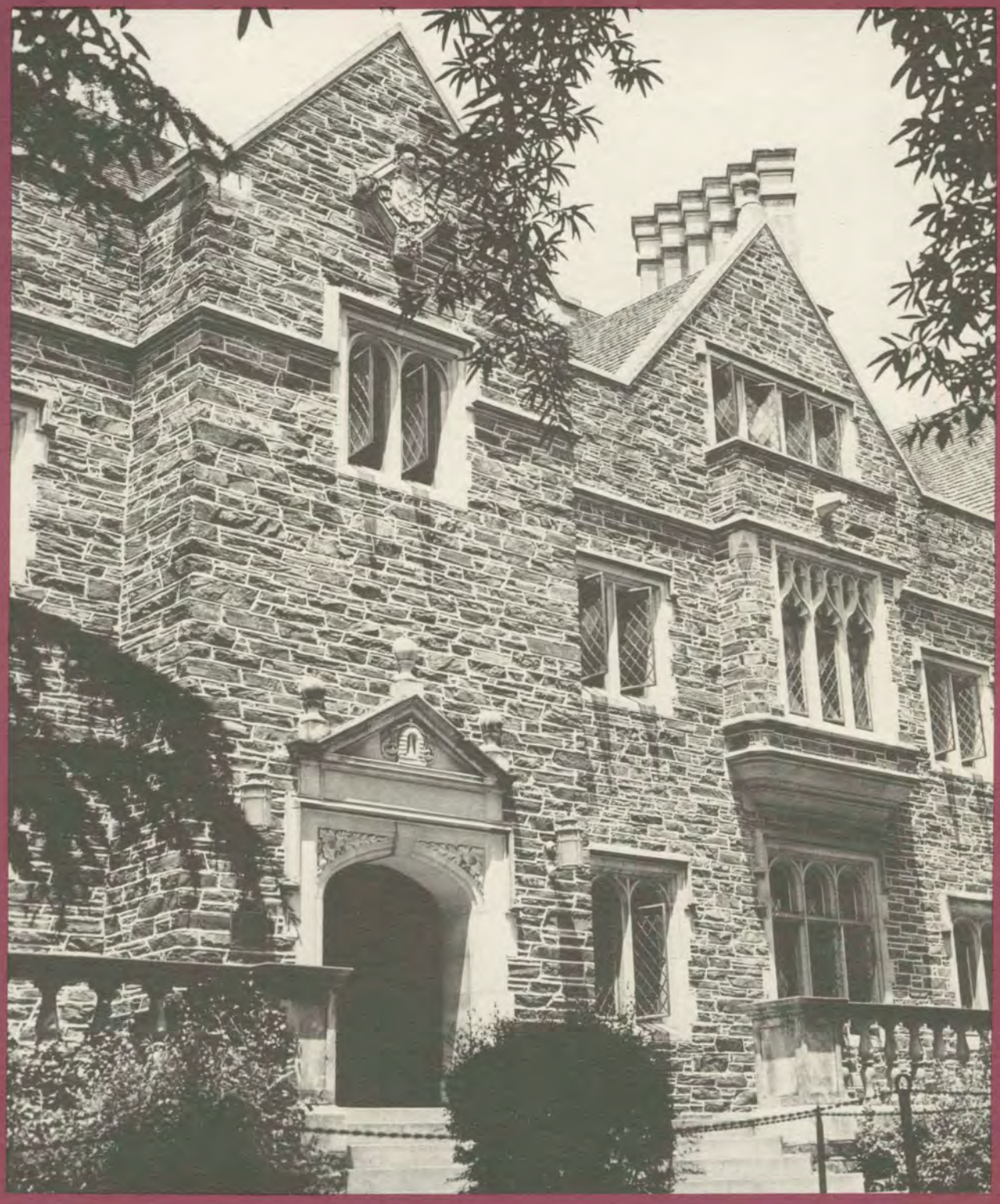
Duke Law Magazine

SUMMER 1983



...pushing back the frontiers of ignorance...

—Mel Shimm

VOLUME 1

Duke Law Magazine

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Duke Law Magazine is published under the auspices of the Office of the Dean, Duke University, School of Law, Durham, North Carolina 27706
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Editor's Column

Because this issue is packed with commentary on the law—on the perplexities of legal reasoning, on the allocation of scarce judicial resources, on the difficult policy choices which lie behind legislative enactments—I take a moment to speak of personalities. In the final week of preparation for this issue, the Law School saw the demise of one "old regular"—and I want to disclaim any connection between our feature piece on Mel Shimm and the accidental crunching of his valiant Plymouth. But I'll miss that familiar sight on the otherwise empty parking lot in the early mornings. (See photo below.)

I want also to welcome Penny Lozon Crook as a "new regular." Since her graduation from the Law School in 1982, and even before, she has been contributing to the periodic supplements for the Larson treatises on *Workmen's Compensation* and *Employment Discrimination*. More recently she has been a special Research Associate for *Law and Contemporary Problems*. In the future Penny will report on some of the conferences, and perhaps do some historical pieces on the Law School as well.

Our photography staff gradually expands—to include people especially close at hand. For Ken Starr's article on prisoner legislation we were thrilled to find the photo by Hihsong Kim, a senior at the N.C. School of Science and Mathematics here in Durham, who goes off to Harvard next year and begins the seven-year haul to a career in the law.

Thanks finally to Charles V. Renner, of Renner, Everett & Powell in Parkersburg, West Virginia, for identifying other faces in the Law Cabins picture on p. 27 of the previous issue. The third person kneeling is Campbell Carden; the seventh person kneeling is John Forsythe. The unidentified person between Aute Carr and Ed Reid is Benson C. Tomlinson.

For those of you who search these pages in vain for alumni notes, or even for the lists of faculty activities and publications, the wait will not be too much longer. The Law School Annual Report is about to appear in a new format, containing such notes together with a five-year summary of the Law School's operations authored by Dean Carrington, a report on Admissions and Placement, and a report on the Annual Fund and donors.

—Joyce Rutledge

On The Cover
(Courtesy of Duke University Archives)

Our cover depicts the original Law School building, located on the main quad of West Campus, next to Perkins Library. The building was dedicated in September 1930, along with several of the other main quad buildings. The first Dean in the original building was Justin Miller, who served as Dean until 1934. He was succeeded by H. C. Horack (1934–47), Harold Shepherd (1947–49), C. L. B. Lowndes (Acting Dean, 1949–50), Joseph McClain, Jr. (1950–56), and E. R. Latty (Acting Dean, 1956–58; Dean, 1958–66). Dean Latty supervised the construction of the present building, which was formally dedicated on Law Day, 1963. For some "inside information" on the construction of the new building, see our interview with Associate Dean Mel Shimm on page 41 of this issue.

The picture to the right will be a familiar face to friends of Dean Shimm. Its old registration will be auctioned to the highest bidder at Alumni Weekend.

R.I.P.
1964–1983

Straight Talk About the Law

William Van Alstyne

This essay first appeared in the "How to Think Straight Series," written by faculty members and published by the office of the President at Duke University. William Van Alstyne joined the Duke Law faculty in 1964, where he now holds the William R. and Thomas C. Perkins chair. He is a former national president of The American Association of University Professors and a member of The National Board of Directors for the American Civil Liberties Union.

Asking a law professor to write about "How To Think Straight" must sound perverse. We teach a subject in law school called "torts." We say it is a branch of the law dealing with civil wrongs for which actions for money damages may be brought in court. But our colleagues in linguistics delight in remembering that the word "tort" comes from the Latin word meaning "twisted" (from *torquere,* as in the modern English word, torque), and so an awfully lot of torts seem to be.

Then too, you may have heard the story of the surgeon, the engineer, and the attorney who fell to quarreling as to who among them belonged to the oldest profession. (If you thought the world's oldest profession was something else, this story will set you right.) The surgeon confidently asserted his was the oldest, pointing out that even the Bible acknowledged the priority of surgery since Eve was made from Adam's rib. He was followed by the clever engineer, however, who quieted his medical friend by noting from the same source that from chaos God had made the heavens, the earth, and all ordered parts of the universe—an original, earlier, and profound feat of cosmic engineering. The surgeon and the engineer were startled when, even as the engineer was completing his explanation, the lawyer simply chuckled while reaching to scoop up the sum the three had put on the table as their wager. Quickly they conceded, however, as the lawyer asked midway in his gesture: "And who, do you think, created the chaos?"

William Van Alstyne

Who, indeed? The lawyers, of course, and one gets a laugh from this story at least partly because we think it has a large element of truth. Yet, strangely, the quality that makes lawyers seemingly so productive of chaos also reflects an insight as to how the process of legal reasoning may compel one to think more clearly.

A principal device of our legal system attempts to minimize error by institutionalizing a check against its occurrence. It *willfully* sets up an adversary process. Within the law, the system is one of practical burdens of proof, tested in cross-examination. Within the discipline of the law school, the setting is much the same. Assertions about what "is" do not pass lightly according to some congenial consensus. Skepticism is not merely welcome; it is factored in. Reliance upon what may appear to be obvious, as a "reason" to decide some issue, may be put to serious challenge. In fact, a frequent consequence of attending law school is one's rising sense of personal uneasiness about one's own convictions. It is not merely an instance of becoming more critical of what is (or isn't) "the law." Rather, it is also a matter of discovering a more profound uncertainty about one's own beliefs and confidence, even in discerning right from wrong.

Exposure to the processes of legal reasoning is thus at once both clarifying and dismaying. Starkly contrasting examples of how different human beings have responded to it are both instructive and disturbing. At one end (of such examples), there is Socrates: an individual so devoted to his society that he would submit to its death sentence, but who nonetheless accepted death rather than abandon a continuing freedom to press questions which others no longer wanted examined. At the other end, there is Pontius Pilate: a figure who, professing not to know where truth lay, abandoned all responsibility of judgment under cover of professional self-restraint.

Socrates and Pilate might well have been classmates in the same law school.

Figuratively, Socrates and Pilate might well have been classmates in the same law school. Had it been so, then doubtless Socrates would have been regarded with justifiable pride; that Pilate acted as he did, a sign of institutional failure. Yet, interestingly, had a scientist been called in, to review the nature of the school and of its ways of thinking about things, it is likely he would have reached a different verdict. "Given your way of thinking," he might say, "both Socrates and Pilate are equally plausible outcomes of this place."

Had such a scientist reached that conclusion, I for one would find

"both...are equally plausible outcomes of this place."

it difficult to disagree. For my feeling is that the essential problem of "thinking straight" within the law is precisely this problem. Because legal education and serious legal reasoning do routinely question the most fundamental normative assumptions as well as those that are much more manageable, the process itself can scarcely help generating doubts within those themselves caught up in the process. But, having stirred these doubts (even as Socrates sought to do), legal reasoning may not be adequate then to put back into the cage the nihilistic beast it has turned loose. Small wonder that the enterprise is often the object of public anxiety. Many are doubtful that even Socrates represents anything useful. Nearly all agree the world does not need the likes of Pilate. Something, surely, is amiss as I do not doubt it is. But the problem is deeper than it seems.

The most oft proposed antidote for what appears to be missing in legal education (e.g., a sense of morality) is the inclusion of a mandatory course in ethics. No doubt such courses are helpful. A course in legal ethics is defensible in any event, moreover, if merely (but importantly) to settle what attorneys need to know, whether or not it suits their taste. Even so, I believe the basic problem will remain and, largely, cannot be avoided. The reason is that virtually all efforts to think seriously about the matters of the law necessarily tend to create headwinds for moral discourse rather than to construct reinforcing rods. The deep problem of legal reasoning and of legal education is, frankly, that they are expected to straddle two traditions of "knowledge" which may have no common elements. Put bluntly, it is the awkwardness of attempting to bridge the empirical tradition and the normative tradition, the realms of sense and (literally) of non sense (not necessarily "nonsense," but certainly non sense). Here, in more detail, is a specification of that dilemma.

On the one hand, the basic orientation of legal analysis is highly congenial to the methods of science, i.e., it is committed to empiricism and to the rational process. Nothing is removed from testing or from critical review, even as the example of Socrates is meant to suggest. Indeed, our principal device (the adversary system) is in some respects a crude social institutionalizing of the scientific method. Matters seldom come into court simply "assumed." Rather, they must be shown to be so. Similarly, what is offered up as "the law" is itself contestable. The system itself provides trained professionals with a vested interest in disputing such assertions, e.g., in distinguishing a case relied upon, in demonstrating the obsolescence of the rule, or in challenging the very constitutionality of the statute.

On the other hand, most of the law is also normative. That is, it is

Put bluntly, it is the awkwardness of attempting to bridge the empirical tradition and the normative tradition...

prescriptive and not simply descriptive; it adjudicates or regulates by rules. But these phenomena, these norms, are at bottom not the stuff of rational empiricism at all. They are literally not the material of "science"

...the best assistance provided by legal reasoning lies in its capacity to expose mistake and inconsistency in what we think we are doing...

subject to the verifiability procedures roughly reviewed in Irwin Fridovich's description of what scientists work on in "getting close to truth." They are not sense data, but assertions of "ought," of "should," of "must," as conventions, as mere human insistencies. Stripped absolutely bare, they are ("scientifically") but sets of social preference the rational defense of which regresses and collapses into explanations in terms of whatever other social preferences the particular rule in question is alleged efficiently to serve.

Concretely, as an obvious example, whether John Hinckley should have been convicted of murder despite whatever degree of mental perturbation he labored under, is in no sense a scientific question in the way of the question as to whether eggs can be crushed with rocks. It is an "ought" question in the first instance: "ought" the rule be that one in Hinckley's position should be treated in one way (e.g., sentenced to life in prison) rather than some other (e.g., committed indefinitely for "treatment")?

Legal reasoning is immensely helpful in avoiding mistakes in thinking about such matters. Its principal uses, however, are by way of clarification, the avoidance of inconsistency, and the minimizing of error that tends to seep in through the crude impulsiveness of the legislative pro-

cess and the distortive emotions or misinformation of those who presume to make the rules as well as those asked to apply them. But these not inconsiderable skills do not per se direct any one "correct" answer. Rather, the legal process supplies the forums that serve usefully as places in which rules (which are often little more than enactments of transient social preference) are given an acid bath: forums in which those rules are pushed to the test by specific encounters that frequently upset one's complacency respecting the wisdom of what we think we are doing. Beyond this, the legal process can also conscientiously fill in the interstices in the face of political default or uncertainty; and much of the process of legal education is devoted to this skill.

Underneath all this, however, there still recurs the deeply nagging question of "ought" and "should" in the law. And, alas for them, students of the law may not take cover from such questions in a pure scientist's (alleged) professional divorce from such matters. The professional confrontation with the normative is not a voluntary one in legal reasoning. It is altogether unavoidable. The imperatives of a social order which cannot operate at all without at least the stipulation of certain normative standards, to which each must be in some measure accountable, forbids to those concerned with law an aloof disinterest in trying to think straight about values. Some nagging "Socrates" will insist upon pressing the issue. And it is no answer to Socrates just to say "it is so because a majority have said that it is to be so," because certain principles are "self-evident truths," or because "the Constitution so ordains it," or because Christ, John Wesley, or Immanuel Kant revealed it.

The roots of legal reasoning in empiricism and in the rational process intellectually forbid to it reliance upon such bailout devices. Its institutional devices are deliberately hard on such schemes. In this respect it veers closer to the incessantly questioning Socrates than to the virtuous Christ. It finds it owes an accounting as much to David Hume's *Inquiry into Human Understanding,* or William James's *Essays on Pragmatism,* as to less skeptical schools of thought.

...and frequently to induce a much needed humility about what we think we know.

Briefly, then, this is the difficulty of "thinking straight" within a framework of legal reasoning: the difficulty of traversing the chasm that separates the empirical from the normative in the concrete circumstances of a social order. My own impression is that the best assistance provided by legal reasoning lies in its capacity to expose mistake and inconsistency in what we think we are doing, and frequently to induce a much needed humility about what we think we know. Much larger claims, however, I would not promise.

Still, standing as it does, at the juncture of the social and the scientific, law is for many of us an immensely interesting discipline. In most of this essay, I have tended to stress its limitations. In closing, I want to state its peculiar attraction. Philosophy in the abstract, untested, merely chatted about, has a corrosive tendency in becoming an armchair exercise that leaves one doubtful of its use. And pure science is itself literally immobilized in not having much to say even as to what it should do, or how it is to be applied. The bruising reality of applied science and an applied philosophy, on the other hand, is marvelously instructive and tends greatly to clear the mind. It is the business of the law and the focus of legal reasoning. And thinking straight about such matters is precisely the aspiration of legal education.

THE JUDICIARY

The Besieged Judiciary

Judge Collins J. Seitz

Remarks by the Honorable Collins J. Seitz, Chief Judge, United States Court of Appeals for the Third Circuit, at the Law Journal Banquet (March 29, 1983).

Judge Collins J. Seitz

. . . Most of you will soon be entering what some call the real world of law practice. It is not always characterized by sweetness and light. Indeed, there are many potential clients who, to put it mildly, have lost touch with total reality. As chief judge I am a lightning rod for the disgruntled, the disenchanted and the kooks.

Also as chief judge I have innumerable "pen pals"—mostly writing from an institutional setting. All the publicity about constitutional rights has spawned a new class of litigants who look upon any apparent personal affront as a violation of their constitutional rights. (Here I recall a recent New Yorker cartoon saying "Didn't know I had so many constitutional rights.")

After an adverse decision, one of my persistent outpatient pen pals wrote me: "Justices of this court do your 'dirty work' but do it well—then when you're finished, I want you all to feel proud of yourselves, as you all will never abide in the shadow of the most high when you are called on 'judgment day.'" In view of this communication, I'm doing my best to put off judgment day! He later wrote me that a panel of judges, of which I was one, were anti-Semitic because we decided another case against him.

The judiciary in a very real sense is not in control of its own destiny. The pressures of population growth, technological advances and the state of our economy touch our courts in a very significant manner. Yet, we are almost helpless to blunt their impacts. A projected population of 260 million by the turn of the century and the consequent grievances generated by such numbers is mind boggling. Certainly, significant steps must be taken to deflect many such controversies away from the traditional court system if it is to continue to discharge its historic function.

Advances in technology create new and novel controversies of colossal proportions. Can a court system meaningfully process protracted controversies in this field? Many of them will assuredly rival *Jarndyce v. Jarndyce* (in Dickens's *Bleak House*) in life expectancy. The demands of such cases on our judicial resources will significantly and adversely affect our ability to deliver justice promptly to the public.

An intimately related question is whether exceedingly complex civil cases are appropriate for jury consideration at all. The fundamental issue as to whether the fifth amendment can ever limit the civil jury trial guarantee of the seventh amendment has not been decided by the Supreme Court. I think the Supreme Court is wise not to rush to consider this important issue. In time, when it does reach the issue, the high court will have the benefit of more lower court exposition, to say nothing of a growing awareness of the complexity of certain types of litigation.

Nor is the impact of the legislative process on our courts always fully appreciated. The Congress and state and local legislative bodies are constantly enacting new laws which continue to add measurably to court jurisdiction and thus to the volume of lawsuits. I do not see this trend abating over the long run. I say this for many reasons, not the least of which is the obvious belief of the sponsoring legislators that it may provide them with political life insurance.

Another factor pressing on the judiciary is the ever-growing litigiousness of our modern society. Why is this so? I suspect that many of the reasons are sociological. There seems to be an ever-increasing facelessness in our society which erodes individual recognition. It is a product of bigness and the impersonality of

number identification.

Frustrations, real or imagined, manifest themselves in many ways. A ready vehicle today to vent one's discontent is the lawsuit. If a court does not provide a satisfactory remedy, the volume of public discontent only increases. Many of the laws passed by Congress tend to encourage litigation by those individuals who feel aggrieved, legitimately or otherwise.

Consider the number of personnel decisions made every day in industry and in the academic world and you gain some appreciation of the magnitude of the problem. Indeed, I think it fair to say that disputes involving every major educational institution in our circuit have found their way to our court. The deflection of resources must be enormous.

Advances in technology create new and novel controversies of colossal proportions.

Putting aside for the moment those litigants who have legitimate complaints, the brute fact is that many times individuals rationalize their own inadequacies by invoking legislation banning various forms of discrimination. It becomes a ready vehicle to blame someone else for a failure to obtain or hold a job, to gain a promotion or to obtain tenure.

The conspiratorial concept of life is very much with us. How the meritorious cases can be expeditiously and inexpensively differentiated from the frivolous cases is one of the major challenges to our court system. I know the total picture is equally baffling to many in the general public.

There are other factors promoting public litigiousness, not the least of which is the frustration of many citizens with delay in the operation of the government bureaucracies at various levels. In addition, media coverage of court decisions has heightened public awareness of possible legal claims. And, some will say, there are too many lawyers.

As the number of docketed cases swells, and their complexity increases, other pressures are also being brought to bear on the judiciary. Ours is a society which, in theory, venerates majority rule. In addition, we say we are equally committed to the protection of individual rights. There is an essential harmony to these two principles when they are confined to their proper spheres. There is, of course, sharp disagreement as to their proper spheres in particular cases. This is most evident when individual rights that clearly conflict with the majority view are asserted in court. Many of the classic cases are in the free speech area. It is, of course, easy to be objective when values close to your heart are not involved.

The courts, in my view, will be under ever-increasing pressure to conform to majority will when judicial protection of individual rights is sought for unpopular causes. We will be confronted with political cries to bridle the judiciary and restrict its jurisdiction when we uphold individual rights involving unpopular subject matter. There will be an ever-increasing clamor to select judges on the basis of politically influential groups' conceptions of orthodoxy. Such groups would make the judge a poll taker whose decisions would presumably reflect the popular will.

Another factor pressing on the judiciary is the ever-growing litigiousness of our modern society.

Just consider such charged areas as crime and punishment, capital punishment in particular, abortion, busing, treatment of the mentally ill and the retarded, and the march goes on.

These problems end up in the judicial branch, which, in many ways, is the least able to provide any meaningful long range solution. Yet when citizens cry out for relief in the courts it is understandable why members of the judiciary will, on occasion, encroach on what is more properly the function of the legislative branch.

I do not stand here to defend every exercise of jurisdiction by the federal courts. If there is deep general disagreement among the public about certain issues, it is equally true that judges will also often disagree. Because it is a judge who decides whether to apply the broad language of a constitutional provision to a particular issue, it is evident that judicial philosophy is a part of the decision-making process. Different judicial philosophies are properly reflected in judicial disagreements, rather than in decisions about the right of the courts to address certain issues in the first place. Judicial restraint is an admirable quality; but in our constitutional system it is a charade if, without more, it is employed merely to avoid doing justice in unpopular cases.

Nor can any remarks touching the future of the judiciary fail to mention the omnipresent electronic media. The classic conflicts between the fifth amendment rights of an accused to a fair trial and the first amendment rights of the media are well known to all of us. And there are more in the pipeline.

It is obviously important that judicial proceedings be open to the media as the surrogates of the public. At the

... the brute fact is that many times individuals rationalize their own inadequacies by invoking legislation banning various forms of discrimination.

same time the media also cannot be above legitimate scrutiny. Their great power and influence give them the inherent capability of projecting an undisclosed partisanship and lack of objectivity.

It seems to me that when the media transmit their image of the legal system, it is important that they be able to give reasonably objective assurance to the public that they do not permit themselves to be used as vehicles for purely partisan or suspect objectives. How this can be done without an odor of censorship is a challenge to all of good will. While the courts and the media often pursue different values, it is assuredly in the public interest that neither be unreasonably recognized at the expense of the other.

Because the public does not have an in-depth understanding of how the courts are required to function... the judicial branch will continue to be the least understood branch of government.

Because the public does not have an in-depth understanding of how the courts are required to function, it seems evident to me that the judicial branch will continue to be the least understood branch of government. In many ways the public is asked to take it on faith that the judiciary is reasonably discharging its important responsibilities. That faith can be enhanced by the selection of judges who may be expected to be industrious and to bring a highly developed sense of fairness and reasonableness to their decision-making.

But not even the wisest judges can be expected to decide all cases in a way to please all the public. The nature of much of the subject matter does not lend itself to such a result. The Constitution and many laws are, as we all know, mostly written in very general terms. When the courts apply them to concrete cases the results will inevitably spark differences and controversy. We must recognize that it is indigenous to the system. But assuredly such reason cannot justify an abdication of judicial responsibility if we are to be faithful to our oath.

But not even the wisest judges can be expected to decide all cases in a way to please all the public.

I do not stand here to suggest unquestioning public acceptance of all that is done in the name of justice. Most assuredly, on occasion, judges will be wrong. But I do insist that one of the glories of our constitutional system is the proper protection by the judiciary of individual and property rights, no matter what adverse interest is involved. In my simple credo, that is what America is all about.

A graduate of the University of Virginia Law School, where he was an editor for the Virginia Law Review, *Collins J. Seitz became vice chancellor for the Delaware Chancery Court at the age of thirty-one. His opinions on corporate litigation soon won national recognition; as chancellor he became the first judge to compel a white, segregated public school to enroll blacks. After more than twenty years on the state bench, Seitz was appointed to the Third Circuit, where he has been Chief Judge since 1971.*

Proposed Reform for Federal Habeas Corpus

Kenneth W. Starr

INTRODUCTION

The Great Writ of habeas corpus has become a well used branch of federal civil jurisdiction. Almost thirty years ago, Justice Jackson, concurring in the landmark case of *Brown v. Allen*, 344 U.S. 443, 536 (1953), complained that the 541 habeas corpus petitions filed in 1952 in the federal courts had begun to "inundate the dockets of the lower courts and swell our [the Supreme Court's] own." By 1981, and for the twelfth time in 13 years, the number of habeas corpus filings in the federal courts exceeded 7,000. Such an explosion has led Chief Justice Burger to remark that the filing of state prisoner petitions in federal courts has become one area of litigation "that must be carefully examined to determine whether other methods may be available."[1]

Habeas petitions do not stand alone, of course, in increasing the burden of the federal courts. Judge Carl McGowan recently observed that the federal judicial system is indeed in serious difficulty by virtue of exploding dockets. "Overshadowing all else is ... the central and overriding phenomenon of growth in the sheer volume of cases crowding in upon the federal system at each of its three tiers."[2]

The proliferation of state prisoners' habeas petitions in federal courts seems to have become a particularly needless part of this crisis in the courts. In writing for the Court in *Brown v. Allen*, 344 U.S. at 497, Justice Frankfurter readily acknowledged that, "experience may be summoned to support the belief that most claims in these attempts to obtain review of state convictions are without merit." Two decades after Justice Frankfurter's dictum, Judge Henry Friendly criticized habeas review as "a gigantic waste of effort ... produc[ing] no result in the overwhelming majority of cases ... and a truly good one only rarely...."[3] Even judges who are considerably more hospitable than Judge Friendly to collateral review of state criminal convictions have acknowledged that frivolous petitions "have depreciated the writ of habeas corpus...."[4]

It is at bottom the federal judiciary itself, not Congress, which has opened the habeas floodgates.

The issue examined in this article is whether habeas corpus jurisdiction should be circumscribed as part of the effort to lessen the flow of civil case filings in the federal courts. My conclusion is that habeas jurisdiction is in grave need of prompt corrective action, that the necessary remedial action can be taken by the Congress, and that recent proposals drafted by the Department of Justice and submitted to Congress provide the best vehicle for bringing about a much needed cure.

THE NEED FOR REFORM: A HISTORY OF FEDERAL HABEAS CORPUS

The need for legislative reforms of federal habeas jurisdiction is suggested by the fact that this branch of jurisdiction has become radically different in recent decades from that originally conferred upon the federal judiciary in the Judiciary Act of 1789. What is most striking about this development is that the expansion of jurisdiction has been almost exclusively judge-made, with the single exception of the passage of legislation in 1867 which extended the availability of federal habeas to state prisoners. While Congress thus expanded over a century ago the *class* of persons to whom such review is available, it is the federal judiciary itself which has substantially transformed in the last generation the *nature* of that review and altered the circumstances which can give rise to federal challenges to state criminal convictions. It is at bottom the federal judiciary itself, not Congress, which has opened the habeas floodgates.

The irony of this sudden awakening of claimed grievances by state prisoners is that it has turned out to be a rare day indeed when the Supreme Court afforded relief to a prisoner, much less rendered a milestone decision in a habeas case. As a result the judiciary's reshaping of traditional habeas review has created, as Judge Friendly suggested, an enormous amount of wasted effort. The tragedy of modern federal habeas corpus is that so much effort has been mandated by the Supreme Court to be devoted by a busy federal judiciary with few salutary consequences flowing from all the effort.

The writ of habeas corpus at common law served a limited function bearing little resemblance to its contemporary use. As has been persuasively demonstrated by Utah Supreme Court Justice (then Professor) Dallin Oaks, the Great Writ historically was limited to testing the legality of an incarceration by executive authority or ensuring that the detention had been authorized by a court of competent jurisdiction.[5] Habeas corpus was a common law safeguard of individual liberty against

arbitrary and capricious action without the benefit of judicial trial. It was not a method for collaterally attacking a criminal conviction secured in a court of competent jurisdiction.

To be sure, the Supreme Court concluded to the contrary in the landmark case of *Fay v. Noia*, 372 U.S. 391 (1963). Canvassing a variety of legal authorities, the sharply divided Court, in an opinion by Justice Brennan, concluded that when the Suspension Clause was written into the Constitution "there was respectable common law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law." Justice Harlan in dissent, joined by Justices Clark and Stewart, rejected the majority's historiography in a restrained portion of an opinion labeled simply but aptly, "Departure From History."

The *Fay* Court's startling reading of history has been subjected to severe scholarly scrutiny, leading Professor Oaks to conclude that even the legal authorities cited by the majority held views "at odds with the historical analysis in the *Fay* case."[6] This post-*Fay* scholarship has led Judge Friendly to observe:

> It has now been shown with as close to certainty as can ever be expected in such matters that, despite the 'prodigious research' evidenced by the *Noia* opinion, the assertion that habeas as known at common law permitted going behind a conviction by a court of general jurisdiction is simply wrong.[7]

The elaborate historical dictum in *Fay,* in an opinion prepared in the unusually brief period of just ten weeks, finds no substantial support in history, as I will now briefly show.

The limited view of federal habeas corpus was embraced by no less an authority than Chief Justice Marshall in 1830. The Supreme Court held in *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), that it could not reach on habeas the merits of an allegation that a federal prisoner had been convicted under an indictment which failed to state an offense. The Court's reasoning was clear:

> The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. . . . An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, *although it should be erroneous.*[8]

Mere error, without more, could not render a final judgment subject to collateral attack. Indeed, the pivotal issue in nineteenth century habeas cases was whether the court whose judgment was attacked had jurisdiction over the case.

The principal change in the general rule that error—other than a jurisdictional issue—was not subject to relitigation in habeas corpus occurred in the watershed case of *Frank v. Mangum*, 237 U.S. 309 (1915). In that case, in which a convicted state prisoner in Georgia claimed that his state trial had been dominated by a mob, the Court embraced an analysis as to whether the state courts had afforded a *process* by which the claimed infraction, mob domination, could be litigated and

cured. If an adequate "corrective process" had been afforded the petitioner by the state courts, then no federal habeas relief would lie. The Court held that where the prisoner is afforded an opportunity to be heard on his claim, as through state appellate procedures, no constitutional violation occurs which could be remedied by the federal courts on habeas corpus.

The immediate result of the *Frank* decision was to deny federal relief to the state prisoner-petitioner. But the effect of the decision was far-reaching. The necessary implication of the Court's reasoning was that a state's denial of adequate opportunity for notice and a hearing —"corrective process" in the Court's terms—would permit the awarding of habeas relief to a state petitioner who had been duly convicted in a court of competent jurisdiction. Error by the state court, or at least serious error going to the very nature of the proceeding, could therefore result in habeas relief if no corrective process was provided by state procedures.

Brown v. Allen "manifestly broke new ground."

Almost forty years after *Frank* came the seminal case of *Brown v. Allen,* which permitted relitigation of state-determined issues of fact regardless of the availability of a state corrective process. In *Brown v. Allen* the writ of habeas corpus became, in effect, an additional opportunity to litigate claims that had been fully and fairly litigated in state proceedings which afforded adequate "corrective process." With the metamorphosis of federal habeas corpus now complete, the floodtide began.

The Court in *Brown v. Allen* held that while no principle of habeas review *required* a trial on the federal constitutional claims if the state process has given the issues and evidence "fair consideration" and has resulted "in a satisfactory conclusion," "a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution."[9]

In this formulation lies the implicit rejection, without analysis, of a century and a half of habeas history in the federal courts. The Court assumed that a claim of a federal constitutional violation could be reconsidered even where state procedures were adequate, where the constitutional issue was addressed by the state courts, and where discretionary review on certiorari was denied by the United States Supreme Court. The crucial point is that the state courts had already determined that no constitutional violation occurred, and the United States Supreme Court on certiorari left that judgment undisturbed. Why, then, does that process—"corrective process" in the words of *Frank v. Mangum*—not end the matter?

The Court never answers this question. *Frank v. Mangum's* approach, justifying habeas review of final state criminal convictions if "corrective process" were not provided by the states, was simply rejected without discussion. Indeed, Justice Reed's opinion did not discuss or even cite *Frank v. Mangum*.

Thus, in the words of the late Professor Hart, *Brown v. Allen* "manifestly broke new ground." No longer was the adequacy of the state corrective process the fulcrum for decision; instead, "due process of law in the case of state prisoners . . . relates essentially to the avoidance in the end of any underlying constitutional error. . ."[10]

The existence of constitutional error was later held to justify relief even where the state refusal to address the petitioner's grievance rested upon an adequate state ground and corrective state process existed. In *Fay v. Noia*, the habeas petitioner was granted relief based upon his allegation that his state conviction had been based upon a coerced confession. Following conviction, two of Noia's co-defendants appealed, unsuccessfully, but were subsequently given relief. Noia then sought *coram nobis* review in state court, but relief was denied on the ground of his previous failure to appeal.

Sustaining the judgment of the court of appeals granting habeas relief to Noia, the Supreme Court held that the federal courts could appropriately provide relief unless it was shown that the petitioner had deliberately by-passed the orderly procedure of state courts. Under these circumstances of a knowing and intelligent waiver, a federal court could as a matter of discretion withhold habeas relief.

Fay's extraordinary standard of "deliberate bypass" has been trimmed by more recent Supreme Court decisions, particularly *Wainwright v. Sykes,* 433 U.S. 72 (1977). The standard of *Fay* is difficult if not impossible to apply in the trial setting, which is where most alleged constitutional errors occur. The reason is that, as Chief Justice Burger pointed out in his concurring opinion in *Wainwright,* tactical trial decisions are necessarily entrusted to the counsel, who in the rush of events at trial cannot assure that the defendant is knowingly and intelligently concurring in trial decisions. Once counsel is in the case, decisions as to whether to conduct cross-examination of a witness or whether to call a witness to testify are those which the trial lawyer must make, with the "insurance" that if counsel does so in an impermissibly poor fashion a Sixth Amendment claim of ineffective assistance of counsel may lie.

Fay v. Noia is therefore of less significance now to the incidence and nature of habeas corpus review than the seminal cases, particularly *Brown v. Allen,* that opened state criminal convictions to routine federal review. But even with cutbacks around the fringes of habeas jurisdiction by recent Supreme Court decisions, the present character of federal habeas corpus remains a quasi-appellate jurisdiction of the lower federal courts over state judgments which goes beyond the scope of ordinary appellate review in authorizing the taking of additional evidence by the reviewing court on claims the state

The suggested definition provides a clear motivation for the "cause" inquiry.

courts have rejected. The defects of this system wrought by *Brown v. Allen* and the Warren Court revolution in criminal procedures have been aptly pointed out in a passage from a leading treatise on federal procedure.

> The most controversial and friction-producing issue in the relation between the federal courts and the states is federal habeas corpus for state prisoners. Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions reexamined by a single federal district judge, and the Supreme Court in recent terms has shown a strong inclination to limit its availability. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as means of redressing constitutional violations.[11]

PROPOSED LEGISLATIVE REFORMS

The haphazard and often unreflective character of the historical development leading to the present system of federal collateral review, coupled with the general dissatisfaction of federal and state judges as well as legal scholars with the current system, suggest that the time is ripe for a general reexamination of the system. A set of reform proposals directed to these ends was transmitted by the Attorney General to Congress in the 97th Congress. These proposals were the subject of hearings on S. 2216 before the Senate Judiciary Committee in the early part of 1982 and have since been re-introduced in a number of later bills. The specific measures proposed are as follows:

A. *Consideration of Claims Not Properly Raised in State Proceedings*

The standard of *Fay v. Noia* limited the preclusive effect in habeas corpus proceedings of a defendant's failure to raise a claim in state proceedings to cases in which the defendant knowingly and intelligently waived the claim. This standard was intelligible but wholly unrealistic. The "cause and prejudice" standard that partially superseded it in later cases reflects a valid recognition of the need for a more restrained approach, but the meaning of the requirement of "cause" has remained unclear.

The reform proposals incorporate a general clarification and codification of this standard. The central inquiry in the definition of "cause" under the proposals is whether "the failure to raise the claim properly or to have it heard in state proceedings was the result of State action in violation of the Constitution or laws of the United States."[12] The suggested definition provides a clear motivation for the "cause" inquiry. The underlying notion is one of estoppel. A state which violated federal law by preventing a claim from being heard during state proceedings would have no grounds for complaint if the situation were remedied during subsequent habeas proceedings. At the same time, however, the lawful procedural requirements of the state should not be ignored or nullified in a later federal habeas corpus proceeding if the petitioner has failed to take advantage of opportunities to raise federal claims properly provided by the state during its criminal proceedings.

This standard is important in relation to attorney error or misjudgment, the grounds most often set forth as "cause" for a procedural default. Under the standard contained in the proposed reforms, attorney error in failing to raise a claim appropriately would be considered "cause" only if the error was of a magnitude sufficient to deny the petitioner the right to constitutionally adequate assistance of counsel. By failing to provide the effective legal assistance guaranteed by the Sixth Amendment, the state causes procedural default.[13] Less significant types of error or misjudgment, however, would not qualify as "cause" since even the most skilled attorney will obviously make mistakes during the course of criminal litigation.

B. *Time Limitation*

The proposed reforms would impose a one year time limit on access by state prisoners to federal habeas corpus proceedings. This one year period normally would begin immediately after the exhaustion of state remedies. Because a priosner who has exhausted state remedies has usually presented his claims to both the state trial and appellate courts, it is reasonable to require that he wait no longer than one year to raise the same claims in a federal habeas court. The proposals would therefore enable every state prisoner to seek federal habeas corpus after the termination of the state criminal process. At the same time, however, the time limitation approach would restrain the filing of petitions years after the state criminal proceedings have concluded, when it may be impossible to reliably determine the petitioner's claims or retry his case.

The lack of a time limit was acceptable when the writ... merely tested the legality of incarceration by executive authority.

The lack of a time limit was acceptable when the writ of habeas corpus merely tested the legality of incarceration by executive authority. With regard to the present expanded nature of federal habeas corpus, however, this absence does not follow the approach generally taken in federal procedure to other instances of review or reopening of judgments. For example, a federal defendant must normally file a notice of appeal within ten days of judgment, a state defendant must apply for direct review by the Supreme Court within ninety days of judgment,

and a federal defendant has two years from the date of final judgment to seek a re-trial on grounds of newly discovered evidence. This last requirement forces a federal prisoner to apply for executive clemency if he discovers proof of his innocence more than two years after final judgment; a state or federal prisoner alleging violations of constitutional rights, however, may seek federal judicial remedy even when such violations have no bearing on his guilt or innocence. The proposed time limit would reduce this discrepancy by making the availability of collateral relief conform more closely with the time limitation approaches applied by federal law in other situations, thus maintaining orderly procedures and assuring finality in criminal adjudication.

C. *The Standard Governing Re-Adjudication*

Deriving from *Brown v. Allen,* habeas corpus has effectively become a quasi-appellate jurisdiction of the lower federal courts in relation to state criminal judgments, under which extensive re-adjudication is required regardless of the character of prior state proceedings. The reform proposals adapt the rationale of *Frank v. Mangum* to current circumstances. Under this approach federal habeas corpus jurisdiction would be generally preserved, but its exercise would be conditioned on a showing of the inadequacy of the state process in the particular case. The proposals would accord conclusive effects in habeas corpus proceedings to the result of full and fair state adjudications of federal claims, but would permit re-adjudication in cases in which the state adjudication did not meet this standard of adequacy. A particularly clear statement of this type of approach appeared in the decision of the Supreme Court in *Ex Parte Hawk,* one of the later decisions of the *Frank v. Mangum* period:

> Where the state courts have considered and adjudicated the merits of . . . [a petitioner's] . . . contentions . . . a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated . . . But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless.[14]

The proposals would accord conclusive effects... to the result of full and fair state adjudications of federal claims, but would permit re-adjudication in cases in which the state... did not meet this standard...

D. *Procedural Reforms Promoting Efficiency*

The legislative reform proposals include, finally, two amendments which are of a more technical nature than those discussed above, but are nevertheless important for reasons of efficiency. First, the bill would change the present rule which allows a state prisoner repetitive opportunities to persuade a district court judge and then, if unsuccessful, a circuit judge that a certificate of probable cause for appeal is warranted. The reform proposals assign responsibility for such determinations solely to the appellate courts, eliminating the need for federal judges to reexamine cases which have already been deemed frivolous by another federal court.

The second technical amendment concerns the requirement of exhaustion of state remedies. Satisfaction of this requirement is generally considered a prerequisite to a decision of a habeas corpus application on the merits, regardless of whether the decision is favorable or unfavorable.

The problem with this approach is that it often requires the federal courts to consider large numbers of frivolous prisoner petitions twice. Dismissal of a frivolous petition for lack of exhaustion of state remedies simply signals the prisoner to return after presenting his claims to the state courts. Ultimately he will reappear in federal court, having presented his frivolous claims to at least two or three state courts, only to have them dismissed for lack of merit. The result is a substantial amount of wasted effort for federal and state judges as well as a prolonged period of waiting for the prisoner before he is told that his attempts from the beginning have been useless. This needless burden on the courts and litigants could be eliminated if the federal courts initially were to deny such petitions on the merits. The reform proposals accordingly provide that habeas corpus applications can be denied (though not granted) on the merits, notwithstanding a petitioner's failure to exhaust state remedies.

The tension in federal-state relations inherent in unlimited federal collateral review of all state criminal convictions... and the relentless flood of meritless petitions resulting from limitless review plainly warrant substantial reform in a time of scarce judicial resources devoted to ever increasing litigation loads.

CONCLUSION

The legislative reforms embodied in these legislative proposals would go far toward curbing the excesses afflicting the present system of federal habeas review. The tension in federal-state relations inherent in unlimited federal collateral review of all state criminal convictions, regardless of how scrupulously fair the proceedings may have been, and the relentless flood of meritless petitions resulting from limitless review plainly warrant substantial reform in a time of scarce judicial resources devoted to ever increasing litigation loads. These reforms would simply restore the Great Writ more closely to the office of habeas review that obtained until the judicially mandated departure from habeas history thirty years ago, a departure that cannot be justified in the present era.

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1. *Report On the Federal Judicial Branch* 9, Address by Chief Justice Warren Burger, American Bar Association Meeting, Washington, D.C. (August 6, 1973).
2. McGowan, *The View From an Inferior Court*, 19 San Diego L. Rev. 659, 661 (1982).
3. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 148 (1970).
4. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 25 (1956).
5. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966).
6. *Id.* at 459.
7. Friendly, *supra* note 3, at 170-71.
8. 28 U.S. (3 Pet.) 193, 202 (1830) (emphasis added).
9. 344 U.S. 443, 463-64 (1953).
10. Hart, *Foreword*, 73 Harv. L. Rev. 84, 106 (1959).
11. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4261, at 588 (1978).
12. *See* proposed 27 U.S.C. § 2244(d)(1) in section 2 of S. 2838.
13. *See Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).
14. 321 U.S. 114, 118 (1944).

Conferees Evaluate Reform of Federal Civil Appellate Jurisdiction

The evolution of the "litigious society" in the United States is well documented. The effect of the resulting tidal wave of cases is felt at all levels of the judiciary. The United States Supreme Court had over 5,300 cases on its docket last year. Federal appeals court filings approached 28,000. Calls for reform of the judicial system accompany the alarming rise in caseloads throughout the federal court system.

The School of Law and the staff of *Law and Contemporary Problems* hosted an editorial conference on "Federal Civil Appellate Jurisdiction" on March 11th and 12th, 1983. The editorial conference assembled leading authorities on federal appellate jurisdiction from throughout North America to review the initial draft of a new restatement on the subject prepared by the staff under the direction of Law School Dean Paul D. Carrington. The conference was organized as a series of working sessions in which the participants discussed and provided comments on the working draft of the restatement, which Dean Carrington described as "a resynthesis of the existing law of federal civil appellate jurisdiction." The restatement's introduction points out it is founded on the premise that "the present law is unnecessarily and unacceptably complex, uncertain, and sometimes even inscrutable." The restatement was envisioned as a method of restructuring the existing concepts of federal civil appellate jurisdiction into a simpler and more predictable form.

The working draft of the restatement was written by *Law and Contemporary Problems* staff members Thomas J. Blackwell, William Blancato, Margaret Callahan, Mark Steven Calvert, and Evelyn Marie Pursley. The final document will be published in a forthcoming issue of *Law and Contemporary Problems.*[1] The draft was prepared following the American Law Institute model. The text of the document presents the statement of the "rule" of law at the beginning of each section and follows that, where necessary, with explanations of operative principles, contradicting judicial decisions and illustrations using simplified hypothetical fact situtations.

Dean Paul D. Carrington

The opening session of the editorial conference was introduced by Professor Maurice Rosenberg of the Columbia University School of Law. Professor Rosenberg presented the conferees with the conceptual framework for the conference. He outlined the three considerations necessary for measuring their work: "decisional efficacy, litigation efficiency and conservation of judicial energy." After elaborating on each of these considerations, Professor Rosenberg discussed the four possible approaches available to achieve these three goals.

The options for approaching the reform of the law of federal civil appellate jurisdiction, in the view of Professor Rosenberg, include: 1) a flat statutory rule similar to 28 U.S.C. §§1291 and 1292(a), structured by categories of appealability; 2) a rule to provide for case by case determination of appropriate standards of review; 3) an open-ended statutory provision similar to § 1651; 4) a judicially declared exception similar to that now used in cases regarding collateral orders following *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); and 5) the possibility of attorney monitoring, where sanctions or incentives would be instituted to encourage proper attorney action. Professor Rosenberg ended his opening charge to the conferees by characterizing the draft restatement as "an imaginative, energetic and constructive effort."

The restatement is organized around two major concepts of federal civil appellate jurisdiction, review of final decisions and interlocutory review. Each concept is divided in the restatement by the nature of procedural action. Part II on interlocutory review is organized according to the type of action and the timing of the action in the district court that is subject to review. This section sets out the types of orders that may lead to an interlocutory appeal and then describes the limits on each review. Each request for interlocutory appeal requires showing that some substantial right is seriously threatened by continuation of the trial without a decision on the motion for appeal. The substantive design of the draft restatement is as a restatement of current case law. The drafters "didn't undertake to change the case law," according to Carrington. Where there is conflict in the case law, the drafters attempted to identify

the "better view," or the rule "which seems most harmonious to the whole" and not necessarily the majority rule. The drafters, however, carefully followed the well established case law in writing the restatement, even at those times when there were reasons to depart from the majority rule.

The conferees were asked for their views on the most useful process for achieving reform of federal civil appellate jurisdiction. The options discussed included allowing for the evolution of case law, revision of Title 28 of the United States Code, congressional action in the form of enabling legislation followed by additions to the Federal Rules of Appellate Procedure, and, finally, a restatement format similar to the *Law and Contemporary Problems* draft.[2]

Each alternative process had its proponents. The choice of process involves controversies over the effect that each method will have on the availability of interlocutory appeal. Some conferees felt that the present system's lack of certainty and standards restricted access to interlocutory appeal in the federal courts. If clearer, more certain standards were available to define the nature of the substantial interest that must be threatened before interlocutory appeal is available, the appellate courts might be flooded with appeals, according to some participants. Others felt that clearer standards would reduce the number of premature and clearly unmeritorious appeals.

The results of any substantial change in the present appellate process for interlocutory appeals will have a widespread effect on the federal court system. Several panel members noted that the alteration of the appeals process has the potential for changing the relationships between the district courts and the courts of appeals. Some of the conferees felt that as the review process is opened up by easing of the standards for interlocutory appeal, a situation will evolve in which the appellate courts become "watchdogs" of the district courts. Other participants rejected this idea. They proposed that the district court judges should have greater discretion in these matters. Instead of the "watchdog" scenario, they preferred to characterize the relationship as a partnership between the district court judge and the appellate court judge.

1. That issue will also contain comparative treatments of the law governing appellate jurisdiction in California, Arizona, Florida, North Carolina, New Jersey, Ontario, and France.

2. Soon after the conference, the draft restatement was cited in opinions in the 2d and 7th Circuits.

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Timing and Jurisdiction: Federal Civil Appeals in Context

Edward H. Cooper

A number of side papers were produced for the Conference on Appellate Jurisdiction. This excerpted paper, authored by a Professor of Law at the University of Michigan, suggests a full "contextual approach" to the problem of devising the most appropriate rules for federal appeals. Such an approach contemplates the use of rules, which may appear and disappear, as well as discretion.

The purpose of these few pages is to show that the calculus of appeal timing is inherently complex. If we are to continue the effort to capture the calculus rules, the rules will be correspondingly complex. The complex rules will have some virtues. Nonetheless, the rules also are likely to generate misunderstanding and may tend to produce undesirable results. It is very tempting to replace the rules with a flexible system that relies largely on discretion to determine the occasions for appeal before a truly final judgment. Whether a flexible system has now become appropriate depends on the same institutional factors that make the calculus so complex. The best answer may be to adopt the framework for discretionary interlocutory appeals without yet abolishing present rules. As the discretionary system becomes more familiar, it should prove possible to discard many of the present rules in a gradual process of attrition.

The most direct components of the appeal timing calculus are so familiar as to require no more than a brief reminder. If review of a trial court ruling is postponed until the final judgment, serious consequences may ensue. As to matters that bear only on the conduct of the litigation, an error may so taint subsequent proceedings as to require reversal and further proceedings. The further proceedings may not only represent an expensive duplication of effort, but may themselves be distorted beyond repair by the events of the first trial. As to matters that have effects beyond the court proceedings, irreparable injury may occur—confidential information is revealed, an injunction has delayed construction of a flood-control project, or the like. Immediate review of every trial court ruling, on the other hand, would impose impossible costs of disruption, delay, and expense. Even short of that extreme, frequent review may severely disrupt the trial process and impose significant costs on the courts of appeals as it becomes necessary to repeat time and again the task of becoming familiar with the case. The possible benefits of early review, moreover, are reduced by the prospect that justice often is done in particular cases without appellate review. Trial judges are more likely to be right than wrong, and the effects of many wrong rulings are dissipated by subsequent trial court proceedings. Loss of the need for review, however, may carry a cost that goes beyond the needs of the particular case, as appellate courts may be deprived of the opportunity to clarify and improve the law on matters that repeatedly evade review.

A wise system of timing depends on the full institutional context of a particular court system.

There are many reasons why these competing concerns cannot be accommodated by a process of logical reasoning from unshakable premises about the nature of the appeal process. Instead, the structure of the relationships between trial courts and appellate courts must be rested on the lessons of experience. . . . These lessons depend on the very structure of the system at both trial and appeals court levels. They depend as well on the nature of the judges; many aspects of non-appeals law, both substantive and adjective; and the character of the bar.

A wise system of timing depends on the full institutional context of a particular court system. The most important aspects that must be considered are set out below. At the end, the question must be whether these matters are so complex and so shifting that they cannot be contained in any set of elaborate rules—whether our institutions have matured to the point at which discretion can be substituted for some part of the rules.

Many of the institutional factors that must be weighed in shaping the timing of appeals turn on the trial courts. The nature and quality of the federal district judges is the single most important factor to be counted. . . . In the best circumstances, we might trust trial judges to view appellate judges as a resource to be invoked whenever immediate review

In the best circumstances, we might trust trial judges to view appellate judges as a resource to be invoked whenever the immediate review promises to facilitate the speediest, most just, and most efficient disposition of litigation.

promises to facilitate the speediest, most just, and most efficient disposition of litigation. To the extent that we do not trust trial judges, on the other hand, we will be driven to rely more on clear rules or on discretionary devices that are controlled by the courts of appeals.

The performance and role of district judges relates to the timing of appeals in another way as well. The authority, prestige, and self-confidence of trial judges are enhanced as the occasions for appeal are reduced. If we begin with a good corps of judges, the result may be to make them better, and to ease the task of attracting the best people to the bench. In a happy cycle of mutual reinforcement, the result may be that we can rely ever more on trial judges in determining the best occasions for interlocutory appeals. . . .

The formal rules of trial court procedure also must be considered in adjusting the timing of appeals to the institutional framework. Procedural rules of course depend on each of three factors—the character of the trial judges, the timing and frequency of appellate review, and the scope of review. Beyond these factors, they may be drawn with more or less specificity according to the confidence of the drafters in their own ability to give clear answers and in the ability of the trial judges and the trial bar to administer flexible rules with wisdom. The formal rules also should depend on the ability of appellate courts to improve on trial court rulings, whether on immediate appeal or on appeal after final judgment. The timing of appeals should depend in part on the nature of the formal rules, and in part on the question whether the formal rules are in fact well adapted to the real workings of the court system.

At least one more aspect of the trial court system must be counted in framing the appeals rules. The volume of litigation and the mix of different types of litigation may prove important in many ways. Federal courts encounter an increasing number of suits that involve difficult law and incredibly complex facts. One complete proceeding in these suits is almost too much. Yet they often pose multiple opportunities for error. If appeal is delayed to final judgment, there are great risks that reversal will entail absurd costs of relitigation or that affirmance will blink at serious error in order to avoid such absurd costs. . . . Quite apart from the incidence of complex litigation, appeals timing may depend on the overall caseload of the trial courts. Although it is not clear just what adjustments are appropriate, it is important at least to think about the needs of a system that may be burdened with more litigation than can be tried efficiently and well.

The character, structure, and procedure of the courts of appeals bear on timing appeals just as surely as those of the trial courts. Perhaps the most obvious factor is the simple number of appellate courts and judges. As appeal capacity becomes increasingly scarce, there are alternative strategies for response. One is to expand the number of appellate courts and judges. This strategy is subject to significant limits—it has proved difficult to administer a large bench within a single circuit, and expansion of the number of circuits reduces the opportunity for uniformity across sizeable regions. These limits might be altered if some new means of achieving uniformity were found, as perhaps by creation of a new court standing between the circuit courts of appeals and the Supreme Court. Another strategy is to adjust the timing of appeals so as to place a higher value on scarce appellate time. Appeals rules thus cannot be set without making wise judgments about the present and probable future capacities of appeals courts.

The procedures of courts of appeals have been adapted as yet another means of rationing their capacities. Old traditions of disposition by full-scale briefing, argument, and opinion are giving way to settlement conferences, expedited submission, and disposition by order or informal opinion. As appellate procedures evolve, the courts may become increasingly adept at sorting out cases that require or deserve close attention. This process may make it possible to rely more and more on appellate discretion, even as to the timing of appeals. Open discretion can be substituted for efforts to define the occasions for interlocutory appeal by specific categories or elaborate doctrine.

Just as trust in the district courts may affect the rules that time appeals, so may trust in the courts of appeals. Appellate discretion can be relied upon more heavily if the judges can be trusted to weigh their capacities against the need for appeal not only rapidly, but well. The scope of review likewise is affected by the comparative capacities of the appellate courts. Review of matters of fact and trial procedure is particularly dependent on the ability of the appellate process and appellate judges to improve on trial court decisions. Whether the matter is seen as higher regard for trial courts or lower regard for appellate courts, a narrow scope of review continues to affect timing by reducing the probable value of interlocutory appeals.

Appellate procedures and capacities combine with the scope of review in at least one more way. It

may be very useful to provide a means of interlocutory review that asks only whether an obvious and important mistake has been made. Extraordinary writ practice now serves this function, perhaps imperfectly. This function can be served more regularly and efficiently if appeals judges become reconciled to a very limited initial screening, and recognize that the same issues may need to be reviewed on the merits after final judgment.

The obvious need to focus on the institutional character of the court system should not obscure the further need to consider the character of the litigating bar. The timing of appeals may have to depend on rules that are clear, simple, and rigid if it is not possible to rely on the learning, wisdom, and character of the lawyers who take appeals. Complex or discretionary rules carry high costs at the hands of an ignorant or supine bar—too many ill-timed appeals will be taken by lawyers who fear their own ignorance, simply do not know better, or submit to unworthy motives of delay or harassment. Complex rules can be tailored to special needs, however, if lawyers can be trained to understand them. Even more important, discretionary systems can be expanded if lawyers can be made to learn and share the policy judgments that inform the wise timing of appeals....

...discretionary systems can be expanded if lawyers can be made to learn and share the policy judgments that inform the wise timing of appeals....

These general institutional factors may seem to provide quite enough confusion, standing alone and in abstract statement. Unfortunately, they cannot be considered alone. The values of interlocutory appeal vary according to the substantive and procedural issues decided by the trial court. It may be more important to achieve prompt correction of errors as to some matters of substance or procedure than others, and errors may be more likely in some areas than others.

As to matters of substance, mistaken trial court rulings may have effects that go far beyond the mere conduct of litigation. Among the most common examples are preliminary injunctions; discovery rulings that force release of confidential information; and adjustment of the relations between judicial proceedings and arbitration....

Procedural rulings warrant the same distinctions as substantive rulings. Some matters of procedure involve more serious consequences or greater probability of error than others. Important procedural innovations may warrant special patterns of review during the early years. All of these concerns are shown in the intense pressures that have shaped appeals with respect to class action rulings. Grant or denial of class certification may have incalculable consequences for the conduct of a suit. Attitudes toward class actions have ranged the spectrum from open hostility to warm embrace, and identifiable doctrinal issues have generated frequent disagreements. It could be particularly beneficial to develop a pattern of relatively permissive interlocutory appeal while class action procedure is growing and changing, and to shift away as it evolves toward maturity.

All of these concerns of institutional structure, lawyerly competence, substance, and procedure may seem confusing and often contradictory. Perversely, they must be brought to a conclusion that accommodates remaining institutional needs. It is important that the rules for timing appeals be clear and well understood. It is also important to avoid foolish forfeitures. Once a case has been submitted to an appellate court, it should not refuse to decide simply on the ground that some mistake of timing has deprived it of "jurisdiction." Decision may be refused, but only if that course protects a proper relationship between courts for the particular case. To the extent that special protective opportunities are afforded for interlocutory appeals, failure to seize the opportunity should not by itself defeat the right to later review.

The best means for combining all of these needs remain uncertain. The final judgment rule remains the point of departure for federal courts, but many extended flights have taken off from this point. Absolute rights to interlocutory review have been recognized by statute in some areas. Elaborations of the final judgment rule have generated rights of interlocutory review that are nearly absolute in some areas, and are subject to broad appellate discretion in others. Trial court discretion has been invoked through procedures for achieving finality as to portions of multiclaim or multiparty litigation, and through procedures for interlocutory appeal by certification. Appeals court discretion has been invoked through the procedure for interlocutory appeal by certification, and through extraordinary writ practice. This process has achieved substantial flexibility to respond to special needs, and has retained clear rules for most of the matters that are involved in most litigation. On the other hand, it may waste too much time in preliminary arguments on jurisdiction, generate ill-founded appeals that rest on uncertainty or ignorance, and formulate opportunities for appeal that outlast any useful life. If by luck or design federal courts have hit upon the best possible rules for today, they must remain alert to change them as time marches on. And state courts can scarcely hope to benefit from the specific rules, which must depend on the peculiar problems of the federal courts....

Behind Closed Doors

Peter G. Fish

Professor Peter G. Fish discusses the historic role of the Chief Justice in managing his "brethren."

CONFERENCE LEADER

As presiding officer of the closed Supreme Court conferences, the Chief Justice enjoys important initiating powers of a titular leader. The opportunity afforded by the position for leadership led Taft to observe shortly before assuming the chief justiceship that the occupant of that office "is the head of the Court, and while his vote counts but one of the nine, he is, if he be a man of strong and persuasive personality, abiding convictions, recognized by learning and statesmanlike foresight, expected to promote teamwork by the Court, so as to give weight and solidarity to its opinions."[1]

The central part played by the Chief Justice in the conference room as envisioned by Taft remained little changed since Taney's day. In 1874, former Associate Justice John Archibald Campbell (1853-61) recalled that "the Chief Justice usually called the case. He stated the pleadings and facts that they presented, the arguments and his conclusions in regard to them, and invited discussion."[2] Nearly a century later, Owen J. Roberts described the continued prominence, if not dominance, of the Chief over conference proceedings. Charles Evans Hughes, whom an adulatory Roberts dubbed "the Administrative Master,"

> opened discussion of . . . the jurisdictional statements and petitions for certiorari. In each of these he had a typewritten memorandum of considerable length, evidently prepared by his clerks, but he did not rely on this memorandum in stating the case. He had a number of small white sheets on which he had scribbled notes in lead pencil. He would glance at one of these and then launch into a statement of the case. He had a marvelous power of condensing the facts without omitting any that were important, and, on the basis of this statement, he would announce his views as to the action the Court should take. So complete were his summaries, that in many cases nothing needed to be added by any of his associates. So comprehensive was his knowledge of the petitions, briefs, and records, that if any questions were raised by one of the brethren, the Chief Justice would reach for the printed book, which was full of white markers, turn to the appropriate place, and either summarize or read the material which supported the statement he had made. I do not remember an instance when he was found to have erred in his original statement.[3]

Over forty years later Chief Justice Burger, like Earl Warren before him, plays much the same part as did

Peter G. Fish

Chiefs have differed in their capacity for leading the conferences.

Hughes. In a film on the Supreme Court prepared in 1976, he stated that "by tradition the Chief Justice gives a brief oral summary of what the case is about, as he sees it, what the issues are, and perhaps in some of them indicating his view of the matter,"[4] or as *New York Times* correspondent Warren Weaver had put it a year earlier, telling "his brethren . . . what action he is inclined to take."[5] Thereafter discussion proceeds from the Chief, to the Senior Associate in descending order of seniority, but Burger was quick to note that "it is not uncommon for a Justice to say he would like to hear the full discussion before he comes to a conclusion. This might

mean that he waits until the most junior Justice has expressed his views, and then a general discussion may take place."[6]

Voting on petitions as well as on argued cases has been conventionally held to proceed in an order the reverse of that characterizing discussion. By voting in ascending order of seniority, the Chief votes last. Thus he is in a position to influence decisively the outcome of a case in which the Court is closely divided, a strategy for which Hughes attained notoriety.

One exception to the Chief's customary conference leadership role has arisen with a newly appointed presiding officer. Earl Warren initially deferred to the Senior Associate Justice by reportedly observing the first few conferences. Thus Hugo Black led the brethren in disposing of certiorari petitions accumulated during the summer of 1953.

Chiefs have differed in their capacity for leading the conferences. Having served under Fuller, White, Taft, and Hughes, Justice Holmes pronounced Fuller "the greatest Chief Justice I have ever known."[7] Fuller "had the business of the Court at his finger ends," the Yankee recollected, and was "perfectly courageous, prompt, decided," capable of turning "off matters that daily called for action easily, swiftly, with the least possible friction with inestimable good humor ... that relieved tension."[8] At least partly explaining Holmes's judgment on Fuller's leadership qualities was the Chief Justice's capacity for what David Danelski has characterized as "social leadership."[9] That quality loomed especially large to Holmes. He had once been the beneficiary of Fuller's skill as social leader by the Chief's timely intervention in a heated conference room exchange between himself and the first Justice Harlan. Fuller's biographer related Holmes's version of the episode:

> Harlan was expounding his theory of a case when Holmes, violating the rule against interruptions, cut in and said, "But that just won't wash." Harlan was outraged; his fists clenched and his eyes bulged. But the Chief saw instantly what was happening, flashed his radiant smile, started a quick washboard motion with his hand, and said, "But I just keep scrubbing away." The Justices laughed and the incident was passed off.

Fuller's more distant successor, William Howard Taft, demonstrated similar diplomatic skills. Taft ascended the bench enjoying esteem as a former President and as one anxious to promote "teamwork" in order to "mass the Court" on judicial opinions and thereby enhance the authority of its decisions and the stature of the institution. He strove mightily to achieve this end by use of well developed social leadership qualities.

As enumerated by Alpheus T. Mason, Taft's qualities included persuasion by example, discouraging dissents, exploiting his own personal courtesy and charm, maximizing the assignment and reassignment powers, and generous reliance on the expertise of his associates.[11] And his colleagues viewed his leadership with favor. "We are very happy with the present Chief," Holmes reported,

Neither task nor social leadership qualities are prerequisites for appointment to the chief justiceship. To the extent that a Chief Justice possesses such skills, the Court's capacity for disposing of its workload may be enhanced.

because, he later explained, Taft was "good humored, laughs readily, not quite rapidly enough, but keeps things moving pleasantly." In fact Holmes thought that "never before ... have we gotten along with so little jangling and dissension."[12] Such an achievement was no mean feat given the presence of James C. McReynolds whom the Chief Justice characterized as "selfish to the last degree ... fuller of prejudice than any man I have ever known ... one who delights in making others uncomfortable. He has no sense of duty. He is a continual grouch; and ... really seems to have less of a loyal spirit to the Court than anybody."[13]

Danelski perceived Hughes as possessing both "social" and what he called "task" leadership skills, the latter skill resting on expertise and an ability to move the Court's business as attested in Justice Robert's recollection of the Hughes conference style. Unfavorable comparisons of their respective conference leadership qualities have been made between Hughes and his successor, Harlan Fiske Stone. Saturday conferences during the latter's chief justiceship from 1941–46 were enervating and long, lengthening from four hours under Hughes to four days, in part because, as Danelski reports,

> when Stone presented cases, he lacked the apparent certitude of his predecessor, and, at times, his statement indicated that he was still groping for a solution. ... Justices would speak out of turn, and ... Stone did not use his control over the conference's process, as Hughes did, to cut off debate leading to irreconcilable conflict. He did not remain neutral when controversies arose so that he could be in a position to mediate them.[14]

Nor did Stone perform well as a social leader who could effectively promote dispatch of the Supreme Court's business by generating interpersonal harmony and a sense of common effort. "Debates in conference were heated. . .," Danelski relates, "and a social leader was needed to smooth ruffled tempers, relieve tensions created by interaction, and maintain solidarity."[15]

For all the acknowledged shortcomings of the conferences under Stone, Professor Walter Fellhorn found himself unprepared to state categorically that their lengthy and discordant dialogues were "an undesirable development." Quantitative success might well be attained by sacrificing qualitative considerations essential to legal

craftsmanship. Such seemed clearly the case with conferences steamrollered by Stone's predecessor. "I am shocked," Gellhorn exclaimed, "by the decisional process in the Supreme Court of the United States as it proceeded under Hughes." The Justices had spent the week prior to conference hearing oral arguments in cases which had survived the certiorari process. "Few of the judges made any extensive notes about the cases they had heard; few of them made any careful study of the records or briefs of the cited authorities before they went to conference," Gellhorn related. Yet "in the space of four hours the Court decided not only the cases it had heard, but also voted on the pending petitions for certiorari, jurisdictional statements, and other materials on the docket. This meant that the discussion in conference was perforce a statement of conclusions more than an exchange of mutually stimulating ideas."[16]

The awesome conference leadership exerted by Hughes entailed consequences for the nature of the final judicial product. "The task of . . . stating the case and indicating the question to be decided is a genuine power," John P. Frank thought, "because in any discussion the first analysis of a problem will more often than not affect the analysis of everyone else. The man who selects the issues to be talked about very frequently dominates the end result."[17] But pitfalls existed as Gellhorn noted. Apparently unanimous opinions were attributed by him to "the superficiality of the discussion which glossed over rather than illuminated difficulties in the path," to their publication "without the actual but with the apparent concurrence of the brethren," and to Hughes' propensity for switching "his own vote in order to give a larger measure of apparent support to an opinion with which he did not in fact agree."[18]

Neither task nor social leadership qualities are prerequisites for appointment to the chief justiceship. To the extent that a Chief Justice possesses such skills, the Court's capacity for disposing of its workload may be enhanced. Without them, a Chief Justice may expect to devote relatively greater time and energy to administering the decisional process in the single Court of which he is "first among equals." Yet his efforts may prove relatively less productive than those of more skillful counterparts. But as with the case of Hughes, productivity constitutes only one criterion for measuring the Chief's presiding officer role in the Court's conference.

DISABLED BRETHREN

Another statutorily imposed intra-Court duty empowers the Chief Justice "to sign a certificate of disability for a justice of the Supreme Court . . . who desires to retire for disability."[19] This apparently routine bureaucratic function masks what, in reality, may be a long, arduous, and emotionally draining campaign to secure the consent of physically or mentally incapacitated colleagues to step down. Initiative and even execution of this duty may well fall largely on the Chief.

Well before his part was formally embodied in statutory form, Fuller orchestrated a year-long effort to win Justice Stephen J. Field's consent to retire from the bench.[20] William Howard Taft confronted a like problem with Joseph McKenna whose mental facilities failed to the degree that as the Chief recalled, "in one instance, he wrote an opinion deciding the case one way when there had been a unanimous vote the other, including his own."[21] Recognizing that McKenna's vote might prove decisive in important cases, Taft gathered the brethren *sans* the Senior Associate Justice and obtained an agreement not to decide cases which turned on McKenna's vote. The obvious solution, retirement, was a thought remote from the aged Justice's mind. "When a man retires," McKenna declared, "he disappears and nobody cares for him."[22] Initially foiled, a determined Taft wrote his lawyer-brother early in the 1923 Term that "we may before the end of the year have to adopt some united action in bringing to bear influence upon him. Of course that will fall on me as the spokesman, and is not a pleasant duty to look forward to, because I shall never be forgiven."[23] Extracting unanimous consent to approach McKenna on the sensitive subject of retirement proved no easy task when Holmes and Brandeis balked. But all concurred after Taft consulted with the disabled Justice's personal physician and brought in an unfavorable medical report. The Chief then met with McKenna. Plying him with an artful array of diplomatic skills, Taft declared "how deeply regretful all the members of the Court were, how deeply they loved him, how chivalrous they found him, how tender of the feelings of others he always was, and how peculiarly trying it was, therefore, to act in the present instance from a personal standpoint." The painful duty executed, McKenna finally acquiesced and retired in 1925 at the age of 82.

When a majority of the brethren requested Hughes to obtain [Holmes's] resignation, they asked him, in the words of his official biographer, "to perform the most distasteful duty he ever had to face—a task he would never have undertaken on his own initiative."

Both Charles Evans Hughes and Warren Burger met similarly difficult personnel problems. Soon after his appointment, the former dealt with a venerable 90-year-old Oliver Wendell Holmes, Jr., who had become so enfeebled during the 1931 Term that he continually dozed off during arguments. When a majority of the brethren requested Hughes to obtain the Civil War veteran's resignation, they asked him, in the words of his

official biographer, "to perform the most distasteful duty he ever had to face—a task he would never have undertaken on his own intiative."[24] Yet it proved less difficult than had Taft's. After beating about the proverbial bushes, Hughes sprung the hard question. As Merlo Pusey described Holmes's reaction, "Without the slightest indication of resentment, he requested Hughes to get out from the bookshelves the applicable statute and wrote his resignation with his usual felicity of expression."[25]

Burger faced disablement of his once robust mountain climbing colleague, William O. Douglas, who suffered a paralytic stroke on December 31, 1974. Justice Brennan later marvelled at "how completely compassionate the Chief Justice had been" at that critical time, "how entirely absorbed with providing the necessary support when the seizure came—at a far off place; how enormously grateful Justice and Mrs. Douglas were to Chief Justice Burger."[26] Nearly a year would elapse between Douglas's attack and his retirement in the painful twilight of a record-breaking thirty-six year career on the High Court.

OPINION ASSIGNMENTS

Once in the majority, the Chief Justice places himself in a position to make strategic use of a vital prerogative of the presiding officer—that of assigning the drafting of Court opinions. But conditions may dictate modification of that function. As Burger observed:

> There are some times when there are not a majority for a particular disposition of the case. In that situation . . . a practice has grown up of assigning it to one Justice to simply prepare a memorandum about the case, and at that time all other Justices are invited . . . to submit a memorandum; and then out of that memorandum usually a consensus is formed and someone is identified who can write an opinion that will command a majority of the Court.[27]

To what extent modified by the exigencies of judicial behavior, the Chief retains the assignment power, the political potential of which did not escape John Marshall's attention. His effective conference leadership and use of opinion-writing assignments recast the very form of the Court's published record. Under Jay and Ellsworth the Court followed the English practice of delivering opinions *seriatim*. Each justice beginning with the junior Associate Justice in order of appointment presented an opinion with that of the Chief delivered last. Although this fragmentation practice only affected a minority of cases, it underwent immediate virtual extinction with Marshall's ascension to the Chief Justiceship. His opinion assignment practice conformed with that instituted by Lord Mansfield who, as Jefferson complained, had "introduced the habit of caucusing opinions." As Marshall's political antagonist described it, "the judges met at their chambers or elsewhere, secluded from the presence of the public, and made up what was to be delivered as the opinion of the Court." The practice endured in England only so long as Mansfield remained. But in America Marshall's legacy endured and the unified opinion of the Court worked to enhance the Court's visibility and its authority as a vital formulator of public policy.

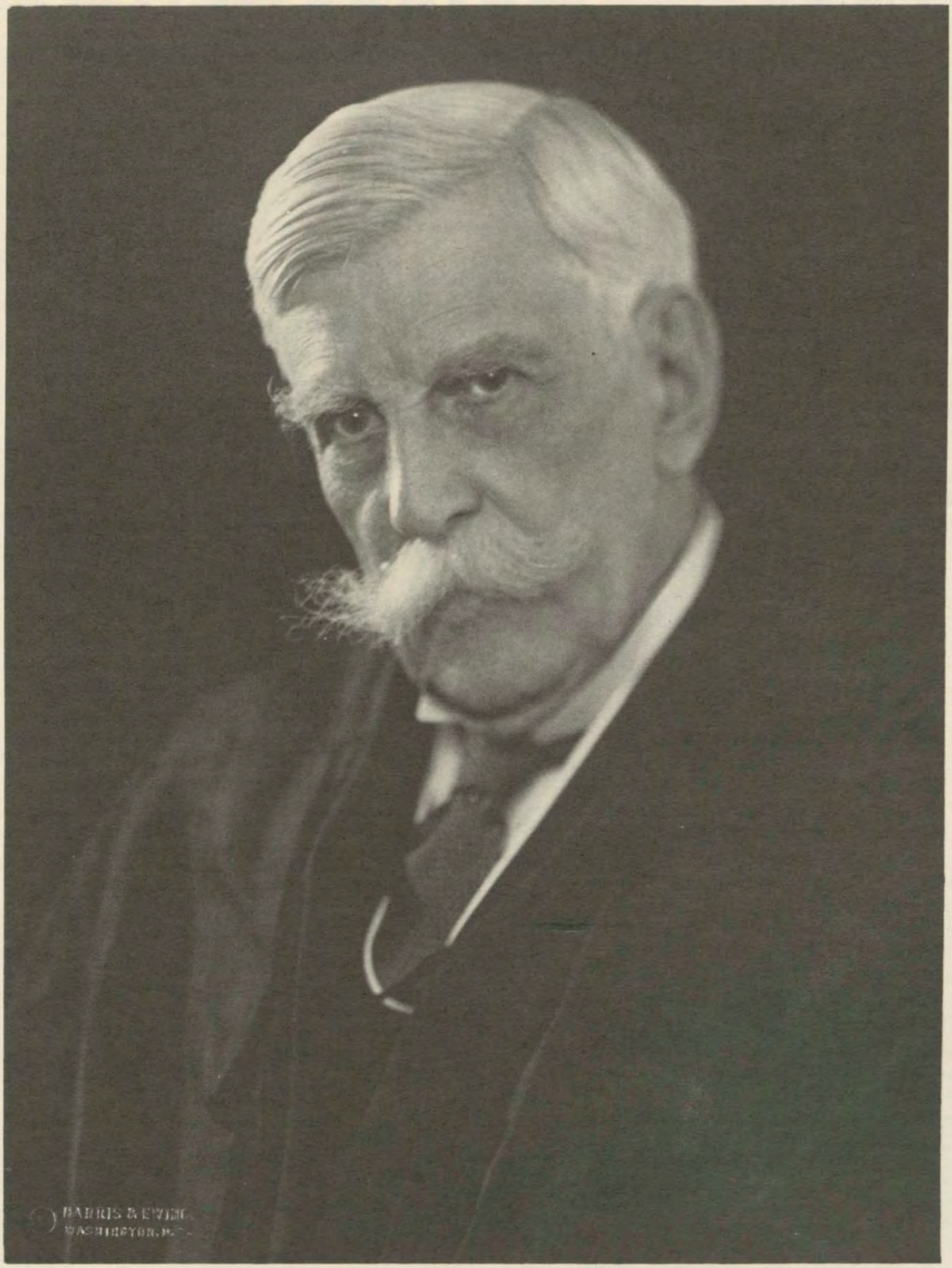
...it is his self-assignment of Court opinions which attests to his leadership role...

As opinion-assigners, Chiefs wield important power. The function, Princeton's Alpheus T. Mason declared,

> offers almost boundless possibilities for the Chief Justice to exert his influence. He can use it to advance his own prestige, taking the plums for himself, leaving the dry, inconsequential cases to his colleagues. The Chief Justice may exercise it so as to exploit the special talents of his Associate Justices, or use it in such a way as to develop specialities they do not already possess. He can use the opinion assigning function to give added weight to a particular decision, or to enhance his own public image. In a controversial case, he can use the assignment power to promote harmony by selecting a writer other than the obvious spokesman of the Court's divergent wings, or add to judicial asperities by singling out the previously vehement dissenter to voice the view now held by a majority. He may pick the man "who will write in the narrowest possible way . . . or . . . take the chance of putting a few seeds in the earth for future flowering."

Concludes Mason, in strategically exercising these prerogatives of the Court's presiding officer, a Chief Justice "will not only affect the dispatch of judicial business but may vitally influence the course of law and history."[28]

If Chief Justice Waite avoided assigning railroad cases to Stephen J. Field and Taft as well as Hughes carefully rationed cases to Harlan F. Stone, while Warren favored Black and Douglas as against Frankfurter, Chiefs throughout history have followed John Marshall's lead and assigned important decisions to themselves. Their actual productivity has, however, varied. Jay wrote 11.7 percent of his Court's majority opinions and sucessor Ellsworth more than doubled that output by writing 26.1 percent. But dramatic change set in with Marshall's arrival. A stunned Associate Justice Johnson, Jefferson's first appointee, expressed "not a little surprise to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his judgment and vote."[29] During the course of his tenure, stretching over the initial two and a half decades of the nineteenth century and beginning with his first opinion of the Court in the 1801 case of *United States v. Schooner "Peggy,"*[30] Marshall would pen 547, or 48.5 percent, of the Court's majority opinions. Melville Weston Fuller, presiding at the century's close from the 1888 to the 1909 Terms emulated Marshall. He wrote more Court opinions than did any one of his eight brethren in 15 of the 22 Terms, producing a total of 840 majority opinions, distantly followed by David J. Brewer with 536 and Harlan with 471. But in the modern era



During his twenty-nine years on the Supreme Court (1902–32) Associate Justice Holmes served under Chief Justices Fuller, White, Taft, and Hughes.

Chief Justices have written a lower proportion of the Court's opinions than did Marshall and Fuller, a possible consequence of increased non-adjudicatory duties devolving on them.

Aggregate opinion production may reflect a Chief's interests, writing skill, and energy level. But it is his self-assignment of Court opinions which attests to his leadership role in the conference. Surveying practices of all Chief Justices from Taft beginning in 1921 to Burger's fourth Term in 1973, political scientist Elliott E. Slotnick tracked what he called "the opinion assignment ratio (OAR), a single measure which reports the percentage of the time when a Justice is 'available' for majority opinion assignments that he actually gets the assignment."[31] Taft, Hughes and Stone all generated a higher self-assignment ratio than the OAR for the Associates. And the trio's rate substantially exceeded that of their successors.

Data derived from the Supreme Court Clerk's Office support Slotnick's conclusions except for those relating to Chief Justice Burger. In ten of the thirteen terms from 1969 through 1981, Burger authored as many or more opinions of the Court than the average number drafted by an Associate Justice. Writing an average of 14.8 such opinions per term as compared to 14.1 for his eight brethren, he became the first Chief since Stone to achieve that feat.

Vinson and Warren may have deferred to colleagues comprising the Court majority of which the Chief was a part. Yet as Slotnick determined, their deferential style excluded "important cases." When the opinions to be assigned in a case met Slotnick's criteria for "important cases,"[32] every Chief Justice has manifested a pronounced self-assignment trait. "The great cases are written as they should be, by the Chief Justice," Associate Justice John H. Clarke (1916–1922) once observed.[33] Self-assignment of "important" opinions not only endows the Court's judgment—as Felix Frankfurter once noted—with "the extra weight which pronouncement by the Chief Justice gives,"[34] it also enables the Chief to advance particular public policy goals. And as in realms other than in jurisprudential contributions, Taft set the pace closely followed by Hughes.

In writing opinions in "important" cases, Slotnick found that the Chiefs wrote for a unanimous Court in 44.0 percent and for a unanimous or highly cohesive Court in 62.3 percent, a far higher proportion than enjoyed by the Associate Justices. On the other hand, he determined that they avoided writing majority opinions in cases where the Court was divided. Yet Slotnick commented that

> when a Chief Justice is in the unique position of being able to make or break a given Court majority at the same time that his exercise of the self-assignment prerogative gives him the potential to structure and guide the parameters of the final majority decision, there is an added impetus for writing the opinions for a highly divided Court. This is so despite the resulting negative implications for the Court's symbolic appearance of unity.[35]

Adapted from The Office of Chief Justice of the United States: Into the Federal Judiciary's Bicentennial Decade, *a paper prepared for the Conference on the Office of Chief Justice of the United States, White Burkett Miller Center of Public Affairs, University of Virginia, October 15, 1982.*

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NEW DIRECTIONS

The Earned Income Tax Deduction

Pamela B. Gann

In 1948 Congress dictated that marital status would make a difference in the allocation of federal income tax burdens. This article examines the non-neutrality of using matrimonial status in allocating tax burdens; the provisions in the Economic Recovery Tax Act of 1981 (ERTA) which partially eliminate the marriage penalty; and the slight efficiency gains in the new earned income deduction to married couples. The author, a Professor of Law at Duke, argues that a more nearly marriage-neutral income tax system, under which all individuals file separate returns under a single rate schedule, is a more satisfactory resolution.

MARRIAGE NON-NEUTRALITY AS OF 1979

In analyzing the equity objectives to be achieved by the relationship of marital status to allocation of income tax burdens, the following criteria are most typically applied by commentators:

(1) The income tax should be progressive so that taxpayers with greater incomes will pay a larger percentage of their income in taxes than taxpayers with lesser incomes.

(2) Equal-income married couples should pay equal taxes.

(3) The income tax should be marriage neutral in that the sum of the individual tax liabilities of two persons should not change when they marry each other.

Our income tax system is based on criteria (1) and (2). It is a progressive tax system, and married taxpayers typically consolidate their income on a joint tax return under a separate tax rate schedule so that equal-income married couples pay equal taxes. The third criterion, marriage neutrality, cannot simultaneously be achieved with criteria 1 and 2, and Congress has since 1948 chosen to forego the third criterion in favor of the second. What are the various effects of this choice under equity analysis?

COMPARISON OF ONE-WORKER AND TWO-WORKER MARRIED COUPLES

Congress adopted the second criterion in 1948 by enacting the split-income plan for married persons, but its implementation has been flawed due to the failure of Congress to define a broad statutory income tax base. Consequently, the applied criterion is "married couples with equal *statutory* income should pay equal taxes," while their actual economic income and ability to pay taxes may be substantially dissimilar. A simple example illustrates this point. Couples A and B each have $50,000 of earned income. In the case of couple A, the husband earns a $50,000 salary (incurring negligible expenses to earn that income), and the wife provides at least $15,000 of home production. In the case of couple B, the husband and wife both work outside the home and earn total salaries of $50,000. They produce only $5,000 of home production themselves, and pay a third person $10,000 a year to perform household services. Couple A has substantially more economic income than does couple B. They have the same statutory income, however, and pay the same federal taxes.

Pamela B. Gann

The adoption of the split-income system for married persons while excluding the value of home production from the income tax base had become by 1980 a significant source of inequity in the allocation of income tax burdens. By failing to take into account a married couple's allocation of labor between the marketplace and home, this system consistently overtaxed two-worker couples in the marketplace relative to one-worker couples. This overtaxation was compounded by the nondeductibility of additional expenses incurred by the

...the 1948 adoption by Congress of the criterion that "equal-income married couples should pay equal taxes" reflected a tax system designed for a society largely composed of one-worker married couples.

two-worker couples over those of the one-worker couples. The two-worker couple probably incurs additional transportation, clothing, and meal costs when the secondary worker enters the job market. The only allowance made by Congress for such additional expenditures is the tax credit for child care expenditures that result from the secondary worker's labor force participation.

The inequities of the split-income system had increased since its enactment in 1948 because of the increasing participation of wives in the labor force. In 1948, only about 20 percent of wives worked outside the home, and since husbands earned most of the labor income of couples, the split-income system of 1948 reduced the tax burdens of most married couples. Moreover, the omission of home production from the tax base probably did not cause substantial inequitable comparisons between one-worker and two-worker couples. By 1980, however, over 50 percent of wives worked outside the home. Given this large number and the likely variances in the allocation of time by these wives between market and home production, the failure to include home production in the tax base became increasingly inequitable.

Because of the increased participation of wives in the labor force, by 1980 two-worker couples had also become the most prevalent taxpayer group in amount of taxes paid. For 1979, two-worker married couples paid 37.7 percent of total individual income tax revenues, while one-worker married couples represented the next highest group at 37.3 percent. Also, by 1979, one-worker couples represented approximately 23 percent of all tax returns filed.

In summary, the 1948 adoption by Congress of the criterion that "equal-income married couples should pay equal taxes" reflected a tax system designed for a society largely composed of one-worker married couples. It represented a political solution to an equity problem that yielded a substantial tax reduction for most taxpayers. By 1980, however, two-earner married couples composed the single largest group of taxpayers in amount of revenues paid and one-earner married couples represented only 23 percent of all tax returns filed. Thus, by 1980 the 1948 solution benefited a substantially diminished group of taxpayers at the cost of increased inequitable allocation of tax burdens among one-worker and two-worker married couples due to the exclusion of home production from the tax base.

SINGLE PERSONS AND MARRIED PERSONS

The split-income plan in 1948 lowered taxes for single persons when they married, unless the two spouses had equal, separate incomes before and after they married. This decrease in tax liability upon marriage has been referred to as the "marriage bonus." Concomitantly, a single person having the same income as a married couple paid substantially higher taxes than the married couple paid. This higher tax liability has been referred to as the "single's penalty." In order to lessen this difference, Congress enacted a separate tax rate schedule for single persons in 1969, which became effective in 1971. At each income level under the separate schedule, the single person's 1971 tax liability was never more than 120 percent of the tax liability of a married couple at the same level.

After enactment of this new schedule for single persons, some persons paid a higher tax on their combined incomes after they married than the sum of the separate taxes they paid when single. This increase in taxes paid after marriage is referred to as the "marriage penalty." Table 1 describes the marriage penalty and marriage bonus under the 1979 rate schedules at both varying levels of total income and varying divisions of income between spouses. The penalty begins roughly when the income is divided between the two persons more evenly than 80 percent and 20 percent. The marriage penalty increases as income is more evenly divided, reaching its maximum at each income level when the income is evenly divided between the spouses before and after marriage. A substantial marriage penalty can occur, however, even when income is fairly unevenly divided between the spouses. Consider, for example, a married couple with a combined income of $40,000. A marriage penalty of $1,031 occurs, even though the income portion of the lesser earning spouse is only 30 percent. The penalty increases to $1,692 when the income is divided evenly. As shown in Table 1, the spread in tax liabilities of married couples at the same income levels is very substantial. Married couples with total family income of $40,000 can pay a difference of $4,493 in tax liability depending upon the division of income between the spouses. At $50,000 the difference is $6,018, and at $100,000 the difference is $7,858.

SUMMARY

As this discussion shows, the factor of marital status has affected the allocation of tax burdens among single and married persons since 1948. The original split-income system created the single's penalty and the marriage bonus; the creation of a separate rate schedule in 1969 to lower the tax on single persons created the marriage penalty. In what way did ERTA in 1981 modify these legislative decisions about the relationship of marital status and allocation of income tax burdens?

TABLE 1
EFFECT OF MARRIAGE ON TAX LIABILITY AT SELECTED INCOME LEVELS AND EARNINGS SPLITS BETWEEN HUSBAND AND WIFE†

	Share of lesser earning spouse										
	0	5	10	15	20	25	30	35	40	45	50
Total family income	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
$5,000	−250	−210	−170	−133	−98	−63	−28	0	0	0	0
$7,000	−378	−315	−252	−189	−126	−66	−10	46	98	147	168
$10,000	−475	−370	−275	−180	−85	10	100	162	182	200	202
$15,000	−710	−515	−328	−148	32	132	183	220	236	243	251
$20,000	−1,092	−760	−460	−160	42	150	238	300	355	381	391
$25,000	−1,505	−1,055	−630	−268	−30	160	310	447	535	594	611
$30,000	−1,929	−1,334	−749	−334	−26	214	439	644	785	875	903
$40,000	−2,801	−1,821	−939	−338	177	667	1,031	1,329	1,564	1,644	1,692
$50,000	−3,344	−2,094	−1,094	−286	454	1,133	1,731	2,121	2,439	2,574	2,674
$100,000	−3,464	−1,214	359	1,691	2,699	3,474	4,014	4,314	4,369	4,394	4,394

† Assumes that taxpayers have no dependents and do not itemize deductions. Marriage penalties would be smaller, and marriage bonuses larger, for itemizers. Marriage penalties are positive in the table, marriage bonuses are negative. Source: Joint Comm. on Taxation.

THE EARNED INCOME DEDUCTION

By 1981 critics directed their primary assault at the taxation of married persons. They made three substantial criticisms. First, the marriage penalty discouraged marriage and undermined respect for the family and for the tax system itself. Second, the system failed to take into account in the tax base the lesser income and home production of two-worker couples relative to one-worker couples. Third, joint returns consolidated the spouses' income, and the resulting high marginal tax rate on the secondary worker's income adversely affected the secondary worker's decision to work outside the home.

These substantial concerns convinced Congress that modification of the system to eliminate or reduce the marriage penalty on earned income had become necessary. Three options were actively discussed before Congress and by various members of Congress: mandatory separate filing by all individuals, optional separate filing by married persons under the single person's rate schedule, and an earned income deduction equal to a percentage of the earned income of the spouse with the lower earnings. The first two options were rejected because they were thought to necessitate complex rules of allocating income and deductions between the spouses' separate returns and would eliminate the marriage penalty with respect to all types of income, when Congress's greatest concern was the plight of the secondary worker.

The third option, the earned income deduction (EID), had been suggested by tax commentators for many years as a response to the inequities in the taxation of one-worker and two-worker couples due to the flaws in the statutory measurement of the tax base. The ideal solution is to include in the income tax base the value of goods and services produced in the home. Because the administrative problems in measuring the amounts and values of these goods and services are thought to be insurmountable, tax commentators suggest the EID as a proxy for the more ideal solution. Substantial and unanswered criticisms to this proxy are raised by critics, however. First, limitation of the EID to two-worker couples introduces yet another inequity into the tax system. While reducing the inequities in the relative taxation of one-worker and two-worker couples with the same statutory income, it creates new inequities in the relative taxation of either nonworker couples and one-worker couples or single persons and one-worker couples. The correct solution to these comparative inequities is to allow a deduction for all full-time workers, without regard to marital status, scaled down for part-time workers. This deduction for all taxpayers who work in the marketplace adjusts for the advantages associated with untaxed imputed income from leisure and household goods and services. Second, no economic studies exist by which to determine whether a particular deduction bears any approximate relationship to the differences in assets and values of imputed income of one-worker and two-worker couples. Such a deduction is acceptable as an equitable proxy only if such evidence becomes available upon which to structure the size and distribution of such a deduction.

Notwithstanding these earlier and correct criticisms of the EID, Congress embraced it in 1981 as the political solution to the marriage penalty on earned income. ERTA added section 221 to the Code, which allows for 1982 an EID of 5 percent of up to $30,000 of the lower of the spouses' earned incomes, and that percentage increases to 10 percent for 1983 and years thereafter. For example, if in 1983, both spouses have earned income and the lesser earned income of one spouse is $10,000, the EID will be $1,000. If the lesser earned income of one spouse is $30,000 or greater, the maximum EID of $3,000 will be allowed. What effects will this deduction have on the taxation of married persons?

Under equity analysis, the EID yields little to praise, for it is too narrow a solution to the marriage penalty. First, the penalty occurs when couples have separate incomes, whether from property or services, and one spouse's income is at least 20 percent of the couple's total income. The EID is limited to a percentage of earned income of two-worker couples and therefore does not eliminate the marriage penalty resulting from unearned income. Congress was of course aware of this effect, and chose to reduce the marriage penalty only for two-worker married couples.

Second, the marriage penalty of two-worker couples is only partially alleviated. Two parts of ERTA affect the amount of the marriage penalty. One provision is the EID. The other significant part is the reduction of all rates in the tax schedules by 23 percent by 1984, and the reduction of the highest marginal tax rate from 70 percent to 50 percent on unearned income as of January 1, 1982. Table 3 compares the marriage penalty paid by couples with evenly divided earned income under the rate schedules immediately prior to ERTA with the estimated marriage penalty to be paid by these couples in 1984 when the full 23 percent rate reduction is in effect. An even division of income is used as the example in the table because the maximum marriage penalty occurs at this division. In order to make a proper comparison, the 1980 income levels were increased by the consumer price index from 1980 through 1984, on the assumption that the couples' earned income would increase at this rate. These increased incomes were then subjected to the 1984 tax rates in order to determine the amount of the marriage penalty before and after the EID. Finally, the amount of penalty determined was then discounted back to 1980 dollars in order to determine the percentage of the marriage penalty alleviated by the ERTA provisions. These calculations ignore, however, the

TABLE 2
ESTIMATED MARRIAGE PENALTY FOR COUPLES WITH EVENLY DIVIDED INCOME FOR 1980 AND 1984†
(1980 Dollars)

	1980			1984				Decrease in Amount of Penalty (Increase is negative)		
Combined Gross Income	Tax on Joint Return	Tax on Single Return (Times 2)	Amount of Penalty	Tax on Joint Return Before EID	Tax on Joint Return After EID	Tax on Single Return (Times 2)	Amount of Penalty Before EID	Amount of Penalty After EID	% Due to Rate Reduction	% Due to EID
$10,000	702	500	202	768	698	644	124	54	37%	56%
$20,000	2,745	2,354	391	2,662	2,428	2,248	414	180	−6	57
$30,000	5,593	4,690	903	4,582	4,200	3,796	786	404	13	49
$40,000	9,366	7,674	1,692	9,039	8,279	7,250	1,789	1,029	−6	42
$50,000	13,798	11,124	2,674	13,018	12,094	10,499	2,519	1,595	6	37
$60,000	18,698	15,044	3,654	17,217	16,293	14,238	2,979	2,055	18	31
$70,000	23,678	19,444	4,234	21,587	20,596	18,343	3,244	2,253	23	31

†Taxable income is determined in every case by assuming no itemized deductions and using the zero bracket amount. Taxes owed for 1980 are determined by applying the tax rate schedules immediately prior to ERTA, including the maximum tax on earned income. Gross income for 1984 is determined by increasing the 1980 income levels by the CPI increased from 1980 through 1984, and taxes owed for 1984 are then determined by applying the 1984 rate schedule to the increased levels of income. These tax amounts are then discounted to 1980 dollars in order to estimate the amount of the penalty prior to and after ERTA.

TABLE 3
ESTIMATED MARRIAGE BONUS FOR COUPLES WITH 90 PERCENT-10 PERCENT DIVISION OF INCOME FOR 1980 AND 1984†
(1980 Dollars)

	1980			1984				Increase in Amount of Bonus (Decrease is negative)		
Combined Gross Income	Tax on Joint Return	Tax on Single Return (Times 2)	Amount of Bonus	Tax on Joint Return Before EID	Tax on Joint Return After EID	Tax on Single Return (Times 2)	Amount of Bonus Before EID	Amount of Bonus After EID	% Due to Rate Reduction	% Due to EID
$10,000	702	977	275	768	754	944	176	190	−36%	8%
$20,000	2,745	3,205	460	2,662	2,603	3,025	363	422	−21	16
$30,000	5,593	6,342	749	4,582	4,506	5,113	531	607	−29	14
$40,000	9,366	10,305	939	9,039	8,887	9,773	734	886	−22	21
$50,000	13,798	14,892	1,094	13,018	12,808	13,913	895	1,105	−18	23
$60,000	18,698	19,564	866	17,217	16,965	18,376	1,159	1,411	34	22
$70,000	23,678	24,194	516	21,587	21,272	22,891	1,304	1,619	153	23

†Taxable income is determined in every case by assuming no itemized deductions and using the zero bracket amount. Taxes owed for 1980 are determined by applying the tax rate schedules immediately prior to ERTA, including the maximum tax on earned income. Gross income for 1984 is determined by increasing the 1980 income levels by the CPI increases from 1980 through 1984, and taxes owed for 1984 are then determined by applying the 1984 rate schedule to the increased levels of income. These tax amounts are then discounted to 1980 dollars in order to estimate the amount of the penalty prior to and after ERTA.

labor supply responses of spouses to these provisions and assume that couples will show no behavioral response, which is unlikely.

The figures in Table 2 show that where income between the spouses is evenly divided the rate reductions roughly offset the effects of inflation in the middle-income levels from $20,000 to $50,000 so that the amount of the marriage penalty is not substantially reduced. The rate reduction at the higher income levels of $60,000 and $70,000 do moderately reduce the penalty by 18 percent and 23 percent, respectively. The EID reduces the penalty that would be paid under the 1984 rate schedule. The amount of the reduction decreases from 56–57 percent at lower income levels to 31 percent at higher income levels. Although the EID reduces the maximum penalty paid by married couples with evenly divided income, it still leaves a significant marriage penalty, particularly at income levels of $40,000 or higher.

Since the marriage penalty generally does not occur unless the lesser earning spouse's share of total income is at least 20 percent of the couple's total income, the EID should increase the marriage bonus for couples whose division of earnings is more unequal than an 80 percent-20 percent division. Table 3 compares the marriage bonus paid by couples with 90 percent-10 percent earned income divisions under the rate schedules immediately prior to ERTA with the estimated marriage bonus that will be paid by these couples in 1984. The comparative amounts of marriage bonus for 1980 and 1984 are given in 1980 dollars, the same as the marriage penalty in Table 2. The figures in Table 2 show that the ERTA rate reductions did not totally counteract the effects of inflation from 1980 through 1984, so that at income levels from $10,000 to $50,000 the bonus actually declines. These declines are then substantially offset by the allowance of the EID. Under the combined effects of the rate reduction and the EID, marriage bonuses at income levels from $10,000 to $40,000 are reduced very little, and at income levels of $60,000 and higher the marriage bonuses substantially increase.

Economist Daniel Feenberg has made a study which estimates the changes from 1979 to 1983 toward greater or less overall marriage neutrality due to the ERTA rate reductions and the EID.[1] Table 4 summarizes these changes. First, the ERTA rate reductions through 1983 decrease the total marriage bonus from $14.5 to $13 billion, an improvement of $1.5 billion. Notwithstanding these rate reductions, the marriage penalty increases $.3 billion, from $9 to $9.3 billion. Thus, the net overall improvement toward marriage neutrality due to rate reductions is $1.2 billion.

The EID produces the opposite effects. It increases by $1.7 billion ($13 to $14.7 billion) the marriage bonus resulting after the ERTA rate reductions and decreases the marriage penalty by $2.0 billion ($9.3 to $7.3 billion). In combination, the ERTA rate reductions substantially reduce the marriage bonus, and the EID substantially reduces the marriage penalty; but the EID also increases the marriage bonus by an amount *greater* than the reduction in the marriage bonus from the rate reduction. Consequently, the overall net improvement toward marriage neutrality is $1.5 billion, and the contribution by the EID of $.3 billion toward that overall improvement is small relative to the $1.2 billion contributed by the ERTA rate reductions.

Table 5[2] summarizes the estimated percentage of returns with marriage bonuses, penalties, or neither in 1979 and 1983.

TABLE 4
SUMMARY OF CHANGES FROM 1979–1983 TOWARD GREATER OR LESSER OVERALL MARRIAGE NEUTRALITY BY ERTA
(In Billions of Dollars)

	Marriage Bonus (Decrease is negative)	Marriage Penalty (Decrease is negative)	Net Improvement (Negative)
ERTA Rate Reductions (Comparison of 1979 with 1983 Before EID)	$–1.5	$ .3	$–1.2
Earned Income Deduction (Comparison of 1983 Before and After EID)	1.7	–2.0	–.3
Total	$ .2	$–1.7	$–1.5

TABLE 5
ESTIMATED PERCENTAGE OF JOINT RETURNS WITH MARRIAGE BONUS, MARRIAGE PENALTY, OR NEITHER BONUS NOR PENALTY

	1979	1983 *(Before EID)*	1983 *(After EID)*
Marriage Bonus	49.1%	48.1%	52.9%
Neither Bonus Nor Penalty	5.8	5.9	6.2
Marriage Penalty	45.1	46.0	40.9
Total	100.0%	100.0%	100.0%

As a result of ERTA, the percent of returns showing neither a marriage bonus nor a marriage penalty increases from 5.8 percent to 6.2 percent; the percent with a marriage bonus increases from 49.1 percent to 52.9 percent; the percent with a marriage penalty decreases from 45.1 percent to 40.9 percent. This shift of married couples from the set paying a marriage penalty to the set receiving a marriage bonus results from the EID. Thus, the deduction contributes a small proportion of the

The exclusion of home production from the tax base and the aggregation of market income on the joint return... operate as a disincentive to wives working outside the home.

overall increase toward marriage neutrality and has the more important effect of shifting couples from the penalty to the bonus categories. Meanwhile, as Table 5 shows, a substantial marriage penalty remains on many couples. The EID therefore cannot be supported under the criterion of marriage neutrality. What, then, about the criteria of efficiency?

MARITAL STATUS UNDER EFFICIENCY CRITERIA

The joint return filing for married couples is inefficient. Our tax base excludes the value of goods and services produced in the home, thereby causing a greater production of such goods and services than would occur if the tax system were neutral between home and market production. This inefficiency is not limited to the joint return, but applies to all individual taxpayers. It is enhanced under the joint return, however, because it aggregates the market income of two taxpayers on a single return under a graduated tax rate schedule, thereby causing the marginal tax rate on increased market production relative to the tax rate of zero on home production to be higher than if the market income were taxed on separate returns.

The exclusion of home production from the tax base and the aggregation of market income on the joint return are sex-neutral on their face. Economists have shown using elasticities of supply of labor, however, that these features of our tax system operate as a disincentive to wives working outside the home. Statistical studies of the labor supply elasticities of men and women show that the labor supply elasticity of husbands is relatively low and that of wives is relatively high. Wives therefore tend to view themselves as the secondary worker and are more likely than husbands to perform the couple's home production. If a married couple is considering whether to perform more market production and less home production the typical comparison that the couple makes will be whether the wife should perform the additional work outside the home and hire a housekeeper for the home production. In making this decision, the married couple will compare the after-tax wage of the wife, taxed at their joint return marginal rate, less the nondeductible costs for the housekeeper, against the non-taxed value of the home production by the wife that would be lost if she goes to work. Economists argue therefore that if the wife filed a separate tax return, she is more likely to work outside the home because the marginal tax rate on the income from market production would typically be lower than the marginal tax rate applicable under the joint return. This argument is supported by economic studies showing that the labor force participation rates of women increase with an increase in after-tax wages. Since wives are more likely than husbands to be the secondary earner, ERTA's EID should have the effect of increasing the after-tax wages of wives and thereby increasing their labor force participation rates. Economist Daniel Feenberg has estimated the effects of ERTA's EID on such rates. His study concludes that the EID will have the relatively modest effect of increasing the labor force participation of wives on average 15 hours per year.[3] Prior studies of economists Feenberg and Rosen indicate that if Congress abolished joint returns and required all taxpayers to file separate returns, labor force participation rates of wives would be substantially greater than under the ERTA system of joint returns with the EID and accordingly more efficient.

Thus, the EID contributes little to marriage neutrality, but does contribute some gains under efficiency criteria. Apparently, Congress willingly extended the EID to those couples with marriage bonuses prior to ERTA, thereby increasing their bonuses and decreasing marriage non-neutrality, in order to provide some efficiency gains to these couples.

A SYSTEM OF SEPARATE FILING FOR ALL INDIVIDUALS

The best solution to the issue of the proper relationship of marital status to the allocation of income tax burdens is a marriage neutral income tax under which all individuals file separate returns. The discussion in this article of the effects of the enactment of the EID confirm this position both under equity and efficiency criteria.

The chief equity argument in favor of the split-income, joint return filing system for married couples has been that married couples share their consolidated income equally. This argument is flawed because all couples at all income levels probably do not adopt this sharing pattern. Moreover, it is too narrowly applied to married couples because it ignores substantial sharing of single persons with others.[4] These inadequacies of the sharing argument contributed substantially to the lowering of tax rates on single persons by establishment of a

The best solution to the issue of the proper relationship of marital status to the allocation of income tax burdens is a marriage neutral income tax under which all individuals file separate returns.

separate single person rate schedule in 1969. The resulting relationships between the two rate schedules cause both the marriage bonus and the marriage penalty, the distribution and magnitude of which cannot be independently justified under equity criteria as proper allocations of tax burdens based on marital status.

These political compromises result from Congress's steadfast determination to maintain the principle that "equal-income married couples pay equal taxes" as the central equity criterion of our tax system, notwithstanding the fact that one-worker married couples are a diminishing group of taxpayers. As discussed earlier, the application of this criterion is substantially flawed, moreover, by the omission from the tax base of goods and services produced in the home. Congress apparently thought in 1981 that it could chill complaints about both this problem and the marriage penalty with the EID, while preserving the joint return. This 1981 response to both problems, however, is inadequate.

As a proxy for the failure to tax home production, the EID has no statistical foundation to legitimize its size or distribution among married couples. Moreover, as such a proxy, its application is too narrow because it correctly should be extended to all taxpayers, whether married or single, who participate in the labor force. Separately, as a response to the marriage penalty, it is estimated to reduce the overall dollar amount of the penalty from only $9.3 billion to $7.3 billion, while substantially increasing the marriage bonus by $1.7 billion. The deduction does produce, however, a small efficiency gain estimated to be an increased labor force participation rate of 15 hours per year by wives.

Only by adopting a system of individual tax returns and eliminating the factor of marital status in the determination of tax rates will Congress provide an acceptable longer term resolution to the issue of the appropriate filing unit.

A system of individual tax returns under a single tax rate schedule responds adequately to most of the complaints about the present system. By being marriage neutral, it eliminates all the various penalties and bonuses. Moreover, by rejecting the joint return, it eliminates the equity problem of one-worker and two-worker couples. It also eliminates the substantial efficiency loss under the joint return system. It does not eliminate the equity and efficiency problems due to the failure to include the value of home production in the tax base. Elimination of the joint return isolates this issue, however, for under the present system the issue becomes mixed into (and confused with) that of the marriage penalty. Were it isolated, Congress could more rationally focus on the issue whether all taxpayers with earned income should obtain an EID to eliminate the bias in the tax system in favor of unearned income and imputed income from home production.

By retaining the joint return and adding the EID in 1981 Congress illustrated again its tendency to temporize. Only by adopting a system of individual tax returns and eliminating the factor of marital status in the determination of tax rates will Congress provide an acceptable longer term resolution to the issue of the appropriate filing unit.

This piece is extracted from an article prepared for the Cornell Law Review, *to be published in the summer of 1983.*

1. Feenberg, *The Tax Treatment of Married Couples and the 1981 Tax Law*, Working Paper No. 872, Nat'l Bur. of Econ. Res. 11 (1982) (Table II.2).
2. *Id.*
3. *Id.*
4. Some argue, however, that the sharing principle is fairly limited to married persons for the administrative reason that the status of marriage provides an easily administered, objective test of sharing. This writer finds this argument unconvincing. Such administrative arguments for limiting the recognition of sharing to that between spouses lose their forcefulness as the results under that limitation appear increasingly arbitrary due to the decreasing importance of the status of marriage in our society, both legally and socially. An interesting contrast is provided by France. Beginning in 1982, France imposes a wealth tax at a progressive rate from .5% to 1.5% on fiscal households whose taxable net worth exceeds 3 million francs. Fiscal households include unmarried cohabiting couples. Loi No. 81-1160, du 30 decembre 1981, art. 3, *reprinted in* Recueil Dalloz Sirey 22 (January 27, 1982).

Conference on Attorney Fee Shifting

A growing interest in the concept of attorney fee shifting, spurred by a more widespread use of the procedure in American jurisdictions, was reflected in a conference held at Duke Law School last November. The Law School, along with the Federal Justice Research Program, Office of Legal Policy, United States Department of Justice, sponsored the three-day event which hosted dignitaries from the fields of legal scholarship, economics, the social sciences, and legal practice.

The prevailing practice in nearly all American jurisdictions with regard to attorney's fees follows the so-called "American rule," under which each party pays his or her own lawyer. This is in contrast to practices in the legal systems in other industrialized Western nations, where the winning party routinely collects at least some portion of reasonable attorney's fees from his opponent. Different countries apply different methods for resolving the issue of what constitutes reasonable fees. For example, in Great Britain, the portion collected by the winning party is not determined by the trial judge but by a special official, the Taxing Master. In Germany, on the other hand, the issue is resolved by statute.

Although the "American rule" is still the norm in this country, a growing number of statutes on both the state and federal levels now adopt some form of "one-way fee shifting." Jurisdictions which have adopted such statutes do so in order to promote a variety of social goals including:

- encouraging private enforcement of statutes
- rectifying economic imbalances between potential litigants
- providing full compensation for legal wrongs

Thomas Rowe

- adding to the punitive impacts of certain types of litigation.

The most important development of this kind involved the Civil Rights Attorneys' Fees Awards Act of 1976, which encouraged litigation under its provisions by normally allowing only successful plaintiffs to recover attorney's fees awards while usually precluding prevailing defendants from so recovering.

Another main exception to the "American rule" involves provisions for fee shifting in particular private contracts. For example, in Arizona, two-way fee shifting is used in all common law contract litigation. In the three West Coast states, statutes provide automatic two-way fee shifting whenever private contracts provide for a one-way shift, out of a concern for preventing adhesion contracts.

Thus, according to Professor Tom Rowe, "the 'American rule' is riddled with an increasing number of exceptions," including at least 1,400 state statutes and about 200 federal statutes.

The basic theme of the conference centered on the relative desirability of the "American rule." Rather than advocating a particular policy choice, the conference participants engaged in an exploration of developments in and possible alternatives to current fee shifting practices. These discussions were part of an ongoing investigation of this issue on the part of Professor Rowe and the Law School, which has included a seminar presented in the fall of 1982 and will culminate in the Autumn 1983 issue of *Law and Contemporary Problems*. This issue will include revised versions of the papers presented at the conference as well as additional contributions by legal scholars and a note on fee shifting practices in the states.

The first day of the conference focused on the historical aspects of fee shifting and included:

- Werner Pfennigstorf's (American Bar Foundation, Chicago) paper on "The European Experience with Attorney Fee Shifting."
- Professor John Leubsdorf's (Boston University) talk entitled "Toward the History of the American Rule on Attorney Fee Shifting."
- Professor Thomas Rowe's (Duke University) discussion "Predicting the Effects of Attorney Fee Shifting."
- "Attorney Fee Shifting and Public Interest Litigation" was the topic of Environmental Defense Fund attorney Robert V. Percival's talk.
- Associate Deputy General Bruce Fein spoke on "Attorney Fee Awards in Government Litigation."
- Frances Kahn Zemans, affiliated Scholar of the American Bar Foundation, addressed the subject of "Legal Structures and the Implementality of Public Policy: The Case of the American Rule."

The remaining papers were delivered at the conference's final session:

- Professor Herbert G. Kritzer, Professor of Political Science at the University of Wisconsin-Madison, presented "Fee Arrangements and Fee Shifting: The Canadian Experience."
- Bruce Owen, Duke University Adjunct Professor of Business Administration and Public Policy Studies, gave "An Economic Analysis of Alternative Fee Shifting Systems."

Of special note was Professor Leubsdorf's new theory on the historical development of the American rule. Leubsdorf contends that the rule was a response of the practicing bar to colonial and state regulations limiting the amount of attorneys' fees which could be collected from the losing side. Rather than respond by trying to raise the limits, the bar turned to the solution of attorneys collecting from their own clients.

Leubsdorf's theory rejects traditional views which hold either that this country has always followed the practice of not allowing attorneys to collect fees from the other side or that the American rule was a reflection of frontier justice, an anti-lawyer response which encouraged parties to initiate litigation, secure in the knowledge they need only compensate their own counsel.

In the area of current fee shifting developments, Professor Herbert Kritzer related an interesting observation on human nature and the Ontario legal practice. Ontario, following the English and continental systems, bans the use of contingent fees as unethical. However, in researching his paper, Kritzer discovered that there was in fact a widespread use by lawyers of contingent fees utilizing informal methods such as losing lawyers' either not sending bills or not attempting to collect on them, and of winning lawyers' setting fees to their own clients (beyond the amounts collected from the other side) at a rough percentage of the damages awarded.

Innovative Construction Methods Discussed at Symposium

BACKGROUND

The construction industry is the largest industry in the United States; in 1981, for example, the total value of construction in this country exceeded $280 billion, approximately 15% of the Gross National Product. During the past decade, however, the construction industry has witnessed a major change in the traditional process of construction contracting, particularly with respect to the construction of medium- and large-sized commercial buildings.

Under traditional construction methods, an architect first develops a schematic design and prepares all the design and specification documents necessary for bidding on the construction work and guiding the actual construction. With these documents in hand, the owner then selects a general contractor who is responsible for managing the construction and for helping to select and coordinating the work of the specialty subcontractors—those responsible for providing such components as heating, cooling, plumbing, and electrical work.

In contrast, with the Design/Build (D/B) and "Fast Track" (FT) construction methods (see Glossary), the architect may not finish the design documents until construction is well under way. The general contractors and specialty subcontractors often bid on their portions of the project after seeing only preliminary schematics. Additionally, with the advent of Construction Management (CM) (see Glossary), a special construction manager, rather than the general contractor, assumes responsibility for management of the project and the owner contracts directly with the specialty contractors, who thus become specialty prime contractors, rather than subcontractors.

The use of CM and D/B–FT methods—methods unknown fifteen years ago—has expanded rapidly throughout the country.

The use of CM and D/B–FT methods—methods which were virtually unknown fifteen years ago—has expanded rapidly throughout the country. In 1982, six of the twenty largest design firms received over 40% of their total revenue billings from CM activities, and ten of the twenty largest construction firms reportedly realized over 40% of their total revenue billings from CM.

NEW CONSTRUCTION METHODS AND THE LAW

The use of the new methods has also altered the traditional legal relationships among the parties, particularly through the realignment of liability and the reallocation of risks. The complex legal relationships resulting from these new methods must currently be assessed within the confines of an extremely fragmented legal framework which, according to Allen Foster of the Duke Law School faculty, is a result of there being "no organized body of law for the construction industry." Traditional contract law has so far failed to adequately address the novel issues presented by the use of these new construction methods.

SYMPOSIUM HELD BY DUKE LAW SCHOOL

Some of the novel legal issues arising from the emerging trend toward the use of CM and D/B–FT construction were addressed in a symposium held on January 21 and 22, 1983, in Durham. The Construction Management and Design/Build–"Fast Track" Construction Symposium was organized to bring together representatives of different groups concerned with the practical and legal aspects of these innovative construction methods.

The faculty sponsors of the symposium, Richard Maxwell, Walter Pratt, and Allen Foster, assembled a distinguished panel of professionals representing not only the academic disciplines of law, architecture, engineering, and economics but also construction managers, insurance carriers and sureties, specialty trade contractors, and owners of construction projects. The more than 160 audience participants, representing all facets of the construction industry, attended to the presentation of ten papers, each of which addressed a different aspect of the emerging law on CM and D/B–FT construction.

Richard D. Conner, Acting Director and General Counsel of the Construction Management Association of America, presented an overview of the different services provided by a construction manager and the alternative forms of contracting for and using such services. Stanley D. Bynum of the law firm of Bradley, Arant, Rose and White in Birmingham, Alabama, outlined the view of CM and D/B–FT construction from the perspective of the general contractor.

The specialty trade prime contractor's view was presented by John B. Tieder of the Washington, D.C., law firm of Watt, Tieder, Killian, Toole & Hoffar. Tieder reviewed the role of the specialty trade contractor under the traditional system and compared the role to that assumed when CM

methods were employed. The impact of the advent of CM on the specialty trade subcontractor was detailed by William Squires of the Seattle law firm of Davis, Wright, Todd, Riese & Jones.

Contractors and subcontractors were not the only ones represented on the symposium's panel. Professor Justin Sweet of the University of California School of Law at Berkeley evaluated CM and D/B methods from the perspective of the professional architect. Milton Lunch, general counsel for the National Society of Professional Engineers, explored the controversies experienced by architects and engineers in the use of CM and D/B methods. The view of the public owner was outlined by David Dibner, former Assistant Commissioner, General Services Administration/ Public Building Service.

The use of CM and D/B–FT methods does not eliminate the possibility of problems arising during or after construction. Therefore, included in the symposium was a presentation on arbitration for dispute resolution by Robert Coulson, President of the American Arbitration Association, and discussion of the use of errors and omissions insurance by Gerald Farquhar of the Washington, D.C., law firm of Ford, Farquhar, Kornblut & O'Neill.

The place of innovative construction management techniques in contract law was the subject of a paper by Professor Walter Pratt. Professor Pratt compared current trends in the law of contracts with the developing legal doctrines in construction law. The direction of future doctrines in construction law will be dictated by the desire of those in the construction industry to maintain flexibility in the CM process. This flexible approach creates uncertainty in the legal relationships among the contracting parties. The result is that the construction contracts currently favored in innovative construction management relationships do not clearly allocate many risks among the parties. The lack of risk allocation can create problems for courts faced with the task of adjudicating disputes concerning the contracts.

According to Professor Pratt, in the absence of contract language allocating risk among the parties, the courts "can turn only to the conduct of the parties or to the habits of the industry for guidance in construing the language. If neither the parties nor the industry have developed useful patterns, then the courts will be left without any standard and litigation will produce only further uncertainty."

After reviewing the response of courts in the nineteenth century to an absence of contract standards, Pratt's paper chronicled the evolution of the use of "social norms" by modern courts to evaluate and enforce private contracts. Professor Pratt suggested that the construction industry, by developing flexible contractual relationships in the context of construction management innovations, runs the risk that courts may be guided by norms very different from those the parties themselves would have chosen to resolve conflicts that arise.

An article written by third-year students Deborah Hartzog and Brett Gladstone analyzed the use of CM from the point of view of the private owner. Unlike the "public" owner (often the federal government) whose frequent construction expense gives him bargaining power and expertise, and the architects and contractors whose interests are well-represented by industry groups, the private owner remains relatively powerless. Yet it has been the private owner who traditionally has borne the risk of loss in the risky business of construction, since he is the one who initiates the entire construction process.

On today's construction projects, a construction manager often fills the need for a expert who can coordi-

Allen Foster

Richard Maxwell

Walter Pratt

nate the work and timing of the many trades involved in the job. The nonprofessional, private owner clearly plays a background role when such a person is present. However, according to Hartzog and Gladstone, both statutory and judicially-created barriers inhibit legal recognition of this background role. Legal responsibility will seldom follow the delegation of actual responsibility to the construction manager. While at first glance the devices of payment and performance bonds, and errors and omissions insurance seem to protect the owner, many gaps exist whereby the owner is not covered. This problem is particularly acute where nonnegligent error exists. The students concluded that allocation of the risk of error and delay is the most equitable and effective method from the owner's point of view.

A major product of the symposium, in addition to an issue of *Law and Contemporary Problems* that will be devoted to construction law questions, is a compilation of the papers presented at the symposium in book form.[1] The sponsors of the symposium were "incredibly pleased" with the book, which presents an analysis of the body of construction law dealing with CM and D/B–FT methods.

Considering the enthusiastic response given to the symposium by the construction professionals in attendance, practitioner education on the emerging law of CM and related concepts is much needed. Given the continuing growth in the use of CM contracts in the construction industry and the somewhat fragmented body of law that has emerged, further symposia designed for the construction professions and further analysis of the emerging law of CM would seem to be a worthwhile undertaking and a valuable contribution to the legal profession.

1. A limited number of copies of the paperback edition of the conference materials are still available. Contact Mrs. Mary Jane Flowers, Duke University School of Law, Durham, NC 27706, for information.

GLOSSARY

Construction Management: Although no consensus exists on the exact definition of construction management, the term refers to a contracting alternative available to owners of construction projects where the owner enlists the services of an individual or group to manage all or part of the construction process in addition to the architect and contractors. The use of a construction manager is a supplement to the traditional contract system utilizing a general contractor. The construction manager's role in the construction is as broad or as narrow as the contract specifies. Typically, a construction manager might provide budgeting, design review, engineering, scheduling, quality assurance and labor control services among others. The construction manager is whatever his contract says he is.

Fast Track Construction: A method of construction in which actual construction is started before completion of all of the design, planning, bidding, and subcontracting phases. When this method is used, the architect prepares preliminary design plans which are used by the contractors for bidding and initial construction prior to completion of final design documents. As a general rule, if construction begins with less than one-half of the plans and specifications completed the project is considered a "Fast Track" project.

Design/Build Construction: A method of construction in which one party contracts with the owner to perform both the design and construction functions on the project. This process eliminates the traditional separate role of the architect who prepares detailed design documents and turns them over to the contractor. In the design/build alternative, the party contracting with the owner agrees to undertake the entire project from beginning to end.

THE DOCKET

Entering the Fourth Decade

Interview with Mel Shimm

According to an estimate made by Tom Croft, Duke Law's new Associate Dean for Administration, Mel Shimm has taught 90% of the living Duke alumni and alumnae in his thirty years on the faculty. And, although Dean Shimm will be handing over the last of his administrative duties to Dean Croft as of July 1, he will continue to teach, embarking on his thirty-first year at the Law School this fall.

In a recent interview, Dean Shimm reflected on his three decades at Duke Law and his last five years as Associate Dean. He assumed the deanship at the request of the current Dean, Paul Carrington, when Carrington first came to Duke and wanted a lieutenant who was already familiar with the students, faculty, alumni, and support staff of the law school. At one time or another during the past five years Dean Shimm has been in charge of student affairs, support services, and alumni development. Those duties have now all been shifted to other capable hands (Jean Taylor Adams, '79, will be taking over from Veronica Mahanger MacPhee, MCL '81, as Dean of Student Affairs; Tom Rowe oversees support services; and Tom Croft, '79, will be handling alumni affairs); and Dean Shimm feels that the law school can profit from having one less chief and one more Indian.

Thus, Dean Shimm will be able to concentrate on adding to the number of Duke Law alumni he has taught. Although he hopes to teach primarily in the field of commercial law, the present administration is not likely to forget that Shimm is, in the words of retired Dean Latty, a fine "utility infielder." During his years at the law school he has often "pinch hit" in times of need and has taught such varied subjects as criminal law, property, civil procedure, and even insurance law, a subject which he had never studied until the professor scheduled to teach it suffered a heart attack just days before the beginning of the semester.

Among what Shimm terms the "more esoteric" of the courses he has taught are Psychiatry and the Law, which he offers together with his wife, Dr. Cynia Shimm, a practicing psychiatrist and psychoanalyst, and the Medical-Legal-Ethical Seminar, which he teaches with faculty from the Medical School and the Divinity School. This latter course, which Shimm characterizes as the most "lively" course he teaches, is limited to an enrollment of eighteen students—six from each of the three disciplines—who are organized into six interdisciplinary teams to explore issues such as euthanasia, abortion, and eugenics. Although Shimm feels that the course may not "appreciably push back the frontiers of ignorance," he feels that it can help young professionals to understand other aspects of issues which they would otherwise view

...Mel Shimm has taught 90% of the living Duke alumni and alumnae in his thirty years on the faculty.

through the "tunnel vision"' of the perspective of just one discipline.

Dean Shimm has also played an important role in the history of two Duke Law School publications. His initial appointment in 1953 was not only for a teaching position but also to serve as an Associate Editor of *Law and Contemporary Problems.* He served as Associate, and then General, Editor for *Law and Contemporary Problems* before the duties devolved on less senior members of the faculty. He resumed the General Editorship for a two-year stint in 1974, and conceived the idea of making the General Editor's job less onerous by selecting Special Editors to oversee particular issues, a format still followed by the journal.

During his first years at Duke, Dean Shimm also started the *Duke Law Journal,* which began as an intramural journal containing only student case notes. In 1958, when the *Journal* was expanded to become a general publication journal like those at other law schools, Dean Shimm solicited articles in addition to continuing

to edit all the material in the *Journal.* Although he resigned his position as General Editor of the *Law Journal* in 1961 (in order to have time to learn insurance law!), he is still the *Journal's* Faculty Advisor. He explains that, as Faculty Advisor, his role is that of an advocate and not an editor.

Asked about changes in the past thirty years, Dean Shimm stated that the major changes had been primarily the enlargement and geographical diversification of the student body. He feels that the quality of the faculty is as good as, or better than, it has been at any time during the law school's history with the possible exception of the first faculty group in the early 1930's. As to the students, Dean Shimm notes that, although the current students are better "on paper" than their predecessors, it appears that they do not write as well.

Dean Shimm finds it *encouraging* that today's women students frequently end up in the middle, or even the bottom, of the class. He recalls that the early women graduates, M. Elizabeth Sulzer in 1953, Sandra Jeanne Strebel in 1962, and Rosemary Kittrell, Laurie B. Bruce, Virginia H. Gallagher, and Marilyn Elaine Meadors in 1968 (the only women to graduate from Duke Law in a fifteen-year span), all graduated at the top of their classes. He feels that this was due to a self-selection process which was different for women than men—i.e., that the reasons women went to law school were different from the reasons men went. He feels that the more varied distribution of today's women graduates reflects that their reasons for attending law school are now the same as those of the men.

Dean Shimm also reminisced about the construction of the new law school building. Since he served as Secretary of the Building Committee during the planning of the new building, he was able to answer such ques-

...although the current students are better "on paper" than their predecessors, it appears that they do not write as well.

tions as: Why did the Law School move? and Why does the building lack the architectural flair of its neighbor, Gross Chem? To the former question, Dean Shimm recalled that the law school faculty wanted to expand the original building when the student body expanded, but the Trustees of the University had already earmarked the space behind the old Law School for the expansion of Perkins Library. Since the Trustees felt that it was easier to move the Law School than the Library, they convinced the Law School to move in return for being put on the top of the new construction list. Unfortunately, because the Law School was moved to the top of the list, it was built during a time when the Board of Trustees was working under a plan which decreed that all West Campus buildings outside of the main quad were to be of red brick. Although the Law School Building Committee had carte blanche as to the internal layout of the building, their control over the exterior was limited to such minutiae as choosing the exact shade of red for the bricks. Dean Shimm remarked ruefully that by the time Gross Chemical Laboratory, the second building on the list was built, the composition of the Board of Trustees had changed and the red brick rule was gone.

On behalf of that 90% of the graduates fortunate to have studied under Mel Shimm, and with sorrow on behalf of the 10% who missed out, *Duke Law Magazine* congratulates Professor Shimm on thirty years of service, and wishes him—and the students—many more years.

Former Law School Building
(Courtesy Duke University Archives)

Community Lecture Series

This spring the Law School, in conjunction with the Program for Older Adults division of the Duke University Office of Continuing Education, presented "Landmark Supreme Court Cases: 1803–1981," an eight-part lecture series devoted to a consideration of major Court decisions involving a number of areas of constitutional concern. Different faculty members delivered each of the lectures before a diverse and enthusiastic audience, including students at the Duke Institute for Learning in Retirement, Medical School faculty, University employees and law students.

Professor Walter Pratt began the series in January with an examination of *Marbury v. Madison* (1803) and the power of the Supreme Court to rule on the constitutionality of Congressional acts. Professor A. Kenneth Pye looked at the topic of suspects' rights and *Miranda v. Arizona* (1966). The abortion case of *Roe v. Wade* (1973) was the focus of Professor William Van Alstyne's talk. In February, Professor Thomas Rowe discussed the development of the segregation cases culminating in *Brown v. Board of Education* (1954) and Professor Pamela Gann addressed the subject of taxation of married persons and the decision in *Poe v. Seaborn* (1930). Entrapment and *United States v. Russell* (1973) were considered by Professor Sara Beale. Professor William Reppy spoke on *McCarty v. McCarty* (1981) and the area of divorce settlements and military pensions. The final lecture in the series was given in March by Professor Walter Dellinger, who discussed the gender discrimination case *Reed v. Reed* (1971).

"Landmark Supreme Court Cases: 1803–1981" was one of the most successful series the Duke Office of Continuing Education, which yearly sponsors from two to four lecture programs, has offered. According to Mrs. Sallie Simons, Associate Director of the Office of Continuing Education, the series attracted about 103 regular subscribers and from twenty to fifty students at each of the lectures. It was by far the largest student turnout any series has had. Mrs. Simons termed the audience response "wonderful."

The idea for a Law School lecture series was one Mrs. Simons had entertained for several years and she credits Dean Charles R. Howell, Senior Assistant Dean and Director of Admissions at the Law School, for helping her implement the idea by arranging for the faculty participation. The Law School teachers, observed Mrs. Simons, "did a remarkable job of addressing a general audience and making them aware and responsive to the legal world around them."

Law Day 1983

On Saturday, April 9, the Moot Court Board of Duke University School of Law presented the final round of the annual Dean's Cup Competition in the Moot Court Room. The judges for the round were Judge Carl McGowan of the United States Court of Appeals for the District of Columbia Circuit, Judge Stephanie K. Seymour of the United States Court of Appeals for the Tenth Circuit, and Judge Samuel Ervin III of the United States Court of Appeals for the Fourth Circuit. The finalists were Geoff Weirich and Jon Gruver for petitioners and Rich Smith and Karen Brumbaugh for respondents.

The Dean's Cup problem was developed by the Marshall-Wythe Moot Court Board and concerned the efforts of the plaintiff, a civil rights organization, to enjoin the defendants, white businessmen who had brought an anti-trust suit against the plaintiff after it had organized an economic boycott of the defendants' businesses, from obtaining a discovery order compelling the disclosure of the names of the plaintiff's officers, members and contributors. The problem involved issues of first and fourteenth amendment rights, state action under 42 U.S.C. § 1983, and the *Younger* doctrine (equitable restraint). The student winners were Rich Smith and Karen Brumbaugh.

Judge McGowan presided over the proceedings. He has been on the United States Court of Appeals for the District of Columbia Circuit since 1963, when he was appointed by President John F. Kennedy. Judge McGowan graduated from Dartmouth College and went on to attend Columbia University Law School. He has practiced in New York, Washington, D.C., and Chicago. He served as Counsel to the Governor of Illinois and has been a faculty member at Northwestern University Law School.

Judge Seymour has been a member of the Tenth Circuit Court of Appeals since 1979. She received her undergraduate degree from Smith College and her legal education at Harvard University Law School. Prior to her appointment she practiced in Boston, Tulsa and Houston. She has been a member of various organizations including the Tulsa Task Force on Battered Women and the Tulsa Human Rights Commission.

Judge Ervin was born in Morganton, North Carolina. He attended Davidson College and Harvard University Law School. He practiced law in North Carolina before becoming a judge of the Superior Court in the Twenty-Fifth Judicial District of North Carolina. He is currently a judge for the United States Court of Appeals for the Fourth Circuit.

Saturday Seminar Series

Saturday mornings have been the time for seminars taught by outstanding practicing lawyers at Duke Law School. The seminars cover a topic of interest and expertise to the visiting seminar host. Approximately fifty Duke law students participate in each seminar. Recent seminars have covered the subjects of drafting lease agreements, negotiating mergers and acquisitions, and undertaking plaintiff derivative action suits. The distinguished seminar leaders have been William B. Patterson, Robert M. Hart and Irving Morris.

In March, William B. Patterson, of Sutherland, Asbill and Brennan, taught a seminar on drafting leases. The lease-drafting seminar is one of four seminars taught by Mr. Patterson at Duke Law School. In his seminar on drafting a lease he stressed the necessity of reducing the complex negotiations of a lease to a simple and clear statement of each party's rights and obligations. Careful and straightforward drafting are the basics of creating a lease document. He presented six leases as examples of tailoring documents to meet the needs of different clients. As with his other seminars, Mr. Patterson was met with enthusiastic questions from the student audience which completely filled the lecture hall.

Robert Hart

In April, Robert Hart, of Donovan and Leisure, led a seminar on the procedures and steps necessary to execute a negotiated friendly acquisition. Mr. Hart explained the role of counsel in negotiated mergers and acquisitions. He stressed the necessity of attention to detail and fulfilling the various obligations of counsel in a negotiated merger and acquisition. He stated that his work was enjoyable to him because of the positive aspects of business mergers and the people with whom he works. Mr. Hart has been a long-time supporter of Duke Law School and has devoted time on previous occasions to such lectures.

Also in April, Irving Morris, of Morris & Rosenthal, held a seminar on plaintiff representative suit litigation. Mr. Morris discussed exemplary cases of plaintiff suit litigation which he had undertaken in Delaware. He stressed the social value of plaintiff representative actions. In addition he discussed some of the practical aspects of managing plaintiff representative suit litigation from his perspective as a plaintiff's lawyer. Mr. Morris has also lent his time and expertise to Duke Law School in the past and has always been well received.

Article Note

Nuclear Pollution in the Pacific

Seth Forman, a third-year student at the Duke Law School, is the author of a paper entitled "Bravo's Fallout: International Law and Nuclear Pollution in the Pacific" which will be published as a comment in the Spring 1983 issue of the *North Carolina Central Law Journal*. The paper traces the history of nuclear activity in the Pacific from the "Bravo" hydrogen bomb test in 1954 to current disputes regarding nuclear vessels and ocean dumping of nuclear wastes, and reviews debates concerning the legality of each type of nuclear use of the ocean.

The paper is intended as a case study of the process which is taking place in many areas of international law due to the increasing influence of Third World nations. Originally, a few superpowers created norms of international law which permitted nuclear activities jeopardizing the health, property, and other interests of Pacific Islanders. As Islanders have gained increased independence, they have rejected these old norms and moved to the forefront in efforts to create a new international legal perspective which recognizes their interests.

The paper was originally written in much shorter form last spring for the Law of the Sea Seminar taught by Horace B. Robertson, Jr. Forman's paper was among those Professor Robertson recommended for submission to legal periodicals. David Paul, Andrew Williams, Bruce Ruzinski, and Celeste Blumer of the International and Comparative Law Forum provided Forman with editorial assistance. Brist Jest, a French graduate student at the Law School, helped Forman obtain additional materials about French nuclear tests in Polynesia.

Article Note

Recognizing the Public Domain

Recognizing the Public Domain, David Lange, *Law & Contemporary Problems* (Autumn 1981).

In this essay, Professor David Lange comments on the recent period of expanding intellectual property litigation and the threat it poses to rights in the public domain. He argues that an increasing recognition of new rights, and an expansion of existing rights, in intellectual property has been "uncontrolled to the point of recklessness." Courts should respond to the recognition of new intellectual property interests, Professor Lange suggests, with an offsetting appreciation for the public domain.

Intellectual property, unlike more traditional forms of property, depends on the law for recognition. Its unique intangibility should be remembered when considering the recognition of new rights or the expansion of existing rights. As Professor Lange points out, intellectual property, "lacking tangible substance altogether, . . . cannot be recognized through the medium of the human senses."

Intangibility is problematic, not only because it creates problems in attempting to create recognizable boundaries in intellectual property but also because it leads to situations in which more than one person may justifiably claim an interest in what appears to be the same property. Professor Lange therefore argues "not that intellectual property is undeserving of protection, but rather that such protection as it gets ought to reflect its unique susceptibility to conceptual imprecision and to infinite replication." Doubtful cases, he maintains, ought to be resolved in favor of the equally valuable public domain.

Professor Lange dates the recent unchecked growth of new intellectual property claims to the opinion in *Lugosi v. Universal Pictures Company, Inc.,* 172 U.S.P.Q. 541 (1972), *rev'd*, 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977), which recognized the right of publicity. In *Lugosi*, the trial court upheld the claim of deceased actor Bela Lugosi's family that Universal Pictures, by licensing commercial representations of the character Count Dracula resembling the actor as he had played the character on film, was appropriating a property right belonging to Lugosi, which descended to his heirs, in his likeness and appearance as Count Dracula. Although the trial court's opinion was subsequently reversed it nevertheless "seemed to encourage a general interest in new causes of action so that, although the right of publicity itself may well be moving toward greater restraints, in the field of intellectual property at large there now appear to be more candidates for protection than one can safely categorize."

Intellectual property, unlike more traditional forms of property, depends on the law for recognition. Its unique intangibility should be remembered when considering the recognition of new rights or the expansion of existing rights.

Three recent cases illustrate Professor Lange's concern that the proliferation of new intellectual property claims has come at the expense of an increasing encroachment into the public domain. In *Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 523 F. Supp. 485 (S.D.N.Y. 1981), the district court agreed with the plaintiffs, the successors to rights in the names and likenesses of the Marx Brothers, that the defendants, the authors and producers of the satiric Broadway play *A Day in Hollywood, A Night in the Ukraine,* which used the Marx Brothers as characters, had violated, among other interests, the plaintiffs' right of publicity. In commenting on the case, Professor Lange argues that even supposing that there is some merit to the plaintiffs' claim of a right of publicity—and this is questionable due to the uncertainty in establishing how much the Marx Brothers as characters owed to the creative invention of the Marx Brothers themselves and how much they owed instead to other vaudeville and burlesque performers—the plaintiffs' interests should nevertheless be offset by the defendants' individual rights in the public domain. Recognizing the plaintiffs' claims results in a loss to society of "a right of access amounting to an easement." In effect, "as access to the public domain is choked, or even closed off altogether, the public loses too: loses the rich heritage of its culture, the rich presence of new works derived from that culture, and the rich promise of works to come."

The public's right of access was similarly threatened in *DC Comics, Inc. v. Board of Trustees*, No. 81 C 2402 (N.D. Ill., filed June 17, 1981), in which the owners of Superman, DC Comics, sued to prevent the students at Daley City College from naming their school paper *The Daley Planet* and using a planet as the paper's logo

David Lange

"...the law of dilution tugs at its own bootstraps and succeeds in lowering itself to a level of supervenience at which all thought of the public domain has been lost."

and the slogan "Truth, Justice and the American Way." The comic owners based their claims on various grounds, including common law trademark infringement, unfair competition and a violation of the Illinois Anti-Dilution statute.

Although Lange acknowledges that "overreaching claims are virtually synonomous with sound trademark management," since trademark owners are compelled to act to prevent the distinctiveness of their trademarks from being weakened, he nevertheless terms DC Comics' claims "utter nonsense" and "contemptuous of the ordinary discourses one would sensibly expect a society to permit." The Daily Planet-trademark was in no danger of being "diluted," nor was the public in any danger of being confused or "misled" by the students' actions, which amounted to "essaying a modest joke." According to Professor Lange:

> The immediate lesson in the *Daley Planet* case seems clear enough. When the proprietor of a mark presumes to intrude into the relationship which the subject of the mark may have contracted with the public in some setting essentially beyond the proprietor's own undertakings —as Superman and all his friends and enemies have a place in the estimation of the American public that simply has nothing to do with the parochial interests of DC Comics, Inc.—the proprietor goes well beyond any purpose legitimate in the law of trademarks and begins, indeed, to engage in an appropriation of its own.

A third "striking" example of the direction which intellectual property cases have recently taken is *Instrumentalist Co. v. Marine Corps League,* 509 F. Supp. 323 (N.D. Ill. 1981), in which the plaintiff, the publisher of a high school band magazine, obtained a preliminary injunction preventing the United States Marine Corps League from using John Philip Sousa's name and likeness in conjunction with their "Semper Fidelis Award" because the plaintiff had earlier been granted exclusive rights by Sousa's children to use his name and likeness in conjunction with the plaintiff's own "John Philip Sousa Award." The defendants had named their award after the march which Sousa composed, and whose title he had appropriated from the Corp's own motto while he was the Director of the Marine Corps band. Beyond the fact that Sousa's "career cannot sensibly be made the exclusive property of anyone. . . . [H]e belongs to the American people, individually as well as collectively," Lange is concerned by the lack of "recognizable legal principle" in the result of the case. The court, although not finding enough evidence of deception, confusion or competition to grant relief under the plaintiff's claims of trademark infringement and unfair competition, did grant the plaintiff injunctive relief on the basis of the Illinois Anti-Dilution Statute, Illinois Trademarks Act, Ill. Rev. Stat. ch. 140, § 22 (Supp. 1981-82), which allows injunctive relief when there exists "the likelihood . . . of dilution of a distinctive quality" of the earlier user's mark. Lange criticizes the use of the anti-dilution statute in this and other intellectual property cases because "indifferent to discovery or invention, indifferent as well as to deception or confusion or competition, but responsive to mere priority, the law of dilution tugs at its own bootstraps and succeeds in lowering itself to a level of supervenience at which all thought of the public domain has been lost."

Professor Lange suggests several ways that courts can respond to "unwarranted" intellectual property claims. These responses include: denying the claims of "overreaching" plaintiffs in such appropriate situations as when the "unsound" anti-dilution theory is proposed; maintaining a presumption against new claims by "erecting barriers not to be hurdled by plaintiffs relying on casual proof"; and, in some cases of new intellectual property interests, appointing "counsel to act, in effect, as guardian ad litem for the public domain."

Lange concludes that the recent developments in intellectual property will continue to threaten the public domain until "courts have come to see the public domain not merely as an unexplored abstraction but as a field of individual rights fully as important as any of the new property rights."

Book Note

The Future of American Political Parties

The Future of American Political Parties, edited by Joel L. Fleishman, Prentice-Hall, Inc. (1982).

Joel L. Fleishman's new book is a collection of essays by the participants in a symposium at Columbia University on the changing nature of American political parties. The final essay concerning political parties and presidential nominations was coauthored by Fleishman, Vice Chancellor of Duke, director of the Institute of Policy Sciences and Public Affairs, and Professor of Law and Policy Studies, and Pope ("Mac") McCorcle, a second year law student at Duke. *The Future of American Political Parties* should interest observers of the evolution of the American political system.

...the decline has resulted from reform movements, which have been a reaction to abuses of power and corruption that invaded party organizations.

In recent decades, there has been a sharp decline in the influence and effectiveness of political parties in the United States. In some measure, this decline has resulted from technological changes that have permitted political candidates to communicate with massive constituencies without the mediation of the party mechanism. But, in larger scope, the decline has resulted from reform movements, which have been a reaction to abuses of power and corruption that invaded party organizations.

Joel L. Fleishman

The result of these processes has been a breakdown in the political systems, as among the branches of the federal government and between the federal level and the state and local levels. Frustration resulting from this situation has caused many political leaders to propose fundamental changes in our constitutional system. The grave threats posed to the Constitution by these proposals moved the American Assembly to convene the meeting at Columbia of elected officials, political party professionals, academicians, businessmen and trade union representatives. Professor Fleishman supervised and edited background papers on the American political system.

The introductory essay by Gary Orren provides a general overview of the differing models for the party system that have competed throughout American history as well as an assessment of contemporary conflicts over the functioning of the party system. The subsequent chapters launch their analyses of and recommendations for the party system from specific vantage points, but all eschew a narrow or highly specialized focus. James Sundquist examines the state of the party system as manifested in Congress and suggests methods for achieving more effective cooperation between the President and the legislative branch. John Bibby and Robert Huckshorn survey the party system from the often neglected perspective of the various state organizations and offer encouraging evidence of their health. Chris Arterton analyzes how the present structure of campaign financing affects the shape of the party system, and, in turn, the post-election relationships between donors and office-holders. Finally, Fleishman and McCorcle discuss some of the ironies of the changing debate over the presidential nominating process.

Book Note

The Law of Unfair Trade Practices in a Nutshell

Charles McManis graduated from Duke Law School in 1972. He clerked for the Honorable Frank W. Johnson, Jr., of the Middle District of Alabama before commencing his teaching career at Louisiana State University at Baton Rouge. Since 1978 he has served as professor at the Washington University School of Law.

The Law of Unfair Trade Practices in a Nutshell, Charles R. McManis, West Publishing Co. (1982).

McManis recognizes in his Preface to *The Law of Unfair Trade Practices* that he is adopting a title for a hitherto unnamed body of law. The types of law dealt with under the heading "unfair trade practices" include such seemingly unconnected areas as copyright and trade secrets, false advertising and trademarks, and patents and injurious pricing practices. The common law roots of the prohibitions against unfair trade practices are generally classified as commercial torts or the law of unfair competition. But the statutory law of unfair trade practices covers a wider field of trade regulation, at times even encompassing facets of antitrust and consumer protection law.

"The law of unfair trade practices," McManis notes, "seeks to protect the trade relations of businesses from undue interference by other businesses, while at the same time promoting bargaining and competition among businesses." Under common law this goal prompted prohibitions against injurious interference by third parties into the advantageous relations of others. Hence the courts protected contractual trade relations from outside private intervention, discouraged coercion and conspiracy that restrained trade, and made actionable such invasions of privacy as the unauthorized commercial use of a person's name and likeness. In addition common law courts have provided redress for malicious competition, consisting of predatory practices exclusively designed to injure another business.

Perceived inadequacies and limitations in the common law treatment of unfair trade practices has led to statutory preemption of much of the common law in this area. For instance, because of its insistence that private injury be shown before recovery would be allowed, the common law provided no remedy for consumer-oriented false advertising.

States have tried to fill these gaps in the common law by enacting statutes which created new causes of action. Often, however, these new laws achieved effects opposite to their apparent aims. Instead of promoting competition, they protected local commercial interests from the strictures of a competitive marketplace. Partially in response to the states' inability to cure the defects perceived in the common law, the United States Congress has drafted legislation in this area that, at times, explicitly preempts state law.

Patent and copyright law exemplifies this type of federal preemption. In two prominent cases, *Sears Roebuck and Co. v. Stiffel Co.* and *Compco Corp. v. Day-brite Lighting, Inc.*, 376 U.S. 225 (1964) (jointly known as *Sears-Compco*), the Supreme Court held that the federal patent preemption extended even beyond the regions specifically covered by the patent statutes. The federal patent laws, according to the Court, did not allow a state to prohibit, or to award damages for, the copying of a work that had not been copyrighted and whose patent had been declared invalid. The Court reasoned that Congress intended to leave in the public domain those articles not subject to patent and copyright protection and that states could not restrict this right even when, as here, the restriction was in the guise of a law barring unfair competition.

Later in *Goldstein v. California,* 412 U.S. 546 (1973), the Court claimed that the *Sears-Compco* rationale was limited to patent law and that states could broaden the reach of copyright protection beyond the confines of federal copyright law. This approach was expressly confirmed by section 301 [a] of the Copyright Act of 1976, passed after the *Goldstein* decision.

Aside from the preemption of state statutes by federal law, the federal courts can nullify state and federal legislation that is deemed unconstitutional. The Supreme Court seems to have moved away from the standard of review known as substantive due process, whereby state laws were evaluated not only by the "fairness" of the *process* of depriving people of life, liberty, and property but also by the fairness of the deprivation itself. The Supreme Court instead has begun to apply the First Amendment to commercial speech. In its landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court held that a state law which prohibited the truthful advertising of prices of prescription drugs (presumably to "protect" the public from unrestrained price cutting) violated the First Amendment.

This brief sketch touches only several of the many branches of law grouped together under the law of unfair trade practices. As Charles McManis writes, "Widely perceived by the practicing bar as an arcane specialty, the law of unfair trade practices is in fact simply a paradigm of what lawyers mean by the law. To study this area of law is to study all of law in microcosm."

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Upcoming Alumni Meetings

June 3	Houston Alumni Luncheon
June 18	Virginia Law Alumni Breakfast
July 31	ABA Cocktail Reception in Atlanta, Georgia
Sept. 13	Los Angeles Alumni Reception
Sept. 16, 17	Barristers' Club Weekend in Durham, N.C.
Oct. 13, 14	Estate Planning Conference in Durham, N.C.
Oct. 14, 15	Law Alumni Weekend in Durham, N.C.

Law Alumni Weekend

Friday, Oct. 14, 1983

2:00 p.m.	Registration Desk opens—Lobby, Law School
3:00 p.m.	Law Alumni Council Meeting—Law School
5:00 p.m.	Cocktails and hors d'oeuvres—Lobby, Paul M. Gross Chemical Building
6:00 p.m.	Dinner on your own
9:00 p.m.	Hospitality Suite at the Sheraton University Center

Saturday Oct. 15, 1983

9:00 a.m.	Coffee and Danish—Law School
9:15 a.m.	Professional Program—Law School
11:00 a.m.	Pig Pickin' BBQ Luncheon, back lawn, Law School
1:30 p.m.	Duke versus Clemson Football Game
7:00 p.m.	REUNION CLASS PARTIES, Sheraton University Center

REUNION CHAIRMEN

1948	Frank Snepp
1953	Hugh Isley
1958	Robert Burrus
1963	Marvin Musselwhite
1968	Michael Angelini
1973	Rod Phelan
1978	Chris Sawyer

The following classes will hold joint reunions in the fall of *1984*: 1923–24; 1928–29; 1933–34; and 1938–39.

Any questions regarding Law Alumni Weekend should be directed to Linda Harris, Room 006, Duke Law School, Durham, North Carolina 27706 919-684-3605.

Duke Law Magazine
Duke University School of Law
Durham, NC 27706

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