

Stanford Lawyer

Fall/Winter 1980

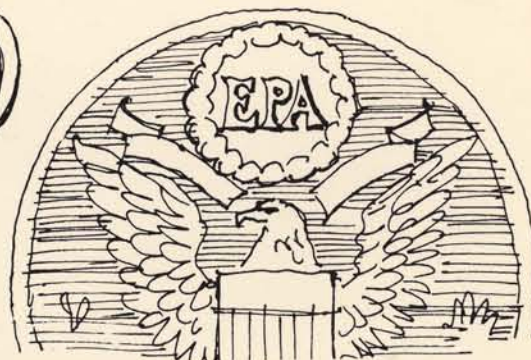
Volume 15, No. 2

"One of the great strengths of the Stanford Law School in the past has been its constant search for ways to improve every aspect of its educational program. That has meant reaching out in new and different directions without losing or compromising the fundamental goal of academic excellence."

Dean Charles J. Meyers



Law & Economics:
A Progress Report



Thoughts on a Year's
Leave at the EPA

Law & Psychology:
On Carefully
Educating
a Jury



Law & Computers:
Creating a Role
for Computers
at Stanford



Jim McGuinness

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Dean's Page



Charles J. Meyers

In looking over the contents of this issue, I was immediately struck by the diversity of subject matter represented in its pages: the interaction of psychology and law in the jury process, the application of law to the field of artificial intelligence, the intersection of law and economics, and the use of a "working sabbatical" to relate practical experience to one's teaching and research.

The realization that the authors and the subjects of their articles are today a part of every Stanford law student's experience prompted me to re-read a report that I prepared in 1968 as chairman of the Curriculum Committee of the Association of American Law Schools. The purpose of the committee was to examine the basic patterns of legal education and to suggest some long-range proposals. The committee's findings, in short, were that legal education in the late '60s was "too rigid, too uniform, too narrow, too repetitious and too long."

With respect to its "narrowness" the report said:

Course requirements do not permit students to pursue avenues of intellectual interest or to capitalize on previous academic or practical experiences. The enshrinement of the case method, a mode of instruction based largely on rigorous cross-examination over purely legal materials (a teaching method we curiously call Socratic), has made law teachers suspicious of exploiting the knowledge of other disciplines that does not readily lend itself to "Socratic" exposition. Moreover, the very precision of thought that the case method develops is antipathetic to the intellectual attitudes of some of the disciplines that could complement law study (e.g. sociology, psychiatry).

Nevertheless law schools must accommodate themselves to the vocabulary and thought processes of disciplines very different from our own. However distressing it may be to listen to an architect who speaks of a building "that doesn't sing," the lawyer concerned with urban planning cannot do without him, or one of his brethren who talks the same way. In short, the law schools have brought to the level of high art the skill of precision in the use of language, but we must, without sacrificing that skill, put more and different substantive content at the disposal of our students.

A glance at the courses being offered during the 1980-81 academic year reveals that Stanford has come a very long way since 1968. A student entering in this law school today

will be exposed not only to the core courses that are the foundation of every law school curriculum but also to the myriad other disciplines that intersect with law. A central purpose of this law school is to provide a firm understanding of the nonlegal environment in which the law functions, because every legal problem has its own set of economic, psychological, historical, and other considerations.

Law cannot be studied in a vacuum; and the first-class lawyer never loses sight of the fact that the legal process is a part of the social process. He knows when and how to work with accountants, doctors, economists, sociologists, engineers, whose expertise can help him or his client.

In 1966, Stanford made its first commitment to the development of stronger ties with other disciplines when it established the first JD/MBA program in the country. Since that time, interdisciplinary work at the School has grown steadily. Joint degree programs have been formally established with several other departments, including economics, history and political science. Moreover, law students are encouraged to develop their own programs with virtually any department on campus, subject to the approval of both the law school and the respective department.

The composition of the faculty also reflects the growing interest and interaction with other disciplines. In addition to teaching Trusts and Estates, Lawrence Friedman is the resident legal historian. Through his research and teaching, Lawrence has made path-breaking contributions to the field of American Legal History. David Rosenhan holds a joint appointment as Professor of Law and Psychology and in that capacity produces significant work in both fields. A. Mitchell Polinsky, a new member of the faculty, is Professor of Law and Associate Professor of Economics. In addition to offering courses in law and economics (including a first-year required course in economic analysis—the first of its kind in any law school), Mitch is a resource for faculty members who are interested in the application of economics to their courses and research. Finally, each year the School invites a computer specialist to spend a year at the School as a Law and Computer Fellow. While pursuing original research this individual also acts as a resource for faculty and students interested in the law and computer field.

These are significant innovations that emphasize the impact of other disciplines on law. But perhaps the most significant measure is the recent funding of three major chairs. In 1978, the Law School received funding from the family of an alumnus to endow a chair in law and economics. This gift was personally gratifying to me

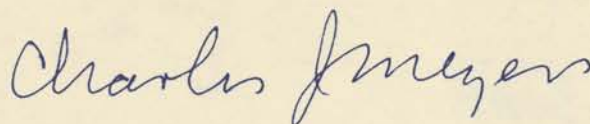
because it is an area that I have worked to develop for the last ten years.

In 1979, Kenneth F. Montgomery of Chicago, Illinois, a member of the Law School's Board of Visitors, and his wife, Harle, A.B. '38, endowed the first professorship in clinical legal education in the country. The chair recognizes the work of Professor Anthony G. Amsterdam, the country's foremost expert in the simulation method of clinical education. Together with Donald T. Lunde, M.D., Clinical Associate Professor of Psychiatry in the School of Medicine and Senior Research Associate at the Law School, Professor Amsterdam is designing a basic clinical law course for use at Stanford as well as other law schools. It is expected that the course will revolutionize law teaching the way the casebook did in the last century. The Montgomery Professorship will enable Stanford to spearhead this revolution.

This year, the School received yet a third monumental gift. Through the generosity of the Ralph M. Parsons Foundation of Los Angeles and the William Randolph Hearst Foundation of New York City, Stanford Law School now holds the first endowed professorship in law and business in the country.

The message is clear: solid links between the Law School and other disciplines now exist. And the prognosis is for more links to be formed in the future. One of the great strengths of the Stanford Law School in the past has been its constant search for ways to improve every aspect of its educational program. That has meant reaching out in new and different directions, without losing or compromising the fundamental goal of academic excellence. Stanford has maintained that excellence, while it continues to be innovative and a leader for other law schools to follow.

What does the future hold? I foresee even greater flexibility and diversity within the curriculum and a growing understanding of the role of the lawyer as social engineer, who is in most instances at the center of the controversy and charged with the responsibility of assimilating all of the data, weighing all of the expert opinions, and creating the appropriate legislative and administrative rules and procedures that allow it all to work. Stanford is committed to providing its students and faculty with the resources and the expertise to make that possible.

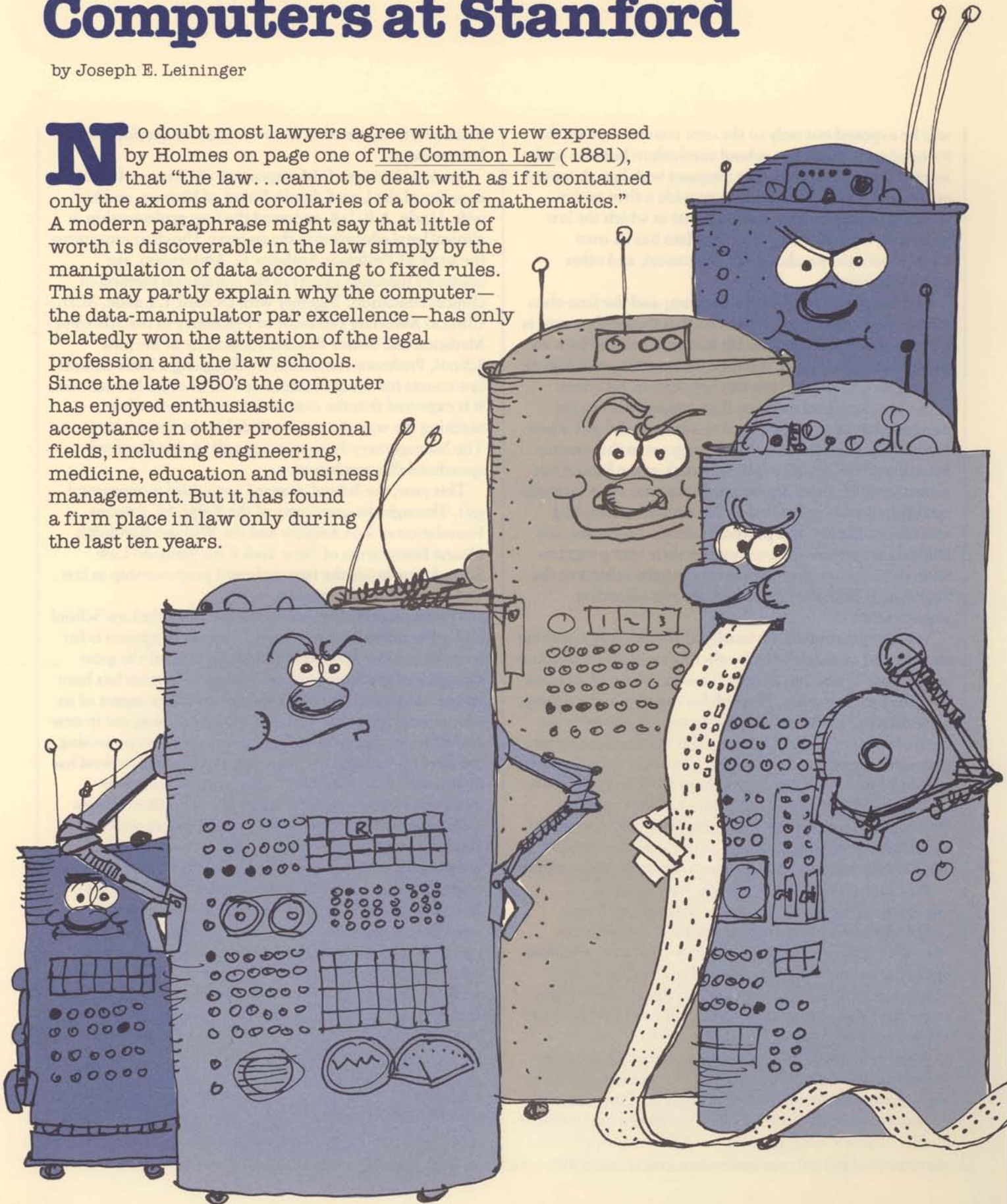


Creating a Role for Law and Computers at Stanford

by Joseph E. Leininger

No doubt most lawyers agree with the view expressed by Holmes on page one of *The Common Law* (1881), that "the law... cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

A modern paraphrase might say that little of worth is discoverable in the law simply by the manipulation of data according to fixed rules. This may partly explain why the computer—the data-manipulator par excellence—has only belatedly won the attention of the legal profession and the law schools. Since the late 1950's the computer has enjoyed enthusiastic acceptance in other professional fields, including engineering, medicine, education and business management. But it has found a firm place in law only during the last ten years.



"...it may be estimated that 25 American law schools offer regular or occasional instruction in some aspects of computer law."

A lot has happened, however, in those ten years. Many law firms, law schools, courts and government agencies now employ LEXIS, WESTLAW or JURIS systems to assist their legal research. Computers are widely used for billing, book ordering and cataloging, and other administrative tasks. They are increasingly used for file management in complex litigation and for the preparation of wills, trusts and other legal instruments. Computerized text-editing, which greatly eases the revision process, is becoming common. Computer-aided statistical techniques are of growing importance in legal research and litigation. All of these uses are giving lawyers direct experience with the computer that serves to build their interest and confidence in it.

In recent years, too, a "law and computer field" has come to be recognized by the American Bar Association and other professional organizations, as well as by a number of law schools. The field can be variously defined, but for convenience here we may divide its subject matter into two groupings: applications of law to computer-related activities, and computer applications to the law. The first grouping, often referred to simply as "computer law," embraces a congeries of substantive legal problems associated with the mer-

chandising, ownership and use of computer equipment and software. A partial list of the problem areas includes contracting and leasing, taxation, protection of rights in software, privacy safeguards in database management, computer "abuse," electronic funds transfer and its related commercial law issues, programmer liability for defective software, the use of computer-produced materials in evidence, the computer industry and its regulation and—a recent addition to the list—regulation of the flow of data across international borders. There is a fast-growing literature on these subjects, and lawyers around the country are being prompted by client needs to gain some familiarity with them. A still-small but growing group of practitioners is developing special competence in the area. Three journals, one of them edited by law students at Rutgers, give attention to these problems, and it may be estimated that 25 American law schools offer regular or occasional instruction in some aspects of computer law.

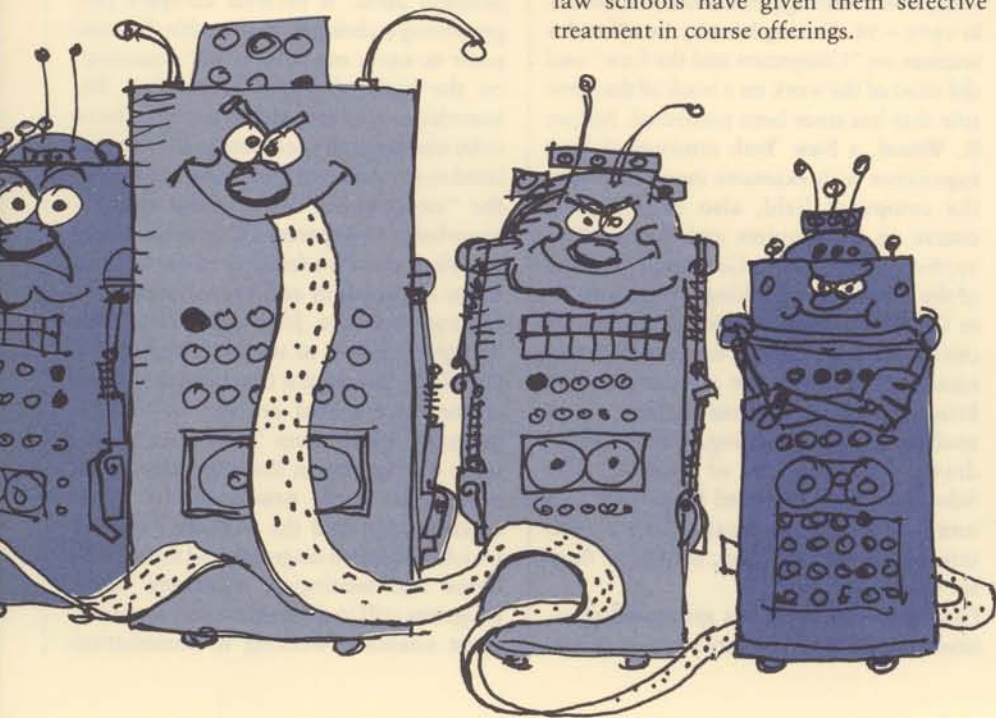
We have already mentioned some of the concerns of the second branch of the field: computer applications to law. These include computerized legal information retrieval, the use of computers in pretrial discovery and trial presentation, text-editing and other computer-based processes in law office management, the role of computers in law enforcement and judicial administration, and computer-aided instruction in law. Within this general category are two other concerns to which we will return: artificial intelligence applications to legal research and analysis, and the use of quantitative methods in the law. All of these areas have been explored at varying length in books and journals, and a few law schools have given them selective treatment in course offerings.

Computers at the Law School

At the Stanford Law School we are using the computer in a number of ways. Since 1977 the Law Library has participated in a computer-based book cataloging and inter-library loan system (created at Stanford as the BALLOTS system but now known as the Research Libraries Information Network) that provides ready access to other collections on and off the campus. A LEXIS terminal has been in place for about the same time, and some two-thirds of the School's students now receive training in its operation. A major part of the Placement Office's work, including the scheduling of job interviews, has been automated at a substantial saving of time to both staff members and students. Programs are being completed for the Admissions Office that will speed the work involved in assembling an entering class of about 168 students out of some 3,000 applicants each year. Several members of the faculty and staff have their own text-editing terminals, another terminal is available in the Law Library for general use, and students show increasing interest in building their skills in this new medium. The computer also makes possible various kinds of statistical studies, for both scholarly and administrative objects, that would not have been conceived or attempted a few years ago.

For some time, however, the School's institutional interest in the computer has extended well beyond these everyday applications. Through the efforts of Dean Bayless Manning and Assistant Dean Thomas E. Headrick, the School in 1968 obtained a substantial grant from the IBM Corporation for the establishment of a Law and Computer Fellows Program. This enterprise was founded on the belief that rapid advances in computer technology offered challenges and opportunities to lawyers that should be identified and dealt with. To this end, the program was designed to support several law teachers each year in intensive computer science studies at Stanford, with the hope that they would explore the uses of the computer in their own research and share their new knowledge—through course offerings or otherwise—on return to their own schools.

But things didn't work out quite that way. It proved hard to find young law teachers who could leave their jobs for a full academic year. As an interim measure, the School sponsored two summer seminars—in 1968 and 1969—for selected law students from schools around the country who had interest in and some experience with computers. The seminars were conducted by Dean Headrick with the collab-



Creating a Role for Law and Computers at Stanford

oration of Bruce C. Buchanan, then a research associate (now an adjunct professor) in Stanford's Department of Computer Science. They focused on computer applications to law, with emphasis on problems of information retrieval. In that period, too, a grant was made to a law school faculty member, Professor William F. Baxter, to enable him to spend an academic year in studies of statistics, matrix algebra, and computer science. He has since drawn heavily upon those studies in his teaching and research on antitrust law, government regulation of business, and legal economics.

"...for many it (artificial intelligence) conjures up images of brainy robots with destructive tendencies."

I assumed charge of the program on Dean Headrick's departure from the School in 1970, and in 1970-71 we received our first off-campus fellow, Associate Professor William E. Boyd of the University of Arizona Law School. After nine months of study in computer science he wrote a perceptive piece on "Law in Computers and Computers in Law: A Lawyer's View of the State of the Art," which later appeared in 14 *Arizona Law Review* 267-311 (1972).

An alternative to bringing law teachers to Stanford was to award fellowships to young law graduates who already had some knowledge of computer science and were interested in entering law teaching. After Professor Boyd, the next five of our fellows were in this category. They included Mark J.F. Fischer (1971-72), a graduate of the Harvard Law School who came to us from a federal court clerkship; L. Thorne McCarty (1971-73), another Harvard Law School graduate who is now a professor at the SUNY, Buffalo, School of Law; J. Roger Hamilton (1973-74), a graduate of the University of Oregon School of Law now in computer-related practice; James C. Boczar (1974-75), a University of Miami School of Law graduate who went from here to the University of Arkansas School of Law as an assistant professor and later into private practice; and Dennis E. Burton (1976-77), a graduate of the University of New Mexico School of Law who took a teaching posi-

tion in business administration at the conclusion of his fellowship. The fellows had varying interests, and they were encouraged to give those interests full play. Some attended courses in computer science, operations research or statistics, while other gave most of their time to research. Three of them, at our invitation, conducted seminars: Fischer on "Law, Cognition and the Computer" (1971-72), McCarty on "Decision Technology and the Law" (1972-73), and Hamilton on "Computers and the Legal Process" (1973-74).

Our most recent, and probably our last, fellow under the IBM grant was Professor Spencer Neth of the Case-Western Reserve Law School. He was with us during the Spring semester of 1979-80, during which he applied himself diligently to a heavy load of studies in programming techniques, the management of information systems, computer-aided instruction, and the application of cognitive psychology to computer systems. He is planning to prepare a scholarly article drawing upon his experience here, and perhaps to inaugurate a course on law and computers at Case-Western Reserve.

Others participated in the program, though not as fellows. Associate Professor Richard K. Markovits of our faculty received support during the summer of 1972 for studies in statistics and computer processes. Susan H. Nycum, now a practitioner-specialist in computer law and past Chairperson of the ABA's Section of Science and Technology, was a program research associate in 1972-73. Colin F.H. Tapper, Fellow and Tutor in Law at Magdalen College, Oxford, and Britain's leading authority in the law and computer field, was a visiting professor at the School in 1975-76. During his stay he offered a seminar on "Computers and the Law" and did most of the work on a book of the same title that has since been published. Milton R. Wessel, a New York attorney of long experience with extensive involvements in the computer field, also conducted a course on "Computers and the Law" in 1978-79. Anne v.d. L. Gardner, a graduate of the School now working toward a Ph.D. in Computer Science at Stanford, has received modest support for her past two summers' research; she is attempting to bring computer resources to bear on an analysis of legal reasoning, with examples drawn from the law of controls. The School has also extended hospitality to a number of foreign legal scholars with interests in the computer, several of them for extended periods.

Finally, the program has sponsored occasional meetings of scholars and practition-

ers in the field, both to assess developments and to point new directions. A 1972 workshop brought together some 30 scholars and specialists in the law and computer field for a general stock-taking and appraisal of work then being done. In the following year the School sponsored a conference on "Computers, Society and Law: The Role of Legal Education," jointly with the American Federation of Information Processing Societies. This attracted around 90 legal scholars, computer scientists, and other professionals to Stanford for a two-day discussion of where, if anywhere, the law schools ought to be going with respect to computer-related training. No firm conclusions were reached, but the proceedings were duly published.

Over the years there has been recurring interest among the fellows in the application of artificial intelligence techniques to law. "Artificial intelligence" is a term widely used by computer science people but disliked outside the discipline because for many it conjures up images of brainy robots with destructive tendencies. It is an especially inapt term to employ with lawyers, whose particular image is of an automated robot-judge that dispenses unappealable rulings at the press of a button. Other appellations have been suggested—at least for branches of the artificial intelligence field—including "semantic information processing," "symbolic information processing" and "knowledge engineering"; but none of them has caught hold. As explained in a recent *Campus Report* profile of Professor Edward A. Feigenbaum, Chairman of Stanford's Computer Science Department, artificial intelligence (or AI) is primarily concerned with the modeling of logical inference processes in defined problem areas. It involves complex programming techniques that enable the computer to carry out a form of "reasoning" on the basis of stored knowledge. The knowledge is of two kinds: the basic facts, rules and generally accepted procedures related to the problem area under study; and the "experiential" — or judgmental — knowledge of experts in that area. (Computerized chess is a familiar example.) Professor Feigenbaum and his colleagues, including Professor John McCarthy, have brought Stanford to world prominence in this field. Two of the functioning systems created at Stanford are the DENDRAL program, which gives "intelligent" assistance to chemists in the interpretation of molecular data produced by mass spectrometry; and the MYCIN program, which advises on diagnosis and therapy for blood and meningitis infections. Three programs still in the preparatory stage will assist scientists working in recombinant

DNA technology, facilitate the designing of large scale integrated circuits, and assist in the analysis of data on the geology and potential hydrocarbon content of oil field areas — in short, help locate new wells. Many other projects involving both faculty members and students are in various phases of development. The profile quotes Professor Feigenbaum: "We are creating programs that will assist professionals. What we have succeeded in doing already is to elicit and make available in programs the knowledge and reasoning power of some of the finest minds in the areas we have studied."

Our interest in artificial intelligence was spurred by an article written jointly by Dean Headrick and Bruce Buchanan on "Some Speculation About Artificial Intelligence and Legal Reasoning," which appeared in 23 *Stanford Law Review* 40-62 (1970). After reviewing work being done in computerized legal information retrieval, the authors described the analytical processes involved in two common tasks of the lawyer: interpreting the facts of an occurrence, and the relevant law, to a client's benefit; and recommending actions that satisfy a client's goals and avoid unfavorable legal consequences. They then explored possibilities for the use of artificial intelligence methods in the performance of those tasks, drawing upon experience already gained in the DENDRAL program and others. They concluded that the relationship between law and artificial intelligence should be seriously explored.

"The ultimate 'practical' objective would be to assist a lawyer in the analysis of corporate reorganization problems under the code."

As a fellow in 1971-73, L. Thorne McCarty moved the inquiry an important step beyond speculation. He devoted a great deal of his time to a project that is fully described in his later article, "Reflections on TAXMAN: An Experiment in Artificial Intelligence and Legal Reasoning," 90 *Harvard Law Review* 837-893 (1977). Very briefly, TAXMAN involved the creation of computer programs intended to model specific concepts and processes that occur in the taxation of corporate reorganizations, with focus on the definitional provisions of Section 368 of the Internal Revenue Code of 1954—a very limited, and therefore manageable, problem domain.

The ultimate, "practical" objective, which McCarty makes no claim to having achieved or even approached, would be to assist a lawyer in the analysis of corporate reorganization problems under the Code. The lawyer could not expect simply to feed the computer a set of facts concerning a merger and to receive back an opinion on the tax consequences. But by drawing upon a database containing both statutory and interpretive materials, the system might—through its specially designed programs—assist the practitioner in an "interactive" way, that is: to "talk" with the lawyer and provide help at various stages of the analytical process. McCarty points out that in this project, as in other artificial intelligence undertakings, one of the most challenging tasks has been to articulate and "represent" in the computer the concepts and logical processes that must go into the analysis. But he regards this as a worthwhile exercise in its own right, as he explains on pages 839-40 of his article:

... Whatever its practical applications, the TAXMAN system provides, I claim, an important tool for the development of our theories about legal reasoning. A great many of the classical jurisprudential problems are tied to problems about the uses of abstract concepts in the regulation of human affairs. In [the]... writings there are many illuminating examples and many valuable insights about the structure and dynamics of legal concepts. But taken as a whole, the jurisprudential literature is notoriously imprecise: the conceptual structures themselves are only vaguely defined and vaguely distinguished from one another; the dynamics of conceptual change appear only as suggestive metaphors... The TAXMAN system adds a strong dose of precision and rigor to these discussions of linguistic and conceptual problems. Its critical task is to clarify the concepts of corporate reorganization law in such a way that they can be represented in computer programs. This requires a degree of explicitness about the structure of these concepts that has never previously been attempted. When we describe concepts in this way, we implicitly articulate theories about them; when we run the computer programs that embody these concepts, we test out implications of our theories. Used in this fashion, the computer is the most powerful tool for expressing formal theories and spinning out

their consequences that has ever been devised.

To our knowledge, TAXMAN is the country's first working experiment in artificial intelligence applications to law. Other projects have been conceived, including one dealing with the rule against perpetuities, by Susan H. Nycum here at Stanford, and another focusing on assault and battery, by Jeffrey A. Meldman of M.I.T. But no other has reached the advanced programming stage. Indeed one writer, perhaps thinking that TAXMAN is capable of more than it really is, recently raised the question whether a layman's use of it would constitute the unauthorized practice of law. His conclusion: probably not.

Meanwhile, McCarty is pressing on with his research. With the help of a National Science Foundation grant and the collaboration of computer scientists at Rutgers, he is engaged in an even more ambitious undertaking, called TAXMAN II. This will refine and extend the capabilities of the parent program.

"...the system might... 'talk' with the lawyer and provide help at various stages of the analytical process."

McCarty's example has been followed by other participants in our program. Two West German lawyers with computer experience, Walter G. Popp and Bernhard Schlink, spent four months at the School as visiting scholars in 1974. During their stay they attended courses, familiarized themselves with artificial intelligence studies being done here, and worked to perfect a program of their own that deals with German law. It is described in their article, "JUDITH, A Computer Program to Advise Lawyers in Reasoning a Case," 15 *Jurimetrics Journal* 303-314 (1975). As already mentioned, Anne Gardner is engaged in an artificial intelligence project involving the computer analysis of contracts problems. Her Ph.D. dissertation, on legal reasoning, is well underway, and she is about to undertake the difficult programming tasks to which her research has led her. Her interest, like McCarty's, is less in producing a service for lawyers than in exploring the possibilities and limits of the approach.

Headrick and Buchanan summed it up in the conclusion to their article. Their observations are still timely:

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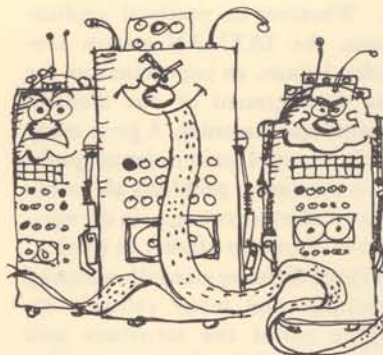
It is premature to state categorically that computers will be used as aids in the process of legal reasoning, or even that they should be. It is hard even to imagine a consensus on the import of the research we propose. Certainly lawyers at one extreme will already have written off computers as a waste of time and money, while some at another extreme will be so convinced of the computer's potential as to feel threatened by its future encroachment upon their work. Between these extremes are numerous positions, some more plausible than others. Such a system could be developed only to die of neglect; it could survive only in the cloisters of academia; it could become an occasional tool of a small or large number of lawyers; it could, conceivably, become a major influence in the practice of law.

New Methods

A second, quite different, area that has been of interest to several of our fellows is loosely called "quantitative methods and law." This is concerned with the application to legal problems (or, more precisely, to problems having legal components) of a melange of new methodologies that are heavily dependent upon the computer and are being applied to an ever-wider range of policy and management problems by government and industry. They include statistical inference, mathematical modeling and optimization, computer simulation, and decision analysis. The need for this kind of study seems plain. Though increasing numbers of students with technical backgrounds are entering the law schools, most lawyers have very little competence in these new approaches to problem analysis, planning, decision making, and management. Yet many of them are being called upon to exercise their professional skills and judgment on problems that can properly be defined and analyzed only in highly "quantitative" terms. Such problems are routinely encountered in the areas of environmental protection, nuclear power regulation, antitrust, legislative redistricting, and school desegregation — to name a few.

The concept of "technology assessment," popular in government circles, challenges lawyers both in and outside of government to involve themselves in a whole range of problems with technical

dimensions. At the same time, both Congress and many state legislatures are increasingly concerned with the optimal use of resources and are requiring executive departments to consider the potential economic impact of new regulation. It is safe to assume that these legislative requirements will lead to litigation that will involve courts and counsel in the evaluation of complex analytical studies utilizing formal, computer-produced models. This will simply add to the heavy new burdens of understanding that have already been placed on the courts by litigation involving complex quantitative issues in the areas I have mentioned, and others. Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia has spoken and written forcefully on this problem.



At the Law School some of the new methodologies have been relevant to such regular or occasional offerings as Legal Economics, Law and Economics, and Methodology in Social Science. But they first received systematic attention in McCarty's 1972-73 seminar on "Decision Technology and the Law," for which he took time from his TAXMAN work. All of the student participants had a level of technical experience higher than the Law School average — in mathematics, physics, or engineering. The seminar's central focus was on a series of readings and case studies demonstrating the use of optimization, simulation or gaming techniques in connection with environmental control, the study of oligopolistic markets, and urban management problems. The group also examined the "global simulation" work then being done at M.I.T., statistical decision theory and the law of evidence, and the use of computer technology in the court system. In a later paper reviewing the seminar experience, McCarty noted that the effec-

tive use of computer models — and other of the new approaches — in law-related areas requires close collaboration between lawyers and technicians. He said:

Part of the job of the lawyer is to design institutional mechanisms that will encourage... continual refinement of [a]... model. Another part of his job involves the setting of substantive standards and guidelines within which the modeling effort will take place... If a systems engineer intends to address public policy questions, then he will necessarily be working with laws and law makers and lawyers; conversely, if the lawyer intends to address a complex systems problem like pollution control, he will be well-advised to make use of all the technical methodologies that are presently available.

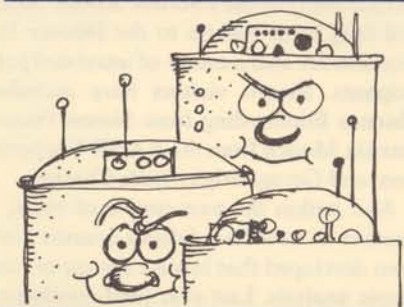
After McCarty, two other fellows — James C. Boczar and Dennis E. Burton — pursued research in this field but did not teaching. McCarty has continued his involvement with the area at SUNY, Buffalo, School of Law, where he has given seminars on "Quantitative Methods in the Legal Process," and on "Economic Models in the Legal Process."

What does this total experience of a decade and more suggest for the future? We have seen the birth and early development of the law and computer field, and with the important help of the IBM grant we have done a few things to help nurture it. Should the institutional effort now continue, or has enough momentum been built to insure that important matters in the law-computer relationship will be addressed without that effort?

The answer depends, I believe, upon which activities within the field we are talking about. Probably as good a case can be made for ongoing teaching and research in computer law — as we have defined it, the branch that embraces the substantive legal problems associated with computers and their use — as for continuing work in environmental law, mass media law or urban law, as examples. Each of these involves the application of at least several bodies of existing or emerging law, including some specific legislation, to problems that are related only by a common, non-legal element — in our case the computer. A course or seminar on computer law, regularly offered, would have the obvious value of informing students and encouraging research on the distinctive issues that increasingly confront lawyers, legislators, administrative agencies and courts in the area. More, it would provide a needed forum for

the study and discussion of more general, but at least equally urgent, questions concerning the accommodation of rapid technological change in our country and the world.

Yet I am not sure that this deserves priority over other needed teaching and research, especially if it would substantially burden the School's budget. A number of the continuing issues in computer law can arguably be treated as effectively, perhaps more effectively, in existing courses and seminars taught by faculty members with special competence in the relevant fields. Among the continuing issues I have in mind are the protection of rights in software, the taxation of computer sales and services, the use of computer-produced materials in evidence, and the protection of privacy. It seems fair to say that a teacher of computer law does not need an extensive background in computer science, though he or she should of course have basic "literacy" in computer processes and a good understanding of the industry and its practices. The emphasis must be—or usually is—on instruction *in law*. But the "smorgasbord" approach, as some call it, places a heavy burden on both instructor and student if it is to afford more than a sampling of the fare.



Thus we must weigh the benefits of a single, coherent offering in computer law against the difficulties of the "pervasive" method, whereby computer-related materials would be incorporated with others in existing courses and seminars. If they have not yet done so, the teachers of these offerings—patent and copyright law, taxation, administrative law, evidence, etc.—will predictably turn their attention to computer-related issues as they are attracted by the novelty or importance of those issues. This is a familiar pattern in law teaching and research.

One problem with the "pervasive" approach is that it tends to be haphazard and slow-moving if sole initiative is left to individual instructors, for they must often make difficult choices among new materials for their courses. It can be made to

work, however, with encouragement and some coordination from the faculty and the Dean's office. It offers at least two advantages: a fair assurance that the issues selected will be treated carefully, and in appropriate depth; and second, a means of acquainting more students with at least a few of the issues in the problem area—here computer law—than would otherwise gain any formal exposure to them. It leaves gaps in the coverage, to be sure. But perhaps we can invoke a Darwinian principle to support the idea that this might not be all bad. On balance, I am of the view that we should seek to engage as many faculty members and students as possible in the examination of computer law problems within the framework of standard offerings, and not commit Law School resources to regular teaching and research in computer law as a separate effort.

The other branch of the field—computer applications to law—needs some separate analysis to provide a basis for answering our question. I doubt that any law school is able to contribute very much of worth to the development of computerized legal information retrieval systems as such, even though they are becoming increasingly important in legal research. This also applies to the use of computers in discovery and trial preparation, in law enforcement and judicial administration, and in other relatively straightforward tasks. All of these matters are better addressed, and are being addressed, by others. Some imaginative and useful programs for computer-aided instruction in law have been developed at a number of law schools, notably Minnesota, Harvard and Illinois; this work should doubtless continue.

In my view, however, the two problem areas that concern the application of artificial intelligence methods to law and the use of quantitative methods in legal problem solving offer the most promise and opportunity for distinctive contributions by law schools. They are both truly "interdisciplinary," in that the problems they encompass are amenable to productive study only through the collaboration of two or more persons well-schooled in the disciplines relevant to those problems, or through the efforts of one person well-schooled in all of the pertinent disciplines. They can best be studied in an academic setting. They are still quite esoteric, compared to other fields of law-related teaching and research. But they challenge investigation by persons with the necessary competencies whose efforts, over time, might well harness the computer to the laws in ways that will significantly enhance lawyer's capabilities to do their jobs as counselors, advocates, adminis-

They (artificial intelligence and law) are still quite esoteric, compared to other fields of law-related teaching and research."

trators, or judges. Those efforts might also cast important new light on the legal reasoning and research processes—now understood largely through intuition—and assist the development of those processes to meet the needs of an increasingly complex society, made so in large part by its growing reliance upon technology.

There are already opportunities at Stanford for law students and faculty members to acquaint themselves with these two problem areas—through cross-registration, joint degree programs, or collaborative teaching or research. The Graduate School of Business, the Department of Economics, and the Department of Engineering/Economic Systems—in addition to the Department of Computer Science—offer courses in computer-related fields including mathematical modeling and optimization, simulation, and decision theory. Students in the law-business program, some twenty each year, gain exposure to some of these methods as a matter of course.

But more is appropriate, and needed. In my opinion there is a clear place for a program sponsored by the Law School, preferably with outside funding, that will give opportunity and direction to a few persons each year—faculty members, students, fellows—for intensive work in these two areas. The cooperation of other Stanford departments, particularly the Department of Computer Science, is assured. Unique scholarly and technical resources are available to support the effort. Through the Law and Computer Fellows Program the Law School has already taken what some have called an "institutional initiative" in these areas. It should not be abandoned.

Associate Dean Leininger was graduated from the University of California at Berkeley in 1951, receiving an A.A. in anthropology and Far Eastern studies, and from Harvard, with an LL.B., in 1959. He was secretary of International Legal Studies, 1962–66, and vice-dean, 1966–69, of Harvard Law School before coming to Stanford.

LAW AND ECONOMICS AT STANFORD: A PROGRESS REPORT

by A. Mitchell Polinsky

Economists don't know limits. They have undertaken (serious) economic analyses of marriage, religion, and even suicide. It is therefore not entirely surprising that economists found their way to law. What may be surprising is the welcome they have received from lawyers. Just within the past decade, the law schools at Berkeley, Chicago, Harvard, Michigan, N.Y.U., Penn, and Yale, as well as Stanford, have appointed at least one economist. Two academic journals now exist — the *Journal of Law and Economics* and the *Journal of Legal Studies* — which specialize in publishing articles analyzing legal issues from an economic perspective. Practically every month at least one of the law reviews at Chicago, Harvard, Stanford, and Yale contains an article or student note using economic analysis. And during the past few years a number of consulting firms which specialize in providing economic support in litigation have been created.

Why have economists been so warmly received by lawyers? On the academic front, economic analysis has been found useful by both law teachers and law students because it helps them to understand better the relationships among different areas of law. For example, in a section of Stanford Law School's first-year curriculum, a short course in the spring term uses the same basic principles of economics to analyze common law remedies for breach of contract and for automobile accidents. From an economics perspective, contract and tort remedies face similar problems: How can incentives be created which will lead parties to take the correct amount of care and thereby appropriately reduce the probability of a breach or of an accident? Given that some breaches and accidents are inevitable, how should the resulting risks be allocated among the affected parties? In addition to common law topics, economic analysis helps law teachers and law students understand the costs and benefits of statutory law and

government regulation. In brief, economics provides a unifying framework for thinking about legal rules and institutions.

On the practicing front, economists are used in a variety of legal matters. For example, they are regularly called upon by both plaintiffs and defendants in antitrust cases to testify on such issues as predatory pricing, price discrimination, market definition, and market concentration. Economists are also frequently involved in other legal problems such as the determination of damages in personal injury cases, the calculation of fair rates of return in public utility proceedings, and the assessment of environmental policy. Whenever a legal argument or policy depends in part on an economic argument or policy — which is often — economic expertise is essential. As a result, a greater number of practicing lawyers are finding that they must learn how to communicate with and use economists.

Stanford's Activities

Stanford Law School has long been known for its interest in "law and economics." William Baxter in antitrust law and regulated industries and Kenneth Scott in banking regulation and corporation law have probably been the most active early users of economics at the Law School. When Charles Meyers became Dean in 1976, he announced an even greater commitment to the subject. Within the last three years, a number of new faculty members have been appointed with research interests in law and economics. They include Robert Ellickson (whose appointment takes effect next year) in land use and property, Thomas Heller in legal theory and tax policy, Thomas Jackson in commercial law, and Mark Kelman in legal theory. (My being brought to Stanford last year was also a direct result of Dean Meyers' commitment and the generosity of a donor very close to the Law School.) In addition to the above, many other Law

School faculty members have an interest in the economic approach to law. They include John Barton in contracts and international law, Lawrence Friedman in law and society, Thomas Grey in legal philosophy, and Robert Rabin in administrative and tort law. Also to be included this year is Robert Mnookin (visiting from Berkeley) in family law and personal financial counseling.

Besides the Law School faculty, there are a number of other persons around Stanford with law and economics interests. These include Michael Block, Aaron Director, and Thomas Moore at the Hoover Institution, Michael Boskin and William Rogerson in the Economics Department, and Gerald Meier at the Business School. Short and long term visitors to the Hoover Institution are also a source of interested participants. Recent visitors have included Thomas Borchering from Simon Fraser, Patricia Munch from the RAND Corporation, and George Stigler from Chicago.

Also within the past couple of years, a number of new Law School courses have been developed that involve the use of economic analysis. Last year (and continuing this year), an alternative first-year curriculum was used for a third of the entering class. This program, developed in large part by Paul Brest, has a substantial social science component. Perhaps for the first time at any American law school, an introduction to "law and economics" became an integral part of the first-year curriculum. This introduction consisted of two "minicourses," one on "Economic Analysis of Law" that I taught and the other on "Liberal Theory" that Mark Kelman taught. In addition, I was brought into regular Property, Contracts, and Torts classes to discuss the economic approach to such topics as products liability and nuisance law.

In the second and third years at the Law School, there are a number of courses which use economic analysis. These include Baxter's courses on economics for

"In addition to common law topics, economic analysis helps law teachers and law students understand the costs and benefits of statutory law and government regulation."

lawyers, antitrust and regulated industries, Heller's tax policy seminar, Rabin's environmental law course, Scott's courses on banking institutions, securities regulation, and business associations, and my own law and economics seminar.

The Law and Economics Seminar, which is jointly offered with the Economics Department, is the focal point for student and faculty research at Stanford on this subject. Each meeting of the seminar consists of a presentation by an invited academic lawyer or economist, frequently from another university, on a topic of current interest. For example, last year Professor Richard Posner of the University of Chicago Law School spoke on contribution among joint tort-feasors; Professor Jerry Mashaw of Yale Law School discussed errors in the administrative provision of welfare benefits; and Professor Steven Shavell of the Harvard Economics Department lectured on causation. Students who enroll in the seminar undertake supervised writing on the application of economics to a particular legal problem. Student topics last year included analyses of a taking case, of employment termination contracts, and of the choice between fines and imprisonment as criminal sanctions.

The Economics Department at Stanford also offers a course, which I teach, for advanced undergraduates and graduate students on the economic analysis of law. This course covers such topics as nuisance remedies, criminal sanctions, antitrust enforcement, breach of contract remedies, land use control, products liability and medical malpractice.

The Future

The Law School is presently considering the development of a new course on the use by lawyers of economic experts and of statistical/econometric methods. (Such a course could be broadened to include the use of other kinds of experts as well — psychiatrists, engineers, accountants, etc.) This course would be based on a series of case studies in which economic or statistical analysis has played an important role in legal proceedings. Two examples would include the use by the Federal Communications Commission of an economic analysis of the effect of cable television on the profits and growth of broadcast television stations, and the consideration by the Supreme Court of econometric evidence on

the deterrent effect of capital punishment. Staffing for such a course might also involve Stanford professors from the Business School and the Departments of Economics, Engineering-Economic Systems, and Statistics.

The Law School is also planning a major research conference on law and economics during the summer of 1981. This conference, which is co-sponsored by the International Seminar in Public Economics, will bring leading scholars in law and economics from the United States, Canada, Great Britain, and Western Europe to Stanford to hear "state of the art" research papers. Law School faculty and selected students will have an opportunity to participate.

Although the Law School has already accomplished a great deal in terms of applying economics to legal problems, there are many other activities that could be undertaken as financial support becomes available. Besides the development of the new course mentioned earlier, it would be desirable to have more active joint degree programs with the Economics Department and the Business School, to make research support available to a greater number of interested faculty, and to bring legal practitioners and policymakers who use economic analysis to Stanford for a semester or two. I hope to be able to describe some of these developments in more detail in another progress report.



A. Mitchell Polinsky

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On Carefully Educating a Jury

by David L. Rosenhan

On June 13, 1980, a Federal District Court jury rendered its judgment in **MCI Industries v.**

AT&T. Guilty, it said, and under the treble-damages provisions of the Sherman Antitrust Act, confronted AT&T with a 1.8 billion dollar penalty, the largest ever accorded in an antitrust litigation. The outcome of this very complex litigation will be appealed of course. But the verdict itself raised again a question that continues to trouble many observers of such trials: can the jury, that hallowed bastion of judicial democracy, be counted upon to render justice in cases that are as complicated as this one was?



The question is not new by any means, nor is its implied distrust of the jury system for such cases. As early as 1921, Learned Hand indicated that he was "by no means enamored of jury trials, at least in civil cases." More recently, Carl Becker, that eminent historian of American law, put the matter very clearly:

"Trial by jury ... is antiquated ... and inherently absurd — so much so that no lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him."¹

The question of jury competence in complex questions gained impetus from a footnote in the Supreme Court's decision in *Ross v. Bernhard*.² There, the Court upheld the right to a jury trial in a shareholder action but indicated that that right was not to be construed universally. Rather, on a case-by-case basis, "the 'legal' nature of an issue is determined by considering ... the practical abilities and

"...can the jury, that hallowed bastion of judicial democracy, be counted upon to render justice in cases that are as complicated as this one was?"

limitations of juries." Subsequently, lower courts have debated the intent of that footnote. One court wrote that "After employing an historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote" (609 F. 2d 411 at 425). But the matter will not rest. Recently, Chief Justice Warren Burger continued to express reservations about the present function of juries in complex civil actions. "It borders on cruelty to draft people to sit for long periods trying to cope with issues largely beyond their grasp. ... Even Jeffer-

son would be appalled at the prospect of a dozen of his yeomen and artisans trying to cope with some of today's complex litigation in a trial lasting many weeks or months."³

Are the issues involved in litigation involving corporate securities and finance, patents, advanced technology and in antitrust simply too complicated for the ordinary juror? If one is to infer from the behavior of many attorneys, they are often ambivalent about the matter. At the outset, they may feel that justice can be done in these cases by the jury, though often they rue that decision. According to AT&T's lead attorney, AT&T chose a trial by jury because "we were worried about the attention we would get from judges in this district because they're so overburdened with cases. It seemed to us we would get the undivided attention of a jury. Looking back, we would have done it differently. I would be less than candid if I didn't say that anything would have been better than this. We were absolutely flab-



bergasted. It's the size of the verdict that's obscene." At another point, the same attorney was quoted as saying, "In my mind there's no way the verdict will be upheld, and it's going to make the jury system look bad."⁴

The question of jury competence is often put less well than it might be. The question is not whether the jury is competent to decide in such cases, but *under what conditions* is it likely to render better decisions or worse ones? Moreover, granted that the jury does occasionally decide without fully considering all of the relevant issues, is that the jury's fault, or does the problem rather lie elsewhere with the nature of the trial itself, or with the capacities of the attorneys or judges to motivate and educate?

Sound answers to these questions are hard to come by. Like jury selection and trial tactics, jury comprehension is a rich topic for research collaboration between lawyers and psychologists. But the issues involved here should not be avoided merely by asserting the need for further research. In the first place, there are sources of information that should be ruled out at the outset. One such source is the impressions of judges and attorneys based on their post-trial interviews of jurors. Such interviews tend to be brief encounters, conducted en masse, just moments after the jury has emerged. The jury in *Memorex v. IBM*, for example, was interviewed by the judge immediately after it had deadlocked. Based partly on his observations, he later wrote that the "magnitude and complexity of the present lawsuit render it, as a whole, beyond the ability and competency of any jury to understand and decide rationally." But like a school principal who interviews a group of boys about their drug habits, a judge may not be well positioned to get the facts. His stature, knowledge and commitment to the case may well intimidate the jury, and lead them to reveal much less than they understand. Moreover, with a deadlocked jury, their immediate frustration and fatigue may inhibit responsiveness. In this particular case, later depth interviews with individual jurors by relatively neutral parties revealed that many jurors had a remarkably deep understanding of many of the issues, so deep in fact, that one wondered

"...does the problem lie elsewhere with the nature of the trial itself, or with the capacities of the attorneys or judges to motivate and educate?"



whether any random judge would have achieved such depths of understanding in so complicated a matter.

Fundamentally then, the question is: under what conditions will a jury meet its obligation to carefully weigh all of the issues, and under what conditions is it likely to fail? On the latter matter, there is no question but that juries occasionally fail to meet the standard. My colleagues and I have encountered jurors in antitrust cases, for example, who never deliberated fundamental questions of market share, or indeed, had no idea that the fundamental issue *was* antitrust. It would be an error, however, to make inferences about jury capacity from such tragedies. For there is equally compelling evidence that juries can and do have a much deeper appreciation of these complex issues than is widely imagined.

Evidence on this matter comes from two sources: the first relatively narrow

but well controlled; the second, broader, closer to the real-life of the jury, but less focal. The first source of evidence arises from a study that was conducted by myself and a group of colleagues which included both attorneys and psychologists. In the course of preparing for an upcoming litigation, we videotaped a lengthy trial simulation which dealt with the financial aspects of the dispute.

In this simulation, the judge opened the trial, instructed the jurors regarding their task, and presented a brief overview of the litigation, in much the manner that judges commonly employ. Subsequently, without opening remarks by either side (which absence clearly made comprehension more difficult) the jurors listened to the president and CEO of each of the litigant firms describe the issues from his point of view. The full technical jargon dealing with the financial aspects of the case was employed, with care taken by the respective attorneys to define particularly arcane terms. Charts and graphs were used where necessary. After each witness was examined and cross-examined, the attorneys proceeded to their summations. That done, the jury deliberated.

The "jury," in this study, was carefully selected to match closely the characteristics of federal jurors on five crucial dimensions: age, gender, race, income and education. 40% had a mere high school education or less. Additionally, 37% were either unemployed, retired or housewives. In fact, the bulk of these "jurors" were precisely the venire about which one hears numerous complaints: that they were too uneducated, too unskilled and too unmotivated to provide a real hearing for complex civil complaints.

All told, 35 jurors heard the "case," which was tried four times: twice before juries of twelve, once before a six-person jury and once before a jury of five. The jurors viewed the five-hour videotape and commenced deliberations on the second day. Their deliberations were tape-recorded and subsequently analyzed. After they finished deliberating, the jurors were intensively interviewed by a team of social scientists to determine, among other things, how much they understood about the case, and how involved they were in the deliberations.

What was remarkable about the find-

ings was in fact, the degree to which the jurors understood the issues of the case, and more significantly, how their understanding enabled them to overcome the biases and predispositions that they had regarding the litigants before they actually heard the case. This is not to say that everyone on the jury had a complete comprehension of all of the issues. Far from it. There were some, as there are on every jury, whose understanding was dim and whose grasp tenuous. But on the whole, the degree of understanding was remarkable, and only minimally correlated with educational or vocational achievement. Gaps in an individual juror's understanding of either the facts or the relevant distinctions that needed to be made (for example, mere adverse effects that arise from ordinary competition, from those that arose from illegal competition) were filled in by other jurors during the deliberation process — a process, we should recall, that judges sitting as sole arbiters in such cases are not exposed to. The result was that 40% of the jurors had an excellent appreciation of the issues in the case, and were clearly able to come to terms with them. Another 20% would be described as having a good, though not excellent, comprehension of the issues.

Equally remarkable was the degree of energy and argument that was brought to bear in the deliberations by these jurors. For the issues in the case were far removed from the experience of all of them. None had had experience in high finance, in the kinds of competition that characterizes large corporate enterprises, and in the kinds of decisions that are made by corporate executives. They were, to a person, middle America whose contact with big business, where it existed at all, was at the lower echelons. Nevertheless, they resounded to these issues, debated them fiercely, often continuing those debates into lunch and coffee breaks, and even after the jury had rendered a decision. Once again, it should be noted, some jurors were relatively passive, relying on others to press the issues home. But overall, we were quite surprised at the vigor of the deliberations and the seriousness with which jurors took their task.

It can be said, of course, that these "experiments" — one hesitates to use that formal word — were mere shadows of the

"...we were quite surprised at the vigor of the deliberations and the seriousness with which jurors took their task."



real thing whose findings were as artificial as such experimental simulations tend to be artificial. Perhaps so. But that view does not accord with our experience interviewing real jurors from real complex trials, which is our second source of information on these matters. By now, we have observed nearly a dozen trials, all of them involving litigation in technological, financial and antitrust arenas in both state and federal courts. The trials have been lengthy, ranging in time from one to nearly eight months — presumably as exhausting for the jurors as they were for the judge and attorneys (and us). Shortly after each of these trials were completed, we interviewed individually all of the jurors who consented to meet with us, often as many as three quarters of the members of each jury. These interviews were quite lengthy, never less than 90 minutes, and sometimes as long as four hours. Our consistent observations have been these:

— Whether, as Chief Justice Berger observed, it was "cruel" to draft these people to sit for long periods of time cannot, of course, be determined long after the fact. But it is remarkably the case that evidence on the effects of such cruelty has yet to be located after the jury had sat for a long time. Quite the contrary, jurors are overwhelmingly pleased with their work, delighted to have been of service, and aware that they have contributed much to the justice process. Moreover, they commonly feel that they have learned a good deal, often in the tutelage of expert attorneys and judges. "You couldn't get an education like this for any amount of money," one of them remarked, and he was not alone. Perhaps this is but another instance of the old adage that men and dogs come to love the things they've suffered for. But regardless, their near-unanimity on this matter is striking. Only when the jury is unable to arrive at a unanimous verdict are these feelings diminished to some extent. Then, jurors often feel that their efforts were to nought. Clearly, the presiding judge can do a good deal to alleviate these feelings, if only by pointing out that reasonable people will often disagree on complicated matters and that justice is being served even under such conditions.

— On the whole, jurors understand much more about such cases than is often assumed. This is not to say, as I indicated earlier, that they understand all of the issues, nor even that they can recall all of the issues that others — attorneys, for example — might find significant. But when some care is taken to educate them, terms such as convertible debentures, debt/equity ratios, and demand curves do not defeat them, even though these terms are quite remote from their everyday experience. The intricacies of the market share concept, mysteries of modern technological innovations and "whodunits" of patent theft allegations all penetrate the sensoria of unemployed people, many of whom barely have a high school education, and housewives. Again they do not retain and understand everything: given the relatively low level of agreement about what is central in a complex litigation, that would be too much to expect. But by reasonable standards, it is perfectly clear that ordinary jurors have the ca-

capacity to understand many of these matters.

What then regulates their understanding? Under what conditions will they meet their obligations, and what conditions encourage failure? It is a commonplace to say that their understanding will be facilitated to the extent that attorneys and judges patiently and provocatively teach, but it is a commonplace that nonetheless needs to be said. Increasingly such trials are coming to be seen as educational ventures, and increasingly attorneys are turning for counsel to educators and social scientists who are experienced in presenting complicated information to innocent minds and enabling them to learn. The evidence suggests to us that this kind of collaboration can be enormously fruitful.

Taking note of the length and complexity of these trials, and in recognition of the burdens these issues place on human memory, a number of federal courts have recently allowed jurors to take notes during the trial and to refer to their notes during the deliberation process. This innovation, in our experience, has been very constructive, though not entirely successful. Jurors frequently complain that while they have it all written down, they are hard pressed to retrieve information from their bulky notebooks, or to separate significant facts from trivial ones. One devoted juror was halfway through a trial before she understood the significance of exhibit numbers, and how the information in exhibits could later be retrieved. Clearly, more can be done here, by instructing jurors at the outset in simple coding and retrieval techniques, by encouraging and giving them time to examine their notes at the end of each day, and perhaps to summarize them.

Yet, even after care has attended the education of the jury in both substantive and retrieval issues, one senses a deeper problem which is occasioned by the psychological incompatibility of the twin goals of a jury trial: to convince the jury, and to make a trial record. That incompatibility arises from the ordinary limits of the human mind, which can retain and assimilate seven issues, plus or minus two, and no more. Even devoted jurors who religiously take notes are overwhelmed by the large corpus of information that arises in such trials, not because it is likely to

"The problem of information overload is a serious one, one that needs to be given considerably more thought."



convince a jury, but because it needs to be part of the trial record. Such fragmented information (from the juror's perspective) is dangerous. The typical juror lacks a "cognitive tree" on which to post such information, and as a result, merely hears distracting "noise." The confusion and frustration that so arises can easily ooze to other issues in the trial, leading them to designate these issues, too, as incomprehensible or insignificant.

The problem of information overload is a serious one, one that needs to be given considerably more thought. Two admittedly partial solutions come to mind. First, overload is not nearly so dangerous when people are prepared for it. At the outset of the trial, the judge might simply warn the jury that it will be inundated with information that is occasionally uncodable. That is the natural course of these trials, and a "good juror" ought neither to be upset by that fact nor allow

that overload to infect his or her motivation to understand the case. Forewarned in this instance, is forearmed. Second, the effects of information overload can be reduced when attorneys take care especially during summation, to collect the many facts around a few significant issues, to highlight those issues and to enable the jurors to retrieve from their notes information that is relevant to those issues. Such summations require considerable thought and advance planning, and often a good deal of time to present. The court has often been helpful here, in both encouraging attorneys to plan their presentations carefully (if they do not already comprehend the advantages of such planning) and in giving them sufficient time to summarize.

The standard closing remark regarding the need for further investigation and research applies here. It is important to learn more about the conditions under which juries understand the issues of a complicated case, and how their understanding can be maximized. Over the past decade, the very nature of the civil jury trial has changed dramatically, from one that was mainly a legal ceremony to one that is increasingly an educational process in which judges and attorneys actively participate. Further changes in this direction are likely to occur, and will be facilitated by greater insight into the capacities of jurors and the conditions that maximize their learning.

Footnotes

1. Quoted in *In Re U.S. Financial Securities Litigation*, 609 F.2d 411 at 429, fn 66.
2. 396 U.S. at 538, fn 10.
3. Quoted in *The National Law Journal*, Aug. 13, 1979 at 21.
4. New York Times, June 15, 1980.

Professor Rosenhan holds a joint appointment in the Law School and department of Psychology. His principal subjects are Mental Health Law and Psychology and Law. He received an A.B. in Mathematics (1951) from Yeshiva College, and an M.A. (1953) in Economics and Ph.D. (1958) in Psychology from Columbia University.

VIEWING THE ADMINISTRATIVE PROCESS FIRST-HAND:

Thoughts on a Year's Leave at the EPA

by Robert L. Rabin

During the summer of 1978, my growing feeling that it was time to spend a year outside the academic environment ripened into a decision to look for an interesting way of utilizing my professional skills. My impulse to spend a year doing something *different* was largely attributable to the path my career had taken since I completed my own education. While I had engaged in some outside consulting, my principal activities in recent years were teaching and research. Although my work was diverse in character, it had been largely grounded in an academic perspective. I wanted a temporary change that might prove useful upon my return.

Most of my writing, as well as a substantial amount of my teaching, has been in the administrative law field. As a result, I gravitated naturally towards the idea of spending a year at an administrative agency. Under the right circumstances, such an arrangement seemed promising for a number of reasons. Ideally, my teaching

"The percentage of single-minded workaholics was at least as high as I have observed in law firm and law school settings."

would benefit from a year of experience at an agency, viewing the administrative process in action. My research would be channeled into new directions by the projects that I worked on. And finally, my horizons would be expanded by the very process of acquiring a great deal of substantive information about a relatively discrete set of policy issues.

All of this was very abstract, of course. The threshold questions remained: (a)

which agency should I approach, and (b) what kind of position should I seek. As might be expected, I narrowed the list of prospective agencies by reference to both my own subject matter interests and my sense of where I would find the most stimulating work environment. A fortuitous set of circumstances led me in the direction of the Environmental Protection Agency. First, while I was by no means an expert on environmental law, I had done a

sufficient amount of consulting for the Ford Foundation Division of Environmental Affairs to have developed an interest in the area. Second, I knew enough about the EPA to be convinced that its mandate included a wide range of complex, vital policy issues which the agency was making a conscientious effort to approach in an innovative way. Finally, I had the good fortune to have a close friend and former colleague among the agency's top officials —



"...my colleagues were largely public sector types who felt more comfortable fashioning public policy than reacting to it."

"One aspect of the group dynamic is that everything has to be cleared with everyone."

"The technology, scientific understanding and economic projections rest on very uneasy foundations, not of the EPA's making."

creating, I surmised, the maximum likelihood that any arrangement I worked out would lead to interesting work.

Still, I had to face the second question: What type of position was I seeking? This issue was actually relatively simple for me to resolve. I had done a sufficient amount of empirical work on agency processes, involving interviewing and data collection, to feel certain that a year as a somewhat isolated "scholar in residence" would yield relatively little in the way of new experience. Rather, I wanted to be on the firing line if possible, treated as a working member of a policymaking group — treated, in other words, as though I would be around for an indefinite period of time. Only in such a position, I thought, would I be likely to have a year that was genuinely different from my ordinary range of research, consulting and writing activities.

After some exploration, it proved possible to work out in general terms a position at the EPA which seemed to match my desires to their needs. As Senior Environmental Fellow, a newly established position, I would work in the Office of Planning and Management (OPM) on projects that involved cooperative work with the "substantive" program offices — the Office of Air, Noise and Radiation, the Office of Water and Waste Management, and the Office of Toxic Substances—as well as with the Office of Enforcement. Having agreed on the position, met my future colleagues and discussed a range of available projects, the inevitable doubt remained: Would the year, in fact, turn out to be what it promised? One never knows in advance.

A little over a year after my initial explorations, on the first of September, 1979, my three-year-old daughter asked, "Daddy, why are you dressed so pretty today?" And my wife queried, "When you get in there, what happens? Will you just sit there until someone shows up with some work?" Apt questions. I was feeling a bit uncomfortable in a business suit — more formal than my daily teaching attire. And, I was experiencing just a bit of apprehension about whether there really would be work for "the professor." But all of my concerns were very quickly put to rest. I arrived to find that meetings had already been scheduled for later that day on two of my principal projects. On my desk was an itinerary

for the week that involved discussions with the top officials in the Office of Planning and Management. Before I knew it, I had as much as I could handle. I was off and running.

Three Major Projects

I worked on three major projects during the year, which I will describe briefly in order to give some sense of what I was doing, as well as a wide variety of smaller assignments. Before arriving, I was told about OPM's continuing efforts to assist the Office of Enforcement in bringing a higher degree of efficiency to the handling of civil penalty enforcement cases. The problem is many-faceted. Civil enforcement cases are investigated and prepared in the EPA regional offices. The cases are then sent to EPA headquarters for review and approval. Headquarters, in turn, sends the approved cases to the Pollution Control Section of the Lands Division in the Department of Justice where another round of review takes place, leading to initiation of action either by the local U.S. Attorney or a DOJ headquarters attorney.

At each stage there is a delay, and frequently strong disagreement about the adequacy of case preparation. Our job was to see if we could find ways to assist the regional EPA offices in preparing cases that would withstand scrutiny. We also were asked to suggest ways in which the review process itself might be streamlined. Working with an interdisciplinary team, I was involved in the preparation of a case development manual for regional attorneys and a set of proposed case review and audit procedures for headquarters' attorneys.

My other major projects were more substantive in nature, dealing directly with central problems of health and safety. About two years ago the government banned the production of aerosol spray cans charged with chlorofluorocarbons (CFC's), a chemical compound that appears from the available evidence to be depleting the ozone layers in the stratosphere. Such depletion could lead to severe human and biological damage through increased ultraviolet radiation. Unfortunately, other major uses of CFC's — principally as a refrigerant, insulator and solvent

—have more than made up for the aerosol ban, and those uses are steadily growing. The issue on the table was whether further regulatory action was required, and if so, the form it ought to take. [In passing, I should mention that the problem has a very complicated international dimension, since the impact of United States cutbacks could easily be undermined by continuing growth abroad.]

An EPA work group, principally staffed out of OPM and the Office of Toxic Substances, spent many months fashioning a strategy to deal with both the domestic and international issues created by CFC use. Before my term ended, we succeeded in devising a scheme that will put a cap on domestic CFC production at current levels and allow trading among producers under a marketable permits system. The latter step will be a highly significant move for the EPA, indicating its willingness to try out a new economic incentives approach to regulatory control.

The third project that I spent considerable time on also involved an economic incentives approach. Under the Clean Air Act, air quality standards establish the upper limits on allowable emissions for certain pollutants. Recently, there has been much discussion and some agency action aimed at creating incentives for least-cost achievement of these limits. One strategy is to allow pollutants to “bank” any emission reductions they achieve beyond the established limits, and either use or sell these excess reductions at a later point in time. During the latter half of my stay, I worked with a group from OPM that was given the task of translating this concept into a limited property right via a comprehensive set of regulations.

“Window Into Another World”

Let me turn to a few general observations about a year in the bureaucracy — based on my involvement in these and a wide variety of less time-consuming projects. First, a sociological observation. In sharp contrast to the academic setting, virtually everything accomplished at the agency results from a group decisionmaking process. I was struck by this contrast on my very first

day, when I was initiated into the world of “meetings.” Collaboration and compromise are the essence of the process. In the academic sphere, most of the important work I do is accomplished in relative isolation — class preparation, research and writing, and so forth. Assuredly, I gain a great deal from collegial discussion, and obviously classroom teaching involves constant interchange with students. Nonetheless, when it comes down to it, I resolve most of the tough intellectual problems I confront — whether before class or in my research — on my own. Putting aside comparative judgments of merit, I did find the sharp difference in process an interesting change of pace.

Secondly, let me address some stereotypes, not necessarily shared by me, which were quickly dispatched by observing the agency from the inside. To begin with, most of the people in OPM worked very long hours by any standard, and were extremely conscientious. The percentage of single-minded workaholics was at least as high as I have observed in law firm and law school settings. And, the overall quality of the personnel at OPM was similarly very high. Moreover, it was soon evident that, for the most part, my colleagues there were not dramatically “pro-environment” or pro anything else; they were professionals with a job to do, trying their best within the existing constraints. Most of them could almost as easily have been working at the SEC or FCC, as far as subject matter orientation was concerned.

On the other hand, at a more subtle level there were some characteristics that marked off these professionals — whether lawyers, economists, or management types — from their counterparts in private practice. First of all, in most cases they simply would not have been as comfortable on the business side of the table. To put it another way, while they may not have demonstrated a burning allegiance to the environment, my colleagues were largely public sector types who felt more comfortable fashioning public policy than reacting to it. Secondly, and perhaps related, I did sense a pervasive restlessness. Unlike academics and private sector professionals, most of them did not regard the EPA as their long-term home. Rather, they were concerned about “advancement” in

some rather elusive sense — often superficially grounded in more prestigious titles or higher government service classifications — which led to a preoccupation with job prospects in other agencies or in other programs within the EPA itself.

Finally, a word about process. Getting things done at the agency is no easy matter. One aspect of the group dynamic is that everything has to be cleared with everyone. And often the established procedures are archaic or meaningless, or the channels of communication are clogged. Here, then, we do find some confirmation of received wisdom about bureaucratic processes in action.

Still, my impression was that the major obstacles to significant advances in agency performance lie elsewhere. The problems of modeling, monitoring and enforcement under the Clean Air Act, as well as related problems under some of the other principal environmental statutes — the basic determinations of magnitude of harm and existence of unlawful action — are staggeringly complicated to resolve. The technology, scientific understanding and economic projections rest on very uneasy foundations, not of the EPA's making. To make matters worse, the statutes are poorly drafted and the Congressional “support” given the agency often borders on unconscionable behavior (committee grandstanding about travel expense items for trips that in fact are the bane of the typical agency official's existence; committee indifference and/or ignorance about substantive statutory issues that need to be addressed).

All in all, it was an interesting, sometimes frustrating and at other times rewarding place to spend a year. A window into another world. It certainly deepened my understanding of the administrative process — which was a basic reason for undertaking the venture in the first place.

Professor Rabin teaches Administrative Law, Torts and Environmental Law at Stanford. He earned a B.S. (1960), a J.D. (1963), and a Ph.D. (1967) from Northwestern University.

On "Interpolating Little Personal Recipes"

by Charles J. Meyers

Dean Meyers delivered these remarks on March 29, 1980, upon accepting the St. Thomas More Award from St. Mary's University School of Law in San Antonio, Texas, at their annual Law Day ceremonies. The award was made in recognition of Dean Meyers' many contributions "to the law and legal education as a nationally recognized author, scholar, teacher and administrator."

The honor that you have so generously given me is named for one of the greatest figures in English history. I should suppose that most educated people have some knowledge of the life and times of Saint Thomas More and knew about him before Robert Bolt wrote the play, *A Man For All Seasons*. More was, after all, the author of a book that added the word "utopia" to the English language. And More was a prominent figure in the reign of Henry the Eighth: a Lord Chancellor of England—not that we know them all—but a Lord Chancellor who lost his office and then his head, over a matter of conscience.

But for me at least, until I prepared for this occasion, the issues that led to More's condemnation and death remained obscure. Public television's "Masterpiece Theatre" had informed me amply about Henry's six wives, but it was the library that helped me to understand the fundamental conflicts of the time.

Henry was not only a bad husband, but a bad king. And the issue that divided Henry and More was deeper than the Act of Supremacy, which separated the English people from the Catholic Church, more fundamental, even, than the power of the monarch to dictate the religion of his sub-

jects. The conflict, as I understand it, was between limited government and tyranny. The point is put succinctly by the best of More's biographers, R.W. Chambers, who writes: "Henry succeeded in establishing a dictatorship, which he maintained for the remaining years of his life. But at what cost? Whether we think of the exploration of distant seas, of English poetry, of English prose, of English scholarship, of English education, of the material prosperity of the English people (apart from a small body of profiteers), of finance, of craftsmanship, of architecture, of freedom, of justice, Henry's tyranny marks a setback. Everything had to pass through the bottle-neck of one man's mind, and Henry, though able, was not equal to the task. Henry's dictatorship was bound to fail in the long run, because it revolted the consciences of his subjects. The resistance to despotism which More began was bound to be carried on, from opposite sides both by Catholic and Puritan."¹

Henry failed and tyranny receded. As biographer Chambers writes, "... Parliament, which Henry had fostered as an instrument of his despotism, ... became an instrument of freedom. Yet we must not forget ... those who, in the darkest hour of English liberty, dared to say "NO" to the fiat of despotism, and who nevertheless kept their loyalty unimpaired ..."² The one we remember best is, of course, Thomas More.

I do not wish to be misunderstood: More did not die for parliamentary rule; its time had not yet come. But he did die for freedom of conscience. As he mounted the block on July 6, 1535, to speak his last words, he said to those around him, "That they should pray for him in this world, and he would pray for them elsewhere, protesting that he died the King's good servant, but God's first."³

I believe he died for a principle even greater than freedom of conscience; he accepted martyrdom as the price a principled man will pay to place limits on the power of the state; he died for liberty.

There are broad lessons for us in More's

life and times—lessons about social justice, about individual liberties, and about statecraft. I shall not attempt to deal with all of these grand themes but will limit myself to a single, yet vital, lesson to be learned from the failure of Henry's tyranny and the triumph of representative government. Broadly stated, that lesson is that the legitimacy of a ruler, and of the ruler's laws, derives from the people, speaking through their elected representatives. If courts usurp the legislative function and flout the legislative will without a clear command from the Constitution, they exceed their prerogative and lose their legitimacy.

These are strong words but I believe they are warranted. In my state of California, the people are losing faith in judges. When the Chief Justice ran against her record for confirmation, she gained a bare 52% of the vote, the lowest percentage in such an election in the history of the state. And that was *before* the discreditable story of *People v. Tanner*⁴ unfolded. That story, in brief, is this: On Election Day, 1978, the *Los Angeles Times* reported that the California Supreme Court had refused to enforce the "use-a-gun, go-to-prison" law recently enacted by the legislature, but had withheld its decision until after the election to protect the Chief Justice. Thereafter, the Chief Justice called for an investigation, which was arranged, but on terms unacceptable to her and some of the other justices. The investigating commission decided the hearings should be open to the public, and they began that way. Justice Mosk brought suit to close the hearings; on appeal Justice Newman (formerly a law professor and dean of a law school) refused to disqualify himself and had to be removed; the *pro tempore* court closed the commission hearings, and that body was confined to issuing to the public a brief statement that it had conducted its investigation and had found no wrongdoing, and regretted that it could say no more.

The suspicion of whitewash still lingers; and the harm to the California judiciary is incalculable. But in the long run the deci-

sions in *People v. Tanner* may do more harm than the investigation itself. In *Tanner I* three members of the court held that the statute did not mean what it said when it denied probation for certain crimes involving use of a gun. In a separate opinion the Chief Justice disagreed with those Justices on the meaning of the statute, but read the state constitution as forbidding the legislature to enact such a law, because of separation of powers.

I believe that constitutional position is untenable. The proposition that must be maintained is that the judicial branch has the *exclusive* power to fix criminal penalties and to determine when to impose them. One looks in vain for authority denying these powers to the legislature. The legislature promptly repassed the law, the Court granted a rehearing, and because one justice switched his vote on the interpretation question, the statute was enforced, according to its terms. Three justices dissented, including the Chief Justice, who adhered to the view that separation of powers invalidated the act.

Could there be a more graphic illustration of the ultimate power of the judiciary? And, in the case of the three dissenting judges, could there be a more evident abuse of judicial power in the attempt to substitute their preferences for the manifest will of the legislature?

What comes from such grasping for power?

Judge Learned Hand raised the question, and suggested an answer over fifty years ago. Speaking of judges, he said, "Yet I must confess to wonder whether in the end our prerogative will survive the startling frankness of our modern Rousseaus. If *Demos* should awake to the disparity between our profession and our performance, if he should find that, behind an obsequious protestation of docility to his supposed will, we have all along been interpolating little personal recipes of our own, who shall say that he will not arise and strip us of our powers?"⁵

Demos is rising in California. Special interest groups, on both the right and left,

are running candidates of their persuasion for the bench. And even when an unpopular judge is not up for election, a recall petition can be circulated against him, as was successfully done in Berkeley this year.⁶ The grievance against the Berkeley judge was that he had issued an eviction order to squatters on the plaintiff's land.

I ponder these events with a growing sense of dismay, for at risk is the very existence of the rule of law. A central function of courts — not their only function but an elemental one — is to resolve civil disputes and to enforce the criminal law. When a litigant or an accused faces a judge who has been elected on one campaign platform or another, where is the appearance of fairness and impartiality? Indeed, where is the fact?

Yet I cannot wholeheartedly fall into step with those leaders of the bar who come automatically and uncritically to the defense of the bench. I do not believe that the people will be content to be governed by an autocrat in a black robe. The disguise has worn too thin.

It is not too late to alter course. The judges themselves, indeed the judges alone, can salvage the institution. If they would return to the classic model of the judge, they could regain respect and avoid the shoals of politics. By their behavior we must judge them. We must demand as the norm the judge who at least begins with the precedents; the judge who appreciates and practices craftsmanship; the judge who employs reason and eschews slogans; the judge who conscientiously seeks and enforces the legislative will; and above all, the judge who has self-doubt, who is infused with the spirit of liberty, "the spirit" to quote Learned Hand again, "which is not too sure that it is right."

Some will regard this view as hopelessly old-fashioned, indeed simplistic. But to scorn the legislative will, to interpolate "little personal recipes," invites disaster. The winds of rebellion are rising in California, and, politically as well as atmospherically, California winds generally move east.

In "A Man For All Seasons," Robert Bolt portrays a scene in which More is urged by his son-in-law, William Roper; his daughter, Margaret; and his wife, Alice, to have a man arrested. The man, Richard Rich, eventually betrays More through perjury. The scene goes like this: *

"Roper	Arrest him.
Alice	Yes!
More	For what?
Alice	He's dangerous!
Roper	For libel; he's a spy!
Alice	He is! Arrest him!
Margaret	Father, that man's bad.
More	There is no law against that.
Roper	There is! God's law!
More	Then God can arrest him.
Roper	Sophistication upon sophistication!
More	No, sheer simplicity. The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal.
Roper	Then you set man's law above God's!
More	No, far below; but let me draw your attention to a fact — I'm <i>not</i> God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester . . ."

The currents and eddies are becoming a maelstrom which will wreck the judiciary unless the judges acknowledge the limits of their power.

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1. R.W. Chambers, *Thomas More* (Harcourt Brace & Co., New York, 1935) p. 382.

2. *Id.*, at 382-3.

3. *Id.*, at 400.

4. *People v. Tanner*, 23 C.3d 16, 587 P.2d 1112, 151 Cal Rptr 299 (Dec. 22, 1978), on rehearing 24 C3d 514, 596 P.2d 328, 156 Cal Rptr 450 (June 14, 1979).

5. L. Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law*, Am. Law School Rev 621, at 624 (1926).

6. San Francisco Chronicle, March 7, 1980.

1980 Kirkwood Competition Signals New Era for Moot Court Program

In May, U.S. Supreme Court Justice Byron White was a presiding judge at the Law School's Kirkwood Moot Court competition. Shown with him at a Faculty Club luncheon are, left to right, Moot Court officers Cory Streisinger '80, Russell Sauer '80, and Frank Melton '80.



Peninsula Times Tribune/Ken Yimm

Following several years of declining student interest and participation, the School's Moot Court Program has undergone an impressive revitalization, thanks to the combined efforts of the Curriculum Committee and the 1979-80 Moot Court Board.

Once a significant part of every law student's experience, the Moot Court Program began to lose some of its appeal when membership on the *Law Review* became elective. This fact, coupled with insufficient faculty and administrative supervision, brought the program to the brink of extinction; during 1979-80 only 22 students participated in the program.

Faced with the possibility of losing what has always been regarded as a vital part of a law school education, the Curriculum

Committee, last fall, agreed to institute some fundamental changes on an experimental basis. Among the most significant were the allocation of two units of writing credit for participation in the program and the involvement of Ezra Hendon of the State Public Defender's Office. Mr. Hendon was hired to provide parttime supervision to the participants and the Moot Court Board.

The effect of these changes on student participation was immediate and very encouraging. In early December, second- and third-year students were given the details of the 1980 Kirkwood Moot Court Competition and were invited to participate. Seventy-two students signed up. Since the program was experimental, the decision was made to limit participation to 24

teams of two students each. A random drawing was held to select 48 participants from the 72 who signed up.

At the end of January, the problem and the competition rules were distributed to the participants. The first drafts of the briefs were due five weeks later. During this period, Mr. Hendon gave three lectures (on appeals generally, on brief writing, and on oral advocacy) and held regular office hours to consult with the participants.

The first drafts were submitted on March 7 and Mr. Hendon critiqued them and held conferences with each team. Revised briefs were turned in on March 21. During the next ten days, each brief was read and critiqued by six members of the Moot Court Board. A preliminary round of oral arguments was then held, in which

each team argued the case twice—once for petitioners and once for respondents—before panels of local attorneys, judges, professors and Board members.

The top eight teams advanced to the quarter-finals. Four teams were selected for the semi-finals, which were videotaped for later review with the participants by Mr. Hendon and the Moot Court Board officers.

In preparation for the final round, the two top teams were allowed to revise their briefs once again and to take part in several mock arguments before members of the Board. These sessions provided both substantive and stylistic critiques.

The finals were held on May 2, before a capacity audience in Kresge Auditorium. Sitting as the Supreme Court of the United States were Justice Byron R. White, U.S. Supreme Court; Judge Patricia M. Wald, U.S. Court of Appeals, D.C. Circuit; and Chief Justice Robert F. Utter, Supreme Court of Washington. The team of John W. Phillips '81 and Marilyn O. Tesauro '81 was selected as the overall winner, over the team of Ronald N. Beck '80 and John V. Roos '80. The Phillips/Tesauro team was also awarded the prize for the best written brief, while Ms. Tesauro was chosen as the competition's best oral advocate.

Commenting generally on the performances of the finalists, Judge Wald observed that all four performances were of consistently high quality.

In a memorandum to Dean Meyers and the Curriculum Committee following the competition, the Moot Court Board expressed its satisfaction with the experimental program and urged that it be continued next year:

"In general, we feel that the Kirkwood experiment has been an unequivocal success. We were continually impressed by the quality of the briefs and oral arguments, and we share with many of the participants a belief that Kirkwood can provide one of the most valuable learning experiences in law school."

Moot Court Board officers for 1979–80 included President Russell F. Sauer '80, and Vice-Presidents Frank E. Melton '80, John W. Phillips '81, and Cory Streisinger '80.

18 Grads Fill Judicial Clerkships for 1980–81

One member of the Class of 1979 and 17 members of the Class of 1980 have accepted judicial clerkships for the 1980–81 term.

United States Supreme Court

Associate Justice Potter Stewart
Robert Weisberg '79

United States Court of Appeals

District of Columbia:

Judge Carl McGowan
Jane M. Graffeo

Fifth Circuit:

Judge Robert A. Ainsworth, Jr.
Mark R. Spradling

Judge Thomas G. Gee
Brian E. Lebowitz

Judge Robert S. Vance
Alan Pfeffer

Ninth Circuit:

Judge Ben C. Duniway '31
David F. Levi

Judge Betty B. Fletcher
Cory Streisinger

Judge Dorothy Nelson
Geoffrey L. Bryan

Judge Joseph T. Sneed
Christopher J. Wright
Kenneth G. Whyburn

United States District Court

California, Northern District:

Judge Thelton E. Henderson
Joshua B. Bolten

Judge William Ingram
Graeme E.M. Hancock

California, Southern District:

Judge William B. Enright
Norman J. Blears

District of Columbia:

Judge Thomas A. Flannery
Robert B. Bell II

Florida, Northern District:

Chief Judge Winston Arnow
Charles M. Gale

Louisiana:

Judge Fred J. Cassibry
Norman M. Hirsh

Chief Judge Frederick J.R. Heebe
Paul J. Larkin

State Courts:

Supreme Court, Alaska:

Justice Roger Connor
Joan M. Travostino

Supreme Court, Minnesota:

Chief Justice Robert Sheran
Janice A. Rhodes

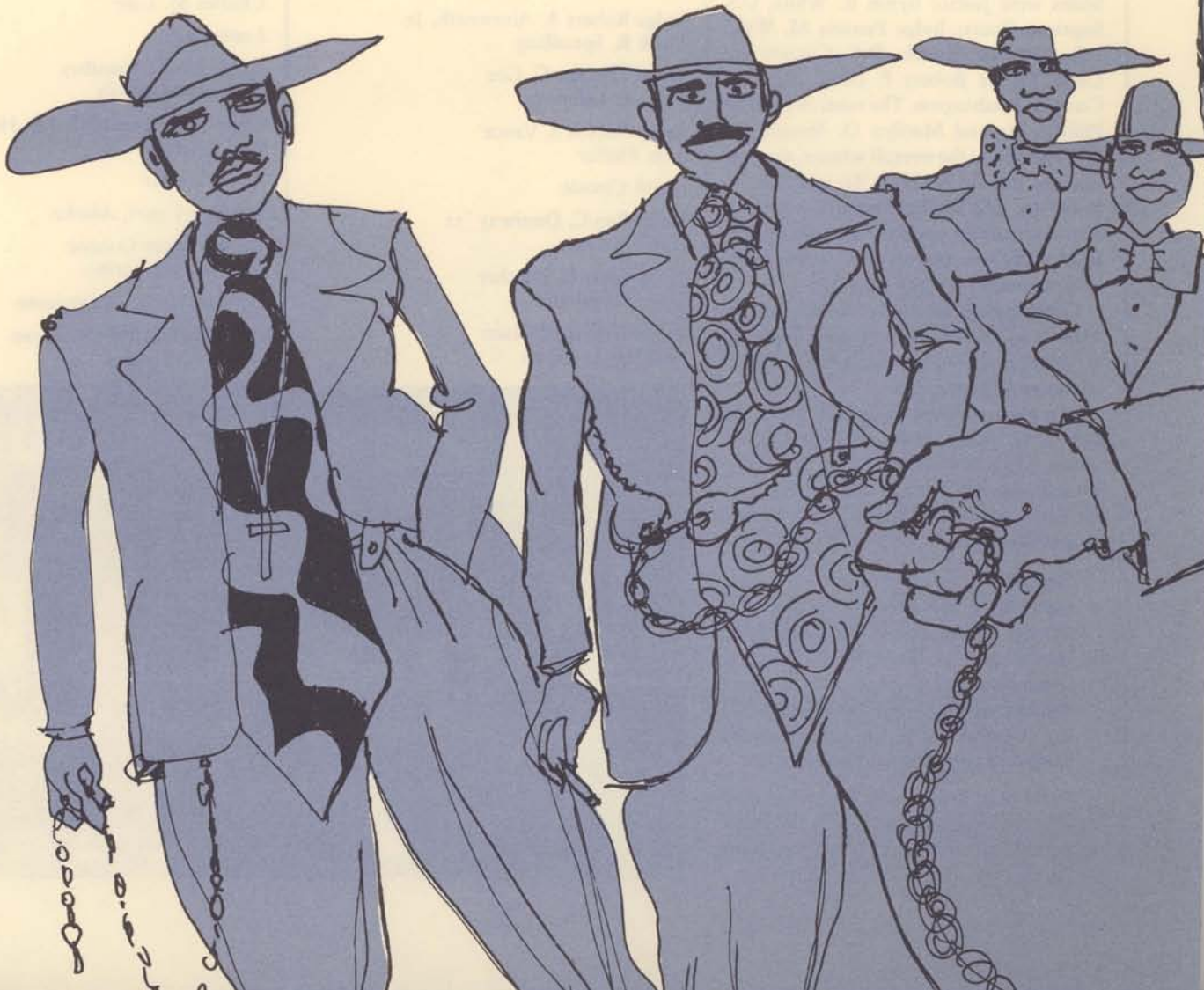


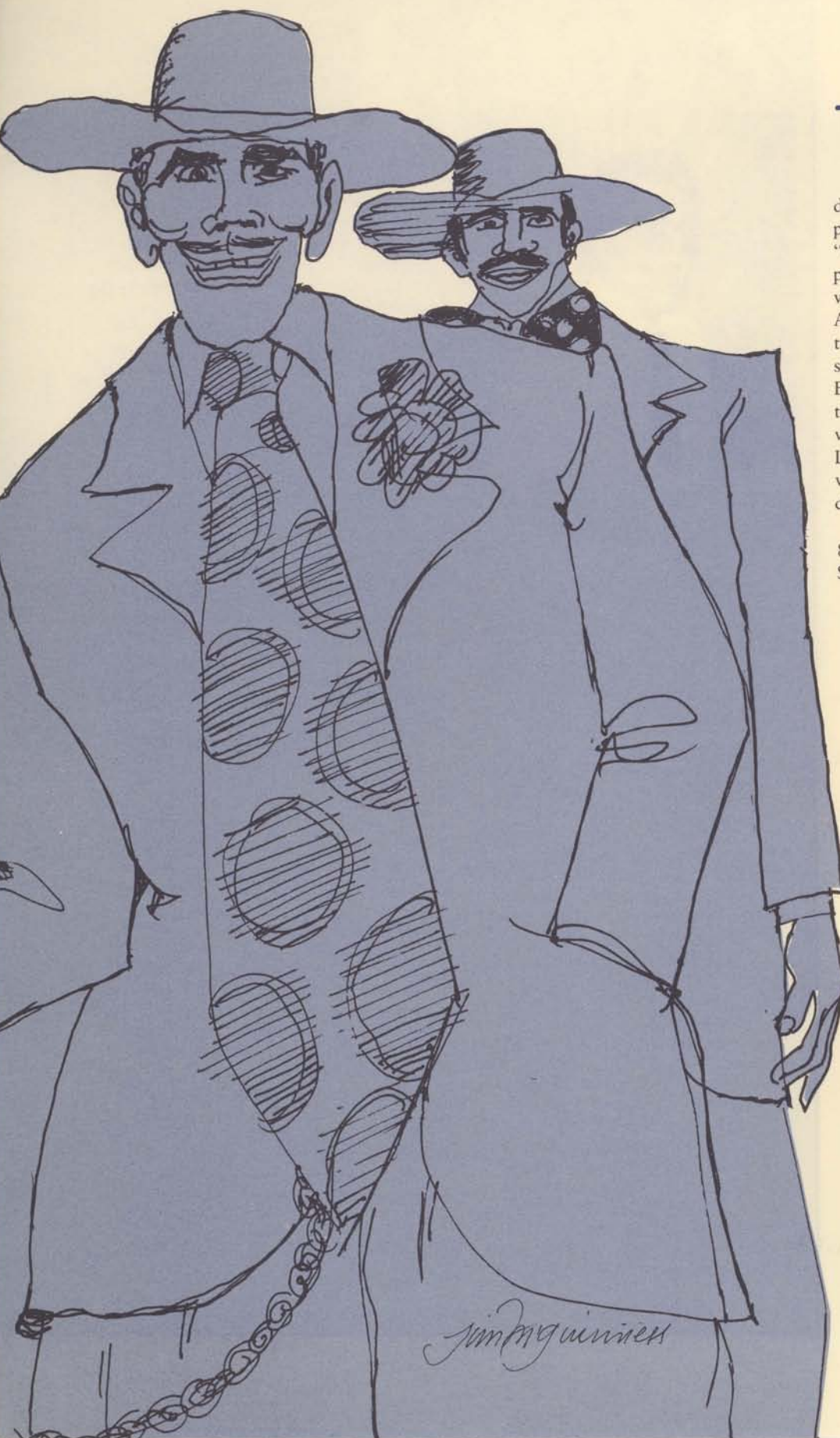
Broadway Play Brings Recognition to Alumnus

by Sara Wood

[Editor's note: A Law School reunion questionnaire completed by George Shibley '34 brought to our attention Shibley's involvement as defense counsel in a widely publicized criminal trial held some 38 years ago, *People v. Zammora*, 66 Cal. App. 2d (1944), also known as "The Sleepy Lagoon Murder Case." In the case, 22 Mexican-American teenagers were charged with murder, but their convictions were later overturned on appeal. In 1978 Shibley again received widespread publicity because of the production of a play called "Zoot Suit," based loosely on that case and on the "Zoot Suit Riots" that occurred during and after the trial. The riots were between Mexican-American youths on one side and sailors and Los Angeles police on the other. "Zoot Suit" was produced first at the Mark Taper Forum in Los Angeles and later simultaneously at the Aquarius Theatre in Hollywood and the Winter Garden in New York City. In its 1980-81 season, CBS is planning a 9-hour special about "The Sleepy Lagoon Murder Case" and Shibley has been asked to be a technical advisor. We thought our readers would be interested in Shibley's recollections of the case and the circumstances surrounding it.]

The Sleepy Lagoon case set off many "Zoot Suit Riots" between Mexican-American youths — sporting pleated, high-waisted pants, or zoot suits — and sailors and Los Angeles police. To the Mexican kids (kids from about 14 to 20 years old), the zoot suit meant style, class, excitement and acceptance.





The play "Zoot Suit" was written by Luis Valdez. Much of the material for the play was drawn from court records, documents, transcripts, letters and newspaper articles of the period. The term "zoot suit" was coined during that period to refer to the pleated, high-waisted pants worn by Mexican-American teenagers at that time. To the teenagers, the zoot suit seemed to mean style, class, excitement and acceptance. But to others it meant gang violence, for those who wore zoot suits were identified with the young defendants in "The Sleepy Lagoon Murder Case" who had received widespread and unfair publicity both during and after the trial.

In a *Los Angeles Times* article dated 8/13/78, "Once Again, Meet the Zoot Suiters," playwright Valdez wrote:

Sleepy Lagoon was an irrigation ditch in Montebello where Mexican-American youths, who were allowed only occasional, restricted access to public pools, went to swim. The area also served as the local lovers' lane.

On August 2, 1942, the body of Jose Diaz, 22, was found near the pond; his skull had been fractured. Although what happened to Diaz never became clear, either during or after the trial, 22 Mexican-Americans were arrested and charged with his murder. The prosecution charged that the defendants, members of a group calling

(Continued)



George Shibley as he appeared on the day of release.

An Interview With George Shibley

itself the "38th Street Gang," had beaten Diaz to death after crashing a birthday party he was attending.

Throughout the 13-week trial newspapers and commentators took the same prejudicial tone as did the judge. An anti-youth, anti-Mexican hysteria dominated press coverage. Individual trials were so outrageously mishandled that the convictions were later overturned.

During the Sleepy Lagoon murder trial the word "Mexican" was replaced by both "Zoot Suiter" and "pachuco." And so it was in relation to "gang violence" that most Anglo newspaper readers became familiar with these terms."

Particular reference to the judicial misconduct of the case was made in an article written by Paul Fitzgerald, a former CAJC (California Attorneys for Criminal Justice) President. (The following material first appeared in the July/August 1979 issue of FORUM, the bi-monthly magazine of California Attorneys for Criminal Justice, 6430 Sunset Boulevard, No. 521, Los Angeles 90028):

Over the years, right and wrong have come to light about the Sleepy Lagoon case. It is now widely recognized that the young Chicanos who were brought to trial were innocent of any crime; and that the guilty parties were the "neutral" judges, prosecutors, police officials, and press who promoted sensationalized prejudice at every turn. The success and popularity of Luis Valdez' recent play, "Zoot Suit," is a reflection of this recognition.



The following interview with George Shibley by Paul Fitzgerald also appeared in the July/August 1979 issue of FORUM.

FITZGERALD: Just parenthetically, I recently learned that the Sleepy Lagoon case gets its name from a song that was popular at the time.

SHIBLEY: "Sleepy Lagoon" was a song popularized by Harry James. The Sleepy Lagoon was an irrigation ditch on the borders of the Williams Ranch in Motebello, and these kids used it as kind of a necking ground, a lovers' lane.

FITZGERALD: And I understand that they would swim there on occasion because Mexicans were not allowed at municipal or public schools.

SHIBLEY: That is correct. Most of the popular public swimming pools had special days for Mexicans and special days for Blacks.

FITZGERALD: In Los Angeles?

SHIBLEY: In Los Angeles, yes.

FITZGERALD: From the perspective of the 1970s and the 1960s, as a criminal defense lawyer looking back, I can't see why this case captured the imagination of the press. It seemed like a typical dispute among groups of kids, and somebody died; this is a big metropolitan center and these things are common. Also, the victim was a Mexican—it was not, for example, an Anglo sailor or soldier. What about a change of venue?

SHIBLEY: At the time, the prejudice against Mexican-Americans, against "zoot suiters" and "pachucos," was

widespread through California. So it is improbable that a change of venue would have helped anyone. Besides, there were practical problems; economic problems; witnesses and everything else would have made that virtually impossible. The case achieved importance because number one, the public had already been aroused by the threat of the "zoot suiters," the "pachucos," the Mexicans, and the fear was cultivated day by day. The case became a pretext for generating even more fear. Consequently, when a dead body was found on the Williams Ranch of Jose Diaz, another Mexican-American, (whom I'm convinced was not murdered), they immediately had a dragnet managed by the Los Angeles Police Department and the Los Angeles County Sheriff's Office, in which they arrested between 300 and 500 Mexican-American teenage kids.

FITZGERALD: I noticed in the play and as a result of some collateral reading that in addition to the dragnet, the arrestees were beaten and confessions physically coerced.

SHIBLEY: Most of them were subjected to physical brutality.

FITZGERALD: Was it routine for the police to beat suspects in criminal cases in those days?

SHIBLEY: Yes, it was routine at that time. I would say that in at least one fourth of the arrests at that time, there was some physical brutality.

FITZGERALD: What kind of physical brutality?

SHIBLEY: From beating them up in the elevator where they were taking them from the ground floor to other floors of the jails, to using rubber hoses on them. It was so routine that nobody even tried to cover it up. It was very common.

FITZGERALD: One of the items that the appellate court cites as reversible error is the severe limitations that were placed on your ability, actual ability to communicate with your clients during the course of the trial. Would you describe generally what the courtroom scene was; the placement?

SHIBLEY: It was absolutely prohibited for any defendant to sit next to his counsel during the trial. This was the subject of a motion that I made, and you may have read it in the decision.

FITZGERALD: I did. And the judge seemed to indicate that you could only communicate with your clients during appropriate recesses, but that was conditioned upon the Sheriff's convenience.

SHIBLEY: That's right.

(from the trial transcripts)

MR. SHIBLEY: I think their right to consult and to be represented by counsel at all stages of the proceedings demands that they have the right to come to their counsel during the proceedings and speak to them...

THE COURT: Well, that is your opinion.

I happen to have another one.

MR SHIBLEY: And I do so demand that they be given those rights.

THE COURT: I am not going to tolerate defendants walking around the courtroom of their own sweet desire. (66 CA2d 232.)

FITZGERALD: Throughout the trial you were able, with astonishing clarity, to protect this record; you made a marvelous record. It's quite obvious that the appellate court reluctantly overturned this case, but only because you had made such a detailed and lengthy record.

SHIBLEY: It was a tough thing to do because I was always being told at the bench, in the absence of the reporter, I was always receiving veiled and sometimes not veiled threats from the trial judge concerning what was going to happen to me.

FITZGERALD: I noticed you were ridiculed several times throughout the trial by the judge. He ridiculed you by saying in several portions of the record that the day wouldn't be complete, or a particular court session wouldn't be complete, without voluminous objections from you.

SHIBLEY: That's right. The day wouldn't be complete.

FITZGERALD: It must have been very difficult to protect that record in the face of such a powerful judge. When I started with the Los Angeles County Public Defender's Office in 1964, this judge was already a legend; a bad legend. He was smart, very powerful, and he was an assistant—if not principal—prosecutor. Many lawyers have told me that at every recess, he would call up the prosecutor and go over things that the prosecutor might have missed. And he heaped a lot of abuse on you. This was a lengthy trial; you were obviously fatigued. What were your feelings about having to deal with this monster?

SHIBLEY: Well, that was it. He was a monster, and it was a very trying experience to be before him. Even though I think he was the most reversed judge in the criminal courts at that time, he did have this great reputation of being a very astute judge. And he had three books—one on California crimes, one on California criminal procedure, and one on California criminal evidence—that were used as bibles by people.

FITZGERALD: So in a sense you were not only appearing in front of the judge, you were appearing in front of the professor?

SHIBLEY: That's right. And he was a very astute man. He did, I think, consciously and deliberately misuse his knowledge. He openly sided with the prosecution, and not just in this trial; he did it routinely in every case. He was a man who was very deeply and obviously prejudiced against Blacks; he was prejudiced against Chicanos; he was prejudiced against poor people; and he was prejudiced in general against all defendants. It was very obvious.

FITZGERALD: If my recollection serves me correctly, it was not until about 1946 or 1948 that Section 170.6 of the Code of Civil Procedure was the law. So in those days you did not have a peremptory challenge against the judge.

SHIBLEY: Oh no! There was no peremptory challenge. There was only a challenge for cause, and that had been restricted by decisional law to cases of just absolutely flagrant abuse.

FITZGERALD: You are a very improbable character generally, but a most im-

probable character to be representing these Mexican-American defendants. You are very proud of your Arab heritage. Tell us a little bit about your background.

SHIBLEY: I am of Arab descent. My folks came from Lebanon to the United States in 1899. I was born in New York in 1910, and my ancestry includes Christians, Moslems and Jews, some of whom lived in Spain. I have had a great interest in Spain and things Spanish since I was a kid. I started studying Spanish when I was in the seventh grade, because some of my ancestors were Jewish-Arabs who lived in Spain. I have also studied Ladino, which is Spanish written in Hebrew characters, the Spanish of Isabella La Catolica. I have always had an empathy for people who were members of minority groups because in my life in New York, in New Jersey, and later in California, I have always been identified with whatever minority was being picked on at the time.

FITZGERALD: Where did you go to school?

SHIBLEY: I went to Long Beach Polytechnic High School, and graduated in 1927. I spent seven years at Stanford. I got my AB in political science in 1931, and my LL.B. in 1934. In 1965, I received my J.D. from Stanford.

FITZGERALD: You have been practicing law for almost 45 years?

SHIBLEY: Yes.

FITZGERALD: And you're not burnt out yet?

SHIBLEY: Not yet. I'm only 69.

FITZGERALD: Do you have any words of advice for lawyers practicing today?

SHIBLEY: Yes. It is the duty of every lawyer who handles criminal cases to keep abreast of current developments. I would advise every practitioner to take advantage of every seminar, to read the advance sheets, keep abreast of the law, and make judges conform to the law. I think lawyers should forget about wooing people and being popular among judges. I think while showing every respect and courtesy to opposing counsel and the judge, you must vigilantly protect the rights of your client.

Dean Mann Appointed Special Master in U.S. v. Alaska

The Supreme Court of the United States has appointed Professor J. Keith Mann, Associate Dean for Academic Affairs, to serve as Special Master in the case of *United States v. Alaska*. The case arose in the Supreme Court of the United States as an original action pursuant to Article III, Section 2, Clause 2, of the United States Constitution.

As Special Master, Dean Mann is responsible for conducting a trial on the issues of the case and then submitting his findings and recommendations in a report to the Court.

The case involves the boundary between areas of state and federal interest along the northern coast of Alaska from Icy Cape east to the Canadian border, a distance of approximately 500 miles. The Court is being asked to rule on several issues of first impression in making seaward boundary determinations. The outcome will determine title to lands containing oil reserves amounting to as much as two billion dollars.

The disputed areas are submerged lands seaward of the mainland and, in most instances, landward of offshore barrier islands. The issues arise in three separate contexts.

The first issue concerns the northern boundary of National Petroleum Reserve-Alaska, located in the western region of the north coast of Alaska. This reserve was established by President Harding in 1923 to assure that the extensive oil supplies known to exist there would be preserved and available to the Navy in a national emergency. The State of Alaska, through its Statehood Act and the Submerged Lands Act, acquired rights to minerals seaward of the Reserve. The northern boundary of the Reserve, and specifically where the boundary lies in relation to Harrison, Smith, and Peard Bays, must be determined to establish the dividing line between these state and federal rights.

Next, to the east, is an area of extensive petroleum development, including Prud-



Special Master Mann resides during two days of hearings held near the end of July in the Law School's Moot Court Room.



Special Master Mann on Cross Island, Prudhoe Bay, Alaska. After the hearings in the case were held at the Law School, Special Master Mann and Counsel for the United States and Alaska flew to Prudhoe Bay for an inspection tour. They landed on the barrier islands from a helicopter (shown) and were taken by a United States Geological Survey research vessel, the Karluk, to a disputed formation known as "Dinkum Sands."



On board Karluk, Special Master Mann (left), discusses disputed areas with Louis F. Claiborne, Deputy Solicitor General of the U.S. (center) and (right) G. Thomas Koester, Assistant Attorney General, State of Alaska, en route to "Dinkum Sands," Prudhoe Bay.



The skipper of Karluk, Peter W. Barnes, a marine geologist, in skiff (off Karluk) near "Dinkum Sands," Prudhoe Bay.



Charles W. Findlay, III, Land and Natural Resources Division, U.S. Department of Justice (left) and Special Master Mann in Fairbanks, Alaska, en route to Prudhoe Bay.

hoe Bay. There is no Reserve involved here and the State is acknowledged to have exclusive mineral rights beneath inland waters and within 3 miles of the coast. There is disagreement as to whether waters between the mainland and a series of offshore islands, but more than 3 miles from either, belong to the State. There is also disagreement as to whether one of these "islands" even exists. (In this particular region, it is anticipated that data will be collected by monitoring tidal gauges for a year before the facts are presented.) The disputed submerged lands have already been leased in a joint federal/state lease sale. Oil companies paid "bonuses" of some \$400,000,000 for the right to obtain leases in these disputed areas. It is expected that royalties of 3 or 4 times that much will accrue from oil and gas production. Distribution of these sums must await the outcome of this litigation.

The third region lies further east. Here, the Court is being asked to determine the boundary of another federal reserve, the Arctic National Wildlife Range, and to determine whether the submerged lands within the Reserve, if any, were excluded from the Submerged Lands Act's grant to the State. Like the Petroleum Reserve, the Wildlife Range is a vast land area whose northern boundary approximates the north coast of Alaska. The Federal Government contends that the Range includes water areas between the mainland and barrier islands and that these areas are necessary to the purpose of the Range. The State disagrees.

In July, two days of hearings in the case were held in the Moot Court Room at the Law School. Afterward, Special Master Mann and Counsel for the United States and Alaska flew to Prudhoe Bay for an inspection tour. The case is still under way and additional hearings are anticipated in the late summer of 1981.

School & Faculty news

Law School Commencement Exercises

More than 1,000 parents and friends attended commencement exercises for the Class of 1980, the Law School's 87th graduating class.

Following opening remarks by Dean Charles J. Meyers, John S. Shaw III of Birmingham, Ala., a member of the Class, presented the 1980 John Bingham Hurlbut Award for Excellence in Teaching to Professor John H. Barton. A 1968 graduate of the Law School and a member of the faculty since 1969, Professor Barton is an expert in Arms Control, Contracts, and International Business Transactions. Following the presentation, Professor Barton gave the commencement address.

Michael A. Wisnev of St. Louis, Mo. was named Nathan Abbott Scholar for highest cumulative grade point average in the Class. The Urban A. Sontheimer Prize for second highest cumulative grade average went to Cory Streisinger of Eugene, Ore.

The Frank Baker Belcher Award for best academic work in Evidence went to Jane M. Graffeo of Richardson, Tex. Susan L. Gaylord of Claremont and Rikki L. Quintana of Santa Fe, N. Mex. shared the honors for the Carl Mason Franklin Prize, awarded annually for the most outstanding paper in International Law.

The Olaus and Adolph Murie Award for the most thoughtful written work in Environmental Law went to Lisa M. and Robert B. Bell II of Washington D.C.

Stanford Law Review awards were given to Norman M. Hirsch of Waco, Tex., for outstanding editorial contributions to the *Review*; Joshua B. Bolten of Washington, D.C. and Graeme E.M. Hancock of Palo Alto, for outstanding student notes published in the *Review*;

and Mark R. Spradling of Oklahoma City, Okla., for outstanding service to the *Review*.

This year special Merit Awards were presented by Dean Meyers to three student organization leaders who have made outstanding contributions to their organizations. They included David F. Levi of Libertyville, Ill., president of the *Stanford Law Review*; Cory Streisinger of Eugene, Ore., vice-president of the Moot Court Board; and Paul L. Saffo of Rolling Hills, president of the *Stanford Journal of International Law*.

Following the class response, given by Class President Mari C. Bush, a champagne reception for the graduates was held in Crocker Garden.

Professor John H. Barton (left) is presented 1980 John Bingham Hurlbut Award for Excellence in Teaching from John Sherman Shaw III (right) during 1980 Law School Commencement.





Commencement 1980: Processional

Stanford Joins Other Top Law Schools in Law Firm Appeal

The skyrocketing costs of educating lawyers has prompted the deans of six of the nation's top law schools to take unprecedented steps to alleviate what is regarded by many to be a potentially dangerous situation.

In May, the deans of Chicago, Columbia, Harvard, Pennsylvania, Stanford, and Yale sent a letter to the managing partners at 200 of the country's largest law firms. The two-page joint appeal stated, "Simply put, the cost of running a great private law school is growing faster than the income it can raise from normal sources." The letter urged each firm to establish a matching gift program whereby the firm would match all contributions by its individual members.

The idea of a matching gift program is not new to law firms. Over the past few years at least ten firms have adopted such programs. Stanford has received matching gifts from several of these firms, including Covington & Burling, Cravath, Swain & Moore, Donovan Leisure Newton & Irvine, Kirkland & Ellis, Lawler, Felix & Hall, Morgan, Lewis &

School & Faculty news

Bockius, O'Melveny & Myers, and Wilmer & Pickering.

From the perspective of the law schools, the appeal is a simple business proposition which points out that law firms have a vested interest in maintaining high quality law schools. And, while alumni giving continues to be the mainstay of most law school development programs, the fact is that alumni support is no longer sufficient to offset the spiraling costs of private legal education.

It appears that most law firms recognize the symbiotic relationship and acknowledge the need to maintain the quality of these law schools in order to sustain their own recruitment standards. But how well this knowledge will translate into concrete gains for the law schools has yet to be determined.

At the very least, it is hoped that law firms will view the program as an effective public relations tool. As Clyde Tritt '49, a partner in the Los Angeles firm of O'Melveny & Myers explained it in an interview with *The National Law Journal* (June 2, 1980): "It's hard to quantify. It won't get you more time or a better schedule arrangement if you recruit where you donate. But the students know that you have supported their school and their education. They know you're public minded."

Law School Summer Retreat for Aspiring Alumni Authors

This summer the Law School was temporary quarters for two alumni who are at work on their first books.

James R. Atwood '69, recently the senior deputy legal adviser at the U.S. Department of State and acting professor at the Law School during the 1980 spring term, spent most of the summer and early fall putting the finishing touches on a new edition of the Kingman Brewster classic, *Antitrust and*

American Business Abroad (McGraw Hill, 1958).

Atwood first thought about updating the book three years ago when he was with the Washington, D.C. firm of Covington & Burling specializing in antitrust and international law. He found that he relied heavily on the book because "it is still the best in the field," but he also found that the recent proliferation of foreign antitrust law and the subsequent growth of "anti-antitrust" statutes abroad has rendered the text inadequate in some areas.

Atwood decided that rather than write "just another law review article," he would tackle a new edition of the text. He proposed the idea to Brewster, who was then President of Yale University. Brewster was receptive to the suggestion and agreed to collaborate on the project.

In addition to updating the existing text, Atwood has added material that deals with the philosophical changes that have occurred over the last several years in U.S. policy regarding business abroad. He anticipates that the book, which will be published next spring, will be of interest not only to law schools but also to law firms and multi-national companies in Europe and the United States.

Essays on the "law business"

For Joseph W. Bartlett '60 of Gaston Snow & Ely Bartlett, Boston, early thoughts about writing a book also

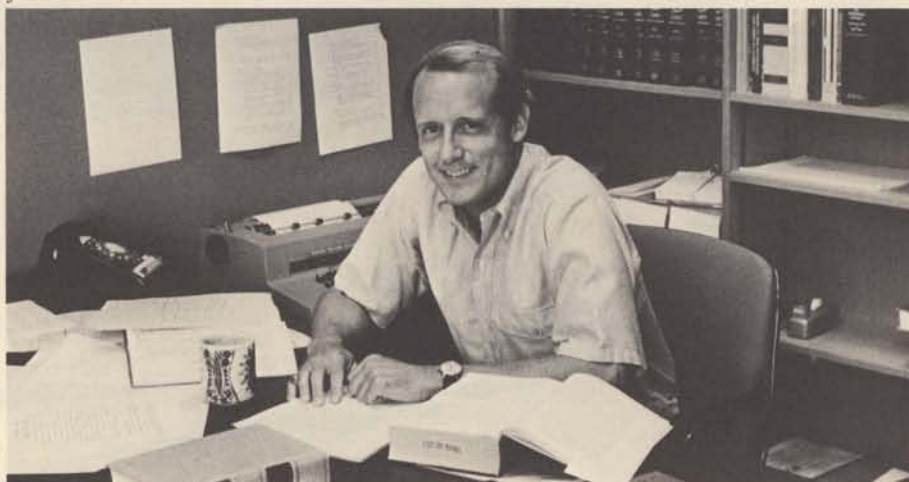
surfaced about three years ago when he was serving as president of the Boston Bar Association. As president he was responsible for writing a President's Page for the *Boston Bar Journal*. The articles he wrote dealt generally with problems in what Bartlett terms, "the law business." These ranged from the high cost of legal services to delay in the courts and questions of legal ethics.

In 1978, Bartlett spent the spring semester at the School teaching Business Associations II and Securities Regulation. During that time he began to work seriously on the articles, attempting to put them into a more cohesive format and relating them to what others had written. He also solicited feedback from individual faculty members. Bartlett now feels that the book is near completion. He expects that, with the help of Kevin Wiggins, a third-year student who is on an externship with the firm this fall, he will have the book ready to submit to a university press by the end of the year.

Judge Wisdom Next Phleger Professor

Judge John Minor Wisdom, U.S. Court of Appeals, Fifth Circuit, has accepted an invitation from Dean Charles J. Meyers to be the Herman Phleger Visit-

James R. Atwood



ing Professor during the Spring Term, 1982. While at the School, Judge Wisdom will teach a seminar and deliver one or more public lectures.

Judge Wisdom is a graduate of Washington and Lee University (A.B., 1925) and Tulane University School of Law (LL.B., 1929). He also holds honorary law degrees from Tulane, Oberlin, and San Diego University. Prior to his appointment to the bench in 1957, Judge Wisdom was a member of the New Orleans firm of Wisdom, Stone, Pigman & Benjamin.

The Phleger Professorship was established in 1972 by Mr. and Mrs. Herman Phleger. Mr. Phleger, an emeritus trustee of the University, is a senior partner in the San Francisco firm of Brobeck, Phleger and Harrison.

The professorship allows for a leading person in the field of law—the judiciary, the bar, government or public affairs—to spend a semester at the School to teach and to provide faculty and students with insights into the legal system and its operations.

Other Phleger Professors have included U.S. District Court Judge Charles E. Wyzanski, Jr.; Simon H. Rifkind, former U.S. district court judge and a partner in the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison; and Edward H. Levi, former U.S. Attorney General and the Glen A. Lloyd Distinguished Service Professor at the University of Chicago Law School.

Former Assistant Dean Appointed to the U.S. District Court

Thelton E. Henderson, assistant dean of the Law School from 1968 through 1977, was inducted as a judge of the U.S. District Court for the Northern District of California on July 30 in ceremonies presided over by Chief Judge Robert F. Peckham '45.

A graduate of the University of California at Berkeley and its law school, Judge Henderson joined the Stanford



Thelton E. Henderson

Law School staff following two years as directing attorney of the East Bayshore Neighborhood Legal Center in Menlo Park. Prior to that he spent two years in private practice in Oakland and a year as an attorney in the Civil Rights Division of the U.S. Department of Justice.

While at Stanford, Judge Henderson established and administered the Minority Admissions Program. He also acted as adviser to nineteen student organizations and assisted in the development of the School's clinical program.

In 1977 he left the Law School to establish Rosen, Remcho & Henderson, a San Francisco firm specializing in civil litigation with an emphasis on civil rights, civil liberties and constitutional law issues.

ELS Awarded Grant

The Stanford Environmental Law Society (ELS) has been awarded a \$12,827 grant from the Board of Directors of the Robert Sterling Clark Foundation. The grant is to be used to support the writing and publication of a handbook on the selection of toxic waste disposal sites. The handbook will be written by three second year law students: Jeff Belfiglio, Steven Franklin, and Tom Lippe.

Faculty News

Anthony G. Amsterdam, Kenneth and Harle Montgomery Professor of Clinical Legal Education, along with alumna Don Lunde (B.A. '58, M.A. '64, M.D. '66) and Kathy Mack '75, is developing a basic clinical course for the Law School. The objective is to identify and design a course around the core material and methodology which the School's experience with clinical legal education has demonstrated can most profitably contribute to a student's overall instruction in the law.

William F. Baxter, Wm. Benjamin Scott and Luna M. Scott Professor of Law, appeared on a panel in August at the luncheon of the Antitrust Section, ABA, in Honolulu. The topic of the panel was "Future of the FTC." Other panelists included Miles Kilpatrick, former chairman of the FTC, Philip Elman, former FTC commissioner, and Robert Pitofsky, current FTC commissioner.

Professor **Paul Brest** served as commencement speaker and received an honorary degree (Doctor of Laws) from Northeastern Law School. In addition, he has been appointed to the Yale University Council on The Law School.

Professor **William Cohen** has co-authored Barrett and Cohen, *Cases and Materials on Constitutional Law*, to be published in Spring, 1981. Professor Cohen will be on leave as Merriam Distinguished Visiting Professor of Law at Arizona State University in the Spring, 1981 term.

Marc A. Franklin, Frederick I. Richman Professor of Law, is completing work on a study of over 500 reported defamation cases decided over a 3-1/2 year period in the late 1970's. The cases were studied to identify those who sued and were sued, the kinds of statements that led to litigation, the procedural patterns of the litigation, the outcomes, and the

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legal rules that seemed most important. The results are being published in the *American Bar Foundation Research Journal*, which, along with the Law School, helped finance the study. He is also completing work on the second edition of *The First Amendment and the Fourth Estate*—a book for undergraduates on newspaper and broadcasting law.

Lawrence M. Friedman, Marion Rice Kirkwood Professor of Law, was a guest speaker at the VIIIth International Symposium sponsored by the National Academy of Sciences, Republic of Korea this year. In addition, Professor Friedman has coauthored *The Roots of Justice* with Robert V. Percival, a Stanford law graduate now clerking for U.S. Supreme Court Justice Byron White. The book, which is due to be published this year, is the culmination of research into the court records and newspapers of Alameda County from 1870 to 1910.

Professor **Paul Goldstein's** book *Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance*, together with a *Statute, Form and Problem Supplement* was published in April by Foundation Press. The casebook and supplement, designed to introduce law students to both basic and sophisticated techniques of land transfer and finance, covers, among other topics, title insurance, mortgage, trust and deed and leasehold financing, federal income taxation, bankruptcy and shopping center development. Professor Goldstein is currently at work on the second edition of his casebook, *Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials*, and on a casebook for the first-year Property course, both also to be published by Foundation Press. In addition, Professor Goldstein recently presented a talk to the San Francisco Patent Law Society on recent developments in copyright law.

Professor **William B. Gould** was elected secretary of the Labor and Employment Section of the ABA for 1980-81. He will deliver a paper next summer at the ABA convention on "The Supreme Court and Labor Law: The October 1980 Term." Professor Gould has also been named a member of the Public Review Board of the Brotherhood of Railway

and Airline Clerks. He is currently at work on a book, *The Labor Arbitration System*, which will be published by Macmillan in 1982.

Professor **Thomas C. Heller** gave a six-week series of lectures at Free University in West Berlin during the summer. He spoke about the emerging role of law and economics, as part of a general program on "Legal Theory in Western Europe and the United States."

Professor **John Kaplan** flew to Taiwan this past spring as observer for the International League for Human Rights and the Lawyers' Committee for International Human Rights. He attended the two-week court martial of eight prominent Taiwanese political figures on charges of sedition. Thereafter, he spent the remainder of the spring and summer on the report, which has received wide publicity on Taiwan and among Taiwanese residing outside that island.

J. Keith Mann, Professor and Associate Dean for Academic Affairs, again served in the spring as salary arbitrator by agreement between the Major League Baseball Players Association and the Major League Baseball Player Relations Committee. After hearings, the decision consists of awarding either the salary figure submitted by the club (or) the player's figure and inserting the awarded salary in the player's contract.

John Henry Merryman, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, lectured at the Faculty of Law, University of Zurich in June and at UNAM (the Autonomous National University of Mexico, in Mexico City) in July. He has also coauthored a new book published in January: Merryman, Clark and Friedman, *Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal and Social Indicators for Comparative Study*. In addition, an "artists' moral right" statute he helped draft and promote was recently enacted as California Civil Code S987. Known as the "Art Preservation Act," it prohibits the "physical defacement, mutilation, alteration, or destruction of a work of fine art." While the right of artists to present such mistreatment of their work already exists in most European and Latin American

legal systems, California is the only state to have enacted such a law.

A. Mitchell Polinsky, Professor of Law and Associate Professor of Economics, gave lectures on nuisance law at New York University Law School in March and at the University of Southern California Law Center in April. He attended a conference on evolutionary theories in law and economics at the University of Miami Law and Economics Center in May. He also published the following papers in 1980: "Private Versus Public Enforcement of Fines" in the January issue of the *Journal of Legal Studies*; "On the Choice Between Property Rules and Liability Rules" in the April issue of *Economic Inquiry*; "Strict Liability Vs. Negligence in a Market Setting" in the May issue of the *American Economic Review*; "The Efficiency of Paying Compensation in the Pigovian Solution to Externality Problems" in the June issue of the *Journal of Environmental Economics and Management*; and "Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies" in the July issue of the *Stanford Law Review*.

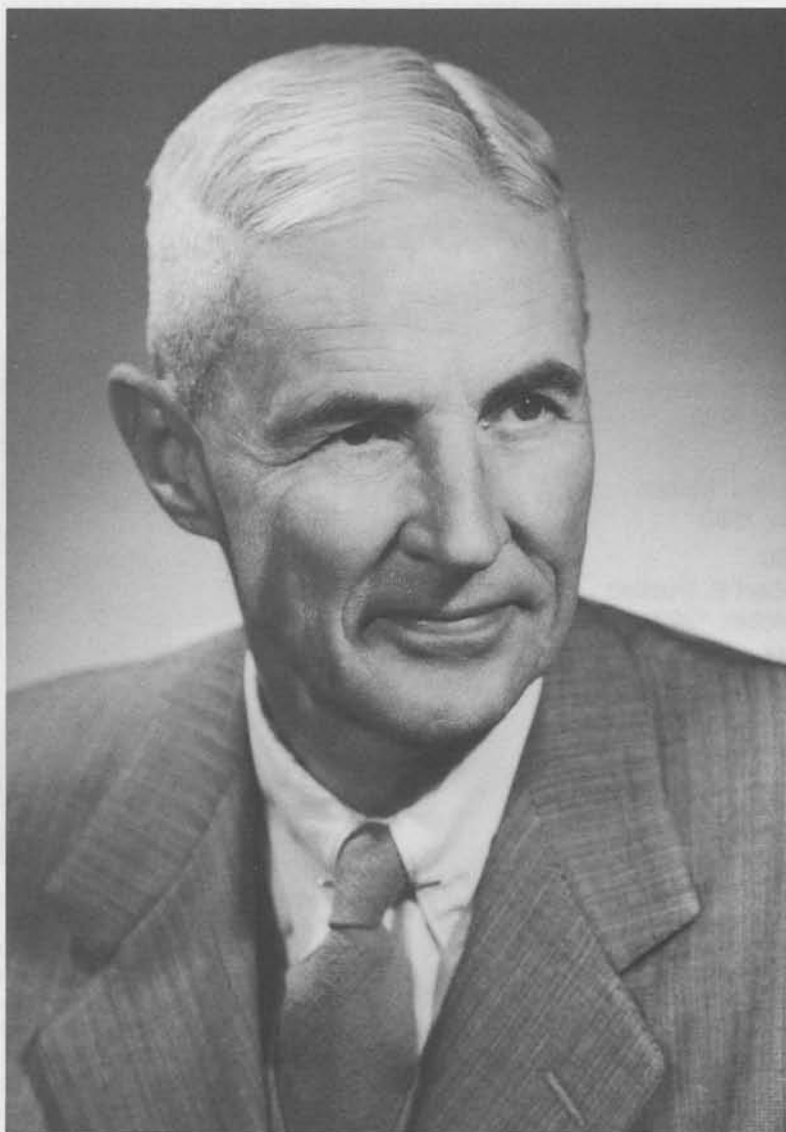
David Rosenhan, Professor of Law and Psychology, has been elected President of the American Board of Forensic Psychology. The Board establishes standards of competence for psychologists who contribute to the legal process, and evaluates candidates against those standards. Those who pass Board examinations become Diplomates of the Board and members of the American Academy of Forensic Psychology.

Professor **Kenneth E. Scott** has coauthored *Economics of Corporation Law and Securities Regulation* with Richard Posner. The book is scheduled to be published in October.

Professor **Michael S. Wald** has served on the State Advisory Committee on Child Abuse. He recently completed writing several chapters for a new CEB (Continuing Education of the Bar) book on Juvenile Court Practice. In April, Professor Wald delivered a series of lectures on the juvenile justice system at the University of New Mexico Conference on the International Year of the Child in New Mexico.

A Tribute to Lowell Turrentine

The annual Law Alumni/ae Banquet to be held November 7, 1980 will honor Lowell Turrentine, Marion Rice Kirkwood Professor of Law, Emeritus. Professor Turrentine served on the Stanford law faculty from 1929 until his retirement in 1961. Turrentine, fondly referred to during his teaching days as "Tut," received an A.B. (1917) from Princeton University, an LL.B. (1922) and an S.J.D. (1929) from Harvard University. A vast number of Law School alumni/ae have studied under him.



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