

Stanford Lawyer



Stanford Lawyer

FALL 1977/VOLUME 12, NO. 2

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Stanford Lawyer is published semi-annually for alumni and friends of Stanford Law School. Materials for publication and correspondence are welcome and should be sent to the Editor, *Stanford Lawyer*, Stanford Law School, Stanford, CA 94305.

A Message from the Dean



After the Board of Visitors' meeting last spring, I sent to each member an abbreviated version of the Law School Bulletin containing a description of the courses to be offered in the academic year 1977-78. We received some interesting responses. One alumnus, a member of the Half Century Club, wrote: "I don't recognize the names of about two-thirds of the courses being offered. They're entirely new from the time I was in school." That observation prompted me to take a look at the Law School Bulletin for 1927-28—fifty years ago. What I discovered was some striking similarities and some pronounced differences between then and now.

In 1927 the School required Contracts, Torts, Criminal Law and Real Property in the first year, as it does today. Personal Property and Agency have dropped out, although some Agency is picked up in Corporations and some Personal Property in Property I. Common Law Actions and Pleading has evolved into Civil Procedure, which emphasizes the Federal Rules. (As a first-year student at the Texas Law School in 1946, the forms of action and common law pleading were the staples of the first-year procedure class. I still remember such miscellany as the special traverse *absque hoc*, but I never thought the course had much contemporary utility until I read a notice in the lawyer-advertising pages of the *L.A. Times* recently. It said: "Practice in Nisi Prius Courts; Trespass on the case and *vi et armis*; Indebitatus Assumpsit; Writs of Novel Disseisin.")

Added to the first-year curriculum in recent times are Constitutional Law, Introduction to Statutory Analysis and

Legal Writing and Research. The School places great emphasis on the last, assuring each student of a place in a small section (of not more than 30) in a basic first-year course in both Fall and Spring terms. A Teaching Fellow works with each small section, preparing and correcting writing exercises which range in complexity from simple library "Find 'em" drills to rather complicated appellate briefs and oral arguments.

The second- and third-year curriculum also reflects important changes, mostly by way of expansion. The School now offers some 68 advanced courses, double the number offered in 1927-28. (The problem of faculty leaves of absence, however, is apparently not new. In 1927-28 six of the 34 courses carried the notation "Not given in 1927-28.") Virtually every advanced course offered 50 years ago is still with us, but new fields of law generated for the most part by federal legislation have forced expansion. For example, the School now offers courses in Environmental Law, Labor Law, Regulation of Investment Advisory Activities, Mass Media Law, Securities Regulation, and Taxation of Corporations and Shareholders—fields that did not exist 50 years ago.

Other sources of expansion are seminars and the clinical education program. Because the faculty is strongly committed to training students in research and writing, the seminar program is extensive. Each student, in order to graduate, must take three writing courses in the second and third year. Since these courses are normally limited to an enrollment of about 18, it is necessary to provide roughly 40 seminars each aca-

demic year. The manpower demands are heavy, but the educational return for both students and faculty is high.

The clinical program, which has been in operation since 1972, has proven to be a superb innovation in law school teaching. Because there is a great deal to be said about the program, I will make it the subject of a message for a future *Stanford Lawyer*, but suffice it to say here that students who enroll in the clinical courses receive intensive training in litigation and can enter the practice flying rather than walking.

Our correspondent was certainly right in suggesting that the curriculum has expanded substantially in 50 years, although I believe he underestimates the number of courses he would recognize. His comments and this little comparative study did, however, prompt me to wonder how today's curriculum will measure up to one fifty years hence. There will doubtless be changes, but I strongly suspect that the similarities will far outweigh the differences. As I stated in an earlier message, I view change as a condition, not a choice. Changes in the curriculum reflect the School's attempt to respond to the intellectual needs of today's legal world. How well we respond to these needs, while still preserving the School's basic values, is perhaps the best measure of how well we are fulfilling our educational mission.

Our correspondent expressed another sentiment that I suspect would gain universal acceptance from alumni: "I certainly would hate to think of having to take examinations any more." At least that part of the Law School hasn't changed in 50 years!

George Osborne In Memoriam



On May 25, friends, colleagues, and former students gathered at Stanford Memorial Church to pay final tribute to George E. Osborne, William Nelson Cromwell Professor of Law, Emeritus, who died on April 10. Dean Charles J. Meyers presided over the memorial service. Tributes were delivered by two of Professor Osborne's former students, James D. Cox, Associate Professor of Law at Hastings, and William T. Keogh, Associate Dean of the Law School, and by Professor Osborne's longtime friend and colleague, Moffatt Hancock, Marion Rice Kirkwood Professor of Law, Emeritus.

A fund in memory of Professor Osborne has been established at the School.

Following are the tributes given by Professor Cox and Associate Dean Keogh and an essay by Professor Hancock on the Osborne years at Stanford, which is adapted from Professor Hancock's memorial tribute.

Nine years ago, I was a student in the two courses Professor Osborne taught at Hastings. They were superb classes. Before enrolling, I had never seen Professor Osborne. I recall my initial disappointment when a few minutes before the first class he appeared at the doorway. He was a small, stooped man. He walked with the aid of a cane. His outward appearance was incongruous with the awesome reputation he had earned as a teacher. As he made his way slowly to the lectern, he was dwarfed by the students standing in the aisle. They hardly noticed his passage. An uncomfortable juxtaposition arose in my mind: the energy and excitement among the students; his slow, faltering passage to the lectern. The bell which announced the start of the class tolled the end of viewing Professor Osborne as being towered over by anyone. His voice boomed out at us. Its assured tone instantly told who was in control. And that we were on our way to an unparalleled experience.

A master of the socratic method, any answer was sure to provoke a more penetrating question. Deeper and deeper proceeded the analysis. Under his forceful guidance, there appeared to be no limit upon how thoroughly a point could be examined or how many insoluble questions could be raised. Occasionally, a point was pursued for three or four consecutive class periods. Such prolonged analysis broadened our perspectives and intellects. It was a honing of the analytical powers which rarely

occurs in the classroom. Too few professors have the ability or are unwilling to make the personal sacrifice to be so effective.

As is true with any great professor, the title of the courses he taught had little relationship to the nature of the insights we acquired as his students. In each class, the dialogue moved quickly from the arcane principles of real property to jurisprudence, legal history and legal process. So fundamental were his courses that we renamed them Law I and Law II.

As any former student will readily confirm, there was no finer spectator sport than watching Professor Osborne serve a fellow student to the class. His wit and humor were ever present. A student's improper use of a legalism met with certain, albeit humorous, condemnation. His demeanor changed by the minute: initially challenging, then solicitous, then a devastating scowl and finally belly laughter. It was a grand performance. And better yet, a performance with great substance.

Paradoxically, it was when you were the focus of his questioning that you fully appreciated and respected the substantial efforts of Professor Osborne. From this perspective, the exchange lost its outward appearance of the student being skewered. It was an earnest and cooperative effort, guided by Professor Osborne. As you progressed and improved, you were warmed by his sense of satisfaction. Of course, you were exhausted by the rapid-fire interrogation

and the challenging plain upon which he had led you. Those of us close to Professor Osborne also were aware that the daily assault was equally taxing upon his waning strength and health. His extraordinary resolve to continue, undertaken for our benefit, committed him to our hearts.

The students' affection for Professor Osborne was most clearly manifested at the end of the course. Gifts of little intrinsic value, but great sentimental significance, were given to him by his departing students. But the greatest manifestation of our affection occurred in preparing for his finals. We sought success on his examinations for the best of motives—to offer proof to him that his efforts and concern achieved their intended effect. That we thought more clearly, from a broader perspective and with greater sensitivity for the development of the law because of Professor Osborne.

The feelings he maintained for his former students were as strong as a father's pride in his family. Talk in his office was filled with remembrances of his former students and a log of their professional attainments. Their accomplishments were his as well. And well they should be, for the bountiful skill and ability he brought to his teaching and scholarship was an inspiration to all of us.

His gift to us was substantial and permanent. Our gratitude is warm and eternal.

James D. Cox

George Osborne was my teacher and my friend for twenty-five years. However, neither relationship enabled me ever to hear from him directly very much about his ambitions, his disappointments, his successes, his concerns, his loves, his dislikes. He was truly a very private person. I never heard George Osborne talk about himself. This was not because he was quiet or reticent. Indeed, his conversation was sparkling, lively and enthusiastic, whether his remarks were in praise or criticism or merely in exposition. The carry of his deep voice was such that Chancellor Sterling claimed to have once attended Professor Osborne's class although he, Chancellor Sterling, was in this Chapel while Professor Osborne was teaching across the Quad.

One has to measure this man by his performance alone. Concerning his style

and conduct he provided no exegesis, rarely an excuse or apology or explanation. The picture which emerges from my years of observation is clear, impressive and inspirational.

With enormous grace and dignity, George Osborne prevailed over a most difficult physical disability. People who dealt with him quickly realized, however, that this small, crippled man was a not-crippled giant.

His greatest fame, all of his students will agree, was earned in the classroom. Teaching was the central concern of his life. His extraordinary intellectual gifts were obvious. His enthusiasm for his subject matter was catching. However, it was the George Osborne style that set him apart. He believed most strongly in total daily preparation for class. He believed in the Socratic method and in the benefits of a thorough exposure of a student's ideas, good, bad or confused. He assisted or drove the student, if you



will, to this exposure by relentless, questioning pursuit during class recitation. Nothing escaped his scrutiny. Accuracy in reporting facts, pronunciation, dates, parties' names were a must. Failure to meet his standards in even small detail evoked strong comment by him. While a student, I presided at a dinner at which the honorees were the then retiring Dean Marion Kirkwood and Professor Bill Owens. Professor Osborne at that time was travelling abroad. I had asked him to furnish me with a cable or letter to read. He sent me a beautifully worded, sensitive tribute. He also enclosed a personal note to me and I am certain that to him it contained only ordinary and necessary instructions for a student. It recited that I had his permission to read that letter in its entirety only and that I was not to change a word or punctuation mark. At the end of any class exercise involving Professor Osborne, it is only fair to say that few, if any, students in the class felt that they had detected in the assigned materials more than a

small fraction of the rich store of subtleties and distinctions they provided. His classes were not noted for the number of volunteers to recite. The dialogue was always exciting and enlightening if not comfortable for the student participant. This trial-by-fire exposure in his classes was generally thought by students to be one of the basic requirements for a Stanford law degree. All agreed that one learned a great deal from him.

George Osborne was a formidable, tough and brilliant Professor of Law. He who banned the tape recorder from his class on the ground that it invaded his privacy, he who would not tolerate latecomers or the ill-prepared, he who honored my class by refusing to teach for a few days because our preparation was insufficient and he who returned to us to teach only after an apology from the students was, simply, A Great Law Teacher. As such he must be remembered. His many devoted years of outstanding teaching were a major contribution to the real success of our enterprise The Stanford Law School, the standing of which is due, in overwhelming part, to its teachers.

You will not be surprised to hear that George Osborne's in-class toughness, although it frightened students, never really obscured his love for them and the Law School. Popular belief, for example, was that he was actively helping some students who were in financial need. He never spoke of any such activity. That was not his style. However, his generous funding and continuous support of the George Osborne Loan Fund wholly administered by students at the Law School for emergency needs certainly supports that popular belief.

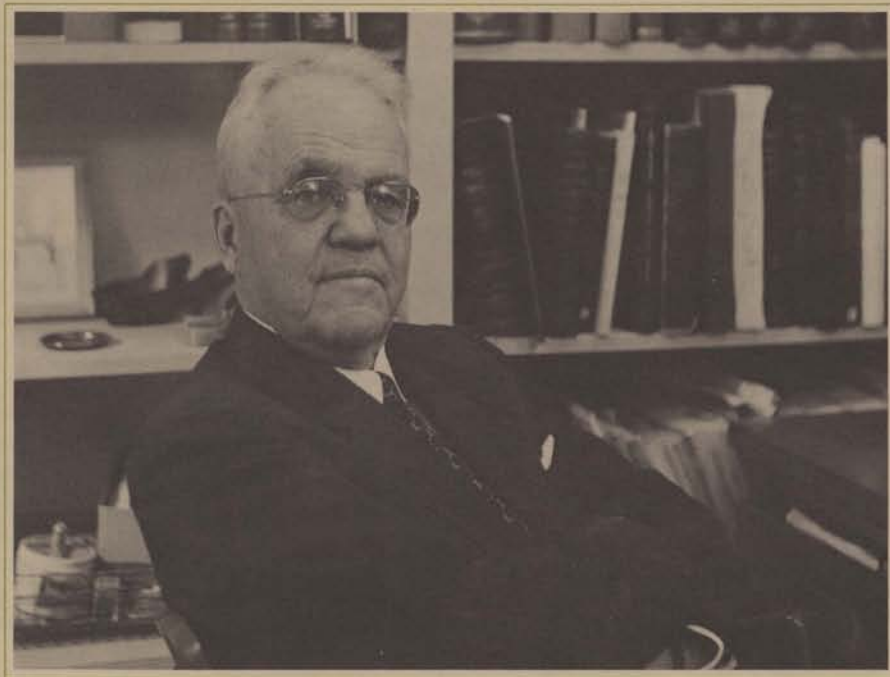
Socially he was at his happiest, sparkling best when talking of his students. Their successes really pleased him. His recollection of their performance both during and after law school always astounded me because of his remarkable detailed memory of them. His pride in their achievements was not a put-on. He glowed, he was simply delighted. I shared quite a few of these reminiscences with him and I always felt that he was really saying to himself, George, you did well. I think he did.

Thus, in memoriam, I state for all his students our admiration of and gratitude for the generous gifts he gave us.

William T. Keogh

George Osborne and The Stanford Law School

by Moffatt Hancock



Foreign observers have frequently noted an unusual characteristic of the better law schools in the United States: their power to attract their most talented graduates to a career of teaching and critical scholarship. The situation is different in Canada and other common law countries where academic teaching and critical writing are not thought to occupy the important place in the legal system that they occupy in the United States. This unique characteristic of the better American law schools is due to the aggressive tactics of their teachers in the late nineteenth and early twentieth centuries. In an open market for the best available training for success in the practice of law they proved conclusively that their demanding teaching methods and high standards imposed in grading examinations produced attractive young men and women who rapidly became more competent practitioners than the products of inferior schools or apprenticeship training. Moreover, the great teachers of those times did more than teach. They accepted responsibility for a

task that judges and practitioners were much too busy to perform—the task of evaluating the work of the judges and legislators. Moving from a purely historical basis of criticism, they called for a candid recognition of competing social interests and an informed sense of injustice in the decision of each particular case. They compared thoughtful, articulate opinions with those based on mechanical application of black-letter rules. They encouraged the judges to cast off the deluding fiction that, in a democracy, judges should not frankly discuss competing social policies. It is the challenge of this great tradition of training the judges and counsellors of the future while providing specialized research and commentarial guidance for those presently in positions of power that constantly attracts the ablest of law school graduates into the teaching branch of this profession.

As long ago as 1919, this great tradition stirred the heart and mind of one of the Harvard Law School's most outstanding graduates, George Edward Os-

borne. When, having served as Editor-in-Chief of the *Harvard Law Review*, he graduated with high rank, he might have gone directly to a teaching position as many Harvard law graduates have done before and since. But George wanted the very best preparation for his career as a teacher and scholar. So he returned to the Harvard Law School for a fourth year of classes and difficult, competitive examinations. What a contrast between George's ambition for self-improvement and the complaints of some all-knowing present-day students that they cannot stand the pressure of competitive grading, and that a third year of law school is a time-wasting bore.

Having received the coveted S.J.D. degree at the end of his fourth year, George became an Assistant Professor of Law at the University of West Virginia, where he stayed for only one year. For during that fateful year he met two men who became his close friends and greatly influenced his career. One was the celebrated property teacher, Everett Fraser, also a Harvard Law School graduate. As Dean of the University of Minnesota Law School, Fraser was building a strong faculty to rival the two great midwestern law schools of the day: Chicago and Michigan. He persuaded George to join his faculty in 1921. But Marion Rice Kirkwood, whom George also met in his first year of teaching, was destined to have a much more lasting impact upon his future. Though only six years older than George, Marion had been teaching for eight years and was then a full professor in the Stanford Law School from which he had graduated in 1911. Marion realized that George, with his enthusiasm for the fine points of real property law and two degrees from the most renowned law school in the nation, could bring tremendous teaching power, scholarship and prestige to Stanford. At Marion's suggestion, Dean Charles Huston invited George to be a Visiting Professor in the summer of 1921 before he went to Minnesota, and George accepted.

Stanford, in 1921, was not in a position to offer George Osborne a full professorship in its law school. That school had a full-time faculty of six full professors and one associate professor whose promotion was overripe and could not be deferred. President Ray Lyman Wilbur would probably have approved the addition of one more full-time teacher to his flourishing law school—but not

one with the rank and stipend of a full professor. However, in the summer of 1922 Dean Huston died very suddenly, and Marion Kirkwood, at the age of thirty-six, became the new Dean. The untimely death of Dean Huston, who had graduated from the University of Chicago Law School only sixteen years before, left a vacancy that enabled Marion to offer a full professorship to George Osborne. It is said that President Wilbur raised his eyebrows when requested to approve the appointment of a young man with only three years teaching experience to the rank of full professor. But Marion, the dynamic young dean, carried the day. At the age of thirty, George began teaching at Stanford, and there he stayed until his compulsory retirement thirty-five years later.

The coming of George Osborne marked a dramatic turning point in the austere, but heroic, history of the Stanford Law School. In 1893, when instruction in law was first offered at Stanford, the great majority of university law schools in the United States were hopelessly inferior to the Harvard Law School and the very few other schools that had followed its example. Most schools admitted high school graduates to a two-year program of lectures and easy examinations. On completing this program they received an LL.B. degree. Most of the lectures were delivered by practicing lawyers or judges on a part-time basis. But Nathan Abbott, the first executive head of the Stanford law department (as he was then called) had no intention of operating an institution of that kind. He would not permit the department to advertise a professional program or confer a professional degree until it had five full-time teachers, each one teaching from a casebook by the catechetical method. Such a program was first announced in 1900. Three years of pre-law study at an approved college was required for admission. Three more years of professional courses in law were required to attain the LL.B. degree. Only a very few other law schools had such strict standards for admission and graduation.

Though Dean Abbott's personal charm and high ideals for the pursuit of excellence attracted some very talented young teachers to his faculty, the University's financial problems made it difficult to keep them on the faculty when other progressive schools offered them better compensation. But near the close of his

deanship in 1907, he persuaded to join his faculty two young men who, within a few years, attained national and international prominence as pioneers in the field of advanced analysis of legal reasoning and judicial methodology. They were the Stanford Law School's first outstanding scholars; their achievements brought a kind of fame that few other schools could boast of. Their names were Wesley Newton Hohfeld and Joseph Walter Bingham. After eight years at Stanford, Hohfeld went to Yale where he unfortunately died three years later. But Bingham remained at Stanford until his retirement in 1943.

Thus, when George Osborne, a young man with the highest credentials and proven teaching ability, left the University of Minnesota to join Stanford's faculty of law, it was made manifest to the law school world that Stanford not only maintained the highest standards for admission and graduation, but that it had emerged from its financial doldrums; it was on the march and planning to become a law school of high degree by drawing to its faculty the keenest legal minds in the country.

In the decade following George's appointment, the school made steady progress on various fronts. Enrollment continued to increase. The library acquired more space, more books and a full-time staff of three. New faculty members were added, including George Osborne's friend and Harvard classmate, Stanley Morrison. An optional fourth year of legal studies, emphasizing research and writing, was offered with the J.D. degree to be awarded on its completion. The psychological impact of the Stanford brand of law teaching is evidenced by the fact that in 1929 seventeen graduates had become full-time teachers in "recognized law schools." A year after George's arrival, the Trustees resolved that the law school must have a building of its own, and a campaign to raise funds was started.

During the 1920s George must have felt that he and his colleagues were building a school with high standards that would eventually attract qualified students, not only from California and adjoining states, but from every part of the nation. Unfortunately, the harsh impact of the economic depression in the 1930s and of World War II upon the

budding Stanford Law School postponed the realization of his expectations until the 1960s and 1970s.

Looking backward to those sad days, it is difficult to believe that the school of Joseph Walter Bingham, George Osborne and Marion Kirkwood had to endure such economic privations. Plans for the new building were abandoned. Year after year went by with no new faculty appointments. Young men, carefully chosen as promising teachers, who did not have tenure, had to be told that Stanford could not afford to retain them. Deep cuts in the library budget forced Jim Brenner to cancel subscriptions to important sets of reports and law reviews. Faculty members not only ceased to receive their usual modest annual increases; their salaries were reduced. And in the dark year of 1943, when George Osborne reached the age of fifty, the total law school enrollment amounted to only thirty students. But through all the disappointing years George never lost faith in the future of the Stanford Law School nor in his long-time friend, Marion Rice Kirkwood. Marion's hopes and plans for the school had inspired George in the days of his youth to leave the secure haven of Minnesota, a state-supported school, to join Marion in the exciting task of making Stanford an elite, private law school of national prominence. George's Scottish stubbornness (to which he occasionally alluded) was never more admirably equal to the occasion.

With the ending of World War II the sun shone once again upon the law school. Enrollment soared. For the long-promised new quarters a large section of the outer quadrangle (north side) was designated, and George played a leading role in planning its renovation. Assuming his colleagues would spend many hours in their offices, pouring over dusty tomes, he had a wash basin installed in each faculty office—a convenience that is notably lacking in the otherwise attractive offices of the new Law Quadrangle. Ironically, neither George (nor anyone else) could have foreseen the extraordinarily rapid growth of the faculty, staff and library that was to take place under the school's new Dean, Carl Bernhardt Spaeth. A mere twelve years later, the law school had outgrown the building that had seemed so commodious and comforta-

ble when first occupied in 1950.

The law school's first endowed professorship (it now has eleven), was the William Nelson Cromwell. In 1952, on the retirement of Marion Rice Kirkwood, the William Nelson Cromwell Professorship became vacant. George's record of scholarly publication made him the obvious candidate, and he was appointed. As a student of Beale, Scott and Williston, he had always recognized the obligation of the law teacher to critically evaluate the work of the judges in his particular field for the benefit of counsellors, judges, law teachers and students. George chose the field of Security Transactions within which the most complex set of multi-party problems are those involving security interests in land. The Editor-in-Chief of the *American Law of Property* (a multi-volume work, in which each of a group of renowned scholars covered his own field) asked George to write the volume on Mortgages. He also produced two different, well-annotated casebooks. His master work, however, was his comprehensive textbook on the law of Mortgages, first published by the West Publishing Co., when he was 58 years old. It probes thoroughly and deeply into every aspect of its complex subject. In 1976, a member of the publisher's staff suggested that since the book had been in print for a quarter century and had gone through a second edition, it might be desirable for the company to replace it with an entirely new work by a different author. But he was told by a senior editor that it would take a new author at least ten years to research and write such a book. Moreover, it was quite possible that the new book would not be as well written or reliable as that of George Osborne.

In 1958 George reached the age at which all Stanford professors must retire: sixty-five. More than a decade earlier, however, David Snodgrass, Dean of Hastings College of the Law, University of California, devised a brilliant plan for bringing to his school some of the nation's most renowned scholar-teachers. He decided to seek out those who, though still in their prime and enjoying good health, were about to be retired by their employers merely because they had reached the age of sixty-five. (Some schools set a slightly higher age limit.) The plan was a great success. George was naturally invited to join what had come to be known as "The Sixty-Five Club," and he accepted. Thereafter, he

taught at Hastings for seventeen years, almost half the time that he had spent at Stanford.

In 1966 his undergraduate *alma mater*, the University of California (Berkeley) recognized his outstanding contributions to legal education and scholarship by conferring upon him the honorary degree of Doctor of Laws.

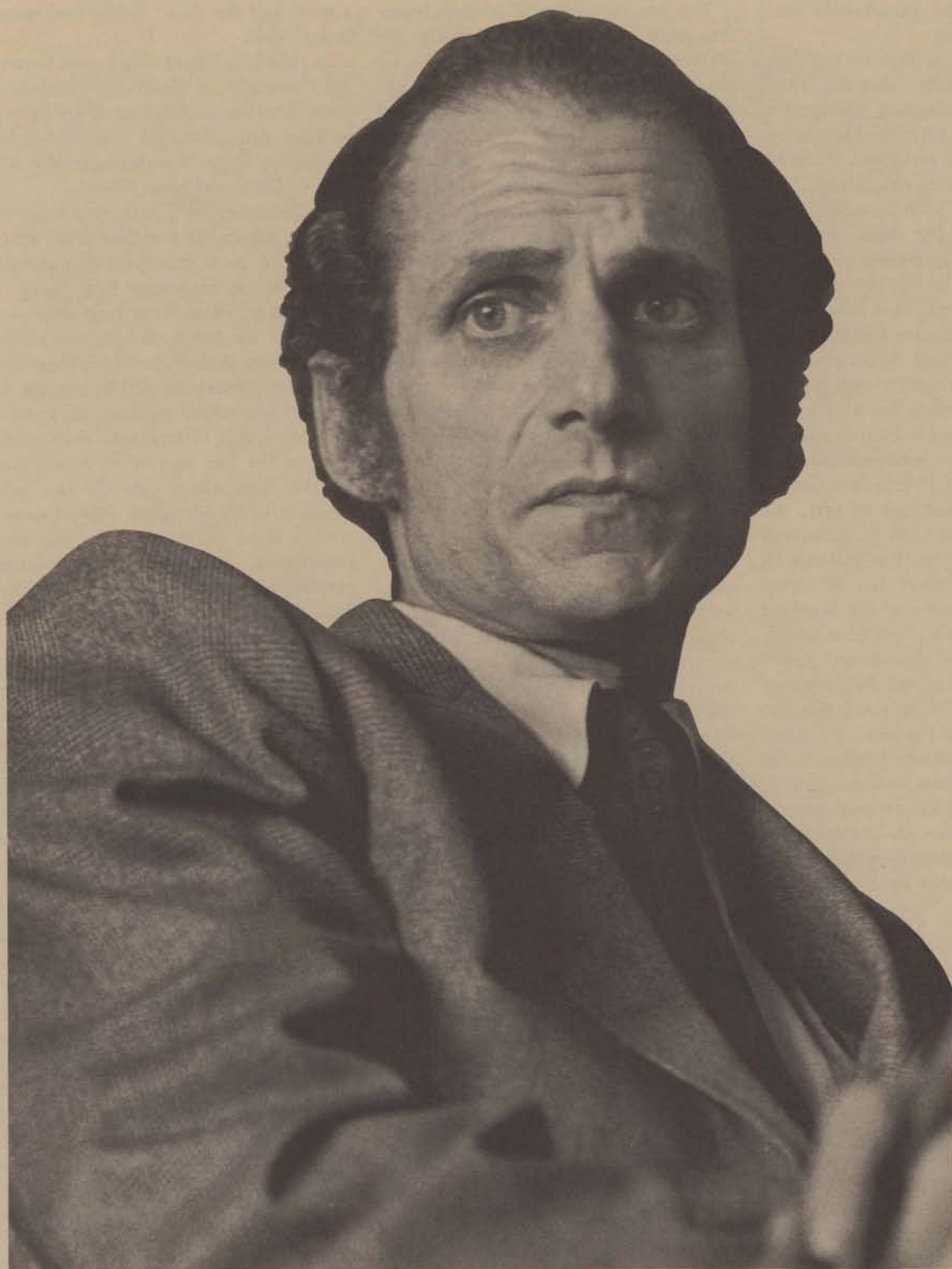
In December 1974, I wrote a letter to George, which, as I realize now, foreshadowed, in a strangely coincidental way, what is happening here today. I had been asked to write brief notes on behalf of the Stanford Law School to half a dozen donors, thanking them for their very substantial gifts in support of the new law school buildings then nearing completion. George Osborne's name was on the list; as you all know, one of the large classrooms in the new building bears his name. Having never written to an old friend under such circumstances, I considered the matter carefully. I decided to begin quite informally with some personal and family news; then I wrote something like this: "I am writing on behalf of my colleagues, George, to thank you for your generous and substantial financial support of the new law school buildings. But I want you to know that we are aware of your much greater gift that you made many years ago when you gave thirty-five of the best years of your life to teaching, to writing and to helping to guide the destinies of this law school in good times and in bad. That gift of dedicated service to this school was not only tremendously important; it was absolutely unique. No one can ever match it."

Unfortunately, George never saw the law quadrangle in its completed state or the classroom named in his honor. In the summer of 1975, a few weeks before the dedication ceremonies, he sustained a severe injury that made it impossible for him to travel from San Francisco to Palo Alto. "Some fine day," he used to say, "I'll ride out there and see the new law school." But that day never came.

There is a beautiful old epitaph that aptly epitomizes, I think, the feelings of George's former students, colleagues and friends at this time. It is quite short and runs as follows:

"To live in hearts we leave behind
Is not to die."

Moffatt Hancock, Marion Rice Kirkwood Professor of Law, Emeritus, retired from the Stanford law faculty in 1976. He is Professor of Law at Hastings.



Passionate civil libertarian, chief strategist in the campaign against capital punishment, architect of the clinical program at the Law School, Tony Amsterdam brings intellectual vigor and dedication to the courtroom and the classroom.

Anthony Amsterdam

by David Margolick

Tony Amsterdam's day usually begins around six in the morning, with phone calls to his associates back east. There are times, though, when it must begin even earlier than this, when a brief which will be hand-delivered to some courtroom in rural Georgia later in the day must first be dictated to and discussed with attorneys in Atlanta. At eight-thirty he leaves his house in Los Altos and drops off his daughter Jessica at school. He arrives at his office shortly after that.

Most of Amsterdam's time on campus is devoted to one of his classes—Criminal Seminar in the Trial of the Mentally Disordered Criminal Defendant, they call it in the catalog, but known more commonly and affectionately as the "Sick Seminar." Though only 12 students are enrolled in it, there are days when Amsterdam spends as many as eight or nine hours on it—meeting with teams of students, planning litigative strategies, videotaping, critiqueing, consulting with the psychiatrists and other assorted experts who participate in it.

Even when the seminar activities are comparatively light, Amsterdam's schedule, which he keeps for himself in a small notebook, fills up quickly and completely, down to the last few fifteen-minute slots.

And sandwiched in among the classes and appointments are scores of other chores to take care of. There are the phone calls, dozens of them, from colleagues, the press, public officials, which, despite sophisticated screening by an experienced secretary, manage to fill whatever time remains.

There are, too, letters, the inevitable trappings of fame and controversy. Each week almost a hundred of them come into the office, and each week almost as many are sent out. Many contain of-

fers—for speaking engagements, government positions, academic appointments—which nowadays are turned down almost without exception. Many others contain requests, from private attorneys or public defenders seeking help, from law students, citizens, and groupies. Many contain information on some matter related to the death penalty passed along to the man who has unavoidably come to lead if not to personify the abolition movement.

One letter, for example, talks of efforts to repeal a Florida regulation restricting the number of books allowed to juvenile inmates in the state's prisons.

And many contain simple pleas for help, expressed in fractured English and written in large and childish script, with numbers twice as long as zip codes for return addresses. These letters come from the prisoners themselves, in prisons all over the nation.

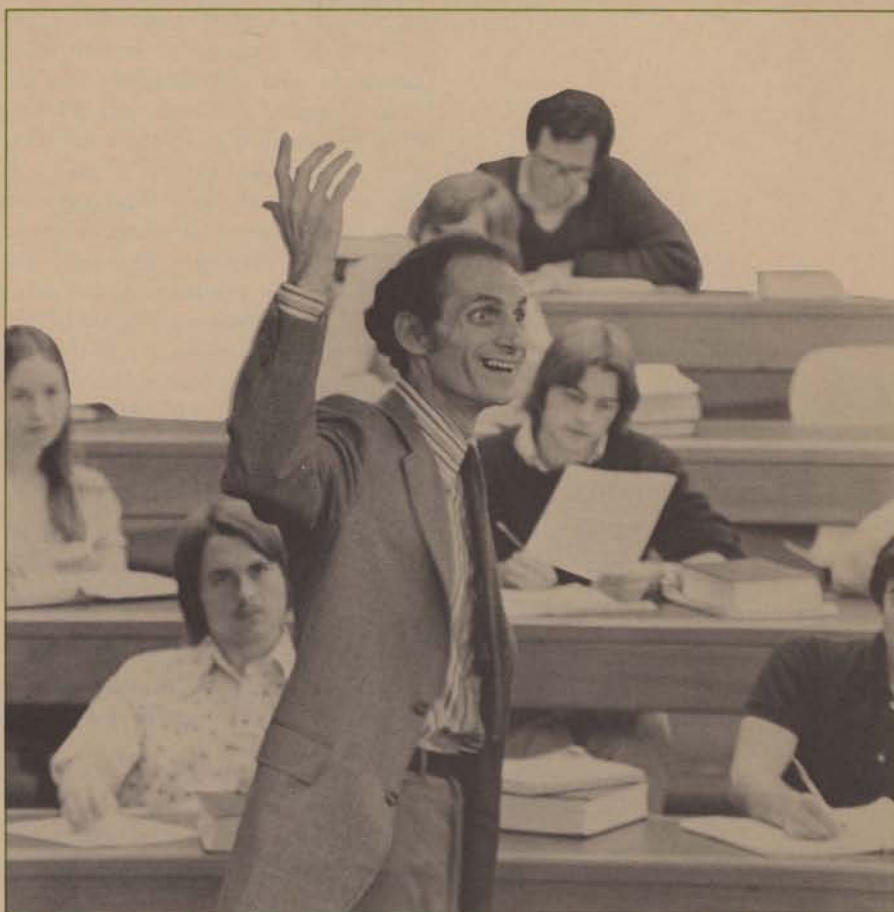
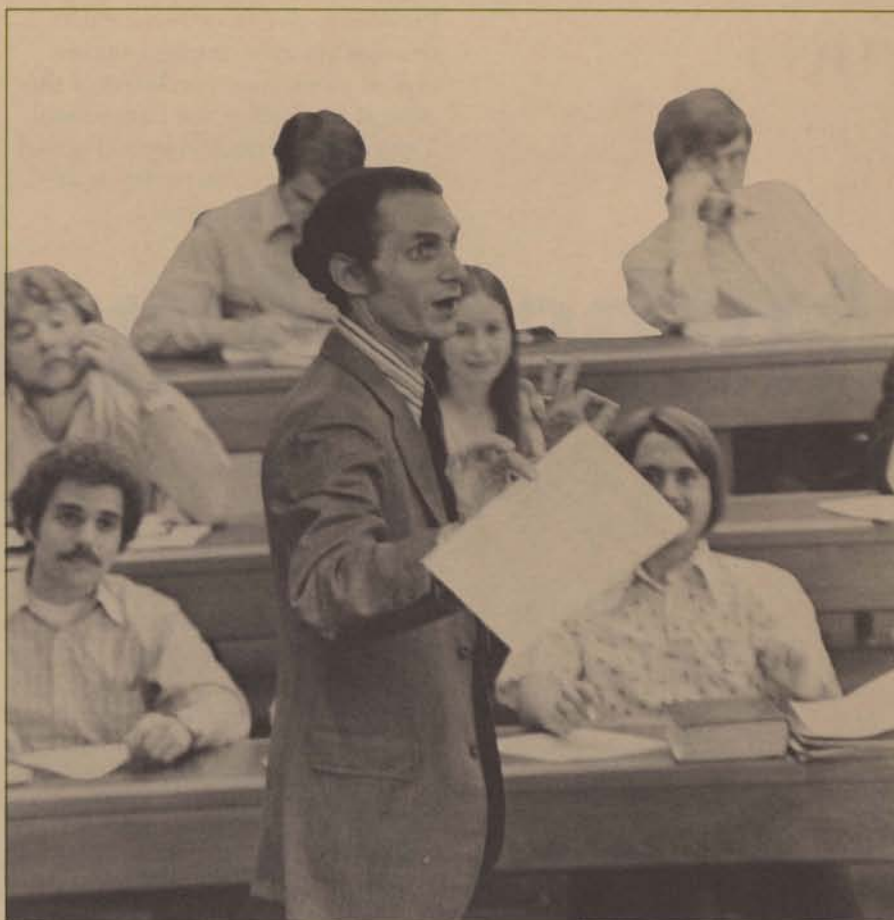
But not all the letters come from his friends. Not unexpectedly for someone in the middle of a firestorm, Amsterdam receives his share of hate mail. He will even answer some of these, the ones he considers to have been written more out of anguish and frustration than out of malice.

As hectic as his days may be, in many ways Amsterdam begins his work only when he returns home in the evening. With the constant stream of interruptions and obligations, office work has been effectively reduced to his intellectual cutting and pasting; the periods of sustained concentration must wait for the quiet of his own study and the insulation of an unlisted phone number.

Amsterdam has put together a small law library in his home, including an index of cases and a set of U.S. Reports which, he says, generally suffices for the tasks he must perform there—writing briefs, drafting legislation, preparing for his seminar, revising his Trial Manual, and dabbling in a variety of creative endeavors, legal and non-legal, a variety, which one suspects is dwindling as other obligations encroach upon time once set aside for them.

The news magazines have been fond of tabulating the length of one work day in the life of Tony Amsterdam. Eighteen hours, said one account; twenty, speculated another.

Over the years, the Amsterdams, more particularly his wife Lois, have become sensitive over this issue, fearful that should the duration of his workday be-



come known, there will be those who regard it as infinitely elastic rather than immensely overloaded, and will add their own demands to the work. Thus, bedtime remains a mystery, though, as Amsterdam concedes, "It is safe to say it's not early." In fact it's safe to say that there are nights when it never comes at all, when, perhaps with someone's life hanging in the balance, one work day and night must blend imperceptibly into the next.

Anthony Amsterdam's roots are in the East, but in no sense of the term are they very deep. He was born in Philadelphia on September 12, 1935, the only child of Gustave and Valla Abel Amsterdam. His grandfather, along with thousands of other Jews, had fled Russia and its pogroms around the turn of the century, and had settled in Pennsylvania. Here he entered the nascent motion picture business as a projection boy, and eventually he came to own a chain of theaters in the area. Here, too, Amsterdam's parents were born and raised. His father went to high school, college, and law school in Philadelphia, and in so doing built a strong foundation for the prominent position he still holds in commercial and civic affairs there.

Like most of this country's older cities, Philadelphia is a collection of pockets—economic and ethnic and political niches, distinct at their core but overlapping both functionally and physically along their edges. Amsterdam grew up in such a pocket. It was a neighborhood of single-family homes and moderate-sized apartments, occupied primarily by the professional and managerial classes, almost exclusively white and largely Jewish.

In such an "inner suburb," separation from the outside and "outsiders" is more psychological than real. Large concentrations of Italians and Blacks lived in close proximity to the Amsterdams, and neighborhood boundaries tended to break down quickly and easily both on the streets and in the schools, the sites of Amsterdam's most vivid impressions of childhood.

"The world I grew up in was not by any means sheltered," he says. "I remember days of middle childhood as days of running in packs, where the ethos was on establishing your turf, not in the Piri Thomas or Claude Brown sense, but in which fights to establish the toughest in the group or the toughest group were reasonably common."

During these years, Amsterdam was even picked up by the police a couple of times, and some of his friends were in more trouble than that. But one measure of the relative gentility of his own experiences, he notes, is the comparatively high level of esteem in which the law was held in his neighborhood. "It's not that we were affirmatively hostile to the police," he recalls. "We were merely flexing the muscles of our freedom."

Although ethnic hostility was not characteristic of Amsterdam's experiences in Philadelphia, ethnic consciousness was. "I definitely perceived the world as being divided into three parts," he recalls—the Italian and the Black worlds in addition to his own. And the boundaries between these groups, though unspoken, were nonetheless not always easy to cross.

Amsterdam managed to cross-pollinate to an unusual extent, though he did so almost in spite of himself. To begin with, nobody could ever figure out exactly where this particular "Tony" fit into the scheme of things. "Given my name," he says, "it took me ten years to get unscrambled."

But more important than his confusing name, was the world of big-city, contained athletics—of box-ball and hand-ball and stick-ball—which helped him to bridge the gap and cement new friendships. Amsterdam was a skilled and committed competitor. He was good enough, in fact, to be named captain of the box-ball team during his first year of junior high school, an honor which was to prompt the most broadening, as well as the most sobering experience of all.

A Brush with Death

For shortly after he was named captain, Amsterdam developed bulbar polio. The disease, which affects the throat, was at that time usually fatal, and Amsterdam pulled through only after some harrowing days in an iron lung.

"It was a mini, almost a comic version of so many great sports tragedies you see these days," he muses. "You know, 'Local Box-Ball Captain, Great Athlete Loved by All, Gets Polio.' This particular athlete was very far from a great athlete, very far from being loved by all. But once the immediate contagion period had passed, everyone in the class started to visit me in the hospital."

Out of this distressing experience, he

believes, came personal ties and feelings of affection which could never have been developed otherwise.

And while these relationships have, almost without exception, since come to an end, casualties of time and distance and disinclination, the interest in athletics which fostered them has persisted. In junior high, he played basketball with Wilt Chamberlain; in high school, he was the city-wide tennis champion of Philadelphia, and flirted for a time with the idea of becoming a professional.

Even today, sports seem to be the one element of comparative frivolity which Amsterdam allows himself to take seriously. "I still enjoy a good college basketball game," he declares, "and you're not about to get me away from the tube when the Super Bowl is on."

High School

Amsterdam attended Central High School in Philadelphia, the same school his father had gone to, open to students city-wide on the basis of a competitive admissions exam. He approached the experience, he says, as he had all of his academic endeavors up to this point: with an anti-intellectual, non-inquiring attitude.

Yet there emerges at this point a thread which runs throughout Amsterdam's academic experiences. For despite his apparent disinterest at the time and his modest disclaimers now, Amsterdam was to move inexorably toward the top. He finished second in his class at Central—the last time in his academic career that anyone beat him.

In his final year at Central, Amsterdam edited the school magazine, and wrote some essays, short stories, and poetry of his own. In so doing he seems to have laid a foundation for his college years at Haverford, years which represented, he now says, "a complete change of life" for him.

Small, bucolic, and sheltered, Haverford was an intensely intellectual but non-competitive academic community, one redolent of the quiet, contemplative Quaker perspective on life, where, according to Amsterdam, "people were fascinated with the good, the true, and the beautiful." Here, Amsterdam pursued the life of the mind with the same degree of intensity with which he had rejected it only a few years earlier.

With the exception of music, he dabbled in almost everything in the course of this search. Nominally a comparative

literature major, he read voraciously, in German, Italian, Spanish, and French as well as in English. At the same time he studied art history at Bryn Mawr.

"This was at a time," Amsterdam recalls, "when I was hung up on ideas for their own sake, when I was very little concerned about their worth or utility or impact on society, when I would have described the good life as the life of a poet or of a plastic artist or of a musician striving toward private truth. I suppose that had I been independently wealthy I would have ended up as a poet at that point."

Casting Lots

Then as now, however, aestheticism was not a growth industry; the pursuit of truth was not especially remunerative. And the most likely alternative—a career in academia—was unacceptable to Amsterdam because of what he regarded as the trivialization of inquiry in some universities.

"People had seemed to me to have stopped writing about Byron and even stopped writing about *Don Juan*," he says, "and were now writing about line thirteen of canto twenty-seven of book two of *Childe Harold*. At that point I flipped out."

Amsterdam's career choice was, however, to hinge more upon the resolution of nagging personal tensions than upon economic or academic realities, tensions perhaps best represented by the involvement in the late 1950s of the heretofore introverted Haverford student body in the incipient civil rights movement.

Amsterdam, along with several of his classmates, black and white, had on several occasions driven to Delaware and attempted to integrate lunch counters and similar public facilities there. And while these early efforts did not force him to confront the kinds of injustice he was ultimately to discover, they intensified his growing dissatisfaction with the aesthetic and the speculative.

In the end, Amsterdam cast his lot almost by default. He opted for law school, at the University of Pennsylvania. "I really just backslid into law," he now says. "I hadn't the slightest interest in it at all." As if to smooth the transition, Amsterdam continued to take courses in art history, and earned more than enough credits to pick up another degree.

Law School Experiences

Penn Law School was the second

chapter in Anthony Amsterdam's remarkable ascent to excellence, remarkable because it was somehow both accidental and inevitable. His experiences there will sound familiar to many contemporary law students, but only to a point, when once again, the normal rules of cause and effect must almost be suspended for the story to make any sense.

Amsterdam approached the legal profession as Wallace Stevens approached the Hartford Accident and Indemnity Company: not out of any innate interest or affection for the work, but purely as a tool through which he could be freed to do what he truly loved. If you want to become a writer, Amsterdam thought, pick some sedentary profession, one which would tax your physical and intellectual energies as little as possible—tombstone cutting, for example. "I treated law school like tombstone cutting," Amsterdam recounts. "It just had no reality to me."

To listen to Amsterdam speak of his experiences at Pennsylvania, nothing and no one there did very much to strengthen his tenuous ties to the legal profession. "I didn't do anything in law school," he recalls. "I don't remember myself doing any of the things that, with some admiration, I watch law students doing now. I don't remember studying much." He had, he says, given himself a year there, to see "if it fit."

And at the conclusion of that probationary period, it was inertia, and not a change of heart, which prompted him to persist.

In law school as in high school, however, personal indifference was apparently no bar to extraordinary achievements for Tony Amsterdam. For having strayed into the University of Pennsylvania Law School, he subsequently strayed into the top position of his class, and into the editorship of the law review there as well. "That was incredible," he says of the appointment, "and I still don't understand that worth a damn."

Amsterdam undertook his new responsibilities, but hardly with the personal enthusiasm one usually associates with the job. "I was reacting to law school in such a mechanistic way," he says, "that if somebody had said to me 'the next thing you do is clean the men's room,' I would have cleaned the men's room. Someone said to me 'you're edi-

tor-in-chief' and I replied 'where's my desk?' That was the name of the game for me." As though to underline his malaise about the entire undertaking, Amsterdam recalls that while editing the publication (and writing his oft-cited note on the void-for-vagueness doctrine) his primary concern was the novel he was working on at the time.

Professorial Ministrations

Amsterdam's success at Penn should have resolved whatever nagging doubts he might once have had about his capacity for the law. But when final exams were over and all obligations had been discharged, the familiar and fundamental career questions once more loomed before him.

As though to provide himself with yet another round of commitments and postpone the inevitable confrontation with himself still further, Amsterdam accepted a position with the Antitrust Division of the Justice Department in Washington.

The job was never to be. Sensing that one of his prized students was simply lost, Professor Louis Henkin offered Amsterdam a modest alternative: a clerkship with Supreme Court Justice Felix Frankfurter, for whom Henkin himself had clerked many years before.

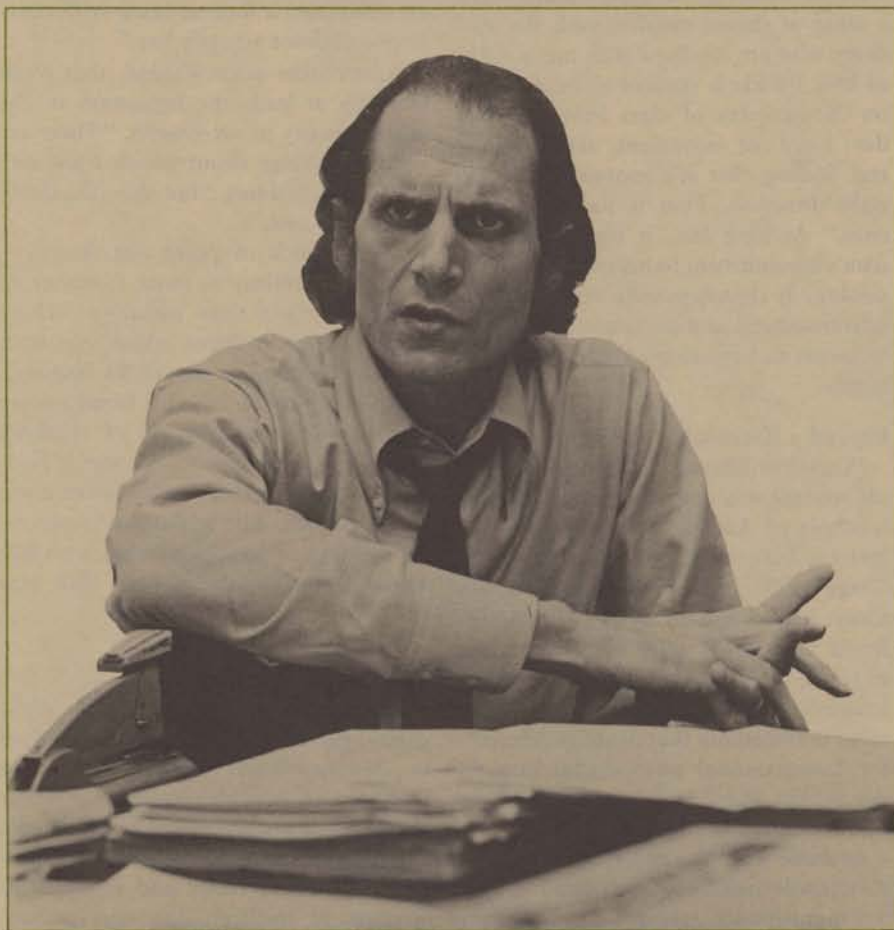
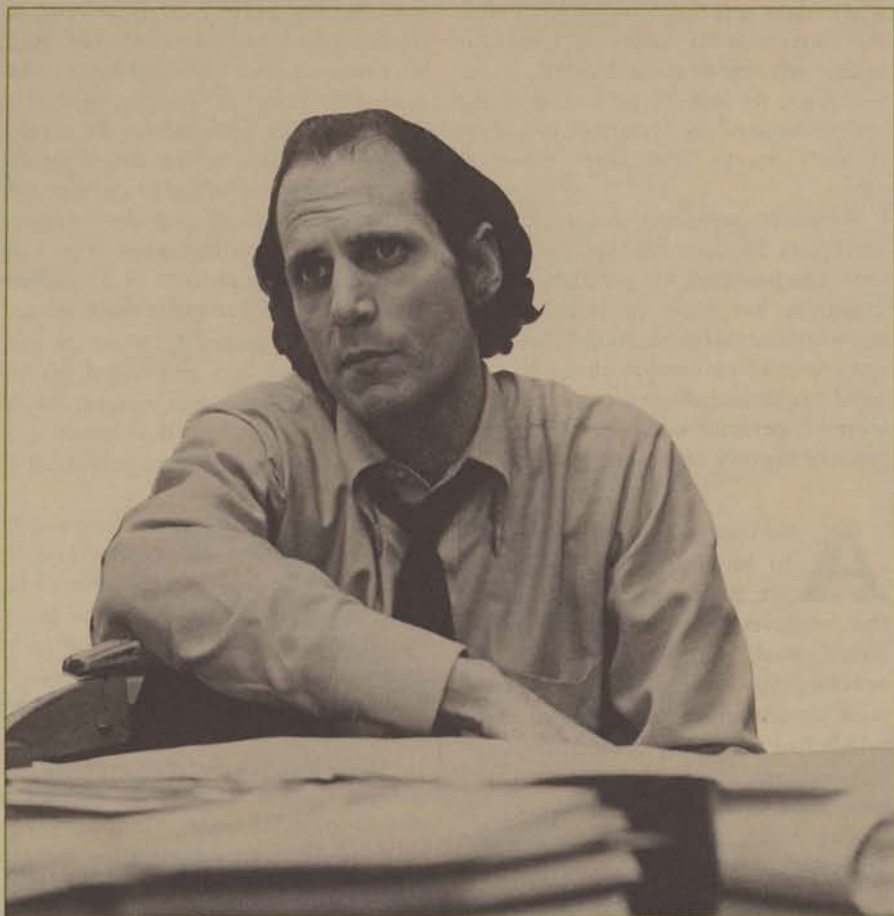
"I suspect," Amsterdam says, "that it wasn't a merit appointment that Lou said to Frankfurter, 'Felix, would you take this guy?'"

Whatever his initial inclinations, Frankfurter apparently agreed to Henkin's request, the first and only time he had been willing to accept an outsider—a non-Harvard man—for one of his clerkships.

Amsterdam's initial reaction, on the other hand, was negative. "I knew how highly prized a commodity Supreme Court clerkships were," he now recalls, "and I felt rather guilty about eating up a slot when I just didn't have the same commitment to law or the same esteem for the Supreme Court or feeling for the institution that I thought a lot of people had." He nonetheless accepted the position, a decision which turned out to have vital personal and professional implications for him.

In the course of his clerkship there grew a strong personal bond between the young Amsterdam and the aging Frankfurter, who was to suffer a stroke and retire from the bench within three years.

"Frankfurter had much of the Jimmy Cagney-Little Caesar quality to him,"



Amsterdam continues, "but it was largely put on. He was an infinitely warm person. He took his law clerks into his family almost as though they were his sons. There was nothing at all about him that was cold or distant or aloof. I look on him with very considerable affection."

Indeed, even after his clerkship was over, Amsterdam continued to provide Frankfurter with research assistance and help on his memoirs.

But Amsterdam was to cultivate more than a lasting affection for the boss during his year at the Supreme Court. Looking back upon his personal development, he says that his clerkship was "the most important determinant of what I have been doing since." For during these few months in Washington, Amsterdam was forced, for the first time, to take a "good hard look at the record," to examine the workings of the nation's criminal justice system.

"A sense of injustice woke up inside of me," he recalls. "I saw a lot of people getting screwed very badly. For reasons not clear to me then nor clear to me now, that bugged me, and bugged me badly."

In a sense, Anthony Amsterdam never really committed himself to the law as a profession; he merely concluded that given the state of American criminal justice, vacillation was a luxury he could no longer tolerate. Frankfurter sensed his young protegee's eagerness to work for reform, and recommended that he begin by studying the mechanism from the inside—in the United States Attorney's Office in Washington.

The advice was not only sincere, but consistent with Frankfurter's peculiar conception of his responsibilities as a justice of the U.S. Supreme Court. "I had the sense," says Amsterdam, "that he would be very delighted to see people go out and change the very institutions he was upholding." Amsterdam worked in the U.S. Attorney's Office for a year and a half, during which time both his familiarity with the criminal justice system and his resolve to reform it intensified.

Re-entering Academia

Once he sensed that the *de minimus* point had arrived in Washington, however, Amsterdam made what may well turn out to be the most important career decision of all. He decided to go into teaching.

Given his own law school experiences, the choice may seem strangely suggestive of his symbolic career as a tombstone cutter; for in the days prior to OEO Legal Services, when the whole spate of pro-bono openings now so difficult to find had not yet even been conceived, teaching seemed to offer him the best accommodation between financial security and personal satisfaction. However mixed a blessing classroom instruction might be, it afforded him a golden opportunity to practice at the same time. And from his first days as a Penn professor, Amsterdam was involved in a wide variety of public interest litigation.

Those who know Anthony Amsterdam, however, know too that he could never have discharged his responsibilities as a teacher with anything less than the commitment he has displayed towards everything else in his life.

"I have a slightly different feeling than a lot of people regarding what a school is about," he says. "I regard universities in almost the medieval sense, when students hired the professors. My contract runs to the students. I don't think I should be here if I'm not doing the kind of job I should."

The sentiments are not new ones for Amsterdam. Indeed, to study his career in the law is to learn that more than the width of his neckties has remained constant over the years. His work and thoughts are characterized by a remarkable consistency. In 1970, for example, when the Law School community was riven by a student strike in the wake of Cambodia, Amsterdam sent a six-page memo to members of his criminal procedure class, outlining his reasons for holding class.

"I believe that I have an obligation to every one of my students, individually, to meet him in class and try to give him the best damned course . . . I know how to give," he wrote at the time. "So long as I am not disabled from doing so, I have to do just that. My own revulsion about Cambodia does not release me from that obligation. Neither does the revulsion of other students, whether or not they are a majority of the class or of the school. If every student in the class but one voted to strike the class, I would continue to have the same obligation toward the one."

No Longer a Lapidary

Still, from his own years in law school, and continuing into his teaching career,

Amsterdam was highly dissatisfied with the contours of the traditional legal education—its apparent aimlessness, its irrelevancy, its lack of contact with the real business of the law, from either the lawyer's or the lawmaker's point of view.

Whatever omissions this might have created in his own life had been more than compensated for through outside litigation. Yet while operating on the outside Amsterdam has sought to reform from within, to combat through a revised curriculum those facets of the law school experience which neutralized the value of his own legal education.

And though it is probably his fate to be restless throughout his life, there is evidence, at least to this observer, that now, at Stanford Law School, Anthony Amsterdam has reached the kind of rapprochement with himself and his professional career which had previously eluded him. Having designed and implemented his own clinical program here, many of the most vexing facets of teaching have disappeared.

"I know very, very well now what I want to achieve," he says, "and I have a sense of shared mission with the students who are involved with me, a sense of how I'd like a student to be different on the last day of class from the first day. I can see movement, and I have a real feeling that it's movement in the right direction. That is the big difference." At long last, it seems, Amsterdam's commitment to his teaching methodology is commensurate with his conscientiousness as a professional; at last, he seems to have stopped carving tombstones.

Beyond a Reasonable Doubt

"Death is different." More than a simple statement of fact, the phrase was the lynchpin of Amsterdam's argument before the Supreme Court one year ago in *Gregg*—different, he said, because the Court itself had said so in *Furman*, different because 35 state legislatures had so treated it, different because it is "final, irremediable, unknowable." "Our argument is essentially that death is different, for constitutional purposes. If you do not accept that we lose this case," he told the nine assembled justices.

In some ways, however, Amsterdam's own involvement with the matter of capital punishment seems hardly distinct

from the rest of his experiences and attitudes. Like his interest in the law itself, his career as an abolitionist began relatively late in his life, relative, that is, to most of those with whom he works, whose opposition to the death penalty had usually been forged in the religious or philosophical training they received as children. It was, like many of his pursuits, hardly the product of an inexorable march to a particular destination.

And like his teaching, the competence with which he has discharged his responsibilities in this area is, according to him, more a function of conscientiousness to a client than of commitment to a cause.

"You have professional responsibilities to your clients which include saving their lives," he declares, the pitch of his voice rising as if to italicize the point. "It ain't a question of fervor." And he goes on to eschew or at least to circumvent other possible explanations for his commitment.

"One can look for psychological or characterological reasons to explain a phenomenon," he says, "and they may be there—I'm not introspective enough to affirm or deny them. But fervor may mean nothing other than the extent of an obligation a human being with these responsibilities actually has."

Amsterdam acknowledges that intellectually at least, the legitimacy of the death penalty in *sui generis*. "There are very few things about which I am sure at all," he declares, "but this (the death penalty) is one."

He is quick to point out, however, that this certainty is more a matter of academic rigor than emotion. "There are some things about which you have to be sure because the awful responsibility you have to bear for being unsure forces you to the work of thinking through and being sure," he says. "Generally you can afford the luxury of intellectual doubt. But sometimes your responsibility as a human being, a professional, or a citizen is such that you can't."

A Matter of Emotion

But to talk with Amsterdam about capital punishment—and to get beyond the descriptive and technical which tend to frame all such discussions—is to get a different impression, an unmistakable impression that to Amsterdam, as a matter of personal belief and emotion as well as of intellectuality and judicial

doctrine, death is indeed different. When he discusses the subject, his conversation is suddenly more fluid, more animated, more expansive; his ideas are uncharacteristically and sometimes disconcertingly harsh and unequivocal.

Judging the Judges

What are his personal feelings toward the *dramatis personae* of the death penalty controversy, particularly his opponents—the Youngers, the Deukmejian, the MacAlisters—who have now mustered yet another capital punishment bill through the California legislature?

"Generally, I believe that people can disagree without being disagreeable," he replies. "There are some issues, however, that are fundamental enough, that cut deeply enough, that I don't have to like the people I disagree with, particularly when I see a constellation of personal characteristics which I regard as personally ugly on the part of so many of them."

"I don't like to stereotype people," he continues, "but they are not as a class very attractive people. Death-penalty proponents are, in my experience, either politicians who are selling out . . . pandering to the worst sentiments of their constituents, or they are people who in character structure are authoritarian or macho. They have a 'what is a man if he can't wear a gun,' 'what is a society if it hasn't got the guts to kill' kind of feeling, or they have the 'red queen' syndrome—'when somebody bothers me, off with their heads.'"

"I have found no legitimate reason why anybody should support the death penalty," he says, "and I have never heard anyone who is a supporter of it advance a rationally satisfying one—and I don't mean rationally satisfying by some super-spectacular intellectual criterion. I am prepared to say that I have never heard anybody espouse a pro-death penalty view on any grounds that didn't seem to me to be something that was more characteristic of a worm than a human being. So I detest, for the most part, these people, *now*, unfortunately, sight unseen."

At the very least, according to Amsterdam, politicians who support capital punishment have failed to do their homework and figure out for themselves whether or not the death penalty does indeed deter.

"Before they mobilize the legitimate fears that all of us have about crime in

the street and about dangers to ourselves and our loved ones," he exclaims, "before they lead a howling pack down the election trail toward enacting laws that will kill people, they ought to know whether they're right or wrong, goddamn it. If they had *read* the goddamn stuff, if they knew it, I would regard them as something slightly higher than worms; they might just be misguided."

Destruction, Physical and Mental

Since 1963, when he first entered the arena, Amsterdam has never lost a client on Death Row, though only recently he lost a client's son—Gary Gilmore. He is quick to point out, however, that his track record is perfect in only the most technical sense.

"I have known people who have been destroyed by the death penalty without actually being executed," he says, "clients who were on Death Row for eight or ten or twelve years and who were psychologically ruined there."

But whatever passion Amsterdam the humanist feels for the personalities involved in the death penalty controversy has effectively been banished from the world of Amsterdam the legal strategist. In this world, there are few extremes. For he has learned from bitter experience, he says, that judicially-forbidden inequities have a remarkable, almost biological viability to them, springing back to life long after court opinions had ostensibly laid them to rest.

"Win 'em or lose 'em," he says, "they're never entirely won or lost. Neither Tamerlane nor Alexander the Great ever conquered the world; and as down as they might have been, neither Orwell nor Rimbaud was ever entirely out."

Though the judicial pendulum was to swing drastically between *Furman* and *Gregg*, then, Amsterdam's reaction to the two rulings was consistent—calm and clinical. There were celebrations at the Legal Defense Fund in Washington the night that *Furman* came down, but nothing similar to that in Palo Alto. For Amsterdam, the decision merely granted him some unexpected time and tactical advantages with which to pursue something else.

"My summer research group broke out a bottle of something . . . I think it was champagne," he now recalls. "But I still got a full accounting of their work

at the end of the day, and we ended up with an expedited trial schedule for the police practice cases which had been held in abeyance while we were doing the death penalty work."

And although its implications were enormous, *Gregg*, too, was greeted with equanimity. "You take it as a surgeon takes a cardiac arrest in the middle of surgery," he explains. "It screws up the operation, may even be fatal, but it is on the roster of possible contingencies. There wasn't much time for shock."

Given a hostile judiciary and a wary, frightened public, the campaign to eliminate capital punishment from this nation's arsenal of retribution is likely to be both long and difficult. Amsterdam and his associates currently envision a campaign which may well last thirty or forty or even fifty years before it finally succeeds.

The continued commitment to "the cause" is something which Amsterdam neither begrudges anyone nor doubts to any great degree. "I will continue to make it as long as I am physically capable of making it," he declares. That the work entails considerable sacrifices no longer upsets Amsterdam very much. "Life is too rich to ever get away without paying that price," he says. "I'm reconciled to this by my age."

The Costs Are High

Unfortunately, the inquiry does not end for him at this point. "What's harder," he continues, "because I have to face it every day, is *who* is short-changed." However long it may last, for sixteen or eighteen or twenty hours, the working day must prove to be inadequate to the many demands on Anthony Amsterdam's life.

He acknowledges, first, that his many outside commitments keep him from developing the kinds of relationships with his students he would like.

"With the exception of the death penalty and a few other areas of professional obligation," he asserts, "teaching is the highest priority around. When that gives, that hurts." He acknowledges, too, that the price must sometimes be paid considerably closer to home. "Lois and Jessica," he adds, "pay a heavy price in the same way students do."

Conspicuously but characteristically absent from Amsterdam's cost/benefit analysis is perhaps the most troublesome expense of all—the costs to himself. Though, to use one of his own meta-

phors, Amsterdam can balance many balls at once, his life has become in many ways a tangled web of commitments, jealous commitments which have come not only to preoccupy him but to preclude the broad universe of interests he once held.

And there are other, perhaps more serious, personal costs as well. Again, they go unmentioned, except by those individuals close to Tony Amsterdam, people who feel for him, it sometimes seems, a loyalty which approaches love. They worry about him, about the relentlessness of his daily regimen, and about the physical and psychic toll it has exacted from him already—and will continue to exact from him in the future.

Reprinted, in edited form, from the Stanford Law School Journal of April 14, 1977.

A Matter of Modesty

In the service of some, one must necessarily subordinate the interests of others. It is the essence of Amsterdam's dilemma, but, more than that, it is the essence of his personality—his commitment, his generosity, his selflessness. It is this overriding deference to others which is most apparent even to those with whom his contacts are most fleeting.

Though generous in his praise of others, Amsterdam is extremely hard on himself, a point which comes across in numerous ways. He will, for one thing, generalize: sure, there are the stories which float around about him, about the prodigious feats of memory in the courtroom, and some of them are even true. But this will inevitably go on, he says; just look at his own professors in law school.

Or he will denigrate his own motives when the accomplishments themselves are undeniable, as though he has no choice but to be extraordinary. His life-saving efforts in the courtroom? It's simply a matter of professional responsibility. "I do it in the Martin Luther sense," he says. "I can't do otherwise." About the overwhelming enrollment in his criminal procedure class? "It's a difficult subject to avoid. There are damn few offerings."

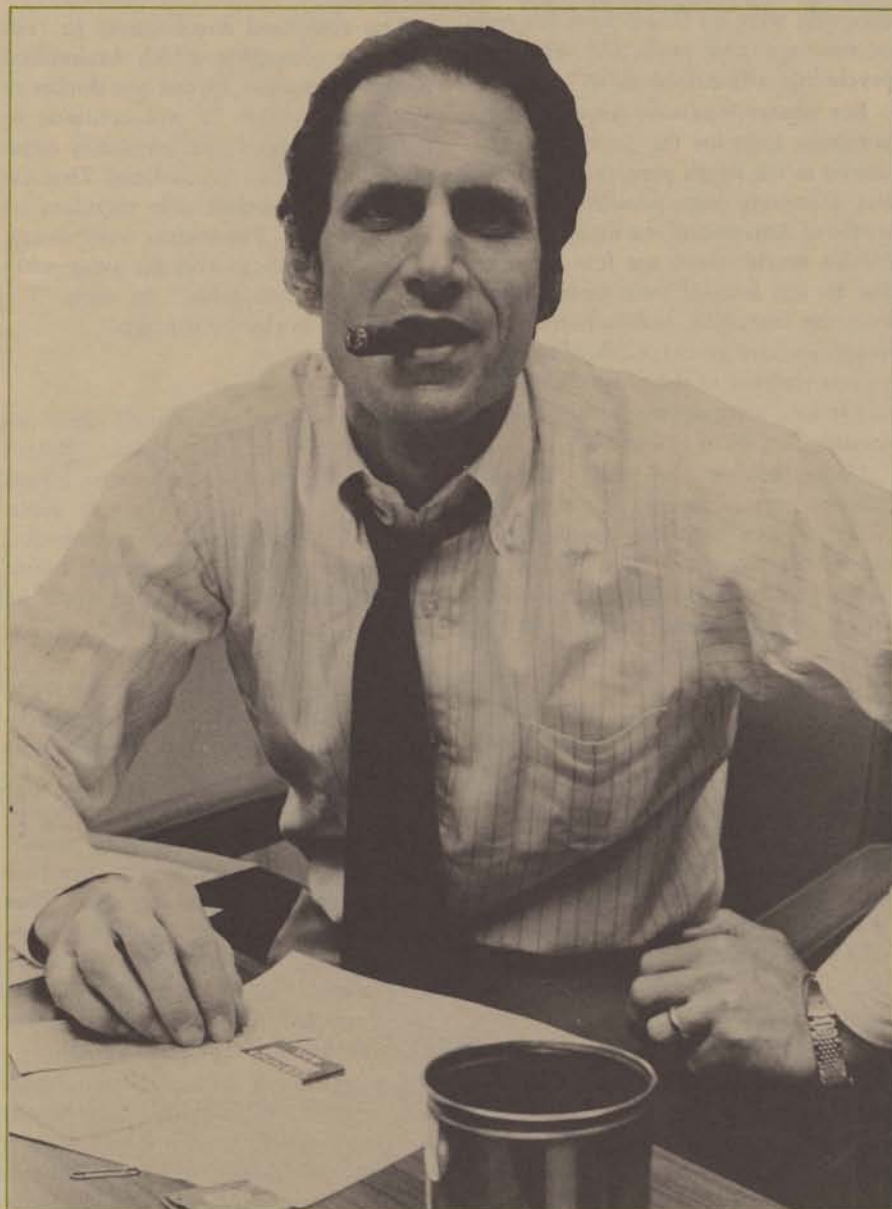
Or he will simply deny. Do you really believe that your intelligence and your accomplishments are not extraordinary? "Yes, I do. That's just an absurdity."

For whatever reason, whether base or simply analytical, the mind wants to rebel at some of these sentiments. One can't help but wonder whether Amsterdam's humility, like his street talk, is sometimes used simply for effect, whether, in realizing that simple acknowledgment of his abilities may appear to be conceit, he has opted for an untenable modesty instead. Yet as perplexing as it sometimes seems, in its own peculiar way Amsterdam's modesty is somehow reassuring, for it is the one remarkable characteristic of his most difficult to deny or to obscure.

Years of public exposure and controversy have diminished Tony Amsterdam's sphere of privacy; our conversation today can and does cover almost everything. Still, when it is over, feelings of awe and awkwardness remain; one still regards Amsterdam as a remarkable but remarkably private man.

In the end, one must ask others for the answers; one must return, however, reluctantly, to those who know Tony Amsterdam best, though do not necessarily know him well. Here, a phrase from Felix Frankfurter, Amsterdam's former colleague and teacher, surely contains not only the likely result of such an inquiry, but also perhaps a piece of loving advice to Amsterdam himself. "Curb that conscience of yours a bit," Frankfurter once wrote to his friend, Learned Hand, "and know a little of what others, not wholly incompetent, know of your gifts."

David Margolick, a 1977 graduate of the Law School, is spending the academic year in Florence, Italy, where he is research assistant to Mauro Cappelletti, Professor of Law and Director of the Institute of Comparative Law at the University of Florence.



President Jimmy Carter has called upon all Americans to unite in support of proposals to overcome the crisis facing a world that, in his words, "is now running out of gas and oil."

"The most important thing about these proposals is that the alternative may be a national catastrophe. Further delay can affect our strength and our power as a nation.

"Our decision about energy will test the character of the American people and the ability of the President and the Congress to govern this nation. This difficult effort will be the 'moral equivalent of war'—except that we will be uniting our efforts to build and not to destroy."

Tonight I will not discuss the President's specific proposals for overcoming this crisis.

Instead I will talk about what I believe to be the proper role of lawyers and the judicial system in assisting the President to accomplish his proposals. I will try to do so from the perspective not only of a chief executive of a large urban utility, but also from that of a former general practitioner of law, administrator of a large federal power agency, and Undersecretary of the Interior.

First let us examine the role that lawyers and courts have played in the development of energy policy during the past decade.

From the mid-60s to the mid-70s the critical energy issue as perceived by the public was how to protect the natural environment against the encroachments of energy producing facilities. Until very recently the availability of energy of all kinds at relatively low prices was taken for granted, regardless of what regulatory constraints might be placed upon energy producers and processors.

For the past decade, courts have played a central role in the energy decisions our country has made, although this role has gone largely unnoticed by the public and by most of the bar. Basing their jurisdiction on federal statutes—chiefly the Federal Power Act, the National Environmental Policy Act, the Clean Air and Clean Water Acts, and the Federal Administrative Procedure Act—the courts have asserted power to review administrative licensing decisions of many kinds. Whatever verbal formulation they have used to describe the scope of such review, the practical result has been an assertion of power to re-exam-

ine administrative energy decisions on the merits. Whether in all cases the language of the several statutes invoked by the courts compelled this assertion of power is, I believe, questionable. But it is undisputed that the Congress, once the courts asserted their power, has not shown any inclination to curb it.

In cases which involve the licensing of new electric generating stations, the courts have entertained appeals from administrative decisions based upon the argument that the agency which granted the license did not adequately consider "other alternatives," including the alternative of not building any generating station at all. Thus the original Storm King decision in 1965 set aside an FPC decision licensing a hydroelectric pumped storage project, which could utilize coal and nuclear energy to generate stored hydro energy, because it found that the FPC had not adequately considered as an alternative gas turbine generators that can utilize only gas and oil to generate energy.

My thesis tonight is that the experience of the past decade in which the courts have labored in the energy-environmental vineyards demonstrates the wisdom, indeed the necessity, of the Congress redefining the judicial role in energy decision-making. Such redefinition should remove from the courts the burden of reviewing energy decisions for correctness, but leave in the courts the more traditional responsibility that they are admirably equipped to discharge, about which I will say more later. And I strongly urge that the administrative agencies themselves not be hamstrung by a requirement that in every case their decisions be preceded by an adversarial hearing with all the trappings of a courtroom trial. Legislative type hearings will often be better suited to arriving at timely energy decisions in the public interest.

When our courts venture into making energy decisions, they tackle an extraordinarily difficult problem of decision-making: how to balance society's interest in having an efficient and productive economy against its interest in a healthful and pleasant environment.

President Carter has posed additional complications to the problem: (1) America's interest in national security from interruption of oil imports, and (2) the prospect of economic shock attendant upon a sudden world scarcity of petroleum so severe as to threaten

The Judicial Role in Energy Decision-Making

by Charles F. Luce



America's free institutions.

The difficulty is that we are trying to balance things that often are not susceptible to measurement, or at least to quantification, and that are quite dissimilar one to the other. On what scales do we weigh the cost and the reliability of electric supply against the aesthetic pleasure of a wilderness area unencumbered with electric transmission lines? Or the energy to be recovered from offshore oil and gas wells against the beauty of an uncluttered vista of the Pacific Ocean, and a Santa Barbara beach secure from the danger of oil spills? Or the risk of war over an oil export embargo against the damage to the landscape and air quality from the mining and the burning of coal?

Balancing production values and environmental values would be difficult enough if all the production values would stay on one side of the scales, and all of the environmental on the other side. But other balances must be struck which require the weighing of production factors against each other (aluminum cans versus glass bottles), and environmental factors against each other (the intrusion on the landscape of a huge closed-cycle cooling tower which emits saline water vapor versus the possible reduction of a fish population by drawing aquatic organisms through an open-cycle cooling system).

Many times the data which must be placed on the scale are inadequate and even contradictory. And even when the data are reasonably well agreed upon, the choices to be made often involve highly personal values concerning which individuals and segments of society legitimately hold conflicting opinions. Should power plants be located in or near the cities they serve, or in remote and undeveloped rural areas? Is it worth the additional expenditure of \$100 million to place a segment of high voltage transmission line underground, or should the priorities of society allocate that sum instead to public transportation?

I believe that judicial review should not extend, as it now does, to a review of the adequacy of the evidence to support administrative decisions which resolve these issues. Rather it should be limited to those matters necessary to assure the integrity of the administrative process: adequate notice of hearing, reasonable opportunity of interested parties (including "public interest" parties)

to be heard, the impartiality of the administrative agency, and the constitutionality of the statutes which govern the proceedings and their correct interpretation.

My reasons for this recommendation are rooted in the character of the issue when economic factors are balanced against environmental factors. Such an issue is not really one upon which courts are competent to pass. It involves a choice among competing and difficult to measure social values. This choice is, fundamentally, more a matter of social engineering than it is of the sufficiency of the evidence. It is therefore, more appropriate for decision by administrative bodies appointed by elected officials to implement legislative policies than for decision by courts. Moreover, it typically involves complex scientific and engineering issues which judges are not trained to handle and courts are not staffed to deal with.

There are other reasons that I believe support this view. Serious delays are inherent in any judicial effort to assess the adequacy of the complicated and voluminous evidence in economic-environmental cases. The social costs of these delays can be very great. The danger of incurring these costs may force persons who seek permission to build energy facilities to make decisions about their design or their location which are unwise from a public interest standpoint.

Historically administrative agencies were created to deal with certain kinds of social conflict which, it was believed, could better be resolved by specialists responsible to the executive and the legislative branches than by the courts. It was asserted that the rules of procedure and evidence of such agencies should be flexible so that they could dispose of cases more quickly and economically. Further, it was felt that such agencies would be more responsive to changes in public policy as reflected in the elections of the executive and legislative officials responsible for their appointment and reappointment. The original concept was that courts would interfere with the judgments of these administrative agencies only if such judgments were rendered in disregard of some fundamental principle of fairness, or in gross disregard of the enabling statute.

Surely the choice between competing economic and environmental claims is the kind of decision that fits this his-

"(The experience of the past decade in which the courts have labored in the energy-environmental vineyards demonstrates the wisdom, indeed the necessity, of the Congress redefining the judicial role in energy decision-making."

torical reason for creating administrative agencies. If the courts, through whatever verbal formula, are to second-guess the decisions of the administrative agencies on the merits, then the advantages of expertise, expeditious proceedings, and social responsiveness will be lost. If administrative agencies are required to conduct adjudicatory administrative hearings, with all their time-consuming adversarial procedures, and then have their decisions re-examined by the courts for "substantial evidence," "arbitrariness," etc., might it not be better to junk the administrative proceeding altogether and start the initial proceeding before a court?

The present practice of wide-ranging judicial review of economic-environmental administrative decisions has the further disadvantage that it diffuses responsibility for decision-making. In plain English, it lets the administrator off the hook. He can make his decision with confidence that a court will have the last say anyhow. And Presidents, Governors, Mayors, and other executive officers can appoint second-raters to administrative agencies with confidence that the courts will take the final responsibility for any mistakes the appointees may make.

I do not underestimate the problems that would attend a legal reform which accorded virtual finality to administrative decisions in energy cases. Lawyers would find it hard to swallow because of the long tradition of judicial review, and their strong though perhaps unarticulated conviction that the quality of decision-making is generally better in courts than it is in administrative agencies.

Some lawyers, indeed, applaud the expansive judicial review which courts today exercise in cases involving the reconciliation of conflicting socio-economic viewpoints because they feel that by today's standards judges, especially federal judges, are more "right-thinking" or "enlightened" than the administrators whose decisions they overturn. Whatever the merits of this feeling may be, to build a legal structure upon it is to build on shifting sands. One need only hark back to the 1920s and 1930s to realize that judges, even federal judges, are not always either "right-thinking" or "enlightened" by today's standards.

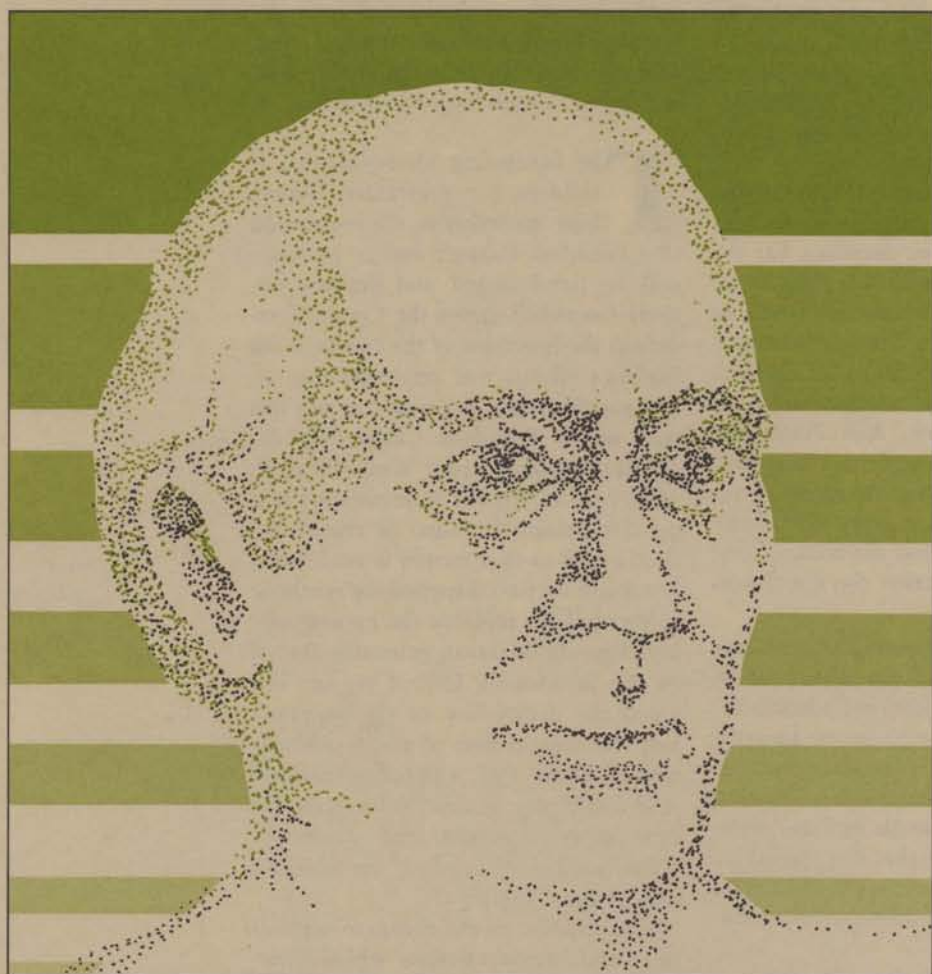
I can think of few energy decisions in the past decade in which a wiser decision has been reached because of judicial in-

tervention in the decision-making process. On the other hand, the delays attendant upon judicial review have forced higher costs upon consumers, and in some cases have forced the substitution of oil-burning generating facilities in place of those that can utilize coal and nuclear fuel. Though I have never seen a balance struck, and I don't know where one would find all the data to strike it, I strongly suspect that from the public interest standpoint as now defined by President Carter the net result of the judicial labors in the energy field in the past decade has been negative.

The foregoing observations, if valid in any substantial degree, lead inevitably to the conclusion that President Carter's energy program will be handicapped and perhaps entirely frustrated unless the Congress redefines the functions of the courts in the Nation's all-out war on impending oil and gas shortages. America can win this war which President Carter has declared. Analogies from World War II, when our country faced devastating material shortages because of enemy action, assure us that victory is achievable. But could we have supplied the synthetic rubber to have replaced the natural rubber from the Malayan peninsula cut off by the Japanese in 1942 if we had litigated the desirability of the program, and the construction of every synthetic rubber plant and supporting facility? And could we, in time, have built the new power facilities and aluminum plants needed to produce the bombers that stopped Hitler?

If in the face of the threat to our Society and free institutions which President Carter has described, we continue to place in the courts final responsibility for society's choices between production values and environmental values, we will be asking them to perform a function for which they are ill-equipped. And the backlash from failures that may be attributed to the judicial effort could damage the high reputation in which the public holds our courts. If our concern is that the quality of administrative agencies is not dependably high, then we should strive to improve that quality. And I believe it is peculiarly appropriate that the legal profession should seize the initiative in finding solutions to all of these problems before it is brought home to the public by hardship and deprivation how terribly serious they are.

Charles F. Luce is Chairman of the Board of Consolidated Edison Company of New York, Inc. He delivered this address at the annual meeting of the Stanford Law School Board of Visitors last spring.



BRAINWASHING

AS A DEFENSE TO CRIMINAL LIABILITY

by Donald T. Lunde and Thomas E. Wilson

The recent trial and conviction of Patricia Hearst for bank robbery¹ has raised anew, within American society and the legal and psychiatric communities more specifically, the question of "brainwashing" as a defense of exculpation or mitigation to criminal liability. The facts of the Hearst case are well known: On April 15, 1974 Hearst participated in a San Francisco bank robbery together with members of the Symbionese Liberation Army who had kidnapped Hearst some ten weeks before, on February 4, 1974. The central

issue at trial was whether Hearst had joined her abductors subsequent to her kidnapping and participated in the robbery voluntarily, or whether she was forced to participate—either by threats of death if she refused or as a result of beliefs inculcated in her through an indoctrination process of the SLA.

The jury in the *Hearst* case was faced with the question of where coerced behavior ends and truly voluntary action begins for persons who appear to have changed their loyalties and values while held in captivity. The answer to that

question was thought to reside in a misunderstood, potentially powerful, yet quite simple, process developed by the Chinese Communists and called "brainwashing." Because of the term's popularization during the Korean War years, and its reappearance in everyday parlance, a widely-held belief was that it was a recognized legal doctrine. In fact, the term "brainwashing" was not used or defended to any extent during the trial itself and the jury rejected the implied brainwashing defense while convicting Hearst. Most importantly, brainwashing is not a presently recognized defense to criminal liability.

This article analyzes the reasons for the nonrecognition of the doctrine. Then, after attempting to define brainwashing in psychiatric terms, the article discusses whether the doctrine as thus defined could fall within any of the legal defenses that turn on the defendant's mental state. The conclusion from that discussion is then tested against the justifications for the criminal system in general, and applied to the *Hearst* case in particular to gauge its viability and usefulness in criminal law.

Background: Brainwashing, Coercive Persuasion and Forced Conversion

In 1951 E. Hunter, an American journalist, introduced the term "brainwashing" into the English language to describe indoctrination techniques practiced within Communist China. Shortly thereafter, the term frequently appeared in the American press and in the works of medical and legal commentators as an explanation for reports of extensive collaboration with the enemy by captured American servicemen during the Korean War. Despite the term's assimilation into colloquial English in the quarter century since its birth, brainwashing, and its various surrogate expressions, remains enshrouded in a web of semantic and substantive confusion.

Brainwashing Popularized: The Korean War POWs

Prior to the San Francisco trial of Patricia Hearst, the phenomenon of brainwashing was most often associated with the experience of American prisoners of war in the Korean Conflict. During that war the American public re-

ceived substantial evidence—reports of broadcasts of POW "confessions" that the United States was waging bacteriological warfare in Korea, and propaganda-laden letters from POWs to newspapers and relatives and other documentary evidence—that many POWs had collaborated with their captors.

The reports of massive collaboration and prisoner misconduct by American POWs in Korea were subsequently shown to be greatly exaggerated. Only a handful of POWs were ever tried by military courts for offenses committed during their captivity. Yet, the experience of the Korean War POWs presented for the first time in American history the spectacle of prisoners of war being subjected to a systematic indoctrination process and manipulated by an enemy for propaganda purposes.

The notion of widespread collaboration by American POWs was tied to a second theme—in the media and popular press at least—that many POWs had been "brainwashed" by the Communists. This theme ran as follows: The Communist captors used mysterious indoctrination techniques against the POWs. These methods were of unprecedented effectiveness in converting men to the ideology of their captors and made prisoners automatically compliant in furthering the propaganda desires of their brainwashers.

This mystical image of brainwashing, that was loosely applied to encompass any method whereby the Communists elicited confessions or cooperation from their captives, carried with it the seeds of self-propagation. In the weeks prior to the first prisoner exchanges in 1953, the State and Defense Departments and the CIA issued press releases to the effect that pro-Communist statements by returning POWs should be discounted because many of the POWs had undergone "brainwashing."

Early medical studies largely conceptualized the process of brainwashing in terms of Pavlovian conditioning or simple learning models, and were criticized by later researchers as ignoring the most important factor—the simultaneous application of social and behavioral controls.

The Communists in Korea did not possess any new ultra-sophisticated techniques of mind conditioning; their methods were merely a combination of old and new indoctrination and interrogation practices. Very few, if any,

POWs had been "brainwashed" in the sense of having past political beliefs erased followed by the meticulous insertion of Communist ideology. The much-ballyhooed Communist program of "brainwashing" was really more an intensive indoctrination program in combination with very heavy-handed techniques of undermining the social structure of the prisoner group, thereby eliciting collaboration that in most cases was not based on ideological change of any sort.

The environment of captivity: Isolation, fear and repetition

In camp the POWs were segregated by race, nationality and rank. Spies and informers were employed to keep the captors informed of possible POW organizations and to engender distrust among the POWs. Indoctrination sessions, like the interrogations, featured tireless repetition of questions and discussion. Collaboration was induced by rewards and punishments—given the marginal existence led by most POWs in the horrid conditions of the camps, any reward of food or medical supplies was a powerful inducement to collaborate. Once a POW had begun to adopt a cooperative line with his captors, Communist indoctrination increased and—without a source of contrary information and usually ostracized by other POWs—the POW became an easy subject for ideological conditioning.

Some characteristics of the POW experience with reference to the indoctrination process should be noted. First, the *isolation* of the POWs, both socially (through the removal of value supports, destruction of group solidarity and friendships) and often, physically (i.e., POWs were sometimes placed in the "cage," a room too small to allow standing, sitting or lying down, or thrown in the "hole," a particularly uncomfortable form of solitary confinement), made many POWs more susceptible to collaboration and ideological change. Second, the conditions of *dehumanization* of the camps and maltreatment and torture of POWs often engendered feelings of fear, confusion and dependency and created an emotional climate favorable to conversion. Third, the *repetition* of questions and demands, combined with the fatigue and stress of the interrogation situation, served an "educative" as well as spirit-breaking function. Finally, it should be noted that "brainwashing" in Korea was far from a sophisticated pro-

cedure. In fact, it was quite crude.

Ideological change and coercive persuasion

The POWs' responses to Chinese Communist indoctrination in Korea included both collaboration and ideological change. Researchers have insisted that the presence of the first response does not necessarily imply the presence of the second. Ideological change itself covers a range of possible shifts in the subject's belief system, from the interjection of some doubt as to the validity of the original belief system to a position of total conversion to a new system of values. Moreover, it is difficult, if not impossible, to quantify ideological change or make differentiations based upon degree.

This points out the definitional shortcomings of the term "brainwashing." "Brainwashing" has become associated, due to its media overexposure, with the concept of "total conversion" or "total replacement" of one value set with another, and this obscures the factor of differentiation in degrees of conversion. For that reason, some psychiatrists prefer to use the term "coercive persuasion." Coercive persuasion occurs when a person is subjected to intense and prolonged coercive tactics and persuasion in a situation from which that person cannot escape.

Two recent illustrations of coercive persuasion may be cited: the propaganda statements made in 1968 by the captured American sailors of the U.S.S. *Pueblo*, and the methods of religious conversion employed by the followers of the South Korean evangelist, Reverend Sun Myung Moon.

Using techniques that involved a considerable amount of sheer terror and coercion, the North Korean authorities forced Commander Lloyd M. Bucher and various members of the crew of the *Pueblo* to make confessions that the *Pueblo* was "an armed spy ship of the U.S. Imperialist Aggressor forces" that had been captured while intruding within the coastal waters of the Democratic Peoples' Republic of Korea.² Bucher knew this statement to be false and knew that making it could make him liable for punishment by the U.S. upon his release. The North Koreans simply broke Bucher and his men by torture and threats to the point where further resistance seemed ridiculous. Thus, while coercive persuasion was present in the treatment of the *Pueblo* crew during

their captivity, there was little or no conversion. In contrast, the Unification Church, led by Rev. Moon (whose followers are nicknamed "Moonies") relies upon "total conversion." This conversion is achieved through psychological coercion in religious indoctrination seminars and encounter groups while the subject is kept completely isolated from family and past associations.

It has been asserted that "Moonies" acquire new subjects for conversion by force. Presumably, new converts assist in these acts. If true, such abductions constitute the *actus reus* of the crime of kidnapping. Similarly, Bucher's giving of propaganda statements was an act prohibited by the Military Code, and Patricia Hearst's participation in the Hibernia Bank robbery was the *actus reus* of robbery. What these seemingly unrelated incidents have in common is the question whether coercive circumstances preceding the commission of the acts negates the *mens rea* required for criminal liability for the acts committed.

The Conceptual Conflict in a Defense of Coercive Persuasion

Both the Korean War POW cases and the Hearst trial illustrate a nearly inescapable conceptual conflict involved in defending a prosecution for crimes committed in captivity. The conflict results because the factual situations that give rise to claims of coercive persuasion—commission of an allegedly illegal act during the stressful conditions of captivity (or as a result of that captivity)—permit allegations that the accused had two conflicting states of mind at the time of the offense, and thus make available two conflicting defenses.

Coercion and duress

A frequently raised defense in the Korean War POW cases that also appeared in the Hearst trial was the defense of duress.

Because it is a complete defense to criminal responsibility, the defense of duress has been strictly construed by military and civilian courts. The standard adopted by most jurisdictions is that the coercion and duress must be present, imminent and impending, and of such a nature to induce a well-grounded apprehension of death or serious bodily injury.

In effect, the courts have imposed a standard of personal courage upon a defendant who seeks to raise a duress de-

fense. The accused must demonstrate that the coercive force was resisted at least to the point where a person of ordinary firmness, fortitude and courage would have capitulated.

Duress failed as an excuse in the Korean War prisoner misconduct cases where the threats alleged were of future consequences and were not sufficiently immediate to the illegal act.

In the *Hearst* case, Hearst alleged that she would have been gunned down by her kidnappers during the bank robbery had she resisted her captors. However, the fatal flaw in the reliance upon a defense of individual duress was the defendant's failure to take advantage of opportunities to escape the coercion of her captors in the months following the robbery of the Hibernia Bank.

The "coercive persuasion" or "brainwashing" defense

The defense of "coercive persuasion" presents an argument from the facts of forced captivity, physical and sensory deprivation and mental indoctrination to the effect that the defendant's ability to reason was so impaired as to make the defendant not culpable for the offense committed. An analogous defense arose in the Korean War POW cases under the allegations of various impairments of mental ability and the general duress of the prison camp experience.

Sources of conflict between coercive persuasion and a defense of duress

Simply stated, a true case of coercive persuasion cannot fit under the duress rubric. The coercive aspects of the indoctrination process may occur long before the commission of the crime for which the accused stands charged. At the time of the commission of the offense—i.e., the making of a false confession of war crimes, the recording of a propaganda broadcast, or the participation in a robbery—the defendant may be under no immediate duress. In such a case, the absence of the immediacy of threatened harm may prevent the defendant from even achieving an instruction by the Court on duress.

The defense in the *Hearst* case attempted to combine a strategy premised upon coercive persuasion while simultaneously clinging to the defense of duress. The result was an inconsistent and seemingly contradictory presentation of the defendant's mental state.

The central flaw in pairing an argument of “brainwashing” with a claim of duress is that the defense may be forced to argue inconsistent states of mind for the defendant at the time of the offense. The gist of the coercion and duress defense is that the defendant clearly perceives that the act is wrong but commits that act out of fear of consequences for herself if she does not act. In contrast, the basis of a defense of “coercive persuasion” or “impairment” secondary to “brainwashing” is that, due to a variety of factors, the defendant is incapable of perceiving that the act is wrong or is incapable of forming the requisite mental states of the crime.

As previously discussed, the doctrine of duress provides no coverage for acts committed while the duressor is absent (since the act is committed outside the scope of immediate threatened harm), and the defendant may critically wound a duress defense by evidence of reluctance to escape her captors, whose political loyalties she had recently adopted while a prisoner. The impairment defense of coercive persuasion, while having some advantage in being relatively unburdened by caselaw, has a corresponding disadvantage of being an unrecognized doctrine of legal defense.

In many instances of coercive persuasion, the defendants themselves seem to view their experiences in a manner that suggests that both the coercion and impairment theories should be operable.

In such cases, however, both client and counsel have a tendency to fashion an inherently inconsistent defense theory of the case. It would appear that the wiser tactical approach, dictated by simple logic, is to select either the duress defense or the impairment defense of coercive persuasion. If the choice is a straight coercion and duress argument, the issues of the validity of coercive persuasion as a mental defense to criminality do not arise. But, as we have seen, the coercion and duress defense is an all or nothing defense that is strictly construed and often inapplicable given the facts in the prisoner context. For this reason, counsel might be better advised to explore the mental impairment theory and rely upon it entirely. For that, one needs a more comprehensive understanding of the elements of coercive persuasion.

A Model of Compelled Conversion

The process of conversion has been described in the literature in terms of

several theories. Combining the respective elements of these separate theories yields a three-stage model of conversion.

The first stage is characterized as “unfreezing,” which, as the name suggests, involves the loosening of one’s commitment to one’s existing belief system. Aspects of a prison or captivity environment that aid the unfreezing process include physical beatings and threats thereof, deprivation of material comforts and medical care that result in general deterioration of physical strength, absence of contact with potentially supportive reference groups such as other prisoners and messages from significant others on the outside.

Once the subject has become “unfrozen” the process of “changing” begins. In this second stage, the subject fills the vacuum left by the rejection of the previous beliefs. The new beliefs adopted are acquired from the captors. While the subject initially resists the new values out of an intellectual belief in their falsity, eventually one is overcome by them because of a need to rationalize one’s behavior and because of a need to establish communication with others.

Upon being rescued from, or released by, the captors, a reversal of this process usually takes place. Since a person may be “deprogrammed” and return to his original beliefs within a matter of weeks in some cases, it becomes very difficult to prepare and present a persuasive defense to charges related to the period of compelled conversion.

Coercive Persuasion and the Mental Defenses to Criminal Liability

This section undertakes the conceptual task of attempting to fit the type of mental impairment that coercive persuasion constitutes or produces into one or more of the legally recognized mental defense doctrines.

Insanity

It has been recognized for centuries that if a person was, at the time of his unlawful act, so mentally disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law. Although there is variation in the phrasing of the legal standards delineating the insanity defense, the majority rule standard in the United States

remains the *M’Naghten* test: To establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. Despite this standard’s elasticity in the hands of a psychiatric expert, the doctrine is probably inapplicable to the instant circumstances.

Requirement of mental disease or defect

As quoted above, the insanity test requires that the defendant be suffering from some mental disease or defect. The change of beliefs caused by circumstances of captivity has not been found to constitute such a disease. One of the Korean War POW cases, *United States v. Batchelor*, is the leading case on this issue and contains the most comprehensive discussion both at the trial and appellate level. Batchelor was charged with writing treasonous statements and mailing them to be published in his hometown newspaper, with informing upon a fellow prisoner for the purpose of seeking favorable treatment for himself, and for participating in a trial of a fellow prisoner.

Three prosecution and two defense experts presented their opinions to the trial court. The defense theory was that the defendant was suffering from an “induced political psychosis” somewhat like a delusion suffered by a schizophrenic. The trial court’s rejection of the claimed defense was sustained on appeal largely by reference to the prosecution’s expert testimony in the record indicating that “there is no recognized ‘political psychosis’ much less ‘induced political psychosis’” and that no treatises or texts recognized it as a disease.

An additional difficulty with the characterization of coercive persuasion as a mental defect is raised by the way the defense was phrased in *Batchelor*—an *induced* psychosis. Because the defendant’s changed beliefs typically endure only for the period of captivity, there is a tendency to see the altered beliefs as unique to the captivity period and thus caused by it, a kind of “temporary insanity.” Although the insanity defense has been utilized in cases involving certain situational reactions, it has traditionally focused on defects that are in-

ternally generated, (e.g. anxiety states and hallucinations), not those that are said to be "induced" from outside (e.g. altered political beliefs). Allowing a defense based on induced disease would create severe line-drawing problems: a defendant could argue for excuse from, or mitigation of the consequences of his crime, because of external factors playing upon him. At some point this dissolves into a deterministic view of human behavior that is incompatible with the Anglo-American jurisprudential tradition of free will.

Ability to tell right from wrong

Even if coercive persuasion circumstances were found to constitute a mental disease or defect, there is considerable doubt that the defendant could meet the rigorous factual sufficiency standard of the *M'Naghten* test that the defendant not "know the nature and quality of the act" and "that he did not know he was doing what was wrong."

*United States v. Fleming*¹⁰ illustrates this difficulty. Fleming raised a defense termed "impaired ability to adhere to the right." The Court correctly pointed out that insanity under *M'Naghten* requires total and not partial impairment of ability to distinguish right from wrong, and noted that Fleming could not claim insanity where there was no evidence that he did not know he was communicating with the enemy and where he in fact recalled that he didn't believe any of the indoctrination to which he had been subjected.

Tactics and policy

As a practical matter from a defense attorney's point of view the insanity defense is difficult to win on even where insanity is obvious. Juries are often unlikely to find a verdict of not guilty by reason of insanity in a case of a defendant whom they believe is truly dangerous or whose conduct in some way merits punishment.

Insanity cases generally arouse much discussion about the value of psychiatric testimony generally. In fact, there has been a strong sentiment among a number of courts and commentators that the insanity defense should be abolished altogether.¹¹ Many recent proposals have argued that by circumventing the insanity plea, the trial would concern only the issue of whether the accused caused the harm in question. Subsequent to an affirmative finding that the defendant

was responsible for causing that harm, the mental condition of the defendant would then be assessed by experts prior to sentencing; the sentence or disposition of the case would take into account these expert findings. Another prominent view has been expressed that the insanity defense should be a stringent one in order to deter where deterrence might be possible even when a person is under extreme temptation or emotional pressure. The inclusion of coercive persuasion within the ambit of the insanity defense would run directly counter to all of the above considerations.

Unconsciousness

Many state criminal statutes or decisions recognize a complete excuse to criminal liability for defendants not conscious of their acts. "Unconsciousness," as the term has been interpreted by California courts, need not reach the physical dimensions commonly associated with the term (coma, inertia, incapability of locomotion or manual action, and so on), it can exist where the subject physically acts in fact but is not, at the time, conscious of acting. The rationale for the defense of unconsciousness is that a person will not be held criminally responsible for an unlawful act if at the time of the act there is no functioning of the conscious mind. A precise standard of unconsciousness has not emerged from the decisions. Generally, the standard is one of awareness of one's actions.

Bringing coercive persuasion under this legal rubric has the advantage of not faltering on the disease or defect hurdle that the insanity defense does because the unconsciousness defense applies only to persons of sound mind. However, coercive persuasion simply does not rise to the factual sufficiency necessary. In none of the prisoner of war cases, nor in the *Hearst* case would it be possible to argue that the defendants were not aware of what they were doing. All remembered their crimes and did not contend otherwise, when an allegation of lack of memory is usually the necessary, but not sufficient, condition for raising an unconsciousness defense.¹⁴

Diminished Capacity Rationale and development

The doctrine of diminished capacity consists of an argument that, owing to

some influence, perhaps drunkenness or mental illness, the defendant was functionally unable to form the requisite *mens rea* for the crime charged. The burden of showing the required mental elements remains with the prosecution; the defense need only present sufficient evidence to suggest a reasonable doubt about the existence of such mental states. Diminished capacity has been applied primarily to the law of homicide where evidence of diminished capacity is relevant to the question of whether the offense is first or second degree murder or voluntary or involuntary manslaughter. The doctrine is well developed in California and is recognized in other jurisdictions as well, including the military jurisdiction.

The diminished capacity doctrine allows juries to steer a middle course between guilt and innocence in cases where a jury would be reluctant to find murder and equally reluctant to let the defendant go free. As such, it is a judicial escape from the all-or-nothingness of the insanity defense, and it allows more responsible psychiatric testimony.

Diminished capacity and coercive persuasion

At first blush the diminished capacity doctrine appears to be an acceptable legal doctrine under which coercive persuasion could be placed. However, there is some doubt whether the conceptual requirements of the doctrine can be satisfied.

Disease or defect requirement Most often the claim of diminished capacity is based on the defendant's intoxication, but mental defects can also be the basis for arguing that the defendant lacked the capacity to form requisite mental states. Since the gravamen of a diminished capacity argument is that a particular mental state is negated, to the extent that several intents are involved, there is a sliding scale of defendant's mental capacity that will excuse crime. Accordingly, there is a sliding scale of severity of mental diseases that can be considered as giving rise to diminished capacity. However, at base some mental defect is probably required. Thus, it remains to be decided whether the mental impairment caused by coercive persuasion could constitute a sufficient mental disease for diminished capacity purposes.¹⁵

Even if coercive persuasion does qualify for diminished capacity, as in insan-

ity the defect relied upon would still not be internal to the defendant. A possible circumvention of this obstacle would be to consider the defendant's susceptibility to the unfreezing stage of coercive persuasion as a defect leading to diminished capacity. Such susceptibility, measured in terms of the defendant's social guilt, political naivete, etc. would focus solely on factors internal to the defendant. Psychiatric testimony could be had on the issue.

However, blackletter diminished capacity doctrine would probably preclude using this tack in all non-military cases. A principal limitation on the doctrine is that the person be suffering from the disease or defect at the time of the alleged crime. Thus, unless the very act of ceasing to resist the captor's coercion itself subjects the defendant to criminal liability, the defendant's diminished capacity of greater susceptibility to unfreezing is not contemporaneous with the crime. In the military context where the giving of information may constitute a violation of military law, the defendant might assert his greater susceptibility, but in a case such as the *Hearst* case where the defendant "broke" and adopted the captors' beliefs, crimes committed after that time would not be a direct result of the defendant's susceptibility to coercion.

Specific intent requirement. Since diminished capacity is something short of unconsciousness or insanity and therefore will not in most cases result in a complete defense if the crime requires only a general intent, the doctrine is rarely available because the negation of intent would be tantamount to negation of criminal liability. This was in fact the holding on the mental impairment issue in *United States v. Fleming*.¹⁰ Since the offense required only a general intent, the defense of partial responsibility arising from a mental impairment was not available. The same would hold for bank robbery. The diminished capacity doctrine in California is most highly developed in cases involving the crime of homicide. Outside the context of murder, cases are rare where the defendant's lack of capacity is found to negate an intent. The limited utility of

diminished capacity in reducing specific intents in non-homicide cases, and its nearly complete inability to affect general intent crimes, indicate that a coercive persuasion defense would be largely a nonstarter if placed under the diminished capacity rubric.

Proposal—Factors in Mitigation of Sentence

Because the three principal mental defenses to criminal liability are not available to the process of compelled conversion or "brainwashing," and because the coercion and duress standards are as rigorous as they are, no conceptual basis exists for finding a defendant not guilty of acts committed while harboring non-traditional beliefs for a reason other than mental illness. The question thus becomes whether the circumstances of individual cases should be considered as factors in mitigation of the sentence imposed on the defendant. This article proposes that the defendant still be charged with guilt for crimes committed, but that several factors be considered for mitigation. Such a disposition would be consistent with the Korean War caselaw, and with the general purposes of the criminal system, and could be applied to the *Hearst* case and future cases with relative ease.

Proposed Analysis

In deciding whether and to what extent a defendant's sentence should be reduced, the judge should consider the following: First, the *susceptibility* of the defendant to compelled conversion. As the phenomenon of compelled conversion has been described, some persons are more capable of resisting than others. While society expects everyone to resist and applauds those who do, society should punish less severely those who at least resist to the extent of their capabilities. Relying on this factor might require some psychiatric examination in the pre-sentencing period to determine whether the defendant resisted as much as he or she was capable of doing. Second, the comparison of the *severity of the offense* and the *amount of coercion* involved must be considered. One would expect even a susceptible person to resist coercion to commit a serious crime more than a lesser crime. Thus, the court should consider a sort of sliding scale of degrees of offenses and degrees of coercion inflicted upon the defendant. Third, the *opportunity to avoid threatened harm* or otherwise avoid perform-

ing the crime. This factor is partially an evidentiary control on the voluntariness of the defendant's conversion.

Each of these factors involves a relaxation of the traditional duress rule. Considering the defendant's own capacity changes the objective reasonableness standard to one of subjective reasonableness. Introducing a sliding scale of coercion moderates the normal "fear of death or great bodily harm" standard and lessens the immediacy requirement. The third fact, or exploitation of opportunities to escape, is semantically the same as the requirement under the formal coercion standard, but in practice it could be used less restrictively. Relaxing the rigorous formal standard at the sentencing stage would not alter the standard for determining guilt or innocence; the defendant seeking to win acquittal at trial would still have to meet the rigorous test.

The Test Applied Caselaw

The sentences imposed in the eleven cases of conviction for prisoner misconduct during the Korean War follow along the lines that the enumerated factors suggest. For example, the most severe sentences were for serious offenses in which there was little evidence of coercion. Batchelor received a life sentence (reduced to 20 years) for planning a postwar subversive organization and for his participation in the trial of a fellow prisoner. Gallagher received a life sentence for unpremeditated murder, informing and maltreatment. In contrast, prisoners who made germ warfare confessions were not even prosecuted.

The records in the Korean cases indicate that this gradation of sentences was reached by applying the factors suggested. For example, in the inquiry into the case of Colonel Schwable, the Board considered the Colonel's ability to resist by hearing psychological evidence—it heard evidence on the nature of Schwable's confinement (solitary confinement for 14 months with frequent interrogations and beatings); the severity of his offense (germ warfare confession) by hearing evidence on the affect the confession had on morale in the camp, and applied a subjectively reasonable test for the duty to resist, holding that Schwable had "resisted the Communists to the limit of his abilities."

The full text of this article appears in Vol. 13 of the Criminal Law Bulletin at p. 341 (Sept./Oct., 1977); published by Warren, Gorham and Lamont, 210 South Street, Boston, Massachusetts 02111, which has granted permission for the publication of the version appearing here.

The proposal suggested here can also be rationalized on the basis of its consistency with the traditional justifications of the criminal justice system—deterrence, retribution, isolation and rehabilitation.

Deterrence is usually subdivided into the specific—whether the convicted person will be deterred from committing future criminal acts by the imposition of punishment, and the general—whether other members of society will be deterred because of the perceived consequences. The specific deterrence concern in compelled conversion cases is easily disposed of. By definition of the psychological process of conversion, when the accused comes out of captivity and is relieved of the constant reinforcement of the captor group, the accused usually readopts traditional values readily. Thus, the likelihood of future criminality outside captivity would be small. The concern for general deterrence is satisfied by the retention of rigorous standards for acquittal; a conviction would be the likely outcome of most cases like the *Hearst* or prisoner of war cases, insuring that society still expects victims of compelled conversion to resist and holds them accountable if they do not. To the extent that the mitigation of sentence acquires a predictable pattern, one can expect individuals to be deterred from illegal conduct according to their own evaluation of the risk of and severity of sentence for their acts. If no predictable pattern emerges, deterrence remains, because the threat of conviction for one's transgressions remains.

The proposal for mitigation of sentence satisfies the concern for retribution as well. First, since the accused is still found guilty of the substantive offense, to the extent that there will be perceived unfairness in treating alike those who resist and those who do not, the problem does not arise since those who fail to resist as society expects are held accountable. Second, cases involving circumstances of compelled conversion have generally aroused feelings of sympathy rather than revenge, thus suggesting that the retributive concern may be quite small.

The rationale of rehabilitation is that the period of incarceration will be used to help the defendant to overcome a tendency toward anti-social behavior. Such

a rationale is inapplicable in a situation, as here, where by definition of the process of compelled conversion, the defendant usually begins an immediate recovery spontaneously upon return from the captivity environment. Although some period of psychiatric counselling may need to follow return, it should not need to be of long duration. In any case, the type of "rehabilitation" required is psychological and not penological.

The rationale for isolation is the segregation of dangerous criminals from society. There is little justification for isolation of defendants convicted of crime under the influence of forcibly imposed belief systems. Those convicted, to the extent they are dangerous at all, have only been proven to be dangerous while under the influence of the alternate belief system. Thus, the fact of their crime raises no inferences about their dangerousness in traditional society, and they should be sentenced consistent with this realization.

1. *United States v. Patricia C. Hearst, Cr.* 74-364-OJC.
2. *New York Times*, March 11, April 4, 5, 13-17, 1953.
3. Bucher's confession of February 1968 is reprinted in L. Bucher, *Bucher: My Story* 410-13 (1970).
4. *San Francisco*, July 1976, pp. 37-96.
5. See *United States v. Birch*, 470 F.2d 808, 812-13 (4th Cir. 1972), cert. denied, 411 U.S. 931; *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935); *People v. Lo Cicero*, 71 Cal. 2d 1186, 1191, 459 P.2d 241, 244, 80 Cal. Rptr. 913, 916 (1969); *People v. Killman*, 51 Cal. App. 3d 956, 957, 124 Cal. Rptr. 673, 676 (4th Dist. 1975); *United States v. Margelony*, 14 U.S.C.M.A. 55, 61, 33 C.M.R. 267, 273 (1963); *United States v. Fleming*, 7 U.S.C.M.A. 543, 559, 23 C.M.R. 7, 22 (1957).
6. *Queen v. M'Naghten*, 10 Clark 2 F. 200, 2 Eng. Rep. 718 (1843).
7. 19 C.M.R. 452 (1955).
8. *Id.* at 493.
9. *Id.* at 495. See also *United States v. Fleming*, 7 U.S.C.M.A. 543, 561, 23 C.M.R. 7 (1957) refusing defense's requested "brainwashing" instruction on insanity on the ground that no evidence existed that defendant was suffering from a mental disease. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (2nd ed. at 48) recognizes a category of disorders called Transient Situational Disturbances which are defined as "disorders . . . that occur in individuals without any apparent underlying mental disorders and that represent an acute reaction to overwhelming stress." The term includes acute panic reactions and what used to be called "shell shock" in the military. It does not, however, include coercive persuasion.
10. 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957).
11. See, e.g., *United States v. Brawner*, 471 F.2d 969, 985-86 (D.C. Cir. 1972) (sources cited).
12. *People v. Newton*, 8 Cal. App. 3d 359, 376, 87 Cal. Rptr. 394, 406 (1st Dist. 1970).
13. *People v. Wilson*, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (1967); *People v. Hardy*, 33 Cal. 2d 52, 198 P.2d 865 (1948).
14. *People v. Bridgehouse*, 47 Cal. 2d 406, 303 P.2d 1018 (1956) (defendant alleged a "vague memory" for the circumstances of the crime); *People v. Wilson*, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (1967) (defendant's testimony that he did not remember shooting the victim).
15. *United States v. Fleming*, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957) did not decide whether brainwashing was a sufficient mental disease for diminished capacity purposes and disposed of the partial mental impairment claim on other grounds.
16. 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957).

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The authors wish to express their gratitude to Nicholas G. Miller '76, who provided invaluable assistance in the research and preparation of the article and to Professors Anthony G. Amsterdam and Michael S. Wald of the Stanford Law School and Commander Lloyd M. Bucher, U.S.N. (Ret.) for their comments and suggestions in the development of the article.



Commencement 1977



Commencement exercises for the Class of 1977 were held on June 12 in Cooley Courtyard at the Law School. More than 700 parents and friends attended the midday ceremony.

Lawrence M. Friedman, Marion Rice Kirkwood Professor of Law, addressed the class. The class response was given by Stephen Griffith, class president.

Tobin Rosen, Law Association Vice President for Student Activities, presented the 1977 John Bingham Hurlbut Award for Excellence in Teaching to James D. Cox, Associate Professor of Law at Hastings, who visited at the School during the 1976-77 academic year.

James S. Liebman was named Nathan Abbott Scholar for highest grade point average in the class. Mary Ellen Richey received the Urban Sontheimer Prize for second highest grade point average. The Stanford Alumni Association Prize for outstanding contributions to the life of the School was shared by David M. Margolick, editor-in-chief of the *Law School Journal*, and Stephen L. Samuels, president of the Law Association.

Fourteen students were elected to the Order of the Coif, the national law school honor society: Michael E. Arthur, William L. Cole, Eugene M. Gelernter, Laurie S. Gill, Nancy E. Howard, James S. Liebman, Loren S. Ostrow, Mary E. Richey, Alan T. Scott, Michael J. Shepard, David N. Slone, Frank G. Smith, Richard S. Swanson, and George A. Yuhas.

A champagne reception in Crocker Garden followed the ceremony.





The ELS: Bigger & Better

This past year has seen a significant strengthening and growth of the Environmental Law Society. The sale and distribution of the Society's handbooks has increased markedly and the continued generosity of the Rockefeller Foundation, David Stone '48 and others has allowed the ELS to open up new horizons and opportunities for 1977-8.

The most significant new dimension to the ELS is the initiation of an ELS annual journal. This represents the first time Stanford law students will have an "in-house" opportunity to do original research in the environmental law field during the school year and to publish their finished articles and essays. The journal will be a collection of articles focusing on some significant environmental problem. The result should be a publication of a greater scope and diversity than anything the ELS has yet attempted.

Fortunately, growth has not led to dilution and the ELS's core activity, the sponsorship of Summer Projects, remains vital. These projects center on reasonably narrow problems in environmental law and culminate in the publication of comprehensive studies and handbooks. Summer Projects are designed and carried out entirely by Stanford law students and represent both research and job opportunities for those involved. Presently, there are a total of eight projects in various stages of production: two have just been released, three are nearing publication and three are now being written.

The two handbooks just released deserve special mention. One is called *The Fragile Balance: Environmental Problems of the California Desert* and it represents one of the first comprehensive studies of the problems of overuse

and overdevelopment of the California desert. This book, with a foreword by Senator Alan Cranston, was authored by Bob Mintz '77, Jon Ginsburg '76 and Bill Walter '76. It is sure to gain wide circulation all over the Southwest. The second book is also timely. *An Environmentalist's Primer on Weather Modification*, authored by Eric Hemel and Cliff Holderness '77, takes a wide-ranging look at the promise and problems of weather modification and precipitation augmentation.

Finite space makes the individual mention of the remaining six projects difficult, so a listing of the topics will have to suffice. Projects include: a study of public participation in Forest Service land use decision-making, the implementation of transit alternatives, smoking regulation, the impact and control of coal development in Colorado, the use of public initiatives and referenda, and the implementation of solar technology.

Other ELS activities that deserve note include the presentation of films and speakers, involvement in community projects, recycling and, of course, one or two camping trips each year.

Professors Honored



Professors Anthony G. Amsterdam and Lawrence M. Friedman were elected to membership in the American Academy of Arts and Sciences at the Academy's 179th annual meeting last May.

Founded in 1780 by John Adams

and other intellectual leaders of the time, the Academy today is a national honorary society with a membership that includes 2,300 representatives in the mathematical, physical and biological sciences, as well as in law, administration, public affairs, theology, fine arts and the humanities. The Academy's principal activity is the sponsorship of interdisciplinary study projects on topics of public interest, which are published in *Daedalus*, its official journal.

The Academy also includes among its members Professor Gerald Gunther, who was elected a Fellow in 1973.

New Director of Placement



Gloria J. Pyska became director of Law Placement on May 1. She replaced Julie Wehrman, who resigned the post to return to her hometown of

Houston where she is recruitment coordinator for the firm of Vinson, Elkins, Searls, Connally & Smith.

Ms. Pyska, who holds a B.A. in Business Administration from the University of Washington and an M.A. in Education from Stanford, brings a broad range of experience to the Placement Office. Previous positions Ms. Pyska has held include admissions officer for Mills College in Oakland, career counselor for University Placement Services at the University of Wisconsin, coordinator of the undergraduate advising program for the Department of Political Science at the University of Illinois, and administrative staff member of the Department of Radiology at Stanford.

Ms. Pyska plans to continue the various placement programs cur-



rently in operation and hopes to expand the Office's career counseling services.

She and her husband, a senior social scientist at Stanford Research Institute, have one daughter.

Professor Gordon Scott Retires



After more than a quarter of a century as a member of the Stanford law faculty, Professor Gordon K. Scott retired on June 30.

A native of Massachusetts, Professor Scott received an A.B. in government in 1938 and an LL.B. in 1941 from Harvard, where he was an editor of the *Harvard Law Review*. That same year he was admitted to the Massachusetts and Washington, D.C. bars. During 1941-42 he practiced law in Washington, D.C. and also served in the Office of the Coordinator for Inter-American Affairs in the Department of State. After a four-year stint in the U.S. Army (1942-46), he joined the law faculty at Stanford. In 1948 he left Stanford to practice law in Boston, returning to the Law School in 1952. Professor Scott taught primarily in the areas of corporations, municipal law, and taxation.

He is the son of Austin Wakeman Scott, Dane Professor of Law, Emeritus, at Harvard. A 1909 graduate of the Harvard Law School, Austin Scott was a distinguished member of the Harvard law faculty for fifty-one years and a nationally recognized scholar in the law of Trusts.

Though Professor Scott has not disclosed his long-range retirement plans, his doubles partner of many years, Associate Dean J. Keith Mann, assures alumni that for Professor Scott and himself it will

be "tennis as usual" every Saturday morning on the Stanford courts.

School Offers New Degree

This fall, the School instituted a new two-year program leading to a Master of Legal Studies (M.L.S.) degree. The program is designed to introduce a small number of graduate students and scholars in other academic disciplines to the foundations of the legal system, basic modes of legal argument and analysis, and substantive law in selected areas.

While the program is open to students from all disciplines, it is expected to be particularly attractive to scholars whose interests overlap those of the law faculty, i.e. scholars in history, economics, computer science, psychology, art, political science, sociology, philosophy, and medicine.

Candidates for the M.L.S. are required to complete 30 units of law study within two consecutive academic years, including at least three first-year, first-semester courses and Research and Legal Writing (and Legal Bibliography). The remaining credit requirements may be fulfilled by taking law courses relevant to the candidate's interests. Finally, students are required to complete one writing/research seminar or directed research project which eventuates in a written paper.

Eligible candidates for the program include those who have been admitted to a doctoral program and have completed a program of study amounting to 45 quarter units or 30 semester units of work or who possess the Ph.D. or other doctoral degree. The standard for admission is equivalent to that required of candidates for the J.D. A maximum of six students will be admitted each year.

Like the Master of Jurisprudence (J.M.), the M.L.S. is a non-professional degree.

Clerkships Go To 17 Grads

Fourteen members of the Class of 1977 have received federal and state judicial clerkships for 1977-78.

In addition, three members of the Class of 1976 are clerking for the United States Supreme Court (as reported in the previous issue of *Stanford Lawyer*).

United States Supreme Court:

Associate Justice William J. Brennan, Jr.
Steven A. Reiss '76
Associate Justice William H. Rehnquist
Barton H. Thompson '76
Associate Justice Potter Stewart
Jay M. Spears '76

United States Court of Appeals:

District of Columbia
Judge Carl McGowan
James S. Liebman
Judge Malcolm R. Wilkey
Richard S. Trutanic
Seventh Circuit
Judge Walter J. Cummings
Michael J. Shepard
Eighth Circuit
Judge Myron H. Bright
Nicholas J. Spaeth
Ninth Circuit
Judge Joseph T. Sneed
Laurie S. Gill
Judge Ben. C. Duniway
Barbara R. Miller

United States District Court:

California
Judge Lawrence T. Lydick
Randall Kleinman
Judge Robert F. Peckham
Jose Cardenas
Judge Cecil F. Poole
Marie L. Fiala
Judge Charles B. Rensfrew
Mary E. Richey

New York

Judge Whitman Knapp
Eugene M. Gelernter
Oregon
Judge James M. Burns
Steven L. Griffith



State Courts:

Supreme Court of Minnesota
Associate Justice Harry H.
MacLaughlin

Steven J. Johnson

Supreme Court of the
State of Washington
Judge Robert F. Utter
Simon Klevansky

Carlsmith Chair Established; Thomas Ehrlich First Holder



The C. Wendell
and Edith M.
Carlsmith Pro-
fessorship in
Law has been
established at the
School by Mr.
and Mrs.
Carlsmith of
Honolulu.

The first holder of the chair
will be former Dean Thomas
Ehrlich, who is currently on leave
from the School to serve as
president of the Legal Services
Corporation in Washington, D.C.

Both Mr. and Mrs. Carlsmith are
Stanford alumni. Mr. Carlsmith
received the A.B. in 1927 and the
J.D. in 1928. Edith (Mattson)
Carlsmith received her A.B. in 1928
and was elected to Phi Beta
Kappa.

Wendell Carlsmith began his
legal career in 1928 in Hilo, Hawaii,
his birthplace, where he practiced
law with his father. Edith Carlsmith
taught school during this time.

Mr. Carlsmith is a senior partner
in the firm of Carlsmith, Carlsmith,
Wichman and Case, Hawaii's
largest law firm. He is also a
partner in the Dillingham Partners
Corporation and a director of
Inter-Island Resorts, Inc.

Active in Stanford affairs, he has
served on the executive committee
of the Law School's Board of
Visitors. With his son, Donn

(Stanford A.B., 1950), he has
developed one of the world's most
complete collections of early
editions of the works of Pacific
explorers and voyagers.

Thomas Ehrlich, the first holder
of the Carlsmith chair, joined the
Stanford law faculty in 1965. He is
a graduate of Harvard (A.B., 1956)
and its Law School (LL.B., 1959),
where he served as an editor of
the *Harvard Law Review*.

In 1959-60 Mr. Ehrlich was law
clerk to Judge Learned Hand,
United States Court of Appeals,
Second Circuit; he then practiced
law for two years in Milwaukee.
From 1962 until coming to Stanford,
he served with the Department of
State, first as special assistant to
the Legal Adviser and later as
special assistant to the Under
Secretary of State. Mr. Ehrlich's
areas of expertise include interna-
tional law and professional
responsibility.

In announcing the establishment
of the Carlsmith chair, Dean
Charles Meyers observed, "It is
hard to conceive of a contribution
to the Law School of more enduring
significance than an endowed
professorship. This new chair will
significantly strengthen legal
education at Stanford by ensuring
a continuing succession of out-
standing teachers and scholars."

New Faculty Strengthen Tax, Commercial, Clinical Areas

This fall the faculty was signifi-
cantly strengthened by the addition
of four new members. They
include Associate Professors
Charles C. Marson and Miguel A.
Mendez and Assistant Professors
Thomas H. Jackson and Mark G.
Kelman.

Charles C. Marson joins the
law faculty after spending the last
five years as legal director of
the ACLU for Northern California.



He is a graduate
of the University
of Southern Cali-
fornia (B.A.,
1964) and the
University of Chi-
cago (J.D., 1967),
where he was
comment editor
of the *University*

of *Chicago Law Review*. Following
a year of private practice in San
Francisco, he joined the ACLU
as staff counsel, becoming legal
director in 1972. During 1976
Mr. Marson was a lecturer at
the School. He will draw on his
extensive litigation experience to
teach a clinical course in
Injunctions and will also offer a
first-year statutory analysis course
entitled, *Legislation: Disclosure
and Confidentiality*.



Miguel A.
Mendez also
brings a strong
background in
litigation to the
faculty. Educated
at Texas
Southmost Col-
lege (A.A., 1963)
and The George

Washington University (A.B., 1965;
J.D., 1968), he spent the year
following graduation clerking for
the U.S. Court of Claims. From
1969 to 1971 he was a legislative
assistant to U.S. Senator Alan
Cranston. In 1971 he joined the
National Office of the Mexican
American Legal Defense and
Educational Fund as a staff
attorney. A year later he became
deputy director of California Rural
Legal Assistance and in 1975
he became deputy public defender
in the Office of the Monterey
County Public Defender. During
1977 Mr. Mendez was a visiting
professor at Santa Clara Law
School. At Stanford he will teach
Evidence and a clinical course in
Criminal Trial Advocacy.

Thomas H. Jackson joins the
faculty after spending this past
year as law clerk to Associate



Justice William H. Rehnquist of the United States Supreme Court. He is a graduate of Williams College (A.B., 1972) and Yale (J.D., 1975), where he was editor of the

Yale Law Journal. After graduation he clerked for the Hon. Marvin E. Frankel, U.S. District Judge for the Southern District of New York. In the short time since he left law school he has co-authored two law review articles and an article on social science research methodology. Mr. Jackson's primary area of interest is Commercial Law, which he will teach along with a first-year course in Contracts and Statutory Analysis.



Mark G. Kelman comes to Stanford from New York, where he was director of Criminal Justice Projects for the Fund of the City of New York, a private

foundation established by the Ford Foundation to be a management consultant for city government agencies. Mr. Kelman worked primarily in the areas of child abuse case management and prison reform. He received both his undergraduate and law degrees from Harvard (A.B., 1973; J.D., 1976). While at law school he was a teaching fellow in social studies. He has published a novel, *What Followed Was Pure Lesley*, and has another in manuscript. Mr. Kelman will teach Criminal Law and Taxation.

Alumna New Assistant Dean

Victoria Diaz, a 1975 graduate of the School, has been appointed to the new position of Assistant



Dean for Student Affairs. Ms. Diaz will have responsibilities in three distinct areas: (1) recruiting students for the Law School; (2) providing programmatic leadership

and managerial assistance to student organizations; and (3) counseling and assisting students with personal, academic and career problems.

Ms. Diaz received her undergraduate training at Stanford and Ohio State University, where she earned the B.S. degree *cum laude* in 1969. She entered the Law School in 1972. While in Law School she was active in the Chicano Law Students Association and was vice president of the Stanford Law Students Association. Following graduation she joined the San Francisco firm of Pillsbury, Madison & Sutro, where she remained until her appointment as Assistant Dean.

In addition to her legal experience, Ms. Diaz has also taught high school in Ohio, been involved in university administration in Oregon, and served as Legal Assistant at the SEC in Washington. She is a member of La Raza National Lawyers' Association.

Upon announcing the appointment, Dean Meyers observed, "Ms. Diaz has all the qualifications to perform the demanding duties of the new job—energy, ability, education and the empathy necessary to attract good students to the Law School and to work with them after they arrive."

Faculty Notes

Professor **Anthony Amsterdam** received the Walter J. Gores award for excellence in teaching at the 1977 Stanford University commencement exercises. Professor Amsterdam was cited "for legendary feats of intellectual assertion

and moral commitment . . . for an addiction to overwork that is both constructive and, miraculously, contagious; and for bringing to large lectures the intensity of a seminar, to seminars that of an individual tutorial, and to the Law School curriculum the fresh stimulus of the clinical approach to learning."

In July Professor Amsterdam addressed the Commonwealth Club in San Francisco on capital punishment.

Professor **John H. Barton** spent the 1976-77 academic year in Europe studying the enforcement of arms control. He was based at the International Institute for Strategic Studies in London and was working under a Rockefeller Foundation Fellowship in Conflict in International Relations. The product of his work is expected to appear as an Adelphi paper this winter. He also completed revision of a book examining the benefits and limitations of arms control. Earlier this year, Stanford University Press published the introductory book, *International Arms Control: Issues and Agreements*, that he and Lawrence Weiler (formerly of Stanford, now with the U.S. Arms Control and Disarmament Agency) had previously edited. This fall Professor Barton is offering a course on international human rights issues.

Professor **Paul Goldstein** wrote an article, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, which appeared in a symposium number of the *UCLA Law Review* this fall. He has written a book, *Changing the American Schoolbook: Law, Politics and Technology*, which will be published this spring by Lexington Books, as part of its Politics of Education Series. Professor Goldstein is currently at work on a casebook on real estate transactions, which he expects will take two to three years to complete. In August he conducted a workshop



at New York University on the new copyright law.

Professor **William Gould** travelled to South Africa during the summer under the auspices of the American Specialist Program of the U.S. Department of State to give lectures in Johannesburg, Pretoria, Durban and Capetown. The lectures focused on three subjects: comparative labor law in Europe, the United States, Japan and Australia; the American arbitration system; and fair employment practices legislation, which is the subject of a book he has recently published, *Black Workers in White Unions: Job Discrimination in the United States*. While in South Africa he also compiled research on South African labor law and labor-management relations, with particular emphasis on the development of black trade unions. He plans to write articles from the research under a Ford Foundation grant. He also addressed the South African Sports Institute on collective bargaining and labor law and sports.

Professor Gould also gave lectures in Lusaka, Zambia and Nairobi, Kenya. He then travelled to Munich and Dusseldorf, where he addressed the DGB, the German equivalent of the AFL-CIO, and to Stockholm and London, where he lectured on South Africa.

Professor **Thomas Grey** spent the summer working on an extensive article on the constitutional ideas of the American revolution, which will form part of a book on judicial review on the basis of "unwritten" constitutional principles. Professor Grey intends to finish the book during his sabbatical in 1978-79.

Gerald Gunther, William Nelson Cromwell Professor of Law, discussed legislative classifications and the equal protection of the law at the Appellate Judges' Seminar held in May in Williamsburg, Virginia. Sponsored by the Appellate Judges' Conference of the ABA's Judicial Administration Di-

vision, the seminar was one of six to be held in 1977 around the country. The seminars provide an opportunity for appellate court judges to examine in depth selected issues that affect the courts.

In September Professor Gunther spoke to the Federal District Judges' Seminar in San Francisco on the Learned Hand-Felix Frankfurter relationship. That subject was also the theme of his William Winslow Crosskey Memorial Lecture at the University of Chicago in the fall of 1976, and of a public lecture at Stanford in the spring of 1977.

Professor Gunther's 1977 Supplement to his casebook on constitutional law was published in August. Earlier this year The American Philosophical Society published a volume based on its bicentennial proceedings (including Professor Gunther's paper, a version of which appeared in the Fall 1976 issue of *Stanford Lawyer*). Professor Gunther's other bicentennial activities included participation in symposia and meetings with German constitutional lawyers and judges in Bonn and Karlsruhe (preceding his teaching at the Salzburg Seminar in American Studies and his lecturing in Poland).

Victor H. Li, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies, was on leave during the 1976-77 academic year, spending the fall semester at the Carnegie Endowment for International Peace in Washington and the spring at the University of Hawaii Law School. Professor Li is the author of several new publications, including *Law Without Lawyers: A Comparative View of Law in China and the United States* (Stanford Alumni Association); *Law and Politics in China's Foreign Trade* (University of Washington Press); *De-recognizing Taiwan: The Legal Problems* (Carnegie Endowment for International Peace); and "Resolving the China Dilemma: Advancing

Normalization, Preserving Security" (*2 International Security* 11), an article on China policy written with John Lewis of the Political Science Department.

John Henry Merryman, Sweitzer Professor of Law, participated in the colloquium on New Perspectives on a Common Law of Europe, held last May at the European University Institute in Florence, Italy, where he delivered a paper on "Convergence (and Divergence) of the Common and Civil Law." Among his most recent publications are an article on the Mark Rothko case for *ART News*; an article on the use of authority by the California Supreme Court for the *University of Southern California Law Review*; an article, co-authored with David Clark '72, on calculating the duration of judicial proceedings, which appeared in the *Michigan Law Review* and the *Rivista di Sociologia del Diritto*, Milan; an article on judicial responsibility in the United States for *Rabels Zeitschrift*, Hamburg; and an article on law and development for the *American Journal of Comparative Law*.

Dean **Charles J. Meyers** was appointed in the spring to the newly created Governor's Commission to Review California's Water Rights Law, which is headed by former California Supreme Court Chief Justice Donald Wright.

Professor **Robert Rabin** published an article on due process in job security cases in the *University of Chicago Law Review* and one on the evolution of administrative law teaching and research in the *Northwestern University Law Review*. An essay on disaster relief has recently been published in the *Stanford Law Review*. He is currently editing a collection of essays on the administrative process that will be published in the spring by Little, Brown Company.

Professor **Byron Sher** was re-elected mayor of Palo Alto in May. He will serve until July 1978.

Alumni Weekend, October 7 & 8, 1977



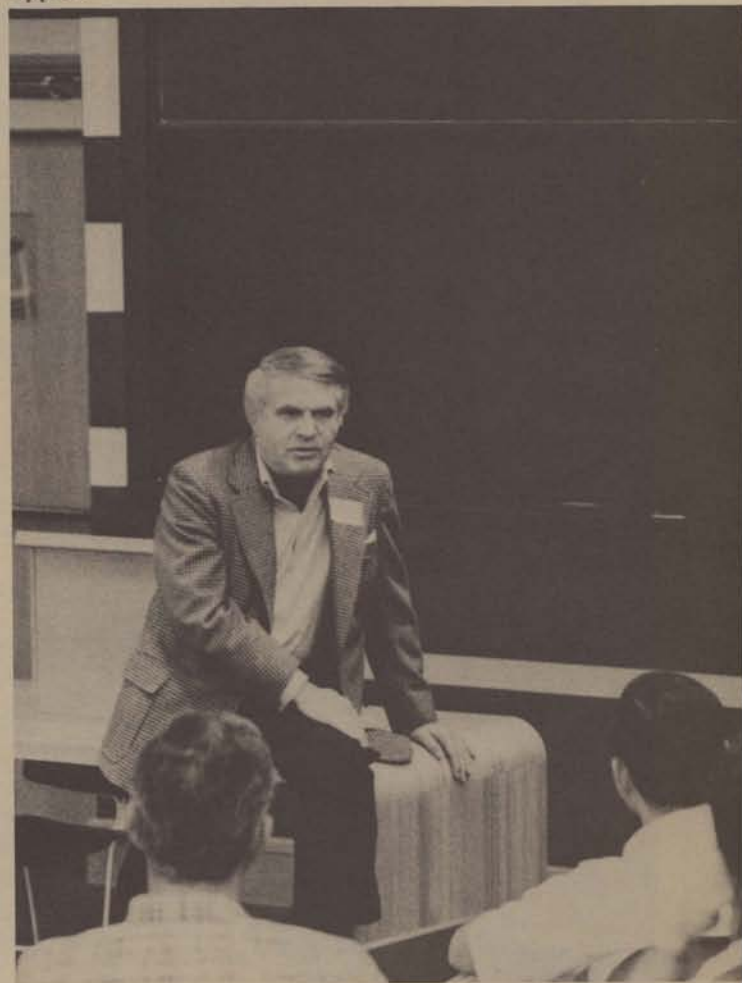
On October 7 alumni returned to the School for two days of educational and recreational activities during the annual Law Alumni Weekend.

Among the events highlighting the weekend were the Law Alumni Banquet, which featured University Chancellor J. E. Wallace Sterling, who shared some "Stanford Reminiscences"; a series of lively seminars presented by members of the faculty on topics ranging from the energy crisis to California's water problems, the cost of housing, and electronic funds transfer systems; the Stanford/UCLA football game; a students' reception for alumni at Crothers; and class reunions.



Members of the Half Century Club, Paul T. Wolf '27 (left) and David Lloyd Davies '27, and their spouses.

Stuart L. Kadison '48 describes the seminar he is currently teaching at the School, "Anatomy of a Federal Civil Appeal."





Tom (T. K.) Houston '72 (left), Art Schneider '73 and Kim Street '72.



Jerome C. Muys '57 (left) and Harold E. Rodgers '55.

Stanford University Chancellor J. E. Wallace Sterling, guest speaker at the Alumni Banquet.



State Bar Luncheon

On September 27 the Council of Stanford Law Societies and the Stanford Law Society of San Diego/Imperial held a luncheon for alumni attending the State Bar Convention in San Diego. Professor John H. Barton delivered the luncheon address, "Is Arms Control Going Anywhere?" to the 150 attendees in the Versailles Room of the Little American Westgate Hotel. Ted Graham '63, new president of the San Diego/Imperial Law Society, acted as host.



Professor John H. Barton

*Dean Charles Meyers with Hon.
and Mrs. Leon T. David '26.*



*Members of the Class of 1950: Bart
Sheela, Clifford Duke and Hon.
Homer Thompson.*



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