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MOTIONS

University of San Diego School of Law

Volume 39, Issue 2

October 2003

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CELEBRATING FIFTY YEARS

USD LAW KICKS OFF ITS GOLDEN ANNIVERSARY FESTIVITIES

By Juliana Lee
Staff Writer

On Tuesday, September 30, 2003, at the Joan B. Kroc Institute for Peace and Justice, USD School of Law kicked off a series of events celebrating 50 years of legal education with a very festive inaugural celebration.

The reception area was decorated with black and white photos of the law school from 50 years ago. The building and parking lot were instantly recognizable. Not much has changed. However, the people in the photos looked much different from the law students of today. For one, the students were dressed formally, in shirts and ties. For another, most were males. The first class of USD School of Law of 1958 graduated eight males. The following year, in 1959, it graduated its first female graduate. Today, the law school student body is comprised of 46% women and 24% minorities.

The masters of ceremonies were Grant H. Morris, Professor of Law and Gary W. Schons, graduate of the class of 1976 and Senior

Assistant Attorney General with the state's AG Office. After an invocation by Msgr. Daniel J. Dillabough, Dean Rodriguez welcomed the guests to USD and informed them that this inaugural celebration was a kick-off of many more events to come. Dr. Mary E. Lyons, President of USD, praised the law school for its scholarly reputation, quality of education, its professors and students. She further stressed the importance of a legal education, not merely for the purpose of practicing law, but also to enrich the understanding of all facets of life.

After the opening remarks, President Lyons and Dean Rodriguez honored Thomas J. Fanning, now 96, the first dean (pro tempore) of the law school, and presented him with a commemorative medal. Governor Gray Davis also presented the law school with a proclamation.

The remainder of the program consisted of a historical program, which sketched the law school's early years, its growth and expansion, and its continuation into the future. Photo images of the law school and faculty, then and now, were flashed on the screen during the presentations.

Keep an eye out for more upcoming events celebrating USD School of Law's 50th anniversary.

2003 THORNES CLOSING ARGUMENT COMPETITION

MOCK TRIAL BEGINS 2003-2004 SEASON WITH A BANG

By Nicole Rothstein
Staff Writer

When you think of oral advocacy at USD, Mock Trial is usually not the first thing that springs to mind. To a lesser organization, that might be a sore spot for debate. But USD's National Mock Trial Team is not one to stop to pat itself on the back. They let their record speak for itself.

The Mock Trial Team has consistently ranked among the finest teams in the nation and has been selected seven out of the last nine years as the best team in the 9th Federal Judicial Circuit. It is an eight-time winner of the Western Regional Championship of the Association of Trial Lawyers of America and a three-time winner of the American Bar Association Western Regional. Of the four to five competitions that the team participates in annually, USD has taken home on aver-

age three to four major awards. The team has never failed in its fifteen years to advance at least one team in each tournament. Not bad for an organization that started out 15 years ago by literally recruiting team members from the hallways.

Since then, the process of recruitment for USD's National Mock Trial Team has understandably undergone changes. Interested students are now chosen for membership on the National Mock Trial Team based on their performance in the highly competitive Thorns Closing Argument Competition, named in honor of their benefactor Michael T. Thorns. The competition is open to all 2L day, 2Levening and 3L evening students.

For the competition, participants are provided with a closed case file, including summaries of case law, witness statements, official exhibits and simplified rules of evidence. Each competitor is to prepare a 10-

minute closing argument, based upon this material, as either counsel for the Plaintiff or the Defendant (Plaintiff's attorney may do a rebuttal argument if he or she has not used all ten minutes in the original argument). These arguments are then presented in front of a panel of three current third-year trial team members.

The 2003 Thorns Closing Argument Competition drew a record 88 competitors this year, all vying for a chance to become a part of USD's prestigious National Mock Trial team. This year's competitors argued a fictitious case, *Jean Jones v. Kids-R-Ours*, involving wrongful demotion and termination under Title I of the Americans with Disabilities Act, 42 U.S.C. 12111 *et seq.* The facts revolved around an employee of a day care center with an epileptic seizure condition, who was terminated after having a seizure on the job.

Preliminary rounds of the competition took place on campus Monday-Wednesday, September 22,

Please see Mock Trial at page 9.

FROM THE EDITOR--Continuing our recherches du temp perdu during the law school's fiftieth anniversary year, this issue we reprint Dan Kaminsky's article on the 1997 Nathanson Lecture.

APRIL/MAY 1997

MOTIONS 9

"Lincoln as a Lawyer"

The 1997 Nathaniel L. Nathanson Memorial Lecture Series, John P. Frank, Speaker

By DAN KAMINSKY
Managing Editor

"The Lord Visited Springfield once and won't come here again," ends a favorite anecdote of Abraham Lincoln describing the town in which his life was spent as a circuit trial attorney. The population in the 1840's was somewhere around 3000 to 7500. Lincoln's law office was 20' by 22' and was described as cluttered, with even a few fallen seeds sprouting in the corner.

John P. Frank went on to describe the frontier legal system in which Abraham Lincoln practiced. His manner was calm and experienced, his voice and tone gruff yet refined. His own personal experience as a lawyer and member of legal academia added a certain intangible aura to his lecture.

John P. Frank is a partner in Lewis & Roca. He attended the University of Wisconsin where he received his M.A. and LL.B. in 1940. He received his J.S.D. from Yale in 1947. He served as clerk to the Honorable Hugo L. Black in the Oct. 1942 Supreme Court term. He has been involved in over 500 appeals in forums from the Arizona Court of Appeals to the United States Supreme Court. Among his many accomplishments are 11 publications on legal history and constitutional law.

Most of us think of Abraham Lincoln as the distinguished President, the man whose efforts began the downfall of slavery.

But his political activities were only a small part of his life's work. He was first and foremost a trial attorney. He supported his wife and family with his hometown law firm.

Lincoln conducted thousands of trials and hundreds of appeals in his career. It wasn't uncommon for Lincoln to juggle five or ten trial matters a day. His firm handled anywhere from 1/5 to 1/3 of all the cases arising in Springfield.

His areas of practice were roughly 50% real property matters, followed by personal property matters, divorce, criminal, and a very few public interest cases.

His income in the 1840's was around \$2,000/year. Average fees ranged from \$2.50 - \$50 a case, \$10 - \$100 for Illinois Supreme Court appearances. \$100 was an extremely large fee.

"He had none of the avarice of the get, but all the avarice of the keep," Frank described.

Lincoln's net worth before his Presidency was \$15,000, but \$83,000 after, due mostly to his \$25,000/year salary as President. Most of his life was modest yet comfortable.

Mr. Frank described Lincoln as an awkward man, physically and personally, at the start of his career. However, his humorous, dignified and concise mannerisms evolved into unmistakable qualities of an affective jurist.

What came through loud and clear from the lecture was that Lincoln had an innate ability to simplify issues, to whittle down a case to the core elements. He was extremely brief and concise. He related to the jury as people and allowed them to focus on what he thought were the deciding factors of a case.

"He spent little time preparing a case, relative to today's standards," Frank described, but the body of law was a century less mature. "His true gift was appealing, clear, brief presentations."

He cared little for credentials, and when asked to take an apprentice he responded with the thought that to be a lawyer, where you read, or who with was unimportant.

Dedication and an ability to understand the material is all that is required.

Lincoln did spend three terms on the Illinois legislature and two years in Congress prior to his Presidency. Mr. Frank was of the opinion that Lincoln did little lobbying, however, although he did occasionally represent railroads. He seemed to present an attitude that harbored dislike of overly political or bureaucracy systems.

"A bargain is a bargain is a bargain." Lincoln was devoted to contract theory and the bond of a man's word. He carried these ideals over into his Presidency and view of the Constitution. "The Union was a

contract, the Constitution the agreement." Secession is a breach, and the contract cannot be nullified but by agreement by all the parties. We all realize how these stern ideals shaped the modern United States.

Overall, the lecture was a pleasant experience. The audience, including Professor and former Secretary of Labor Willard Wirtz, Mrs. Nathanson, and much of the USD law faculty, was distinguished and added to the historic atmosphere. Even though I could not fight the feeling that perhaps Mr. Frank was overly flattering and that no man, American Hero or otherwise, could be so perfect, I cannot fault the lecture for it. The qualities he described were of the ideal historical figure, innocent yet intelligent, human yet moral, honest yet successful. Abraham Lincoln is a great American figure, and as we recall such models of behavior and achievement, perhaps their qualities should be slightly out of reach. I came away realizing that as I aspire to reach certain levels of knowledge, dignity, and achievement, I am better placing my goals comparably just out of reach. Becoming a modern day Lincoln may be impossible, but in our continuing efforts we are all better for the endless pursuit.

I end as Mr. Frank ended, stating that the qualities that made Abraham Lincoln great were not qualities of a lawyer or President, but qualities of humanity and conscience, the qualities of a good person.

"He had none of the avarice of the get, but all the avarice of the keep ..."

Philosophy,

continued from page 7.

by the notion that what "harms" others is not permitted. If I have a "right" to do something, it seems like others have an obligation to allow us our rights, particularly if our rights are based on nothing but some arbitrary decision or law that admittedly has no truth as its foundation. Ironically, this view that all is permitted combined with the notion of "harm," has worked to expand the powers of the state, not to lessen them, since the state now has no theoretic limits about what is its competence.

In conclusion, let me again recall the sentence of Chesterton: "What a man can believe depends on his philosophy, not on the clock or the century." Within all professions - law, medicine, clergy, farming, politics, craftsmanship - there is need of those who are also devoted to what is. Philosophers are not the only ones affected by answers to philosophical questions. Indeed, the very existence of revelation suggests that not even philosophy can answer all philosophic questions. In the course of his short active life of about twenty five years, Thomas Aquinas is said to have asked some ten thousand questions. What is significant about Aquinas is not that he asked the ten thousand questions. What is significant is that he also answered them. If philosophy is a quest, it is also a search for answers. It does not depend on the time or the century.

"What is truly human is never the average." "You are not to tell lies to the judge." "At philosophical conventions deaf men make speeches for other deaf men." Science "can say nothing about what a man is or what he must do." "The truths of philosophy ... are not restricted to the sometimes ephemeral teachings of the professional philosophers." "The standard by which truth and falsity, good and evil, are measured, is not alone the divine, but also the human." What is significant about Aquinas is not that he asked ten thousand questions. What we can believe does indeed depend on our philosophy.

Egyptian Law,

continued from page 4.

sented in English if there is a foreign issue involved.

Finally, about Egyptian law. Although Egyptian law, as stated in the Britannica Concise Encyclopedia, has existed since 3000 B.C., modern Egyptian law started after the French invasion to Egypt in 1798 - 1801. During the administration of Mohammed Ali and his royal successors, and after Egypt claimed Sudan and the Arab Peninsula (Hegaz) as Egyptian territory from the Ottoman Empire, the administration maintained a good relationship with France. The principles of French law became the main principles of Egyptian law. The court system was influenced by the French concept of a strict separation of the administrative legal system from the judicial system. Therefore, in Egypt there are two judicial classifications. First, the Civil, Commercial and Criminal Courts; the Egyptian High Cassation Court is the tribunal of last resort for these courts. Second, administrative courts have the High Administrative Court as their highest court. Courts from either category are barred from adjudicating the constitutionality of a statute or an administrative regulation. These issues are reserved to the Egyptian High Constitutional Court.

(Mr. Mottaleb is an LL.M.C. Candidate at the University of San Diego School of Law, as well as an Attorney at Law in the Egyptian High Appellate Court and State Council).

Smart Savings



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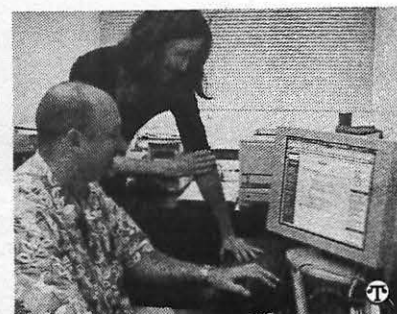
(NAPS)—Spending money is easy; saving it is another matter. That's why the Treasury Department is making it easier for Americans to purchase, manage and redeem U.S. Savings Bonds through TreasuryDirect at www.treasurydirect.gov.

"Savings bonds are a safe investment that can be purchased securely by anyone with Internet access, 24 hours a day, seven days a week," said Don Hammond, Treasury Fiscal Assistant Secretary. "Savings bonds provide a guaranteed return."

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Consumers can now use TreasuryDirect to purchase, manage and redeem savings bonds.

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In the future, the ability to purchase and manage additional Treasury securities, such as marketable bills and notes, will be added to TreasuryDirect. To learn more about savings bonds and how to open an account, visit www.treasurydirect.gov.



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The Dean's Corner

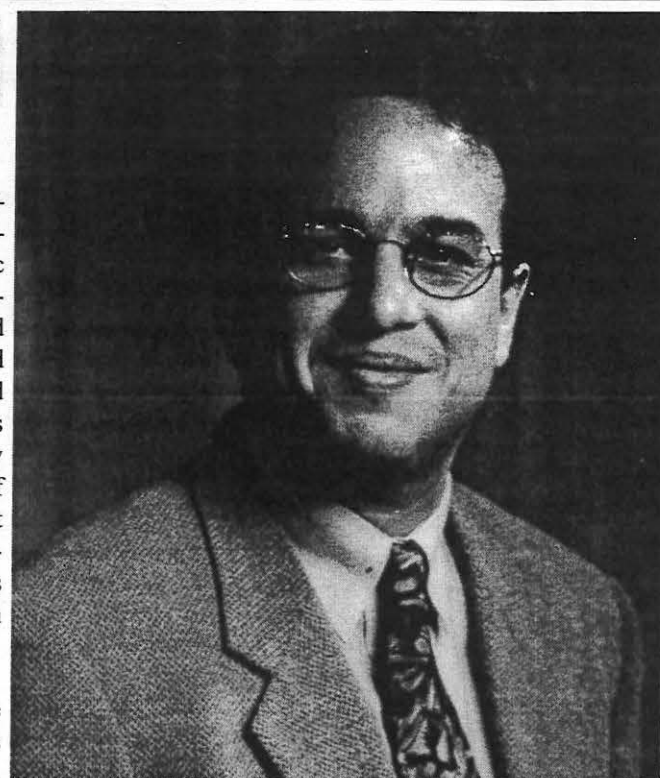
From the Dean's Corner,

The Law School 50th Anniversary celebration has begun in stellar fashion. Two hundred plus alumni, students, faculty, staff, members of the local bench and bar, and representatives from many state and local government offices were on hand at the Kroc Peace and Justice Center on September 30 to usher in the beginning of this historic occasion. Hugh Friedman, Sister Sally Furay, Larry Alexander and Bert Lazerow provided an excellent and entertaining look at the past 50 years. Professor Grant Morris and Senior Assistant Attorney General and alum (Class of 1976) Gary W. Schons proved worthy masters of ceremonies. President Mary Lyons addressed the accomplishments and strengths of our outstanding school, and I looked forward to our continuing journey to the next level of excellence as we enter this new millennium. One of the highlights of the evening was the presentation of a special medallion to Thomas J. Fanning, the first dean of the law school. Dean Fanning, now 96 years young, received a standing ovation and shared some eloquent remarks with an appreciative audience. The evening's festivities were videotaped and we hope to archive the event for viewing on our 50th Anniversary web page. Stay tuned for details.

The display cases on the second floor of Warren Hall are taking on a new look. Gone are the scholarly publications of our faculty and in their place are photos and articles relating to the history of the law school. In a "that was then, this is now" retrospective, you will find the first volume of the law review, the first issue of the student newspaper, the first law school bulletin, among others. The current counterparts to these items are also on display. In addition, archival photos show the law school under construction, students hard at work (with cigarettes at hand!) in the old library, and classes in session. Be sure to check out the "Law School Wives Club" Scrapbook and the poem, "A Tribute to a Law School Widow: Unsung Heroines: I was Married to a Law School Library Lothario." We plan to change these displays over the next several months to reflect various periods in our law school history and/or changes in the law. If you are interested in participating in this project, please contact Theresa Hrenchir, Director of Special Projects, at WH 202 or by phone at 619-260-7438.

Congratulations to Mike Diaz and Alfonso Morales who were scholarship recipients at the recent San Diego La Raza Lawyers Association Annual Scholarship and Awards Dinner. Kudos also to Robert Scott Dreher, class of 1985, who was named Pro Bono Attorney of the Year by the San Diego Volunteer Lawyers Program at its recent 2003 Justice for All Awards Dinner. Another law alum, George "Woody" Clarke, class of 1977, was appointed by Governor Davis as a judge of the San Diego Superior Court. Clarke, currently serving as a Deputy District Attorney, is one of the leading experts in the United States on the use of DNA and other scientific evidence in criminal cases.

On a somber note, the Law School joins with the rest of the University in mourning the loss of Joan B. Kroc. Mrs. Kroc, a well-known and respected philanthropist, touched our campus in a particularly special way. Her dedication to non-violence and the cause of peace and justice led to the establishment of the Institute which bears her name. Her generosity, both financial and of spirit, will be a legacy which will long endure.



Joan B. Kroc: *In Memoriam*

Dear Campus Community:

The University of San Diego community mourns the passing October 12 of Joan B. Kroc, a shining light for peace, and sends its deepest condolences to her family and all those who had the fortune to know and love her. Joan Kroc was a dynamic force for peace, a force matched only by her philanthropy, which gave her wings to spread that vision and passion to others. The University of San Diego is proud to have a living legacy to that vision and passion in the Joan B. Kroc Institute for Peace and Justice, established with a \$25 million gift from Mrs. Kroc in 1998 with the institute building dedicated in December 2001. Joan Kroc was an exemplary woman, committed to making this world a better place and doing so through her compassion, energy, and tremendous generosity. We will miss her deeply and extend our sympathy and prayers to her family and friends.

Sincerely,

Mary E. Lyons, Ph.D.
President

VOLUNTEER!

San Diego's abused and neglected children need you. There are over 7,500 children in foster care waiting for help. Become a child advocate today. Serve as a Court Appointed Special Advocate (CASA). You'll be glad you did. All training provided. Volunteers research the case, gather information, attend court hearings and lend support to the child. The next information sessions will be November 4 and December 2. Call Voices for Children at (858) 569-2019 or visit www.voices4children.com.

CASES AND CONTROVERSIES

By Damien Schiff
Editor

Depending upon whom one asks, we Californians are headed squarely down the road of political perdition and anarchy, or have courageously and successfully asserted the people's sovereignty in choosing who shall govern us. This is the debate which the Recall has produced. In the ocean of political babble spewn from the television talking heads following Arnold's electoral termination of Gray, one theme has been particularly striking: California's Recall represents a shift from traditional American representative democracy to a European-style parliamentary system. Along these lines, the recall is viewed as the functional equivalent of a "no confidence" vote.

This observation contains a kernel of truth. Those states, including California, that have recall provisions adopted them during the early part of the twentieth century, when the Progressive movement gripped the nation. The recall process was considered to be a needed and useful check on the alarmingly pervasive influence of Big Money, Big Finance and Big Industry. America was rapidly changing, in part due to new waves of immigration, in part due to the effects of mechanization and urbanization, and in part due to the emergence of the United States as a so-called imperial power following the Spanish-American War.

Widespread fear existed that the army of Cincinnati, upon which Jefferson had placed such faith, and for which William Jennings Bryan delivered his famed "Cross of Gold" oration, was quickly being replaced by the army of financiers, venal politicians and unfeeling Rockefeller. America's faith was also threatened by the New Science; Jennings Bryan ended his prosecution of the evolution-teaching John T. Scopes with a tuneful a capella rendition of *Faith of Our Fathers*. It was that faith which was being lost, and which recall provisions, in a tangential manner, were meant to regain.

Recall statutes represented just one division in the legislative army unleashed by the Progressives. We can ascribe several constitutional amendments to their efforts: the 16th, which permitted Congress to tax the people's income irrespective of the apportionment principle; the 17th, which provided for the direct election of senators; the 18th, which instituted prohi-

bition; and the 19th, which precluded the states from denying their citizens the right to vote on account of sex. These provisions, along with the recall statutes, betray three themes common to the Progressives: faith in Big Government; faith in the People; and neo-Puritanism.

Were any of these themes present in the California Recall? As for Big Government, that was if anything an anti-theme. As for neo-Puritanism, only the sophist could harmonize the Schwarzenegger campaign with any form of Puritanism. But as for faith in the People, that indeed was the political value most often voiced by the Recall's supporters. They argued that Davis had violated the public trust, that his election one year ago was corrupted by his active concealment of the state's woes, and that consequently whatever mandate he may have had to govern had been thoroughly eviscerated by intervening events.

It is one thing to identify the Recall with the venerable populist traditions of American politics; it is quite another to divine from the recent special election a movement toward a parliamentary system. Now, one may grant that both the Progressive and Parliamentary systems contain similar weaknesses. Most importantly, each is dangerously susceptible to majoritarian excess. That very excess precipitated the first shots at Concord and Lexington; that very excess deposed Louis XVI and decapitated thousands in a gruesome reign of terror; and it would not be untenable to hold that this characteristic excess aided and fomented the rise of nationalism in 1930s Europe.

So also one observes excesses with the results of Progressivism, although not to the same degree as the aforementioned examples. The demise of the *Lochner* era and the institution of the New Deal come immediately to mind. The modern crusade against tobacco is if anything a resurgence of neo-Puritanism. Perhaps too one might consider that the recent Recall is really Progressivism *redivivus*; popular excess remains a matter of degree.

There is then at least a superficial commonality between the parliamentary system and what can be termed the neo-Progressive system exemplified by the Recall. But does this link between the two ideologies bode evil for the American Republic? Insofar as one speaks of a particular state ordering its electoral affairs according to the likes of its citizens, the danger of

majoritarian excess is one that was contemplated by the Framers. It was they who took the gamble of federalism, hoping that the several states might prove to be several laboratories of freedom, rather than a farago of petty fiefdoms and pulpits for self-interested public men. And it should not surprise any astute student of American government that the *federal* constitution contains no recall provision (indeed, the Electoral College stands as a monument to the anti-democratic tendencies of the Founding Generation).

The Recall itself produced no oddities, although it might well have. Had Davis been defeated 51%-49%, and Schwarzenegger elected as successor with 25%, many would the cries have been, "the people's will is frustrated!" That eventuality was avoided; and now occupies the governor's mansion a man commanding more popular support than his predecessor did in the November 2002 election. This result may well strengthen the faith of the Recall's supporters and quiet the vituperations of its enemies.

And so we are left with the question with which we began this ramble: is the end near for ordered liberty in California? Will tyranny replace democracy, will demagoguery replace leadership, will panache replace substance? In a decade's time will California have a Prime Minister rather than a Governor? The answer must be no, but not because of some arcane strand in the ideological bundle of American democracy that makes our system incompatible with the ultimate goals of a Recall-oriented society. Rather, the answer to the Chicken Little parade of horrors is "no" simply for this reason: Americans, including Californians, are not fond of government. The modern welfare state notwithstanding, it is the avatar of the rugged individualist and Jefferson's yeoman farmer; the ideology of Emerson's transcendental self-reliance and Thoreau's Eastern escapism; the *Weltanschauung* connoted by Muir's naturalism and Teddy Roosevelt's San Juan Charge. For all these examples point to the unavoidable conclusion that Americans prefer subsidiarity to centralization. As a consequence, they would much rather be left alone and leave the politicking to those who have a penchant for vexatiousness. Yes, a recall may be necessary, but so may be the occasional dose of cod liver oil: both are medicine, both leave a bad taste in one's mouth.

First Annual Bridesmaid Charity Ball

By Kaelyn Romey
Special to Motions

The San Diego Barristers Club would like to present its 1st Annual Bridesmaid Charity Ball! The event will be held on October 25, 2003 at Galileo 101 Ristorante & Bar in Downtown San Diego.

Remember that bride who said you would wear that dress again? Well, now is your chance. Get out those old bridesmaid dresses, if they still fit, put them on. And if they don't, donate them, and wear cocktail attire! Gentlemen, come as crazy as you dare.

Please assist us in taking on a major issue in the San Diego community: domestic violence. The charity proceeds recipient this year is "Becky's House". For those of you who are not familiar with this program, please read on.

In 1999, Star 100.7 FM made it their goal to raise enough money to start building "Becky's House". Becky's House is an 18-month residential program for survivors of domestic violence and their children. This residential program provides furnished residences for families, counseling and parenting classes, legal assistance, tutoring, GED and continuing education assistance, job skill assessment, training and career counseling, and education and activities for children.

The concept of Becky's House became a reality through the vision and foresight of STAR, and the help of Councilmember Barbara Warden and thousands of radio listeners. The challenge was to build Becky's House, provide counseling services, job training assistance, and to help victims of domestic violence gain a new start on life. Becky's House began when Dr. Barbara DeAngelis made a guest-appear-

ance on the Jeff and Jer Showgram in late January 1999. A listener (we named her Becky) called to seek advice about her troubled relationship. Soon they uncovered that "Becky" was a victim of domestic abuse.

Hundreds of STAR listeners heard the story of "Becky" and her young son and rushed to their aid. The following morning between 6 and 10AM, listeners donated a tremendous sum of \$43,000 for "Becky" to get back on her feet. This demonstrated not only the incredible generosity and responsiveness of the listeners, but also a sincere desire to help victims of domestic abuse.

The San Diego Barristers Club has chosen Becky's House as the recipient of all charity proceeds generated by the 1st Annual Barristers Bridesmaid Ball.

If you know of anyone who would like to make a donation of cash or prizes, or someone who would like to help sponsor this event please contact Kaelyn Romey at kromey@sandiego.edu. Becky's House is a non-profit organization which qualifies as a 501(c)(3) organization. The program's Tax ID Number is 95-1661119.

Our second goal for this event is to generate donations of gently worn formal dresses which will be donated to young girl's in the community who cannot afford to purchase prom dresses on their own. So empty those closets and give to a good cause! Please show your support by attending and helping promote this year's event. Tickets are \$35 before and \$40 at the door. Your ticket price will include beer, wine, light appetizers (6:00 - 9:00, music & dancing (all night)), and a \$15-20 donation to Becky's House!

Please feel free to check out the Barrister's Club website at www.sdbarristers.com for more information.

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Professor Lester Snyder 2003 Witkin Award Winner

By Damien Schiff
Editor

Professor Lester Snyder, longtime faculty member of USD School of Law, is a 2003 Bernard E. Witkin Award winner.

A USD faculty member since 1983, Professor Snyder was awarded the Witkin honor for his tremendous contributions to the study of tax law, both in its practical and theoretic applications. For almost twenty years Professor Snyder served as the editor in chief of the *Journal of Real Estate Taxation*. He also was the first professor in residence at the Justice Department's Tax Division. And he is the author of numerous scholarly articles on tax policy and reform. Professor Snyder obtained his bachelor's degree from Syracuse, his law degree from Boston University and his LL.M. in tax from Columbia.

The Witkin Award is presented annually by the Law Library Justice Foundation, which uses the funds generated from the award ceremony dinners to purchase books for use by area practitioners. The legal materials are kept at the San Diego Public Law Library. Representing the foundation was Charles R. Dyer, Esq., Director of the San Diego Public Law Library.

Most California law students are familiar with the award's namesake through their researches into California law. Mr. Witkin, a titan of California law, produced a scholarly treatise on almost every important division of the Golden State's jurisprudence. But he was much more than a scholar. Mr. Witkin had a deep interest in the legal profession and those called to live it. In his memory the Witkin award is given annually "to honor members of the San Diego legal community for civic leadership and excellence in the teaching, practice, enactment, or adjudication of the law."

Professor Snyder was introduced at the award dinner by Dean Daniel B. Rodriguez. The Dean warmly recalled the time during which he has been professionally associated with Professor Snyder. The Dean noted that Professor Snyder is one of those people who make a good first, second, third and continuing good impression. In reminding his listeners of Guido Calabresi's standard for a good dean (i.e. someone who can pass by each faculty member's office door and say to a visitor what that faculty member does), Dean Rodriguez praised Professor Snyder for being an essential and invaluable asset to the law faculty, especially in the field of tax.

Professor Snyder accepted the award with humility. He informed the audience that, when first notified by telephone that he had been chosen to receive the Witkin award, he queried his interlocutor, "We have more than one Snyder at this school; are you sure you have the right one?" Professor Snyder thanked all his fellow faculty members, especially his tax colleagues, for their friendship and support through the years.

Professor Snyder was accompanied by his daughter and two grandchildren, as well as two former LL.M. students. Nearly two dozen USD Law faculty and staff members were in attendance to congratulate Professor Snyder on his achievements.

Receiving the Witkin Award with Professor Snyder were Justice Judith Haller of the California

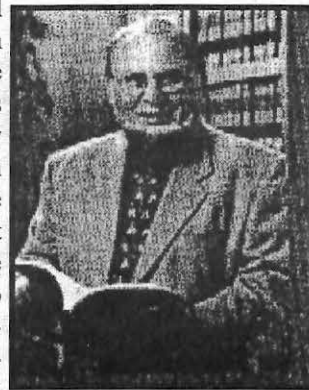
Court of Appeal, Fourth District, and Janice Brown, Esq., an accomplished local practitioner.

Professor Snyder is not the first USD faculty member to receive the Witkin Award. In 1999 Professor Hugh Friedman was honored; and in 2000, the late Dean and Professor Donald Weckstein received the accolade.

The award dinner was held at the Sheraton Harbor Island, East Tower. The menu included a mezzelun salad with spiced pecans and dried fruit. The main course was beef tenderloin and pistachio-crusted sea bass, served with vegetable and mashed potatoes. Cheesecake and coffee followed.

Interspersed throughout the evening were various clips of the late Mr. Witkin speaking on law and his own scholarship. Two of these vignettes are worth recalling. In one interview Mr. Witkin recollected the famed California Supreme Court decision of *Li v. Yellow Cab Co.*, which instituted the comparative negligence regime for California and began a movement throughout the nation's jurisdictions toward abandoning the traditional common law contributory negligence doctrine. Mr. Witkin wryly noted that the California Supreme Court's "brilliant if not convincing" decision in *Li* was a monument to the good effects of judicial leadership in policymaking.

A second memorable clip came following a brief introduction by Master of Ceremonies Kenneth Turek, Esq., concerning Mr. Witkin's inimitable laugh. All those in attendance who had known Mr. Witkin seemed to be of the unanimous opinion that Mr. Witkin's laugh was unique. Accordingly, at the end of the evening a clip was shown of Mr. Witkin laughing; this writer concurs in Mr. Witkin's friends' good-natured judgment.



Comparative Law

Legal Education and the Laws of Egypt

By Ayman M. A. Mottaleb
Special to Motions

The Faculty of Law (law school) was the first modern Egyptian institution offering degrees at a university level. The Cairo University Faculty of Law was established in 1868 under the name of "The School of Administration and Foreign Languages." This school was created because the administration wanted to eliminate the power of the clergy, who were theretofore the main source of education in Egypt. This shift in the educational and administrative process was the first step in separating the State from religious institutions. Scholars and administrators competed for admission to this new and non-traditional school. Moreover, the opportunity of obtaining a publicly funded scholarship to France for talented students and scholars led many Egyptians to ignore traditional religious education. In 1882 the School of Foreign Languages and the School of Administration became two independent schools, and by 1925 the latter became one of the faculties of the Egyptian University, latter Cairo University, in turn renamed "Faculty of Law."

Egyptian law professors are influenced by civil law principles because of the original nature of Egyptian law. Therefore, law students are expected to analyze comparative legal issues based on several legal theories, mainly Egyptian, French, German and Italian. However, in studying constitutional law students are expected to understand, in addition to the aforementioned legal systems, the basics of the American and English constitutions.

By the 1960s, over 20 law schools had been established in Egypt. Egyptian jurists held positions in many internationally recognized legal institutions, e.g. the 6th Secretary General of the United Nations, Professor Boutros Ghali; and, as International Court of Justice Judges, the Hon. Abdel-Hamid Pasha Badawi (1946-1965), Dr. Abdullah al-Erian (1979-1981) and Dr. Al-Arabi (2001 - present). Recently, Egyptian law scholars have become more interested in studying American law; for example, the Hon. Hesham Fawzi, member of the Egyptian High Constitutional Court (the highest Egyptian judicial institution), is conducting comparative research on "The Retroactive Effect of Law Voided by the United States Supreme Court Rulings." The legal cooperation between the American and Egyptian legal institutions is at a remarkable stage. For the last three decades, Egyptian mediation and arbitration has been influenced by the U.S. legal system; for example, memoranda and petitions in some of the Egyptian arbitration centers must be pre-

ST. VINCENT DE PAUL'S NEEDS YOU!

Twice a week students head out in a USD van on a 15 minute drive to St. Vincent de Paul/Joan Kroc Center to help serve some 1,000 meals to homeless men, women and children. Trips are made during mid-day "dead hours" (10:50AM to 12:30PM); students return in time for afternoon classes. Please call University Ministry at x4735 or stop by the office in the UC.

Did You Know?

(NAPS)—Identity theft is one of the fastest-growing forms of white-collar fraud, with up to 500,000 individuals victimized each year. The American Bankers Association suggests that you keep an eye on account activity. Before discarding bills, cancelled checks, bank statements, etc., tear them up or shred them. Don't carry your Social Security card, birth certificate or passport in your wallet or purse. Order a copy of your credit report twice a year, and make sure all accounts and inquiries belong to you. For additional information on how your bank can keep your finances and identity safe, call 1-800-BANKERS or visit the Web site at www.aba.com.

The American Automobile Association anticipates responding to 7.4 million vehicle breakdowns this summer. The most common causes of vehicle failure can often be discovered during a routine oil change service. The Jiffy Lube Signature Service® oil change includes replacing oil with up to five quarts of quality motor oil; replacing the oil filter



with a quality filter; visually inspecting antifreeze/coolant reservoir levels; inspecting the air filtration system, wiper blades and lights; checking the condition of belts; vacuuming interior floors; cleaning exterior windows; lubricating the chassis (when applicable); checking and setting tires to the proper pressure; and checking and topping off transmission/transaxle fluid, differential fluid, power steering fluid, windshield washer fluid and battery water. Visit www.jiffylube.com for more road trip tips.

Please see Egyptian Law, page 11.

RED MASS 2003

By Damien Schiff
Editor

The Red Mass, a tradition dating back to the late Middle Ages, was celebrated by the Law School and the San Diego legal community this October 6, 2003 at Founders Chapel on the campus of the University of San Diego. The Red Mass derives its name from the practice of jurists, scholars and lawyers wearing red robes during Mass to signify the Holy Ghost, whose guidance they invoked for the carrying out of their duties. In the United States, the Red Mass is held on the first Monday of October, to coincide with the opening of the Supreme Court's October term.

The Mass was sponsored by USD Law, USD Ministry and the San Diego Thomas More Society. Present at this Year's Red Mass were many important figures in the local legal community, including several state and federal judges, noted practitioners and members of the USD Law faculty. Dean Daniel Rodriguez gave the "Call to Worship," and several USD law students served as lectors, alter servers or extraordinary Eucharistic ministers. Dr. Mary Lyons, President of the University, and Dr. Frank Lazarus, Provost, were also present.

This year's Red Mass featured the Most Reverend Salvatore Cordileone, Auxiliary Bishop of San Diego, as the principal celebrant and homilist. Bishop Cordileone's presence was especially apt; prior to his episcopal consecration, he had spent a number of years as a canon lawyer working in Rome at the Apostolic Signatura.

Bishop Cordileone's homily focused on the readings taken from Wisdom and St. Matthew's Gospel. In the former, the bishop commented upon the wisdom of Solomon, who showed more than mere prudence in asking for the knowledge necessary to govern his people justly; Solomon also revealed a profound humility in admitting that he did not have all the answers, that a higher assistance was imperative.

Once that Solomonic wisdom is received, the purpose of the law, said Bishop Cordileone, becomes clear: "to promote the common good and to protect rights, especially those of the most vulnerable and marginalized in society." In answer to the question why we have law in the first place, the bishop sought guidance from St. Thomas Aquinas:

"It is evident that the proper effect of law is to lead its subjects to their proper virtue; and since virtue is that which makes its subjects good, it follows that the proper effect of law is to make those to whom it is given, good . . . For if the intention of the lawgiver is fixed on true good, which is the common good regulated according to divine justice, it follows that the effect of law is to make people good."

Therefore, the responsibility of lawyers, judges and law professors is clear: to create, interpret and apply the law "in accordance with divine justice and eternal truth, so that our law participates in that truth and reflects the very justice of God."

The gospel passage from St. Matthew concerned the end times, with Christ separating the just from the unjust according to how they treated their fellow human beings and, in turn, how they treated Christ present in one another. This standard of judgment in the gospel passage elicits a nonplused response from the elect: "'Lord, when did we see thee hungry, and feed thee: or thirsty, and give thee drink? And when did we see thee a stranger, and take thee in: or naked, and clothe thee? Or when did we see thee sick, or in prison, and come to thee?' And answering the king will say to them, 'Amen I say to you, as long as you did it for one of these, the least of my brethren, you did it for me.'" (Matthew 26:37-40).

Bishop Cordileone noted that those who had not ministered to their brethren were castigated even though they professed the same ignorance as the elect. The fault

of the damned was that they "lacked that humility to be other-centered." From this conclusion emerges a truth "we need to be reminded about frequently, the truth that we cannot separate the demands of faith from how we live our life in public, that we cannot separate morality from policy, or conscience from action."

Bishop Cordileone referenced the Vatican's recent statement on Catholics in political life, which teaches that "democracy must be based on the true and solid foundation of non-negotiable ethical principles, which are the underpinning of life in society." These principles must be derived from the natural law, imprinted in every human heart and knowable, to varying degrees, by every human person. For "if fundamental human rights are not those which are self-evident from the natural law, which comes from God, but rather are defined by human beings, then there are no fundamental human rights, since those who have the power to define rights have the power to change them. Clearly, if rights can be changed, they are not fundamental!"

Taking a moment to praise the glorious example of St. Thomas More, patron of lawyers and politicians, Bishop Cordileone asserted that More represents the highest aim of the legal profession and indeed of the Christian life: "fidelity to conscience and fulfilling one's duty exactly and faithfully, no matter how difficult." More had risen from humble beginnings to become the Lord Chancellor of England and a trusted confidante of King Henry VIII. But More refused to approve of Henry's divorce to Catharine of Aragon and subsequent marriage to Anne Boleyn, and steadfastly declined to sign Parliament's Oath of Supremacy. Thus the king's ire turned upon the saint. Having been falsely convicted of treason, More was given a chance to speak before his sentence was read. More took the opportunity gladly:

"Forasmuch as, my lord, this indictment is grounded upon an Act of Parliament directly repugnant to the laws of God and his Holy Church, the supreme government of which or of any part whereof, may no temporal Prince presume by any law to take upon him, as rightfully belonging to the See of Rome, a spiritual pre-eminence by the mouth of Our Saviour Himself, personally present upon the earth, only to St. Peter and his successors, Bishops of the same See, by special prerogative granted, it is therefore in law amongst Christian men insufficient to charge any Christian man."

After the sentence of death was read to him, St. Thomas stated:

"More have I not to say, my lords, but that like the Blessed Apostle St. Paul, as we read in the Acts of the Apostles, was present, and consented to the death of St. Stephen, and kept their clothes that stoned him to death, and yet be they now both twain Holy Saints in heaven, and shall continue there friends for ever, so verily I trust and shall therefore right heartily pray, that though your lordships have now here in earth been judges to my condemnation, we may yet hereafter in heaven merrily all meet together, to our everlasting salvation."

"The peace of Christ ruling in our hearts; that is the ultimate effect of the law of God." In reaching that goal martyrdom may be required us, as it was of Thomas More, argued Bishop Cordileone. But the bishop continued, "If that be the case, so be it! There is no other way than integrity—and we all need constantly to remind ourselves of this—there is no other way than integrity for the peace of Christ to rule in our hearts, the peace which no human authority can take from us precisely because it is the peace of conscience. It is the peace which lasts to eternity!"

Following the Mass, a scrumptious buffet was served in the foyer of Founders Hall, consisting of carved turkey sandwiches, grilled vegetables, cheeses and brie, pasta salads, dried fruits and spreads. An elegant tray of desserts was served in the French Parlor. Attendees were treated to petit fours, brownies, lemon bars, fruit torts and other delectable delights.

"For if the intention of the lawgiver is fixed on true good, which is the common good regulated according to divine justice, it follows that the effect of law is to make people good."—St. Thomas Aquinas

Professor Kenneth Culp Davis: *In Memoriam*

By Jack Williams
The San Diego Union Tribune

More than 50 years ago, Kenneth Culp Davis brought together various legal disciplines under one unifying title: administrative law. Beginning with a 1951 text, which he supplemented with a multivolume treatise in 1958, Mr. Davis explained the central role of administrative law in modern government.

His body of work earned him the moniker "the father of administrative law." It also served as a guideline for lawyers who practice before administrative agencies and judges who review agency decisions.

Mr. Davis, who taught at the University of San Diego from 1976 until his 1994 retirement, died of natural causes Aug. 30 in San Diego. He was 94.

"Davis' shadow falls over virtually all that administrative lawyers do," said Bill Funk, chairman of the administrative law section of the American Bar Association. "To say that he was a giant in his field is like saying Mount Everest is a big mountain."

Carl Auerbach, a law professor recruited by Mr. Davis to USD, said, "Some lawyers practicing before government agencies doubted that there was a unified body of law that could be described as administrative law. Ken's treatise created the field."

Such disciplines as evidence law, procedural law and constitutional law fell under Mr. Davis' administrative law umbrella.

His contributions to his field included a role in the Administrative Procedure Act, a 1946 law intended to guarantee the fairness of government proceedings by governing the relationship between administrative agencies and the individuals and businesses they influence.

Earlier this year, the act came under the national spotlight when certain authorities challenged the legality of proposals by the Bush administration. The proposals concerned changes in the Medicare program to make it more difficult for beneficiaries to appeal denial of benefits.

While at USD, Mr. Davis was voted into the prestigious American Academy of Arts and Sciences and in 1984 published a second edition of his administrative law treatise.

He attracted prominent educators to the USD law faculty, including Auerbach, the former dean at the University of Minnesota; Nathaniel Nathanson, an administrative law teacher at Northwestern University; and Willard Wirtz, a law professor at Northwestern who served in the Kennedy administration as secretary of labor.

Known as an indefatigable worker, Mr. Davis

wrote and kept abreast of legal developments well into his 80s. Colleagues said he was fit enough to frequently challenge and defeat much younger men at squash and racquetball.

Mr. Davis was born in Leeton, Mo. After earning a bachelor's degree at Whitman College, he received his law degree at Harvard in 1934.

He practiced law individually and with the federal government before entering the field of education.

Teaching appointments took him to the universities of Virginia, Texas, Minnesota, Harvard and Chicago. He left Chicago in 1976 to join the USD faculty.

During his career, he published more than eight dozen scholarly articles in national law journals. In *Discretionary Justice*, a monograph he published in 1969, Mr. Davis argued for greater legal constraints on administrative officials in policy formation.

Survivors include his wife, Inger; daughter, Margaret Davis Galanti of Naples, Fla.; son, Malcolm Davis of Freeland, Wash.; four grandchildren; and three great-grandchildren.

Private services were held.

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ON THE THINGS THAT DEPEND UPON PHILOSOPHY

By James V. Schall, S.J.

Professor of Government, Georgetown University
Special to Motions

"Thus it is not unusual to meet people who think that not to believe in any truth, or not to adhere firmly to any assertion as unshakeably true in itself, is a primary condition required of democratic citizens in order to be tolerant of one another and to live in peace with one another. May I say that these people are in fact the most intolerant people, for if perchance they were to believe in something as unshakeably true, they would feel compelled, by the same stroke, to impose by force and coercion their own belief on their co-citizens. The only remedy they have found to get rid of their abiding tendency to fanaticism is to cut themselves off from truth."

— JACQUES MARITAIN, *HEROIC DEMOCRACY: SELECTED READINGS* 188 (Kelly ed. 2003).

"Some dogmas, we are told, were credible in the twelfth century, but is not credible in the twentieth. You might as well say that a certain philosophy can be believed on Mondays, but cannot be believed on Tuesdays. You might as well say of a view of the cosmos that it was suitable to half-past three, but not suitable to half-past four. What a man can believe depends upon his philosophy, not upon the clock or the century. If a man believes in unalterable natural law, he cannot believe in any miracle in any age. If a man believes in will behind law, he can believe in any miracle in any age."

— G. K. CHESTERTON, *ORTHODOXY* 74-75 (Doubleday Image 1959) (1908).

I. What can it mean to suggest that things can "depend" on philosophy? And what things might these be? Philosophy, after all, is "for its own sake." Philosophers, moreover, even in classical times, were considered to be rather odd or eccentric. To "depend" on them was, to say the least, to be quite rash. Even St. Paul associated philosophy with "foolishness," and in Athens, it was said to be difficult to distinguish the philosopher from the fool. To the normal man, both philosopher and fool seemed to be distinctly peculiar.

Yet, this same "normal man," who might greet the professional philosopher as suspicious, must also himself be conceived to be a philosopher, to be interested in philosophic things. John Paul II, in *Fides et Ratio*, put it well: "The truths of philosophy ... are not restricted only to the sometimes ephemeral teachings of professional philosophers. All men and women ... are in some sense philosophers and have their own philosophical conceptions with which they direct their lives. In one way or another, they shape a comprehensive vision and an answer to the question of life's meaning' and in the light of this they interpret their own life's course and regulate their behavior" (#30).

We suspect that the whole world, including philosophers trained and untrained residing within it, might rise or fall on whether the truth is known and upheld. Everything, in some sense, depends on it. The very definition of philosophy is the love of wisdom, the highest form of philosophy. The philosopher was not a god. He did not, like the gods, "have" wisdom. He could only "seek" it. He was a man characterized by a quest, a quest not just for the seeking, but for the finding of what he sought, the truth.

There was a time in our culture when we spoke of a familiar figure known as a "gentleman doctor," or a "gentleman lawyer," or a "gentleman farmer." The American founding fathers, indeed, were usually both gentlemen lawyers and gentlemen farmers, if not all gentlemen doctors like Benjamin Rush, who, in fact, started out to be a lawyer. The noble notion of "gentleman" or "gentle woman," notions we so much associate with Burke, Newman, and Samuel Johnson, have become less intelligible to us. In an egalitarian age, everyone is a gentleman. It sometimes seems that everyone likewise is becoming a lawyer. Josef Pieper, however, wrote: "In Plato, there is a concept of slavery which no social changes, no emancipation of the slaves, can wipe off the face of the earth. This conception is rooted in the belief that what is truly human is never the average. The standard by which truth and falsehood, good and evil, are measured, is not alone the divine, but also the human. To put that more exactly: the standard is what man himself is capable of being, and what he is called upon to be." (*ENTHUSIASM AND THE DIVINE MADNESS: ON THE PLATONIC DIALOGUE, PHAEDRUS* 43 (trans. R. and C.

Winston, Harcourt 1964).

The average and the excellent are not the same thing even in a fallen world in which everyone is not expected to be perfect. Both the ordinary man and the philosopher, it seems, because of their common humanity, have need of something beyond philosophy, redemption, perhaps.

Such expressions of a more excellent way of being what one is were, however, designed to suggest that "ordinary" doctors or lawyers were not, as such, "gentleman lawyers or doctors." Moreover, the gentleman doctor or lawyer was not the same as the man exclusively "learned in the law or medicine." The specialist, the one who knew more and more about a particular discipline with the time it takes to learn such things, was not what was meant by the "gentleman" lawyer or doctor. There was a certain unsettlement of the soul in knowing so much about so relatively little. Somehow there was a wisdom beyond, but not exclusive of, a profession.

These latter "gentlemen" were so designated because they knew something more than their own profession. They actually read poetry and history. They knew of Nietzsche as well as of St. Bernard. They might play the cello or write short stories. They played golf or handball. Being skilled or being learned in a given profession was not conceived to be a complete life, granted the worthiness of a particular field. Those who only knew their own area of expertise were practitioners, journeymen or masters, to use the medieval terms. The "gentleman" lawyer or doctor not only knew where his own profession fitted into the scheme of things, but he was also interested in the very scheme of things itself.

Plato often refers to the fact that the doctor's craft, as craft, is limited by what it is to be healthy, something the doctor does not create but only serves. Once a person is healthy, the doctor's task is over. The great human question is not how to make us healthy, however important that is at times, but what to "do" when we are already healthy. Health addresses health, as Aristotle put it. When we are healthy, we pay little attention to what happens inside us. Rather we want to know and to act in a world of incredible abundance and variety.

In *The Republic*, Socrates refers to the case of a certain Herodicus, a physician trainer, a sort of team doctor, I suppose. This good man spent his whole life tending to his own health. The result was that he stretched out his death into "a lengthy process." He could not cure himself. The result was that "he lived out his life under medical treatment, with no leisure for anything else whatever. If he departed even a little from his accustomed regimen, he became completely worn out, but because his (medical) skill made dying difficult, he lived into old age" (406a-b). Without a Christian sense of the value of suffering, this sort of leisureless life was thought to be rather fruitless as it participated in none of the activities of leisure for which we are originally intended. Life is not merely staying alive. What do we do when all else is done is a philosophic question of far greater significance.

Very few if any human beings, moreover, can be really specialists or skilled in more than one or two areas or sub-areas, or even sub-areas of sub-areas. The list of specialties under, say, tax law alone approaches infinity. No doubt, we live in a world in which we need many skills in all areas of life so that we might be skilled in our own field without losing the advantage of participating in the goods that others specialists present us. Understanding this need is what stands behind the notion of precisely a "common" good, a notion thought to save both the common and the particular good.

The novelist Walker Percy, a gentleman doctor, if there ever was one, even a "Southern gentleman doctor," remarked, in an interview: "What I was protesting ... was the view of so many, not merely scientists, but also writers and artists, that only scientists and only science is interested in telling the truth. Provable, demonstrable truth, whereas art and writing have to do with play, feeding the emotions, entertainment. I've always held that art and even novels are just as valid as science, just as cognitive. In fact, I see my own writing as not really a great departure from my original career, science and medicine, because ... where science will bring you to a certain point and no further, it can say nothing about what a man is or what he must do." (*CONVERSATIONS WITH WALKER PERCY* 60 (1985)).

Obviously such reflections come from a man unsettled by the narrowness of his profession. He doubts a scientific philosophy that prevents his mind from dealing with truth wherever it is found. He is concerned about

methods or epistemologies that do not, by their own structures, allow truth to be found at all.

II. Boswell tells us that in the Spring of 1768, he had published his book about Corsica. He then returned to London only to discover that Samuel Johnson was in Oxford, with his friend, Mr. Chambers, who had become Vinerian Professor, at New Inn Hall. On arriving at Oxford and being treated with gentility by Mr. Chambers, Boswell inquired of Johnson, in his capacity as "a moralist," whether "the practice of law, in some degree, hurt the nice feeling of honesty." Recall that Boswell himself was a lawyer. The gist of Johnson's reply was, "Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge." (1 JAMES BOSWELL, *LIFE OF JOHNSON* 366 (Oxford Univ. Press 1931)). Boswell's question obviously implies that, in the practice of law, one might well be tempted to misrepresent one's opinion to clients or to tell lies to judges, in short to "hurt the nice feeling of honesty," that presumably every man should have, lawyer or not. The lawyer, Johnson implied, is already involved in philosophic questions by his very profession.

The question of the "use" of philosophy, of whether philosophy, in other words, is, as many suspect, "useless," is itself a question of philosophy. It is of some importance to know if our solicitor thinks it legitimate to lie to us, his clients. Yet, the pages of Plato abound with adversarial suspicions that the answer to the question of whether philosophy is "useful" is negative. The philosopher, as we have indicated, is popularly looked upon as a rather tweedy, odd character, hardly capable of negotiating his way down the street. He is a subject among the masses who observe him with much humor and pleasantry.

Even Socrates portrayed himself, at the beginning of his trial, as someone who had not been much concerned with public or practical affairs. He claimed to have had little clue about how to present himself before the law. "Gentlemen, if you hear me making my defense in the same kind of language as I am accustomed to use in the marketplace by the bankers' tables, where many of you have heard me, and elsewhere, do not be surprised or create a disturbance on that account. The position is this: this is my first appearance in a lawcourt, at the age of seventy; I am therefore simply a stranger to the manner of speaking here" (17c-d). The philosopher, in fact, did not succeed in defending himself before the Athenian court, though his trial still goes on in our books if we read them, as we should. Judged by its external consequences, philosophy appeared in fact to be rather useless to Socrates, however eloquent to us his speech before the lawcourt now appears to be.

None the less, philosophy has always prided itself on being itself "beyond use." It claims to be something, to repeat, "for its own sake." We do not want it for some other purpose but itself. Indeed, we want other things for it, for philosophy, not the other way around. Through it, we know where things, including ourselves, belong in the order of things. Even if philosophy had no "use," we would, like beauty or sight, still want to know it. It is one of those things which, after it has been proved to be good for nothing further, we still want. Utility — the asking, "is it useful?" — is itself a consideration of moral philosophy, one of the "goods" to which we can legitimately tend, but not necessarily the highest one. The subject of utility already appears in Aristotle's *Ethics* (1156a22 ff.) and Cicero's *De Officiis*.

Everyday we are surrounded by things that are merely useful, but still we are glad that we have them, the hammer to pound the nail, the razor to shave our beard, even perhaps lawcourts, to render what is "due" to us. The elevation of "utility" to the highest ranks of philosophy in the 19th century — the Epicureans had already conceived much of this in ancient times — has not been particularly "useful" either to politics or to philosophy, though it has provided occasion to clarify exactly what we mean by the usefulness of something. Paradoxically, "utility," as a philosophy, as a knowing what it is, is not useful. Things that are useful to us, moreover, apples, for instance, might, in themselves, be simply beautiful, or rotten. An infinite string of utilities ends up by undermining utility itself, by having ultimately nothing for which anything is really useful. A universe of utility is a universe with no real meaning, granted that much of our lives is spent with useful things. One dubious attraction of a philosophy that logically makes the world meaningless, however, is that it exempts us from responsibility and allows us to do what we will.

Christof Cardinal von Schönbrunn once remarked

Please see opposite page.

that Thomas Aquinas was the first man who was ever canonized simply for thinking. What else can this affirmation mean except that thinking in itself is a worthy activity. Indeed, it is the activity that most distinguishes us as the kind of being we have been given. The opposite of thinking is not to think at all. The opposite of thinking rightly is thinking but not rightly. While it is true that we praise the being who has the natural capacity to think, as well as the process or activity of what it is to think, what is important about thinking is not the faculty or the process of thinking, but what in fact is concluded, what is thought about, the truth that is affirmed.

We are interested in Thomas Aquinas, therefore, not because he had a mind, or because his mind worked like all human minds work, but because of what he thought with his mind. We are concerned with the truth that he affirmed, a truth we too, if we follow him, come to re-affirm in reading him. We are concerned about what he said about the soul, about virtue, about law, about metaphysics, about God. Truth is not Aquinas' truth, even when he is the one who leads us to see that something is true. Truth cannot, as such, be "owned" by anyone. It is free and freeing. But the "freedom" of truth is not the power to make it into its opposite and still call it true.

"Every demonstrable proposition is, de jure, communicable without limits," Yves Simon wrote to this point of solidity of truth. "But it often happens that the understanding of a fully demonstrated proposition or even that of an immediately obvious one, requires conditions which are not commonly satisfied in any society. De jure some propositions of metaphysics and ethics are no less communicable than any theorem of geometry or law of biology At philosophical conventions deaf men make speeches for other deaf men, and blind men play pantomimes for other blind men, and this will never prove anything against the intrinsic communicability of philosophic truth." (YVES SIMON, *A GENERAL THEORY OF AUTHORITY* 112 (1980).

Using Platonic terms, truth is to say of what is that it is, of what is not, that it is not. We are given minds precisely to make such affirmations. We have a longing to know precisely the truth and cannot be settled with anything less.

The world's worst tyrants, moreover, were often men of thought, not just brutes, as we sometimes think. As the Greek writers depicted them, they were often handsome, charming, witty. The difference between the philosopher-king and the tyrant was not that one thought and the other did not. The tyrant had intellectual capacities every bit as high and powerful as the greatest philosopher. This is why he was so dangerous. Indeed, it was often his philosophy that compelled the tyrant into politics. The tyrant differed from the philosopher because of what he willed, not because of any native difference in intellectual capacity.

III. A city, to be a city, with its variety of things to be done, goods freely to be put into being, cannot be composed solely of philosophers (or tyrants), at least if we assume philosophers are specialists who devote their whole lives to their unusual trade. Philosophers are not shoe-makers, or airline pilots, though we might well expect, in their own ways, that shoe-makers and airline pilots know something of philosophy, of the truth of things. If, however, an airline pilot is, philosophically, a theoretic pessimist, who has published books on the virtues of suicide or on the political value of terrorism, if he is someone who does not think that life is worth living, we do well to fly with another airline. This is one case where philosophy might be rather "useful," both if we did or if we did not agree with that philosophy, if we wanted to kill ourselves or if we wanted to stay alive.

When Socrates proceeded, after the prodding of the young potential philosophers, Adeimantus and Glaucon, to build a city in mind or speech in order to find where injustice came into the city, he proposed, as a building block, a principle of specialization, whereby each member of the city was to be free to devote himself to what was most fitting for him to do (369a-c). But this separate contribution of each was not seen as a principle of absolute separation or isolation but of cooperation. Most worthy things needed time and talent to come to fruition. "And because people need many things and because one person calls on a second out of one need and on a third out of a different need," Socrates continued, "many people gather in a single place to live together as partners and helpers. And such a settlement is called a city. Isn't that so? . . . And if they share things with one another, giving and taking, they do so because each believes that this is better for himself" (369b-c). It is better for oneself that he is not be required to do everything, for it he did have to provide himself with everything, he would receive very little of anything compared to what he might have with the help of others. "Man is by nature a political animal," as

Aristotle put it.

The common good includes, as it were, also our private good, as Socrates implied. Indeed, as the Athenian says in *The Laws*, "the proper object of true political skill is not the interest of private individuals but the common good. This is what knits the state together, whereas private interests make it disintegrate. If the public interest is well served, rather than the private, then the individual and the community alike are benefitted" (875a-b). The philosopher is the one who knows this common good as precisely common, as making the private goods also to be what they are. The common good is not some sort of overarching alien good separate and distinct from the reality of private goods, which are in fact goods.

This principle of specialization has appeared in many forms in the history of political things. In the famous Encyclical of Pius XI, *Quadragesimo Anno* (1931), it was called the principle of subsidiarity (#79-80). Yves Simon, in his *A General Theory of Authority*, called it the principle of "autonomy" – "by the principle of autonomy, any pursuit that a particular unit is able to carry out satisfactorily ought to be entrusted to precisely such a unit." (Simon, *supra*, at 137). On the political level, arrangements like federalisms or confederations have likewise sought to preserve this twofold advantage, the participation in a larger good while retaining the value of the smaller unit both for its members and for the excellence of the product. In order for the whole to be the whole, the parts must be the parts. Or to put it another way, the preservation of the parts is itself one of the main functions of common authority. The collapse of parts with their own relative autonomy is but another definition of tyrannical uniformity.

IV. The main purpose of philosophy insofar as it is political philosophy is the work of persuasion – for this is the way philosophy must proceed, this is its main and, as it were, only weapon. Who is persuading whom? The lesson of both the trial of Socrates and the trial of Christ is that the city can kill the philosopher, if it chooses to do so. It always has the raw power to do so. The philosopher's protection is not more power. The philosopher's ultimate protection is what he thinks about death, as Socrates put it at his trial. Most often cities choose the actions they will put into effect within their limits in the form of laws and their execution. As in the case of Socrates before his Athenian accusers and in the case of Christ before Pilate or Caiphas, the question arises whether the politician is persuadable, open to listen to and follow the philosopher. If he is not, the philosopher is dead.

The significant difference between the two rather similar Platonic characters Thrasymachus in *The Republic* and Callicles in the *Gorgias* had to do with how they listened to the philosopher. Thrasymachus held, much in advance of Machiavelli, the notion that justice is power, the interest of the strongest. However, the result of his discussion with Socrates in the first book of *The Republic* was that he had no more arguments to defend his own position. Thus, reluctantly, he saw that he could not hold it and became in turn rather benevolent and friendly to Socrates. In this case, the philosopher moves the politician, or at least the sophist.

Callicles, on the other hand, in the *Gorgias*, never seriously discusses the question of whether philosophy is important to the politician. Philosophy is merely something we amusingly study in college, but we quickly put it aside when we come to exercise actual power. When in the course of his conversation with Socrates, Callicles sees that he cannot defend his own view, he refuses to continue the conversation. Conversation is the only weapon of the philosopher against the politician with the power to kill him. When the politician refuses to continue any discussion about the rightness of his procedure or ideas, we know that the philosopher is dead, though we don't know whether death is the final word even for the politician. That he suspected it was not constituted the content of the last book of Plato's *Republic*, wherein the question of ultimate rewards and punishments comes up.

Thus it is that the possibility of philosophy to some extent depends on the success of the political philosopher in directly or indirectly rendering the actual politician benevolent. This approach does not forget that basically the politician is suspicious, and sometimes rightly so, of the possibility of the philosopher undermining the moral foundations of the polity, of the existing city's explanation of itself to itself. The experienced politician, at his peril, has to know the damage caused by unworthy philosophers in the city. In Greek thought and history, Alcibiades, the most charming of the tyrants and of the young men around Socrates, is forever the symbol of the validity of this concern. And we should not forget, following the Symposium, that Alcibiades was even the most dangerous threat to the integrity of Socrates, of philosophy itself. Both the philosopher and the politician who do not

love truth after their own lights are dangerous both to philosophy and to the city, indeed to themselves.

We know, of course, again thanks to Plato, that philosophy does not have to succeed in convincing the politician to let him live for it, philosophy, to conquer. Had Socrates, instead of drinking the hemlock according to the law after a formal trial, chosen banishment instead, or to cease to philosophize, or to escape from jail, as he was free to do, philosophy would not have triumphed. Many a "philosopher" who ends up violating the Socratic principle that "it is never right to do wrong" drops into obscurity.

V. Following a remark of Chesterton, I have entitled these reflections, "On the Things that Depend on Philosophy." If we can put it this way, it is by our philosophy that we see the world, not by our eyes, unless our eyes themselves, in their seeing, are directed by a philosophy that affirms of what is, that it is. We can divert both our eyes and our minds from seeing what is there, what is to be seen or known. Whether a philosophy is true or not does not depend on whether it is ancient or modern, from this land or that, whether it is Monday or Tuesday. It depends on its understanding of things, on its willingness to be measured by things of which it is not itself the cause.

Does democracy, does a legal system, depend on a philosophy that denies that the theoretic truth cannot be known? Let us suppose, for the sake of argument, that democracy does depend on a philosophical position that specifically denies that truth is possible, indeed that affirms that truth is dangerous in politics. In an obvious sense, of course, truth has always been considered to be dangerous, specifically to falsity. Truth and falsity themselves belong to a philosophical system that maintains that they are not the same, even when there is a disagreement about what specific thing might be true and what false. Part of the purpose both philosophy and polity is to find this out, what is true and what is not. The "truth" that there is no "truth" founds all skepticism and grounds it in what cannot be coherently thought.

Within the philosophical system that, as part of its own tenets, denies that truth is possible in order to suggest that all things are possible, the major danger to this system is any view that maintains that "absolute truths" exist and can be known. Generally, this latter position is said to be "fanatical." Thus, one who holds that truth is to say of what is that it is, and of what is not, that it is not, is a fanatic. Here, one uses his mind to deny the purpose of mind, which is to affirm the truth of things. Evidently, the philosophic view that there is no truth is seen to be itself a conclusion that is necessary to protect from the influence of other positions. What other positions? Those that recognize that there is error and evil that have to be identified and acknowledged as precisely what they are, evils and errors. Tolerance as a "theoretic" philosophic position means that any philosophy that recognizes that, in the order of things, including human things, there are things wrong, or evil, is by definition false and dangerous. To insist on it is fanatical.

However, if there are other views that would allow people to live at peace with each other that did not involve the denial of the possibility of truth, the presumed alternative "either no truth or no democracy" would be false. What is interesting about the remarks of Maritain that I cited in the beginning is his awareness that the theory of tolerance that sees itself only as based on the denial of truth is itself a "fanaticism" since it refuses to admit the validity of arguments about the truth.

The logic of this remark is worth spelling out: since one cannot conceive a theory in which people of different persuasions can tolerate each other, then, to make no theory dangerous to another, one must deny that any theory is true. As Maritain pointed out, such people understand truth only as something that, if it exists, "must" be imposed. Thus, to continue the argument, if they thought that there were a truth, they would, by their own theory, have to hold it. In order not to be forced into this terrible alternative, what they do, in self-defense, is to deny that there is any truth possible on any terms to anybody. Such a view of democracy, then, results not from a surfeit of philosophy but from a lack of it.

And this observation brings us back to the question of what is philosophy? And where can it exist? Clearly existing polities can embrace, as the foundation of their laws, that there is no truth. That is the truth that they hold as "self-evident." Therefore, all things are permitted. If anything is not permitted, it is not because there is anything objectionable about it, but just that this polity wills this view. Some other polity, with equal logic, wills its opposite. There is no polity in speech or argument that would address the premises of any actual polity, because that alternative would in theory threaten the foundation of the actual polity.

Usually, the view that all is permitted is modified

Please see *Philosophy*, page 11.

BEWARE OF CHOCOLATE-FLAVORED STERIODS

NFL PRO'S CAREER SIDETRACKED BY MYSTERY INGREDIENTS IN HIS PROTEIN POWDER SUPPLEMENT

By Victor Ongjoco
Staff Writer

New England Patriots running back Mike Cloud returned Sunday, Week 5, from a four-game substance abuse suspension and scored the go-ahead touchdown on a 15-yard run with under 4 minutes left to give the Patriots a 38-30 win against the Tennessee Titans.

Cloud, who played for Boston College, was drafted in the second round by the Kansas City Chiefs in 1999. His troubles began last March (while Cloud was still with the Chiefs) when he reportedly tested positive for the banned steroid nandrolone. He has repeatedly stated that he did not know the substance was in an over-the-counter protein supplement. Nothing regarding nandrolone appeared on the label of the chocolate-flavored protein powder supplement.

The NFL tested the product and found nandrolone, but also admitted that it appeared to be an innocent mistake. However, with the NFL's zero-tolerance substance abuse policy, Cloud was nevertheless suspended for four games without pay. What made matters worse was that Cloud was an unrestricted free agent. And his team had indicated to him that they would not bring him back. He brought with him this stigma to any potential team. Every team who was originally interested looked the other way. Instead of cashing in, Cloud could only land a league-minimum deal from the Patriots.

Cloud's agent John Feinsold released a statement that his client filed a lawsuit this week against Muscle Tech, the supplement company that produced the product. Cloud's lawsuit claims Muscle Tech failed to disclose the addition of norandrostenedione and androstenediol on the product label. These compounds produce a positive test for metabolites of nandrolone. According to the suit, laboratory analysis of Nitro-Tech, the protein powder consumed by Cloud, was found to contain the compounds. Additionally, the suit alleges that this is not the first time Nitro-Tech has caused a professional athlete to test positive for anabolic steroids. The suit also alleges that independent laboratory tests of multiple bottles also revealed the presence of the two compounds. According to the FDA's website, it is the sole responsibility of the supplement company properly to label its products. A motivating factor behind the suit, however, is to rebuild Cloud's tarnished reputation. "The problem is that people will look at me and think I'm a cheater or say, 'There goes the steroid user,'" Cloud stated. "That's all they'll know about me when they hear my name, and it isn't true. That's going to be very difficult to change that image on my reputation." Further details of the lawsuit will be released this coming week.

Some other big name athletes have been caught with nandrolone in their system. Most notable is C.J. Hunter, the American shot putter married to sprinter and long-jumper Marion Jones. Others are British sprinter Linford Christie and Czech tennis pro Petr Korda. Hundreds of other lesser known athletes have tested positive for the anabolic steroid.

Experts say, at least in part, that the increase is due to the availability of the steroid in pill form. Another reason may relate to the heavy use among athletes of nutritional supplements. Paul Melia of the Canadian Centre for Ethics in Sports says many athletes are convinced they can't compete without taking nutritional supplements. Experts agree that these supplements often contain mystery ingredients not listed on the label. Dr. Robert Foxford, chief medical officer for the Canadian team at last year's Winter Olympics, stated "We are not condoning the use of any supplements because it is absolutely 100 per cent impossible to guarantee that what it says on the label is actually inside." Foxford went on to add, "It may list 10 ingredients, you analyze it and there's actually 13. And one of those three extra may be illegal."

"This is a huge problem."

A study conducted by the International Olympic Committee showed the wide-scale problem. When 600 over-the-counter nutritional supplements were chemically analyzed, one in four were found to contain a non-labelled ingredient that could produce a positive doping effect.

Foxford also noted that at the 2000 Summer Olympics in Sydney, more than 90 percent of the athletes randomly tested for drugs listed at least one nutritional supplement on their declaration.

In the past, athletes accused of using nandrolone have pleaded ignorance and pointed the finger at their supplement bottles. "In the last two or three years, all the athletes that were faced with a positive result for nandrolone... claimed that it was through contaminated supplements," stated Dr. Christiane Ayotte, director of Montreal's doping laboratory. Dr. Ayotte was surprised that none of the athletes had sued the companies before. That is until Cloud sued Muscle Tech.

The International Olympic Committee's stance regarding nandrolone mimics the NFL's zero-tolerance policy. The position of the IOC and other sports organizations is that the athlete is ultimately responsible for what is in his body.

At least one professional athlete agrees. "I think every athlete has to understand that when they do take something, they are responsible for what's in it," says Cassie Campbell, captain of the national women's hockey team.

"They really have to look at what's on the box and make sure that what's on the box is what they're getting." Do you agree?

(This story was originally reported by Jay Glazer at www.sportsline.com/nfl/story/6678850 (last visited Oct. 14, 2003).

THE HIDDEN PRICE OF "DON'T ASK, DON'T TELL"

By Nicole Rothstein
Staff Writer

In a surprise turn of events, the Ninth Circuit U.S. Court of Appeals last month reinstated a lawsuit by former Air Force doctor and San Francisco psychiatrist John Hensala, who was ordered to pay back his medical school expenses after revealing to the service that he was gay. But, this case could end up being about a lot more than just the military's policy of attempting to recoup education costs from service members who fail to live up to their military obligations after completing their education.

In reviewing the case, the majority suggested that the military's "Don't Ask, Don't Tell" policy could possibly be re-evaluated in light of the recent Supreme Court decision in *Lawrence v. Texas*, 123 S.Ct. 2472. Further, they suggested that discharging a gay recruit and then demanding tuition repayment may constitute an even more serious form of discrimination. According to the majority opinion, written by Judge Sidney Thomas, "If it is demonstrated that the armed forces is discriminating based on status [rather than conduct], Hensala's equal protection and First Amendment claims present genuine issues that need to be resolved at trial."

In 1986, John Hensala dreamed of a career as a doctor in the Air Force. The air force in turn offered him a four-year scholarship to attend medical school at Northwestern University, if he agreed to serve four years as a physician in the service after graduating. After completing medical school, Dr. Hensala spent three years as a resident at Yale University and another two years as a fellow at the University of California in San Francisco. But, just one month before he was due to report to the Scott Air Force Base in Kansas to begin active duty, he informed the Air Force that he was gay. The Air Force initiated discharge proceedings. After his honorable discharge in 1997, the military demanded that Dr. Hensala reimburse more than \$70,000 paid toward his medical education.

According to the Associated Press, Dr. Hensala's situation is not unique. During the six years from 1994 to 2000, the Air Force sought tuition repayment in 274 out of 277 cases involving medical students who failed to live up to their military obligations after completing their education. The military currently has a policy to pursue recoupment only under certain conditions, one being if the service member makes a claim of homosexuality, specifically, to get out of military service.

This is precisely what military officials say Dr. Hensala did. According to the Air Force, Dr. Hensala told recruiters he was heterosexual when he began his medical training back in 1986. After medical school, he delayed active duty for years, completing a residency at Yale University, and a fellowship at the University of California in San Francisco. Only one month before Dr. Hensala was due to report for active duty, he informed his superiors that he would be living with his same-sex partner while on duty. Air Force lawyer Ray Hawkins insists that the highly publicized "don't ask, don't tell" policy was common knowledge by 1994 and for Dr. Hensala to notify the Air Force of his sexual orientation was "the functional equivalent of a voluntary separation."

But, according to Dr. Hensala, the military should bear the responsibility for the broken contract. After all, he has always been willing to fulfill his end of the contract; it was the Air Force that initiated discharge proceedings under the "don't ask, don't tell" policy. Dr. Hensala did not comfortably identify himself as gay until well into medical school and it was important to him to come out not only for his own psychological health but because, in terms of his profession, it was especially important that he be in the position of promoting mental health. And, at the time he came out, there were known exceptions to the policy, cases in which gay men were allowed to serve even after they had come out. According to Dr. Hensala, the main case against allowing homosexuals to serve, that of unit cohesion, simply wasn't applicable to the medical corps.

Hensala originally sued in 2000, seeking the right to refuse payment, but was prevented from challenging the "Don't Ask, Don't Tell" policy itself. The 9th Circuit upheld it in *Holmes v. California Army National Guard*, 124 F.3d 1126, saying it had to defer to military policy on matters of national security.

"After his honorable discharge in 1997, the military demanded that Dr. Hensala reimburse more than \$70,000 paid toward his medical education."

MOCK TRIAL, *continued from page 1*

23 and 24th. Finalists were announced last Wednesday evening, after coaches had analyzed and tabulated the results. According to Assistant Coach Lisa L. Hillan, "the level of talent was so high" that the judges decided to advance 27 finalists, instead of 20 (which is their goal each year) from the field of eligible preliminary competitors. To put this number into perspective, the number of competitors not advancing to the finals this year was equal to the entire number of competitors who participated last year!

This year's finalists were: Cynthia Adams, Todd Ausherman, Philip Azzara, Laura Brandenburg, Michael Diaz, Daniel Eisman, Charity Fowler, Ryan Friedl, Greg Garrison, Norman Grissom, Cormac Kehoe, Elisa Kert, Denny Kim, Jeffrey Lang, Tate Lounsbery, Kristin Lund, Dana Mann, Kimberly Miller, Jeff Moore, Ameca Park, Scott Pirrello, W. Tattnell Rush, Aine Smith, Alexander Souders, Pamela Tahim, Sharon Voloria and Anna Yum.

Those students fortunate enough to advance still had to conquer interviews with both the coaches, Assistant Coach Lisa L. Hillan and Head Coach Richard "Corky" Wharton (who is also the founder and director of the program), and prepare a scaled down 8 minute version of their closing argument for presentation in the final round.

The Final Rounds were held in the Grace Courtroom on Saturday, September 27th. Current trial team members observed while both coaches and several trial team alums scored. Of the 27 finalists, only 16 could be invited to join the team. This is no small feat considering the talented pool of participants in this year's competition.

Congratulations to the newest members of USD's National Mock Trial Team: Cynthia Adams, Philip Azzara, Daniel Eisman, Charity Fowler, Greg Garrison, Norman Grissom, Cormac Kehoe, Elise Kert, Tate Lounsbery, Dana Mann, Jeff Moore, Ameca Park, Scott Pirrello, W. Tattnell Rush, Pamela Tahim and Anna Yum.

As for the rest of the Mock Trial Team, there has been little time to breath since this competition ended. The first interschool tournament this semester, the Annual San Diego Defense Lawyers Invitational Competition, took place on October 16th-18th. Competing teams were: Brooklyn, Hastings, Thomas Jefferson, USD and Whittier. Although the results are unknown to us now, USD has won this competition three straight years and four out of the last five years. Representing USD this year were: Ankush Agarwal, Amy M. Bamberg, Megan Godochik, Alfonso Morales, Paul H. Reizen, Kyle E. Rowan, Celeste Toy and J. Alex Vargas.

On November 6-8th, our own Lisa Hillan will be co-hosting the Consumer Attorneys of San Diego Competition. Competing teams will be: Cal Western, Chapman, Golden Gate, Pepperdine, USD, University of the Pacific and Whittier. Representing USD this year will be: Martin I. Aarons, Kirsten J. Andreasen, Troy Atkinson, Monte A. Bennett, Eve Brackmann, Scott Caldwell, Noel Adam Fischer and Terry S. Hunt.

Also, the team faces two regional tournaments in Spring 2004, the Texas Young Lawyers Competition and the ATLA Competition. The top three teams from the ATLA Competition will advance to the nationals and

THE FIRST AMENDMENT-- WHAT'S THAT?

By Juliana Lee
Staff Writer

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

According to a 2003 survey conducted by the First Amendment Center and the American Journalism Review, few Americans seem to know their First Amendment Rights. 63% correctly named the freedom of speech as a right guaranteed under the First Amendment. 22% identified the freedom of religion; 16% named the freedom of the press; 11% the right of assembly; and 2% the right to petition. 37% didn't know or refused to answer. 21% named rights not guaranteed under the First Amendment.

I conducted a small survey among 1Ls, 2Ls, 3Ls and 4Ls to see how law students compare to the "average" American. The results were surprising (or not surprising) depending on your expectations of the average law student's retention of constitutional law or ability to recall First Amendment rights.

So how did law students compare?

Two students I surveyed were able to repeat verbatim the entire First Amendment. 100% of the students surveyed named freedom of speech, press, and religion. 85% named the right of assembly. 60% named the right to petition. A few law students pointed out to me that that the freedom of religion is not specifically stated in the First Amendment: there are two clauses, an anti-establishment clause and a free exercise clause which guarantee a freedom of religion. Only one law student incorrectly named the right to bear arms (which is listed under the Second Amendment.).

End conclusion? Law students know their first amendment rights, or can at least name them correctly.

the top two teams from the Texas Young Lawyers Competition will advance as well. Since the team's inception, it has never failed to go to at least one final.

As you might imagine, USD's National Mock Trial Team is not for the weak at heart. Practices for existing team members are a minimum of four to five times a week. Undoubtedly, the competitions themselves demand a great deal of hard work and commitment from both students and coaches. However, most participants feel that the benefits more than compensate for the work involved as USD's National Mock Trial Team provides an unparalleled opportunity for students to gain hands-on experience of the innerworkings of the legal system while still in law school.

For those students still interested in becoming part of the Mock Trial Team, the next Mock Trial competition open to students this year is the Third Annual ATLA Intramural Mock Trial Tournament, to be held in Spring 2004. Although it is an intended to be a stand-alone intramural

competition, open to all law students at USD (including LLMs, 1Ls, 3L day students, visiting students and student transfers), it also operates as a second mechanism to recruit trial team members. Not everyone eligible to compete in the competition will be eligible to make the team but those that are interested in membership can indicate whether they want to be considered for the team. The team has reserved two competitor spots for next fall, although Lisa Hillan has stated that they would like to invite more than that.

You can also find out more about the mock trial team or oral advocacy here at USD by contacting Assistant coach and National Mock Trial Team Administrator Lisa L. Hillan at (619) 260-4255 or Lhillan@sandiego.edu. Her office is located on the third floor of Warren Hall in room 308.

"USD's National Mock Trial Team provides an unparalleled opportunity for students to gain hands-on experience of the innerworkings of the legal system while still in law school."

ASK MADAM GRAMMAR

Dear Madam Grammar,

Are you as concerned as I about the creeping colloquialisms and sloppy slang that are infesting the legal lexicon? I am particularly agitated by the corruption of intransitive verbs tortured into transitivity by little minds who imagine an infantile unison in the formation of word forms. Particularly perplexing is the transitive use of the intransitive legal verb depose.

Webster's College Dictionary correctly defines the word as a transitive verb meaning (1) to remove from a throne or higher position; (2) to put down; or (3) (intransitive) to testify under oath. The Oxford American Dictionary limits itself to two definitions: (1) to remove from power; or (2) (intransitive) to testify or bear witness, especially under oath or in court. Accord The American Heritage Dictionary. Yet too often is the ear offended by the phrase repeated in Burton, The Legal Thesaurus, which adds "associated concepts: depose a witness." This torture screams as loudly as any of the agonizing souls who suffered for their faith, whatever their denomination.

Although I hate to "put them down" (not the intended secondary meaning in Webster), please admonish those of your readers who would be future litigators to adhere to the time-honored principle: We depose Lieutenant Colonels in Banana Republics; We take the deposition of a witness, who deposes.

--DSM

Dear DSM,

Placet.

Dear Madam Grammar,

Would you please elucidate the difference between the adjectives continuous and continual? They appear to me to be synonymous, but I'm not quite sure.

--Suspicious about Synonyms

Dear Suspicious about Synonyms,

You are quite right to have your doubts about these two words. Although they share the first seven letters, their meanings are subtly different. This difference can be understood best by reference to the words' etymologies.

Continuous is derived directly from the Latin *continuus*, which is from the verb *continere*, meaning to contain, from *com* plus *tenere*, to hold. Continuous means without ceasing, as of a line or (as is too often the case) of a car alarm.

Continual is derived from the Middle English, then Old French, *continuel*, from *continuer*, and finally from the Latin *continuare*, meaning to be continuous. In English the word describes something happening repeatedly or frequently.

Thus can one discern the difference in meaning between continuous and continual. Continuous means that something occurs without ceasing within a given period of time. Continual does not go quite so far; rather, it means only that something occurs repeatedly, not constantly, within a given period of time. Hence it would be apt to describe a dog's barking as continual (if it were continuous, the poor pooch would soon, I should think, collapse from exhaustion).

Dear Madam Grammar,

What is the subjunctive?

--Tense and Moody

Dear Tense and Moody,

Madam Grammar thanks you for asking such an important question. Alas! the poor subjunctive mood has fallen into a much undeserved desuetude. Of the subjunctive we can echo Hood's words,

For when the morn came dim and sad,
And chill with early showers,
Her quiet eyelids closed--she had
Another morn than ours.

But let us buck the tide and get to brass tacks. There are three instances when the subjunctive is apt: (1) to denote contingency ("I shall be happy if the plumber arrive on time"); (2) to express a wish ("I wish I were a plumber"); and (3) to express a contrary-to-fact condition ("If I were a plumber, I would be happy") (in the preceding example, *would* is not itself in the subjunctive but is a sign of the conditional construction).

The verb-form of the subjunctive is the naming form. For example, the subjunctive of "to eat" is "eat." Consequently, the subjunctive is distinguishable from the indicative only when the verb is in the third-person singular. The one exception to this rule is the verb "to be."

One authority states that "[s]ome writers of excellent repute make little use of expressions like, *If it rain, unless he go, whether he leave*, etc." That should be no bar to Madam Grammar's crusade (and she hopes yours now as well) to revivify this great "mood" and save the English tongue from those who would root out its delightful old quirks.

Summerlin v. Stewart

The Bizarre Story (Part One)

By Jonathan Meislin
Staff Writer

The Ninth circuit began its opinion in *Summerlin v. Stewart*, 2003 WL 22038399 (9th Cir. (Ariz.)), by quoting Mark Twain; "Truth is often stranger than fiction because fiction has to make sense." Looking at the facts in *Summerlin*, Mark Twain may be right. A murder was uncovered by a psychic vision, a defendant was represented by a line of three defense attorneys, a prosecutor and a defense attorney had a love affair, and a judge was discovered to be a habitual marijuana smoker and later disbarred.

This is truly a case stranger than fiction.

Warren Summerlin was arrested for the murder of a debt collector in 1981. On the morning of the murder, Brenna Bailey arrived at the defendant's home to discuss Summerlin's wife's outstanding debt with her company. Her boyfriend reported her missing when Bailey did not come home after work that day. That evening, the police received an anonymous tip that Summerlin had murdered the debt collector. The anonymous call came from the defendant's mother-in-law after her daughter had a psychic vision that Summerlin was the killer. The next morning, a road construction crew noticed a smell coming from Summerlin's car trunk, which was later identified as coming from the body of the victim. Summerlin's sister-in-law's psychic vision was correct.

Summerlin's first attorney left the Public Defender's Office just after he moving the court for a competency exam to establish whether the defendant was competent to stand trial. Nnew counsel, referred to as 'Jane Roe' by the court, was assigned to the case. Although the defendant had suffered mental problems throughout his life, ranging from dyslexia and schizophrenia to explosive tempers, and was described by the court as being functionally retarded, he was found to be competent to stand trial by two psychiatrists. Roe then obtained an extremely favorable plea bargain from the prosecutor, named by the court as 'John Doe', because Doe believed that the offence failed to satisfy the standards for 'heinous, cruel and depraved.' According to the agreement, the defendant would serve up to thirty-eight and a half years, conditioned on his pleading guilty to second degree murder and an aggravated assault charge stemming from an incident where he wielded a knife at a man who nearly ran over his wife. Summerlin rejected the plea bargain, which then made him eligible for the death sentence. Amidst all of this defense counsel was having an affair with the prosecutor.

despite his previously denied motions for new counsel, a third defense attorney was finally assigned to his case. John Doe was removed as the prosecutor, and the case was reassigned to a new judge. Although Summerlin refused the earlier plea bargain, the new defense attorney failed to disqualify the aggravated assault charge, which was created as part of the plea bargain, and Summerlin faced two criminal proceedings. After a failed motion for a continuance, Summerlin's defense attorney failed to present any witnesses, other than the defendant's wife, at the aggravated assault case. Summerlin was convicted of aggravated assault. During the murder trial, the Summerlin's attorney failed to present evidence supporting his defense, failed to

interview any psychiatric experts, and only called Roe, Summerlin's second attorney, as a witness to impeach some of the prosecution's evidence.

The jury found Summerlin guilty of first degree murder and sexual assault. Later, during sentencing, the defense, at the request of Summerlin, did not call any witnesses. The judge, after a weekend deliberation sentenced Summerlin to death based on the murder charge and the aggravated assault charge. Amidst all of this, the judge had been a habitual marijuana smoker.

Summerlin complained that the judge had often either been confused or forgetful throughout his trial. The judge had forgotten to rule on Summerlin's motion for a new trial, to let him speak

on the last day before sentencing, and even at times seemed to confuse the facts of Summerlin's case with another murder trial the judge was hearing. The appellate court also found that trial judge exhibited confusion about the evidence during pre-trial hearings and at trial, and that during the trial he made "quite perplexing, if not unintelligible, statements." The judge was convicted in 1988 for possession of marijuana and was cited in 1991 for attempting to purchase marijuana. The judge admitted at his disbarment hearing that he had smoked marijuana during Summerlin's trial. The judge was eventually disbarred.

Despite all of these beyond-fictional facts, Summerlin's conviction was upheld by the Ninth Circuit. The court found that notwithstanding the controversies surrounding the case, Summerlin received constitutionally adequate counsel. But, Arizona's procedural rules allowing the judge to sentence Summerlin to death violated the Sixth Amendment's guarantee to trial by jury. Consequently, Summerlin's death sentence was overturned. Summerlin is now serving a life sentence.

"The judge admitted at his disbarment hearing that he had smoked marijuana during Summerlin's trial. The judge was eventually disbarred."

Summerlin v. Stewart

The Aftermath (Part Two)

By Jonathan Meislin
Staff Writer

In *Summerlin v. Stewart*, 2003 WL 22038399 (9th Cir. (Ariz.)), the Ninth Circuit overturned 111 death sentences within its jurisdiction, after finding that Arizona's, Idaho's and Montana's capital punishment systems were incompatible with the 6th Amendment. All three states, along with Colorado and Nebraska, changed their death sentencing procedures, restricting a judge's ability to impose death sentences on criminals, and granting the sole power to juries.

The Ninth Circuit panel's opinion stated, "Depriving a capital defendant of his constitutional right to have a jury decide whether he is eligible for the death penalty is an error that necessarily affects the framework within which the trial proceeds." The judgment applied retroactively to all inmates sentenced to death where aggravating circumstances were determined by judges.

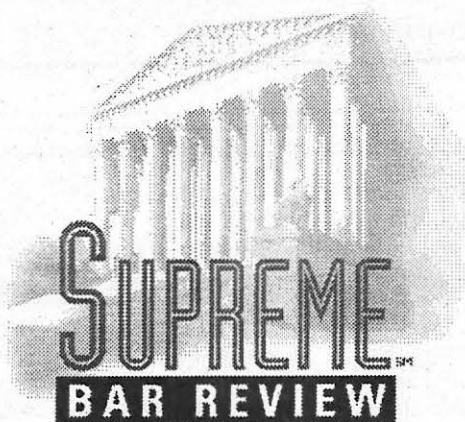
The decision was based on Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584, 609 (U.S. 2002). *Ring* held that Arizona's capital punishment scheme was unconstitutional because it was incompatible with the Sixth Amendment's right to a trial by jury "to the extent that it allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Arizona's statutes separated capital murder from non-capital murder based on aggravating circumstances. Arizona allowed judges to determine if certain other offences constituted aggravating circumstances, thus allowing the imposition of the death penalty. The Supreme Court in *Ring* held that allowing a judge sitting without a jury to sentence a defendant to the death violated the Sixth Amendment. Unlike *Ring*, Summerlin's case involved a collateral attack on the constitutionality of a judge-imposed death sentence, rather than a direct appeal. The Ninth Circuit determined that the sentencing was a procedural error, and fell within certain exceptions allowing the rule in *Ring* to be applied retroactively to previously convicted criminals on death row.

Of the 111 death sentences overturned by the decision, 89 were from Arizona, 17 from Idaho and five from Montana. The case sparked two other states, Nebraska and Colorado, to revise their statutes to be in accordance with the *Summerlin* decision. The Arizona Attorney General expressed displeasure with the ruling, and said that Arizona intended to appeal the ruling. Although the 111 death sentences have been overturned, prosecutors have the option to empanel new juries to rehear the death sentences. The chance that all 111 convictions will be reinstated is minimal.

Death Penalty Facts

Number of states with the death penalty	38
Number of states that use lethal injection	36*
Number of states that use eletrocution	7*
Number of states that use the gas chamber	2*
Number of states that use hanging	3*
Number of states that use a firing squad	2*
Total number of prisoners on death row	3,517

*Some states have more than one option for execution.



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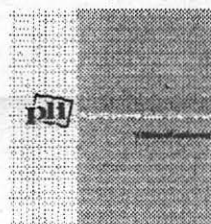
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