

LASCHER AT LARGE

By Edward L. Lascher

My lately-chronic condition of gloom continues unabated. Eleven months in the same trial will do that to a lawyer, it seems. Unfortunately, every time I poke my head up to look around, I seem to see nothing but demagoguery, ineptitude and downright foolishness surrounding the legal profession and its institutions -- not to mention the world.

Once in a while, I tell myself that people my age have been saying much the same about their world since memory of man runneth not. So maybe I've just reached a certain age, and we're no worse off than ever. Unfortunately, when that happens, the phrase "wishful thinking" keeps intruding

THAT PROPOSITION

I have yet to talk with anybody -- legislator, judge, prosecutor or just plain folk -- who could say with a straight face that Prop 8 even begins to approach constitutionality. (The fact that the pols among them concede the point does not mean for an instant they're willing to say so in public. Nothing could be more contrary, in view of the current vogue of running for everything from water commissioner to United States Senator on a platform of stamping out crime. The insubstantial, totally fact-free rhetoric generated on that topic in 1982 -- a vintage year for hypo-critical poltroons -- makes me wish, every once in a while, that some pro-crime spokesman would come along to demand equal time.)

Something is being done about it, too. Oh, yes, isn't it just! Specifically, by a lawsuit entitled Brosnahan v. Brown, brought to declare the proposition unconstitutional.

Of course, the litigation doesn't involve some guy who's about to go to the slammer for 263 years for a string of unpaid parking tickets, a DA with more cases set for next Tuesday than his office has employees and whose plea bargains just got invalidated, or some board about to be required to post a battalion of the 82nd Airborne in every schoolyard. It's none of the things you would expect. Instead, it's a purely hypothetical case brought by (are you ready for this?) the ex-president of the San Francisco Bar, the ex-president of the State Bar, and the current president of the California Teachers' Association, as taxpayer/volunteer/white knights.

ERRING KNIGHTS

With respect (and while I don't know the CTA guy, my regard for Bob Raven and Jim Brosnahan is enormous), I think these knights errant err. It seems to me that, in choosing this particular tactic for pulling society's chestnuts out of the fire, they compiled a sort of golden treasury of wrong ways to pursue eminently desirable ends.

In the first place, there are more than enough real cases pending right now in which the validity of Prop 8 is overripe for decision. (I'd guess 20 or 30 thousand, give or take a few hundred.) The boys could have applied their vast talents and prestige to some flesh and blood person with a present, justiciable controversy. That, as most of us understand it, is the way courts are supposed to operate: deciding tangible cases between specific people.

The approach selected is an outright avowal of the concept that the courts sit in regal hegemony, endowed with authority to re legislate whatever legislation they don't like by proclamation, not litigation as we used to know it. That simply is not our way. There may be only a slight tangible difference between judicial activism practiced in a case-by-case context and judicial activism which openly and shamelessly would interpose a plenary veto of legislation. But, slight though that difference may be, it is indispensable to the preservation of the judicial role.

Otherwise, the Richardsons, McAllisters and the rest of that ilk are right. If a court is to operate as a frankly legislative body, then that court is fair game for being politicized, i.e., made responsible to electoral whim. (Of course, that would leave us without a judicial branch and give us a redundant legislative one.) Although our judiciary has flirted occasionally with approaching that line, it has always demonstrated the internal sense and instinct to pull back in time.

AIDING AND COMFORTING

The message this "test case" broadcasts is that some of the most eminent leaders of our profession are urging the courts to cross that line. There are few people around who know the distinction better than Jim and Bob, but their trumped-up lawsuit provides an unmistakable, if unwitting, implication that the know-nothings' rantings are valid. They lend credence to the claim that judges see no difference between: invalid-- acting legislation because, in a specific case, it violates the constitution, and invalidating legislation in a moot case because they don't like what was. Obviously, that is not what those plaintiffs meant, but it's the impression they broadcast.

Moreover, if they had to use a hypothetical lawsuit, why oh why pick a couple of lawyers as plaintiffs? You and I know that Raven and Brosnahan don't do any criminal practice, that they need more business like they need more gallstones, and are doing this out of intellectual conviction. But eight million other Californians don't know it. So the last strokes on the portrait show greedy lawyers protecting their rice bowls by leading the compliant court system around by the nose. With the public attitude toward lawyers and courts what it is today, a conjunction of the two in confronting what may be nonsense, but nonsense which was just embraced by a healthy chunk of the populace, seems like the ultimate banzai charge.

I asked the proverbial qualified spokesman about these concerns, and was told: "But otherwise there will be chaos." I rest. The village can't be saved -- even from chaos -- by destroying it.

If the "test case" fails, due process, fiscal responsibility, availability of courts to law abiding citizens and their disputes, and plenty of other cherished features of our society will suffer. On the other hand, if it succeeds, the court will be inflicting a blow to itself from which it well may never recover. (I suspect that, in the latter event, we will see the unthinkable this Fall in the form of the defeat of one or more Supreme Court justices for reelection -- a disaster which even a battle-scarred trooper such as I shrinks from contemplating.)

That's a delightful choice. I, therefore, move to dismiss. Get that case off the books, fellas. Take your noble motives, your diligent research, your fine lawyering, and apply them to some real case and controversy. Everyone -- especially those of us who share your views -- will be far better off.

THE SCREWED-UP LETTERS

On the other hand, I offer the fact that two members of the California Legislature, the ineffable Allister McAllister and somebody named Nolan from Glendale, are circularizing presiding judges in all our courts. (They may be hitting all judges, but the one I happened to see was obviously word processed for PJs.) Their letter, sent under the aegis of the Assembly Judiciary Committee and doubtless prepared and produced at taxpayer expense, announces that, if the judge hates crime (see above) -- which the writers know he does or damn well better -- he will want to join as an amicus curiae in the Attorney General's brief in support of Prop 8, doing so "either as presiding judge of your court or as an individual member of the judiciary." This communique then directs their honors to sign and return the attached sheet, thus making them participants in the lawsuit.

It doesn't exactly surprise me that McAllister and Nolan want judges to commit themselves in advance, not only to deciding but to becoming litigants over a question of law likely to come before them in the immediate future. That seems totally consistent; indeed, trying to make prejudgment of cases a qualification for judicial office has become quite a fad lately.

Don't say these guys didn't warn you. They've told us exactly the kind of courts they think we've got now, and that they want them to be even more so in the future.

By the way, has anyone else noticed the thunderous outpouring of silence with which the Judiciary has reacted to this open, cynical, ham-handed incitement to impropriety? We are not reassured by the apparent fact that such an outrage is deemed to lie within the purview of Daily Journal columnists, rather than the presiding judges who got those letters. Although it's nice to know that columnists are good for something.

TORY TRAINING CAMP?

Actually, I encountered something quite troubling myself the other day. The Pacific Legal Foundation, which acts as a sort of solicitor general for right wing interests (The Western Center for Law and Plutocracy, you might say -- though I, of course, wouldn't) asked if I would meet with some of their lawyer trainees to give out tips on appellate tactics. My first reaction was roughly the same as I would have accorded an invitation to pass the hors d'oeuvres at a pool party for piranhas. They included with their letter a publicity brochure listing the big cases they've been involved in -- unflaggingly on the wrong side, from my standpoint.

But, hold on a minute, I told myself. Don't conservatives have a right to good advocacy? Don't you go running around telling other kinds of lawyers the secrets of the trade (which, boiled down, turn out to be the color of covers to put on briefs, and which side of the table you sit on) without imposing a loyalty oath? When did you become so damned doctrinaire, Lascher?

The answer is: I hope never. Thinking about it, I realized that, if the system is to work, all views need effective advocacy. I know that puts me out of step with the times, but what else is new? Matter of fact, I think the processes of litigation and public debate are far better advanced by clear, forceful, effective presentation of all sides than by a lot of foot-in-mouth, knee jerk ideological BS.

Yes, I am going to do what I can to help those lawyer heirs of Daddy Warbucks become better advocates. Of course, I hope they'll lose all their cases, but because they're wrong, not because they didn't know how to present them.

BOOK NOTES

Okay, gang. This may be what you have been waiting for. (No, not where you can buy an unannotated Constitution.) I am currently reading that which may well be the best written book I have ever encountered: *Liebling Abroad*, a trade paperback collection of pieces by the late A. J. Liebling on his years in Europe. It may not sound that good, but trust me. Practically every paragraph, I say to myself "I wish I'd written that; heck, I wish I'd thought that." It's so good that, when I read it out loud to people, they're glad A sequel, *Liebling at Home*, which (you may be surprised to learn) is a collection of essays about the USA, has just appeared. I haven't read it, but you'd better believe I own it Book-related thought at a college graduation. One thing you never hear the speaker tell the grads is that, if they look around them, one out of every three they see will never thereafter read a book. They should be told; it's a warning to which they are entitled about the world to which they're headed.