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University of San Diego School of Law Student Bar Association

THE NEWSPAPER OF THE UNIVERSITY OF SAN DIEGO SCHOOL OF LAW

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MOTIONS

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NETWORKING: *Nearly 140 USD Law alumni met with first years at the annual alum event. Left to right are: Adam Philipp, Ray Mercado ('75), Ludlow Creary, and Michael Eisenberg.*

First Years Gussy Up for Mentor Meetings

By Stacie L. Brandt
Motions Editor in Chief

The Law School Alumni Mentor program kicked off last month with a reception in the UC. The annual event is the only formal opportunity for first year law students to meet their assigned alumni mentors.

The purpose of the Mentor program is to give first years contact with alumni in their specified interest areas. Students then can receive realistic information about the day to day aspects of a legal practice. To this end, 50% of the first year class filled out surveys. The hot interest areas they indicated were sports, entertainment, sports, and environmental law. Unfortunately, fewer alums in San Diego practice in those areas. Top alumni practice areas were litigation, criminal law, and personal injury, and in fact these areas are bread and butter for lawyers. 85% of the students were matched with first, second, or third choices.

The alumni seemed to really enjoy the event. Ernie Grijalva ('84) was heard saying, "Don't worry, your grades this semester are better than mine were, and look where I am now."

Following the reception, the students are responsible for maintaining contact with alumni mentors. Some will visit the attorneys' offices; others may attend trials with their mentors.

This year's event was organized by Robert Chong, program chair of the Law Alumni Board student relations committee, and Denise Botticelli ('77), alumna chair of the committee. 168 students and over 137 attorneys signed up to participate, the highest number ever.

USD Hosts Debate for ALI Products Liability Study

San Diego Law Review Sponsors Tort Symposium Featuring ALI Study Participants

By Gregory T. Lyall
Motions Editor

The *San Diego Law Review* (SDLR) presented "Blueprint for Tort Reform" Nov. 6 and 7 in Grace Courtroom. The topic of this symposium was the American Law Institute (ALI) Reporters' Study on Responsibility for Personal Injury (Study). SDLR's Kathy Cannon and USD professor Edmund Ursin organized the conference.

The symposium was structured to stimulate informed debate on the Study, which is the product of a five year collaboration by fourteen eminent scholars (Reporters) in the field of tort reform. Three sessions each addressed a different aspect of the Study. Each session began with the Study recommendations, followed by a critique by prominent tort scholars. The Reporters had an opportunity to respond, and USD faculty commentators then asked questions.

ALI Reporters participating in the conference were: Paul Wieler, Chief Reporter, Harvard; Kenneth Abraham, University of Virginia; and Robert Rabin, Stanford. Critiquing the Study were symposium authors: Alfred Connard, University of Michigan; Jeffrey O'Connell, University of Virginia; Jerry J. Phillips, University of Tennessee; and Marshall S. Shapo, Northwestern University. Mediating the symposium was USD professor Robert Fellmeth. USD faculty commentators were: Mary Jo Newborn, Virginia Nolan, Michael Rappaport, Thomas Smith, and Edmund Ursin. Not attending the conference, but participating in the SDLR symposium issue is Victor Schwartz, a senior partner at the Washington D.C. law firm of Crowell & Moring, and coauthor of *Cases and Materials on Torts* by Prosser, Wade, and Schwartz.

The Study was initiated in 1986 to respond to the tort crisis of the 1980's. While not a restatement, it is an evaluation of key issues of tort law and policy in "high stakes" litigation. According to Judge Jack Weinstein of the U. S. District Court for the Eastern District of New York, the Study is "destined to be the baseline for judicial and legislative activity in the years to come."

Having hosted previous Tort symposia, the SDLR is rapidly gaining a reputation as a high quality publication in the area of tort law. Developing this reputation is the culmination of years of hard work by the SDLR. Professor Rabin praised the SDLR for having "consistently...taken a great deal of initiative in putting together first rate symposia," particularly in the torts area. Such a reputation improves the standing of USD in both academic circles and the legal community in general.

Planning the conference began almost a year ago when Kathy Cannon, SDLR Lead Article Editor, with the help of Professor Ursin, chose the newly released Study for a symposium and subsequent *Law Review issue subject.*

See **TORTS** *page 4*

Musings of a Supreme Court Justice: California Jurist Panelli

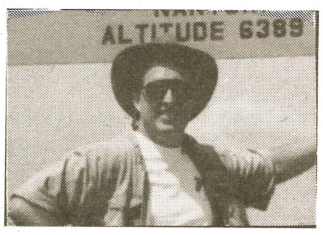
By Christopher Harris
Motions Staff writer

The Federalist Society recently invited California Supreme Court Justice Edward J. Panelli to speak at USD. In the program, appropriately entitled "Musings of a Supreme Court Justice," Justice Panelli described the administrative functions of the California Supreme Court and courts of appeal.

He lamented that the opportunity for justices in both the Supreme Court and the courts of appeal to write scholarly opinions has become drowned by a tidal wave of litigation. Because the Supreme Court is a policy court, not an error court like the courts of appeal, it can decide what issues it chooses to review, in addition to its traditional function of rectifying competing lines of appellate decisions. Every Wednesday the Court decides which cases it wants to grant review, yet the justices can only spend approximately 90 seconds per case scanning the table of contents for interesting issues because there are over 200 appellate decisions which are asked to be reviewed per week! He described the role of a Supreme Court Justice as a "traffic cop" constantly directing the flow of paper and an "editor" merely revising opinions originally crafted by staff attorneys.

Justice Panelli enjoyed the discussion with the students and fielded questions on a variety of topics. Regarding the need for habeas corpus reform of death penalty cases, he stated the court will frequently see the same issues twice, once on the Court's automatic appellate review and then via a petition for habeas corpus, usually argued in the guise of Ineffective Assistance of Counsel (commonly referred to as IAC for those in the know). He speculated this argu-

See **PANELLI** *page 4*



JCLI Seeks Student Articles

First Faculty-Managed Issue of the Journal of Contemporary Legal Issues Seeks Articles by 2, 3, and 4L Students

By Paul C. Wohlmuth

On Oct. 30, the USD Law faculty passed a resolution transferring management of the *Journal of Contemporary Legal Issues* to a Faculty General Editor (FGE) to be designated annually on a rotating basis by faculty consensus. The resolution was drafted by Dean Strachan, Professor Larry Alexander (who will be the FGE for 1993-94) and me, with consultation and input from the outgoing student editorial board consisting of Victoria Black, Richard Gruenberger, Keith Johnson, Tony Palmer and Kim Resnick, and SBA President Robert Chong. The resolution assigns to the student editors significant consultative, editorial, operational and authorial responsibilities. Annually or semi-annually the *Journal* will publish the results of a live symposium on a specific theme held each year at the Law School.

I have taken on the role of FGE for the 1992-93 issue, to be published in the Fall. I will conduct a live symposium at USD in late May on the role of private and public sector lawyers in the shaping of public policy. To help generate student articles for the issue, I am inviting submissions by April 15, 1993, of papers on the theme "The Lawyer as a Moral Agent." These papers can be written on an academic credit or non-credit basis. As announced in the pre-registration packet last week, papers may be written under my supervision in conjunction with my Spring JDR Seminar on a 3-unit graded basis or a 2-unit pass-fail independent study basis. Papers written under other faculty members' supervision would, of course, be welcome.

The best papers submitted will be published in the issue and their authors invited to join faculty participants in the live symposium.

The author is a professor at the University of San Diego School of Law and writes about the newly reorganized Journal *at* Motions' *invitation.*

An Interview With the Dean

By Scott Slattery
Motions Editor

Last week, the author sat down with Law School Dean Kristine Strachan and a tape recorder. What follows is an edited transcript of the questions and answers discussed.

Q: *When California Supreme Court Justice Edward J. Panelli spoke at the law school last week, many students attending were surprised by the lack of attendance by the administration and faculty.*

A: I must say that I was somewhat surprised myself the way this occurred. I think there may be some information gap between the student organizations and the administrative system in the law school. What needs to happen when a student organization invites an important person on campus is the same thing that happens when a faculty member invites a VIP on campus - they know the system and obviously the students don't. The person in charge of inviting the V.I.P. on campus needs to come into the Dean's office and actually schedule the event on my calendar, or on Dean Shue's calendar, so that the V.I.P. can be greeted by the Dean or the Associate Dean. Unless an appointment is made, the event is not registered on the Dean's calendars.

Posting notices on posters doesn't do it, because there are far too many of those for us to attend, and the dates and times conflict with the scheduled meetings and appointments. Perhaps people are unaware of how heavy our schedules are. I'm usually clocked for every 15 or 30 minutes of every day 8am to 7pm. So I just move through the days in a semi-robotic trance - or so it seems sometimes.

A particular problem with that visitor was that it was the day the entire faculty and the deans were interviewing a potential candidate for the faculty. I was interviewing the candidate from 4 to 5pm. It would have been very difficult for me or most faculty to meet Justice Panelli on that day because of the candidate, but there might have been time on Dean Shue's calendar if someone would have known to make an appointment. When Professor Stern was here for the international law society, Professor Darby knows the system, and so what he did was arrange to have Professor Stern and his wife come down and meet the Dean.

The other point to be made here, is that if an appointment is made, we can tell right away if we have a major schedule conflict between events and could have tried, in this situation, to see if it were possible to get Justice Panelli here on a day when there was not a faculty candidate coming in. In general I think the point is, if you want the deans and members of the faculty to come to something, simply putting up a poster around (which is the way you attract student attention) is not geared to fit in with the system we use to schedule ourselves or the hectic and heavy nature of our schedules. You have to make personal invitations or personal appointments. We tend not to notice posters or to consider them the same as invitations or appointments.

Q: *What is the current status of the Journal of Contemporary Legal Issues?*

A: I think that the Journal is going to go off as planned, and the faculty editor is currently talking to some of the students who were previously involved, trying to see how they can stay involved. I think the end result was a good compromise. When everything was said and done, the University and faculty were willing to entrust the funds necessary to make the Journal a quality publication. I'm personally hoping that all of the students who were involved can find a way to become involved and benefit from the new resources that are going to be available to the Journal. I hope to be completely removed from the Journal from now on, except to make sure financial irregularities never occur again.

Q: *Will the U.S. News and World Report be ranking law schools this year? To what extent will USD participate?*

A: U.S. News and World Report

See **DEAN** *page 4*

New Journal Format

MEMORANDUM

To: Members of the Faculty
Re: Journal of Contemporary Legal Issues Proposal
Date: 30 October 1992

1. The Journal of Contemporary Legal Issues ("Journal") operating under the auspices of the University of San Diego School of Law, shall be managed by a Faculty General Editor ("FGE"). At the end of the academic year 1993-94, the Journal shall cease to exist unless its existence is continued by a majority vote of the faculty voting at regular faculty meetings.
2. The format of the Journal, to be published once or twice a year, will be the publication of papers generated by a live symposium on a selected theme, held annually or semiannually at the Law School.
3. The FGE appointment will rotate on an annual basis among interested members of the faculty in an order determined collegially by said faculty and the Dean. Any issue concerning the rotation will be resolved by majority vote of an ad hoc committee consisting of three faculty members appointed by the Dean. By mid-March each year, faculty members will indicate their interest in becoming FGE by submitting to the Dean a detailed, one-page summary of the proposed symposium theme, likely participants and their topics.
4. The term of an FGE is September 1 to August 31. During his/her year's term, the FGE has complete authority, subject to budget restrictions, over development of the symposium theme and selection of participants, acceptance or rejection of submitted contributions, conduct of

See **JOURNAL** *page 4*

MOTIONS

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How to Practice Being a Lawyer

By Elizabeth Genel
Motions Associate editor

I spent last Wednesday at the Clinical Program information meeting. I'm glad I did, because clinics are a great way to practice being a lawyer while you are still in school. Kind of a reality check, work in progress sort of thing. An excellent opportunity to make sure you are in the right school, as opposed to art school or medical school.

The purpose of a clinic is to get students involved in skills development in the practice of law. The clinics focus on specific skills such as interpersonal relationships, including building rapport with clients, judges, juries, and yes, your adversaries. Students learn effective interviewing, negotiating and presentation skills. Some of the basic office practice skills students learn are: how to prioritize your time, how to keep a case file, and basically how to avoid malpractice. All the clinics have prerequisites, and you need to get approval of the clinic supervisor, so keep that in mind, and pick up a handy info sheet on clinics, available in room 308.

The Civil Clinic is affectionately known as the oldest, most prestigious law firm in San Diego. (Think how great that will look on your resume.) Their motto is, "no case is too simple." The clinic is a 4 unit course where students have the opportunity to interview, counsel and represent clients in actual cases. Students work on cases such as landlord and tenant, disputes over dogbites, foodstamps, and your everyday contract disputes. Students average 20 hours per week, but sometimes things can get hectic, and students have been known to spend up to 50 hours per week. (Very rare, but it does happen.) Weekly group meetings like Douglas has on "L.A. Law" are combined with individual case conferences to provide intense personal training in the above-mentioned skills. Talk with Professor Hartwell during the spring semester, if you are interested in the fall program.

The Criminal Clinic is a great way to maximize courtroom time and practice all the skills you learned in Lawyering Skills II. Students obtain placements in different offices depending on their preferences. For example, students may be placed with the District Attorney, City Attorney, the Public Defender, the Federal Public Defender or the in-house clinic. The criminal clinic is very exciting no matter which agency you choose to work for. The in-house clinic gives students the experience of working with juvenile criminal cases. Professor Berend is the person to speak to if you have any questions.

The Environmental Clinic is the place for you if you want to develop your litigation skills in the context of environmental law. Students will be involved in helping the San Diego Bay by attending hearings and impact lawsuits. Professor Wharton will be supervising this clinic; talk to him if you have questions.

The Immigration Law Clinic is for you if you are interested in helping indigent clients with various immigration problems like deportation and political asylum. It sounds intriguing, and space is very limited so catch up with Professor Esparza if you're interested.

So that's what I learned about clinics. They sound like an awful lot of fun to me. Remember, there are prerequisites, and some of the clinics have a class you take at the same time. Also, you need approval from the clinic supervisor. Head over to room 308, get yourself a clinic info sheet, and start thinking about the clinic you want to take next year.

Pro Bono Publico

Lawyers Donating Services

By Shannon Goldman

Pro Bono Legal Advocates (PBLA) is an organization of students formed last year to promote the values of charity and selflessness among the members of the USD Student Bar. "Pro bono" comes from the concept of lawyers donating services to the poor; *pro bono publico* - for the common good. It's a long-standing tradition and an ethical obligation of being a lawyer. PBLA is listed in the 1992-93 Campus Compact Member's Survey and Resource Guide for its role in the provision of legal aid to the indigent and its work in exposing students to public interest law. Last year, about 150 students participated in our programs.

Currently, there are four programs in place for those USD law students wanting to assist others and get involved with the San Diego community. Two of these, the Domestic Violence Prevention Project and the Supplemental Security Income (SSI) Project, are operated in coordination with the San Diego Volunteer Lawyer Program (SDVLP). Many students attended the Domestic Violence Prevention Training in September and the SSI training earlier this month that were provided by SDVLP. The PBLA coordinator for the Domestic Violence Prevention Project is Nina Golden, and the coordinator for the SSI Project is Rich Britschgi.

Mediation training by the San Diego Mediation Center is scheduled for November. Students who successfully complete this training may help resolve landlord-tenant disputes and conflicts referred by the City Attorney's Office. Most students who participate in this training will go on to mediate cases for the Small Claims Court. Students will receive intensive classroom and on-the-job training on their way to individually mediating the small claims disputes. Suzanne Burke is the PBLA mediation coordinator.

The Mentoring Program at Kearny High School targets juniors who have a potential for academic success but need a role model. A two-year commitment is requested in order to see the high school students through both their junior and senior years. Mentors are needed for the new juniors, so leave your name, telephone number, and year in school in coordinator Courtney Wheeler's mailbox, if you are interested.

Some new areas PBLA is considering include developing student volunteer programs for AIDS-related issues, emancipation for minors in Juvenile Court, and assisting at the Public Defender's Office. For more information on current Pro Bono activities, check the PBLA bulletin board on the first floor of the law school (across from the Writs), come by our office at lunchtime (located in the Community Service Office on the lower level of the University Center), or call 260-4600 ext. 8733.

PDP Initiates with Cal Western

By John G. Iannarelli

Phi Delta Phi Legal Fraternity held their fall initiation ceremony Dec. 13 at California Western School of Law. The initiation, which takes place once each semester, formerly inducted new members into the country's oldest legal fraternity.

Sharon Cusic, Newport Beach attorney and PDP National Council member, chaired the initiation with USD Professors John Roche and Hugh Friedman, both of whom are PDP members. Also present were PDP members Andrew Aller, a California Western alumnus who is now a San Diego attorney, and Professor Arthur Campbell of California Western.

SECRET CEREMONY: *Left to right are USD Professors John Roche and Hugh Friedman, Sharon Cusic, Andrew Aller, and Cal Western Professor Arthur Campbell.*

New fraternity inductees from USD are Rachel Merrill (2D) and Meg Edwards (3D), which brings the number of active members to 40. Seven were initiated in a ceremony last spring. California Western students just organized a chapter this semester, and they inducted 21 members in this ceremony.

PDP held its initiation off campus for the first time in its 46 year history with USD, even though both legal professionals and faculty attended the ceremony. This change of location was due to the Office of the Dean's new policy which limits use of the Grace Courtroom for only "special events." Although this new policy has yet to be fully formulated, it was decided that a semi-formal Friday evening ceremony by an established legal fraternity is not a "special event." Fortunately, California Western's School of Law administration stepped in and offered the use of their facilities so that this fall's initiation was not canceled.

PDP is a service fraternity whose goal is to provide assistance to the surrounding community, while at the same time enhancing the public's perception of the legal profession. Toward this end PDP currently operates a number of community service ventures, including the student mentor program which is run in conjunction with nearby Carson Elementary School. This program is designed to assist needy 5th and 6th graders by pairing them with law students, much like the "Big Brother/ Big Sister" program. Those interested in participating in any of the PDP programs, or becoming a member of the fraternity, can stop by its Writs office.

The USD Phi Delta Phi chapter was established in 1964 and is headed by Magister Denise Hickey. PDP began in the U.S. before 1900.

TORTS from page 1

According to Cannon, the most difficult organizational hurdle was to convince ALI Reporters Weiler and Abraham to commit to the symposium. Cannon explained that encouraging quality writers to submit articles is difficult for most legal journals. However, once Weiler and Abraham were confirmed, quality authors quickly fell into place. As Cannon noted, "At one point I had to start turning them down."

Professor Ursin rates the symposium a success. All participants enjoyed having a forum in which to share their views. Ursin was pleased to note that many of the participants were familiar with, and respected, the work that the SDLR had done in the torts area. Such a reputation is "good for all of us."

JOURNAL from page 2

the symposium, the number of issues to be published, student editors' work, and editorial matters. All expenditures for each FGE's term must be paid or invoiced by August 31. On September 1, all budgetary support and authority is transferred to the incoming FGE.

5. By the end of August each new academic year, the senior student editors ("SSE"), after consultation with the FGE regarding the symposium theme, shall solicit from the student body at large "comments" on that theme or another topic to be considered for inclusion in the next issue. All those submitting comments considered by the SSE or the FGE to be of publishable quality shall become assistant student editors if they so desire. Senior student editors may also contribute to the pool. The FGE thereafter shall select, with the assistance of the SSE, those student comments to be published in the journal. At least one such comment will be selected for publication in each issue.

6. Each Spring, the FGE designate, with the assistance of the outgoing FGE and the SSE shall select from among the assistant editors the SSE for the following year. The incoming FGE with the assistance of the current SSE may augment the SSE candidate pool should he/she deem it necessary.

7. In addition to their responsibilities above, the SSE will assist the FGE in the selection of authors and articles; running the live symposium; editing articles submitted; dealing with the printer and other third parties; and in general overseeing all the details of publication. The FGE will also select senior editors who will be responsible for coordinating the mechanics of publication, including communication flow, tracking deadlines, management of subscriptions and keeping of accounts.

8. Subject to the budgetary process and parameters of the University, the Law School will provide budgetary and other support for the Journal as follows: symposium expenses, publication expenses, student stipends or tuition remissions, administrative and secretarial assistance, and release time or other appropriate support for the FGE.

9. The Journal is subject to USD's policies providing academic freedom and decanal authority over budget and administrative appointments (i.e., the general USD policy - which is applicable to the Director of CPIL: appointment may be terminated "upon reasonable notice and for unsatisfactory administrative performance or other cause.")

PANELLI from page 1

ment was common because the appellate attorneys are not the trial attorneys.

Furthermore, every death row convict has two attorneys and one investigator. Although they "do not earn a handsome amount," they usually reinvestigate the case in its entirety and will also file a petition, not because they think the court will find it meritorious, but merely as a vehicle to get into the federal system. Justice Panelli cited the Robert Alton Harris case as the most egregious example of how this procedure becomes abused. However, he stated he preferred California's system to states like Mississippi and other Southern states where the attorney will get paid a paltry amount to handle both the trial and the appeal.

Regarding tort reform, Justice Panelli discussed a recent case which may signal a rift in the Court regarding strict liability. This case involved the defense of assumption of risk. In a plurality decision, half the justices utilized a strict liability argument while the other half infused negligence concepts into the analysis. Justice Panelli saved his most disparaging comments for the California political environment and complained that by involving the Court in political disputes, California government resembled the worst aspects of the judicial climate in nations like Bolivia or Columbia, where judges' opinions are closely examined by those responsible for their funding. He cited the legislature's bipartisan effort to punish the Supreme Court for approving the constitutionality of Prop. 140 (a 1988 proposition which installed term limits in the California legislature, reduced staff and expenses by 38% and reduced retirement benefits) by attempting to reduce the Court's budget by the identical 38%. Fortunately, Governor Wilson vetoed that budget. However, Wilson involved the reluctant Court into the redistricting quagmire when he vetoed all three of the legislature's efforts. He noted even though the Court has a majority of Republican appointees, the Special Masters who handled the technical process of creating districts turned out to be mostly Democrats. Although he verified partisanship did not enter into the district designs, he wondered if poetic justice had not been served by the gain of two or three seats in the Assembly for the Democratic party.

JUSTICE PANELLI: *Meeting for informed discussion with lecture audience, including the author.*

Surprisingly, the student turnout was very light, particularly considering what an engaging talk Justice Panelli gave when compared to last year's Nathanson lecturer, Supreme Court Justice Sandra Day O'Connor. Professors Wohlmuth, Siegan, Horton, and Advisor Janet Madden represented the faculty and administration.

DEAN from page 2

has made it very clear that they will continue to do their rankings despite the anger and the protestation of the ABA and most law schools. I'm in the process of continuing the discussions with U.S. News and World Report that have been going on for several years. A couple of the issues we've had in the past - with the way they count the library books and some other things that have been the subject of intense discussions - have been resolved in our favor.

Our major remaining problem is the extent to which they will base their rankings upon the survey that they pass out to 2000 persons nationwide. A school whose students stay - like ours do - 90% within the state of California, and the vast concentration of that 90% being within San Diego, cannot compete fairly in that system, because very few of the survey forms go to San Diego or Southern California, or to California for that matter. So what we've been after them to do is either construct a different survey distribution system or weigh out the survey less. If they are willing to do that we would be much more willing to participate, but I need to exercise as much leverage as possible so that once we do provide them with information that they want, we will be fairly evaluated by them in the process. We do not want to be in the position of giving them all of our numbers, and then ending up in a lower quadrant anyway because this evaluation system is artificially skewed against us - how do you then explain that?

We will participate when they deal fairly with us - and it looks like that will be the case this year. But it has been a difficult battle, and they have engaged in conduct bordering on extortion to get this information out of law schools. If there was some way that law schools could legally band together and boycott them they would, but it would probably be an antitrust violation. The other thing that is happening to schools like USD in these difficult employment times is that we are seeing more of our students go out of state. As that happens, we will get a fairer shake on a national survey. If there is a USD alum in a law firm where a partner gets that survey, I think we will be fairly evaluated. But that survey goes out to all these firms who have never had contact with anybody at USD, so naturally they don't know enough about us to rank us high.

Q: *What projects has the Dean has been working on?*

A: Nice you should ask. I'm working on a lot of things, and I usually give updates at the faculty meetings, where the SBA President is present, and I talk sometimes at SBA meetings, but I think the word doesn't get out as much as I think it does so I like to be able to talk to the students at large through Motions.

Disability Access Audit. We've made a lot of progress with the disability access audit, that was a top priority for me and the SBA for the past two years. It was a consciousness raising experience and a project that took an awful lot of effort on the part of one of our disabled students and his wife, who contributed their time and their expertise. Carrie Wilson and Janet Madden really worked hard on it.

See **DEAN** *page 5*

TRIAL TEAM CHOSEN:
USD's Trial Team has completed its selection process for this school year. Members are, left to right: Front row, Robin Segal, Steve Weisenberg, Susan Woods, Melissa Burke, Wendy Angus; Center row Dyke Huish, Ann Broderick, Stephen McGreevy, Adam Springle, Advisor Professor Richard Wharton, Marc Gamberdella, Julie Westwater, Chris Harrington; Back row, Steve Polapink, Sonny Celatka, Paul Hora, and Mike Gillaspie. Other Trial Team members are: Lisa Werries, Shirvan Sherma and Paul Junge II.

Werries Persuades Pest Control Agency to Comply with the Law

By CPIL Staff

Center for Public Interest Law (CPIL) intern Lisa Werries prevailed in convincing a state pest control regulatory agency to utilize the rulemaking process when adopting regulations it seeks to enforce. She appeared at its Nov. 6 meeting.

Werries, now a third-year USD student, became interested in the issue when she monitored the Structural Pest Control Board (SPCB) as a CPIL intern during her second year. CPIL is a unique clinical program which serves as a watchdog of 60 state agencies regulating business, trades, professions, and the environment. As part of her CPIL assignment, Werries monitored the activities of the SPCB, which is statutorily charged with protecting consumers by regulating the termite/insect/rodent control industry which eradicates pests with the use of insecticides or fumigants.

At CPIL, Werries learned that most state agencies, including SPCB, are governed by the Administrative Procedure Act (APA), which requires them to follow the formal rulemaking process in order to adopt regulations which have the force of law. Quickly, Werries realized that SPCB was violating the APA by simply approving "specific notices" to its licensees rather than undergoing the rulemaking process, which involves notice to the public of the proposed rules, an opportunity for public comment, and final approval of the rules by the state Office of Administrative Law.

In October, Werries filed a formal petition for rulemaking with the Board, requesting that the Board rescind all twenty of its existing "specific notices" and initiate the rulemaking process to formally promulgate those which it seeks to enforce. After reading Werries' persuasive legal analysis of its "specific notices" and listening to her oral presentation at its Nov. 6 meeting, the Board decided to grant her petition.

"The Board's decision to follow the APA is a big victory for CPIL. The Center's whole focus is on opening up the regulatory processes of California government and ensuring that these licensing boards follow the 'sunshine statutes' which guarantee licensees and members of the public the right to participate in agency proceedings," said CPIL Supervising Attorney Julie D'Angelo. "It's also a tribute to Lisa's excellent legal analysis and oral advocacy skills." Werries was a member of the Mock Trial Team which recently won first place at the National Tournament of Champions.

As Werries' experience illustrates, USD's Center for Public Interest Law enables students interested in regulatory or public interest law to personally participate in state agency decision making before they graduate from law school. CPIL interns also write articles on their assigned agencies for publication in the Center's quarterly legal journal, the *California Regulatory Law Reporter*. Over 500 students have graduated from CPIL since its creation in 1980.

USD Mediation Training Nation's First

By Troy Zander

Twenty-two law students recently participated in the first mediation training program of its kind in the nation. Sponsored by the Pro Bono Legal Advocates, it is likely to serve as a model for other law schools in the future.

Barbara Filner is the Director of Training at the San Diego Mediation Center (SDMC). She and a host of SDMC staff and trainers came to USD to instruct the first, second, and third year students in this rapidly expanding alternative method of dispute resolution.

Mediation is a powerful tool for settling disputes. In the mediation model that SDMC teaches and practices, disputants meet with mediators who structure a process in which the parties can voluntarily reach a specific oral agreement to resolve their conflict. The agreement is then written down for the disputants. As a general philosophy, the mediators control the process; the disputants control the result.

During the training, students participated in seven mock mediations, ranging from auto repair bill disputes to property and landlord-tenant issues. Students acted as both mediators and disputants to practice their newly learned skills. Observers and students acted as disputants and gave constructive criticism to the mock mediators to let them know what was effective and what was not.

In addition, the students participated in several training sessions that focussed on active listening, reframing and translating. This training was designed to facilitate the student mediators' ability to identify the disputants' underlying concerns, validate those concerns with neutral, objective language, and emphasize the disputants' goals.

In a recent article in *California Lawyer*, Pepperdine University School of Law Professor Robert F. Cochran, Jr. suggested that attorneys who fail to offer their clients alternatives to litigation, including mediation, should be subject to malpractice. Calling litigation the "equivalent of surgery," Cochran believes that just as doctors must inform their patients of alternatives to surgery, "clients who bring legal problems to a lawyer have the same right to personal choice as patients who seek medical treatment."

Cochran's article reflects the growing trend in favor of alternative methods of dispute resolution and away from the winner-loser mentality of litigation.

SDMC began in 1982 as a joint effort of the San Diego County Bar Association and the University of San Diego School of Law. SDMC is now an independent, non-profit corporation. The program receives funding from the city and county of San Diego, contracts, training fees and private donations. SDMC handles a variety of cases, including landlord-tenant, employer-employee, creditor-debtor, real estate, personal injury, property damage and domestic issues.

The mediators at SDMC have diverse backgrounds, including law, teaching, business, and mental health. To become a mediator one must successfully complete a 25 hour training program. Thereafter, active mediators are required to attend a two hour educational meeting every month for one year. Normally, unpaid volunteers act as mediators. Volunteers receive the skills training at no charge in exchange for mediating 8-12 hrs/mo for one year.

For more information on mediation or the SDMC, contact the SDMC at 295-0203.

DEAN from page 4

We cleaned up a lot of problems in both buildings, and fixed all kinds of things that nobody really had noticed were problems for the disabled students - little things, like the height of soap dispensers - so I think we are more attuned to it. We're still working on a couple of major things - like the ramp outside of Warren Hall - but that has to be handled by Physical Plant, that goes through the central university. They've set up a university-wide committee to deal with physical accessibility issues. If students should find continuing problems, it's a high priority for me, and I would very much like to have any problems or suggestions of disabled access reported to Carrie Wilson.

Nathanson Lecture. I've been working on getting our major speakers for this year. The rumors are true - we do have another Supreme Court Justice coming for the Nathanson lecture in the Spring, and that will be Justice Blackmun. I'm going to not make the mistake I made last year, and explain to everyone at the outset that we got Justice Blackmun because of the efforts of the Nathanson lecture committees; the lecture is paid for by the Nathanson endowment; since its inception eight years ago, that lecture series was intended to be for the entire law school community, which means: students, faculty, staff, alums, and important people to the law school - such as people who employ our students and judges. 20-25% of the seats will be for students (probably by lottery, or SBA will be left to figure out distribution).

We don't have a date yet. And we don't know what else Justice Blackmun will do. I am going to try and get him to a class. But Supreme Court Justices do exactly what they want to do. So he will be telling us what he's willing to do and what he's not willing to do.

Commencement Speaker. Our commencement speaker for this year's graduation is Morris Dees. He was the unanimous choice for graduation speaker for last year, but when I contacted him it was too late for him to get it on his schedule. So he agreed to it this coming year, and I snapped him up because he is so hard to get. Morris Dees, (and more will be published about him) is known as the man who bankrupted the Ku Klux Klan. He has been active in the civil rights movement for thirty years. And he, together with Julian Bond, founded the Southern Poverty Law Center. They made a movie of his life entitled "Line Of Fire." That included the $7 million precedent setting judgment he got against United Klans of America on behalf of a young African-American man who was hanged by the Klan in Mobile, Alabama. He's the one who has gone after Metzger here.

He is just an inspiring person and outstanding lawyer who has argued cases to small town justices of the peace and to the United States Supreme Court. One of the nice things about Morris Dees is that he is very interested in being accessible to students (unlike Supreme Court Justices). So we may be able to structure his visit to allow for more student contact with him.

Continued next issue

SBA President's Report

By Robert Chong

I hope everyone who attended the Halloween Party had an outrageous time. I did! Stop by the SBA office to see some of the Kodak moments as captured by the Dragon-cam (Yours Truly).

Enough of the fun and games. As SBA President, I sit on a number of committees to represent you, the student body. If you have a concern to express, please feel free to see me.

FACULTY COMMITTEE: Each year, the SBA president sits on this committee and has a vote on issues raised at meetings. The faculty meets monthly to address issues pertinent to both the campus and the faculty. I find the views and debates of various professors both interesting and perplexing. (If you think law students like to debate, wait until we become law professors.)

Dean Strachan opened the Oct. 30 meeting by recognizing the student accomplishments of the National Trial Team and *Motions*. Most of the meeting focused on the *Journal of Contemporary Legal Issues*. The committee passed the motion proposed by Professors Wohlmuth and Dallas to have faculty control of the *Journal*. I thought the proposal was fair, and even though it takes away student autonomy, the *Journal* should be better served.

LAW ALUMNI BOARD OF DIRECTORS: Many USD Law School Alumni are prominent members of the legal community, and we are lucky that our Law Alumni Association is very active. In particular, those who sit on the Alumni Board spend valuable time working to help USD and its students. The Board has six standing committees: Student Relations, Communications, Programs, Nominations, Executive, and Law Alumni Weekend. I am the lone student representative on the Board and also serve as a member of the Student Relations committee.

Student Relations is responsible for the Alumni Advisor program, as well as the Law Clerk Training and Career Choices Program in conjunction with Career Placement. Also in the works is a Post Bar Party for all July bar takers (we'll probably have something for February bar takers, too). Last year, the Alumni Board hosted a party after the third day of bar exams and a sack luncheon on the second day.

STUDENTS AFFAIRS COMMITTEE FOR THE BOARD OF TRUSTEES: Members of the Board of Trustees and representatives from the law, undergraduate, and business schools, and all other graduate programs sit on this committee. We meet twice a semester to discuss various student concerns: parking problems, the enactment and implementation of the American with Disabilities Act, cultural diversity, and financial aid. Student Affairs is a source of information about programs and benefits throughout campus, as well as a valuable networking system.

Among the Board of Trustees are Ernest Hahn, Chairman of the Board who sits ex officio, and Jenny Craig, president of Jenny Craig, Inc. Donna Baytop, Medical Director of Solar Turbines, is chairman of the Student Affairs Committee.

VITA UPDATE: After all the hoopla and coaxing, we have enough student interest to get the Volunteer Income Tax Assistance program off the ground. According to VITA coordinator Renae Adamson, the training will be on two consecutive weekends, Jan. 16, 17 and 23, 24; times will be 8-5pm (over in plenty of time for the Superbowl). The campus center will open in February, and we will advertise our free services in the community. Program volunteers will help the poor and elderly fill out simple tax forms. A pamphlet and sign-up cards are in the SBA office.

I leave you with these parting words: "Do you not know that in a race all runners run, but only one gets the prize? Run in such a way as to get the prize." GOOD LUCK WITH FINALS.

THE MENTOR RECEPTION: *Left to right are Roxanne Parks ('85), Denise Botticelli ('77), and Kathleen Quinn, Director of Law School Development.*

USD School of Law Final Exam Schedule Fall, 1992

Wed. Dec. 9

9am	Con Law B - *Siegan*
	Con Law C - *Zacharias*
1:30	Torts A1, A2 - *Morris*
	Torts B1, B2, C - *Nolan/Ursin*
	Products Liability - *Ursin*
6pm	Torts E1, E2 - *Heriot*
	Con Law E - *Schwarzschild*
	Crim Pro I - *Huffman*
	Patents - *Knobbe/Bunker*
	Civ Tax Pro - *Wilson*

Mon. Dec. 14

9am	Crim Pro I - *Schwarzschild*
	Admin. Law - *Davis*
	App. Prac. & Pro - *Niddrie*
1:30	Contracts A - *Engfelt*
	Contracts B - *Wonnell*
	Contracts C1, C2 - *Kelly*
	Family Law - *Shea*
	Reg. Indus. - *Fellmenth*
6pm	Contracts E - *Wohlmuth*
	Crim Law E - *Roche*
	Conflicts - *Engfelt*
	Int'l Tax - *Pugh*
	Trusts & Est. - *Spearman*

Thurs. Dec. 17

9am	Tusts & Est. - *Shue*
	Trusts & Est. - *Smith*
1:30	Legal Acctg - *Pilchen*
6pm	Income Tax. of T & E - *Harris*
	Civ Pro E - *Bratton*

Thurs. Dec. 10

9am	Secur. Regs. - *Dallas*
1:30	Immigrn. Law - *Esparza*
	Ins. Law - *Rappaport*
6pm	Corps. - *Smith*
	Envt'l Law - *Rappaport*
	Fed. Est. Gift Tax - *Hersh*
	White Collar Crime - *Halpern*
	Corp. Reorg. - *Steinhause*
	Prof. Resp. - *Hartwell*

Tues. Dec. 15

9am	Bnkrptcy - *Newborn*
	MCL Intro. to Law - *Darby*
1:30	Evidence - *Peterfreund*
	Evidence - *Cole*
6pm	Labor Law - *Sullivan*
	Tax II - *Snyder*

Fri. Dec. 18

9am	Remedies - *Simmons*
1:30	Crim Law A - *Alexander*
	Crim Law B - *Cole*
	Crim Law C - *Montoya*
	Prof. Resp. - *Zacharias*

Fri. Dec. 11

9am	Cal. Admin. Law - *Fellmeth*
1:30	Civ Pro A - *Brooks*
	Civ Pro B - *Strachan*
	Civ Pro C - *Heiser*
	Fed Jurisdn - *Bratton*
	UCC - *Wonnell*

Wed. Dec. 16

9am	Corps. - *Friedman*
	Pub. Int'l Law - *Pugh*
1:30	Property A - *Sherwin*
	Property C - *Minan*
	Tax I - *Snyder*
	Fed. Est. & Gift Tax - *Smith*
6pm	Property B, E - *Rashenbush*
	Tax'n of Prop. Trans. - *Jelsma*

Note: Typing will be available Room 2A throughout entire exam period. Only typewriters with no memory capability are allowed.

LRAP Survey Results

Students Show Tremendous Support

By Christopher Harris
Motions Staff writer

Everyone by now has become aware of the clip boards circulating around classrooms the last couple of weeks or the pink sheets in the mailboxes. The petition asked students to express their support for the creation of an LRAP (Loan Repayment Assistance Program) at USD Law. Over 500 students signed the petition.

In the survey, an overwhelming 84% of students thought USD would benefit from an LRAP position. Unfortunately, USD is the only major California law school not to have some version of an LRAP.

However, the survey also revealed disillusionment with the public interest field. Although 31% of students chose public interest careers as their first career option upon entering law school, only 19% are currently still considering the field. A whopping 86% of the students cited law school debt as the primary reason which prevents them from seriously considering public interest careers. These students averaged almost $55,000 in debt. The average salary nationwide for public interest positions in $25,000; the average salary nationwide for private employment is over $50,000 (according to the National Association for Law Placement Class of 1991 Employment Report and Salary Survey).

Sacrificing personal aspirations for the betterment of the community is an integral part of the public interest work ethic, but over the past decade, public interest work has demanded an increasingly greater financial sacrifice from conscientious graduates. An LRAP would enable USD graduates to not only gratify their own civic duty, but it would provide important legal assistance to a needy community as well. An LRAP would reduce the initial loan payments of students who entered low paying public interest jobs with non-profit or government organizations. The USD Office of Financial Aid would administer the fund, which would pay a portion of a student's loans based on a sliding scale according to that student's ability to pay. A student who leaves the public interest field would pay back the fund the monies loaned.

Members of the LRAP committee have met with Dean Strachan, who voiced her general approval to the concept of forming an LRAP on this campus. However, the administration does not want to reduce current levels of school funding from existing programs in order to seed the LRAP program. Consequently, the LRAP task force will now begin to solicit "new money." The LRAP task force is considering foundation/grant money, local law firms' philanthropy programs, alumni and faculty as potential sources.

The LRAP task force leader is Christine Harbs.

APALSA Legal Clinic Is Major Challenge

By Robert Chong

The Asian Pacific American Law Student Association (APALSA) is an organization comprised of students with Asian backgrounds or interest in the Asian culture. APALSA members share common goals and interests, including cultural awareness, civic activities and educational achievements.

APALSA is undertaking one of its greatest challenges, one which will affect both law students and the San Diego community. It is establishing a legal clinic dedicated to the needs of low income Asians in the San Diego area. The project is the joint effort of the Pan Asian Lawyers of San Diego, the San Diego Volunteer Lawyer's Association, the Union of Pan Asian Communities and APALSA members from Cal Western and Western State.

A few years back, members of APALSA and the Pan Asian Lawyers recognized San Diego's need for a legal clinic to assist the rapidly growing Asian community. Many in the Asian community are reluctant to take advantage of organizations such as Legal Aid because of cultural and language differences. New immigrants often distrust attorneys or have encountered corrupt legal systems in their native countries. The Pan Asian Legal Clinic uniquely assist clients by attorneys and law students with similar cultural backgrounds and languages.

Statistically, Asians comprise 11.8% of the City of San Diego's total population (roughly 130,945 of 1,100,549 people are of Asian descent). In all, there were fifteen different Asian groups reported in the 1991 census. These groups include: Filipino (63,381), Vietnamese (17,060), Chinese (14,076), Japanese (8,873), Laotian (6,261), and Cambodian (3,198). Also classified as Asians are lesser known groups, such as: Guamanian (2,643), Hmong (1,577), Somoan (1,528), and Tongan (53). These various groups have many differences in culture, language, and religious beliefs.

The Pan Asian Legal Clinic will operate in conjunction with the Union of Pan Asian Communities (UPAC) to provide free clinics every third week to the community. UPAC is widely recognized as offering many social programs that cater to the Asian community. UPAC's staff will serve as the central location and provide much of the needed language translation. The San Diego Volunteer Lawyers Association will supervise the Pan Asian Legal Clinic. The Clinic's pilot project will concentrate on domestic violence. If that project is successful, the Clinic will be open more often and for more legal problems. Ultimately, our goal is for the Legal Clinic to be self sufficient and to expand into other areas of need.

Students will be trained to handle domestic violence cases, including the filing of Temporary Restraining Orders. The first clinic will open in November. If interested in participating, contact Jackson Wang (294-2168) or Robert Chong (569-9218).

The *Lucas* Decision

Impacts and Implications

By Jamison A. Ross
Motions Staff writer

When the Supreme Court handed down its much awaited decision in *Lucas v. South Carolina Coastal Commission* this past June, it was anticipated to have a profound impact on regulatory takings law. In the ensuing months commentators and practitioners have dissected the opinion to determine the precise impact and implications of the high court's decision. USD's newly formed Land Use and Planning Association hosted a panel discussion to address these questions on November 4 in the Law School Faculty Lounge.

Moderated by Professor Jack Minan, the panelists were: Karen ZoBell, partner with Seltzer, Caplan, Wilkins & McMahon; Dwight Worden, USD graduate and president, Law Offices of Dwight Worden; and Valerie Tehan, supervisor of the land use litigation team for the County of San Diego. The panelists were chosen to provide perspectives of both property owners and developers, as well as regulatory governmental agencies.

The panelists agreed that the impact of the decision remains unclear and will remain so until future cases are decided in light of the Court's ruling. Given the current state of the economy, particularly in Southern California, building and development is grinding to a halt. Ms. ZoBell is skeptical that, until the economy picks back up and developers seek permits, major challenges to land use regulation will be dormant.

Another point of agreement was that the decision enhances the burden on governmental regulatory agencies to justify their denial of building and development permits. Ms. Tehan and Mr. Worden did not see this as problematic because they do not advise the governmental entities they represent to ever effect a total taking of all reasonable economic value. Ms. ZoBell, however, sees this as good faith attempt by the Supreme Court to attempt to articulate standards by which governments may regulate land use.

Historically, regulatory agencies have had an "ideal" of how they want to see the land within their control regulated. When a property owner seeks a permit to develop his land, if the proposed development does not fit into the agency's ideal plan, the agency has had a great deal of discretion to manipulate the semantics of existing regulatory law to deny the permit. For example, a regulatory agency might define what is a wetland and what is a waterway and then manipulate their "findings" that a particular piece of property is within that definition to deny the building permit. Ms. ZoBell believes the Supreme Court is attempting to give property owners and developers a clearer picture of what they can expect by placing the burden on the regulatory agencies to use traditional common law nuisance standards to deny building permits.

One area of debate is the meaning of the Court's "investment backed expectations" language. Mr. Worden vehemently opposed "[Justice] Scalia's unstated assumption that one of the sticks in the bundle that you get when you buy property is the right to develop it, even if the right to develop it involves injuring, damaging or destroying the property itself." Mr. Worden believes that governments should be able to deny permits for uses which would injure, damage or destroy the property without compensating the property owner. He pointed out that the common law is "replete with the concept of waste, and you do not have the right under traditional common law or nuisance law to do that." Mr. Worden used the example of a property owner who purchased a swamp. He does not believe the right to drain the swamp and build on it are in the "bundle of rights" acquired by the owner. If the owner cannot build on it, the "government didn't take your property away from you, nature did. You didn't buy a piece of buildable land, you bought a swamp." Further, Mr. Worden believes that requiring compensation for frustration of investment backed expectations would open up a Pandora's Box of claims from individuals who would argue, "I had a wish, I had plans for this land that you've denied me, so pay me."

Ms. ZoBell responded that it seemed "somewhat unfair" to her that a government can take the right to build away from both a developer that buys 3,000 acres intending to build residential units and an infrastructure and a retired couple who only has one piece of real property and want to build their retirement home.

The panelists further discussed various subjects in light of the decision: the result when an owner of an appropriated water right upstream of a bay delta is required to release his water to preserve the delta; diminution of land values versus complete elimination of land values; mitigation value of land rendering some "value" to property even if building may not occur. The only clear answer is that it isn't clear. The panelists agreed that it will be interesting to watch as suits are brought on "*Lucas* Takings" claims, how the Supreme Court's decision will be interpreted.

The Land Use and Planning Association is planning another panel discussion in February in conjunction with the ABA National Water Law Conference in San Diego. Water Law practitioners from around the United States will attend the conference, and the Association has invited a number of them to USD for a discussion and reception.

Northern Summer Exposure

USD Student spends summer in Alaska, where men are men, and Moose are Scared

By Kathryn Turner Arsenault

HAPPY HOLIDAYS: *Motions sends correspondent Kathryn Arsenault to the Great White North for the ulitimate Christmas card.*

May 18, 1992 - My little Honda Civic is loaded to the gills with clothes, books, and everything else I might need for the summer. I don't know if there will be any stores where I am going, so I am taking everything. Art checked the car over thoroughly, changed all the belts, fluids, etc. I drove to Stockton yesterday and will try to make mid-Oregon by tonight. I hope I'm not really lonely this summer. Art and I have never been apart for more than two days in seven years, and now we won't see each other again for 83 days.

Storage room for office

May 29 - I started work Tuesday. When I arrived the lawyers weren't there yet, so the secretary showed me to the storage/library/supply/extra furniture room, which she said I could fix up for myself. I cleaned it all out and spent two days doing library filing and organizing new notebooks for the advance sheets. (The filing gets done once a year - when the summer law clerk arrives.) I have a great view of snow-covered mountains out my window.

There are twelve offices in the Alaska Public Defender Agency. Only four of those twelve can be reached by car. To get to the others takes a several long days' ferry ride or an airplane. I chose Pal r because it is rural yet clos to Anchorage, and I could bring my car.

I drove 3,700 miles in six days to reach this place. I traveled from San Diego through California, Oregon, Washington, British Columbia, and the Yukon before reaching the road into Alaska - then I had to go south for almost four hundred miles to reach Palmer.

Most of the roads here, once you get off the main highways, are gravel and dirt, and the street the office is on is no exception. Today, I made three trips to the courthouse and broke one of my $75 high heels on the second trip! Now I know why the woman lawyer wears tennies to court (and changes in the courthouse library), even though it's only a couple hundred yards away.

June 1 - Todav I took a tour of the Matsu (short for Matanuska-Susitna Borough) Pre-trial facility (jail). It is absolutely unlike the San Diego County Jail (except for the cement, guns, barbed wires, prisoners, and locked doors). The Public Defender's office is cattycorner from the courthouse, down the street from the jail, and around the corner from trooper headquarters. The courthouse is fairly new and light and airy. Only four courtrooms - nice and big. The view out the back door of the courthouse is farmland, dirt roads, and a small airport. (Alaska has a higher per capita number of airplanes than any other state.)

There are one district court (municipal) judge, one superior court judge, and one magistrate (small claims and bail hearings and arraignments). The superior court judge is a woman and a former P.D. The Palmer judges are generally acknowledged to be fair and of excellent judicial temperament.

***Raven* still good law in Alaska**

I have been told by at least two different attorneys that Alaska is a great place to be a public defender. For one thing, search and seizure law is construed strictly in favor of the defendant. Some of the pro-defendant cases that the Rehnquist U.S. Supreme Court has overruled are still good law in Alaska. Marijuana was legal (in any amount) until just recently. Despite the Constitutional amendment which made it illegal in most circumstances, *Raven* is still good law. The *Raven* court held that no one may search a residence for marijuana, no matter the quantity, even with a search warrant. A person's right to privacy in her own home is greater than the government's need to search for pot.

June 5 - One of the attorneys in this office never works from June 1 to October 1. He runs a charter fishing business and bed and breakfast with his wife. His position is, if you are going to live in Alaska, why work in the summer? If I were to work here, I would take my rotation from December 1 to April 1. My position is, why live in Alaska when it's dark?

The office where I work is a mobile home parked on a corner lot in a residential area across from the courthouse. Each of the two felony lawyers has one bedroom. The two misdemeanor lawyers have the garage (with a wall built down the middle). I have the smallest bedroom, and the secretary and her helper have their office in the kitchen, which also has a microwave and refrigerator and all the file cabinets. Any noise (ahem) from the one bathroom carries crystal clear to the rest of the office.

Fish stories plentiful

June 8 - I really like what I am doing here. The lawyers (and staff, if they want) go to lunch every day. They have a certain restaurant for each day, and they sit around and talk about their cases and fishing and clients and fishing and politics and fishing, fishing, FISHING! And, when they're not talking about fishing, they talk about FISH.

This is a very different state. When I was doing the library filing, I could not believe the number of appellate and supreme court cases having to do with fishing and hunting and poaching. In addition, I am living in the Matanuska Valley, about forty miles north of Anchorage, and this is the marijuana capital of Alaska. Plants of any kind grow well here; 24-inch heads of lettuce are common.

The sun has been going down closer and closer to midnight, and coming up around 4:15 a.m. There is still snow on the mountains, and I hear it never completely melts.

June 11 - Great job, great office, great summer. The bad news is that there is no Westlaw or Lexis computer available, even at the library. The good news is that Alaska is only 33 years old, and all of their case law fills a mere twelve feet of shelf space. They have fourteen looseleaf binders of statutes, a fourteen volume *West's Digest*, and a six book administrative code. That's *it*. The other good news is that the Evidence Code tracks the Federal Evidence Code - same section numbers and everything -none of those weird California numbers and multiple subparts.

PALMER, ALASKA: *View from the courthouse door. Can you spot the moose in this picture?*

Things are expensive here. Even a cheap lunch costs around $7-10. My nails ($18 in Fallbrook) cost $30! Gasoline is cheap, though, $1.23 for a gallon of super. Palmer has a 2% sales tax because it has a police force. Towns with no police force have no sales tax. In addition, there is no state income tax, and once a year every man, woman, and child receive approximately $1,000 - their share of the profits from Alaska's publicly owned oil fields.

Part 1 of a 2 part article.

Did You Know?

Is Humor in Law School Illusory?

By Sylvia Polonsky
Motions Staff writer

Most of us come and go to USD everyday without giving much thought to humor. We know a good sense of humor is healthy. Yet for most of us, humor ceased to be regular once we entered law school. Of course, the exception is grades. Twice a year we get a good laugh.

Generally speaking, we are a serious bunch. We arrive at USD at the crack of dawn to get a parking spot. We bury our heads in horn books. We pour over commercial outlines like they were hot novels. We play the evidentiary rules version of Trivial Pursuit. We watch law shows on TV to practice our knowledge. We rent *The Paper Chase*. (I still don't know how that kid was able to get away with the bogus answer to the *Carbolic Smoke Ball* case.) We sometimes fraternize at Bar Review. Occasionally, we crack a joke in class. Let's face it...we are law nerds.

I thought it might be interesting to talk to the faculty and staff about the law nerd phenomenon. The issue was whether law school is all work and no play. One professor said, basically nothing humorous had occurred in more than two decades that he had been teaching at USD. His was the minority opinion. The majority held that the law school was work *and* fun. They ruled that regular bouts of laughter occurred inside and outside of class. However, the majority were more readily able to come up with funny stories about other faculty members than they were about students. It is no wonder faculty meetings are closed to students.

I met with Professor Minan. He thought that grading exams could at time be humorous. Tortured misspellings such as St. Paul, Minisoda will stay etched in his mind. He also laughed about the infamous faculty meetings. He recalled Professor Morris' oral argument before the faculty to retain his old corner office. Apparently, the faculty had been shuffled around in the LRC. On appeal, Professor Morris pleaded as his argument, a "right to return to the promised land." When that failed, he changed his argument to discrimination of short people. Nice try Professor Morris.

Professor Roche reflected on his years at USD. After all of these years he felt parking was still our best joke.

Many third year students remember one professor who forgot to turn off his classroom microphone that was clipped to his shirt when he walked down the hall to use the restroom. The sound of flushing over the classroom speakers filled their humor quota for the year.

I also met with the Records Office staff. They unanimously decided that the professors were becoming funnier while the students were becoming more serious. They felt this year's incoming class was the most serious bunch that they had encountered. They were disappointed that Sir Thomas More (you know the statue in our law school in case you've been buried in the library) wasn't decorated this year. Usually, Sir Thomas receives offerings of beer, pens, notes, books, cigars, and other creative items. Much to the Records Office's dismay, the incoming class hasn't done anything for Sir Thomas.

So maybe humor in law school is illusory. Is the minority rule becoming the majority consensus? That decision is in your hands.

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San Diego

SCHEDULE OF CLASSES

Friday, November 20, 1992 6:30 pm to 10:30 pm **CIVIL PROCEDURE I** (Jurisdiction, Venue, Choice of Law, Pleadings, Joinder)	Saturday, November 21, 1992 1:00 pm to 5:00 pm **REAL PROPERTY I** (Concurrent Interests, Future Interests, Adverse Possession, Class Gifts, Easements, Landlord-Tenant)	Sunday, November 22, 1992 9:00 am to 1:00 pm **CONTRACTS I-U.C.C** (Formation, Defenses, Third Party Beneficiaries, Breach, Remedies)	Sunday, November 22, 1992 2:30 pm to 6:30 pm **TORTS I** (Intentional Torts, Defenses, Negligence-Causation Emphasis, Defenses)	Monday, November 23, 1992 6:30 pm to 10:30 pm **CRIMINAL LAW**

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Monday, Nov. 30, 1992 6:30 pm to 10:30 pm **CONSTITUTIONAL LAW I** (Justiciability, Commerce Clause, Federal/State Conflicts, Separation of Powers, Due Process, Equal Protection)	Tuesday, Dec. 1, 1992 6:30 pm to 10:30 pm **CORPORATIONS-BUSINESS ORGANIZATIONS II**	Wednesday, Dec. 2, 1992 6:30 pm to 10:30 pm **EVIDENCE I** (Relevancy, Opinion, Character, Impeachment, Best Evidence, Types of Evidence, Burdens/Presumptions, Judicial Notice)	Thursday, Dec. 3, 1992 6:30 pm to 10:30 pm **CONTRACTS II-U.C.C.** (Assignments/Delegations, Third Party Beneficiaries, Conditions, Breach, Remedies)
Friday, Dec. 4, 1992 6:30 pm to 10:30 pm **REAL PROPERTY I** (Concurrent Interests, Future Interests, Adverse Possession, Class Gifts, Landlord/Tenant)	Saturday, Dec. 5, 1992 6:00 pm to 10:00 pm **CIVIL PROCEDURE I** (Jurisdiction, Venue, Choice of Law, Pleadings, Joinder, Class Actions)	Sunday, Dec. 6, 1992 1:00 pm to 5:00 pm **CONTRACTS I-U.C.C.** (Formation, Defenses, Third Party Beneficiaries, Remedies)	Sunday, Dec. 6, 1992 6:30 pm to 10:30 pm **TORTS I** (Intentional Torts, Defenses, Negligence-Causation Emphasis, Defenses)
Monday, Dec. 7, 1992 **NO CLASS**	Tuesday, Dec. 8, 1992 6:30 pm to 10:30 pm **TORTS II** (Strict Liability, Vicarious Liability, Products Liability, Nuisance, Misrepresentation, Business Torts, Defamation, Invasion of Privacy)	Wednesday, Dec. 9, 1992 6:30 pm to 10:30 pm **REMEDIES I** (Tort Remedies, Injunction Emphasis)	**PROFESSIONAL RESPONSIBILITY REVIEW** *Course Available on Cassette Tape with Corresponding Outline: $64.65 (includes sales tax)*

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Mr. Fleming has taught as an Assistant Professor of the adjunct faculty at Western State University in Fullerton and is currently a Professor at the University of West Los Angeles School of Law where he has taught for the past eight years. He maintains a private practice in Orange County, California.

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'The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.' Greenman v. Yuba Power Products, Inc. (Cal. 1963)

Tort Perspective: ALI Reporters' Study

The ALI Reporters' Study on Enterprise Responsibility for Personal Injury Recommends Changes in U.S. Tort Law

ALI Study Proposals

By Gregory T. Lyall
Motions Editor

The American Law Institute (ALI) initiated the Reporter's Study on Enterprise Liability (Study) in 1986 in response to the tort crisis of the 1980s. The two volume Study concentrates solely on personal injuries: disabilities arising out of product use, medical treatment, the workplace, and environmental toxic exposures.

Volume I of the Study examines the reasons for the steady increase in tort claims in the past several decades, the aims and limits of tort law, and institutional alternatives to tort law. This volume concludes that, despite the shortcomings of the tort system, it is the best available alternative.

Volume II of the Study sets forth recommendations. The goal is to improve the performance of the tort system and better define relations with tort law's "institutional neighbors."

In-depth analysis of motor vehicle injury litigation wa omitted from the Study. Although these cases comprise a significant bulk of present day tort litigation, the Study's authors (Reporters) state that, because of the relatively stable litigation rates and moderate damage awards, these cases were not a major contributor to the tort crisis. Following is a synopsis of the proposals in Volume II.

Liability Standards

Product Defects and Warnings

Manufacturing Defects. The Study recommends retaining strict liability for defects that can ordinarily be measured against the manufacturer's own standard of design.

Design Defects. The Study endorses a de facto negligence standard. The risks and benefits of alternative designs should be balanced in light of the state of the art. The Reporters reject consumer expectation tests and any reference to the manufacturer's superior capacity as insurer for products injuries. They commend courts which have not presumed some product risks to be so severe as to render them unmarketable.

Thus, the maker of a defective product design would be liable only if there was a "feasible alternative design which would have avoided the injury in question without materially altering the consumer's expected use and enjoyment of the product, and then only if the costs of incorporating the new precaution in the design do not outweigh the harms from the injuries preventable thereby."

Warnings. The Study acknowledges the significant contribution that competitive markets can make to product safety when consumers are well informed about the hazards presented by various product choices. The Reporters propose that the law of product warning should be recast to serve this function. Risk level warning should be given for products in a standardized vocabulary that federal agencies are encouraged to develop. Manufacturers should also give proper use warnings when safe procedures are not apparent. To avoid dysfunctional label clutter (situations where the efficacy of a warning is diminished by too much information), the Study encourages courts to be more cautious about holding enterprises liable for failing to instruct consumers to prevent low-probability accidents. Finally, it is recommended that when a manufacturer violates its duty to provide the proper warning, the court should presume the plaintiff would have read and followed the absent warning.

Regulatory Compliance

In cases where the manufacturer complied with administrative regulations, the Study recommends some type of regulatory compliance defense. Although not defined, it was suggested that this defense could range from a total tort liability bar to preclusion of punitive damages. The latter would be coupled with a jury instruction stating that regulatory compliance creates either a rebuttable presumption or strong and substantial evidence of no fault.

The proposed model defense has four elements. The regulation must be created by an agency with statutory responsibility to monitor risk-creating activities in that area, and the agency must establish and update specific standards governing enterprise behavior. The agency must have addressed the specific risk involved and made an explicit judgment about appropriate legal controls. The manufacturer must have complied with all relevant standards prescribed by the agency. Finally, the manufacturer must have disclosed any information in its possession (or information it should have known) to the agency regarding both the hazards created by the risk and the available means of controlling the risk.

Medical Malpractice

The medical malpractice system did not receive in-depth treatment in this report. However, the Reporters did recommend that hospitals or other health care organizations, and not the doctor, be the primary bearer of liability for negligently caused injuries to hospitalized patients.

Joint and Several Liability

The study approves of this common law doctrine as developed and recently expanded by the courts, except in the cases where *ex ante* contracting is not feasible among potential defendants. However, when a defendant is judgment-proof, his share of responsibility should be allocated among all involved parties, including the plaintiff, in proportion to their respective negligence or whatever alternative basis of equitable responsibility is used by the court in apportioning the loss amongst the parties.

Tort Damages

Principles governing damage awards are more responsible for the recent problems in tort litigation than principles that specify initial liability, according to the Reporters. Consequently, the Study recommends extensive changes in this area of tort law. These proposals were designed to reflect the theory that the primary, though not exclusive, focus of tort compensation should be to redress the victim's actual pecuniary losses.

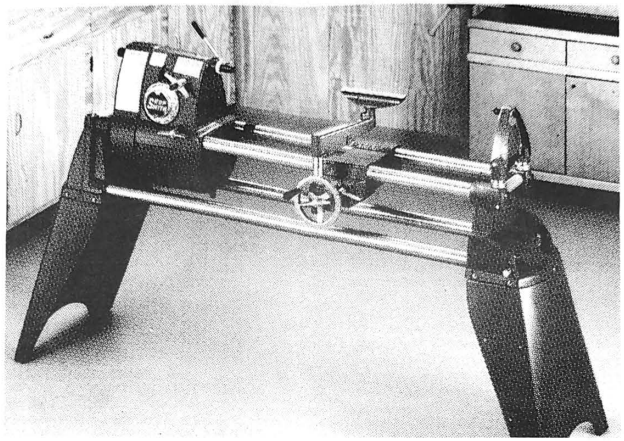
Collateral Sources.

The Study recommends the reduction of tort awards by any past and estimated future payments for the loss from first party insurance systems, except life insurance or other similar policies. Additionally, it is suggested that there would be a bar to any subrogation or reimbursement rights by loss insurers against the tort award.

Workers' Compensation and Product Liability

The Reporters propose a complete offset of workers' compensation benefits against the tort award, while eliminating both the employer subrogation rights to recover these payments and the employer's responsibility to indemnify or contribute to the manufacturer's product liability. Additionally, it is suggested that all products liability suits by employees covered by workers' compensation be eliminated, but only if the

See **Study** *page 12*



GREENMAN v. YUBA POWER PRODUCTS, INC.: *A 'defective' predecessor of this Shopsmith® 'launched' strict products liability in California.*

Products Liability in Switzerland

By Christine Schaub

The position of a Swiss consumer who has suffered either a bodily injury (including death) or damage to goods can best be explained by a fictional case which bears elements of the two leading cases of the Swiss Supreme Court. Mr. Smith purchased a kitchen appliance in a specialized shop. The appliance exploded in Mr. Smith's house and caused bodily injuries to his guest, Mr. Brown. The appliance was either manufactured in Switzerland or imported exclusively from abroad. What legal steps can poor Mr. Brown take to claim compensation? Is he entitled to an indemnity at all?

Mr. Brown did not buy the appliance himself, nor was he a party in the purchase contract. Therefore, Switzerland applies only an extra-contractual liability. In Switzerland, it is generally accepted that a person who puts a dangerous product into circulation is liable for damages resulting from such an appliance. Article 41 of the Swiss Code of Obligations (SCO). However, the injured party has to show that the manufacturer committed a fault. This means the plaintiff must prove that the manufacturer did not take the necessary measures (such as safe construction, warning of the dangers in case of incorrect handling) in order to prevent damage. Due to the growing technical complexity of development and the production process, one can see that it is a very heavy burden for the plaintiff to prove that in a specific case the producer has either intentionally or with gross negligence omitted to take a certain necessary measure which would have prevented the damage from occurring.

Nevertheless, in this day and age engineers, employees and workers assume greater responsibility in the production process for consumer articles. The employer is liable for these persons according to Article 55 SCO. In contrast to Article 41 SCO, this article does not require that the employer commit fault or gross negligence. It is a "law of causality," and it appears to be favorable for the Swiss consumer. But the employer frees himself from liability if he can show that he has selected, instructed, and supervised his employees with reasonable care.

The Swiss practice has confirmed that this has never been a very difficult burden of proof for the defendant. Thus, the Swiss Supreme Court has in a recent decision required that, in addition to the above, the employer has to show that he provided for a suitable organization in his field of labor and applied a security check to his products. This decision strengthens the producer's product liability. However, product liability for defective and dangerous products which could not have been discovered even with a suitable organization and security control is still excluded under Swiss law.

Switzerland is said to be a developing country in this field of law. For many years the Swiss legal society has neglected this subject, and only some U.S. export companies cared about it. In only about five cases has the Swiss Supreme Court had to give a ruling in a product liability case. In the most recent case, decided in 1984, the Court held that the manufacturer, either at the time of the production process or the security check, has to apply all the necessary care so that any latent product defect which is likely to cause damage can be excluded with all probability.

It can therefore be said that the Swiss consumer is well

See **Swiss** *page 13*

Symposium Authors Debate Study

By Gregory T. Lyall
Motions Editor

In order to stimulate informed debate, the *SDLR* invited torts scholars to participate in the symposium. Five papers were accepted for publication. Following is a synopsis of those papers. *Motions* has tried to convey in abbreviated form each authors' arguments, while at the same time quoting the papers extensively. Papers may have been inadvertently quoted without attribution. *Motions* recommends that if a paper is of particular interest, the reader consult it in the upcoming symposium issue of the *SDLV*.

Alfred F. Conard

Professor Conard considers the Study's weakness to be its "pervasive lack of attention to [tort law's] effects on the individual humans who ultimately contribute to its costs." Conard notes that because defendants actually responsible for the injuries ("malefactors") are generally insured or judgment proof, few are required to pay. Instead, most payments are made by the malefactor's employer or insurer, or by the faulty product's manufacturer. To recapture the high costs of injury compensation, these enterprises charge higher prices to their consumers or reduce benefits to investors, workers, or the general public. Consequently, it is the "innocent" public that ultimately pays for the injury.

Although the innocent public bears the burden of tort compensation, it receives many social benefits. Tort reform should balance the benefits conferred by tort law against the costs imposed on the public. The goal should be to concentrate as much on minimizing forced contributions by the public as on relieving distress and motivating

See **Conard** *page 12*

Jeffrey O'Connell

Professor O'Connell considers many of the Study's proposals, when taken individually, to "arguably make sense." O'Connell cites Study recommendations concerning collateral sources and pain and suffering as being sensible. However, he is concerned that these proposals would lead to only minor changes in tort law. O'Connell explains that "the ALI set out with a very broad purpose in mind only to end up with a disappointingly narrow focus, concentrating on modest changes in the tort law doctrines."

The project's purpose was to find a solution to the tort crisis of the 1980s, not merely "bandage some areas where the bleeding was the worse." Unfortunately, the Study confines itself "too much to poultices." O'Connell explains that this was possibly the result of recruiting a large number of scholars, each of whom specialized in a part of the Study. By focusing on one area, the authors lost sight of the big picture. Consequently, the Study is overly concerned with details and inconsistent, as well as

See **O'Connell** *page 12*

Jerry J. Phillips

Professor Phillips questions the Study's proposed strict liability standard for manufacturing defects and *de facto* negligence standard for design defects. The line separating these defects is unclear. Both may be unintentional and random in causing injury, but generic to a line of production. Alternatively, both may be the result of conscious design decisions. Adopting a de facto negligence standard for design defects undervalues the importance of consumer expectations. The Study's proposal shows a lack of understanding of the inter-relationship between these types of defects.

Phillips contends the Study's "proposals regarding product warnings reflect an anti-jury bias that is pervasive throughout the study." The creation of a standardized vocabulary by federal government agencies suggests a judicial or governmental preemption of the jury's role in determining warning adequacy. The need for warnings, and their adequacy, is within the lay juror's common knowledge. Consequently,

See **Phillips** *page 12*

Victor E. Schwartz

Mr. Schwartz focuses on the Study's recommendations for punitive damages. Schwartz contends that the Study's recommendations are both timely and appropriate because current vague and uncertain punitive damages law has negatively impacted American industry and undermined confidence in the civil justice system.

Schwartz takes issue with the Study's standard of "*reckless disregard* for the safety of others" as the appropriate standard for punitive damage liability in enterprise cases. Because this standard is too vague and too broad in the area of behavior, it undermines the deterrent effect of punitive damages. This standard provides little guidance to predict behavior that would trigger punitive damages liability.

A more appropriate punitive damages standard would require that "the defendant acted with *deliberate* indifference to safety." This standard would establish a clear trigger required by both juries and defendants. It would promote deterrence and make punitive

See **Schwartz** *page 12*

Marshall S. Shapo

Professor Shapo concentrated on the Study's "Product Defects and Warning" chapter. Shapo begins his analysis by expressing dissatisfaction with the Study's historical treatment. He explains, "One can appreciate the desire of the reporters to avoid reinventing the historical wheel while one laments the inaccuracy of a presentation that comes close to caricature."

The Study defines a product as having a design defect when "an appropriately safer design was feasible when the product was marketed." Shapo contends this "bald" statement fails to account for either the considerable thought by courts and commentators on this question or the "dimensions of the judicial struggle in what is, after all, a difficult task."

In failure to warn cases, the Study recommends that a "product has a warning defect if: (1) it is unavoidably unsafe and the manufacturer failed to warn about the risk level; or (2) it is improvable and the manufacturer failed to give appropriate instructions in safe use." This proposal presents at least

See **Shapo** *page 12*

CONARD from page 11

reduction of injuries.

To achieve this goal, Conard recommends that pain and suffering damages should be outlawed. However, pain and suffering could be considered when deciding the amount of "incentive damages" required to induce care. These damages should be excluded from insurance and indemnification. Additionally, all damages should be made difficult to pass on by eliminating deductions for damage payments and insurance premiums from taxable income. Finally, Conard asserts that to intelligently apply the rules of liability, attorneys should be duty bound to edify judges as to who ultimately bears the costs of compensation.

Alfred E. Conard is the Henry M. Butzel Professor Emeritus at the University of Michigan Law School, and a distinguished visiting Scholar at Stetson University College of Law.

STUDY from page 10

value of benefits is materially improved.

Pain and Suffering

The Study recommends limiting pain and suffering damages to victims of "significant injuries," where large monetary awards are paid to permanently disabled victims for adjustment to their disabled condition. Although the Reporters oppose absolute caps on pain and suffering damages, they suggest a scale of inflation-adjusted damage amounts attached to a series of disability profiles to provide jury guidance.

Punitive Damages

To be liable for punitive damages, there must be clear and convincing evidence of reckless disregard for the safety of others by the manufacturer's management officials or other senior personnel. Calculation of the punitive award should exclude the defendant's overall wealth and require closer judicial scrutiny of the size of the jury verdict. The Study recommends that judges should have the power to bifurcate these trials into compensatory claim and punitive damages trials. In the event of a positive compensatory claim verdict, it is suggested that the trial judge fix the amount of the award once the jury has determined that the punitive award is warranted.

Attorney Fees

Recognizing legal expenses as a distinct financial loss by victims of tortious injuries, the Study's foregoing proposals of damages reform are only encouraged in conjunction with expansion of recoverable attorney fees incurred by the successful plaintiff.

The Reporters make several recommendations. When the plaintiff prevails, reasonable attorney fees and other litigation expenses should be an independent category of compensatory damages paid by the defendant. When the plaintiff rejects a formal offer of settlement and is unable to improve his ultimate recovery, the plaintiff forfeits his entitlement to attorney fees incurred after the time of the rejection. Determination of attorney fee awards should be based on a "contingency-based percentage-of-recovery" approach. Finally, prejudgment interest calculated from the time of the loss should be added to damages.

Environmental Liability and Science Disputes

Science Experts

The Study recommends that judges extensively utilize their power to appoint court experts and calls for the creation of a Federal Toxic Board to serve as a source of impartial science experts. Additionally, the Board would convene "science panels" aimed at developing criteria to further accurate and even-handed adjudication of these cases.

Environmental Liability

In addition to the creation of the science panel, the reporters recommend the addition of the following features to environmental liability law. In tort cases for long latency diseases caused by environmental hazards, statutes of limitations should be extended until the plaintiff has a reasonable time to discover the disease and identify a causal link. Enterprises creating substantial environmental risks causing personal injury should be subject to strict liability.

This provision, based on sections 519 and 520 of the Restatement (Second) of Torts, provides a state of the art defense. Where the causal connection between toxic exposure and disease is based on epidemiological studies of large classes of victims, damages should be prorated on par with the probability that the disease was caused by the exposure. Finally, where toxic exposure is ascertained, but the disease not manifested, courts should create a fund. The fund would pay for the costs of medical surveillance of the population at risk and compensate victims of the disease when the conditions manifest.

Mass Torts

The Study sets forth two models for processing mass tort claims in court. The first model authorizes courts to order: (1) class actions for pre-trial, trial, and post-trial processing of claims; (2) the class-wide disposition of specific issues common to multiple claims, regardless of the predominance of other individualized issues; and (3) class-wide disposition of the same issues in other accrued claims not yet pending.

The second model relates to the treatment of large-scale, long-latency mass-exposure cases, such as asbestos and DES cases. In addition to the first model, the Study encourages a markedly increased collective regime to handle such cases. This regime governs both future risks and present injuries; it authorizes insurance fund judgments covering predictable future losses from past exposure.

Administrative Compensation Schemes

The Study did not endorse the use of administrative compensation alternatives for at least the "general run of injuries." However, in mass-exposure cases, an administrative alternative to the second mass tort model was proposed. This model contains six elements. "Toxic harm" would be given a broad definition. Claimants must establish exposure to a designated source of the substance, creating a rebuttable presumption of harm. The causal connection would be established by reference to a "Toxic Substance Document" adopted by the administrative compensation board or by judicial referral to the board when the filed claims indicate the likelihood of a significant number of related, long-latency toxic harm cases. As in the Workers' Compensation model, claimants would be compensated for pecuniary loss, with a modest allowance for nonpecuniary loss in serious cases.

If the tort system is retained, claimants must chose between either no-fault benefits or a possible tort award. However, the tort option would allow only scheduled damages for nonpecuniary loss and a reversal of the traditional collateral source rule. Initially, the system would be financed by a flat tax on toxic producers.

The Study also proposes that an administrative no-fault system for pharmaceutical and medical injuries be explored.

O'CONNELL from page 11

suffering from a "pervasive sense of compromise."

O'Connell notes that despite the Study's caution, the ALI has "chosen to studiously ignore its contents." The irony is the ALI's decision to revise the Restatement (Second) of Torts as it relates to products liability. Given the current state of products liability, "the last thing it needs is to be restated." To retreat to an even narrower view in the Restatement would compound the error.

Jeffery O'Connell is the Samuel H. McCoy II Professor of Law, at the University of Virginia.

PHILLIPS from page 11

the Study's requirement for expert testimony would only add expense and possible confusion to the outcome of these cases.

The Study's proposals for medical malpractice are problematic. Making hospitals the primary bearer of liability is unlikely to lower medical costs. Nor is it likely that this shift in liability would yield stronger safety incentives for doctors. In fact, considering the general reluctance of hospitals to monitor the safety practices of their doctors, it is likely that this shift in liability could result in a decrease in medical safety measures.

Phillips also takes issue with the Study's proposal for joint and several liability. The Study sets forth three situations in which potential co-defendants can contractually apportion obligations among themselves. These contracts may have the problems of inequality of bargaining position. In cases falling outside these situations, where a defendant is unavailable, damages will be apportioned between available solvent defendants and the plaintiff proportionally to each party's equitable contribution. Imposing a burden on the plaintiff to seek recovery from a potential tortfeasor not a party to the original suit is problematic. The plaintiff may be precluded from recovery by the expiration of the statute of limitations or some other procedural matter. Alternatively, under the principles of nonmutual defensive collateral estoppel, the plaintiff could be bound by the findings in his first suit.

The Study recommendations on collateral sources reduce the amount of recovery by the sum of collateral benefits, except life insurance. The "Achilles heel" of this proposal is the exception. The Study's rationale is that these benefits do not typically provide direct compensation for out-of-pocket losses; they contain investment components that should be returned to beneficiaries without offset. However, the "investment component" rationale is the same rationale against offsetting collateral sources in general. Thus, the Study does "not make a convincing case for abolishing the collateral source rule.

The Study's proposals for pain and suffering again reflect an anti-jury bias. Although juries have broad discretion in awarding damages for pain and suffering, the evidence suggests that such awards are generally not arbitrary or excessive.

Phillips considers reasonable the Study's heightened evidentiary requirements and bifurcated trials for punitive damages cases. However, the other proposals are dubious. Restricting liability to senior personnel is problematic because it is ordinarily the employee on the "firing line" that is responsible for corporate misconduct. Having trial judges fix the amount of punitive damages raises questions regarding the right to trial by jury. Ceilings on punitive damages also reflect an anti-jury bias. Finally, the mandatory class action proposal creates major choice-of-law problems in national suits.

The Study's "offer-of-settlement" in the attorney fees context creates problems. This rule would disadvantage risk-adverse claimants and could result in conflicts of interest between the plaintiff's attorney and his client.

Jerry J. Phillips is the W.P. Toms Professor of Law at the University of Tennessee.

SHAPO from page 11

two problems. As a term of art, "unavoidably unsafe" has been used to immunize manufacturers of products that merit the warning. Additionally, the distinction between the two categories does not seem airtight.

The Study's departure from the consumer expectation test fails to take into account the conditioning of consumer expectations by advertising. Product promotion influences decisions under negligence, warranty, and strict liability doctrine. For example, in risk benefit analyses, methods of product promotion are central to consumer calculations of the risks and benefits. The Study notes that the consumer expectations test is used to buttress a strict form of liability. This suggests that the important point in these cases is the use of strict liability. If so, the Study should have confronted the issue directly, instead of focusing on the ancillary concern about the use of the consumer expectation language.

A fundamental weakness in the Study is the overuse of comparative institutional analysis. This chapter contains no evidence that regulatory agencies better provide courts with socially important information on product hazards than do litigants. Further, the Study fails to recognize the "value of the litigation system as a decentralized watchdog on new syndromes of injury and illness."

"From the standpoint of the difficulty of the undertaking, the chapter merits our admiration for its ambition. However, despite its frequently stylistic felicity, the efforts appear to suffer from production flaws, a lack of quality control, and ultimately, a pervasive series of defects in design."

Marshall S. Shapo is the Frederic P. Vose Professor of Law at Northwestern University of Law.

SCHWARTZ from page 11

damages liability consistent.

Schwartz endorses the Study's recommendation of a clear and convincing evidence burden of proof standard. This heightened evidentiary standard has several benefits: it would inform juries that they must be more certain in finding punitive damages liability; it would allow closer scrutiny of the evidence by trial courts, making some cases inappropriate for hearing by a jury; and it would provide appellate courts power to carefully review decisions in which punitive damages are imposed.

The Study recommends that punitive damages be limited to some ratio of compensatory damages. Schwartz suggests a model developed by the American College of Trial Lawyers that provides a two-to-one ratio or $250,000, whichever is greater. Schwartz warns that if this model is adopted, juries should not be apprised of the limit. Such information could lead jurors to conclude the amount is a guideline for assessing punitive damages. Rather than a ceiling, the limit could become a floor.

Schwartz endorses the Study's "compliance with regulatory standards" defense. As a public policy we want to encourage companies' investment and development of new products, particularly in the area of medicine. This defense would provide strong incentive to develop innovative pharmaceuticals and medical devices, while pun-

See **SCHWARTZ** *page 13*

SCHWARTZ from page 12

ishing manufactures that withhold material from a federal agency.

Schwartz questions the Study's proposals in mass tort cases. The Study recommends granting federal courts broad power to compel joinder by issuing injunctions against any related suits in any state or federal court. Schwartz contends the proposals "require burdensome and complicated procedural reforms, and impose new or national choice-of-law rules." Also, these recommendations do not address situations involving lower numbers but possibly devastating punitive damages claims. Finally, in many cases there are insufficient common facts to justify a class.

Schwartz contends a better approach would be to establish a presumption in all punitive damages cases that a defendant will be subject only to a single punitive damages award flowing from one course of conduct. Subsequent claimants could overcome this presumption only upon the showing of substantial new evidence of "conscious and deliberate misconduct." This approach both guards defendants from over-punishment and provides a way to augment punishment if it is subsequently determined that the original award was based on inadequate information.

Victor Schwartz is a senior partner at the Washington, D.C. law firm of Crowell & Moring, and the coauthor of Cases and Materials on Torts *by Prosser, Wade, and Schwartz.*

SWISS from page 10

protected to a certain point, but this result can hardly be said to be compatible with the Swiss legal provision. This is the reason Swiss theorists require an amendment of the legal provision and the introduction of a product liability.

Now, it seems that time has sorted things out. On the December 6, 1992, the Swiss will vote in a referendum whether to join the European Economic Area (EEA). The EEA is a treaty between the EC and the European Free Trade Association (EFTA, of which Switzerland is a member with Austria, Finland, Iceland, Norway, Sweden, and the Principality of Liechtenstein) creating a 19 nation free trade zone. It will create a market of around 380 million people in which EC rules on the free movement of people, goods, services, and capital will apply.

The issue of products liability had been under discussion between the EC and EFTA for some time on how best to determine the source of liability for defective imported products. As the treaty provides that a number of EC policies are to be adopted by the EFTA countries, such as the EC law on competition (including mergers), government subsidies, state monopolies, public procurement, intellectual property rights, the environment, companies and social affairs generally, now also the EC consumer protection rules will have to be implemented by Switzerland.

In 1985, Council Directive 85/374/EEC concerning liability for defective products was adopted and came into force in 1988. This Directive provides for a system of "no fault" liability that should lead to a savings of time and expenses for a victim. The victim must prove there has been a defect and establish the causal link between this defect and the injury suffered. The Directive covers bodily injury and death as well as damage to goods. The latter liability is limited to products for private use or consumption and is subject to the deduction of a fixed amount (500 ECU) to avoid an excessive number of lawsuits. In the other fields the Directive does not set any financial ceiling on the strict liability of the producer.

It also foresees a reduction in the producer's liability by reason of the plaintiff's contributory negligence. Subject to certain conditions, the producer can free himself from liability; e.g., if he can prove that the state of scientific and technological knowledge at the time he put the product into circulation was not such as to enable the existence of a defect to be discovered. As another consequence of the legal framework of EC-EFTA relations, the Lugano Convention provides that a consumer can go to a court in his own country and sue a foreign producer over a product which is defective or has caused harm.

The polls show that Switzerland will probably vote for the EEA treaty (although it will certainly be a very close outcome); therefore, not only the lawyers but especially the Swiss producers will have to care now about the newly introduced product liability.

RIGHT from page 18

efficiency. We could have a system where moral stigma was not attached to criminal behavior, where prison was more like a hospital, and where we didn't require proof of requisite mens rea to send someone there. The death penalty would be inappropriate in such a system. Instead, we have a system based on moral judgments. We punish people who do harmful things with an ill will by locking them up and treating them as bad people, which is what they are. The death penalty is appropriate in such a system, whether or not it is cost efficient or an effective general deterrent.

Critics of the death penalty also suggest that it is unfair to minorities, who are more likely to receive death sentences than white people. The problem with this criticism is that everyone whose crime is so heinous as to warrant a death sentence deserves it. Section 190.2 of the California Penal Code requires that the death sentence can only be given when a criminal kills someone and there are applicable "special circumstances" (torture murder, killing a police officer, etc.). So the only possible injustice is not that minorities receive the death penalty too much but that white people don't receive it often enough. This militates for the more frequent application of the death penalty, not for its elimination. Think about it.

Let's be frank: David Raley deserves to die. He's earned it, fair and square. He has a complete disdain for the value of human life and he has acted accordingly. We would be an unjust society if we refused give him what he deserved.

This isn't about vengeance. I didn't know Jeanine and thus have no desire to avenge her. But you and I both know that if we allow David Raley (and those like him) to get off with anything less than he deserves, we will be accessories in the injustice which he perpetrated.

We cannot hide behind a misplaced compassion for killers. We cannot make excuses for the actions of others because we lack the intestinal fortitude to follow our visceral convictions. We can show no greater disrespect for the sanctity of human life than by tolerating those who selfishly destroy it. And we can only claim to be a just society if we enforce the death penalty when the actions of criminals merit its application.

JUSTICE from page 18

doctor told her that if she carried this child to term, her health would deteriorate. She had a tumor on her uterus. She asked me if I thought this meant she would die.

They were poor. They had no health insurance. The clinic was paying for most of her procedure. Her husband wanted to stay with her, but certain clinic areas were designated for patients only. She was worried because he was missing a day's pay and they couldn't afford it. She asked me to remind her to get information about birth control from the counselor, since her doctor told her she couldn't get pregnant again. She was uncomfortable with women who had multiple abortions. "But everybody's got their reasons, I guess." She said that she didn't believe that abortion was right, that it was killing, but that *she* had no choice.

"I guess that must be how most women feel," she said as she looked around the room at the women waiting. A few were crying. Some were reading. A couple were staring off into space. "Whatever people feel about abortion, though, it should be up to the woman and her family to decide what to do. I never really understood that until now."

We went through two counseling sessions, one mostly about birth control and one about the actual procedure. I remember being surprised at the gentleness of the staff. By this point, I felt myself almost feeling protective of her.

She squeezed my hand so tightly throughout the procedure that it turned white. When the operation was over, I left her in the recovery room and went to tell her husband that she was fine, that he could see her now. She shouted to me as I left. "Wait - where are you going?" I explained to her that I had to leave. She began crying softly. "Thank you. You helped me. You helped me a lot. And thank you for what you are doing."

I never saw Patricia again, but I went home thinking about my political work in a more personal way. Women choose to have abortions for many different reasons, and it is not for us to know or judge why they may choose abortion as an option. Reproductive freedom is about women deciding on their own when to have children. Reproductive freedom is about making abortion less necessary. Reproductive freedom is about accessible and affordable prenatal care and the reduction of infant mortality.

Patricia is representative of many of the women who elect to have abortions in this country. They will never tell their families because they have been brought up to believe that it is a shameful procedure. Women who have had an abortion at some time in their lives are everywhere. They are your friends. They are your sisters and your mothers. They are your girlfriends and your wives. You may never know.

According to Pat Robertson, the feminist movement is a "political movement that encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism and become lesbians."

I'm happy to consider myself to be in such good company. When I think of the feminist movement, I think not just of popular leaders from Sojourner Truth to Gloria Steinem, but of all the women and men whom I have met along the way who have added just one more verse of justice to the poem of our world. I think of women like Patricia.

LEFT from page 18

stretch of the imagination to guess what quality attorney would take a major case for that sum.

Several justifications for the death penalty have been offered in the past, but have been shown to be factually untrue. Rather than saving taxpayers' money, killing criminals costs more than imprisonment for life. Virtually no evidence supports the contention that the existence of a death penalty deters criminals. While killing a criminal certainly prevents his committing further crimes, a life sentence would have the same effect more cheaply.

Some also claim that only by killing those who commit particularly terrible crimes can justice be done. Death seems to be a rather unsatisfactory revenge. I fail to understand how ending a person's life, thus ending his ability to feel suffering or remorse, is worse for him than, for example, torture or forced labor. But these things are not permitted - they are considered to be too cruel.

What is the true reason people support the death penalty? An abiding concern for justice? I think not. I submit that it is a savage desire to see a person suffer and die for something he has done - perhaps the same sort of blood lust that led many of these convicts to kill.

Some will admit that their true motive, while masquerading as a passionate desire for justice, is a passionate desire for revenge. Others claim that only by killing can we affirm the sacredness of life. This is equivalent to a husband arguing that he can only affirm his devotion to his wife by cheating on her. But the most morally corrupt, in my view, are those who suggest that Christianity permits or even supports capital punishment. They ignore Jesus' message of love, mercy and forgiveness in favor of selectively relying on Old Testament law permitting killing by the state. Even they would probably reject an "eye for an eye" doctrine permitting the mutilation of mutilators and raping of rapists as cruel and inhuman. However, these result-driven apologists justify their thirst for revenge in the name of the Prince of Peace.

I do not believe that the death penalty is just or that it is justly administered. Many educated, thoughtful Christians believe just as strongly that the lives of innocent people should be sacrificed by the state in the name of revenge, regardless of the fact that they are discriminatorily tried, convicted and sentenced. If I were forced to choose who was to be first up against the wall when the revolution comes, I would have a difficult time choosing between those enlightened people and death row inmates. No, I would not.

POLITICS from page 18

Republican must excite Orange County and raise turnout among conservatives who are unlikely voters. Moderate Republicans have never been able to do this.

Second, moderate Republicans lose by playing ball on the Democrat court. Attempting to capture more of the center, they run on Democrat issues, but with a fiscal responsibility slant. To people really interested in these issues - environmentalism, social welfare spending, ethnic special interests - the moderate Republican will always be outbid by the Democrat. The swing voters will vote for the real McCoy over the poseur, the real progressive over the phony progressive.

Barry Goldwater called moderate Republican policies "dime store New Deal:" voters either want the program or they don't, but they don't want an ineffective version of the program. The Republican penchant for fiscal responsibility, combined with only the faintest opposition to government spending, made moderate Republicans the tax collectors for the welfare state. Democrats could run on the argument: We deliver your programs, Republicans raise your taxes.

This is why the national Republican Party, like the state party, has only been successful over the past thirty years when it has been ruled by conservatives. The moderate, Establishment, hereditary Republicans - George Bush and Gerald Ford - have been much less successful. Fortunately for the Republicans, the corral of candidates for the 1996 nomination for President shows a wealth of conservatives - Kemp, Bennett, Gramm, Cheney, Pete du Pont - and a dearth of moderates.

LETTERS Please submit letters to the editor on a Word Perfect disc. We prefer 100 - 300 words and reserve the right to edit.

Star Trek

A Look Into the Realm of a True Trekkie

By Sandra L. Johnson
aka Commander Johnson

Space, the final frontier. These are the voyages of a solitary law student exploring the realm of a true "Trekkie," where many of you have probably gone before.

I do not consider myself a true "Trekkie." I am not yet able to tell which episode is which based simply on the star date. I do have a stuffed lion named Chekhov, but I'll save that story for another time. In fact, I didn't really get into this, Star Trek I mean, until the "Next Generation." Perhaps because I am too young, perhaps because I was a deprived child. I suspect it's the former, but my boyfriend Mike would have me believe it's the latter.

My adventures began about three years ago when I began dating a true Trekkie. I have no regrets. In fact, because "Next Generation" reruns are so frequent, I probably haven't missed any episodes predating my "Trek" submersion. One does not become a Trekkie by choice. It is something that just happens to you, and I don't think there's any way out. It's like being caught in a worm hole, but you don't want to get out, either.

My adventures as a result of Star Trek are many. To begin, watching "Next Generation" new episodes or reruns has become a nightly ritual. Thanks to our local TV stations, run by Trekkies, I believe, the "Next Generation" is on at least two or three times every evening. (Consult your local TV guide for times, or call my boyfriend, Mike.)

Second, I became a "Next Generation" character for Halloween. Not just one Halloween, but possibly for all Halloweens to come. Mike became Commander Data (with a mustache because I wouldn't let him shave it off), and I became a green alien which I'm sure will be seen on some future episode or (is it possible?) a past episode I have missed.

Third, I became positive life exists in other galaxies. Life would not be livable without Romulans, Klingons, and Feringhi. (Professor Friedman, that one is for you.) I am looking forward to holodecks and food replicators.

Tuition at Starfleet Academy

Fourth, I have discovered attorneys will still be needed in the 24th century. At least I may be able to get a job by then from Starfleet. Do you think Starfleet Academy tuition is as much as law school? Remember the episode where our hero J.L. Picard defended a planet against the overtake attempt of "Ardra." Commander Data was the infallible judge.

Fifth, although attorneys are needed, I have decided to provide some advice. GET OUT OF LAW AND GET INTO STAR TREK MEMORABILIA! My latest adventure was a visit to a Star Trek convention. At $17.50 a head, someone was making a profit that is out of this world. One secret pointer if you arrive two hours before closing, you may be able to sneak in a side door for free. Rooms are lined with tables filled with Star Trek memorabilia. These are sold by individual vendors who travel with the conventions. Last stop was Canada. A true Trekkie can purchase everything from tricorders to autographed photos. However, you may be surprised at the high prices. Low quality T-shirts which will shrink run $14. Communicators, which don't even work (I tried), are $15. Now if you want something really spectacular like a jacket with an iron-on Star Trek symbol, be ready to pay $250.

No recession at convention

This convention was full of true Trekkies, all wearing their "Next Generation" uniforms. I felt out of place in my USD sweatshirt and tennis shoes. People from ages 7 to 70 were spending money like there was no recession.

The greatest part of the adventure was seeing Brent Spiner, better known as Data. He really looks like Data. He's slightly pale, but wears wire rimmed glasses. I wonder if those yellow contacts really improve his vision and are just tinted yellow. He had a great sense of humor, and you could purchase his autographed photo for only $15. Well, this adventure ended with a seafood dinner and another episode of the "Next Generation."

Finally, I leave you wondering when Capt. James T. Kirk will make an appearance in the "Next Generation." We've had Scotty, Spock, and Bones. "COUNSELOR JOHNSON TO THE BRIDGE." Oops, on my way Captain. I hope I have violated the prime directive enough to interfere with your studious lives, and have convinced you to take an hour off to watch Star Trek tonight. May all of you live long and prosper. One to beam up.

Sex We Can Do Without

By Dallas O'Day
Motions Staff writer

The drool had not stopped flowing off the fangs of my Democrat friends when I decided that I wouldn't write about politics in this issue. In fact, I decided to avoid politics like a Trusts and Estates lecture. But what could I write about in the wake of the Republican Waterloo? UCLA's football prowess was out, as was an essay on Barbara Boxer's virtues (not enough material). Having nothing to write about, I wrote about nothing.

Sex is the insightful title of Madonna's latest exercise in public display. It is a collection of photographs of Madonna acting out fantasies, accompanied by pages of prose penned by "Dita", Madonna's alter ego. It costs only slightly less than a Lear Jet and weighs about the same as an anvil. The "book" has metal pages, perhaps to prevent irate purchasers from ripping it up. In other words, this is an "artistic" statement.

The photographs are the main thrust of this "book," in a manner of speaking. In these photographs, Madonna is able to convey a sexuality that goes beyond the confines of the imagination and lands squarely in the centerfolds of the cruder porno magazines. With rare exceptions, most of the photos are uninspired and dull. So are the models, unless you have a soft spot for Vanilla Ice. Finally, most of the photographs are shot in black-and-white, which tout le monde knows confers purpose and "artistic" accolades upon even the most inane material.

Madonna's book uninspired

A picture is worth a thousand words. One wishes that Madonna had remembered this when writing this book. The prose of the accompanying material is written in the same idiom popularized by the writers of *Penthouse*'s Forum section. It must be said, however, that the proverbial "freshman at a small Midwestern college" has the advantage over Madonna in concept, structure, and clarity, not to mention humor and intelligence. After further review of Madonna's scribblings, I decided to see how her musings stacked up against Jane Austen.

Austen: Author of six completed novels, including "Pride and Prejudice." A sharp-eyed observer of people and society. Master of irony and structure. Blended intelligence and astringent wit to become the greatest novelist in the English language.

Madonna: Author of *Sex*. Writer of dance songs, including "La Isla Bonita" and "Justify My Love." A sharp-eyed observer of the discos, divorce law, and her own self image. Master of pointless lyrics and a good beat you can dance to. Blended ego and a subservient public to have herself labeled a genius and admired as a savvy businesswoman by a gullible press.

One could purchase many things with the $50 it costs to become the proud owner of *Sex*. A complete set of Jane Austen's novels, for instance. Or a half dozen piano concertos by Mozart to remind one of good music. Or even a few cases of beer. It doesn't really matter. Just take a page out of Nancy Reagan's handbook and "Just say no" when you cast your eyes upon this tome of monotony. Your senses, and your bank account, will be the beneficiaries of your reticence.

With the production of this insult to civilization, Madonna may have made a mistake. A work as sweepingly pretentious and depressingly dull as this just might be Madonna's ticket to entertainment oblivion someday. It's a circumstance to be hoped for.

Pavarotti Plays Sports Arena

By Allan D. Wopschall

On October 22, Luciano Pavarotti made his much anticipated arrival in San Diego at a near sellout performance. Unfortunately for Luciano and his fans, he arrived at the antediluvan sow's ear of musical venues, the San Diego Sports Arena. Although not even Luciano could turn the Sports Arena into a silk purse, he probably could have come close with a little help from the fans.

A great event involves an interplay of the setting, the audience, the music and the performances. Score two and a half out of four here: a point each for the performances and musical selections; no points for the dismal acoustics and visual blight of the arena with all its attendant cables and grotesque rooftop jumble of scoreboard and steel. Give a generous half point for San Diego's fans. Perhaps the apathetic attitude demonstrated can be explained away by the setting, so some benefit of the doubt is due. Performers tend to feed on the energy of the crowd, and Pavarotti was left hungry until the second of his three encores.

Only with the second encore, in which Pavarotti sang the venerable "'O sole mio" and the magnificent finale of "Nessun Dorma," did the hall come alive. Earlier bravos were given mainly in foreign accents. It was sad to see many in the crowd depart before each of the three encores. Perhaps someday San Diego will awaken from its listless slumber.

In spite of the obstacles, Pavarotti was magnificent as always, supported by a fine performance of the San Diego Concert Orchestra with Leone Magiera as guest conductor and Andrea Griminelli as flute soloist.

Pavarotti managed to give much of the magic most have grown to expect. One notable highlight from the main performance was "E lucevan le stelle" from Puccini's "Tosca".

The San Diego Opera is a fine organization and did an excellent job in putting together the event, but it was hamstrung by the commitment of the promoter to the Arena. This was likely the last performance of Pavarotti for San Diego, as his announced schedule for the foreseeable future is limited to Europe and the east coast. One can only hope that for any future performances of similar calibre, the economic considerations which forced the choice of the arena will be addressed to allow the choice of another venue. On balance, better to see the master than not, but a tape of the Hyde Park or Rome concerts on a stereo VCR is as good as it gets without being at a truly great live performance. Don't hold your breath waiting for the compact disc of Pavarotti at the San Diego Sports Arena.

The San Diego Opera has what looks to be a fine season ahead at the Civic Center, and it offers very reasonable student and non-student tickets and subscriptions for as little as $8. "The Barber of Seville" will be performed Jan. 23, 26, 31 and Feb. 3. "Madama Butterfly" runs Feb. 13, 16, 19, 21 and 24. Mozart's "Don Giovanni" plays on March 6, 9, 12, 14, and 17. "The Pearl Fishers" plays March 27, 30, April 2, 4, and 7. Finishing the season is Massenet's "Werther" on April 17, 20, 23, 25, and 28. Expect strong performances throughout the season, and as a plus "Werther" will star Richard Leech, who will replace Pavarotti as Edgardo in the Metropolitan Opera's production of "Lucia di Lammermoor" in November. For ticket information call 232-7636.

BAR REVIEW:

The North County: Watering Holes in the Wilderness

THE SANDBAR

PCH & TAMARACK, CARLSBAD

Hollywood: The Sandbox is the premier North County hotspot. The Sandbox has many hot babes, and I think even a few were over twenty-one. I specifically remember the one patron who wore two glow-in-the-dark Sandbar bumper stickers across her bumpers.

The Sandbar, like Neon lovers, does glow in the dark. It features black lighting which casts an eerie hue over the bar and makes anyone wearing a white shirt a star (I wish I had known in advance). The decor comes alive with life under the sea. The walls are painted iridescent light blue and are humorously decorated with plastic sharks trapped in netting. The back bar radiates with the shimmery rotating shine of a disco ball. I love a bar where one can bask in the iridescent glow of polka dots. However, I was distracted by the television sets which featured sports on a Saturday night. One should have played "The Little Mermaid," and the other should have played reruns of "Gilligan's Island."

The major attraction was the band. A bawdy group of teenagers, they enthralled the crowd with covers of classic rock tunes. When they performed the club was alive, and everyone took to the dance floor. However, when the band did not perform, all the patrons zoned out at their tables. The bar has poor circulation, so if you are going alone you can't be shy if you expect to meet anyone. There are two additional rooms where beer is sold, yet both of these remained strangely empty. Not a bad bar, but bring your wallet because it will cost you four dollars for admission, beers average three dollars, and pitchers are not sold.

Gringo's Reprise: How could you speak so ill of my neighborhood bar? When I was apartment hunting this was my headquarters and rest stop, so naturally I got a place nearby. It's just a skip & a stumble from my doorstep. When I stopped here originally, the prices were good, the babes abounding, and the burgers not quite toxic. However, a subsequent late night knifing in the parking lot, presumably by patrons, did spur some changes! First thing they did was raise the cover and the drink prices considerably. While this hurts me personally to no small extent (considering my appetites for beery comestibles), it does keep the riffraff out (except me) and lowers the number of resident Marines (Godblessemeveryone!) onaccounta they can no longer afford this particular hole in the wall. Maybe they could arrange special financing for all E-1 and up like they do at the used car lots?

My return visits to this, my nearest form of outside recreation, have revealed that the food in fact is abysmal. Avoid it like Serbian politics, like vacationing in Somalia, like the Kool-aid at religious cult picnics. The decor is miserable, most especially because of that disco ball on the ceiling that Hollywood loves so much. The bands have been thus far disappointing, but Tuesday is reggae night and I am yet to sample this weekly desecration of the island sounds.

As I am now retiring from this law school thing (if all goes as planned!), look for me here, but not because I like it, just because it's so darn convenient. Maybe I'll get a tattoo.

THE COYOTE BAR

CARLSBAD

Hollywood: The great American Southwest joins the great American Suburbia. Although hardly a place Thelma and Louise would cruise by on the Jack Keroac journey, the Coyote Bar proved amply wild for its more domesticated crowd. It is best known for stocking over 100 bottles of tequila, about 90 of which are Cuervo Gold. Cactus grows wild here, and there is a great Georgia O'Keefe cattle skull sculpture over the fireplace. Recreating the circle the wagon theme, the Coyote Bar patio features many a circular fire pit where you and the posse can gather round to swap stories, tell lies, and do tequila shots.

The crowd here was disappointingly lackluster for such a creative and potentially rowdy establishment. I thought everyone would be wearing cowboy boots (the type you purchase used), faded jeans and matching denim shirts. I was wrong. The only strong characteristic about the patrons is that they all seemed to be groups of two or four on dates. I guess this is as wild as it gets in this neck of the woods.

Personally, I appreciate the Southwestern influence. I'm all for going to Taos to commune with cattle bones, buy expensive Native American jewelry straight off the reservation, and eat snake meat burritos with blue tortilla chips and baked, not refried, beans. I like drinking out of handblown glasses with the dyed blue lip and think it's quite novel how they give you a 6 oz. glass to drink your beer. Although the Coyote Bar has yet to reach its potential, I highly recommend it.

Gringo's Retort: Man, this place sucked! 150 of the worst tequilas ever made (contrary to popular belief, I did not try them all) on display in a strip mall bar decorated in K-Mart Southwestern with fuzzy cowhide bar stools. There was even an antler mosaic chandelier, which was OK if you don't mind the murdered critter motif.

The crowd may have been lackluster, but when the twelve of us showed up after a party at my house, things picked up considerably. In fact, it was the patrons that picked up to go when we scared them all off! I can't actually tell you about the prices since I left the previous bar with my beer carefully hidden (it was only half gone and I wasn't going to waste it). Hollywood had left the earlier place with his shaker of Manhattans not so carefully hidden, but he was kind enough to return the shaker by knocking on the correct bar's door after closing! And what's this Georgia O'Keefe crap? It was a plaster cow skull, all white with black horns - the sort of thing they can't even get rid of at swap meets! One good thing: they sometimes have live blues.

When we entered the place, Hollywood made a bee line for the most buxom beauties in the bar, but they bruskly gave him a most bodacious blow-off. I guess some things are worse than being alone on a Saturday night! A substandard establishment by the "reasonable guy standard." Avoid it like Italian cars, like French waiters, like cheap cigars at the dinner table.

HOLLYWOOD'S PICK OF THE MONTH

The Belly-Up Tavern

SOLANA BEACH

The Belly-Up is the flagship of North County bars. In fact, it is three different bars under one roof. The Belly-Up features a mingling and schmoozing bar (my favorite), a lounge for romantic moments or late night dining (the kitchen serves the typical: nachos, chicken wings, crab cakes, etc.) and the main pit, a large, cavernous area where one stands to watch the often magnificent bands. (John Mayall & the Blues Breakers and Harry Connick all have played here recently.) The crowd is a lively mix of UCSD students, North County yuppies, and a few middle aged night owls.

The diversity of the Belly-Up is one its best qualities. The bar caters to every whim and wanton desire. One can meet someone special, dance to the band, and then intimately gaze into each other's eyes in the lounge, and walk along the beach on your way to the car. By the time you make it home, you will have already accomplished enough activities to satisfy the third date rule! Saunter over to the Belly-Up for the best the North County has to offer. It's just past Del Mar, and you will appreciate the change of pace from having to only go out in the Gaslamp or P.B. Just be careful of the local police. Nothing else goes on in Solana Beach, so they closely monitor patrons leaving the Belly-Up after a night of making merry.

GRINGO'S NON-PICK OF THE MONTH:

Neiman's

CARLSBAD

If you haven't picked up on it yet, I have moved to the Great White Suburban North. If you ever come by and see me mowing the lawn or (godforbid) "puttering" around the house, PLEASE KILL ME!! Next thing you know I'll be married with kids. OK, fat chance there with my love life, but weirder things have happened.

So after the housewarming/birthday party (I turned thirty-one; sweet Jesus, now I'm THIRTY-SOMETHING (please kill me), we were all fairly liquored up, so the dozen of us wandered down to Neimans. I'd had a pretty good lunch there, and it seemed like a nice place. The bar was beautiful, the selection of potables outstanding: they had three kinds of Meyer's rum and a whole shelf full of Jagermeister (DANGER! Danger Will Robinson!). It's a gorgeous 104 year old building and a very historic landmark. Looks great, food's good, restaurant is very date-worthy (from what I remember of that particular part of the mating ritual).

So in we go. It was karaoke night. "Karaoke" is from the Japanese word meaning "get really drunk and make a complete ass out of yourself." We went in. Now, I need no special devices or encouragement to make an ass out of myself, so I felt no compulsion to sing. I had in fact seen this machine in action in PB where the "singers" (construing this term in its broadest sense) would dress up as Cher, or whoever, and put their all into their performance under the unshakable belief that there were a plethora of talent scouts present just waiting to find them. This was never so in PB and was most certainly not so in Carlsbad. The situation became so disappointing that the karaoke operator felt compelled to sing a few tunes himself; this was even more disappointing. As far as I'm concerned, when it comes to karaoke, follow Mommy Reagan's advice and Just Say No.

Personally, I liked Neimans. It had everything you want in a bar except people, atmosphere, music, and dancing.

Avoid it for anything but a nice dinner. Avoid it like sharing needles, like being politically incorrect, like getting roped into being my replacement for this column now that I'm graduating.

Gay Rights

In a recent letter, L. Lucarelli stated his opposition to the rights of gay people to teach school, lead a scout group or adopt children. The basis of his opposition is that millennia of universal condemnation, supported by Western religion, demonstrate that homosexual behavior is, as a matter of human nature, morally wrong. He uses as comparisons cannibalism and incest. Before *Motions*' readers take Lucarelli too seriously, they might think twice about his arguments and where they lead. Lucarelli talks about homosexuality exclusively as conduct. Being gay is essentially a way of being in the world, not a choice about conduct. While Lucarelli is correct that condemning people as immoral for who they are by inveighing against how they supposedly behave has a long history, that long history is marked by hate and bigotry. Consider the following.

As recently as the 1920s, educated white society almost universally continued to teach that Afro-Americans (and other colonial peoples) were inherently morally inferior based on their supposed behavior. Duckitt, "Psychology and Prejudice," 47 Am. Psychologist 1182 (1992). The U.S. Armed Forces continued to preach that blacks were morally inferior based on their behavior until the late 1930s. Melton, "Public Policy and Private Prejudice," 44 Am. Psychologist 933 (1989). More than 16 states still had miscegenation laws on the books when the Supreme Court struck them down in 1967 in *Loving v. Virginia*. The indifference and bigotry of the educated white majority prolonged lynching in this country for generations. As with homophobia, a dominant motive of lynchings was sexual fear: if you are not too sure about your own sexuality, make yourself feel better by beating up on someone else. Zangrando, "The NCAAP Crusade Against Lynching," (1980).

Further, our educated society continued to teach that women were inherently morally inferior to men as reflected by their behavior until the early 1980s. Gilligan, "In a Different Voice," Harvard Univ. Press (1982). This official view continues to condone gender oppression and gender violence for many men.

Until 1973, mainstream psychology taught that homosexuality was a mental illness. Mainstream psychology now recognizes that homosexuality is a normal sexual orientation of normal people. Research psychologists attribute the delay in understanding to cultural homophobia that scared away competent researchers, adequate research funding and candid subjects.

I hope Lucarelli, as an educated and influential member of the community, understands the dangerous consequences of his editorializing beyond his concern that someone might think he's a bigot. An estimated 20-30 million gay people live in the United States, the majority of whom remain closeted because of the physical danger they face in coming out, a danger orchestrated by influential people like Lucarelli who casually lump being gay with cannibalism and incest. Among the people Lucarelli condemns are quite possibly his third grade teacher that he adored, the priest to whom he makes confession, the student sitting next to him whose notes he borrowed, as well as the cop who wrote him up for speeding.

The best estimate, based on a number of studies, is that virtually all "out" gay people regularly endure some form of verbal abuse. More than 25% report having suffered physical attack because of their sexual orientation. The incidence of hate crimes and of hate speech nationally appears to be on the increase. Herek, "Hate Crimes Against Lesbians and Gay Men," 44 Am. Psychologist 948 (1989). Where, we might ask, do these misguided people get the pathological notion that it's morally acceptable to abuse a gay man or lesbian as if they were no better than cannibals? To affirm, as Lucarelli asks, that he is no worse than a common bigot is to let him off lightly.

Steven Hartwell ***Clinic Professor of Law***

LETTERS

I'd like to address a few points raised by L. Lucarelli's letter which appeared earlier in this space. Such misguided thinking has long been repudiated by those who, unlike Lucarelli, know some-thing about this subject. The research shows that sexual orientation is part of our identities, and may or may not correlate with behavior. May I suggest that Mr. Lucarelli and like-minded people actually *read* some of the research, e.g., Troiden, "*Gay and Lesbian Identity: A Sociological Analysis*" (1988); Halley, "The Politics of the Closet: Toward Equal Protection for Gay, Lesbian, and Bisexual Identity," 39 U.C.L.A. L. Rev. 915 (1989). For uninformed laymen to criticize others while ignoring this research is pathological arrogance. (For such persons to lump homosexuality with "cannibalism and incest" is gratuitously stupid and hateful.)

Second, in order to even *debate* most of Lucarelli's "questions," we'd have to take seriously the notion that gay men and women are, simply by virtue of their sexuality, inferior human beings. Enlightened people can't do that. And as to the label "bigotry", if the shoe fits....

Warner Broaddus

Mr. Lucarelli's diatribe against the homosexual community incensed me. The position he advocates results in gays being bashed, killed, maimed and discriminated against in almost every conceivable way. While Lucarelli questions gay rights, homosexuals are struggling for equality and the right not to be discriminated against by an intolerant and insensitive society, where hate crimes are increasing.

Yes, major Western religions have condemned and persecuted homosexuals for being who they are. That does not make such condemnation right. Such denunciation does not suggest that homosexuality contradicts human nature. Homosexuals have been a part of our world since the dawn of civilization - proving that homosexuality is a part of human nature for millions of people and so is homophobia.

For Lucarelli, it seems that only heterosexual expression represents human nature. This premise is both false and absurd. The most current scientific research demonstrates that there are multiple millions of homosexuals all over our planet. Approximately 25-30 million homosexuals call the United States home. For each of these individuals, an aspect of human nature means being homosexual. To each of them, homosexuality is a question of orientation, not choice about conduct.

Homosexual couples should be allowed to adopt and have their own children because they are as entitled to have families as heterosexual couples are. Homosexuals should also occupy positions as role models and scout leaders because they have a right not to be discriminated against based solely on their sexual orientation.

Hate crimes against homosexuals are on the rise all over the world, especially in the United States. Hate crimes often start with unenlightened and hate-filled perspectives about homosexuals. Such deep-seated prejudice should not go unanswered. Respect human dignity regardless of sexual orientation and fight back when confronted by homophobia. Strive to make this world a less hateful and ignorant place, seek to enlighten.

Dinyar Mehta

EDITORIAL

The other day, Justice Edward A. Panelli of the California Supreme Court spoke to an audience of twenty-nine in Grace Courtroom. The talk was well publicized: flyers entitled "Musings of a Supreme Court Justice" with Justice Panelli's photograph were posted around the law school; individual copies of the flyer were placed in all faculty mailboxes a week before; the sponsoring Federalist Society cleared the event through the Office of the Dean.

Federalist Society President Bob Little arrived with Justice Panelli from the airport around 3pm. They visited with Professor Siegan for a few minutes. As no coordinated plan had been formed with Dean Strachan, she was unavailable to meet the justice due to prior commitments. No formal reception was held before or after the speech.

The talk began a few minutes after 5pm. An assortment of students, three faculty, and a member of the administration had found their way to the courtroom. Justice Panelli was an engaging speaker and provided welcome insight into the thinking of California's highest court. The seven students who accompanied him to dinner afterwards talked for days about how special the experience had been.

Nevertheless, it was both sad and embarrassing that only twenty-nine people attended. Reasons have been put forth: 5pm is a bad time because evening students have class soon after; one professor with a competing time slot forbade her large class to attend; because the Federalist Society and Justice Panelli himself are known to be "conservative," "liberals" were not interested in his views.

Education at any university is a concept that goes beyond classroom attendance and exam grades. The quality of a university is often judged by events that occur outside the lecture halls: faculty research, accomplishments of alumni, publications, and outside speakers who lecture on campus. For example, Oxford is one of the premier universities in the world, yet few classes hold regular meetings. Instead, students supplement one-on-one tutorial discussion with voluntary attendance at many lectures held throughout the university.

Great institutions have concrete goals; great universities should have as their primary goal providing a place where the finest education possible can occur. The University of San Diego School of Law should be honored that Justice Panelli would speak here; to provide that opportunity for the Law School community promotes the mission of the school. However, each member of the law school community must take seriously the reciprocal of that mission: each must seize that opportunity for education.

For a year and a half now, the true identity of Gringo has been a not so closely guarded secret. He did come out of the darkness of the pub this year enough to let us publish his photo sans disguises.

So, Jeffrey Gaffney, you will be sorely missed in the editorial byways of *Motions*. Your contributions as Gringo relieved late deadline tensions more than you should know. We refrain from expressing surprise at your early graduation, and wish you luck with the Law Office of John Lawrence Allen in Carlsbad, where we understand you will be "saving little old ladies from crooked stockbrokers from coast to coast."

Note: Hollywood seeks a new pub partner.

THE GRILLE: *Slow lines to "fast" food.*

Bagging the Grille

USD Food Monopoly Inefficient

By Christopher Scott Trunzo
Motions Staff writer

The UC Grille is the most inefficiently run food service organization this side of Jack Murphy Stadium. The comparison with the stadium is apt, as both organizations can trace their problems to a single root cause: they are both monopolies.

How many times have you gone over to the Grille, your mouth watering for some of the weirdburgers and salt-fries or greaseball pizzas they seem to specialize in, only to be deterred by a line of people stretching into Tecolote Canyon? While waiting your requisite fifteen minutes in line, observe the food preparers and servers. They spend a great deal of time just standing around. Make no mistake; this is no fault of the employees themselves: when they do work, they work hard and for the most part well. The problem is that quite simply they often have no work to do. The fault lies within the system itself; the Grille is both structurally and operationally poorly organized.

Quite often, you will see the cashier-food servers waiting for the food preparers to finish, or vice versa. In a well run system, everybody should be doing something constantly. This year, the Grille added another register. However, this is little help when there is still only one person to prepare the food. Instead of two really long lines, we now have three marginally long lines. Even though you spend the same amount of time in line, in the wild and wacky world of bureaucratic monopolies this is called improvement. While we do have the freedom to leave campus for food, we would never, upon our return, be able to find a parking spot closer than Little Rock, Arkansas. This would be fine if we all wanted to take up chicken farming, but it leaves the students and faculty with very little choice and creates a de facto monopoly for all of the university-owned food outlets on campus. Monopolies are by their very nature inefficient and slow to adapt to consumer needs. Without any real competition, a monopoly has no incentive to change its ways; the people are forced to use its services.

The food service people may argue that they can improve or reform the system, but rather than attempt to reform a system with an inherent structural flaw at its heart, i.e., lack of competitive incentive to improve, wouldn't it be better to rebuild the food service system from the ground up? The American people have recently expressed a mandate for change. In keeping with this spirit of revolution I make this modest proposal: break the University's monopoly on food service, and lease areas of the Grille out to private contractors. By introducing an element of competition, the various campus eateries will be forced to offer increasingly better food, services and prices.

Visit the coffee cart behind [Insert Rich Donor's Name Here] Hall. Ask any of the patrons if they would rather drink the wonderful gourmet coffee served there or the nasty foul brew concocted over at the UC. Yet until this year, we were forced by the exigencies of scholastic life and the unavailability of any real choice to drink swill. Imagine the possibilities if other private contractors were allowed to operate on campus instead of a mile or more away! For those of you who still have doubt, drive over to UCSD, where private and university run establishments operate side by side to their mutual benefit.

There is an argument that the University would lose revenues and student jobs if they were to privatize the Grille. But, because of its relatively low prices, the Grille cannot be a cash cow. Almost any losses to the University could be recouped by rents or a percentage of the net income of the private contractors. (The Pannikin Cart pays a sliding scale profit percentage to the University.) As to the jobs, let the students work somewhere else on campus; the government subsidizes a great deal of the cost of those workers anyway. They could even try to work for the private establishments that would be running the Grille.

The University should explore the options for private food services on campus. The school, the faculty and even the students would benefit from such a move. If you are tired of waiting in long lines for third rate food, try putting some pressure on the local authority figures. Perhaps, in this time of sweeping changes, we can effect some small change locally as well.

Interviewing Tips by SNL's Cajun Man

By Susan Kang

The day was sweltering. My pantyhose clung to my legs as I began to glisten. So there I was, wearing my power navy suit and my Barbara Bush pearls, practicing my most sincere smile. In front of me was a closed door with the list of names of my colleagues who were "lucky" enough to chosen to interview with this firm. I recognized most of the names. The list was made up of the same ten people I had been seeing in suits all week. I began to get nervous.

As I was about to bolt out of there, my good friend John (A.K.A. the Tool) came up to say "hi." I live vicariously through John's career because he actually got a job at his first choice firm located in his favorite city.

Sensing my distress, John asked me in his thick, Irish brogue, "Whatever's the matter, Lass?"

"John, I'm fully stressed about this interview thing. Can you help me out? What was your secret?"

"Now calm down, Lass. Just listen to this interviewing techniques tape by the Cajun Man and you'll be fine." He loaned me his tape and Walkman, and he left muttering something about buying a Super Nintendo system with all of the money he was going to make this summer.

I listened. I interviewed. I conquered. (Or at least they haven't sent me a rejection letter yet.)

In these woeful days of job hunting, I wanted to share the transcript of the tape with everyone. And if you get a job through this and get your name on a letterhead, will you remember me? Here's the tape.

Interviewing by the Cajun Man.

Q: You're late, Cajun Man. What happened?
A: Parking situaTION.
Q: Well, good morning.
A: SalutaTIONs.
Q: What position are you applying for?
A: Summer law clerk posiTION.
Q: What did you major in as an undergrad?
A: CommunicaTIONs.
Q: Your transcript shows that you scored very high on the LSAT. What was your method?
A: Process of eliminaTION.
Q: Why did you decide to go to law school?
A: Loan RemisSION.
Q: What have you enjoyed the most about law school thus far?
A: Moot court competiTION.
Q: Really?
A: Summer VacaTION.
Q: What kind of law do you want to practice?
A: My intenTIONs?
Q: Yes.
A: LitigaTION.
Q: It says on your resume that you're taking environmental law. What do you study in that class?
A: PolluTION.
Q: What other classes are you taking?
A: CorporaTION.
Q: Why did you apply to our law firm?
A: ReputaTION.
Q: What is the number one priority in your job search?
A: CompensaTION.
Q: Have you ever been arrested?
A: Repeat the QuesTION?
Q: What charge, if any, have you been arrested for?
A: ProstituTION.
Q: Why did you do that for?
A: ExcitaTION.
Q: Besides that, have you broken any other laws, American or otherwise?
A: Drug experimentaTION.
Q: Have you tried to reform in any way?
A: RehabilitaTION.
Q: What would you do if you got this job?
A: CelebraTION.
Q: What would you do if you didn't?
A: DepresSION.
Q: Thanks so much for coming in. Finally, what extra curricular activities have you participated in?
A: Writing for MoTIONS!

OPINION

Adding a Verse of Justice

By Judy Carbone
Motions Staff Writer

I drove up to the clinic and noticed the usual handful of week day anti-abortion protesters. I knew them all by name. We had confronted each other every Saturday for the last two years on the front lines of the abortion battle, yet this was the first morning they had ever approached me with their literature and their taunting. I had heard it all before - "We can save your baby! You don't know what they'll do to you in there! Stop! Don't kill your baby!" but it was somehow different this time; now it was directed at me, instead of at someone I was assisting into the clinic.

I checked in and leafed through magazines while waiting for a patient who would allow me to accompany her throughout her day. The receptionist called to me and introduced me to Patricia. She told us to wait in the next room. That was it. I had been told by the Assistant Director that I was not to become a part of the procedure or to interfere. She had also warned me that the patient may not want to talk at all. Let her take the lead, she advised. So I did. Patricia looked at me and smiled shyly and then asked why I wanted to go with her. She nodded as I explained my political involvement and my desire to learn more about what goes on inside the clinics.

"My mother protests in front of clinics," she said, looking at the floor. "We don't believe in abortion. I didn't really know what it was she did until this morning. When my husband and I walked in here and all those people came jumping out at us - yelling and throwing those pictures at us - it was as if they didn't think we knew where we were going." She started to cry.

"What is it that you do out there?" she asked. I told her about protests and that sometimes bomb threats were aimed at clinics. I told her about pro-choice activists escorting women into clinics. I also told her that all protesters were not alike, and that her mother might not act the way the protesters did this morning. She seemed to appreciate my understanding.

I learned a lot about her during our wait: She was 25 years old. She grew up in a small town outside Boston. She and her husband had driven almost two hours to the clinic. They had four children and desperately wanted to keep this one, but she had medical problems, and her

See **Justice** *page 13*

Complying with (Moot) Court Rules

By Michael B. Kelly
Moot Court Faculty Advisor

This is in response to the Oct. 13 *Motions* opinion piece in which two students expressed resentment and misunderstandings about the actions of the Moot Court Board. In the hope of assuaging any remaining tension, I feel it necessary to reopen the discussion and offer an explanation of the Moot Court Board's action. I believe the Board made a difficult but appropriate decision in a good faith effort to interpret the rules and apply them as fairly as possible. The Board properly insisted that contestants read and comply with the rules, a demand every law student must learn to face before entering the practice of law.

The Oct. 13 article concerns the Board's decision to enforce a rule that prevented several students, including the authors, from competing in the Alumni Tort Competition. The General Rules for Moot Court Competitions, ¶ III.6., stated: "Each competitor must sign up for the side they are writing for by the specified deadline for each competition." The Board distributed the General Rules with the problem and Alumni Tort Competition Schedule to every student interested in the competition. The schedule contained the deadlines involved (emphasis in original):

September 8Deadline to sign up at Moot Court Office door is by **6 p.m. YOU MUST SIGN UP BY THIS DATE IN ORDER TO COMPETE. NO EXCEPTIONS.**

September 9Briefs due inside Moot Court Office at 6:00 p.m. **SHARP**.

. . .

Some students apparently thought the Sept. 8 sign-up deadline referred to the sign-up they had already completed when they first picked up the problem and rules packet.

The Board reasonably could assume that students who read General Rule III.6. knew three things: (1) they must sign up to brief a specific side of the problem; (2) they had not signed up for either side when they picked up the problem; and (3) they needed to sign up for a side by a specific deadline. The Board reasonably assumed that students would check the schedule to find that deadline. The schedule contains two deadlines: one to sign up and one to submit briefs. In

See **Rules** *page 19*

A Framework for California Politics

By Robert Little

The vote totals of conservative Republican Bruce Herschensohn and moderate Republican John Seymour in their campaigns for the U.S. Senate point to the great irony of California politics: Democrats have no enemies to their left; Republicans have no friends to their right. Simply put, while Democrats can pick up more support by going centrist and avoiding the liberal label, moderate Republicans have no such luck.

Anecdotally, this appears true. This month, tens of thousands of voters voted for conservative Republican Bruce Herschensohn, then voted against moderate Republicans George Bush and John Seymour. Being "too conservative" never hurt George Deukmejian or Ronald Reagan, who both won four statewide general election victories. Nor did it hurt Attorney General Dan Lungren. Being moderate never helped Ed Zschau, who lost to Alan Cranston in 1986, nor Seymour, who lost woefully, nor Bush, whose loss in California was a first for a Republican candidate for President since 1964. As for the Democrats, note the success of the centrist Feinstein, who received many more votes than Barbara Boxer, who is significantly to her left.

(The enigma is Republican centrist Pete Wilson. But his three statewide wins are explainable within this framework: as a defense-oriented Republican, from a conservative city, he appeared more conservative in the Senate during the Cold War. When he ran for Governor in 1990, the supreme issue in conservatives' minds was reapportionment, and for that they were willing to compromise to get Wilson elected.)

Why the irony? Two reasons:

First, a matter of demographics. Any Republican is going to lose big - really big - in the Bay Area. He or she can offset this by wins close to the margin in Los Angeles, San Diego and the Central Valley, where voters are attracted by arguments for restrained government growth and reasonable environmental policies. This leaves the race still slightly in the Democrat's favor because of his or her big win in the Bay Area. Therefore, the Republican must win big - very big - in Orange County. To do this, the

See **Politics** *page 13*

On the Left

Against the Death Penalty

By D. Elisabeth Espy
Motions Staff writer

Capital punishment is barbaric and should not be condoned in any civilized society. All of our European allies and most religions in the U.S. have rejected such killing. Executions by judicial authority are procedurally unjust, poorly justified even by proponents, and morally wrong.

Dozens of citizens later proven innocent have been executed in America. This number is a product of the examination of only a fraction of capital cases; it is unknown how many more mistaken executions have not been exposed. No sufficient benefits have been offered to justify a system which knowingly accepts the killing of innocent citizens.

Even if we assume that those who commit monstrous crimes deserve to die, we should reject the death penalty. Of all the injustices committed in the name of justice in this country, the most heinous is the killing *by the state* of an innocent person. By making itself a party to this wrongful killing - shall we call it murder? - it undermines the authority we have voluntarily granted it.

Those who support the death penalty first assume that a particular convict is guilty of a terrible crime, then claim that justice requires his death. They erroneously assume that the process by which we determine guilt and decide which convicts are to be killed is efficient and just. In fact, the imposition of the death sentence is arbitrary and unjust.

Whether a particular convict is condemned to death depends substantially on his race or class. A black killer, especially one who kills a white victim, has been shown to be as much as ten times more likely to be executed than a white killer (all other things being equal). Poor defendants usually cannot afford to hire an attorney, bring witnesses to court, or make an appeal. In some states the attorneys assigned to capital cases are paid less than two thousand dollars. It takes no

See **Left** *page 13*

On the Right

The Death Penalty: A Matter of Justice

By L. Lucarelli
Motions Staff writer

Let me tell you about a man named David Raley. Raley was a security guard at a mansion, where he would sometimes give unauthorized tours. One day, Laurie (17 years old) and Jeanine (16) asked for a tour. Raley concluded the tour by taking the two teenage girls downstairs and locking them in a safe. After subjecting them to humiliating sexual molestation, Raley assured the girls that he would let them go. He then proceeded to club Jeanine into unconsciousness. Laurie resisted, and he clubbed her and stabbed her thirty-five times with a knife. Raley then dumped the girls in the trunk of his car and drove home. He refused Laurie's plea to be taken to a hospital. He left them in the trunk, bruised and bleeding, for about five hours while he watched television and played monopoly with his family. When night came he drove out to a ravine, removed the girls from the trunk, and beat Laurie around the head and neck with a club ten or eleven times. Finally, he threw the bound and bleeding girls into the ravine and left them there to die.

Laurie managed to crawl out and flag down a passing motorist. She survived. Sixteen-year-old Jeanine was less fortunate. She bled to death on the operating table. Her autopsy revealed forty-one stab wounds and a skull fracture.

A lot of arguments about the death penalty focus on its impracticality. Its opponents suggest that it is not a good deterrent and that it is expensive. They are right. The death penalty is actually applied only in extremely rare circumstances, which makes it ineffective as a general deterrent (although it's an outstanding specific deterrent). And the unavoidable and exhaustive appeals make it much cheaper to simply keep an offender in prison for life. But the death penalty is not about utility. It is about justice.

Our criminal justice system is aimed at promoting justice, not

See **Right** *page 13*

Czar's Corner

Section E Pulls Off Stunning Upset

By Keith Cramer
Intermural Czar

Competitive League:

In what has got to be the biggest shocker of the year, **Section E** - thirteenth ranked and without a win all year - pounded the fourth ranked **Bad Guys** in a first round stunner. The Bad Guys, always willing to talk a good game, failed both offensively and defensively as Section E moved on to a second round date with the seventh ranked **Tortfeasors**. The Tortfeasors, led by some mighty (mighty high) pitching, knocked of the once powerful, now tenth ranked, **Weasels**. Section E better enjoy that winning feeling while they can, because the Tortfeasors are going to put an end to it next week.

In other first round action, eighth ranked **Section B** (Yeah, I know you guys don't like to be called Section B, but get used to it), whose self-congratulatory style has dimmed a bit since dropping three in a row, sent ninth ranked **Bark Like A Dog**'s offense to the dog house as they advanced to a meeting with number one ranked, and undefeated, **Well Hung Jury** - Another team that talks a big game but one that has thus far proven that it isn't bragging when you can back it up. Look for them to easily prove it again against Section B.

Fifth-ranked **Czarist Forces** overcame some early inning lethargy to coast to the easy win over twelfth ranked **Section A** (Note to Che: Neither choice would have got you very far.) to advance to a second round meeting with the third ranked **Fixers**. Both of these teams are erratic from week to week and this should be a close one, but give the Fixers a slight edge.

Rounding out the second round bracket is **Undergrad Aluminum**. The Skins, as they call themselves, showed that they didn't deserve their eleventh ranking by defeating a much improved sixth ranked **Section C** team. The Skins move on to play the always tough, and second ranked, **WSU** team. The Skins are going to have to be at the top of their game if they hope to stay with the heavily favored WSU team.

Co-Rec:

While the qualifying round of the playoffs produced two exciting games, the quarterfinal round saw the top four teams advancing easily.

Eighth ranked **Section C** squeaked by ninth ranked **Section B** in extra innings to advance to a second round rematch with second ranked **Drunk Sluts.** In the final week of the regular season, Section C dropped Drunk Sluts from their previous number one ranking by overcoming, in one inning, a fourteen point deficit in a game that wound up ending in a tie. Section C was out to prove that their run scoring ability was no fluke - it didn't happen. Drunk Sluts revenged the earlier loss and advanced to the semifinals by easily crushing their overmatched opponent.

In the other qualifying game, a late inning scoring surge fell just short as the tenth ranked **Faculty** team managed to pull off an upset by holding off seventh ranked **Smile, We Suck.** The Faculty, who always talks a big game, finally managed to play one. The celebration was short-lived, however, as the faculty, trailing 15-1 after two innings to the number one ranked **Knuckleheads**, decided they had better things to do and forfeited. The Knuckleheads were less than pleased with the Faculty's actions, but got the win and advanced to the semifinals.

Section A had a bad day as both of their teams were handed quarterfinal round defeats. Both number three **Not** and number four **Godzilla** got by Section A teams to advance to the semifinals.

The semifinal pairings look like this:

#2 Drunk Sluts v. #3 Not

Tough game to call. Not, as always, is playing tough and is looking to avenge an early season loss to the Sluts. The smart bet, however, is on the Drunk Sluts to win a close one.

#1 Knuckleheads v. #4 Godzilla

Even though APALSA changed their name to Godzilla, so far they haven't managed to strike fear in the hearts of many of their opponents. Look for the girls to carry the Knucklehead guys into the finals.

MOTIONS Top Ten

Top Ten Reasons Why You Can't Find a Parking Space at USD

10. Everyone else was given the special parking instructions and you were intentionally excluded.
9. Savvy shoppers have switched from Fashion Valley to the USD Bookstore.
8. The new building has classrooms and offices, and those people have taken YOUR space.
7. Planning your day around getting a parking space teaches you valuable organizational skills.
6. What do you expect for your $25 parking sticker?
5. This is all a misperception. There are always spaces available in the supplemental lot. In El Cajon.
4. Those metered spaces by the bookstore will generate an extra $102.75 this semester alone.
3. Administrators made a secret pact to do nothing until parking at USD gets worse than SDSU.
2. Parking tickets expand the economy by creating jobs for security personnel.
1. Futile search for parking spaces prepares you for futile search

By Gini Henkels

RULES from page 18

deciding which deadline applied to the rule requiring them to "sign up" for a side, the "[d]eadline to sign up" seems the natural choice. The use of identical language ("sign up") in the General Rule and the schedule entry for Sept. 8 presents a natural match. The schedule could have been even more explicit, but the Board believed, reasonably, that the rule and schedule read together provided adequate notice.

Understandably, students participating in their first moot court competition might not have been completely sure which deadline applied. They might seek clarification by asking a Moot Court Board member about the deadline or by attending the informational meeting held by the Board: a prudent student might have signed up by the earlier deadline. The strong language about the consequences ("**NO EXCEPTIONS**") suggests erring on the side of caution. Contestants would lose nothing by committing a day early because, realistically, they had committed themselves to one side long before 6pm on Sept. 8.

After talking to students who almost made the same mistake, I understand how the mistake occurred and sympathize with those who made it. Contestants who did not read General Rule III.6. easily might misinterpret the schedule, missing the significance of signing up *for a side*. The *Motions* article never mentions General Rule III.6., suggesting the authors still have not recognized its importance.

Understanding the error does not excuse it. Students who did not read the rules carefully must accept responsibility for failing to comply with them. Everyone can benefit from the lesson thus illustrated: READ THE RULES CAREFULLY! Not all law students learn that lesson. I hear frequent complaints from practitioners about associates who try to fake their way through assignments without reading the pertinent rules or who assume they know what a rule means without adequate investigation or reflection. An embarrassing mistake may make the lesson memorable but also makes it painful.

The schedule could have been drafted more clearly, and in fact the critical deadline sheet has been redrafted to clarify sign-up dates and deadlines. The Board also can learn from experience; they do not want to see this kind of problem recur.

The possibility of better drafting, however, does not excuse the failure to read the rule or to understand it as written. In legal practice rules could be drafted more clearly, and courts do not hand out all the pertinent rules in a package. To comply with these rules, techniques of interpretation and clarification are necessary - like asking the Moot Court Board which deadline applies or attending an information session. Lack of clarity establishes the need for interpretation but does not make a careless interpretation acceptable.

Perhaps the Board could have granted an exception in this case. Courts sometimes grant motions permitting parties to file papers despite failure to comply with the rules. But the argument abandons any claim of entitlement. No right to an exception exists; exceptions depend on the grace of the court. You have a *right* to file if you comply with the rules. If you don't, you require the exercise of discretion by a body that has other concerns, including the concerns that led to the creation of the rule. The tenor of the article, that students *deserved* an exception, seems to misunderstand the very nature of the decision. The Board realistically could refuse to make exceptions here. It had announced in advance that it would make "**NO EXCEPTIONS**" to this rule. In addition, the reasons for an exception in this case are not the kind of reasons courts usually accept. Courts sometimes excuse deadlines when unavoidable problems, such as illness or trial in another court, prevent compliance. Courts rarely excuse deadlines for attorneys who misinterpret the rule without seeking a clarification or who attack the rule as poorly drafted or pointless. The authors seem to claim that they deserved an exception to the deadline because they spent a lot of time working on the brief. I have never seen an attorney include that kind of reason in a request for relief. As a justification for failure to comply with the rules, the reason quickly would make rules unenforceable.

The above discussion assumes that the moot court program should simulate the conditions of appellate practice fairly closely. If you believe moot court is just a game, you may disagree with the discussion. But perhaps you can accept that others, such as those who administer the program, seriously believe that it should simulate appellate practice and feel obliged to act accordingly. The importance in legal practice of complying with court rules requires that the Moot Court Board enforce their rules. In practice, failing to comply with court rules may jeopardize a client's interests, may subject an attorney to liability for malpractice, and may get an attorney fired. The sanctions in the simulation are minuscule by comparison.

I hope all students will learn something from this unfortunate episode. Education differs from practice in its willingness to accommodate student preferences. Teachers (including myself), by their willingness to make exceptions, risk teaching students that deadlines aren't real, that any excuse (and sometimes no excuse at all) is sufficient to escape the consequences of a failure to comply with the rules. The world of legal practice will not make similar accommodations. Practice insists on results, not excuses. Law school must try to help students adjust to the demands they will face in practice.

I praise the Moot Court Board for the courage to stand by its convictions. Having made an appropriate and reasonable decision under very difficult circumstances, the Board deserves your understanding at least and, I believe, your support.

The author is a professor at the University of San Diego School of Law and Advisor to the Moot Court Board.

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Robert Feinberg
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Dear Mr. Feinberg,

I am writing to let you know that I recently passed the California bar exam. I attribute my passing largely to having taken the PMBR full study course prior to the last test. I have enclosed a copy of the letter from the committee of bar examiners showing I passed. I have also enclosed a copy of my failing letter from the previous bar exam.

If you look at my scores from the earlier test you will notice that not only did I fail the test, I failed each and every portion of it. I did not pass one single essay, performance test or the multi-state. Although it is very embarrassing to point this out, I want to show you just how big a difference the PMBR course made to me.

While preparing for the first test I believed that if I had good knowledge of the law that it would be enough to carry me through. I discovered the hard way that there is a lot more to passing the bar exam than just knowing the law. It is at these other "Bar Taking Skills" where the PMBR course really shines. Knowing what the graders are looking for in an answer and how to give it to them was the thing that really made the difference for me.

The essay writing workshops gave me usable approaches to each type of potential question on the bar. Mr. Honigsberg's lectures on the performance test portions were not only informative but highly motivational. He really knows his stuff.

I would truly like to thank you for all your help in passing the bar. I am recommending the PMBR full course to all my friends who have yet to take the California bar exam.

Sincerely,
Steven R. Smith

FAILED WITH OTHER COURSE

THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
555 FRANKLIN STREET • SAN FRANCISCO, CALIFORNIA 94102 • (415) 561-8

STEVEN RANDALL SMITH
21276 WHITEPINE SP 94
TEHACHAPI, CA 93561

November 27, 1991

TOTAL SCALED SCORE 1197

Code Number 3992
Social Security No. 549-27-2572
Application Number 08120

The Committee of Bar Examiners regrets to inform you that you were unsuccessful on the July 1991 Bar Examination.

Your answers were all read once, and your total scaled score was below 1390.

Below are your raw MBE subtotals, your raw and scaled MBE scores, and your raw and scaled written scores. For the General Bar Examination, the total scaled score is the sum of: the scaled MBE score multiplied by .35, and the scaled written score multiplied by .65. For the Attorneys' Examination, the total scaled score is equal to the written scaled score.

MBE		Written	
nstitutional Law:		Essay 1:	
tracts:	15	Essay 2:	60.0
inal Law:	28	Essay 3:	45.0
nce:	16	Essay 4:	65.0
operty:	15	Essay 5:	55.0
	19	Essay 6:	55.0
	26	PT A:	60.0
		PT B:	50.0
			65.0
	119	Raw Written:	570.0
	1325.7270	Scaled Written:	1127.7341

TOTAL SCALED SCORE: 1197.0316

ds indicate that you passed the Multistate Professional Responsibility Examination

dmission to Practice Law in California (Moral Character Determination Application) with a ion to certify must be on file for you to be certified for admission. Committee records reflect the Moral Character Determination Application. We urge you to do so as soon as possible. latively small staff to process the over 6,000 moral character screening applications it rocessing depends in part on inquiry responses from persons and agencies over whom the As a result, it generally takes 180 days to complete the processing of an application. s possible.

or if you have any questions, please submit a written inquiry to either of the

ee the enclosed "Information for Unsuccessful Applicants".

Sincerely,
The Committee Of Bar Examiners

The Switch Is On To PMBR!

pmbr
BAR REVIEW

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