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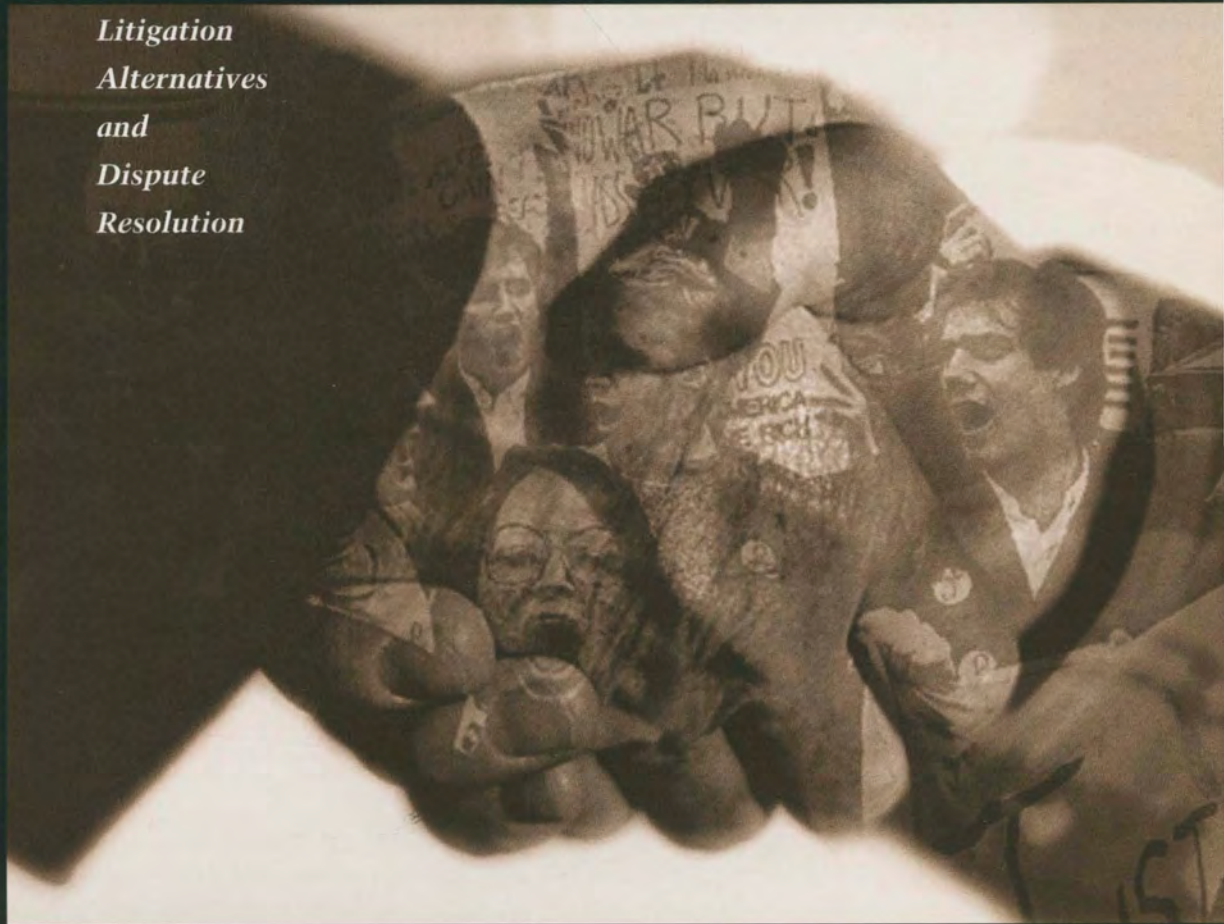
Volume 14, Number 1



Duke Law Magazine

CONFLICT RESOLUTION:

*Litigation
Alternatives
and
Dispute
Resolution*



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January 1988—Duke
students demonstrate
against government policy
outside Cameron Stadium
during a speech by
President Ronald Reagan.

Enhancing the human capital of the Law School is one way to describe the way I spent this academic year. The faculty and I devoted an unusually high degree of activity to faculty development. In addition, we deepened our commitments to a number of program areas, including ethics and conflict resolution. We also worked diligently to take advantage of our extensive investment in information technology and to understand better the impact that a networked environment has on our work. I want to share a brief overview of these initiatives with you.

Faculty Appointments

The most important asset of the Law School is its faculty. We enjoyed an outstanding year in faculty development, including the appointment of five new faculty. We also granted tenure to two junior faculty, which you can read about in Faculty News on page 49.

James E. Coleman, Jr. will return to Duke Law School as a professor of law. He is a graduate of Harvard University and Columbia University Law School, where he was a contributing editor of the *Columbia Human Rights Law Review*. His extensive professional experience includes a judicial clerkship and service with a congressional committee, the Legal Services Corporation, and the Office of Legal Counsel for the U.S. Department of Education. He is leaving his partnership with a large Washington, D.C. law firm, where he performed a significant amount of *pro bono publico* services, particularly in the area of capital proceedings. Coleman was on our faculty from 1991-93, and received the 1993 Duke Bar Association's Distinguished Teacher Award. He returned to private practice while continuing to teach the death penalty seminar each year. At Duke, he will teach criminal law, and, with Robert Mosteller, he will teach a seminar on the death penalty and an associated clinic.

The appointment of Steven L. Schwarcz culminates a two-year search for an out-

standing appointment in the fields of commercial law and transactions, bankruptcy and corporate restructuring, and structured finance. Schwarcz earned a BS from New York University School of Engineering and a JD from Columbia. He was a partner and practice group chair at a large New York law firm, where he represented many of the world's leading financial institutions in structuring innovative capital market financing transactions, both domestic and international. While practicing law, he taught at Yale, Columbia and Cardozo (Yeshiva University) Law Schools. Schwarcz has written numerous scholarly works and his monograph, *Structured Finance. A Guide to the Principles of Asset Securitization*, is the most widely used book in the field of inventive commercial finance. At Duke, he will teach courses in commercial law and transactions, bankruptcy and corporate restructuring, and capital markets. He brings the experience of someone at the top of his professional field in an area of law where practical experience is extremely valuable to both teaching and scholarship, while also having achieved a worldwide reputation for his scholarship.

Professor Charles T. Clotfelter, the Z. Smith Reynolds Professor of Public Policy Studies at Duke, also was appointed as a professor of law at Duke. He holds a PhD in economics from Harvard, and his fields include public finance, tax policy, and the economics of education. His books include *Federal Tax Policy and Charitable Giving*, *Economic Challenges in Higher Education*, and the forthcoming *Buying the Best: Cost Escalation in Elite Higher Education*. Clotfelter and Richard Schmalbeck have co-taught a number of seminars in the Law School on

tax policy, not-for-profit organizations, and charitable giving.

Beth A. Simmons was promoted to associate professor with tenure in Duke's political science department, and appointed associate professor of law. A Harvard PhD, Simmons writes in the fields of international political economy and interna-



tional relations theory. She is, without question, one of the best young scholars working in this field. Her first book, *Who Adjusts? Domestic Sources of Foreign Economic Policy during the Interwar Years 1923-1939*, won the 1995 American Political Science Association (APSA) Woodrow Wilson Award for the best book published in the United States on government, politics, or international affairs, and the 1995 APSA's Section on Political Economy Award for the best book or article in political economy published in the past three years. Her next major research project will take her full force into the Law School. She plans to work on the subject of compliance in international law in the absence of effective enforcement. In pursuing this field, she would be one of the few scholars working on the relationship between international law and international relations theory. Her appointment and research complement those of Benedict Kingsbury in public international law.

Doriane Lambelet Coleman will join the faculty in the full-time position of lecturing fellow. She graduated with distinction from Cornell University, where she was a varsity track athlete, and she completed her law degree at Georgetown University Law Center, where she was associate editor of the *Georgetown Law Journal*. She has worked for several years as an associate in a major Washington, D.C. law firm, and also maintained a consulting practice for international athletics. In addition to teaching torts, she will offer a new course on international sports law, drawing upon her extensive practical experience in this rapidly expanding and important field of international law. A citizen of Switzerland and fluent in French, she has a significant interest in our non-American students and will work with the graduate LLM students in their course on the introduction to the American legal system.

Looking over this summary of appointments, our attention to faculty development is evident. The law faculty is developing at the highest possible levels of both academic and practical capacity. The challenge to any superb law school in a major research university is to balance faculty appointments across fields of law. That balance extends to having a faculty who have the capability and interest in shaping whole fields central to legal scholarship, by tackling large topics and developing their own analytical framework, while also drawing applications of their work to the improvement of law and legal institutions.

Conflict Resolution

One of Duke Law School's strengths is the area of conflict resolution. It also is an area that we have targeted for significant future development. The Law School already possesses an extensive curriculum in conflict resolution. Its wide range extends to negotiation, mediation, alternative dispute resolution, complex litigation, international litigation and arbitration; inclusion of specialized areas like mass torts and toxic substances; and larger international and societal conflict issues such as mass crimes arising from societal upheavals to management of ethnic conflict by constitutional provisions and voting arrangements.

The Private Adjudication Center is a unique feature of our conflict resolution

program. No other law school in the United States has organized an affiliate to provide research, education, and dispute services. A description of some of the Center's current activities is a feature on page 16.

This issue of *Duke Law Magazine* also features articles by professors Thomas B. Metzloff and Thomas D. Rowe, Jr., both of whom are active in the work of the Center. Continuing with this issue's focus, be sure to read the article on conflict resolution, which includes brief profiles of our alumni working in the field; articles about books by professors Neil Vidmar and Clark Havighurst; and profiles of Paul D. Carrington and Gerald Wetherington.

Professionalism and Ethics

In March, *U.S. News & World Report* published its latest rankings of professional and graduate programs. The magazine's lead feature on law schools concerned the increased emphasis on the teaching of ethics and professionalism, and the initial examples were drawn from the Duke Law School. It used, in particular, the judicial ethics course taught by Judge Wetherington '63 and federal judge William Hoeveler. Judge Hoeveler is quoted as saying to the students: "I guarantee that sometime you will be asked to do something dishonest. Your future lies in that moment. Even if you have kids and a big mortgage, there's only one answer: 'No.'"

As discussed at page 31, the Law School hosted the W.M. Keck Foundation board and officers and all the law schools that received grants from the Foundation to improve the teaching of ethics in American law schools. This conference was intellectually rich, bringing together deans and faculty from leading law schools to work intensely for two days on what the schools had learned about the teaching of ethics, what types of curricular materials had been created pursuant to the grants, and in particular, what would be some of the most important steps that could be taken by law schools permanently to improve the teaching of ethics.

Technology and Legal Education

The Law School enjoys one of the finest computing environments anywhere. With this infrastructure in place, we are turning to the interesting questions of how to apply technology to change the way we work, our teaching methods, and

our means of communicating, including with our alumni. Among the key factors influencing all of these areas are the existence of the Internet and our World Wide Web site and the context of a networked client/server computing environment.

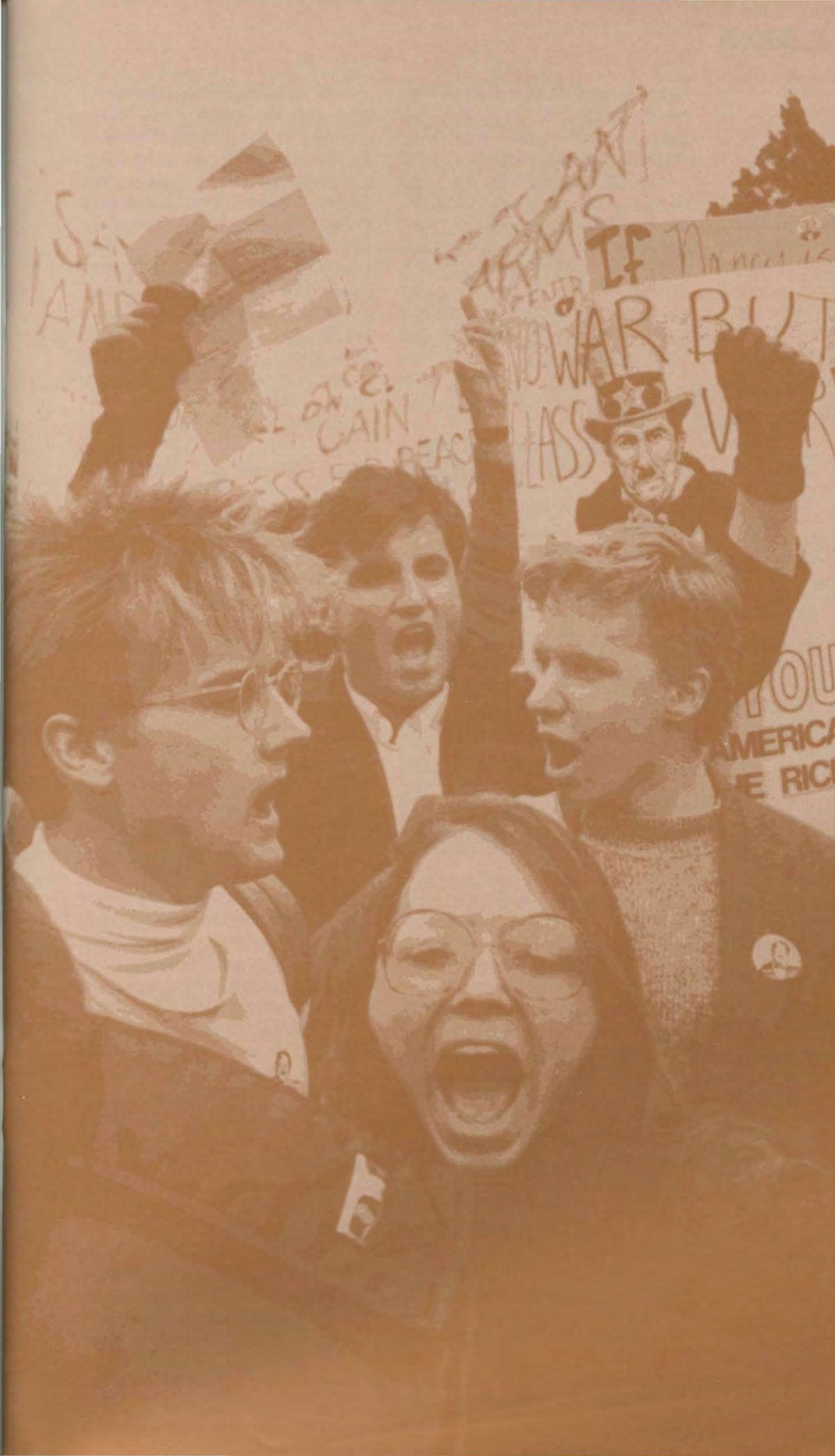
I invite you to look at our Web site from time to time at <http://www.law.duke.edu>. You will see a rapidly growing use of this site for admissions, career services, journals, legal information, and communications with our alumni. Over half of our alumni have graduated since 1980, and an increasing number are located outside the United States. These two portions of our alumni surely will rely on computer-based communications. We are using the Web site for alumni communications and information, and I hope that you will "bookmark" the site so that you will use it frequently.

Leadership in Legal Education

Duke Law School continues to provide leadership in legal education. Our recent faculty appointments are world-class. They reflect careful thought about fields of knowledge, the mix of the theoretical with the practical, and the attention that must be paid to globalization and the increasing importance of comparative law. We take seriously our commitment to law as an intellectual field and also to law in its application to manage private and public relationships in our world society.

The field of conflict resolution is one example of a subject in which law schools have a special role to play in research and teaching. This Law School seeks solutions to major problems, such as the modeling of appropriate dispute resolution mechanisms and facilities and the maintenance of professional and ethical standards in an increasingly competitive and complex practice environment. Lastly, information technology is one of the most significant opportunities that we all face. We expect to be among those law schools staking out a leadership position in the incorporation of information technology in legal education.

PAMELA B. GANN '73
DEAN



PERSPECTIVE

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Conflict Resolution

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**Book Review:
Medical Malpractice
by Neil Vidmar**

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**Book Summary:
Health Care Choices
by Clark Havighurst**

"DO I UNDERSTAND YOU CORRECTLY? Your client is asking for a million dollars for some temporary numbness in one hand? That is just not reasonable."

"But my client's hand is her entire livelihood. Because of the defendant's negligence, my client lost an entire season of her working life. Imagine if your client, a surgeon, were to lose use of his right hand or if you as a lawyer were to lose all use of your voice. And, now, imagine the suffering caused by believing this loss might be permanent."

With their clients intent beside them, the negotiators squared off. How much

promise rather than capitulate on pain and suffering. Defendant Ben Butler reserved most of his comments for closed door strategy sessions, appearing impassive during the active negotiations. But when his attorney, Marc Fitoussi, drew an analogy between the jazz pianist and a relative whose numbness briefly had kept him off the tennis court, Butler winced visibly as he saw the comparison pierce his opponent like a poison dart. With \$70,000 still separating them, the parties disbanded, promising to meet again in court, many months later, when the crowded docket would permit.

Resuming their identities as law students, Butler, King, McFadden, and Fitoussi joined classmates and professor Neil Vidmar to debrief. Furrowed brows and tough postures now relaxed, students exchanged impressions of the case they had negotiated. Fewer than half of the student teams had reached settlement and, one after one, those headed for court enumerated the obstacles that derailed their first foray into alternative dispute resolution (ADR).

"When I felt my injuries were being reduced to a number, I became incensed and my willingness to compromise was destroyed," said one plaintiff. "It was hard to get out of a legal role," reflected a negotiator. Another observed that "reaching a settlement is not always the best outcome."

"When I was first considering a course in negotiation," said Vidmar, "I would not have predicted that it would now be one of the most popular electives in the Law School." Five years hence, student demand has prompted two additional sections taught by legal writing instructor Diane Dimond and Private Adjudication Center (PAC) executive director René Stemple Ellis '86. Originally, in planning the course, Vidmar sought the advice of faculty at the handful of law schools teaching dispute resolution and, closer to home, at the Fuqua School of Business. The result: a practicum, short on lecture and long on experiential learning.

After this first, single-party session, Vidmar's students move on to more complex, multi-party negotiations. The course culminates in a joint simulation that pairs an MBA student with a law student, playing the roles of executive and lawyer-mediator, respectively. Students also are invited to create and field test their own

CONFLICT RESOLUTION



Litigation Alternatives and Dispute Resolution

should a jazz pianist be compensated for a controversial, but probably not unreasonable, medical procedure that cost her the use of her hand for six months? And what about the prospective engagements she usually booked during the high season? Alongside the basic legal and ethical questions, the parties grappled with tactical issues. Should the physician reveal that he carried no malpractice insurance? Would this information liquidate the punitive damages claim or be interpreted as professional irresponsibility?

The allotted time elapsed, and the two parties remained locked in conflict. Unlike most plaintiffs in a courtroom, Dayatra King was an active participant in her case, frequently whispering legal pointers, urging her attorney, Angus McFadden, to hold the line on lost income and medical expenses and com-

simulations, an exercise that Vidmar speculates might lead to a student-authored case book.

Vidmar believes that negotiation training should not be reserved for those headed for careers in alternative dispute resolution. "A good portion of what all lawyers do is develop relationships, and negotiation is central to almost any ongoing relationship. A contract is signed and immediately the situation changes—lawyers have to modify the original agreement or figure out how their client can disengage. All this has to be negotiated." Vidmar also notes that the growing size and organizational complexity of law firms favor lawyers most skilled in negotiating for finite resources.

What does it take to be an effective negotiator? Vidmar looks to his own background in psychology for some of the answers. "Effective negotiators think about the intangibles—emotions, egos, and face-saving. They also are good listeners who resist imposing their own interests and solutions on others." According to Vidmar, novice negotiators fall prey to the assumption that others think and feel the way they do. The presence in the course of international LLM students, who bring a variety of cultural norms to the table, helps correct this fallacy.

For one student in Vidmar's class, Susan Kinz, the exercise must have looked familiar. As professor Thomas Metzloff's summer research assistant, Kinz was part of a team charged with observing mediations involving aggrieved patients and relatives. "The project, explained Metzloff, "is part of a larger statewide initiative to redesign the structure of North Carolina courts—our part is to consider who should fit within this new structure." Kinz and her fellow researchers visited courthouses in several North Carolina counties, examining legal records and sitting in on mediation sessions to determine the effectiveness of court-ordered mediation in bringing medical malpractice cases to resolution.

Kinz recalls a mediation that took place in a small rural courthouse on the final day of the O.J. Simpson trial. The informal nature of the mediation proceedings prompted the parties to decide to break for the verdict. Kinz believes that the tense moments the participants shared with Simpson while he waited to

learn his fate had a determining effect on their mediation. "The parties could see how scary it can be to face a jury and in those few moments, I think they unconsciously moved closer to settling their own case."

Metzloff, who teaches a seminar in dispute resolution, believes that such research projects provide invaluable clinical experience for students. "They see the vitality of the practice of law and learn both the benefits and drawbacks to alternative dispute resolution." And observing actual mediations has given Kinz a more balanced view of alternatives to litigation. "When I first came to law school," said Kinz, "I thought the court system was totally inferior to the beauty of ADR. Now I've seen that ADR has its weaknesses, that some cases should be tried."

Both Vidmar and Metzloff make a point of stressing the limits as well as potential of ADR. Vidmar, for example, has presented research he conducted with Duke colleagues Ellis and Karla Fischer, a specialist in law and psychology, that questions the use of mediation in domestic violence cases where power differentials between batterer and victim are extreme.

Like Vidmar, Metzloff stresses that ADR is not a "niche area," but one that infuses the entire judicial system. "When you consider that 90 percent of all cases settle, it's hard to view ADR as a utopian vision. It's out there now."

Metzloff, who also supervises the required first-year program in ethics and the legal profession, believes ethics and conflict resolution are inextricable. "The program helps overcome the image of lawyer as hired gun, which is neither ethically desirable nor required." Thus, in his classes, Metzloff invites prospective lawyers to consider not just how, but also whether to bring a claim.

Duke students interested in dispute resolution also benefit from Duke's Private Adjudication Center, where students obtain direct practical experience

in a variety of areas. Recently, for example, the PAC undertook the processing of claims from the Dalkon Shield litigation (see page 18).

As the Law School's focus expands globally, so, too, do student opportunities to explore international dispute resolution. Professor Donald Horowitz weaves into his teaching, his vast and ever-enlarging experience observing and advising governments across the globe that are seeking to manage ethnic conflict. Last spring, Horowitz traveled to Canterbury,

New Zealand, to work with a constitutional commission to develop an electoral process for Fiji designed to ameliorate the rift between the country's Indian and native Fijian populations. In 1994, Horowitz was part of a delegation to Romania whose mission was to stem violence against gypsies. The previous year took him to Tatarstan, south-east of Moscow, where he made recommendations about establishing an electoral system that would diffuse conflict between Tartar and

Russian populations. Horowitz also has worked on constitutional reforms aimed at lessening ethnic conflict in South Africa, Nigeria, and Northern Ireland.

These ventures provide rich case study material for students in Horowitz's seminar in comparative law and policy. Cross-listed in the Political Science Department, the seminar takes a decidedly interdisciplinary approach, drawing on fiction, sociology, and foreign policy to crystallize the explosive potential of ethnic group relations in Asia, Africa, and the Caribbean. A comparative approach is essential, Horowitz believes, not only to "explore the dimensions of ethnic conflict in severely divided societies," but also to "come to grips with the prescriptive problem of what might be done about such conflict."

Horowitz's research provides some clues to prevention. In Romania, he discovered the subtle, but devastating effect of "authoritative social approval" on esca-

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ON OTHERS."**

lating violence against gypsies. The government delivered the implicit message to its police that the political costs of suppressing antigypsy violence outweighed the practical benefits. "This became a green light for violence." Horowitz also cautions his students against uncritical loyalty to American paradigms. When Nigeria sought to institute an electoral college similar to that of the United States, Horowitz recommended an alternative model in which geography served as a proxy for ethnicity.

With Horowitz, students examine ways to avert ethnic violence. In Madeline Morris's classes, they face the dilemma of determining how governments should react to ethnic violence *ex post facto*. Morris is engaged in a comparative study of legal responses to mass scale crimes against humanity. She has gone to Kigali, Rwanda, where the courts face the staggering task of prosecuting more than 60,000 largely Hutu defendants charged with massacring millions of Tutsis. Morris will focus on establishing alternatives to costly and time-consuming traditional litigation and sentencing.

"This is particularly challenging in a country with a civil-law system and no history of plea bargaining," said Morris. "And add to this a decimated court system in which 80 percent of the country's judges were either killed or fled the country, and the urgency of finding alternatives to traditional litigation becomes compelling." Given the magnitude and motive behind the genocide, Morris emphasizes that sanctions not become too lenient. "There's something particularly chilling about taking a whole people and saying you don't deserve to inhabit the earth."

Duke law faculty and students are involved in other aspects of healing the rifts caused by genocide. In commemoration of Rafael Lemkin, the international

lawyer/humanitarian who coined the term genocide while teaching at Duke, the University has forged a collaboration with Connecticut-based Save the Children. Under the Lemkin Fellows program, interns from a variety of disciplines deal directly with the impact of genocide on children. Currently, Lemkin Fellow David Archey is spending a year in Kigali on leave from his studies at the Law School. A veteran of Peace Corps service in Chad, Archey is part of an international, interdisciplinary team confronting the problem of how the Rwandan judicial

system should respond to genocide involving children as perpetrators. One particularly grisly aspect of the Rwandan cataclysm was the recruitment of young adolescent boys into the death squads charged with carrying out some of the war's most harrowing slaughter. Archey is helping the international tribunal frame an appropriate response to this crisis in juvenile justice.

In addition to their class and field work, Duke law students also are involved in research and publication related to international facets of conflict resolution.

Supervised by Morris and her colleague, Benedict Kingsbury, an international law specialist, Duke law students Dylan Cors and Siobhan Fisher, and Rob Plowden '96 conducted research designed to help the courts mete out punishment to those convicted of war crimes in Bosnia. After devoting months to mastering the political landscape of the former Yugoslavia and the rudiments of Serbo-Croatian, Cors and Fisher spent the past summer in Belgrade and Zagreb, mining archives relevant to both national and international criminal law.

"We found that because there are few international norms, the tribunal agreed to respect the laws of the former Yugoslavia," explained Cors. "But the tribunal also removed the death penalty as an option.

This is a problem because the former Yugoslavia operated under a sort of all-or-nothing criminal sentencing system. Convicted defendants faced either the death penalty or rather short terms of imprisonment." Thus by abandoning the death penalty, conclude Cors and Fisher, the tribunal must grapple with a commitment that has boxed them into inappropriately mild sanctions. When they publish their research, Cors and Fisher hope to benefit future tribunals as they seek just and consistent remedies.

Another '96 graduate, Greg Mose, is investigating violation of international laws prohibiting destruction of cultural property. His research focuses on the selective despoiling of churches as a consequence of religious and ethnic conflict in Bosnia. Mose expects to publish his findings in an upcoming issue of the *Duke Journal of Comparative & International Law*.

Can there be justice after genocide? Duke law students and faculty will have the chance to explore this wrenching question in July 1996 at a symposium in Brussels that will draw experts in international criminal prosecutions from across the globe. Duke law professor Madeline Morris is organizing the event, "Justice in Cataclysm: Criminal Tribunals in the Wake of Mass Violence." Among the speakers and panelists will be Richard Goldstone, prosecutor for the International Criminal Tribunal for the former Yugoslavia and Rwanda; Girma Wakjira, chief special prosecutor for the Republic of Ethiopia; Alexander Boraine, vice chair of the South African Truth and Reconciliation Commission; and Michael Scharf '88, assistant professor at New England Law School.

In offering exposure to conflict resolution within domestic and international contexts, the Law School hopes to prepare graduates for legal careers in both traditional and nontraditional settings. But even before this range of opportunities was available, some Duke law graduates forged their own paths in alternative dispute resolution, as the following profiles illustrate.

LUCY HAAGEN

IN OFFERING
EXPOSURE TO
CONFLICT
RESOLUTION
WITHIN
DOMESTIC AND
INTERNATIONAL
CONTEXTS,
THE LAW SCHOOL
HOPES TO
PREPARE GRADUATES
FOR LEGAL CAREERS
IN BOTH
TRADITIONAL AND
NONTRADITIONAL
SETTINGS.

ALUMNI SNAPSHOTS

Vincent Sgrosso '62

For Vin Sgrosso, an interest in alternative dispute resolution developed gradually over the course of a career as general counsel for BellSouth. "Many times in resolving disputes with the union," said Sgrosso, "we turned to arbitration. When you've got a company to run, you often need a quick decision. Take the case of a contested firing. No one benefits from a prolonged state of irresolution during which back pay builds and ongoing operations suffer."



Vincent Sgrosso '62

But even more intriguing to Sgrosso than straight arbitration, long a feature of labor relations, was mediation, increasingly a component of management-union negotiations.

In 1989, with retirement in mind, Sgrosso set about becoming an American Arbitration Association-certified mediator/arbitrator, taking practicums in both civil and domestic cases and specialized training in "lemon law" negotiation. Since his retirement in 1994, he has served as a neutral in a variety of cases, including one in which he found himself faced with test-driving a car alleged to have malfunctioning brakes.

Though Sgrosso has been impressed by the effectiveness of mediators and arbitrators from a wide variety of professions, he believes that a legal background is a definite advantage. "As a lawyer, I have a certain credibility and can talk to my client with some authority about the costs of going to court." Sgrosso is quick to add that negotiation requires a host of skills from a variety of disciplines, as well as some innate instincts. "A good mediator must be able to establish rapport quickly with each party to demonstrate both neutrality and con-

fidentiality," said Sgrosso. He also considers the creative ability to generate multiple options vital to gaining a viable solution. When successful, Sgrosso believes, "mediation has got to be better justice than litigation because parties are fashioning their own agreements."

Patrick Coughlin '65

Like Vin Sgrosso, Pat Coughlin came to mediation with extensive experience in a traditional legal setting. But unlike Sgrosso, his transition was epiphanic rather than evolutionary. As managing partner in a large Los Angeles law firm, Coughlin found himself dismayed at the increasingly adversarial nature of litigation and its incentive system. "Are we crazy, I thought, paying people for how much time they're taking, rather than for their skill or effectiveness." At the same time, Coughlin found himself turning more frequently to negotiation at the behest of his Pacific Rim clients. He was particularly influenced by Akio Morita, president of Sony, who Coughlin remembers as chiding, "We have as many lawyers in all of Japan as you have in Palm Beach."

In the mid-1980s, Coughlin left Los Angeles and his legal practice for Portland, Maine, where he acquired several real estate related businesses and a children's camp. In 1988, with the connections and capital gained from his foray into business, Coughlin started a mediation firm. "It was rough-going financially at first," said Coughlin, who estimates that it took three years to establish a viable enterprise. In a risk that paid off, Coughlin merged with two other northeastern providers to form Conflict Solutions, a full-service mediation, arbitration, partnering, and training firm with a national reputation.

Coughlin and his four partners handle a range of cases from construction contracts and real estate transactions to divorce and personal injury suits. Some of his more interesting work has come in the environmental arena. Recently, he settled a case between a

company caught developing wetlands and a regulatory agency. "We were able to convince the parties to negotiate trade-offs that enabled the company to complete its project, while limiting environmental impact," said Coughlin.

Coughlin emphasizes the variety of talents a mediator must possess. "Charisma is a huge factor. Parties must feel a sense of identity with the mediator from the outset." Coughlin also believes that "neutral" is really a misnomer for the effective mediator. "People want an evaluative mediator, not just a facilitator. They want you to call it as you see it—to know what you see as the strengths and weaknesses of their case."

Coughlin's mediation practice has brought him into close touch with Duke. A member of the board of directors of the Durham Dispute Settlement Center, Coughlin also credits the growing national reach of his practice to the Duke law alumni network.

Anne Claussen '85



Anne Claussen '85

Anne Claussen took a long time to decide between graduate school in psychology and law. Though she opted for law, Claussen knew she would never practice in a large metropolitan firm. Upon graduation, she sought out a small firm in a livable community. But even after three successful years practicing envi-

ronmental law in Tallahassee, Florida, she realized she didn't want to continue in the private practice of law, however congenial the setting.

"The law firm was great, but I really wanted to be representing the public interest," said Claussen. That realization led her to the Florida Treasurer's Office, where she served as a legal adviser on environmental issues. While in the Treasurer's Office, she took the courses and completed other requirements to become

certified as a family court and circuit court mediator in Florida. The training proved useful when Hurricane Andrew struck, spawning a volume of insurance disputes and a legal logjam that threatened to overwhelm the state's courts. When Florida responded by instituting a mediation program, Claussen volunteered to assist with the program.

"Mediation was immediately attractive. The peacemaking aspects appealed to me," said Claussen. "I never really enjoyed litigation; my tendency has always been to try to help people work things out." A year after becoming a trained mediator, Claussen left the Treasurer's Office in 1993 to launch a private mediation practice. Shortly thereafter, she took a part-time job as mediation coordinator for Florida's Second Circuit and currently balances the two positions. Claussen recently adopted an 8-year-old daughter from Russia, and the prospect of parenthood on a single income makes the two-job approach an economic necessity for her.

Claussen has completed approximately 1,000 mediations. As an environmental lawyer living in a fragile setting, she has mediated a number of natural resource cases. Recently, she brought landowners and environmentalists to the table to resolve a dispute involving cougars with an appetite for local livestock. The largest proportion of Claussen's work comes in resolving family conflict, particularly related to the aftermath of divorce. Claussen finds this sphere both her most challenging and rewarding. "I urge my divorce clients with children to remember that divorce does not end a relationship. I remind them that years from now, they will be grandparents together." And for

Claussen, and others in the field, this situation exemplifies why mediation is the preferred solution in instances of an ongoing relationship.

Like her fellow Duke law graduates, Sgrosso and Coughlin, Claussen believes that legal train-

ing is crucial to a mediator's credibility. But she also finds herself using human skills gained in her prelaw career as a teacher. "An effective mediator has to get a feel for when a person is approaching the point of no return and be able to diffuse explosion," said Claussen. "You must be able to help people get their needs and desires out on the table without sympathizing too much or making them feel patronized."

Caroline Guthrie Benne '95

Caroline Guthrie Benne came to Duke Law School knowing she wanted to pursue a career in mediation. Before applying to Duke, Benne worked for the Saturn Corporation, where during her last year and a half, she set up a dispute resolution program for the firm's franchisees. Inspired by the project, Benne sought advice on careers in ADR. Those she consulted—attorneys and executives alike—stressed the need for graduate management and legal training. Undaunted, Benne chose to invest four years in a JD/MBA and found Duke's joint degree program particularly attractive.



Carolyn Guthrie Benne '95

Benne credits the Fuqua School of Business with giving her positive exposure to collaborative problem solving. "You really learn how to manage conflict when you have been sitting in a tiny room for 10 hours working on a team project," said Benne. At the Law School, she found the case study/simulation approach in her negotiations class useful preparation for anticipating issues and client responses. Equally valuable was a

course on ethics in the civil system taught by professor Thomas Metzloff.

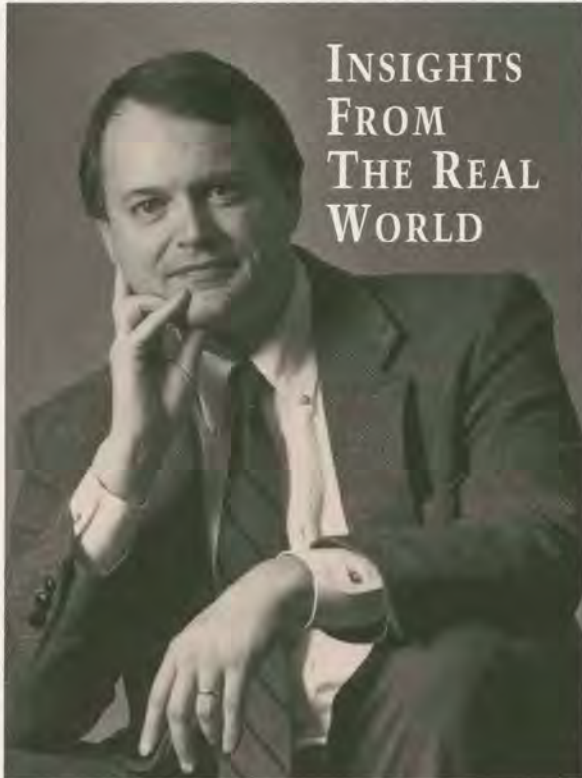
Out of Benne's joint degree experience came a joint venture. In 1995, Benne and Fuqua graduate Jana Dean Lake founded Partnership

Solutions, an Atlanta-based consulting firm. The firm is devoted to helping clients improve productivity and profitability through a proactive approach to business disputes. In approaching potential clients, Benne stresses the time and money saved by avoiding litigation, citing an automobile manufacturer that resolved 68 percent of customer complaints before they reached litigation. She also notes the positive correlation between in-house conflict management programs and customer retention.

Unlike many mediation firms, Partnership Solutions does more than provide mediators and arbitrators to clients. Benne and Lake believe their special niche is providing training for managers to establish their own permanent programs. A key feature of such programs is the use of an ombudsman. According to *The Wall Street Journal*, use of ombudsmen at medium-sized and large companies has more than doubled in the past five years, largely in response to a rise in employee discrimination cases. Ombudsmen, the majority of whom are not lawyers, function as sounding boards for employee complaints ranging from sexual harassment to pay disputes. "Such a neutral party is a confidential resource for someone who thinks they are experiencing discrimination," said Benne. "They help the employee figure out if they want to bring a more formal complaint."

Somewhat in jest, Benne describes the fledgling enterprise as a "virtual company." From their small office, Lake and Benne, the firm's only two permanent employees, can call upon a network of 20 associates trained in different areas to provide a wide range of services. Like other entrepreneurs, Benne admits to being somewhat scared by the risks associated with starting her own company. "But I love the flexibility and being the person who makes things happen, rather than just a provider of underlying support as I would be as an employee in a large organization."

ARBITRATING MALPRACTICE DISPUTES



Thomas B. Metzloff is professor of law and director of the PAC's Medical Malpractice Research Project. This article is adapted from his article *The Unrealized Potential of Malpractice Arbitration*, 31 Wake Forest L. Rev. 205 (1996).

Those interested in alleviating problems with the current litigation system for medical malpractice cases have long suggested the use of binding arbitration. Indeed, the very first governmental report on malpractice written in 1973, just before the first malpractice crisis erupted, included a reference to arbitration as a "better way" to handle malpractice cases, even though there was no evidence that it would be an improvement. During

the first malpractice crisis in the 1970s, a number of state legislatures supposedly provided some impetus to arbitration by enacting malpractice specific statutes designed to facilitate its use.

What does arbitration potentially offer? For its proponents, arbitration offers several benefits, including the use of more qualified decision makers. Many arbitration advocates question the ability of lay juries to decide complex malpractice disputes and have looked to alternative dispute resolution (ADR) to provide a more qualified decision maker. Proponents also regularly cite arbitration's potential to reduce the high costs associated with the current litigation system.

Malpractice litigation is undoubtedly expensive. If administered properly, arbitration offers the potential for significantly shorter "trial" time. Arbitration hearings can be shorter than trials, in part, because there is no need to select, instruct, or manage a jury. In addition, conflicts over evidentiary issues are minimized because arbitration hearings are typically less formal than a jury trial. In addition, arbitration hopefully reduces the amount of discovery required. Traditional malpractice litigation takes an emotional toll on the parties, particularly the doctor accused of malpractice. Physicians perceive suits as allegations of almost criminal misconduct. Arbitration reduces the emotional drain by being more private as well as less lengthy.

It is important to remember that unlike other ADR mechanisms, arbitration is not a process designed to promote voluntary settlement. Rather, it is an alternative method of reaching a decision on the merits of the case. In addition, the parties to an arbitration have substantial power to determine for themselves the particular details of the arbitration procedure. Procedural variables relating to the conduct of an arbitration hearing include, among others: the length of the arbitration hearing, the number of arbitrators, the required qualification of arbitrators, the process for selecting arbitrators, and the amount of discovery permitted to be conducted. Significantly, arbitration does not change the basic tort theory of liability; most arbitration clauses require the arbitrators to apply the applicable substantive law. To be sure, however, arbitrators are not subject to the same level of appellate review as judges and, thus, might have greater flexibility to ignore specific substantive law requirements.

Yet, it is clear that, to date, few malpractice cases have been resolved through arbitration. In other litigation contests, such as securities and construction disputes, arbitrations have become routine. But for malpractice, arbitration remains an exception to the norm of traditional litigation heading towards trial by jury. For example, in Michigan—a state that made a concerted effort to promote malpractice arbitration—a recent study indicated that during a 13-year period, only 247 malpractice disputes out of a total pool of approximately 20,000 claims were arbitrated. In another study of all malpractice claims closed in 1984, the U.S. General Accounting Office (GAO) estimated that well less than 1 percent of malpractice claims were arbitrated.

Why Hasn't Malpractice Arbitration Become Predominant?

What combination of legal, social, structural, and political factors explain this failure? The differing explanations cannot all be simultaneously true. For example, it cannot be the case that an arbitration system, on the one hand, is inherently derogatory of patients' rights, while, on the other hand, it is likely to result in an explosion of successful and lucrative

awards to plaintiffs. The combination of these explanations reveals the difficult challenges that lie ahead for developing arbitration programs in the current malpractice climate.

Judicial Hostility and Legal Uncertainty:

Conventional wisdom says that part of the lack of use of arbitration is a function of judicial hostility to malpractice arbitration. To be sure, there are cases from the mid-1970s and 1980s relying on such contract notions as the unconscionability doctrine to void or significantly modify malpractice arbitration agreements. One of the supposed benefits of arbitration is to avoid prolonged preliminary disputes. If plaintiffs can routinely challenge the validity of an arbitration agreement on a case-by-case basis, a major advantage of arbitration has been denied.

Regardless of the degree to which these early cases interfered with the development of arbitration, an argument could be made that recent U.S. Supreme Court cases, such as the recent decision in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, and state cases authorizing the routine use of arbitration have removed any real doubt about the availability of arbitration even in the malpractice context. Nonetheless, issues about the basic validity of malpractice arbitration continue to be raised. Recently, the California Supreme Court granted review of a case that challenges the underlying legality of the arbitration program operated by Kaiser Permanente, the acknowledged leader in requiring malpractice arbitrations. Other courts continue to entertain claims that malpractice arbitration clauses are unconscionable under particular facts indicating overreaching by health care professionals.

State Statutes Designed to Promote Arbitration Did Nothing of the Sort:

In retrospect, many of the malpractice-specific arbitration statutes based during the first wave of malpractice "reform" measures in the 1970s did little to promote the use of arbitration. In Michigan, for example, the malpractice arbitration statute details the specific form that arbitration hearings must follow, thus defeating one of the advantages of arbitration—party control over a flexible procedure. Georgia's provision is even more restrictive in that the malpractice arbi-

tration agreement will be enforced only if the claimant's consent occurs after the date of the physician's alleged negligence and only if the patient has consulted with an attorney. A statute that truly promotes malpractice arbitration would simply need to announce that the public policy of a particular state was to encourage the use of arbitration under the same flexible rubric that defines the Federal Arbitration Act.

Comfort with the Current System:

Malpractice insurers and defense counsel are clearly repeat players in the litigation system. As such, they are cognizant of the many potential advantages that the litigation system affords to malpractice defendants. Thus, while physicians might be highly critical of juries, insurers and defense counsel might be less so. Aware of the results that doctors fare well before juries, insurers and defense counsel are understandably reticent about trading the known quantity of the current litigation system for what is the unknown of arbitration. This comfort level is not necessarily nefarious; it is, in part, simply a recognition that the current system provides extensive opportunities for defendants to obtain the vindication that many physicians seem to desire. By the same token, malpractice insurers are in a better position than patients to use the expense associated with the current litigation system to create incentives for plaintiffs to drop cases or settle cheaply.

Need for Judicial Involvement: Malpractice defenders also appreciate the high level of involvement that malpractice cases collectively have within the court system. Many of the procedural tools available through the court system provide physicians with strategic advantages. For example, one benefit of having cases proceed in court is the availability of the judge to resolve discovery motions or motions for summary judgment. Such motions are common in malpractice

cases and are often successful in either narrowing the issues or resulting in outright victories for defendants. While arbitration forums must provide some mechanism to resolve discovery disputes, the procedures for such matters are not well understood. Additionally, in arbitra-

tion there is no clear analog for a summary judgment motion. Instead, the norm is that the matter proceeds to the arbitration hearing where non-meritorious cases will be so adjudged. Defenders might also value procedural rules designed to sanction attorneys or parties for filing non-meritorious claims; arbitrators rarely engage in such considerations.

The Lack of Empirical

Information: Those interested in using arbitration have not received any impetus from empirical studies showing that the perceived benefits of

arbitration are in fact attainable. Empirical research on the impact of arbitration on malpractice cases is sparse primarily because so few malpractice cases have been submitted to arbitration. Empirical analyses of tort reform measures generally have found that the existence of a malpractice arbitration statute did not have a significant impact.

The scant evidence that does exist suggests that the arbitration process is not inherently pro-physician as some have contended. A recent study by the GAO, for example, found that plaintiffs prevailed slightly more often in arbitration than traditional litigation and that the process was less time consuming. Surprisingly, however, the GAO study found that the average cost to the litigants of resolving the cases was comparable, and not cheaper as expected.

There is at least one HMO that has extensive experience with arbitration over an extended period of time. Kaiser Permanente Health Maintenance Organization has used arbitration as the exclusive remedy for its subscribers in California since the mid-1970s. To date, however,

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Kaiser has not permitted a detailed analysis of the outcome of its experience. More general accounts suggest that arbitration leads to quicker results and that plaintiffs achieve similar or even better results than in the trial system. By the same token, without more rigorous empirical scrutiny, these generalized assessments lack any predictive force.

Fundamental Flaws of the Litigation

Process: Arbitration in and of itself does not radically change how a dispute is litigated apart from the identity of the decision maker. Discovery might be somewhat limited and the hearing itself is hopefully shorter. But beyond such tinkering, the use of an arbitration format does not usually alter many of the procedural elements that malpractice defenders find objectionable. For example, arbitration is not thought of as a means to limit plaintiff's attorneys' contingency fees, to impose more effective offer of settlement rules, or to develop more elaborate cost-shifting mechanisms.

Nor does the use of arbitration in and of itself solve the uncertainties inherent in the process of determining pain and suffering. To be sure, it changes the decision maker, moving from a panel of jurors to an arbitrator or panel of arbitrators. But without some additional change in the applicable substantive law to be applied, the arbitrators must make the same subjective determination about the value of non-economic damages as are made by jurors. While some would argue that arbitrators are less likely to make a runaway award of the type that juries are occasionally accused of making, a counter-argument exists that because of their own higher incomes and sophistication, arbitrators may tend to award more money in certain cases because they value interference with the enjoyment of life in greater absolute dollar terms than lay jurors.

Many academics see arbitration, even if done well, as little more than a band-aid that would cover up the far more serious shortcomings. Most would prefer significant reform of the controlling liability principles often towards some aspect of no-fault compensation.

Understanding Policy Priorities:

Policy leaders within the medical establishment have not made arbitration, or ADR for that matter, a priority in recent years. It is a relatively low-level concern among those interested in pursuing tort reform options. As a policy choice, arbitration must be considered in a political context in which a host of policy alternatives are being simultaneously considered. Put simply, the American Medical Association (AMA) is, at this point, more interested in establishing meaningful caps on damages than it is in developing ADR programs.

Perceived Failure: Defenders have been turned off from pursuing arbitration by the perceived past failures of ADR efforts in alleviating the problems of malpractice. The foremost example is the experience of states that adopted, at the urging of the medical profession, "pre-

trial screening panels" for medical malpractice cases in the mid-1970s. These early ADR procedures typically required plaintiffs to submit their claims to a special panel, often composed of a physician, attorney, and lay member. The panels issued non-binding decisions which would, in theory, convince the parties either to drop or settle the claim. A common criticism of the panels is that they were administratively cumbersome and that they often led to long delays. Other concerns were that the process came too early in the evolution of the claim before the parties had conducted sufficient investigation. The conventional wisdom is that these panels, which looked something like arbitration panels,

were ineffective in impacting the culture or reality of malpractice litigation; indeed, several states have recently abandoned their programs.

Proponents of Other ADR Forms: Even those who are ADR evangelists do not necessarily support the use of binding arbitration. For example, one area of rapid growth in the ADR field is the development of court-sponsored ADR programs. Concerned with burgeoning dockets, numerous state and federal courts have initiated mandatory, non-binding ADR procedures. Such ADR initiatives have the advantage of not engendering active opposition from patient advocates since these programs are non-binding, meaning that the plaintiff can obtain a traditional jury trial if desired, and because they fall under the supervision of the court.

Still others who believe in the desirability of litigation alternatives would rather invest their time and energy not in arbitration, but in alternative systems seeking early identification and resolution of potential claims. Such approaches would rely on the use of mediation rather than arbitration. The mediator's role is primarily to facilitate the parties' understanding of the nature of the dispute and to explore practical solutions, even if those solutions are not necessarily required by applicable substantive law principles. The challenge of ADR is learning how to choose intelligently among a range of procedures—to "fit the forum to the fuss." Each of the different procedures might be better suited to certain types of malpractice disputes. If true, then realizing the full benefits of ADR requires a careful matching of specific malpractice disputes with the particular ADR process best suited to that case.

Letting the Genie Out of the Bottle:

The malpractice insurers' lack of interest also represents a concern that if a truly expedited process for asserting malpractice claims were established, the number of malpractice claims would skyrocket. It is generally thought that health care providers would be the beneficiaries of arbitration, based in large part upon the fact that those providers were the ones who initially raised the idea. This simplistic notion is no longer uncritically accepted. The interest in developing binding arbitration has no doubt been cooled

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by recent evidence of the large, currently untapped pool of potential malpractice claims. Arbitration could solve that problem by providing a quality system that would quickly deal with what was a large cohort of nonmeritorious claims. The Harvard study changed the perception—the real situation is not that there are too many claims being asserted, but in fact too few. Moreover, the available empirical evidence did not support the claim that plaintiffs routinely won their cases. This insight logically requires rethinking of the premise of arbitration as a means primarily of limiting the filing of nonmeritorious suits. If an effective and efficient arbitration system were in fact developed, plaintiffs now excluded from the current system might find it easier to file and pursue claims.

"Splitting the Baby"

Concerns: Some malpractice defenders do not have sufficient faith in the process of arbitration to seek routine submission of malpractice disputes. Anecdotal experiences have served to give them serious pause. Perhaps the most widespread concern is that arbitrators tend to make compromise decisions that do not fully vindicate their clients' interests. Especially in malpractice where physicians are often interested in vindicating their conduct, the perception that arbitrators "split the baby" represents a serious potential difficulty. Another widely-held notion about arbitration is that it can be just as expensive as regular litigation. Other anecdotal accounts criticize arbitrators who step in to help unprepared plaintiffs or who feel compelled to make some award to a plaintiff regardless of the proof offered.

Anti-Arbitration Sentiment: Plaintiffs' advocate groups continue to strongly oppose the use of binding arbitration in most contexts, including medical malpractice. Why is this position held so strongly despite the clear evidence that

the current system hardly operates to the benefit of patients? Certainly, as noted above, there is no valid empirical basis for plaintiff advocates at this point to tar and feather malpractice arbitration. Upon reflection, it is no wonder that the public's perception is that arbitration is a loaded pistol being aimed at its head by physicians given how the issue has been presented. The primary proponents of malpractice arbitration have been members of the medical profession who, at the same time as they tout arbitration, have been forwarding a panoply of other tort reform options such as caps on damages or other measures to restrict access. It has not been presented as a neutral and informed suggestion for improving the

overall quality of how malpractice disputes are resolved. In the simplistic nature of the tort reform debates, patient advocates are against it because doctors are for it; arbitration has become a prisoner of war. The general suspicion with which consumer groups view arbitration also is based on the fact that contractual relationships of this sort are not necessarily limited to procedural as opposed to substantive law changes. They are concerned that arbitration clauses will be used as a front to mask more direct assaults upon plaintiffs' rights. Certainly, there are those who advocate the

use of private contracts as vehicles for altering legal rules in this area.

Another factor is the role played by plaintiffs' counsel who serve as spokespeople, almost by default, for the interests of patients. It is generally assumed, for example, that plaintiffs' attorneys are suspicious of arbitration and desire strongly to have a jury. As a result, plaintiffs are likely to challenge arbitration agreements vigorously, and such challenges would defeat a central benefit of arbitration, namely, expedited resolution on the merits.

After reviewing the lengthy list of reasons, it should hardly come as a surprise that malpractice arbitration has largely been a non-starter. Among those who litigate malpractice cases day to day, there is no common understanding that the current system has failed. Lacking a clear empirical basis for believing that arbitration would be better, why face the hassles of legal review to force arbitration down the throats of patients who apparently believe that arbitration is a bad idea? In reviewing the list, however, there is one important truth. Despite conventional wisdom, there is no clear understanding that arbitration is demonstrably "better" for physicians. Indeed, some of the reasons why there has not been greater use of arbitration is the suspicion that arbitration would benefit plaintiffs in a number of important ways. As a result, in looking to the future, there is no reason based upon the present record to assume that arbitration is somehow inappropriate or inherently unfair in the malpractice context. Its possible virtues should be considered unencumbered by the ill-informed claims and counterclaims made in the heat of "tort reform" battles.

The Future of Malpractice Arbitration

In looking towards the future, one is confronted by a number of questions about the possible role of arbitration. If one accepts a broad view of patient interests—one that focuses not just on those slight minority of patients who currently have a malpractice claim—is arbitration a good idea? As a policy matter, should its use in malpractice be tolerated or indeed encouraged? Is there anything unique about malpractice cases that make them inappropriate for arbitration? What arbitrator qualifications should be most sought after in forming panels? Will arbitrators be as willing as juries apparently are to award defendants outright victories when they perceive the case to be nonmeritorious? Will they be as able or better than juries when it comes to valuing meritorious claims? Will malpractice arbitrations in fact prove to be more cost-efficient than traditional litigation? Will arbitration deal more effectively with the special challenges of using experts?

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These questions cannot at this time be answered with any confidence. Nonetheless, my opinion is that arbitration, if well-administered, can be a particularly effective dispute-resolution method in malpractice. This conclusion is based upon my own involvement through the Duke Private Adjudication Center coordinating malpractice arbitrations.

In 1987, the Private Adjudication Center received a grant from the Robert Wood Johnson Foundation to study the potential of alternatives to litigation in the context of medical malpractice cases. The grant involved two major efforts: the evaluation of the current litigation system and direct efforts to facilitate the use of alternatives. With respect to the second objective, our goal was to facilitate the use of various forms of ADR in a large number of medical malpractice cases.

Experiences with Malpractice Arbitration: Working under the auspices of Duke Law School's Private Adjudication Center, I have, during the past five years, worked closely with malpractice litigants in discussing the voluntary use of binding arbitration. Some of the discussions were largely perfunctory with one party seeking general information on what arbitration might offer. Most discussions were more elaborate, but not always fruitful. There were numerous cases in which one party was seriously interested in arbitration only to have the other side, or a co-party, refuse the offer. In 19 cases, however, the discussions led to an agreement about the use of binding arbitration. The disputes ranged from relatively minor cases involving less than \$100,000 in damages, to two multi-million dollar disputes involving sharply contested issues of liability. These cases provide an overview of the inherent flexibility of the arbitration process; the parties in many cases developed unique approaches. For example, numerous approaches were developed for the selection of arbitrators. In no case were any arbitrators directly selected by one party; all arbitrators were "neutral" arbitrators even though, in most cases, the parties had significant input into who would be selected.

The nature of the decision-making process was also a point for creative thinking. In one case, in an effort to overcome what one party believed was an inherent tendency for arbitrators to reach

compromise awards, the agreement provided for the three arbitrators to deliberate separately and render separate awards. In two cases, the parties agreed to limit their use of adversarial experts in favor of neutral experts jointly paid for by the litigants.

The hearings were clearly far less lengthy than trials. On average, the hearings lasted one day or less; the longest was only two-and-a-half days. Moreover, the costs associated with the process were modest because quality arbitrators were available for a fee of between \$100 and \$125 per hour. The parties also were charged an administration fee of about \$500 per case to reflect our efforts in setting up the arbitrations and assisting the parties. This rate was subsidized by the grant from the Robert Wood Johnson Foundation.

These 19 arbitration cases were, of course, not randomly selected, thus no empirically-based conclusions can be drawn from the results. Nonetheless, some important points may still be made in reference to some of the assumptions about arbitration discussed above.

Included in the 19 cases were seven cases in which liability was at issue. In six cases, the defendant prevailed; in only one of the cases did the plaintiff clearly prevail. In one of these six cases, the liability issue was submitted to three arbitrators who returned separate decisions without deliberating. One of the three arbitrators returned an award finding liability and entered a small award for damages, but the other two found no liability. Does this indicate that arbitration is somehow biased against plaintiffs? In fact, this rate of plaintiff victory in contested liability cases is about the same as the plaintiff success rate in jury trial cases. Moreover, one must also consider the possibility of a selection bias. Some of the cases in this group appeared to be relatively weak cases where the plaintiffs' attorneys were willing to submit to arbitration rather than undergo the greater expense associated with a trial. My interpretation of the results in these cases is that it demonstrates that an arbitration

process employing neutral arbitrators can indeed make decisions on the merits and thereby avoid the "compromise" mentality that has led some to eschew the arbitration process. In most of these cases, I

attended all or part of the arbitration hearings and reviewed the relevant documents. In each case, based upon my own experience in the field of professional responsibility, my assessments matched the decision of the arbitrators.

The remaining 12 cases were "damages only" cases in which the parties submitted to the

arbitrators only the issue of damages. In most of these cases, the defendant did not expressly admit liability, but rather "accepted responsibility" for the injury. The fact that the issue turns only on damages does not always mean that no medical issues are presented. In many of these disputes, difficult causation issues remain. Typical is the question as to whether the plaintiff's injuries are a result of the negligence (which is assumed) or rather the natural consequence of the plaintiff's underlying illness. All but one of these cases involved a "high/low" agreement in which the parties established maximum and minimum recoveries to minimize the risk associated with overly generous or restrictive awards.

The results in these 12 cases clearly favored plaintiffs. Of the 12 cases, seven were close to or exceeded the "high" figure of the agreed upon "high/low" amount. The defendant clearly prevailed, defined as obtaining a result close to or below the "low" in the "high/low," in only three cases. Of these, two of the three defendant victories were in small stakes cases. As noted above, one of the concerns with arbitration is the perceived tendency of arbitrators to "split the difference." Such an effect was not noticeable in these awards. Only two of the 12 "damages only" awards were in the middle of the "high/low" award ranges. As a matter of policy, the Private Adjudication Center does not inform the arbitrators of the "high/low" agreements, thus ensuring that the arbitrators cannot

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intentionally chose to split the difference. These results lend some credence to the concern expressed by some malpractice insurers that arbitration may in fact not result in lower awards, although with reasonable "high/low" agreements, runaway awards can be prevented.

Collectively, these 19 cases demonstrate that if administered carefully, arbitration can be an efficient process. The average duration of the arbitrations was about six hours. In the damages-only cases, most of the cases were resolved following hearings that lasted four hours or less. Even in the most complex matter, the longest arbitration was two-and-a-half

days in a case in which the parties estimated that trial of the matter would have been a minimum of three weeks. Decisions in the cases were reached promptly, usually within two or three days of the arbitration hearing. No appeals were filed on any of the decisions; payments were usually made within a week of the receipt of the award.

Effective Arbitration: It is commonly argued that the key to effective protection of patient interests is the inclusion of various "consumer protection" provisions within arbitration clauses. Such clauses would require clear notice to patients about what rights they are waiving or would insist that arbitration clauses not be a condition of medical treatment or that they be revocable. In my view, such standard consumer protection add-ons are counterproductive. To the extent that they increase the transaction costs associated with entering into valid arbitration agreements, they primarily serve to deny the potential benefits associated with arbitration. More importantly, as one looks toward the future, the likely growth area of arbitration relates to managed care

providers who would agree up front with all patients within the organization to a set dispute resolution system. The key is not to significantly encumber the initial decision to employ arbitration, but rather to think more seriously about what elements will maximize the fairness and quality of the arbitration process.

If consumer protection measures of the type previously used are not appropriate, what should be done to ensure the quality of the arbitration program? As I have argued elsewhere with my colleague Clark Havighurst, the key is in providing statutory safeguards to ensure the quality of the arbitration procedure itself. On this point, the most impor-

tant factors are the neutrality and qualifications of the arbitrator. Also important is requiring that malpractice arbitrations be administered by a neutral entity that possesses appropriate expertise. Ideally, an ADR provider handling a complex matter such as the typical medical malpractice case should, at a minimum, have demonstrated expertise in administering ADR procedures; employ methods of selecting arbitrators that insure their neutrality and competence; disclose funding sources; and develop a set of appropriate procedures. Legislation to ensure such attributes (as opposed to limiting the use of arbitration) would be welcome as the type of a new generation of reforms needed to improve the situation.

What else should arbitration provide that would make it better suited to the malpractice context? Flexibility in administering malpractice arbitrations is a virtue. There is no one ideal length or approach. Rather, some degree of individualized design is appropriate for many malpractice disputes. Moreover, flexibility should also be encouraged to permit the parties to employ other ADR methods (perhaps most notably mediation) in appropriate cases.

Conclusion

Having researched both the litigation and arbitration processes in the malpractice context, I have become convinced that well designed and administered arbitration systems would provide several advantages over traditional litigation. The primary benefits include quality of the decision maker and speed of resolution, with its attendant potential reduction in litigation expenses. In expressing this preference, it is important to point out that the potential benefits accrue both to physicians and to claimants who often are unable to access the system because of its exceptionally

high administrative costs. A flexible arbitration program using other ADR methods in appropriate cases, qualified decision makers, and perhaps neutral experts would be as likely—and indeed in my view more likely—to generate reliable and consistent results at a significantly lower cost than the current system. ■

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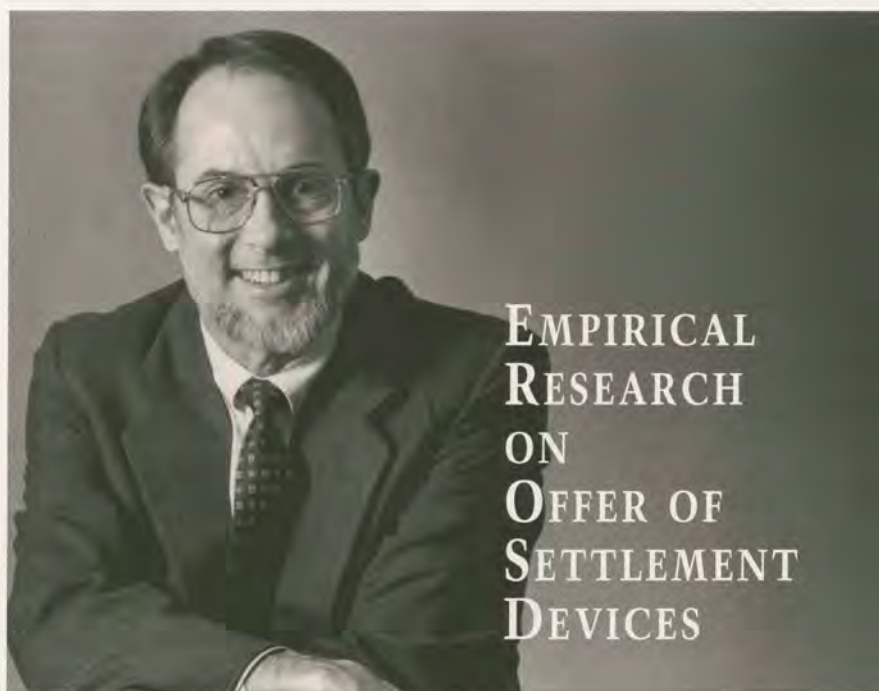
Proposals to modify Federal Rule of Civil Procedure 68 keep appearing in response to various perceived civil litigation problems. Such "offer of judgment" or "offer of settlement" rules provide for some consequence, such as the payment of a larger share of litigation costs, if a civil litigant does not accept an adversary's formal offer and then fails to improve on it (or come within a certain range) at trial. To the extent that the eventual judgment fairly reflects what had been the case's settlement value, such offer rules reward those who make—and punish those who reject—an offer that turns out to have been fair or more than fair.

settlements by eliciting reasonable offers early and giving offerees incentives to consider them seriously. Considerable theoretical work, however, has questioned some of these expectations,¹ and empirical evidence on the actual or likely effects of present and proposed offer rules has been scanty.

Whatever the theoretical reasons for doubt and the empirical information gaps, proposals for enhanced settlement offer devices have been coming increasingly thick and fast. In the early 1980s, around the time that the Advisory Committee on Civil Rules was proposing the major changes that greatly stiffened Federal Rule 11 on sanctions for party and attorney misconduct, it floated kindred but soon-abandoned drafts to amend Rule 68. One of these would have allowed sanctions in the form of attorney fee liability for those who forced needless litigation by rejecting an offer and failing to improve on it at trial. More recently the Advisory Committee informally circulated another possible revision of Rule 68, based on a 1992 proposal by the then Director of the Federal Judicial Center, Judge William Schwarzer.²

Using another variant, the Eastern District of Texas has incorporated into its Civil Justice Expense and Delay Reduction Plan a rule imposing limited post-offer attorney fee liability on a rejecting offeree if "the final judgment in the case is of more benefit to the party who made the offer by 10 percent." Just last year, acting to implement the Contract with America, the House of Representatives included in the "Attorney Accountability Act of 1995" a fee-shifting offer of settlement device that would apply in all federal diversity actions except to claims seeking equitable relief. And most recently the American Bar Association, abandoning its long-standing total opposition to "loser-pays" attorney fee shifting proposals, narrowly supported yet another form of offer device that would contain several limits but still let either side make offers that could entitle it to recover attorney fees.³

We cannot hope to do laboratory or field testing on all these variants, but we have tried to run realistic empirical simulations to test some of the expected effects of enhanced offer rules. After an



EMPIRICAL RESEARCH ON OFFER OF SETTLEMENT DEVICES

Professor Thomas D. Rowe, Jr. is senior associate dean for academic affairs at Duke Law School. His co-author **David A. Anderson** is assistant professor of economics at Centre College. They began working together while Anderson was a doctoral student in economics at Duke.

Rule 68 has had limited use and effectiveness, though, because it usually affects liability for only non-fee "costs" and not attorney fees, which are commonly much the largest item of litigation expenses. It also has been available to defendants only, to reverse or arrest cost or fee entitlements that would otherwise run to plaintiffs. Consequently the most frequent type of proposal to add teeth to existing Rule 68 would make it available to plaintiffs and defendants alike and would have it affect, as it usually does not now, liability or entitlement to post-offer attorney fees. A widely shared hope and expectation for such changes is that they would encourage more, earlier, and fairer

initial round of experimentation using student subjects and paper questionnaires that was reported in an article by Professors Rowe and Vidmar some years ago in *Law & Contemporary Problems*,⁴ we have moved on to the novel device of computer simulations of litigation situations administered to practicing lawyers. In this effort we have received invaluable help from the American Inns of Court Foundation and the Dispute Resolution Committee of the North Carolina Bar Association, which provided endorsement and access to their members. The subjects bring up our program on a computer screen, give some data about themselves, and read about a hypothetical but realistic litigation situation, in which they are cast in the role of plaintiff's or defense counsel. They are then asked about their evaluation of the case and how they would advise their clients in making and responding to settlement offers under different types of formal offer rules. The answers are recorded by the program and can be loaded directly into a database for statistical analysis along with other responses. This use of modern technology brings a new and as yet little-exploited tool to empirical legal research.

We ran two different simulations, one based on a tort scenario and using an offer rule somewhat like that in the House's Contract with America bill—each side could trigger possible attorney fee liability if it made a formal offer that was rejected and not improved on at trial. Exploiting the versatility of the computer-simulation tool, we included in this first simulation an unconventional rule that, in theory, destroys imbalance in bargaining positions and assures settlement near the level of the expected jury award. Under this variation an offeror, instead of gaining a possible favorable fee shift from an adversary's rejection of an offer and failure to do better, would be *liable* for the reasonable post-offer fees of a rejecting offeree, whatever the result of trial. The method behind what may at first sound like the madness of this approach is that offers would have to be good enough to be highly likely to be accepted, yet could still be worth making because the offeror would benefit from the savings of not going to trial. And even offerees who would have a free ride should not turn down good offers, because they

would be unlikely to net better at trial. Because of these incentives we nicknamed this variation the Sincerity or Godfather Rule—you'd better be sincere and make an offer that's too good to refuse.

Our second simulation tested a type of rule that very much exists in the real world of federal civil rights litigation: a defendant, otherwise liable for all of plaintiff's reasonable attorney fees, may make an offer that if rejected and not improved on will eliminate the defendant's liability for the plaintiff's post-offer fees. A possible variant, not used in practice, could go beyond stopping the clock on plaintiff's fees and make the plaintiff liable for post-offer defense fees. In both these simulations we were testing hypotheses about likely impact of offer rules, looking for what effects they actually seemed to have on the likelihood that litigants would be more or less likely to accept offers, what they would recommend by way of counter-offers, and so on. Some of the data we collected also enable us to look at other interesting matters aside from the working of offer rules themselves, such as apparent degrees of attorneys' optimism in evaluating a case.

We will try to describe each simulation and its results as concisely as we can, and we will spare our readers here the equations and statistical analysis.⁵ The first simulation used a typical auto tort scenario and tested three possible types of offer rules—none, a fee-shifting version under which either side can make Rule 68 offers, and the "Sincerity Rule." The respondents were practitioner members of American Inns of Court with the inns selected for geographical dispersion, practitioner members of the North Carolina Bar Association's Dispute Resolution Committee, and some upperclass law students. The simulation assigned the practitioners to the side they said they usually represented in real life, and practitioners with no predominant side plus all the students to the plaintiffs' side. We ran our data with and without the students so as to avoid possible systematic bias from the students' inexperience. Students tended to say they would demand somewhat higher settlements than practitioners but in other respects did not affect the results. The program gave subjects the facts of the tort case and data on awards in compar-

able cases taken from actual jury verdict reports.

Once subjects had read this part, the program asked them to estimate an expected jury award and also to state likelihoods that the result would reach various dollar levels. These two different ways of evaluating the same case permit a comparison of whether the subjects systematically varied depending on the estimation technique they were asked to use. The program then asked for what their bottom line would be if no offer rule were in the picture, and followed by injecting a fee-affecting Rule 68 and asking whether they would recommend acceptance of offers \$1,000, \$2,000, \$4,000, \$6,000, and \$8,000 worse than what they had said was their bottom line. This key aspect of the simulation sought to test whether the offer device made parties more likely to accept settlement offers inferior to what they had said they would insist upon, with consequent increases in the likelihood of settlement. Moving on to the "Sincerity Rule" to test the hypothesis that plaintiffs would accept defense offers greater than or equal to the expected jury award, the program made offers under the rule for amounts equal to, and \$1,000 and \$3,000 more and less than, the expected award.

The results indicated that offer rules did have some impact on subjects' willingness to recommend acceptance of offers worse than what they had said was their bottom line. With the case evaluation averaging about \$25,000, 62 percent of plaintiffs'-side respondents and 91 percent of those on the defense side said they would recommend acceptance of an offer \$1,000 worse than their bottom line. Those numbers declined to 42 percent and 61 percent for offers \$2,000 worse, and 21 percent and 39 percent for offers that were \$4,000 worse. This result, showing fairly rapidly decreasing but still notable rates of recommended acceptance of significantly less favorable offers, suggests some modest effect for this form of enhanced Rule 68 on settlement rates. More troubling, though, this effect could come at the cost of giving considerable impact to "low-ball" settlement offers, playing on an adversary's risk aversion to force a settlement favorable to the offeror. As for the Sincerity or "Godfather" Rule, it elicited

responses more or less as expected—recommended acceptance rates well above 50 percent for offers equal to or more favorable than the expected verdict, but dropping below 50 percent when offers became inferior to the expected verdict. Thus the Sincerity Rule showed promise not only for inducing settlement, but for doing so in ways that might limit the effects of unequal bargaining power and reduce unfairness by encouraging settlements not just at any level but at amounts close to the expected result of trial.

Undue optimism on the part of either side makes settlement less likely, and we took advantage of the simulation's expected-verdict questions to compare the verdicts expected by plaintiffs' and defense sides as a measure of optimism based on their position. With both sides given identical information, the mean stated expectation for plaintiffs' lawyers was more than \$2,000 above that for defense counsel. By contrast, the figures for likely result based on estimates the subjects gave of probabilities of verdicts at various levels differed by less than \$1,000. The greater difference when subjects gave just a single figure for expected verdict suggests the presence of some degree of settlement-inhibiting optimism in a common way that attorneys evaluate cases—and the importance of litigation devices aimed at inducing realism.

Such optimism may be offset, though, by risk aversion—a tendency to avoid the

risk of down-side outcomes. Recommending acceptance of Sincerity Rule offers that are inferior to the expected award is a sign of risk aversion, because offerees have the prospect of a free ride at trial with fees paid by the offeror. Substantial minorities showed risk aversion by this measure, which could translate into some impact of increased settlement likelihoods under the more conventional form of enhanced offer rule.

In our second simulation, the scenario involved a federal civil rights damage suit by the victims of a mistaken-address drug bust. In such cases prevailing plaintiffs are entitled to attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976; but it is now settled as a matter of interpretation of present Federal Rule 68 that a rejected but unbeaten defense offer stops the clock on plaintiffs' fee entitlement—yet ordinarily without making the plaintiff liable for the defendant's post-offer fees. As in the tort scenario, the program gave subjects the facts and sample verdicts from comparable cases, and asked for recommended bottom lines. The simulation then described three possible alternative applications of Rule 68 to a civil rights suit: that an offer would affect only non-fee "costs" of litigation, that it would stop the clock on defense liability for plaintiffs' attorney fees, and that it could go further and threaten the plaintiff with liability for defense fees.

The main results from this second scenario were that plaintiffs' demands moderated slightly under the costs-only and clock-stopping version of Rule 68, but considerably under the stiff liability-reversing version. At the same time defense offers became not less but somewhat more favorable to plaintiffs as rule impact increased. The logic to this opening of the purse strings could be that the prospect of greater gain from not having to pay plaintiffs' post-offer fees, or from even recovering the defense's own fees, is attractive enough to elicit more generous offers. If this effect were to appear regularly, the stiff version of Rule 68 with its definite demand-moderation impact on plaintiffs and its possible offer-improving effect on defendants might considerably increase the likelihood of settlement. The evaluative question that remains, of course, is whether such an impact on settlement rates would be worth the threat of making often impecunious civil rights plaintiffs liable for defense fees, with the effects that would likely have on the pursuit of civil rights claims in the first place.

On the one hand, the results we have reported are tentative and modest. On the other hand, these results do permit us to say to advocates and critics of offer rules that they should not be too sure that changing offer rules to affect attorney fee liability will have a strong impact, for good or ill, on settlement-offer and -demand levels and on settlement rates.

With less pronounced changes than the polar shift from plaintiff to defendant fee entitlement, our results indicate that enhanced versions of Rule 68 might still have some settlement-encouraging effect, yet it appears likely to be modest. If that is so, the moderating features of such versions as the Schwarzer and ABA proposals would be likely to dampen still further the incentive effects of the offer device. With the uncertainty that remains undispelled after the theoretical debates and our empirical efforts, moderate proposals might be the best way to start. Larger-scale experience with such provisions could replace our small-scale experiments as a basis for debate and decision on reforming Rule 68. ■

1 The main reasons for questioning whether and how much enhanced offer devices will succeed in encouraging settlements are that they might not remove the general impediments to settlement from the parties' disagreement over the likely outcome of trial or from bargaining impasse over how to divide the savings from not going to trial. There also can be a "dig-in" effect making settlement harder to reach after a rejected offer because the offeror expects the likely trial outcome to be more favorable as a result of the offer, perhaps by more than the offer worsens a relatively optimistic adversary's expected yield from trial. In short, although formal offers might smoke out realistic offers early and get settlement in cases that are likely to settle anyway, the making and rejection of an offer might push the parties further apart than before and leave them with less reason to be forthcoming in later settlement negotiations.

2 William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 *Judicature* 147 (1992). The central feature of the Schwarzer proposal and of the draft considered by the Advisory Committee is a "capped-benefit-of-the-judgment" formula for reckoning attorney fee liability. Rather than being liable for all of an adversary's reasonable post-expiration-of-offer fees, a party who rejected and did not improve on an offer would ordinarily owe the amount of such fees minus the difference between the offer and the judgment, limited by the total amount of the judgment. The limit to the total amount of the judgment would keep winning plaintiffs from going into the hole, and would save defendants who lose modest judgments from having to pay large plaintiffs' attorney fees. Deducting the offer-judgment difference from post-offer fees would reduce total fee liability and give offerors the net outcome they had been willing to accept as shown by their offer.

3 See Henry J. Reske, *ABA Won't Endorse Fee Shifting, but OKs Model*, A.B.A. J., Apr. 1996, at 34. A key element of this ABA model is a 25 percent buffer that would shield from fee liability plaintiffs who recover more than 75 percent of the rejected defense offer, and defendants who are held liable for no more than 125 percent of a plaintiff's rejected offer.

4 Thomas D. Rowe, Jr., with Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51:4 *Law & Contemp. Probs.* 13 (Autumn 1988).

5 Full reports on our experiments and their results appear in two articles, David A. Anderson & Thomas D. Rowe, Jr., *Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?*, 71 *Chi.-Kent L. Rev.* 517 (1996), and Thomas D. Rowe, Jr. and David A. Anderson, *One-Way Fee-Shifting Statutes and Offer of Judgment Rules: An Experiment*, 36 *Jurimetrics J.* 255 (1996).

THE PRIVATE ADJUDICATION CENTER AT DUKE



René Stemple Ellis '86,
Executive Director,
Private Adjudication
Center

In 1983, members of the Law School faculty began discussions about the inefficiencies frequently faced by litigants in civil disputes and the burdens faced by courts in their attempts to process and advance cases to a just resolution. It was the expressed desire that one or more state or federal courts might enter a cooperative effort with a law school affiliate organization to provide a laboratory for research on more efficient methods of judicial administration.

This distinction sets the Private Adjudication Center apart from other organizations involved in dispute resolution. It also relates to its focus on the investigation of private adjudication processes that might be more efficient than the traditional system, but that adhere to fundamental legal principles. This early discussion continued with Carmon J. Stuart '38 (former clerk of court for the U.S. District Court in the Middle District of North Carolina), other friends of the Law School, and with federal judges in the U.S. District Court in Greensboro. The discussion centered on the idea of court annexed arbitration of civil cases, an idea that was considered somewhat novel at the time. The court favored the concept and was interested in cooperating with the Center.

According to its Articles of Incorporation, the Private Adjudication Center's purpose is to improve the administration of private law by studying and providing alternative means of dispute resolution in lieu of traditional judicial routes. The Center also provides instruction to Duke law students and wider audiences in the arts and skills of settlement and private adjudication. The Center develops and presents continuing legal education programs and publishes articles setting forth the results and conclusions of its studies. Its purpose also is to improve the administration of private law by exploring an alternative means of dispute resolution which will be efficient yet faithful to controlling law.

The first purpose of the Center identifies the means by which the administration of private law might be improved, that is by exploring "alternative means of dispute resolution." This requires that the Center involve itself in opportunities to create processes and procedures that are

more efficient than the traditional litigation system. The Center must compare and contrast cases that are adjudicated through some alternative procedure to those that continue through the traditional court system. To this end, the Center engages in alternative dispute resolution (ADR) programs, over which it has a great deal of control, that are designed to test the merits of new and innovative procedures.

One of the Center's earlier opportunities to critically examine a dispute resolution program was its administration of a court annexed arbitration program for the Middle District of North Carolina. The U.S. District Court entrusted court annexed arbitration to the Center on an experimental basis for two and one-half years in a program described more fully below. Cases that are processed by the Center are clinical laboratories for the study of methodologies for improving the administration of private law—each is an independent educational endeavor. Providing private adjudication services is a central element of the Center's education and research goals by providing on-site observation opportunities. One criterion used to determine whether a case is appropriate for the Center is directly related to its educational function: Will the Center learn something from the experience that might be helpful in identifying ways of improving the administration of justice?

The other purposes identified in the Articles are to provide instruction to Law School students, and to a wider audience, in the arts of settlement and private adjudication; to pursue inquiry into effective procedures for resolving disputes regarding the application of private law; and to disseminate knowledge derived from research and application of private adjudication through publication and continuing education.

In a typical ADR process there are educational events at every step—from procedure design, through the process itself, to post-hearing study.

Designing a dispute resolution process appropriate in a specific case or group of cases involves an understanding of the choices for developing an alternative procedure. The Center spends a significant amount of time educating practitioners about the details and options available.

There are many dispute resolution procedures, ranging from the negotiation model to the summary jury trial, including arbitration, mediation, mini-trials, med-arb, ombudspersons, early neutral evaluation, and other hybrid processes. This design phase is a learning experience for the parties to a dispute, their lawyers, and the Center personnel assigned to negotiate and develop the process. In some cases, law students have been observers during this stage. This opportunity allows the Center to control the process in a manner conducive to further study and dissemination of information.

Once a procedure has been designed an opportunity is created for all who are involved to learn about more efficient methods of dispute resolution. It is through this critical observation that data is collected by the Center for study and analysis.

The Center attempts to study the ADR processes and report its findings. It carries out this evaluative component by following each procedure with evaluation forms, interviews, and follow-up study. From the efforts involved in dispute resolution design and administration, the Center makes significant contributions to the body of knowledge available about conflict resolution.

Educational Programs

The Center has sponsored major conferences over the years, including a 1988 conference on empirical studies of civil procedure. In 1989, the Center co-hosted a conference with the Law School and the Torts and Insurance Practice section of the American Bar Association, the Association of Trial Lawyers of America, and the Defense Research Institute on the settlement of mass torts.

The Center sponsored a 1992 conference on international civil procedure. The papers, published in *Law & Contemporary Problems*, were presented under the auspices of the Hague Conference on Private International Law, by the Center and the ABA Section on Litigation. They address the efforts of the Hague Conference to facilitate litigation across international boundaries. In 1994, the Center sponsored a conference on international commercial arbitration.

More recent educational efforts of the Center include development of in-house continuing legal education programs. A partial list of the program topics includes ADR Basics, ADR and Mediation in Employment Cases, Construction Cases, Medical Malpractice Cases, and Bankruptcy, Dispute Resolution in Mass Torts, Ethics Issues in Mediation, Early Neutral Evaluation, and short courses in mediation and negotiation.

The Center also is training lawyer mediators in the N.C. Superior Court Mediated Settlement Conference Program. The comprehensive 40-hour training program is certified by the Administrative Office of the Courts. The Center offers these programs with David Strawn, president of Dispute Management Incorporated, a former judge, and active mediator. The faculty includes Private Adjudication Center mediators Robert A. Beason as lead trainer, J. Dickson Phillips, III, professor Thomas Metzloff, and Center executive director René Ellis. The training programs are scheduled every three months.

Programs for the Judiciary

Another component of the Center's continuing education mission is to contribute to the effective administration of justice by enhancing the education and information available to the judiciary. The Center has offered a series of three educational programs for state and federal judges, sometimes referred to as "Judging Science" seminars. The Center develops educational programs to improve the capacity of state and federal judges to deal with the concepts, theories, data, and personnel of science, and to apply these insights in contexts that are often significant for the outcome of litigation.

The seminars have helped judges learn enough about scientific concepts, methods, theories, and data to distinguish acceptable scientific evidence from unacceptable "junk science." A related objective is to improve judges' awareness of resources available to assist them in understanding and utilizing the materials of science in litigated disputes involving serious scientific issues.

Additional aims of the programs are to test a revised curriculum that, when fully refined, will serve as a model for use by

other institutions, judicial and academic, and to develop a trained cadre of instructors who can serve as faculty or discussion leaders in similar programs. Four programs were conducted between 1991 and 1996. Twenty state and federal judges attended each seminar.

With the support of the Smith Richardson Foundation and the Federal Judicial Center, a superb faculty assembled by the Center presented 24 hours of high quality education for the 1995 program. The program included lectures on statistical, survey, medical, economic, epidemiological, and DNA evidence, including an intensive analysis of the court's gatekeeping function governing the admissibility of the scientific evidence under the U.S. Supreme Court's *Daubert* decision and related authorities. Participants evaluated the seminar as contributing significantly to their understanding of scientific and technical evidence.

The Center's interest in promoting a better understanding and resolution of issues involving scientific and technical subjects was furthered by the establishment of an Advisory Committee to assist in the implementation of a certification program for scientific and technical experts. The program aims to aid public and private adjudication by assisting courts, private adjudicators, and parties in obtaining scientific and technical experts who are committed to a code of conduct that eschews conflicts of interest and requires expert assistance based upon competence, objectivity, fairness and impartiality. Again with the generous support of the Smith Richardson Foundation, a planning conference to discuss this proposed certification program was held in September 1995.

The Center has developed a grant proposal to present a seminar on judicial responsibility to invited state and federal judges. This seminar will focus on issues involving judicial ethics, judicial handling of courtroom misconduct by attorneys, independence and accountability of judges, the duty of recusal, the duty to avoid *ex parte* communications, judges' freedom of speech, issues confronting judges in sensational trials, management of public institutions, sanctioning improper conduct, and involvement in the settlement process.

This proposed seminar was modeled after a successful seminar presented to Duke law students by Judge Gerald Wetherington, the Center's 1994-95 acting president, Metzloff, and Federal District Judge William Hoever of the Southern District of Florida.

Research Opportunities

The Center is seeking foundation funding to study the effectiveness of ADR procedures for adjudicating or otherwise settling liability questions that arise between health care providers and their patients or between organized health plans and their enrollees. Specific procedures will be developed to resolve, in particular, claims of professional malpractice or corporate negligence, and disputes concerning the obligation of a health plan to cover a particular procedure or treatment.

The Center's specific goals in designing and implementing such procedures will be as follows:

- to develop a comprehensive ADR program offering standard procedures tailored for the accurate and expeditious resolution for particular classes of disputes, as well as optional alternative procedures;
- to assist selected entities (including organized health plans and one or more liability insurers) in utilizing the Center's program to resolve liability issues;
- to identify reasons why health plans, providers, and counsel for various parties might resist the use of ADR to resolve malpractice disputes and to take appropriate steps to overcome such resistance;

- to work with HMOs, insurance regulators, and others to overcome regulatory and other legal obstacles to arbitration and to ADR clauses in HMO and other contracts;
- to design an innovative ADR procedure that can serve as part of a larger process, by which an organized health plan, an ERISA plan administrator, or a health insurer makes difficult coverage determinations in areas of medical uncertainty;
- to operate the comprehensive ADR program for at least three years, improving it in accordance with insights gained in its operation;
- to use social science research methods to evaluate experience under the program both concurrently and upon completion of the project.

Court-Annexed Arbitration Program

The first major program undertaken by the Center was contributing research, drafting rules and procedures, and providing guidance to the U.S. District Court for the Middle District of North Carolina in designing a program for court annexed arbitration of pending civil cases and later co-managing the program with the clerk's office personnel. This program was the first of its kind in the southeast and one of 10 pilot programs in the nation. It was recognized as a success by a district-wide advisory committee and in an extensive published study conducted by the Rand Corporation.

The program was co-administered with the Court under the leadership of Carmon Stuart, the Center's then-vice president for adjudication services. Stuart now serves as the vice chairperson of the board of directors.

The Dalkon Shield Claimants Trust Arbitration Programs

In 1991, the Center successfully secured a contract approved by the U.S. District Court for the Eastern District of Virginia and the U.S. Bankruptcy Court to administer arbitration programs for the Dalkon Shield Claimants Trust. U.S. District Judge Robert R. Merhige, Jr. retained jurisdiction over the case and jointly decides matters with bankruptcy Judge Blackwell N. Shelley. The A.H. Robins Company's bankruptcy plan of reorganization implicated hundreds of thousands of tort claims which are "inherently judicial" matters within the sole authority of Article III federal judges. (A brief history of the Dalkon Shield and the Chapter 11 case is set forth in *In re A.H. Robins Co.*, 880 F.2d 709, 711-22 (4th Cir.), *cert.denied sub nom. Anderson v. Aetna Casualty & Surety Co.*, 493 U.S. 959 (1989).

The bankruptcy plan discharged the debtor, the A.H. Robins Company. It released the Robins family, company officials, insurers, and doctors or health care providers who otherwise could have been sued for malpractice on claims arising out of the insertion, removal, or use of the Dalkon Shield by permanently enjoining claims against them. The plan authorized the court to appoint five trustees to carry out the plan, and Merhige supervises their activities. The plan provided the format for setting up the claims resolution process and arbitration programs.

The Center developed a training program to provide the expertise necessary for the Dalkon arbitrators to carry out their responsibilities in an effective and efficient manner. The six-hour training session consisted of basic training in obstetrics/gynecology and epidemiology relevant to the Dalkon Shield arbitration program, in addition to the rules and philosophy of the arbitration program. Experts were recruited from the Centers for Disease Control and Duke University Medical Center to assist with the training that was later produced on video tape.

The Center has administered over 2,000 arbitrations nationally and internationally for the Dalkon program. To date hearings have been held in Australia, England, Holland, Sweden, Puerto Rico, and Canada.



Professor Neil Vidmar leads a session for the PAC.



Silicone Gel Breast Implant Orientation Program

The Center was requested to play a major role in assisting the U.S. District Court for the Northern District of Alabama in its effort to help claimants understand their rights and options under the revised settlement program being offered by four participating defendants in the Silicone Gel Breast Implant Litigation. Under the leadership of professor Francis McGovern, University of Alabama School of Law and Special Master in the litigation, the Center began its coordination effort with a planning meeting in Washington, D.C. on December 14, 1995.

Participants at the planning meeting included Judge Sam C. Pointer, Jr., Chief Judge of the Northern District of Alabama; Judge Ann Cochran, Administrator of the Claims Office; McGovern; key lawyers from the plaintiff's steering committee; key lawyers for the defendants; and Ellis of the Private Adjudication Center. The agenda focused on the best design for a comprehensive program to educate claimants about the revised settlement program. The goal was to have the program ready to serve claimants by February 1, about two weeks after the program notice was mailed to over 350,000 potential claimants.

Planners decided that public information meetings held in major metropolitan cities with high claimant concentrations might be an effective way to orient claimants. Another major task was identifying persons qualified to educate the claimants,



PAC attorney – mediator Robert A. Beason, at far left, leads a mediation training session.

and deciding how best to train the trainers. The Center recruited 20 well-qualified lawyers who were also dispute resolution professionals to facilitate the regional meetings.

To design the structure of the regional meetings, pilot sessions were scheduled in Memphis and Atlanta with invited audiences. The hope was that the pilot sessions would provide information for planning the actual claimant meetings. In addition, a training session was held for the facilitators in Memphis in conjunction with a meeting of the Silicone Gel Breast Implant Litigation Subcommittee of the Mass Tort Litigation Committee of the Conference of State Supreme Court Chief Justices. The goals of the training included both assisting the facilitators in their assimilation of the details of the revised settlement program and designing a structure for the presentations in the regional meetings. The training effort also included a day at the claims office in Houston for each facilitator to answer the telephones and respond to questions from claimants.

Regional information meetings were scheduled for two hours in length. The content consisted of a video recording of a Court TV program, which had aired on January 24, 1996, and featured Pointer and Cochran, along with Leslie Bryan, lawyer for the plaintiff's steering committee, and Linda Willett, lawyer for Bristol-Meyers. The Court TV program explained the forms and notices and the rights and options of implant recipients. Facilitators presented a brief overview of the materials and invited questions from the attendees after the Court TV video was shown.

Claimants were notified about the meetings through an 800 number (included in a packet of information mailed to them in January) that contained a com-

plete schedule of the meetings. The meetings were scheduled in 27 cities across the country during a series of four-day weekends in February. The Center initially scheduled over 450 sessions. After each weekend, the Center compiled reports. Although the number of attendees was significantly lower than anticipated, those who attended the meetings seemed satisfied with the content.

Fibreboard Interim Arbitration Program

The Interim Committee of the Fibreboard Asbestos Trust selected the Center to administer an arbitration program for indigent and exigent claims prior to the approval of a global settlement. The Center's role is to appoint arbitrators, pursuant to a random selection procedure established by the Interim Committee, and coordinate the scheduling and location for the arbitrations.

IN SUMMARY, the Center has had, and continues to have, a pioneering and significant role in the changing legal landscape. Its officers, directors, and the Law School view its future as rich with opportunities for creative public service. Thus it has made, and is poised to make truly significant contributions to the education of students, the practicing bar and to society generally in the delivery of civil justice.



The Private Adjudication Center offers mediation certification training. In conjunction with Dispute Management, Inc., the PAC will offer training in November at Duke's R. David Thomas Center. For information, call 1-800-DUKE-PAC or 1-800-385-3722.

Paul Carrington, Harry R. Chadwick, Sr. Professor of Law, looks and acts the part of the traditional professor. He wears suits and bow ties to class and uses a desktop lectern. He teaches what the uninitiated might consider the driest of subjects—civil procedure, a course of technical rules with great potential for confusion. So Carrington's first-year students are jolted when, in the midst of

establishing new programs and founding the Private Adjudication Center.

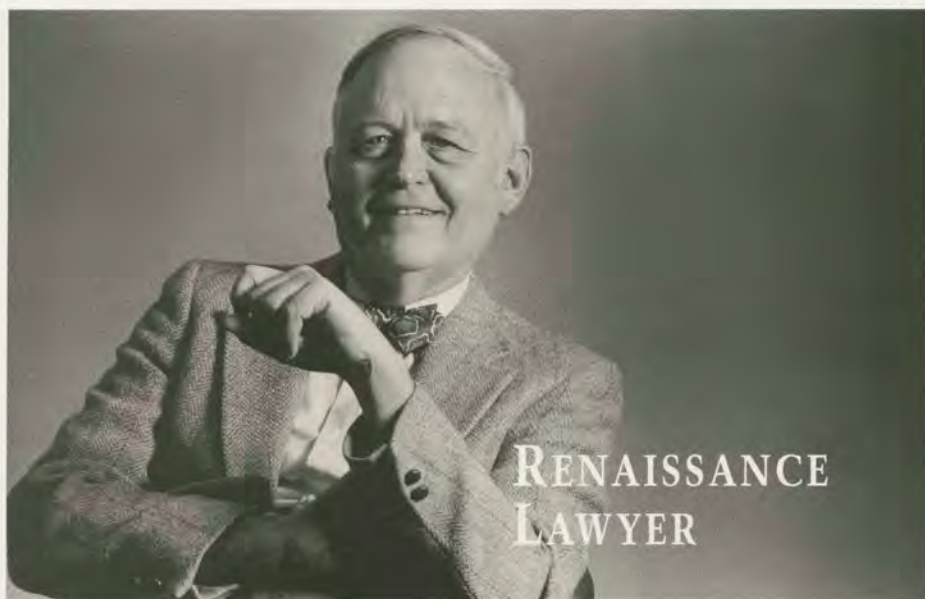
The Civ Pro Foundation

Practitioners might come to view civil procedure as a weapon of litigation, a set of rules in which to ensnare one's opponent. But Carrington introduces first-year students to the philosophies and constitutional principles behind the rules. "I like to begin the course by reviewing the constitutional elements of civil procedure, the constitutional law of civil procedure in state courts, our basic values," Carrington explains. In his class, "due process" is not just a buzzword; it is a concept that is thoroughly explored. How much process is due when the state aims to terminate parental rights or welfare benefits? When does one have a right to a jury trial? How should controversies be adjudicated so that rights are preserved? These questions formed the foundation of Carrington's highly successful civil procedure casebook. First published in 1969, the book has been through three editions and used by dozens of law professors around the country.

The one civil procedure class that never uses his casebook is his own. For his students, Carrington assembles a fresh set of course materials every summer, logging onto LEXIS and combing through the previous year's legal developments. His students receive a three-inch stack of the most recent Supreme Court decisions adjudicating rights and interpreting the rules of civil procedure.

Scholar of the Law School

But Carrington is not just a scholar in the Law School; he is a scholar *of* the Law School. A great portion of his intellectual energy has been directed toward critically examining legal education. In the late 1960s and early 1970s he directed a law curriculum study for the Association of American Law Schools. His report, "Training for the Public Pro-



Paul D. Carrington,
Harry R.
Chadwick, Sr.
Professor of Law
and former dean

explaining how a plaintiff in New York may sue a defendant in Connecticut, he turns to the chalkboard and draws swift, perfect outlines of New York and Connecticut. Word has it he can draw every state in the union freehand.

Impromptu graphic design is just one of Carrington's many talents. An innovative teacher, he has guided several thousand students down the twisting paths of civil procedure, illuminating their constitutional underpinnings. A prolific scholar, he has authored an influential casebook and chronicled the history of American legal education. And as dean of Duke Law School from 1978 to 1988, he guided Duke during a critical 10-year period of growing national and international prominence,

fessions of the Law," was called "a provocative analysis of legal education." More recently, he researched the history of legal education in the United States. In each of the past few years, he has written several articles on the subject, which he hopes to compile into a book. He has already completed a book-length manuscript on Thomas Cooley, the former dean of Michigan Law School and Chief Justice of Michigan's Supreme Court.

But Carrington's best opportunity to scrutinize legal education was his 10 years at the helm of Duke Law School. When he assumed the deanship in 1978, he was a tenured professor at one of the country's most prestigious law schools, the University of Michigan. As professor William Van Alstyne put it, "Paul was by far the Duke faculty's first preference for dean, but we were caught in the usual paradox of such things: the sort of person one most often desires to attract as one's dean is very often the same person already enthusiastically engaged, and therefore least likely to want to respond." But Carrington did respond, despite the increased workload and decreased time for academic pursuits. "The costs [of being dean] were much less for me than for others," Carrington insists, "because it was my own interest."

"Paul Carrington was incredibly creative about ideas for the institution to change and grow, during a time of great stimulation and ferment," says current Dean Pamela B. Gann. For example, in a time when the law was awakening to the interdisciplinary nature of many legal problems, many law schools recruited faculty with doctorate degrees. "But Paul did not want to skew our faculty to be another arts and sciences faculty," Gann states. "Instead, he used the joint appointment process, where scholars would have a primary home that was not in the Law School. This added to our ability to do legal theory, jurisprudence, social science applications, without tilting the faculty toward the arts and sciences," Gann explains. "It's a balancing

act. He defined the problem, created a solution, and pursued it, and it sustains us to this day." Under Carrington's plan, academic stars like historians John Hope Franklin and William Leuchtenburg, English professor Stanley Fish, political scientist Peter Fish, and philosopher Martin Golding enriched the Law School curriculum with cross-disciplinary courses.

Carrington's ideas shaped the student body as well as the faculty. "The summer-entering class was his idea," Gann notes. Though other schools had held summer sessions, Duke was the first to start a portion of its first-year class in the summer. Because each summer-entering student pursues one of a dozen joint degrees, the summer class uniquely comprises students with diverse intellectual backgrounds.

Carrington also is responsible for the high number of international students at Duke. Duke's LLM program for foreign lawyers, established during Carrington's deanship, enrolls young attorneys from around the world in a year-long American law curriculum. Students take first-year courses as well as upper-level, business-oriented courses.

The three-year JD program also is open to international students. One of Carrington's legacies is a list of 30 alumni from mainland China with Duke JDs. "Our close relationship with China is 100 percent credited to him," declares Gann.

While students from Europe had attended Duke Law School in the past, in the 1970s and '80s political and financial difficulties hampered efforts to attract Asian students. Duke's most famous alumnus, the late President of the United States, Richard Nixon '37, eased the political difficulties in bringing the first student from China in 1980. And Carrington and others in

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the administration solicited financial support for the students from American law firms.

Other international innovations during Carrington's deanship include adding an associate dean for international studies, Judith Horowitz; founding the JD/LLM program for American students; and establishing visiting scholar relationships with legal scholars from abroad.

"Internationalization occurred on my watch, but I don't take credit for it," Carrington insists. "Opportunities came along, people started applying. My own interest was opportunistic. If there's an opportunity, let's do it."

One such opportunity came all the way from Anchorage, Alaska. In 1983, Duke's faculty was considering establishing a third law journal to join the *Duke Law Journal* and *Law & Contemporary Problems*. At the same time, the Alaska Bar Association was seeking a law school to publish its law journal. Because there are no law schools in Alaska, the bar had no natural forum for scholarly analysis of Alaska's unique legal issues. So Duke joined several other law schools in a competitive bidding process. Carrington and Walter Dellinger, Duke law professor now on leave at the U.S. Department of Justice, drafted a proposal, and Carrington flew to Anchorage to present Duke's proposal to the Bar Association personally. The contract was awarded, and the Law School has maintained this unique tie to Alaska ever since.

ADR Pioneer

A substantial portion of Carrington's legacy is the Private Adjudication Center (PAC). When Carrington first arrived at Duke, its involvement with a legal aid clinic had waned, and it had no formal public service commitments. Carrington strongly desired some public service involvement for the Law School. "We have a public service responsibility as an institution, as well as individuals," he declares. He combined this desire with his career-long interest in adjudicating

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rights, and devised the PAC. An affiliate of the Law School, the PAC was created as a laboratory for teaching, research, and direct service in the area of conflict resolution. "It was an attempt at law reform, to learn how to enforce rights," Carrington says.

Gann considers establishment of the PAC one of Carrington's greatest innovations. "This was the first adjudication center that was an affiliate with a law school at a research university," she says. "Just as medical schools run hospitals and deliver patient care, this was a direct service delivery system."

A member of the PAC's executive committee and board of directors since 1983, Carrington took a turn as executive director in 1988, and is currently chairman of the board.

"He's been a true leader," says René Stemple Ellis '86, PAC executive director. "He guided the Center through its growing pains and helped it blossom into what it is today. He has contributed literally thousands of hours to the Center with no compensation."

Most recently, Carrington has organized conferences on international commercial arbitration and on dispute resolution programs in Pacific Rim nations. He also has promoted more efficient judicial administration through the PAC's initiative to educate judges on scientific evidence and expert witnesses.

Despite his involvement with the PAC, Carrington does not view alternative dispute resolution [ADR] as the best way to resolve most conflicts. "I'm a skeptic about ADR," he proclaims. "I think it is in danger of being overused, and it will have negative secondary impacts. It is the law of unintended consequences: Put in an ordinary quota of greed and mendacity, and you don't know what the consequences will be."

Carrington cautions that mediation between parties with unequal bargaining power risks unfairness, especially when it is mandated by the courts. The weaker party ends up waiving the constitutional protections available in the courts. He cites a study showing that divorcing mothers receive lower sums from mediation than litigation. "Divorcing mothers

are most anxious about custody," he says, so their keen desire to keep their children can cause them to bargain away property or money. "There is a romantic element in the ADR movement that the lion will lie down with the lamb," Carrington smiles. "The fact is, without some protection, the lion will eat the lamb."

Ellis credits Carrington with influencing the PAC's approach so that it "uses dispute resolution mechanisms that are faithful to the law, so that we're working within the current system."

CARRINGTON IS GOING STRONG. "I'VE BEEN EMPLOYED FOR 40 YEARS AND I'VE NEVER DONE A DAY'S WORK," HE SAYS. "IT'S ALL BEEN FUN TO ME."

investment on the Committee to have been "trying to lighten up Rule 11." In 1983, Rule 11 was amended to allow a party to recover attorneys' fees upon the filing of an opponent's frivolous pleading or motion. That year, 1,000 Rule 11 cases were filed. Carrington pushed hard for a softening of the rule. Finally, in 1993, the Rule was amended

to provide a 21-day "safe harbor" in which to withdraw a motion or pleading before it draws a Rule 11 challenge.

"It's a political job in a lot of ways," Carrington reflects. "The process is now somewhat embattled. Congress is more aggressive. [The Advisory Committee during his tenure] was dominated by judges. They were disinterested for the most part. When Congress is involved, it's because it's political." He points to the new federal statute establishing a special procedure for shareholder suits against corporations. "Congress would reinvent the forms of action," he complains. "They would have a different procedure for every kind of case. Congress is letting itself in for a nightmare."

Though he no longer serves on the Committee, Carrington has not let up his scrutiny of the rules process. His latest article examines whether there are constitutional limits on Congress's ability to interfere with the Rules of Civil Procedure.

After four decades in the law, 17 at Duke, Carrington is going strong. "I've been employed for 40 years and I've never done a day's work," he says. "It's all been fun to me."

AMY GILLESPIE '93

Professional Commitments

As if the deanship of a law school were not enough to occupy him, in 1985 Carrington took on another major commitment in the profession. For seven years, three of them overlapping with his deanship, he served as reporter for the Advisory Committee on Civil Rules for the Judicial Conference of the United States. This job required some two months' work per year, drafting and coordinating review and discussion of amendments to the Federal Rules of Civil Procedure. "It was fun," Carrington says. "I thoroughly enjoyed doing it."

Carrington considers his largest emotional

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DISTINGUISHED AND INNOVATIVE JURIST



Gerald T. Wetherington '63

During his 20 years on the bench in Dade County, Florida, Judge Gerald T. Wetherington '63 has more than a few exceptional accomplishments of which to be proud, including his record-breaking tenure as chief circuit judge, immense popularity with his colleagues, and the implementation of many innovative and pioneering programs in alternative dispute resolution and judicial education. But, it is perhaps his unswerving commitment to public service that is his most impressive achievement. After serving a decade each as circuit judge and chief judge of one of the largest metropolitan court systems in the country, which routinely handles huge and difficult case loads, Wetherington has not lost his enthusiasm or optimism for finding creative solutions to society's problems either within the courts or in alternative dispute resolution (ADR) programs.

A Distinguished Foundation

Wetherington first distinguished himself early in his academic career. He graduated from the University of Miami *summa cum laude* in 1959 with a political science degree. In 1963, he received his JD from Duke University, graduating first in his class, a member of the national moot court team, and recipient of 14 American Jurisprudence Awards for the highest grades in law courses. That same year, he was admitted to the Florida Bar after achieving the highest score on the bar exam. Says professor Melvin Shimm, "Jerry was one of those truly exceptional students who I felt probably could teach me more than I could teach him. Among my most vivid memories of him is the 'Wetherington seminar'—Jerry down in the lounge area after class, surrounded by a small crowd of classmates to whom he was lucidly "interpreting" fine points of law that the professor had been trying (apparently less than successfully) to get across."

After two years as an associate with a law firm in Miami, he began his career in

public service as an assistant county attorney in Dade County. Since public service to Wetherington has always included teaching as well as service to the court, he also became an instructor of law at the University of Miami in 1967, and was named University legal officer in 1971. According to his daughter, Chriss Wetherington '90, "His students often tell me he is the best professor they ever had. He is the funniest and most articulate and can take extremely difficult legal concepts and make them accessible."

On the Bench

In 1974, Wetherington was appointed as circuit judge to the 11th Judicial Circuit, Dade County, by Governor Rubin Askew and was elected for a six-year term in September 1976 and again in 1982. Dade County's circuit and county judges elected Wetherington chief judge in 1981 and for four more terms after that. No other judge had previously supervised the Dade County system for more than two terms.

This feat may be attributable to the fact that Wetherington "has an outstanding reputation in the legal community as judge and administrator and is considered to be above politics," according to Judge Philip Hubbard '61, a former appellate judge in Florida, and Wetherington's friend since they were law students at Duke.

Pioneering Educational Programs

According to Hubbard, Wetherington "set up excellent education programs for his judges ranging from routine legal matters to lectures on problems of philosophy and Western culture, which have an impact on the cases judges handle. These subjects illustrate his own broad range of knowledge and intellectual curiosity."

"We felt that judicial education in the broader sense of the term was extremely important for our court and particularly so in a metropolitan court that deals with all of the problems that you confront

within Western society," explains Wetherington. "So our education programs were geared not only to bringing in top legal scholars, such as Arthur Miller from Harvard, but also scholars, such as professor Louis Dupré from the humanities department at Yale, to deal with such questions as: What are the causes of society's problems? What are the best approaches to take to confront the ills that generate huge judicial caseloads?"

With the help of his Law School classmate, Frank (Tom) Read '63, who is president and dean of the South Texas College of Law in Houston, Wetherington developed a video on teaching hearsay evidence to new judges that is used by the court to this date. According to Read, one of Wetherington's major contributions to public service was the pioneering of educational programs for judges.

ADR Programs in the Courthouse

When Wetherington began supervising close to 100 Dade County judges, he had to cope with "the expanding responsibilities that were being imposed upon the court because of the escalating number of criminal cases and the tensions that existed in the community," says Wetherington. He also would have to deal with a number of major civil disturbance cases that occurred during his 10 years in office.

It was the "continued expansion of the use of alternative dispute resolution in various forms that was essential to the ability of the courts in Dade County to properly perform their function" during this period, he explains. "In 1981, we initiated a court annexed mediation program for settling landlord/tenant disputes. When the people came to court for their final hearing, they would be referred to the mediator who was right there on the same floor with the judges. The mediator would meet with these people and try to resolve their dispute without the judge having to hear it.

We have had about a 94 percent settlement rate since 1981," Wetherington concludes.

Wetherington also expanded the general masters program for dealing with family cases. Cases involving child support or custody, visitation, or even financial matters in divorce were referred to the general masters (appointed quasi judicial officers) to make sure they would get a quick hearing. In addition to these officers, Judge Wetherington established an additional special group of non-lawyers who played a mediation role in the area of child custody and visitation. "This became an automatic requirement, and we were able to resolve about 85 percent of our child custody and visitation disputes at this level. As we went on, we expanded the number of people in that particular unit because of its tremendous effectiveness and because it had an enormously positive impact in protecting children."

"We also developed, and greatly expanded, a citizen's dispute program for handling neighborhood disputes," continues Wetherington. "Neighbors could come in and present their dispute to our mediators who would help them work out an agreement so that the matter would never have to go to court. This program offered an immediate and inexpensive forum in which neighbors could settle disputes without getting into fights or taking the law into their own hands."

Wetherington introduced mediation on a broad-scale basis. In those programs that were not formal media-

tion programs, such as the general masters, mediation techniques were used effectively to reach settlements.

In 1985, Wetherington initiated a pilot program involving the use of non-binding arbitration in tort cases. This program, which was basically voluntary, was innovative in that it required the plaintiff's lawyers to pick the defendant's arbitrators

and vice versa. Consequently, both parties had confidence in the arbitrators who were made available on a voluntary, no-charge basis.

Wetherington not only implemented creative alternative dispute resolution programs in his court system, but he developed long-range budget strategies so that programs could be adequately funded. For example, he introduced a program in the juvenile court to help dependent children who were being automatically placed in foster homes that would allow them to stay in their homes under supervision.

Importance of ADR

Wetherington adamantly believes that ADR programs are tremendously important in assisting the courts in dealing with society's problems. The most obvious reason is the increase in the number of cases. Says Wetherington, "the courts, many times, are driven by an overwhelming criminal caseload to which they have to give priority because of speedy trial rules and constitutional considerations." Court annexed mediation programs can alleviate some of this burden by dealing principally with civil disputes and family cases.

However, "it's not simply the volume of cases that makes these alternative dispute resolution programs essential," Wetherington says, "but also the dramatic change in the court's remedial function in the last 30 to 40 years. In the past, a case was brought before the court, a judgment was entered, and the court was finished with it. With the breakdown, to some extent, of other institutions of social control, such as the family unit, problems afflicting people, such as alcoholism, drug addiction and mental illness, are brought before the courts with increasing frequency. Often the courts end up having to supervise people in their family relationships and in rehabilitation or mental health programs for many, many years, in some cases for life."

"In addressing many of these problems," says Wetherington, "you have to depend upon cooperation to get people to change their behavior. That's the area where mediation techniques, alternative dispute resolution techniques, are so sig-

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nificant and have such a great impact. They can do for you what you can't do through a hearing and an order. If you can find a basis for agreement between parties in dealing with their problems, chances are greatly improved for a lasting solution."

Mediation also can be helpful in the criminal area, according to Wetherington. "The idea of simply warehousing people isn't going to work. We don't have enough prisons and it's not the most effective way to deal with most people. A high percentage of criminal defendants can be rehabilitated by using probation with conditions that treat their basic problems. This is not a softhearted approach; it's actually a very tough approach. If you demand that offenders comply with effective rehabilitative conditions, you'll often achieve a better result than you would with a prison stretch."

Respect of Colleagues

The legal community regards Wetherington very highly, according to Hubbard. During his tenure as chief circuit judge, he was repeatedly ranked as one of the county's most qualified judges by the Bar Association. The Cuban American Bar Association ranked him as one of the most sensitive to Hispanics; the young lawyer's section of the Florida Bar named him as Florida's outstanding jurist; the South Florida Chapter of the American Society for Public Administration gave him its Outstanding Public Administrator Award; and the Grand Jury Association of Florida named him citizen of the year. He was elected president of the National Association of Chief Judges of Metropolitan Courts in 1981. He was honored by the Duke Law Alumni Association with the Charles S. Murphy Award for Public Service in 1988 in recognition of his long career serving the public in a variety of ways. In 1992, he was honored by the National Center of State Courts with its Distinguished Service Award for trial judges for his "outstanding contributions to the administration of justice nationally and for the work he has done for the Center."

Back at Duke

After serving the Dade County Court System as its chief for 10 years, Wetherington served in the general juris-

diction of the court, with certain periods in the criminal division, until the end of 1995. He took a leave of absence from the court system for the first half of 1995 to assume the position of acting president of the Private Adjudication Center at Duke and to teach at the Law School.

While at the PAC he coordinated two important projects. As part of the Center's ongoing educational programs for the judiciary, Wetherington helped assemble a superb faculty to present a series of seminars on statistical, survey, medical, economic, epidemiological and DNA evidence to top state and federal judges. "It has been an extremely successful program, and I think, from what I have been told by Joe Cecil, the director of research at the Federal Judicial Center, a co-sponsor of the program, it is the best program that is available on scientific evidence in the country," says Wetherington.

Wetherington also was asked by professor Paul Carrington, founder of the Center and present chairman of the board, to set up a planning conference to study the feasibility of administering a panel of independent scientific and technical experts. In September 1995, a group of distinguished legal and scientific scholars, judges, and lawyers met to discuss the state of scientific evidence in the American court system and to consider a proposal by the Center to offer a program to certify impartial expert witnesses who would assist judges in trial courts, both state and federal.

Wetherington served for one semester as a visiting professor at the South Texas College of Law, and assisted in teaching a mediation course. "Among other activities, I'm also going to serve as vice president of judicial education for the Private Adjudication Center and work on special projects involving judicial education and

in the whole area of alternative dispute resolution," says Wetherington.

René Stemple Ellis '86, the Private Adjudication Center's executive director, is looking forward to working with Wetherington. According to Ellis, he is an excellent leader and administrator. "He is clearly willing to take on challenging projects and to create the action plans necessary to implement them. He is highly effective in moving people in the right direction in such a friendly and outgoing manner."

An Inspiration

Wetherington's commitment to public service is an inspiration to his colleagues, including his daughter Chriss, who is special assistant to the director of the National Institute of Justice, where she is studying crime control and the justice system to find innovative ways to deal with offenders and those at risk for

becoming offenders. She says of her father, "I have probably never known anyone so incredibly committed to serving others and doing everything in his capacity to make their lives better. He has an amazing ability to relate to other people and understand what's going on with them. I can't begin to tell you the number of people he has counseled, helped find jobs, encouraged to seek treatment for substance abuse or other problems. My current career path is a complete reflection of both my mother and father, two people who have spent their lives committed to public service—serving the underserved and less fortunate."

PEGGY SEEGER

"IT'S NOT SIMPLY THE VOLUME OF CASES THAT MAKES THESE ALTERNATIVE DISPUTE RESOLUTION PROGRAMS ESSENTIAL," WETHERINGTON SAYS, "BUT ALSO THE DRAMATIC CHANGE IN THE COURT'S REMEDIAL FUNCTION IN THE LAST 30 TO 40 YEARS."

During a break in trial a few years ago I went to investigate a cheer from a neighboring courtroom. Two of my fellow lawyers had just won a jury verdict of hundreds of thousands of dollars for a client who had been injured on Halloween when, blind drunk and reportedly naked except for a condom beneath a Batman cape, he had apparently attempted to board, if not actually copulate with, a moving Metrobus.

Weird cases make good stories. No one blinks at a sensible verdict for modest damages in some garden-variety accident case. Now that Court TV is returning us to those golden years of our colonial experience when other people's legal misfortunes were a public sport, the public knows firsthand the lurid tales from one end of the

country to the other—O.J. Simpson, Lorena Bobbitt, the Menendez brothers.

Some days I get phone calls from friends in far-off places like France or New Jersey demanding to know whether we should amend the Constitution to get rid of jury trials in favor of panels of experts (like my friends). Meanwhile, op-ed prescriptions for fixing a system with which most op-ed writers have little or no experience appear regularly. The weird cases are driving the public debate.

For anyone really interested in the evidence about the daily grind of the courthouse mill, Neil Vidmar's *Medical Malpractice and the American Jury* is a good place to start. Vidmar confronts the usual rap on civil juries: that they're erratic, decide cases differently from the way judges or experts would, render judgment more readily and in larger amounts against wealthy defendants, are suckers for meretricious experts, and are easily and often confused. Drawing on a large sample of medical malpractice cases from populous North Carolina counties and a review of the literature from other jurisdictions,

Vidmar demonstrates that the evidence fails to support any of these conclusions.

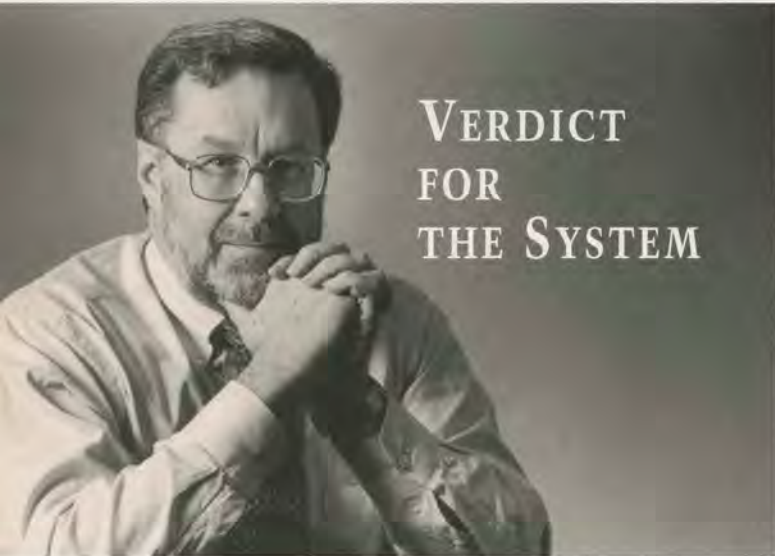
His basic argument is set forth in an engaging mix of statistical evidence and well-told stories, and it's persuasive: The criticism of civil juries is much exaggerated, and the problems that do exist should be dealt with by carefully considered reforms (a subject regrettably beyond the scope of this review) rather than radical or knee-jerk changes.

Vidmar reminds us that the alternative to juries is judges. Why does the public think that judges are never erratic, do not display marked differences among themselves, and are not sometimes confused? Lawyers know that outcomes can be determined by what judge they draw. That's why lawyers judge-shop whenever they can—and why well-run court systems are carefully designed to prevent their doing so.

Sometimes Vidmar's argument is almost too well made. You'd almost think there were no dumb jurors, or that experienced trial counsel are not sometimes compelled to settle cases based on the intolerable possibility of a runaway verdict. These occasional realities present difficulties for lawyers and can be wrenching for clients. But these and other minor points do not diminish the force of Vidmar's well-made case.

One thing he doesn't do is explain the gap between the evidence and the perception, especially among physicians, of how juries behave. That subject is beyond the scope of this book, but the question is illuminating. In most of their encounters with non-professionals, professionals exercise power. For a physician to be suddenly forced to submit to the judgment—especially in the area of his or her expertise—of a dozen retired postal workers, cocktail waitresses, and folks for whom 40 bucks a day is good money is an enraging experience. Nor is the fear confined to physicians. Lawyers feel it too, especially lawyers who rarely try jury cases. Juries figure you out in a flash. This is scary, but hardly a demerit in the system.

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VERDICT FOR THE SYSTEM

Professor Neil Vidmar is the author of *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets and Outrageous Damage Awards*. This review of his book is written by Joel F. Brenner, who practices law in Washington with Storch & Brenner. It appeared in *The Washington Post* on December 24, 1995.

PRIVATE CONTRACTS AS INSTRUMENTS OF HEALTH REFORM

H *Health Care Choices* is primarily concerned with the effectiveness of private contracts as instruments memorializing the choices that consumers make in purchasing health care. Its objective is to inspire organized health plans to write contracts with their subscribers that address the cost problem that so bedevils health care in the United States. Only by doing so can they give consumers a full range of health care options. Without better contracts, consumers can choose only different versions of the same costly product—state-of-the-art, American-style medical care. The book suggests how health plans could offer contracts

The following is a summary of the book Health Care Choices: Private Contracts as Instruments of Health Reform by professor Clark C. Havighurst. "Health Care Choices is an important, even seminal scholarly accomplishment. It presents a morally powerful vision of what health care markets might someday accomplish," according to a January 3 review in The Journal of the American Medical Association.

contract. Ordinarily, when purchasers contract for the future delivery of complex goods or services, the sales contract contains detailed specifications of the purchaser's requirements. In contrast, today's health care contracts are unspecific concerning the nature, quality, and content of the services to be provided.

The failure of private contracts to specify patients' entitlements in health care transactions has made them ineffective as instruments of consumer choice. The absence or inadequacy of crucial terms in health care contracts has meant that all concerned have had to look elsewhere for definitive decisions concerning the specific services to be provided. The bundle of rights belonging to each consumer is ultimately established by judges, juries, and medical expert witnesses. As construed by these arbiters, patients' entitlements have come to include the legal right to expect—and to demand at little or no direct cost to themselves—the provision of many health services having a low probability of significant benefit.

The adverse cost and legal consequences of inadequate health care contracts have become increasingly serious. With physicians, technology suppliers, and hospitals free to sell ever more costly goods and services with little reference to cost considerations, health care costs have risen to levels now regarded as unbearable. At the same time, the courts picked up the costly professional standards and customary practices emerging in the dysfunctional marketplace as reference points for defining the coverage obligations of health plans and for detect-



Clark C. Havighurst is William Neal Reynolds Professor of Law. *Health Care Choices* is published by American Enterprise Institute Press.

that authorize providers to take efficient, responsible cost-saving measures that are deterred by legal risks today.

Contract Failure in Health Care

Although immense market-driven changes have occurred in the financing and delivery of American health care since the 1970s, it is still not clear that health plans and providers are fully responsive to consumer choice. The market failure that causes the cost of health care to remain beyond effective control by its purchasers is, in the last analysis, a failure of private

ing substandard care in malpractice suits. The health care industry thus has operated for many years as a kind of regulated industry, under legal standards that have never been formally adopted as public policy and that have increasingly lost touch with economic reality.

Why have private contracts not been employed to help consumers and providers escape the tyranny of inefficient standards? Ascribe much of the blame to a paradigm of medical care that denies

consumers any say in the nature of the services provided. In addition, courts have been reluctant to enforce contracts that might have been fair *ex ante* but that appear to cause avoidable hardship when viewed *ex post*.

Although HMOs and other managed-care plans are currently rationing some care, they are doing so without clear legal authority. The consumer-driven revolution in health care will remain unfinished as long as private contracts do not serve consumers as explicit instruments of choice and as legal authority for the degree of economizing that consumers elect. Yet contract failure and impediments to freedom of contract have never been addressed in policy proposals. Although this book documents the failure of today's contracts to customize the standards under which health services are provided under individual health plans, it also shows how a new generation of health care contracts could give consumers just what they are willing and able, with some government assistance, to pay for.

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A Précis for Policy Makers

With a view to capturing the attention of busy policy makers, the book's themes are connected to issues in the movement for health reform. Instead of proposing a complete national health policy, however, the book argues only that contracts could strengthen, and could in turn be strengthened by, a variety of policy initiatives. In particular, it demonstrates how better health care contracts would advance the objectives of

the managed-competition strategy of health care reform and, indeed, are necessary to fully realize those objectives. The book uses the 1993 Clinton reform bill to illustrate the jeopardy in which the reform movement placed health care contracts. It also shows how that bill might have been written to leave contracts a role in implementing consumer choices.

Failures to Define Obligations

The book demonstrates both that private health care spending in the United States is out of control and that the instruments by which consumers might exercise control—private contracts—have been nearly useless for that purpose. It calls attention to the "benefit-cost no man's land" in which health plans must fight economically inappropriate health spending. As the metaphor implies, any effort to fight the battle on the ground that marginal costs exceed marginal benefits is likely to draw heavy fire, including litigation. Responsible economizing is thus systematically deterred, accounting in large measure for the failure of health care contracts to address critical issues.

Health care contracts in use today provide no legal authority for challenging spending on benefit-cost grounds. Instead, virtually every contract makes a commitment to provide all "medically necessary" care, defined by reference either to professional standards or to efficaciousness. Indeed, contract failure is significant precisely because it reflects implicit or explicit acceptance of medical efficacy alone—what might be called an "any-benefit" test—as the sole criterion for deciding what care should be provided and financed. Because industry custom and professional practice generally embody this same standard, the legal system threatens to give it the force of law in every case.

Another feature of today's contracts between health plans and their subscribers is their disclaimer of responsibility for the quality of care actually provided. Most plan-subscriber contracts perpetuate the idea that financing entities do not provide health care but merely enable its provision by licensed providers. This notion is another tenet of the professional paradigm of medical care and finds expression in legal rules against the "corporate practice of medicine" and in industry resistance to recent proposals to establish "enterprise liability" for medical malpractice.

Under a similar line of thinking, professional-patient relationships are not a matter of contract. Yet deriving the rights and responsibilities of parties from their relative stations in life, rather than from their voluntary contracts, is reminiscent of prerevolutionary America, when, as historian Gordon Wood reports, contracts were "patriarchal" and served merely "as evidence that the parties to the relationship, however unequal, had mutual rights and obligations established in custom." Instead of empowering consumers, today's health care contracts simply deliver them into the hands of self-governing professional elites. Introducing freedom of contract in health care is a truly revolutionary and democratic idea.

Using Contracts for Consumers

Writing a contract that fully specifies an administrable alternative regime under which to finance and deliver health services is a daunting task. Nevertheless, the book provides numerous recommendations, including actual contract language, for specifying crucial features of health care transactions. The goal is both to induce creative lawyering in the rewriting of health plan contracts and to demonstrate for policy makers and skeptics the reasonableness of many innovations that contracts might accomplish. Many health care contracts now are being offered under conditions that give consumers enough choice and information to legitimize alternative legal regimes that consumers might elect to govern their health care.

Contracts are proposed to knit the various parties into a single, integrated transaction coordinating the legal responsibilities of providers with the financing obligations of the health plan. The book also suggests different ways in which health plans could articulate varying degrees of coverage to expand the economizing options of consumers. One approach is to incorporate selected practice guidelines in the contract as a way of defining the plan's obligations in particular clinical situations. Greater specificity in contracts will diminish disputes and improve the conditions of medical practice by giving physicians advance guidance in treating their patients, obviating much of the micromanagement they currently encounter in managed-care plans. Patients, instead of facing *sub rosa* rationing,

would face only limits to which they had previously agreed, at least in general terms.

Health plans are advised to cease their common practice of treating "experimental" technologies differently from other services and, instead, to approach all health care choices in the same plan-specific, appropriately cost-conscious way. It is not only new technologies that lack a solid foundation in health services research or that involve difficult trade-offs between benefits and

costs. The current policy of covering procedures only if they are accepted in medical practice is a vivid demonstration of how health plans have abdicated their responsibilities for product design in favor of the medical profession. A vital point to be gained by innovative health care con-

tracts is the freedom of a plan, acting through its physician agents, to consider both benefit-cost trade-offs and the state of scientific evidence in deciding coverage issues of all kinds.

A crucial element in an innovative contract is the procedure by which the plan gives effect to its contractual standard in individual cases. Although plan personnel would interpret the contract in the first instance, it is essential to provide an expeditious appeal mechanism for close cases. The book offers insights on the uses of

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alternative dispute resolution (ADR) mechanisms in this process, recommending that independent arbiters be charged not with making *de novo* determinations of coverage but only with evaluating the reasonableness and procedural integrity of the plan's interpretation.

Among the entitlements implicitly conferred on patients by the legal system is the right to obtain a particular kind of legal redress for whatever the law (not the provider-patient

contract) defines as medical malpractice. Private contracts can be written to introduce substantial reforms of patients' malpractice rights and remedies. Indeed, any of the reforms being proposed for legislative adoption might also be adopted by contract. The book suggests clauses for introducing ADR, limitations on damages, and modifications of the operative standard of care as well as more radical reforms.

In sum, this book offers drafters of health care contracts not only food for further thought, but also actual ammunition for revolutionary action in the no man's land of benefit-cost trade-offs. As private health plans exhaust the cost-containment possibilities of cost sharing, of categorical limits on coverage, of utilization management, of new methods of payment, and of selective contracting with providers, they soon will be searching for better legal authority for husbanding the resources that consumers entrust to them. This book shows the potential value of freedom of contract in meeting the challenge of spending resources wisely on health care. ■

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ETHICS MATTER IN LEGAL EDUCATION



Judges William Hoeveler, at left, and Gerald Wetherington '63 taught a seminar on the ethics of judicial decision making.

The important role that ethics play in legal education at Duke Law School earned national recognition in two leading arenas in recent months. *U.S. News & World Report* recognized Duke's leading role in this field in the magazine's annual rankings issue, "America's Best Graduate Schools," published March 18. And in November, leading legal scholars and law school deans convened at Duke to attend the "Symposium on Teaching Ethics and the Legal Profession," sponsored by the Law School and the W.M. Keck Foundation, a leading supporter of ethics in legal education.

The *U.S. News* article, entitled "A Move to Ethics," reported that law schools are putting "more emphasis on teaching right from wrong." The article began by describing a Duke Law School seminar in which federal judge William Hoeveler, who heard the case of Manuel Noriega, warned Duke students: "I guarantee that sometime you will be asked to do something dishonest. Your future lies in that moment. Even if you have kids and a big mortgage, there's only one answer: 'No.'"

"For generations, the subject of ethics was little more than a throwaway in the curriculum at most law schools," Ted Gest wrote in *U.S. News*. "Duke's emphasis on ethics typifies a new focus on courses in professionalism at many of the nation's 178 accredited law schools."

The article reported that Duke offers a required week-long course for first-year students each January, as well as advanced ethics seminars in which 40 percent of upperclass students enrolled in the past two years. "They hunger for these kinds of discussions," Duke Law professor Thomas Metzloff told *U.S. News*.

Because the required ethics course taught at most schools historically has not been popular with students, Keck symposium participants explored innovative approaches to improving its teaching. "The seriousness of the endeavor was demonstrated by the participation of deans from 14 of the country's leading law schools," said Metzloff, symposium organizer.

More than 60 legal scholars and deans met at Duke Law School to discuss the teaching of legal ethics during the two-day symposium in November. Over the past five years, the Keck Foundation has made grants to 23 law schools and other organizations to develop innovative approaches in the teaching of ethics. The objective of the symposium was to share the lessons learned by those receiving the Keck grants.

Law school representatives gave presentations on their approaches to ethics education. Duke's approach is to develop specialized courses that typically are taught through advanced seminars, in addition to the standard required course. Metzloff contends that students are better served by examining ethical dilemmas through concrete, factual examples, rather than evaluating ethical issues only from theoretical or philosophical perspectives.

Duke Law School has developed a series of advanced course offerings in the areas of ethics and professional responsibility. During the 1994-95 academic year, the Law School offered a successful series of nine advanced ethics offerings. Student interest was high, evidenced by oversubscription in three of the courses. The spring semester offerings provide a rich array: Ethics and the Government Lawyer; Ethical Considerations in Corporate Law and Practice; Deals, Government, Crime, and the Attorney; Lawyers in the Criminal Setting; and Seminar in Medical-Legal-Ethical Issues.

In fall 1994, two faculty seminars were held to enhance substantive knowledge and to assist in curricular development. Professor Ted Schneyer of the University of Arizona discussed "An Institutional Approach to Legal Ethics," and New York University law professor Stephen Gillers shared his use of a videotaped series of ethics scenarios.

Metzloff is eager to repeat the expanded seminar on the ethics of judicial decision making. Hoeveler, senior judge for the U.S. District Court for the Southern District of Florida, and Gerald

Wetherington '63, circuit judge for Dade County, Florida, taught the course in an intensive, four-hour per day format over the span of a week. The seminar covered such diverse topics as the regulation of judicial free speech; the meaning of impartiality and independence; recusal; judicial accountability; and judicial management of institutions.

"Our experience with the judicial responsibility course was particularly positive," said Metzloff. "Our hope for this course was to provide students with an introduction to and an appreciation for the special responsibilities of judges within our law system. Too often, law schools focus exclusively on the role of the lawyer as *advocate* rather than the lawyer as *decision maker*. Increasingly, lawyers are playing more diverse roles. Many law students serve as judicial law clerks. Alternative dispute resolution programs rely on attorneys as arbitrators or mediators to assist in solving disputes. More clients are asking attorneys to assist in dispute resolution rather than litigate. So our seminar was a response to these trends—by providing our students with insights into the responsibilities of a judicial decision maker."

Another approach to teaching ethics is the "pervasive method" of integrating ethical considerations in a number of other substantive law courses. Other methods include the use of clinical or simulated clinical settings and an "oral history" seminar that pairs students with distinguished members of the profession or an interdisciplinary approach.

A primary focus of the W.M. Keck Foundation grants has been on teaching legal ethics within law schools. Still, some of the foundation-funded programs included elements that dealt directly with the profession. The University of Texas works with practicing lawyers, with students having the option of attending confidential disciplinary actions against lawyers. Cornell University professors Roger Cramton, a member of the Duke Law School's Board of Visitors, and Peter Martin demonstrated a new

research technology which tracks relevant ethical material on a state-by-state basis on a CD-ROM. Another session dealt with the special issues surrounding ethics education for judges.

The Keck symposium also considered priorities for law schools and foundations regarding future funding of ethics programs. Investments in ethics was a source of debate at the "Deans' Roundtable," as tight budgets affect law schools' allocation of resources. Still, deans remain interested in improving their ethics programs spurred on by the strong views of alumni and bar officials to bolster such offerings.

This climate makes foundation support increasingly important for future advancements in the ethics field. The Keck Foundation is one of only a handful of foundations that has supported law schools in achieving major curricular changes. It has invested \$5 million in this area since 1991.

"The W.M. Keck Foundation conference was an intellectual feast," said Dean Pamela Gann. "Curricular innovation accomplished by the law schools was very significant, and these innovations will be shared with law schools generally. The conference participants also noted several remaining shortcomings—in particular, not enough law schools have faculty dedicated to research and teaching in ethics as their primary responsibility. Until law schools treat legal ethics and professionalism as a serious subject for research, the supply of faculty in the field will remain thin. I believe that this is the next area to be tackled by the law schools."

Duke's *Law & Contemporary Problems* will publish a special edition of the Keck symposium papers. The journal is one of the most widely circulated law journals in the United States and abroad. ■

Students Pursue Thorny Legal Problem All the Way to the Balkans

What began as a *pro bono* project for law students Dylan Cors and Siobhan Fisher blossomed into an independent project that took them to the Balkans for seven weeks of research.

Cors and Fisher traveled last summer to Belgrade, Serbia, and Zagreb, Croatia, to study the sentencing practices of the former Yugoslavia. Their findings will serve as an academic resource for the U.N.-established International Criminal Tribunal for the former Yugoslavia looking at war crimes in the civil war.

The project was the ideal forum to synthesize the students' special interests, skills, and work experience with the study of law. Both are enrolled in the JD/LLM program in international and comparative law at Duke. Cors is a MIT physics graduate who spent a year studying in Australia and two years as a field engineer on oil rigs in Southeast Asia. Fisher is a Stanford graduate who studied in Berlin and lectured at the University of West Bohemia. She developed her skills as an interpreter for several East-West joint ventures and as a researcher for an Eastern European economic journal.

"Our interest in legal issues surrounding the allegations of war crimes in the former Yugoslavia came out of our involvement in a *pro bono* project at the Law School," said Fisher. "Fifteen students researched unresolved issues that arose when, in 1993, the U.N. Security Council created the first major international criminal tribunal since the post-World War II trials at Nuremberg and Tokyo. Our group focused on the issue of criminal sentencing, such as what form of punishment a person would receive if convicted by the new tribunal."

Fisher and Cors learned more about the tribunal when the Law School's Center on Law, Ethics and National Security sponsored conferences on international humanitarian law, a field that includes war crimes. (See page 36.) They met Judge Richard

Goldstone, a South African jurist who is the chief prosecutor for the tribunal, his senior legal adviser William Fenrick, and others associated with the tribunal. The students received feedback on their *pro bono* project and their ideas for an independent research project.

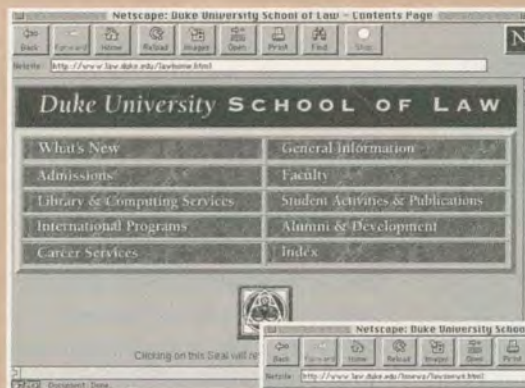
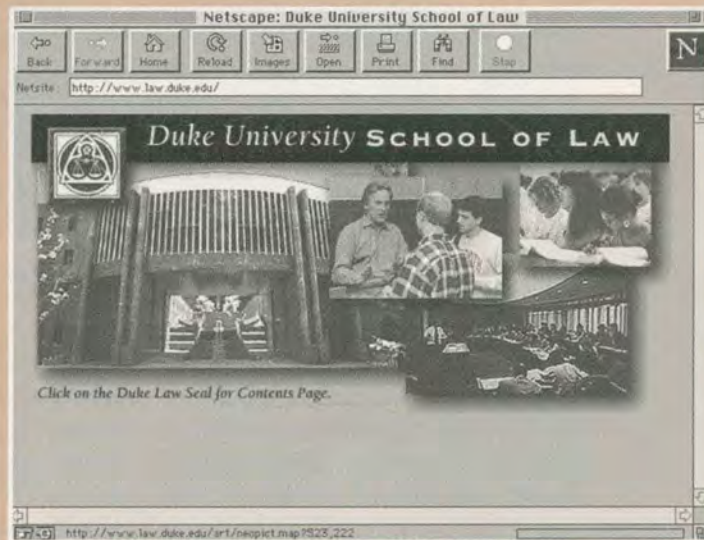
The two became intrigued by criminal sentencing by the International Tribunal. "In determining the appropriate punishment, the International Tribunal is directed to follow the general practice of the courts of the former Yugoslavia regarding imprisonment," said Cors. "There is a simple, but thorny problem involved in this. The tribunal is precluded from passing the death penalty, but the law that it is directed to follow—the civil code of the former Yugoslavia—included the death penalty as an option. Moreover, a maximum duration on prison sentences in the former Yugoslavia was set at 15 years, or 20 in special cases. In interpreting the provision directing recourse to the law of the former Yugoslavia, the International Tribunal will have to decide whether the former Yugoslav sentencing framework will place limitations on its own maximum sentencing competency."

Legal analysis of how that provision should be applied required an in-depth investigation of the law of the former Yugoslavia. "For us, this provided an opportunity to study civil law, the legal system prevalent in continental Europe and somewhat different from the English and American common law system. It also provided an opportunity to examine the legal and political evolution of an ex-Communist country undergoing violent change, as well as the motivation to undertake an intensive language study, since we would conduct our primary research in Serbian and Croatian," said Fisher.

The opportunity was ripe, too, since the two would be in Brussels in July attending Duke's Institute in Transnational Law. "We wanted to use the rest of the summer to augment our direct study of international legal issues," said Fisher.

VISIT THE VISIT THE LAW SCHOOL WEB SITE

If a busy schedule is preventing a trip to the Law School, visit the Internet where you will find our new site on the World Wide Web. Point your browser at <http://www.law.duke.edu>. There you will find the alumni calendar, information about faculty, international programs, upcoming events, the weekly *Herald*, links



to other Web sites and more. The Law School launched the Web site in October to foster both external and internal communication.



<http://www.law.duke.edu>

Cors and Fisher raised funds to support the project from the Law School, Peter Lange and the office of the vice provost for academic and international affairs, and an interdisciplinary fund established by Duke professors Benedict Kingsbury of the Law School and Joseph Grieco of the political science department. Preparation for their travels included intensive language study, versing themselves in relevant legal issues and historical background, and arranging logistics for the summer stay. They also established contacts with law professors, attorneys, and court officials in Zagreb and Belgrade.

Although they never came close to the war front, a late bombing assault in Croatia changed their plans. Initially, they intended to spend most of their time in Zagreb, but the risks associated with the bombing campaign convinced them to head to Belgrade instead, and conduct as much of the research as they could there. (They later found out that one of the bombs fell just 40 yards from the law school's front door.) This presented last minute complications of daunting proportions. For example, the U.N.-mandated sanctions on the former Yugoslavia prohibited international monetary transactions. This meant that credit cards and travelers checks were not an option, and they had to use cash.

They spent much of their time in the law library of the Law Faculty of Belgrade. Previously made contacts proved helpful as they pored through the criminal code commentaries, scholarly articles, and legal gazettes to determine what were the standard sentencing practices for the types of crimes in which the tribunal would be interested.

"We received a lot of cooperation from the faculty members we had contacted," Fisher said. "But legal research in Belgrade and Zagreb was quite unlike anything we had experienced at Duke. The concept of research librarian is essentially a fantasy. There were few computers, and the index cards in the card catalogues were placed in

what seemed to be a random order. We are accustomed to going into stacks and browsing through books and journals, but there you had to request a specific book and the librarian would bring it out for you."

"The best we could do was look up a title that seemed somewhat relevant and then follow our noses," Cors said. "Much of what we pored through wasn't exactly on point, so when we found something that was useful we latched right on to it. Creativity, persistence, and patience were required to unearth pertinent materials, but our efforts were rewarded. We returned home with many journal articles and penal code provisions related to our narrow topic of long-term prison sentences."

The students deemed the project a success, one that complements the international training they are receiving at Duke. "Conducting this research has been an integral part of our legal education," Cors said. "By creating and executing the project, we not only became well-versed in a rapidly developing area of international law, but also worked in a domestic legal system in a different language. Through this combination, we familiarized ourselves with the issues surrounding the sometimes painful development of the international community."

Cors and Fisher plan to put that education to use in their professional endeavors. They have written an article based on their findings, which they are submitting for publication in a legal journal. Cors intends to study and work in the area of energy law with a focus on Russia and other former Soviet states. Fisher's goals focus on the reconstruction process between East and West, in particular facilitating mergers, investments, and joint ventures in Eastern Europe and Russia. ■

Gender's Role in Higher Education

A diverse group of interdisciplinary scholars and legal practitioners from across the country gathered at Duke in February to explore the role gender plays in higher education. The *Duke Journal of Gender Law & Policy* presented "Gender & The Higher Education Classroom: Maximizing the Learning Environment" February 16-17 at the Sanford Institute.

The conference explored the legal issues arising from the existence of government-supported, single-sex educational institutions; public policy issues relating to separate schools and programs for women and men; and social issues relating to gender-based differences in learning. Duke president Nannerl Keohane opened the conference. Professor Jane Roland Martin, professor emerita of philosophy at the University of Massachusetts, Boston and author of *Changing the Educational Landscape* and *Reclaiming a Conversation*, gave the keynote address.

Duke Law professor Katharine Bartlett moderated a panel on single-sex versus coeducational learning. The recent Virginia Military Institute and Citadel litigation served as a platform to explore questions of educational policy and gender equity. One of the panelists was Ron Vergnolle '94, a Citadel graduate who received a JD/LLM in transnational and comparative law from Duke. Vergnolle, who practices in the Washington, D.C. office of Baker & Botts, served as a witness on Shannon Faulkner's behalf in The Citadel case.

A second session examined the classroom dynamics and the university environment as influenced by gender and race. Panelists discussed recent observational studies and explored the current campus and classroom climate for women, men and minorities in undergraduate, graduate and professional institutions. The conference ended with an exploration of strategies for change and how to optimize the educational experience for men and women. This

panel explored various strategies that address gender inequities at the graduate and undergraduate levels, including curriculum transformation, alternative classroom models and the transition from the classroom to the workplace.

Also speaking at the conference was law professor Linda R. Hirshman, director of the Women's Legal Studies Institute at Illinois Institute of Technology, Chicago-Kent College of Law. In the September issue of *Glamour* she wrote about a study of women's potential at various law schools, finding that "some law schools offer more opportunities for success for their women students than other schools do." The study re-ranks the *U.S. News & World Report* top 20 law schools, placing Duke in the No. 1 spot as the law school ranked highest for developing women's potential.

Schools were ranked by comparing the percentage of female students with the percentage of female students on law review. "At Duke, for instance, women made up 40 percent of the classes involved and 48 percent of law review members," according to Hirshman. The study found a high percentage of female faculty members at law schools where female students excel. Duke had 21 percent tenured or tenure-track female professors in 1994.

Symposium planning and fund raising were done entirely by students, under the direction of Loren Montgomery '96. The symposium was the third in an annual series. The *Duke Journal of Gender Law & Policy* will publish a symposium issue containing conference papers. ■

HOLD the DATE

**1997 Gender
Law Conference**

February 14-15



Legal professionals from around the world came to Duke to learn about the U.S. legal system.

Good Global Citizens

The Law School expanded its role in the global community by hosting two programs on the U.S. legal system for professionals from around the world during the past year.

Judges, attorneys, and academics from 21 nations in Africa, the Caribbean, the Middle East, and Southeast Asia attended a day-long presentation on U.S. legal education at the Law School in July. The U.S. Information Agency and the Triangle International Visitors Council sponsored the program, which was organized by Jennifer Maher '83, senior lecturing fellow. Charles Becton '69, a Raleigh attorney and senior lecturing fellow, explained the importance of experiential learning and practical skills training in U.S. law schools. The group attended classes, learned about curriculum and faculty development, and attended a seminar on teaching ethics and professional responsibility. They also attended a session on law school/university relations and law school/bar relations led by Paul Carrington, Chadwick professor of law and dean emeritus, and watched a demonstration on the use of computers in legal education.

Seven delegates from the Shanghai Bar Association spent three days at the Law School and in courts and law offices in Durham and Raleigh in November. Hosted by professor Jonathon Ocko, they visited the offices of Parker, Poe, Adams & Bernstein and Jack Nichols, and met with representatives of the North Carolina State Bar and

with Justice Willis Whichard of the Supreme Court. Three of the delegates gave a presentation at the Law School on Chinese property and securities law. The Law School expects to hold additional programs with the Shanghai Bar Association. ■



Major General William K. Suter, clerk of court for the Supreme Court of the United States, visited the Law School October 27 at the invitation of long-time friend, professor Robinson Everett. Suter gave a behind-the-scenes look at the Supreme Court and met with students and Moot Court Board members.

Building Intellectual Capital Around the Globe

Developing a greater understanding of law in a global economy is the driving force behind a series of programs sponsored by Duke Law School.

The most effective and appropriate roles for justice systems to respond to mass crimes committed in the context of violent conflict will be the focus of **"Justice in Cataclysm: Criminal Tribunals in the Wake of Mass Violence."** The conference will be held in Brussels July 20-21 by Duke Law School in conjunction with the Office of the Prosecutor of the International Tribunal for the former Yugoslavia and Rwanda. Leading legal scholars and international lawyers, including personnel of the International Criminal Tribunals for Rwanda and the former Yugoslavia, will examine the appropriate roles of national and international criminal justice systems in responding to war crimes, genocide, and crimes against humanity. Panel topics will include national prosecutions in collapsed justice systems and prospects for international assistance; international and national tribunals and the implications of concurrent jurisdiction; issues confronting the international criminal tribunals for the former Yugoslavia and Rwanda; prosecutions and the reconciliation process; and alternatives and adjuncts to criminal prosecutions.

Duke law professor Madeline Morris, who is organizing the conference, will serve on the national prosecutions panel. Justice Richard Goldstone, prosecutor of the International Criminal Tribunal for the former Yugoslavia and Rwanda, will give a major address. Goldstone visited Duke Law School in 1994 to meet with faculty and students, two of whom were inspired to undertake an independent study project of sentencing practices in the former Yugoslavia. (See page 32.)

"Justice in Cataclysm" has received funding support from the Carnegie Corporation, U.S. Institute for Peace, Duke University, and several individuals and



Atlanta Mayor Bill Campbell '77 returned to the Law School in November to talk with students and faculty. "Cities are in crisis today," he said. "The challenges are so great it requires a reordering of our priorities."

foundations. For more information, contact Morris at (919) 613-7049 or e-mail her at morris@law.duke.edu.

Other global activities for the Law School include the second **Asia-America Institute in Transnational Law**, offered jointly with the University of Hong Kong Faculty of Law, July 7- August 6. The Asia-America Institute is designed to address the educational needs of young professionals in law and business who are engaged in, or plan to enter, transnational practice in Asia or work in corporations and financial institutions doing business in Asia. The study program offers accredited courses in comparative intellectual property, comparative and transnational solvency, international business transactions in China, Taiwan, and Asia; international human rights; introduction to American law for non-U.S. students; and transnational securities law.

The **Summer Institute in Transnational Law** sponsored by the Law School and Faculty of Law of the Université Libre de Bruxelles will be held July 7-August 6 in Brussels. The 11th annual,

four-week summer institute is designed for students and young professionals with interests in international and comparative law and transnational practice. It is part of the fully accredited curriculum of the Law School and approved by the ABA. Institute students are invited to attend "Justice in Cataclysm." ■

LENS Center Sponsors Programs

The Center on Law, Ethics and National Security (LENS) made significant contributions to the international legal community by sponsoring conferences and teaching seminars during the 1995-96 academic year.

LENS sponsored "National Security Law in a Changing World: The Fifth Annual Review of the Field" in conjunction with the Standing Committee on Law and National Security of the American Bar Association. The two-day conference in Washington, D.C. reviewed developments in national security law and dealt with such timely issues as the press and national security,

reinventing the intelligence community, problems in counterintelligence, addressing the threat of domestic terrorism, and the continuing challenge of international terrorism. Governor Frank Keating of Oklahoma addressed the issues involved in the aftermath of the bombing of the Oklahoma City federal building. He said that the greatest lesson of the Oklahoma City bombing is that terrorism cannot overcome the spirit of free men and women who value, respect, and emulate democratic virtues.

"Nuremberg and the Rule of Law: A Fifty-Year Verdict" was the second fall conference sponsored by LENS, the Center for National Security Law at the University of Virginia School of Law, and the Center for Law and Military Operations at the U.S. Army's Judge Advocate General School. Looking at the legacy of the tribunals in Nuremberg and Tokyo, the conference dealt with a variety of questions: Would a more systematic deterrence of regime elites contemplating aggressive war or genocide serve to lessen such horrors? Can war crimes of a more regional nature, involving ethnic conflict, be successfully dealt with by U.N.-chartered tribunals? Is there a need for a permanent international criminal court—rather than ad hoc tribunals such as those convened at Nuremberg and Tokyo—to deal with future violations of international humanitarian law?

LENS sponsored "The United Nations, Regional Organizations and Military Operations," April 12-13, 1996, in conjunction with UVA's Center for National Security Law. It examined the interrelationship between the U.N. and regional organizations, such as the OAS and OAU. It also addressed the unique status of NATO as it continues its mission in Bosnia; the President's authority to deploy U.S. armed forces to Bosnia under NATO sponsorship; the adequacy of law to protect peacekeepers; and the issues surrounding the refusal of the United States to honor its financial obligations to the U.N. The conference attracted prominent speakers from government, academia, and the

DEDICATED TO DURHAM

Hundreds of Law School students, faculty, and staff set their alarm clocks to rise early on a Saturday morning last August. They volunteered their day—and sweat equity—to tackle service projects for local non-profit organizations as part of the second "Dedicated to Durham."

"Dedicated to Durham" debuted in April 1995 as part of the dedication events for the Law School addition. That event was so successful that associate professor Jonathan Wiener agreed to organize a second event to "work together as a community for the community." He thought that "re-dedicating ourselves to being a constructive part of the broader Durham community" was a positive way to begin the academic year.

Volunteers warmed with calisthenics before they contributed more than 500 hours of service to such projects as building affordable housing, cleaning up highways, preparing meals for the hungry, and renovating a shelter.

Now an on-going program, "Dedicated to Durham" was designed to strengthen ties within the Law School community as well as with the larger Durham community. A third event was held April 5, 1996. More than 200 members of the Law School shared their time and service. ■

Professor Jonathan Wiener warms up with volunteers who are "Dedicated to Durham."



private sector. The Honorable Kofi Annan, U.N. Under-Secretary-General for Peacekeeping, gave a major address.

Executive director Scott L. Silliman and founder Robinson O. Everett, Duke law professor, taught the popular national security law seminar at law schools of Wake Forest University and North Carolina Central University in the fall, and at Duke and the

University of North Carolina in January. In addition, Silliman teaches several blocks of instruction during the spring semester at the various services' Reserve Officer Training Corps program at Duke, UNC-Chapel Hill, and North Carolina State University.

For information about LENS and its programs, contact Silliman at silliman@law.duke.edu. ■

New Leadership in External Relations, Admissions

Two staff members have joined the Law School: Linda G. Steckley is associate dean of external relations, and Cynthia L. Rold is assistant dean for admissions and financial aid.

Linda G. Steckley directs the Law School's fund-raising and alumni operations, with responsibilities for publications and communications.



Linda G. Steckley

Steckley came to Duke from New York University School of Law, where she was assistant dean for development and alumni relations, and responsible for directing a \$125 million fund-raising campaign. A graduate of Dickinson College, she received her MBA from the University of Miami, where she worked in key positions at the business school, the medical school, and for the university.

"She is a highly regarded professional who brings rich and diverse experience to Duke," said Dean Pamela Gann, who appointed her. "Everyone has been unstinting in their praise of Linda's abilities and contributions to the University of Miami and to New York University. Many have noted that she is among a handful of the very best working in the field of university development anywhere."

Steckley had formed a high opinion of Duke long before she began her work at

the Law School in July. "I've never met a Duke graduate who didn't love the University," Steckley said. "Development and alumni relations begin with building a sense of community. This process starts the day an individual decides to become a student here. It's the totality of experiences—student experiences, faculty experiences, alumni experiences—that is the essence of the Law School. My job is to enhance the building of this community and to develop the financial resources for achieving goals determined by Dean Gann, the faculty, and the University."

Since her arrival at Duke in July, Cynthia L. Rold has implemented a number of initiatives, including inviting pre-law advisers to campus for a weekend and hosting receptions for admitted students in New York and Washington, D.C.

Rold received her JD from Northwestern, and is a *magna cum laude* graduate of Carroll College. She came to Duke from the University of Illinois College of Law. As assistant dean for student affairs, she managed the offices of admissions, career services, and registrar. Previously she served as director of career counseling and placement at Northwestern University School of Law. She also worked as a summer associate with Crowell & Moring in Washington, D.C. and Calkins, Kramer, Grimshaw & Haring in Denver.



Cynthia L. Rold

"In searching for someone to fill the able shoes of Liz Gustafson '86," recalled Susan Sockwell, associate dean for student affairs, "we looked for a candidate who could lead Duke Law School through a challenging period. We recognized that strong leadership in admissions will be critical to Duke's ability to continue matriculating the best law students. We also recognized that as tuition rises and students reach the limits on loan eligibility, astute management of the financial aid office is critical. Cindy Rold's success record in law school administration and the breadth of her experience made us confident that she could meet these challenges."

Rold was president of the National Association for Law Placement for 1994-95. She serves on the executive committee of the AALS Section on Prelegal Education. She served on the Illinois State Bar Association Committee on Legal Education, Admission and Competence and the editorial advisory board of *Minority Law Journal*. She is a member of the Illinois Bar.

"I am gratified by the interest Duke alumni take in the Law School and the admissions process," Rold said. "The support and involvement of alumni is critical to our efforts. Alumni help in many ways, such as encouraging students to apply, calling admitted students to encourage them to matriculate, hosting receptions, and being enthusiastic advocates for the School." ■

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**Flat Tax,
VAT Tax,
Anything
But
That Tax**

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Faculty News

FLAT TAX, VAT TAX, ANYTHING BUT THAT TAX

For those of us who work in tax policy, the first few months of years divisible by four are interesting times. The quadrennial alignment of the presidential primary and tax preparation seasons rescues our vocation from the obscurity that technical fields naturally attain, and temporarily thrusts it to the forefront of the public mind. This year was better than ever, with each candidate proposing some new or recycled tax plan. One momentarily successful candidate—Steve Forbes—even went so far as to base his entire campaign on his vision of the tax future.

Interest in tax policy could not be sustained even briefly were it not for the widespread dissatisfaction with our

current tax structure. Though I and most of the tax professionals I know believe that our system is actually reasonably fair and reasonably well administered, that is certainly far from the general taxpayer view. As one reliable barometer of popular opinion put it in describing the Forbes campaign:

"He has captured perfectly the fury Americans feel for a system they think treats them like suckers while the rich enjoy a secret tax code written just for them."¹

There is no little irony in this view, since Forbes himself and many of his supporters are the supposed beneficiaries of this secret code. Perhaps the tax system's dismal popular stature derives from the fact that rich people hate it because it actually *is* progressive,² while everyone else dislikes it because they don't believe that.

In any case, the presidential primary smoke has now cleared, and the principal remaining contenders are men whose fin-

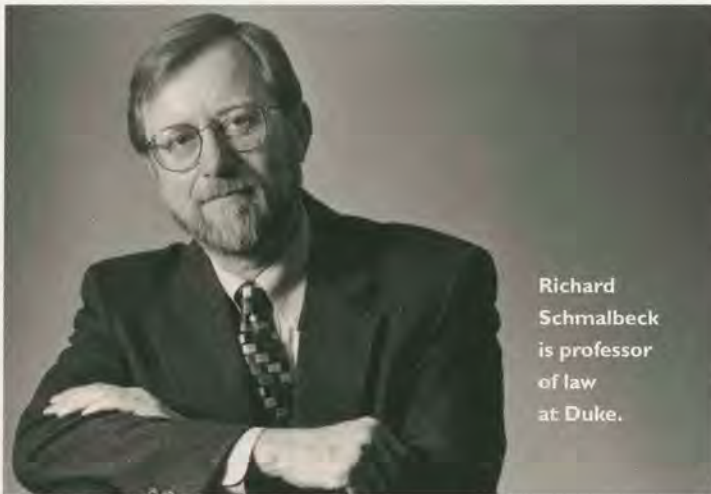
gerprints are quite visible on the current tax code. They may find it hard to persuade the public that they share the taxpayers' pain in confronting their Form 1040s every spring, and for this reason tax issues may recede a bit from the current campaign. Still, gross unhappiness with our tax system persists. Major changes in the tax system seem likely in the next few years, and radical change is far from impossible. It seems a good time to ask what some of the alternatives might be.

Literally dozens of plans have been suggested, most of which can be described as belonging to a category of tax systems broadly referred to as consumption taxes. Consumption taxes have two great—and closely related—attractions. First, by removing tax burdens from income that is not consumed, they could be expected to stimulate private savings. The appropriate measure of national savings is subject to debate, but analysts agree that the United States has one of the lowest savings rates among developed nations, and most think that this is regrettable.

The second, related attraction of consumption taxes has to do with the moral qualities associated with thrift, and correspondingly with a tax system that encourages that virtue. Whatever we tax we tend to discourage. Income represents the return on productive deployment of labor and capital; why would we want to discourage that? Consumption, in contrast, is a necessary but essentially destructive activity; it quite literally consumes resources, making them unavailable for the future use of the current taxpayers, or for future generations. Burdening that activity as a means of simultaneously financing the government and sending the right signals to taxpayers has considerable appeal.

With that affirmative case as background, let's look at several of the possibilities that have been suggested within the last year or so:

A National Sales Tax: Both conceptually and administratively, the simplest form of consumption tax is the sales tax. Among its advantages is its familiarity: all



Richard Schmalbeck is professor of law at Duke.

but five states had general sales taxes in effect in 1994. Sales taxes appear to most of us to be easy to compute and collect, generally without the aid of an army of accountants, lawyers, and auditors, and without the intrusiveness that many associate with current income tax system. Senator Lugar (R-Indiana) has proposed such a tax, at a rate of 18 percent, as the primary federal revenue source.

Of course there are some problems. The first has to do with the scope of the tax. To keep the tax rate as low as possible, the base against which it is assessed must be as broad as possible. But most state and local sales taxes are assessed only on sales of goods, not on services. In an increasingly service-oriented economy, a national sales tax could not afford to be so generous with its exemptions. But how will Americans feel about adding 18 percent to their doctors' bills, their college tuition payments, their apartment rent? In addition to the surprise of having these things taxed, there are other more deeply troubling conceptual conundrums. For example, how should we tax the purchase of a life insurance policy, where some part of the payment is for services, but another part functions more like a savings account, creating a life insurance reserve for the policyholder? These questions are not easily answered. Most of the available options either ignore the problems—which means tolerating unfairness—or add a good deal of complexity to a tax system whose simplicity is supposed to be one of its great strengths.

Another problem with a national sales tax is a problem that is endemic to all consumption taxes: they tend to be regressive. Lower-income households spend a larger proportion of their incomes on domestic retail purchases than middle and higher income households do, and will thus face higher average tax rates unless something is done to mitigate this effect. One mitigation mechanism is to exempt—or tax at lower rates—certain categories of goods and services that are disproportionately likely to be consumed by lower-income households. Unfor-

tunately, this is always imprecise, and usually complicated.

A preferable means of controlling regressivity is to distribute a partial tax rebate to all households, in fixed amounts that depend only on family size. This provides some relief from regressivity, but at some additional administrative and compliance costs: taxpayers must presumably file some sort of statement regarding their eligibility for the credit, and some government agency must

verify the accuracy of the family size claimed, and that no claim for that year had already been made, and must also process payment of the rebate. These costs would undoubtedly be smaller than the costs associated with the current income tax system; but they would not be insignificant, and the amount of progressivity that could be achieved through these devices would be quite limited.

The greatest administrative problem with a national sales tax, however, is likely to be in its enforcement. Enforcement problems begin with bald-faced noncompliance, as might be expected from peddlers, sellers at flea markets, and other less formal participants in the economy. But a more insidious and probably greater enforcement problem stems from the fact that a retail sales tax puts a great deal of pressure on the determination of when a retail sale has taken place. With only final sales subject to tax, buyers would have incentives to portray their purchases as intermediate ones, whether they were or not, and sellers would have an incentive to believe those claims, so as to reduce the gross prices of their goods and services. Reasonable control of abuses of this sort is imaginable, but it would be expensive. Enforcement problems have not been critical with respect to the current low-rate retail sales taxes. But if a federal rate of 18

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percent is added to a state and local tax rate of 6 percent or more, the overall tax rate would be high enough to provide ample incentives for buyers and sellers to find ways to avoid reporting taxable sales. In fact, tax administration experts believe that a sales tax rate very much above 10 percent would not be feasible due to enforcement problems.⁴

A Value-Added Tax:

A value-added tax (VAT) is a tax under which businesses are assessed

on the difference between the cost of their purchases and the volume of their sales. Although the tax rate would be about as high as in the case of a retail sales tax, the tax collection is spread over the entire chain of production, from initial manufacture through the distribution and retail networks. This spreads the compliance burdens more equitably among businesses, and also yields a lower tax amount collected at each point in the production chain, with concomitantly lower incentives to try to evade the tax on any single transaction.

Otherwise, the advantages and disadvantages of value-added taxes closely resemble those of a national sales tax. Incentives are provided to be thrifty, to avoid immediate taxation by saving rather than spending one's income. But a value-added tax tends to be regressive, and can only be made less so at some cost. The several VAT proposals currently under discussion in Congress include some creative approaches to the regressivity problem. The bill sponsored by Rep. Gibbons (D-Fla.) would retain an income tax on very high income taxpayers. The revenue generated by this income tax would permit modest lowering of the VAT rate, and would relieve the bulk of the taxpaying public from the necessity of filing income tax returns.

This approach would preserve existing progressivity between the very rich and the rest of the taxpaying public; however, within the group of taxpayers below the threshold of the Gibbons income tax—which is to say, among the vast majority of taxpayers—this tax would still be regressive. Alternatively, both of the next two types of tax reform present ways of retaining some progressivity within the context of a VAT-like tax, as will be explained below.

A Consumed-Income

Tax: The proposals of this type would retain the current income tax in something resembling its present form, but with deductions for additions to savings. The income tax has been moving in this direction for a number of years, as more and more opportunities for deductible savings have been added to the code. Qualified pension plans, Keogh plans, 401(k) plans, and individual retirement accounts are all examples of this trend.

Some of the plans within this category would simply extend favorable treatment to one or more additional savings vehicles—specialized accounts created to save for higher education or home purchases, for example. In other plans, the deduction for net savings is more general. The most prominent example of the latter type of plan is the “Unlimited Savings Act” (USA) bill introduced by Senators Nunn (D-Ga.) and Domenici (R-NM). This plan would retain the general contours of the current income tax, including deductibility of mortgage interest and charitable contributions, but would also allow deduction of any new “savings assets”—a concept defined broadly enough to permit investment in virtually any financial asset or real estate.⁴ Because the base of the tax would be somewhat eroded by allowance of a sav-

ings deduction, the rate structure would be about as high as under the present tax.

Proposals in this category have received considerable attention in academic and policy-making circles. However, they suffer from some serious defects. First, they present considerable transition difficulties, stemming largely from the perceived need to protect existing savings assets from double taxation. In fairness, a taxpayer ought to be able to dispose of any pre-enactment assets (that were pur-

chased without benefit of a savings deduction) without negative tax affect. Thus, consumption financed by those assets ought not be subtracted from gross new savings to reach the net new savings deduction. On the other hand, consumption financed by liquidation of previously tax-favored savings clearly should reduce the deduction for net savings. Making this distinction in an accurate and just manner adds a good deal of complexity

to the USA tax, for at least as long as pre-enactment savings assets exist.⁵

In addition to the complexity, the rate structure, as noted, is as apparently burdensome as the current system, or even more so. Taken together, these features deprive the USA tax of the two principal objects of tax reform sought by most American taxpayers: simpler rules and lower rates. It thus seems to deserve the characterization it has received as an “inside-the-beltway” proposal. It is difficult to imagine that it would generate the sort of popular, grass-roots support necessary to enact major tax changes.

Flat Taxes: The so-called “flat tax” has enjoyed an enthusiastic reception among some part of the electorate. Senators Specter and Gramm, House Majority Leader Armev, former Presidential candidate Steve Forbes, and a host of others

have presented variants to the public. What are the essential elements of a flat tax? As to individuals, a single rate—typically about 17 percent—is assessed against that part of the tax base that exceeds a fairly generous family exemption. The size of the exemption varies with the particular plan, and in all plans varies as well with family size; typically, an exemption of between \$25,000 and \$35,000 for a family of four is provided. The tax base is defined to include only wages and salaries paid in cash, pensions, and income from labor. Interest, dividends, rents, royalties, and capital gains are simply excluded from the tax base of individual taxpayers.

A tax at the same rate would also be assessed against all business income. The base of the business tax generally allows the same deductions as the present system, except that interest paid is non-deductible. Thus, business costs except capital costs are deductible under this tax.

The flat tax is essentially a VAT, with a personalized element for wages. Thus, the business tax allows deduction of all purchases—as does a VAT—but also allows deduction of wages. The wage income that is taken out of the VAT base, however, is also taxed, but is assessed against the individual wage-earner, not against the business. At year-end, the wage-earner reports her wage income, and computes a tax on that amount, incorporating the \$25,000 (or more) exemption provided by the act. This accomplishes much the same purpose as the rebate of a sales tax might: it provides for a basic, subsistence level of income to be consumed free of tax, and thus preserves at least a modest amount of progressivity in the system. The flat tax thus incorporates a personal element into what would otherwise be a purely transactional tax.

Some proponents of a flat tax have made bold claims about the effects such a tax would have on the economy, suggesting that it might double the rate of growth. There is some theoretical support for the claim that flat taxes favor growth: lower rates and stronger incentives to



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save are certainly consistent with improved growth prospects. However, the magnitude of these effects is uncertain. History offers conflicting lessons on these issues. On the one hand, the 1964 tax cut was followed by solid growth.⁶ The first Reagan tax cut, which reduced top rates on investment income from 70 percent to 50 percent, and cut the rates at all income levels by about 23 percent, presents ambiguous evidence with respect to growth. But that act unambiguously contributed to hugely increased budget deficits.⁷ And it remains true that the greatest period of American economic growth in this century occurred during the 25 years or so following the end of World War II—a period that was characterized by marginal tax rates much above the levels that prevail under current law. In light of this very mixed record, it would be difficult to conclude that lowering marginal tax rates is likely to have any profound effects on economic growth.

Transitions

There is a tax policy maxim to the effect that an old tax is a good tax. There is more to this observation than mere resistance to change. The crucial insight of this maxim is that taxpayers make investments based on, and in some sense, investments in, existing tax rules, especially if they have reason to believe that those rules are durable.

A simple example will illustrate the wisdom of a conservative approach to tax changes. Municipal bonds—interest on which is exempt from federal income taxes—generally have rates of return that are about 20 to 30 percent below the rates of return available on taxable corporate bonds of comparable risk. The market deems this discount an appropriate price to pay for the tax exemption. (In fact, the discount is itself a form of tax payment, since it is received by a local governmental unit as an interest subsidy.) What if the tax exemption suddenly vanishes, as it essentially would under a flat tax that made all interest payments excludable?

Investors would demand similar rates from similar financial instruments, since the nature of the borrower would no longer be a meaningful variable. All else being equal, the prices of (previously) tax-exempt bonds would fall, and prices of (previously) taxable bonds would rise.

How much rise and fall would occur depends on what happens to interest rates generally after enactment of a new tax system. But if we assume—just to take one possible outcome—that the new equilibrium rate is midway between the two pre-enactment rates, then the value of a recently-issued tax-exempt bond would fall by about 10 percent, and the value of a recently-issued taxable bond would rise by a similar percentage. Predictably, the owner of the taxable bond will enjoy her windfall gain quietly, while the owner of the tax-exempt bond will be outraged by his windfall loss, thinking—not without reason—that Congress has reneged on one of the terms of his investment contract. And, of course, local governments will suffer a detriment as a side-effect of tax reform: their cost of financing new capital assets will increase by 10 percent or so.

This example is a microcosm of the massive windfall gains and losses that will develop in the market as every asset undergoes revaluation in light of a radically different tax regime. Perhaps the area of greatest concern in this regard to most taxpayers is the effect of tax changes on the price of owner-occupied housing. Estimates of the loss in value of such housing that would be occasioned by enactment of a flat tax vary between 15 percent and 40 percent—or more, in some markets.

The magnitudes—and in some cases even the direction—of the changes in the value of assets following fundamental tax system changes are highly uncertain. But a few predictions can be made: 1) Those who seem likely to be losers in the asset

re-valuation shuffle will argue vociferously for partial relief in the form of lengthy transition rules—phase-outs, grandfathering, and the like; 2) those who seem likely to benefit will not expect to find their windfall gains subject to transition rules; and 3) Congress will respond to this lob-

bying asymmetry by letting the gains fall where they may, while providing at least some transition relief to the losers.

These observations lead in turn to a few other predictions: 1) Whatever the revenue losses of the tax proposals in their purest form might be, they will be exacerbated during the transition period; and 2) mediating between those revenue losses and the legitimate complaints of the victims of tax changes will lead to a web of transition rules that will be highly complex, yet will still leave some residual unfairness unrelieved. If one doubts the accuracy of these predictions, he need only review the effects of the Tax Reform Act of 1986, which contained a number of transition rules that were complex, but still inadequate. And that act was of modest scope in comparison to the proposals discussed here.

Distributional Effects

As George Bernard Shaw once observed, "A government which robs Peter to pay Paul can always depend on the support of Paul."⁸ In the long run, it seems clear that the wealthy would do very well under a consumption tax regime, and especially so under a flat tax; proponents of such a tax can presumably count on the support of this group. One countervailing effect should be noted: consumption taxes are likely to be at least partially passed on to consumers in the form of higher gross prices for everything touched by the consumption tax. This general increase in price levels—which might be as much as 20 percent—will have the effect of lowering the purchasing power, and hence the

value, of all fixed-rate assets. This is likely to be particularly troublesome with respect to elderly taxpayers, whose assets generally represent after-tax investments, who would nevertheless face, under a consumption tax regime, an additional tax as they spend down those assets on support during retirement.

My guess, however, is that much of this one-time tax on wealth will be relieved by transition rules of the sort discussed in the preceding section. That will leave us with the effects of a system that is centered around a consumption tax, with some relief thrown in at the bottom end in the form of the exemption of the first \$25,000 or so of income. This is likely to produce a revenue profile that appears modestly progressive when households at the lowest income levels are compared to households having moderate incomes; above those levels, the revenue profile will likely be flat at best, and may well be regressive.

The regressivity in the upper half or so of the individual part of the flat tax stems from the fact that a flat tax rate would be assessed primarily against wage and salary income, which is a component of total income whose proportion diminishes as income rises. In 1992, for example, more than 80 percent of the income of taxpayers with adjusted gross incomes less than \$200,000 was wage and salary income, while less than 50 percent of the income of taxpayers above that level was from wage and salary sources.⁹

It is possible that some of the regressivity inhering in these distributional facts would be offset by the tax burden of the business side of the flat tax; however, the incidence of that part of the tax is very difficult to project. Much of the business tax may well be borne by consumers rather than by owners of businesses. Overall, it seems fairly likely that the flat tax would turn out to be regressive in the middle-to-upper ranges of the income distribution, and would in any event be significantly less progressive than the current income tax.¹⁰

Progressivity of the Present Income Tax

Of course, many taxpayers do not believe that the current income tax is really progressive at all. However, as the table shows, the federal income tax is noticeably progressive, with average rates marching up from less than 5 percent on low-income groups, to more than 25 percent for taxpayers with incomes above \$200,000.

DISTRIBUTION OF THE FEDERAL INCOME TAX BURDEN—1992¹¹

| INCOME GROUP | PCT. OF ALL TAXPAYERS | PCT. OF ALL ADJ. GROSS INCOME | PCT. OF ALL INCOME TAX | AVG. INCOME TAX RATE |
|--------------|-----------------------|-------------------------------|------------------------|----------------------|
| < \$20K | 48.9% | 12.8% | 4.6% | 4.7% |
| \$20-50K | 33.8% | 34.5% | 25.8% | 9.8% |
| \$50-100K | 13.9% | 29.0% | 29.4% | 13.3% |
| \$100-200K | 2.5% | 10.2% | 14.2% | 18.3% |
| > \$200K | .9% | 13.5% | 26.0% | 25.3% |

Those inclined to disbelieve that the graduated rate schedules produce a tax that is progressive in practice may be disinclined to believe in this table as well. They might point out, for example, that adjusted gross income does not include much of the true income of the wealthy, and that the denominator of the average rate fraction is therefore understated in the upper bracket. On the other hand, the implicit tax (in the form of foregone interest) incurred by investors in tax-exempt bonds is not included in the numerator either. I believe (but cannot prove) that when appropriate adjustment is made for both the tax savings and the foregone income of tax-motivated investments, the table would not look very different. For the most part, our tax system—at least since the very important reforms in the 1986 Tax Reform Act—does very well at taxing income from labor, and fairly well, though less comprehensively, at taxing income from capital.

One of the reasons is that there really is a “secret”—or at least a little-known and poorly understood—tax code for the

rich, but its operation is roughly opposite what is popularly supposed: it operates primarily to control the wealthy's tendency toward tax-avoidance excess. It consists, for example, of several hundred pages of regulations regarding the alternative minimum tax, a vehicle designed exclusively to ensnare high-income taxpayers who run up large “tax preferences.” It consists of the complex web of rules referred to as the “time value of

money” rules, which exist exclusively to prevent taxpayers with large amounts of capital income from engaging in income deferral, or conversion of ordinary income into capital gain.

Curtailing excessive tax-avoidance behavior is difficult, and certainly not comprehensively accomplished by the current code. Nevertheless, it is effective enough that the overall pattern of the income tax is one of moderate progressivity, through a broad range of incomes.

Why a Progressive Tax?

Throughout this article, I have addressed the issues involved in selecting an appropriate federal tax system at least partly in terms of whether or not proposed tax systems preserve the progressivity of the current income tax. It is certainly fair to ask why that is important. There is a short answer to that and a long one.

The long one is too long for this article,¹² fortunately, the short one is sufficient. It is premised on the belief that the overall revenue profile of governments at all levels in this country, as a minimal con-

dition of fairness, ought not be regressive. Because that overall revenue profile—except for the federal income tax—consists mostly of taxes that are regressive, it requires the addition of a significantly progressive element to reach a balance that is roughly proportional overall.

The largest state and local revenue sources are sales taxes, which accounted for about 35 percent of the \$556 billion in state and local tax revenues in 1992, and property taxes, which accounted for another 32 percent.¹³ Because the proportion of a household's budget that is devoted to items burdened by such taxes declines with income, sales taxes tend to be regressive, and property taxes might be as well.¹⁴

About 20 percent of state and local taxes are in the form of individual income taxes; but these are, with a few notable exceptions, not structured to be very progressive. They either run through a very narrow range of rates, or reach the top rate very quickly, or both. State and local governments also generate revenue by operating monopolies of public utilities, lotteries, liquor distribution, and transit systems—which tend to be regressive for the same reasons that sales taxes generally are.

The federal revenue picture is no more encouraging. Payroll taxes generate almost as much revenue as the individual income tax: about \$484 billion, compared with \$588 billion in 1995.¹⁵ The largest part of that is the FICA tax, most of which

applies only to the first \$62,700 of wages. The corporate income tax, which produced about \$151 billion of revenue in 1995, may be one element besides the individual income tax that tends to be somewhat progressive. The accepted view now appears to be that this tax is for the most part a tax on capital, and hence borne by those who own it. But it seems doubtful that this is enough to offset the regressivity of the other taxes noted.

In the 1970s, the conventional wisdom was that the revenue profile was U-shaped, with relatively high effective tax rates at the very bottom of the income distribution (mostly due to benefit phase-outs of non-tax programs), and slightly higher effective tax rates at the very top end, due to the then high marginal income tax rates of the individual income tax. The effective tax rates were thought to be lower, and relatively flat, through the middle 80 percent or so of the income distribution.

However, the flood of tax legislation in the 1980s surely destabilized that view. A new consensus on the revenue profile hasn't yet emerged, but that profile has been flattened at the upper end with rate cuts, and flattened at the lower end by an expanded earned income tax credit, so the overall revenue structure is by now probably close to being flat throughout the income distribution. If we were at this point to replace the moderately progressive federal income tax with something that was much less progressive, or even regressive, we would, in all probability, produce a revenue profile in which overall effective tax burdens as a percentage of income decline as income rises. In an era of increasing pre-tax income inequality, we don't need "reform" like this.¹⁶ ■

1 Gibbs, "Knock 'em Flat," *Time*, 1/29/96, at 22, 24. The candidate, of course, was Steve Forbes.

2 A progressive system is one in which tax burdens as a proportion of income rise as income rises. A regressive system is one in which they decline as income rises. A proportional system taxes all incomes at the same rate. A tax system can be continuously progressive or regressive, or it can be progressive within some ranges, and regressive within others.

3 See V. Tanzi, *Taxation in an Integrating World*, Washington, D.C., The Brookings Institution, 1995, pp. 50-51.

4 Of course, taxpayers engaged in a business also could deduct investments in machinery and equipment. The principal category of investment that would not be deductible would be collectibles—paintings, carpets, antiques, and the like. This bill also would add a VAT to the tax system, as a substitute for the current corporate income tax.

5 In some sense, it is unfair to criticize the USA tax for its complex transition rules. As will be discussed below, all consumption taxes face the same problem of what to do about taxing consumption financed by previously taxed savings. The USA tax is the only plan that really takes this problem seriously, and therefore the only one that makes clear what a difficult problem this is.

6 Of course, it was also followed by an expensive war, which had its own stimulative effects. It is also worth noting that the top-end rate cuts in the 1964 Act were from a breath-taking 91 percent to a mere 70 percent.

7 The federal budget deficit, which had averaged less than \$50 billion per year over the decade preceding the 1981 Act, averaged \$190 billion per year in the decade following. Author calculations based on *The Statistical Abstract of the United States*, 1995, Table 517.

8 G. Shaw, *Everybody's Political What's What!* London: Constable and Co., 1944, p. 256.

9 Author calculations based on data in the 1992 Individual Tax Returns report from the IRS *Statistics of Income* series.

10 A preliminary study on the distributional effects of several structural tax options by Gale, Houser, and Scholz indicated that the Arney flat tax plan would reduce the tax burden on taxpayers with incomes above \$200,000 by 42 percent if we assume that the business part of the tax is borne by consumers, and by 26 percent if we assume that the business part is borne in equal measure by capital and labor.

11 This table is prepared from author calculations based on the 1992 individual report from the IRS *Statistics of Income* series. (1992 is the most recent year for which final data are available; the progressivity of the current income tax is actually somewhat greater than is shown in this table, due to the addition in 1993 of the 36 percent and 39.6 percent brackets.)

12 It has to do with the fact that income is the best measure of ability to pay tax, and with the fact that the declining marginal utility of additional sums of after-tax income suggest that overall sacrifice can be minimized by some progression in the tax structure. These ideas are quite controversial, but I believe they are still defensible.

13 Author calculations based on *The Statistical Abstract of the United States*, 1995, table 481.

14 Local property taxes are somewhat problematic. The general assessment within the public finance community is that if such taxes are geographically uniform, they are a tax on capital, and hence a progressive element in the tax system. To the extent that they vary, they can be passed on to renters, and this tends to be regressive.

15 Table 518, *Statistical Abstract of the United States*, 1995.

16 Indeed, some commentators who have studied our increasing income inequality have specifically suggested increasing the progressivity of the tax system as a means of reducing the effects of changing income distributions. See Frank and Cook, *The Winner-Take-All Society*, 1995.

Before the Supreme Court

In the spring of 1995, the Supreme Court appointed professor **Sara Sun Beale** to represent an indigent inmate who sought to overturn the agreement in which he had pled guilty and forfeited all of his property. The case was something of a home-



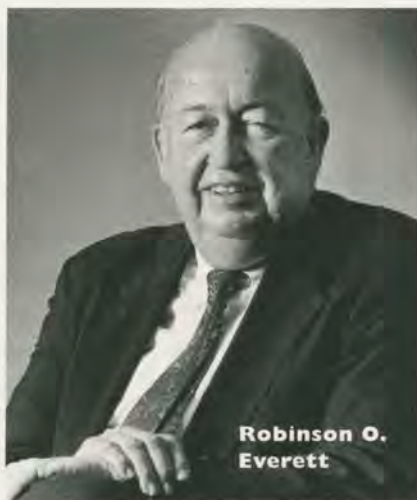
Sara Sun Beale

coming for Beale, whose last job before joining the Duke Law School faculty was representing the United States in the Supreme Court, where she has argued six cases. Beale used the case as an opportunity to expose Duke students to the real world of appellate litigation, using student research assistants to help prepare the briefs, having students sit on a panel that conducted a practice argument, and arranging for 30 students in her classes to attend the argument.

The principal question in Beale's case, *Libretti v. United States*, was whether the trial judge had an obligation to determine if there was a factual basis for criminal forfeiture pursuant to a guilty plea. The lower court ruled that the Federal Rules do not require such an inquiry when the defendant pleads guilty and agrees to the forfeiture. Beale sought to

persuade the Supreme Court that judicial review is necessary both to protect the defendant's interests and to ensure that the government does not exceed the statutory authority for forfeiture. In the absence of judicial review, she explained, "a wealthy defendant could buy a shorter sentence by agreeing to forfeit property the government is not entitled to take, and an overzealous prosecutor could force a defendant to agree to such a forfeiture in order to avoid a much longer prison sentence." Libretti, for example, was faced with a mandatory 50-year sentence if he did not agree to forfeit all of his property, including assets that were not drug tainted, such as his employer funded retirement plan and a bank account his parents started for him in elementary school.

In December 1995, professor **Robinson O. Everett** returned to the Supreme Court to argue a case he first presented in 1993. In the 1993 appearance, Everett argued *Shaw v. Reno* concerning the practice of redistricting in compliance with the Voting Rights Act. Everett, representing himself and four other Durham voters, including professor Melvin Shimm, argued that the state General Assembly violated constitutional principles when it created districts that would "guarantee the election to Congress of persons of a specific race."



Robinson O. Everett

When Everett appeared in December to argue *Shaw v. Hunt*, he "urged the court to strike down a 'monstrosity' of racial gerrymandering that cast aside such traditional redistricting principles as contiguity and compactness," according to Knight-Ridder News Service. He argued that creating separate but equal districts for minorities simply divides people further, according to States News Service, which quoted Everett as saying, "The North Carolina redistricting is a racial classification and therefore unconstitutional."

On June 13, 1996, the Court ruled in a 5-4 decision that the use of race in legislative districting in North Carolina and Texas was unconstitutional.

Medal of Freedom to Franklin

President Bill Clinton presented the Presidential Medal of Freedom, the nation's highest civilian honor, to **John Hope Franklin**. Franklin, professor emeritus of legal history, was one among 12 honorees to receive the honor during a White House ceremony in September. Clinton called him the "true face of American heroism," according to States News Service. "John Hope Franklin, son of the South, has always been a moral compass for America, pointing us in the way of the truth." In other honors, the Duke University Library has established the John Hope Franklin Research Center for African and African American Documentation, which will collect and preserve research critical to scholarly research and teaching in all areas related to African and African American studies.

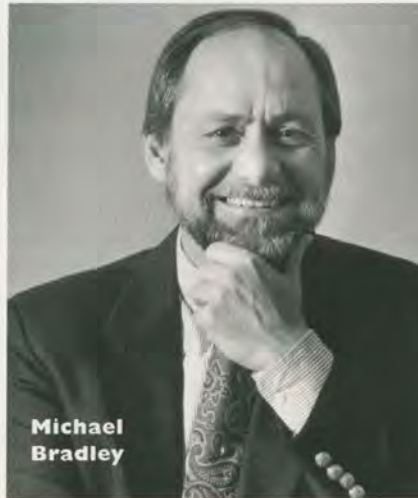
New Faces at Duke Law

Two faculty members joined the Law School during the 1995-96 academic year. Assistant professor **Trina Jones** worked in general litigation as an associate for Wilmer, Cutler & Pickering in Washington, D.C. from 1991-95. Her primary interests are in race and gender issues, and she teaches civil procedure and employment discrimination at Duke. She received her JD in 1991 from the University of Michigan, where she served as articles editor for the *Michigan Law Review*, and a BA from Cornell University in 1988.

Michael Bradley is the F.M. Kirby Professor of Investment Banking, with appointments in the Law School and the Fuqua School of Business. His teaching and research interests lie at the intersection of corporate finance and corporate law. He has published papers on corporate capital structure, mergers and acquisitions, takeover defenses and tactics, govern-



Trina Jones



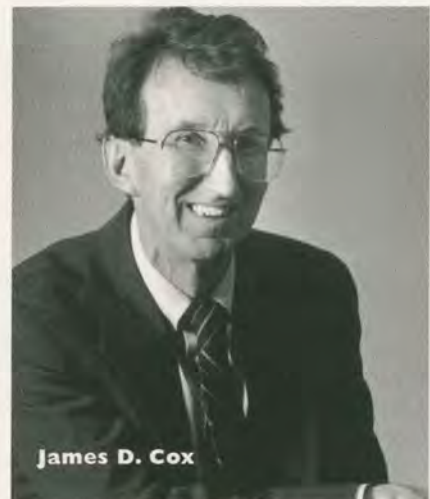
Michael Bradley

ment regulation of the securities market, insider trading, fiduciary duties of corporate managers, corporate governance and corporate bankruptcy. His work has been cited in textbooks, professional journals, and in the decisions of numerous state and federal courts, including the U.S. Supreme Court. Bradley earned his Ph.D. from the University of Chicago, an MBA from Syracuse University and an AB from the University of Idaho. Bradley came to Duke from the University of Michigan where he had appointments at the law and business schools; he also served on the faculties of the Universities of Chicago and Rochester.

Honors for Cox

Professor **James D. Cox** received the Distinguished Teacher Award for 1994-95 from the Duke Bar Association (DBA). The DBA has presented the Distinguished Teaching Award annually since 1985 to recognize outstanding classroom contributions from a member of the Law School faculty. Cox is a previous winner of this high honor.

Cox's book *Corporations* has received the award for best new legal book of 1995 in the Association of American Publishers' annual awards competition. His co-authors are Thomas Lee Hazen and the late F. Hodge O'Neal, a former Duke Law School professor and dean. The AAP presents the awards to recognize



James D. Cox

excellence and innovation in professional, scholarly, and reference publishing. *Corporations* is the first comprehensive treatment of corporate law in more than 30 years. Cox and his co-authors cover contemporary issues of corporate law, including corporate governance and directors' fiduciary duties, mergers and acquisitions, shareholder litigation, takeovers and defensive maneuvers, and the full range of share transactions. Little, Brown and Company published the book.

DeMott Appointed as ALI Reporter

Professor **Deborah DeMott** was appointed the reporter for the American Law Institute's new (third) Restatement of Agency. The project also will have a group of judges, practicing lawyers, and academics designated to serve as its advisers. This is the third time the ALI has restated the law of Agency; the previous projects were in 1958 and 1933. DeMott joins her colleague, professor **Katharine Bartlett**, as an ALI reporter. Bartlett was appointed as a reporter on the ALI's Principles of the Law of Family Dissolution in 1994. Her primary area of responsibility on the project is child custody.

Professional News

Professor **Sara Sun Beale** was asked to serve on the criminal law advisory board of the *Journal of Criminal Law & Criminology*. She will work with colleagues from other top law schools around the country on the newly formed board.

Professor **Katharine Bartlett** completed her service as senior associate dean for



**Katharine
Bartlett**

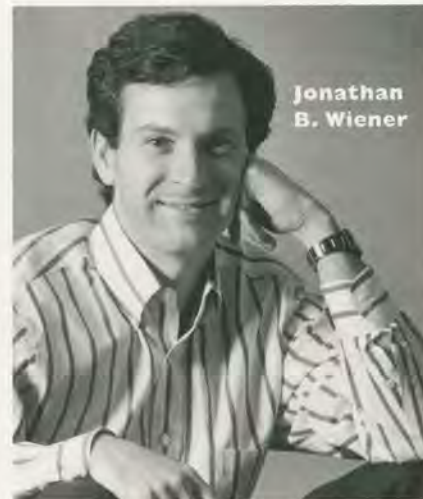
academic affairs. During her term she focused on the faculty community and the curriculum, while continuing to serve the School as a productive scholar and teacher. "Her leadership and service have left this a better law school," said Dean Pamela Gann.

Associate professor **Amy L. Chua** has received an International Affairs Fellowship from the Council on Foreign Relations. Chua will spend 1997-98 in a policy-making setting, such as the International Monetary Fund or the U.S. Department of the Treasury, pursuing her research project. Chua is studying the interrelationship among the forces of ethnonationalism, marketization, and democratization in the Central Asian republics of the former Soviet Union. Chua is the third Duke Law School faculty member to receive this honor: professor Donald L. Horowitz, and Dean Pamela B. Gann were International Affairs Fellows in, respectively, 1971-72 and 1983-84.

Dean Gann appointed professor **Thomas Rowe** to serve as senior associate dean for academic affairs for the 1995-96 academic year.

Assessing the N.C. Justice System

Three Duke Law faculty members are part of a 27-member commission designed to assess the future of the justice system in North Carolina. Professors **Thomas Metzloff** and **Robert Mosteller**, and **Theresa Newman**, senior lecturer/head of the research and writing program, are serving on the commission, along with legal professionals, business and government leaders, and politicians. The commission will take the first comprehensive look at the state court system since the 1950s. Newman and Mosteller will serve as reporters for the commission's civil justice and criminal justice committees, respectively.



**Jonathan
B. Wiener**

Protecting Health and the Environment

Associate professor **Jonathan B. Wiener** co-edited and co-authored *Risk versus Risk: Tradeoffs in Protecting Health and the Environment* (Harvard University Press, 1995). Wiener and John D. Graham of the Harvard School of Public Health use case studies to demonstrate how efforts to reduce risks to health and the environment can actually make things worse by creating new risks. They illustrate the complexities of risk trade-offs, ranging from personal medical choices to control of toxic substances and prevention of global crises. *Risk versus Risk* critiques counter-productive risk-reduction efforts, but it also offers a new method of analysis designed to illuminate and help resolve risk tradeoffs. The book concludes by suggesting constructive reforms in government institutions, medical care, and risk decision making to help solve the conundrum of risk tradeoffs.

Wiener received special recognition for his essay, "Law and the New Ecology: Evolution, Categories and Consequences," published in *Ecology Law Quarterly* in 1995. A national expert panel chose the

essay as one of the best 13 articles on environmental law published in 1995, selecting it from more than 400 entries. The next annual *Land Use and Environmental Law Review* will reprint the selected articles.

Faculty Granted Tenure

Laura S. Underkuffler was granted tenure and was promoted to the rank of professor of law on July 1, 1996. Her scholarship is concentrated in two fields: religion and law, and the constitutional protection of property. Both fields include the role of the state in limiting fundamental individual freedoms, and both involve the exploration of basic areas of jurisprudential and constitutional inquiry. Both also involve the presence (or absence) of explicit value choice in public decision making. Her more recent work has dealt



with the meaning of "property," and particularly its application in the context of "takings" of property under the Fifth and 14th Amendments.

Underkuffler plans to begin comparative work in the field of corruption. This project includes the development of a conceptual framework for looking at the area, and the application of the framework to the problem of corruption in the context of our legal and judicial systems. She will apply her work across three countries: the United States, Chile, and Venezuela. This work will move her directly into the field of comparative law, which is an under-worked field. Underkuffler regularly teaches the first-year required course in property, an elective in advanced property theory, and the course in federal courts.

Martin J. Stone was granted tenure and was promoted to the rank of professor of law at July 1, 1996. Stone, who was awarded his PhD in philosophy from Harvard this June, holds a secondary appointment in Duke's Department of Philosophy. His published scholarship has engaged in contemporary debates concerning the rationality of legal and political institutions. His earliest published essay, focusing on the work of Roberto Under, examined the "politics of modernism"—a politics appropriate to the historical experience that Nietzsche calls "nihilism" and identifies as the re-grounding of all values in human will. His second essay took up issues in interpretive theory that are currently central not only in legal studies but in philosophy and literary studies, too. His most recent work concerns the substantive justification of a specific area of legal doctrine, tort law, and it attempts to illuminate certain classical theses of legal philosophy by bringing them to bear on the problems in this area of law. The major thrust of his work is to forge productive alliances between the disciplines



of law and philosophy. For Stone, this requires a kind of philosophical work in which the law becomes a genuine source of philosophical creativity, which means that the law would interrogate philosophy and not simply be submitted to it. He has an abiding interest in the relation between law and the larger intellectual culture, including literature and film. Stone regularly teaches the first-year required course in torts, and he also teaches upper-class seminars in legal theory and in jurisprudence. Because of his secondary appointment in the philosophy department and his more general interests in the humanities, he will offer a graduate seminar in the School of Arts and Sciences.

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Law Alumni Association News

Alumnae Legislators

Duke Law School graduates Ember Reichgott Junge '77 and Susan Bysiewicz '86 are applying their talents to their state legislatures.

For **Ember Reichgott Junge '77**, public service and private practice offer a perfect complement. The fourth-term Minnesota state senator, who plans to run again in 1996, finds "it's a wonderful balance to be able to spend time dealing with the issues that are so real to Minnesotans, and at the same time to continue to grow professionally as a lawyer and to confront challenges in that realm." Because the Minnesota legislature is a part-time or "citizen" legislature, Reichgott Junge has been able to balance a career as a lawyer-legislator. When not attending to her legislative duties, she is one of eight lawyers in The General Counsel, Ltd., a firm that serves as in-house counsel to major corporations in the Twin Cities area on a time-shared or contract basis.

Reichgott Junge has represented five suburban Minneapolis communities since she was first elected to the Minnesota State Senate in 1982. In 1994, she was the first woman elected to the state senate leadership, when she assumed the role of Senate Assistant Majority Leader, the second-ranking leadership post in the Minnesota Senate. She also was the first woman to serve on the Judiciary Committee when she joined in 1982, and the first woman to chair that committee in her state, as she did from 1993-94. Since then, the membership of the committee has grown to 50 percent women. "This is extremely important," she explains, "because we deal with many issues of concern to families, such as family law and adoption."

Judiciary is one of three main areas where Reichgott Junge has focused her work over the years. She also has worked on tax policy, chairing several tax sub-committees and working to reform the state's tax system. Her third area of interest—the one closest to her heart—is education and education funding. She was the chief sponsor of the first open enrollment legislation in the country, as well as the first charter school legislation in the country. Charter

schools are autonomous public schools funded by state dollars that are subject to a charter, or contract, with the school district to live up to certain performance standards. Twenty states have followed the charter school legislation originated in Minnesota.

As chair of the Senate Sub-Committee on Ethical Conduct, Reichgott Junge faces a particularly challenging situation. Several state senators have been convicted of misdemeanor criminal violations, and another has been charged with felony violations. "We have opened hearings on the ethics issues that have come before our committee, so this has been a very challenging time. And it's one area where I have had to use every possible skill that I learned in law school and in my practice."

Reichgott Junge first became interested in politics when, as a senior at St. Olaf College, she went to Washington as an



Ember Reichgott Junge '77

intern with then-Senator Walter Mondale. "I became very interested in some of the issues he was working on, including the Select Committee on Children and Families and the issue of domestic violence." Although she originally planned to work with the federal government, during her studies at Duke Law School she became more interested in returning to Minnesota and becoming involved in politics there.

Her experience at Duke Law School has been helpful in her legislative duties as well

as her legal career. "A number of the issues we talked about in criminal law and constitutional law at Duke have become important in the work that I do in the legislature, and I had a number of opportunities to use my business law background as well. I chief-authored legislation that created limited liability companies and partnerships, authored a number of changes to our business corporation laws, and authored legislation creating living wills, durable powers of attorney and related initiatives."

Eighteen of Minnesota's 67 state senators are women, as are approximately 25 percent of the entire state legislature. "The climate for women has changed," Reichgott Junge notes. "When I began serving 14 years ago, women were definitely well-respected and effective in getting their bills passed, but there wasn't that critical mass that helped bring issues to the forefront. Now that we have more women, we are focusing more on crime prevention, education, health care, and the issues that affect middle class families. Women have been able to bring some life experience to the legislature that has changed the focus over the years."

One of those women who joins Reichgott Junge in bringing life experience to the state legislatures of our nation is Representative **Susan Bysiewicz '86**, who serves in the Connecticut General Assembly. The youngest woman serving in the Connecticut legislature—which is approximately 25 percent women—and the only one with three young children, Bysiewicz feels that she represents the young, working woman with children. "It's hard enough for women who work and have a family—it's doubly hard to be in the legislature too," she explains.

Growing up with a mother who was one of the first female graduates of the University of Connecticut Law School, a prominent lawyer, law professor and an appointed member of a number of state commissions, Bysiewicz was attracted to public service. After earning her undergraduate degree at Yale, Bysiewicz began her legal studies at UConn while finishing

her book on Ella Grasso, the first woman governor elected in her own right. She transferred to Duke Law School for her second and third years. "I knew Duke was a beautiful school with a fine reputation, and I wanted to go to law school in a different part of the country. Duke Law School was important in that it taught me to think critically. It was a good place to learn and to meet other people who were interested in public affairs."

After graduating from Duke, Bysiewicz joined a firm in New York City, then moved back to Connecticut and practiced law in Hartford. She decided to help Dick Blumenthal run for Connecticut attorney general and served as his campaign manager for his first term election. "That's when the political bug bit," she remembers. "Dick had served in the state legislature before he ran for attorney general, so when the opportunity arose to run for state representative, I was familiar with the office, and I decided it would be interesting." She was elected in 1992, and reelected in 1994.

Like Minnesota, Connecticut also has a part-time legislature, although Bysiewicz says that in practice, it is a full-time job, particularly with her responsibilities as a co-chair of one of the major committees, in addition to her role in representing her district. In spite of the time commitment, she also maintains her own private practice in consumer law.

As co-chair of the Government Administration and Elections Committee, Bysiewicz has worked toward creating a single New England Presidential Primary on March 5. Setting the presidential primaries in Connecticut, Massachusetts, Rhode Island, Maine, and Vermont on the same date, she says, will give the Northeastern states more clout in the presidential primary process. She also has worked on gender balance law, which requires the Governor and other legislative leaders who make ap-



Susan Bysiewicz '86

pointments to state boards and commissions to consider the gender and ethnic diversity in Connecticut in making those appointments, and has focused on improving day care health and safety regulations.

Bysiewicz and another woman lawyer were the first women to serve on the Judiciary Committee in her state.

Bysiewicz agrees that it is particularly important for women to serve on this committee, since issues related to civil rights, criminal justice, confirmation of judges, issues of gender and access to health care, and laws related to reproductive choice are decided there.

Both women have husbands who understand the demands of legal careers. In 1993 Reichgott Junge married Mike Junge, an elected county attorney (district attorney) for a rural community in Minnesota. "Because we are both elected, we are not allowed to live together by statute!" Reichgott Junge laughs, explaining that the two maintain separate homes and commute back and forth. Bysiewicz met her husband, David Donaldson, JD/MBA '87 at Duke Law School. They have three children under age five. "I had our first daughter five months before I first ran for the legislature, a daughter during my first term, and my son in the second term!" exclaims Bysiewicz. "I'm lucky to have a very supportive husband, otherwise I couldn't do what I do."

Both women are pleased with their career choice. Reichgott Junge's words are echoed by Bysiewicz. "Public service is one of the most rewarding occupations you can have. It is an honor and a privilege, and it has added a great richness to my life."

LAURA ERTEL

White House Fellow

For the second time in this decade, a young Duke Law School alumna is serving as a White House Fellow. Appointed by President Clinton, Tanya Oubre is spending the 1995-96 year as a Fellow in Washington, D.C. She follows in the footsteps of Kimberly Till '80 who began the decade as a Fellow for 1990-91.

A non-partisan award, the White House Fellowship program places exceptionally talented men and women in full-time positions for a year at the White House and Cabinet-level agencies. The Fellows write speeches, chair meetings, draft legislation, and coordinate policy. In addition, they attend an educational program of regular meetings with senior government officials, top business executives, journalists, and other leaders. Says Oubre, "This wonderful education program has allowed us to have many engaging and timely discussions with a variety of fascinating people, including President Clinton, former President Bush, Ambassador Richard Holbrooke, Attorney General Janet Reno, Carl Sagan, Vernon Jordan, Tom Brokaw, and Justice Stephen Breyer. We will be traveling to Vietnam, Cambodia, Hong Kong, and Singapore."

The program's alumni include HUD Secretary Henry Cisneros, CNN president Tom Johnson, Tenneco CEO Dana Mead, and former chairman of the Joint Chiefs of Staff Colin Powell. Till, who spent her year working on a variety of international trade projects with the Secretary of Agriculture, now works as director of business planning for EuroDisney.

Oubre is an attorney specializing in energy regulation at the Southern California Edison Company, where she is responsible

for the company's nuclear licensing and waste disposal matters. Previously she worked as a corporate associate at Simpson, Thacher & Bartlett, and as a mathematics instructor for Upward Bound preparing disadvantaged students for college. Since 1990, she has taught music, dance, drama, and Sunday School to children at an inner-city ministry and has volunteered



Tanya Martin Oubre '89

as a tutor and mentor for at-risk youth. While in Law School, she was director of the Volunteer Income Tax Assistance program and secretary of the Duke Bar Association, as well as serving on the Deans' Advisory Council and the Moot Court Board and working with the Black Law Students Association.

Oubre, who is spending the year as special assistant to Secretary of Education Richard Riley, has had the opportunity to conduct briefings, review legislation and other documents, and observe the process of governing at the highest levels. She finds, "One highlight of my job has been to prepare for and attend meetings between Secretary Riley and various members of the Cabinet. Whenever I am in the West Wing of the White House, I am struck by its magnificent history and am grateful to have

the chance to be there." She has been working in areas involving the development of school-business-community partnerships, the role of education in community development, teen pregnancy prevention, charter schools, and access to post-secondary education.

The program was of interest to her "because of the exposure it provided to senior-level leadership and policy-making, and its emphasis on having Fellows use the experience to benefit their communities." At the end of the Fellowship, Oubre will "return better prepared to contribute to my community and to my profession with an enhanced understanding of public policy."

One of the most exciting parts of the year for Oubre and her husband, Derek, was the birth of a daughter, Lauren Elise, on November 12, 1995—nicely timed so that it corresponded to the government furlough. Oubre notes, "Lauren has had a number of interesting experiences, including seeing the White House Christmas decorations and being introduced by Secretary Riley, that I will enjoy telling her about in the years to come." ■

Educator, Arbitrator Believes in Community

In the fall of 1931, a very young and determined Paul Sanders hitchhiked from Texas to North Carolina to enter Duke Law School. "A Duke sticker on the small bag I carried and my thumb enabled me to average over 300 miles a day for four days over roads at times unpaved," Sanders said. "I arrived in Durham early on the fifth day in time to check in at the Law School and be settled in a dormitory room. My out-of-pocket travel expenses were around \$20."

Sanders' spirit of adventure was matched by the activity on the "new" West Campus:

construction of the Duke Chapel, the planting of oak trees on the West Campus, and the beginning of Wallace Wade's legendary career as the Duke football coach.

As it is today, the environment at the Law School was energetic and ambitions were high. Under the leadership of Dean Justin Miller and then-professor H. Claude Horack, the School forged new paths in legal study and trained future leaders for the bench, the bar, and the academy. The faculty—mostly young, brilliant, and newly recruited—numbered 12 and included "giants" David Cavers, Lon Fuller, and John Bradway. Professors Douglas Maggs, William Roalfe, and Gordon Dean accompanied Dean Miller to Duke the year before. The student-faculty ratio was 8:1, and the Law School's location in a handsome, new Gothic building on the main quadrangle enhanced the pioneering mood.

It was into this milieu that Paul Sanders immersed himself. Like many of his classmates, Sanders was attracted to Duke by the generous scholarship monies available for its gifted student body. And like Sanders, many traveled long distances to attend Duke. "Although the total School enrollment was very small by today's standards, students came from virtually every section of the country," said Sanders. "My roommate was a Phi Beta Kappa graduate of Dartmouth, whose home was in New Hampshire."

Sanders—lawyer, educator and arbitrator—has embodied the School's vision of leadership at the bar and in the academy. He started out in private practice in Texas, and then spent two years at the American Bar Association's headquarters in Chicago. He returned to Duke to teach in 1936, and earned the rank of professor 10 years later. With the onset of World War II, Sanders took leave, first to work with the National

War Labor Board and then to serve in the U.S. Navy as an industrial relations specialist. He engaged in private practice in Atlanta before returning to the academy in 1948 to teach at Vanderbilt. He was accorded the rank of professor emeritus in 1974 and taught until the late 1980s.

Reflecting on his career for *Who's Who*, Sanders said, "My primary interests as a law teacher and arbitrator have centered in systematic study of the processes of dispute settlement and conflict resolution, particularly in the labor relations field. This reflects a conviction that building 'community' is the essence of civilization and that there needs to be individual and group commitment to understand and utilize the art of peaceful accommodation. Social conflict is as inevitable as change. All too frequently we show that we have not learned to distinguish, and to maintain the proper balance between the productive and counterproductive aspects of such conflict."

Sanders established four Paul H. Sanders Charitable Gift Annuities between 1990 and 1995. Upon the termination of the annuities, Duke will add the funds to the *Law & Contemporary Problems* Endowment Fund.



Paul Sanders '34

Sanders' motivation to make these gifts is clear: "I want to help keep a publication like this doing its job!"

Sanders' involvement with the publication dates back to his student days. It was first published during his second year at Duke and he served as its associate editor from 1937-46. "Its editorial concept and its approach to a better understanding of a significant law-related problem attracted me from the very beginning," recalled Sanders.

"On returning to Duke in 1936 to teach, my duties included assisting David Cavers with *Law & Contemporary Problems*. This later included major responsibility for developing, organizing, and editing a number of issues, including the "Labor Dispute Settlement" issue, published in the spring of 1947. The entire issue provided the springboard for the Vanderbilt Seminar on "Conflict Resolution and Legal Process" initiated in 1972. In my opinion, most of the basic ideas in the present alternative dispute resolution development were subject to discussion and analysis in that 1947 symposium."

True to the mission set forth by the faculty in the 1930s, the Law School continues to open the minds of students to the broader implications of law. Duke encourages joint studies that link law to other insights into the human condition. Evidence of this commitment is that the faculty has more joint appointments than any other law faculty and more Duke law students pursue joint degrees than at any other law school—regardless of size in both cases.

And much like the now majestic oaks that were planted on the Duke quad during Sanders' first year, the Law School has matured, enjoying a position of consequence in the profession. " 'Tis education forms the common mind, just as the twig is bent, the tree's inclined." 🌳

Richard W. Kiefer retired as senior partner of Hooper, Kiefer & Cornell in Baltimore as of June 30, 1995.

Charles S. Rhyne has published his autobiography. Representing states, cities and counties in cases in federal and state courts throughout the United States, Rhyne argued cases in the Supreme Court from 1939-84 including serving as lead counsel in the "one man, one vote" case of *Baker v. Carr*, 369 U.S. 226 (1962). Rhyne held offices in bar associations at the local, national, and world levels, including serving as president of the American Bar Association. He worked to expand the rule of law as a credible method of achieving world peace. The book sets out the accomplishments of his career in litigation and public service placing them in historical context.

Charles F. Blanchard, formerly of Blanchard, Twiggs, Abrams & Strickland announces the formation of a new general trial practice firm, Blanchard, Jenkins & Miller of Raleigh. The firm emphasizes product liability, wrongful death, personal injury, aviation, and professional negligence law.

E. D. Baumgartner is retired and living in Key West, Fla.

Hugh E. Reams retired from the St. Petersburg office of Holland & Knight in 1995 after 45 years of law practice in the area of trusts and estates. During his career, he served as president of the St. Petersburg Bar Association, president of the Pinellas Trial Lawyers Association, and president of Gulfcoast Legal Services. He has been a member of the board of directors of the Florida Methodist Foundation and a member of the Conference Legal Advisory Council of the Florida Conference of the Methodist Church. He served as attorney for the St. Petersburg District of the United Methodist Church for more than 25 years.

James S. Byrd, after serving 13 years on the federal bench and six years on the Florida Circuit Court, was appointed as regional administrator of the Florida Parole Commission with jurisdiction over nine central Florida counties.

Edward L. Williamson of Whiteville, N.C., was one of five attorneys inducted into the General Practice Hall of Fame at the N.C. Bar Association's annual meeting in June 1995. The Hall of Fame selection committee considers general practitioners' ethical standards and history of legal competence as well as their standing in the community. Williamson, city attorney for Whiteville for 24 years, is now of counsel to the firm Williamson & Walton which includes his son and nephew.

Abraham I. Gordon, a partner in Gordon & Scalo of Bridgeport, was awarded the Rotary Foundation's highest honor, the Distinguished Service Award. The Foundation, the humanitarian arm of Rotary International, presents no more than 50 such awards worldwide annually, and only 12 were presented to Rotarians in the United States. In announcing the award, Hugh Archer, chairman of the Foundation's board of directors, said that Gordon's "efforts to promote the ideals of the Foundation have greatly contributed to the success of its many international programs. You represent the best that Rotary has to offer, the caring, the concern, the hope of a better life for those less fortunate than ourselves."

Perry Keziah, attorney in High Point, N.C., was appointed chairman of High Point Regional Hospital's board of trustees for 1995-96. Keziah has served on the hospital's board since 1991.

Charles E. Rushing retired as a senior foreign service officer for the State Department in 1994 after serving 38 years in 10 countries.

John A. Carnahan finished 12 years as a member of the ABA House of Delegates and is finishing a 7-year term as chairman of the Ohio Fellows of the American Bar Foundation. He is active in private practice as a partner with Arter & Hadden.

Roland R. Wilkins retired as associate director of development for the Duke Medical Center in February.

Business North Carolina magazine featured **Russell M. Robinson, II** in the cover story of its December 1995 issue. The article about "The Brow" described him as having a "mind as sharp as raptor talons" and as a "legal eagle that makes many of the biggest deals fly. But his greatest gift might be his talent for keeping his law firm's feet on the ground." Robinson is a partner in the Charlotte firm, Robinson, Bradshaw & Hinson.

Arnold H. Pollock has been serving as an administrative law judge for the state of Florida in Tallahassee since retiring from the USAF Judge Advocate General's Department as a colonel.

Robinson O. Everett was named a vice president of the N.C. Bar Association during the 1995 annual meeting. He also is chair of the N.C. Continuing Legal Education Board. He is in private practice in Durham, on the faculty at Duke Law School, and a senior judge of the U.S. Court of Military Appeals.

Alexander Drapos, lawyer and active community leader in Worcester, Mass., was elected to the board of trustees of the American Farm School of Thessaloniki, Greece. The American Farm School is an agricultural training center and demonstration farm, which has provided advanced practical education for Greek stu-

dents since 1904. Drapos practices law with the firm of Fletcher, Tilton & Whipple, where he specializes in the areas of commercial and banking law and immigration.



Robert E. Young is retired from the Baltimore firm of Piper & Marbury after 26 years, including 18 as a partner.

E.D. Gaskins, Jr., Raleigh attorney, was named to the Board of Governors of the N.C. Bar Association at its annual meeting in June 1995. Gaskins has chaired the N.C. Bar Association's Public Information Committee and Lawyer Effectiveness and Quality of Life Committee. Active with many professional groups and projects serving the county and city, he served on the Greater Raleigh Chamber of Commerce Board and the Advisory Council to the Wake County School Board.

William K. Holmes, a partner with the Grand Rapids-based law firm, Warner Norcross & Judd, was elected to the American Board of Trial Advocates. Over 4,000 defense and plaintiff civil trial lawyers are "by invitation only" members. Holmes practices in the areas of business and commercial litigation, including antitrust, securities, corporate control litigation, and mass tort litigation. He is a fellow with the Michigan State Bar Foundation and the American College of Trial Lawyers.

Jerry J. McCoy opened an office in 1994 as a sole practitioner in Washington, D.C., specializing in charitable tax planning and nonprofit organizations.

James A. Adams, who is the Richard M. and Anita Calkins Distinguished Professor of Law at Drake University Law School, was selected the Leland Forrest Outstanding Professor by the students of the Class of 1995—the fourth time he has received this award. He co-authored *Trial Motions in Criminal Prosecutions* published by The Michie Co.

John T. Berteau, who practices with the law firm of Williams, Parker, Harrison, Dietz & Getzen of Sarasota, was elected a fellow of the American College of Trust and Estate Counsel. The College is an association of lawyers who have been recognized as outstanding practitioners in the fields of estate and trust planning and administration, related taxation, business succession and insurance planning, employee benefits and fiduciary litigation.

Norman Cooper was named head of the U.S. Department of Agriculture's National Appeals Division. The Division, an independent USDA agency, is responsible for administrative appeals of decisions within certain program agencies of the department and replaces separate administrative appeals staffs. Previously, Cooper served as assistant general counsel with the Department of Veterans Affairs, and as the senior legal officer for the commander-in-chief of the U.S. forces in South Korea. Cooper retired as a colonel after serving for over 25 years in the U.S. Army's Criminal Law Division, chief of its Government Appellate Division, a military circuit judge, and associate professor of law at the U.S. Army Judge Advocate General's School in Charlottesville.

Lanty L. Smith, Greensboro business executive and chair of the Law School's Board of Visitors, was named a trustee of the Kathleen Price Bryan Family Fund. Smith, who is chairman of the board of directors and chief executive officer of Precision Fabrics Group, a manufacturer of high-technology textile products, also is chair of the board of trustees of Moses H. Cone Hospital in Greensboro.

Rosemary Kittrell is in the final year of a master's degree program in social work at the University of Georgia, after which she will have a practicum assignment as a counselor at a counseling agency, Families First.

Charles W. Petty, Jr. joined the Washington, D.C. office of Ross & Hardies as a partner. He will continue to represent domestic and foreign enterprises, individuals and financial institutions in transactions and regulatory matters.

Frank T. Read is president and dean of South Texas College of Law in Houston.

Harry J. Haynsworth is president and dean of William Mitchell College of Law in Minneapolis.

David G. Warren was chosen as one of three Americans to serve on an international bioethics network panel established by the McGill University Centre for Medicine, Ethics and Law.

Paul R. Ervin, Jr. was elected executive vice president of The Foundation for Evangelism. He was in private practice until 1984, when he became chief of staff for U.S. Representative George Darden. Ervin is a member of the General Board of Discipleship and secretary for Discipleship Resources. He is a trustee of Gammon Theological Seminary in Atlanta, and on the board of both Cobb County and Georgia Special Olympics.

Ronald G. Seeber serves as a member of the board of directors of the N.C. League of Municipalities and is a past president of the N.C. Association of Municipal Attorneys.

Carl F. Lyon, Jr. joined the New York office of Orrick, Herrington & Sutcliffe as a partner. Lyon, nationally known for his comprehensive energy finance practice, has extensive experience in all areas of finance and contractual negotiations for rural electric cooperatives, public power issuers, and federal power agencies.

Robert S. Marquis, a member of McCampbell & Young in Knoxville, was elected a fellow of the American College of Trust and Estate Counsel. He practices in the areas of federal and state tax and estate law, corporate law and health care law.

Marlin M. Volz, Jr. was appointed co-chair of the Iowa Governor's Blue Ribbon Transportation Taskforce to review how the road use tax fund is spent.

Lynn E. Wagner is a partner in the Orlando office of Baker & Hostetler.

Charles L. Becton, Raleigh attorney and former N.C. Appeals Court judge, received the Robert E. Keeton Trial Advocacy Teaching Award from the National Institute for Trial Advocacy.

John P. Cooney, Jr., a partner in the New York firm of Davis Polk & Wardwell, was inducted as a fellow of the American College of Trial Lawyers.

Ronald E. DeVeau established the firm of DeVeau & Norcross in Kill Devil Hills, N.C. He emphasizes civil litigation, particularly personal injury and business disputes.

Frank M. Mock, a partner in the Orlando office of Baker & Hostetler, was elected a fellow of the American College of Mortgage Attorneys.

Thomas W. Murray joined Central Carolina Bank and Trust Company as senior vice president and manager of the trust and investment division in Durham.

Julie A. Gaisford has her own law practice in Seattle. She is a frequent lecturer and panelist for the American Trial Lawyers Association, a public defender for the Suquamish Tribe, and a member of the Pacific Islanders Children and Youth Services Board.

E. William Haffke was named partner-in-charge of the Cleveland office of Benesch, Friedlander, Coplan & Aronoff. Prior to joining the firm in 1992, he was executive vice president of credit policy and risk management at Ameritrust Corporation.

Charles B. Neely, Jr., director of the firm Maupin Taylor Ellis & Adams in Raleigh, was named to the Board of Governors of the N.C. Bar Association. Neely has chaired the Association's law office management section. His primary area of practice is state and local taxation. He is a member of the N.C. House of Representatives.

Ernie Baird is majority leader of the Arizona House of Representatives, in addition to practicing law in Phoenix.

John R. Ball was named to the new position of executive vice president for clinical services at Pennsylvania Hospital. The nation's first hospital, Pennsylvania Hospital, is a major teaching institution. Ball is the chief administrative officer for the hospital and related clinical matters, and serves as a member of the hospital's board of managers. He oversees the hospital's three operating divisions, an acute care facility in Society Hill, a psychiatric facility in West Philadelphia, and the Hall-Mercer Community Health Center.

Mary Joyce Carlson was named deputy general counsel of the National Labor Relations Board. Since 1993, Carlson had been special counsel, International Brotherhood of Teamsters, where she was responsible for setting up an ethical practices committee and internal ethical standards and guidelines for the union. She was associate general counsel, American

Federation of State, County, and Municipal Employees from 1991-93.

James R. Fox, director of the Winston-Salem law firm of Bell, Davis & Pitt, was appointed to chair the Trial Practice Continuing Legal Education Curriculum Committee of the N.C. Bar Association, charged with developing and coordinating continuing legal education in the areas of litigation and trial practice.

David L. Sigler, shareholder of The Gray Law Firm of Lake Charles, La., was appointed chairman of the Advisory Commission for Estate Planning and Administration Specialization of the Louisiana State Bar Association.

D. Todd Christofferson was called in 1993 to serve as member of the First Quorum of the Seventy of the Church of Jesus Christ of Latter-Day Saints. Prior to serving as a full time general authority of the Church, he was associate general counsel of NationsBank in Charlotte. Previously he was senior vice president and general counsel for Sovran Bank of Tennessee in Nashville, and practiced law in Washington, D.C. after serving as law clerk to then-U.S. District Judge John J. Sirica.

John D. Englar was named senior vice president for corporate development at Burlington Industries, a new position that will facilitate the company's exploration of new business opportunities worldwide. Englar has held a number of corporate offices since joining Burlington in 1978, and has been a member of the company's board of directors since 1990.

Joseph A. McManus, Jr., a partner practicing construction and government contract law with Lyon and McManus in Washington, D.C., was elected secretary of the American College of Construction Lawyers. He was appointed chair of the Procurement Reform Task Force commissioned by the District of Columbia City Council's Government Operations Committee.

Jeffrey S. Portnoy was appointed per diem district court judge in Hawaii and elected as state representative to the Defense Research Institute.

Laurence R. Tucker, a partner at Watson, Ess, Marshall & Enggas in Kansas City, is president of the Missouri Bar Association.

S. Ward Greene, who practices with Greene & Markley in Portland, was elected president of the Owen M. Panner American Inn of Court in Portland for 1995-96. The Inn promotes civility, professionalism, ethics, and excellence in the practice of law.

Kenneth W. Starr, former U.S. Solicitor General and currently a partner in the Washington, D.C. office of Kirkland & Ellis, and Whitewater counsel, was named the third president of the Council for Court Excellence by its board of directors.

Ralph B. Weston received a master's degree in information science with honors from the University of Texas at Austin with emphasis on legal informatics. He is coordinator of the Center for Computer-Based Legal Research and Instruction at the Tarlton Law Library at Texas. Formerly of counsel to the firm of Wray, Woolsey & Anthony, Weston had practiced law in Corpus Christi since 1973, and started Lawyers' Information Services, a business providing information retrieval and consulting services to the legal profession.

Edna Ball Axelrod opened a law office as a sole practitioner in West Orange, N.J., in 1995. She concentrates in the areas of criminal defense, white collar litigation, appellate practice and commercial litigation.

Candace Carroll was elected to a three-year term on the San Diego County Bar Association's board of directors (SDCBA) in 1995. Carroll is a mentor in the SDCBA Partnerships in Education Program and president of the Muirlands Foundation.

Ira Sandron, judge of the U.S. Immigration Court in Miami, was appointed to the Task Force on Opportunities for Minorities in the Judiciary of the Judicial Administration Division of the American Bar Association. He spoke at a program sponsored by the American Immigration Lawyers Association on issues pertaining to the inter-relationship between criminal and immigration law held in Miami in 1995.

Peter D. Webster received a master of laws degree in judicial process from the University of Virginia Law School in 1995.

Allyson K. Duncan, a commissioner on the N.C. Utilities Commission, received the 1995 Gwyn Davis Award from the N.C. Association of Women Attorneys. Duncan was honored for her community involvement with women's organizations and as the first African-American woman to serve on the N.C. Utilities Commission and the N.C. Court of Appeals. Duncan is a member of the 1996 U.S. Women's Open Golf Championship advisory committee.

Nathan C. Goldman, adjunct professor of space law at South Texas College of Law, is publishing the second edition of his *American Space Law: Domestic and International*. His article on changes in space law appears in the fall edition of *Trial* magazine.

Griffeth T. Parry formed the law firm of Parry & Howard in West Orange, N.J. The firm primarily represents insurers.

Robert C. Weber is president of the Cleveland Bar Association. His plans for the association include a special effort to substantially improve juvenile justice by establishing a Juvenile Justice Initiative and Juvenile Justice Committee.

Charles Wiggins was appointed to complete an unexpired term on the Washington Court of Appeals in 1994, after practicing law with Seattle's Edwards, Sieh, Wiggins and Hathaway for 18 years.

G. Gray Wilson, attorney in Winston-Salem, was elected a fellow in the American College of Trial Lawyers.

Allan D. Windt, who in 1981 authored *Insurance Claims and Disputes* (Shepard's/McGraw-Hill, 1988, 2d ed.) had a two-volume edition of the book published in 1995.

Harold I. Freilich is a member of the Washington, D.C. office of Verner Liipfert Bernhard McPherson and Hand, where he continues his corporate and international transaction practice.

Lauren E. Jones was elected secretary of the Rhode Island Bar Association. Jones is the principal of the Providence law firm, Jones Associates, where his practice is concentrated in appellate law. He has been active in the Rhode Island Bar Association's House of Delegates and Executive Committee, and recently completed a six-year term as editor-in-chief of the *Rhode Island Bar Journal*.

Andrew J. Peck is magistrate judge for the U.S. District Court for the Southern District of New York.

Michael H. Wald was appointed vice chair of the Alternative Dispute Resolution Committee in the General Practice Section of the American Bar Association. The General Practice Section represents approximately 13,000 lawyers throughout the country, most of whom are in private practice.

Suzanne J. Melendez was appointed criminal court judge of the City of New York by the Mayor.

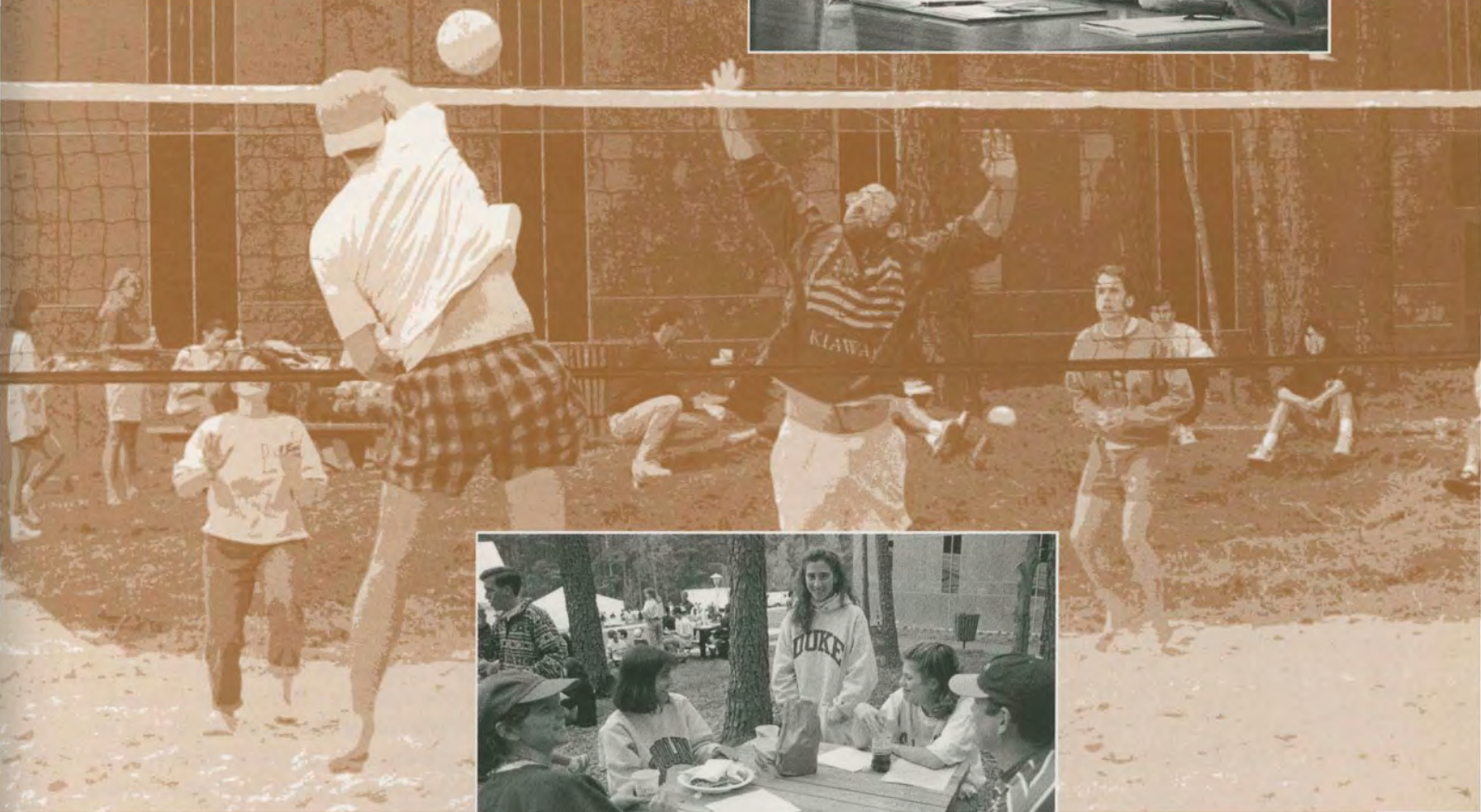
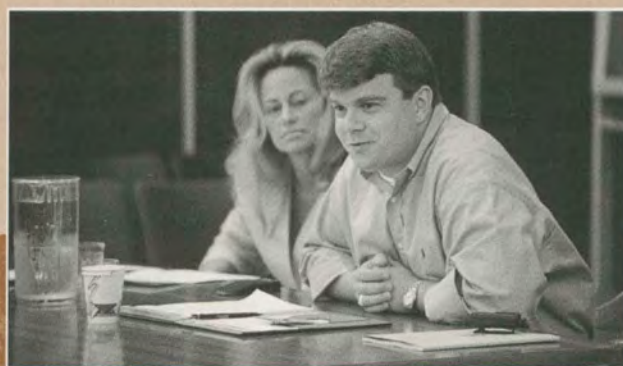
THE ALUMNI WEEKEND



*Renewing
Our
Ties
for the
Future*



OCTOBER 1995



Edward P. Tewkesbury, former senior real estate counsel with Giant Food, Inc. in Washington, D.C., joined Adams Kleemeier Hagan Hannah & Fouts, a multi-specialty law firm serving clients throughout the Southeast. He concentrates on commercial real estate, construction financing, and environmental law.

Alan Bender is senior vice president and general counsel with Western Wireless Corporation in Bellevue, Wash.

Joel H. Feldman was elected president of the Florence Fuller Child Development Center in Boca Raton, a non-profit preschool, afterschool and summer camp, providing services to approximately 600 economically disadvantaged children in Palm Beach County. The Palm Beach County Bar Association presented him with the 1994 Community Service Award for outstanding *pro bono* services.

Gray McCalley is general counsel for the German division of the Coca-Cola Company's European operations.

Elizabeth Kuniholm was one of 48 women in the North Carolina delegation to the United Nations Fourth World Conference on Women and the tandem Non-Governmental Organization forum.

Happy R. Perkins was appointed general counsel and general manager, public affairs for General Electric Appliances headquartered in Louisville, Ky.

Lisa Margaret Smith became a U.S. magistrate judge for the Southern District of New York in 1995.

Michael B. Kupin joined the real estate practice group of the New York-based law firm, Camhy, Karlinsky & Stein. Kupin, formerly associated with firms in New York and Newark, tax consultant with Price Waterhouse, and in-house legal counsel to a New York real estate investment company, has extensive experience in commercial leasing and lending.

Kimberly S. Perini is assistant general counsel, U.S. lodging management and real estate development for Marriott International in Bethesda, Md.

David C. Tarshes was named co-recipient of the 1995 Trial Lawyer of the Year Award by Trial Lawyers for Public Justice.

Beth Woodland-Hargrove, former deputy counsel to Maryland's Department of Housing and Community Development, was named deputy Baltimore County attorney. Since 1988, she has worked in the Maryland attorney general's office.

Barbara J. Degen, a staff attorney at Catawba Valley Legal Services in Morganton, N.C., received the N.C. Bar Association's 1995 Outstanding Legal Services Attorney Award honoring legal services attorneys who have provided outstanding service to low-income and disadvantaged North Carolinians.

Vern Fagin wrote the surety bond chapter in the three-volume treatise, *Insurance Litigation*, on the topic of California bonds and surety law. He is an attorney for the Los Angeles office of Wilson, Elser, Moskowitz, Edelman & Dicker.

John A. Forlines, III was appointed a managing director of JP Morgan & Company. He is a senior banker in JP Morgan's investment banking division specializing in public equity and debt financings.

Bernard H. Friedman took a position as a law clerk to Washington State Supreme Court Justice Philip A. Talmadge in 1994.

Thomas W. Logue served on the faculty of a series of legal seminars sponsored by the National Trust for Historic Preservation. Logue, an assistant Dade County attorney, has served as legal adviser to the Dade County Historic Preservation Board since 1984. For his work in preservation, he was given a 1995 individual service award from the Dade Heritage Trust.

I. Scott Sokol was appointed executive director of the South Carolina Democratic Party.

Mark S. Calvert, an associate general counsel at Carolina Power & Light, was selected by the Land Trust for Central North Carolina to serve on its board of advisors. The Land Trust protects land resources for the public benefit. He continues to serve on the board of directors for Artspace, Inc., a non-profit art studio and gallery in Raleigh.

Richard L. Garbus is a partner at Solomon, Fornari, Weiss & Moskowitz in New York.

John B. Garver, III became a shareholder at Robinson, Bradshaw & Hinson in Charlotte, where he practices business, employment, and domestic litigation.

Paul A. Hilding is practicing with the San Diego firm of Hilding, Kipnis, Lyon & Kelly in the areas of insurance coverage, real estate, financial institutions, and general business litigation.

Michael A. Lampert, board certified tax lawyer in private practice in West Palm Beach, serves as emergency services chair and chapter vice chair of the Palm Beach County Red Cross.

Mark J. Langer was appointed to serve as clerk of court of the U.S. Court of Appeals for the District of Columbia Circuit. He will oversee a major reorganization of the Clerk's Office and the Chief Staff Counsel's Office. Langer was chief staff counsel to the

Court for eight years supervising a 17-person Counsel's Office that assists the Court in organizing and managing complex litigation and in handling motions and emergency matters and the screening of cases.

Michael T. Petrik, a partner in the Atlanta office of Alston & Bird, was elected to the board of directors of the United Way of Metropolitan Atlanta. He is a member of the board of directors of Big Brothers/Big Sisters of Metro Atlanta.

Carolyn J. Woodruff announces the formation of Schoch & Woodruff with offices in High Point and Greensboro.

Benjamin R. Foster was elected to the national board of directors of the Alzheimer's Association. Foster now serves as president of Sunset Management Services, a company providing services to people with Alzheimer's disease and their families, from offices in Harvard, Mass., and Jupiter, Fla.

Audrey McKibbin Moran has her own firm in Jacksonville, Fla., where she practices employment law.

Carla Behnfeldt opened her own general practice in West Chester, Pa.

William W. Horton joined Healthsouth Corporation, the nation's largest provider of rehabilitative and outpatient health care services, as group vice-president for legal services in Birmingham, Ala.

Michael A. Kalish was promoted from associate to counsel in the New York office of the law firm of Winthrop, Stimson, Putnam & Roberts. He is a litigator concentrating his practice on the representation of management in all aspects of labor and employment law.

FIGHTING FOR A CURE

Daniel J. Grossman '89 has given up the practice of law to lead a charitable foundation that promotes research and education into his young son's rare disease. Grossman has organized the Children's Motility Disorder Foundation (CMDF), dedicated to physician education and medical research in the type of rare gastrointestinal disorder suffered by his son, Matthew, since he was born in October 1992.

Grossman resigned from the Atlanta law firm of Powell, Goldstein, Frazer & Murphy after five years as a commercial litigation attorney. As president of the foundation, which he established in January 1995, Grossman raises and distributes funds to increase awareness about pediatric gastrointestinal motility disorders, a range of relatively rare disorders affecting a child's ability to eat and process food.

"As a result of my son's illness, I experienced the grief, terror, and desperation felt by parents facing the possible loss of a child, whose only hope is that a long-term treatment or cure will be discovered before it is too late. I knew that I needed to do whatever I could to help this cause," wrote Grossman. Atlanta resi-

dents read about Grossman and the CMDF in the article "A father finds another calling" in the *Atlanta Business Chronicle* in May: Matthew's condition is stable but "requires constant medical attention. ...Requiring the occasional aid of oxygen, he is fed through feeding tubes that run directly into his small intestine."

"We have gotten considerable support from the Duke Law alumni community," said Grossman. "As just one example, Randy Hughes of Powell, Goldstein was one of our earliest supporters." For more information about the Children's Motility Disorder Foundation, contact Grossman at 1534 Dunwoody Village Parkway, Suite 104, Atlanta, Ga. 30338.



Daniel Grossman
and his son,
Matthew.

David S. Liebschutz was appointed associate director of the Center of the States at the Nelson A. Rockefeller Institute of Government. The Center was established in 1990 to provide high quality, practical, independent research about state programs and finances. Liebschutz joins the Center after four years in New York State government, most recently as the director of marketing and special projects at the NYS Environmental Facilities Corporation. He spent several years in Washington working for the U.S. Treasury Department and the private sector.

Neil D. McFeeley, an attorney with the Boise, Idaho law firm of Eberle, Berlin, Kading, Turnbow & McKlveen, was re-elected to the board of directors of the American Judicature Society, the national organization that promotes improvements in the courts.

David E. Mills is a partner at Dow Lohnes & Albertson in Washington, D.C. in the litigation department.

Peter Weinstock served on the special task force that rewrote the state banking laws in Texas.

M. David DeSantis is a partner in the Northern California law firm Kincaid, Gianunzio, Caudle & Hubert specializing in civil litigation.

Larry Gramlich was named partner in the Atlanta firm of Troutman Sanders where he practices in the commercial real estate area.

Christopher M. Kelly joined Jones, Day, Reavis & Pogue, working in the firm's Cleveland office.

Lisa A. Krupicka is a partner in the law firm Burch, Porter & Johnson in Memphis.

Robin Panovka is a member of the Wachtell, Lipton, Rosen & Katz law firm in New York.

John Pelletier is vice president and general counsel of Boston Institutional Group, Inc. and senior vice president and general counsel of its Funds Distributor, Inc., Premier Mutual Fund Services, Inc. and Boston Institutional Group, Inc. subsidiaries. In addition, he is vice president and secretary of the Dreyfuss Funds.

Michael Peterson-Gyongyosi manages the Prague office of the German partnership Haarmann, Hemmelrath, attorneys, CPAs and tax advisers. The partnership will open additional offices in Eastern Europe.

Robert A. Scher was named partner in Friedman, Wang & Bleiberg in New York.

Daniel R. Schnur was promoted to senior vice president, general counsel and secretary of Richfood Holdings, Inc, a wholesale grocery distributor headquartered in Richmond.

Kristen Larkin Stewart is a partner in the Pittsburgh office of Kirkpatrick & Lockhart, where she practices general corporate, securities and financial institutions law.

Peter Tobias is a partner at Viner, Kennedy, Frederick, Allan & Tobias in Kingston, Ontario, where he practices corporate and commercial law.

Richard H. Winters was named rector of St. John's Episcopal Church in Saginaw, Mich.

Scott A. Cammann is senior counsel for regulatory affairs for NationsBank in Charlotte. He will teach a banking regulations class at the Law School this fall.

Carol Davis has associated with the law firm of Wear & Travers in Vail, Colo., where she practices real estate law.

David Donaldson owns and operates the Bysiewicz-Donaldson insurance agency in Manchester, Conn.

Thomas S. Gauza is of counsel to the law firm of Blau, Kokoszka & Bonavich in Chicago.



Cynthia Buss Maddox was named partner in the law firm of Goldberg & Simpson. She practices in the Louisville, Ky. office where she concentrates in commercial loan

documentation, secured transactions, commercial real estate, bankruptcy, and commercial litigation.

Julie O'Brien Petrini was promoted to trademark counsel at Polaroid Corporation in Cambridge, Mass.

J. Thomas Vitt, III was named a partner in the trial department of Dorsey & Whitney in Minneapolis in 1995.

Amy Kincaid Berry returned to the full-time practice of law, following her maternity leave with her second son in March 1995, at the law firm of Hill, Wynne, Troop & Meisinger in Los Angeles. She was elected to principal status in 1994.

Kodwo Ghartey-Tagoe is an associate with the Richmond-based law firm of Mays & Valentine, where his practice focuses on utility and insurance regulatory law and international business. He was elected to a two-year term on the Virginia State Bar's Administrative Law Section Board of Governors.

Robert McDonough joined Aetna Health Plans in Middletown, Conn., in 1995 as medical director and senior technology consultant in Aetna's clinical and coverage policy division. Previously, he was senior analyst and project director for the Health Program, Office of Technology Assessment, U.S. Congress in Washington, D.C.

Theresa A. Newman, head of Duke Law School's legal research and writing program, will serve as reporter for the civil justice committee for the commission designed to assess the future of the justice system in North Carolina.

Emily Quinn received an MLS from the University of Washington.

Michael C. Sholtz is director of planned giving for Duke University.

Howard A. Skaist is senior attorney with Intel Corporation in Hillsboro, Ore., where his responsibilities include providing counseling covering all aspects of intellectual property such as patents, copyrights and trade secrets.

Barbara Heggie Stewart is a clerk on a full-time, permanent basis with the New Hampshire Supreme Court.

James Walker IV joined the Atlanta office of Nelson Mullins Riley & Scarborough as an associate in the corporate and securities area.

Carla L. Brown was promoted to head of the litigation department in the West Palm Beach office of Honigman Miller Schwartz and Cohn.

Jeffery S. Haff is employed with the law firm of J. Michael Dady & Associates in Minneapolis, which specializes in litigation on behalf of franchisees, distributors, and dealers throughout the United States.

Angela M. Hinton announces the opening of her office in Savannah for the general practice of law.

Paula A. Hulnick announces the opening of her office for the general practice of law in Teaneck, N.J.

Frank J. Kokoszka is managing partner of Blau, Kokoszka & Bonavich in Chicago.

Dania A. Leatherman joined Kizer and Black in Maryville, Tenn., as an associate concentrating in tax and corporate law.

Phillip McCarthy, who received an MBA from the University of Chicago in 1995, is a financial consultant with KPMG Peat Marwick in Chicago.

Tricia Wilson Medynski became a partner in Wallace, Creech, Sarda & Zaytoun in Raleigh, where she concentrates her practice in the areas of medical negligence, complex tort litigation, and commercial litigation.

Wendy D. Sartory is working with Gunster, Yoakley, Valdes-Fauli & Stewart in West Palm Beach in the real estate and finance departments.

Matthew L. Woods was named partner in the Minneapolis office of Robins, Kaplan, Miller & Ciresi, where he practices all aspects of business litigation with a special emphasis on intellectual property and antitrust matters representing both plaintiffs and defendants.

Gregory Baylor is assistant director of the Center for Law and Religious Freedom, the legal advocacy arm of the Christian Legal Society in Washington, D.C. The Center seeks to protect religious liberty of Americans through litigation, amicus advocacy, legislative work, and public education.



Bradley B. Furber is a founding partner of the Van Valkenberg Furber Law Group in Seattle, which provides assistance with corporate finance and general business matters.



Michael B. Gay joined Foley & Lardner as an associate in the litigation department of its Orlando office. He was in private practice in Houston.

Thomas A. Hanusik is senior counsel in the Division of Enforcement at the SEC in Washington, D.C.



Sally J. McDonald, an associate at Rudnick & Wolfe in Chicago, was awarded the Chicago Bar Foundation's 1994 Maurice Weigle Outstanding Service Award which

is given in recognition of young lawyers whose activities in a given year make an exceptional contribution to the integrity of the legal profession, the organized bar and the community. McDonald is active with the Young Lawyers Section of the Chicago Bar Association, since 1991 serving as co-chair of the Women and the Law Committee and vice-chair of the Section for 1995-96. She chaired the Young Lawyers Section's annual Children's Book Drive, and organized a Children's Story Hour and collection drive for necessities for area homeless shelters. She serves on the personnel board of the Greater Chicago Food Depository.

Mark A. Redmiles has joined the Denver office of Cooley Godward Castro Huddleson & Tatum, where he continues to practice in the areas of business, bankruptcy and employment related litigation.

Lawrence Silverman was appointed to the Council of the American Bar Association Section of Antitrust Law.

Calvin Bennett was promoted to major and assigned to headquarters, U.S. Marine Corps Military Law Policy Branch in Washington, D.C.

Cris D. Campbell is a law clerk for Judge Clarence Brimmer, U.S. District Court in Cheyenne, Wyo. He was previously an associate in the Washington, D.C. office of Kirkland & Ellis.

James R. Cannon is practicing patent law at Bell, Seltzer, Park & Gibson in Raleigh.

Louis S. Citron joined the New York City office of Kramer, Levin, Naftalis, Nessen, Kamin & Frankel where he practices in the area of financial services representing mutual fund complexes, investment advisers, broker-dealers and other service providers within the pooled investment vehicle industry.

Jane Elizabeth H. Davis has joined the Richmond office of McGuire Woods Battle & Boothe where she practices in the general business section.

Shawn Flatt joined the U.S. State Department in 1995, and was posted to Santo Domingo, Dominican Republic for a two-year consular/economics rotation.

Dawn M. Futrell opened an office in Stuart, Va., where she is engaged in a general law practice and is an assistant Commonwealth's attorney on a part-time basis.

Stephen A. Good is in-house legal counsel with PCS Health Systems, Inc., the largest prescription benefit management company in the United States, located in Scottsdale.

Cynthia Craig Johnson and **Todd C. Johnson** are in Jacksonville, Fla., where they work for Mahoney, Adams & Criser and Holland & Knight, respectively.

Monique Rowtham Kennedy joined the legal department of Northeast Utilities Service Company in Berlin, Conn., as a regulatory attorney.

Ron Krotoszynski, Jr. joined the faculty at Indiana University School of Law where he will teach administrative law, constitutional law, and communications law. He recently published *Celebrating Selma: The Importance of Context in Public Forum Analysis* in the *Yale Law Journal*.

Trent W. Ling started his own firm practicing insurance defense litigation in Orlando.

Adam A. Milani joined the University of Illinois as a legal writing instructor following a clerkship with the federal magistrate in South Bend, Ind.

Michael S. Popok joined the New York office of Sidley & Austin concentrating on complex commercial and business tort litigation and white collar defense.

Dara S. Redler is in-house counsel for Worldspan in Atlanta.

Cliona Mary Robb is working at Christian, Barton, Epps, Brent & Chappell in Richmond.

Gloria Cabada-Leman is an associate in the Durham office of Moore & Van Allen practicing intellectual property litigation.

Jayne Chapman has joined the CIT group in Atlanta as in-house counsel.

Gail H. Forsythe has settled in White Rock, British Columbia, where she has her own law offices, after living in four American and Canadian cities.

Sandra Galvis is an associate at Cleary, Gottlieb, Steen & Hamilton in New York.

Katherine A. Hermes, who received her Ph.D. in history from Yale University in 1995, is on the history faculty at the University of Otago in New Zealand.

Henry J. Mims is in private practice in Greer, S.C., where he also serves as a municipal court judge. He was invited to attend the first Gerry Spence Trial Lawyer's College in Wyoming.

Douglas H. Jackson joined Jenner & Block as an associate in the corporate department in 1995.

Norman H. Petty, Jr. is an associate in the business and finance section in the Philadelphia office of Morgan, Lewis & Bockius.

Erin E. Powell has moved from the public to the private sector. After serving as an administrative judge for the EEOC from 1992-95, Powell is now an associate in the Washington, D.C. office of Ogletree, Deakins, Nash, Smoak & Stewart, which specializes in labor and employment law.

Anuja Purohit has joined the San Francisco office of Sonnenschein Nath & Rosenthal as an associate.

Bradford J. Tribble is working in-house at Sara Lee/DE in the Netherlands, where he is responsible for the legal affairs of the direct selling division.

Paul Veidenheimer returned to Boston in 1995, where he is working at Hutchins, Wheeler & Dittmar.

Anna Elizabeth Daly has joined her father, George Daly, as an associate with his practice in Charlotte.

Jennifer Buchanan Machovec is a staff attorney at the U.S. Court of Appeals for the Federal Circuit.

James O. Stuckey, II is an associate in the Columbia, S.C., office of Nelson Mullins Riley & Scarborough.

Jamie Yavelberg is an attorney with Orans, Elsen & Lupert in New York.

SPECIALLY NOTED

LAW ALUMNI
ELECTED AS
DUKE
TRUSTEES

Two Law School alumni were named to the Duke University Board of Trustees. Paul Hardin III '54, former chancellor of the University of North Carolina at Chapel Hill, was elected to serve a six-year term. State Rep. Daniel T. Blue Jr. '73, former speaker of the North Carolina House of Representatives, is completing the unexpired term of retiring trustee Dr. Daniel Tosteson, serving through 1999 before becoming eligible for reelection to the board. Another new University Trustee is Sally Dalton Robinson, a 1955 Duke graduate, a community service volunteer in Charlotte, and wife of Russell M. Robinson, II '56. They join Christine M. Durham '71, an associate justice of the Utah Supreme Court, who began her Duke Trustee service in 1994.

John A. Koskinen, chairman of the board, said the new trustees "bring a wealth and variety of experience to the board."

Constantine J. Zepos moved to Paris, where he works on financial and legal projects of the European Commission in the former Soviet Republics. He expects to spend at least eight months in Moscow.

Randall L. Clark joined the Los Angeles office of Morrison and Foerster.

David A. Coolidge, Jr. entered the Duke School of Medicine class of 1999.

Frank M. Dale, Jr. joined the Washington D.C. firm of Dickstein, Shapiro & Morin in the business crimes group.

Theodore C. Edwards, II has joined the Charlotte office of Petree Stockton where he practices in the area of environmental law. He is a member of the N.C. Black Lawyers Association and the Law Student Activities Committee of the N.C. Bar Association.



Michael J. Elston was appointed an adjunct professor of legal writing at the University of Missouri at Kansas City School of Law for the 1995-96 academic year. He is in the second year of a two-year term as a law clerk to the Honorable Pasco Bowman of the U.S. Court of Appeals for the Eighth Circuit.

Patrick C. Heinrich joined Robinson, Bradshaw & Hinson in Charlotte. Having been admitted to the Brussels bar, where he practiced briefly, Heinrich is licensed to practice in all member states of the European Union and handles a variety of international corporate and commercial matters.

Kevin J. Karpin joined the Overland Park, Kansas office of Shook, Hardy & Bacon as an associate in the business litigation practice group.

Giordano Rezzonico has re-joined his firm, Lenz & Stachelin, in Switzerland following an internship with Hogan & Hartson in Washington, D.C. After spending six months in the Zurich office focusing on intellectual property matters, he re-joined the litigation department of the Geneva office.

Kathy Schill is an associate in the litigation group at Michael Best & Friedrich in Milwaukee.

James W. Smith, III was promoted to the rank of captain in the U.S. Army Judge Advocate General's Corps. He is a legal assistance officer at Fort Eustis, Va.

Michael J. Sorrell is an associate in the corporate section of Jenkens & Gilchrist in Dallas.

Lisa P. Sumner is an associate at the Columbia, S.C., office of Nelson Mullins Riley & Scarborough.

Jeremy R. Johnson married Kathleen Gale McCourt on September 16, 1995, in Washington, D.C. He is a retired appellate judge for the U.S. Army Court of Military Review in Washington. They reside in Sarasota, Fla.

Jerry J. McCoy married Alexandra Armstrong on September 30, 1994. They reside in Washington, D.C.

John C. Weistart married **Denise E. Thorpe '90** on May 28, 1995, in Denver. They reside in Raleigh.

Joan Harre Byers Erwin married Robert Erwin on November 24, 1995. They reside in New Hill, N.C. Joan is an assistant attorney general in Raleigh.

Ira Sandron married on February 24, 1996, in Miami.

Kiyoshi Nakatsui and his wife, Dorothy, had their first child, a daughter named Kiyoko Alicia, on February 20, 1995.

Robert M. Blum and his wife, Tracy, announce the birth of a son, Matthew Lynch, on November 11, 1994.

Lawrence G. McMichael and his wife, Virginia, announce the birth of a son, John Lawrence, on April 6, 1995.

Genevieve Harris Roche and her husband, Con, report the birth of their second son, Con Kieran, on July 7, 1995.

Lisa Margaret Smith married William Bowen in October 1994. They reside in South Salem, N.Y.

David C. Tarshes married Deborah Kerdeman on August 20, 1995. They reside in Seattle.

Nina Collins Carey married Stephen James Merten on August 5, 1995. They live in Traverse City, Mich.

Edith K.W.J. Revet and her husband, Paul Klemann, announce the birth of a son, Marc Alexander Paul, on May 11, 1995.

Richard L. Garbus and his wife, Peggy, announce the birth of their third child, Richard William, on December 1, 1995.

Rondi Hewitt Grey and her husband, Michael, announce the birth of a son, Colin Andrew, on November 9, 1994.

Barbara Tobin Dubrow and her husband, Kenneth, announce the birth of their second child, Scott Forrest, on May 22, 1995.

Audrey Moran and her husband, John, welcomed their fourth child and second son, Michael Patrick, on March 1, 1995.

Steven Natko and his wife, Sherrie, announce the birth of a daughter, Emily George, on June 22, 1995.

Eric Weiss reports that he and his wife, Stacey, are the parents of twin boys, Alexander Vale and Benjamin David.

Carla Behnfeldt married Chuck Mooney in June 1994, and moved to the Philadelphia area.

William W. Horton and his wife, Judilyn Brooks, announce the birth of their first child, William Reid Horton, on May 4, 1995.

James R. (Rob) Moxley, III and his wife, Ann, announce the birth of their second child, Ellen Marie, on January 6, 1995. She joins a brother, James, IV.

Mary Woodbridge married Robert K. deVeer, Jr. on February 18, 1995. They are both managing directors of Lehman Brothers in New York and live in Bernardsville, N.J., with their five children.

Susan Bysiewicz and **David Donaldson '87** announce the birth of their third child, Tristan Taylor, on August 5, 1995.

Larry Gramlich and his wife, Chris, announce the birth of Sean Daniel on December 28, 1994. He joins a brother, Eric Andrew.

Lyndall J. Huggler and his wife, Elizabeth Seiders, announce the birth of a daughter, Kimberly Susan, on November 29, 1994.

Lisa A. Krupicka and her husband, Sam L. Crain, Jr., announce the birth of Samantha Charles on September 25, 1994.

Stephen Labaton married Miriam Sapiro on June 11, 1995, in East Hampton, N.Y. They reside in Washington, D.C. where Stephen is a legal affairs correspondent for *The New York Times* and Miriam is a lawyer in the Legal Adviser's Office of the U.S. Department of State.

Jess Lorden and her husband, Dave, welcomed their first son, Robert, on February 27, 1995. He joins a sister, Sarah.

Robert Scher and his wife, Amy, announce the birth of Madeline on July 31, 1995. She joins a brother, Jackson. The family resides in Pleasantville, N.Y.

Peter Tobias and his wife, Heather, are living in Kingston, Ontario, and have two children, George and Madeleine.

Joel Bell and his wife, Susan, announce the birth of their first child, a daughter named Courtney Taylor, on April 30, 1995.

David Donaldson and **Susan Bysiewicz '86** announce the birth of their third child, Tristan Taylor, on August 5, 1995.

James E. Felman and **Marleen A. O'Connor** announce the birth of their second daughter, Allison Lynne Felman, on July 31, 1995.

Amy Solomon Hecht announces the birth of Allison Whitney on February 8, 1995. She joins a sister, Sara Hilary.

Chris and **Julie O'Brien Petrini** announce the birth of Tabitha O'Brien Petrini on September 15, 1994. She joins a brother, Shawn.

Erika Chilman Roach and her husband, Neal, announce the birth of their first child, Samuel Chilman Roach, on September 29, 1994.

Susan Gwin Ruch and her husband, David, announce the birth of their third son, Michael Robert, on January 4, 1996.

Tom Vitt and his wife, Kamala, announce the birth of their first child, Joseph Paul, on April 20, 1995.

Yan Xuan and his wife, Delphine Kune, announce the birth of their son, Matthew K. Yan, on June 11, 1995, in Fountain Valley, Calif.

Amy Kincaid Berry had a son, Andrew Laurence, in March 1995. He joins a brother, Alexander Scott.

Jeffrey Paul Bloch and his wife, Sharon, announce the birth of their first child, Randall Adam, on November 18, 1994.

Mark DiOrio announces the birth of Nicholas Grant, on April 30, 1995. He joins a sister, Bailey, and a brother, Luke.



Lyman H. Brownfield '37 meets **Carol Anne Sennello '96** and **Julie Anne Sennello '96** at the ABA reception in Chicago.

Ansley and **Mary Grey Reddick Moses** announce the birth of a son, James Thatcher, on March 31, 1995. He joins a sister, Ann Tyler.

Phillip Nichols and his wife, Amy, announce the birth of a second son, Hilyard James, on January 8, 1995.

Emily Quinn and her husband, Mark Ryan, announce the birth of their second child, Emma Dallas, on August 2, 1995.

Michael Scharf and his wife, Trina, announce the birth of a son, Garrett Michael, on August 17, 1995.

Barbara Heggie Stewart and her husband, David, announce the birth of a daughter, Madeleine, on July 29, 1995. They reside in Concord, N.H.

Carol Hardman and her husband, John, announce the birth of their son, Robin Paul, on October 17, 1994.

Irene Bruynes Ponce and **Mario Ponce '88** announce the birth of William Alexander, on May 20, 1995. He joins a sister, Elizabeth.

Wendy D. Sartory married Scott J. Link on March 4, 1995, in Palm Beach Gardens, Fla. They reside in West Palm Beach.

Mark A. Redmiles and his wife, Beth, announce the birth of their first child, Elissa Marie, on September 29, 1994.

James E. Ritch married Paulina Rocha Cito on March 2, 1996, in Mexico City.

Lawrence Silverman married Jennifer Berry on July 9, 1995.

Denise E. Thorpe married **John C. Weistart '68** on May 28, 1995 in Denver. They reside in Raleigh.

Michael and **Debra Marcus Watton** announce the birth of Jacob Benjamin on May 16, 1995. He joins a sister, Melissa.

James R. Cannon announces the birth of Christopher John on April 1, 1995. He joins a brother, Drew, and a sister, Maria.

Louis S. Citron married Danielle Keats Morris in Garden City, N.Y., on May 7, 1995. They reside in New York.

Charles S. Detrizio and **Erica Edwards** were married on October 8, 1995, in Bernardsville, N.J. They reside in Flemington, N.J.

Monique Rowtham Kennedy and her husband, Ken, announce the birth of a daughter, Taylor Joyce, on November 23, 1994.

Susan Lennon married Edward Reed on October 21, 1995 in Washington, D.C., where they are both associates at Shaw Pittman, Potts & Trowbridge.

Ellen Lisa Marx married Christoph Zeyen in Brussels on July 1, 1995. The couple are associates at the law firm of Akin, Gump & Strauss in Brussels.

Dara S. Redler and her husband, Daniel, announce the birth of Alec Brent on December 26, 1995.

David Sager announces the birth of a son, William Benjamin, on June 23, 1995.

Eric Avram and his wife, Lynne Greenberg, announce the birth of a son, Benjamin Kaye.

Samantha Evans married **David Ross '93** on October 14, 1995.

Martina Monique Garris married Galen Bingham on April 29, 1995, in New Haven, Conn. They reside in University Heights, Ohio.

Cliona Mary Robb and her husband, Henry, announce the birth of their first child in November 1995.

Mark C. Brandenburg married Michelle Leigh Fulghum on December 16, 1995.

Jennifer Buchanan married Lieutenant Kenneth Machovec, USN, on September 2, 1995. They live in Alexandria, Va.

David Ross married **Samantha Evans '92** on October 14, 1995.

Jamie Yavelberg married Hunter Hogewood on December 10, 1994. They reside in Morristown, N.J.

Jonathan Zeitler and his wife, Cynthia Baker, announce the birth of a son, Adam, on September 15, 1994. They live in Washington, D.C.

Victoria K. McElhaney married Charles Coleman Benedict, Jr. in Dallas on September 2, 1995. They reside in Atlanta, where McElhaney is employed as director of annual giving for the professional schools at Emory University.

Paige N. Tobias married Timothy H. Button on August 27, 1994. They reside in Indianapolis, where Tobias is a corporate finance associate with Baker & Daniels.

Class of 1932

Clyfford Goodman Scott, 92, of Waynesville, N.C., died December 27, 1995. Born in Concord, N.C., Scott received degrees from Trinity College and Duke Law School. He was in private practice in Durham from 1932-42, then became project manager and attorney for the U.S. Corps of Engineers, for whom he engaged in land acquisitions until 1945. He transferred to the Office of General Counsel with the U.S. Department of Agriculture in Washington, D.C. Later he was assigned to the rural electrification division, where he served until his retirement in 1965. He is survived by his wife of 70 years, Lois Collins Scott, a sister, and several nieces and nephews.

Class of 1933

J. Paul Coie, 84, one of Washington state's leading trial lawyers and anchor of his firm's litigation department, died March 25, 1995. He earned a political science degree from Washington State College, and after completing his law degree at Duke, he moved to Seattle, where in 1942 he joined the law firm that is now Perkins Coie and helped build it into one of the largest firms in the Northwest. He belonged to many professional organizations, including service as a regent of the American College of Trial Lawyers and president of the King County Bar Association. He established the J. Paul Coie Fellowship at the Law School to provide financial aid to joint degree candidates. Coie is survived by two sons, a daughter, grandchildren, great-grandchildren, and two sisters.

Sam Garland Winstead, Jr., 85, attorney and philanthropist in Dallas, died April 12, 1995. Born in North Carolina, he attended Davidson College and graduated from the University of North Carolina at Chapel Hill with a degree in classics and a membership in Phi Beta Kappa. He earned an LLM at Columbia. Upon arriving in Dallas in 1934, he joined the faculty at Southern Methodist University Law

School. He went to work in the U.S. Treasury's tax department in 1935, and entered private practice in 1944. In 1947, he was one of the founders of the firm of Jackson, Walker, Winstead, Cantewell & Miller, the predecessor of the present-day firm, Jackson & Walker where he continued to serve of counsel.

Class of 1935

Roy Murphy Booth, 83, died February 9, 1995. Born in Pollocksville, N.C., Booth graduated from Duke University. He was admitted to the North Carolina bar in 1935, practiced in Greensboro from 1946-94, and was a member of both the American Bar Association and the N.C. Bar Association for more than 50 years. During World War II, Booth served as a communications officer in the U.S. Navy with active duty in both the Atlantic and Pacific. Active in the Greensboro community, Booth was on the board of directors of the Bank of North Carolina and later the board of NCNB. Booth is survived by his wife of 60 years, Marguerite Collins Booth, two daughters, three sons, grandchildren, four sisters, and a brother.

Frank U. Fletcher, 83, retired communications attorney, died in Washington, D.C. on July 23, 1995. A native of North Carolina, Fletcher attended Wake Forest and Duke universities. He joined the FCC in 1934, and moved to private practice in Washington in 1939. Following service in the Army as a legal officer during World War II, he returned to private practice retiring in 1983. He helped his father, A. J. Fletcher, establish the Capitol Broadcasting Co. in Raleigh and served as grants coordinator for the A. J. Fletcher Foundation. Fletcher served as president of the Federal Communications Bar Association, on the National Association of Broadcasters Board, and as chairman of the Washington chapter of Broadcast Pioneers, which gave him its chapter award in 1984. Fletcher received an honorary law degree from Shaw University. He is survived by his wife, Nelle Wood Crowell Fletcher, two sons, and a daughter.

John Calvin Harmon, Jr., 85, of Morehead City, N.C., died March 27, 1995. After receiving the bachelor's and law degrees from Duke, he became director of social and industrial relations for the Board of National Missions for the Methodist Church. He was director of special services and legal counsel of Goodwill Industries of America in Washington, D.C., where he was instrumental in getting legislation enacted that aided sheltered workshops for the handicapped. Harmon is survived by his wife, Lucille C. Harmon.

James Rutledge Peake, Jr., 84, died November 6, 1994, in Norfolk. After receiving bachelor's and law degrees from Duke, he was an agent with the Equitable Life Assurance Society for more than 60 years, and served in the U.S. Navy during World War II. He was involved in the United Way for over 40 years. He is survived by his wife, Sara W. Peake, a daughter, and grandchildren.

Class of 1937

John Daniel McConnell, 85, retired North Carolina Superior Court judge, died October 14, 1995, in Pinehurst, N.C. Born in Davidson, McConnell graduated from Davidson College where he was a member of Phi Beta Kappa, Omicron Delta Kappa and Kappa Alpha Order. He taught at Episcopal High School in Alexandria, Va., before earning his law degree at Duke. During World War II, he served in the Navy as a lt. commander. From 1946-48 he served as an assistant U.S. attorney before becoming administrative assistant to U.S. Senator J. Melville Broughton and his successor, Senator Frank P. Graham. He was in private practice until his appointment to the Superior Court by Governor Terry Sanford in 1961, where he served until his retirement in 1980. He was a member of the North Carolina Bar from 1937; vice president of the N.C. Bar Association in 1979-80; and former president of the North Carolina Judges Conference. He was awarded the Order of

the Long Leaf Pine, the highest civilian honor awarded by the governor. He is survived by his wife, Janice Little McConnell, two sons, two daughters, three stepsons, a brother, grandchildren, and great-grandchildren.

Class of 1938

Morris Marks, native of Augusta, died May 3, 1995. A graduate of Augusta College, Marks served in the Army Air Forces during World War II. He was manager at Marks Handkerchief Manufacturing Company, founded by his parents in 1924, where he remained until 1995. He was co-founder of Sardis Manufacturing Co., Carole Fabrics, Burke Manufacturing Co., Homestead Draperies, Southgate Bank (later Trust Company Bank), Belle S. Marks Foundation, and Augusta West Rotary Club. Marks is survived by his wife, Henrietta T. Marks, two sons, a stepson, two stepdaughters, a brother, and a sister.

Class of 1940

R. Kennedy Harris, 82, retired Greensboro attorney, died December 30, 1995. He was a special agent of the FBI from 1942-45, and served as an assistant U.S. attorney. He retired from a general civil practice in 1983. He was president of the Greensboro Bar Association. He is survived by his wife, **Margaret Adams Harris '40**; a daughter, Ann Louise Matney; two sons, **Charles Marcus Harris '72** and **Thomas Adams Harris '71**, and grandchildren.

Maurice A. Weinstein, 79, a champion of Jewish education on the national level, died July 25, 1995, in Charlotte. Weinstein helped to create a study institute for adult Jews at Wildacres, North Carolina, in 1948. This retreat gave rise to the B'nai B'rith Institutes of Judaism, the centerpiece of a national B'nai B'rith adult education program. He was the founding chairman of the B'nai B'rith Continuing Jewish Education Commission, which publishes books and sponsors the B'nai B'rith Jewish Book Club and

B'nai B'rith Lecture Bureau. He was a chair of the International Council of B'nai B'rith. After graduating from Duke with bachelor's and law degrees and serving in World War II, he founded a law firm in Charlotte, where he practiced until his retirement. He is survived by two daughters, a son, and grandchildren.

Class of 1941

Hervey Moore, Jr., 78, retired state Superior Court judge and former mayor of Hamilton Township, N.J., died August 13, 1995. After graduating from Duke Law School, Moore served in the military during World War II, leaving in 1946 to accept a commission in the National Guard. He served as head of New Jersey's Selective Service Board from 1963 until his retirement from the National Guard at the rank of colonel in 1973. Moore was mayor of Hamilton Township from 1954-55, after which he co-founded a law firm in Princeton, where he was a partner until his appointment to the court in 1973. Moore began his judicial career as a judge of the Mercer County Court, becoming a Superior Court judge in 1980, and presiding judge of the Civil Division in 1982 until his retirement in 1986. Upon retiring from the bench, he returned to the firm he helped found as of counsel until his retirement in 1994.

Class of 1947

James Tilghman Earle, Sr., 71, who practiced law in St. Petersburg, Fla., for more than four decades, died August 27, 1994. After doing his undergraduate work at Washington and Lee and the University of Texas, and receiving his law degree from Duke, he joined a private firm in St. Petersburg. Working with several firms during his career, he specialized in workers' compensation cases. He was a president of the Pinellas County Trial Lawyers Association and a member of the Florida Bar and the St. Petersburg Bar Association. He is survived by his wife, Barbara P. Earle, four sons, two daughters, a brother, a sister, and grandchildren.

Sidney A. Martin, 76, retired attorney in Tulsa, died May 18, 1994.

Class of 1948

William Brinkley, Jr., 71, died July 6, 1994, in Coral Gables, Fla. Brinkley received his undergraduate degree from the University of Colorado. He was director of admissions at Duke and Johns Hopkins University, former vice president for student affairs at the College of Charleston, and director of admissions at Florida International University. He is survived by his friend, Blake Powell, a sister, a nephew, and a great-nephew.

Class of 1950

William R. Cameron of Newtown, Pa., died April 22, 1994. He practiced law in Bensalem, Pa., for 42 years. He was a solicitor for Bensalem Township, and served as Bucks County controller. He is survived by his wife, Lois, two daughters, two sons, two sisters, and grandchildren.

Class of 1951

Jay Gore, 69, died September 4, 1995, in Grenada, Miss. Gore received his bachelor's degree from the University of Mississippi. He was a lieutenant in the Navy Reserve from 1943-45. A member of the Mississippi and the American Bar Associations, he was a president and member of the Grenada County Bar Association; member of the American Judicature Society, Mississippi Defense Lawyers Association, and fellow of the Mississippi Bar Foundation. He was a prosecuting attorney for Grenada County, member of the Mississippi Judiciary Selection Committee, and attorney for the Grenada County Board of Supervisors. He is survived by his wife, Mary Jane Daigre Gore, a daughter, a son, and grandchildren.

John E. Pierce, Jr., 67, of Sanford, Fla., died February 11, 1995. A lifelong Central Florida resident, Pierce had retired from Sunniland Corporation and had been in private practice and a co-owner of the Mayfair Country Club. He is survived by his wife, Mary Ann Whelchel, two sons, two daughters, a sister, grandchildren, and a great-grandchild.

James A. Scott, 70, died on May 31, 1995. He was a native of North Carolina and received bachelor's and law degrees from Duke after serving as commanding officer of a patrol boat in the Pacific during World War II. A former chief counsel for the Cleveland office of the Internal Revenue Service, he later entered private practice as a tax attorney. His professional affiliations included the American Bar Association, Cleveland Tax Institute, and the Ohio and North Carolina Bar Associations. He is survived by his wife of 45 years, Patricia, two daughters, a son, four sisters, and a brother.

Class of 1968

J. Michael Hardin, 51, died August 8, 1995, in Atlanta. He was an associate of Vaul-Cas, Inc., an attorney, and a Marine veteran of the Vietnam War. He is survived by his wife, Liz Hardin, a son, his parents, a sister, and a brother.

Class of 1975

John Robert Kernodle, Jr., 50, a Greensboro community leader who led the Guilford County school system into a successful merger and chaired its board, died October 25, 1995, in Atlanta. Kernodle, a lawyer and an ordained minister in the United Church of Christ, received an undergraduate degree from Duke, where he was an Angier B. Duke Scholar, and graduated from Andover Newton Theological Seminary in Boston. He was in private practice in Greensboro for a decade before becoming executive director of the Community Justice Resource Center and a lecturer in justice and policy studies at Guilford College in 1987. He

was an adjunct faculty member of the Wake Forest University School of Law, assistant to the dean and lecturer in education administration at UNC-Greensboro, a law clerk for U.S. District Court Judge Eugene Gordon, campus minister at Duke and Brandeis, and prison chaplain at Walpole Prison in Massachusetts. He is survived by his wife, Lynn Wright-Kernodle, a son, his parents, and a sister.

Class of 1979



Elizabeth Dunn White died April 4, 1995. The daughter of a military family, her childhood years spanned locations in Taiwan, Germany, Australia, Texas, Florida,

and Maryland before she chose North Carolina as her home. She was a graduate of the University of North Carolina, where she was a member of Phi Beta Kappa. She served as research assistant to the Honorable J. Franklin Parker on the N.C. Court of Appeals before entering private practice in Greensboro. She was a member of the American Bar Association, Greensboro Bar Association, and the N.C. Bar Association. The Young Lawyers Division has named the Justice Fund in memory of Betsy White. A Justice Fund is a named endowment of at least \$25,000 in memory or honor of a lawyer whose career has demonstrated dedication to the pursuit of justice and outstanding service to the profession and to the public. She is survived by her husband, William Donald White, two sons, and her parents.

Class of 1989

Ralph Erich Jones died July 9, 1995. He was in private practice in New York City. He is survived by his partner, Daniel. He is remembered by classmate Leora Tec:

"I remember the first time I saw Ralph. It was at the picnic for the summer students in 1986. We started talking and I glanced at his name tag: 'Ralph Jones—Columbia Bible College.' 'Oh, no,' I sighed inwardly, 'just my luck.' I barely listened as he spoke about his recent experience in Japan, so eager was I to get away from this person with whom I obviously had nothing in common.

"Luckily, logistics forced us to spend a lot of time together. I quickly learned that Ralph was far more complex and multi-faceted than I had imagined. I learned what a warm, funny, reliable, brilliant, and curious person Ralph was.

"After taking the bar I led a group of law students on a seminar to Israel during which we met with government officials and academics. Ralph was the only non-Jewish student on the trip. He also was the one who asked the most insightful questions.

"Over the last several years though I saw Ralph every year when visiting from Israel, we hadn't kept in such close touch between visits. Still, I always knew that Ralph would come through if I needed him. He will be sorely missed by me and my family and countless others who were fortunate to know him."

Leora Tec '89

Class of 1992

Karen Elizabeth Forehand Boychuk, 31, died December 31, 1995. She was in solo private practice in Raleigh where she moved after a short time in private practice in New York. She is survived by her husband, William Boychuk, and her parents.

Class of 1998



Jason Lee Haight, 22, first-year student, died August 24, 1995 in Durham. Born and raised on a ranch in Gillette, Wyo., Haight was a National Merit Scholar who

graduated from George Washington University, where he was a Presidential Scholar in the Honors Program and earned a distinguished prize for his academic accomplishments in international business. He represented GWU on its Intercollegiate Debate Team for four years, winning many awards, and was a member of the Interfraternity Council. He was pursuing the JD/LLM in comparative and international law at Duke Law School, where he was the Nixon Scholar in his class, the distinction awarded annually to an outstanding law student who shows promise in international affairs. Haight is survived by his parents. Following a memorial service at Duke Chapel, a tree was planted on the Law School grounds in Jason's memory.

The Duke Law Alumni Association (LAA), which includes all law alumni, sponsors programs designed to advance legal education and to promote communication between alumni and the Law School. Following is a report on some of these programs.

Career Panels

Alumni returned to the Law School to share career advice with students in a series of panels sponsored by the Offices of External Relations and Career Services during spring semester. Panelists, who are listed below, discussed legal careers in public interest, government, international law, corporate practice and litigation practice.

Cindy Adcock '91
 Karen A. Aviles '84
 Gill Beck '85
 Alexandra Allen Carr '86
 Roger M. Cook '84
 Christine Witcover Dean '71
 John S. DeGroot '90
 Mary Woodbridge deVeer '85
 James Alec Gelin '87
 Peter S. Gilchrist, III '67
 Elizabeth A. Gustafson '86
 Mark Daryl Gustafson '86
 Thomas A. Hanusik '90
 Sharon Harrington '89
 Cecily Hines '81
 Katherine S. Holliday '80
 John Keller '87
 Denise L. Majette '79
 Jim Maxwell '66
 Michelle Nowlin '92
 Rick Robinson '92
 Elizabeth Miller Roesel '87
 Martin Schaefermier '90
 John Stark '89
 Denise Thorpe '90
 Gregory Wetstone '78

Law Alumni Weekend

The classes ending in '5' and '0' celebrated their reunions on October 12-13 during Law Alumni Weekend 1995. Members of the Half Century Club—those who have celebrated the 50-year anniversary of graduation—also attended. Alumni and their families returned to renew friendships with classmates and ties with faculty.

The weekend began on Friday afternoon with a student/alumni luncheon, sponsored by the LAA to provide career advice to students. Students were matched with alumni who have specialty areas or who reside in areas that are of particular interest to students.

The luncheon was held on the front lawn of the Law School to accommodate the large crowd and to take advantage of beautiful weather. Over 125 alumni and students attended the luncheon, including members of the Law School's Board of Visitors and LAA Board of Directors.

Friday evening offered an all-alumni reception and dinner, during which the LAA held its annual meeting and presentation of public service awards. On Saturday morning two programs were attended by alumni, families, and faculty. "Two Perspectives on the Death Penalty" featured professor Phillip Cook from the Sanford Institute of Public Policy Institute presenting "An Examination of the Costs of Capital Punishment in North Carolina," and professor Robert P. Mosteller of the Law School presenting "A Look at Post-Conviction Litigation in an Individual Death Case." The second program, "Should We Pay College Athletes (More)?" was moderated by professor Paul Haagen, who has served on the University's committee to advise student athletes, and featured former Duke basketball stars and Law School alumni, Jay Bilas '92 and John Marin '80, Richard W. Chryst '89 of the Atlantic Coast Conference, Sonja Steptoe '85 from *Sports Illustrated*, and Paul Braithwaite '96.

Classes ending in '1' and '6' returned on April 12-13 to celebrate their reunions for Law Alumni Weekend 1996, which was held in conjunction with the 1996 Barristers Weekend and featured a celebration of professor Melvin Shimm's time at the Law School from his arrival with the Class of 1956 through his retirement in the spring of 1996. This weekend marked a change from fall to spring dates for the annual Law Alumni Weekend. Photos and a full report on Law Alumni Weekend '96 will appear in the fall issue of *Duke Law Magazine*. The 1997 Law Alumni Weekend with reunions for the '2' and '7' classes will be April 4-5, 1997.

Wheeler Receives Murphy Award

Douglas Wheeler '66, California's secretary of resources, received the Charles S. Murphy Award at the LAA October 12, 1995, all-alumni dinner. The LAA presents the award annually to an alumnus of the School who, through public service and/or dedication to education, has shown a devotion to the common welfare reflecting ideals exemplified in the life and career of Charles S. Murphy. Murphy was a 1931 graduate of Duke University, and a 1934 Duke Law School graduate. He received an honorary LLD from Duke in 1967. During his career, he held several positions in the Truman, Kennedy and Johnson administrations including serving as administrative assistant and special counsel to President Truman, undersecretary of agriculture under President Kennedy and counselor to President Johnson. He also was a member of the Law School's Board of Visitors and the University Board of Trustees.

The awards committee of the LAA Board of Directors recommended that Wheeler receive the Murphy Award because "he has dedicated his career to public service, particularly in the fight to protect and improve the environment at



Douglas Wheeler '66 received the 1995 Charles S. Murphy Award.

a time when this goal is reaching a critical point." Wheeler said that he came to Duke Law School with "the idea of a career in government and public policy" and found that "law school strengthened the impetus to government service." Wheeler, who has been California secretary of resources since 1991, stresses "cooperative problem solving" as the best approach to enduring improvement.

In a career devoted to public service in both government and private organizations, Wheeler's previous government positions include deputy assistant secretary for Fish and Wildlife and Parks and legislative counsel for the U.S. Department of the Interior. He served as vice president of the World Wildlife Fund and The Conservation Foundation, as executive vice president of the National Trust of Historic Preservation, and executive director of the Sierra Club. He was founding president and first chief executive officer of the American Farmland Trust, a not-for-profit proponent of farmland retention and conservation of agricultural resources. He serves on the boards of directors for the Resources Development Foundation, the Walkways Center and the Wildlife Habitat Enhancement Council, and received the Department of the Interior Achievement Award for Outdoor Recreation in 1980.

In accepting the award, Wheeler noted to the audience, which included his son, Duke law student Clay Wheeler '97, that public service is not only satisfying but also pleasurable. He encouraged all alumni to become as involved in public service pursuits as possible in a variety of ways.

Womble Receives Rhyne Award

The LAA established the annual Charles S. Rhyne Award to honor alumni with distinguished careers in private practice who have also made significant contributions *pro bono* publico in education, professional affairs, public service or community activities. The second Rhyne Award was presented to **William F. Womble '39**, Winston-Salem attorney, at the LAA all-alumni dinner during Law Alumni Weekend, October 12, 1995. The award is named for Charles S. Rhyne '37, who has been an active trial lawyer in Washington D.C. since 1937, representing chiefly states, cities, and counties in cases in federal and state courts throughout the United States, including serving as lead counsel in the "one man, one vote" case of *Baker vs. Carr*, 369 U.S. 226 (1962). While actively engaged in the practice of law, Rhyne held offices in bar associations at the local, national and world levels, including serving as president of the American Bar Association. He also participated in education, serving as visiting professor at a number of universities and on the Board of Trustees of both Duke and George Washington University. Rhyne actively worked to expand the role of law as a credible method of achieving world peace by serving in a number of roles at the highest levels of the federal government and international organizations.

Womble, a recent recipient of the 50-Year Award of the Fellows of the American Bar Foundation, joined what is now Womble Carlyle Sandridge & Rice (presently over 180 lawyers strong with offices in Winston-Salem, Charlotte, Raleigh, and Atlanta) following graduation. He developed a practice in general

civil litigation, municipal and school law, business law, and wills and trusts. He served in the Army Air Corps during World War II, earning the rank of major. Former counsel to the City of Winston-Salem and the local school board, he served as president of the Junior Bar Association of Winston-Salem, Forsyth County Bar Association, and N.C. Bar Association. His long-time involvement with the American Bar Association includes current membership on the Standing Committee on Ethics and Professional Responsibility and the Resource Development Council, and earlier participation in the ABA House of Delegates, the ABA Board of Governors, and the National Conference of Bar



William F. Womble '39 received the 1995 Charles S. Rhyne Award.

Presidents. He received the N.C. Bar Foundation's John J. Parker Award for Service to the profession in 1984.

A member of the N.C. House of Representatives from 1953-58, Womble also has held memberships on the N.C. General States Commission, N.C. Board of Higher Education, and N.C. Budget Commission. He has been a leader in fund raising for numerous bar association causes, including the 1986-88 Founders Campaign that established a permanent endowment for the N.C. Bar Association.



LAA president Valerie T. Broadie '79 with president-elect Richard Salem '72, and past president Haley J. Fromholz '67.

He is an active member of the Centenary United Methodist Church in Winston-Salem, and has served as county United Way chairman, Chamber of Commerce president, Rotary Club president, and a trustee of High Point College. He also was a founder and first president of the Association for the Handicapped.

In recognizing him as this year's Rhyne Award recipient, the LAA Board noted, "Bill Womble is a perfect example of a lawyer who maintains the highest standards of professional ability and integrity in establishing a distinguished career in private practice, while also devoting himself to the improvement of the legal community through service in professional organizations."

New LAA Members and Officers Welcomed

The Board of Directors welcomed the new members recommended by its nominating committee at its fall meeting on October 13, 1995. The new members are: **Sarah Adams '73** of Atlanta, **Herbert O. Davis '60** of Greensboro, **Willie O. Dixon '88** of Raleigh, **Michael Dockterman '78** and **Martin P. Marta '72**, both of Chicago, **Stuart Feiner '74** of Toronto, **Sandra J. Galvis '92** of New York, **William L. Riley '67** of San Francisco, **Martin Schaefermeier '90** and

David L. Vaughan '71, both of Washington, D.C. **Bruce Baber '79** of Atlanta became the new secretary-treasurer of the LAA. He will rotate through the officer ranks to become president.

During the LAA meeting on October 12, 1995, president **Valerie T. Broadie '79** thanked immediate past president **Haley J. Fromholz '67** for his outstanding service, and presented him with an engraved gavel and stand to commemorate his service as president for 1994-95. Fromholz was appointed to the California Superior Court, Los Angeles County in 1994. Before that he was a litigation partner at Morrison Foerster's Los Angeles office. He joined the LAA Board in 1989. He served on and chaired both standing committees (Awards and Nominations). Because of the by-laws revision in 1993, he served an additional year as vice president and therefore served as chair of the standing committees for two years. While secretary-treasurer he chaired the ad hoc committee to review the LAA Treasury policies. He has chaired the education committee for two years, and he served on a committee to review the LAA matching program for the Student Funded Fellowship in 1993-94.

1996 DUKE LAW SCHOOL ALUMNI DIRECTORY

Keep up with your classmates and other friends from Duke Law School. Network with your Duke Law School colleagues around the world. The Law Alumni Association will publish an updated all-alumni directory with alphabetical, class, and geographic listings. This will be the first directory printed since 1993. Be sure that the Law School External Relations Office has your current address information. Our toll-free number is 1-888-LAW-ALUM.



CALENDAR OF EVENTS

For more information about events at the Law School, consult our Web site at <http://www.law.duke.edu>.

1996

April 12-13

Board of Visitors meeting,
Alumni Weekend/Barrister Weekend

Half Century and classes of
1946, 1951, 1956, 1961, 1966, 1971,
1976, 1981, 1986, 1991

April 12

Conference: The United Nations, Regional
Organizations and Military Operations
and Military Operations, Center on Law,
Ethics and National Security

Law Alumni Association Board
of Directors Meeting

All Alumni Reception and Dinner

Barristers/Reunion/Mel Shimm
Retirement Celebration

April 13

Conference: The United Nations,
Regional Organizations and Military
Operations, Center on Law,
Ethics and National Security

Issues Forums: "Technology and the Law:
Tomorrow is Today," "Medical Malpractice
and the American Jury: Myth vs. Reality"

Seminar on Alternative Careers

April 18

Cummings Colloquium on Environmental
Law, "Beyond the Balance of Nature"

May 11

Hooding Ceremony, Address by
Atlanta Mayor William C. Campbell '77

May 12

University Commencement

June 11

Alumni Event in Raleigh

June 13

Alumni Event in Durham

June 17

Alumni Event in Boston

June 21

Alumni Event in Columbia, S.C.

June 22

Alumni Event in Myrtle Beach, S.C.,
N.C. Bar Association meeting

July 7

Asia-America Institute in
Transnational Law begins in Hong Kong
and Summer Institute in
Transnational Law begins in Brussels

July 13

Alumni Event in Hong Kong

July 18

Alumni Event in London

July 21

Alumni Event in Brussels

July 22

Alumni Event in Frankfurt

July 20-21

International Conference: "Justice
in Cataclysm: Criminal Tribunals in the
Wake of Mass Violence in Brussels"

August 5

ABA reception in Orlando

September 12

Inn of Court

October 10-13

Board of Visitors meeting

Law Alumni Association
Board of Directors meeting

Alumni Weekend
Barristers Weekend

October 17

Inn of Court

November 1-3

Alumni Conference in Brussels

November 14

Inn of Court

November 19

Scholarship Luncheon

1997

January 3-7

AALS annual meeting in Washington, D.C.
with Law School reception

January 16

Inn of Court

February 13

Inn of Court

February 14-15

Gender Law Conference

March 13

Inn of Court

April 4-6

Alumni Weekend:
1947 and Half Century,
1952, 1957, 1962, 1967, 1972,
1977, 1982, 1987, 1992

May 17

Hooding Ceremony

May 18

Commencement

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