York. They are taken from the book, *Appellate Judicial Opinions,* by Robert A. Leflar; it is a West Publishing book. I got it in 1976, it may have been updated since that time. It is an excellent little book giving you reasons and good suggestions about the overall process of opinion writing and the appellate judicial function. I will not bother to go over them with you now. That is something that you can review at your leisure.

One excellent suggestion is: "Humor has a dubious place in an opinion. It is not a universal commodity and the decision of the rights of the parties is a serious matter. Irony may be an effective tool of expression when sparingly used but sarcasm directed toward the parties is seldom in good taste." And that leads me to another thing. If you happen to be an appellate judge and you disagree with the majority

Gloria Kindig

Richard Perry

in a written opinion, I sincerely hope that you do not use sarcasm or strident words in your dissents because it builds animosity between the judges. That animosity can last for years and years. It just does not go away. Appellate judges, like elephants, just do not forget those things. It is much better to say respectfully, "I would approve this opinion in all respects except for issue number so and so", or "I believe the facts would require contrary results; see case so and so." You do not have to say, "When this opinion is stripped of the birdlime of rhetoric," which one of the members of my court said in a dissent. The sound of that keeps ringing. It has rung now for over fourteen years in the ears of the author of the majority opinion. He still hears it, "When this opinion is stripped of the birdlime of rhetoric". That is rough. And it stays in the books forever. You really do not have to say that. You should be respectful to your colleagues. You can disagree and still not be disagreeable.

Also, if you feel that the author of an appellate opinion has left out a significant part of an opinion or should develop a thought a little further, you may want to file a special concurrence, saying you agree with this but have

an additional reason. Then I think it is good etiquette to go to the author of the opinion and suggest, as Judge Canby said, that you offer him an opportunity to place that additional reasoning in his opinion, so that he can incorporate it, rather than having this little appendage sticking out of the opinion showing that somebody else disagreed because he thought that the author's thoughts could be developed a little further. I think the author should be given that courtesy and opportunity to include that additional suggestion.

Participant Is there a rule of thumb as far as citing case law is concerned?

Chief Justice Frank Gordon In other words, should you cite only one case to establish a certain position, or string-cite a whole line of cases that would establish the same proposition? I disagree with string-cites. I think one substantial citation is sufficient, and you might even state that there are others that are uncited. I think it just adds to the length of the opinion. It is unnecessary and redundant.

Participant Would you comment on writing concurring and dissenting opinions?

Chief Justice Frank Gordon Well, if you will notice in reading the United States Supreme Court decisions, many times there will be seven, eight, or nine opinions in one case. Although they are very smart people, and a lot smarter than I am, I feel that if they conferenced more in their opinions after the oral argument and after the case was assigned, then fractionated opinions may be avoided. I think if they went to the author and said, as I suggested, "I agree with your reasoning but I think you ought to put in another paragraph that would take care of my objection," that would do away with one of those extra opinions. It would get down to more of a consensus by the court.

Now, when it comes to dissents, I think a lot of dissents may come for the very same reason. The judges do not conference again once the draft of the opinion comes out. Our court's procedure is this: We circulate a draft of an opinion. There are five of us, and we each send back a buck slip that says we approve or disapprove of the opinion. If we disapprove, we write down what issue we feel we could not agree to. Then, the opinion is put back on for conference next week, and we talk about it then. The other judges, at this point, perhaps for the first time, hear what my feeling is and why I cannot agree with them on that issue. It might be that somebody else agrees with me also. So, without going up and down the hall and trying to convince other people to take my position, I ask for a conference and we discuss the case. On occasion, we resolve the situation with no dissent. The court accepts a suggestion and incorporates it, compromises the opinion perhaps a little bit, but comes to the right conclusion. Now, there are cases where you cannot avoid dissent, and you have to state your conscience. When that happens, make it as clear, as distinct, but as respectful, as possible. You also have another question. How far down the line do you want to dissent on an issue, one year, two years, three years? Eventually it is going to be the law of your court, and most judges think you ought to give up dissenting on that issue, on that point. I have done that after three years. I do not know why I have picked three years, but I figure that, after three years, if the legislature does not change the majority by putting a new law on the books, I might as well give up. The legislature must agree with the majority. I have done that in a couple of cases. At other times, you may wish to hold on to your feeling, because ultimately a higher court might agree with you. ■

Delbert Ray, Barbara Brandt, Homer Bluehouse

Graduation Ceremony, 1988

May 23, 1988

Dean Paul Bender
College of Law
Arizona State University
Tempe, Arizona 85287

Dear Dean Bender:

Before rushing on to the world beyond law school, I wanted to take a moment to thank you, the faculty and staff for the honor of attending the College of Law. It has been a profound experience; one that I will never forget.

Given the caliber of the administration, faculty and staff and its Phoenix location, I have no doubt that the college will continue its tradition of academic excellence. It has been a privilege to be a part of that tradition.

Thanks again.

Sincerely,

Don Hudspeth
Class of 1988

The College of Law held its 18th graduation convocation on May 13th in the Willard H. Pedrick Great Hall. A maximum capacity crowd gathered to see the 141 graduates ceremoniously receive their Juris Doctor Degrees from Law School ***Dean Paul Bender.***

Paul F. Eckstein, *a partner in the Phoenix law firm of Brown and Bain and prosecuting attorney in the recent Court of Impeachment trial, delivered this year's graduation address. His remarks are printed below.*

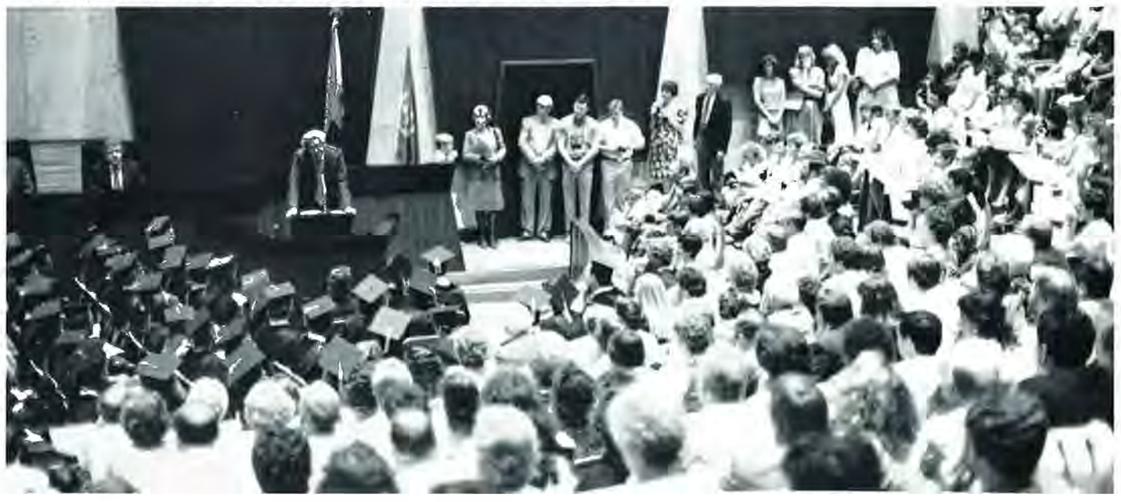
How to Find Happiness in the Practice of Law

by Paul F. Eckstein

Introduction

It's about time. For you and for me. For you who have spent three years learning how to think, read and write as your mentors would have you believe lawyers think, read and write. And for me as someone who has been out of law school for nearly a quarter of a century. Although my diploma says (if one can understand Latin and knows how to read Roman numerals) that I received my Bachelor of Legal Letters in 1965, I did not attend the graduation ceremony because it was nearly a month after my last examination. It is not every lawyer who is able to speak at his first law school graduation, and I am deeply honored to be here.

The dean speaks to a capacity crowd during commencement exercises in the Great Hall.



While this is my first law school graduation, it is not the first graduation ceremony I have attended at this great institution. Forty years ago — long before most of you were born and when ASU was still a college — my parents dragged me to a graduation ceremony held at night in the old Goodwin Stadium, which was located several hundred yards southwest of this building. We were there to honor Fred Banks, the son of our housekeeper, who had struggled mightily to get his bachelor's degree in education. For years afterward Fred taught in what were basically segregated schools in south Phoenix. Some of you may remember his son who, during the early 1970's, was the highstepping drum major of the ASU Band. I don't know why the memory of that evening has stayed with me so long, but every time I have attended a graduation since then (and I have managed to make a few of my own and those of various members of my family), I remember hearing Fred Banks' name being read and watching him receive his diploma. Perhaps the memory is so vivid because the event was so important. It was for Fred, as I know it is for you, a moment in which you and your loved ones can reflect and take pride in your accomplishment and look forward with great anticipation to your using the skills you have learned.

The Genre of Graduation Speeches

Whatever obligations a speaker at a commencement may have to praise the efforts of the graduates, celebrate the scholarship of the faculty, honor the greatness of the institution and assure everyone that the years of study were worthwhile, I know that I have a special obligation today because, as you may have noticed, today is Friday the 13th. I don't know why those in charge of this ceremony thought it fit to send would-be lawyers into the world on Friday the 13th, but they have done so and we must all make the best of it. Knowing the suppleness of the lawyer's mind, many of you undoubtedly are thinking that this is not bad luck for you, but bad luck for the rest of those folks out there. I am somewhat more superstitious than Dean Bender. Had I been given the responsibility of finding a speaker for today's ceremonies, after consulting Nancy Reagan's astrologer, I would have chosen a sorcerer to pronounce magic incantations and sprinkle a special protective dust over you and all those around you. That opportunity was lost when Dean Bender called on an ordinary, diabolical lawyer to attempt to charm away the evil spirits. Commencement addresses are grand occasions suffused with banalities and, more often than not, utterly devoid of worthwhile thoughts or ringing oratory. In a commencement address delivered at American University in 1984, John Kenneth Galbraith said it all when he said:

> No student has ever been known to confess in later life to any influence from the address that graced his or her graduation or, indeed, to any recollection of what was said. Nonetheless, there must be a speech; speeches in our culture are the vacuum that fills a vacuum.[1]

I am confident that this address will be in the great tradition of commencement addresses — "a vacuum filling a vacuum."

The State of the Practice as We Approach the Last Decade of the Twentieth Century

No sententious discourse on American lawyers would be complete without paying homage to the most quoted and least understood of critics of American society, Alexis de Tocqueville, whose observations of 150 years ago still cause lawyers to puff their chests with pride:

> The special information which lawyers derive from their studies, ensures them a separate station in society; and they constitute a sort of privileged body in the scale of intelligence.
>
> In America there are no nobles or literary men, and the people is apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated circle of society.
>
> As the lawyers constitute the only enlightened class which the people do not mistrust, they are naturally called upon to occupy most of the public stations.[2]

I don't know whether Tocqueville accurately described the intelligence, culture or trustworthiness of lawyers in the first half of the 19th century, or whether something was lost in the translation from French to English, but it is doubtful that anyone today would characterize lawyers as a "privileged body in the scale of intelligence" or "the most cultivated circle of society" or "the only enlightened class which the people does not mistrust." A modern day Tocqueville undoubtedly would liken us more to used car dealers.

Who knows whether our fall from grace has all taken place in the last half of this century, but if one is to believe the high priests of our era — the public opinion pollsters — our fall from grace is complete. As we have come to rely more and more on technology as a substitute for clear thinking, as our services are beyond the reach of all but the most wealthy and stubborn in our society, as statutes and regulations have become so complex that lawyers must hire lawyers who must hire other lawyers to ferret out their true meaning and as we have abandoned our historical calling and sought to emulate those we represent, on occasions such as this we must surely wonder what we can do to recapture the respect and station we long ago enjoyed.

No one has described the current problems of the profession you are about to enter better than Sol Linowitz in his address at the Cornell Law School Centennial last month:

> Over the years . . . something seriously disturbing has been happening to the legal profession. We have become a business — dominated by 'bottom-line' perspectives. In too many of our law firms, the computer has become the Managing Partner as we are ruled by hourly rates, time sheets and electronic devices. We have seen an increase in technological expertise with a corresponding diminution of the human side of law practice. We are making more and achieving less, and in the process, I am afraid, we have lost a great deal of what we were meant to be.[3]

I do not come here as a modern-day Jeremiah to rail against the false idols and corruption in high places, but as a lawyer who has taken a long look at a calling he loves and reveres to offer some suggestions on how you may be able to find happiness in the practice of law in this mercantilistic environment.

How to Find Happiness in the Practice of Law

Since I was admitted to practice in this State, the membership of the Bar has grown five-fold. Nationally, it has doubled. When I began practicing, I knew most of the lawyers in Phoenix by reputation and many on a first name basis. It is extremely unlikely that any lawyer knows more than ten percent of the practicing Bar in Phoenix today. While lawyers in Phoenix 25 years ago did not experience the closeness that the lawyers who rode the circuit with Abe Lincoln did when they travelled and ate together, and even slept in the same bed,[4] when I began the practice it was still expected that lawyers would be civil and cordial to one another. In an era when you may only see your adversary in court or the negotiator on the other side of a table once every several years, it is easy to forget the importance of being civil in the heat of battle and after the battle has subsided. Many of you may think it strange that I place civility first on my list of keys to happiness in the practice of law, but I have learned through bitter experience the toll that a lack of civility and cordiality takes on a lawyer and how it diminishes the joy of the practice. So I would say as a first order of business, always be respectful of those who are your adversaries and understand that your role as an advocate or negotiator does not require you to assume the demeanor of those you represent.

As technology has advanced, the art of thinking and writing carefully has given way to the practice of creating endless pages of unintelligible prose made even more unintelligible by endless footnotes. Not so long ago it was difficult to change but a word, let alone move entire paragraphs from one part of a document to another. Guided by the instruments that sit on our desks and outside our offices, we have abandoned carefully reasoned analysis and tightly written briefs for processed words. More words are better, particularly when the argument is difficult. Many of today's practitioners remind me of the young lawyer in William Faulkner's *The Hamlet,* who "did what he could and overdid what he could not."[5] You will see that the second key to happiness is doing what you can do well and taking care with each word that you write and with each thought that you put forth. From your earliest days in law school, you have been taught that it is the quality of your thought, not the quantity of your work product, that distinguishes good lawyers from mediocre lawyers. That lesson is often forgotten in a world of complex legal problems. In a profession where mastery of detail is a necessity, it is not easy to cut to the core of the problem quickly and elegantly, but if you are able to do so, your clients and the legal process will be better served. Through it all, I hope you will remember Thoreau's injunction "simplify, simplify."[6]

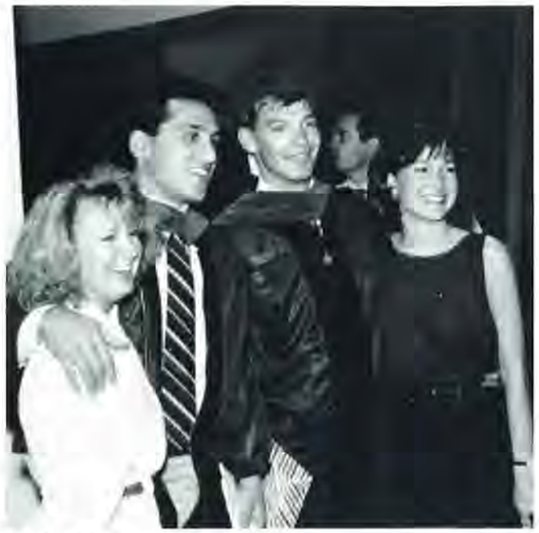
However you practice law — whether it is as a sole practitioner, in a small or large firm, in a corporation or for a governmental entity — at some point in your career you will feel the pressure to specialize. To be sure, if you are a sole practitioner, at least in the beginning it may seem that you will be required to serve clients who have problems in every subject area covered by the bar examination. Yet, even you who begin life as sole practitioners or as lawyers in small firms will find it convenient or economically advantageous continually to narrow the scope of your practice. With our system becoming more and more like a civil law system with each passing legislative session, I see nothing wrong with lawyers limiting the scope of their practice and implicitly admitting that they are not competent to practice in all areas covered by the bar examination. Indeed, such acts and admissions are commendable and may soon be required by those persons with green eye shades who write our professional liability insurance. Nevertheless, I think you will find, as I have, that there is a very real satisfaction in constantly plowing and cultivating new fields. I, for example, began the practice of law more or less assisting people in business and real estate transactions with a heavy emphasis on tax matters, only to find myself three years later being required to learn the law of trade secrets and the technology associated with the fabrication and assembly of integrated circuits. More recently, as some of you may know, I have had occasion to gain some passing familiarity with the law of impeachment. Now, if only I could find an endless supply of governors who have stolen trade secrets and cheated on their income tax returns, I would be gainfully employed for the rest of my career.

To a large extent we become experts in areas that our clients' business and interests take them, so we must abandon our total and fanatical aversion to risk if we are to have any clients at all. This call to stretch yourselves does not mean that you should practice outside your limits, but if you are truly to enjoy the practice, I submit that you must stretch and expand yourselves constantly. As a third key to happiness in the practice of law, I would urge you to seek outand master new areas of the practice, however foreign and intimidating they may at first appear to be.

Just as you should not artificially cabin the scope of your practice, you should not freeze your intellectual development. I suspect that to the extent any of you read great books or thought great thoughts before you entered law school, you ceased doing so the moment you digested your first case. When I went to law school, it was said that it took one ten years to recover from a law school education. The aphorism of the day, which I am sure has currency at this time, was that the law sharpened the mind by narrowing it. I always thought that was the ultimate non sequitur. If the law is a learned profession, to be effective as a lawyer one must read and have a true understanding at least of history, government, philosophy, modern psychology and the rudiments of the so-called hard sciences. How can one possibly become smarter and better able to practice law by ceasing to be a person of breadth? As a fourth way to find happiness in the practice of law, I implore you to make the time to read great novels, listen to fine music, keep a watchful eye for new architecture and above all to develop a deep appreciation of our history and of our governmental institutions.

All of you will be confronted with difficult and demanding clients. Sometimes I think the definition of a client ought to be a person who demands that you do the impossible yesterday. From your first day as a lawyer until your last, your clients will press you to bless activities they know full well cannot be blessed and should not be undertaken. Those of you who will be asked to give advice to persons seeking public office as well as those already in office will be pressed every day to sanctify conduct that is unwise, unjustifiable, and at times illegal. Two of the great tragedies of the last 15 years — the Nixon Administration's planning of and reaction to the Watergate affair and, closer to home, the Mecham Administration's attempt to govern by deception and intimidation — were fueled in large part by the lawyers who failed in their duty to say: "No. You cannot do that." There will be many occasions in your legal

Paul F. Eckstein, a partner in the Phoenix law firm of Brown & Bain, as he addresses the graduates at commencement.



Enjoying the moment.

career when your clients will challenge not just your legal acumen but more importantly your moral strength. As a fifth key to happiness — indeed survival — in the practice of law, you must be prepared to resign your position or fire your client, however painful that may be, when you are asked to participate in or bless unjustifiable conduct.

With the advent of cheaper and cheaper computers with faster and faster throughput and the popularity of "The American Lawyer" and "L.A. Law," many of us find ourselves competing on false grounds, summed up by the bumper sticker I saw the other day which said, "The winner is the one who dies with the most toys." Most of us were satisfied, as we should have been, with winning cases and pleasing our clients until surveys told us how much better we could have done had we been with another firm or in another state. As the managing partner of a large law firm, I understand all too well the relationship between billings and collections, but I understand even better the relationship between outstanding service and the ability to survive in an era when law firms thought of as institutions for decades are disappearing almost monthly. Pleasing your client is difficult enough. You need not compete on false economic grounds. Perhaps I have an old-fashioned sense of values, but I cannot imagine how one can ever be truly happy in the practice when he is more concerned with the quantity of his possessions than the quality of his service. Thus, the sixth key to happiness is constant attention to the quality of your work.

In an era when many in our profession are more concerned with billable hours than community service, more with how many Rolex watches and BMWs they can put on the head of a pin than with how many lives they can enrich, I hope you will be ever mindful of the importance of public service throughout your career. In recognition of the importance of public service, the Arizona Supreme Court promulgated rules of professional conduct several years ago stating for the first time:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.[7]

I do not believe this rule goes far enough. While I think public service is important throughout your career, it is particularly important as you begin the practice of law, and as you are forming your professional values and attitudes. I would like to see the rules amended to require each person to perform substantial public service on a pro bono basis for six months to a year as a condition to membership in the Bar. I understand that no one would find it easy to make that kind of commitment and sacrifice, but that is the kind of commitment and sacrifice that is necessary to remind us that, as Justice Robert Jackson once wrote: The law is "like a religion" and "more than a means of support; it [is] a mission."[8] Public service is an indispensable element in finding true happiness in that mission.

Conclusion

The ultimate key to happiness in the practice of law is to understand that however frustrating the task and relentless the pressure, when you are called to the Bar, you are called to an undertaking of service and trust. If you view the practice as a means to acquire goods in an acquisitive society, you will be inordinately unhappy. If you view the practice as a challenge to solve seemingly insolvable problems and to employ the law as an instrument for positive social change, you will be able to find fulfillment and happiness. If you take seriously your obligations of public and private service, the next Tocqueville will be able to say that your generation of lawyers is like those who helped found and nurture this Republic — an enlightened class in which the people once again can place their trust. ■

END NOTES

[1]J.K. Galbraith, "The Convenient Reverse Logic of our Time," *A View From The Stands* 34 (1986).

[2]A. de Tocqueville, *Democracy in America* (Schocken Books ed.) Vol. I, 322, 328, 329 (196).

[3]S.M. Linowitz, "Keynote Address at Cornell Law School Centennial" (April 15, 1988).

[4]C. Sandburg, *Abraham Lincoln: The Prairie Years*, (Vol. II, 259-270 (1926); S.B. Oates, *With Malice Toward None: The Life of Abraham Lincoln* 102 (1977).

[5]W. Faulkner, *The Hamlet* 332 (1964).

[6]H.D. Thoreau, *Walden* (Riverside Paperback ed.) 63 (1960).

[7]Rule 6.1, Arizona Rules of Professional Conduct.

[8]Mr. Justice Jackson: *Four Lectures In His Honor* 18 (1969).

"Does the U.S. Constitution Allow a Limit of One habeas corpus petition in Capital Punishment Cases?"

In November, the ASU Chapter of The Federalist Society for Law and Public Policy Studies, part of an association of conservative and libertarian law students that formed at Yale and the University of Chicago in 1982 "to oppose the orthodox liberal ideology predominant in the nation's law schools," presented a debate on the need for finality in capital punishment cases. The two speakers were both from the local community and authorities on the death penalty. ***William J. Schafer, III,*** *Chief Counsel in the Criminal Division of the Arizona Attorney General's Office, argued for a limit on death penalty appeals. Schafer echoed the comments of retired U.S. Supreme Court Justice* ***Lewis Powell*** *in criticizing the patent abuse of the current system of multiple and dual collateral review.* ***Colin F. Campbell,*** *with the law firm of Meyer, Hendricks, Victor, Osborn & Maledon, delivered a spirited defense of the present system's mechanisms to protect an erroneously convicted innocent person. Campbell represented Arizona death-row inmate* ***John Henry Knapp*** *in both state and federal proceedings, ultimately obtaining the grant of a new trial.* ***Steven J. Twist,*** *Chief Assistant Attorney General of Arizona, moderated the debate. A transcript of the debate is printed below.*

Mark Hessinger

Good evening and welcome to the College of Law. Thank you for coming tonight. Tonight's debate is sponsored by the Federalist Society. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians who are interested in the current state of the legal order. The Federalist Society is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, and not what it should be. The society seeks both to promote an awareness of these principles and to further their application through activities, such as this debate tonight.

In the Book of Genesis it is written, "Whoever sheds man's blood, by man his blood shall be shed, for in the image of God, He made man." Thousands of years after that was written, public opinion polls indicate that 70% of Americans favor the death penalty, although a majority concede that it is no deterrent to murder. Most Americans simply adhere to the principle that if anyone willfully murders another human being, that person must pay for the crime with his or her own life. Tonight's debate does not concern the constitutionality of capital punishment. The U.S. Supreme Court has upheld properly drafted death penalty statutes. The question we address tonight, one faced by our society, is whether the current system for capital punishment is workable when it includes seemingly endless appeals that result in few, if any, executions ever being carried out. The question for our speakers is over the constitutionality and advisability of limiting post-conviction appeals.

At this time I would like to introduce one of our vice-presidents of the Federalist Society, **Tammy Mort,** who will tell you a little bit about tonight's speakers.

Tammy Mort

Thank you, Mark. Good evening everyone. My name is Tammy Mort and I'm a third-year law student at Arizona State University. I'm also vice-president of the Federalist Society. Tonight's debate is a very serious one, and tonight's speakers are well qualified to speak on these issues.

For the position that we should limit in some way the number of appeals that those convicted with a sentence of death should have after their conviction is **William J. Schafer III,** Chief Counsel, Criminal Division, Arizona Attorney General's Office. He was a graduate of Western Reserve University School of Law, and he graduated in 1957 with the Order of the Coif. He participated in Moot Court as well as Law Review. Prior to that he argued criminal appeals before the U.S. Supreme Court in conjunction with the United States' Attorney General's Honor Law Student Recruitment Program. He is one of a very small group of law students who were chosen to participate in that program. Mr. Schafer also served as the Pima County Attorney from 1966 to 1969. He currently is writing a book on death penalty issues. This year he received the Distinguished Public Lawyer Award from the Maricopa County Bar Association. We would like to welcome Mr. Schafer here tonight.

The speaker in defense of not limiting the lateral attacks on convictions that result in the penalty of death is Mr. **Colin F. Campbell.** He is currently a partner in the law firm of Meyer, Hendricks, Victor, Osborn & Maledon, which is a law firm here in Phoenix, Arizona. He attained his law degree from the University of Arizona in 1977, summa cum

laude. He served for Judge William P. Copple in the U.S. District Court, in Arizona. His specialty is criminal law, and he has been so certified. Prior to that he served as an assistant Federal Public Defender. His most intimate interaction with death penalty issues came when he represented John Henry Knapp, who was on death row for 13 years, had five state habeas corpus proceedings, and through the efforts of Mr. Campbell, was released on the last. I'm told that the nature of that case is that he was granted a new trial based on newly discovered evidence. I would like to welcome Mr. Campbell, in the position of defending more than one appeal on death penalty sentences.

Our moderator tonight is Chief Assistant Attorney General for Arizona, **Steven J. Twist.** I will now turn the podium over to Mr. Twist.

Steven J. Twist

Thank you very much. Tonight's debate is about a very serious matter. It's not really a debate about the death penalty itself as much as it is a debate about the process by which we go about deciding when and if the death penalty is appropriate.

In 1901, on September 6th, William McKinley's assassin fired the fatal shot, and on September 14th of that same year William McKinley died as a result of the attack. Before Halloween of that same year, the anarchist assassin who killed William McKinley had been caught, tried, been given his appellate opportunity, and executed on October 29th of that same year. The question which reasonably arises is what has happened in America in the intervening years since the McKinley assassination that so changed the criminal justice system that that sort of process is now an unthinkable one? To go from September 6th to October 29th, with all of the things that happen in the criminal justice system, doesn't seem to be really reflective of the kind of system that we have today.

What's happened in America in the intervening years? I think the speakers are going to touch on this. Let's get to the question. Does the United States Constitution allow a limit of one habeas corpus petition in capital punishment cases? I would ask both of them not to propose to answer that question with a yes or no, even though it emits to one, but rather to also talk about whether the Constitution should, whether our system should allow for more limits.

Let me just give you a brief statistical sketch about where we stand in America today on the death penalty. First of all, tonight in Arizona, there are 81 people on death row. Eight states, in 1987, executed 25 prisoners, bringing the total number of executions to 93 in this country since 1976. Those executed during 1987 have spent an average of almost eight years on death row since the time of the imposition of their sentence until execution. Two in three of the offenders under the sentence of death had prior felony convictions. A little more than ten percent have prior homicide convictions.

Let me share a couple of other statistics with you. Of the 37 states in the country that allow capital punishment, 34 have automatic rights to appeal, not depending upon whether or not the person convicted chooses to appeal. In 34 states they are automatic. The median age of those under sentence of death was almost 33 years. About one in ten of the inmates (for whom information on education was available) had not gone beyond the seventh grade. But nearly the same percentage, about 10%, had some college education. The median level of education was almost eleven years. Of those executed since 1977, the average time between sentence imposition and execution was six years and five months. For the 25 prisoners executed during 1987, the average time, as I mentioned, was over seven years. For black prisoners executed during 1987, the average time spent since imposition of sentence was eight years, and for white inmates the average time awaiting execution was six years and six months.

So this brings us to the question. Mr. Schafer will go first. He will assume the burden of proving to you all that there should be and can be some limits under the U.S. Constitution to the number of post-conviction appeals in death penalty cases. Mr. Schafer will speak for 20 minutes. Mr. Campbell will then go for 25 minutes and argue to you the opposite side of the case. Mr. Schafer will close with five minutes of rebuttal, and then we will open it up to your questions. Let's turn it over to Mr. Schafer first.

William J. Schafer, III

Good evening. To the question, does the Constitution allow only one habeas corpus petition in death penalty cases, the answer I would give right off is no! But it should come as close to that as possible. Let me read you a recent quote from the obviously exasperated Federal Circuit Court of Appeals: "A pattern," said the court, "seems to be developing in the capital cases of multiple review in which claims that could have been brought years ago are brought forward in a piecemeal fashion." And on another recent occasion that same court had this to say: "Three execution dates have been set aside in this case. Four petitions for habeas corpus have been heard and denied in state court, and one in federal court. Petitioner has just filed a fifth habeas corpus petition in state court, which makes two of the same claims that he is bringing here. Petitioner is now before this federal court on denial of his second habeas corpus petition."

Are post conviction procedures in death penalty cases out of control? Yes they are. Once the direct appeal in a death penalty case is finished, any prisoner on death row in any of the states where the death penalty statute is available to him has at least two more courses for review. Now, each one of these is normally referred to, even by prosecutors who should know better, as an appeal. And yet, neither is an appeal. And neither was intended to be an appeal. That's important. A defendant may file a petition for a state post-conviction remedy or he may file an application for a federal habeas corpus or he may file both at the same time, and unfortunately, he can do that in various sequences.

Neither the federal habeas corpus procedure nor any of the state post-conviction procedures were intended to supply more than one post-conviction review. It is clear now that when the federal rule on habeas corpus was drafted, and the various state rules were drafted (Arizona drafted its parent rule in 1973, and I was on the committee to draft that rule) we knew what we were doing but we had no idea how lax the enforcement would be and how resourceful the petitioners and their lawyers would be.

Often, when I speak in public, I'm asked when I think the next person will be executed in the State of Arizona. I used to say, "three to five years." I don't say that anymore. I just say, "Well, we really don't know; it depends on when he and his lawyer run out of points, claims that they can bring up. A lot depends on the ingenuity and resourcefulness of the lawyer."

Both systems, federal and state, have built-in safeguards against what we are now experiencing on a daily basis. Both systems have provisions designed to prevent abuses of the procedures. Both systems condemn successive applications. Both systems provide for the dismissal of applications that raise points that could have been raised in prior petitions and points that have been decided on their merits before. The commentators on the federal rules said when they were drafted some years ago, and this is a quote: "There are instances in which a petitioner will have three or four petitions pending at the same time, in the same court. There are many hundreds of cases where the application is at least the second one by the petitioner. These rules, and I'm talking about the federal rules, are aimed at screening out the abusive petitioner."

Many lawyers were sure that a sub-section on abuse in the federal rule was not really needed. One law review commentator had this to say, "Most prisoners, of course, are interested in being released as soon as possible. Only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the abuse law is apparently to deter repetitious applications from those few bored and vindictive prisoners. The occasional highly litigious prisoner stands out as the rarest exception." How foolish that was. Since that time, federal habeas corpus filing has increased well over 1,000%, really closer to 2,000%. In death penalty cases, the bored, the vindictive, the rare exception prisoner has now become the norm.

Let's look at our state. Steve told you we have 81 prisoners with death sentences. Of course, we haven't executed anybody in the State of Arizona since March 14, 1963. That sometimes is an argument that is used against us. Arizona must not want the death penalty because it never executes anybody. I think Arizona would, if the defense would stop filing petitions and motions. Of those 81, 36 are on their direct appeal. In almost all cases it is the first time for those people ever before in appellate court. That means there are 45 at some stage beyond the direct appeal. Now, of those 45, 29, which is 65%, have filed successor state post-conviction petitions. One has filed five, one has filed four, a bunch have filed three, and more have filed two. Four have filed successive federal habeas corpus petitions and about ten of the 45 have petitions pending in federal and state courts at the same time. With only a handful of exceptions, once you go onto death row in Arizona, you never leave. You are suspended somewhere in the appeal process. Arizona is not alone. Today in every state, we see second, third, fourth or more petitions filed on the same claim; second, third or fourth petitions filed on claims piecemeal.

And we also see abuse in the timing of the filing of the petitions. In that regard let me read you a quote from a Federal Circuit Court of Appeals in a 1984 death penalty case. This is quote: "This timing of presentation to this federal court is also an abuse of the Great Writs. Petitioner was aware of this claim" (in this particular case, it was ineffectiveness of counsel) "but he did not raise it until the last minute. Even then, his new counsel held this claim in his pocket until he was sure that the stay being sought from the United States Supreme Court on other grounds was denied." It is plain to most observers who have expressed opinion that both the state and the federal systems are being abused. It is plain to most observers that this abuse eats up valuable court time. And it is also plain that the fuses of a number of judges are getting shorter.

This isn't an issue, as I see it, that should pit prosecution against defense, or vice-versa. The abuse that is happening goes much beyond that. Finality in our system is extremely important. The more we diminish that, the more you detract from one of the main lessons of the entire criminal procedure known as deterrence. And we must all be concerned with that, for it's upon that that our safety depends. It is also curious that if the delays continue, and they worsen, the ones who will suffer the most and immediately are a number of defendants. A lot of the discussion and the comments on the federal rules concerning habeas corpus revolve around that thought,

cleansing the system of abuse "so that the more meritorious petitions can get quicker and fuller consideration." Now that's a problem that transcends any issue of prosecution versus defense. And I'm sure that Mr. Campbell will also agree that if the abuse continues, and if it is not stopped, petitioners and their lawyers will also have the difficult job of remaining credible before the judges to whom they appeal.

Take, for instance, the quote I gave you from the Fifth Circuit a few minutes ago and in addition, take this quote from the Eleventh Circuit Court. "This court is troubled by the virtually automatic claim of habeas petitioners to ineffective assistance of counsel. Since this petition was filed, both habeas counsel have submitted affidavits emphasizing their personal difficulties at the time of the earlier habeas petition. In addition, the trial counsel in this case have been cast as ineffective. Attorneys have turned against themselves as well as each other. Omitted claims are explained away by the incompetence of one or two or all three counsel in this case. The claim itself becomes suspect, with each instance of over use."

That claim is a claim that we see, this is true throughout the country, more than any other claim from any post conviction petition filed anywhere — the ineffectiveness of counsel. Now, what can be done? Well, I don't know what can be done, but I do know some things that should be done.

One, judges should apply the breaks on the abuse that we now have in the post-conviction remedy procedures. Often, for various reasons, judges simply do not enforce the rules. It is not entirely uncommon to appear before a judge who does not know what the rule is. Judges do not, on many occasions, enforce the rules that already exist.

Two, we should put a time limitation on the filing of a post-conviction petition. I would suggest that it be one year from the date of the judgment resulting in the direct conviction.

Three, we should require that both the petitioner and his lawyer state in their petitions that they have reviewed the record, that they have discussed the law that is applicable to that record and that case, and that they have determined that the claims in their petition are the only claims the petitioner has.

Four, when a second petition raises a claim that was raised in a first petition, the petition should be dismissed summarily by the judge.

Five, there should be no second or successive petition unless the petitioner did not know the facts which gave rise to this new claim and neither he nor his lawyer could have learned of those facts before they filed their first petition.

Six, when an execution date has been set, the post-conviction petition must be filed at least three weeks before the date of the execution. This must be so as to give opposing counsel time to reply, and to give the court time to read, time to determine the issue. It is not uncommon, even in our Supreme Court, for petitions to be filed at the last moment. Our Supreme Court long ago should have done something to the rules to stop that. It pushes any judge to get such a late petition. The execution is set on Wednesday; the petition may be filed on Monday — no one has time to look at that. Normally there might be 20, 30 or 40 points in a petition. It is no argument against reform of this review to say, as some attorneys have been saying recently, that successive writs and petitions are necessary to ferret out the injustices in the system, and that it is necessary to have a protracted procedure to ferret out those injustices. Some point to what they say is a fact.

I really suspect, although I have heard no attribution, that this comes from **Judge Broadbolt** in the Eleventh Federal Circuit Court of Appeals. "In one half of the death penalty cases, serious constitutional error is found." Now, I am not familiar with the context of that quote and even if it is Judge Broadbolt's quote, I am not familiar with the context in which he said it. But I am familiar with the statistics. And they show that that argument is incorrect. The Bureau of Justice of the United States Department of Justice reports that since 1980, 2,166 individuals have been sentenced to death. Only 14.5% have been removed from death row by appeal courts declaring the death penalty statute unconstitutional or overturning their conviction reversing, modifying or remanding their sentence. Many of those in that 14.5% had their death penalty removed by state courts on direct appeal. Now I don't know what that figure is, that is not broken down. No one does that, that I'm aware of. But, even if we were to assume that all of those death penalties were removed by a post-conviction procedure, we're still only talking about 14.5%. That hardly justifies the abuse that we see in the system today. And it hardly justifies repeated or successive writs or applications.

In the vast majority of cases, there is nothing mysterious about the statute or its possible unconstitutionality. There is nothing mysterious about a flaw in the conviction process that led to the particular sentence. And there is nothing mysterious about any flaws in the sentencing process. In the overwhelming number of cases, those things are known immediately after the conviction or the sentence, or very soon thereafter. There is no reason why they cannot be raised at that time in one petition, filed in a reasonable time, after disposing of the direct appeal. And most of those petitions will be taken care of on the direct appeal. In most cases there is no pressing need for a post conviction petition.

To me, it is also no argument to say, "This is a death sentence." We do hear that. You've probably heard that. "This is a death sentence, it is different." But, it is only

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Arizona State University College of Law Status Report 1988-89

Date Founded: 1967
Location: Armstrong Hall, Tempe, Arizona 85287-0604
Telephone: (602) 965-7207
Accreditation: American Bar Association; Member, Association of American Law Schools
Degrees Granted: Juris Doctor, LL.M.
Programs: Full-time Day Division only
Enrollment: First Year: 1398 applied; 390 accepted; 175 enrolled
Total school enrollment: 476

First Year Class (Fall, 1988)

Median LSAT	37
Median UGPA	3.41
Average Age	28
Residence:	
Arizona	66%
California	5%
28 Other States	29%
Minorities	19%
Hispanic 46	10%
Black 27	6%
American Indian 12	3%
Asian 7	2%
Women	40%

Alumni

Arizona	76%
California	5%

Annual Tuition and Fees

Arizona Residents	$1,362
WICHE eligible Nevada Residents	$1,362
Non-Residents	$5,484
Estimated Living Expenses 9 month academic year	$6,200

Placement Statistics

Types of Employment

Firms	66%
Government	11%
Public Interest	7%
Judicial Clerkships	15%
Corporations	2%

Special Programs

Clinics

Civil
Community Legal Services Based
Criminal Defense
Criminal Prosecution

Joint Degree Programs

JD/MBA
JD/MS Economics
JD/MHSA Health Services Administration
JD/Ph.D. in Justice Studies

Faculty: Full-time 31; part-time 11
Faculty to Student Ratio: 1:15
Class Size: Largest section 135; small sections 39
Colleges and Universities Represented: 165 including 4 foreign universities
Financial Aid: Scholarships $367,650; loans $1,277,896
Library: 270,000 volumes, 3 LEXIS/WESTLAW terminals
Arizona State Law Journal: Membership by class standing and writing competition
Moot Court Board: Competes annually in six competitions
Jurimetrics Journal of Law, Science and Technology: Student editor positions available

different." But, it is only different in some respects. It is not different in any of the respects that we're talking about here tonight. This problem of abuse exists in cases other than death penalty cases. In fact, I think death penalties provide a great incentive for speedy resolution; it actually should be just the opposite. Procedure, as it is practiced today, must be changed.

I will leave you with a quote, in a slightly different context, from **Justice Jackson** who dissented in a U.S. Supreme Court opinion and ended the opinion with a wonderful quote. He was condemning the majority for what they had done. And he said "If this court does not temper its doctrinaire logic with a little bit of practical wisdom it will turn the Bill of Rights into a suicide pact." Thank you, & I will return.

Steven J. Twist

We now turn to Colin Campbell to state the opposite case and I advise you, Colin, that we will give you an extra minute and a half.

Colin F. Campbell

Thank you, Steve. I think it's important to start out by talking about the common ground that exists today, and that is that the political propriety of the death penalty is not at issue. Every one here starting out this debate agrees, or should agree, that society can exact that penalty. Whether it be for deterrence, or whether it be for some notion of retribution, it is the only just punishment for a crime that a defendant has committed. Let's put aside whether the death penalty is correct or not, let's assume it is correct. The issue in this debate is the administration of the death penalty; more particularly, how swiftly will we exact that punishment? Or to put it in perhaps value loaded terms, how long will we let a defendant cheat the hangman? Underneath that issue is a more fundamental, philosophical issue, and that is, how do we create effective, humane and sensible procedure for enforcing the criminal law?

That fundamental, societal, philosophical issue has two principles behind it that are at war with each other. On one hand, we have the writ of habeas corpus. We all know those are Latin words. It is a legal procedure. It means bring the body before me. And it is a court's power to order the government to bring a person before me, and I will test the legality of his incarceration by the government. It is the writ of habeas corpus that prevents our society from becoming a dictatorship. It is the writ of habeas corpus that is one of the fundamental linchpins of the separation of powers. On the other hand, we have another principle, which Mr. Schafer has talked about tonight, and that's the principle of finality. By finality, we refer to the complete closure of criminal procedures and the ability of the defendant to attack a criminal conviction. And it raises the question, what role does finality have upon criminal proceedings and the right of an individual to challenge the constitutional validity of his detention or, indeed, whether the state can take his life. Should finality have any role where life and constitutional liberties are at stake? If finality does have a role, how much of a role does it have?

This war between the principle of habeas corpus on the one hand and the principle of finality on the other is one which society has addressed and found a solution. It exists in the rules of procedure for habeas corpus. The rule states, and I'll quote, "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief, and the prior determination was on the merits; or if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition was an abuse of the writ." That is the current law. If it is an abuse of the writ, the petition can be dismissed. The criminal conviction can be closed, and the punishment of death can be inflicted. Now in this debate, I'm going to argue in support of the status quo. And that that rule, that the discretion to close a criminal proceeding must be with the judge in the determination of whether the writ has been abused, is correct, on both constitutional principles and on public policy grounds.

I have watched the presidential debates, and I have learned from them. I have been taught by them that defenders of the status quo are conservatives. And although it may be somewhat ironic for me to cast Mr. Schafer in the role of a liberal, I would suggest that in this debate the plan put forward is a radical transformation of the status quo. History tells us that when we are dealing with a writ of habeas corpus, we are going all the way to the Magna Carta, to three centuries of English Common Law, and to an idea embodied in our Constitution. We should think twice, think carefully about the rhetoric before we change it.

Now let me talk a little bit about the Great Writ, the writ of habeas corpus. It is the legal vehicle which requires the court, an independent body of government, to inquire into the legality of a person's incarceration for the purpose of ordering his release. The underlying principle behind habeas corpus is that only the law can justify incarceration. Only the law can justify death, not an unfettered, indiscrete, governmental body. It is the great contribution of the English to our body of law. It arose from the struggle between the English trying to take away the prerogatives of their king to kill and to incarcerate. It allowed the king to be brought into court and justify by law the reasons for incarceration. The importance of the writ of habeas corpus to our Constitution cannot be underestimated. It was of such importance that the founders of the Constitution drafted the suspension clause to the Constitution, which

states "the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it." The writ was so important that it is even embodied in the Arizona Constitution. The Arizona Constitution states that "the privilege of the writ of habeas corpus shall not be suspended by the authorities of the state," and it allows no exception, even public insurrection.

Ironically, the one time in our constitutional history when a president took it upon himself to suspend the writ of habeas corpus, was when Abraham Lincoln, on his own power, suspended the writ of habeas corpus and arrested the Maryland legislature as they were traveling to the state capital to vote on succession. And it caused such a public outcry that when congress reconvened he submitted the issue to congress.

Now, as a constitutional matter, the issue arises whether the Constitution allows the writ of habeas corpus to be limited to only one petition or to only a petition filed within one year, as presented by the affirmer. An argument could be made, and you have to go back to the original intent of the Constitution, that the Constitution does allow it, because when the Constitution was drafted, the writ of habeas corpus was directed only toward the executive, only toward the president. At that time it was thought that if you were convicted by a court, that was a determination by law that you were legally incarcerated, and courts did not inquire into the validity of their own convictions. Indeed, the first judiciary act did not even allow the federal courts to inquire into the validity of a state conviction.

I think it has been recognized, perhaps by the concession that the Constitution does not allow the limitation, that things have changed since the time of the founding of this country. The great transformation caused by the Civil War has changed our thinking on habeas corpus. After the Civil War the Fourteenth Amendment was adopted, which states unequivocally that no state shall deprive a person of life, liberty or property without due process. The argument was then made that if you take the writ of habeas corpus together with the Fourteenth Amendment a citizen of this country should have the right to challenge whether the state was taking, at the very least, his life, without due process of law. And it has now become well established that one of the functions of the Great Writ is to challenge detentions of not only the executive branch, but of the states, and whether the state procedure violates due process and the constitutional rights of the citizens of this country. The Constitution, then, does not speak to this issue. It does not allow limitations. And we have always been loath to place limitations or amendments upon our Constitution.

But let's address whether there are sound public policy reasons to allow more than one writ of habeas corpus. I think the answer has to be, without reservation, yes! And in doing that let me suggest a couple different areas that arise in cases where one has to say yes, a successor writ should be filed. One is the area of newly discovered evidence. No one can reasonably dispute that newly discovered evidence which casts doubt on the validity of conviction should form the basis of a new, successive post-conviction collateral attack on a judgment. There are instances. Maybe they are only one percent of all the convictions in this country since the year 1900. But one percent would be in excess of 500 convictions, where newly discovered evidence established that a man or woman who had been sentenced to death was in fact innocent, innocent even though twelve jurors found the person guilty beyond all reasonable doubt. I don't think there's the suggestion that under circumstances like that, whether or not it is a last minute file, the law would not allow the writ of habeas corpus to be filed.

Let me suggest another area, and that deals with changes in the law applied retroactively. Here I think the affirmative case runs up against a revolution in the law that has taken place since the early 1960's — first, in the area of individual rights in the respect of criminal convictions and criminal prosecutions, but also in the death penalty itself. Before 1974, there was no challenge one could make to the imposition of the death penalty itself. If the jury or the judge thought the death penalty was appropriate, that was their decision, no one would redo it. Then in Furman v. Georgia, in 1974, the United States Supreme Court, in nine separate decisions, struck down the death penalty as unconstitutional in every state that applied it. The reason was simple; the court looked at the death penalty and found that getting death was as arbitrary and capricious as being struck by lightning. In fact, there were worries about racism, that a black man charged with raping a white woman in Georgia had a ten times greater chance of getting the death penalty than vice versa. The court felt that this was a fundamental violation of due process. That there must be some way to rationally explain why some people get death and some don't.

That resulted in the reformulation of death penalty laws in this country. And the way they have been reformulated is that each state is trying to establish a system which takes a class of admittedly bad actors, first degree murderers, and from this class finds a rational basis to say that this sub-class within the judiciary is deserving of death and these other people are not. The way the court has constitutionalized this process is to say that, "states, you can set up certain aggravating factors, and if a person commits a murder, and one of these aggravating factors applies, he can be death eligible." But then the court or the jury has to consider all mitigating factors of this particular defendant to determine whether death is the appropriate punishment. Because the court recognized in the 1970's that whether death should be inflicted upon a defendant is a philosophical, a moral and an ethical judgment, and it could only be constitutional if it follows certain highly defined procedures.

Unfortunately, the issue is complex; the court has handed down major decisions every year since 1974 regarding the death penalty. For example, last year four justices held, one concurred and four dissented in an opinion that a 16-year old could not constitutionally be subject to the death penalty. Four justices felt that there was something fundamentally abhorrent about taking a juvenile and saying that that juvenile must be killed . . . that society does not require that under the eighth amendment. Well, that poses a change in the law. What do you say to those 16-, 17- and 18-year olds who are on death row? Although it is a constitutional principle that the infliction of death on someone that young cannot be allowed, too bad for you. Let's go ahead and kill you. Fortunately, the law doesn't work that way; there is equal protection. If you have changes in the law that come down every year that apply to a class of persons, they have the right to raise those issues under our society and under our Constitution. An unconstitutionally imposed death sentence is just that. And that's what the writ of habeas corpus is trying to protect against.

Let me give you another example. Last year the court held that the death sentence cannot be imposed if the sentencer considered victim impact statements. A very close decision, a 5-4 decision. But the majority of the court said that the impact on the victim and upon his family is not a rational consideration of whether someone should get death or not. We shouldn't select people for death because of the impact upon families. In Arizona, routinely, victim impact statements have been used in death penalty proceedings since 1974. It creates an issue with respect to most everyone on death row, that is, whether the application of death to them is constitutional. The writ of habeas corpus allows them to raise those issues.

Now, if the court holds that certain state practices are unconstitutional, we have to ask whether it violates our sense of fairness to say let's apply the rules to some, but not to others. Let me give you another last example, and this one might strike closer to the guilt determination concept. For years the courts stated that a prosecutor could use his preemptory challenges to eliminate minority members of the population from the jury. Within the last two years the Supreme Court in the Batson v. Kentucky case said that unless there is a non-racial reason to strike someone from a jury panel, it is unconstitutional to do that, because you are denying the defendant a fair cross section of the community and you are stacking the jury against him to come back with a guilty verdict or a death sentence. Should that decision be retroactive? Should it be applied to people who are incarcerated today who had jury minority members who were stricken from the jury? I think the court is going to decide that question this year, but if they say it does, there is no reason why the writ of habeas corpus could not be utilized by a prisoner to challenge the constitutionality of his detention. So changes in the law require successive petitions, and it is not innovative and creative counsel who are making the changes in the law, it is the Supreme Court. It's the law of the land, and it would be malpractice for an attorney not to raise it.

Let's talk about another area, ineffective assistance of counsel. The question was posed why last minute petitions are filed. There is an easy answer to that. People on death row are not Rockerfeller. They are not that fellow from Rhode Island who committed murder and had Dershowitz from the Harvard Law School and four other defense attorneys representing him. They are indigent, they are poor, they do not have attorneys. The state of Arizona does not provide attorneys to them. They have no training in the law. They cannot file petitions on their own behalf. Petitions are filed at the last minute because of volunteer efforts by attorneys who feel it is their obligation to represent someone who is indigent, and see that he gets all the process that the law affords him. But ineffective assistance of counsel is a fact. Most people charged with a death penalty are prosecuted for murder and are indigent. They are given public defense, they are given overworked public defenders. They are given overworked public defenders who do not have funds to hire experts, or do not have funds to hire psychologists, or do not have funds to hire investigators and prepare a competent defense.

It is particularly true with respect to the area of sentencing. The United States Supreme Court has held that in a sentencing proceeding everything about a defendant is relevant evidence as to whether he should be committed to death: how he was raised, what his family background was, whether he was abused by his father, what opportunities he had as a young man, what opportunities he had for rehabilitation, what his prior record has been, how he has reacted to the incarceration center, does he have problems with drugs, does he have problems with alcohol? Everything is relevant to the philosophical, moral and ethical question, does that defendant deserve death?

Unfortunately, the message has slowly permeated to the defense community. Many death sentencings in Arizona have been done where the defense counsel put on no mitigation evidence at all, and have not even made an investigation into the circumstances of the individual defendant. Should a successor petition be allowed, so that that petitioner can challenge the constitutionality of being

sentenced to death when he received ineffective assistance of counsel? You bet it should! Especially when we are dealing with a class of society that is the poorest. They can't hire counsel themselves, and as a result, suffer from it. These are all sound public policy reasons not to limit successive petitions.

But let's address the question here in Arizona. Is there something wrong in Arizona, is death delayed, justice denied? The unstated premise here is that something is wrong because the state hasn't executed anyone yet. Let me suggest to you why there are good reasons why Arizona has not yet reached the execution record of the southern states. But let me also assure you that although the process of the law is slow, there will be death sentences in Arizona. There will be executions, and we will have the same rate as a Florida or a Texas, or an Alabama or a Louisiana; we just simply haven't reached that level yet. You have to remember that in Arizona the death penalty was declared unconstitutional in 1974. It was then reinstated. Then in 1977, there was a class action law suit filed by an inmate I represented, John Henry Knapp, in later proceedings, seeking a determination in federal court that the Arizona death penalty was unconstitutional, as drafted by the Arizona legislature. The Arizona death penalty did not allow a defendant to present all mitigating evidence he wanted. If he had an abusive father, he could not present it. It limited the ability to raise mitigation and argue the individual culpability of the defendant and whether as an ethical, legal or moral matter death should be imposed. Judge Muecke, looking at the statute, concluded the death penalty was unconstitutional. The Arizona Supreme Court in a later decision then reinterpreted, reconstrued the death penalty and said to the extent it limits mitigation evidence, it is unconstitutional. Now you can present anything you want; but that delayed the processing of cases in Arizona for three to four years. So many of the prisoners' petitions have only been ongoing since 1981, when the federal court stay was lifted.

But there are still many outstanding questions regarding the constitutionality of Arizona's death penalty. For example, right now the Ninth Circuit Court has a case, the Adamson case. Some attorneys believe that the Ninth Circuit may address the question of whether an aggravating circumstance in Arizona — whether a murder is especially cruel, heinous or depraved — is unconstitutionally vague. [The Ninth Circuit did so hold shortly after this debate]. Because when you stop to think about it, just about all murders are cruel, heinous and depraved. As it has been interpreted by the Arizona Supreme Court, it can certainly be applied that way. But they're going to decide that. If that issue is decided, it will affect many petitioners on death row, who are there only because a court said their particular murder was cruel, heinous and depraved.

There are many other issues. For example, the issue of jury sentencing was one raised for many years. In Arizona, the judge decides sentencing, not a jury. Many people thought that violated the right to a jury trial, the federal constitutional right to a jury trial. If the death penalty is a consensus of the community, that death is the only appropriate punishment, why is it decided by a judge rather than the jury? The issue was decided adversely to the jury trial issue some years ago, but it was one that applied to everyone, and everyone had a right to raise under a writ of habeas corpus. Arizona has simply not progressed as far as Florida, Texas, or Louisiana. Many of our major death penalty cases are out of those states. But within a few years we will have progressed. The number of issues that can be raised that are undecided as of this time will start closing, and we will start seeing executions in Arizona. Nevertheless, although we haven't had an execution yet, each day we move closer to the day when we will begin to execute prisoners. The question I think that has to be asked is, why as a matter of public policy should we expedite the careful and deliberate review of cases which are meant to ensure that when the state takes a human life it abides by the constitutional requirement that it gives that individual due process. Delay only results in the delay of death, but the infliction of death will be certain when that day comes.

You know, it's not like these prisoners on death row are living in a country club. The death row in Arizona requires a prisoner to be in a nine by six foot cell 23 out of 24 hours a day, with one hour for exercise. They are hardly there under conditions that do not punish them, that do not impose severe suffering upon them, and do not give them more than adequate opportunity to reflect upon the punishment that society is going to inflict upon them. Therefore, I think that the present system is a good one; it does allow for successive petitions, but it allows a judge to determine that if there is an abuse of the writ that that petition can be set aside. The simple fact of the matter is that we are living in an era of change, of unprecedented revolution in death penalty jurisprudence. These petitions are not abusive. They are constitutional due process issues that go right to the heart of the trial, and that's why writs are not being denied. Thank you very much.

Steven J. Twist

Thank you, Colin. Now we will turn to Mr. Schafer for five minutes of a rebuttal argument.

William J. Schafer, III

I hope Mr. Campbell wasn't generalizing there at the very end, that these writs are not abusive, that these writs always go, whether they are state or federal, to the heart of the matter. When you see as many as we do in my office, all of the death penalty writs and post-conviction petitions in the state, you know that that simply isn't true. Some of these actually do go to the heart of the matter. Our quarrel is, has been, and will be that you should not be able to litigate that two, three or more times. I don't think there is anyone who advocates what I do, for reform of the abuse going on, who would say we should do away with the writ of habeas corpus, or we should do away with post-conviction remedy petitions. What we are advocating, what I have advocated tonight, what we have advocated from the very beginning, is that we stop the abuse.

It is true that in both systems the judge apparently has the ability and the authority to dismiss a petition that is abusive, that is excessive. One of the things I've pointed out to you, however, that is not being done in many cases — why, we may be able to quarrel over, but it is simply not being done — is that we should put something into the rules or the statute that will tell the judge in those instances when this should be done, no matter what he has in his own mind or array of guidelines. It simply isn't being done. The Constitution provides for the writ of habeas corpus; it does not provide for two or three or four and it does not specifically say one writ. The writ of habeas corpus already has within it, and it's been approved by the United States Supreme Court on more than one occasion, an exhaustion rule. This rule means you have to exhaust your state remedies before you can really go into federal court with a writ of habeas corpus.

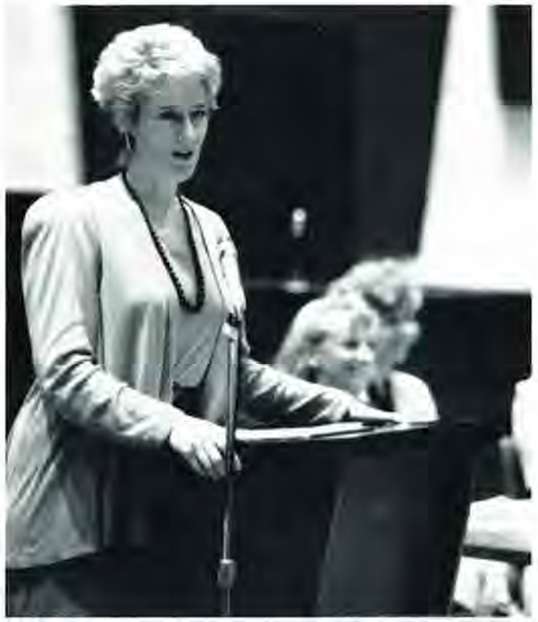
It also has, which is perhaps more important, a preclusion rule; you are precluded from raising some point on a federal writ of habeas corpus. For instance, I'm sure Mr. Campbell has run into this, you have waived by not raising it in state court. That is one of the very first things we do whenever we face a federal writ of habeas corpus petition, look and see if for some reason this particular defendant and lawyer did not raise the point in state court. Federal courts, according to the rules at least, and the United States Supreme Court is quite good at this, will say you have not raised it in state court, you cannot raise it in federal court. You have by-passed the state procedure. The very first thing you start out with on the federal habeas corpus is to see if an opportunity was given to the state court to dispose of this claim. If they had not been given the opportunity, you are precluded in federal court. But again, one of the problems with that is that a great many federal courts and circuit courts of appeal simply do not follow that, and allow those things to be raised time and again.

Now, that's pernicious in a number of regards. One is that a state court has never had a chance to look at it, and there is no reason to suppose that the federal court is any better at reading the Constitution or interpreting it than a state court, a state supreme court or even a state superior court. And the second thing is often that if that point is allowed to be raised in federal court, the case assumes all sorts of proportions that the case did not have in the state court proceedings. The record has to be made again in many cases. The record is augmented in many cases. And often you end up with a different case in the federal system than you had in the state system.

Mr. Campbell mentioned due process. Again, I don't think anyone would advocate that we take away due process from a defendant. But what we are advocating is that you don't get due process, after due process, after due process. The U.S. Constitution or the Arizona Constitution does not say, "Mr. Defendant and his lawyer, you can do this time and time again." I just can't let this go without remarking. We often hear that some of these men, in fact, you often hear that a lot of these men, do not have lawyers. In other states, some of that may be true. I dare say that Mr. Campbell could not point to anyone on death row now in the State of Arizona who does not have a lawyer. He mentioned as an example that someone couldn't get Alan Dershowitz like the guy in Rhode Island did. Curiously enough, I argued the Tyson case for the second time in the Arizona Supreme Court two weeks ago; Mr. Dershowitz was there for both Tysons. It's very curious too that I was the only lawyer for the state. There were four for the Tysons. Adamson was mentioned. Mr. Adamson now currently has, and I'm sure these people are still listed on the book, five lawyers. In Arizona, because of the way our rules are written, you almost have to have a lawyer, especially if you are in direct appeal. Because it is automatic you do have a lawyer, and even after that you may have more than one lawyer. It is not uncommon to see two or three lawyers for a defendant, and often these lawyers stay with that case for a very long time.

One last thing. Mr. Campbell mentioned a number of examples where those points were raised on habeas corpus, and I'll just give you one, a case called Thompson and the United States Supreme Court. Nothing that I advocate would wipe out the ability of Mr. Thompson — he was 15-years old when he committed the murder — nothing would wipe out his ability to file a federal habeas corpus. The one exception that I think most people realize, even when talking about reform, is a change in the law as it applies to newly discovered evidence. Even with our rules now, there is an exception for newly discovered evidence. If you have a limitation of one year on filing a petition, it is obvious to many that you have to have an exception to that, especially for newly discovered evidence. I doubt if anybody would really wipe that away. What we would do however, is to set, but you have to do more than state that; you have to prove that it is truly newly discovered. I believe my time is well up. Thank you. ■

Fall Orientation



Ruth V. McGregor, (Class of 1974) of Fennemore Craig, P.C., addressing the largest incoming class ever at the College of Law.

The challenge of making it into law school is one thing. The shock of finding oneself there is another. Helping students know what to expect and where to go for help are the objectives of Student Orientation, held each summer in the College of Law.

Orientation activities this year were directed to the largest incoming class ever in the College — 181 students. These students came from 30 different states, represented 93 different undergraduate institutions, were comprised of 40% women and 21% minorities, and were an average of 28 years old.

The class of 1991 was welcomed by ***Dean Paul Bender,*** *Student Bar Association President* ***Sheila Madden,*** *and* ***Ruth McGregor,*** *a 1974 ASU College of Law graduate and a partner in the Phoenix law firm of Fennemore Craig, P.C. Ruth's welcoming address, both entertaining and inspirational, is printed below.*

Good afternoon. When Dean Bender called and asked me whether I would talk to you at your orientation, I, without thinking too much, said yes, of course, I would be glad to. And then I realized that I did not know what I was supposed to do. So I said, "Dean Bender, is there anything in particular you would like me to talk about?" And he said, "No, Ruth, just whatever you think." And I thank you, Dean Bender, for that good advice.

So then I considered whether perhaps something in my personal experience would tell me what to talk with you about. But honestly I did not remember a single thing about my orientation at Arizona State University College of Law, although I am sure we had one.

The thing that I noticed more than anything else today is that there are some spouses here. But the wonderful thing is I can look at this group and not know whether the man or the woman is the spouse of the law student or whether you are both here. In our class at ASU when we began in 1971, out of about 140 beginning students, we had 18 women which was regarded as an incredible number of women to be in one law school class. So the changes have been wonderful and I am glad to see that.

But since I did not have any personal experience to draw on, at least none that I could remember, I decided, as any lawyer should, to go to some source materials. And I thought if I had a good definition of "orientation" maybe

Deàn Paul Bender welcomes the Class of 1991.

that would help me decide what to say. So since I was talking to law students I went first to a book that you may have already seen called *Black's Law Dictionary.* I got it off the shelf in our library where it had been taking up space and gathering dust since my first semester in law school and I looked up "orientation." It was not there. (Nothing you want is ever in *Black's Law Dictionary.*) The closest thing I could find was "ordinance." There was a definition of the ordinance of 1648. The ordinance of 1681, the ordinance of 1787, the ordinance of Edward I and my own personal favorite, the ordinance of the forest. But none of that would help at all and I should probably tell all of you who have already dutifully purchased the *Black's Law Dictionary* that using that to understand principles of law is roughly equivalent to, and roughly as useful, as your efforts when you were eight or ten years old to understand sex from looking up words in the dictionary.

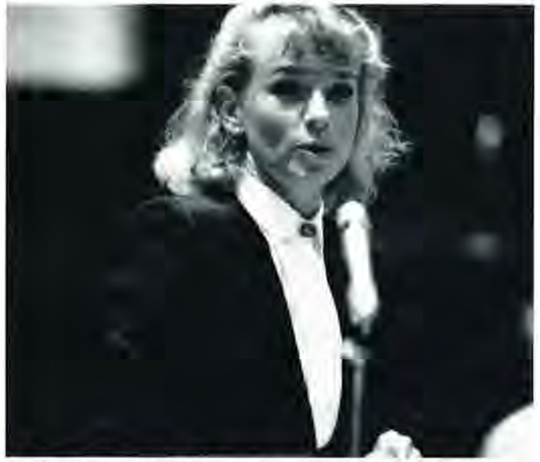
Not having gotten any help from *Black's Law Dictionary,* I pulled another book off my shelf: the *College Edition of Webster's Dictionary.* That did have definitions of "orientation" but they turned out not to be all that useful. There were several. The first one: "orientation — an orienting or being oriented." Now while that sounds like some of the things that lawyers write and law professors say, it did not really help me. The second definition was: "position with relation to the points of a compass." Now it is true that law students often don't know what direction they are headed but that didn't seem exactly what I was looking for either. There was a third definition: "the planning of church architecture so that the altar is at the east end." Now I thought the specter of law exams does sometimes challenge the beliefs of agnostics and atheists but I did not think that that was perhaps exactly what I should focus on either. The fourth definition started out well; it said: "familiarization with or adaptation to an environment." But the definition went on. "Specifically, in psychology, interpretation of the environment as to time, space, objects and persons." And now I am going to give you the best advice you will hear today: if any of you sitting out there are not oriented as to time, space, object and person, do yourself and those supporting you a big favor and leave before the day ends! The fifth definition in *Webster's* said: "in zoology, the homing faculty or instinct of certain animals." And it is true again that the law school experience, particularly in early weeks, does sometimes arouse the homing instincts in the people starting classes and that as the years go by your homing instinct tends to be centered around the law school classroom. But none of those definitions (and I swear to God those are the only ones that were there for orientation) were really helpful.

But lawyers must be resourceful. And like all lawyers, I know that if one word is good perhaps three or four would be better. So I got my third book off the shelf, the *Thesaurus.* And there it said: "orientation — familiarization, bearing introduction." And that made sense. I knew then that I was here to try to help you get your bearings and give you an introduction to the practice of law. And that also leads me to the second bit of advice that I have for you. And that is whether you are acting as a law student or a lawyer, remember to look until you find a source that gives you the answer that you want.

I then decided what my topic should be: How to help you get your bearing; how to introduce you to the practice and study of law. You will receive much advice from many people on how to study, what books to buy, and what materials you should read as a beginning law student. In fact, unless you are an extremely unusual class, I suspect you have already gotten all the advice you can from any lawyer you know, any person you know who has ever talked to a lawyer, and probably anybody who has walked through the building. So I will leave those matters to people better qualified.

What I would like to talk with you about, then, is your introduction to law school as a step on your way to becoming a practicing lawyer. I received some assistance with the comments I am going to make today. Before I came down, I talked with about a dozen of the new associates in our law firm who have been practicing for approximately one year. I asked them, "What do you wish somebody had told you when you started law school that you did not know then, but that you know now that you have practiced for awhile?" I will be passing on to you some of the comments they made.

The best advice, really, that I can give you is to be clear as you start your law school studies about what your goal is. You all know that it is easier to arrive at a goal if you know what the destination is. Your goal as law students should not be just to get good grades, although some of you will and they will be helpful to you. Your goal should not be just to become a member of a profession, although when you finish you will be so classified. Your goal is not just to learn how to make money, although many of you will and there is nothing inherently bad about that. Your goal is not



Sheila Madden, Student Bar Association President, describing the activities and benefits of the SBA.

even to become a lawyer, because becoming a lawyer is only a means to an end. The end or goal that you should all be bearing in mind is the same whether you enter private practice or governmental service or practice community law. And that is, you must be prepared to serve and assist people who come to you as clients, to help them with their problems, to help them with the complexities that they face in a society largely governed by the rule of law.

It is essential for you to know what your goal is because once you achieve your degree and begin practicing, your position will make you a repository of trust from your clients, and you will be responsible for assuring that their interests are primary and that you do all you can within ethical boundaries to advance those interests. One of the associates I talked with, who gets a gold star, said "I wish I had known that practicing law is not just *L.A. Law* and it is certainly not just making money. It is assuming a position of trust." And, he said, "If I had thought about that, if I had known that, I would have taken some parts of law school a lot more seriously."

Now if you start out with the goal of serving clients in mind, then the approach you need to take to your studies during these next three years is obvious. You must use your time to learn as best you can the knowledge and skills you need to practice law and serve your client. There can't be any alternative goal or any alternative approach to your practice. It does not matter, once you have defined that goal, whether you are assured of a job because your father and older sister started a law firm and will give you a job no matter what your grades are. And it doesn't matter if you say, "Personally, I don't care what my grades are." Because what matters is that when you get out in practice you will know that, during law school, you did not lose an opportunity to learn a skill that will help you recover what your client is entitled to, or will help you find and develop a dispositive argument to assist your client. You must learn, you must take advantage of the three years here.

How do you go about making maximum use of the opportunity you have here? You will get a lot of conflicting advice on this. How should I study? What should I do? I am sorry to tell you, there is no magic answer. When I talked to our associates, all of whom had done well at various schools, I got interesting advice. One thing you will hear about, I am sure, is study groups. One associate said, "Ruth, whatever you do, tell them to join a study group because it will be so helpful." Another person said, "Please let them know that no matter what else they are told, don't waste time with a study group, they would be much better off to spend that time themselves." In my own experience I joined one study group that was a waste of time and later formed a second study group with just one other person who was enormously helpful. So you have to adjust and adapt to your own needs.

I also talked to our associates about the study aids that are available: the outlines, the nutshell series and so forth. One said, "Tell them this, Ruth; all the professors will say don't use study aids. But they need to use whatever will be an advantage to them. And they should take advantage of those study aids." As you might guess, somebody else said, "Don't have them use any study aids because that will just send them off on tangents and they will learn a lot of things that are either wrong or not of any interest to the professor." So, in deciding how to approach things, find your own angle of repose. Find your own way to deal with studies and prepare to adapt and change your study methods. Whatever you decide to do in the first month is not written in stone. The law changes; lawyers must adapt; you can too.

But it is clear, no matter how you approach your studies, that developing the time, the expertise and skills necessary to do what you need to do for your clients requires considerable effort. What if you make that considerable effort during your three years of law school? Will you actually learn anything that will help you when you get out to practice law? When I was in law school, I heard, and I still hear lawyers say, "Forget about law school, it's a necessary evil; you won't learn anything there that's of any use to you." I frankly am amazed every time somebody says that to me. Because the one thing that law school teaches better than anything else, as Dean Bender referred to, is the ability to analyze. You learn to analyze legal and factual issues, and you will do that every day of your practice. If you do not, there is something wrong with the way you are practicing. You are constantly considering issues presented to you by your clients, and your responsibility is to analyze those issues. If you put in any effort in law school, you will come out knowing how to perform that kind of analysis.

There is also something positive to be said about the workload, which will sometimes seem overwhelming to you in law school. But by having to deal with the workload, you will learn organizational skills that will be essential to you in practice. Another one of our associates said, "I understand now the rationale for the amount of work required of us in law school. As a student, you need to develop good work habits and you need to learn to put out a consistent effort. Lawyers work hard," he said. "You can't slack off for two months and then make it all up with two weeks of hard work." Dean Bender said one thing to you that I disagree with. He said that in the next several years you will probably be working harder than you ever will again. That's not true! Practicing law is a demanding profession. If you think you are working hard in law school, be prepared, because it is harder once you begin practicing, but it is also more fun. Another one of our associates said, "Tell them this. Tell them that you can never be too prepared in the practice of law." I wholeheartedly agree with his statement. And, he said, "The organizational and preparation skills I learned in law school transferred directly to my practice." So those are some of the things I think you should keep in mind.

But there is one lesson more important than anything else. If you remember one thing from today, and I hope you do, the one factor I would like you to bear in mind during the next three years is that it is essential for all of you to learn to respect what is a proud and honored profession, the profession that you are about to enter. Our profession is damaged when practitioners of the law present the practice of law as a game. It is not a game. Our profession is damaged when people who practice law forget that they are acting as part of a judicial system and that it is their responsibility to uphold the system and its principles.

One of the people that I have been privileged to practice with for the last 14 years is a man named Cal Udall, one of the senior partners in our firm. Through 40 years of practice, Cal has never lost his respect for the law and the fun and enjoyment he gets from practicing. He recently wrote a short article titled, "Professionalism and Its Fragile Unnecessary Foundations." I am going to leave you with some of the thoughts from that article because Cal speaks of professionalism as well as anyone can. He wrote: "Our tradition of professionalism is rich and ancient. Law students immemorially have been, and presumably still are, constantly imbued with intent that when they earn the privilege and accept the responsibility of becoming lawyers they also become officers of the court. The oath we take solemnly proclaims our professionalism and our obligation to the courts, our clients, and the profession. We are honor bound to subordinate our own interests to those of our clients and even to the cause of the defenseless and oppressed, no matter how unpopular the cause may be. What is the essence of professionalism? It could have many meanings. But its definition is clear to lawyers. Professionalism is public service, not self-service. It reminds us of our duties to inform and educate the public about the rule of law and our system of law and justice. It commands us to do public, civic and bar service. It is the still voice that goads us to do, not merely what is required, but what is proper, even though our worthy actions never are revealed. The preservation of our justice system and its institutions demands that lawyers by their words and deeds must preserve the nobility of their calling. The perpetuation of our courts compels that the relatively few members of our judicial branch must act without reproach and beyond reproach and must sustain and nurture the common law and the traditions of the profession. Those in the profession's teaching branch must be ever mindful that they are the modelers and exemplars of future lawyers. They have the means and the duty to show their disciples the path of professionalism rather than to suffer or abet them to become exploiters of the law and the legal system for their own financial gain."

Those are the principles of professionalism that I hope you all keep in mind during the next three years and practice once you leave this law school. If in a few years, one of you is standing here trying to help orient an entering class, I hope that you will at that time be able to feel about our profession the way I do. Because I can tell you that I enjoy our profession; I am challenged by our profession and I am proud of our profession. And you will find that the next three years, if you give them a chance, will be exciting, will be challenging and will be rewarding. I wish you all the very best of luck. Thank you. ■

What is Happening in British Legal Education?

David Carson *is visiting the College of Law during the Spring semester of 1989. He is from the law faculty at Southampton University, England, with which the College has a faculty exchange arrangement. While at ASU, he is teaching a seminar in comparative criminal law, which is particularly concerned with considering alternative tests for, and means of proving, corporate or institutional responsibility for injuries to people.*

In Southampton he has special responsibilities for developing their continuing education program which provides courses for British lawyers and other professions. He is heavily involved in inter-disciplinary studies and takes advantage of his position as a member of a district health authority to develop practical ideas in law and health care and social services management. (The district health authority is statutorily responsible for the delivery of the national health service to a population of 230,000 people.)

He described the exchange as "immensely valuable" both in terms of opportunities to learn about U.S. laws, procedures, ideas and teaching practices and in providing a much needed space, away from the incessant demands of juggling ever increasing deadlines and jobs to provide time to think — and recover. He confessed that he has checked the phone several times to be sure it is still working.

David Carson has contributed the following personal observations on developments in British universities, and legal education in particular.

Immediately, right after the absence of hills and green, one notices the differences in size and resources. Southampton University is an average size at some 6,000 students. But then only about 2% of the British population go to a university. The law faculty compares, at least in having some 30 teaching staff and an intake of just over 100 students each year. There, the comparison ends. Southampton shares one librarian with social sciences, a faculty clerk in charge of timetable, registration of students, examination and other administration, and ten secretaries with two exclusively involved with continuing education and two with printing.

Law is an undergraduate course in Britain. Most of our students come straight from school, aged 18, although we, unusually, have about 10% mature age students who would rarely be people changing careers. Law is a highly popular course so all law schools can demand high grades in the public examinations (called "A levels") used by all subjects as entry requirements. (A few schools have experimented with LSAT.) Most law students have specialized in arts or humanities subjects since the age of 16 which, perhaps, contributes to the relative disinterest in social or statistical sciences and other contributions to law.

All law schools' degrees offer exemption from lawyers' professional examinations by requiring study of the legal system, constitutional, criminal and contract law, land law and equity. Most students also study family and company law. Southampton is unusual in the wide range of optional courses it offers, but increasingly less so for its requirement that all final (third) year students submit a 10 - 15,000 word dissertation on a topic of their choice. It is supervised by a teacher and we treat it as equivalent to a whole subject. We do not teach legal writing as a separate subject, although a recent committee condemned the standard of law graduates' literacy and law teachers know what they were referring to. We do not offer clinical courses; that is seen as being for the professions to teach. There is no particular advantage, in terms of appointment and promotion, for law teachers to have had professional or practical experience of the law.

Students follow four courses at a time through two ten week terms and part of a third term, when examinations also take place. Half options, lasting just one term, have been introduced. Most courses involve one or two one-hour lectures where usually (not in mine) the teacher describes and discusses the law and students note. Then each student joins a tutorial (8 - 12 people) or a seminar (around 25 people) for one or two hours a week in that subject and is expected to contribute. British students are more reticent than students are in this country and less politically aware or concerned. (There is only one law student organization in the faculty.) We use textbooks rather than casebooks and require students to find and read the statutes and cases in their original form. Preparation of six to eight cases and 40 pages of textbook for each tutorial would be quite common.

The most common examination is a three-hour paper of questions on hypothetical fact situations or discussions of a quotation. But assessment of course work essays is increasingly common. Our pass mark is 40%. However the standards are clearly comparable; its the way we use numbers to describe them that is different! There is no prescribed distribution of marks or mean. The distribution of marks varies from year to year according, we believe, to variations in the calibre and application of the students that year and, which we may not so readily concede, the quality of our teaching that year. However, we have five external examiners who are experienced teachers from other universities who examine all fail, all "first class," and all borderline papers plus a selection of their choice in order to ensure standards are maintained. They report their conclusions to the university's Senate, although they rarely signify much. About two or three students would obtain "first class" degrees. (We do not have strangely named, doubtless secret, societies for the best graduates — or perhaps they just did not tell me.) This is common to all universities.

Most law students become solicitors, that is, lawyers who directly meet clients and only practice advocacy in the lower courts. The London practices take most of our able and not so able students as there is a tremendous demand for law graduates. Provincial firms are getting desperate for more graduates but it is still acknowledged true that it is easy to move from a London practice to a provincial practice but not the reverse. The quality of a graduate's degree is treated as much more important, both for those wishing to become practitioners and those wishing to teach law, than where the degree was obtained. There is, however, often a residual preference for graduates of Oxford or Cambridge (who have eight week terms) and suspicion of schools which emphasize a social science perspective in their teaching.

There are a range of titles for law teachers. Initial appointment is to a lectureship which is probationary for three years, although usually automatically confirmed. The next stage is promotion to senior lectureship. Reader is mainly an honorary title. And finally, people apply for a limited number of professorships. A school of our size would usually have three to five professors; that it has seven is because some colleagues' contributions have been recognized in a personal post (we call it a "chair") which is lost on retirement or movement elsewhere. In 1987 the long-standing rule that only 40% of the teaching staff of a university could be senior lecturers or higher was abrogated, but the proportions have not significantly altered because the universities cannot afford to pay the higher scales that go with promotion.

University funding has reduced significantly, partly because of the government's policy of reducing public expenditure and insistence that universities generate alternative sources of income. This has led to a number of departments closing, particularly philosophy, classics and minority languages. (There is now a shortage of Russian courses.) Tenure has been removed, by legislation, for new appointments, so permitting dismissal of staff. The government is pressing for more science graduates and greater efficiencies. There are proposals, particularly developed in earth sciences, to group universities by regions and then decide within them which departments deserve to be fully funded for research, others only for particular forms of research, and others for teaching.

Various performance indicators are being developed of the quality of different schools. That they are very crude has not prevented them leading to differential allocation of resources. Law schools have been rated on a four stage hierarchy, although the criteria have not been disclosed. (When first announced, two law schools protested vociferously about their ratings which were promptly altered and blamed on "clerical error.") Another exercise is beginning which appears to be emphasizing amount of publications.

There is little that schools can structurally do. The movement of people between departments is virtually limited to new entrants and at full professor level. Work demands make it desireable to appoint as many junior lecturers as possible for the money available. All university lecturers, except clinical doctors, are paid on the same scales which have also declined in real terms and, particularly, relative to the private sector and even central government civil service. It is particularly difficult to appoint junior lecturers with interests in property and business law given the pull of the City of London.

Some law schools have successfully sought funds to endow new chairs for professors from the private sector, particularly from large firms of solicitors who believe it improves their corporate image. Others, particularly Southampton, (it has been my additional job for the past three years) are obtaining funds by providing continuing education courses for practicing lawyers and other professions. The Law Society (the solicitors' professional body) requires all new entrants to attend a minimum number of courses during their first three years. However, Southampton at least has been able to attract many other people as well to its courses. Courses on the law relating to the European Economic Community, and competition law in particular, are very popular.

This requirement to seek external funding and master new managerial skills, which may not be unusual within a U.S. context, necessarily considerably reduces the time available to British academics to undertake their traditional roles. As indicated at the beginning, we have very little administrative support but many tasks such as selection of students, sustaining relations with alumni, controlling (there are too many) visits from prospective employers, managing a continuing education program (50+ courses or conferences a year) and others fall directly on academics. Deans are elected by the faculty from its senior membership and not searched for throughout the country.

But, despite an atmosphere of competitive rivalry between and within schools, and frustration with having administrative tasks for which academics are not necessarily competent, much good work is still being done. Centers and institutes are being opened, (although seemingly often for the separate headed note-paper and publicity), and good quality education is being provided. The biggest dangers are in a few departments being able to attract so much research talent that the others suffer by being designated teaching only departments. Many in power believe it is possible to teach law without also being a researcher or passing some such skills to your students. But law departments are not complaining too much; we can see that we are in a much better state (e.g. student demand and alternative sources of funds) than other departments such as arts and some social sciences. The government's "managerial approach" to the national health service and nationalized industries has had demonstrable successes; but that has been made possible by a very hierarchical management system that is inimical to universities, if not the main threat — because it is indirect and superficially often plausible or true — to academic freedom. ■

Faculty Highlights

In September of 1988, Professor **Jane Aiken** was appointed Chair of the Governor's Task Force on AIDS, a 34-person Task Force charged with assessing the state's response to AIDS and recommending ways in which the state should be responding. Professor Aiken was also appointed Commissioner of the Arizona Disease Control Research Commission, an organization which funds several million dollars worth of research grants for medical researchers doing work of significance to Arizona. She has served on the Executive Board of the Committee on Law and Social Sciences Ph.D. program, and as a member of the Indian Programs Committee and the Dean's Search Committee at the College of Law. This past fall she taught evidence and clinical studies and was involved in the clinic's win of a major class action affecting library access for inmates in the Arizona State Prison in Florence.

Jane Aiken

Professor **Robert D. Bartels'** book, *Benefit of Law: The Murder Case of Ernest Triplett,* was published in the fall of 1988 by the Iowa State University Press. Professor Bartels is a member of the initial Board of Directors of the Arizona Capital Representation Project, and is also serving as its first President.

Professor **Michael A. Berch** is a Visiting Professor of Law at Southern Methodist University during the 1988-1989 academic year. His article, "Insurer, Insurer-Retained Counsel, Insured: A Re-examination of Conflicts of Interest in the Tripartite Relationship," co-authored with Professor Rebecca Berch, was accepted for publication in the *Journal of Air Law and Commerce.* Professor Berch prepared a paper, "RICO: Elements, Pleading, Jurisdiction and Res Judicata," and spoke at the Ninth Circuit Judicial Conference, Coeur d'Alene, Idaho, during the summer of 1988. He also completed a chapter in a book accepted for publication by Cornell Publishing, "The Bankruptcy Appellate Panel and Its Implications for the Adoption of Specialist Panels in the Courts of Appeals."

In the spring of 1988, Professor **Rebecca Berch** published "Insurer-insured Conflicts: Can Insurer-retained Counsel be True to the Insured?", in the *Land and Water Law Review* (23 Land & Water L. Rev. 185 (1988)). She was a featured speaker at a day-long, State-Bar sponsored seminar on legal writing, and continues to author the Legal Writing column for *Arizona Attorney,* the State Bar magazine. Professors Rebecca and Michael Berch co-authored an article to be published in the spring of 1989 in the *Journal of Air Law and Commerce,* and worked on corrections for the second printing of their textbook, *Introduction to Legal Method and Process* (West Publishing, 1985). In the fall, she also published a chapter on legal writing in a paralegal textbook.

In addition to teaching in the civil clinic program during the fall semester, Professor **Charles Calleros** chaired the College of Law Committee on Indian Programs and represented the College to the Arizona Council on Judicial Education and Training. In October, he conducted an opinion-writing workshop for Arizona tribal court judges. He also began directing a new writing program at the Phoenix law firm of Streich, Lang, Weeks & Cardon.

Professor Calleros served as a member of the planning committee for the A.A.L.S. 1989 Workshop on Minorities in Legal Education, and continued to serve as a member of the Board of Governors of the Society of American Law Teachers, as well as the editor of its newsletter. In January, 1989, he will have completed one and one half years of pro bono representation on behalf of 16 plaintiffs, securing compensatory and punitive damages for them on contract and consumer fraud claims after trial before a court-appointed arbitrator.

Adjunct Professor **William Canby** published the second edition of his nutshell book on *American Indian Law* (West Publishing Company) during the summer of 1988.

Professor **Ira Ellman** spent the fall semester on leave from ASU, teaching family law and bioethics at Hastings College of Law, University of California, San Francisco. He was invited to participate in a conference held in October, Divorce Reform in Retrospect, co-sponsored by the Earl Warren Legal Institute at Berkeley, and the Stanford Institute for Research on Women and Gender.

Professor Ellman's most recent article, "The Theory of Alimony," appeared as the lead article for Volume 77 of the *California Law Review,* in January, 1989. He has completed a first draft of a sequel, tentatively titled "Implementing the Theory of Alimony: Of Presumptions, Fault, and Tort Claims for Marital Misconduct." He is currently working with Professor Hall on a new book, *Health Care Law, Ethics and Policy in a Nutshell.* He also team taught a new course with Professor Hall in the spring semester, Health Care Policy and Ethics. Professor Ellman has resumed his service on the Ethics Committee of the Good Samaritan Hospital in Phoenix.

Professor **Mark A. Hall** has produced drafts of two books, *Health Care Law and Forensic Science* (Little, Brown) (4th ed.), with Wm. J. Curran and Professor D.H. Kaye, and *Health Care Law, Ethics and Policy in a Nutshell* (West) with Professor Ira M. Ellman. His article "Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment," was accepted for publication in the *University of Pennsylvania Law Review.* Professor Hall also published "The Unlikely Case in Favor of Patient Dumping," in *Jurimetrics* and "Making Sense of Referral Fee Statutes," in the *Journal of Health Politics, Policy and Law.*

His current research focuses on the charitable status of nonprofit hospitals. Professor Hall spoke on "Efficiency Criteria in Physician Staffing," at the annual meeting of the Health Law Teacher's Section of the American Society of Law and Medicine in Philadelphia.

Professor **David Kader** continues to serve on the Dean's Advisory Committee, as Chairman of the Curriculum Committee, and as Faculty Advisor to the Moot Court Board and the Jewish Law Students Association. His book, *Law and Genocide: A Critical Annotated Bibliography,* was recently published in 11 Hastings Int'l & Comp. L Rev. 381 (1988). He is currently working on an article, "The Religion Clauses of the Arizona Constitution."

Professor Kader was invited by the Arizona Humanities Council to be on its Consortium of Arizona Humanities Scholars (a speakers bureau) and has, under its auspices, given several talks throughout the community on church and state issues. He is also a member of the Executive Board of the Phoenix Holocaust Survivor's Association and as such, recently spoke both locally and in California in commemoration of the Kristallnacht anniversary.

At the spring 1988 commencement ceremonies of the Department of Theater, Professor and Mrs. Kader received an award from the Department "for outstanding service to the ASU Theater Department," in recognition of the annual Prize for Creative Achievement, which they established several years ago.

Professor Kader will be a Visiting Professor of Law at Loyola University Law School in Los Angeles in the summer of 1989.

Professor **David Karjala** was a Visiting Professor at Washington University in St. Louis for the fall of 1988 semester, teaching the basic corporations course and a seminar in computer law. His article "The Protection of Operating Software under Japanese Copyright Law" appeared in both *Jurimetrics Journal* and the *European Intellectual Property Review.* He also completed manuscripts for "The Closely Held Corporation under United States Law" and "The Closely Held Enterprise under Japanese Law," both prepared for presentation at the Symposium on Dualism in Corporation Law to be held in Bregenz, Austria, in April, 1989, as well as the manuscript for "A Coherent Approach to Misleading Corporate Announcements, Fraud, and Rule 10b-5," to be published in the Annual Symposium on Securities Law of the *Albany Law Review* in the spring of 1989.

Professor **John D. Leshy** published three articles in the fall: "The Making of the Arizona Constitution," in the *ASU Law Journal's* symposium issue on the Arizona Constitution, 20 *ASU L. J.* 1; "Wilderness and Water / Law and Politics," XXIII *Land & Water L. Rev.* 389; and "Arizona Law Where Ground and Surface Water Meet," (with James Belanger), 20 ASU L. J. 657. A fourth article, "Reforming the Mining Law: Problems and Prospects," is appearing in the next issue of the *Public Land Law Review.*

Professor Leshy addressed an ASU Alumni Association-sponsored Arizona Water Law Symposium in October, and served on the City of Phoenix's Environmental Quality Commission. In December he was named to a special committee of the National Academy of Sciences, National Research Council, formed at the direction of Congress to study and make recommendations for improving the integration of land use planning and environmental assessment procedures into the system of leasing onshore federal oil and gas resources.

Professor **Alan A. Matheson's** community activities during the spring and fall of 1988 included his appointment as Pro-Tem Judge for the Arizona Court of Appeals, and as Arbitrator for the Superior Court of Maricopa County. He also continued to serve as a member of the Board of Directors, DNA (Navajo Legal Services), as a member of their Executive Committee, as the chair of their Budget and Audit Committee, and as a member of their Evaluation Committee. Professor Matheson was a member of the Tempe Athletic Advisory Authority, and a member of the Legal Writing Committee, Section on Legal Education and Accreditation, American Bar Association.

Within the law school, he served as a member of the Minority Affairs Committee, the Law School Admission Council, the Advisory Personnel Committee, the Dean's Advisory Committee, and as Chairman of the Admissions Committee. He also coached the College Negotiations Team. At the university level, he chaired the University Athletic Advisory Committee, and was a member of the ASU West Provost Search Committee, the Faculty Senate, the Curriculum and Academic Programs Committee, and the President's Consultative Committee.

Professor **Jeffrie G. Murphy** published *Forgiveness and Mercy* in December of 1988. This book, co-authored with Jean Hampton, inaugurated the new series "Cambridge Studies in Philosophy and Law" published by Cambridge University Press.

Visiting Professor **Leigh Price** served as Acting Administrator for the ASU Indian Legal Program adopted by the College of Law faculty in the spring of 1988. He presented a paper on "Regulatory Law on Indian Lands" to the Rocky Mountain Mineral Law Foundation and delivered addresses on environmental law and federal Indian law at conferences of the American Bar Association, Council of Energy Resource Tribes, National Indian Health Board and Western States Water Council. In addition to organizing conferences of state and tribal judges, he served on a national task force of Indian court judges drafting a position paper on federal review of tribal court decisions. He also advised the U.S. Environmental Protection Agency on regulations pertaining to Indian lands, and he continued to serve as Vice Chairman of the ABA Committee on Native American Natural Resource Law.

Fernando Teson

Professor **Milton Schroeder's** book, *The Bank Officer's Handbook of Commercial Banking Law* was published by Warren, Gorham and Lamont (6th edition, 1989) this past fall. The 1989 cumulative supplement to that book is currently at press.

During the fall, Professor Schroeder served as a member of the NCAA Committee on Infractions, the ABA Ad Hoc Payments Committee of the Business Law Section, and as an advisor to the ALI Project on Real Property Servitudes. His university activities included serving as Chairman of the Intercollegiate Athletics Board, Chairman of the Search Committee for Head Men's Basketball Coach, Chairman of the Search Committee for Head Volleyball Coach, Chairman of the Search Committee for Head Softball Coach, member of the Faculty Compensation Committee (faculty elected), member of the President's Athletics Council, member of the Faculty Academic Council on Intercollegiate Athletics, member of the University Advisory Committee to Student Athletics, member of the Ad Hoc Committee on ICA Board Policies, and member of the Ad Hoc Committee on ICA.

Professor **Ralph Spritzer** is currently serving as a member of the Arizona Supreme Court Committee to Review Rules of Criminal Procedure.

Professor **Fernando Teson's** book *Humanitarian Intervention: An Inquiry into Law and Morality* was published by Transnational in the spring of 1988. In the summer he was invited to teach as a Visiting Professor at the University of San Diego Institute on International and Comparative Law in Dublin, Ireland. Professor Teson spent the fall semester in London, where he taught in Arizona State University's London Law Program. When in England, he lectured at University College, London, and at the University of Southampton.

Professor Teson is currently serving as a Senator for the College in the Faculty Senate, and is Chair of the Graduate Committee. He is working on a second book on the philosophy of international law. ■

Law School News

The Twenty-First Annual Dinner
of the College of Law Alumni Association and the Law Society of Arizona State University

The Law School's Alumni Association and Law Society Annual Dinner was held in the Rotunda of Armstrong Hall on Friday, April 29th, 1988, following the building dedication earlier that day. Approximately 260 alumni, Law Society members, faculty and friends of the College attended the event, never before held within the School.

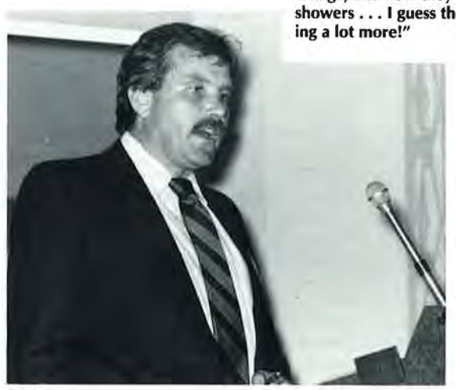
The Rotunda underwent a metamorphosis to become a near-perfect dining area for a capacity crowd that evening. **Founding Dean and Professor Willard H. Pedrick** served as Toastmaster. **Dean Paul Bender** seized the occasion to recognize many Law School supporters and cheer the accomplishments of the faculty. **Law Society President Gary Keltner** delivered the report of the Nominating Committee and listed this year's nominees, all of whom were approved by acclamation.

Chuck Allen, General Manager of KAET-TV Channel 8, presented the historic Court of Impeachment video tapes to **Neal Kurn,** President of the Arizona Bar Foundation. **Sharon Womack,** Director of the Arizona Department of Library, Archives and Public Records, later accepted the tapes for permanent storage on behalf of the department.

Highlights of the dinner are pictured below.

Professor Pedrick, Toastmaster: "Well, I suppose I'd better get about the business at hand. As Herb Shriner once said, 'The house caught on fire and it would have burned down in an hour except that the volunteer fire department kept it going for most of the night.'"

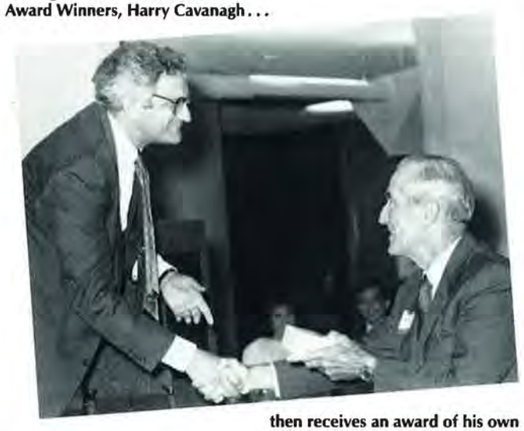
Law Society President Gary Keltner: "Each (dean) has built upon the foundation he found and each has made his own unique contribution. The result is one of the finest public law schools in the country, now housed in one of the finest facilities."



ASU Law Alumni Association President Michael Scott: "When I went here there was no student lounge, and now they even have showers . . . I guess they're studying a lot more!"

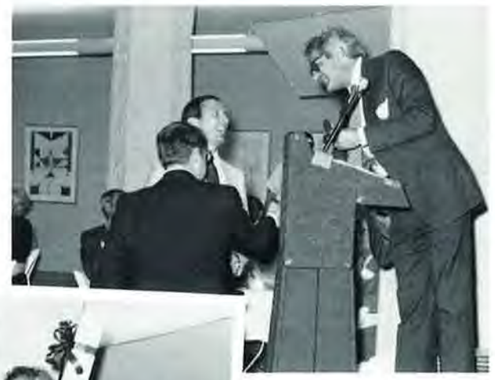
Law School Dean Paul Bender: ". . . some of the most essential things that happen at a law school are not all that visible, at least to the general community. That's the scholarship production, the thought production . . . the ideas that are generated by a law school faculty which are really the central strength of a law school."

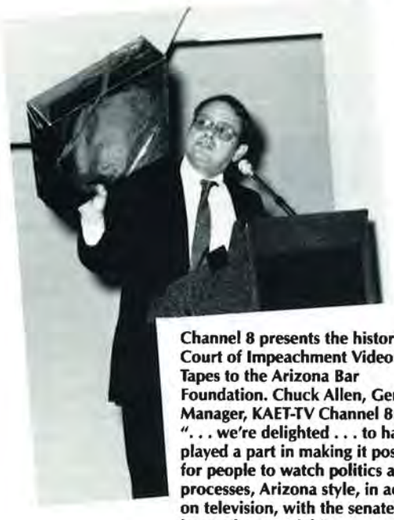
The Dean congratulates this year's Distinguished Achievement Award Winners, Harry Cavanagh . . .



then receives an award of his own from KAET-TV — a box of chocolate 8's.

Gary Keltner, Elias Romley, Frank Gordon (not shown), and Channel 8 — Chuck Allen, Dan Durrenberger . . .





Channel 8 presents the historic Court of Impeachment Video Tapes to the Arizona Bar Foundation. Chuck Allen, General Manager, KAET-TV Channel 8: ". . . we're delighted . . . to have played a part in making it possible for people to watch politics and processes, Arizona style, in action on television, with the senate impeachment trial."

Neal Kurn, President, Arizona Bar Foundation: ". . . the Foundation was very pleased to participate in underwriting the cost of these archival tapes. . . ."

College of Law Alumni Association Board of Directors 1988-89

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The Law Society Board of Directors 1988-89

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*Denotes Emeritus

Negotiations Team Captures Regional Title

For the second year running, the Negotiations Team from the Arizona State University College of Law won the Western Regional Negotiations Competition, held at ASU this past November.

Dan Christl and **Linda Williamson,** both second-year students at the College, took first place in the competition, while third-year students **Joe Johns** and **Alice Finn Gartel** won third place. Dan Christl, of the Cherokee Tribe, is the first Native American student from the College to win this competition.

ASU was represented by two teams because of the uneven number of schools represented. Other competitors were Brigham Young University, the University of Denver, University of California — Davis, Loyola University of Los Angeles, Southwestern Law School, California Western, Pepperdine and ASU.

The competition revolved around a hypothetical case in which competitors had to negotiate the fate of two foster children who had been abused by their foster parents. Competing students from each school were given the details of the situation about one month in advance to review and decide on a negotiating strategy.

Professors **Jane Aiken** and **Alan Matheson** coached the ASU teams. Professor **Gary Lowenthal,** who coached last year's national championship team, this year organized the regional competition. ■

I. Harrison Levy, of the Phoenix law firm of Levy, Sherwood, Klein & Dudley, P.A., was elected President of the Law Society of Arizona State University for the 1988-89 academic year.

Student Bar Association Update

Last fall the Student Bar Association (SBA) concentrated on improving its student services and fostering greater student involvement in the college community and the community-at-large. These efforts met with tremendous success! Under the direction of **Sheila Madden** and **Susan Turner,** the SBA started by opening its own student-operated bookstore in a new office generously provided by the administration. The store provides students with a convenient place to buy used books and study aids as well as supplies and snacks. Plans to expand the bookstore are currently underway.

The SBA also moved quickly to appoint student representatives to attend the law school faculty meetings for the first time ever. Interested students were also appointed to serve on the Curriculum Committee and the Dean Search Committee. In addition to working more closely with faculty and staff, the SBA encouraged increased communication and cooperation between student organizations by instituting a central calendaring system. Better coordination and publicity through the master calendar boosted attendance at many SBA events, including the debate between the candidates for County Attorney and the annual golf tournament, to record levels.

The SBA facilitated community involvement in a variety of ways. It sponsored a successful canned food drive to benefit St. Mary's Food Bank in late October. Student participation was at its greatest when 30 volunteers toured Central Arizona Shelter Services (CASS) to kick off a clothing drive for the homeless. The organization collected three large carloads of clothing during the week-long drive, and students are still bringing in donations. The SBA also organized a group of students to give their time every weekday afternoon to help the CASS staff with everything from registering guests to assisting teachers in the on-site school for homeless children. Most recently, the SBA sent several students to teach sixth graders at Roosevelt Elementary School about the law and answer their questions. The SBA hopes to expand this program in the coming months.

Support of Cordova Scholarship Fund Continues

Retired U.S. District Court Judge Valdemar Cordova, at the Cordova Scholarship Reception, April 5th, 1988.

Jose Cardenas, President of Los Abogados, as he thanks Mrs. Valdemar Cordova for attending the event.

Michael Sillyman receives a round of applause for his efforts in organizing the benefit.

Support of the Valdemar Cordova Scholarship Fund continued to be a priority for both the College of Law and Los Abogados this past year. The selection of and awards to the first Cordova Scholars were made in the fall of 1987, and a reception to honor the 1987-88 Cordova Scholars was held at the Uptown Arizona Club in the spring of 1988. The reception, hosted by the law firm of Roush, McCracken and Guerrero, had as its special guest retired **U.S. District Judge Valdemar Cordova,** in whose name the fund was established. Although he was weakened by the stroke he had experienced some months earlier, Judge Cordova was in good spirits that evening, as evidenced by the photograph shown here. Sadly, however, Judge Cordova passed away on June 18th, 1988.

Los Abogados, the Hispanic Bar Association of Maricopa County, had begun preparations earlier in the year to hold a fundraising event to benefit the Cordova Scholarship Funds at both the ASU and the University of Arizona Colleges of Law. Under the direction of **Michael Sillyman,** a member of Los Abogados and an associate in the Phoenix law firm of Gallagher and Kennedy, arrangements were made to feature "La Gran Fiesta," a Puerto Rican film, in a premier showing in Phoenix. The movie, a period piece in Spanish with English subtitles, starring Raul Julia and E.G. Marshall, was followed by a Puerto Rican reception with authentic Puerto Rican hors d'oeuvres and a rhythmic salsa band. Approximately 400 people, including the Cordova family and the Cordova Scholars from both Arizona law schools, attended the movie and reception. The event was a great success both socially and financially, raising nearly $14,000 to offset the expenses of the evening and to be directed into the scholarship funds.

Governor Rose Mofford and members of the Cordova family at the September 29th, 1988, "La Gran Fiesta" reception.

The College of Law extends its grateful thanks to Los Abogados for their commitment to the success of the Valdemar Cordova Scholarship Fund. It also wishes to thank all the Arizona law firms and businesses who helped sponsor the September 29th event, and **Senator John McCain** for his generous gift that evening.

The Cordova Scholarship Fund is an important ingredient in ensuring that the opportunity for success exists for Hispanic students pursuing a law degree. It is also a wonderful tribute to Judge Valdemar Cordova, whose life-long achievements are an inspiration to us all.

The 1988-89 Cordova Scholars from the ASU College of Law are:

Cecelia Lujan
Manuel Delgado
Jacqueline Martinez
Alfred Smith
Jeannie Garcia
Norma Lebario
Virginia Herrera-Gonzales. ■

Berch Scholarship Fund Established

Professor of Law **Michael Berch** and his wife, **Rebecca Berch,** Director of the Legal Writing and Tutorial Programs at the ASU College of Law, have established an endowed scholarship fund at the College. The Rebecca and Michael Berch Scholarship Fund will be awarded annually to "a second- or third-year law student demonstrating academic achievement and promise for success in the field of law . . . and contributing most to the quality of life at the College of Law."

The Berches have a long-standing history of loyalty and dedication to the College of Law. Professor Michael Berch has been with the College since 1969. A New Yorker, he earned his Juris Doctor from Columbia University in 1959 and then went to work for the Criminal Division of the U.S. Department of Justice. He also served as the Assistant U.S. Attorney for the Southern District of New York, and as a trial attorney for the New York City law firms of Townsend & Lewis and Seligson & Morris. Professor Berch is currently visiting the Southern Methodist University College of Law.

Rebecca Berch is originally from Phoenix and earned her undergraduate degree from Arizona State University. She is also a 1979 graduate of the ASU College of Law. She joined the law school in 1984, and now directs the Writing and Tutorial Programs. Before coming to ASU, she was a member of the law firm of McGroder, Tryon, Heller, Rayes & Berch.

The decision to create the scholarship fund was an easy one for the Berches. It was a natural extension of their affection for the institution which brought them together and to which they have devoted a significant portion of their lives.

The Berches wanted to give something back to the law school. "It's been very good to us. We felt that the best way to do that was to fund an endowment which would continue to generate scholarship support for years to come. Directing the award to academically outstanding students also helps the school attract and retain gifted people from all over the country." ■

Lee Loevinger Works to Promote Jurimetrics Fund

Lee Loevinger, a senior partner in the Washington, D.C. law firm of Hogan & Hartson, has undertaken a campaign to secure financial support for the *Jurimetrics Journal of Law, Science and Technology.* Loevinger, a member of the Editorial Board of the Journal and a Council Member of the American Bar Association Section of Science and Technology, has been soliciting contributions to be directed into the Jurimetrics Endowment Fund. Interest from the endowment has been accruing and will be available to support various projects and expenses associated with publishing the Journal.

The *Jurimetrics Journal of Law, Science and Technology* was first published in 1959 as *Modern Uses of Logic in Law* (MULL). The current name was adopted in 1966, and publication of the Journal was assumed by the ABA Section of Science and Technology in 1974. Now co-published by the ABA Section and the Center for Law, Science and Technology (CeLaST) at the ASU College of Law, the Journal serves as a leading forum for the publication and exchange of ideas and information about the relationships between law, science and technology. Its current Editor-in-Chief, Professor of Law **Laurence H. Winer,** holds both a Juris Doctor Degree and a Ph.D in mathematics. Both he and Loevinger believe that the Journal should have an "academic home".

In an effort to see the Journal develop, Loevinger has actively sought support from members of the legal and business community with which he is involved, and continued to make generous contributions of his own. Because of his strong intellectual commitment to the Journal, he has been very effective in securing such support, and increasing the corpus of the endowment. The College of Law is grateful to Lee Loevinger for his long-standing personal support of the *Jurimetrics Journal.* ■

Capital Representation Center Funded at College of Law

The College of Law received two grants in the fall to establish an Arizona Capital Representation Center. A $100,000 grant was received from the Arizona Bar Foundation, and was later supplemented by a $180,000 grant from the U.S. Judicial Conference.

The Center will be housed in the College of Law, and will aid attorneys representing defendants facing the death penalty. The project will be administered through an independent board of governors, and is scheduled to open in the spring semester of 1989. **Professor Robert Bartels,** who holds the Charles M. Brewer Chair in Trial Advocacy, will serve as its first president.

The College of Law will provide the Center with office space, library services and student clerks, who will earn academic credit for their work. The funding which has been received will directly support three attorneys, two assistants and several law students who are expected to staff the Center.

The Center will provide services for death penalty cases, including assisting the courts in finding and training attorneys appointed to represent capital-punishment defendants. It will also provide valuable clinical education for law students. Attorneys will be able to consult with the Center to get the information they need, and the result will be a cost-effective, streamlined method of dealing with death penalty cases. ■

Employment Statistics Class of 1988

Number of Graduates ____132
Number of Graduates Reporting _____115
Number of Graduates Employed _____103

Types of Employment

Employed in full-time legal position	94	82%
Employed in full-time non-legal position	4	3%
Employed in part-time legal position	5	4%
Unemployed and not seeking work	2	2%
Unemployed and seeking	10	9%

Employment Category

Law Firm		
Very small (1-10)	28	27%
Small (11-25)	9	9%
Medium (26-50)	15	14%
Large (51-100)	8	8%
Very large (100+)	11	11%
Size Unknown	1	1%
Corporation	7	7%
Government/Public Interest	10	10%
Judicial Clerkship	14	13%

Geographic Distribution

Arizona	89	86%
New England/East Coast	4	4%
Mountain States	3	3%
Pacific States	6	6%
Overseas	1	1%

Compensation

Salary Range:
$18,000-$55,000
Mean: $35,688

Placement Update

The Alumni Advisor Program

Finding the right legal job is always a difficult task for graduating law students, especially since there are so many areas of specialization. Last year, in order to assist students in exploring the various legal paths and specialties, we asked the graduates of Arizona State University College of Law if they would be willing to become Volunteer Alumni Advisors to students currently enrolled in law school. The role of the Volunteer Advisor is simply to be available to provide professional perspectives and experiences in one's particular area of practice.

The response was phenomenal and as a result, the Placement Office has a great resource file for students exploring the various legal career options. Thank you, participants, for your interest and support.

We would like to involve as many alumni as possible. If you are interested in being a part of this program, the process is easy. Complete the form above; this information will then be made available to the students who may either write or call to ask you for your "inside scoop" on your chosen career path. All you need to do is talk to the student and address his/her questions and concerns. Not only will you gain the satisfaction of helping students make better career choices, but you might also get to know some outstanding people.

Name: _____

Name of Employer: _____

Address: _____

_____

Phone: _____

Area(s) of Specialization: _____

_____

_____

Please return the form to:

Kathy MacNabb
College of Law
Arizona State University
Tempe, AZ 85287

Thanks for volunteering to help!

KAET Channel 8 Funds Tribal Reporter Project

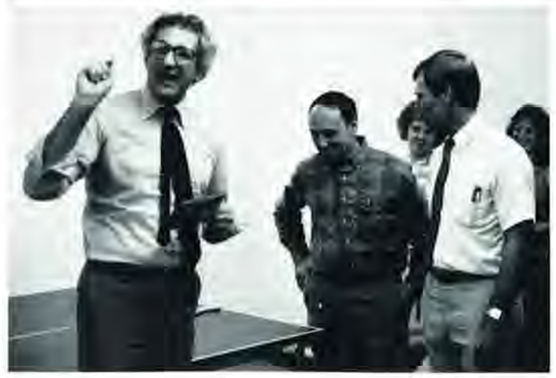
Arizona State University's public television station, KAET — Channel 8, offered significant support to the College of Law this past year.

In the fall, KAET supplied funding to the law school in support of a tutorial program, a third year scholarship, and a research assistantship for an Indian student. As part of an innovative Tribal Court Opinion Project proposed by the dean, the student will collect, categorize and publish written opinions of tribal court judges in Arizona. The opinions will be circulated to tribal courts throughout the state, making them readily available in an organized form for the first time in the state's history. In its first year, the project was funded entirely through KAET's gift.

During its spring 1988 coverage of the Arizona Governor's Court of Impeachment Proceedings, the station also donated two color television sets to the College so that students, faculty and staff could watch the historic proceedings as they were being conducted.

KAET, nationally recognized for the high quality of its programming, has had a particularly close relationship with the College since **Paul Bender** became dean in 1983. When making the gift to the College, **Chuck Allen,** General Manager of KAET, wrote: "With this gift Channel 8 is pleased to acknowledge the close cooperation that it has enjoyed with faculty and students of the Law College. The AIDS Seminar, Arizona cases before the U.S. Supreme Court, and an unending amount of competent assistance regarding the impeachment issues are all endeavors that worked well because of our mutual admiration and trust. Your personal appearances on our HORIZON series continue to be moments of wisdom and wit, cherished by KAET's audience and staff as well."

Channel 8's special support to the College is especially appreciated, and of great benefit to the students and faculty at the law school. We take this opportunity to once again acknowledge their generosity and assistance. ■



Dean Paul Bender (left), Professor Jonathan Rose (center) and Robert Schmitt, Class of 1973 (right), are pictured here during the ceremony at which the "Jonathan Rose Memorial Ping Pong Table" was dedicated. The table, a gift of Robert Schmitt, was given to the College in September to be placed in the Student Lounge and dedicated "in memory of Professor Rose's support of student athletics."

Law School Expansion Complete — Dedication Ceremony Takes Place

On Friday, April 29th, 1988, the College of Law celebrated the long-awaited completion of Armstrong Hall's renovation and expansion. For over a year, the building had been in a state of flux, with the constant hum of machines, the smell of paint, the intrusion of construction workers, and the inconvenience of blocked entrances, deliveries, dusty walkways and scaffolding.

But moving day finally arrived. Faculty members traded their outdoor trailers for spacious new offices, and refurbished lecture halls and seminar rooms were unveiled. The office contents of the dean and associate dean were moved upstairs, and all student services offices — assistant dean, registrar, placement, academic advising and admissions — were consolidated downstairs. The Clinic relocated to a renovated suite of offices, and the Moot Court organization got some space to call its own. Students curiously wandered into the new student lounge, and library technical services staff were seen smiling for the first time in months.

The next several weeks were spent correcting the minor problems that surfaced: adjusting the air-conditioning, transferring phones, renumbering rooms, and directing the myriad of lost visitors to their intended destination. The nameplates arrived. The school's artwork was hung. The College of Law was ready to be re-dedicated.

Over 300 people gathered in the Great Hall on the afternoon of April 29th to take part in this proud moment in the School's history. **Dean Bender** welcomed the guests and introduced the speakers, who included **C. Roland Haden,** Vice President for Academic Affairs; **Michael Scott,** President, ASU College of Law Alumni Association; **Sheila Madden,** President, Student Bar Association; **Michael D. Hawkins,** President, Maricopa County Bar Association; **Selmer D. Lutey,** President, State Bar of Arizona; **Herman Chanen,** President Elect, Arizona Board of Regents; The Honorable **Frank X. Gordon, Jr.,** Chief Justice, Arizona Supreme Court; and The Honorable **Rose Mofford,** Governor, State of Arizona. The ceremony culminated with the unveiling of a rendering of the College of Law by Dean Paul Bender and Governor Rose Mofford.

During an open house reception, both before and after the ceremony, guests were greeted at the door and encouraged to tour the new facility. In preparation for the Law School's Annual Dinner scheduled later that evening, the Rotunda was transformed into a lovely large dining room, with candlelight table settings of mauve and white, sheltered by a magnificent **Dennis Numkena** mural suspended from the ceiling. With the gentle music of a string quartet in the background, visitors enjoyed cocktails and hors d'oeuvres and the chance to view the building at its finest. ■

Gov. Rose Mofford

C. Roland Haden

Shiela Madden

Michael D. Hawkins

Herman Chanen

Selmer D. Lutey

Justice Gordon seems pleased with the over-sized gavel the Dean has presented him.

Staff News

Lynn Campbell, Administrative Assistant, came to work for the College of Law in October, 1988. Lynn left Cleveland, Ohio, almost three years ago, moved to Arizona, and worked as an administrative assistant for G.M. Development for the next two years. Anxious to complete her degree in accounting, she left that position to work at ASU. Her responsibilities at the law school include administrative support to Professors Rose and Murphy, and to Business Manager Rhonda Kirkeide. She also assists Rhonda with the financial aspects of the overall budgetary and fiscal responsibilities of the College.

Leslie Mamaghani, Assistant Registrar for the College of Law, joined the staff in September, 1988, under an experimental time-share arrangement. In what is actually a full-time position, Leslie works half-time, afternoons only, sharing the responsibilities of the office with the Registrar. Leslie is a 1985 graduate of Arizona State University, and worked for six years in the Office of the Registrar for ASU. She says she likes the time-share arrangement because it leaves more time for other areas of interest.

Two new staff members joined the permanent staff of the Law Library in the fall. **Sara Murphy** began work as a Library Assistant I in the Cataloging Department on October 24, 1988. Sara had worked previously as a library clerk in the University of Illinois Library.

Angeia Calhoun, who had worked for the Law Library as a temporary staff member, joined the permanent staff as a Clerk Typist I in November.

Casandra Rose, Interpreter III, also started working at the College of Law this past fall. In November, 1988, after working two years for McDonald Douglas Helicopter in Arizona, she began working for Professors Tucker and Karjala. Sandra offers administrative support for both professors, and assists Professor Tucker as an oral interpreter both in class and on the phone. Sandra is originally from Dayton, Ohio, and came to Arizona in 1978 during a four-year stint in the U.S. Air Force, which included a two-year tour in Japan.

Apple Computer Honored at the College of Law

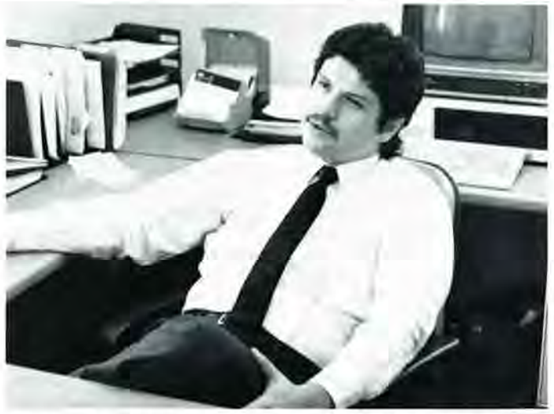
In recognition of a significant gift to the Law School Clinic, the ASU College of Law held a reception in the fall to honor Apple Computer, Inc. **John Karalis,** Vice President and General Counsel of Apple, and **James Burger,** Chief Counsel for Government Relations for Apple, were both on hand to receive the acknowledgement and thanks of Law School **Dean Paul Bender.** Apple's gift to the law school included both computer hardware and software which is now used by law students in the Law Clinic for case management, document organization and time record-keeping.

In addition to its gift of equipment, Apple Computer supported the development of special legal applications for the newest member of its software family, Hypercard. Funding of a student fellowship from Apple enabled the student recipient of the fellowship, **Scott Patterson,** along with law school computer specialist, **David Hesser,** to design legal software applications for implementation in an easy to use, computer graphics environment.

The first application, the student attorney timekeeper, is a system which tracks student attorney actions by client, date of action, time expended and action details. It uses buttons and pulldown menus to activate most of its features, and is easily adaptable to the professional law office.

The second application developed at the law school is a software package which provides all the materials necessary to understand, evaluate, and report the tax aspects of virtually any type of real estate transaction. It includes a detailed description of common real estate transactions, frequently used reference materials, and the tax forms necessary to report each transaction, complete with their instructions.

A demonstration of these legal software packages, and others developed outside the College, were available throughout the reception. In addition, tours of the Law School Clinic and the computing environment within which it operates were open to the public. ■



In August, 1988, **Fausto I. Ramos G.** became the new Director of Admissions for the College of Law. Fausto, the only Hispanic serving in this post out of 175 law schools nationwide, was formerly the Admissions and Financial Aid Counselor at the University of Connecticut School of Law in Hartford. One of his goals at ASU is to expand the demographic representation of future classes, and continue the emphasis on recruiting academically outstanding people. He would also like to increase the number of minority students who enroll at the College, and plans on doing so through an aggressive recruitment program. Although he is responsible for all recruitment, he "can't help but be the contact person" for all the minority student groups. "If I am the voice that recruits them and I'm not there to help, I'll feel as if I'm not doing my job very well."

Olivia H. Birchett

Olivia H. Birchett died on December 16, 1988. Olivia was the College of Law's first Registrar and Admissions Officer and, more accurately, a jack of all trades. She was a long standing and loyal member of the College staff. Olivia established the Olivia H. Birchett Endowment in 1983 to provide short-term emergency loans for students. Those interested in making a gift in tribute to Olivia Birchett may wish to direct their contribution to that fund. ■

Library Development — The Campaign for Law

ASU College of Law Launches Fundraising Campaign

Who could have known that in only twenty years, the facility would be bursting at its seams? But that's exactly what has happened to the ASU College of Law Library.

Built in 1967 as part of the new College of Law, the Law Library was considered a spacious and unique facility, more than adequate to handle the initial collection and large enough to accommodate projected increases. But that turned out to be wrong.

As a result, the College is in the midst of a campaign to raise over two million dollars to build a new library, and is calling upon the legal community to help.

For the past several years, the Law Library has been faced with serious space problems. Over 20,000 volumes of the current collection have been placed in storage facilities both on campus and off. Students wishing to access those books must sometimes wait days for their retrieval. Because the library is functionally full, new books can be added to the collection only by removing others.

"The current facility is much too small to handle the resources of a first-rate research institution," said **Richard Brown,** Director of the Law Library. "Books are unable to be shelved because there isn't sufficient room, and student study spaces are virtually non-existent. Areas originally designed for study now house books and other materials, virtually eliminating the possibility of uninterrupted study. And, in addition to a severe shortage of space, the library's unusual circular design makes even simple tasks complicated and time consuming, and severely limits the space for books, shelves and study materials."

But the news isn't all bad. The Board of Regents, the state's university governing body, has recognized the College's dilemma and authorized $6 million in state bonding authority to construct an adequate facility at ASU. Since such a facility will cost an estimated $8.5 million, the College of Law has launched a major fundraising campaign to raise the difference, and is asking the community for help.

Under the leadership of **Marriner P. Cardon** of Streich, Lang, Weeks and Cardon, and six other Valley attorneys, the "Campaign for Law" hopes to raise the $2.5 million needed in private support to offset the library's construction costs. The College has produced a video tape describing the library's dilemma, and is using it in presentations to law firms, alumni, and businesses throughout the Valley to help present its case. "State support is contingent upon our meeting our private fundraising goal," said **Paul Bender,** Dean of the College.

The College hopes to draw the bulk of its support from the Phoenix legal community. Dean Bender and members of the Committee to Lead the Campaign for Law are calling upon law firms in Phoenix in an attempt to secure their support. Naming opportunities, at a wide range of sponsorship levels, are being offered to firms that make a substantial gift to the Campaign. Areas available for naming in Armstrong Hall include the rotunda, lecture halls, seminar rooms, faculty offices, and the office suites used by the Law Journal editorial staff and the Moot Court Board. In the new library, naming opportunities include the new student lounge, two reading rooms, several multi-purpose rooms, special collection rooms, and the courtyard between the new facility and Armstrong Hall.

The law school is also depending heavily on a broad base of support from its alumni. Realizing that most alumni cannot endow an entire room, the College is proposing that, instead, alumni sponsor one of the 500 student study carrels which will be built in the new library. Their cost is significantly less than other naming opportunities. As with all the sponsorships available, a pledge and five-year payment system is being offered as an incentive to give. It is hoped that most of the pledges will be in by July, 1989.

"The future of the College hinges on the success of this fund drive," said Bender. "Without a first-rate law library to complement its programs and curriculum, the College cannot maintain its place in the top ranks of American law schools."

The Committee to Lead the Campaign for Law

Marriner P. Cardon, Chairman
Streich, Lang, Weeks & Cardon, P.A.

John J. Bouma
Snell & Wilmer

Paul F. Eckstein
Brown & Bain

L. Gene Lemon
The Greyhound Corporation

I. Harrison Levy
Levy, Sherwood, Klein & Dudley, P.A.

Ruth V. McGregor
Fennemore Craig, P.C.

Martha Taylor Thomas
Martha Taylor Thomas, Ltd.

Paul Bender
Dean, College of Law

Kathy Neitzel
Development Officer

In Memoriam

Founding Law School Professor Richard Effland Dies at 72

Professor **Richard W. Effland** of the College of Law died on Monday, October 17, 1988. A member of the University faculty since the founding of the Law School in 1967, Professor Effland held the distinction of being the only person to receive both the Distinguished Teaching Award and the Distinguished Faculty Achievement Award from the Alumni Association of Arizona State University.

As Reporter for the Uniform Probate Code, he helped to modernize wills administration throughout the country in an effort described by a fellow participant as "prodigious."

Through his dedication, he was responsible, as well, for the adoption of the Code in Arizona in 1973 — a measure which simplifies procedures and reduces the costs of dealing with less complicated estates. He served as a consultant in the State of Wisconsin's adoption of the Uniform Marital Property Act. The Effland casebook on *Decedents' Wills and Trusts* has been the leading text in the field for decades, and his scholarly articles appear in the leading law reviews of the country.

Richard Effland was a superb teacher. Prepared, up to date, conscientious, caring and challenging, he was a favorite of students at Arizona State, at the University of Wisconsin Law School where he taught for twenty years, and at Hastings, Stanford, Berkeley, Arkansas and Pepperdine.

He received his B.A. and his LL.B. degrees from the University of Wisconsin and an LL.M. from Columbia University. At Wisconsin, he was first in his law class and Editor-in-Chief of the *Law Review.* After graduation, he practiced law and later served with the State Department and as Counsel and Secretary of the Export-Import Bank.

A significant force in the success of the ASU College of Law, Richard Effland will be remembered as a master teacher, productive scholar, legislative craftsman, wise and generous colleague and friend.

In tribute to Professor Effland, a memorial scholarship fund has been established at the College of Law in his name.

On January 21st, 1989, the College of Law held a memorial service for Professor Effland to enable his former students, colleagues and friends the opportunity to recognize his contributions to the field of law, and to the lives of all who knew him. The service was conducted by Professor of Law **Alan A. Matheson,** and speakers included Professor of Law **Willard H. Pedrick,** Professor of Law **Neill H. Alford, Jr.** from the University of Virginia, **Martha Taylor-Thomas,** a Phoenix attorney and a graduate of the ASU College of Law Class of 1972; Professor of Law **Walter B. Raushenbush,** from the University of Wisconsin; and **John P. Frank,** from the Phoenix law firm of Lewis & Roca. The following excerpts are from that collective tribute.

Willard H. Pedrick

"Now it is said Dick has gone from our presence. I do not believe it, not for one moment. Over the years he probably taught at least five or six thousand law students. He probably had at Wisconsin, at ASU and schools were he visited as a Distinguished Visiting Professor from time to time, at least a hundred colleagues who knew him well. The law school supporting staffs at Wisconsin, ASU, and other schools loved this gentle, fun loving "prof". A man of religious faith, active in his church, he and Virginia have a host of friends, not to mention a close knit and loving family. All of us whose lives have been touched by this man of integrity, decency, generosity and compassion, who labored throughout his life for a better legal system, a better and more compassionate society, do not believe for a moment that he is really gone.

He is with us still — in our minds and in our hearts. And for all our days we will be affected, in ways we cannot now fathom, by our friendship with this wise and good man. In our lives he lives still! What a boon, what a privilege to have lived with Dick Effland!"

Neill Alford

"Dick Effland taught me more about trusts and estates in my middle years of teaching than anyone with whom I came in contact. This was no patent effort on his part. People around him seemed to learn by osmosis. He was the greatest natural teacher I ever knew — and I say this without ever having heard him in the classroom. Anyone, even on slightest acquaintance, could sense his scintillating intellect, but one had to work directly with him — to fly in the light — to appreciate his extraordinary talent to stimulate thought in others. Not only was he at the cutting edge of developments in our subjects — I often thought he was sharpening the cutting edge. He had a mind that seemed to work with the speed of a computer. He could grasp new ideas and apply them in a new context in a flash."

John P. Frank

"Dick and I were fellow students at the University of Wisconsin Law School. We entered in the fall of 1938, graduated in June 1940, and were admitted to the Bar at the same time. When he came to Arizona State University, it was a renewal of an old friendship.

When Dick came here, he was already a nationally distinguished scholar, but in 1938 we were simply youngsters tackling the profession together.

And yet the mark of distinction fell on him quickly. Not instantly. Dick, in his everlastingly gentle way, was always quiet and unassertive and his was not the hand waving in the class for a churning dispute or a show of knowledge.

As a result, it took us exactly one semester to find out that Dick was simply smarter than the rest of us. He led the class for all three years and graduated so far in front that a laggard like me could only choke in his dust.

His interests were framed and his character revealed for life in those years. What he cared about was real property and wills, perhaps because we had two of the country's leading authorities on those areas. One was the reporter for the *Restatement* and the other was the author of the principal textbook in his field. I don't know whether a spirited discussion of a point in conveyancing or future interests set his pulse pounding, because Dick, temperamentally, did not reveal a pounding pulse; but it set his mind aflame and the rest of us could only wonder at his knowledge and his perception."

Professor Walter B. Raushenbush

"A list of achievements does not do justice to the man. When I came to the Wisconsin Law School as a student in September 1950, he was in his fifth year of teaching, already reputed to be tough, fair, and fun. In the second semester, he was my teacher for Real Property. He taught rather a classical property course, but in a modern and memorable way. Would we remember the Statute Quia Emptores? Perhaps even the Statute de Donis Conditionalibus? At the time, it seemed the prudent thing to do. But we learned the latest problems in landlord-tenant law, too, and had more work in applying statutes as well as cases than many law school courses then offered. The next autumn, with many others, I enrolled in four credits of Trusts. Just Trusts. Not wholly rational, perhaps — But Effland was teaching it! And it was tough. But we all showed up for the exam, on the very last day of the exam period. There he was at the podium, looking at us through those thick spectacles with a characteristic look, equally quizzical, kind, and amused. He said, 'You've had the rest, now it's time for dessert!' A voice from the rear: 'Couldn't we just skip dessert?' He laughed with us, not at us.

Dick taught seven of my faculty colleagues, at times ranging from the late 1940's to the mid-1960's. Their recollections mirror mine: The image that abides is of a gentle, helpful, tolerant, patient man — but also of a persistently demanding teacher. He represented the best of the Wisconsin Law School teaching tradition. His teaching honors at Arizona State were no surprise."

Martha Taylor Thomas

"As a professor, Dick Effland made learning a challenge — never denying his students the 'joy of discovery.' As a mentor, Dick was always available and competently recommended his students for positions of responsibility." ■

Class Notes

Class Editor's Note: Alumni should use the enclosed information form, found at the back of this magazine, to provide address changes and news. We welcome personal notes, clippings, photographs and other forms of communication about events of interest in the lives of the College of Law Alumni. Photographs will be credited and returned after publication if so requested. Please send your news to Class Notes Editor, Law Forum, College of Law, Arizona State University, Tempe, AZ 85287-0604.

The class agents listed below are for the 1988-89 fiscal year.

'70

Albert Lagman
Attorney at Law
111 W. Monroe, Suite 1114
Phoenix, AZ 85003

Colonel Robert L. Schaefer has been appointed the Chief Trial Attorney of the Air Force. He has also been elected to a 3-year term on the Council of the Public Contracts Section of the American Bar Association.

'71

Harold Swenson
Ridenour, Swenson, Cleere & Evans
201 N. Central Avenue, #2350
Valley Bank Center
Phoenix, AZ 85073

Donald B. Kunkel, M.D., J.D., is Medical Director of the Samaritan Regional Poison Control Center, Department of Medical Toxicology, Good Samaritan Medical Center, Phoenix, Arizona. He is specializing in industrial and environmental toxicology, chemical and drug poisoning, and care of poisonous bites and stings.

Rosemary Meyer is now serving on the faculty of the University of Nebraska Medical School as a Professor of Medical Ethics.

The Law School regrets to report the death of **Dean Peterson,** who passed away April 30, 1988.

Harold Swenson of Ridenour, Swenson, Cleere & Evans was a speaker at the Arizona Trial Lawyers Association's seminar, Mastering Settlement Techniques, held September 23, 1988.

'72

Harriet C. Babbitt
Robbins & Green
3300 N. Central Avenue
Suite 1800
Phoenix, AZ 85012

Barry A. MacBan, Esq., has become a Fellow of the American College of Trial Lawyers. Membership, which is a position of honor, is by invitation of the Board of Regents. The College is a national association of 4500 Fellows in the United States and Canada. Its purpose is to improve the standards of trial practice, the administration of justice and the ethics of the profession.

The induction ceremony took place during the recent Annual Banquet of the American College of Trial Lawyers. More than 1000 persons were in attendance at this meeting of the Fellows in Toronto, Ontario.

Mr. MacBan is a partner in the firm of Weyl, Guyer, MacBan & Olson, P.A., where he has been practicing for 16 years.

Crane McClennen authored both the *Arizona Courtroom Evidence Manual* and *Reporter* in 1988.

John Wall is an Assistant Attorney General in the Consumer Fraud Section of the Financial Fraud Division. He is Chairman of the Editorial Board of the *Arizona Attorney* magazine.

'73

Barbara Caldwell
County Attorney's Office
201 W. Jefferson
Seventh Floor
Phoenix, AZ 85003

Shirley Frondorf is the author of the book "Death of a Jewish American Princess." The book focuses on the 1982 trial of Steven Steinberg, a Scottsdale restaurateur associated with the defunct B.B. Singer's chain. Steinberg was acquitted of murder after defense attorney Bob Hirsh convinced the jury that his client's wife was such a nagging shrew that she had driven Steinberg "temporarily insane," causing him to stab her 26 times while she slept in the couple's McCormick Ranch home.

'74

Daniel E. Drake
Mariscal, Weeks, McIntyre & Friedlander, P.A.
201 W. Coolidge Street
Phoenix, AZ 85013

Janet Effland has been named Vice President and General Partner with Alan Patricof Associates, a large New York-based venture-capital firm. She will work out of the firm's West Coast office, located in Palo Alto, California.

John G. Gliege of the Law Office of John G. Gliege, Flagstaff, Arizona, announces the addition to the firm of the following people: Corbin Vandemoer (University of Arizona, Class of 1986), David W. Rozema (Arizona State University, Class of 1986), Melinda L. Garrahan (Arizona State University, Class of 1977), and David N. Howarth (University of Washington, Class of 1968). The firm is involved in community development law and municipal bond law, and works predominately with rural Arizona communities in providing financing for public improvements. In addition, the firm will engage in the general practice of law at its new address, 125 East Elm Avenue, Flagstaff, Arizona.

'75

Shari M. Capra
Capra & Beckett
111 W. Monroe
Suite 1114
Phoenix, AZ 85003

William F. Atkin has returned to the San Francisco office of Baker & McKenzie after a four-year assignment at Baker & McKenzie's Taipei office. Bill specializes in foreign commercial transactions, particularly assisting computer companies with their transnational activities.

Dougal B. Reeves, Jr., is a partner in the law firm of Simon, Reeves & Roberts.

Herbert Yazzie is the President of the Board of Directors for DNA, the people's legal services for the Navajo-Hopi Tribes.

'76

Martha Kaplan
Horne, Kaplan & Bistrow
201 N. Central
Suite 2480
Phoenix, AZ 85073

Aaron Kizer is of counsel to the firm of Rivera, Scales and Kizer, 700 E. Jefferson, #100, Phoenix, AZ 85034.

Ralph Kostant is currently of counsel with Weissberg E. Aronson, Inc., Los Angeles, California.

The Honorable Barry Silverman served as Chairman for "Pac Man v. Perry Mason: Sharpening Trial Skills by Computer Training," a seminar sponsored by the State Bar of Arizona in August, 1988.

'77

Jack N. Rudel
Robbins & Green
3300 N. Central
Suite 1800
Phoenix, AZ 85012

Robert N. Bass served as Chairman and Moderator for "Practicing Before the Department of Real Estate: Subdivisions, Recovery Funds, Hearings," a seminar sponsored by the State Bar of Arizona in November, 1988.

Melinda Garrahan left the Arizona Attorney General's Office, Civil Division, to move to Flagstaff and join private practice. Her new law firm is active in the natural resources and municipal bond areas.

Glenda Ulfers' present position is Executive Vice President and Chief Operating Officer for Little Company of Mary Hospital — a 375-bed acute and long term care hospital in Torrance, California.

'78

Scott W. Ruby
Gust, Rosenfeld, Divelbess & Henderson
3300 Valley Bank Center
Phoenix, AZ 85073-3300

The Honorable Jane Bayham-Lesselyong served as Co-Chairperson for "Handling a Basic Dissolution," a seminar sponsored by the State Bar of Arizona in September, 1988.

Francis G. Fanning recently joined Bill Stephens and Associates, P.C., practicing in the areas of Domestic Relations and Employment Litigation.

Phil Gordon specializes in Real Estate and Corporate Law and started Phoenix Intergroup in 1981, of which he is currently the President. Gordon's and Phoenix Intergroup's goals are to preserve historic buildings in the Phoenix area.

Michael Hinson left the Arizona Attorney General's Organized Crime and Racketeering Division to join the Coconino County Attorney's Office as a prosecutor.

Dennis Kavanaugh, formerly Chief Counsel of the Arizona Industrial Commission, has been certified as a specialist in Worker's Compensation. He is now in private practice with Bill Stephens & Associates, P.C.

Karen C. Kennedy, a shareholder and director of the law firm of Butt, Thornton & Baehr, P.C., was the recipient of a State Bar of New Mexico Outstanding Contribution Award for her assistance as Chair of the Minimum Continuing Legal Education Committee of the New Mexico Supreme Court. The award, presented to judges and attorneys who have made extraordinary contributions of service to the Bar in the last year, was presented during the State Bar's 102nd Annual Convention, September 28-October 1, 1988.

Ms. Kennedy received her B.A. from Arizona State University in 1974 and her Juris Doctor from Arizona State University College of Law in 1978. After a one-year Judicial Clerkship to Judge Laurance T. Wren of the Arizona Court of Appeals, she relocated to Albuquerque. In 1982 she joined the law firm of Butt, Thornton & Baehr, P.C., and became a shareholder in 1985.

Kennedy is a member of both the New Mexico and Arizona State Bars. Her practice is primarily limited to the defense of civil rights claims and employment disputes and grievances.

Kennedy was appointed by the New Mexico Supreme Court as Chair of the Minimum Continuing Legal Education Committee in August, 1986. MCLE develops, administers and enforces the requirements for continuing legal education in the state.

Nominations for the award are solicited from the entire Bar membership, which includes all practicing judges and attorneys in the state. Kennedy is one of eighteen chosen by the State Bar's Board of Bar Commissioners to receive the Outstanding Contribution Award.

David M. Talamante served on the faculty of "Practicing Before the Department of Real Estate: Subdivisions, Recovery Funds, Hearings," a seminar sponsored by the State Bar of Arizona in November, 1988.

Teri Thomson-Taylor is expecting her second daughter in February, 1989. Her practice is limited to Worker's Compensation Defense for the State Compensation Fund.

Lt. Col. Lynn K. Whyte is currently the Deputy Staff Judge Advocate of the Air Force Communications Command.

Elliot Wolfe served as Seminar Chairman for "The Seat Belt Defense," a seminar sponsored by the Arizona Trial Lawyers Association in March, 1988.

'79

Ron Kilgard
Meyer, Hendricks, Victor, Osborn & Maledon, P.A.
2700 N. Third Street
Suite 4000
Phoenix, AZ 85004

Edward L. Barry is listed in the 5th edition of *Who's Who in American Law.* (Marquis).

Donna Killoughey served as Chairperson for "Putting CLOUT in your Law Office," a seminar sponsored by the State Bar of Arizona in September, 1988.

Craig J. Langstraat is now an Associate Professor in the School of Accountancy at Memphis State University. Craig has published over 30 journal articles (including seven law review articles) and four book chapters during his eight years as a tax academic.

Patrick McGillicuddy is a lawyer with the Maricopa County Public Defenders Office. He and his wife, Carol, are expecting twin girls in May of 1989.

Gregory P. Novak is a partner in the plaintiff personal injury firm of Kleinman, Carroll & Kleinman.

After practicing for seven years in the in-house law department of Homart Development Co., **Teri O'Brien** took a break from practicing law in May, 1979. Since that time she has pursued her avocation, bodybuilding, and is working part-time as a personal fitness trainer. She recently passed the fitness instructor certification exam given by the International Dance Exercise Foundation and administered by ETS and is considering getting an advanced degree in a fitness-related field.

Albert E. Van Wagner, Jr. married **Tessie Goodwin** in July, 1988, and opened his second office in Litchfield Park, where they also reside.

'80

Randy Nussbaum
Ownes, Rybarsyk & Nussbaum, P.C.
7322 E. Thomas Road
Scottsdale, AZ 85251

Diane Lindstrom has been promoted to Assistant Chief Counsel for the State of Arizona Compensation Fund.

Alicia Mykyta has become associated with the law firm of Shull, Rolle & Watland, Phoenix, Arizona.

A. Gregory Ramos recently moved from the law firm of Howell, Fisher, Branham & North to the law firm of North & Gideon in Nashville, Tennessee. His practice is primarily Civil Litigation.

Vicki G. Sandler is senior attorney at the Arizona Public Service Legal Department and is expecting her second child in June, 1989.

'81

Clare Abel
Burch & Cracchiolo, P.A.
P.O. Box 16882
Phoenix, AZ 85011

John Gaylord joined with George Ferrin in February, 1987. They moved to Tempe on June 1, 1988. Their practice focuses on business matters of the construction industry.

Kim D. Gillespie is the Supervising Attorney of the Child Support Unit at the Attorney General's Office. She recently returned from a three-week trip through France.

After five years of practicing law with Winston & Strawn in Washington, D.C., **Ann Woodley Harbottle** started teaching at the University of Akron School of Law at the end of August, 1988. She is an Assistant Professor of Law, teaching Civil Procedure (and related subjects). Her husband, Scott Harbottle, is working for the Cleveland law firm of Hahn, Loeser and Parks, and they are living in-between the two cities — in Hudson, Ohio.

'82

Judy Miller
Attorney at Law
4008 N. 15th Avenue
Phoenix, AZ 85015

Phyllis Parise was admitted as a partner of Storey & Ross, P.C., in the summer of 1988.

On November 8, 1988, **Richard Romley** was elected Maricopa County Attorney, Phoenix, Arizona.

The law firm of Edwards, Hunt, Hale & Hansen, Ltd., of Oxford Court, 415 South Sixth Street, Suite 300, Las Vegas, Nevada 89101, is pleased to announce that **Gloria J. Sturman** has become a shareholder in the firm as of September 15, 1988.

'83

Scott A. Swinson
Warren, Angle & Roper
3550 N. Central Avenue
Suite 1700
Phoenix, AZ 85012

Bruce D. Crawford was recently made a Litigation Partner at Jones, Skelton & Hochuli. He specializes in representing physicians, hospitals and other members of the health care profession in medical malpractice lawsuits.

He and his wife, Michelle, are now the proud parents of two little girls: Karly, age 2-½ years, and Courtney, age 2 months.

Gail M. Ledward became a partner in the firm of Killian, Legg in Mesa on January 1, 1989.

In November, 1987, **James F. Stanley, III,** took to a jury trial his first 1st-degree murder capital case. The jury came back with a death penalty verdict. This was a three-week trial and the most difficult case he has had as a lawyer.

'84

Jody Pokorski
Snell & Wilmer
3100 Valley Bank Center
Phoenix, AZ 85073

Wendi A. Sorensen served as Chairperson for "Handling a P.I. Case Under $50,000," a seminar sponsored by the State Bar of Arizona in September, 1988.

'85

Gerald T. Hickman
Teilborg, Sanders & Parks
101 N. First Avenue
Suite 2900
Phoenix, AZ 85003

Bette Adelman is currently working in the Child Support Enforcement Unit, Economic Security Division, in the Attorney General's Office.

Kenneth J. Belongia was promoted January 1, 1988, to the rank of Major. He was reassigned on August 15, 1988, to Andrews Air Force Base, Maryland, where he is the Executive Officer to the Staff Judge Advocate, Headquarters Air Force Systems Command. He supervises the legal support for the research, development and acquisition of all major Air Force weapons systems.

Deborah Cole-Williams joined the Federal Public Defenders Office in early September, 1988, after a year at the County Public Defender. (She started out in private practice for 1-½ years after graduation, but grew disgruntled. The money in defender offices isn't there but the rewards definitely are! They may be the only lawyers around who like what they do for a living!!!)

Patricia Esser Cooper, Class of 1985, served on the faculty of "Practicing Before the Department of Real Estate: Subdivisions, Recovery Funds, Hearings," a seminar sponsored by the State Bar of Arizona in November, 1988.

Debbie Mitchell accepted a job with Amoco Corporation in Chicago as an environmental lawyer.

Ann A. Scott Timmer, Class of 1985, was part of the faculty conducting Discovery I, a seminar sponsored by the Maricopa County Bar Association, Arizona Institute of Continuing Legal Education, in September, 1988.

'86

Mark D. Samson
Meyer, Hendricks, Victor, Osborn & Maledon, P.A.
2700 N. Third Street
Suite 4000
Phoenix, AZ 85004

The Law School regrets to report the death of **Mark George Downs,** who passed away September, 1988.

Diana Fuller is currently an associate with Solton, Jacobs & Weiss in Downey, CA. She is the recipient of the Army Achievement Medal and promoted to Sergeant E-5 in the U.S.A.R.

Diane Albrecht Huckleberry is currently practicing in Mesa with Ilene L. McCauley, Ltd.

'87

Susan Speck-Lowther
4601 W. Berridge Lane
Glendale, AZ 85301

Gary N. Jones will be working as a prosecutor in Germany for the next three years with the United States Army, Judge Advocate General's Corps.

'88

Lee David Stein
356 E. Orange Drive
Phoenix, AZ 85012

The October 17, 1988, issue of the *Tribune,* (in Tempe, Arizona), featured an article on **Randy Howe.**

Justin Reidhead was recently selected as the first recipient of the "Public Lawyers Section Law Student Award." The Public Lawyers Section of the Maricopa County Bar Association created this award to recognize the Arizona State University law student who makes "a significant contribution to the field of public law or to a public law office" during the year.

Reidhead, a Tempe resident and 1984 graduate of Arizona State University, was presented a placque and a $100 cash award in honor of his selection.

D. Scott Wiggins was married on August 6, 1988, to Susan C. Keim. He is still looking for employment in the Philadelphia area and is awaiting the Pennsylvania Bar Exam results from July, 1988. ■

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The Law Forum welcomes comments, news, and photos. Please let us know about a new job or a promotion, honors or awards publications, family events, travels, etc.

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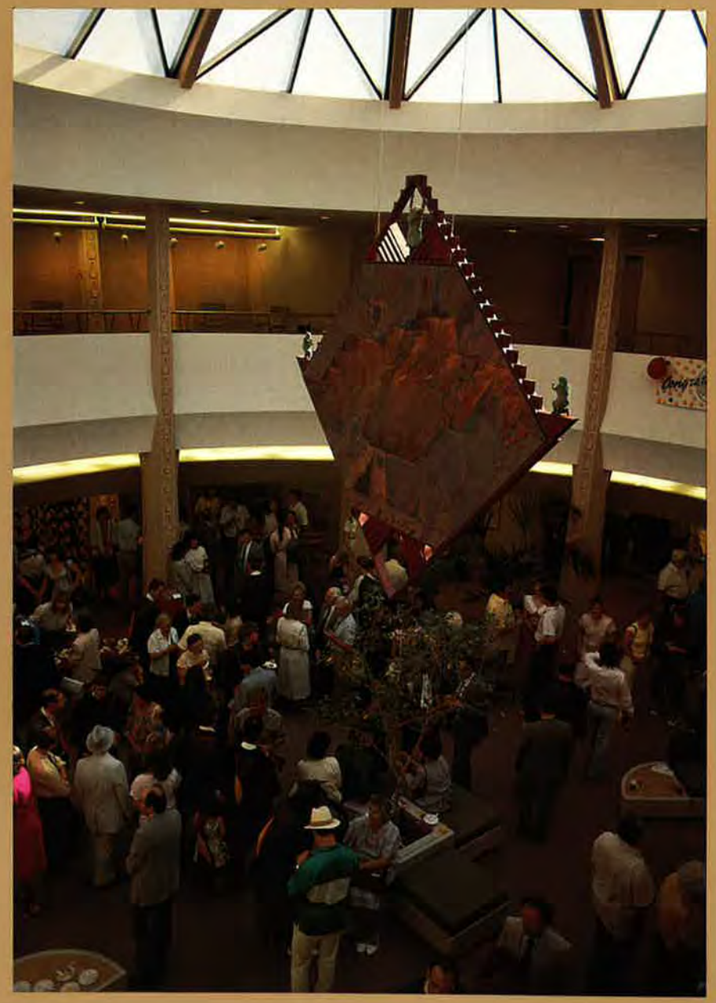

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